

ARKANSAS SENATE
84th General Assembly - Regular Session, 2003
Amendment Form

Subtitle of Senate Bill No. 920

"AN ACT TO REMOVE LICENSED CIGARETTE WHOLESALERS FROM THE
REQUIREMENTS OF THE UNFAIR CIGARETTE SALES ACT; TO LEVY A TAX AT THE
WHOLESALE LEVEL."

Amendment No. 1 to Senate Bill No. 920.

Amend Senate Bill No. 920 as originally introduced:

Delete everything after the enacting clause and substitute the following:

“SECTION 1. Arkansas Code § 4-75-702 is amended to read as follows:

As used in this subchapter, unless the context otherwise requires:
4-75-702. Definitions.

(1) "Basic cost of cigarettes" means whichever of the two (2) following amounts is lower, namely, the invoice cost of cigarettes to the ~~wholesaler or~~ retailer, ~~as the case may be~~, or the lowest replacement cost of cigarettes to the ~~wholesaler or~~ retailer, ~~as the case may be~~, within thirty (30) days prior to the date of sale, in the quantity last purchased, whether within or before the thirty-day period, less, in either of the two (2) cases, all trade discounts except customary discounts for cash, plus the full face value of any stamps or any tax which may be required by any cigarette tax act of this state or political subdivision thereof, now in effect or hereafter enacted, if not already included in the invoice cost of cigarettes to the ~~wholesaler or~~ retailer, ~~as the case may be~~;

(2) "Buying pool" means and includes any combination, corporation, association, affiliation, or group of retail dealers operating jointly in the purchase, sale, exchange, or barter of cigarettes, the profits of which accrue directly or indirectly to the retail dealers;

(3) "Cigarettes" means and includes any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, except tobacco;

(4)(A) "Cost to the retailer" means the basic cost of the cigarettes involved to the retailer plus the cost of doing business by the retailer as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and



advertising.

(B) In the absence of proof of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the retailer shall be presumed to be six percent (6%) of the basic cost of cigarettes to the retailer.

(C) In the case of any retail dealer who in connection with the retail dealer's purchase of any cigarettes shall receive not only the discounts ordinarily allowed upon purchases by a retail dealer but also in whole or in part the discounts ordinarily allowed upon purchases by a wholesale dealer, the cost of doing business by the retail dealer with respect to the said cigarettes shall be, in the absence of proof of a lesser or higher cost of doing business by the retail dealer, the sum of the cost of doing business by the retail dealer and, ~~to the extent that he or she shall have received the full amount of the discounts ordinarily allowed to a wholesale dealer which are received by the retailer, the cost of doing business by a wholesale dealer as defined in subdivision (5)(B) of this section.~~

~~(5)(A) "Cost to wholesaler" means the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler as evidenced by the standards and methods of accounting regularly employed by him or her and must include, without limitation, labor costs, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance, and advertising.~~

~~(B) In the absence of proof of a lesser or higher cost of doing business by the wholesale dealer making the sale, the cost of doing business by the wholesale dealer shall be presumed to be two percent (2%) of the basic cost of the cigarettes to the wholesale dealer, plus cartage to the retail outlet, if performed or paid for by the wholesale dealer, which cartage cost, in the absence of proof of a lesser or higher cost, shall be presumed to be three fourths of one percent (0.75%) of the basic cost of the cigarettes to the wholesale dealer;~~

~~(6)(5) "Director" means the Director of the Arkansas Tobacco Control Board;~~

~~(7)(6) "Person" means and includes any individual, firm, association, company, partnership, corporation, joint-stock company, club, agency, syndicate, the State of Arkansas, county, municipal corporation, or other political subdivision of this state, receiver, trustee, fiduciary, or trade association;~~

~~(8)(7) "Retailer" means and includes any person who is engaged in this state in the business of selling cigarettes at retail and includes any group of persons, cooperative organizations, buying pools, and any other person or group of retailers purchasing cigarettes on a cooperative basis from licensed distributors or wholesalers. Any person placing a cigarette vending machine at, on, or in any premises shall be deemed to be a retailer for each such vending machine;~~

~~(9) (8) "Sale" or "sell" means any transfer for a consideration, exchange, barter, gift, offer for sale, advertising for sale, soliciting an order for cigarettes, and distribution in any manner or by any means whatsoever; and~~

~~(10) (9) "Sell at retail", "sale at retail", or "retail sales" means and includes any sale for consumption or use made in the ordinary~~

course of trade or usual conduct of the seller's business;.

~~(11) "Sell at wholesale", "sale at wholesale", and "wholesale sales" mean and include any sale made in the ordinary course of trade or usual conduct of the wholesaler's business to a retailer for the purpose of resale; and~~

~~(12)(A) "Wholesaler" means and includes:~~

~~(A) Any person other than a buying pool as defined in subdivision (2) of this section, wherever resident or located, who brings or causes to be brought into this state unstamped cigarettes purchased directly from the manufacturer thereof and who maintains an established place of business where substantially all of the business is the sale of cigarettes and related merchandise at wholesale to cigarette licensees and where at all times a substantial stock of cigarettes and related merchandise is available for resale, if seventy five percent (75%) thereof are sold to retailers or other wholesalers not connected with the wholesaler by reason of any business connection or otherwise; and~~

~~(B) Any person retailing cigarettes to consumers, if at least seventy five percent (75%) of his or her purchases are made directly from the manufacturers thereof; and~~

~~(C) Any person in this state other than a buying pool, as defined in subdivision (2) of this section, who purchases cigarettes from any other person who purchases from a manufacturer, at least seventy five percent (75%) of which are for purposes of resale to retailers in this state not connected with the wholesaler by reason of any business connection or otherwise and who maintains an established place of business where cigarettes and related merchandise are sold at wholesale to persons licensed under this subchapter, and where at all times a substantial stock of cigarettes and related merchandise is available to all retailers for resale; and~~

~~(D) Any person in this state who acquires cigarettes solely for the purpose of resale in cigarette vending machines, provided the person operates thirty (30) or more machines.~~

SECTION 2. Arkansas Code § 4-75-703 is amended to read as follows:
4-75-703. Sales excepted from subchapter.

The provisions of this subchapter shall not apply to a any sale at wholesale, ~~or nor shall they apply to~~ a sale at retail that is made:

(1) In an isolated transaction and not in the usual course of business;

(2) Where cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in such cigarettes, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of such cigarettes advertised, offered for sale, or to be sold;

(3) Where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of the cigarettes advertised, offered for sale, or to be sold;

(4) Where cigarettes are sold upon the final liquidation of a business; or

(5) Where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

SECTION 3. Arkansas Code § 4-75-704 is amended to read as follows:
4-75-704. Transactions permitted to meet lawful competition.

~~(a)(1) Any wholesaler may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is rendering the same type of service and is selling the same article at cost to the competing wholesaler as defined by this subchapter.~~

~~(2) Any retailer may advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to the competing retailer as defined in this subchapter.~~

(b) The price of cigarettes advertised, offered for sale, or sold under the exceptions specified in § 4-75-703 shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost, nor shall the price established at a bankrupt sale be considered the price of a competitor within the purview of this section.

(c) In the absence of proof of the actual cost to the competing ~~wholesaler or to the competing~~ retailer, ~~as the case may be,~~ the cost may be presumed to be the lowest cost to ~~wholesalers or the lowest cost to~~ retailers, ~~as the case may be,~~ within the same trading area as determined by a cost survey made pursuant to § 4-75-711(b).

SECTION 4. Arkansas Code § 4-75-708 is amended to read as follows:
4-75-708. Sales at less than cost, rebates, concessions, etc. -

Penalty.

(a) It shall be unlawful for any ~~wholesaler or~~ retailer, with intent to injure competitors or destroy or substantially lessen competition, to advertise, offer to sell, or sell, at retail ~~or wholesale,~~ cigarettes at less than cost to the ~~wholesaler or~~ retailer, ~~as the case may be.~~

(b) It shall be unlawful for any ~~wholesaler or~~ retailer, with intent to injure competitors or destroy or substantially lessen competition, to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or to give a concession of any kind or nature whatsoever in connection with the sale of cigarettes.

~~(c)(1) It shall be unlawful for any retail dealer to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler.~~

~~(2) It shall be unlawful for any retail dealer to induce or attempt to induce or to procure or attempt to procure any rebate or concession of any kind or nature whatsoever in connection with the purchase of cigarettes.~~

~~(d)(c)~~ Any ~~wholesaler or~~ retailer who violates the provisions of this section shall be guilty of a misdemeanor and be punishable by a fine of not more than five hundred dollars (\$500).

~~(e)(d)~~ Evidence of advertisement, offering to sell, or sale of cigarettes by any ~~wholesaler or~~ retailer at less than cost to him or her, or evidence of any offer of a rebate in price or the giving of a rebate in price or an offer of a concession or the giving of a concession of any kind or nature whatsoever in connection with the sale of cigarettes, ~~or the inducing or attempt to induce or the procuring or the attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer~~ shall be prima facie evidence of intent to injure competitors and destroy or

substantially lessen competition.

SECTION 5. Arkansas Code § 4-75-709 is amended to read as follows:
4-75-709. Combination sales.

In all advertisements, offers for sale, or sales involving two (2) or more items, at least one (1) of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales involving the giving of any gift or concession of any kind, whether coupons or otherwise, ~~the wholesaler's or retailer's~~ combined selling price shall not be below the cost to the ~~wholesaler or the cost to the~~ retailer, ~~respectively~~, of the total of all articles, products, commodities, gifts, and concessions included in the transactions; but if any such articles, products, commodities, gifts, or concessions shall not be cigarettes, the basic cost thereof shall be determined in the manner provided in § 4-75-702(1).

SECTION 6. Arkansas Code § 4-75-710 is repealed.

~~4-75-710. Sales by a wholesaler to a wholesaler.~~

~~When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his or her selling price to the latter the cost to the wholesaler, as provided by § 4-75-702, but the latter wholesaler, upon resale to a retailer, shall be subject to the provisions of that section.~~

SECTION 7. Arkansas Code § 4-75-711 is amended to read as follows:
4-75-711. Determination of cost generally - Cost surveys.

(a) In determining cost to the ~~wholesaler and cost to the~~ retailer, the court shall receive, and consider as bearing on the bona fides of the cost, evidence tending to show that any person complained against under any of the provisions of this subchapter purchased the cigarettes involved in the complaint before the court at a fictitious price or upon terms or in such manner or under such invoices as to conceal the true cost, discounts, or terms of purchase, and shall also receive and consider as bearing on the bona fides of the costs, evidence of the normal, customary, and prevailing terms and discounts in connection with other sales of a similar nature in the trade area or state.

(b) Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for the trading area in which a violation of this subchapter is committed or charged to determine and establish on the basis of actual existing conditions the lowest cost to ~~wholesalers or the lowest cost to~~ retailers within the area, the cost survey shall be deemed competent evidence in any action or proceeding under this subchapter as tending to prove actual cost to the ~~wholesaler or actual cost to the~~ retailer complained against, but any party against whom any such cost survey may be introduced in evidence shall have the right to offer evidence tending to prove any inaccuracy of the cost survey or any state of facts which would impair its probative value.

SECTION 8. Arkansas Code § 4-75-712 is amended to read as follows:

4-75-712. Determination of cost - Sales outside ordinary channels of business.

In establishing the basic cost of cigarettes to a ~~wholesaler or a~~ retailer, it shall not be permissible to use the invoice cost or the actual

cost of any cigarettes purchased at a forced, bankrupt, or closeout sale, or other sale outside of the ordinary channels of trade.

SECTION 9. Arkansas Code Title 26, Chapter 57, Subchapter 8, is amended to add an additional section to read as follows:

26-57-804.

(a) In addition to the excise or privilege taxes levied under §§ 26-57-208, 26-57-802, 26-57-803, or other statute of this state, there is levied a wholesale cigarette tax of four dollars and twenty-five cents (\$4.25) per one thousand (1,000) cigarettes for cigarettes sold at wholesale that are stamped pursuant to § 26-57-235 or that are otherwise sold for retail sale within this state.

(b) The additional tax levied under this section shall apply to all sales of cigarettes at wholesale in this state, including cigarettes sold in Arkansas within three hundred feet (300') of a state line or in any city which adjoins a state line.

(c) Any exemption or waiver allowed under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., applies to this section.

(d) The additional tax levied under this section shall be reported and remitted in the same manner and at the same time as other taxes levied on cigarettes by the Arkansas Tobacco Products Tax Act of 1997, § 26-57-201 et seq.

(e) The moneys collected under this section shall be deposited in the State Treasury as special revenues to the credit of the Arkansas Medicaid Program Trust Fund, created by § 19-5-985.

(f) The tax levied by this section shall not apply to cigarette package tax stamps held by a wholesaler on the date this section becomes effective or the sale of cigarettes that are in a wholesaler's warehouse inventory on the date this section becomes effective.

SECTION 10. Arkansas Code § 19-5-985 is amended to read as follows:
19-5-985. Arkansas Medicaid Program Trust Fund.

(a) There is hereby established on the books of the Treasurer of the State, Auditor of State, and the Chief Fiscal Officer of the State a fund to be known as the Arkansas Medicaid Program Trust Fund.

(b)(1) This fund shall consist of all revenues derived from taxes levied on soft drinks sold or offered for sale in Arkansas as provided for in § 26-57-901 et seq. and all revenues derived from the wholesale tobacco tax as provided for in Title 26, Chapter 27, Subchapter 8, there to be used exclusively for the state match of federal funds participation under the Arkansas Medicaid Program; the additional ambulance annual fees as set out in § 20-13-212 and those special revenues as specified in subdivision (156) of § 19-6-301.

(2) If the Arkansas Medicaid Program should be discontinued for any reason, the revenues derived from the soft drink tax levied in the Arkansas Soft Drink Tax Act, § 26-57-901 et seq. and from the wholesale tobacco tax levied in Title 26, Chapter 27, Subchapter 8 shall be used exclusively to provide services to Arkansas residents comparable to the services now provided under the Arkansas Medicaid Program.

SECTION 11. EMERGENCY CLAUSE. It is found and determined by the Eighty-Fourth General Assembly of the State of Arkansas that the purpose of

the Arkansas Unfair Cigarette Sales Act, § 4-75-701 et seq., is fair and lawful competition in the sale of cigarettes in the State of Arkansas; that application of the Unfair Cigarette Sale Act to sales at wholesale has resulted in unnecessary price maintenance that bestows on wholesalers excess profits which are used in part to further promote the sale of cigarettes and smoking; that the policy of the State of Arkansas is to discourage smoking; that there no longer exists circumstances that requires price protection in the sale of cigarettes at wholesale; that the Arkansas Medicaid Programs provides services to recipients that are smokers of cigarettes; and that the services provided by the Arkansas Medicaid Program to smokers of cigarettes have caused a strain on the finances of the Arkansas Medicaid Program. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

The Amendment was read the first time, rules suspended and read the second time and _____

By: Senator Bisbee
LDH/MHF - 031120031641
MHF359

Secretary