

## Talking Points for Retailers, Retail Employees, Adult Consumers and Wholesalers

### Introduction

Below are different talking points that can be used to draft your comments to the FDA. Please remember to use your own wording and where you see blank lines, add in the information that would apply to your store or stores.

### Prohibition is Not the Answer

Tobacco retailers and wholesalers are facing major challenges – a supply chain crisis, labor shortages, significant inflationary pressures, economic uncertainty, and increasing crime rates.

Yet, the FDA's proposed ban on the legal distribution and sale of menthol cigarettes and flavored cigars in the U.S., even for products sold to adults 21 and older, is a Prohibition-based policy that makes no sense because:

- It will push these products to illicit, unregulated markets where illegal sellers do not follow the law, do not check IDs to verify legal age, and do not submit to FDA compliance checks.
- It will undermine the public health purposes of FDA regulation and other laws.
- It will lead to the sale of tobacco products not regulated by the FDA.
- It will put billions of dollars in wholesale and retail sales at risk, as well as dramatically reduce payment of taxes to the federal, state and local governments.
- It will increase crime in neighborhoods where law-abiding retailers live and work.

The FDA has better options that would not negatively impact tobacco retailers – like education, smoking cessation support, and underage prevention. This is what FDA should focus on – not prohibition.

### Underage Tobacco Use is at Historic Low Rates

The FDA needs to acknowledge that historically low and further declining tobacco usage rates among underage youth do not support nor justify an across-the-board prohibition on menthol cigarettes and flavored cigars.

According to the National Survey on Drug Use and Health (NSDUH) data from 2002 to 2020, tobacco use by 12 to 17 year olds who report using tobacco products in the past 30-days is as follows:

- Youth cigarette smoking is the lowest in a generation (1.3%)
- Youth menthol cigarette use is the lowest in a generation (0.8%)
- Youth use of cigars is also the lowest in a generation (0.8%)

None of this progress could have been made without maintaining a legal, regulated market for tobacco products. This is why it is so important to **keep these products in licensed stores** rather than foster an illicit trade where anyone of any age can buy menthol cigarettes and flavored cigars.

## **Licensed Retailers and Wholesalers are Essential to the Regulation of Tobacco Products**

Licensed retailers and wholesalers are *the critical component* of ensuring all tobacco products are responsibly distributed and sold in the U.S. Licensed retailers and wholesalers:

- Support We Card's prevention efforts to prevent tobacco sales to anyone under 21.
- Sell only FDA-regulated products made by FDA-regulated manufacturers.
- Comply with all federal and state laws, marketing restrictions, and Master Settlement Agreement requirements.
- Sell legitimate products with appropriate FDA health warning labels.
- Pay taxes.

Handing sales of flavored cigars and menthol cigarettes over to the illicit marketplace will undermine all these safeguards. To ban all these products is to abandon the regulated marketplace that has delivered such favorable public health gains over the last several decades.

## **Alternative Options that Avoid Significant Economic Impact**

There are better options for protecting public health which **keep these products within the licensed, regulated system**. However, the FDA has to first acknowledge that historic low and declining tobacco usage rates among both underage youth and adults does not support nor justify an across-the-board prohibition on menthol cigarettes, menthol roll-your-own tobacco, and flavored cigars.

Rather, the FDA should focus on education, tobacco cessation, underage prevention, and providing adult consumers with less harmful alternatives. These harm reduction policies:

- Preserve age-verification at retail
- Ensure all products are FDA-regulated
- Inform adults of the health risks of different products
- Do not lead to more illegal sales and crime
- Do not financially impact responsible retailers and wholesalers.

## **FDA's Claim that Retailers Will Not Lose Sales Revenue is Unfounded**

In its Regulatory Impact Analysis reports that supplement the agency's proposed regulations banning menthol cigarettes and flavored cigars, the FDA claims that retailers will not experience a reduction in sales revenue due to the menthol cigarette ban because consumers will use the money they would otherwise spend on menthol cigarette purchase to purchase other tobacco products and non-tobacco products in retail stores. The FDA goes on to state in the report on the flavored cigar ban that retailers may or may not experience sales declines.

The FDA offers no proof or substantiation in the report that there will be a dollar-for-dollar substitution by consumers from the amount they would spend on menthol cigarettes to buy other tobacco and non-tobacco products, let alone that retail sales will actually increase.

With menthol cigarettes and flavored cigars making up \_\_\_\_% of our store sales, a ban on menthol cigarettes and flavored cigars cannot and will not be made up by customers buying other products. As a retailer, I know our customers' buying habits, and with their preferred tobacco products no

longer legally available, they will search out other sources for the products they want to purchase and use.

This means our sales will decline and that decrease will likely be substantial. We estimate that our gross store sales of menthol cigarettes, menthol roll-your-own tobacco, flavored cigars and ancillary products will decrease by \$\_\_\_\_\_ annually.

The result will be employee layoffs and possibly even store closures. We estimate that we will need to consider laying off \_\_\_ employees per store due to the decrease in sales.

### **These Proposed Bans Will Impose Major Economic Harms on Responsible Retailers and Employees**

The total ban on the sale of menthol cigarettes, menthol roll-your-own-tobacco, and flavored cigars will shift products to illegal sellers, at a heavy cost to tobacco wholesalers, retailers and their employees. Contrary to the claim by the FDA that retail sales revenue will remain constant, the sheer volume of menthol cigarette and flavored cigar sales will not be replaced by the sale of other tobacco products and non-tobacco products.

- Convenience stores support 2.38 million jobs (National Association of Convenience Stores).
- Tobacco is the top retail revenue generator: 34.7% of in-store sales nationwide (National Association of Convenience Stores) and up to 90% for tobacco-only stores.
- Menthol cigarettes generated approximately \$17 billion in annual wholesale sales to retailers (Tax Burden on Tobacco volume and price data) and \$29 billion in annual retail sales (Management Science Associates sales data).
- Flavored cigars generate between \$1 billion to \$2 billion in annual wholesale value and between \$4 to \$5 billion in annual retail sales (Cigar Association of America sales data).
- Due to sales losses, convenience store retailers could be forced to cut as many as 150,000 jobs, the equivalent of one full-time position at each of the nation's 150,000+ convenience stores (National Association of Tobacco Outlets estimate).
- Job losses at tobacco-only stores would likely be more than one full-time position because tobacco products account for approximately 90% of all tobacco store sales.

### **Comments on Adding Pipe Tobacco to the Flavored Cigar Ban Regulation**

The statement made by the FDA in its Regulatory Analysis Report that the agency is assuming the same percent of pipe tobacco is flavored as cigars is an incorrect assumption. Virtually all pipe tobacco is flavored and always has been. This means that if the FDA proposes to ban flavored pipe tobacco, the entire product category would essentially be prohibited. The Family Smoking Prevention and Tobacco Control Act prevents the FDA from prohibiting the sale of an entire category of tobacco product.

According to the 2021 National Youth Tobacco Survey, only 0.3% of middle and high school students reported using pipe tobacco. Such a low percentage does not justify a total ban on all pipe tobacco.

With the average age of a traditional pipe smoker in the mid-50s, there is no reason to ban all pipe tobacco.

### **Adult Consumer Talking Points**

- The FDA should not ban the sale of legal tobacco products that I choose to buy and use.
- As an adult, I should have the right to buy and use legal products meant for adults.
- These proposed bans will force me to seek out other sources of the tobacco products that I want to purchase.
- This means my local retailer who abides by the law will lose sales.
- There are other ways for the FDA to further reduce underage use of tobacco, but prohibition has been tried in this country before and it has failed.

### **Request at Conclusion of Comments**

At the end of your letter or comments, request that the FDA not proceed with implementing the menthol cigarette ban and the flavored cigar ban to avoid the significant economic impact and illicit market that the regulations will cause.