



November 21, 2023

Hello, I'm Elizabeth Hicks, US Affairs Analyst of the Consumer Choice Center. As a consumer advocacy group that fights for lifestyle freedom, innovative technologies, and smart policies, we strongly oppose the Food and Drug Administration's ban on menthol cigarettes and cigars.

The first reason is simple.

1.) By rendering menthol tobacco products illegal, the FDA is depriving adult consumers of a chosen product category and flavor rather than offering concrete solutions to get adults to switch to less harmful alternatives.

It's well documented that combustible cigarette use is the leading cause of lung cancer and also contributes to other types of cancers and serious diseases which can be fatal. As a recent cancer survivor myself, I applaud the agency's goal of working towards eliminating smoking to reduce the negative public health impacts that combustible cigarettes play.

However, rather than tinkering on the edges, the FDA can take the definitive step already taken by other global public health regulators: **embrace** and **promote** less harmful nicotine alternatives like flavored vaping devices, nicotine pouches, snus, nicotine gums and lozenges, and more.

These products exist and have been embraced by millions of consumers. They save lives. These did not result from millions of dollars of government grants, they were not concocted in high-priced boardrooms by well-funded public health groups nor were they the result of any government or anti-smoking group, many of which may applaud the FDA's ban on menthol cigarettes and cigars.

Rather, these products have been introduced by entrepreneurs and innovators who saw a market opportunity: the estimated 31 million Americans who still smoke and want to quit.

The fact remains that these products are much more effective at reducing smoking than bans, restrictions, and the long arm of the law.

In 2015 Public Health England concluded from their research that vaping is 95% less harmful than smoking. Last year King's College released the largest study of its kind



confirming the findings of Public Health England that vaping is indeed significantly less harmful than smoking combustible cigarettes. The UK government released a report in [2022](#) that shows that flavored vaping products, specifically fruit and menthol/mint flavors, remain the most common aid used by people to help them stop smoking combustible tobacco. When analyzing the stop smoking service data from 2020 to 2021, it was noted that vaping devices produced the highest success rates for attempts at quitting.

Canada announced recently that they are embracing the scientific evidence and are promoting vaping as a less harmful alternative that can help individuals stop smoking combustible tobacco. They note that evidence indicates those who switch completely from combustible tobacco to vaping:

- Immediately reduce their exposure to the harmful chemicals found in cigarette smoke
- See general health improvements in the short term as a result of no longer smoking cigarettes
- Are more likely to quit smoking than those who use nicotine replacement therapy (NRT) or counseling to quit
- Do not currently report serious unwanted effects while using vaping products to quit
- May have a higher startup cost but save money in the long run (cost per equivalent puff)

Another great international example to look to is Sweden. The World Health Organization recently announced that Sweden [will likely](#) become the first smoke-free country as they have [embraced](#) the concept of tobacco harm reduction by supporting its citizens to switch from cigarettes to less harmful alternatives including vaping, nicotine pouches, and snus.

Consequently, Sweden [reduced](#) its smoking rates two times faster than any other country in the European Union and smoking rates have declined by 55% in the last decade. Additionally, smoking-related deaths are 22% lower in Sweden than the European Union average and cancer incidence is 41% lower than in the rest of Europe, with total deaths from cancer being 38% lower.

Nicotine [pouches](#) became available in Sweden in 2018 and the smoking rates dropped by more than 20% since then.



It would be prudent for the FDA to embrace and promote less harmful nicotine alternatives like vaping, pouches, snus, and others as these products provide an effective and versatile contribution to ending smoking.

Reason number two:

2.) By rendering products that are legal today illegal, the FDA will create an incentive for an illicit market where no regulations, rules, product, or age restrictions will be followed.

When we spoke at the FDA's May 2019 public hearing on the science and potential regulations for cannabis products, our argument was exactly the same as today. We should champion smart policy that encourages competition and choice, fact-based evidence on harm reduction, and eradication of the illicit market.

Back then, it was to address the largely illegal market of cannabis products in the United States.

Thankfully, our country has learned the lessons of the war on drugs and has begun undoing many of these punitive and socially damaging restrictions, with some states leading the way. But we are still living with the consequences of cannabis prohibition.

How bad will this situation be once we've entered the territory of nicotine prohibition?

If the FDA's rule aiming to outlaw flavored cigars and menthol cigarettes goes forward, it will indeed create a large illicit market. This rule **will** cut off legal supply, but it will do nothing to address the demand for these products.

After the 2019 menthol cigarette and flavored vaping ban in Massachusetts, the Multi-Agency Illegal Tobacco Task Force admitted that the ban had created a new market for hundreds of millions of dollars worth of illicit counterfeit tobacco products, brought in from states such as New Hampshire.

Studies have proven the same in Canada and Poland when menthol cigarettes were banned. At the very least, former menthol smokers switched to using non-menthol cigarettes.

A recent study of discarded cigarette packs was conducted to examine the ban on flavored tobacco products (which includes menthol) that went into effect in California in



2022. Researchers found that after the ban had taken effect, menthol products and menthol work-around products continue to make up over 21% of the marketplace. Whereas before the ban went into effect, menthol cigarettes made up a little over 24% of the marketplace, meaning the ban had little effect on consumer access.

Frighteningly, international smuggling through the illicit market has helped fill the void for consumer demand. One of the most-found brands, Sheriff, is known to be trafficked by Mexican cartels. It made up over 5% of the sample examined in the study, which suggests that tens of millions of packs are illegally in California.

Is this some victory for public health? Or an absolute failure? Why is the FDA looking to replicate this on a larger scale? Is this really the flag you wish to plant for a public health regulator?

The last few years have proven that the FDA has not been particularly equipped to deal with major health and safety issues in this country, and it has been distracted.

Whether it was the delay in approving a single standard COVID test [before November 2020](#), or blocking the efforts of dozens of universities and private firms that had developed tests in spring of 2020 of the pandemic, or even the ongoing baby formula crisis, this agency has chosen to put its resources into addressing non-communicable diseases and endorsing product and flavor bans, all the while denying the scientific potential of harm reducing nicotine alternatives.

Has the FDA considered that a menthol ban may not achieve its primary aim, and may end up pushing smokers to just use other tobacco products?

When Congress gave the FDA authority to regulate nicotine products, it was with the expectation that the FDA would be able to both discourage youth use and help adults quit smoking.

Sadly, to date, the FDA has accomplished little to help adult consumers, and we believe a ban on menthol flavor in combustible tobacco would once more fall short of giving smokers and former smokers a better option, while depriving informed consumers of an option they prefer.

3.) Making menthol flavor illegal, despite the positive statements of the FDA, would lead to more interactions between law enforcement and the users of these products.



If a menthol tobacco product or a flavored cigar is made illegal by the FDA, and FDA claims this will not carry over to consumer possession penalties, you must understand that these rules are guidelines that states will follow. States, which write the majority of criminal laws in our country, will have every incentive to include these product bans in their enforcement regimes, especially considering the very real incentives that have fueled the national war on drugs, the militarization of police, civil forfeiture, and more.

Hence, considering the very real [demographic statistics](#) on the users of menthol tobacco products, this prohibition will lead to more interactions between law enforcement and minority communities. Despite the FDA's claims of not criminalizing consumers. Consumers ALWAYS bear the brunt of these policies and bans. Not institutions.

We have sadly already seen what can happen when law enforcement is tasked with upholding tobacco regulations. The tragic loss of Eric Garner's life for example, where the sale of untaxed individual cigarettes resulted in a deadly police interaction. Unfortunately, aggressive police interactions prompted by tobacco regulation enforcement are becoming more regular as more states and localities implement their own bans on tobacco products. In Ocean City, Maryland, for example, there have been multiple instances of individuals who have been tased and arrested for consuming tobacco products in public parks.

That is perhaps why many [civil liberties groups](#) oppose this law, and for the right reason.

Has the FDA considered that while the intentions of eradicating menthol tobacco products are noble, it may be creating yet more social justice implications than we may be prepared to handle?

Lastly,

4.) Instead of a ban on menthol cigarettes and cigars, the FDA should explore and implement more effective ways to reduce harm, increase smoking cessation, and promote overall public health.

As we mentioned previously, one key aspect to achieve the desired result of moving adult consumers away from the harms of combustible cigarettes is to embrace less harmful alternatives such as flavored vaping products, nicotine pouches, snus, lozenges, nicotine gums, and other products. We were hopeful that we would be seeing



more nicotine alternative products on the market now as a result of the PMTA process, however FDA seems to be spending much more it's time and attention on banning certain products altogether.

Perhaps instead of wasting taxpayer dollars that would be used to enforce a federal ban on menthol cigarettes and cigars, that money could instead be used to create a Swap-2-Stop program where adults who want help to stop smoking combustible tobacco could trade in their packs of cigarettes for a vaping starter kit. The UK adopted this strategy earlier this year and has pledged to distribute over 1 million vaping kits to smokers throughout their country.

One final idea is to increase educational efforts around available nicotine alternatives that are less harmful than smoking in addition to cessation resources. For example, there could be a small informational packet inserted into each combustible cigarette pack highlighting less harmful nicotine alternatives and various resources on which programs exist to help adults quit smoking altogether.

To conclude, we strongly oppose FDA's rule to ban menthol cigarettes and cigars for the reasons we have outlined. We thank you for your time today and look forward to answering any questions you may have.