



May 4, 2022

U.S. Department of Health and Human Services
Food and Drug Administration

Re: Comment on FDA's Proposed Tobacco Product Standard That Would Prohibit Menthol As
A Characterizing Flavor In Cigarettes
21 CFR 1162
Docket Number: FDA-2021-N-1349
RIN 0910-AI60

To Whom it May Concern:

My name is Jeffrey A. Singer. I am a Senior Fellow in Health Policy Studies at the Cato Institute. I am also a medical doctor specializing in general surgery and have been practicing that specialty in Phoenix, Arizona for over 35 years. The Cato Institute is a 501(c)(3) non-partisan, non-profit, tax-exempt educational foundation dedicated to the principles of individual liberty, limited government, free markets, and peace. Cato scholars conduct independent research on a wide range of policy issues. To maintain its independence, the Cato Institute accepts no government funding. Cato receives approximately 80 percent of its funding through tax-deductible contributions from individuals. The remainder of its support comes from foundations, corporations, and the sale of books and other publications. The Cato Institute does not take positions on legislation.

I would like to thank the FDA for providing me the opportunity to comment on the proposed tobacco product standard that would prohibit menthol as a characterizing flavor in cigarettes. I appreciate this opportunity to provide my perspective, as a health care practitioner and policy analyst.

According to the 2020 National Survey on Drug Use and Health, 81 percent of Black and 51 percent of Hispanic smokers preferred to menthol flavored cigarettes. The FDA's proposed product standard is intended to reduce cigarette smoking, particularly in this demographic, thereby reducing health inequities in Black and Brown communities. However, a closer look at the data on menthol cigarettes, as well as the European Union experience with a menthol ban, suggests that the proposed product standard will, unfortunately, have the opposite effect and exacerbate health inequities. Perhaps even worse, the product standard might further aggravate criminal justice inequities. Set forth below are the reasons for this concern.

- A prospective cohort study involving more than 85,000 participants in 12 southern states, published in the *Journal of the National Cancer Institute* in 2011, concluded: "The findings suggest that menthol cigarettes are no more, and perhaps less, harmful than non-menthol cigarettes."¹
- Research reported in the October 2012 journal *Nicotine and Tobacco Research*, by Brian Rostron, PhD of the FDA Center for Tobacco Products, concluded: "We found evidence of **lower cancer mortality risk** [emphasis added] among menthol smokers compared with non-menthol smokers among smokers at ages 50 and over in the U.S. population."²

- A study published in the *Journal of the National Cancer Institute* in April 2022, involving a large cohort of African Americans and whites living in 12 southern states recruited between 2002 and 2009, found menthol smokers had no greater difficulty quitting tobacco smoking than non-menthol smokers. Perhaps more significantly, the researchers performed a meta-analysis on all the research on menthol cigarettes and cancer risk and concluded: “A significantly lower risk [12 percent lower] of lung cancer is seen among menthol smokers.”³
- A January 2020 study by the Reason Foundation found states with the highest menthol cigarette consumption had the lowest youth smoking rates.⁴
- Regarding concerns about teen smoking, the U.S. Centers for Disease Control and Prevention reported in March 2022 that 60 percent of teen smokers choose non-menthol cigarettes.⁵ Furthermore, teen smoking has reached an all-time low of 1.5 percent of teens (just 1 in 250 teens are daily smokers). Therefore, a menthol cigarette ban is unlikely to significantly impact teen smoking rates.
- Menthol smokers tend to smoke fewer cigarettes per day.⁶ This might help at least partially explain the lower lung cancer mortality rate seen among menthol cigarette smokers.

The above data suggest that a ban on menthol flavored cigarettes might increase the harm associated with tobacco smoking, and disproportionately affect Black and Brown communities.

Next, consider the futility, as well as the harmful unintended consequences of prohibition. The European Union banned menthol cigarettes in 2020. Menthol smokers have developed “workarounds,” such as “mentholizing” recessed cigarette filters, menthol flavor inserts, or have simply added menthol to their tobacco.⁷ A recent EU survey finds 40 percent of menthol smokers switched to non-menthol and only 8 percent quit smoking. More important, however, was that 13 percent reported getting menthol cigarettes from “other sources.”⁸ A black market in smuggled menthol cigarettes has emerged. A major source is Belarus, where menthol brands such as *Minsk*, *Fest*, and *Queen* are smuggled into EU countries. The U.K. press reported that such “illicit whites,” as they are called, are smuggled into the country by gangs, and can be purchased “under the counter” from small British tobacconists for the right price.⁹

Prohibition fuels an underground market where peaceful voluntary transactions become crimes. It gives law enforcement another reason to interact with non-violent people who commit these victimless crimes. Like everyone else, police respond to incentives. They are rewarded by arrests and convictions. Low-level street dealers in illegal substances are “low-hanging fruit.” They are much easier to find in dense inner cities, and less dangerous to confront than violent felons. Law enforcement tends to scour racial or ethnic minority communities for victimless crimes because they are “easy pickings.” That’s how we wind up with African Americans arrested for marijuana violations four times as often as whites, even though both ethnicities use marijuana roughly equally.

And never forget Eric Garner? New York City’s exorbitant taxes on cigarette packages generated an underground market in untaxed individual cigarettes, called “loosies.” In 2014, police infamously encountered 43-year-old Eric Garner selling loosies on a street corner, and a policeman’s chokehold led to his death as he repeated “I can’t breathe.” This happened without a menthol ban.

With menthol cigarettes more popular among Blacks and Hispanics, expect police to focus their attention on minority communities. The last thing this country needs is yet another reason for law enforcement to engage with minorities they suspect are committing the victimless crime of selling menthol cigarettes in the black market.

Thus, in addition to worsening health inequities, the proposed tobacco product standard might worsen criminal justice inequities.¹⁰

The best approach to take toward tobacco smoking is harm reduction. Nicotine e-cigarettes, especially the flavored ones, are a proven way to reduce tobacco's harms for those who like the feeling of smoking and the "kick" of nicotine. And flavored e-cigarettes, including menthol, are preferred by over 90 percent of adults trying to quit combustible tobacco.¹¹

Based on current data showing menthol cigarette smokers tend to smoke fewer cigarettes, have the same quit rates as non-menthol smokers, and may have a lower risk for developing lung cancer than non-menthol smokers, I contend that banning menthol flavored tobacco cigarettes runs counter to harm reduction principles.

Respectfully submitted,

Jeffrey A. Singer, MD, FACS
Senior Fellow
Department of Health Policy Studies
Cato Institute

¹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3096798/>

² <https://www.jstor.org/stable/26763586>

³ <https://academic.oup.com/jnci/advance-article-abstract/doi/10.1093/jnci/djac070/6571153?redirectedFrom=fulltext&login=false>; see also <https://www.acsh.org/news/2022/04/26/new-wrinkle-menthol-ban-16271>

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- ⁴ <https://reason.org/policy-study/does-menthol-cigarette-distribution-affect-child-or-adult-cigarette-use/>
 - ⁵ https://www.cdc.gov/mmwr/volumes/71/ss/ss7105a1.htm?s_cid=ss7105a1_w
 - ⁶ <https://www.webmd.com/smoking-cessation/news/20110323/are-menthol-cigarettes-riskier-than-non-menthol>
 - ⁷ <https://tobaccocontrol.bmj.com/content/early/2022/03/20/tobaccocontrol-2021-057213>
 - ⁸ <https://www.smokefreeworld.org/eu-menthol-cigarette-ban-survey-2/>
 - ⁹ <https://www.mirror.co.uk/news/uk-news/gangs-making-millions-smuggling-menthol-22416137>
 - ¹⁰ <https://www.cato.org/commentary/expect-ban-menthol-cigarettes-worsen-inequities-criminal-justice>
 - ¹¹ https://www.dropbox.com/s/b8uwoxay6i2fzb2/Docket%20No.%20FDA-2017-N-6565_FARSALINOS.pdf