



August 1, 2022

Dockets Management Staff (HFA-305)
U.S. Food and Drug Administration
5630 Fishers Lane, Rm. 1061
Rockville, MD
20852

Re: Docket Number FDA-2021-N-1309; Tobacco Product Standard for Characterizing Flavors in Cigars

To whom it may concern,

Americans for Tax Reform (ATR) thanks the Food and Drug Administration for the opportunity to submit comments regarding the proposal to prohibit characterizing flavors other than tobacco in all cigars and cigar components.

It is submitted that the proposed rule will bring about economic harm, lead to an increase in criminal activity, and weaken our nation's security. ATR would also like to respectfully submit that the rationale provided by FDA in justification of this proposed rule is flawed. It is in the best interests of every American for our public policy to be based in fact and evidence.

History has shown that prohibitions on popular adult-use products, like alcohol in the 1920s or cannabis and other drugs in the 1980s, are not effective means of discouraging use of those products. Rather, it creates an opportunity for criminal organizations to profit. These profits come at the expense of taxpayers, local governments, and America's national security.

Tobacco smuggling is not a victimless crime. It is [submitted](#) that tobacco smuggling is largely run by multi-million-dollar crime syndicates that operate internationally. These criminal networks use the robust profits they earn from tobacco smuggling to fund other nefarious activities which include, but are not limited to, human trafficking, money laundering, and terrorism.

Finalizing this rule to prohibit all characterizing flavoring in cigars will energize these smugglers. Almost all cigars contain some version of flavoring, making this proposal effectively a near-total prohibition on cigars. Removing legal access to flavored cigars and premium cigars will cause many consumers to turn to the illicit market. This will lead to an increase in profits for these criminal groups, profits that we know will fund highly dangerous activities that make America a significantly less safe country.

A [report](#) from the U.S. Department of State explicitly labels the global illicit trade in tobacco as a threat to national security. The report finds that tobacco smuggling is a "low-risk, high-reward criminal activity" in which smugglers make huge profits

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with little risk of detection. Tobacco smuggling “enables corruption” and “undermines good governance.”

The report also notes how tobacco smuggling undermines health policy objectives. The report clearly states that smuggling increases the use of tobacco products and deprives funds for anti-smoking campaigns and healthcare costs. Additionally, the report discusses the health risks of illicit-market tobacco, noting that smugglers “may introduce products to consumers that do not meet the health regulations of the destination country” and may include “ingredients not fit for human consumption.”

The Department of State’s report shows quite clearly that tobacco smuggling is trafficked through the same routes as drugs and weapons. There have been many cases that show specific links between tobacco smuggling and terrorism, including in Ireland, Kurdistan, and Lebanon. One particularly disturbing example is that of former Al-Qaeda senior commander Mokhtar Belmokhtar who earned the moniker “Mr. Marlboro” for his tobacco smuggling exploits that raised funds for Al-Qaeda’s terrorist activities.

It was recently [reported](#) that, in Mexico, the highly dangerous and highly powerful Jalisco Cartel is taking control of illicit tobacco production and sale in Mexico. The cartel uses their immense influence to force vendors to sell only cartel-produced tobacco products. If they refuse to comply, they [risk](#) being threatened, tortured, and shot for their disobedience.

It is submitted that implementing this proposal, which would be effectively a prohibition on cigars, will exacerbate conflict at America’s southern border. With border crossings and arrests at all-time highs, encouraging a black-market for a popular adult-use product will likely increase smuggling of cigars across the border. As we saw in late June 2022, when more than 50 migrants [died](#) in a tractor-trailer in Texas, illegal border crossings can lead to death and despair. A prohibition on flavored cigars will increase the likelihood of future incidents stemming from smuggling attempts.

In Australia, international organized crime groups are turning to the illicit tobacco market as a “low risk and high reward” trade. According to the Australian Criminal Intelligence Commission (ACIC), organized crime cartels are using illicit tobacco as a [“platform”](#) for further illicit activities. ACIC listed drug trafficking and terrorism as particularly concerning cartel activities.

Of high importance, Australian Federal Police Commissioner Reece Kershaw recently warned that drug cartels are being “infiltrated and assisted” by hostile foreign governments to launder money and smuggle illegal substances into Australia. It is submitted that finalizing this rule will not only encourage criminal smugglers, but it will also give the “green light” to foreign governments who seek to weaken America’s national security and international standing.

A problematic aspect of this rule's rationale is the claim that a flavored cigar ban will "reduce the tobacco-related death and disease associated with cigar use." It is submitted that the actual health impacts of flavored cigar use do not justify such a far-reaching policy.

According to a FDA-funded [study](#) released in March 2022, the health risks of premium cigars are likely lower than other cigars because premium cigar users smoke less frequently compared to others who smoke. The study was performed by a panel of thirteen scientists at the National Academy of Science, Engineering, and Medicine (NASEM).

This study determined that cigars have a "moderate" risk to health, while cigarettes have a much higher risk. Another key aspect of cigar smoking that impacts user health is the degree of inhalation. Cigarette smokers, for instance, inhale deeply when smoking. On the contrary, cigar smokers do not inhale deeply and few inhale at all. This subjects the user to a lower health risk.

Premium cigar and other flavored cigar use among youths is virtually nonexistent. Only 1% of the U.S. adult population smokes premium cigars and youth usage is essentially nonexistent. The 2022 NASEM study found that only 0.6% of all Americans who reported smoking a premium cigar in the past 30 days were under the age of 18.

Another [study](#), one that has been cited by FDA, found that only 3.3% of 12 to 17-year-olds had smoked a cigar and that, of that 3.3%, 3.8% identified premium cigars as their cigar of choice. This means that, according to the study, the youth premium cigar smoking rate is a miniscule 0.1%.

The NASEM study also found no evidence that premium cigars companies use marketing targeted to children. This discredits a section of the proposed rule that states "the (tobacco) industry has a long and well-established history of deliberately targeting children through the development and/or marketing of flavored tobacco products." The NASEM study showed that premium cigars are not marketed to children, a direct rebuttal of FDA's claim.

Additionally, there is evidence that youth usage of non-premium flavored cigars is also incredibly low. A separate report from the Population Assessment of Tobacco and Health (PATH), a long-term study of tobacco use published by FDA and the National Institute for Health, [found](#) that only 3.8% of 12 to 17-year-olds reported ever having smoked a cigar and that 0.7% of that same population reported having smoked a cigar in the past 30 days. Further, less than half (44%) reported smoking a flavored cigar. Therefore, youth past-month usage of flavored cigars is approximately 0.3%.

ATR respectfully submits that virtually non-existent usage of these products among youths does not justify a complete prohibition on premium and flavored cigars.

However, FDA also claims that that the industry targets children through product “development”, presumably the addition of flavoring. This claim completely ignores the fact that it is not just children that enjoy flavoring in products, adults like it too.

Alcohol, for example, is an adult-only product that is often mixed with flavoring. Using FDA’s logic, this flavoring must be an attempt to attract children. It is, of course, just another example of adults enjoying flavoring in a variety of products. Cigars are no different. Yet this rule singles out flavored cigars and seeks to prohibit them. It is submitted that this rule will not only lead to an increase in illicit market activity, it will hurt the American economy and hinder the pursuit for racial justice.

It is critical to consider the sheer size of lost tax revenue that state and local governments will face because of this proposed rule. In 2019, state and local governments [collected](#) over \$19 billion in revenue from tobacco taxes while the federal government collected approximately \$12.5 billion. Tobacco tax revenue is used to fund programs that support children and adults, like the Children’s Health Insurance Program ([CHIP](#)), that provides health insurance to children who would otherwise be uninsured. Revenue from tobacco taxes is also used to fund quitting services as well as programs that prevent tobacco uptake among youth.

Finalizing this rule will remove a portion of these funds from federal, state, and local governments and turn them over to criminal syndicates. Rather than funding healthcare for uninsured children, or helping people quit smoking, this revenue will now be used to victimize innocent people across the globe.

Finalizing this rule would also lead to the closure of countless small businesses across the United States. One such business that would almost certainly close in the presence of a flavored cigar ban would be cigar lounges. As of 2022, there are [1,893](#) cigar lounges in the country. These lounges employ tens of thousands of Americans, all of whom would lose their jobs if this rule is finalized. Further, stores that sell flavored cigars and premium cigars would lose a significant portion of their income, likely forcing additional store closures and job loss.

This submission would also like to draw attention to the extremely legitimate concerns of a diverse group of activists who believe that this rule, should it be finalized, will exacerbate inequality in African American communities. In the words of the family members of George Floyd, Trayvon Martin, and Eric Garner, banning flavored tobacco will “unleash a Category 5 unintended consequences storm in our communities.” All three of these men were Black and extrajudicially killed, while unarmed, for minor or nonexistent offenses.

In the [case](#) of Eric Garner, it was the alleged sale of single cigarettes, “loosies”, that led New York City police to perform an illegal chokehold on the 44-year-old father of six until he died. Garner is not the first unarmed Black man to be killed by police for a tobacco-related incident. In 1981, 51-year-old Richard Ramey was [killed](#) by Chicago police for the crime of smoking a cigarette on a train.

Sadly, Garner will likely not be the last Black man to die at the hands of police over a minor infraction involving tobacco. In 2020, police in California [brutally beat](#) a 14-year-old for possessing a Swisher tobacco cigarillo and the next year, in 2021, a group of [teenagers](#) in Maryland were tasered, kneed, and violently restrained by police for vaping on a public boardwalk. These victims thankfully survived their encounters with police. However, we see far too often that interactions between police and people of color over minor infractions can lead to major problems.

In an effort to alleviate these concerns, FDA has made clear that “FDA cannot and will not enforce against individuals for possession or use of flavored cigars.” This statement, however, does not address the actual concerns. FDA has never had the authority to enforce policies against individuals. That authority rests with federal, state, and local law enforcement. Should this rule be finalized, all flavored cigars would hereby be untaxed. Possession of untaxed tobacco is a serious criminal offense in all 50 states. Therefore, as a direct result of this proposal, any individual carrying a flavored cigar on their person could be stopped, questioned, and arrested by police.

Police organizations recognize this and are proactively taking steps to oppose this proposed rule. The National Organization of Black Law Enforcement Executives, National Association of Black Law Enforcement Officers, National Latino Officers Association, the Law Enforcement Action Partnership, and the National Organization of Retired State Troopers all [signed](#) onto a letter urging FDA to see the “warning signs of a racially discriminatory policy.”

This stance is supported by civil rights groups like the American Civil Liberties Union (ACLU). The ACLU has time and again rallied against flavored tobacco bans, [expressing](#) their concern that they would “disproportionately affect communities of color, resulting in criminalization and more incarceration.” This submission urges FDA to listen to these activists and strongly consider how a proposal aimed at improving the lives of Black Americans may, in fact, do the opposite.

It should also be noted that cigars are a traditional form of leisure for many Americans. Smoking a cigar with close friends and family can be a way of sharing a monumental occasion with them. Examples of times in which people traditionally smoke cigars include graduations, job promotions, athletic victories, getting married, or becoming a parent. Finalizing this rule will, at best, destroy these traditions, and, at worst, encourage users to turn to dangerous black market alternatives.

Further, it is submitted that a prohibition of flavored cigars will lead to significant job losses across the country. In addition to tobacco farmers, whose livelihoods depend entirely on these products, there are hundreds of thousands of retail workers who could lose their jobs as a result of this rule being finalized. Small businesses, like convenience stores, tobacco markets, and gas stations, would lose significant portions of their profits and lead to layoffs and store closures. It is estimated that the cost of this prohibition will be \$5,000,000,000. At this time of great economic uncertainty, it is submitted that pushing forward with this proposal will cause extensive economic damage without worthwhile changes in health.

Finally, ATR encourages FDA to embrace consumer choice. According to FDA's own data, youth premium cigar usage is approximately 0.1% and flavored cigar usage among youths is 0.3%. These minute proportions of youths smoking flavored cigars is not enough to justify a complete prohibition of these products for legal adult consumers. Adult access to popular products that are unlikely to lead to widespread harm must be protected.

ATR would once again like to thank FDA for the opportunity to submit these comments. We submit that FDA's rulemaking procedures should engage with evidence and fact. We further submit that the consequences of this rule shall far outweigh any benefits. In seeking to prohibit characterizing flavors in cigars, this rule will lead to economic harm, weakened national security, and the perpetuation of racial injustices. As such, we strongly urge the proposed rule to be withdrawn.

Thank you for taking the time to consider the points raised in this submission. Please do not hesitate to contact us if you have any further questions.

Sincerely,

Tim Andrews
Director of Consumer Issues
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