

MEMO

To: Cedric Richmond, Director of the White House Office of Public Engagement; Susan Rice, Director, Domestic Policy Council
From: Representatives Donald McEachin, Yvette E. Clarke, Al Lawson, Abigail Spanberger, Sanford Bishop, Elaine Luria, G.K. Butterfield, Steven Horsford, Bennie Thompson
Re: FDA Action on Tobacco Products
Date: April 22, 2022

Background: In 2009, following passage of The Family Smoking Prevention and Tobacco Control Act (TCA), [P.L. 111-31](#)¹, a central federal regulatory regime for the manufacture, marketing, and distribution of tobacco products was established as the Center for Tobacco Products.

To reduce the allure of flavored tobacco products to minors, the TCA bans flavors (other than tobacco and menthol) in traditional cigarettes and components. The TCA also empowers the Food and Drug Administration (FDA) to adopt certain tobacco product standards if the agency determines that a standard is appropriate to protect the public health. Such standards may relate to reducing nicotine levels, removing harmful components of a product, or other features, such as further restrictions on the sale of flavored products. However, the TCA does not allow the FDA to ban all cigarettes and other types of tobacco products.

In July 2013, pursuant to a directive in the TCA, the FDA released an advance notice of public rulemaking (ANPRM) on a tobacco product standard for menthol in cigarettes, seeking public comment.² FDA released an ANPRM in March 2018, "Regulation of Flavors in Tobacco Products," requesting information related to the role of flavors generally in tobacco products, among other things.³ Neither the 2013 or 2018 ANPRM resulted in proposed rules being issued to date.

In January 2020, FDA stated its intention to issue a proposed rule that would "ban the use of characterizing flavors in cigars," but did not speak to characterizing flavors in other tobacco products.⁴

Recent Developments: In April 2021, pursuant to litigation filed by certain tobacco control parties, the FDA granted a citizen petition originally filed in 2013 requesting that the agency pursue rulemaking to prohibit menthol in cigarettes.⁵ The FDA also announced that it would pursue rulemaking that would ban all characterizing flavors (including menthol) in cigars. At that time, the FDA indicated that the rulemaking

¹ [http://www.congress.gov/cgi-lis/bdquery/R?d111:FLD002:@1\(111+31\)](http://www.congress.gov/cgi-lis/bdquery/R?d111:FLD002:@1(111+31))

² <https://www.federalregister.gov/documents/2013/07/24/2013-17805/menthol-in-cigarettes-tobacco-products-request-for-comments>

³ <https://www.federalregister.gov/documents/2018/03/21/2018-05655/regulation-of-flavors-in-tobacco-products>

⁴ <https://www.fda.gov/media/133880/download>

⁵ <https://www.fda.gov/news-events/press-announcements/fda-commits-evidence-based-actions-aimed-saving-lives-and-preventing-future-generations-smokers>

process would be undertaken “within a year,” and the White House OMB’s Unified Agenda indicates that FDA aims to release proposed rules regarding cigars⁶ and cigarettes⁷ in April 2022.

Potential Impacts: *Economic Impact:* The economic impact of such a rule would be significant, with legal businesses losing out to illegal sellers, employees losing jobs, and government losing billions of dollars in excise tax revenue. A ban on menthol cigarettes would entail a ban of 36% of national cigarette sales⁸ – totaling \$28.3 billion and putting \$14.8 billion in government revenue at risk annually (\$3.8 billion federal government/\$11 billion state government).

Impact on Criminal Justice Enforcement: Currently, all 50 states treat the sale and distribution of illegal cigarettes as a crime. In 44 states, it is classified as a felony. In 37 states, it is subject to mandatory minimum sentences. Simple possession of illegal cigarettes is a crime in over 30 states.

With the banning of menthol cigarettes and flavored cigars would come the criminalization of menthol cigarettes and a large segment of the cigar category. A ban may lead to illegal and unlicensed distribution of these products in communities of color, where research has shown that over 80 percent of black smokers choose menthol tobacco products. Importantly, none of the requirements established by the TCA and FDA—including age verification—are applied to illegal sales.

According to the Law Enforcement Action Partnership (LEAP), a ban on menthol cigarettes could lead to increased negative interactions between law enforcement and these communities, leading to increased incarceration. In a letter sent to the Administration, LEAP noted that the “illegal market problem will be principally one for state and local communities and law enforcement to deal with, not the FDA. In other words, FDA will issue the rule – but the impact will be downstream, on communities and criminal justice systems in our cities, towns, counties, and states.”

Impact on Black Farmers: The Biden Administration has been strongly supportive of Black farmers. However, a ban on menthol cigarettes and on flavored cigars would lead to a decline in demand for tobacco, putting \$171 million in U.S. farmer revenue at risk.⁹ This reduction could also damage production of other crops as well, as the yield from tobacco supports this production.

Bottom Line: It is rare that we can prevent negative impacts on Black communities and other communities of color by not doing anything at all. However, this is the case regarding a proposed ban on menthol cigarettes and flavored cigars, and it would be

⁶ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0910-AI28>

⁷ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0910-AI60>

⁸ Management Science Associates Inc (MSAi), FY2021 data

⁹ 52% of cigarette leaf is assumed domestic based on Congressional Research Service, “U.S. Tobacco Production, Consumption, and Export Trends,” June 2003., <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL30947.pdf>. Price data from USDA Crop Production Reports, *ibid*.

beneficial to Black communities for the FDA to not move forward in promulgating regulations in this space. At minimum the FDA should undertake additional research to study the impacts of such regulations, to include an assessment of the criminal justice implications related to a ban on menthol cigarettes and flavored cigars.