



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-1349; Tobacco Product Standard for Menthol in Cigarettes

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 menthol as a characterizing flavor in cigarettes.

It is submitted that the proposed rule will bring about economic harm and lead to an increase in criminal activity. Further, this rule will perpetuate injustice against Black Americans 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, including the flawed model that predicts life-years saved by the rule. 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, 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 menthol flavoring in cigarettes will energize these smugglers. Removing legal access to menthol cigarettes 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 cigarette smuggling is a "low-risk, high-reward criminal activity" in which smugglers make huge profits with little risk of detection. Tobacco smuggling "enables corruption" and "undermines good governance."

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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 cigarette smuggling is trafficked through the same routes as drugs and weapons. There have been many cases that show specific links between cigarette 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 cigarette production and sale in Mexico. The cartel uses their immense influence to force vendors to sell only cartel-produced cigarettes. If they refuse to comply, they [risk](#) being threatened, tortured, and shot for their disobedience.

It is submitted that implementing this prohibition on menthol flavoring in cigarettes 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 cigarettes 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 menthol cigarettes will increase the likelihood of future incidents stemming from smuggling attempts.

In Australia, soaring prices for cigarettes has resulted in international organized crime groups 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.

It is further submitted that an academic article [published](#) June 9, 2022 in the European Journal of Public Health found that Poland's 2020 ban on menthol cigarettes did little to nothing to decrease overall cigarette consumption. The prohibition was the largest menthol cigarette ban ever attempted and affected almost 1/3 of all cigarettes sales in Poland, approximately 30 billion cigarettes a year. The researchers utilized Nielson sales data and found that the policy did lead a significant decrease in menthol cigarette sales, but that standard cigarettes sales almost completely replaced menthol sales. The study only looked at legal sales, meaning that illicit market sales were not included in the results. It is easy to infer that with the addition of illicit sales, overall cigarette consumption in Poland may even have increased after the menthol ban was implemented.

This study shows clearly that prohibitions do not work as intended. Proponents of the rule often claim that it will save hundreds of thousands of lives and prevent millions from taking up smoking. As this data from Poland illustrates, those addicted to cigarettes will continue to smoke in the presence of a menthol ban.

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 take a significant portion of these funds away 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.

Menthol cigarettes make up approximately [30%](#) of the tobacco market in the United States. Therefore, sales of menthols contribute over \$9 billion in tax revenue each year. It is crucial to consider the impact that this proposal will have on the fiscal affairs of governments before moving forward with this rule.

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, Travon Martin, and Eric Garner, banning menthol cigarettes 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 menthol cigarettes.” 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 menthol cigarettes would hereby be untaxed. Possession of untaxed cigarettes is a serious criminal offense in all 50 states. Therefore, as a direct result of this proposal, any individual carrying a menthol cigarette on their person could be stopped, questioned, and arrested by police.

Statistically, those most likely to be stopped by police over a menthol cigarette will be African Americans. Black adults are more likely to smoke menthols than non-Blacks and Black communities are historically overpoliced. There is no question that finalizing this rule will lead to more interactions between police and communities of color with potentially deadly consequences.

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 menthol bans, [expressing](#) their concern that a menthol cigarette ban 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.

A driving force behind this proposed rule is the advancement of “health equity”, as menthol cigarettes are more popular in Black communities than among Caucasians

or other non-Black populations. While this is true, Black adults and Caucasian adult smoke cigarettes at nearly [identical](#) rates.

Even though Black smokers may prefer menthol cigarettes, this choice does not lead them to be exposed to more harm than adults who choose to smoke non-menthol cigarettes. There is no chemical difference between menthol cigarettes and non-menthol cigarettes besides the addition of menthol flavoring, a cooling agent, that does not impact the health of the user. A [study](#) from researchers at the Vanderbilt-Ingram Cancer Center in Nashville found that people who smoke menthol cigarettes are no more likely to develop lung cancer than people who smoke non-menthol. In fact, the study found that the rate of lung cancer among menthol smokers may be *less* than that of non-menthol smokers.

In the study, pack-a-day menthol smokers were 12 times more likely to develop lung cancer compared to never smokers, a concerning statistic. However, pack-a-day non-menthol smokers were a stunning 21 times more likely to develop lung cancer compared to never smokers.

The study also discredited another of FDA's justifications for this ban, which is that menthol cigarettes are harder to quit than non-menthols. The study found that the quitting rate was similar between menthol and non-menthol smokers. Further, the study identified that menthol smokers consume fewer cigarettes per day than non-menthol smokers. In the [words](#) of researcher Dr. William J. Blot, "I don't think there is enough scientific evidence to justify a ban of menthol cigarettes in comparison with non-menthol cigarettes."

A follow-up to this study was [published](#) in 2022, and once again found no statistically significant difference in quit rates between menthol and non-menthol smokers. Additionally, the study sought to determine if there was a difference in quit rates between African American smokers and white smokers and found no difference in quit rates. Dr. Blot offered this comment in regards to the study, saying that a ban on menthol cigarettes "could have the unintended consequence of a net increase rather than decrease in risk, at least in lung cancer."

Another problematic aspect of this rule's justification is the claim that menthol cigarettes must be prohibited to prevent youth uptake of smoking. According to the Center for Disease Control's 2021 National Youth Tobacco Survey, underage smokers are less likely to smoke menthol cigarettes than adult smokers. It is estimated that a mere 0.78% of high-schoolers are menthol smokers. Youth smoking is at an all-time low across the country, hardly indicative of an issue that should be solved by prohibiting products that make up 30% of the tobacco market from being sold legally.

A policy [study](#) from the Reason Foundation found that states with the highest rates of menthol smoking were also the states with the lowest rates of youth smoking. If

menthol cigarettes led to youth uptake, the states with high rates of menthol smoking would also have high youth smoking rates. The data shows the opposite.

Additionally, it should be noted that the [model](#) used to estimate the life-years saved because of this proposed rule is likely flawed. One of the main reasons behind the estimate is the assumption that menthol smokers would switch to menthol flavored vaping products. While this would be beneficial for their health, as vaping is significantly safer than smoking, FDA has never approved a menthol vape. If consumers lack access to vaping products, it is unreasonable to assume that menthol smokers will switch to menthol vapes. Further, the model relies upon the assumption that upwards of 10% of current menthol users would turn to the black-market. As recognized earlier in this submission, a prohibition on a popular tobacco product would certainly grow the illicit market for tobacco. It is likely that significantly more than 10% of current users would turn to readily available, illicit sources for menthol cigarettes.

ATR would like to take this moment to recognize that there are alternatives to a menthol prohibition that will lead to demonstrated decreases in smoking, smoking-related disease, and death. E-cigarettes, also known as vaping devices, are shown to be [95% less harmful](#) than combustible cigarettes and at least twice as effective at helping smokers [quit](#) than traditional nicotine replacement therapies. ATR submits that, rather than enter into a new age of prohibition, FDA should embrace the benefits of tobacco harm reduction and allow adults to access e-cigarettes, particularly flavored e-cigarettes as they are more [effective](#) than non-flavored e-cigarettes at helping smokers quit. According to a large scale [analysis](#) from Georgetown University Medical Center, switching from smoking to vaping can save 6.6 million American lives over the next ten years. Adult vaping access, rather than prohibition, is the best path towards a smoke-free future.

Americans for Tax Reform 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 menthol as a characterizing flavor in cigarettes, 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
Americans for Tax Reform