
HOUSE BILL No. 1268

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-3-2.

Synopsis: Regulation of cigarette retail sales. Provides that the cigarette fair trade act prohibits only retailers from selling cigarettes at below cost to the retailer (currently the cigarette fair trade act also prohibits distributors from making wholesale sales at below cost to the distributor). Eliminates a provision requiring a retailer that receives discounts ordinarily allowed on purchases by a distributor to include the distributor's cost in the basic cost to the retailer. Repeals a provision regarding a distributor's cigarette cost.

Effective: July 1, 2008.

Cochran, Dobis

January 14, 2008, read first time and referred to Committee on Public Policy.

C
o
p
y



Second Regular Session 115th General Assembly (2008)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2007 Regular Session of the General Assembly.

C
o
p
y

HOUSE BILL No. 1268



A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-3-2-1 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2008]: Sec. 1. It is declared to be the public
3 policy of this state to promote the public welfare by making unlawful
4 unfair, dishonest, deceptive, destructive, and fraudulent business
5 practices now existing in transactions involving the sale of, offer to
6 sell, or inducement to sell cigarettes in this state in ~~wholesale and~~ retail
7 trades. The offering for sale or sale of cigarettes below cost in the retail
8 ~~or wholesale~~ trade with the intent of injuring competitors or destroying
9 or substantially lessening competition is an unfair and deceptive
10 business practice and adversely affects the collection of revenue due
11 this state from the sale of cigarettes.

12 SECTION 2. IC 24-3-2-2 IS AMENDED TO READ AS FOLLOWS
13 [EFFECTIVE JULY 1, 2008]: Sec. 2. Unless the context in this chapter
14 requires otherwise, the term:

15 (a) "Cigarette" shall mean and include any roll for smoking made
16 wholly or in part of tobacco, irrespective of size or shape and
17 irrespective of tobacco being flavored, adulterated, or mixed with any



1 other ingredient, where such roll has a wrapper or cover made of paper
 2 or any other material; provided the definition in this paragraph shall not
 3 be construed to include cigars.

4 (b) "Person" or the term "company", used in this chapter
 5 interchangeably, means and includes any individual, assignee, receiver,
 6 commissioner, fiduciary, trustee, executor, administrator, institution,
 7 bank, consignee, firm, partnership, limited liability company, joint
 8 vendor, pool, syndicate, bureau, association, cooperative association,
 9 society, club, fraternity, sorority, lodge, corporation, municipal
 10 corporation, or other political subdivision of the state engaged in
 11 private or proprietary activities or business, estate, trust, or any other
 12 group or combination acting as a unit, and the plural as well as the
 13 singular number, unless the intention to give a more limited meaning
 14 is disclosed by the context.

15 (c) "Distributor" shall mean and include every person who sells,
 16 barter, exchanges, or distributes cigarettes in the state of Indiana to
 17 retail dealers for the purpose of resale, or who purchases for resale
 18 cigarettes from a manufacturer of cigarettes or from a wholesaler,
 19 jobber, or distributor outside the state of Indiana who is not a
 20 distributor holding a registration certificate issued under the provisions
 21 of IC 6-7-1.

22 (d) "Retailer" shall mean every person, other than a distributor, who
 23 purchases, sells, offers for sale, or distributes cigarettes to consumers
 24 or to any person for any purpose other than resale, irrespective of
 25 quantity or amount or the number of sales.

26 (e) "Sell at retail", "sale at retail", and "retail sales" shall mean and
 27 include any transfer of title to cigarettes for a valuable consideration
 28 made in the ordinary course of trade or usual conduct of the seller's
 29 business to the purchaser for consummation or use.

30 (f) ~~"Sell at wholesale", "sale at wholesale", and "wholesale sales"~~
 31 ~~shall mean and include any transfer of title to cigarettes for a valuable~~
 32 ~~consideration made in the ordinary course of trade or usual conduct of~~
 33 ~~a distributor's business.~~

34 (g) (f) "Basic cost of cigarettes" shall mean the invoice cost of
 35 cigarettes to the retailer ~~or distributor, as the case may be~~, or the
 36 replacement cost of cigarettes to the retailer ~~or distributor, as the case~~
 37 ~~may be~~, within thirty (30) days prior to the date of sale, in the quantity
 38 last purchased, whichever is the lower, less all trade discounts and
 39 customary discounts for cash, plus the cost at full face value of any
 40 stamps which may be required by IC 6-7-1, if not included by the
 41 manufacturer in ~~his~~ **the manufacturer's** selling price to the distributor.

42 (h) (g) "Department" shall mean the alcohol and tobacco

C
o
p
y



1 commission or its duly authorized assistants and employees.

2 (i) ~~(h)~~ "Cost to the retailer" shall mean the basic cost of cigarettes

3 to the retailer, plus the cost of doing business by the retailer as

4 evidenced by the standards and methods of accounting regularly

5 employed by him in his allocation ~~of the retailer in allocating~~

6 overhead costs and expenses paid or incurred and must include without

7 limitation labor (including salaries of executives and officers), rent,

8 depreciation, selling costs, maintenance of equipment, delivery costs,

9 all types of licenses, taxes, insurance, and advertising. ~~however, any~~

10 ~~retailer who, in connection with the retailer's purchase, receives not~~

11 ~~only the discounts ordinarily allowed upon purchases by a retailer, but~~

12 ~~also, in whole or in part, discounts ordinarily allowed on purchases by~~

13 ~~a distributor shall, in determining costs to the retailer pursuant to this~~

14 ~~section, add the cost to the distributor, as defined in paragraph (j), to~~

15 ~~the basic cost of cigarettes to said retailer as well as the cost of doing~~

16 ~~business by the retailer. In the absence of proof of a lesser or higher~~

17 ~~cost of doing business by the retailer making the sale, the cost of doing~~

18 ~~business by the retailer shall be presumed to be eight percent (8%) of~~

19 ~~the basic cost of cigarettes to the retailer. In the absence of proof of a~~

20 ~~lesser or higher cost of doing business, the cost of doing business by~~

21 ~~the retailer, who in connection with the retailer's purchase receives not~~

22 ~~only the discounts ordinarily allowed upon purchases by a retailer, but~~

23 ~~also, in whole or in part, the discounts ordinarily allowed upon~~

24 ~~purchases by a distributor, shall be presumed to be eight percent (8%)~~

25 ~~of the sum of the basic cost of cigarettes plus the cost of doing business~~

26 ~~by the distributor.~~

27 (j) "Cost to the distributor" shall mean the basic cost of cigarettes to

28 the distributor, plus the cost of doing business by the distributor as

29 evidenced by the standards and methods of accounting regularly

30 employed by him in his allocation of overhead costs and expenses, paid

31 or incurred, and must include without limitation labor costs (including

32 salaries of executives and officers), rent, depreciation, selling costs,

33 maintenance of equipment, delivery costs, all types of licenses, taxes,

34 insurance, and advertising. In the absence of proof of a lesser or higher

35 cost of doing business by the distributor making the sale, the cost of

36 doing business by the wholesaler shall be presumed to be four percent

37 (4%) of the basic cost of cigarettes to the distributor, plus cartage to the

38 retail outlet, if performed or paid for by the distributor, which cartage

39 cost, in the absence of proof of a lesser or higher cost, shall be deemed

40 to be one-half of one percent (0.5%) of the basic cost of cigarettes to

41 the distributor.

42 (k) (i) "Registration certificate" refers to the registration certificate

COPY



1 issued to cigarette distributors by the department of state revenue under
2 IC 6-7-1-16.

3 SECTION 3. IC 24-3-2-3 IS AMENDED TO READ AS FOLLOWS
4 [EFFECTIVE JULY 1, 2008]: Sec. 3. (a) It is a Class A infraction for
5 a retailer, ~~or distributor,~~ with intent to injure competitors or destroy or
6 substantially lessen competition, to offer to sell or sell at retail ~~or~~
7 ~~wholesale~~ cigarettes at less than the cost to ~~him~~. ~~The registration~~
8 ~~certificate held by such a distributor under IC 6-7-1 may be revoked by~~
9 ~~the department for the balance of the term thereof; the retailer.~~

10 (b) Evidence of offering to sell or sale of cigarettes by any retailer
11 ~~or distributor~~ at less than the cost to ~~him~~ **the retailer** is prima facie
12 evidence of intent to injure competitors and to destroy or substantially
13 lessen competition.

14 (c) Notwithstanding IC 34-28-5-5(c), a judgment for a violation of
15 this section shall be deposited in the enforcement and administration
16 fund established under IC 7.1-4-10-1.

17 SECTION 4. IC 24-3-2-4 IS AMENDED TO READ AS FOLLOWS
18 [EFFECTIVE JULY 1, 2008]: Sec. 4. In all offers for sale or sales
19 involving two (2) or more items, at least one (1) of which items is
20 cigarettes, at a combined price, and in all offers for sale or sales,
21 involving the giving of any gift or concession of any kind whatsoever
22 (whether it be coupons or otherwise), the retailer's ~~or distributor's~~
23 combined selling price shall not be below the cost to the retailer, ~~or the~~
24 ~~cost to the distributor,~~ irrespective of the total of all articles, products,
25 commodities, gifts, and concessions included in such transactions.

26 SECTION 5. IC 24-3-2-6 IS AMENDED TO READ AS FOLLOWS
27 [EFFECTIVE JULY 1, 2008]: Sec. 6. The provisions of this chapter
28 shall not apply to sales at retail ~~or sales at wholesale~~ made:

- 29 ~~(a)~~ **(1)** in an isolated transaction and not in the usual course of
30 business;
- 31 ~~(b)~~ **(2)** where cigarettes are offered for sale or sold in bona fide
32 clearance sales for the purpose of discontinuing trade in such
33 cigarettes and said advertising, offer to sell, or sale shall state the
34 reason thereof and the quantity of such cigarettes offered for sale
35 or to be sold;
- 36 ~~(c)~~ **(3)** where cigarettes are offered for sale or sold as imperfect or
37 damaged and said offering to sell or sale shall state the reason
38 therefor and the quantity of such cigarettes offered for sale or to
39 be sold;
- 40 ~~(d)~~ **(4)** where cigarettes are sold upon the final liquidation of a
41 business; or
- 42 ~~(e)~~ **(5)** where cigarettes are offered for sale or sold by any

C
o
p
y



1 fiduciary or other officer acting under the order or direction of any
2 court.

3 SECTION 6. IC 24-3-2-7 IS AMENDED TO READ AS FOLLOWS
4 [EFFECTIVE JULY 1, 2008]: Sec. 7. (a) Any retailer may offer to sell
5 or sell cigarettes at a price made in good faith to meet the price of a
6 competitor who is selling the same article at cost to ~~him~~ **the**
7 **competitor** as a retailer, as defined in section ~~2(i)~~ **2(h)** of this chapter.
8 ~~Any distributor may offer to sell or sell cigarettes at a price made in~~
9 ~~good faith to meet the price of a competitor who is rendering the same~~
10 ~~type of service and is selling the same article at cost to him as a~~
11 ~~distributor, as defined in section 2(j) of this chapter. The price of~~
12 ~~cigarettes offered for sale or sold under the exceptions specified in~~
13 ~~section 6 of this chapter shall not be considered the price of a~~
14 ~~competitor and shall not be used as a basis for establishing prices~~
15 ~~below cost, nor shall the price established at a bankrupt sale be~~
16 ~~considered the price of a competitor within the purview of this section.~~

17 (b) In the absence of proof of the price of a competitor under this
18 section, the lowest cost to the retailer, ~~or the lowest cost to the~~
19 ~~distributor, as the case may be,~~ determined by any cost survey made
20 pursuant to section 11 of this chapter, may be deemed the price of a
21 competitor within the meaning of this section.

22 SECTION 7. IC 24-3-2-9 IS AMENDED TO READ AS FOLLOWS
23 [EFFECTIVE JULY 1, 2008]: Sec. 9. (a) In determining cost to the
24 retailer, ~~and cost to the distributor,~~ the court or the department, as the
25 case may be, shall receive and consider as bearing on the bona fides of
26 such cost evidence tending to show that any person complained against
27 under any of the provisions of this chapter purchased cigarettes with
28 respect to the sale of which complaint is made at a fictitious price, or
29 upon terms, or in such manner, or under such invoices, as to conceal
30 the true cost, discounts, or terms of purchase, and shall also receive and
31 consider as bearing on the bona fides of such cost evidence of the
32 normal, customary, and prevailing terms and discounts in connection
33 with other sales of a similar nature in the trade area or state.

34 (b) Merchandise given gratis or payment made to a retailer ~~or~~
35 ~~distributor~~ for display, ~~or~~ advertising, or promotion purposes or
36 otherwise shall not be considered in determining the cost of cigarettes
37 to the retailer. ~~or distributor.~~

38 SECTION 8. IC 24-3-2-10 IS AMENDED TO READ AS
39 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 10. (a) In establishing
40 the cost of cigarettes to the retailer, ~~or distributor,~~ the invoice cost of
41 said cigarettes purchased at a forced, bankrupt, or close-out sale, or
42 other sale outside of the ordinary channels of trade, may not be used as

C
o
p
y



1 a basis for justifying a price lower than one based upon the replacement
2 cost of the cigarettes to the retailer, ~~or distributor~~, within thirty (30)
3 days prior to the date of sale, in the quantity last purchased, through the
4 ordinary channels of trade.

5 (b) Any cigarettes that are imported or reimported into the United
6 States for sale or distribution under a trade name, trade dress, or
7 trademark that is the same as or confusingly similar to a trade name,
8 trade dress, or trademark used for cigarettes manufactured in the
9 United States for sale or distribution in the United States are presumed
10 to be purchased outside the ordinary channels of trade.

11 SECTION 9. IC 24-3-2-11 IS AMENDED TO READ AS
12 FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 11. Where a cost
13 survey pursuant to recognized statistical and cost accounting practices
14 has been made for the trading area in which the offense is committed
15 to establish the lowest cost to the retailer, ~~and the lowest cost to the~~
16 ~~distributor~~; said cost survey shall be deemed competent evidence to be
17 used in proving the cost to the person complained against within the
18 provisions of this chapter.

19 SECTION 10. IC 24-3-2-5 IS REPEALED [EFFECTIVE JULY 1,
20 2008].

C
o
p
y

