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H.B. 71
133rd General Assembly

Bill Analysis

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Version: As Reported by House Ways & Means

Primary Sponsors: Reps. Scherer and Cera

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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.
- Prescribes the manner by which a wholesaler must obtain the Tax Commissioner's approval before using its actual cost of doing business in pricing cigarettes instead of a statutory 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 approved by the Commissioner before another wholesaler may match the competitor's price.
- Requires a retailer or wholesaler to obtain approval from the Commissioner before conducting cigarette sales exempt from the minimum pricing law.
- Creates new prohibited actions with respect to the sale of cigarettes.

DETAILED ANALYSIS

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 and prescribes procedures a wholesaler must follow to obtain the Commissioner's approval to use a cost of doing business in pricing cigarettes that is lower than a statutorily prescribed cost. 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 approved by the Tax Commissioner before other wholesalers or retailers may match that competitor's price. Fourth, the bill requires a retailer or wholesaler to obtain approval from the Commissioner before conducting any cigarette sales that are exempt from the minimum pricing law under continuing law. Fifth, the bill creates new prohibited actions with respect to the sale of cigarettes.

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 Sales 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, less 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 Tax Commissioner that its actual costs of doing business deviates from that amount and the Commissioner approves the modified mark-up. In addition, the bill allows a retailer to use cartage costs other than 0.75% of its invoice costs only

if it obtains approval of its actual cartage costs in a similar manner. Current law, in both instances, simply requires that those actual amounts be proved without specifying the manner in which they may be proven.

The bill authorizes the Tax Commissioner to require a wholesaler who requests that the Commissioner approve a different cost of doing business to submit documents supporting the differing cost, including a certification from a certified public accountant (CPA) verifying that the cost has been determined in accordance with generally accepted accounting principles. The Commissioner is ultimately required to approve or deny a wholesaler's request within 90 days after the later of the date the request is made or a verifying document is submitted.

The bill authorizes a wholesaler to appeal the Commissioner's rejection of a request for an alternative cost of doing business to the Board of Tax Appeals.¹

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 to match a competitor's price only if the competing wholesaler has obtained approval from the Tax Commissioner that its costs of doing business are lower than the otherwise-prescribed 3.5% mark-up, subject to any financial documentation requirement and appeal rights described above (see "**Wholesale**

¹ R.C. 1333.11(C).

² R.C. 1333.13.

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.

minimum pricing modifications”).⁵ A retailer may continue to match a competing retailer’s price without the competitor having received the Commissioner’s approval.

Minimum pricing exemptions

Under continuing law, the following cigarette sales are exempt from the minimum pricing law:

- Isolated transactions not in the usual course of business;
- Discontinued product clearance sales;
- Damaged cigarettes;
- Liquidation sales;
- Court-ordered sales.

The bill requires a cigarette retailer or wholesaler to obtain prior approval from the Tax Commissioner before selling any cigarettes that are to be exempted from the minimum pricing law on those grounds.⁶

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, from selling 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 wholesaler from recklessly offering or giving a concession in connection with the sale of cigarettes;
- A retailer from purposely inducing, procuring, or attempting to induce or procure the purchase of cigarettes at a price that, including any related concessions, is 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 obtained approval from the Tax Commissioner that its cost of doing business is lower than that amount.⁷

Under continuing law, a person acts purposely when it is their specific intention to engage in the prohibited conduct; it is the highest degree of intentionality. A person is considered to act recklessly when, “with heedless indifference to the consequences, the person

⁵ R.C. 1333.15.

⁶ R.C. 1333.14.

⁷ R.C. 1333.12.

disregards a substantial and unjustifiable risk” that their conduct is likely to cause a certain result.⁸

HISTORY

Action	Date
Introduced	02-14-19
Reported, H. Ways & Means	05-01-19

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⁸ R.C. 2901.22, not in the bill.