

**BRIAN E. FROSH**  
Attorney General

**ELIZABETH HARRIS**  
Chief Deputy Attorney General

**CAROLYN QUATTROCKI**  
Deputy Attorney General



**STATE OF MARYLAND**  
**OFFICE OF THE ATTORNEY GENERAL**

FACSIMILE NO.

WRITER'S DIRECT DIAL NO.

(410) 576-6584

**TO:** The Honorable Delores G. Kelley, Chair, Senate Finance Committee

**FROM:** Brian E. Frosh, Attorney General

**DATE:** February 13, 2020

**RE:** SB 233 — Business Regulation—Flavored Tobacco Products—Prohibition (SUPPORT)

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The Office of the Attorney General urges a favorable report on Senate Bill 233.<sup>1</sup> This emergency bill prohibits the manufacture, shipment, import, or sale of flavored tobacco products within the State. A violation is a misdemeanor punishable by maximum penalties of a \$1,000 fine and/or 30 days imprisonment. Further, the manufacture, shipment, import, or sale of (or attempt to manufacture, ship, import, or sell) a flavored tobacco product into or within the State constitutes doing business without an appropriate license; thus, a violation is a misdemeanor subject to existing penalties.

Along with the new Tobacco 21 law restricting tobacco sales to individuals older than 21, SB 233 will aid Maryland's efforts to reduce smoking, particularly by deterring the explosive growth in the use of electronic smoking devices ("ESDs") among Maryland youth. SB 233 removes tempting flavored tobacco products so that kids do not begin to smoke in the first place because the product is less available overall. The flavor ban is part of a multi-pronged approach to help reduce youth interest and access to ESDs and other tobacco products, which in turn reduces the likelihood of them ever starting to use tobacco. Most adults who smoke or use tobacco started by age 21,<sup>2</sup> and recently there has been a marked increase in youth ESD use: the CDC found that in 2019, over 5 million U.S. middle and high school students used e-cigarettes in

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<sup>1</sup> While this letter highlights our support for SB 233, the Office of the Attorney General is generally supportive of every legislative attempt to ban flavored tobacco products. In short, the Office urges a favorable report on SB 233, SB 54 (Senators Lam and Kelley's bill) and SB 410 (Senators Kramer, Rosapepe, and West's bill).

<sup>2</sup> Maryland Dep't of Health, *Monitoring Changing Tobacco Use Behaviors: Maryland 2000-2016*, 25 (May 2018), available at <https://phpa.health.maryland.gov/ohpetup/Documents/2000%20-%202016%20Legislative%20Report%20Monitoring%20Changing%20Tobacco%20Use%20Behaviors.pdf> (among adult smokers, almost 90% reported that they smoked their first whole cigarette before the age of 21).



the past 30 days, including 10.5% of middle school students and 27.5% of high school students.<sup>3</sup> Similarly, the Maryland Department of Health's Youth Risk Behavior Survey found in 2018 that nearly 40% of high school students had tried electronic vapor devices.<sup>4</sup>

According to the U.S. Surgeon General, ESD use among youth and young adults is now an "epidemic."<sup>5</sup> Part of the rise of ESD use among youth and young adults is the attraction of flavor ESD products. There is a long history of the tobacco industry using flavored tobacco products to entice kids to use those products and to mask the taste and harshness of tobacco; studies show that youth are more likely than adults to choose flavored cigarettes and cigars.<sup>6</sup> Menthol cigarettes, which are mint-flavored and more difficult to quit than regular cigarettes,<sup>7</sup> are disproportionately used by young people and African-Americans: more than half of kids ages 12 to 17 and the majority of African-Americans who smoke use menthol cigarettes, in part because the tobacco industry has aggressively marketed menthol tobacco products to young people and African-Americans, especially in cities.<sup>8</sup>

SB 233 is aimed at the sellers of flavored tobacco products and has received criticism because it does not penalize users of prohibited tobacco products. SB 233 does not punish users of flavored products because youth purchase and possession laws are ineffective in reducing youth access to tobacco products. Moreover, any such enforcement may unfairly target certain groups, including minority groups. Other opponents argue that SB 233 is unnecessary because the problems it addresses merely require increased enforcement of existing tobacco laws. Maryland already has a robust enforcement regime: the State carries out field enforcement that tracks and stops cigarettes coming from out of state, as well as interdiction operations like the raids last November that resulted in the seizure of more than \$450,000 worth of tobacco products. The forthcoming Alcohol and Tobacco Commission will build on this work, bringing an even more focused approach to stopping illegal cigarette smuggling. Local agencies also take part in tobacco enforcement: they enforce in-store at the point of sale, conduct compliance checks using underage youth, and conduct checks with youth who use their own real

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<sup>3</sup> U.S. Centers for Disease Control & Prevention, *About Electronic Cigarettes (E-Cigarettes)* (Jan. 3, 2020), available at [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/about-e-cigarettes.html#e-cigarettes-help-adults-quit-cigarettes](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html#e-cigarettes-help-adults-quit-cigarettes).

<sup>4</sup> See Maryland Dep't of Health, *The Maryland Youth Risk Behavior Survey & Youth Tobacco Survey 2018-2019, Maryland High School Survey*, Detail Tables 49 (2019), available at <https://phpa.health.maryland.gov/ccdpc/Reports/Documents/2018%20YRBS%20YTS%20Reports/Maryland/2018MDM%20Detail%20Tables.pdf> (39.7% of high schoolers reported using an electronic vapor product).

<sup>5</sup> U.S. Dep't of Health & Human Servs., Office of the Surgeon General, *Surgeon General releases advisory on E-cigarette epidemic among youth* (Dec. 18, 2019) (citing data from the Centers for Disease Control and Prevention and the Food and Drug Administration's National Youth Tobacco Survey showing that the percentage of high school-age children reporting past 30-day use of e-cigarettes rose by more than 75% between 2017 and 2018, and use among middle school-age children also increased nearly 50 percent).

<sup>6</sup> U.S. Dep't of Health & Human Servs., Office of the Surgeon General, *E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General, 11* (2016), available at [https://www.cdc.gov/tobacco/data\\_statistics/sgr/e-cigarettes/pdfs/2016\\_sgr\\_entire\\_report\\_508.pdf](https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf).

<sup>7</sup> Truth Initiative, *Menthol cigarettes: Attitudes, beliefs and policies* (May 9, 2018), available at <https://truthinitiative.org/research-resources/traditional-tobacco-products/menthol-cigarettes-attitudes-beliefs-and-policies>.

<sup>8</sup> U.S. Centers for Disease Control & Prevention, Office on Smoking & Health, *Menthol and Cigarettes* (Aug. 1, 2019), available at [https://www.cdc.gov/tobacco/basic\\_information/tobacco\\_industry/menthol-cigarettes/index.html](https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html).

government-issued ID.<sup>9</sup> And while no single bill can solve the complex and widespread issue of youth smoking and black markets for tobacco products, SB 233 would be an important additional component of Maryland's efforts to reduce the availability of tempting tobacco products to youth.

Opponents of SB 233 claim that it will reduce tax revenues and result in job losses at wholesalers and retailers. It is true that SB 233 will reduce smoking tax revenue, which may cause both losses to wholesalers and retailers and a reduction in tax revenue from depressed sales of tobacco products. It is equally true that banning flavors, and the concomitant reduction in smoking, will prevent future significant expenditures on health care by reducing the number of smokers or e-cigarette users. Maryland already spends far in excess on tobacco-related health care than it receives from tobacco tax revenues: in 2019, Maryland took in approximately \$356 million in tobacco revenue<sup>10</sup>—a large amount of money that nevertheless pales in comparison to the \$2.7 billion that Maryland spends annually on medical costs to treat cancer and diseases caused by smoking.<sup>11</sup> Medical costs are and will be far greater than any amount of revenue the State takes in through tobacco revenue.

Finally, some of those against SB 233 claim that it will push ex-smokers who switched to flavored vaping back to smoking cigarettes or cigars, more harmful addictions. Notably, ESDs are not smoking cessation products, which require FDA approval after a review process. The FDA has never approved ESDs as an aid to quit smoking and they may, in fact, expose users to some of the same toxic chemicals found in combustible cigarette smoke.<sup>12</sup> Although many adults report using ESDs to try to quit smoking combustible cigarettes, most adult ESD users do not stop smoking cigarettes and instead continue to use both products.<sup>13</sup> A recent longitudinal study in the American Journal of Preventative Medicine found that not only were ESDs harmful on their own with effects independent of smoking conventional tobacco, dual users get the combined risk of ESDs and conventional cigarettes, leaving users worse off than tobacco smokers.<sup>14</sup>

SB 233 will be an important part of Maryland's fight against youth tobacco use by reducing the availability of flavored tobacco products that are designed to attract our youngest

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<sup>9</sup> Comptroller of Maryland, *Tobacco Enforcement: A Local Agency Perspective 2* (Jan. 27, 2020), available at <https://www.marylandtaxes.gov/forms/etaskforce/County-Depts-of-Health01-27-2020.pdf>.

<sup>10</sup> Comptroller of Maryland, *Alcohol & Tobacco Tax Annual Report Fiscal Year 2019*, at 23, available at [https://marylandtaxes.gov/forms/compliance\\_forms/AnnualReportFY2019.pdf](https://marylandtaxes.gov/forms/compliance_forms/AnnualReportFY2019.pdf) (reporting that Maryland received \$315,294,028 in cigarette tax revenue and \$41,320,813 in other tobacco products tax revenue).

<sup>11</sup> Maryland Dep't of Health, *Monitoring Changing Tobacco Use Behaviors: 2000-2016, Summary Report, 2*, available at [https://phpa.health.maryland.gov/ohpetup/Documents/2000-2016%20Summary%20Report\\_Monitoring%20Changing%20Tobacco%20Use%20Behaviors.pdf](https://phpa.health.maryland.gov/ohpetup/Documents/2000-2016%20Summary%20Report_Monitoring%20Changing%20Tobacco%20Use%20Behaviors.pdf).

<sup>12</sup> U.S. Food & Drug Admin., "Fact or Fiction: What to Know About Smoking Cessation and Medications," (Mar. 28, 2019), available at <https://www.fda.gov/consumers/consumer-updates/fact-or-fiction-what-know-about-smoking-cessation-and-medications> (stating that there are only three different types of medications approved by the FDA to help smokers quit—nicotine replacement therapies, bupropion, and varenicline).

<sup>13</sup> U.S. Centers for Disease Control & Prevention, *About Electronic Cigarettes (E-Cigarettes)* (Jan. 3, 2020), available at [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/about-e-cigarettes.html#e-cigarettes-help-adults-quit-cigarettes](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html#e-cigarettes-help-adults-quit-cigarettes).

<sup>14</sup> Bhatta & Glantz, "Association of E-Cigarette Use With Respiratory Disease Among Adults: A Longitudinal Analysis," *AM. J. PREVENTATIVE MED.*, vol. 58(2): 182–190 (Dec. 19, 2019), available at [https://www.ajpmonline.org/article/S0749-3797\(19\)30391-5/fulltext#articleInformation](https://www.ajpmonline.org/article/S0749-3797(19)30391-5/fulltext#articleInformation).

and most vulnerable citizens. Given the urgent health concerns associated with youth tobacco usage and the unique threat of flavored tobacco products, we ask that this Committee return a favorable report on SB 233.