

THE OHIO COUNCIL OF

Retail Merchants

The voice of retail since 1922

Proponent Testimony on House Bill 223
Before the House Ways and Means Committee

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Chairman Merrin, Vice Chair Riedel, Ranking Member Sobecki, and members of the House Ways and Means Committee, my name is Tony Ehler. I represent the Ohio Council of Retail Merchants in support of House Bill 223.

The Ohio Council of Retail Merchants is a trade association that has served the interests of Ohio retail and wholesale businesses for nearly 100 years. It has over 7,000 Ohio members. The Council works closely with state and local policy-makers to advance the interests of Ohio businesses and their customers. It is dedicated to helping foster a fair and competitive environment that produces jobs for Ohio citizens and encourages consumers to select businesses operating in Ohio when deciding to make purchases. This is healthy for Ohio, its citizens and its businesses. The Council supports the sales tax objectives in H.B. 223.

I have focused my law practice for nearly 35 years on state and local tax with a concentration in sales and use taxation. I started my practice in 1987 as an associate at Vorys, Sater, Seymour and Pease in Columbus. I became chairman of the law firm's State and Local Tax Sub-Group in 2009 and currently I serve as Chairman of the Tax Group. I also have served as Chairman of the Tax Committees for both the Columbus and Ohio State Bar Associations. My professional experience has shown me that tax law can

be tedious and sometimes difficult to understand. At the conclusion of my prepared remarks, I will try to answer any questions you might have.

I watched Sponsor Testimony of Representative Hillyer and I have read the bill analysis of LSC. Both were credible and faithful summaries of H.B. 223. At its core, H.B. 223 would help modernize Ohio's tax code and make it more fair to stakeholders.

Ohio sales tax is an excise tax on consumers when making purchases at retail. Retail vendors are involved in this tax process by statutory obligation. Retailers add sales tax to price when sales are consummated. Retailers must remit that tax, sometimes on an accelerated basis before the end of the month in which the sale is consummated. Thus, retailers are required by Ohio law to accrue and remit the sales tax even if it is not yet paid by consumers.

I note that I have described the timing of the retail vendor remittance of sales tax relative to when a sale is consummated and not when the retailer collects sales tax from the consumers. This practice developed decades ago when purchases were paid for primarily with cash at the point of sale. Under these circumstances, it was rational for the state to expect the tax to be remitted soon after the retailer possessed the tax.

Over the years, business practices developed that encourage retail sales, while increasing consumer flexibility and sales tax to the state. One such practice was credit sales. This practice developed when there was a more personal relationship between retailers and customers. A shop owner would decide whether to extend credit to a customer based on many factors of experience. Even so, when credit was extended the vendor was obligated to remit the customers' sales tax before the vendor collected the tax. In this way the vendor "advanced" the sales tax to the state.

Still, retailers were not and are not the taxpayer on whom the tax is imposed. They are the primary sales tax collection agents for the state. They serve as the intermediaries that hold the customer's tax in trust until remitted. Retail vendors are not guarantors of the tax.

It is not surprising that Ohio law developed to allow vendors and retailers that: (1) extend credit directly to customers and (2) remit tax to the state to reimburse themselves for this previously advanced tax when the customer fails to pay the purchase price and the sales tax. R.C. 5739.121. After meeting certain legal and factual safeguards, the retailer that consummates the sale and advances the tax may deduct the amount of bad debts from future sales tax returns. One of the safeguards is that the retailer must be the party that writes off the receivable as a "bad debt." This was the norm when the bad debt deduction was enacted in the 1970's as credit service companies had not yet gained a foothold in the private label credit card market.

This process worked fairly until retail commerce became more specialized. Retailers found more efficient ways to encourage sales and empower consumers by extending credit to a much broader group of customers. Today, nearly every retailer that extends credit does so in concert with private credit service companies. These companies study the retailer customer base and the credit characteristics of individual customers (as permitted by federal and state laws) and issues a credit card for the customer to purchase items on credit from a specific vendor or vendor affiliates. These are known as private label credit cards.

These arrangements result in more flexibility for consumers to manage their own finances and make purchases when needed. The arrangements increase the number and volume of retail sales as consumers take advantage of additional means to finance purchases. The credit service companies advance sales proceeds to the retailers based on prearranged terms. The retailers remit sales tax as before and the credit service companies then seek to collect the debts from the consumers. If the debts

remain unpaid, the credit service company eventually writes off the receivables as “bad debts” for federal income tax purposes. The retailers or the credit service companies or both feel the sales tax sting of the “bad debt” because neither can receive the benefit of the bad debt sales tax deduction under current Ohio law. This is so because the retailers are not the party permitted by the Internal Revenue Code to take the “bad debt” deduction for income tax purposes and because the credit service companies did not remit sales tax as the retailers.

The result imposes responsibility for the sales tax advanced to the state on these businesses even though the customer (the taxpayer) never paid the sales tax. H.B. 223 rectifies that by allowing the vendor (the party that remitted and returned the sales tax to the state) to claim the sales tax bad debt deduction even when the “bad debt” is written off by the credit service companies. In essence, this legislation prevents the state from keeping sales taxes advanced on phantom sales arising from the timing issue that exists because of the state’s desire for the sales tax prior to sales tax collection from the customer.

As noted, retailers are not broadly intended to serve as guarantors of Ohio sales tax. It is not their legal tax liability. Ohio does have other taxes that expressly impose guarantor obligations on sellers or dealers (see Ohio motor fuel tax in R.C. 5735.01 et seq.). H.B. 223 addresses this problem for retailers and places Ohio in step with other states that have addressed it. States like Florida, Texas, California, Michigan, Wisconsin, Illinois and Pennsylvania have modernized their tax codes by adopting legislation similar to H.B. 223 for private label credit card bad debts.

Ohio vendors cannot operate in a purely “cash only” business environment. That would reduce consumer options and significantly reduce commerce as well as the overall sales tax generated from that commerce. The Council supports H.B. 223 because it restores fairness to retailers as the parties

required to serve as tax collector for the state. It balances modern tax safeguards with the needs of the state for robust sales and the vendor to make credit sales.

The Council supports H.B. 223 and encourages this Committee to pass it. Thank you.