

As Passed by the Senate

134th General Assembly

Regular Session

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S. B. No. 40

Senator Schaffer

Cosponsors: Senators Antani, Blessing, Cirino, Fedor, Hoagland, Reineke, Rulli

A BILL

To amend sections 1333.11, 1333.12, 1333.14, and 1
1333.15 and to enact section 1333.13 of the 2
Revised Code regarding cigarette minimum 3
pricing. 4

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1333.11, 1333.12, 1333.14, and 5
1333.15 be amended and section 1333.13 of the Revised Code be 6
enacted to read as follows: 7

Sec. 1333.11. As used in sections 1333.11 to 1333.21 of 8
the Revised Code: 9

(A) "Cost to the retailer" means the invoice cost of 10
cigarettes to the retailer, or the replacement cost of 11
cigarettes to the retailer within thirty days prior to the date 12
of sale, in the quantity last purchased, whichever is lower, 13
less all trade discounts except customary discounts for cash, to 14
which shall be added the cost of doing business by the retailer 15
as evidenced by the standards and the methods of accounting 16
regularly employed by the retailer in the retailer's allocation 17
of overhead costs and expenses, paid or incurred. "Cost to the 18

retailer" must include, without limitation, labor, including 19
salaries of executives and officers, rent, depreciation, selling 20
costs, maintenance of equipment, delivery costs, all types of 21
licenses, insurance, advertising, and taxes, exclusive of county 22
cigarette taxes paid or payable on the cigarettes. Where the 23
sale to the retailer is on a cash and carry basis, the cartage 24
to the retail outlet, if performed or paid for by the retailer, 25
shall be added to the invoice cost of the cigarettes to the 26
retailer. In the absence of proof of a lesser or higher cost by 27
the retailer, the cartage cost shall be three-fourths of one per 28
cent of the invoice cost of the cigarettes to the retailer, not 29
including the amount added thereto by the wholesaler for the 30
face value of state and county cigarette tax stamps affixed to 31
each package of cigarettes. 32

(B) In the absence of proof of a lesser or higher cost of 33
doing business by the retailer making the sale, the cost of 34
doing business to the retailer shall be eight per cent of the 35
invoice cost of the cigarettes to the retailer exclusive of the 36
face value of county cigarette taxes paid on the cigarettes or 37
of the replacement cost of the cigarettes to the retailer within 38
thirty days prior to the date of sale in the quantity last 39
purchased exclusive of the face value of county cigarette taxes 40
paid on the cigarettes, whichever is lower, less all trade 41
discounts except customary discounts for cash. 42

(C) "Cost to the wholesaler" means the manufacturer gross 43
invoice cost of the cigarettes to the wholesaler, or the 44
replacement cost of the cigarettes to the wholesaler within 45
thirty days prior to the date of sale, in the quantity last 46
purchased, whichever is lower, less all trade discounts except 47
customary discounts for cash, to which shall be added a 48
wholesaler's markup to cover in part the cost of doing business, 49

which wholesaler's markup, in the absence of proof filed with 50
and approved by the tax commissioner of a lesser or higher cost 51
of doing business by the wholesaler as evidenced by the 52
standards and methods of accounting regularly employed by the 53
wholesaler in the wholesaler's allocation of overhead costs and 54
expenses, paid or incurred, including without limitation, labor, 55
salaries of executives and officers, rent, depreciation, selling 56
costs, maintenance of equipment, delivery, delivery costs, all 57
types of licenses, taxes, insurance, and advertising, shall be 58
three and five-tenths per cent of such invoice cost of the 59
cigarettes to the wholesaler, to which shall be added the full 60
face value of state and county cigarette tax stamps affixed by 61
the wholesaler to each package of cigarettes, or of the 62
replacement cost of the cigarettes to the wholesaler within 63
thirty days prior to the date of sale in the quantity last 64
purchased, whichever is lower, less all trade discounts except 65
customary discounts for cash. 66

Where the sale by the wholesaler to the retailer is on a 67
cash and carry basis, the wholesaler may, in the absence of 68
proof of a lesser or higher cost filed with and approved by the 69
tax commissioner, allow to the retailer an amount not to exceed 70
three-fourths of one per cent of the "cost to the wholesaler" 71
excluding the amount added thereto for the face value of state 72
and county cigarette tax stamps affixed to each package of 73
cigarettes. 74

The tax commissioner may require a wholesaler who is 75
filing proof of a lesser or higher cost of doing business under 76
this section to have an independent certified public accountant 77
certify that the calculation of the wholesaler's cost of doing 78
business has been made in accordance with generally accepted 79
accounting principles. The commissioner also may request, and 80

upon such a request the wholesaler shall provide, any additional 81
information the commissioner considers necessary during review 82
of the filing. The commissioner shall deny the wholesaler's 83
request for a new cost of doing business if the wholesaler fails 84
to provide such information. The commissioner shall approve or 85
deny the wholesaler's request within ninety days after receipt 86
of the original filing or of the filing of requested additional 87
information, whichever is later. A denial is subject to appeal 88
under section 5717.02 of the Revised Code. 89

(D) Any person licensed to sell cigarettes as both a 90
wholesaler and a retailer, who does sell cigarettes at retail, 91
shall, in determining "cost to the retailer", first compute 92
"cost to the wholesaler" as provided in division (C) of this 93
section; that "cost to the wholesaler" shall then be used in 94
lieu of the lower of either invoice cost or replacement cost 95
less all trade discounts except customary discounts for cash in 96
computing "cost to the retailer" as provided in divisions (A) 97
and (B) of this section. 98

(E) In all advertisements, offers for sale, or sales 99
involving two or more items at a combined price and in all 100
advertisements, offers for sale, or sales involving the giving 101
of any concession of any kind, whether it be coupons or 102
otherwise, the retailer's or wholesaler's selling price shall 103
not be below the "cost to the retailer" or the "cost to 104
wholesaler", respectively, of all articles, products, 105
commodities, and concessions included in such transactions. 106

(F) (1) "Sell at retail," "sales at retail," and "retail 107
sales" include any transfer of title to tangible personal 108
property for a valuable consideration made, in the ordinary 109
course of trade or usual prosecution of the seller's business, 110

to the purchaser for consumption or use. 111

(2) "Sell at wholesale," "sales at wholesale," and 112
"wholesale sales" include any such transfer of title to tangible 113
personal property for the purpose of resale. 114

(G) "Retailer" includes any person who is permitted to 115
sell cigarettes at retail within this state under section 116
5743.15 of the Revised Code. 117

(H) "Wholesaler" includes any person who is permitted to 118
sell cigarettes at wholesale within this state under that 119
section. 120

(I) "Person" includes individuals, corporations, 121
partnerships, associations, joint-stock companies, business 122
trusts, unincorporated organizations, receivers, or trustees. 123

(J) "County cigarette taxes" means the taxes levied under 124
section 5743.021, 5743.024, or 5743.026 of the Revised Code. 125

Sec. 1333.12. No retailer shall, with intent to injure 126
competitors, destroy substantially or lessen competition, 127
advertise, offer to sell, or sell at retail cigarettes at less 128
than cost to the retailer. 129

No wholesaler shall recklessly, with intent to injure 130
competitors, or destroy substantially or lessen competition, 131
advertise, offer to sell, or sell at wholesale cigarettes at 132
less than cost to the wholesaler, unless the lower cost has been 133
approved by the tax commissioner pursuant to division (C) of 134
section 1333.11 of the Revised Code. 135

Evidence of advertisement, offering to sell, or sale of 136
cigarettes by any retailer or wholesaler at less than cost to 137
him the wholesaler or retailer, is prima-facie evidence of 138

intent to injure competitors, or destroy substantially or lessen 139
competition. 140

Sec. 1333.13. When one wholesaler sells cigarettes to 141
another wholesaler, the selling wholesaler shall not be required 142
to include in the selling price the cost to the wholesaler who 143
is the seller, as defined in division (C) of section 1333.11 of 144
the Revised Code. Upon resale to a retailer, the purchasing 145
wholesaler shall be deemed to be the wholesaler and shall be 146
governed by division (C) of section 1333.11 of the Revised Code. 147

Sec. 1333.14. Sections 1333.11 to 1333.21, inclusive, of 148
the Revised Code do not apply to sales at retail or sales at 149
wholesale made in any of the following circumstances, provided 150
prior approval of the tax commissioner is obtained: 151

(A) In an isolated transaction and not in the usual course 152
of business; 153

(B) Where cigarettes are advertised, offered for sale, or 154
sold in bona fide clearance sales for the purpose of 155
discontinuing trade in such cigarettes, and said advertising, 156
offer to sell, or sale states the reason thereof and the 157
quantity of such cigarettes advertised, offered for sale, or to 158
be sold; 159

(C) Where cigarettes are advertised, offered for sale, or 160
sold as imperfect or damaged and said advertising, offer to 161
sell, or sale states the reason thereof and the quantity of such 162
cigarettes advertised, offered for sale, or to be sold; 163

(D) Where cigarettes are sold upon the complete final 164
liquidation of a business; 165

(E) Where cigarettes are advertised, offered for sale, or 166
sold by any fiduciary or other officer acting under the order or 167

direction of any court. 168

Sec. 1333.15. Any retailer or wholesaler may advertise, 169
offer to sell, or sell cigarettes at a price made in good faith 170
to meet the prices of a competitor who is selling the same 171
article at cost to ~~him~~ the competitor as a wholesaler or 172
retailer. A wholesaler may meet the price of a competitor that 173
is less than the cost to the wholesaler only if the competitor's 174
lower cost has been approved by the tax commissioner pursuant to 175
division (C) of section 1333.11 of the Revised Code. The prices 176
of cigarettes advertised, offered for sale, or sold under the 177
exemptions specified in section 1333.14 of the Revised Code 178
shall not be considered the price of a competitor and used as a 179
basis for establishing prices below cost, nor shall prices 180
established at bankrupt sales be considered as prices of a 181
competitor under this section. 182

Section 2. That existing sections 1333.11, 1333.12, 183
1333.14, and 1333.15 of the Revised Code are hereby repealed. 184