

**HOUSE BILL NO. 512**

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SECOND LEGISLATURE - SECOND SESSION

**BY THE HOUSE FINANCE COMMITTEE**

**Introduced: 3/26/02**

**Referred: Labor and Commerce, Judiciary, Finance**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to cigarette sales; and providing for an effective date."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 \* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
4 to read:

5 SHORT TITLE. This Act may be known as the Unfair Cigarette Sales Act.

6 \* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to  
7 read:

8 INTENT. It is the intent of this Act to

9 (1) encourage fair and honest competition and to safeguard the public against  
10 unfair, dishonest, deceptive, destructive, and fraudulent business practices existing in  
11 transactions involving the sale of, offer to sell, or inducement to sell cigarettes in the  
12 wholesale and retail trades in the state;

13 (2) prohibit the advertising, offering for sale, or sale of cigarettes below cost  
14 in the wholesale or retail trades with the intent of injuring competitors or destroying or  
15 substantially lessening competition as an unfair and deceptive trade practice;

1 (3) promote the general welfare and public interest through the prohibition of  
2 unfair cigarette sales.

3 \* **Sec. 3.** AS 45.53 is amended by adding new sections to read:

4 **Article 2. Unfair Cigarette Sales.**

5 **Sec. 45.53.200. Sale at less than cost; rebate in price.** (a) A wholesaler-  
6 distributor or retailer may not, with intent to injure competitors or destroy or  
7 substantially lessen competition,

8 (1) advertise, offer to sell, or sell, at retail or wholesale, cigarettes at  
9 less than cost to the wholesaler-distributor or retailer; or

10 (2) offer a rebate in price, give a rebate in price, offer a concession of  
11 any kind, or give a concession of any kind or nature in connection with the sale of  
12 cigarettes.

13 (b) A direct-buying retailer may not induce or attempt to induce or procure or  
14 attempt to procure

15 (1) the purchase of cigarettes at a price less than the cost to wholesaler-  
16 distributor;

17 (2) a rebate or concession of any kind or nature in connection with the  
18 purchase of cigarettes.

19 (c) Evidence of advertisement, offering to sell, or sale of cigarettes by a  
20 wholesaler-distributor, retailer, or direct-buying retailer at less than cost, or evidence  
21 of an offer of a rebate in the price, the giving of a rebate in price, offer of a  
22 concession, or the giving of a concession of any kind or nature in connection with the  
23 sale of cigarettes, or the inducing, attempt to induce, the procuring, or the attempt to  
24 procure the purchase of cigarettes at a price less than cost to the wholesaler-  
25 distributor, retailer, or direct-buying retailer is prima facie evidence of intent to injure  
26 competitors and to destroy or substantially lessen competition.

27 (d) A wholesaler-distributor, direct-buying retailer, or retailer who violates the  
28 provisions of this section is guilty of a class B misdemeanor.

29 **Sec. 45.53.210. Sale at less than cost; with gift or concession.** In all  
30 advertisements, offers for sale, or sales involving two or more items when at least one  
31 of the items is cigarettes at a combined price, and in all advertisements, offers for sale,

1 or sales involving the giving of any gift, concession, or coupon of any kind in  
 2 conjunction with the sale of cigarettes, the wholesaler-distributor's or retailer's  
 3 combined selling price may not be below the cost to the wholesaler-distributor or the  
 4 cost to the retailer, respectively, of the total of all articles, products, commodities,  
 5 gifts, and concessions included in the transactions, except that, if any articles,  
 6 products, commodities, gifts or concessions, are not cigarettes, the basic cost shall be  
 7 determined as provided under AS 45.53.300.

8 **Sec. 45.53.220. Sale to another wholesaler-distributor.** When one  
 9 wholesaler-distributor sells cigarettes to another wholesaler-distributor, the seller is  
 10 not required to include in the selling price the cost to the wholesaler-distributor, but  
 11 the purchasing wholesaler-distributor, upon resale to a retailer, is required to include  
 12 the cost to the wholesaler-distributor in the selling price.

13 **Sec. 45.53.230. When provisions of law not applicable.** The provisions of  
 14 AS 45.53.200 - 45.53.350 do not apply to

15 (1) a sale at wholesale or retail made in an isolated transaction and not  
 16 in the usual course of business;

17 (2) a sale at wholesale or retail made where cigarettes are advertised,  
 18 offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing  
 19 trade in the cigarettes, and the advertising, offer to sell, or sale states the reason for the  
 20 sale and the quantity of the cigarettes advertised, offered for sale, or to be sold;

21 (3) a sale at wholesale or retail made where cigarettes are advertised,  
 22 offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or  
 23 sale states the reason for the sale and the quantity of the cigarettes advertised, offered  
 24 for sale, or to be sold;

25 (4) a sale at wholesale or retail made where cigarettes are sold upon  
 26 the final liquidation of a business;

27 (5) a sale at wholesale or retail made where cigarettes are advertised,  
 28 offered for sale or sold by a fiduciary or other officer acting under the order or  
 29 direction of a court; and

30 (6) the resale of cigarettes purchased from sales under (3) and (5) of  
 31 this section.

1           **Sec. 45.53.240. Sales at price to meet competition.** (a) A wholesaler-  
 2 distributor may advertise, offer to sell, or sell cigarettes at a price made in good faith  
 3 to meet the price of a competitor who is rendering the same type of service and is  
 4 selling the same article at cost to a competing wholesaler-distributor. A retailer may  
 5 advertise, offer to sell, or sell cigarettes at a price made in good faith to meet the price  
 6 of a competitor who is selling the same article at cost to a competing retailer. The  
 7 price of cigarettes advertised, offered for sale, or sold under the exceptions specified  
 8 under AS 45.53.230 may not be

9                           (1) considered the price of a competitor;

10                          (2) used as a basis for establishing prices below cost; or

11                          (3) considered the price of a competitor for purposes of this section if  
 12 established at a bankruptcy sale.

13                          (b) In the absence of proof of the actual cost to a competing wholesaler-  
 14 distributor or the competing retailer, actual cost may be presumed to be the lowest cost  
 15 to the wholesaler-distributor or the lowest cost to the retailer within the same trading  
 16 area as determined by a cost survey under AS 45.53.260(b).

17           **Sec. 45.53.250. Contracts in violation of law are illegal.** A contract, express  
 18 or implied, made by a person in violation of the provisions of AS 45.53.200 -  
 19 45.53.350 is illegal and void.

20           **Sec. 45.53.260. Determination of cost.** (a) In determining cost to the  
 21 wholesaler-distributor and retailer, a court shall consider as establishing the cost  
 22 evidence tending to show that a wholesaler-distributor or retailer complained against  
 23 under a provision of AS 45.53.200 - 45.53.350 purchased the cigarettes involved in the  
 24 complaint at a fictitious price, or upon terms, in a manner, or under invoices, in a  
 25 manner that conceals the true cost, discounts, or terms of purchase. The court shall  
 26 also consider evidence of the normal, customary, and prevailing terms and discounts  
 27 in connection with other sales of a similar nature in the trade area or state.

28                          (b) If a cost survey that follows recognized statistical and cost accounting  
 29 practices has been made for the trading area in which a violation of a provision of  
 30 AS 45.53.200 - 45.53.350 is committed or charged and the cost survey was conducted  
 31 to determine and establish, on the basis of actual existing conditions, the lowest cost to

1 a wholesaler-distributor or retailer within the trading area, the cost survey is  
 2 considered competent evidence in a court action or proceeding as tending to prove  
 3 actual cost to the wholesaler-distributor or retailer complained against. A party  
 4 against whom the cost survey is introduced in evidence has the right to offer evidence  
 5 tending to prove any inaccuracy of the cost survey or any state of facts that would  
 6 impair its probative value.

7 **Sec. 45.53.270. Determination of cost of cigarettes purchased outside of**  
 8 **ordinary channels of trade.** In establishing the basic cost of cigarettes to a  
 9 wholesaler-distributor or retailer, the invoice cost or the actual cost of cigarettes  
 10 purchased at a forced, bankrupt, or closeout sale, or other sale outside the ordinary  
 11 channels of trade may not be used.

12 **Sec. 45.53.280. Injunction.** (a) The department or a person injured by a  
 13 violation or who would suffer from any threatened violation of AS 45.53.200 -  
 14 45.53.350 may maintain an action to prevent, restrain, or enjoin the violation or  
 15 threatened violation. If, in the action, a violation or threatened violation of  
 16 AS 45.53.200 - 45.53.350 is established, the court may enjoin and restrain or  
 17 otherwise prohibit the violation or threatened violation, and the court shall assess the  
 18 costs of reasonable attorney fees against the defendant. In the action it is not  
 19 necessary that actual damages to the plaintiff be alleged or proved, but, if actual  
 20 damages are alleged and proved, the plaintiff, in addition to injunctive relief and costs,  
 21 including reasonable attorney fees, may recover actual damages.

22 (b) If injunctive relief is not requested or required, a person injured by a  
 23 violation of AS 45.53.200 - 45.53.350 may maintain an action for damages in the  
 24 appropriate court.

25 **Sec. 45.53.290. Administration of AS 45.53.200 - 45.53.350.** The  
 26 department

- 27 (1) shall administer AS 43.50.500 - 43.50.650;  
 28 (2) may adopt regulations relating to the administration and  
 29 enforcement of AS 45.53.200 - 45.53.350;  
 30 (3) may make cost surveys for the state or a trading area or areas;  
 31 (4) may, after reasonable notice and hearing, revoke or suspend a

1 license issued under AS 45.53 to a person who refuses or neglects to comply with a  
2 provision of AS 45.53.200 - 45.53.350.

3 **Sec. 45.53.300. Presumptions applicable to determination of cost.** For  
4 purposes of AS 45.53.200 - 45.53.350,

5 (1) the basic cost of cigarettes is equal to the lower of the two  
6 following amounts:

7 (A) the invoice cost of cigarettes to the wholesaler-distributor  
8 or retailer; or

9 (B) the lowest replacement cost of cigarettes to the wholesaler-  
10 distributor or retailer, within 30 days before the date of sale, in the quantity last  
11 purchased, within or before the 30-day period, less all trade discounts except  
12 customary discounts for cash, plus the full face value of any tax that may be  
13 required by AS 43.50 if not already included in the invoice cost of the  
14 cigarettes to the wholesaler-distributor or retailer;

15 (2) the cost to the wholesaler-distributor is equal to the basic cost of  
16 the cigarettes acquired by the wholesaler-distributor plus the cost of doing business by  
17 the wholesaler-distributor, as evidenced by the standards and methods of accounting  
18 regularly employed by the wholesaler-distributor, and includes labor costs, rent,  
19 depreciation, selling costs, maintenance of equipment, delivery costs, all types of  
20 licenses, taxes, insurance, and advertising;

21 (3) in the absence of proof of a lesser or higher cost of doing business  
22 by the wholesaler-distributor making the sale, the cost of doing business by the  
23 wholesaler-distributor is presumed to be two percent of the basic cost of the cigarettes  
24 to the wholesaler-distributor; a fraction of a cent used in computing the cost of doing  
25 business shall be rounded off to the next highest cent, plus cartage to the retail outlet if  
26 performed or paid for by the wholesaler-distributor; the cartage cost, in the absence of  
27 proof of a lesser or higher cost, is presumed to be one-half of one percent of the basic  
28 cost of the cigarettes to the wholesaler-distributor; a fraction of a cent used in  
29 computing the amount of the cartage shall be rounded off to the next highest cent;

30 (4) the cost to the retailer is equal to the basic cost of the cigarettes  
31 plus the cost of doing business by the retailer; the cost of doing business may be

1 proven by the standards and methods of accounting regularly employed by the retailer  
 2 and must include labor costs, rent, depreciation, selling costs, maintenance of  
 3 equipment, delivery costs, all types of licenses, taxes, insurance, and advertising;

4 (5) in the absence of proof of a lesser or higher cost of doing business  
 5 by the retailer making the sale, the cost of doing business by the retailer is presumed to  
 6 be six percent of the basic cost of cigarettes to the retailer; a fraction of a cent used in  
 7 computing the cost of doing business shall be rounded off to the next highest cent;

8 (6) in the case of a direct-buying retailer who, in connection with the  
 9 purchase of any cigarettes, receives not only the discounts ordinarily allowed on  
 10 purchases by a direct-buying retailer but also, in whole or in part, the discounts  
 11 ordinarily allowed on purchases by a wholesaler-distributor, the cost of doing business  
 12 by a direct-buying retailer is presumed to be, in the absence of proof of a lesser or  
 13 higher cost of doing business, the sum of the cost of doing business by the direct-  
 14 buying retailer and, to the extent that the full discounts ordinarily allowed to a  
 15 wholesaler-distributor are received, the cost of doing business by a wholesaler-  
 16 distributor described under (2) of this section.

17 **Sec. 45.53.350. Definitions.** In AS 45.53.200 - 45.53.350,

18 (1) "cigarette" has the meaning given in AS 43.50.170;

19 (2) "department" means the Department of Revenue;

20 (3) "direct-buying retailer" has the meaning given in AS 43.50.170;

21 (4) "retailer" has the meaning given in AS 43.50.170;

22 (5) "sale" has the meaning given in AS 43.50.170;

23 (6) "sell at retail," "sale at retail," or "retail sales" means a sale for  
 24 consumption or use made in the ordinary course of trade or usual conduct of the  
 25 seller's business;

26 (7) "sell at wholesale," "sale at wholesale," or "wholesale sales" means  
 27 a sale made in the ordinary course of trade or usual conduct of the wholesaler-  
 28 distributor's business to a retailer for the purpose of resale;

29 (8) "wholesaler-distributor" means a person licensed under  
 30 AS 43.50.035.

31 \* **Sec. 4.** This Act takes effect July 1, 2002.