

AN ACT

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

Be it enacted by the General Assembly of the State of Ohio:

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

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

(A) "Cost to the retailer" means the invoice cost of cigarettes to the retailer, or the replacement cost of cigarettes to the retailer within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added the cost of doing business by the retailer as evidenced by the standards and the methods of accounting regularly employed by the retailer in the retailer's allocation of overhead costs and expenses, paid or incurred. "Cost to the retailer" must include, without limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, insurance, advertising, and taxes, exclusive of county cigarette taxes paid or payable on the cigarettes. Where the sale to the retailer is on a cash and carry basis, the cartage to the retail outlet, if performed or paid for by the retailer, shall be added to the invoice cost of the cigarettes to the retailer. In the absence of proof of a lesser or higher cost by the retailer, the cartage cost shall be three-fourths of one per cent of the invoice cost of the cigarettes to the retailer, not including the amount added thereto by the wholesaler for the face value of state and county cigarette tax stamps affixed to each package of cigarettes.

(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 to the retailer shall be eight per cent of the invoice cost of the cigarettes to the retailer exclusive of the face value of county cigarette taxes paid on the cigarettes or of the replacement cost of the cigarettes to the retailer within thirty days prior to the date of sale in the quantity last purchased exclusive of the face value of county cigarette taxes paid on the cigarettes, whichever is lower, less all trade discounts except customary discounts for cash.

(C) "Cost to the wholesaler" means the manufacturer gross invoice cost of the cigarettes to the wholesaler, or the replacement cost of the cigarettes to the wholesaler within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added a wholesaler's markup to cover in part the cost of doing business, which wholesaler's markup, in the absence of proof filed with and approved by the tax commissioner of a lesser or higher cost of doing business by the wholesaler as evidenced by the standards and methods of accounting regularly employed by the wholesaler in the wholesaler's allocation of overhead costs and expenses, paid or incurred, including without limitation, labor, salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment,

delivery, delivery costs, all types of licenses, taxes, insurance, and advertising, shall be three and five-tenths per cent of such invoice cost of the cigarettes to the wholesaler, to which shall be added the full face value of state and county cigarette tax stamps affixed by the wholesaler to each package of cigarettes, or of the replacement cost of the cigarettes to the wholesaler within thirty days prior to the date of sale in the quantity last purchased, whichever is lower, less all trade discounts except customary discounts for cash.

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

The tax commissioner may require a wholesaler who is filing proof of a lesser or higher cost of doing business under this section to have an independent certified public accountant certify that the calculation of the wholesaler's cost of doing business has been made in accordance with generally accepted accounting principles. The commissioner also may request, and upon such a request the wholesaler shall provide, any additional information the commissioner considers necessary during review of the filing. The commissioner shall deny the wholesaler's request for a new cost of doing business if the wholesaler fails to provide such information. The commissioner shall approve or deny the wholesaler's request within ninety days after receipt of the original filing or of the filing of requested additional information, whichever is later. A denial is subject to appeal under section 5717.02 of the Revised Code.

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

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

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

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

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

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

(I) "Person" includes individuals, corporations, partnerships, associations, joint-stock

companies, business trusts, unincorporated organizations, receivers, or trustees.

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

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

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

Evidence of advertisement, offering to sell, or sale of cigarettes by any retailer or wholesaler at less than cost to ~~him the wholesaler or retailer~~, is prima-facie evidence of intent to injure competitors, ~~or~~ destroy substantially or lessen competition.

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

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

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

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

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

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

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

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

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

Speaker _____ *of the House of Representatives.*

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

Governor.

S. B. No. 40

134th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

Secretary of State.

File No. _____ Effective Date _____