

**As Passed by the House**

**134th General Assembly**

**Regular Session**

**2021-2022**

**S. B. No. 40**

**Senator Schaffer**

**Cosponsors: Senators Antani, Blessing, Cirino, Fedor, Hoagland, Reineke, Rulli  
Representatives Roemer, Troy, Brown, Cutrona, Fraizer, Galonski, Hoops, Jones,  
Loychik, Miller, A., Miller, J., O'Brien, Oelslager, Pavliga, Riedel, Russo, Seitz,  
Sobecki, Stein, White**

---

**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