



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

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H.B. 566

132nd General Assembly
(As Re-Referred by H. Rules and Reference)

Reps. Scherer and Cera, Butler, Antani, Lipps, Seitz, Retherford

BILL SUMMARY

- Qualifies the manner in which cigarettes' wholesale minimum sale price is calculated by referring to the manufacturer's gross invoice cost as the basis of a wholesaler's cost.
 - Explicitly permits one wholesaler to sell cigarettes to another wholesaler without having to recover the minimum wholesale cost as is required when selling to a retailer.
 - Explicitly requires a competitor's price to be demonstrated to the Department of Taxation before other wholesalers or retailers may match the competitor's price.
 - Creates new prohibited actions with respect to the sale of cigarettes.
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CONTENT AND OPERATION

Cigarette minimum pricing and offenses

Continuing law prohibits cigarette retailers and wholesalers from selling cigarettes for less than statutory minimum prices with the intent to injure competition. A dealer violating the minimum pricing law risks suspension or revocation of its dealer license, may be sued for damages and costs by injured competitors, and may be found guilty of a fourth degree misdemeanor. The bill makes several modifications to the law governing the statutorily prescribed minimum sales prices of cigarettes in Ohio. First, the bill further specifies the cost basis on which cigarettes' wholesale minimum sale price is calculated. Second, the bill expressly incorporates into law the current policy of allowing one wholesaler to sell cigarettes to another wholesaler without having to charge the seller's entire cost, as is required for sales to retailers. Third, the bill explicitly

requires a competitor's price to be demonstrated to the Department of Taxation before other wholesalers or retailers may match that competitor's price. Fourth, the bill creates new prohibited actions with respect to the sale of cigarettes, including a prohibition on offering or accepting "concessions" in connection with a sale between a wholesaler and retailer.

Cigarette minimum pricing

Continuing law prescribes a minimum price that cigarettes may be sold for in Ohio. This minimum pricing law is administered by the Department of Taxation and directed primarily at discouraging unfair competition through underpricing competitors at the wholesale and retail level of trade. Distinct minimum prices, detailed in the table below, apply to sales of cigarettes for resale (wholesale) and to sales for customers' use (retail).

Current Law's Minimum Cigarette Sale Prices	
Wholesale Price	Retail Price
Wholesaler's invoice cost	Retailer's invoice cost
+	+
Wholesaler's mark-up = [3.5% (or actual cost of doing business) X invoice cost]	Retailer's mark-up = [8% (or actual cost of doing business) X (retailer's invoice cost – county excise taxes)]
+	+
State and county excise taxes	If the retailer pays cartage costs, the actual cartage costs or 0.75% of the wholesaler's cost, subtracted by any state or county excise taxes paid by the wholesaler
=	=
Minimum wholesale sale price	Minimum retail sale price

Wholesale minimum pricing modifications

In calculating the wholesale minimum sale price, the bill specifies that the wholesaler's invoice costs—the base cost from which each wholesaler's minimum sale price is calculated—is the "manufacturer gross" invoice cost. Current law does not define "invoice cost," nor does the bill further define the term other than adding the descriptor "manufacturer gross" to the term.

The bill also specifies that a wholesaler may use a mark-up other than 3.5% of the invoice price only if it provides proof to the satisfaction of the Tax Commissioner that its actual costs of doing business deviates from that amount. In addition, the bill allows a retailer to use cartage costs other than 0.75% of its invoice costs only if it proves its



actual cartage costs in a similar manner.¹ Current law, in both instances, simply requires that those actual amounts be proved without specifying the manner in which they may be proven.

Sales to other wholesalers

Current law does not expressly contemplate transactions between two cigarette wholesalers, with the possible implication that when one wholesaler sells cigarettes to another wholesaler, the seller must comply with the wholesale minimum price level, as described above, including both the seller's invoice cost and the mark-up representing the seller's cost of doing business. The bill specifies that the selling wholesaler may exclude the wholesaler's "cost"—presumably its actual, proven costs of doing business or the 3.5% mark-up—when determining the price in a wholesaler-to-wholesaler sale. However, a wholesaler selling to a retailer must continue to charge that wholesaler's minimum sales price.² This amendment appears to expressly codify the Department of Taxation's current policy as stated in a recent information release.³

Competitive sales adjustments

Under continuing law, a retailer or wholesaler may advertise or sell cigarettes at a price less than the applicable minimum sale price if the purpose in doing so is to match the price of another retailer or wholesaler, respectively. (Pursuant to this provision, a recent Department of Taxation information release permits a wholesaler mark-up of 0.39% in lieu of 3.5% on the basis of at least one wholesaler demonstrating a significantly lower cost of doing business.)⁴

The bill explicitly allows a wholesaler or retailer to match a competitor's price only if the competitor has demonstrated to the Department of Taxation that the competitor's "costs"—again, presumably its costs of doing business—are lower than the otherwise-prescribed 3.5% mark-up for wholesalers and 8% for retailers.⁵

¹ R.C. 1333.11(C).

² R.C. 1333.13. One possible reading of this provision is that it would permit a wholesaler to sell cigarettes to another wholesaler at a price less than the seller's invoice cost of the cigarettes.

³ See Information Release XT 2017-01 (April 2017), available at https://www.tax.ohio.gov/excise/information_releases/index_excise/XT2017-01.aspx.

⁴ See Information Release XT 2017-02 (April 2017, rev. 2018), available at https://www.tax.ohio.gov/excise/information_releases/index_excise/XT2017-02.aspx.

⁵ R.C. 1333.15. Alternatively, the bill could be interpreted as authorizing a wholesaler or retailer to calculate its minimum pricing using some undefined method based on the wholesaler's or retailer's actual costs independent of the formula required under continuing law.

Prohibitions

The bill prohibits and criminalizes additional activities in relation to the sale of cigarettes. Continuing law prohibits a retailer or wholesaler, with the intent to inhibit competition, to sell cigarettes at less than the applicable minimum sale price. Any such act is a fourth degree misdemeanor.

The bill additionally prohibits each of the following, the commission of which is also a fourth degree misdemeanor:

- A retailer from recklessly inducing, procuring, or attempting to induce or procure a concession from a wholesaler in connection with the sale of cigarettes;
- A wholesaler from recklessly offering or giving a concession in connection with the sale of cigarettes;
- A retailer from recklessly inducing, procuring, or attempting to induce or procure the purchase of cigarettes at a price less than the minimum wholesale sale price.

The bill also clarifies that a wholesaler may charge a price that incorporates a mark-up lower than 3.5% without committing a crime if it has demonstrated to the Department of Taxation that its cost of doing business is lower than that amount.⁶

HISTORY

ACTION	DATE
Introduced	03-19-18
Reported, H. Economic Dev., Commerce, and Labor	05-22-18
Re-referred, H. Rules and Reference	06-05-18

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⁶ R.C. 1333.12. One possible reading of this provision is that it would decriminalize a wholesaler selling cigarettes at a price less than the wholesaler's invoice cost of the cigarettes.

