

House Bill 2502

Sponsored by Representative BUTLER

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 wholesalers and retailers from selling cigarettes and other tobacco products below actual wholesale cost or in retail sales below actual retail cost except with Department of Revenue approval or in specified circumstances. Prohibits offering rebate or concession in connection with sale of cigarettes or other tobacco products. Makes contract that violates provision of Act illegal and void. Specifies what constitutes evidence of violation in court proceeding. Permits Department of Revenue or other person injured by violation of Act to maintain action for damages or for injunction. Grants Department of Revenue power to administer Act, to set presumptive wholesale cost and presumptive retail cost and to approve sales below presumptive wholesale cost or presumptive retail cost. Punishes violation of Act by maximum of six months' imprisonment, \$2,500 fine, or both.

A BILL FOR AN ACT

1
2 Relating to sales of tobacco products.

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

4 **SECTION 1. As used in sections 1 to 12 of this 2007 Act:**

5 (1) **"Actual retail cost" means the actual wholesale cost plus 10 percent.**

6 (2) **"Actual wholesale cost" means the manufacturer's list price plus:**

7 (a) **Eight percent of the list price for cigarettes or 10 percent of the list price for other**
8 **tobacco products, as appropriate; and**

9 (b) **The total amount of any tax required by ORS 323.005 to 323.482 for cigarettes or the**
10 **total amount of any tax required by ORS 323.500 to 323.645 for other tobacco products, as**
11 **appropriate.**

12 (3) **"Cigarette" has the meaning given that term in ORS 323.010.**

13 (4) **"Other tobacco product" means:**

14 (a) **Cigars, cheroots, stogies and periques;**

15 (b) **Granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco;**

16 (c) **Snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing to-**
17 **bacco;**

18 (d) **Shorts, refuse scraps, clippings, cuttings and sweepings of tobacco; and**

19 (e) **Other kinds and forms of tobacco prepared in such a manner as to be suitable for**
20 **chewing or smoking in a pipe or otherwise, or both for chewing and smoking.**

21 (5) **"Retailer" means a person who is engaged in the business of selling cigarettes or**
22 **other tobacco products at retail in this state.**

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

25 (7) **"Sell at retail" or "retail sale" means a sale for use or consumption as defined in ORS**
26 **323.010 or to a consumer as defined in ORS 323.500 made in the ordinary course of trade or**
27 **in the usual conduct of the seller's business.**

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 (8) "Sell at wholesale" or "wholesale sale" means a sale that a wholesaler, in the ordinary
2 course of trade or in the usual conduct of the wholesaler's business, makes to a retailer for
3 the purpose of resale.

4 (9) "Wholesaler" means any dealer that engages in the sale of cigarettes or other tobacco
5 products to any other dealer for purposes other than use or consumption.

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

8 (a) Advertise, offer to sell or sell cigarettes or other tobacco products to another
9 wholesaler or to a retailer at less than actual wholesale cost or in a retail sale at less than
10 the actual retail cost; or

11 (b) Offer or give a rebate in price or offer or give a concession of any kind in connection
12 with the sale of cigarettes or other tobacco products.

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

14 (a) The purchase of cigarettes or other tobacco products at a price less than the actual
15 wholesale cost or the retail purchase of cigarettes or other tobacco products at a price less
16 than the actual retail cost; or

17 (b) A rebate or concession of any kind in connection with the purchase of cigarettes or
18 other tobacco products.

19 (3) Prima facie evidence of a wholesaler's or retailer's intent to injure competitors and
20 to destroy or substantially lessen competition consists of:

21 (a) Evidence of an advertisement, offer to sell or sale of cigarettes or other tobacco
22 products in a wholesale sale at less than actual wholesale cost or in a retail sale at less than
23 actual retail cost;

24 (b) Evidence of an offer to provide or the provision of a rebate in price or an offer to
25 provide or the provision of a concession of any kind in connection with the sale of cigarettes
26 or other tobacco products; or

27 (c) Evidence of a retailer's inducing or procuring or attempting to induce or procure:

28 (A) The purchase of cigarettes or other tobacco products from a wholesaler or another
29 retailer at a price less than actual wholesale cost or in a retail sale at less than the actual
30 retail cost; or

31 (B) A rebate or concession of any kind in connection with the purchase of cigarettes or
32 other tobacco products.

33 (4) This section does not prohibit a manufacturer from offering promotions to a whole-
34 saler or retailer if the wholesale promotion is the same for all participating wholesalers and
35 the retail promotion is the same for all participating retailers. Any wholesale or retail pro-
36 motion is subject to sections 1 to 12 of this 2007 Act.

37 **SECTION 3.** (1) In all advertisements, offers for sale or sales involving two or more items
38 at a combined price when at least one of the items is cigarettes or a tobacco product, and
39 in all advertisements, offers for sale or sales in which the wholesaler or retailer, in con-
40 junction with the sale of cigarettes or a tobacco product, provides any gift, concession or
41 coupon of any kind to the purchaser, the wholesaler's or retailer's combined selling price
42 may not be below the actual wholesale cost or the actual retail cost, as appropriate, of the
43 total of all articles, products, commodities, gifts and concessions included in the sale or offer
44 for sale.

45 (2) A wholesaler or retailer may not advertise, offer for sale or sell cigarettes or other

1 tobacco products below actual wholesale cost or in a retail sale below actual retail cost by
 2 means of a discount or rebate provided in connection with the wholesaler's or retailer's ex-
 3 tension of credit, either for the purchase of cigarettes or other tobacco products or for the
 4 purchase of other goods that the retailer or wholesaler may sell.

5 **SECTION 4.** (1) When one wholesaler sells cigarettes or other tobacco products to an-
 6 other wholesaler, the selling wholesaler need not include the selling wholesaler's actual
 7 wholesale cost in the selling price.

8 (2) A wholesaler that sells cigarettes or other tobacco products to a retailer shall include
 9 in the selling price to the retailer the actual wholesale cost to the selling wholesaler de-
 10 scribed in subsection (1) of this section or the actual wholesale cost to the wholesaler that
 11 purchases from the selling wholesaler described in subsection (1) of this section, whichever
 12 is greater.

13 **SECTION 5.** (1) A wholesaler may advertise, offer to sell or sell cigarettes or other to-
 14 bacco products at a price made in good faith to meet the price of a competitor who is ren-
 15 dering the same type of service and is selling the same article at cost to a competing
 16 wholesaler.

17 (2) A retailer may advertise, offer to sell or sell cigarettes or other tobacco products at
 18 a price made in good faith to meet the price of a competitor who is selling the same article
 19 at cost to a competing retailer.

20 (3) A manufacturer that, directly or through an intermediary, sells cigarettes or other
 21 tobacco products in this state shall provide the Department of Revenue with the current list
 22 prices for all brands of the manufacturer's cigarettes or other tobacco products and shall
 23 notify the department at least 10 days before a change in price takes effect.

24 **SECTION 6.** A contract, express or implied, that violates a provision of sections 1 to 12
 25 of this 2007 Act is void.

26 **SECTION 7.** (1) In determining actual wholesale cost or actual retail cost, a court shall
 27 consider evidence tending to show that a wholesaler or retailer against whom an action is
 28 brought under section 9 of this 2007 Act purchased the cigarettes or other tobacco products
 29 involved in the complaint at a fictitious price or upon terms, under invoices or in a manner
 30 that conceals the actual wholesale cost or actual retail cost, any discounts provided or the
 31 terms of purchase. The court shall also consider evidence of the normal, customary and
 32 prevailing terms of purchase and discounts provided in connection with other sales of a
 33 similar nature in this state.

34 (2) Except when the Department of Revenue under section 11 (3) of this 2007 Act has
 35 approved the wholesale sale or retail sale of cigarettes or other tobacco products at less than
 36 the presumptive wholesale cost or presumptive retail cost described in section 11 (1) and (2)
 37 of this 2007 Act, the presumptive wholesale cost or presumptive retail cost is competent ev-
 38 idence in a court action or proceeding against a wholesaler or retailer for the purpose of
 39 proving the actual wholesale cost or actual retail cost, as appropriate, to the wholesaler or
 40 retailer. A person may offer rebuttal evidence that tends to prove any inaccuracy in the
 41 presumptive actual wholesale cost or presumptive actual retail cost or any statement of
 42 facts that would impair the probative value of the presumptive actual wholesale cost or
 43 presumptive actual retail cost.

44 **SECTION 8.** The invoice cost of or amount actually paid for cigarettes or other tobacco
 45 products purchased at a forced sale, a sale in connection with a bankruptcy proceeding, a

1 closeout sale or other sale outside the ordinary channels of trade may not be used to deter-
 2 mine the actual wholesale cost or actual retail cost.

3 **SECTION 9.** (1) The Department of Revenue or a person injured by a violation or who
 4 would be injured by a threatened violation of a provision of sections 1 to 12 of this 2007 Act
 5 may maintain an action to prevent, restrain or enjoin the violation or threatened violation.
 6 If a plaintiff in the action establishes a violation or threatened violation, the court may en-
 7 join and restrain or otherwise prevent the violation or threatened violation, and the court
 8 shall assess the costs of reasonable attorney fees against the defendant. The plaintiff need
 9 not allege or prove actual damages but may recover actual damages alleged and proved, in
 10 addition to injunctive relief and costs, including reasonable attorney fees.

11 (2) If a plaintiff injured by a violation of sections 1 to 12 of this 2007 Act does not request
 12 or require injunctive relief, the plaintiff may maintain an action for damages in the appro-
 13 priate court.

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

15 (1) Shall administer sections 1 to 12 of this 2007 Act and may adopt rules necessary to
 16 administer and enforce sections 1 to 12 of this 2007 Act;

17 (2) May determine the presumptive wholesale cost or presumptive retail cost of ciga-
 18 rettes and other tobacco products as provided in section 11 of this 2007 Act; and

19 (3) May, after reasonable notice and hearing, revoke or suspend a license issued under
 20 ORS 323.005 to 323.482 or 323.500 to 323.645 to a licensee who refuses or neglects to comply
 21 with a provision of sections 1 to 12 of this 2007 Act.

22 **SECTION 11.** (1) For purposes of sections 1 to 12 of this 2007 Act, the presumptive
 23 wholesale cost of cigarettes and other tobacco products is the actual cost to a wholesaler,
 24 independently calculated by the Department of Revenue, based on list price information
 25 provided to the department by manufacturers under section 5 of this 2007 Act, plus:

26 (a) Eight percent of the list price for cigarettes or 10 percent of the list price for other
 27 tobacco products, as appropriate; and

28 (b) The total amount of any tax required by ORS 323.005 to 343.482 for cigarettes or the
 29 total amount of any tax required by ORS 323.500 to 323.645 for other tobacco products, as
 30 appropriate.

31 (2) For purposes of sections 1 to 12 of this 2007 Act, the presumptive retail cost of ciga-
 32 rettes or other tobacco products is the actual cost to a retailer independently calculated by
 33 the Department of Revenue based on the presumptive wholesale cost calculated by the de-
 34 partment under subsection (1) of this section, plus 10 percent.

35 (3) A wholesaler or retailer that intends to advertise, offer to sell or sell cigarettes or
 36 other tobacco products at less than the presumptive wholesale cost or presumptive retail
 37 cost as calculated under subsection (1) or (2) of this section must first obtain approval from
 38 the department. Notwithstanding sections 2, 3 and 6 of this 2007 Act, the department may
 39 grant the approval only if the wholesaler or retailer provides proof satisfactory to the de-
 40 partment that the wholesaler's or retailer's actual wholesale cost is lower than the
 41 presumptive wholesale cost or that the actual retail cost is lower than the presumptive retail
 42 cost. The department may not approve sales of cigarettes or other tobacco products at less
 43 than the presumptive wholesale cost or presumptive retail cost calculated in subsection (1)
 44 or (2) of this section for a period longer than one year.

45 (4) In evaluating the proof that a wholesaler or retailer submits in an application to sell

1 cigarettes or other tobacco products below the presumptive wholesale cost or presumptive
2 retail cost calculated in subsection (1) or (2) of this section, the department:

3 (a) May consider the costs shown on a sales invoice, but may not consider cash dis-
4 counts.

5 (b) May consider the standards and methods of accounting regularly employed by the
6 parties to the sale.

7 (c) Shall consider labor costs, rent, depreciation, selling costs, maintenance of equipment,
8 delivery costs, all types of licenses, taxes, insurance, advertising, preopening expenses, pro-
9 vision for impaired assets and closing costs, interest expenses and provision for merger and
10 restructuring expenses.

11 (5) The department, for purposes of subsections (3) and (4) of this section, shall adopt
12 rules for evaluating the adequacy of a wholesaler's or retailer's proof of the wholesaler's or
13 retailer's actual wholesale cost or actual retail cost.

14 SECTION 12. Violation of section 2 of this 2007 Act is a Class B misdemeanor.

15 SECTION 13. Sections 1 to 12 of this 2007 Act apply to sales of cigarettes or other tobacco
16 products on or after the effective date of this 2007 Act.

17