

**Testimony in Support of House Bill 134 (2021)**

Business Regulation – Flavored Tobacco Products – Prohibition  
*Before the Economic Matters Committee: February 10, 2021*

House Bill 134, cross-filed with Senate Bill 177, is an emergency measure that prohibits the manufacturing, shipping, importing, or selling into or within the State any flavored tobacco product. Tobacco products subject to the flavor ban include, but are not limited to, cigarettes, cigars, pipe tobacco, chewing tobacco, snuff, electronic smoking devices (“ESDs”, commonly referred to as vapes), and any component or accessory used with ESDs or other tobacco products. A flavored tobacco product is defined as a tobacco product that contains any taste or smell that an ordinary consumer could distinguish from tobacco. Menthol flavored tobacco products, including menthol cigarettes, are included in the prohibition. A licensee who violates cigarette licensing, other tobacco product licensing, or ESD licensing requirements will be guilty of a misdemeanor and subject to a fine of \$1,000 or imprisonment not exceeding 30 days, or both. This bill does not prohibit any consumer from possessing or using flavored tobacco products. This public health measure, as part of a comprehensive tobacco prevention program, will reduce youth tobacco use initiation and overall tobacco consumption and increase tobacco use cessation.

**Current Federal and Maryland Law Regulating Flavored Tobacco Products**

Nothing in federal law limits Maryland from adopting flavored tobacco prohibitions as proposed in HB134. Indeed, the FDA has taken little action with respect to flavored tobacco products. The Family Smoking Prevention and Tobacco Control Act (“TCA”) that was signed into law in 2009 gives the U.S. Food and Drug Administration (“FDA”) the authority to regulate the manufacturing, marketing, and sale of cigarettes and smokeless tobacco.<sup>1</sup> The TCA explicitly prohibits the sale of flavored cigarettes, except menthol. Additionally, the TCA gave FDA authority to assert jurisdiction over all tobacco products. Effective August 2016, the FDA asserted jurisdiction over all products containing tobacco, including ESDs.<sup>2</sup> Because ESDs are

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<sup>1</sup> Campaign for Tobacco-Free Kids, *FDA Regulation of Tobacco Products: A Common Sense Law to Protect Kids and Save Lives*, Apr. 25, 2016, <https://www.tobaccofreekids.org/assets/factsheets/0352.pdf>

<sup>2</sup> 21 C.F.R. §§1100,1140,1143 (2016)

technically new tobacco products under the TCA, they should not be marketed until the FDA authorizes their sale under the Premarket Tobacco Application (PMTA) process. The FDA has exercised enforcement discretion, however, to allow ESDs to remain on the market pending review of PMTAs.<sup>3</sup> Nevertheless, with the increasing rates of vaping by youth, who almost exclusively use flavored ESDs in pod systems like JUUL, in early 2020, the FDA issued [guidance](#) announcing that it would begin taking enforcement actions against flavored, cartridge-based vape products, excepting menthol.<sup>4</sup> By this action, the FDA prohibited the sale of flavored vape products, such as JUUL and Sourin, while leaving on the market flavored vape liquids that are used in open tank systems and usually sold in vape shops.<sup>5</sup> Likely unintentionally, the FDA did not prohibit the sale of flavored disposable vape products, like Puff Bars.

To reinforce FDA's flavor ban and close the gap left by the FDA, the Comptroller of Maryland issued [Tobacco Bulletin 77](#) directing wholesalers and retailers to stop selling and marketing cartridge-based and disposable ESD products that contain flavors other than tobacco or menthol. The Bulletin is based on the Comptroller's regulatory authority over tobacco products in the Business Regulation Article as well as the fact that all vape products are technically on the market illegally because they have not been through the PMTA process with FDA.<sup>6</sup> In all, the FDA has prohibited the sale of flavored cartridge based ESDs excluding menthol and tobacco flavor, while the Maryland Comptroller has banned the sale of both flavored cartridge-based and disposable ESDs excluding menthol and tobacco flavor. This leaves other flavored tobacco products on the market including vape liquid for tank systems, smokeless tobacco, hookah, and cigars.

### **Other Jurisdictions and Flavored Tobacco Products**

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<sup>3</sup> 21 U.S.C.A § 387j (West)

<sup>4</sup> FDA, *Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised)\**, April 2020, <https://www.fda.gov/media/133880/download>.

<sup>5</sup> FDA, *FDA Finalizes Policy on Unauthorized Flavored Cartridge Cigarettes That Appeal to Children, Including Fruit and Mint*, Jan. 2, 2020, <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children>

<sup>6</sup> Comptroller of Maryland Bulletin 77, *Wholesalers and Retailers Must Cease All Sales and Marketing of Cartridge-Based and Disposable ESD Products Containing Flavors Other Than Tobacco or Menthol*, Feb. 10, 2020,

[https://content.govdelivery.com/attachments/MDCOMP/2020/02/10/file\\_attachments/1376534/Tobacco%20Bulletin%2077%20-%202002.10.2020%20-%20Flavored%20ESDs%20Unlawful.pdf](https://content.govdelivery.com/attachments/MDCOMP/2020/02/10/file_attachments/1376534/Tobacco%20Bulletin%2077%20-%202002.10.2020%20-%20Flavored%20ESDs%20Unlawful.pdf)

Maryland would not be the first state to impose comprehensive restrictions on the sale of flavored tobacco products. In 2019, Massachusetts restricted the sale of all flavored tobacco products and in 2020, California passed legislation, implementation pending referendum vote, prohibiting the sale of most flavored tobacco products including menthol cigarettes.<sup>7</sup> In addition to Massachusetts and California, three states, New Jersey, New York, and Rhode Island, have banned the sale of flavored ESDs.<sup>8</sup> Similarly, approximately 300 localities within the United States have passed laws restricting the sale of flavored tobacco products in various ways. Of those 300 localities, at least 110 localities have passed restrictions on the sale of menthol cigarettes in addition to other flavored tobacco products. For example, major cities like San Francisco, Chicago, Minneapolis, and Boston placed restrictions on the sale of menthol and other tobacco products.<sup>9</sup>

None of these laws have been struck down despite many challenges in court brought by the tobacco industry. In *U.S. Smokeless Tobacco Manufacturing Company, LLC v. City of New York*, the Court of Appeals for the Second Circuit held that a state or local government regulation imposing a sales prohibition on certain flavored tobacco products is not preempted by the TCA. The Court explained that a sales prohibition would only be preempted if the regulation constituted a product standard. A product standard “must require manufacturers to alter the construction, components, ingredients, additives constituents...and properties of their products.” The Court determined that the local flavored tobacco sales regulation was not a tobacco product standard and therefore was not preempted by the TCA or FDA regulations.<sup>10</sup>

Similarly, in *R.J. Reynolds Tobacco Co., et al., v. County of Los Angeles, et al.*, the tobacco manufacturers and sellers challenged a Los Angeles County ban on all flavored tobacco

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<sup>7</sup> Mass. Gen. Laws Ann. ch. 270, § 28 (West); California [Senate Bill 793](#) (2019-2020)(passed as Chapter 34, subject to [referendum](#)). See also Laura Bach, *Campaign for Tobacco-Free Kids, States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, Jan. 12, 2021, <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.

<sup>8</sup> N.J. Stat. Ann. § 2A:170-51.12 (West); N.Y. Pub. Health Law § 1399-mm-1 (McKinney); 216 R.I. Code R. 50-15-6.10

<sup>9</sup> S.F., Cal., Health Code § 19Q (2018); Chicago, Ill., Code §§ 4-64-100, 4-64-515(B) (2018); Minneapolis Code of Ord., Title 13, ch. 281, § 281.45; Boston Public Health Commission, Youth Access Regulation §§ 2(4), 3(E)(1)(2016). See Laura Bach, *Campaign for Tobacco-Free Kids, States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, Jan. 12, 2021, <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>

<sup>10</sup> *U.S. Smokeless Tobacco Manufacturing Company LLC v. City of New York*, 708 F.3d 428 (2nd Cir. 2013)

products including ESDs, smokeless products, and menthol, claiming that the ordinance was expressly and impliedly preempted by federal law.<sup>11</sup> The Court granted the defendants’ motion to dismiss concluding that “the Ordinance is not expressly preempted by [the TCA] because it does not regulate tobacco product standards and therefore is protected by the Preservation Clause, which permits states and localities to prohibit the sale of tobacco products even if those sales bans are stricter than federal law.”<sup>12</sup> Therefore, states and localities may enact sales bans on flavored tobacco products even if the bans are stricter than the TCA.

The takeaway from these cases is that Courts have held that the TCA specifically permits states and localities to implement sales restrictions on flavored tobacco products even if the restrictions are stricter than federal law. HB134, which is similar to the ordinances enacted in Los Angeles and New York City in that it prohibits the sale of all flavored tobacco products and components, is not preempted by federal law.

### **Conclusion**

If House Bill 134 is enacted and if a lawsuit is brought against the State of Maryland alleging that the prohibition on flavored tobacco products is preempted by federal law, Maryland courts will likely follow the precedent established by the courts in other jurisdictions and uphold the flavored tobacco ban codified in HB134.

*This testimony is submitted on behalf of the Public Health Law Clinic at the University of Maryland Carey School of Law and not by the School of Law, the University of Maryland, Baltimore, or the University of Maryland System.*

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<sup>11</sup> *R.J. Reynolds Tobacco Co., et al., v. County of Los Angeles, et al.*, 471 F. Supp. 3d 1010 (C.D. Cal. 2020)

<sup>12</sup> Order Granting Defendants’ Motion to Dismiss at 2, *R.J. Reynolds Tobacco Co., et al., v. County of Los Angeles, et al.* (No. 3), 2020 WL 5405668, at \*2