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Maine State Legislature  
Committee on Health and Human Services

**STATEMENT of OPPOSITION**

***LD 1550 – An Act to End the Sale of Flavored Tobacco Products***

Chairman Claxton, Chairwoman Meyer, and Members of the Committee,

The New England Convenience Store & Energy Marketers Association (NECSEMA) represents convenience stores and the business which supply them. NECSEMA members own, operate and/or supply the 1,000+ convenience stores in Maine which employ over 16,000 people. LD 1550 disproportionately impacts our members since, according to the National Association of Convenience Stores (NACS), convenience stores hold the largest share of the cigarette market at 89.3%<sup>1</sup>, and cigarette sales represent 31% of in-store sales, nationally.

NECSEMA strongly encourages the Committee to **oppose LD 1550** on the basis it is an ill-conceived policy that is doomed to result in a public health, public safety and financial disaster for the state, the people it seeks to protect and more than 1,000 businesses throughout the state. Simply put, it may be well-intended, but is a damaging, dangerous, consequence-riddled policy in reality.

On April 29, 2021, the FDA announced it will begin working toward issuing proposed product standards within the next year to ban menthol as a characterizing flavor in cigarettes and ban all characterizing flavors, including menthol, in cigars. Notably, it did not include electronic nicotine delivery systems (ENDS), often referred to as vape, most likely recognizing them as a less harmful off-ramp for menthol cigarettes smokers. This will kick off a process that could take several years.

If the FDA takes nationwide action, then at least it will not disadvantage Maine retailers, residents and state revenue unfairly. It will be a uniform policy. However, if LD 1550 is passed into law Maine will be way out in front of the federal action and will isolate the Maine general fund, it's retailers and adult tobacco users.

Recent news and advocacy efforts have attempted to portray flavored tobacco as racist tools of tobacco companies. But make no mistake, a ban on flavored tobacco in Maine will not harm tobacco companies because the demand will simply shift elsewhere. Instead, it targets local, family owned Maine businesses and Maine adults who choose to use legal adult products.

Following is elaboration on several of the reasons why prohibiting flavored tobacco from legal sale in Maine is policy mistake.

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<sup>1</sup> NACS State of the Industry 2018

## **All Products Should Not be Treated the Same**

Reducing youth initiation to nicotine is a laudable goal we can all support, and there are a variety of practical approaches that can be employed – several of which I offer at the end of this letter. But a Maine-only flavored tobacco ban is not one of them. To begin with, it is a mistake to evaluate all nicotine products through the lens of *flavors*. Doing so implies they all have the same youth appeal when, in fact, youth appeal for electronic nicotine delivery systems and e-vapor (collectively “ENDS”) is vastly different from that of cigarettes, smokeless and cigars. The latest CDC’s National Youth Tobacco Survey<sup>2</sup> shows in 2020 that high school-aged use for ENDS is 19.6% (down from 27.5% in 2019), cigarettes use at 4.6% (down 15.8% since 2011), smokeless use at 3.1% (down 7.9% since 2011) and cigar use at 5% (down 11.6% since 2011). The CDC recommends education and cessation which Maine is already doing a notable job with. In fact, the American Lung Association gives Maine an A-grade for funding its tobacco control programs.

Any conversation about youth initiation must include which products are used at the highest rates. The statistics above demonstrate ENDS, despite the precipitous drop in just a year and aggressive federal action, has a higher youth prevalence rate while other traditional tobacco products are clearly adult-preferred. Yet, LD 1550, treats them all the same under the banner of flavor despite there being no basis for this. Policy mistake #1.

## **The Legal, Licensed, Regulated, Enforced and Taxed Framework**

Over the decades, Maine has designed a legal, licensed, regulated, enforced and taxed framework for a variety of age-restricted products, including tobacco and ENDS. Within this framework exist licensed retailers who spend significant time and financial resources in age-restriction training and technology. In fact, statewide FDA-verified compliance is 94%<sup>3</sup>. Retailers that receive compliance violations are subject to financial penalties and can lose their license. Licensed tobacco retailers are the only face to face gatekeepers preventing underage youth from buying products they are not legally allowed to buy. Nobody else stands between youth attempting to break the law and age-restricted tobacco products and checks IDs. It is this legal framework that protects youth and ensures that only adults may purchase tobacco and ENDS. Policy Mistake #2.

## **Market Demand**

In Maine, 18% of the total cigarette market is menthol, 88% of the total moist smokeless market is flavored, and 72% of the total vape market is flavored. Combined, these products represent over \$42,000,000<sup>4</sup> in annual excise and sales tax revenue to Maine. Understanding the enormity of the flavored tobacco market is crucial.

During each of the past two years, almost 60,000,000 cigarette excise tax stamps were sold in the state representing almost \$660,000,000 in cigarette tax revenue. At 18%, this one category is \$120,00,000 of the total cigarette market and means approximately \$22,000,000 in excise tax revenue. At 88% of the moist smokeless market, the state collects almost \$9,000,000 on the sale of almost 4,000,000 tins.

These figures are shared for two purposes: First to demonstrate the enormous market demand, and second to show the revenue that will be lost which could otherwise be used for cessation and education.

When there is demand, there is a market. Period. Irrefutable. The question the HHS committee must ask itself is whether it wants that market to be the legal, licensed, regulated, enforced and taxed system that exists today, or a dismantled system that no longer involves retailers checking IDs and ensuring only legal and regulated products are sold. Those are the only choices. If the legal market is abandoned, it will indeed be filled. We know cross border sales will occur, online sales will explode and the already-existent illicit market will thrive. The only question that remains is how is that unfortunate, unintended pie split up? If you believe any of this is hyperbole, think again. The Boston Convenience Store Owners Association, a partner organization of NECSEMA, has [video surveillance](#) of menthol street sales occurring. The CDC reports<sup>5</sup> *As cigarette prices*

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<sup>2</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm)

<sup>3</sup> [https://www.accessdata.fda.gov/scripts/oc/inspections/oc\\_insp\\_searching.cfm](https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm)

<sup>4</sup> Tax Burden On Tobacco, Volume 55 2020, Page 27 (Gross State Cigarette Taxes), Shipments to Retail Data (FY2020)

<sup>5</sup> <https://www.cdc.gov/prc/study-findings/research-briefs/internet-cigarette-vendors-study.htm>

increased over the past decade at retail stores, smokers began purchasing cigarettes online... Online cigarette sales threaten to undermine success in decreasing the prevalence of tobacco use in the United States. And, New Hampshire is the “top export state for cigarettes in the country”<sup>6</sup>, a situation Maine must consider. The notion that adults, and unfortunately youth, will be anything more than inconvenienced with a flavor ban is, plainly, irrational. Policy Mistake #3.

### **Impact to State Revenue and Small Business**

Maine stands to lose over \$42,000,000 in excise and sales tax revenue. Not accounted for in this figure is sales tax losses for non-tobacco related sales, referred to as the market basket.

Maine would be wise to learn from the “Massachusetts Mistake”. Effective June 1, 2020, it became illegal to sell flavored tobacco including ENDS in the Commonwealth. Since then, the state has lost \$129,000,000 in cigarette sales and excise tax revenue and is on pace to lose \$155,00,000 this fiscal year. More bitter than the actual revenue loss, however, is that 76% of the packs not sold in the state since June have been accounted for by gains in New Hampshire and Rhode Island sales. Between June and March, Massachusetts sold 31,340,000 fewer excise tax stamps than it did over the same period in 2019 while New Hampshire and Rhode Island, over the same period, combined to sell 23,940,000 more stamps. It is very safe to assume most of the product once sold in Massachusetts by its licensed retailers came back into the state for personal consumption and illegal street sales. The result: All the same health effects with none of the offsetting revenue. Policy Mistake #4.

### **Federal Action**

Beyond the recent FDA announcement, the federal government and its agencies have taken significant action, particularly in the ENDS space, since late 2019. It cannot be overstated how important these actions are for LD 1550 context. Respectfully, if any member of the HHS committee is not keenly aware of each of these, the impact they have had and will continue to have on the category, in general, and specifically the products most favored by youth then it would be improper to vote in favor of LD 1550.

- November 13, 2018: Juul Labs, far and away the most popular ENDS product with youth, stops selling their mango, fruit, crème and cucumber flavored pods to retail stores and will make them available exclusively online<sup>7</sup>.
- December 24, 2019: The federal minimum legal sales age to purchase tobacco is raised to 21.
- December 21, 2020: Congress passed legislation extending the applicability of the Prevent All Cigarette Trafficking (“PACT”) Act to include ENDS. This legislation tightened loopholes for the online sale and delivery of ENDS by requiring “delivery sellers” of any tobacco product orders (including ENDS) placed online, by telephone or by other electronic transmission and delivered to be subject to a number of requirements including:
  - Sellers must register with the Attorney General of the US via the Bureau of ATF
  - Strict invoice reporting requirements
  - May not be shipped through US mail
  - May not weigh more than 10 pounds
  - The age of the purchaser must be verified through commercially available databases
  - Shipments must be signed for and by a person who presents proof of being of legal age
  - Packages must be labeled as containing tobacco
  - Must pay state taxes and comply with state law as if the sale occurred within the state including legal sales age.
- February 6, 2020: The federal government bans the sale of all flavored pod-based e-cigarettes with the exception of menthol and tobacco flavor. It is important to note that mint and menthol flavored ENDS

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<sup>6</sup> Mackinac Center for Public Policy: *Cigarette Taxes and Smuggling* (2016)

<sup>7</sup> <https://www.juullabs.com/juul-labs-action-plan/>

are not the same thing. This action by the federal government eliminates mint. The reason for leaving menthol and tobacco flavor is that it mirrors the available flavors of cigarettes allowing for an *off-ramp* from the more harmful combustible products to something, generally considered, less harmful.

- September 9, 2020: Deadline for companies to file a **Pre-Market Tobacco Application (PMTA)**<sup>8</sup> with the FDA. This is significant and requires explanation. Any new tobacco product marketed after February 15, 2007 must apply to receive an order by the FDA permitting the ongoing marketing of the product called a PMTA authorization. For the FDA to issue a PMTA marketing order, it must determine that the manufacturer has demonstrated to the agency that marketing of the new tobacco product would be appropriate for the protection of the public health. This is a very high bar and an incredibly expensive and resource intensive process. As a result, many of the thousands of products available last year did not submit an application. If an application was not received by the 9/9/20 deadline they were required to be removed from the market. Accepted product applications are allowed to remain up to a year after the deadline or until the FDA has rendered a decision – some uncertainty over this deadline exists.

Countless products are already no longer legally allowed to be sold because their manufacturers chose not to submit a PMTA, and countless more will not receive a PMTA authorization. Only those products deemed *appropriate for the protection of public health* will remain. Along the *spectrum of harm*, where combustible products are certainly on one side, PMTA authorized products would lean heavily toward the other end providing adults with an alternative to cigarettes. Flavors will likely play an important role in this alternative or off-ramp, but not if Maine chooses to ban all flavors and restricts access to choices. Look no further than the FDA leaving menthol-flavored ENDS out of their recent action. Policy Mistake #5.

### **National Opposition to Flavor Bans**

On February 7, 2020, a coalition of civil rights and civil liberties organizations sent a letter<sup>9</sup> to Chairman Pallone (Energy and Commerce Subcommittee on Health) opposing a blanket prohibition of menthol and other flavored products included in HR2339. The signatories include: the American Civil Liberties Union, Center for Popular Democracy, Drug Policy Alliance, Friends Committee on National Legislation, Law Enforcement Action Partnership, National Action Network, and the National Association of Criminal Defense Lawyers. They write, “... we have concerns that a blanket prohibition on menthol and other flavored tobacco products, which will apply to adults, will (1) disproportionately impact people and communities of color; (s) trigger criminal penalties, prioritizing criminalization over public health and harm reduction; and (3) instigate unconstitutional policing and other negative interactions with local law enforcement.”

NECSEMA does not claim to be an expert on law enforcement or racial matters, rather we share this letter to provide additional information for the Committee to consider within the context of unintended consequences.

### **Impact to Retailers**

Convenience stores are in every community across the state. Most are family-owned business and provide thousands of jobs to neighborhood folk. According to the National Association of Convenience Stores (NACS), convenience stores hold the largest share of the cigarette market at 89.3%<sup>10</sup>, and cigarette sales represent 31% of in-store sales, nationally. As stated earlier, menthol cigarettes represent 41% of the legal cigarette market making LD 1550 a direct assault on convenience stores due to its disproportionate impact on our class of retail trade. Once again, other more practical options exist without harming so many local businesses and related jobs.

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<sup>8</sup> U.S. Food and Drug Administration, “Premarket Tobacco Product Applications,” <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/premarket-tobacco-product-applications>

<sup>9</sup> <https://www.aclu.org/letter/coalition-letter-criminal-justice-concerns-hr-2339-reversing-youth-tobacco-epidemic-act>

<sup>10</sup> NACS State of the Industry 2018

Since June 2020, NECSEMA has continually surveyed member stores in Massachusetts, New Hampshire and Rhode Island to assess the impact of the flavor ban. Our statewide survey of MA retailers shows the loss of flavored tobacco has meant an in-store sales loss of 10%. During the same period, inside stores sales of our surveyed members in New Hampshire and Rhode Island have increased 95% and 15%, respectively.

### **Suggestions**

We have enumerated a number of policy flaws and anticipated negative consequences. Following are what we consider some practical alternatives to build on existing federal and state actions already in place that will not cost the state money, dismantle the existing legal framework, inconvenience or irritate our adult customers, nor damage our businesses:

1. Work within the existing regulated and enforced framework
2. Strengthen statewide purchase, use and possession laws for minor who knowingly break the law;
3. Strengthen laws to hold enabling adults accountable;
4. Continue to spend appropriately in education and cessation programs.
5. Consider closing federal loopholes for flavored disposable ENDS products.

Thank you for your thoughtful consideration of these comments and suggestions.

Respectfully submitted,



Jonathan Shaer  
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