OHIO WHOLESALE MARKETERS ASSOCIATION

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Testimony on Senate Bill 40
Beth Wymer, Executive Director
Ohio House of Representatives
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, thank you for the opportunity to share the Ohio Wholesale Marketers Association's support for Senate Bill 40 which brings much needed clarifications to Ohio's cigarette minimum mark-up law as it applies to wholesalers.

OWMA's core membership is wholesalers who supply products to convenience stores (c-stores), mom-n-pop corner stores and similar retailers. They carry competing brands from competing manufacturers, and they compete against other wholesalers that are both in state and out of state for retail accounts to service. With few exceptions, the Association's distributor members are Ohio-based family-owned businesses that have served their communities for one or more generations. They sell much more than just tobacco but the category accounts for 70 to 80 percent of a typical wholesaler's overall sales volume. For the smallest wholesalers, the category can be up to 90 percent of overall sales.

Ohio's cigarette minimum mark-up law was enacted in the 1940s to address predatory below cost pricing at the wholesale and retail levels. It requires wholesalers and retailers to apply a cost of doing business mark-up before selling cigarettes. SB40 is not making any changes to the stated statutory presumptive cost of doing business mark-ups, which are 3.5% at wholesale and 8% at retail.

When the law was originally enacted, the distribution channel was simply manufacturer to wholesaler to retailer. But the channel has changed since the 1940s and while some states have updated their laws or related rules, Ohio has not. For example, today wholesalers sell cigarettes to other wholesalers but Ohio's mark-up law doesn't recognize these transactions. SB40 adds that in sales of cigarettes between wholesalers, the statutory mark-up is not required but the wholesaler who sells to retailers is required to apply the mark-up (new section 1333.12). This is consistent with industry practice, other states that have addressed sales between wholesalers in their laws and guidance from the Tax Department.

Related to recognizing wholesale to wholesale transactions is the need to be very clear about the reference to 'invoice cost' in the definition of 'cost to the wholesaler'. The cigarette price calculation starts with the invoice from the manufacturer to the wholesaler and the reference to 'invoice cost' has always been presumed and understood to mean the 'manufacturer gross' invoice cost to the wholesaler, even though 'manufacturer gross' is not specifically stated in Ohio's law. Because sales *between* wholesalers can be negotiated to be at any price [even at below cost pricing], to maintain the intent to the law it is important to clearly state that 'invoice' is '*manufacturer gross*' invoice. Without this specific wording, there is an unintended loophole that can be manipulated by wholesalers to engage in predatory pricing and circumvent the intent of the law.

Cigarette minimum mark-up laws presume that the business' costs are not less than the stated statutory mark-up and these laws all have two required elements: 1. they allow a wholesaler to apply less than the stated statutory mark-up if the business can prove its costs are less than the stated mark-up; and 2. if a wholesaler applies a mark-up that is less than the stated statutory mark-up, other wholesalers can also apply the lessor mark-up to meet the competitor's price. This seems simple enough but these points are in different sections of the cigarette mark-up law and over time the connection between them has been loosely interpreted to the point that correct application and enforcement of the law is compromised.

To correct the disconnect, SB40 adds language to 1. make it clear that if a wholesaler does want to use less than the stated statutory mark-up, the wholesaler's proof of a lessor cost of doing business has to be filed with and approved by the tax commissioner; and 2. if a wholesaler is using less than the statutory mark-up under 'meeting the competition', the price of the competitor must be a legal, *ie, the competitor's use of a lower than stated statutory mark-up has been approved by the commissioner.*

At the Tax Department's request, SB40 also adds notification/approval of the commissioner if a wholesaler or retailer is going to sell cigarettes under the mark-up exclusions that are in current law. These exclusions from the mark-up requirement include if the business is discontinuing sales of cigarettes, going out of business or if the product is outdated/damaged. OWMA supports this addition to the bill because it is codifying current practice.

The absence of clear connections and clarifications between sections of the mark-up law has frustrated wholesalers who are trying to follow the intent of the law and the Tax Department as it enforces the law. SB40 is well thought out legislation that this association and the Department agree will bring clarity for wholesalers and the Department for purposes of compliance, administration and enforcement.

Mr. Chairman and members of the committee, thank you for your time and I would be happy to answer questions.