

**Maryland Flavored Tobacco Ban:
Unnecessary, Costly, and Dangerous to Public Health**

David R. Hancox, CIA, CGFM (Ret.)

I. Introduction

My name is David Hancox, and I am the former Director of State Audits in the Office of the New York State Comptroller. I also was Director of State Expenditures in that Office. In total, I had 37 years of service with the State of New York. I am a retired Certified Internal Auditor and Certified Government Financial Manager. I've also written and taught extensively on a wide array of issues focused on government performance auditing, which relates to an assessment of planning, implementing, and managing government programs and policies, such as that before you now.

At the outset, a few points are in order. First, R. J. Reynolds Tobacco Company has compensated me for my time in preparing these comments, but, second, the opinions expressed are my own. Third, I am not a user of tobacco products, I am not an advocate for using tobacco, and I believe smokers of traditional cigarettes should quit. That said, I would expect that my analytic approach is similar to what your Legislative Auditor, Mr. Gregory Hook, and his staff might do in preparing for a performance audit on the implementation of the proposed legislation before you now.

An outright ban on the sale of all flavored tobacco products will be detrimental to your State and its residents. The fiscal impact on the State budget in a time of unprecedented financial crisis is underestimated in the Committee's Fiscal and Policy note on this bill. In fact, data collected not from a Canadian province but from the first state in the United States to ban all flavored tobacco products indicate that the proposed favor ban will cost Maryland hundreds of millions of dollars in its first year alone. Additionally, the proposed ban also severely limits the

ability of Marylanders to access tobacco products determined by the FDA to protect public health. And, along with its predictable, harmful consequences arising from a ban on commonly used products, a flavored tobacco ban simply will not decrease smoking rates in Maryland.

The proposed flavor ban will:

- ***Cost the State millions of dollars in tax revenue***, much of which will flow to your neighboring states.
- ***Create job loss, lost wages, and damage small businesses across the State.***
- ***Fuel the State's illicit tobacco and vaping markets***, allowing criminal and even terrorist organizations to fill demand created when these otherwise legal products are outlawed in Maryland.
- ***Limit Marylanders' access to tobacco and nicotine products that the FDA has determined will further public health interests.***

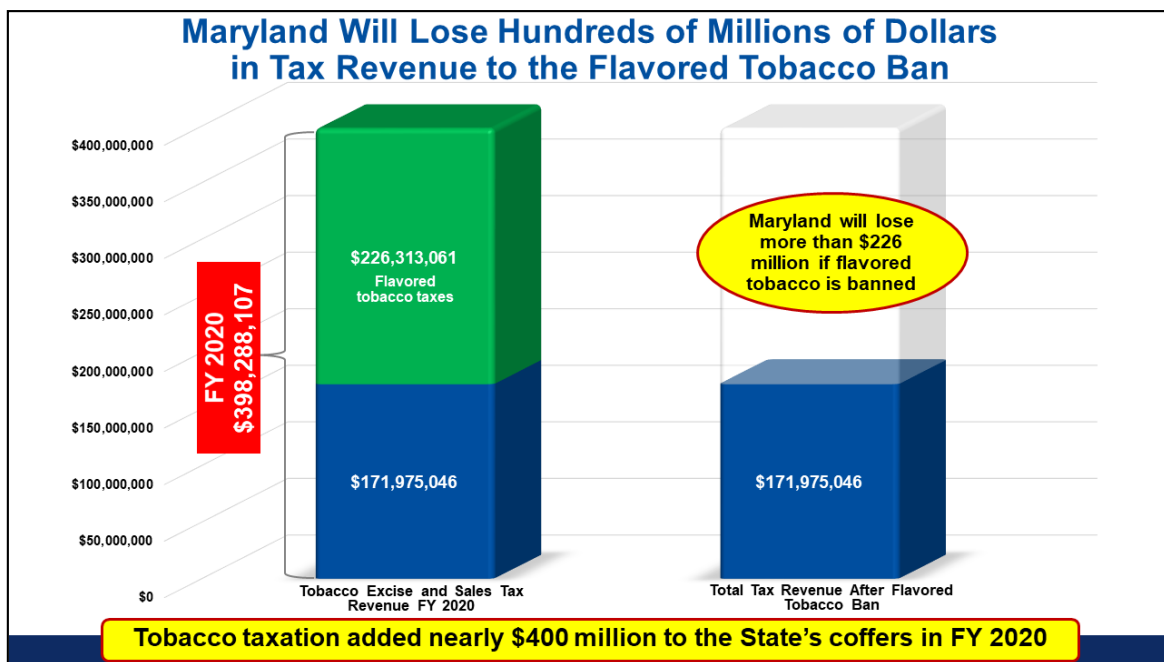
The proposed ban's hypothetical benefits do not outweigh the adverse consequences. This legislation puts the public at risk from a variety of consequences caused by bans and prohibitions.

II. The Proposed Ban Will Cost the State Hundreds of Millions of Dollars

With flavored tobacco accounting for 57 percent of tobacco sales in Maryland, the proposed ban will result in a loss of more than \$226 million in tobacco excise and sales taxes annually. The Committee's Fiscal and Policy Note on this bill estimates loss of tax revenue of around \$70 million annually for the next three years, based on the results of a flavored tobacco ban in Ontario, Canada.¹ A more accurate reflection of the tax revenue hit Maryland can expect comes from Massachusetts, which, in 2020, became the first state in the country to ban nearly all flavored tobacco products. The critical difference is this: menthol cigarette (the most widely

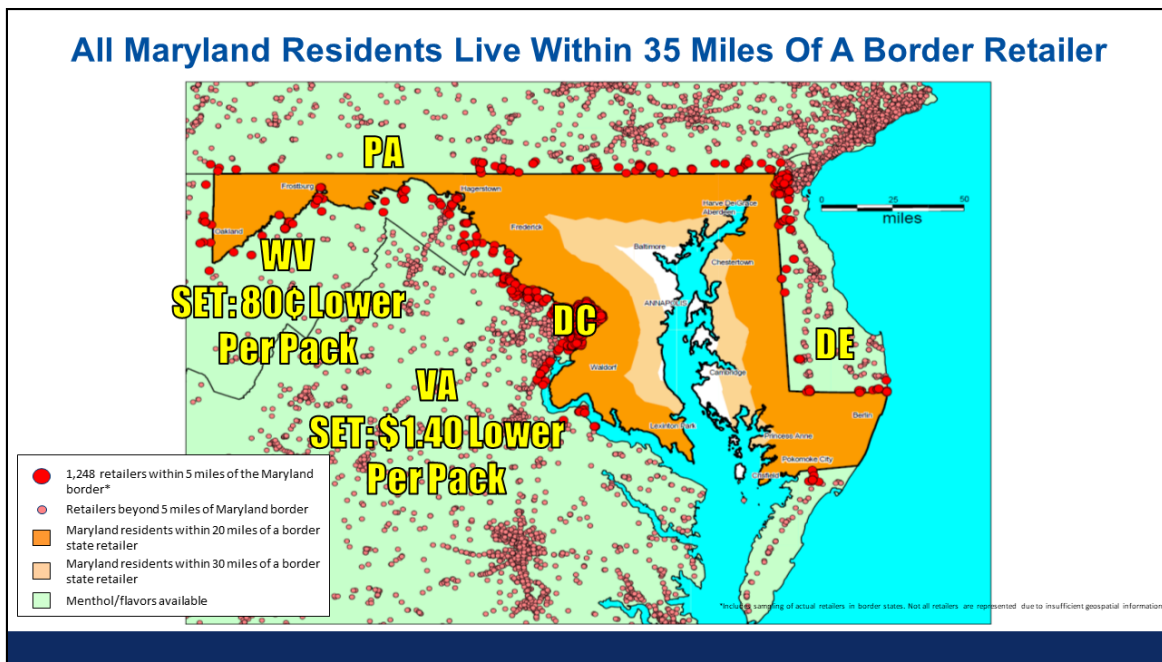
¹ Fiscal and Policy Note supporting Bill HB 134, page 5, Exhibit 1

sold flavored tobacco product) sales in Canada accounted for only 5 percent of the cigarette market; in Massachusetts, menthol cigarette sales accounted for about one-third of the market. In less than three months after banning the sale of nearly all flavored tobacco products (menthol cigarettes and all other tobacco products) Massachusetts lost out on more than \$25 million in sales and excise tax revenues. Nor do the data show that Massachusetts's flavor ban reduced smoking rates there. In your State, where flavored tobacco sales comprise nearly 60 percent of tobacco product sales, you stand to lose even more than Massachusetts. And an expectation that flavored tobacco users will switch to non-flavored products or quit using these products altogether is unreasonable and not supported by data from other jurisdictions that have implemented similar bans.

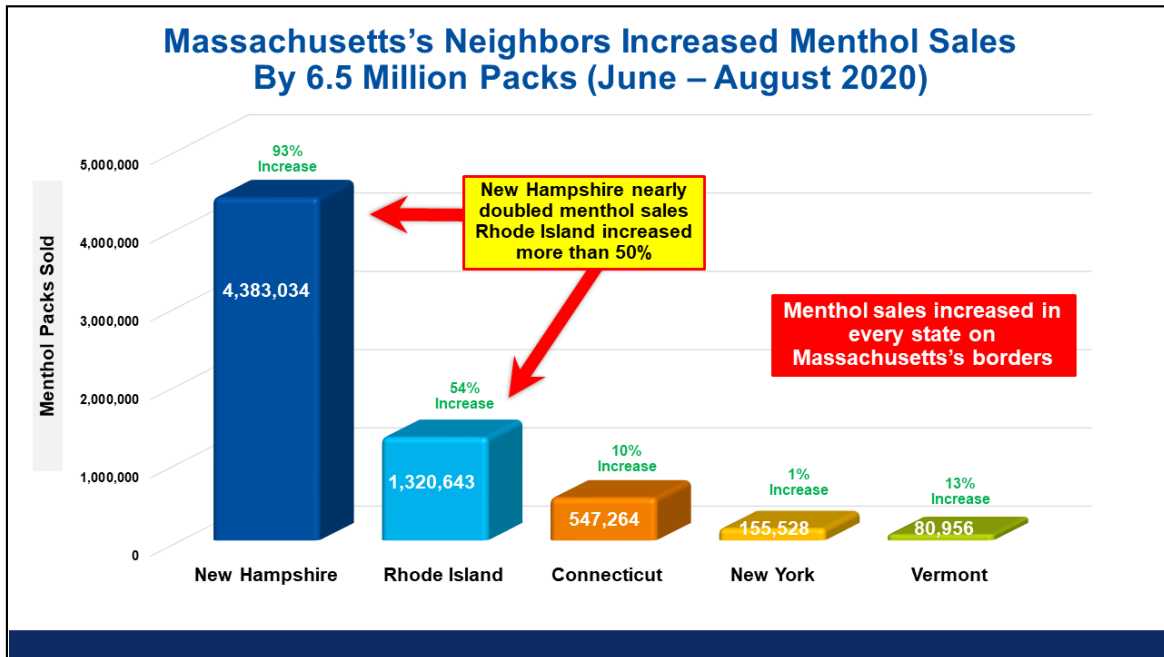


(a) A Flavored Tobacco Ban Will Force Sales to Neighboring States

No Maryland resident lives farther than thirty-five miles from a retailer that will continue to offer flavored tobacco products for sale should your State ban them. Current users of these products simply will cross those state lines to purchase the flavored products they prefer.



Massachusetts became the first state to ban flavored tobacco products statewide in 2020. Data collected over just the first three months of that ban revealed that menthol cigarette sales in Massachusetts's neighboring states consumed roughly 70 percent of the lost Massachusetts market, while the remaining 30 percent menthol cigarette sales converted to in-state, non-flavored sales. Massachusetts retailers lost out on the sales of nearly 10 million packs of menthol cigarettes from June to August of 2020, while sales of menthol cigarettes in its neighboring states increased more than 20 percent – by about 6.5 million packs total.

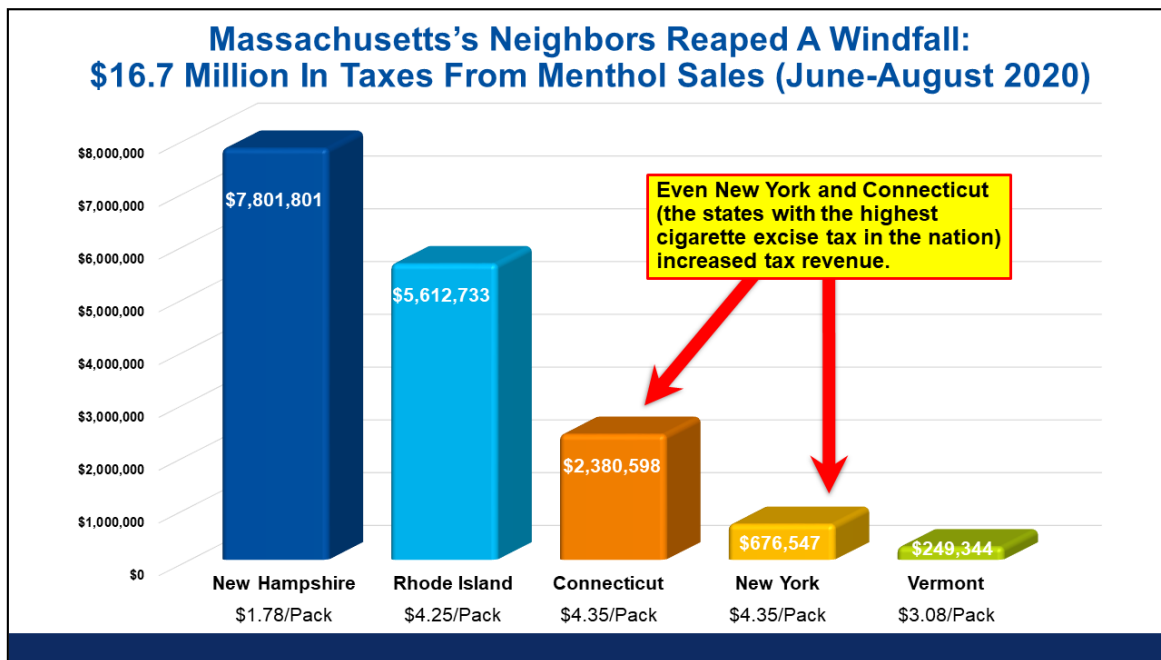


The graph above illustrates the most striking example. In New Hampshire (Massachusetts's neighboring state with the lowest cigarette excise tax), sales of menthol cigarettes nearly doubled over sales in the same period in 2019. In fact, sales of menthol cigarettes increased in *every* state on Massachusetts's borders – even those with significantly higher excise taxes on cigarettes, such as New York and Connecticut.

(b) Neighboring States Will Reap a Tax Revenue Windfall

As Maryland's coffers shrink as a result of the ban, your neighbors will benefit. Again, Massachusetts presents a cautionary tale. That state lost more than \$25 million in sales and excise tax revenue on menthol cigarette sales alone in less than three months after enactment of the ban. In the same period, Massachusetts's neighbors generated \$16.7 million in increased taxes on the sale of these product. In fact, at a November 2020 meeting of a New Hampshire legislative committee it was reported that that state's tobacco tax revenues were 22.2% ahead of

the prior year. It was not lost on New Hampshire's legislators that the increase was largely driven by Massachusetts's flavor ban.²



It is reasonably foreseeable that a ban in Maryland that is even more restrictive (Massachusetts still permits the sale of flavored tobacco and vape products for use at adults-only smoke shops) will exact a significant toll on the State's finances in an already historically tragic economic time. Maryland stands to lose nearly *\$19 million monthly* in sales and excise taxes on flavored tobacco products. Such a financial hit could devastate State programs and resident support, including educational reform, programs to combat domestic violence and protect its victims, and even smoking cessation. As a result of the economic devastation wrought by CoViD-19, Maryland ended fiscal year 2020 with a \$925 million reduction in tax revenue, and it is estimated that those revenues may be down as much as *\$2 billion* for the current fiscal year.³

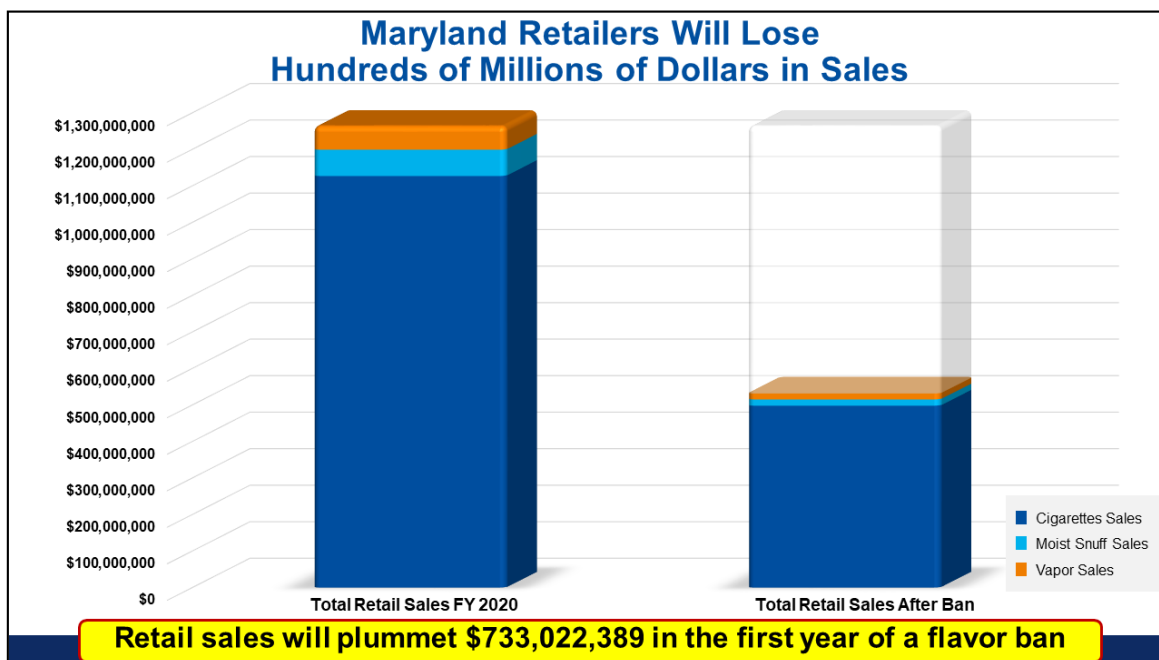
² http://www.gencourt.state.nh.us/LBA/Revenues/FY20-21/November_2020/DRA_FY21_Revenue_Estimate_HWM_11_17_20.pdf, at p. 5.

³ <https://www.npr.org/2020/08/03/895379435/maryland-says-it-needs-more-federal-aid-to-survive-economic-effects-of-covid-19>

The loss of tax revenue resulting from a ban on flavored tobacco products without objective evidence that the proposed ban will achieve its stated goals is not worth the economic hardship the State will face.

III. The Proposed Ban Will Create Job Loss, Lost Wages, and Damage Small Business

Not only will a ban on all flavored tobacco products negatively impact your State's budget, it also will create job losses, lost wages, and damage small businesses across Maryland. Tobacco retail sales in the State, which occur primarily in convenience stores, are over \$1.26 billion annually and more than 57 percent of those sales are flavored tobacco products. A ban on sales of flavored tobacco products will cost retailers in your State more than \$733 million. Additionally, tobacco product sales also drive significant purchases of other goods. Data presented at the 2013 annual meeting of the Tobacco Tax Section of the Federation of Tax Administrators suggest that for every \$8 spent on cigarettes, purchasers spent nearly \$7 on non-tobacco products⁴ – a nearly doubling of purchase dollars.



⁴ Presentation by Don Burke, Senior Vice President, Management Science Associates, Inc., at the Federation of Tax Administrators' Annual Meeting (Tobacco Tax Section), Albuquerque, New Mexico, Aug. 13, 2013.

Maryland's tobacco sales support nearly 6,300 tobacco retailer, wholesaler, and supplier jobs, with wages and compensation of nearly \$300 million annually, according to Orzechowski and Walker.⁵ They further estimate that retailers may lose \$130 million in gross profits to the proposed ban and that more than 3,000 jobs with a payroll of \$142 million may be at risk. In fact, adding sundry product sale losses, every convenience store in the state has nearly \$70,000 in gross profits at stake.⁶

What is certain is that the economic impact on Marylanders will be swift and negative, as it was in Massachusetts. The New England Convenience Store and Energy Marketers Association reported in early January 2021 that convenience store sales as a whole were down 10 percent in Massachusetts and up more than 90 percent in New Hampshire over the first six months of Massachusetts's flavor ban.⁷ Similarly, every convenience store in Maryland stands to lose tens of thousands of dollars in gross profits to a flavored tobacco ban costing job jobs, lost wages, and even, in the worst-case scenario, a complete shuttering of small businesses.

IV. The Proposed Ban Will Fuel Black Market Sales

While Maryland has a low cigarette smuggling rate today,⁸ a ban on products comprising nearly 60 percent of the total market opens the door wide to an already well-established illicit tobacco trade running straight through the State. State law enforcement is already tracking criminals smuggling cigarettes and other tobacco products: from 2015-2107 Maryland law enforcement seized nearly half a million cigarette packs and nearly 400,000 packages of other

⁵ Orzechowski & Walker, The Economic Impact of the Proposed Ban on Menthol Cigarettes and Flavored Tobacco Products in Maryland, at p. 1.

⁶ *Id.* at 5.

⁷ NECSEMA press release, 1/5/21.

⁸ <https://www.mackinac.org/smokes>: About 9 percent of cigarettes consumed in Maryland are smuggled into the State, avoiding Maryland excise and sales taxes.

tobacco products.⁹ And in 2018, two Ocean City men were charged with running a cigarette smuggling that was estimated to have brought 1.25 million packs of cigarettes into New York State.¹⁰

Furthermore, increasing illicit sales of banned tobacco products means increased opportunity for interactions with law enforcement. This issue is particularly acute in the African-American community, as studies show nearly 85 percent of adult, African-American smokers prefer menthol cigarettes.¹¹ Banning the sale of nearly two-thirds of this State’s cigarette market only boosts the existing illicit cigarette market without objective evidence of a material public health benefit.

And vaping products are not immune from black marketeers, either. As you know, in 2019, the country was confronted with a large number of persons who died or experienced severe

⁹ Comptroller of Maryland, Field Enforcement Division, “Enforcement Efforts, FY2017.” <https://www.marylandtaxes.gov/divisions/fed/index.php>

¹⁰ U.S. Immigration and Customs Enforcement, “Maryland Brothers Accused of Operating inter-state cigarette trafficking ring,” News Release, 18 October 2018.

¹¹ 2018 National Household Survey on Drug Use and Health, SAMHSA (based on 18+).

illnesses associated with vaping illicit THC products, primarily products adulterated with Vitamin E acetate.¹² That crisis demonstrated that for illegal vaping products there was already a robust market. The black markets for cigarettes and for illegal, unregulated, and dangerous vaping products are already thriving. A prohibition on the sale of these otherwise legal and regulated products will undoubtedly add fuel to these markets' dangerous fire.

V. The Proposed Ban Limits Access to Products Determined by the FDA to Protect Public Health

An all-out ban on flavored tobacco products blindly forecloses Marylanders' access to tobacco products determined by the FDA to be "appropriate for the protection of public health."

¹³ Of the eight original tobacco products approved by the FDA for marketing as modified-risk tobacco products ("MRTP"), fully half are *flavored* (either mint or wintergreen) products.¹⁴

Along with modified-risk designation, the agency is currently assessing thousands of pre-market tobacco applications ("PMTA") for "new" tobacco products,¹⁵ including e-cigarette and other vapor products, many of which are flavored tobacco products. The MRTP and PMTA processes reflect the FDA's recognition that true, effective tobacco harm reduction requires making available tobacco products that are less risky to current tobacco users than traditional combustible cigarettes.¹⁶

¹² https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html

¹³ <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-marketing-orders>

¹⁴ <https://www.fda.gov/tobacco-products/advertising-and-promotion/modified-risk-tobacco-products>

¹⁵ <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-marketing-orders>

¹⁶ <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/mitch-zeller>

FDA's Regulatory Framework Acknowledges the Continuum of Risk

Tobacco harm reduction hinges on the availability of less risky products for smokers



Mitch Zeller
Director,
FDA Center for
Tobacco Products

"The Food and Drug Administration (FDA) is shaping its comprehensive tobacco regulation plan [. . .] based on this recognition that nicotine makes tobacco products addictive—but that nicotine does not directly cause smokers' cancer, lung disease, and heart disease."

"To truly protect the public, the FDA's approach must take into account the continuum of risk for nicotine-containing products."

"FDA will pursue a regulatory framework that focuses on nicotine and supports innovation to promote harm reduction. This framework will recognize that the core problem of nicotine lies not in the drug itself but in the risk associated with the delivery mechanism."

<https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/mitch-zeller>

An MRTP application must demonstrate to federal regulators that a specific product (not a class of products, such as "smokeless tobacco" or "e-cigarettes") "will or is expected to benefit the health of the population as a whole."¹⁷ And the PMTA process ensures that only those new and innovative tobacco-based products that are "appropriate for the protection of the public health" can be sold.¹⁸ In considering either an MRTP or PMTA, the FDA determines the risks and benefits of the product to the population as a whole, *including both users and non-users of tobacco products*.¹⁹ This includes an assessment not only of whether current tobacco users will be more likely to switch to the new product, but also whether the new product might entice non-tobacco users to begin using tobacco products (with the goal to ensure they will not).

In fact, retailers in your State currently sell several flavored tobacco products approved by the FDA for marketing as modified-risk tobacco products that would be removed from their shelves upon enactment of the proposed ban. In October 2019, the FDA granted Swedish Match

¹⁷ <https://www.fda.gov/tobacco-products/advertising-and-promotion/modified-risk-tobacco-products>

¹⁸ <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-marketing-orders>

¹⁹ *Id.*

USA, Inc., the very first MRTP approvals for eight of its snus products – fully half of them *flavored* snus products. These eight products became the first authorized by the FDA for marketing to consumers as tobacco products that present less risk than both traditional combustible cigarettes and traditional chewed or smokeless tobacco.²⁰

Alongside the MRTP process, the PMTA process is an effective, responsible way for tobacco product manufacturers to market innovative tobacco-based products that align with public health priorities. Incongruously, the proposed flavor ban would deny Maryland's current smokers the opportunity to purchase and even to switch to these products. Just as the FDA already has granted MRTP marketing status to some more traditional tobacco products, the likelihood is high that the agency will approve some of these innovative products for the same reason. Why would Maryland want to limit its residents' ability to purchase and use those products?

Without an exception for MRTP-approved and PMTA-approved products, the proposed flavor ban will halt in your State the marketing and sale of products determined to benefit public health. The result will be to make it difficult, if not impossible, to market and even to introduce these products to Marylanders who use traditional tobacco products today. Denying your State's adult tobacco product users the benefits of the FDA's consideration of the science on tobacco harm reduction simply is not in their best interests. This may be the most significant negative of the proposed ban on flavored tobacco products.

VI. Conclusion

History has taught that consumers resent and ultimately circumvent laws and regulations that restrict their ability to access goods they are accustomed to legally purchasing and using,

²⁰ <https://www.fda.gov/news-events/press-announcements/fda-grants-first-ever-modified-risk-orders-eight-smokeless-tobacco-products>

whether the government's intent is to improve public health or otherwise. High taxes, excessive regulations, and outright bans on goods generally and historically drive consumers to turn to alternative – not always legal – new sources to supply the goods they are accustomed to using. In Maryland, there is no evidence that the result of a flavored tobacco product ban will be any different from the history of the prohibition of other goods. And the proposed ban actively limits traditional tobacco product users from accessing innovative, alternative products the FDA has determined to be beneficial to public health as a whole.