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Testimony of Jonathan Shaer

Executive Director, New England Convenience Store & Energy Marketers Association

Maine Legislature

Committee on Health and Human Services

LD 1693 - *An Act To Advance Health Equity, Improve the Well-being of All Maine People and Create a Health Trust*

Statement of Opposition

Chair Meyer, Chair Claxton and Members of the Committee,

The New England Convenience Store & Energy Marketers Association (NECSEMA) represents convenience store retailers throughout New England including the 1,000+ stores in Maine that employ over 16,000 people and contribute billions to the state's economy.

NECSEMA supports Part A of LD 1693 which establishes the Trust for a Healthy Maine. The Trust will collect and distribute tobacco settlement and other sourced funds for the purpose of tobacco control and prevention. The American Lung Association already rates Maine better than most other states for education and cessation funding, but policies and/or programs that dedicate tobacco related funds and dedicates them to education and cessation is a policy we will generally always support. And now that the Committee on Taxation has passed an amended LD 1423, the Trust could receive even more revenue to do its good work.

NECSEMA does not have the expertise to offer insight on Part B or Part C, but both appear to be thoughtful recommendations.

NECSEMA opposes Part D which would ban the sale of all flavored tobacco products in Maine, and Part E which would double the tax on cigarettes from 100 mills to 200 mills.

Opposition to Part D – Flavored Tobacco Ban

A flavored tobacco ban is an ill-conceived policy recommendation. It is both unnecessary given intense federal activity over the past few years, and it has already been proven to fail most recently in Massachusetts. Following is a summary of the many reasons we oppose Part D.

All Flavored Products Are Not the Same

Proponents of a flavored tobacco ban claim they only seek to protect youth, however not all flavored tobacco products have youth appeal. In fact, it is only electronic nicotine delivery systems (ENDS), commonly referred to as vape, that have discernable youth appeal, but LD1693 would ban every flavored tobacco product including cigarettes, smokeless tobacco, pipe tobacco and cigars which are statistically adult-preferred products.

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According to the latest CDC's National Youth Tobacco Survey¹ which 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). Any conversation about youth initiation must begin by asking which products are used at the highest rates. The statistics above demonstrate ENDS, despite the precipitous drop and aggressive federal action limiting their availability, has a higher youth prevalence rate while other traditional tobacco products are clearly adult-preferred. Yet, LD 1693 treats them all the same under the banner of "flavor" despite there being no basis for this.

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%². 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 by checking identification. It is this legal framework that protects youth and ensures that only adults may purchase tobacco and ENDS.

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 \$42,000,000³ 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.

The demand for these products is massive and today they are sold through a legal system of licensees. But a ban would dismantle that system and eliminate retailers from checking IDs and ensuring only legal and regulated products are sold. If the legal market is abandoned, you can expect cross border and online sales will explode, and the already-existent illicit market will thrive. If you question the existence of street sales, please view this [video surveillance](#) by our partner organization, The Boston Convenience Store Owners Association. The notion that adults, and unfortunately youth, will be anything more than inconvenienced with a flavor ban is, plainly, irrational.

Impact to State Revenue and Small Business

Maine stands to lose over \$42,000,000 in excise and sales tax revenue. Not included 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. In the first twelve months, the state lost \$136,000,000 in cigarette sales and excise tax revenue. More bitter than the actual revenue loss, however, is that 87% of the packs not sold in the state since the start of the ban have been accounted for by gains in New Hampshire and Rhode Island sales. New Hampshire tax stamps sales rocketed by 22% and Rhode Island by 18%. Of the remaining 13%, 8% transitioned to non-flavored cigarettes with the majority of the 5% transitioning to non-flavored vape and other OTP. It is very safe to assume most of the product once sold in

¹ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm

² https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm

³ Tax Burden On Tobacco, Volume 55 2020, Page 27 (Gross State Cigarette Taxes), Shipments to Retail Data (FY2020)

Massachusetts by its licensed retailers came back into the state for personal consumption and illegal street sales.

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%⁴, and cigarette sales represent 31% of in-store sales, nationally. As stated earlier, menthol cigarettes represent 41% of the legal cigarette market making LD 1693 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.

Losing all these sales would be devastating. But it is unthinkable to allow this economic damage to occur to over 1,000 Maine businesses knowing the banned products will flow right back into the Maine as they have in Massachusetts.

Federal Action & the FDA's PMTA Process

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 relative to a flavor ban discussion. Respectfully, if any Committee member is not keenly aware of each of these, the impact they've 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 1693.

Most significantly is the FDA's Pre-Market Tobacco Application (PMTA) process. By law, every nicotine product marketed after February 15, 2007 must receive an order from the FDA permitting the ongoing marketing of the product. The order is called a PMTA authorization. For the FDA to issue a PMTA marketing order, the agency must determine that the manufacturer has demonstrated that marketing of the new tobacco product would be appropriate for the protection of the public health. The FDA's deadline was September 20, 2021. The FDA still has some products it needs to evaluate, but only a handful will be issued PMTA orders effectively decimating the category. In other words, the days of thousands of flavors and devices are over. Anyone using the term *unicorn tears* from this point forward is either uninformed or trying to pray on past emotions.

The bottom line is that flavored vape products – the source of youth initiation and nicotine use – will be off the market in the very near future except for a handful of products the FDA deems *appropriate to protect public health*. Incidentally, LD1693 would ban these products as well, highlighting the overly sweeping nature of this ill-conceived policy.

In addition to the PMTA process, the federal government has:

- Raised the minimum legal sales age to purchase tobacco to 21.
- Passed legislation extending the applicability of the Prevent All Cigarette Trafficking ("PACT") Act to include ENDS. In doing so, it tightened loopholes for the online sale and delivery of ENDS.
- Banned the sale of all flavored pod-based ENDS with the exception of menthol and tobacco flavor.

National Opposition to Flavor Bans

On February 7, 2020, a coalition of civil rights and civil liberties organizations sent a letter⁵ 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

⁴ NACS State of the Industry 2018

⁵ <https://www.aclu.org/letter/coalition-letter-criminal-justice-concerns-hr-2339-reversing-youth-tobacco-epidemic-act>

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.

Opposition to Part E – Tax Increase

Maine already collects sufficient excise taxes on tobacco to appropriately fund tobacco control; something the state is already doing suitably and effectively. According to a 2020 report of the Maine State Legislature Office of Fiscal and Program Review⁶, Maine collected over \$136 million in tobacco excise taxes, not including the nearly \$200,000 in license fees.

From a retail perspective, we are concerned that any increase to the existing tax rate will increase smuggling into Maine from New Hampshire. According to a paper by the Mackinac Center for Public Policy, a 100% increase in cigarette taxes in Maine would more than triple inbound smuggling rates. Also from Mackinac, worth noting is that New Hampshire is the top cigarette export state in the country. “For every 100 cigarettes consumed there, an additional 81 were smuggled out and likely ended up being consumed by smokers in neighboring states.” New Hampshire’s excise tax on a pack of cigarettes is only \$1.78 and there isn’t a sales tax.

The CDC reports⁷ *As cigarette prices 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”⁸, a situation Maine must consider.

It is a well-known fact, that tobacco taxes are among the most regressive. The people who use these products do so despite the high taxes they pay and would continue to do so regardless of the prices. All a doubling of the tax would do is impact those least able to shoulder the burden.

The state does not need the money. Tobacco control well-funded and could be even better funded if LD1423 is passed to assure the funds the state already receives from taxes and settlement are used appropriately. Retailers would lose, and the adults using these products would be saddled with the additional cost that will most likely end up in the general fund.

For all these reasons, we ask that you please oppose LD 1693.

Respectfully submitted,



Jonathan Shaer
Executive Director

⁶ <https://legislature.maine.gov/doc/4877>

⁷ <https://www.cdc.gov/prc/study-findings/research-briefs/internet-cigarette-vendors-study.htm>

⁸ Mackinac Center for Public Policy: *Cigarette Taxes and Smuggling (2016)*

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