

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2808 Session of
2000

INTRODUCED BY SCRIMENTI, CAPPABIANCA, GRUCELA, LEDERER, MELIO,
RUBLEY, FRANKEL, YOUNGBLOOD, BARD, YUDICHAK, M. COHEN,
CORRIGAN, JOSEPHS AND FREEMAN, OCTOBER 5, 2000

REFERRED TO COMMITTEE ON FINANCE, OCTOBER 5, 2000

AN ACT

1 Amending the act of April 9, 1929 (P.L.343, No.176), entitled,
2 as amended, "An act relating to the finances of the State
3 government; providing for the settlement, assessment,
4 collection, and lien of taxes, bonus, and all other accounts
5 due the Commonwealth, the collection and recovery of fees and
6 other money or property due or belonging to the Commonwealth,
7 or any agency thereof, including escheated property and the
8 proceeds of its sale, the custody and disbursement or other
9 disposition of funds and securities belonging to or in the
10 possession of the Commonwealth, and the settlement of claims
11 against the Commonwealth, the resettlement of accounts and
12 appeals to the courts, refunds of moneys erroneously paid to
13 the Commonwealth, auditing the accounts of the Commonwealth
14 and all agencies thereof, of all public officers collecting
15 moneys payable to the Commonwealth, or any agency thereof,
16 and all receipts of appropriations from the Commonwealth,
17 authorizing the Commonwealth to issue tax anticipation notes
18 to defray current expenses, implementing the provisions of
19 section 7(a) of Article VIII of the Constitution of
20 Pennsylvania authorizing and restricting the incurring of
21 certain debt and imposing penalties; affecting every
22 department, board, commission, and officer of the State
23 government, every political subdivision of the State, and
24 certain officers of such subdivisions, every person,
25 association, and corporation required to pay, assess, or
26 collect taxes, or to make returns or reports under the laws
27 imposing taxes for State purposes, or to pay license fees or
28 other moneys to the Commonwealth, or any agency thereof,
29 every State depository and every debtor or creditor of the
30 Commonwealth," expanding provisions relating to cigarette
31 sales and licensing to include tobacco products; and
32 providing restrictions on placement and operation of tobacco
33 product vending machines.

1 The General Assembly of the Commonwealth of Pennsylvania
2 hereby enacts as follows:

3 Section 1. Article II-A heading and section 201-A of the act
4 of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code,
5 added July 2, 1993 (P.L.250, No.46), are amended to read:

6 ARTICLE II-A

7 [CIGARETTE] TOBACCO PRODUCT SALES AND LICENSING

8 Section 201-A. Legislative Intent.--It is hereby declared to
9 be in the public interest of this Commonwealth:

10 (1) To prohibit advertising or offering [cigarettes] tobacco
11 products for sale below cost if the intent thereof is to
12 increase the incidence of [cigarette] tobacco product usage or
13 to injure, destroy or substantially lessen competition.

14 (2) To declare such practice to be unfair, deceptive and
15 adverse to the collection of taxes from the sale of [cigarettes]
16 tobacco products.

17 (3) To license [cigarette] tobacco product dealers to effect
18 the orderly collection of taxes.

19 (4) To promote fair competition.

20 Section 2. Section 202-A of the act, amended or added July
21 2, 1993 (P.L.250, No.46) and December 12, 1994 (P.L.1015,
22 No.138), is amended to read:

23 Section 202-A. Definitions.--As used in this article--

24 "Basic Cost of [Cigarettes] Tobacco Products" shall mean the
25 manufacturer's list price to which shall be added the full face
26 value of any tax which may be required by law, if not already
27 included in the manufacturer's list price. Manufacturer's list
28 price shall mean the gross price of the [cigarettes] tobacco
29 product from the manufacturer to the dealer in the quantities
30 stated and shall include any Federal tax, freight or handling

1 charges, if not already included.

2 "Board" shall mean the Cigarette Licensing, Marketing and
3 Control Board created under section 207-A.

4 "Cigarettes" shall mean and include any roll for smoking made
5 wholly or in part of tobacco, irrespective of size or shape, and
6 whether or not such tobacco is flavored, adulterated or mixed
7 with any other ingredient, the wrapper or cover of which is made
8 of paper or any other substance or material, excepting tobacco,
9 and shall not include cigars.

10 "Cigarette Stamping Agent" shall mean any person who is
11 licensed as such by the Department of Revenue for the purpose of
12 affixing cigarette tax stamps to packages of cigarettes and
13 transmitting the proper tax to the Commonwealth.

14 "Cigarette Tax Act" shall mean Article XII of the act of
15 March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of
16 1971."

17 ["Cigarette Vending Machine" shall mean any mechanical or
18 electrical device from which cigarettes are dispensed for a
19 consideration.]

20 "Cost of Doing Business" shall mean that amount, as evidenced
21 by the standards and methods of accounting regularly employed in
22 the determination of costs for the purpose of Federal income tax
23 reporting, for the total operation of the establishment for the
24 previous twelve-month period and must include, but shall not be
25 limited to, all direct and indirect costs such as product cost,
26 freight charges, labor costs, cost of equipment, rental and
27 maintenance expenses, cigarette licenses, preopening expenses,
28 management fees, costs, rents, depreciation, selling costs,
29 maintenance expenses, interest expenses, delivery costs, all
30 types of licenses, all types of taxes, insurance, advertising

1 and any central and regional administrative expenses.

2 "Cost of the Retailer" shall mean the basic cost of
3 [cigarettes] tobacco products to the retailer plus the cost of
4 doing business by the retailer in excess of the basic cost of
5 [cigarettes] tobacco products, expressed as a percentage and
6 applied to the basic cost of [cigarettes] tobacco products. In
7 the absence of filing of satisfactory proof of a lesser or
8 higher cost of doing business by the retailer making the sale,
9 the cost of doing business by the retailer shall be presumed to
10 be six per centum of the basic cost of [cigarettes] tobacco
11 products to the retailer. When a retailer establishes a lesser
12 cost of doing business than the presumptive six per centum cost
13 of doing business, such lesser cost of doing business may be
14 used to compute the cost of the retailer for a period of time no
15 greater than twelve months, at the end of which time the cost to
16 the retailer shall be computed using the presumptive six per
17 centum cost of doing business, unless the retailer again
18 establishes a lesser cost of doing business. Any fractional part
19 of a cent in such cost per carton shall be rounded off to the
20 next higher cent. In the case of any person who purchases
21 [cigarettes] tobacco products for sale at retail from any
22 manufacturer of [cigarettes] tobacco products without resort to
23 a wholesaler as such, such person shall be deemed, for the
24 purposes of this article, to be engaged in the sale of
25 [cigarettes] tobacco products as a stamping agent, wholesaler
26 and retailer and as such shall be subject to all mark-up
27 provisions of this article in the order named.

28 "Cost of the Stamping Agent" shall mean the basic cost of
29 [cigarettes] tobacco products plus the cost of doing business by
30 the cigarette stamping agent in excess of the basic cost of

1 [cigarettes] tobacco products, expressed as a percentage and
2 applied to the basic cost of [cigarettes] tobacco products. Any
3 fractional part of a cent in the cost per carton of cigarettes
4 shall be rounded off to the next higher cent. In the case of
5 sales at retail by cigarette stamping agents, the cost of the
6 cigarette stamping agent shall be the same as the cost of the
7 retailer. There shall be determined a separate cost of the
8 cigarette stamping agent for sales to wholesale dealers and for
9 sales to retail dealers. In the absence of filing of
10 satisfactory proof of a lesser cost of doing business of the
11 cigarette stamping agent making the sale, the cost of doing
12 business shall be presumed to be the basic cost of [cigarettes]
13 tobacco products for sales to wholesale dealers and four per
14 centum of the basic cost of [cigarettes] tobacco products with
15 respect to sales to retail dealers. When a cigarette stamping
16 agent establishes a lesser cost of doing business than the
17 presumptive costs contained herein, such lesser cost of doing
18 business may be used to compute the cost of the cigarette
19 stamping agent for a period of time no greater than twelve
20 months, at the end of which time the cost of the cigarette
21 stamping agent shall be computed using the presumptive costs
22 contained herein, unless the cigarette stamping agent again
23 establishes a lesser cost of doing business.

24 "Cost of the Wholesaler" shall mean the basic cost of
25 [cigarettes] tobacco products to the wholesaler plus the cost of
26 doing business by the wholesaler in excess of the basic cost of
27 [cigarettes] tobacco products, expressed as a percentage and
28 applied to the basic cost of [cigarettes] tobacco products. Any
29 fractional part of a cent in the cost to the wholesaler [per
30 carton of cigarettes] shall be rounded off to the next higher

1 cent. There shall be determined a separate cost of the
2 wholesaler for sale to retail dealers. In the absence of filing
3 satisfactory proof of a lesser cost of doing business by the
4 wholesaler with respect to sales to retail dealers, the cost of
5 doing business shall be presumed to be four per centum of the
6 basic cost of [cigarettes] tobacco products. When a wholesaler
7 establishes a lesser cost of doing business than the presumptive
8 cost of doing business, such lesser cost of doing business may
9 be used to compute the cost of the wholesaler for a period of
10 time no greater than twelve months, at the end of which time the
11 cost of the wholesaler shall be computed using the presumptive
12 four per centum cost of doing business, unless the wholesaler
13 again establishes a lesser cost of doing business.

14 "Dealer" shall mean any cigarette stamping agency, wholesaler
15 or retailer of tobacco products as these terms are more
16 specifically defined herein. When used in this article, the term
17 shall include all of the above-mentioned categories. Nothing
18 contained in this article shall preclude any person from being a
19 cigarette stamping agency, wholesaler or retailer of tobacco
20 products: Provided, That such person meets the requirements for
21 each category of dealer.

22 "Department" shall mean the Department of Revenue of the
23 Commonwealth.

24 "Franchisee" shall mean any person engaged in the sale of
25 [cigarettes] tobacco products who is granted the right to engage
26 in the business of offering, selling or distributing goods or
27 services under a marketing plan or system prescribed in
28 substantial part by the grantor of that right, for which a
29 direct or indirect fee is paid, and whose franchisor franchises
30 five or more retail outlets in this Commonwealth through which

1 [cigarettes] tobacco products are sold.

2 "Person" shall mean any individual, unincorporated
3 association, company, corporation, joint stock company, group,
4 agency, syndicate, trust or trustee, receiver, fiduciary,
5 partnership, conservator and any political subdivision of the
6 Commonwealth or any other state. As applied to a partnership,
7 unincorporated association or other joint venture, the term
8 shall also mean the partners or members thereof and, as applied
9 to a corporation, shall also mean all the officers and directors
10 thereof.

11 "Retailer" shall mean:

12 (a) Any person who, in the usual course of business,
13 purchases or receives [cigarettes] tobacco products from any
14 source whatsoever for the purpose of sale to the ultimate
15 consumer.

16 (b) Any person who, in the usual course of business, owns,
17 leases or otherwise operates one or more vending machines for
18 the purpose of sale of [cigarettes] tobacco products to the
19 ultimate consumer.

20 (c) Any person who buys, sells, transfers or deals in
21 [cigarettes] tobacco products for profit and is not licensed as
22 a cigarette stamping agency or wholesaler under this article.

23 "Sale" and "Sell" shall mean any transfer for a
24 consideration, in exchange, as barter, as a gift, as an offer
25 for sale or in distribution, in any manner or by any means
26 whatsoever.

27 "Secretary" shall mean the Secretary of Revenue of the
28 Commonwealth.

29 Tobacco Product shall mean any legal substance containing
30 tobacco, including cigarettes, cigars, smoking tobacco, snuff or

1 smokeless tobacco.

2 "Tobacco Product Vending Machine" shall mean any mechanical
3 or electrical device from which tobacco products are dispensed
4 for a consideration or for a token, card or similar device.

5 "Vending Machine Operator" shall mean any person who places
6 or services one or more [cigarette] tobacco product vending
7 machines whether owned, leased or otherwise operated by him at
8 locations from which [cigarettes] tobacco products are sold to
9 the ultimate consumer. The owner or tenant of the premises upon
10 which a vending machine is placed shall not be considered a
11 vending machine operator if his sole remuneration therefrom is a
12 flat rental fee or commission based upon the number or value of
13 [cigarettes] tobacco products sold from the machine, unless the
14 owner or tenant actually owns the vending machine or leases the
15 vending machine under an agreement whereby the profits from the
16 sale of the [cigarettes] tobacco products directly inure to his
17 benefit.

18 "Wholesaler" shall mean and include:

19 (a) Any person who, in the usual course of business,
20 purchases [cigarettes] tobacco products from a cigarette
21 stamping agent or other wholesaler and receives, stores, sells
22 and distributes within this Commonwealth at least seventy-five
23 per centum of all such [cigarettes] tobacco products purchased
24 by him or her to retail dealers or wholesale dealers or any
25 combination who shall buy the [cigarettes] tobacco products from
26 him or her for the purpose of resale to the ultimate consumer:
27 Provided, That such person maintains an established place of
28 business for the receiving, storage and distribution of
29 [cigarettes] tobacco products.

30 (b) Any person who is engaged in the business of

1 distributing [cigarettes] tobacco products through vending
2 machines to the ultimate consumer by means of placing the
3 [cigarette] tobacco product vending machines, owned or leased by
4 him, in various outlets within this Commonwealth and who pays to
5 the owner or lessee of the premises a commission or rental for
6 the use of the premises: Provided, That such vending machine
7 operator shall operate at least ten vending machines: Provided
8 further, That the vending machine operator meets all the other
9 requirements for licensing of wholesalers under this article,
10 including maintaining an established place of business for the
11 receiving, storage and distribution of [cigarettes] tobacco
12 products.

13 (c) Any person, including a franchisee, who owns and
14 operates no less than five retail outlets in this Commonwealth,
15 having one hundred per centum common ownership, who purchases
16 [cigarettes] tobacco products from a cigarette stamping agency
17 or another wholesaler for resale to the ultimate consumer:
18 Provided, That such person maintains complete and accurate
19 records of all purchases and sales in his or her main office and
20 also in the retail outlet.

21 Section 3. Sections 203-A(a), 209-A and 213-A of the act,
22 added July 2, 1993 (P.L.250, No.46), are amended to read:

23 Section 203-A. Licensing of [Cigarette] Tobacco Product
24 Dealers.--(a) No person, unless all of his sales of
25 [cigarettes] tobacco products are exempt from Pennsylvania
26 cigarette tax, shall sell, transfer or deliver any [cigarettes]
27 tobacco products within this Commonwealth without first
28 obtaining the proper license pursuant to the provisions of this
29 article.

30 * * *

1 Section 208-A. License Fees; Issuance and Posting of
2 License.--(a) At the time of making any application, an
3 applicant for a wholesale [cigarette] tobacco product dealer's
4 license shall pay to the department a license fee of five
5 hundred dollars (\$500), an applicant for a retail [cigarette]
6 tobacco product dealer's license shall pay to the department a
7 license fee of twenty-five dollars (\$25), an applicant for a
8 vending machine license shall pay to the department a license
9 fee of twenty-five dollars (\$25) and an applicant for a
10 cigarette stamping agency license shall pay to the department a
11 fee of one thousand dollars (\$1,000). Fees shall not be pro-
12 rated.

13 (b) Upon approval of the application and payment of the
14 fees, the department shall issue the proper license which must
15 be conspicuously displayed at the place for which issued.

16 Section 209-A. Transfer of Licenses.--The department may
17 permit a dealer, under such conditions as the department may
18 impose by regulation, to transfer a license from one location to
19 another or from one [cigarette] tobacco product vending machine
20 to another.

21 Section 211-A. Expiration of License.--(a) Every license
22 shall expire on the last day of February next succeeding the
23 date upon which it was issued unless sooner suspended,
24 surrendered or revoked.

25 (b) After the expiration date of the license or sooner if
26 the license is suspended, surrendered or revoked, it shall be
27 illegal for any dealer to engage directly or indirectly in the
28 business heretofore conducted by him for which the license was
29 issued. Any licensee who shall, after the expiration date of the
30 license, engage in the business theretofore conducted by him

1 either by way of purchase, sale, stamping, distribution or in
2 any other manner directly or indirectly engaged in the business
3 of dealing with [cigarettes] tobacco products for profit shall
4 be in violation of this article and be subject to the penalties
5 provided herein.

6 Section 213-A. License for [Cigarette] Tobacco Product
7 Vending Machines; Names of Owner and Operator.--Each [cigarette]
8 tobacco product vending machine shall have a current license
9 which shall be conspicuously and visibly placed on the machine.
10 There shall be conspicuously and visibly placed on every
11 [cigarette] tobacco product vending machine the name and address
12 of the owner and the name and address of the operator.

13 Section 4. The act is amended by adding a section to read:

14 Section 213.1-A. Restrictions on Placement and Operation of
15 Tobacco Product Vending Machines.--(a) (1) Each vending
16 machine dispensing tobacco products shall be located within the
17 immediate vicinity, plain view and control of an owner or
18 operator of the establishment wherein the vending machine is
19 located or of his employe, in such a manner that all purchases
20 are readily observable by that owner, operator or employe.

21 (2) No vending machine shall be permitted in a coatroom,
22 restroom, unmonitored hallway, outer waiting area or similar
23 unmonitored area.

24 (3) No vending machine shall be accessible to the public
25 when the permitted location is closed.

26 (b) Each tobacco product vending machine may only be
27 operated with a token, card or similar device that an individual
28 consumer may only obtain or purchase from the owner, employe or
29 agent of the owner of such an establishment wherein the vending
30 machine is located, except that, tobacco product vending

1 machines located in any establishment that minors are prohibited
2 by law from entering, or in an establishment operated by a
3 veterans organization or fraternal benefit society, as defined
4 in the act of December 14, 1992 (P.L.835, No.134), known as the
5 "Fraternal Benefit Societies Code," shall be exempt from this
6 subsection.

7 (c) Persons charged with furnishing such tokens, cards or
8 similar devices for operation of a tobacco product vending
9 machine shall determine whether a purchaser is a minor prior to
10 furnishing the purchaser with the means to operate the tobacco
11 product vending machine and may reasonably rely on documentary
12 proof of age or on the appearance of the purchaser to form an
13 opinion as to the age of the purchaser.

14 (d) A person who violates any provision of this section
15 commits a summary offense and shall, upon conviction, be
16 sentenced to pay a fine of not more than three hundred dollars
17 (\$300). Fines collected under this section shall be paid to the
18 municipality in which the vending machine is located. Conviction
19 of a violation under this section shall not preclude prosecution
20 of a violation of 18 Pa.C.S. § 6305 (relating to sale of
21 tobacco) or 6306 (furnishing cigarettes or cigarette papers).

22 Section 5. Sections 216-A and 217-A of the act, added July
23 2, 1993 (P.L.250, No.46), are amended to read:

24 Section 216-A. Examination of Records, Equipment and
25 Premises.--(a) The department is hereby authorized to examine
26 the books and records, the inventory of [cigarettes] tobacco
27 products and the premises and equipment of any dealer in order
28 to determine compliance with the provisions of this article and
29 to verify the accuracy of the payment of the tax imposed by the
30 Cigarette Tax Act. Every such person is hereby directed and

1 required to give to the department or its duly authorized
2 representative the means, facilities and opportunity for such
3 examinations.

4 (b) Any person who prevents or hinders the department or any
5 designated agent thereof from making a full inspection of the
6 premises where [cigarettes] tobacco products are sold or stored
7 or prevents or hinders the inspection of invoices, books,
8 records, equipment, inventory or papers required to be kept
9 shall be guilty of a violation of this article and subject to
10 the penalties provided herein.

11 Section 217-A. Sales at Less Than Cost.--(a) It shall be
12 unlawful:

13 (1) For any dealer, with intent to injure competitors or
14 destroy or substantially lessen competition or with intent to
15 avoid the collection or paying over of such taxes as may be
16 required by law, to advertise, offer to sell or sell
17 [cigarettes] tobacco products at less than cost of such
18 [cigarette] tobacco product dealer.

19 (2) For any wholesaler:

20 (i) to induce or attempt to induce or to procure or attempt
21 to procure the purchase of [cigarettes] tobacco products or to
22 accept [cigarettes] tobacco products at a price less than the
23 cost of the [cigarette] tobacco product dealer from whom the
24 purchase or acceptance of [cigarettes] tobacco products was
25 made; or

26 (ii) to induce or attempt to induce or to procure or attempt
27 to procure or to accept any unauthorized rebate or concession of
28 any kind or nature whatsoever, other than a rebate or concession
29 authorized by the department, in connection with the purchase of
30 [cigarettes] tobacco products.

(3) For any retail dealer:

(i) to induce or attempt to induce or to procure or attempt to procure the purchase of [cigarettes] tobacco products or to accept [cigarettes] tobacco products at a price less than the cost to the [cigarette] tobacco product dealer from whom the purchase or acceptance of [cigarettes] tobacco products was made; or

(ii) to induce or attempt to induce or to procure or attempt to procure or to accept any unauthorized rebate or concession of any kind or nature whatsoever, other than a rebate or concession authorized by the department, in connection with the purchase of [cigarettes] tobacco products.

(b) Evidence of advertisement offering to sell or sale of [cigarettes] tobacco products by any [cigarette] tobacco product dealer at less than cost to the dealer or evidence of any offer of a rebate in price or giving of a rebate in price or an offer of a concession or the giving of a concession of any kind or nature whatsoever in connection with the sale of [cigarettes] tobacco products or the inducing or attempt to induce or to the procuring or the attempt to procure the purchase of [cigarettes] tobacco products at a price less than cost of the cigarette stamping agent, wholesaler or retail dealer shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition or of intent to avoid the collection or paying over of such taxes as may be required by law. Evidence of a final selling cost which is not the invoice cost or an invoice which does not include allowable discounts, rebates, allowances or free or discounted merchandise relating to or in conjunction with the sale of [cigarettes] tobacco products when used by the cigarette stamping agent, wholesaler

1 or retailer shall be prima facie evidence of violation of this
2 article.

3 Section 6. Section 217.1-A of the act, added December 15,
4 1999 (P.L.942, No.66) is amended to read:

5 Section 217.1-A. Labeling and Packaging.--(a) It shall be
6 unlawful to knowingly affix a tax stamp or meter impression to,
7 or to knowingly sell, give, transfer or deliver to any person,
8 any [cigarette] tobacco product package:

9 (1) that bears a label or notice set forth in Federal law or
10 regulation or used to identify [cigarettes] tobacco products
11 that are exempt from tax under the Internal Revenue Code of 1986
12 (Public Law 99-514, 26 U.S.C. § 5704(b));

13 (2) that is not labeled in conformity with the Federal
14 Cigarette Labeling and Advertising Act (Public Law 89-92, 15
15 U.S.C. § 1331 et seq.) or any other Federal requirement for the
16 placement of labels, warnings and other information applicable
17 to [cigarette] tobacco product packages intended for domestic
18 consumption; or

19 (3) the packaging of which has been modified or altered by a
20 person other than the original manufacturer. Modification or
21 alteration shall include the placement of a sticker, writing or
22 mark to cover information on the packages. For purposes of this
23 paragraph, a [cigarette] tobacco product package shall not be
24 construed to have been modified or altered by a person other
25 than the manufacturer if the most recent modification or
26 alteration was made by the manufacturer or person authorized by
27 the manufacturer and approved by the department.

28 (b) The department is authorized to exchange information
29 with the United States Customs Service for purposes of enforcing
30 this act.

1 Section 7. Sections 218-A, 219-A, 220-A, 221-A, 223-A, 224-
2 A, 227-A and 228-A of the act, added July 2, 1993 (P.L.250,
3 No.46), are amended to read:

4 Section 218-A. Combinations Sales; Inducements.--In all
5 advertisements, offers for sale or sales involving two or more
6 items, at least one of which items is [cigarettes] a tobacco
7 product, at a combined price and in all advertisements, offers
8 for sale or sales involving the giving of any gift or concession
9 of any kind whatsoever, whether it be coupons or otherwise, the
10 portion of the dealer's combined selling price relating to
11 [cigarettes] tobacco products shall not be below the cost of the
12 stamper, cost of the retailer or cost of the wholesaler, as the
13 case may be. Other merchandise offered for sale as a tie-in with
14 the [cigarettes] tobacco products shall not be sold at less than
15 the cost of the other merchandise nor shall the gift or
16 concession of the other items advertised or offered for sale be
17 used as an inducement to purchase [cigarettes] tobacco products
18 nor shall any payment, openly or in secret, of any rebates,
19 refunds, commission or unearned discounts, whether in the form
20 of money or otherwise, or secret extensions to certain
21 purchasers of special services or privileges not extended to all
22 purchasers upon like terms and conditions be made or offered as
23 an inducement to purchase [cigarettes] tobacco products.

24 Section 219-A. Sales by Wholesaler to Wholesaler.--When one
25 wholesaler sells [cigarettes] tobacco products to another
26 wholesaler, the former shall not be required to include in the
27 selling price the cost of the wholesaler as defined in this
28 article, but the latter wholesaler, upon the resale of such
29 [cigarettes] tobacco products to a retailer, shall be subject in
30 all respects to the provisions of this article: Provided,

1 however, That such latter wholesaler may, at his option, use as
2 his basic cost of the [cigarettes] tobacco products so sold the
3 basic cost of the wholesaler from whom he shall have purchased
4 the same.

5 Section 220-A. Sales; Exceptions.--The provisions of this
6 article shall not apply to sales of [cigarettes] tobacco
7 products a dealer made (i) in an isolated transaction and not in
8 the usual course of business; (ii) where [cigarettes] tobacco
9 products are advertised, offered for sale or sold in good-faith
10 clearance sales for the purpose of discontinuing trade in such
11 [cigarettes] tobacco products and such advertising, offer to
12 sell or sale shall state the reason thereof and the quantity of
13 such [cigarettes] tobacco products advertised, offered for sale
14 or to be sold; (iii) where [cigarettes] tobacco products are
15 advertised, offered for sale or sold as imperfect or damaged and
16 such advertising, offer to sell or sale shall state the reason
17 therefor and the quantity of such [cigarettes] tobacco products
18 advertised, offered for sale or to be sold; (iv) where
19 [cigarettes] tobacco products are sold upon the final
20 liquidation of a business; or (v) where [cigarettes] tobacco
21 products are advertised, offered for sale or sold by any
22 fiduciary or other officer acting under the order or direction
23 of any court.

24 Section 221-A. Advertising of Certain Sales; Good Faith.--
25 (a) Any retailer may advertise, offer to sell or sell
26 [cigarettes] tobacco products at a price made in good faith to
27 meet the price of a competitor who is selling the same article
28 at cost to him as a retailer. Any wholesaler may advertise,
29 offer to sell or sell [cigarettes] tobacco products at a price
30 made in good faith to meet the price of a competitor if the

1 competitor is rendering the same type of service, has been
2 approved by the department to sell [cigarettes] tobacco products
3 at a price different from the presumptive minimum and is not
4 selling the same article below cost to him as a wholesaler. The
5 price of [cigarettes] tobacco products advertised, offered for
6 sale or sold under the exceptions specified in this article
7 shall not be considered the price of a competitor and shall not
8 be used as a basis for establishing prices below cost nor shall
9 the price established at a bankrupt sale be considered the price
10 of a competitor, within the purview of this section.

11 (b) In the absence of proof of the cost of a competitor
12 under this section, the lowest cost of the stamping agent or the
13 lowest cost of the wholesaler, as the case may be, determined by
14 any cost survey made in the same trading area pursuant to the
15 provisions of this article, may be deemed the cost of such
16 competitor within the meaning of this section.

17 Section 223-A. Admissible Evidence.--(a) In determining the
18 cost of the stamper, cost of the retailer and cost of the
19 wholesaler, the fact-finder shall receive and consider, as
20 bearing on the good faith of such cost, evidence tending to show
21 that any person complained against under any provision of this
22 article purchased [cigarettes] tobacco products with respect to
23 the sale of which complaint is made at a fictitious price or
24 upon terms or in such a manner or under such invoices as to
25 conceal the true cost, discounts or terms of purchase. The fact-
26 finder shall also receive and consider, as bearing on the good
27 faith of such cost, evidence of the normal, customary and
28 prevailing terms and discounts in connection with other sales of
29 a similar nature in the trade area or state.

30 (b) Merchandise given gratis or payment made to a stamping

1 agent, retailer or wholesaler by a [cigarette] tobacco product
2 manufacturer for display or advertising or promotion purposes,
3 or otherwise, shall not be considered in determining the cost of
4 [cigarettes] tobacco products to the [cigarette] tobacco product
5 dealer if such practice is customary in the trade and offered to
6 all dealers on an equal or proportional basis.

7 Section 224-A. Sales Outside Ordinary Channels of Business;
8 Effect.--In establishing the cost of [cigarettes] tobacco
9 products to the stamper, retailer or wholesaler, the invoice
10 cost of such [cigarettes] tobacco products purchased at a forced
11 bankrupt or closeout sale or other sale outside of the ordinary
12 channels of trade may not be used as a basis for justifying a
13 price lower than one based upon the replacement cost of the
14 [cigarettes] tobacco products to the stamper, retailer or
15 wholesaler within thirty days prior to the date of sale in the
16 quantity last purchased through the ordinary channels of trade.

17 Section 227-A. Administration Powers and Duties.--(a) The
18 administration of this article is hereby vested in the
19 department. The department shall adopt rules and regulations for
20 the enforcement of this article and may from time to time make
21 or cause to be made one or more cost surveys to establish the
22 lowest cost of the cigarette stamping agent, the lowest cost of
23 the retailer and the lowest cost of the wholesaler, as defined
24 in this article for the Commonwealth or such trading area or
25 areas therein as it shall define. Any such survey made or caused
26 to be made by the department may be used for the purposes
27 specified in this article. If the survey is conducted in
28 connection with a [cigarette] tobacco product dealer's request
29 to sell at a price different from the presumptive minimum, the
30 [cigarette] tobacco product dealer shall pay for the survey.

1 Regulations shall provide a procedure for dealers to prove a
2 cost different from the State presumptive costs, including proof
3 of lower costs, filing of petitions, cost allocation, data to be
4 submitted and guidelines necessary to implement this article.
5 Authorization to sell below the presumptive minimum prices shall
6 be in writing published in the Pennsylvania Bulletin and
7 otherwise in conformance with the requirements of this article
8 and shall contain a statement that the authorization is
9 effective forty-five days after the issuance of the writing and
10 is valid for twelve months therefrom. Authorization by the
11 department for a dealer to sell [cigarettes] tobacco products
12 below the established presumptive minimum prices shall be stated
13 as a percentage and be applied to all levels of [cigarette]
14 tobacco product prices in the percentage allowed, and this
15 percentage shall also be applied to any new presumptive minimum
16 prices established by the department during the effective period
17 of the dealer's authorization. The department may impose such
18 fees as may be necessary to cover the costs incurred in
19 administering this section, including review and audit of
20 petitioning dealer's audited financial statement. On the
21 effective date of this article and until such time as a dealer
22 receives authorization from the department, in accordance with
23 its regulations, to sell [cigarettes] tobacco products at a
24 price different from the presumptive minimum prices established
25 pursuant to this article, the last dealer request to have been
26 authorized by the department shall continue in effect.

27 (b) The department is authorized to jointly administer this
28 article with the act of March 4, 1971 (P.L.6, No.2), known as
29 the "Tax Reform Code of 1971," including joint reporting of
30 information, forms, returns, statements, documents or other

1 information submitted to the department.

2 Section 228-A. Sales Without License.--(a) Any dealer or
3 other person who shall, without being the holder of a proper
4 unexpired dealer's license or vending machine license properly
5 affixed as required by this article, engage in the business of
6 purchasing, selling, stamping, distributing or in any other
7 manner directly or indirectly engaging in the business of
8 dealing with [cigarettes] tobacco products for profit shall be
9 in violation of this article and, upon conviction in a summary
10 proceeding, shall be sentenced to pay a fine of not less than
11 two hundred fifty dollars (\$250) nor more than one thousand
12 dollars (\$1,000), costs of prosecution or to suffer imprisonment
13 for a term of not more than thirty days, or both, at the
14 discretion of the court.

15 (b) Open display of [cigarettes] tobacco products in any
16 manner shall be prima facie evidence that the person displaying
17 such [cigarettes] tobacco products is directly or indirectly
18 engaging in the business of dealing [with cigarettes] in tobacco
19 products for profit.

20 Section 8. Section 229-A of the act, amended December 15,
21 1999 (P.L.942, No.66) is amended to read:

22 Section 229-A. Violations and Penalties.--(a) The license
23 of any [cigarette] tobacco product dealer or wholesaler or
24 retailer who violates any of the provisions of this article may
25 be suspended after due notice and opportunity of hearing for a
26 period of not less than five days nor more than thirty days for
27 a first violation and shall be revoked or suspended for any
28 subsequent violation.

29 (b) In addition to the provisions of subsection (a), upon
30 adjudication of a first violation, the [cigarette] tobacco

1 product dealer shall be fined not less than two thousand five
2 hundred dollars (\$2,500) nor more than five thousand dollars
3 (\$5,000). For subsequent violations, the agent, wholesaler or
4 retailer shall, upon adjudication thereof, be fined not less
5 than five thousand dollars (\$5,000) nor more than fifteen
6 thousand dollars (\$15,000).

7 (c) A person who violates section 208-A(b), 214-A, 215-A or
8 216-A shall be subject to a civil penalty not to exceed three
9 hundred dollars (\$300) but shall not be subject to subsections
10 (a) and (b).

11 (c.1) A person who violates section 217.1-A shall be subject
12 to a civil penalty equal to two hundred per centum of the value
13 of the [cigarettes] tobacco products or two thousand five
14 hundred dollars (\$2,500), whichever is greater. The [cigarettes]
15 tobacco products, vending machine, machinery, equipment or
16 vehicles involved in a violation of section 217.1-A shall be
17 confiscated by the department and forfeited to the Commonwealth
18 in accordance with section 1285 of the act of March 4, 1971
19 (P.L.6, No.2), known as the "Tax Reform Code of 1971." Upon a
20 second or subsequent violation of section 217.1-A, the
21 department may revoke the license of the person. The licensee
22 and any other person with an equitable interest in the license
23 may be prohibited from holding an interest in any license issued
24 pursuant to this act for a period of up to two years.

25 (d) Notwithstanding any provision of this article to the
26 contrary, the department shall suspend or revoke any license for
27 violation of any provision of the act of March 4, 1971 (P.L.6,
28 No.2), known as the "Tax Reform Code of 1971," concerning
29 contraband [cigarettes] tobacco products or counterfeit
30 cigarette stamps.

(e) In addition to the penalties provided in subsection (c.1), a person who violates section 217.1-A commits the following:

(1) A summary offense for a first offense involving twenty or fewer cartons of [cigarettes] tobacco products. Upon conviction, the person shall be subject to imprisonment and to a fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000) and shall pay the costs of prosecution.

(2) A misdemeanor of the first degree for a second offense, or first offense involving more than twenty and fewer than three hundred cartons of [cigarettes] tobacco products. Upon conviction, the person shall be subject to imprisonment and to a fine of not less than one thousand dollars (\$1,000) nor more than fifteen thousand dollars (\$15,000) and shall pay the costs of prosecution.

(3) A felony of the third degree for a third or subsequent offense, or first or second offense involving more than three hundred cartons of [cigarettes] tobacco products. Upon conviction, the person shall be subject to imprisonment and to a fine of not less than two thousand dollars (\$2,000) nor more than twenty thousand dollars (\$20,000) and shall pay the costs of prosecution.

(f) Receipt of a percentage of a franchisee's gross profits by a franchisor shall not be deemed an equitable interest in the retail license of a franchisee.

Section 9. Section 230-A of the act, added July 2, 1993 (P.L.250, No.46), is amended to read:

Section 230-A. Unfair Sales Act Inapplicable.--The provisions of the act of August 11, 1941 (P.L.900, No.344),

1 known as the "Unfair Sales Act," shall not apply to sales of
2 [cigarettes] tobacco products covered by the provisions of this
3 article.

4 Section 10. This act shall take effect in 60 days.