

Written Testimony in Support of Senate Bill 259

Business Regulation – Flavored Tobacco Products – Prohibition
Before the Finance Committee: February 16, 2023

Introduction

Senate Bill 259 prohibits the sale and distribution of flavored tobacco products into or within Maryland. Flavored tobacco products include those with the smell or taste of menthol, and the ban applies to both traditional tobacco products, like cigarettes and chewing tobacco, and electronic smoking devices. A licensee who violates SB 259 is guilty of a misdemeanor, and subject to a fine up to \$1,000, imprisonment up to 30 days, or both.

The purpose of this testimony is to explain that: (1) Federal law does not restrict Maryland’s ability to adopt a flavored tobacco product ban because the Family Smoking Prevention and Tobacco Control Act (“TCA”) permits states to enact sales restrictions; (2) Maryland should not rely on the U.S. Food and Drug Administration (“FDA”) to adopt a timely, complete product flavored tobacco ban; and (3) Maryland counties are preempted from enacting their own laws to restrict the sale and distribution of flavored tobacco products due to the Court’s opinion in *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307 (2013), so counties must rely on this body to take action. I urge the Committee to support SB 259 for these reasons.

States are not preempted from adopting flavored tobacco product bans.

States have historically regulated tobacco through their police powers to protect the general welfare and safety of the public. When Congress passed the TCA in 2009, Congress preserved the states’ role in regulating tobacco by incorporating a three-clause preemption scheme: preservation, preemption, and savings. The preservation clause protects a state’s ability to enact laws that prohibit the sale and distribution of tobacco products. The savings clause reinforces the preservation clause, expressly exempting tobacco sale and distribution laws from federal regulation.

Laws that establish tobacco products standards, labeling, and manufacturing standards are preempted by the TCA and consequently fall within the FDA’s exclusive authority. Flavored tobacco product bans do not establish manufacturing, labeling, or product standards that are preempted under the TCA. Instead, flavored tobacco product bans are sales restrictions because they restrict whether or where a product may be sold in a state or county. By that definition, SB 259 is a sales restriction because it does not instruct manufacturers to change the character of a product. The bill only prohibits the sale of flavored tobacco products within Maryland.

Courts have upheld flavored tobacco product bans because they are sales restrictions protected under the TCA’s preservation and savings clause. In *U.S. Smokeless Tobacco Mfg. Co.*

LLC v. City of New York, the U.S. Court of Appeals for the Second Circuit upheld a New York City ordinance banning the sale of any flavored tobacco product (excluding menthol) except in tobacco bars because the ordinance restricts where the product can be sold but does not require the physical makeup of the tobacco products to be changed. Moreover, in *R.J. Reynolds v. Los Angeles County*, the U.S. Court of Appeals for the Ninth Circuit upheld a Los Angeles County ordinance banning the sale of any flavored tobacco product – including electronic smoking devices – because the ordinance prohibits the sale of the product within the county but does not require the nature of the product to change. These cases demonstrate that courts will uphold flavored tobacco bans under the TCA because they are sales restrictions.

SB 259 fills a gap in the FDA’s proposed regulation of flavored tobacco, and it enacts a sales restriction that localities in Maryland are unable to adopt.

The Committee should vote in favor of SB 259 because it is critical for the regulation of flavored tobacco products in Maryland. The FDA cannot be relied upon to comprehensively address menthol and other characterizing flavors because the proposed federal regulation of flavored tobacco products does not apply to electronic smoking devices. Moreover, localities throughout Maryland fear they are unable to adopt flavored tobacco product bans because of the *Altadis* case. SB 259 serves as the only means by which Marylanders can see a flavored tobacco ban come into fruition.

A. The FDA cannot be relied upon to comprehensively prohibit the use of menthol and other flavors in tobacco products.

Congress enacted the TCA to give the FDA the authority to regulate the manufacture, distribution, and marketing of tobacco products. It also prohibits the sale of flavored cigarettes, but the ban does not extend to menthol. In addition to the law’s substantive provisions, the TCA established the Tobacco Products Scientific Advisory Committee (“TPSAC”) to evaluate health and safety concerns relating to tobacco products. In 2011, the TPSAC found that menthol cigarettes have an adverse effect on public health. However, the FDA did not take timely action. Various public health groups filed a citizen’s petition in 2013 asking the FDA to prohibit menthol in cigarettes, yet the FDA did nothing.

In 2016, the FDA enacted the Deeming Rule which extends the Agency’s regulatory coverage to electronic smoking devices, cigars, and other tobacco products. The Deeming Rule does not include any flavored tobacco product restrictions.

Finally, in June of 2020, after taking no action on menthol or responding to the citizen’s petition, two leading public health groups sued the FDA for their inaction on addressing menthol in cigarettes. In 2021, the FDA informed the public health groups that it would respond to the citizen’s petition. The FDA responded in 2022, announcing that it would propose a new rule to ban menthol in cigarettes, and menthol and other characterizing flavors in cigars. However, the proposal fails to account for electronic smoking devices or other tobacco products under a flavor ban. The proposed rule will also not have legal effect for several years.

Maryland should not rely on the FDA's proposed rule because it fails to comprehensively restrict the sale of flavored tobacco and it make take years to become effective. SB 259 imposes a sales restriction upon electronic smoking devices and other tobacco products, closing a gap that would be left open by the FDA and ensuring that all forms of flavored tobacco are prohibited in Maryland.

B. The *Altadis* decision preemptes counties in Maryland from adopting their own flavored tobacco bans.

Counties in Maryland do not have their own flavored tobacco product bans because of the *Altadis* decision. In *Altadis*, the Maryland Supreme Court ruled a county ordinance banning the sale of unpackaged cigars was preempted by state law. The Court reasoned that, since the General Assembly had already passed extensive packaging and sale laws, the legislature did not intend to leave any authority to counties to regulate in this area.

It remains unclear whether the Court will extend the *Altadis* decision to preempt local laws relating to the sale and distribution of all tobacco products. Because of this uncertainty, many local jurisdictions have not adopted flavor bans out of fear of legal challenges. Thus, SB 259 is critical because jurisdictions that wish to ban flavored tobacco products must rely on the state to do so.

It is also important to note that Maryland would not be the first state to ban the sale of flavored tobacco products. Massachusetts banned the sale of any menthol and flavored tobacco product in 2020, while states like New York, New Jersey, and Rhode Island banned the sale of menthol and flavored electronic cigarettes in 2020. Over 300 local jurisdictions throughout the United States have adopted flavored tobacco bans, and Washington, D.C. recently prohibited the sale and distribution of flavored tobacco products and electronic smoking devices.

Conclusion

Federal law does not prevent Maryland from adopting a ban that prohibits the sale and distribution of menthol and flavored tobacco products. This is because SB 259 is a sales restriction not preempted by the TCA, and courts have routinely upheld flavored tobacco bans around the country. Because the law is not preempted, SB 259 serves as an opportunity for the General Assembly to prohibit the sale of flavored tobacco products excluded from the scope of the FDA's 2022 proposed rule. Additionally, the *Altadis* decision has prevented local jurisdictions in Maryland from adopting their own flavored tobacco bans and local jurisdictions must rely on the State to take action since they may not have the authority to do so. For these reasons, the Committee should vote in favor of SB 259.

This testimony is submitted by Ashleigh Pagano, student attorney, and Professor Kathi Hoke, 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.