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Directive 03-14: Cigarette Manufacturer Coupon Programs

Introduction

This Directive addresses certain practices whereby manufacturers of cigarettes offer promotional coupons for redemption that result in a price reduction to consumers. The rules set out in this Directive are intended to clarify those types of promotional coupon programs that the Department of Revenue ("Department") will allow to be applied in calculating the base cost of cigarettes when determining the presumptive minimum cost/price of cigarettes. The Department is responsible for administering the cigarette excise and enforcing fair minimum pricing rules under G.L. c. 64C and the regulations promulgated thereunder.

Issue 1. Is a manufacturer's coupon presented by a consumer to a retailer at the time of sale allowed in Massachusetts if it does not reduce the retail sales price of cigarettes below the applicable presumptive minimum price under G.L. c. 64C and 830 CMR 64C.14.1?

Directive 1. Yes. A manufacturer's coupon presented by a consumer to a retailer at the time of sale is permitted in Massachusetts so long as it does not reduce the retail sales price of cigarettes below the applicable presumptive minimum cost pursuant to G.L. c. 64C and 830 CMR 64C.14.1. A coupon presented to a retailer that does reduce the price to the customer below the presumptive minimum price is not allowed.

Issue 2. Is a manufacturer's coupon issued to a consumer and redeemed directly by the manufacturer with either cash or goods permitted in Massachusetts under G.L. c. 64C and 830 CMR 64C.14.1?

Directive 2. Yes. A manufacturer's coupon issued to a consumer who has previously purchased a package or carton of cigarettes is permissible if the coupon is redeemed directly by the manufacturer with either cash or goods because such a redemption does not affect either the wholesaler's or retailer's presumptive minimum cost. G.L. c. 64C and 830 CMR 64C.14.1.

Issue 3. Is a manufacturer's coupon (e.g., a stick-on coupon) issued to a retailer or affixed by the manufacturer prior to the time of sale to a consumer, but after the retailer's purchase from a wholesaler, permitted in Massachusetts under G.L. c. 64C, Directive 02-2 and 830 CMR 64C.14.1 if it reduces the retail sales price below the applicable presumptive minimum cost to the retailer?

Directive 3. No. A coupon issued to a retailer by a manufacturer prior to the time of sale to a consumer is not permitted in Massachusetts if the coupon reduces the retail sales price of cigarettes below the applicable presumptive minimum cost of the retailer pursuant to G.L. c. 64C, Directive 02-2 and 830 CMR 64C.14.1. A similar coupon presented to a retailer that does not reduce the price to the customer below the presumptive minimum price may be allowed depending upon the facts and circumstances of the coupon or other promotional program if the program is not in violation of any other requirement found in G.L. c. 64C, Directive 92-4, Directive 02-2 and 830 CMR 64C.14.1.

Discussion

The Department licenses all persons selling and dealing in cigarettes destined for sale in the Commonwealth. G.L. c. 64C, § 2. The fair pricing provisions of the cigarette excise statute regulate cigarette prices. G.L. c. 64C, §§ 13 - 21. Generally, licensees are not allowed to sell at a price below

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the presumptive minimum prices set by the Department without prior permission from the Department upon a showing that the wholesaler's or retailer's actual costs are lower than those derived from the statutory formula for determining the licensee's presumptive minimum costs. G.L. c. 64C, §§ 13, 14 and 830 CMR 64C.14.1(4). In addition, G.L. c. 64C, § 14 makes it unlawful for any retailer or wholesaler to intentionally injure competitors or to destroy or substantially lessen competition or advertise, offer to sell, or sell cigarettes at a price below their cost, as defined by G.L. c. 64C, § 13.

Section 13(e) of chapter 64C provides that: "[i]n all advertisements, offers for sale or sales involving two or more items at a combined price, and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or wholesaler's selling price shall not be below the 'cost to the retailer' or the 'cost to the wholesaler', respectively, of all articles, products, commodities and concessions included in such transactions."

The cost to the retailer is the base cost of the cigarettes to the retailer plus the retailer's overhead costs and expenses and the cost to the wholesaler is the base cost of the cigarettes to the wholesaler plus the wholesaler's overhead costs and expenses. G. L. c. 64C, § 13 (a), (c) and 830 CMR 64C.14.1(2). Massachusetts defines the base cost of cigarettes as the invoice cost of the cigarettes to the retailer or wholesaler (or the replacement cost of the cigarettes within thirty days prior to the date of sale in the quantity last purchased, if lower), less all trade discounts except customary discounts for cash. *Id.* The cigarette excise imposed by G.L. c. 64C is added to the invoice cost when calculating the cost to the wholesaler. G.L. c. 64C, § 13. The Commissioner periodically announces retailers' and wholesalers' presumptive minimum cost of cigarettes, which is the lowest price at which cigarettes may be sold. The applicable presumptive minimum cost of selling cigarettes is 125 percent of the base cost of the cigarettes for retailers, 102 percent for wholesalers and 100.5 percent for wholesalers selling to chain stores. G.L. c. 64C, § 13.

For cigarette excise purposes, generally, a "manufacturer's coupon" is a coupon issued by the manufacturer to be redeemed by a retail purchaser of the product being promoted. The coupon may be presented by the consumer either at the time of the retail sale, or mailed or presented to the manufacturer as a rebate after the retail sale. If the manufacturer's coupon presented to the retailer at the time of retail sale does not reduce the retail price of the cigarettes below the applicable presumptive minimum cost, it is allowable. However, the manufacturer's promotional coupon program must otherwise conform to the requirements of G.L. c. 64C as well as DOR Directives 92-4 and 02-2 which limit the types of promotional programs that manufacturers, wholesalers and retailers may offer in Massachusetts.

A manufacturer's coupon that is redeemed directly by the manufacturer for either cash or goods is also permitted by the Department since the statute regulates only pricing (i) as between a wholesaler and a retailer, and (ii) as between a retailer and the consumer.

Coupons attached to a pack of cigarettes by a manufacturer or his representatives after retailer's purchase from a wholesaler are prohibited if the coupons reduce the consumer's retail sales price of cigarettes below the applicable presumptive minimum cost of the retailer as an illegal buydown pursuant to Directive 02-2, G.L. c. 64C and 830 CMR 64C.14.1. However, a similar coupon presented to a retailer that does not reduce the price to the customer below the presumptive minimum price is allowed.

Conclusion

Cigarette coupons presented by the consumer at the time of sale that do not reduce the retail sales price of cigarettes below the applicable presumptive minimum cost are permitted in Massachusetts. If a consumer mails a coupon to a manufacturer for redemption, the coupon is not considered to impact the presumptive minimum cost or pricing structure and is therefore allowable. If a manufacturer attaches a coupon to a pack of cigarettes after the retailer purchases from the wholesaler and the coupon reduces the consumer's retail sales price of cigarettes below the applicable presumptive minimum cost, the coupon is prohibited.

/s/Alan LeBovidge

Alan LeBovidge
Commissioner of Revenue

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