



February 8, 2021

**Testimony of Jonathan Shaer**

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Connecticut General Assembly  
Public Health Committee

STATEMENT of OPPOSITION

***SB 326 – An Act Prohibiting the Sale of Flavored Cigarettes, Tobacco Products, Electronic Nicotine Delivery Systems and Vapor Products***

Chairwoman Daugherty Abrams, Chairman Steinberg and Members of the Committee,

The New England Convenience Store & Energy Marketers Association (NECSEMA) represents convenience stores and the business which supply them. NECSEMA members own, operate and/or supply the nearly 1,700 convenience stores in Connecticut which employ over 25,000 people and generate over \$6.5 billion in sales annually.

NECSEMA strongly encourages the Committee to oppose SB 326 on the basis it is an ill-conceived policy that is doomed to result in a public health, public safety and financial disaster for the state, the people it seeks to protect and nearly 2,000 businesses throughout the state. Simply put, it is a well-intended idea, but is a damaging, dangerous, consequence-riddled policy in reality.

**All Products Should Not be Treated the Same**

Reducing youth initiation to nicotine is a laudable goal we can all support, and there are a variety of practical approaches that can be employed – several of which I offer at the end of this letter. But a flavored tobacco ban is not one of them. To begin with, it is a mistake to evaluate all nicotine products through the lens of *flavors*. Doing so implies they all have the same youth appeal when, in fact, youth appeal for electronic nicotine delivery systems and e-vapor (collectively “ENDS”) is vastly different from that of cigarettes, smokeless and cigars. The latest CDC’s National Youth Tobacco Survey<sup>1</sup> 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). Nowhere outside big money-backed anti-tobacco advocates will you find prohibition as a suggested policy to reduce youth initiation or promote adult cessation. In fact, the CDC makes several recommendations<sup>2</sup> to reduce youth tobacco product use and product ban, including a flavor ban, is not among them.

Any conversation about youth initiation must include which products are used at the highest rates. The statistics above demonstrate ENDS, despite the precipitous drop in just a year and aggressive federal action, has a higher youth prevalence rate while other traditional tobacco products are clearly adult-preferred. Yet, SB 326, treats them all the same under the banner of flavor despite there being no basis for this. Policy mistake #1.

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<sup>1</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm)

<sup>2</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm)

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## **The Legal, Licensed, Regulated, Enforced and Taxed Framework**

Over the decades, Connecticut 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 over 90%<sup>3</sup>. 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 and checks IDs. It is this legal framework that protects youth and ensures that only adults may purchase tobacco and ENDS. Policy Mistake #2.

## **Market Demand**

During each of the past two years, over 75,000,000 cigarette excise tax stamps were sold in Connecticut representing almost \$830,000,000 in cigarette tax revenue. According to industry shipment information, 41% of cigarettes sold in Connecticut are menthol which means this one category is \$380,00,000 of the total; and at a \$4.35 excise tax rate, Connecticut collects approximately \$155,000,000 in tax revenue from the sale of menthol cigarettes alone. In fact, 2020 is pacing 3.5% ahead of 2019 equating to a little over \$160,00,000. In addition, nationally 60% of smokeless, 26% of premium cigars, 48% of large machined cigars (cigarillos), 41% of little cigars and 89% of snus are flavored<sup>4</sup>. When all other flavored tobacco products are counted along with the related sales tax revenue, collections will far exceed these numbers.

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 true recommendations of the CDC.

When there is demand, there is a market. Period. Irrefutable. The question the Public Health committee must ask itself is whether it wants that market to be the legal, licensed, regulated, enforced and taxed system that exists today, or a dismantled system that no longer involves retailers checking IDs and ensuring only legal and regulated products are sold. Those are the only choices. If Connecticut should ban all flavored tobacco products – a market worth over \$380,000,000 – it will be filled. We know cross border sales (including tribal land) will occur, online sales will explode and the already-existent illicit market will thrive. The only question that remains is how is that unfortunate, unintended pie split up? If you believe any of this is hyperbole, think again. The Boston Convenience Store Owners Association, a partner organization of NECSEMA, has [video surveillance](#) of menthol street sales occurring. The CDC reports<sup>5</sup> *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”<sup>6</sup>, a situation Connecticut must contend with along with the two sovereign tribal lands within its borders – Foxwoods and Mohegan Sun. The notion that adults, and unfortunately youth, will be anything more than inconvenienced with a flavor ban is, plainly, irrational. Policy Mistake #3.

## **Impact to State Revenue and Small Business**

Connecticut stands to lose over \$380,00,000 million in cigarette revenue and over \$160,000,000 in excise tax revenue. Not accounted for in this figure is sales tax losses or other sales tax losses from related sales, referred to as the market basket.

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<sup>3</sup> [https://www.accessdata.fda.gov/scripts/oc/inspections/oc\\_insp\\_searching.cfm](https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm)

<sup>4</sup> National statistics. See “Trends in Sales of Flavored and Menthol Tobacco Products in the United States During 2011-2015,” <https://www.ncbi.nlm.nih.gov/pubmed/28575408>, May 3, 2018.

<sup>5</sup> <https://www.cdc.gov/prc/study-findings/research-briefs/internet-cigarette-vendors-study.htm>

<sup>6</sup> Mackinac Center for Public Policy: *Cigarette Taxes and Smuggling (2016)*

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Connecticut 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. Since then, the state has lost \$96,000,000 in cigarette sales and excise tax revenue and is on pace to lose \$144,00,000 this fiscal year. More bitter than the actual revenue loss, however, is that the number of packs not sold in within the state seem to have been more than accounted for by gains in New Hampshire and Rhode Island. Between June and December, Massachusetts sold 18,171,000 fewer excise tax stamps than it did over the same period in 2019, a reduction of 24%; but New Hampshire and Rhode Island, over the same period, combined to sell 21,372,000 more stamps, an increase of 44.7%. It is very safe to assume all the product once sold in Massachusetts by its licensed retailers came back into the state for personal consumption and illegal street sales. The result: All the same health effects with none of the offsetting revenue. Policy Mistake #4.

### **Federal Action**

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 for SB 326 context. Respectfully, if any member of the Public Health committee is not keenly aware of each of these, the impact they have 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 SB 326.

- November 13, 2018: Juul Labs, far and away the most popular ENDS product with youth, stops selling their mango, fruit, crème and cucumber flavored pods to retail stores and will make them available exclusively online<sup>7</sup>.
- December 24, 2019: The federal minimum legal sales age to purchase tobacco is raised to 21.
- December 21, 2020: Congress passed legislation extending the applicability of the Prevent All Cigarette Trafficking (“PACT”) Act to include ENDS. This legislation tightened loopholes for the online sale and delivery of ENDS by requiring “delivery sellers” of any tobacco product orders (including ENDS) placed online, by telephone or by other electronic transmission and delivered to be subject to a number of requirements including:
  - Sellers must register with the Attorney General of the US via the Bureau of ATF
  - Strict invoice reporting requirements
  - May not be shipped through US mail
  - May not weigh more than 10 pounds
  - The age of the purchaser must be verified through commercially available databases
  - Shipments must be signed for and by a person who presents proof of being of legal age
  - Packages must be labeled as containing tobacco
  - Must pay state taxes and comply with state law as if the sale occurred within the state including legal sales age.
- February 6, 2020: The federal government bans the sale of all flavored pod-based e-cigarettes with the exception of menthol and tobacco flavor. It is important to note that mint and menthol flavored ENDS are not the same thing. This action by the federal government eliminates mint. The reason for leaving menthol and tobacco flavor is that it mirrors the available flavors of cigarettes allowing for an *off-ramp* from the more harmful combustible products to something, generally considered, less harmful.
- September 9, 2020: Deadline for companies to file a **Pre-Market Tobacco Application (PMTA)**<sup>8</sup> with the FDA. This is significant and requires explanation. Any new tobacco product marketed after February 15, 2007 must apply to receive an order by the FDA permitting the ongoing marketing of the

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<sup>7</sup> <https://www.juullabs.com/juul-labs-action-plan/>

<sup>8</sup> U.S. Food and Drug Administration, “Premarket Tobacco Product Applications,” <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/premarket-tobacco-product-applications>

product called a PMTA authorization. For the FDA to issue a PMTA marketing order, it must determine that the manufacturer has demonstrated to the agency that marketing of the new tobacco product would be appropriate for the protection of the public health. This is a very high bar and an incredibly expensive and resource intensive process. As a result, many of the thousands of products available last year did not submit an application. If an application was not received by the 9/9/20 deadline they were required to be removed from the market. Accepted product applications are allowed to remain up to a year after the deadline or until the FDA has rendered a decision – some uncertainty over this deadline exists.

What does this mean? This should be considered the “great shakeout” of the ENDS industry. Countless products are already no longer legally allowed to be sold because their manufacturers chose not to submit a PMTA, and countless more will not receive a PMTA authorization. Only those products deemed *appropriate for the protection of public health* will remain. Along the *spectrum of harm*, where combustible products are certainly on one side, PMTA authorized products would lean heavily toward the other end providing adults with an alternative to cigarettes. Flavors will likely play an important role in this alternative or off-ramp, but not if Connecticut chooses to ban all flavors and restricts access to choices. Policy Mistake #5.

### **National Opposition to Flavor Bans**

On February 7, 2020, a coalition of civil rights and civil liberties organizations sent a letter<sup>9</sup> 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 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.

### **Impact to Retailers**

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%<sup>10</sup>, and cigarette sales represent 31% of in-store sales, nationally. As stated earlier, menthol cigarettes represent 41% of the legal cigarette market making SB 326 a direct assault on convenience stores due to its disproportionate impact on our class of retail trade. In more urban communities where flavored tobacco prevalence is likely higher than 41%, this policy would have disastrous consequences for these businesses and impact their ability to serve their communities with other products and services they depend on our stores for. Once again, other more practical options exist without harming so many local businesses and related jobs.

Since June 2020, NECSEMA has continually surveyed member stores in Massachusetts, New Hampshire and Rhode Island to assess the impact of the flavor ban. Our statewide survey of MA retailers shows the loss of flavored tobacco has meant an in-store sales loss of 10%. This number is likely closer to 25% in urban stores where cigarette sales are higher and menthol cigarettes are a larger share of total cigarette sales. During the same period, inside stores sales of our surveyed members in New Hampshire and Rhode Island have increased 95% and 15%, respectively.

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<sup>9</sup> <https://www.aclu.org/letter/coalition-letter-criminal-justice-concerns-hr-2339-reversing-youth-tobacco-epidemic-act>

<sup>10</sup> NACS State of the Industry 2018

## **Suggestions**

Clearly, we are opposed to SB 326 and have enumerated a number of policy flaws and anticipated negative consequences. Following are what we consider some practical alternatives to build on existing federal and state actions already in place that will not cost the state money, dismantle the existing legal framework, inconvenience or irritate our adult customers, nor damage our businesses:

1. Work within the existing regulated and enforced framework
2. Strengthen statewide purchase, use and possession laws for minor who knowingly break the law;
3. Strengthen laws to hold enabling adults accountable;
4. Introduce legislation requiring a reasonable percentage of the hundreds of millions in excise and sales tobacco tax revenue is allocated toward cessation and education programs. Currently the state contributes \$0.00.
5. Consider closing federal loopholes for flavored disposable ENDS products.

Thank you for your thoughtful consideration of these comments and suggestions.

Respectfully submitted,



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