

As Passed by the House

133rd General Assembly

Regular Session

2019-2020

Sub. H. B. No. 71

Representatives Scherer, Cera

**Cosponsors: Representatives Antani, Becker, Green, Hambley, Lang, Lipps,
Riedel, Rogers, Schaffer, Seitz, DeVitis, Miller, A., Reineke**

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
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, 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. (A) 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

(B) No retailer shall purposely induce, procure, or 130
attempt to induce or procure the purchase of cigarettes at a 131
price, including any related concessions, that is less than the 132
cost to the wholesaler. 133

(C) No wholesaler shall recklessly, with intent to injure 134
competitors, destroy substantially or lessen competition, 135
advertise, do either of the following: 136

(1) Advertise, offer to sell, or sell at wholesale 137

cigarettes at less than cost to the wholesaler, unless the lower 138
cost has been approved by the tax commissioner pursuant to 139
division (C) of section 1333.11 of the Revised Code; 140

(2) Offer or give a concession of any kind in connection 141
with the sale of cigarettes. 142

(D) Evidence of advertisement, offering to sell, or sale 143
of cigarettes by any retailer or wholesaler at less than cost to 144
him the wholesaler or retailer, is prima-facie evidence of 145
intent to injure competitors, or destroy substantially or lessen 146
competition. 147

Sec. 1333.13. When one wholesaler sells cigarettes to 148
another wholesaler, the selling wholesaler shall not be required 149
to include in the selling price the cost to the wholesaler who 150
is the seller, as defined in division (C) of section 1333.11 of 151
the Revised Code. Upon resale to a retailer, the purchasing 152
wholesaler shall be deemed to be the wholesaler and shall be 153
governed by division (C) of section 1333.11 of the Revised Code. 154

Sec. 1333.14. Sections 1333.11 to 1333.21, inclusive, of 155
the Revised Code do not apply to sales at retail or sales at 156
wholesale made in any of the following circumstances, provided 157
prior approval of the tax commissioner is obtained: 158

(A) In an isolated transaction and not in the usual course 159
of business; 160

(B) Where cigarettes are advertised, offered for sale, or 161
sold in bona fide clearance sales for the purpose of 162
discontinuing trade in such cigarettes, and said advertising, 163
offer to sell, or sale states the reason thereof and the 164
quantity of such cigarettes advertised, offered for sale, or to 165
be sold; 166

(C) Where cigarettes are advertised, offered for sale, or 167
sold as imperfect or damaged and said advertising, offer to 168
sell, or sale states the reason thereof and the quantity of such 169
cigarettes advertised, offered for sale, or to be sold; 170

(D) Where cigarettes are sold upon the complete final 171
liquidation of a business; 172

(E) Where cigarettes are advertised, offered for sale, or 173
sold by any fiduciary or other officer acting under the order or 174
direction of any court. 175

Sec. 1333.15. Any retailer or wholesaler may advertise, 176
offer to sell, or sell cigarettes at a price made in good faith 177
to meet the prices of a competitor who is selling the same 178
article at cost to ~~him~~ the competitor as a wholesaler or 179
retailer. A wholesaler may meet the price of a competitor that 180
is less than the cost to the wholesaler only if the competitor's 181
lower cost has been approved by the tax commissioner pursuant to 182
division (C) of section 1333.11 of the Revised Code. The prices 183
of cigarettes advertised, offered for sale, or sold under the 184
exemptions specified in section 1333.14 of the Revised Code 185
shall not be considered the price of a competitor and used as a 186
basis for establishing prices below cost, nor shall prices 187
established at bankrupt sales be considered as prices of a 188
competitor under this section. 189

Section 2. That existing sections 1333.11, 1333.12, 190
1333.14, and 1333.15 of the Revised Code are hereby repealed. 191