

House Bill 3360

Sponsored by Representative BUTLER (at the request of Alan Campf)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Prohibits wholesaler or retailer of cigarettes from advertising, offering to sell or selling, at retail or wholesale, cigarettes at less than actual cost to wholesaler or retailer with intent to injure competitors or destroy or substantially lessen competition. Punishes violation by maximum of six months' imprisonment, \$2,500 fine, or both.

Allows Department of Revenue or injured person to seek injunction for violations. Allows cause of action for damages. Directs department to adopt rules specifying method for determining presumptive actual cost of cigarettes to wholesaler and retailer.

A BILL FOR AN ACT

1
2 Relating to cigarette sales.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. As used in sections 1 to 12 of this 2005 Act:**

5 (1) **"Basic wholesale cost" means the manufacturer's list price, less trade discounts, plus**
6 **the full face value of any tax required by ORS 323.005 to 323.482.**

7 (2) **"Cigarette" has the meaning given that term in ORS 323.010.**

8 (3) **"Retailer" means a person who is engaged in the business of retail sale of cigarettes**
9 **in this state.**

10 (4) **"Sale" means a sale, barter, exchange or any other manner of transferring the own-**
11 **ership of personal property.**

12 (5) **"Sell at retail," or "retail sale" means a sale for consumption or use made in the or-**
13 **inary course of trade or usual conduct of the seller's business.**

14 (6) **"Sell at wholesale" means a sale made in the ordinary course of trade or usual con-**
15 **duct by a wholesaler to a retailer for the purpose of resale.**

16 (7) **"Trade discount" means a price reduction that is offered by a cigarette manufacturer**
17 **on the date of sale, is reflected on the invoice as a deduction from the manufacturer's list**
18 **price and is fully earned and determinable on the date of sale.**

19 (8) **"Wholesaler" has the meaning given that term in ORS 323.010.**

20 **SECTION 2. (1) A wholesaler or retailer may not, with intent to injure competitors or**
21 **destroy or substantially lessen competition:**

22 (a) **Advertise, offer to sell or sell, at retail or wholesale, cigarettes at less than actual**
23 **cost to the wholesaler or retailer; or**

24 (b) **Offer a rebate in price, give a rebate in price, offer a concession of any kind or give**
25 **a concession of any kind in connection with the sale of cigarettes.**

26 (2) **A retailer may not induce or attempt to induce or procure or attempt to procure:**

27 (a) **The purchase of cigarettes at a price less than the actual cost to a wholesaler; or**

28 (b) **A rebate or concession of any kind in connection with the purchase of cigarettes.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (3) The following evidence constitutes prima facie evidence of intent to injure competitors
2 and to destroy or substantially lessen competition:

3 (a) Evidence of a wholesaler or retailer advertising, offering to sell, or selling cigarettes
4 at less than actual cost.

5 (b) Evidence of a wholesaler or retailer offering a rebate in price, giving a rebate in price,
6 offering a concession of any kind or giving of a concession of any kind in connection with the
7 sale of cigarettes.

8 (c) Evidence of a retailer inducing, attempting to induce or procuring or attempting to
9 procure:

10 (A) The purchase of cigarettes at a price less than actual cost to a wholesaler or retailer;
11 or

12 (B) A rebate or concession of any kind in connection with the purchase of cigarettes.

13 (4) This section does not prohibit a manufacturer from offering promotions to a whole-
14 saler or retailer if the wholesale promotion is the same for all participating wholesalers and
15 the retail promotion is the same for all participating retailers.

16 SECTION 3. (1) Except as provided in subsection (2) of this section, in all advertisements,
17 offers for sale or sales involving two or more items when at least one of the items is ciga-
18 rettes at a combined price, and in all advertisements, offers for sale or sales involving the
19 giving of any gift, concession or coupon of any kind in conjunction with the sale of cigarettes,
20 a wholesaler's or retailer's combined selling price may not be below the actual cost to the
21 wholesaler or the actual cost to the retailer, respectively, of the total of all articles, pro-
22 ducts, commodities, gifts and concessions included in the transactions.

23 (2) If any articles, products, commodities, gifts or concessions described in subsection (1)
24 of this section are not cigarettes, the actual cost to the wholesaler or retailer shall be de-
25 termined as provided under section 11 of this 2005 Act.

26 SECTION 4. (1) When one wholesaler sells cigarettes to another wholesaler, the selling
27 wholesaler is not required to include the actual cost of the selling wholesaler.

28 (2) Upon resale to a retailer, the purchasing wholesaler is required to include the actual
29 cost of the purchasing wholesaler or the actual cost of the selling wholesaler, whichever is
30 greater, in the selling price.

31 SECTION 5. (1) A wholesaler may advertise, offer to sell or sell cigarettes at a price
32 made in good faith to meet the price of a competitor who is rendering the same type of
33 service and is selling the same article at cost to a competing wholesaler.

34 (2) A retailer may advertise, offer to sell or sell cigarettes at a price made in good faith
35 to meet the price of a competitor who is selling the same article at cost to a competing
36 retailer.

37 (3) A manufacturer whose product is sold in this state directly or through an interme-
38 diary shall provide the Department of Revenue with a current price list for all brands of
39 cigarettes of the manufacturer and shall notify the department at least 10 days before a price
40 increase takes effect.

41 SECTION 6. A contract, express or implied, made by a person in violation of any pro-
42 vision of sections 1 to 12 of this 2005 Act is illegal and void.

43 SECTION 7. (1) In determining actual cost to the wholesaler or retailer, a court shall
44 consider evidence tending to show that a wholesaler or retailer against whom an action is
45 brought under section 9 of this 2005 Act purchased the cigarettes involved in the complaint

1 at a fictitious price or upon terms, under invoices or in a manner that conceals the true
 2 cost, discounts or terms of purchase. The court shall also consider evidence of the normal,
 3 customary and prevailing terms and discounts in connection with other sales of a similar
 4 nature in this state.

5 (2) The presumptive actual cost of cigarettes as determined by the Department of Re-
 6 venue under section 11 of this 2005 Act is considered competent evidence in a court action
 7 or proceeding as tending to prove actual cost to the wholesaler or retailer complained
 8 against. A party against whom the presumptive actual cost as determined by the department
 9 is introduced in evidence has the right to offer evidence tending to prove any inaccuracy of
 10 the presumptive actual cost or any statement of facts that would impair its probative value.

11 **SECTION 8.** In establishing the actual cost of cigarettes to a wholesaler or retailer, the
 12 invoice cost of cigarettes purchased at a forced, bankrupt or closeout sale or other sale
 13 outside the ordinary channels of trade may not be used.

14 **SECTION 9.** (1) The Department of Revenue or a person injured by a violation or who
 15 would be injured by any threatened violation of any provision of sections 1 to 12 of this 2005
 16 Act may maintain an action to prevent, restrain or enjoin the violation or threatened vio-
 17 lation. If, in the action, a violation or threatened violation is established, the court may en-
 18 join and restrain or otherwise prohibit the violation or threatened violation and the court
 19 shall assess the costs of reasonable attorney fees against the defendant. In the action, it is
 20 not necessary that actual damages to the plaintiff be alleged or proved, but, if actual dam-
 21 ages are alleged and proved, the plaintiff, in addition to injunctive relief and costs, including
 22 reasonable attorney fees, may recover actual damages.

23 (2) If injunctive relief is not requested or required, a person injured by a violation of any
 24 provision of sections 1 to 12 of this 2005 Act may maintain an action for damages in the ap-
 25 propriate court.

26 **SECTION 10.** The Department of Revenue:

27 (1) Shall administer sections 1 to 12 of this 2005 Act;

28 (2) May adopt rules necessary for the administration and enforcement of sections 1 to
 29 12 of this 2005 Act;

30 (3) May determine the presumptive actual cost of cigarettes to a wholesaler or retailer
 31 as provided in section 11 of this 2005 Act; and

32 (4) May, after reasonable notice and hearing, revoke or suspend a license issued under
 33 ORS 323.005 to 323.482 to a person who refuses or neglects to comply with any provision of
 34 sections 1 to 12 of this 2005 Act.

35 **SECTION 11.** (1) For purposes of sections 1 to 12 of this 2005 Act, the presumptive actual
 36 cost of cigarettes to a wholesaler is the presumptive wholesale cost as calculated by the
 37 Department of Revenue plus an amount equal to four and one-half percent of the
 38 presumptive wholesale cost to account for business costs. For purposes of this subsection,
 39 the presumptive wholesale cost is the manufacturer's list price, less trade discounts, plus the
 40 full face value of all cigarette taxes.

41 (2) For purposes of sections 1 to 12 of this 2005 Act, the presumptive actual cost of cig-
 42 arettes to a retailer is the presumptive actual cost of cigarettes to the wholesaler as calcu-
 43 lated by the department under subsection (1) of this section, plus an amount equal to six
 44 percent of the presumptive actual cost of cigarettes to the wholesaler to account for busi-
 45 ness costs.

1 **(3) A wholesaler or retailer that wishes to advertise, offer to sell or sell cigarettes at less**
2 **than the presumptive actual cost to the wholesaler or retailer as calculated under subsection**
3 **(1) or (2) of this section must first obtain approval from the department. The department**
4 **may grant approval only if the wholesaler or retailer provides proof satisfactory to the de-**
5 **partment that the wholesaler's or retailer's actual cost is lower than presumed. Approval for**
6 **cigarette sales at less than the presumptive actual cost as determined under subsection (1)**
7 **or (2) of this section may not be granted for a period longer than one year.**

8 **(4) In reviewing proof of actual wholesale or retail cost, the department may consider the**
9 **costs reflected on the actual invoice, but may not consider cash discounts. In reviewing proof**
10 **of actual costs, the department may consider the standards and methods of accounting reg-**
11 **ularly employed and must include labor costs, rent, depreciation, selling costs, maintenance**
12 **of equipment, delivery costs, all types of licenses, taxes, insurance, advertising, preopening**
13 **expenses, provision for impaired assets and closing costs, interest expenses and provision for**
14 **merger and restructuring expenses.**

15 **(5) The department shall adopt rules for determining the actual costs for the wholesaler**
16 **and retailer for the purposes of sections 1 to 12 of this 2005 Act.**

17 **SECTION 12.** **Violation of section 2 of this 2005 Act is a class B misdemeanor.**

18 **SECTION 13.** **Sections 1 to 12 of this 2005 Act apply to sales of cigarettes occurring on**
19 **or after the effective date of this 2005 Act.**

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