

March 5, 2024

House Committee on Finance
Rhode Island House of Representatives
82 Smith Street
Providence, RI 02903

Subject: H.7225 – Opposition of ENDS flavor ban and cigarette and ENDS tax increases; Support of increased enforcement against sales of youth-friendly, illegal ENDS/vapor products

Dear Chair Abney and Members of the House Committee on Finance:

Thank you for the opportunity to submit comments on H.7225. Reynolds American Inc. (RAI) and its operating companies oppose several proposals contained in H.7225, particularly the increase in the cigarette excise tax, the ban on the sale of all flavored ENDS other than tobacco flavor, and the imposition of a high tax on ENDS and vapor products that does not reflect evidence-based principles of harm reduction.

However, RAI supports the portion of H.7225 that provides for strengthening enforcement efforts against unscrupulous purveyors of youth-friendly, illegal ENDS (electronic nicotine delivery systems) and other vapor products.

Oppose: ENDS/Vapor Flavor Ban

H.7225's further solidification of Rhode Island's ban on the sale of flavored ENDS adds nothing new to the state's efforts to reduce youth use of vapor products. Further, this ban (and the regulatory ban first imposed in 2020) actually makes it less likely that Rhode Island's thousands of adult cigarette smokers will try an e-cigarette as a possible replacement for their traditional, combusted cigarettes. At the very least, lawmakers should consider exempting menthol-flavored ENDS from the current regulatory ban. As far back as 2018, then-FDA Commissioner Scott [Gottlieb](#) proposed banning flavored ENDS, with the exception of menthol/mint flavors. Gottlieb cited survey data that established that adults were more likely to use menthol/mint flavored ENDS than youth. Exempting those products from his proposed flavor ban, Gottlieb argued that those flavors "may be important to adult smokers seeking to transition away from cigarettes."

A growing [body](#) of scientific evidence suggests that e-cigarettes can help adult smokers quit smoking. In fact, according to FDA Center for Tobacco Products (CTP) Director Brian King, it is [clear](#) from existing evidence that e-cigarettes present markedly less risk to users than traditional, combusted cigarettes. A 2021 [study](#) showed that adult smokers who were not interested in quitting smoking but who used ENDS daily were *eight times* more likely to have quit smoking at the end of the study period than smokers who did not use ENDS daily. And a 2019 [study](#) published in the New England Journal of Medicine reported that adult smokers who used ENDS to support smoking cessation were nearly twice as likely to successfully quit smoking as those who used nicotine patches and gums or who tried to quit cold turkey.

Lifting the current regulatory ban and not passing the portion of H.7225 that solidifies that ban are science-based steps toward support of tobacco harm reduction for adults in Rhode Island who smoke today. And those steps need not be accompanied by any increase in youth use of ENDS/vapor products, thanks to H.7225's proposal to step-up enforcement against those vapor products that are most attractive to youth.

Encouraging adult smokers to try a new, possibly safer, alternative to cigarettes must involve offering those smokers a meaningful choice of products. Under federal law, manufacturers of new tobacco products (such as e-cigarettes and modern oral nicotine products) must show that the products are “appropriate for the protection of public health.” That is, the manufacturer must show to the satisfaction of FDA CTP scientists that the new product is more likely to help adult smokers move away from combustible cigarettes than it is to attract youth or other tobacco-naïve users. To date, 23 e-cigarette products have successfully made that case to CTP, and it is likely that more will follow.

But the state’s current regulatory ban provides no exceptions or exemptions for new products authorized for marketing by FDA CTP or for tobacco and nicotine products authorized by CTP as “[modified risk tobacco products](#).” At the same time, it does exempt purveyors and cultivators of cannabis vapor products. This differentiation makes little scientific or logical sense. Vapor products that have met FDA CTP’s exacting standards for marketing authorization should be exempted from any state ENDS flavor ban.

Assuming the state takes a tough stand on *illegal* ENDS products available today in most outlets that sell tobacco in Rhode Island, the issue of youth access to flavored ENDS could be eliminated. Then Rhode Island’s flavor ban will do nothing more than limit access to and acceptability of these products for adults who smoke combustible cigarettes today. Those are the people who need access most to benefit individual and public health.

Oppose: ENDS/Vapor Excise Tax and Increased Cigarette Tax

Similarly, H.7225’s treatment of ENDS/vapor excise taxation misses an opportunity to support tobacco harm reduction in Rhode Island. While these products are not currently taxed under state law, the proposed ad valorem tax of 80 percent of the wholesale price would create a market in which ENDS are *more expensive* than traditional, combustible cigarettes. Given the potential for ENDS to help smokers quit, this result is nonsensical.

[Research](#) confirms that increasing ENDS taxation (and otherwise making ENDS less appealing, such as through [flavor bans](#)) decreases ENDS use at the cost of increased cigarette use. ENDS taxation must be implemented with a scalpel, not a hammer. The proposed ad valorem tax would increase the cost of a Vuse Alto pod, for example, by \$5.43, resulting in the consumer paying more than \$18 for that Vuse Alto pod – compared to the roughly \$13 price of a pack of Camel cigarettes.

RAI is not opposed to taxing ENDS entirely. Instead, we urge you to consider a tax based on principles of tobacco harm reduction: making products that may present less risk to health less expensive for adult smokers than their cigarettes. Consider implementing a *bifurcated* tax on ENDS products, with those ENDS products containing less than 3 mL of e-liquid (this category includes all e-cigarettes authorized for marketing by FDA CTP) taxed at \$0.10 per mL of fluid and those containing more than 3 mL of e-liquid taxed at an ad valorem rate. The larger capacity vapor products include the youth-friendly disposables currently flooding the market and open system e-cigarettes, which allow users to add their own e-liquids. Again, using Vuse Alto pods as an example, under this proposed bifurcated taxation scheme, the total cost of a pod increases to just more than \$10 and provides an incentive for smokers currently paying more than \$13 for a pack of cigarettes to choose the less expensive and potentially less dangerous product. Other states have already implemented bifurcated ENDS taxation schemes to support tobacco harm reduction, including Connecticut, New Jersey, and New Hampshire.

In addition, RAI opposes the proposed \$0.25 per pack increase in the state’s cigarette excise tax (SET) from \$4.25 per pack to \$4.50 per pack. This tax increase will result in lost jobs, create an undue burden for low-income workers, and exacerbate cross-border smuggling. Rhode Island has increased its excise tax on cigarettes four times since 2009. The SET increased by \$1.00 per pack in 2009; \$0.04 per pack in 2012; \$0.25 per pack in 2015; and an additional \$0.50 per pack in 2017. And, according to the National Association of Convenience Stores 2015 State of the Industry

Report, in the year following the 2009 SET increase, the number of convenience stores in the state decreased by 50. That led to about 891 lost jobs and a decrease of \$1.4 million in employee wages.

To avoid the higher cigarette tax, many adult tobacco consumers in Rhode Island will look to bordering states to save money. In fact, after Massachusetts banned the sale of flavored tobacco products in 2020, cigarette sales in Rhode Island [increased](#), while smoking prevalence among Rhode Islanders continued its [steady decline](#). And in the first year after Rhode Island's 2009 SET increase, the state [lost](#) an estimated \$111 million in cigarette excise tax revenue to bordering states.

Moreover, increased cigarette taxes invite illegal activity. If the state increases the cigarette SET by \$0.25 per pack, a smuggler could make approximately \$2 million by transporting one tractor-trailer load of cigarettes from Virginia to Rhode Island.

Importantly, excise taxes are highly regressive and unfairly burden low-income earners who smoke. In Rhode Island in 2022, only about [11 percent](#) of adults were smokers. But among those in the lowest income brackets in the state smoking prevalence was much higher: more than 40 percent have household incomes of less than \$35,000 and more than 55 percent of smokers in Rhode Island have a household income of less than \$50,000 annually according to data from CDC's 2021 Behavioral Risk Factor Surveillance System. Those same consumers already spend 20 percent of their discretionary income on the cigarette SET.

Finally, H.7225, by definition, intends to tax "heat not burn products" under the definition of ENDS. However, "heat not burn products" are treated as cigarettes—not ENDS—for federal excise tax purposes, for purposes of assessing manufacturer escrow payments under Rhode Island's Qualifying Statute, see R.I. Gen. Laws §§ 23-71-2, 3, and pursuant to Rhode Island's 2017 settlement of the NPM Adjustment Dispute with RJRT and other tobacco product manufacturers, under which [Rhode Island has certain reporting obligations](#). Exempting "heat not burn products" from the reporting and stamping obligations associated with cigarettes may impact Rhode Island's ability to track, and thus meet its obligations to report and to collect escrow on such sales, which could potentially result in Rhode Island being subjected to an NPM Adjustment reduction to its MSA payments.

Adult and youth smoking rates are at historic lows in this country today. There is no reason to believe that this additional tax will accelerate that downward trend. Rather, what we know from direct experience in Rhode Island and other states, is that it will aggravate the burdens, costs, lost jobs and lost revenue, and other serious risks described above.

Support: Increased Enforcement against Youth-Friendly, Illegal Vapor Products

The U.S. e-cigarette market has been flooded with illegal ENDS and vapor products sold in kid-friendly flavors and with kid-friendly packaging. All of those products are evading FDA's efforts to regulate the e-cigarette market, and H.7225's proposed increase in enforcement against manufacturers, distributors, and retailers of these illegal products in Rhode Island is to be applauded.

Neither RAI nor any of its operating companies wants *any* youth to use e-cigarettes or any other tobacco products. Accordingly, when FDA ordered cartridge/pod-style e-cigarettes sold in flavors other than tobacco and menthol off the market in early 2020 – in response to a spike in youth use of e-cigarettes in 2018-19 – RAI complied. But, at the same time, less scrupulous ENDS manufacturers with little concern for the law and for the well-being of US youth, seized advantage of FDA's decision to exclude disposable ENDS from its order. Not surprisingly, sales of disposable e-cigarettes with names like California Cherry, Rainbow Candy, Snow Cone Ice, and Banana Cake exploded.

Four years later, those brands dominate the US e-cigarette market. In fact, CDC's 2023 National Youth Tobacco Survey revealed that the two most popular e-cigarette brands among middle- and high-school students who vape are both illegally sold in the United States. That statistic is frankly shocking. And while FDA has made efforts to enforce

against the manufacturers and retailers of these products, that enforcement has had little effect on the market. RAI supports Rhode Island's move in H.7225 to protect its own residents from unscrupulous manufacturers, distributors, and retailers of these illegal vapor products. And Rhode Island is right to take action to protect its own youth, particularly given the failure of federal authorities to address this illegal market.

In conclusion, RAI opposes the portions of the bill that would enshrine the state's current regulatory ban on the sale of all flavored ENDS and arbitrarily increase ENDS and cigarette excise taxes without regard for the likely impacts of those tax increases. RAI applauds H.7225's proposal to increase enforcement against manufacturers, distributors, and retailers of illegal, youth-friendly ENDS and other vapor products.



Testimony by RAI Services Company

