

1 State of Arkansas  
2 84th General Assembly  
3 Second Extraordinary Session, 2003  
4

Call Item 6

# A Bill

SENATE BILL 95

5 By: Senator Bisbee  
6  
7

## For An Act To Be Entitled

9 AN ACT TO LEVY AN ADDITIONAL TAX OF FIVE DOLLARS  
10 (\$5.00) PER ONE THOUSAND (1,000) CIGARETTES AT  
11 THE WHOLESALE LEVEL TO SUPPORT EDUCATION; TO  
12 REMOVE PRICE PROTECTIONS AFFORDED TO WHOLESALERS  
13 OF CIGARETTES SO THAT THE MARKET MAY ABSORB A TAX  
14 INCREASE; TO CREATE THE EDUCATIONAL ADEQUACY  
15 TRUST FUND; AND FOR OTHER PURPOSES.  
16

## Subtitle

17 AN ACT TO LEVY AN ADDITIONAL TAX OF FIVE  
18 DOLLARS (\$5.00) PER ONE THOUSAND (1,000)  
19 CIGARETTES AT THE WHOLESALE LEVEL AND TO  
20 REMOVE PRICE PROTECTIONS FOR CIGARETTE  
21 WHOLESALERS.  
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25 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
26

27 SECTION 1. Arkansas Code Title 26, Chapter 57, Subchapter 8 is amended  
28 to add an additional section to read as follows:

29 26-57-806. Additional wholesale tax on cigarettes.

30 (a) In addition to the excise or privilege taxes levied under §§ 26-  
31 57-208, 26-57-802, 26-57-803, 26-57-1101, and 26-57-804, as added by Act 38  
32 of the First Extraordinary Session of 2003, there is levied an additional tax  
33 of five dollars (\$5.00) per one thousand (1,000) cigarettes sold in the  
34 state.

35 (b) The additional tax levied under this section shall apply to all  
36 sales of cigarettes by wholesalers licensed under § 26-57-214, including



1 cigarettes sold in Arkansas within three hundred feet (300') of a state line  
 2 or in any city which adjoins a state line.

3 (c) The tax levied by this section shall not apply to the sale of  
 4 cigarettes that are in a wholesaler's warehouse inventory on the effective  
 5 date of this section but shall apply to inventory purchased after the  
 6 effective date of this section.

7 (d) The exemptions and waivers allowed under §§ 26-57-209 and 26-57-  
 8 210 shall apply to this section.

9 (e) The additional tax levied under this section is reported and  
 10 remitted in the same manner and at the same time as other taxes levied on  
 11 cigarettes by the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et  
 12 seq.

13 (f) The additional tax levied under this section shall be special  
 14 revenue to be credited to the Educational Adequacy Trust Fund.

15  
 16 SECTION 2. Arkansas Code § 4-75-702 is amended to read as follows:  
 17 4-75-702. Definitions.

18 As used in this subchapter, unless the context otherwise requires:

19 (1) "Basic cost of cigarettes" means ~~whichever of the two (2)~~  
 20 ~~following amounts is lower, namely, the gross invoice cost of cigarettes to~~  
 21 ~~the wholesaler or retailer, as the case may be, or the lowest gross~~  
 22 ~~replacement cost of cigarettes to the wholesaler or retailer, as the case may~~  
 23 ~~be, within thirty (30) days prior to the date of sale, in the quantity last~~  
 24 ~~purchased, whether within or before the thirty day period, plus the full face~~  
 25 ~~value of any stamps or any tax which may be required by any cigarette tax act~~  
 26 ~~of this state or political subdivision thereof, now in effect or hereafter~~  
 27 ~~enacted, if not already included in the gross invoice cost of cigarettes to~~  
 28 ~~the wholesaler or retailer, as the case may be~~ the lesser of the following  
 29 amounts:

30 (A) The gross invoice cost of cigarettes to the retailer  
 31 plus the full face value of any stamps or any tax required by any state or  
 32 local cigarette tax law if the value of stamps or amount of tax is not  
 33 included in the invoice cost of cigarettes to the retailer; or

34 (B) The lowest replacement cost of cigarettes to the  
 35 retailer within thirty (30) days prior to the date of sale in the quantity  
 36 last purchased, whether within or before the thirty-day period, plus the full

1 face value of any stamps or any tax required by any state or local cigarette  
 2 tax law if the value of stamps or amount of tax is not included in the  
 3 invoice cost of cigarettes to the retailer;

4 (2) "Buying pool" means and includes any combination,  
 5 corporation, association, affiliation, or group of retail dealers operating  
 6 jointly in the purchase, sale, exchange, or barter of cigarettes, the profits  
 7 of which accrue directly or indirectly to the retail dealers;

8 (3) "Cigarettes" means and includes any roll for smoking made  
 9 wholly or in part of tobacco, irrespective of size or shape and whether or  
 10 not the tobacco is flavored, adulterated, or mixed with any other ingredient,  
 11 the wrapper or cover of which is made of paper or any other substance or  
 12 material, except tobacco;

13 (4)(A) "Cost to the retailer" means the basic cost of the  
 14 cigarettes involved to the retailer plus the cost of doing business by the  
 15 retailer as evidenced by the standards and methods of accounting regularly  
 16 employed by him or her and must include, without limitation, labor including  
 17 salaries of executives and officers, rent, depreciation, selling costs,  
 18 maintenance of equipment, delivery costs, all types of licenses, taxes,  
 19 insurance, and advertising.

20 (B) In the absence of the filing with the Arkansas Tobacco  
 21 Control Board of proof satisfactory to the board of a lesser or higher cost  
 22 of doing business by the retailer making the sale, the cost of doing business  
 23 by the retailer shall be presumed to be seven and one-half percent (7 1/2%) of  
 24 the basic cost of cigarettes to the retailer.

25 (C) In the case of any retail dealer who in connection  
 26 with the retail dealer's purchase of any cigarettes shall receive not only  
 27 the discounts ordinarily allowed upon purchases by a retail dealer but also  
 28 in whole or in part the discounts ordinarily allowed upon purchases by a  
 29 wholesale dealer, the cost of doing business by the retail dealer with  
 30 respect to the said cigarettes shall be, in the absence of proof of a lesser  
 31 or higher cost of doing business by the retail dealer, the sum of the cost of  
 32 doing business by the retail dealer and, ~~to the extent that he or she shall~~  
 33 ~~have received~~ the full amount of the discounts ordinarily allowed to a  
 34 wholesale dealer, ~~the cost of doing business by a wholesale dealer as defined~~  
 35 ~~in subdivision (5)(B) of this section~~ and which are received by the retailer.

36 ~~(5)(A) "Cost to wholesaler" means the basic cost of the~~

1 ~~cigarettes involved to the wholesaler plus the cost of doing business by the~~  
 2 ~~wholesaler as evidenced by the standards and methods of accounting regularly~~  
 3 ~~employed by him or her and must include, without limitation, labor costs,~~  
 4 ~~including salaries of executives and officers, rent, depreciation, selling~~  
 5 ~~costs, maintenance of equipment, delivery costs, all types of licenses,~~  
 6 ~~taxes, insurance, and advertising.~~

7 ~~(B) In the absence of the filing with the board of proof~~  
 8 ~~satisfactory to the board of a lesser or higher cost of doing business by the~~  
 9 ~~wholesale dealer making the sale, the cost of doing business by the wholesale~~  
 10 ~~dealer shall be presumed to be four percent (4%) of the basic cost of the~~  
 11 ~~cigarettes to the wholesale dealer;~~

12 ~~(6)(5)~~ "Director" means the Director of the Arkansas Tobacco  
 13 Control Board;

14 ~~(7)(6)~~ "Person" means and includes any individual, firm,  
 15 association, company, partnership, corporation, joint-stock company, club,  
 16 agency, syndicate, the State of Arkansas, county, municipal corporation, or  
 17 other political subdivision of this state, receiver, trustee, fiduciary, or  
 18 trade association;

19 ~~(8)(7)~~ "Retailer" means and includes any person who is engaged  
 20 in this state in the business of selling cigarettes at retail and includes  
 21 any group of persons, cooperative organizations, buying pools, and any other  
 22 person or group of retailers purchasing cigarettes on a cooperative basis  
 23 from licensed distributors or wholesalers. Any person placing a cigarette  
 24 vending machine at, on, or in any premises shall be deemed to be a retailer  
 25 for each such vending machine;

26 ~~(9)(8)~~ "Sale" or "sell" means any transfer for a consideration,  
 27 exchange, barter, gift, offer for sale, advertising for sale, soliciting an  
 28 order for cigarettes, and distribution in any manner or by any means  
 29 whatsoever;

30 ~~(10)(9)~~ "Sell at retail", "sale at retail", or "retail sales"  
 31 means and includes any sale for consumption or use made in the ordinary  
 32 course of trade or usual conduct of the seller's business;

33 ~~(11) "Sell at wholesale", "sale at wholesale", and "wholesale~~  
 34 ~~sales" mean and include any sale made in the ordinary course of trade or~~  
 35 ~~usual conduct of the wholesaler's business to a retailer for the purpose of~~  
 36 ~~resale;~~

1           ~~(12)~~ "Wholesaler" means and includes:

2           ~~(A)~~ Any person other than a buying pool as defined in  
 3 subdivision ~~(2)~~ of this section, wherever resident or located, who brings or  
 4 causes to be brought into this state unstamped cigarettes purchased directly  
 5 from the manufacturer thereof and who maintains an established place of  
 6 business where substantially all of the business is the sale of cigarettes  
 7 and related merchandise at wholesale to cigarette licensees and where at all  
 8 times a substantial stock of cigarettes and related merchandise is available  
 9 for resale, if seventy five percent (75%) thereof are sold to retailers or  
 10 other wholesalers not connected with the wholesaler by reason of any business  
 11 connection or otherwise; and

12           ~~(B)~~ Any person retailing cigarettes to consumers, if at  
 13 least seventy five percent (75%) of his or her purchases are made directly  
 14 from the manufacturers thereof; and

15           ~~(C)~~ Any person in this state other than a buying pool, as  
 16 defined in subdivision ~~(2)~~ of this section, who purchases cigarettes from any  
 17 other person who purchases from a manufacturer, at least seventy five percent  
 18 ~~(75%)~~ of which are for purposes of resale to retailers in this state not  
 19 connected with the wholesaler by reason of any business connection or  
 20 otherwise and who maintains an established place of business where cigarettes  
 21 and related merchandise are sold at wholesale to persons licensed under this  
 22 subchapter, and where at all times a substantial stock of cigarettes and  
 23 related merchandise is available to all retailers for resale; and

24           ~~(D)~~ Any person in this state who acquires cigarettes  
 25 solely for the purpose of resale in cigarette vending machines, provided the  
 26 person operates thirty ~~(30)~~ or more machines;

27           ~~(13)~~(10) "Gross invoice cost" means the manufacturer's or  
 28 wholesaler's price for the product sold as listed on the invoice to the  
 29 ~~wholesaler or retailer, as the case may be,~~ retailer before any deduction for  
 30 allowances, whether manufacturer promotional allowances or otherwise, or for  
 31 discounts of any kind; and

32           ~~(14)~~(11) "Manufacturer promotional allowance" means any payment  
 33 or compensation given by a manufacturer of cigarettes to ~~wholesalers or to~~  
 34 ~~retailers~~ to promote the sale of cigarettes and which the manufacturer  
 35 requires the ~~wholesaler to pass on to the retailer and the retailer to pass~~  
 36 ~~on to the retailer's customer.~~

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SECTION 3. Arkansas Code § 4-75-703 is amended to read as follows:  
4-75-703. Sales excepted from subchapter.

The provisions of this subchapter shall not apply to a any sale at  
wholesale or a to any sale at retail that is made:

(1) In an isolated transaction and not in the usual course of  
business;

(2) Where cigarettes are advertised, offered for sale, or sold  
in a bona fide clearance sale for the purpose of discontinuing trade in such  
cigarettes, and the advertising, offer to sell, or sale shall state the  
reason therefor and the quantity of such cigarettes advertised, offered for  
sale, or to be sold;

(3) Where cigarettes are advertised, offered for sale, or sold  
as imperfect or damaged, and the advertising, offer to sell, or sale shall  
state the reason therefor and the quantity of the cigarettes advertised,  
offered for sale, or to be sold;

(4) Where cigarettes are sold upon the final liquidation of a  
business; or

(5) Where cigarettes are advertised, offered for sale, or sold  
by any fiduciary or other officer acting under the order or direction of any  
court.

SECTION 4. Arkansas Code § 4-75-704 is amended to read as follows:  
4-75-704. Transactions permitted to meet lawful competition.

~~(a)(1) Any wholesaler may advertise, offer to sell, or sell cigarettes  
at a price made in good faith to meet the price of a competitor who is  
rendering the same type of service and is selling the same article at cost to  
the competing wholesaler as defined by this subchapter.~~

~~(2) Any retailer may advertise, offer to sell, or sell  
cigarettes at a price made in good faith to meet the price of a competitor  
who is selling the same article at cost to the competing retailer as defined  
in this subchapter.~~

(b) The price of cigarettes advertised, offered for sale, or sold  
under the exceptions specified in § 4-75-703 shall not be considered the  
price of a competitor and shall not be used as a basis for establishing  
prices below cost, nor shall the price established at a bankrupt sale be

1 considered the price of a competitor within the purview of this section.

2 (c) In the absence of proof of the actual cost to the ~~competing~~  
 3 ~~wholesaler or to the~~ competing retailer, ~~as the case may be~~, the cost may be  
 4 presumed to be the lowest cost to ~~wholesalers or the lowest cost to~~  
 5 ~~retailers, as the case may be~~, within the same trading area as determined by  
 6 a cost survey made pursuant to § 4-75-711(b).

7  
 8 SECTION 5. Arkansas Code § 4-75-707 is amended to read as follows:  
 9 4-75-707. License requirement.

10 (a) No person shall engage in or conduct the business of purchasing  
 11 for resale or selling cigarettes without having first obtained the  
 12 appropriate license for that purpose.

13 (b) All such licenses shall be issued by the Director of the Arkansas  
 14 Tobacco Control Board, or his or her designated agent, who shall make rules  
 15 and regulations respecting applications therefor and issuance thereof.

16 (c) A wholesaler as defined in § 26-57-203 or retailer who sells or  
 17 intends to sell cigarettes at one (1) or more places of business shall be  
 18 required to obtain a separate license for each place of business.

19 (d) Any person licensed only as a wholesaler under § 26-57-214 shall  
 20 not operate as a retailer unless the appropriate license therefor is first  
 21 secured, and any person licensed only as a retailer shall not operate as a  
 22 wholesaler unless the appropriate license therefor is first secured.

23  
 24 SECTION 6. Arkansas Code § 4-75-708 is amended to read as follows:  
 25 4-75-708. Sales at less than cost, rebates, concessions, etc. -

26 Penalty.

27 (a) It shall be unlawful for any ~~wholesaler, retailer, retailer~~ or  
 28 salesperson with intent to injure competitors ~~or~~ and destroy or substantially  
 29 lessen competition to advertise, offer to sell, or sell, ~~at retail or~~  
 30 ~~wholesale, cigarettes at retail~~ at less than cost to the ~~wholesaler or~~  
 31 ~~retailer, as the case may be~~ retailer.

32 (b) It shall be unlawful for any ~~wholesaler, retailer, retailer~~ or  
 33 salesperson with intent to injure competitors ~~or~~ and destroy or substantially  
 34 lessen competition to offer a rebate in price, to give a rebate in price, to  
 35 offer a concession of any kind, or to give a concession of any kind or nature  
 36 whatsoever in connection with the retail sale of cigarettes.

1           ~~(c)(1) It shall be unlawful for any retail dealer to induce or attempt~~  
 2 ~~to induce or to procure or attempt to procure the purchase of cigarettes at a~~  
 3 ~~price less than cost to the wholesaler.~~

4           ~~(2) It shall be unlawful for any retail dealer to induce or~~  
 5 ~~attempt to induce or to procure or attempt to procure any rebate or~~  
 6 ~~concession of any kind or nature whatsoever in connection with the purchase~~  
 7 ~~of cigarettes.~~

8           (d) Any ~~wholesaler, retailer,~~ retailer or salesperson who violates the  
 9 provisions of this section shall be guilty of a misdemeanor and be punishable  
 10 by a fine of not more than five hundred dollars (\$500).

11           (e) The following shall be prima facie evidence of intent to injure  
 12 competitors and destroy or substantially limit competition:

13           (1) The advertisement, offer for sale, or sale of cigarettes at  
 14 retail by any ~~wholesaler, retailer,~~ retailer or salesperson at less than cost  
 15 to him or her;

16           (2) Any offer of a rebate in price or the giving of a rebate in  
 17 price or an offer of a concession or the giving of a concession of any kind  
 18 or nature whatsoever in connection with the retail sale of cigarettes; or

19           (3) Inducing or attempting to induce or procuring or attempting  
 20 to procure the purchase of cigarettes at a price less than cost to the  
 21 ~~wholesaler or the retailer.~~

22  
 23           SECTION 7. Arkansas Code § 4-75-709 is amended to read as follows:

24           4-75-709. Combination sales.

25           (a)(1) In all advertisements, offers for sale, or sales involving two  
 26 (2) or more items, at least one (1) of which items is cigarettes, at a  
 27 combined price, and in all advertisements, offers for sale, or sales  
 28 involving the giving of any gift or concession of any kind, whether coupons  
 29 or otherwise, the ~~wholesaler's or retailer's~~ combined selling price shall not  
 30 be below the cost to the ~~wholesaler or the cost to the retailer,~~  
 31 ~~respectively,~~ retailer of the total of all articles, products, commodities,  
 32 gifts, and concessions included in the transactions.

33           (2) If any such articles, products, commodities, gifts, or  
 34 concessions shall not be cigarettes, the basic cost thereof shall be  
 35 determined in the manner provided in § 4-75-702(1).

36           (b) The redemption by a retailer of coupons supplied to consumers by



1 manufacturers and redeemable from the retailer by the manufacturers is not a  
 2 violation of this subchapter if the sum of the coupon and other consideration  
 3 paid by the consumer is not below the cost to the retailer.

4 (c) Any manufacturer's promotional allowance provided to a ~~wholesaler~~  
 5 ~~or~~ retailer may be passed on to the purchaser by the ~~wholesaler or~~ retailer  
 6 without violating this subchapter if the sum of the manufacturer's  
 7 promotional allowance and other consideration paid by the purchaser is not  
 8 below the cost to the ~~wholesaler or retailer, as the case may be~~ retailer.

9  
 10 SECTION 8. Arkansas Code § 4-75-710 is repealed.

11 ~~4-75-710. Sales by a wholesaler to a wholesaler.~~

12 ~~When one wholesaler sells cigarettes to any other wholesaler, the~~  
 13 ~~former shall not be required to include in his or her selling price to the~~  
 14 ~~latter the cost to the wholesaler, as provided by § 4-75-702, but the latter~~  
 15 ~~wholesaler, upon resale to a retailer, shall be subject to the provisions of~~  
 16 ~~that section.~~

17  
 18 SECTION 9. Arkansas Code § 4-75-711 is amended to read as follows:

19 4-75-711. Determination of cost generally - Cost surveys.

20 (a) In determining cost to the ~~wholesaler and cost to the~~ retailer,  
 21 the court shall receive, and consider as bearing on the bona fides of the  
 22 cost, evidence tending to show that any person complained against under any  
 23 of the provisions of this subchapter purchased the cigarettes involved in the  
 24 complaint before the court at a fictitious price or upon terms or in such  
 25 manner or under such invoices as to conceal the true cost, discounts, or  
 26 terms of purchase, and shall also receive and consider as bearing on the bona  
 27 fides of the costs, evidence of the normal, customary, and prevailing terms  
 28 and discounts in connection with other sales of a similar nature in the trade  
 29 area or state.

30 (b) Where a cost survey pursuant to recognized statistical and cost  
 31 accounting practices has been made for the trading area in which a violation  
 32 of this subchapter is committed or charged to determine and establish on the  
 33 basis of actual existing conditions the lowest cost to ~~wholesalers or the~~  
 34 ~~lowest cost to~~ retailers within the area, the cost survey shall be deemed  
 35 competent evidence in any action or proceeding under this subchapter as  
 36 tending to prove actual cost to the ~~wholesaler or actual cost to the~~ retailer

1 complained against, but any party against whom any such cost survey may be  
 2 introduced in evidence shall have the right to offer evidence tending to  
 3 prove any inaccuracy of the cost survey or any state of facts which would  
 4 impair its probative value.

5  
 6 SECTION 10. Arkansas Code § 4-75-712 is amended to read as follows:

7 4-75-712. Determination of cost - Sales outside ordinary channels of  
 8 business.

9 In establishing the basic cost of cigarettes to a ~~wholesaler or a~~  
 10 retailer, it shall not be permissible to use the invoice cost or the actual  
 11 cost of any cigarettes purchased at a forced, bankrupt, or closeout sale, or  
 12 other sale outside of the ordinary channels of trade.

13  
 14 SECTION 11. Educational Adequacy Trust Fund.

15 (a) There is created on the books of the Treasurer of State, Auditor  
 16 of State, and Chief Fiscal Officer of the State a special revenue fund to be  
 17 known as the "Educational Adequacy Trust Fund".

18 (b)(1) All moneys collected under §§ 26-57-806 shall be deposited into  
 19 the State Treasury to the credit of the Educational Adequacy Trust Fund as  
 20 special revenues.

21 (2) The Educational Adequacy Trust Fund shall also consist of  
 22 any other revenues as may be authorized by law.

23 (c) On the last day of the month, the Treasurer of State shall  
 24 transfer amounts available in the Educational Adequacy Trust Fund to the  
 25 Department of Education Public School Fund Account to be used for the  
 26 purposes provided by law.

27  
 28 SECTION 12. EMERGENCY CLAUSE. It is found and determined by the  
 29 General Assembly of the State of Arkansas that the Arkansas Supreme Court in  
 30 Lake View School District No. 25 v. Huckabee, 351 Ark. 31 (2002) declared the  
 31 current system of education to be unconstitutional because it is both  
 32 inequitable and inadequate; that revenue available for the support of  
 33 necessary state services has not kept pace with the needs of the State of  
 34 Arkansas; that a tax levied on cigarettes at the wholesale level will provide  
 35 necessary revenue to fund educational improvements; that price protections  
 36 currently afforded to wholesalers of cigarettes artificially inflate the

1 price of cigarettes above that established in a free marketplace; that the  
2 wholesale market for cigarettes is a thriving national market that needs no  
3 price protection; that a repeal of the price protections afforded to  
4 wholesalers of cigarettes will allow an additional tax on cigarettes to be  
5 more readily absorbed in the marketplace and reduce any price elasticity  
6 effect caused by an additional tax; and that delaying the effective date of  
7 this act will reduce the amount of revenue for public education. Therefore,  
8 an emergency is declared to exist and this act being immediately necessary  
9 for the preservation of the public peace, health, and safety shall become  
10 effective on the first day of the second calendar month following:

11 (1) The date of its approval by the Governor;

12 (2) If the bill is neither approved nor vetoed by the Governor,  
13 the expiration of the period of time during which the Governor may veto the  
14 bill; or

15 (3) If the bill is vetoed by the Governor and the veto is  
16 overridden, the date the last house overrides the veto.

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