NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC.

June 29, 2021

To: Chair Stephen M. Casey and House Health and Human Services Committee Members

From: Thomas Briant, NATO Executive Director

The National Association of Tobacco Outlets (NATO) is a national trade association that represents hundreds of retail store members across the State of Rhode Island. NATO and its Rhode Island member stores urge you to oppose H 6396, which bans the sale of all flavored tobacco products. There are many reasons to oppose this bill:

- **New Research Proves Flavored Product Bans Result in Increased Youth Smoking:** On May 24, 2021, the Journal of the American Medical Association Pediatrics published a study online proving this very point. The author studied the effects of San Francisco's ban on flavored products that became effective in July 2018 on youth smoking rates, concluding:

  > San Francisco's ban on flavored tobacco product sales was associated with increased smoking among minor high school students relative to other school districts. While the policy applied to all tobacco products, its outcome was likely greater for youths who vaped than those who smoked due to higher rates of flavored tobacco use among those who vaped. This raises concerns that reducing access to flavored electronic nicotine delivery systems may motivate youths who would otherwise vape to substitute smoking. Indeed, analyses of how minimum legal sales ages for electronic nicotine delivery systems are associated with youth smoking also suggest such substitution.

  H 6396 proposes a flavor ban like San Francisco's, which will likely cause "increased smoking among high school students."

- **Allow the FDA's Consideration of a National Ban on Menthol Cigarettes to Conclude:** In April 2021, the FDA announced a proposed regulation within the next year to ban menthol cigarettes and all flavors in cigars. That process will require significant public input, including scientific, data-driven studies, of the impact of such bans on the public health. The State of Rhode Island should wait to see the outcome of this new FDA proposed regulation and the scientific review that intense study before adopting a state standard that may become overtaken by the process at the Federal level.

- **Rhode Island Could Lose Millions in Tax Revenue.** A year ago, a flavored tobacco ban much like that of H 6396 went into effect for the entire Commonwealth of Massachusetts. According to the New England Convenience Store and Energy Marketers Association, which has been tracking lost sales since the ban went into effect, Massachusetts has lost over $140 million in tax revenue on menthol cigarettes alone in the first year of the ban, while neighboring states including Rhode Island have combined to sell nearly 9 in 10 of the menthol cigarettes that were once sold in Massachusetts. All the Massachusetts ban has done is moved where the sales occurred, from

licensed, responsible Massachusetts retailers to other states or to an illicit market. This bill would have the same effect.

- **Economic Impact on Retailers Would Force Layoffs and Stores to Close.** Retailers selling tobacco products include tobacco-only stores, with virtually all revenue from tobacco sales to convenience stores with approximately 36% of in-store revenue from tobacco. Flavored products are a significant part; the loss of hundreds of flavored products would force tobacco-only stores to close and make the convenience store business model untenable, causing layoffs or closures.

- **The State of Rhode Island Considers Convenience Stores "Essential.**" Convenience stores and gas stations are among those businesses deemed "essential" by all levels of government. Prohibiting them from selling hundreds of flavored tobacco products will put further financial pressure on these retailers. If stores close, the state will lose these "essential" businesses next time an emergency arises.

- **Allow for Products Authorized by the Food & Drug Administration.** The Legislature should consider providing that retailers may sell an electronic cigarette product if the U.S. Food and Drug Administration authorizes the product for sale. An approval by the FDA can only be issued after the agency reviews and acts upon what is known as a Premarket Tobacco Product Application (PMTA). A PMTA is filed by a manufacturer with the FDA for any "new tobacco product," which includes every electronic cigarette product. The purpose in filing a PMTA is to seek a marketing authorization order from the FDA so that a tobacco product can be sold on the market. For the FDA to authorize a PMTA and issue a marketing order, the manufacturer must provide scientific data that demonstrates a product is "appropriate for the protection of public health." To continue marketing a product after September 9, 2020, a PMTA was required to be filed by that date. As the manufacturers of many such products did not file in time, thousands of brands of e-cigarette products were no longer allowed to be marketed, and the FDA has enforced that order against many manufacturers and pulled thousands of products from the market. This same kind of provision allowing an electronic cigarette product to be sold on the market if the FDA issues a marketing authorization order for an electronic cigarette product was adopted in New York. This New York state law provision reads as follows:

  > "The provisions of this section shall not apply to any vapor products dealer, or any agent or employee of a vapor products dealer, who sells or offers for sale, or who possess with intent to sell or offer for sale, any flavored vapor product intended or reasonably expected to be used with or for the consumption of nicotine that the U.S. Food and Drug Administration has authorized to legally market as defined under 21 U.S.C. § 387j and that has received a premarket review approval order under 21 U.S.C. § 387j(c) et seq."

- **Prohibition of Flavored Modified Risk Tobacco Products Would Be Detrimental:** FDA regulations allow a manufacturer to file what is known as a "modified risk tobacco product" application to seek a determination that a tobacco product has a reduced risk or reduced level of exposure when an individual uses the product. To designate a product as a "modified risk product," the FDA reviews applications under rigorous scientific standards. Manufacturers are required to provide the FDA with a great deal of detailed information regarding each product including relative health risks to individuals of the product, likelihood that existing users of tobacco products will switch to the product rather than quit altogether or that persons who do not

use tobacco products will use the product, risks and benefits to persons from the use of the product compared to approved smoking cessation products, and comments, data, and other information submitted to the FDA. The FDA will only designate a product as "modified risk" if, at the end of their detailed review of this information, the agency determines that the product will or is expected to benefit the health of the entire population. Thus far, the FDA has designated only twelve products as modified risk: Swedish Match General Snus (a moist, powdered tobacco in a pouch) and Philip Morris IQOS (a heat, not burn, tobacco product). Both come in flavored versions. This modified risk designation is very important to those individuals who use these products. A flavor ban would prohibit the sale of all flavored versions of these modified risk products to the detriment of the public health.

- **Adult Prohibition Would Be Detrimental to Public Health:** A total flavored tobacco product ban would move all flavored traditional tobacco products, including menthol cigarettes, menthol, mint and wintergreen smokeless tobacco, flavored cigars and pipe tobacco, and flavored electronic nicotine vapor products, virtually all the electronic cigarette market, out of the state's current regulated retail environment and into an illicit market that would grow exponentially. Prohibiting the sale of adult-only products has been enacted in this country before and it has proven to be a failed policy. It will encourage legal age adults who currently buy these products from legitimate retailers to find other sources, including the unregulated, illicit market which will expand to respond to the increased demand for flavored products, or in other states such as New Hampshire or Connecticut, which rejected flavor ban legislation.

  Scientific studies show that some tobacco products such as electronic cigarettes and other modern oral products have less risk than traditional products and that adults have been able to reduce or eliminate their use of traditional products because of these new options. Any health gains that might be expected from this legislation will be undermined because adults will be discouraged from using non-traditional tobacco products they reasonably believe are less risky while at the same time encouraging all tobacco consumers to obtain products they prefer through illicit or out-of-state markets. This means that a statewide flavor ban would be detrimental from a public policy standpoint and contrary to health-related goals.

- **Allow FDA Electronic Nicotine Product Restrictions to Work.** In February of 2020, the FDA banned most flavored cartridge-based and pod-based electronic cigarettes. Effective in April 2021, the expanded Prevent All Cigarette Trafficking Act places new restrictions on the sale of electronic cigarettes and nicotine vapor products over the Internet. These restrictions include age verification at the time of purchase, a signature of an adult 21 or older when the products are delivered, and collection and remittance of state excise and sales taxes on the products. This new law will further restrict underage access to electronic nicotine vapor products.