



### **Comments of the Regulatory Action Center**

RE: Tobacco Product Standard for Menthol in Cigarettes

Docket No. FDA-2021-N-1349

RIN 0910-AI60

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rulemaking process of government agencies to which they are entitled to contribute.

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On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the Food and Drug Administration's (FDA) proposal to ban the manufacture and sale of menthol cigarettes. We write in strong opposition to this ban, which will devastate small businesses and escalate cross-border and black-market sales—harming, not protecting, public health.

Menthol cigarettes comprise more than a third of the tobacco market.<sup>1</sup> Smokers who opt for menthol cigarettes will not suddenly quit smoking—or even quit smoking menthols—when the ban takes effect. Cessation is notoriously difficult. According to the CDC, nearly 7 in 10 adult smokers wanted to stop; but in 2018, only 7.5 percent succeeded.<sup>2</sup>

Banning menthols will not make quitting any easier. The European Union's (EU) experience in banning menthol cigarettes is illustrative. Roughly 90 percent of menthol smokers continued to smoke but either purchased their cigarettes of choice in another country, switched to other flavored tobacco products, or switched to non-flavored cigarettes.<sup>3</sup> Illicit sales are likely to be much higher in the United States, as the large menthol market (more than 35 percent of smokers vs. less than 10 percent in the EU) will be more attractive to smugglers.

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<sup>1</sup> [https://www.convenience.org/Media/Daily/2021/Apr/30/1-FDA-to-Ban-Menthol-Cigarettes-Cigars\\_GR](https://www.convenience.org/Media/Daily/2021/Apr/30/1-FDA-to-Ban-Menthol-Cigarettes-Cigars_GR) (accessed July 27, 2022).

<sup>2</sup> [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm#beginning](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#beginning) (accessed July 27, 2022).

<sup>3</sup> <https://taxfoundation.org/federal-menthol-cigarette-ban/> (accessed July 27, 2022).

The consequences of fueling illicit sales are far-reaching. Black-market cigarettes are often manufactured in less-than-pristine conditions in countries without an FDA—or conscientious manufacturer—to ensure high manufacturing standards. They may be contaminated with chemicals and filth that exacerbate the health effects of smoking. The FDA would condemn one-third of smokers—and three-fourths of African American smokers—to these unregulated, ultra-hazardous products. It’s hard to understand how that is “appropriate for the protection of public health.”

Taxpayers would also suffer. Excise taxes make up 40 percent of the retail price of a pack of cigarettes. According to an analysis by the Tax Foundation, federal and state governments stand to lose more than \$6.6 billion in the first year alone.<sup>4</sup> Much of that money would instead go to black marketeers—or to whatever terrorist group they support.<sup>5</sup> And providing another lucrative black-market opportunity will further strain law enforcement, which is better focused on stopping illicit Fentanyl and other drugs that kill first-time users.

The menthol ban will harm legitimate businesses, including U.S. tobacco manufacturers, wholesalers, and distributors. It will decimate small businesses, who rely on cigarette sales to keep their businesses afloat in the Biden era of escalating inflation and ridiculously-high gas prices.

In conclusion, imposing an outright ban on a popular category of cigarettes will do little to promote public health and result in a cascade of unintended consequences: loss of taxpayer revenue, harm to small businesses, a robust black market, and consequent criminalization of consumers who, up until now, were using a legal product. This ban employs the heavy hand of government to deprive adults who choose to smoke and prefer menthol cigarettes of choice, infantilizing them in the process.

Cigarette smoking continues to decline. Government’s resources should be focused on keeping cigarettes away from kids, facilitating the development of less-risky tobacco products, and ensuring the availability of smoking cessation products for smokers who want to quit. The FDA should focus on these tasks and stay out of the cigarette-banning business.

Respectfully submitted,

Beverly McKittrick  
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<sup>4</sup> Ibid.

<sup>5</sup> <https://www.policechiefmagazine.org/illicit-cigarette-trafficking-the-funding-of-terrorism/> (accessed July 27, 2022).