

**Maine’s Proposed Flavored Tobacco Ban (H.P. 1155):
Unnecessary, Costly, and Dangerous to Public Health**

David R. Hancox, CIA, CGFM (Ret.)

I. Introduction

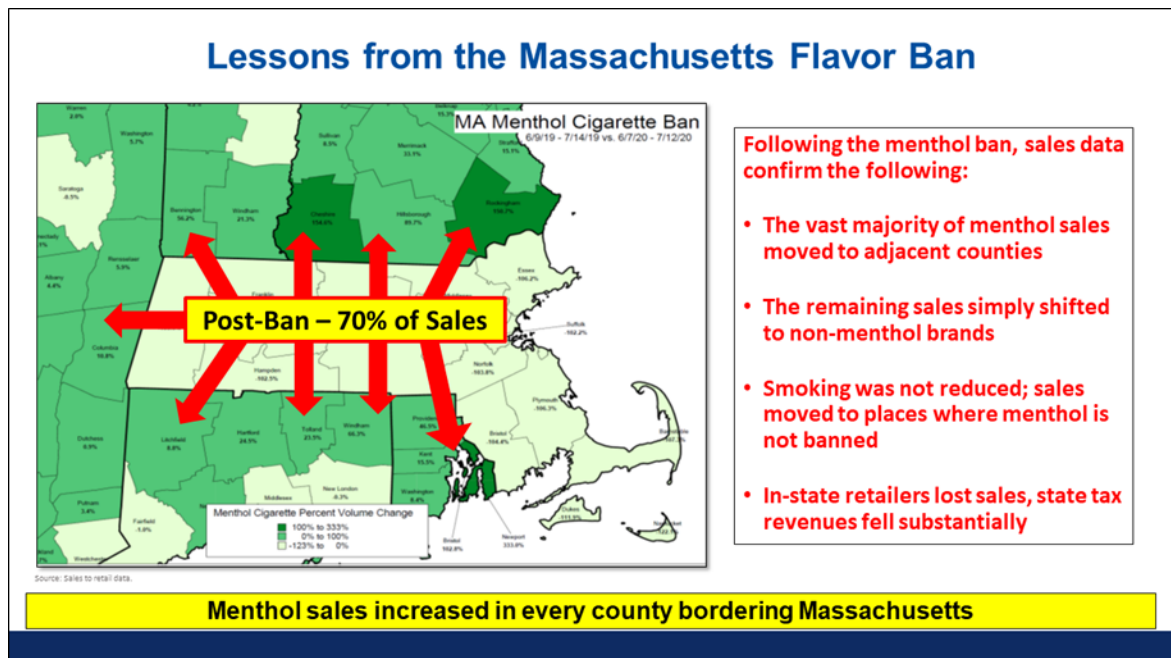
My name is David Hancox, and I am an expert in evaluating why and how public policies succeed or fail. A retired Certified Internal Auditor and Certified Government Financial Manager, I served the State of New York for 37 years, working in the Office of the New York State Comptroller as the Director of State Audits and also as the Director of State Expenditures. During my career, I've been focused on understanding why some government programs fail to meet their objectives and often undermine other government policies. I believe H.P. 1155, if enacted, will serve as a case study of how policies of prohibition don't account for human behavior or market realities, inevitably failing to meet their objectives while doing great damage to other significant government priorities.

At the outset, a few points are in order. First, RAI Services Company has compensated me for my time in preparing these comments, but second, the opinions expressed are my own. Third, I neither use nor advocate the use of tobacco products. I believe smokers of combustible cigarettes should quit, and failing that, they should switch to less risky forms of tobacco. And that leads me to the problem with H.P. 1155. It will not cause smokers to quit, but it will reduce their opportunities to switch to less risky products. It will also drive illicit trade in cigarettes, substantially undermining state revenues and small businesses at a time when both are under extraordinary pressure.

II. The Proposed Ban Will Not Decrease Smoking Rates

While banning menthol and other flavors in tobacco products may seem a direct route toward decreasing and preventing tobacco product consumption in Maine, the evidence from

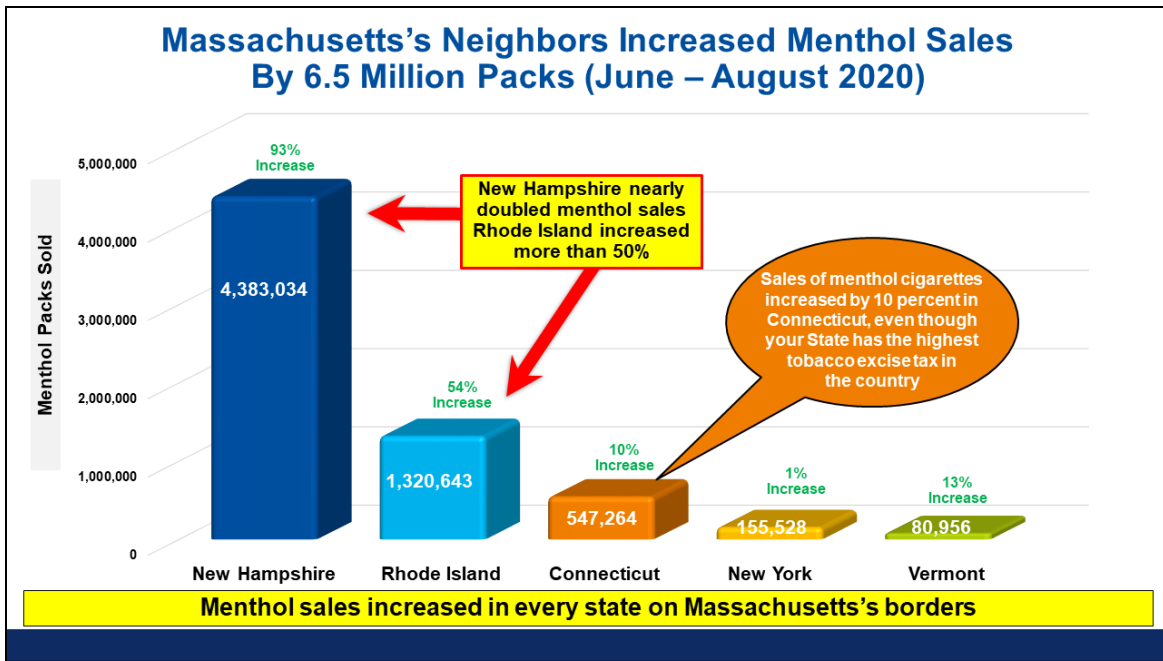
jurisdictions that tried it shows that prohibition won't take you where you want to go. Cigarettes cross jurisdictional borders, whether in the trucks of organized criminal traffickers or the trunks of citizens' cars. Most smokers will likely purchase illicit menthol cigarettes, others will switch to non-menthol, but smoking rates are not likely to drop. Massachusetts is the case-in-point.



In the first three months after Massachusetts implemented its flavor ban in June 2020, menthol cigarette sales in neighboring states, including Vermont, consumed roughly 70 percent of the lost Massachusetts menthol market.¹ The remaining 30 percent of the Commonwealth's menthol cigarette market bought non-menthol cigarettes at their local retailers. While Massachusetts retailers lost out on the sales of nearly 10 million packs of menthol cigarettes from June to August 2020, their sales of non-menthol cigarettes increased over the same period from the previous year by 3,027,195 packs or 31 percent of the total lost menthol sales. At the

¹ Management Science Associates, Inc. sales to retail data.

same time, sales of menthol cigarettes in Massachusetts’s neighboring states increased by about 6.5 million packs total.



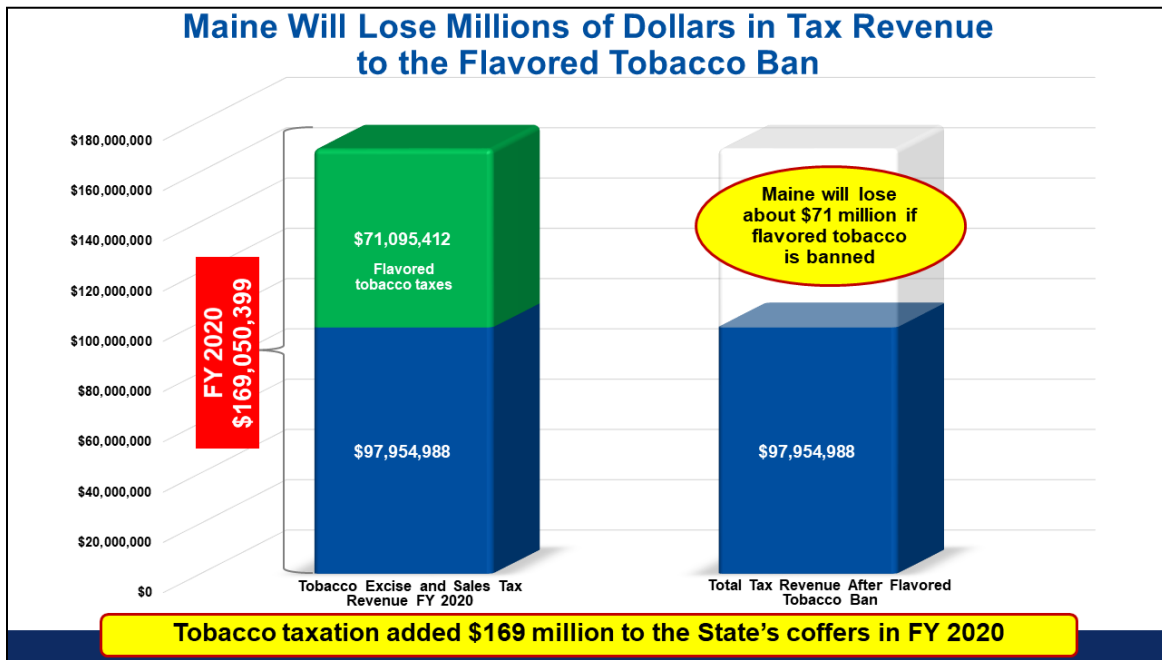
The graph above makes the point. In New Hampshire (Massachusetts’s neighboring state with the lowest cigarette excise tax and Vermont’s longest border state neighbor), sales of menthol cigarettes nearly doubled over sales in the same period in 2019. And in Rhode Island menthol sales increased more than 50 percent. In fact, sales of menthol cigarettes increased in *every* state (and every county) on Massachusetts’s borders – even those with some of the highest tobacco excise tax in the country.² Massachusetts’ ban on menthol cigarettes did not appear to have reduced smoking rates.

III. The Flavor Prohibition will cost Maine Millions of Dollars in Tax Revenue.

No pack of menthol cigarettes in Maine will bear a Maine tax stamp if this bill is enacted. Flavored tobacco products accounted for 43 percent of all tobacco product sales (\$229 million),

² Id.

generating more than \$71 million in sales and excise taxes in your State in 2020.³ A ban on the sale of flavored tobacco products will create a multimillion-dollar hole in Maine’s General Fund.



Maine’s neighboring states will be happy to collect the taxes on the menthol cigarettes smoked by Maine’s citizens. Again, Massachusetts presents a cautionary tale. During the first six –months following the effective date of its flavor ban, Massachusetts sold 17,656,000 fewer tax stamps than sold in the same period the prior year, while Rhode Island and New Hampshire respectively sold 2,847,000 and 16,053,000 more stamps than each had sold in the prior period.⁴ The New England Convenience Store and Energy Marketers Association, reports that Massachusetts lost more than \$73 million in combined sales and excise tax revenue on menthol cigarettes during the first six months after its ban.⁵

³ Management Science Associates, Inc. sale to store data.

⁴ New England Convenience Store and Energy Marketers Association. (January 5, 2021). *Massachusetts has lost nearly \$62 million in menthol cigarette tax revenue through the first six months of the flavor ban* [Press release]. http://www.necsema.net/uploads/1/2/2/9/122970598/menthol_press_release_january_2021_fn1.pdf. Accessed May 5, 2021.

⁵ Id.

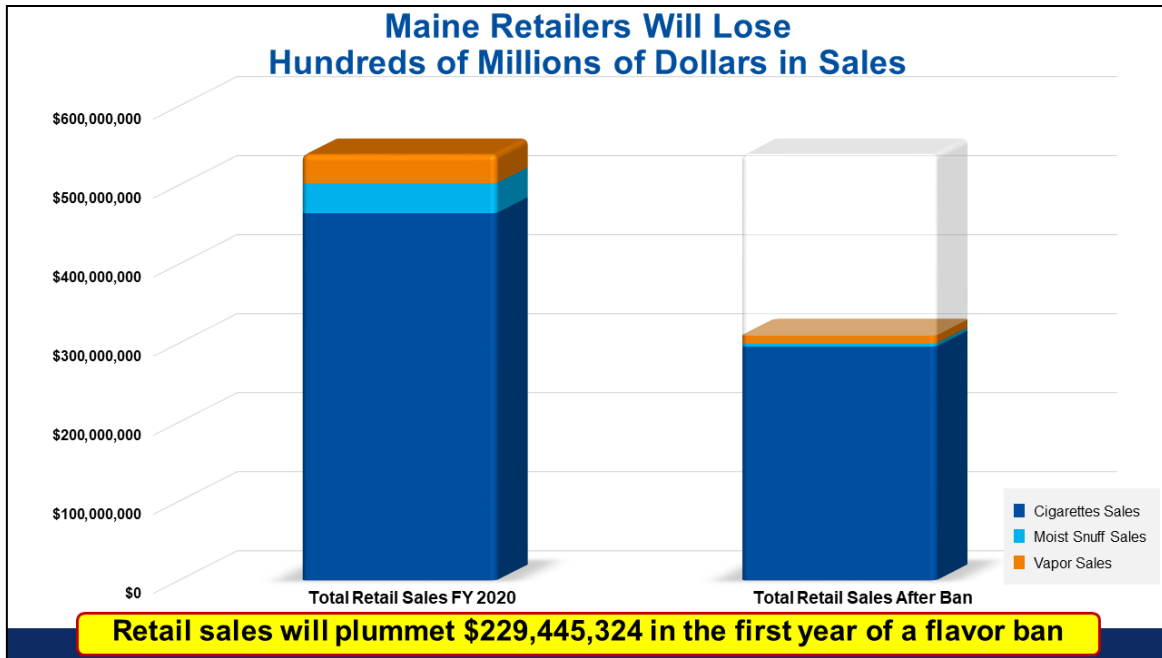
Flavor prohibition will undercut Maine's finances in an historically difficult economic time. If Maine follows Massachusetts, it can expect what Massachusetts experienced: significant declines in revenue, with no appreciable reduction in cigarette consumption.

IV. The Proposed Ban Will Create Job Loss, Lost Wages, and Damage Small Business

Maine retailers, and the wholesalers who supply them, will find little consolation in the fact that they are unlikely to lose *all* of their flavored tobacco product customers. Losing seven of ten menthol customers (some potentially switching to non-menthol cigarettes) is a significant hit to retailers and other small businesses across Maine. Tobacco retail sales in the State, which occur primarily in convenience stores, are more than \$539 million annually and 43 percent of those sales are flavored tobacco products.⁶ A ban on sales of flavored tobacco products will cost retailers in your State more than \$229 million. Additionally, tobacco product sales also drive significant 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 products⁷ – a nearly doubling of purchase dollars.

⁶ Wholesaler reports on retail sales provided by Management Science Associates, Inc.

⁷ Vonder Haar, Melissa, "The True Value of the Tobacco Consumer." CSP News, August 21, 2013, <https://www.cspdailynews.com/company-news/true-value-tobacco-consumer>. Accessed May 5, 2021.



The economic impact on Maine’s retailers and other residents will be swift and negative, as it was in Massachusetts. The New England Convenience Store and Energy Marketers Association reported in early January 2021 that convenience store sales were down 10 percent in Massachusetts and up more than 90 percent in New Hampshire over the first six months of Massachusetts’s flavor ban.⁸ Similarly, convenience stores in Maine stand collectively to lose millions of dollars in gross profits. Stores will have to find that money by either raising prices or cutting jobs and wages. Some won’t and will be forced to close.

V. The flavor ban criminalizes citizens but incentivizes criminals.

Prohibition makes crimes out of things that used to be normal behavior. The possession of more than two cartons of menthol cigarettes, necessarily not tax-stamped in Maine, is *prima facie* evidence of the unlawful importation of unstamped cigarettes, unless the person with the

⁸ NECSEMA press release, 1/5/21.

cigarettes is a licensed distributor.⁹ Consumers buying menthol cigarettes out-of-state could face a criminal charge and everything that comes with it, such as a misdemeanor arrest record, court appearances, and potentially incarceration or significant fines. Other consumers will turn to the in-state illicit market and buy a pack or just a few cigarettes on the street. Remember, the people who sell prohibited products to the community will in many cases be members of the community. Consider Eric Garner, whose sidewalk sales of illicit single cigarettes (or “loosies”) taken from unstamped, illicitly – trafficked packs led to an arrest which he did not survive.

The real beneficiaries of prohibition are the sophisticated criminal networks that specialize in trafficking contraband. Tobacco traffickers are an insidious problem and create unintended consequences that ultimately harm innocent people. As reported by the ATF:

Current investigations have identified several instances of terrorist groups forming alliances with tobacco traffickers to generate monies used to support their organization and activities. Diversion schemes often generate tremendous cash profits that are then laundered to disguise the origin of the money and to further unlawful schemes. Criminal organizations also use these profits to fund other criminal activities such as smuggling illegal immigrants and trafficking narcotics, firearms, and stolen property.¹⁰

The black markets for cigarettes and other tobacco products is already thriving. Traffickers will view the ban on menthol cigarettes as a sign that Maine is open for business.

⁹ 36 M.R.S. §4366-B

¹⁰ <https://www.atf.gov/file/58866/download>, page 5

VI. The Flavor Ban Frustrates FDA Tobacco Harm Reduction Policies

The first question state policy makers should ask is whether they are acting on an issue which is better left to the Federal government. The FDA has the budget, the expertise, and the authority to make a science-based regulatory determination that a flavored product, all things considered – including the risk of youth usage, the health of smokers, and the risk of illicit trade – should or should not be permitted on the market.¹¹ The FDA can make this decision through one of two mechanisms:

- The pre-market tobacco applications (PMTA) for new tobacco products,¹² including e-cigarette and other vapor products, many of which are flavored tobacco products; and,
- The modified risk tobacco products approach (MRTP),¹³ which considers whether a product should be permitted to advertise the fact that it presents less risk than other tobacco products.

Each pathway to market requires the FDA to determine the risks and benefits of the product to the population as a whole, *including both users and non-users of tobacco products*.¹⁴ The FDA examines not only whether current smokers will be likely to switch to the new product, but also whether people who don't use tobacco products might start (which weighs against approval).

Under either pathway, approval to market a product is dependent upon the FDA finding that the availability of the product “appropriate for the protection of public health.”¹⁵

¹¹ Food Drug and Cosmetics Act, 21 U.S.C. §§ 387a-387j (1935). <https://www.fda.gov/regulatory-information/federal-food-drug-and-cosmetic-act-fdc-act/fdc-act-chapter-ix-tobacco-products>.

¹² 21 U.S.C. § 387j. <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-marketing-orders>

¹³ 21 U.S.C. § 387k. <https://www.cga.ct.gov/2017/rpt/pdf/2017-R-0110.pdf>

¹⁴ *Id.*

¹⁵ <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-marketing-orders>

Rather than undertaking an analysis to determine whether a specific product with a specific flavor presents an opportunity for smokers to reduce their risk without materially increasing the risk of youth usage, this bill would simply ban every flavored product, regardless of the FDA's determination about whether the marketing of the product is appropriate for the protection of public health. Instead, Maine should let the FDA, and the market it regulates, work to help smokers in a manner that is appropriate to the public health generally.

Conclusion

History has taught that consumers resent and ultimately circumvent laws and regulations that restrict their ability to access goods they are accustomed to legally purchasing and using, whether the government's intent is to improve public health or otherwise. High taxes, excessive regulations, and outright bans on goods generally and historically drive consumers to turn to alternative – not always legal – new sources to supply the goods they are accustomed to using. There is no evidence that the result of a flavored tobacco product ban in Maine will be any different from the history of the prohibition of other goods. And the proposed ban actively limits traditional tobacco product users from accessing innovative, alternative products the FDA has determined to be beneficial to public health as a whole.