



November 8, 2023

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

**RE: Docket No. FDA-2021-N-1349 for “Tobacco Product Standard for Menthol in Cigarettes” and Docket No. FDA-2021-N-1309 for “Tobacco Product Standard for Characterizing Flavors in Cigars”**

Dear President Biden,

On behalf of the National Association of Convenience Stores (“NACS”), we are writing to urge you to reconsider the recent Food and Drug Administration’s (“FDA”) proposals to ban menthol cigarettes and flavored cigars. FDA’s proposed bans will have significant negative economic and public health consequences while failing to deliver reductions in tobacco use by affected consumers. NACS submitted formal comments on the proposals to this effect in July of last year and has a meeting scheduled with the Office of Management & Budget on November 28, 2023.

NACS represents more than 150,000 convenience stores in the United States, the majority of which are small operators with 60% being single-store operators. Tobacco products are a vital source of revenue for the convenience store industry. Menthol cigarettes account for 34% of cigarettes sales and flavored cigars account for 51% of cigar sales in convenience stores today. Collectively, menthol cigarettes and flavored cigars combined for \$23.7 billion in sales last year.<sup>1</sup> Adult smokers purchasing menthol cigarettes and flavored cigars also purchased \$10.7 billion in other, non-tobacco products during their visits to convenience stores last year.

NACS acknowledges that these proposals are well intended. However, if implemented, they are likely to usher in an array of negative unintended consequences by adding to the already burgeoning illicit tobacco market, moving business away from legitimate companies to unregulated foreign producers, and removing the consumer guardrails put in place by responsible sellers like the convenience store industry. These stores sell legal products that consumers wish to buy. They cater to, rather than create, demand for the products they sell, and removing the legal market for these products will only shift that demand.

The illicit tobacco market is not theoretical. It is an already existing, massive, and growing market without age verification or safety controls. The business generated through this

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<sup>1</sup> Calculation based on volume and price data in Ozechowski & Walker, *Tax Burden on Tobacco*, (2021) and cigar data from Cigar Association of American, Retail Price Data (2021).

market benefits transnational criminal enterprises rather than legitimate small businesses and denies governments at all levels tax revenues that drive public improvements and healthcare spending. According to some estimates, as much as 21 percent of the tobacco products sold in America are purchased through the illicit market.<sup>2</sup> In fact, a recent study in California found that more than six months after a state flavor ban took effect, menthol cigarettes continued to make up more than 21 percent of the marketplace. Of the discarded packs found, 27.6 percent were non-domestic products. A portion of which were duty-free cigarettes, including the brand Sheriff, which are purchased with the intention of taking them out of the United States, yet evidence shows they are making their way back into the hands of American consumers.<sup>3</sup>

As these proposals drive more demand to the illicit market, they will in turn deny it to small businesses like convenience stores. Sixty percent of American convenience stores are owned and run by single-store operators who follow age verification laws while collecting federal, state, and local taxes and providing jobs in their communities.

Driving sales to the illicit market risks harming public health and increasing youth access to tobacco products. The absence of age verification procedures in the illicit market would create a dangerous environment where more children and underage individuals could easily access nicotine products. The lack of age verification would effectively erode the safeguards and protections put in place to deter youth access to these harmful substances, potentially leading to increases in nicotine use among minors. Such a scenario would not only compromise the health and well-being of our youth but also undermine the very purpose of these regulations.

Another consequence of the proposals would be the sale of unregulated products, frequently imported from sources outside the United States. These unregulated alternatives would likely lack the quality control and safety standards that legitimate, FDA-regulated products meet. Consequently, consumers would face the risk of unknowingly exposing themselves to more harmful and potentially dangerous ingredients. A shift to unregulated products could significantly increase health risks associated with tobacco use and undermine public health efforts to reduce harm. It is imperative to ensure that rigorous regulatory standards are upheld to protect consumers from the potential hazards of unverified and unchecked products.

Lastly, the proposed ban on menthol cigarettes and flavored cigars would have a detrimental impact on small businesses, including approximately 93,250 small operators in the U.S. convenience store industry.<sup>4</sup> If implemented, a single convenience store would lose \$72,285

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<sup>2</sup> Nat'l Research Council, Comm. on the Illicit Tobacco Market, *Understanding the U.S. Illicit Tobacco Market: Characteristics, Policy Context, and Lessons from International Experience* (Peter Reuter and Malay Majumdar, Editors) (Feb. 19, 2015).

<sup>3</sup> See Adam Hoffer "Californians Still Smoking Menthol after Ban: Evidence from a Discarded Pack Audit," Tax Foundation (Oct. 26, 2023) available at [California Menthol Ban Results Mixed, with Illicit Market Thriving \(taxfoundation.org\)](https://www.taxfoundation.org/california-menthol-ban-results-mixed-with-illicit-market-thriving). For previous studies using this method, see, e.g., Kulick & Prieger, *Empty Discarded Pack Data and the Prevalence of Illicit Trade in Cigarettes in California*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3320922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3320922)

<sup>4</sup> Nielsen TDLinx Store Count Data (December 31, 2021)

a year in non-tobacco sundry sales, representing close to 4% of inside sales, on top of the \$160,107 lost due to the reduction in sales of tobacco products.<sup>5</sup> Overall, this means that small operators in the convenience industry would collectively lose \$2.16 billion in sales, representing \$232,392 in lost sales per store.

The net effect of the FDA's proposals will harm public health, increase youth access to tobacco products, make small businesses worse off, reduce tax revenues for states and local communities, and enrich criminal enterprises. The robust state of the American illicit tobacco market indicates that these proposals are likely to fail on their own terms by shifting demand to unscrupulous producers and sellers rather than reducing net demand for these products.

We respectfully ask that you reconsider these proposals. We're grateful for your consideration of the convenience store industry's perspective on this issue, and, as always, we welcome the opportunity to work with you to continue improving standards for the retail sale of tobacco products.

Sincerely,



Doug Kantor  
NACS General Counsel

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<sup>5</sup> Based on data from the Massachusetts Case Study, 90.3% of sales for menthol cigarette and flavored cigar packs would be lost. Altria, Flavor Bans Don't Work: Massachusetts Case Study (Sept. 2021).