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OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research
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S.B. 40
134th General Assembly

Final Analysis

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Version: As Passed by the General Assembly

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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 default 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.
- Clarifies an existing offense prohibiting a wholesaler from selling cigarettes at less than the applicable minimum sale price.

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 act makes several modifications to the law governing the statutorily prescribed minimum sales prices of cigarettes in Ohio. First, it further specifies the cost basis on which

cigarettes' wholesale minimum sale price is calculated and prescribes procedures a wholesaler must follow to obtain the Tax Commissioner's approval to use a cost of doing business in pricing cigarettes that is lower than a statutorily prescribed cost. Second, the act expressly incorporates into law the continuing 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 act explicitly requires a competitor's price to be approved by the Commissioner before other wholesalers or retailers may match that competitor's price. Fourth, it 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 act clarifies an existing offense prohibiting a wholesaler from selling cigarettes at less than the applicable minimum sale price.

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).

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

Minimum pricing modifications

In calculating the wholesale minimum sale price, the act 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. Former law did not define "invoice cost," and the act

does not further define the term other than adding the descriptor “manufacturer gross” to the term.

The act 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 act 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. Former law, in both instances, simply required that those actual amounts be proved without specifying the manner in which they may be proven.

The act authorizes the 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 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. A wholesaler may 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

Former law did not expressly contemplate transactions between two cigarette wholesalers, with the possible implication that when one wholesaler sold cigarettes to another wholesaler, the seller was required to 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 act specifies that, in such a wholesaler-to-wholesaler sale, 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 minimum selling price. 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’s policy as stated in a 2017 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

¹ R.C. 1333.11(C).

² R.C. 1333.13.

³ See Information Release XT 2017-01 (April 2017), available at <https://tax.ohio.gov/wps/portal/gov/tax/business/ohio-business-taxes/excise/information-releases/index-excise/XT2017-01>.

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

Prohibitions

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 act 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

⁴ See Information Release XT 2017-02 (April 2017, rev. 2018), available at <https://tax.ohio.gov/wps/portal/gov/tax/business/ohio-business-taxes/excise/information-releases/index-excise/XT2017-02>.

⁵ R.C. 1333.15.

⁶ R.C. 1333.14.

⁷ R.C. 1333.12.

HISTORY

Action	Date
Introduced	02-02-21
Reported, S. Ways & Means	04-28-21
Passed Senate (33-0)	05-05-21
Reported, H. Ways & Means	06-23-21
Passed House (95-0)	06-24-21
