

By: Representative Whittington

To: Ways and Means

HOUSE BILL NO. 440

1 AN ACT TO AMEND SECTION 75-23-5, MISSISSIPPI CODE OF 1972, TO
2 REVISE THE DEFINITION OF THE TERM "COST TO THE RETAILER" UNDER THE
3 STATE UNFAIR CIGARETTE SALES LAW TO INCREASE THE PERCENTAGE OF THE
4 BASIC COST OF CIGARETTES TO A RETAILER THAT MAY BE USED TO
5 DETERMINE THE COST TO THE RETAILER; AND FOR RELATED PURPOSES.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

7 **SECTION 1.** Section 75-23-5, Mississippi Code of 1972, is
8 amended as follows:

9 75-23-5. The following words, terms and phrases, when used
10 in the Unfair Cigarette Sales Law, shall have the meaning ascribed
11 to them in this section except where the context clearly indicates
12 a different meaning:

13 (a) "Person" shall mean and include any individual,
14 firm, association, company, partnership, corporation, joint-stock
15 company, club, agency, syndicate, the State of Mississippi,
16 county, municipal corporation or other political subdivision of
17 this state, receiver, trustee, fiduciary or trade association.

18 (b) "Commission" shall mean the State Tax Commission of
19 the State of Mississippi.

20 (c) "Cigarettes" shall mean and include any roll for
21 smoking made wholly or in part of tobacco, irrespective of size or
22 shape and whether or not such tobacco is flavored, adulterated or
23 mixed with any other ingredient, the wrapper or cover of which is
24 made of paper or any other substance or material, excepting
25 tobacco.

26 (d) "Wholesaler" shall mean and include any person
27 qualified as a wholesaler with the State Tax Commission of
28 Mississippi and shall also mean and include any person other than

29 a buying pool as defined herein, wherever resident or located, who
30 brings or causes to be brought into this state unstamped
31 cigarettes purchased directly from the manufacturer thereof and
32 who maintains an established place of business where substantially
33 all of the business is the sale of cigarettes and related
34 merchandise at wholesale to cigarette licensees and where at all
35 times a substantial stock of cigarettes and related merchandise is
36 available for resale; provided, that seventy-five per cent (75%)
37 thereof are sold to retailers or other wholesalers not connected
38 with said wholesaler by reason of any business connection or
39 otherwise; and also any person retailing cigarettes to consumers,
40 provided, at least seventy-five per cent (75%) of his purchases
41 are made directly from the manufacturers thereof; and also any
42 person in this state other than a buying pool as defined herein,
43 who purchases cigarettes, from any other person who purchases from
44 a manufacturer at least seventy-five per cent (75%) of which are
45 for purposes of resale to retailers in this state not connected
46 with said wholesaler by reason of any business connection or
47 otherwise and who maintains an established place of business where
48 cigarettes and related merchandise are sold at wholesale to
49 persons licensed under this law, and where at all times a
50 substantial stock of cigarettes and related merchandise is
51 available to all retailers for resale; and also any person in this
52 state who acquires cigarettes solely for the purpose of resale in
53 cigarette vending machines; provided, such person operated thirty
54 (30) or more machines.

55 (e) "Retailer" shall mean and include any person who is
56 engaged in this state in the business of selling cigarettes at
57 retail and includes any group of persons, cooperative
58 organizations, buying pools, and any other person or group of
59 retailers purchasing cigarettes on a cooperative basis from
60 licensed distributors or wholesalers. Any person placing a

61 cigarette vending machine at, on or in any premises shall be
62 deemed to be a retailer from each such vending machine.

63 (f) "Buying pool" means and includes any combination,
64 corporation, association, affiliation or group of retail dealers
65 operating jointly in the purchase, sale, exchange, or barter of
66 cigarettes, the profits of which accrue directly or indirectly to
67 such retail dealers.

68 (g) "Sale" or "sell" shall mean any transfer for a
69 consideration, exchange, barter, gift, offer for sale, advertising
70 for sale, soliciting an order for cigarettes and distribution in
71 any manner or by any means whatsoever.

72 (h) "Sell at wholesale," "sale at wholesale" and
73 "wholesale sales" shall mean and include any sale made in the
74 ordinary course of trade or usual conduct of the wholesaler's
75 business to a retailer for the purpose of resale.

76 (i) "Sell at retail," "sale at retail" or "retail sales"
77 shall mean and include any sale for consumption or use made in the
78 ordinary course of trade or usual conduct of the seller's
79 business.

80 (j) "Basic cost of cigarettes" shall mean whichever of
81 the two (2) following amounts is lower, namely, (1) the invoice
82 cost of cigarettes to the wholesaler or retailer, as the case may
83 be, or (2) the lowest replacement cost of cigarettes to the
84 wholesaler or retailer, as the case may be, within thirty (30)
85 days prior to the date of sale, in the quantity last purchased
86 (whether within or before the said thirty-day period), less, in
87 either of said two (2) cases, all trade discounts except customary
88 discounts for cash, plus the full face value of any stamps or any
89 tax which may be required by any cigarette tax act of this state
90 or political subdivision thereof, now in effect or hereafter
91 enacted, if not already included in the invoice cost of the
92 cigarettes to the wholesaler or retailer, as the case may be.

93 (k) (1) "Cost to wholesaler" shall mean the basic cost
94 of the cigarettes involved to the wholesaler plus the cost of
95 doing business by the wholesaler as evidenced by the standards and
96 methods of accounting regularly employed by him, and must include,
97 without limitation, labor costs (including salaries of executives
98 and officers), rent, depreciation, selling costs, maintenance of
99 equipment, delivery costs, all types of licenses, taxes, insurance
100 and advertising.

101 (2) In the absence of proof of a lesser or higher
102 cost of doing business by the wholesale dealer making the sale,
103 the cost of doing business by the wholesale dealer shall be
104 presumed to be two per cent (2%) of the basic cost of said
105 cigarettes to the wholesale dealer, any fraction of a cent thus
106 computed shall be rounded off to the next highest cent, plus
107 cartage to the retail outlet, if performed or paid for by the
108 wholesale dealer, which cartage cost, in the absence of proof of a
109 lesser or higher cost, shall be presumed to be one-half of one per
110 cent (1/2 of 1%) of the basic cost of the said cigarettes to the
111 wholesale dealer, any fraction of a cent in computing the amount
112 of the cartage shall be rounded off to the next highest cent.

113 (1) (1) "Cost to the retailer" shall mean the basic
114 cost of the cigarettes involved to the retailer plus the cost of
115 doing business by the retailer as evidenced by the standards and
116 methods of accounting regularly employed by him and must include,
117 without limitation, labor (including salaries of executives and
118 officers), rent, depreciation, selling costs, maintenance of
119 equipment, delivery costs, all types of licenses, taxes, insurance
120 and advertising.

121 (2) In the absence of proof of a lesser or higher
122 cost of doing business by the retailer making the sale, the cost
123 of doing business by the said retailer shall be presumed to be ten
124 percent (10%) of the basic cost of cigarettes to the said

125 retailer. Any fraction of a cent thus computed shall be rounded
126 off to the next highest cent.

127 (3) In the case of any retail dealer who in
128 connection with the said retail dealer's purchase of any
129 cigarettes shall receive not only the discounts ordinarily allowed
130 upon purchases by a retail dealer but also in whole or in part the
131 discounts ordinarily allowed upon purchases by a wholesale dealer,
132 the cost of doing business by the said retail dealer with respect
133 to the said cigarettes shall be, in the absence of proof of a
134 lesser or higher cost of doing business by the said retail dealer,
135 the sum of the cost of doing business by the retail dealer and, to
136 the extent that he shall have received the full discounts
137 ordinarily allowed to a wholesale dealer, the cost of doing
138 business by a wholesale dealer as hereinabove defined in
139 subdivision (k)(2) of this section.

140 **SECTION 2.** This act shall take effect and be in force from
141 and after July 1, 2006.