

**HOUSE BILL NO. 1321**

Introduced by

Representatives Mickelson, Maragos

1 A BILL for an Act to provide for the regulation of cigarette marketing; and to provide a penalty.

2 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

3 **SECTION 1. Definitions.** As used in this Act:

- 4 1. "Basic cost of cigarettes" means the list cost of cigarettes as reported to the  
5 attorney general by the manufacturer without any deductions for discounts or taxes  
6 of any kind.
- 7 2. "Cigarette" means any roll for smoking made wholly or in part of tobacco and  
8 encased in any material except tobacco.
- 9 3. "Cost to the retailer" means the cost to the wholesaler from which the cigarettes  
10 were purchased by the retailer plus the cost of doing business by the retailer as  
11 determined in section 2 of this Act.
- 12 4. "Cost to the wholesaler" means the basic cost of cigarettes purchased by the  
13 wholesaler from a manufacturer plus the cost of doing business by the wholesaler  
14 as determined in section 3 of this Act.
- 15 5. "Manufacturer" means any person who fabricates cigarettes from raw materials for  
16 the purpose of resale.
- 17 6. "Retailer" means a person who operates a store, stand, booth, concession, or  
18 other outlet for the purpose of selling cigarettes at retail.
- 19 7. "Sale" or "sell" means any transfer of cigarettes for consideration, exchange,  
20 barter, gift, offer for sale, or distribution, in any manner or by any means.
- 21 8. "Sell at retail", "sale at retail", or "retail sales" means any transfer of title to  
22 cigarettes for a valuable consideration, made in the ordinary course of trade or  
23 usual conduct of the retailer's business, to the purchaser for consumption or use.

- 1           9. "Sell at wholesale", "sale at wholesale", or "wholesale sales" includes any bona  
2           fide transfer of title to cigarettes for a valuable consideration, made in the ordinary  
3           course of trade or in the usual conduct of the wholesaler's business, to a retailer for  
4           the purpose of resale.
- 5           10. "Sole distributor" means a person who either causes a unique brand of cigarettes  
6           to be manufactured according to distinctive specifications and acts as the exclusive  
7           distributor of the cigarettes or is the exclusive distributor of a brand of cigarettes  
8           within the continental United States.
- 9           11. "Wholesaler" means a person who services retail outlets by maintaining an  
10          established place of business for the purchase of cigarettes and who purchases  
11          cigarettes from a manufacturer for the purpose of selling cigarettes to retailers or  
12          purchases cigarettes from a sole distributor, another wholesaler, or any other  
13          person for the purpose of selling cigarettes to retailers.

14           **SECTION 2. Determination of cost to the retailer.**

- 15          1. To determine the cost to the retailer, a retailer shall use the standards and  
16          methods of accounting regularly employed by the retailer in the retailer's  
17          determination of costs for income tax reporting purposes for the total operation of  
18          the retailer's establishment. The cost of doing business by the retailer includes:
- 19          a. Labor costs, including salaries of executives and officers;
  - 20          b. Rent;
  - 21          c. Depreciation;
  - 22          d. Selling costs;
  - 23          e. Maintenance of equipment;
  - 24          f. Delivery costs;
  - 25          g. All types of licenses;
  - 26          h. All types of business taxes;
  - 27          i. All types of insurance;
  - 28          j. All types of advertising;
  - 29          k. Any rebates, patronage dividends, or concessions;

- 1           l. Expenses before opening for business, including all startup costs, land  
2                    acquisition costs, construction costs, costs for marketing studies, and similar  
3                    expenses;
- 4           m. Any district, central, regional, and national administrative and operation costs  
5                    and expenses; and
- 6           n. All other indirect or overhead costs with respect to the operation of the  
7                    business of the retailer.
- 8           2. The cost of doing business by the retailer must be expressed as a percentage and  
9                    applied to the cost to the wholesaler from which the cigarettes were purchased.
- 10          3. A retailer that purchases directly from a manufacturer or from any other person at  
11                    or at less than or about the price normally and usually charged for purchases in  
12                    wholesale quantities shall, in determining the cost to the retailer, add the cost of  
13                    doing business by the wholesaler, as determined in section 3 of this Act, to the  
14                    basic cost of cigarettes to the retailer, as well as the cost of doing business by the  
15                    retailer.
- 16          4. In the absence of the filing with the attorney general of satisfactory proof of a lesser  
17                    or higher cost of doing business by the retailer making the sale, the cost of doing  
18                    business by the retailer is presumed to be ten percent of the cost to the wholesaler.

19           **SECTION 3. Determination of the cost to the wholesaler.**

- 20          1. To determine the cost to the wholesaler, a wholesaler shall use the standards and  
21                    methods of accounting regularly employed by the wholesaler in the wholesaler's  
22                    determination of costs for income tax reporting purposes for the total operation of  
23                    the wholesaler's business. The cost of doing business by the wholesaler includes:  
24                    a. Labor costs, including salaries of executives and officers;
- 25                    b. Rent;
- 26                    c. Depreciation;
- 27                    d. Selling costs;
- 28                    e. Maintenance of equipment;
- 29                    f. Delivery costs;
- 30                    g. All types of licenses;
- 31                    h. All types of business taxes;

- 1 i. All types of insurance;
- 2 j. All types of advertising;
- 3 k. Any rebates, patronage dividends, or concessions;
- 4 l. Expenses before opening for business, including all startup costs, land  
5 acquisition costs, construction costs, costs for marketing studies, and similar  
6 expenses;
- 7 m. Any district, central, regional, and national administrative and operation costs  
8 and expenses; and
- 9 n. All other indirect or overhead costs with respect to the operation of the  
10 wholesaler.
- 11 2. The cost of doing business by a wholesaler must be expressed as a percentage  
12 and applied to the basic cost of cigarettes.
- 13 3. In the absence of the filing with the attorney general of satisfactory proof of a lesser  
14 or higher cost of doing business by the wholesaler making the sale, the cost of  
15 doing business by the wholesaler is presumed to be five percent of the basic cost  
16 of cigarettes to the wholesaler plus cartage to the retail outlet if performed or paid  
17 for by the wholesaler. The cartage cost, in the absence of the filing with the  
18 attorney general of satisfactory proof of a lesser or higher cost, is considered to be  
19 three-fourths of one percent of the basic cost of cigarettes to the wholesaler.

20 **SECTION 4. Wholesaler-to-wholesaler sales.** When one wholesaler sells cigarettes  
21 to any other wholesaler, the seller may not be required to include in the selling price to the  
22 purchaser the cost to the wholesaler except that no such sale may be made at a price less than  
23 the basic cost of cigarettes. The purchasing wholesaler, upon resale to a retailer, is considered  
24 to be the wholesaler governed by section 3 of this Act.

25 **SECTION 5. Sales to meet competition permitted.**

- 26 1. A retailer may advertise, offer to sell, or sell cigarettes at a price made in good faith  
27 to meet the price of a competitor that is selling the same article at cost to that  
28 competitor as a retailer.
- 29 2. A wholesaler may advertise, offer to sell, or sell cigarettes at a price made in good  
30 faith to meet the price of a competitor who is rendering the same type of service  
31 and is selling the same article at cost to that competitor as a wholesaler.

1           3.    The price of cigarettes advertised, offered for sale, or sold under the exceptions  
2                    specified in section 11 of this Act may not be considered the price of a competitor  
3                    and may not be used as a basis for establishing prices below cost, nor may the  
4                    price established at a bankrupt sale be considered the price of a competitor.

5           4.    In the absence of proof of the price of a competitor under this section, the lowest  
6                    cost to the retailer or the lowest cost to the wholesaler, as the case may be,  
7                    determined by any cost survey made pursuant to section 11 of this Act, may be  
8                    considered to be the price of a competitor within the meaning of this section.

9           **SECTION 6. Determining cost - Prices below cost - Free merchandise.**

10          1.    In determining the cost to the retailer and the cost to the wholesaler, the attorney  
11                    general or the district court shall receive and consider evidence tending to show  
12                    that any person accused of violating this Act purchased cigarettes, with respect to  
13                    the sale of which complaint is made, below either the cost to the retailer or the cost  
14                    to the wholesaler, depending upon the status of the person accused, or upon terms  
15                    or in a manner or under invoices that conceal the true cost, discounts, or terms of  
16                    purchase. The attorney general or the district court shall receive and consider  
17                    evidence of the normal, customary, and prevailing terms and discounts in  
18                    connection with other sales of a similar nature in this state.

19          2.    Merchandise given gratis or payment made to a retailer or wholesaler by the  
20                    manufacturer of the merchandise for display, advertising, promotion purposes, any  
21                    type of discount, or otherwise may not be considered in determining the cost of  
22                    cigarettes to the retailer or wholesaler.

23          **SECTION 7. Purchases outside ordinary trade channels.** In establishing the cost of  
24                    cigarettes to the retailer or wholesaler, the invoice cost of the cigarettes purchased at a forced,  
25                    bankrupt, or closeout sale or other sale outside the ordinary channels of trade may not be used  
26                    as a basis for justifying a price lower than one based upon the replacement cost of the  
27                    cigarettes to the retailer or wholesaler in the quantity last purchased through the ordinary  
28                    channels of trade.

29          **SECTION 8. Sales below cost.**

30          1.    A retailer or wholesaler violates this Act if the retailer or wholesaler:

- 1           a.    Advertises, offers to sell, or sells, at retail or wholesale, cigarettes at less than  
2                    cost to a retailer or wholesaler.
- 3           b.    Offers a rebate in price, gives a rebate in price, offers a concession of any  
4                    kind, or gives a concession of any kind in connection with the sale of  
5                    cigarettes that are sold by the wholesaler or retailer in the ordinary course of  
6                    trade or business if the rebate or concession offered or given in connection  
7                    with the sale of cigarettes is not offered or given by the wholesaler or retailer  
8                    in the same ratio with respect to all other merchandise to which the rebate or  
9                    concession may lawfully be given.
- 10          2.    A retailer violates this Act if the retailer:
- 11           a.    Induces or attempts to induce or procures or attempts to procure the purchase  
12                    of cigarettes at a price less than the cost to the wholesaler.
- 13           b.    Induces or attempts to induce or procures or attempts to procure any rebate  
14                    or concession in connection with the purchase of cigarettes.

15           **SECTION 9. Illegal contracts.** Any contract made by any person in violation of this  
16 Act is illegal and void, and no recovery may be had upon the contract.

17           **SECTION 10. Cost survey as evidence.** When a cost survey pursuant to cost  
18 accounting practices used for income tax reporting purposes has been made by the attorney  
19 general, a trade association, an industry group, a wholesaler, or a retailer to establish either the  
20 lowest cost to the retailer or the lowest cost to the wholesaler, or both, for the state, the cost  
21 survey is competent evidence for use in proving the cost to the person complained against  
22 under this Act.

23           **SECTION 11. Exceptions.** This Act does not apply to sales at retail or sales at  
24 wholesale made:

- 25          1.    As an isolated transaction and not in the usual course of business.
- 26          2.    Where cigarettes are advertised, offered for sale, or sold in bona fide clearance  
27                    sales for the purpose of discontinuing trade in the cigarettes and the advertising,  
28                    offer to sell, or sale states the reason of the sale and the quantity of the cigarettes  
29                    advertised, offered for sale, or sold as imperfect or damaged.
- 30          3.    Where cigarettes are sold upon the final liquidation of a business.

- 1           4.   Where cigarettes are advertised, offered for sale, or sold by any fiduciary or other  
2                   officer acting under the order or direction of any court.

3           **SECTION 12. Injunctive and other civil relief.**

- 4           1.   In addition to the penalty provided by section 13 of this Act, any person injured or  
5                   any trade association that represents a person injured by violation of this Act may  
6                   maintain an action in district court to prevent, restrain, or enjoin the violation. If in  
7                   the action a violation of this Act is established, the court shall enjoin and restrain or  
8                   otherwise prohibit the violation and shall assess in favor of the plaintiff the costs of  
9                   the suit and reasonable attorney fees. It is not necessary that actual damages to  
10                  the plaintiff be alleged or proved, but when alleged and proved, the plaintiff in the  
11                  action, in addition to injunctive relief and fees and costs of suit, is entitled to  
12                  recover from the defendant the amount of actual damages sustained by the  
13                  plaintiff.
- 14          2.   If injunctive relief is not sought or required, any person injured by a violation of this  
15                  Act may maintain an action for damages alone in district court. The measure of  
16                  damages in the action is the same as prescribed in subsection 1.

17          **SECTION 13. Revocation or suspension of license - Civil penalty.**

- 18          1.   The attorney general may revoke or suspend the license of, impose a civil penalty  
19                  not to exceed five hundred dollars on, or order any combination of revocation,  
20                  suspension, and penalty to be imposed on any license upon sufficient cause  
21                  appearing of the violation of this Act or upon the failure of the licensee to comply  
22                  with this Act.
- 23          2.   A license may not be suspended or revoked except upon notice to the licensee and  
24                  after a hearing prescribed by the attorney general. The attorney general, upon a  
25                  finding that the licensee has failed to comply with this Act or any rule adopted to  
26                  implement this Act, shall, in the case of a first offender, suspend the license of the  
27                  licensee for a period of not less than five or more than twenty consecutive business  
28                  days, impose a civil penalty in an amount not to exceed five hundred dollars, or  
29                  order both the suspension and the penalty. In the case of a second or plural  
30                  offender, the attorney general shall suspend the license for a period of not less  
31                  than twenty consecutive business days or more than twelve months, impose a civil

- 1 penalty in an amount not to exceed five hundred dollars, or order both the  
2 suspension and the penalty. If the attorney general finds the offender has been  
3 guilty of willful and persistent violations, the attorney general may revoke the  
4 licensee's license and may impose a civil penalty in an amount not to exceed five  
5 hundred dollars.
- 6 3. A person whose license has been revoked may apply to the attorney general at the  
7 expiration of one year for a reinstatement of the license. The license may be  
8 reinstated by the attorney general if it appears to the satisfaction of the attorney  
9 general that the licensee will comply with this Act and the rules adopted to  
10 implement this Act.
- 11 4. A person whose license has been suspended or revoked may not sell cigarettes or  
12 permit cigarettes to be sold during the period of the suspension or revocation on  
13 the premises occupied by the person or upon other premises controlled by the  
14 person or others or in any other manner or form.
- 15 5. A determination by the attorney general and any order of suspension or revocation  
16 of a license or refusal to reinstate a license after revocation is reviewable by the  
17 district court.