

Massachusetts Illegal Tobacco Task Force

June 3, 2020

David R. Hancox Testimony

I. Introduction

Thank you for offering me an opportunity to speak.

My name is David R. Hancox. 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. Also, I've 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.

My comments are focused on Questions 2 and 3 posed by the Task Force in its announcement of this hearing. At the outset, two quick disclaimers are in order. First, that the opinions expressed are my own and, second, that R.J. Reynolds Tobacco Company has compensated me for my time in preparing these remarks and appearing today. That said, I would expect that my analytic approach is similar to what your State Auditor, Ms. Suzanne Bump and her staff might do in preparing for a performance audit of the functions at issue in the questions presented by the Task Force and I would suggest that you seek her assistance, especially as it relates to my recommendation for a comprehensive risk assessment. Finally, I hope that in coming from New York State government, which has long-battled and suffered from an extremely large illicit tobacco market, my views will be of use to the Task Force.

Your Commonwealth is the first state in the country to ban retail sales of all flavored tobacco and vapor products. I believe the ramifications of this ban will be far-reaching and will

be extremely difficult to manage and will severely test Commonwealth resources if you are to stop the consumption of these products. There are several reasons I hold this admittedly negative assessment:

(1) the ban will impact approximately 509,000 adults who consume menthol cigarettes, flavored smokeless tobacco or vapor products in the Commonwealth¹ – that is more than the combined populations of Worcester and Springfield, except here they are spread throughout the Commonwealth so your response accordingly must be state-wide;

(2) existing data shows these menthol smokers are unlikely to merely switch to non-flavored products or quit; thus, you should assume that you will be confronting a substantial demand for these products despite the ban on retail sales;

(3) continued demand for these products will result in illicit trade and cross-border purchasing, particularly given the proximity of 90% of in-state consumers to their preferred products in adjacent states (including states with a significantly lower excise tax burden); and

(4) this will produce an array of ancillary impacts such as substantially increasing demands on limited government resources, large negative impacts on local businesses who previously sold these products, and a number of predictable adverse effects broadly referred to as “unintended consequences.”

I would now like to address two of the questions you have posed.

II. Question 2: What is the expected business impact of the Act and what increased enforcement mechanisms by the member agencies could address this impact?

Menthol cigarettes account for one-third of all cigarette sales in the Commonwealth, and you should not expect consumers to merely switch from menthol to non-menthol cigarettes or quit. San Francisco, in 2019, similarly banned flavored tobacco, and subsequent data demonstrate that virtually all the sales of menthol cigarettes shifted to adjacent counties. (See

Chart 1) As this task force may know, 90% of Massachusetts's population lives within 35 miles of another state where these products continue to be sold. (See Chart 2) In fact, more than 400 retailers sit on your borders poised to sell these products to Massachusetts residents – in some instances at a significantly lower cost due to lower excise tax rates. (This is also shown on Chart 2) Taken together, this suggests that the economic impact on Massachusetts retailers will be adverse.

The adverse consequences on Massachusetts and its retailers are reasonably predictable. First, a very large proportion of \$228 million in sales and excise taxes attributable to the sale of flavored tobacco products here will be lost to illicit and cross-border trade.² Second, it is likely that Commonwealth retailers will lose more than \$500 million in revenue.³ Tobacco products have long been the number one in-store sales item for the Commonwealth's convenience stores.⁴ And, those purchases also drive 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 products.⁵ The average Massachusetts convenience store sells an estimated \$144,000 in menthol cigarettes and other similarly-flavored tobacco products annually.⁶ Adding ancillary product losses, every convenience store in this Commonwealth stands to lose more than \$36,000 in gross profits.⁷

The only way to potentially stem these harms is to prevent meaningful access to illicit and cross-border products thus driving sales of legal tobacco products back to Massachusetts retailers.

To do this, you must dramatically expand and simultaneously rethink allocation and strategies for your enforcement resources. This effort will require: (1) robust, frequent, retailer inspections; (2) enhanced resources directed to interdiction of an illicit product; (3) training for

existing law enforcement personnel; and (4) determination of enforcement policies. I particularly wonder how one manages the risk that the Commonwealth will be criminalizing a substantial proportion of the adult population since possession of an unlicensed product is a crime. That alone raises troubling and complicated issues, as we saw in New York resulting from the tragic death of Eric Garner for selling loose menthol cigarettes in New York City.

III. Question 3: What data is available concerning black market sales of electronic nicotine delivery systems/vape products during the state's recent ban on vaping that could inform the Task Force's next steps?

Since the Commonwealth's vapor ban was only in effect for a few months (Sept. to early Dec. 2019), I have not seen hard data on the illicit vapor market during that brief period. However, we do know that there is a substantial existing black market for cigarettes in the Commonwealth (See Chart 3), and you can expect it will now include newly illicit flavored vapor products. Moreover, in 2019, the country was confronted with a large number of persons who died or experienced severe lung illnesses associated with vaping illicit THC products, primarily products blended with Vitamin E acetate.⁸ In short, this crisis demonstrates that for illegal vaping products there is already a robust market. These illnesses were widespread and very serious – affecting every state, including Massachusetts.⁹ Moreover, this illustrates a related problem, stemming the risks of adulterated vaping products: this crisis sapped significant resources from state health departments, as well as the FDA and CDC, who all had to shift resources to investigate the sources and ultimate cause of these illnesses and deaths.

By making a commonly used product unlawful, the Commonwealth invites consumers and sellers to adulterate the products with flavorings which can pose risks. Consequently, in addition to resources directed to illicit and cross-border trade for menthol cigarettes, you will need to prepare local health departments for complaints attributable to tainted products.

My recommendation would be that you need to undertake a comprehensive risk assessment of your existing enforcement practices to see how you can allocate your existing resources in the most effective manner recognizing the pandemic will result in fiscal stress to the Commonwealth and most likely limiting expansion of resources in the near-term.

Thank you for listening and I am happy to answer any questions you may have.

¹ CDC, Behavioral Risk Factor survey data (2017, 2018)(<https://www.cdc.gov/brfss/index.html>) and [industry shipment to retailer data \(2019\)](#).

² Tax Burden on Tobacco Vol. 54, 2019; B. Orzechowski, R. Walker.

³ National Association of Convenience Stores; Orzechowski and Walker, The Economic Impact of a Ban on Menthol-Flavored Cigarettes and Flavored Moist Snuff Tobacco in Massachusetts (2020).

⁴ Id.

⁵ 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.

⁶ Orzechowski and Walker, The Economic Impact of a Ban on Menthol-Flavored Cigarettes and Flavored Moist Snuff Tobacco on Massachusetts (2020).

⁷ Id. at pg. 3.

⁸ https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html

⁹ E.g., (1) <https://www.bostonglobe.com/metro/2019/12/05/six-with-lung-illness-linked-regulated-marijuana-vapes-state-says/bm4BXhhC7PJ6wNdiGNwDQK/story.html>; (2) <https://www.nbcnews.com/health/vaping/not-just-counterfeit-legal-the-vaping-products-linked-lung-illnesses-n1097011>; (3) <https://www.wbur.org/commonhealth/2019/09/17/vaping-lung-illness-massachusetts>; (4) <https://www.mass.gov/news/departments-of-public-health-reports-first-death-from-vaping-associated-lung-disease-to-us>.

Charts

Chart 1 - Summary re San Francisco Illicit Trade

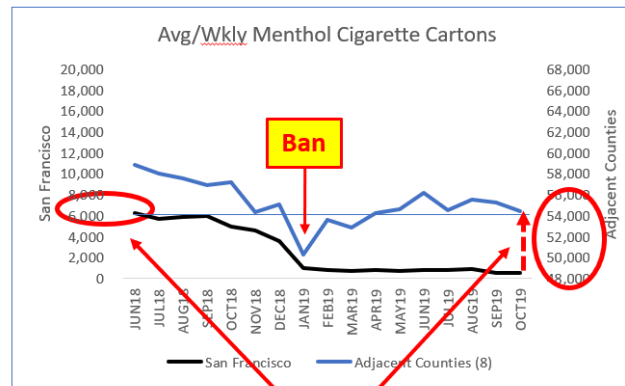
What Happens If Menthol Is Banned? The San Francisco Ban (2018)

San Francisco, CA



- Banned menthol cigarettes as of July 20, 2018.
- Lacking an enforcement strategy, Dept. of Public Health delayed until January 1, 2019.

Cigarette Sales: 2019



Sales data shows virtually all San Francisco menthol sales went to adjacent counties*

* Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, Sonoma counties.

Conclusions:

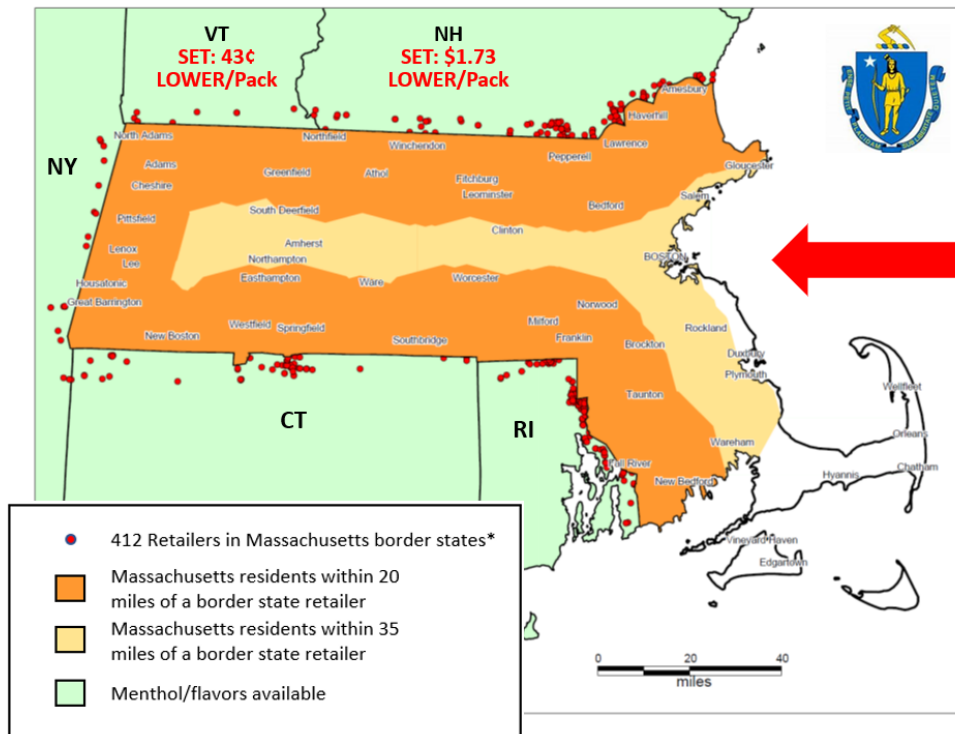
Following the San Francisco menthol ban, sales data confirms the following:

- Menthol sales moved to adjacent counties
- Only a small percentage of menthol shifted to non-menthol brands
- **Thus, the San Francisco menthol ban did NOT reduce consumer demand, it just shifted it to places where it was not banned**

Source: Sales to retail data.

Chart 2 - Massachusetts Map Re Proximity of Banned Tobacco Products

A Menthol Ban Will Drive Illicit Trade in Massachusetts



- Existing SET differences already driving significant cross-border purchases
 - Menthol/flavor ban will aggravate this – No adjacent state has similar ban
 - Proximity of population to state borders will significantly encourage cross-border purchases and illicit trade
- ❖ **90% of MA menthol sales within 35 miles of a border state retailer**

*Includes sampling of actual retailers in border states. Not all retailers are represented due to insufficient geospatial information.

Chart 3 -- Summary re MA Illicit Trade

