

The Honorable Xavier Becerra  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

The Honorable Robert Califf  
Commissioner  
U.S. Food and Drug Administration  
10903 New Hampshire Avenue  
Silver Spring, MD 20993-0002

The Honorable Charles E. Schumer  
Majority Leader  
United States Senate  
Washington, DC 20510

The Honorable Mitchell McConnell  
Minority Leader  
United States Senate  
Washington, DC 20510

Re: Law Enforcement Response to FDA Proposed Ban on Menthol Cigarettes and Flavored Cigars (Docket Nos. FDA-2021-N-1349 and FDA-2021-N-1309)

Dear Secretary Becerra, Commissioner Califf, Majority Leader Schumer, and Minority Leader McConnell:

This correspondence reflects the considered viewpoint of the largest law enforcement organizations in the United States, who together represent nearly 700,000 sworn officers, as well as their labor and management groups, at the federal, state, and local levels.

We are writing to urge the Administration not to move forward with the FDA's proposal to ban the legal sale of menthol cigarettes and flavored cigars in the U.S. History has shown repeatedly that bans have an unintentional consequence of creating or strengthening illicit markets. Based on historical precedent, there is no doubt that the proposed bans will exacerbate an already thriving illicit tobacco market, increase crime in our communities, strain already tight public safety resources, and place further stress on our departments that are greatly understaffed.

The FDA is proposing to totally ban the legal sale of these products at a time when the Law Enforcement community is facing unprecedented challenges, including rising violent crime, rising property crime, continuing gun violence and an opioid crisis that is testing our people to their limits.<sup>1</sup> All of these issues in turn are fueling a real crisis in recruitment, retention, and modernization of our organizations.<sup>2</sup>

In the midst of these challenges, this ban will create new criminal markets in these products. With a retail value of over \$30 billion, criminals will rapidly seize the opportunity to fill the consumer demand by securing supplies of menthol cigarettes from illegal importers and smugglers, and illegally distribute and sell these products in our communities. The data is clear in this regard, as confirmed by multiple federal government reports over the years.<sup>3</sup> These reports document what we in law enforcement encounter every day – criminal networks actively seeking opportunities to create alternative channels for tobacco products to avoid the legal system. These bans will make the situation far worse. For example, following a menthol cigarette

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<sup>1</sup> <https://counciloncj.org/crime-trends-yearend-2021-update/>

<sup>2</sup> <https://nij.ojp.gov/topics/articles/chiefs-panel-points-top-issues-and-related-innovation-needs-facing-law-enforcement>

<sup>3</sup> <https://www.gao.gov/assets/gao-11-313.pdf>; <https://www.gao.gov/assets/gao-18-21-highlights.pdf>; <https://www.gao.gov/assets/gao-04-641.pdf>; <https://nap.nationalacademies.org/read/19016/chapter/1>; <http://vscc.virginia.gov/Illegal%20Cigarette%20Trafficking.pdf>

ban in Massachusetts in 2020, taxable cigarette sales in the state decreased while sales of menthol and flavored tobacco products increased proportionately in neighboring states.<sup>4</sup> The Massachusetts Illegal Tobacco Task Force recently issued a report detailing the significant law enforcement consequences of this policy.<sup>5</sup>

This illicit trade issue will not be a problem primarily for FDA’s law enforcement personnel—FDA has already said they will focus only on the task of pushing these products out of the regulated system. It will, instead, be an issue for us – the men and women of state, county, and local law enforcement. Of course, we don’t enforce FDA law (the product standard prohibiting menthol as an ingredient) but we do enforce state laws that prohibit the manufacture, sale, transportation, and possession of untaxed cigarettes – which is exactly what all menthol cigarettes found in our communities in the future will be, regardless of how they get there. And that means state, county and local law enforcement having these illicit products showing up in their neighborhoods at a time when we are doing our best to address all of the other challenges we are facing. Through communications with our federal law enforcement partners, we have been informed that they lack the necessary resources to devote full time towards investigating the anticipated increase in illicit tobacco crimes.

A new illegal market in menthol cigarettes and flavored cigars will have a much bigger impact than just the crime of illicit tobacco – it will increase multiple categories of crime in our communities. The data is clear that illicit tobacco attracts gangs and organized crime, and the proceeds from smuggling finance other criminal activities – including drugs, guns, and property crime.<sup>6</sup> There have already been cases in many states of gangs and organized crime smuggling cigarettes, and cigarette smuggling has been a part of larger criminal conspiracies. We know this because we live this experience every day. Moreover, underage youth in certain areas will be utilized to distribute the black-market cigarettes thus putting them at a higher risk of danger and violence from gangs. This would further add to the increase of negative law enforcement interactions which would lead to the continued mistrust of law enforcement in the black and brown communities.

In this regard, it is important to note that all 50 states have laws on the books that treat unlicensed tobacco sales as a serious crime – and that means we will have the responsibility to enforce those criminal laws. Where will the resources come from for our police officers to enforce this ban? The FDA’s proposal includes no proposal at all for funding any law enforcement response, especially not state and local efforts. To us, that makes this ban an unfunded mandate – it places a new category of criminal conduct into our neighborhoods which violate the state and local criminal laws we are obligated to enforce but provides no funding at all to support that work.

Many in law enforcement also have concerns about the health dangers that our citizens may face if this ban goes in effect. If the ban is implemented, licensed US manufacturers and distributors will stop making menthol cigarettes and flavored cigars. The demand for these products will be met through imports from unregulated manufacturers overseas, such as those that are operating in China. Lacking any FDA oversight, these products are much more likely to contain

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<sup>4</sup> <https://taxfoundation.org/massachusetts-flavored-tobacco-ban/>

<sup>5</sup> <https://www.mass.gov/doc/task-force-fy22-annual-report/download>

<sup>6</sup> <https://2009-2017.state.gov/documents/organization/250513.pdf>

ingredients or other components that increase the possibility of harm for consumers.<sup>7</sup> Given previous challenges with counterfeit products and the lack of regulation in China, it's conceivable that fentanyl analogues could make their way into the menthol cigarettes and flavored cigars produced by unregulated manufacturers.

We agree with the goal of reducing tobacco use among African Americans, which is already lower than it has been in decades. In our opinion, the greatest need that our communities have is REAL infrastructure investment, not Prohibition. The ostensible premise for the FDA's ban of menthol cigarettes is to protect young African American males who consume a disproportionate amount of this product. According to a 2020 National Institutes of Health report, evidence suggests that young African American males are a large consumer of individual menthol cigarettes referred to as "loosies."<sup>8</sup> These loosies are sold illegally in lower income neighborhoods within large urban areas. The sellers are either individuals on the street or corner grocery stores known as "bodegas." If a ban is imposed, this will empower the illicit loosie cigarette market, lower the price due to competition, and increase the availability of menthol loosies for young African American males. That is an unacceptable outcome.

The bottom line for us is that this potential ban will invite law enforcement in to communities of color to become the menthol cigarette police at a time when all stakeholders are looking for ways to improve police-community relations. It makes no sense to impose new regulations that we can foresee will make this situation worse. At the end of the day, we will be the ones forced to decide when and where to stop a person suspected of trafficking in menthol cigarettes or flavored cigars. We will be the ones forced to decide when and how to prevent escalation of violence in situations that intensify. We will be the ones having to respond when gun violence breaks out in neighborhoods over gangs struggling for control over the illicit menthol cigarette market. We agree that cities across the country are in the midst of a historic spike in homicides and violence that disproportionately impacts Black and Brown Americans. However, we fail to see how criminalizing menthol cigarettes will do anything but make matters worse.

None of this is to deny the need for policies that make our communities healthier. But what our communities need is REAL investment. Investment in community-based health care programs, education, employment, mental health services, solutions for homelessness, and small businesses. Investment, not Prohibition, can actually improve the conditions that lead to safer, healthier communities.

In closing, we believe it is vital to keep tobacco products within the licensed retail system and avoid policies that risk creating large illicit markets that trigger criminal laws in all 50 states. We are particularly concerned that the FDA has not engaged in any genuine dialogue with the law enforcement community or the criminal justice reform groups that jointly oppose this proposal. We deserve better. We urge you to find a different policy solution than a total ban on the legal sale of these products to adults 21 and older. At a minimum, FDA should withdraw this proposed rule and embark on a serious intra-governmental engagement with law enforcement and other

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<sup>7</sup> <https://icc-ccs.org/index.php/360-counterfeit-cigarettes-contain-disturbing-toxic-substances#:~:text=Studies%20have%20shown%20that%20when,133%20percent%20more%20carbon%20monoxide>

<sup>8</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6994289/>

stakeholders to better understand the risks and costs this proposal will have on the communities we serve.

This correspondence is the result of a collaborative support effort among the following organizations:

Federal Law Enforcement Officers Association (FLEOA) Foundation  
National Association of Police Organizations (NAPO)  
National Narcotics Officers Association Coalition  
National Organization of Black Law Enforcement Executives (NOBLE)  
National Troopers Coalition  
Police Athletic League (PAL)  
Police Benevolent Association of the New York State Troopers