



July 18, 2022

**Comments on FDA product standard:
Tobacco Product Standard for Menthol in Cigarettes
Docket No. FDA-2021-N-1349**

The Honorable Robert M. Califf M.D
Commissioner
Food and Drug Administration
5630 Fishers Lane, Rm. 1061
Rockville, MD 20852

Dear Commissioner Califf,

National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, appreciates the opportunity to provide comments on Docket No. FDA-2021-N-1349, the Food and Drug Administration's (FDA) Tobacco Product Standard for Menthol in Cigarettes, which seeks to eliminate menthol flavoring in all combustible cigarettes and all characterizing flavoring in cigars.

The FDA has incorrectly assumed that removing flavoring from combustible tobacco will lead to a reduction in tobacco use and increase public health outcomes, while reducing or eliminating underage usage. In all likelihood, a ban on menthol cigarettes nationwide would have the inverse effect the FDA is trying to accomplish. The FDA is asserting that menthol is more attractive to young people, but the data fails to substantiate that claim.

Earlier this year, an analysis conducted by Reason Foundation found that states with a higher distribution of menthol cigarettes tend to actually have lower youth smoking rates than states with low menthol distribution.¹ In general, the analyses show consistent non predictive relationships between relative menthol cigarette consumption rates and use of any age group. The data from the study proves that menthol cigarette distribution does not increase youth smoking initiation any more than non-menthol cigarette distribution and that menthol cigarettes do not pose a greater risk to public health than menthol cigarettes.

The FDA should not be considering prohibition of menthol and all characterizing flavors in cigars. By eliminating the legal manufacturing and distribution of menthol the FDA will create a new black market, making cigarettes and flavored cigars more accessible to youth and first time

smokers. If a nationwide ban moves forward, youths across the country will likely be able to readily find and purchase these items for sale by unregulated illegal actors. For example, Massachusetts implemented a ban on menthol cigarettes in June of 2020 that proved ineffective and caused a myriad of other issues. There is now a bipartisan effort in their state legislature to repeal the ban.² State Sen. Ryan Fattman, R-Sutton, and state Rep. Alan Silvia, D-Fall River, filed legislation to reinstate the sale of menthol cigarettes. In the last two years since the Massachusetts ban took effect, sales of menthol cigarettes dropped by 24 percent, however consumers simply found other avenues to procure these banned items. In New Hampshire tobacco purchases surged by 65 percent and Rhode Island saw an increase in overall purchases of 17 percent. Specifically menthol sales in New Hampshire soared by 91 percent and Rhode Island's rose 40 percent.³ Massachusetts ban did nothing to curb actual consumption, rather the state simply lost out on millions of dollars in taxes by eliminating the state from the process.

By shifting the sale of menthol and flavored cigars to the black market Massachusetts lost \$116 million in cigarette tax revenue according to the latest numbers, which do not include the lost sales tax revenue.⁴ It is important to understand that the sale of menthol cigarettes still took place in Massachusetts, all the ban accomplished was ensuring that Massachusetts did not collect taxes from the sales. As mentioned earlier, sales in the surrounding states spiked after the ban and there has been significant evidence that illegal sales took place. According to the Annual Report of the Massachusetts Multi-Agency Illegal Tobacco Task Force, issued in March of 2022, Massachusetts law enforcement officials made hundreds of thousands of seizures of illegal tobacco products smuggled into the state, including more than 5,377 menthol packs, 5,121 smokeless tobacco products, 9,364 cigars, and 106,775 electronic nicotine delivery systems.⁵ In one real world example a Springfield man was indicted for tax evasion related to the illegal importation of smokeless tobacco, smoking tobacco, and cigars from Connecticut to various retail locations in Massachusetts. The smuggling involved a loss of over \$4 million in excise taxes, in another case, a Milton man pleaded guilty to running an illegal tobacco distribution network, importing tobacco products from distributors in Pennsylvania and selling them via a delivery van to stores and gas stations in Massachusetts.⁶

Instead of charting a failing path towards prohibition of tobacco products the FDA should refocus its efforts on traditional cessation strategies, which have worked to reduce adult and youth smoking to its lowest levels in history. According to a report issued by the Centers for Disease Control (CDC) in March 2022, youth smoking rates plummeted to an all-time low of 1.5 percent during 2021, representing a drop in more than half from the previous year's 3.3 percent of youths smoking daily. 1.5 percent of youth equates to only 1 in 250 young people being daily smokers, showing that youth smoking is close to nonexistent.⁷ According to another report by the CDC adult usage has also hit an all time low, only 19 percent of U.S. adults used tobacco products in 2020, representing the lowest amount of adult users since the CDC began recording tobacco use data in 1965.⁸ Prohibition will not reduce the amount of youths accessing menthol

cigarettes and flavored cigars but will instead create an unregulated black market, cost hundreds of millions of dollars in lost federal and state tax revenue and prevent responsible adult usage.

Thank you for your consideration of these comments. Please do not hesitate to reach out should you have any questions or if there is any way NTU can be of service.

Sincerely,

Alex Milliken
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¹ Bentley, Guy, and Jacob J Rich. *Does Menthol Cigarette Distribution Affect Cigarette Use?* Reason Foundation, <https://reason.org/wp-content/uploads/does-menthol-cigarette-distribution-affect-cigarette-use.pdf>.


² Pearce, Madeleine. “Two Years after Massachusetts Approved Menthol Ban, Some Lawmakers Seek Reversal.” *The Berkshire Eagle*, 15 Nov. 2021, https://www.berkshireeagle.com/state/two-years-after-massachusetts-approved-menthol-ban-some-lawmakers-seek-reversal/article_7cc111e2-4626-11ec-9ca9-77dad03c0bec.html.

³ Bentley, Guy. *The Negative Impacts of Massachusetts' Flavored Tobacco Ban*. Reason Foundation, 2 Dec. 2020, <https://reason.org/commentary/the-negative-impacts-of-massachusetts-flavored-tobacco-ban/>.

⁴ Boesen, Ulrik. “Massachusetts Flavored Tobacco Ban: No Impact on New England Sales.” *Tax Foundation*, Tax Foundation, 27 May 2022, <https://taxfoundation.org/massachusetts-flavored-tobacco-ban-sales-jama-study/#:~:text=Sales%20in%20the%20Bay%20State,not%20including%20sales%20tax%20losses>).

⁵ Hayes, John, and Brian Connors. *Annual Report of Multi-Agency Illegal Tobacco Task Force*. Multi-Agency Illegal Tobacco Task Force, 1 Mar. 2022, <https://www.mass.gov/doc/task-force-fy22-annual-report/download>.

⁶ Hayes, John, and Brian Connors. *Annual Report of Multi-Agency Illegal Tobacco Task Force*. Multi-Agency Illegal Tobacco Task Force, 1 Mar. 2022, <https://www.mass.gov/doc/task-force-fy22-annual-report/download>.

⁷ Gentzke AS, Wang TW, Cornelius M, et al. Tobacco Product Use and Associated Factors Among Middle and High School Students — National Youth Tobacco Survey, United States, 2021. *MMWR Surveill Summ* 2022;71(No. SS-5):1–29. DOI: <http://dx.doi.org/10.15585/mmwr.ss7105a1>

⁸ Cornelius ME, Loretan CG, Wang TW, Jamal A, Homa DM. Tobacco Product Use Among Adults — United States, 2020. *MMWR Morb Mortal Wkly Rep* 2022;71:397–405. DOI: <http://dx.doi.org/10.15585/mmwr.mm7111a1>