



June 3, 2020

Marikae Toye, Co-Chair, Illegal Tobacco Task Force
Massachusetts Department of Revenue
General Counsel's Office, Criminal Investigations Bureau
100 Cambridge St., 8th Floor
Boston, MA 02114

RE: Written Testimony of Christopher Banthin
Act Modernizing Tobacco Control, 2019 Mass. Acts 133

Dear Attorney Toye and other Members of the Illegal Tobacco Task Force:

Tobacco use remains the leading preventable cause of death in Massachusetts and the United States. The CDC reports that approximately 480 million Americans continue to die each year from cigarettes alone.¹ The alarming rise of high school age children in Massachusetts who vape (now 20%) tells us that tobacco and nicotine addiction continue to threaten a new generation.²

The Act Modernizing Tobacco Control [hereinafter "Act"] helps, in part, by restricting the sale of all flavored tobacco products and vapes, including menthol and mint flavors. Their sale will be allowed only in smoking bars and only for onsite consumption. The flavor restriction is perhaps the most effective component of the Act. Menthol and other flavorings make tobacco products more appealing to young people, masking the harshness of the smoke and nicotine.³ Over 80 percent of young people who use tobacco products report starting with a flavored product.⁴

My testimony focuses on the flavor restriction, as it relates to possible illegal trade. I draw much of my information from the experience of local public health officials in Massachusetts, some of whom already have similar flavor restrictions in place. We can learn from these local officials and seek to support them.

The first issue I would like to raise is that the Act restricts the sale, but not the purchase or possession of flavored tobacco products. This distinction is very important. We know that going after the addicted smoker for possessing flavored tobacco products does not work. Possession laws unfairly punish addicted individuals.

Responsibility for nicotine addiction should start with the tobacco industry. In 2006, the leading cigarette manufacturers were found liable under Racketeer Influenced and Corrupt Organizations Act (RICO) for targeting children in a case brought by the United States Department of Justice.⁵ Evidence revealed in that case found “Philip Morris [now Altria] has conducted extensive consumer research to help inform and shape marketing campaigns that appeal to their youngest potential smokers.” The Court concluded that all of the leading cigarette manufacturers “spent billions of dollars every year on their marketing activities in order to encourage young people to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive.” In February 2020, our Attorney General brought suit against JUUL, the leading nicotine vape manufacturer, also for marketing to teenagers.⁶

Regarding menthol cigarettes, the tobacco industry has targeted menthol marketing and sales at African American communities for decades. As a result, menthol smoking rates are highest among African Americans - 85 percent of all African-American smokers smoke menthol cigarettes, compared to 29 percent of Whites.⁷ The FDA concluded that African Americans are disproportionately burdened by the health harms of menthol cigarettes.⁸

I recommend that when considering how best to address any potential illegal trade in flavored tobacco products, allowances must be made to support, and not punish, individuals who have the disease of nicotine addiction. The best strategy for addiction is to treat it like the disease it is, and promote and provide cessation services. Cessation services are evidenced-based strategies that work. The Massachusetts Department of Public Health, MassHealth, and other health insurers promote and provide cessation services. The best gateway for these services is 1 800 QUITNOW.

The second issue I would like raise is to suggest the Task Force develop a referral telephone line or guidance for municipal officials who may come across evidence or incidents of illegal trade in flavored tobacco products. (Note that municipal boards of health will be the municipal agencies charged with enforcement of the Act. Their authority becomes effective on June 12, 2020.) Board of health agents and other municipal officials would benefit from guidance on what to do if they see something, and when they should refer possible illegal trade to the State Police. Municipal officials also might need to contact the Department of Revenue regarding compliance with licensing for smoking bars, the only place in Massachusetts where flavored tobacco products may now be sold.

A third issue I would like to raise is the reporting requirements found in the Department of Public Health’s implementing regulations for the Act.⁹ The regulations established a product reporting requirement for the Act’s flavor restriction. The reporting requirement was necessary because some retailers and distributors continued to put flavored tobacco products in retail stores in municipalities where they were prohibited. The tobacco industry helped create this problem by often keeping the names of actual product flavors off the packaging. The packaging showed other indicia of flavor, e.g. color, and brand names and descriptions that do not expressly acknowledge the flavoring.

Under the Regulation’s reporting requirement, every tobacco retailers will need written verification from the product manufacturer for every tobacco product they sell attesting that each product is not flavored. The retailers must keep the written verification updated and available for inspection. Under the Act, there should be no more confusion about which tobacco products are

flavored and which are not. This information might be relevant when determining whether someone is trafficking in flavored tobacco products. (This reporting requirement also applies to nicotine levels in vape products. High nicotine content vapes with more than 35 milligrams per milliliter may only be sold in adult-only retailers. All other retailers who sell vapes need written certification from the vape manufacturers that the vapes they sale have lower nicotine levels.) .

Please contact me with any questions. My telephone number is (508) 655-8400. My email is chrisbanthin@phaionline.org. Thank you.

Kindest regards,

/s/

Christopher N. Banthin

¹ Office of Smoking and Health, CDC (2020) available at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (visited on May 28, 2020).

² Youth use of e-cigarettes, MA Dep't Public Health (2020) available at <https://www.mass.gov/info-details/learn-about-youth-use-of-e-cigarettes-and-other-vaping-devices> (visited at June 1, 2020).

³ Public Health Law Center, Flavored Tobacco (2020) available at <https://publichealthlawcenter.org/topics/commercial-tobacco-control/sales-restrictions/flavored-products> (visited on May 28, 2020).

⁴ Id.

⁵ *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd* in part & vacated in part, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 3501 (2010).

⁶ JUUL Bought Ads Appearing on Cartoon Network and Other Youth Sites, Suit Claims, NY Times (Feb. 11, 2020) available at <https://www.nytimes.com/2020/02/12/health/juul-vaping-lawsuit.html> (visited on May 28, 2020).

⁷ Villanti, A., et al., "Changes in the prevalence and correlates of menthol cigarette use in the USA, 2004–2014," Tobacco Control, published online October 20, 2016.

⁸ TPSAC, Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations (July 21, 2011) available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf> (visited on June 1, 2020).

⁹ Minimum Standards for Retail Sale of Tobacco and Electronic Nicotine Delivery Systems, 105 CMR 665.00.