

## **ILLEGAL TOBACCO TASK FORCE**

### **Public Meeting #61 Minutes**

**Meeting Date:** Tuesday, September 24, 2024

**Meeting Time:** 1:00 pm

**Meeting Location:** Via Zoom, dial (646) 558-8656, Meeting ID# 870 0388 0446, Passcode 375393

**Board Attendance:** John Hayes (DOR), Brian Connors (MSP), Jackie Doane (DPH), Molly Butler (DPH), John Melander (EOPSS), Dan O'Neil (State Treasurer/Lottery), and Nicholas Ogden (AGO).

**Public Attendance:** 25 attendees

#### **Call to Order:**

- Mr. Hayes called the meeting to order at 1:05 PM. Mr. Hayes informed all participants that this meeting will not be recorded by Zoom and that Cole Doherty-Crestin will take notes to complete the minutes, which will be posted to the Task Force website.

#### **Opening Remarks:**

- Mr. Hayes thanked everyone for attending and Task Force members introduced themselves. Mr. Hayes indicated the purpose of today's meeting is to discuss recent trends regarding nicotine pouches and ENDS disposal.

#### **Approval of Minutes from Meeting #60 on September 24, 2024:**

- Cole Doherty-Crestin emailed a copy of the minutes for Meeting #60 to Task Force members prior to this meeting. Mr. Hayes asked members if there were any recommended edits to be made and hearing none, he asked for a motion to approve. Lt Col Brian Connors and Dan O'Neil approved the motion. Mr. Hayes stated that with no objection, the minutes were approved and will be posted to the Task Force website.

#### **Recent Trends RE Nicotine Pouches:**

- Mr. Hayes continued the discussion regarding Nicotine pouches. The Task Force briefly discussed the rise in popularity of this product during the last meeting and the fact that nicotine pouches are not taxed as the nicotine is not derived from tobacco unlike the similar pouches from smokeless tobacco products. However, the products must adhere to the state flavor ban so flavored nicotine pouches can't be sold at retail stores in the Commonwealth. Mr. Hayes re-introduced Jackie Doane from the Department of Public Health who serves as the Tobacco Cessation & Prevention Program Director. Jackie Doane provided a brief of an advisory on nicotine pouches. The advisory is attached at the end of this document. Mr. Hayes thanked Jackie and asked whether members of the board had any questions. Members of the board discussed whether other states tax nicotine pouches. Members agreed it would be worthwhile to reach out to those states to inquire about the regulations impact on use and revenue. No comments other comments were made by members. Mr. Hayes reminded attendees that the Task Force is asking for the public to comment on this question about the possible regulation of nicotine pouches by providing written testimony for discussion during the next meeting.

## **ENDS Disposal**

- Summary of environmental and legal challenges: Mr. Hayes reminded members that liquid nicotine is classified as an acutely hazardous substance and therefore regulated by the EPA and MA DEP. The regulation does not apply to consumers but does apply to government agencies, schools, and businesses. Therefore, those entities cannot just throw any spent or unused ENDS products in the trash. The products must be disposed of by a licensed HAZMAT contractor and the cost is significant (~20K per barrel). Last meeting, the Task Force highlighted an option for funding the disposal of the products being considered by the Nebraska and Nevada legislatures – namely charging the unlawful possessor the cost of the disposal. The Nevada bill utilized a civil penalty that covered the cost of the disposal and then provided that the civil penalty would be earmarked for reimbursement of the disposal costs. The Nebraska bill didn't address the mechanism of the payment. Members agreed it would be worthwhile discuss with entities, schools, boards, municipalities the regulations impact on revenue.

## **Recent Trends RE ENDS Enforcement**

- The Massachusetts State Police investigators assigned to the Illegal Tobacco Task Force recently uncovered a new trend in the counterfeit ENDS market – which is the false labeling of ENDS products as clear, when the products are in fact flavored. The products are marked as “clear,” but the boxes are highlighted with different colors which corresponds to the flavor contained in the products (for example, blue can be blueberry or blue raspberry, red can be strawberry, orange can be mango, green can be mint, etc.). These products are widely available in stores throughout the Commonwealth and in clear violation of the flavor. It is also an open question as to whether the products violate DOR tax laws if ENDS distributors are filing excise tax returns indicating the products are clear instead of flavored. The MSP and DOR are currently seeking the laboratory analysis of the products to prove that the products contain a flavor.

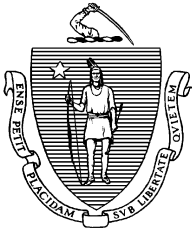
## **Member Agency Updates**

- AGO – MSA Settlement: Recently reached settlement with major tobacco companies pursuant to the Master Settlement Agreement. Recently resolved 7 years of those disputes and will obtain \$600 million in tax revenue.
- DOR – Tobacco Storage Facilities: The DOR is close to opening its first tobacco storage facility which will be located in eastern Massachusetts. The facility is scheduled to open on November 1<sup>st</sup>. The western storage facility should be opened in the beginning of the new year.
- DPH - Advisory RE Certain Non-menthol Cigarettes: Jackie Doane discussed a recent advisory issued by DPH. A copy is attached at the end of this document.

## **Closing Remarks**

- Mr. Hayes kindly thanked participants for their attendance and asked whether there was a motion to end the meeting. Dan O'Neil and Lt Col Brian Connors approved the motion. Mr. Hayes adjourned the meeting at 1:35 PM.





The Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Department of Public Health  
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ROBERT GOLDSTEIN, MD, PhD  
Commissioner

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**To:** Tobacco Retailers  
**From:** Commissioner Robert Goldstein, Massachusetts Department of Public Health  
**Date:** July 1, 2024  
**RE:** Implementation of 105 CMR 665.000 and Flavored Tobacco Product Return for Retail Establishments  
**CC:** Local Boards of Health

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On June 6, 2024, the Massachusetts Department of Public Health (the "Department") issued an advisory entitled "Implementation of 105 CMR 665.000 and Restriction on the Sale of Flavored Tobacco Products."<sup>1</sup> In that advisory, the Department determined that the following tobacco products are "flavored tobacco products" within the meaning of [Massachusetts General Law, Chapter 270, Section 28](#) and the Department's regulation [105 CMR 665.000](#):

1. Newport Non-Menthol Green;
2. Newport EXP Non-Menthol;
3. Camel Crush Non-Menthol Oasis;
4. Camel Crisp Non-Menthol Green Box; and
5. Maverick Non-Menthol.

In that same advisory the Department also required retail establishments that are not licensed smoking bars to remove these products from their premises by July 6, 2024.

The Department has been made aware that retail establishments that cannot legally sell flavored tobacco products may require more time to return said products to the manufacturer. In order to provide retailer establishments an opportunity to return products for reimbursement and remove the above referenced products from the premises of Massachusetts tobacco retailers the Department is extending its July 6, 2024 deadline to September 4, 2024 for retail establishments that can demonstrate the following:

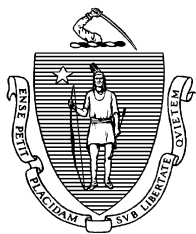
1. The retail establishment does not intend to sell the above reference flavored tobacco products for sale;

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<sup>1</sup> Dep't of Public Health, *Implementation of 105 CMR 665.000 and Restrictions on the Sale of Flavored Tobacco Products* (June 6, 2024), available at <https://www.mass.gov/doc/dph-flavor-guidance-letter-2-2024/download>.

2. The retail establishment has removed the above reference flavored tobacco products from all public areas of the premises;
3. The retail establishment is storing the above reference flavored tobacco products in a way that clearly identifies that the tobacco products cannot be offered for sale and are in the process of being returned; and
4. The retail establishment has initiated the process to return the above referenced flavored tobacco products.

Please note that the Department determined that the above referenced tobacco products are flavored tobacco products and in violation of Massachusetts General Law, Chapter 270, Section 28 and the Department's regulation 105 CMR 665.000. The intent of this advisory is to provide retailer establishments that meet the above referenced requirements additional time (until September 4, 2024) to return existing inventory of these products. Retail establishments that are not licensed smoking bars cannot offer for sale the above referenced flavor tobacco products or any flavored tobacco product.



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**To:** Tobacco Retailers

**From:** Commissioner Robert Goldstein, Massachusetts Department of Public Health

**Date:** June 6, 2024

**RE:** Implementation of 105 CMR 665.000 and Restriction on the Sale of Flavored Tobacco Products

**CC:** Local Boards of Health

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The Massachusetts Department of Public Health (the “Department”) understands that there is confusion from both tobacco retailers and local boards of health about whether tobacco products labeled as non-menthol tobacco products but marketed to menthol consumers constitute a flavored tobacco product within the meaning of [Massachusetts General Law, Chapter 270, Section 28](#) and the Department’s regulation [105 CMR 665.000](#).

To be considered a flavored tobacco product under Massachusetts Law a product must:

1. be a tobacco product; and
2. produce a characterizing flavor.

In considering whether a tobacco product is a flavored tobacco product, a person may consider multiple factors, including but not limited to,

- whether a constituent in the tobacco product produces a distinguishable taste or aroma;
- testimony or consumer reviews about the taste or aroma of a tobacco product;
- product packaging or labeling;
- public statements, claims, or indicia made by a manufacturer or an authorized agent of the manufacture
- scientific articles; and
- sworn testimony from persons familiar with tobacco industry or regulation.

The Massachusetts Department of Public Health (“Department”) has determined that the following tobacco products are “flavored tobacco products” within the meaning of [Massachusetts General Law, Chapter 270, Section 28](#) and the Department’s regulation [105 CMR 665.000](#):

1. Newport Non-Menthol Green;
2. Newport EXP Non-Menthol;
3. Camel Crush Non-Menthol Oasis;
4. Camel Crisp Non-Menthol Green Box; and
5. Maverick Non-Menthol.

Accordingly, any establishment that is not a licensed smoking bar as defined in [Massachusetts General Law, Chapter 270, Section 22](#) and 105 CMR 665.000 is prohibited from offering for sale or selling these products to persons in Massachusetts.

The Department bases its determination that Newport Non-Menthol Green, Newport EXP Non-Menthol, Camel Crush Non-Menthol Oasis, and Camel Crisp Non-Menthol Green Box are a flavored tobacco product on the following:

1. The above reference cigarettes contain tobacco.
2. The above referenced cigarettes contain n-Ethyl-p-Menthane-3-Carboxamide, a synthetic cooling agent commonly referred to as WS-3, or vanillin and ethyl vanillin that produce a taste that distinguishable from the taste of tobacco.
3. Consumer reviews of the above referenced cigarettes indicate that the products have a taste of menthol, mint, fruit, or vanilla when consumed. The taste of menthol, mint, fruit, or vanilla are tastes that are statutorily defined as a characterizing flavor.
4. The labeling and packaging of the above referenced cigarettes strongly resembles the labeling and packaging of menthol cigarettes.
5. Advertisements and promotional materials of the above referenced cigarettes use terms associated with flavor or taste.

The Department bases its determination that Maverick Non-Menthol is a flavored tobacco product on the following:

1. Maverick Non-Menthol contains tobacco.
2. Maverick Non-Menthol contains menthol in the tobacco filler. The taste of menthol is statutorily defined as a characterizing flavor.
3. The labeling and packaging of Maverick Non-Menthol strongly resembles the labeling and packaging of its traditional menthol cigarettes.

Based on the Department’s determination that the above referenced tobacco products are flavored tobacco products within the meaning of the law, the sale of these flavored tobacco products in retail establishments that are not licensed smoking bars is in violation of Massachusetts law M.G.L. c. 270, § 28(b) and 105 CMR 665.010(D). Therefore, retail establishments that are not licensed smoking bars should remove these products from their premises no later than 30 days after this release (July 6, 2024).