July 29, 2022

Hon. Robert M. Califf  
Commissioner  
Food and Drug Administration  
5630 Fishers Lane, Room 1061  
Rockville, MD 20852  

RE: Docket No. FDA-2021-N-1309 (Tobacco Product Standard for Characterizing Flavors in Cigars)  
Docket No. FDA-2021-N-1349 (Tobacco Product Standard for Menthol in Cigarettes)

Dear Commissioner Califf:

We the undersigned organizations are contacting you on behalf of millions of consumers, small businesses, and community advocates. We write in opposition to the Food and Drug Administration’s proposed individual bans on menthol cigarettes and flavored tobacco products.

It is clear that the FDA has not taken into account the harmful, even if unintended, impact that the proposed ban would have on communities, consumers, small businesses, and the American economy as a whole.

First, the cigar manufacturing industry continues to contain and be influenced by Hispanic-owned businesses. Flavored products are a significant portion of this business and the many times the center of competition among brands. FDA’s own rationale underscores that the proposed rule targeting them would devastate the small manufacturers who produce flavored cigars, costing them an average of $2 million a year over 40 years, a blow many if not most of them would never be able to survive, hurting their workers and the communities in which they are located.

Many of the products in question are sold by tens of thousands of other small businesses, in particular independent small retailers, owned by, employing, and serving Latinos and Latino communities. These small retailers are key economic components of their communities, frequently providing a first rung up on the job ladder, serving as oases in inner-city and rural food deserts, and providing a major source of SNAP food sales, for example.

As important it is to note the importance of retailers on specific communities and demographics, it is equally important to state the overall role that retailers, especially small retailers have in the overall American economy. Of the approximately 253,000
convenience stores, grocery stores, and other outlets selling tobacco, 136,000, or 54%, are single-store owners. Convenience stores alone support 2.38 million American jobs.

In short, “retailers are at the center of the community and the economy,” as stated by Noe Castro of the San Francisco Hispanic Chambers of Commerce.

Tobacco is the top revenue generator for these retailers, generating 34.7% of in-store sales nationwide. Menthol cigarettes generate about $29 billion in annual retail sales, while flavored cigars generate between $4 to $5 billion in annual retail sales. Furthermore, consumer research shows that for every $1 an adult smoker spends on cigarettes, they spend an additional 25¢ on additional items.

The importance that these products have for retailers through sales volume renders impossible FDA’s claim that retail sales revenue will remain constant. The sales of menthol cigarette and flavored cigar sales will simply not be replaced by the sale of other products. It follows that the taxes generated by these sales will also plummet, causing increased pressure on state and local governments and taxpayers in general.

Yolanda Serrano of the Neighborhood Business Alliance appropriately sums up the impact on small retailers “[our members] don’t understand why they will be punished.”

In addition to the extraordinary economic damage that would result from the prohibition of menthol cigarettes and flavored tobacco, a massive increase in counterfeiting and contraband sales will be another devastating consequence of these proposed bans.

Currently, licensed retailers sell products regulated by the FDA and made by manufacturers who are also regulated by the FDA. Licensed retailers comply with all federal and state marketing limitations and play a key role in preventing anyone who is not of legal age from purchasing tobacco products through proper verification of valid driver’s licenses and other forms of acceptable identification, efforts that have been critical in driving down cigarette use among youth to 1.3%. As Michael Juarez of the Los Angeles Hispanic Chamber of Commerce has stated, “the small businesses that do sell these products, they make sure that they go through certain protocols to make it safe for everyone that’s involved.”

It is unavoidable that implementing prohibition for these products will create a robust black market and in turn lead to other social ills.

First, illicit sellers are highly likely to rely on unregulated products often smuggled into the U.S. Such products contain more harmful ingredients. Analysis by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) concluded that “while all cigarettes are dangerous and are known to cause disease, counterfeit cigarettes often contain higher
levels of tar, nicotine and carbon monoxide than genuine cigarettes, and may contain contaminants such as sand and packaging materials. Counterfeit cigarettes pose a greater health risk to consumers and cost taxpayers millions in lost revenue.”

Much of those illicit products would undoubtedly make their way into underserved communities, where illegal sellers would compete with legitimate retailers, and where, even more disturbingly, much of the trafficking of contraband tobacco products is controlled by street gangs. Increased criminal activity, violence, and burdens on law enforcement would be the result. And of course, illegal products would be even more accessible to youth who are now prevented from purchasing cigars by Tobacco 21 laws.

In closing, we respectfully urge you to consider that vast unintended consequences of prohibition of specific tobacco products for use by adults. All of the negative effect we outline would be magnified at a time when the American economy is struggling to recover from the pandemic and the supply-chain, labor-shortage, impacts of inflation, and other issues. Hurting responsible manufactures, retailers as well as their workers and consumers, and enhancing a black market for products that will not simply disappear, should not be an appropriate policy action.

Sincerely,

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