

## Testimony and Policy Considerations by

### APCA- American Petroleum and Convenience Store Association

[www.APCA.US](http://www.APCA.US)

APCA represents over 1500 members including gas stations, convenience and liquor stores.

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We believe a total ban on the legal sale of these products to adults 21 and older is the wrong policy choice.

Underage menthol cigarette use is the lowest in decades – down to 0.8% according to recent government data.<sup>1</sup>

· We believe the data supports harm reduction – not Prohibition – as the best path forward to address menthol cigarette use. All of the following stats from National Survey on Drug Use and Health 2002-2020:

- o Youth 12-17 year old cigarette smoking is the lowest in a generation (1.3%)
- o Youth 12-17 year old menthol cigarette smoking is the lowest in a generation (0.8%)
- o Youth 12-17 year old menthol cigarette use among African Americans is lower than among Whites (0.5% v. 1.2%)
- o Adult 26+ cigarette smoking in the U.S., including among African Americans, is at the lowest levels in a generation (16.3%)
- o Youth 12-17 year old cigar smoking is the lowest in a generation (0.8%)

All of this points to the conclusion that the regulated-and-taxed system is working

a. This starts with the manufacturers who are subject to ingredient disclosure, and product and facility oversight

c. Tax compliance and product control at the wholesaler

d. Age-enforced sale only to adults 21+ at the retailer, enacted by Congress in 2019

i. We have led the charge in complying with this new federal age standard with our programs, etc.

d. FDA has oversight and ability to remove problem products, recalls are possible in the rare event that they happen

### **Menthol Ban – Opposition – Summary of Issues - TRADE**

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This document summarizes issues that merit further research by FDA before it reasonably decides if a ban on menthol cigarettes is “appropriate for the protection of public health” or the timetable for doing so, and also summarizes other significant problems with implementing such a ban. This document does not address the scientific or legal arguments why a menthol ban is unwarranted.

This document is intended for use with appropriate stakeholders who choose to weigh in on FDA's proposed menthol ban. Of course, ultimately it is the stakeholders who determine how to do so and what to say, and nothing contained in this document should be construed to the contrary. Moreover, the key strength of individual stakeholder submissions to FDA will come from their unique perspectives, members and evidence that they highlight. All contributions to the dialogue on this important issue are important.

Each of following issues are detailed in this document:

**1. FDA needs to do further research before a menthol ban can be implemented**

- a. Introduction
- b. FDA Must Research Anticipated Illicit Trade in Contraband Menthol Cigarettes
- c. FDA Must Research the Impacts of Existing Menthol Bans
- d. FDA Must Study the Impact of a Menthol Cigarette Ban in the Context of Post-Covid Impacts in the U.S.

**2. Banning menthol cigarettes will result in widespread, negative "unintended consequences"**

- a. Introduction
- b. Adverse Impacts re Illicit Trade
  - i. A menthol ban will further expand the already well-established national illicit cigarette market
  - ii. Illicit cigarette sales will aggravate many inter-related problems
  - iii. Cigarettes sold on the illicit cigarette market could be more dangerous because they are not subject to quality controls and FDA regulatory oversight
  - iv. An increased illicit cigarette market will benefit gangs and other criminal organizations, leading to broader increases in criminal activity
  - v. An increased illicit cigarette market will make it easier for youth to obtain cigarettes
- c. Adverse Economic Impacts
  - i. Illicit trade has diverse adverse economic impacts
  - ii. The ban will cause indirect costs such as increased law enforcement outlays
  - iii. Shifting of menthol sales to the illicit market will cause federal, state, and local governments to suffer a significant loss of tax revenue, and states may also suffer a significant loss of Master Settlement Agreement payments. That, in turn, will lead to cuts in valuable programs, including those that promote public health
  - iv. Shifting of menthol sales to the illicit market will also harm retailers and farmers, leading to job losses
- d. Timing
  - i. Ban is be all the more disruptive in the midst of the ongoing pandemic, high inflation, and a supply-chain crisis

## 1. FURTHER RESEARCH MUST BE DONE PRIOR TO MENTHOL CIGARETTE BAN IMPLEMENTATION

### a. Introduction

- i. This is the most substantial regulatory intervention in the U.S. taken regarding cigarettes; FDA estimates it will directly affect nearly 18.6M US adult menthol smokers.<sup>1</sup>
- ii. What is clear at this point is that FDA must do critical research **BEFORE** a ban can be adopted, much less implemented:
  1. to validate its assessment of the possible benefits vs. unintended consequences,
  2. to ensure that it has plans and resources in place to maximize any possible public health benefits, and
  3. to ensure that it has plans and resources in place to minimize the known unintended consequences.

### b. **FDA Must Research Anticipated Illicit Trade in Contraband Menthol Cigarettes**

- i. Illicit cigarette sales are already an extensive problem in the U.S.
  1. For example, a 2015 report by the National Academies of Sciences, Engineering, And Medicine, entitled “Understanding The U.S. Illicit Tobacco Market: Characteristics, Policy Context, And Lessons From International Experiences”<sup>2</sup> estimates that:
    - a. 8.5%-20% of all U.S. sales are illicit
    - b. Illicit sales amount to 1.25-2.91 billion packs annually
    - c. And cost lost tax revenue of \$2.95-6.92 billion
  2. In fact, the illicit market is supported by a well-developed international smuggling infrastructure, along with well-established and profitable networks for the unlicensed manufacture and distribution of cigarettes.<sup>3</sup> The mechanisms by which illicit cigarettes are produced and distributed is well-documented.<sup>4</sup>

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<sup>1</sup> <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#:~:text=In%20the%20U.S.%3A,current%20smokers%20of%20menthol%20cigarettes.&text=Nearly%2085%20percent%20of%20African,White%20smokers%20smoke%20menthol%20cigarettes>

<sup>2</sup> National Academies of Sciences, Engineering, And Medicine, Understanding The U.S. Illicit Tobacco Market: Characteristics, Policy Context, And Lessons From International Experiences (2015) (estimating that 8.5%-20% of all US sales are illicit, approx. 1.25-2.91 billion packs annually, and lost tax revenue of \$2.95-6.92 billion).

<sup>3</sup> U.S. State Dep’t, The Global Illicit Trade in Tobacco: A Threat to National Security 12 (Dec. 2015), available at [tinyurl.com/650w2ytw](https://tinyurl.com/650w2ytw) (describing FBI investigation that uncovered supply route that “ran from China directly to United States ports” from which smugglers would distribute illicit cigarettes and other contraband “throughout the United States and Canada”)

<sup>4</sup> U.S. GAO, Illicit Tobacco: Various Schemes Are Used to Evade Taxes, Report to Congressional Committee 15 (2011), available at <https://tinyurl.com/4yfm54dw> (describing how cigarettes are diverted from the legal supply chain to the illicit supply chain)

3. Given the existing substantial network that supports illicit trade, it is logical to conclude that it will accommodate the increased demand for contraband menthol cigarettes.
  - a. Research studies, “[u]sing various methodologies and assumptions,” concluded that “banning menthol cigarettes would lead to the manufacture, sale and purchase of menthol contraband cigarettes and the creation of a significantly expanded illicit market.”<sup>5</sup>
4. And this is confirmed by recent experience.
  - a. In the context of the 2009 federal ban on clove cigarettes with a comparatively miniscule market presence, the U.S. Trade Representative stated that “[b]anning all cigarettes—or any type of cigarette favored by a large portion of U.S. smokers— could significantly increase the existing black market for cigarettes and all the attendant contraband trafficking and other illegal activity.”<sup>6</sup>
  - b. Massachusetts banned the sale of menthol cigarettes in 2020 and it resulted in massive illicit trade, as was recently reported in the latest annual report by the Massachusetts Illegal Tobacco Task Force.<sup>7</sup> For example,
    - i. “The increase in seizures of flavored ENDS products and menthol cigarettes combined with the decrease in revenue for cigarettes and OTP likely indicates increased cross-border smuggling of these products. Several neighboring states, including New Hampshire, Rhode Island, and Vermont, have reported an increase in tobacco revenue related to cigarettes and OTP during the past year. For example, cigarette excise tax revenue increased approximately 15% between FY20 and FY21 in New Hampshire while OTP excise tax revenue increased approximately 56%.”
    - ii. “[T]he Task Force now identifies the cross-border smuggling of untaxed flavored ENDS products, cigars, and menthol cigarettes as the primary challenge for tobacco enforcement in the Commonwealth. Inspectors and investigators are routinely encountering or seizing menthol cigarettes, originally purchased in surrounding states, and flavored ENDS products and cigars purchased from unlicensed distributors operating both within and outside the Commonwealth.”

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<sup>5</sup> Non-Voting Industry Representatives on TPSAC and Other Tobacco Industry Stakeholders, The Industry Menthol Report: Menthol Cigarettes: No Disproportionate Impact on Public Health 215–16 (March 23, 2011), available at [tinyurl.com/48c4k7cd](https://tinyurl.com/48c4k7cd).

<sup>6</sup> United States, MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES (2010).

<sup>7</sup> <https://www.mass.gov/doc/task-force-fy22-annual-report/download>

- c. In Canada, researchers report that a significant number of adult menthol smokers evaded provincial bans by purchasing menthols from First Nations reserves.
  - i. “We found that 19.5% of pre-ban menthol smokers continued to smoke menthol cigarettes after bans, with First Nations reserves as the most common source of post-ban menthol cigarette purchase, followed by convenience stores.”<sup>8</sup>
- d. In South Africa, only 9% of respondents quit smoking during a temporary nationwide cigarette ban, while the other 91% turned to illicit-market sales.<sup>9</sup>
  - i. The authors note several issues led to this outcome:
    - 1. The demand-side preconditions for an effective sales ban were not in place in South Africa, making a sales ban inappropriate.
    - 2. Supply-side factors are also important in ensuring the success of a sales ban: (1) the illicit market must be under control before implementing a sales ban; and (2) an effective sales ban needs to be synchronized with a ban on the manufacture, transport and distribution of cigarettes.
  - ii. And over a year and a half after South Africa’s ban was ended, the country’s tobacco market is still reeling, with illicit sales still making up 60% of the country’s entire cigarette market.<sup>10</sup>
  - iii. The illicit cigarette market will be dramatically expanded if the government bans the legal sale of menthol cigarettes, currently smoked by 1/3 of adults who smoke (FDA ests. to be 18.6M adults).<sup>11</sup>
  - iii. FDA has only given the issue of illicit trade caused by a ban on menthol cigarettes cursory study and has not done so recently.
    - 1. FDA prepared a “draft” report on the impact of a menthol cigarette ban on illicit trade in 2018,<sup>12</sup> the report is brief and fails to address many key issues

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<sup>8</sup> Carpenter & Nguyen, *Intended and Unintended Effects of Banning Menthol Cigarettes* at 6; Chung-Hall, et al., *Evaluating the Impact of Menthol Cigarette Bans* at 6.

<sup>9</sup> Samantha Filby, et al., *The Temporary Ban on Tobacco Sales in South Africa: Lessons for Endgame Strategy*, *Tob Control* (Pub. First Online) 1, 4 (2021), available at [tinyurl.com/1eja8rnc](https://tinyurl.com/1eja8rnc)

<sup>10</sup> Stefanie Rossel, *Damage Done*, *Tobacco Reporter* (Mar. 1, 2022), available at <https://tinyurl.com/3jwtk48>.

<sup>11</sup> <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#:~:text=In%20the%20U.S.%3A,current%20smokers%20of%20menthol%20cigarettes.&text=Nearly%2085%20percent%20of%20African,White%20smokers%20smoke%20menthol%20cigarettes>

<sup>12</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

- (e.g., criminal justice, enforcement against individual consumers at the state level, federal and state-level financial impacts of illicit trade).
2. Indeed, in the conclusion of this “draft” report, FDA referred to it as only an “initial” step in addressing this significant issue.<sup>13</sup> Despite conceding this work was merely preliminary, FDA has not published any further analysis of this issue to date.
  3. On the critical question of how large the illicit market would be given the size of the legal market, FDA states: **“There is no way to determine with certainty the prevalence and extent to which an illicit market will occur after any particular tobacco product standard is in place, nor how long such a market might be sustainable.”**<sup>14</sup>
  4. Notwithstanding this, FDA notes, e.g., that “The actual sale of illicit products would likely happen in one of two ways: online or person-to person (e.g., street, tribal, international/duty free, gifts from family/friends). . . . It is also likely that the probability that consumers will seek to purchase illicit tobacco products online versus person-to-person will depend on geography, possibility of other types of sales, such as via mail order or phone . . . .”<sup>15</sup>
  5. At the same time, FDA noted the problem could be significant.<sup>16</sup>
- iv. FDA needs to specifically address how the ban will affect cigarette manufacturing and sales by tribal / Native American sellers.
  - v. The illicit cigarette market creates a large number of inter-related problems, incl., e.g.:
    1. Increased crime;
    2. Criminal justice concerns stemming from the disproportionate impact of enforcement against those in communities of color, e.g.,
      - a. Increased interactions with police; leads to increased interactions with the judicial system; less access to legal representation; leads to missed court appointments; leads to bench warrants; leads to impact of criminal record on educational and employment opportunities.
    3. The need for increased local law enforcement resources, training to address this illicit market;
    4. The impact of illicit menthol cigarettes on FDA resources;
    5. The losses of state/local tax and related-sales taxes;

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<sup>13</sup> Id. at 24.

<sup>14</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

<sup>15</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

<sup>16</sup> Id. at 23 (“Depending upon the standard, there might remain strong, legal demand for components that, while intended for legal products outside the scope of the standard, could be used to make an illicit product”).

6. Loss of business revenues (from both cigarettes as well as other products that would have been purchased at the same time);
  7. Loss of urban retailers, and related loss of employment, particularly specific communities that bear the disproportionate impact of this ban;
  8. The impact on vulnerable populations, e.g. in drug treatment;
  9. The impact of loss of menthol sales on retailer costs and prices;
  10. The risks to consumers from exposure to adulterated products;<sup>17</sup>
  11. The risks of increased youth access to cigarettes via illicit cigarette sellers.
- vi. Prior to determining whether a ban is “appropriate for the protection of public health,” FDA must fully account for these negative consequences in “balancing” them against the asserted benefits of a menthol ban.
- vii. Moreover, FDA should collect up-to-date, science-driven information regarding this issue and how to address it to mitigate the risk. In that regard, it should assign the following questions to appropriate study groups and solicit research and data, incl., e.g.:
1. *FDA needs to conduct a comprehensive study of the illicit trade issue, including an assessment of its specific proposed measures to mitigate contraband. The complexity of this issue is underscored by the important competing social justice issues related to how enforcement of contraband laws could have a disproportionate impact on communities of color.*
  2. *What is the estimated magnitude of the illicit market for menthol cigarettes if the ban is implemented?*
    - a. *It is notable in the context of the vapor market, FDA has been subject to criticism for its failure to communicate and police illegally sold products.<sup>18</sup> The FDA needs to offer a candid assessment of its performance and focus on what it would do differently regarding a menthol cigarette ban.*
    - b. *The issue in the context of menthol cigarettes will be much more significant because there are many more retailers who sell cigarettes and the number of adults who consume them is much greater, compared to vapor products.*
  3. *What will be the primary sources for illicit cigarettes, and how can those sources be mitigated? Relatedly,*
    - a. *FDA must study the impact of failing to apply the ban to tribal sellers.*

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<sup>17</sup> E.g., CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, available at [cdc.gov](https://www.cdc.gov); various news media (Fall 2019); [https://www.realclearpolicy.com/articles/2020/07/02/e-cig\\_flavor\\_ban\\_grows\\_10\\_billion\\_massachusetts\\_black\\_market\\_497817.html](https://www.realclearpolicy.com/articles/2020/07/02/e-cig_flavor_ban_grows_10_billion_massachusetts_black_market_497817.html)

<sup>18</sup> <https://oversight.house.gov/news/press-releases/subcommittee-chair-krishnamoorthi-calls-on-fda-to-crackdown-on-puff-bar-for>

- b. Ports have been identified as a key source for illicit cigarettes; what resources are needed to better prevent ports from being sources for illicit contraband menthol cigarettes?*
- 4. Product risks to consumers from self-mentholation of cigarettes?*
- 5. The risk that the menthol ban will lead to the development of a new market for products providing an array of flavoring options that can be used to flavor non-menthol cigarettes?*
- 6. What law enforcement resources will be necessary to address this new influx of illicit trade?*
- 7. How will FDA address sales by tribal or Native American sellers?*
- 8. How to balance competing considerations of enforcing contraband cigarette laws with the complex related criminal justice issues stemming from the likely disproportionate impact on communities of color?*

**c. FDA Must Research the Impacts of Existing Menthol/Flavor Bans**

- i. Menthol bans have been adopted in the European Union, Canada, by Massachusetts and some U.S. localities.
- ii. These bans provide a “real-world” fact check for FDA to study the impact of those menthol bans on quitting and unintended consequences.
- iii. Flavor bans often lead to unintended consequences.
  - 1. In 2018, for example, San Francisco banned the sale of all flavored cigarettes, cigars, e-cigarettes, and smokeless tobacco. Youth smoking increased by 30% in San Francisco after the ban. In surrounding areas that did not ban flavors, youth smoking decreased.<sup>19</sup>
  - 2. In 2020, Massachusetts banned all flavors in cigarettes. Rather than quit, consumers appear to have responded by buying cigarettes from other states.<sup>20</sup>
  - 3. Canada recently enacted a menthol ban that is similar to the ban FDA is considering now. One recent study concluded that Canada’s provincial menthol bans “did not significantly reduce overall smoking rates among youths or adults.”<sup>21</sup> In fact, the study found that the provincial bans led to a significant increase in youth smoking of non-menthol cigarettes.<sup>22</sup> Moreover, Canada’s experience highlights another potential unintended consequence of a menthol ban – the creation of a market for flavor

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<sup>19</sup> Friedman AS. A difference-in-differences analysis of youth smoking and a ban on sales of flavored tobacco products in San Francisco, California. *JAMA Pediatr.* 2021;175(8):863-865.

<sup>20</sup> The Tax Foundation, “Massachusetts Flavored Tobacco Ban Has Severe Impact on Tax Revenue” (Jan 19, 2021); available at <https://taxfoundation.org/massachusetts-flavored-tobacco-ban/>.

<sup>21</sup> Carpenter & Nguyen, Intended and Unintended Effects of Banning Menthol Cigarettes, 64 J. Law & Economics 629, 631 (2021), available at <https://tinyurl.com/48v82m6b>

<sup>22</sup> *Id.*

additives being used by nearly 15% of smokers who previously purchased menthol cigarettes.<sup>23</sup>

4. More recently, in May 2020, the European Union implemented a menthol ban. There is no evidence FDA has engaged in research to determine what unintended consequences have occurred there.
- iv. There is no indication that FDA has researched the impact of these bans in a systematic, science-driven way. Yet, these recent experiences could provide important guidance on both how to maximize health gains and minimize unintended consequences.
- v. For example, FDA has said that the primary reason it is implementing this rule is to promote smoking cessation. FDA should look at whether there is evidence that the menthol bans in these jurisdictions resulted in increased quitting.
  1. This will be particularly relevant to its assessment of whether the ban is “appropriate for the protection of public health” and its estimates of the number of menthol smokers who may quit.
  2. There is no evidence that the Massachusetts ban resulted in quitting,<sup>24</sup> however it did prompt a dramatic increase in illicit cross-border sales.<sup>25</sup> San Francisco’s flavor ban did not materially impact access to menthol cigarettes.<sup>26</sup>
  3. The Canadian provincial menthol bans did not affect overall smoking rates, led to a significant increase in youth smoking of non-menthol cigarettes, and resulted in adult smokers evading the bans.<sup>27</sup>
  4. The recent EU menthol ban (implemented May 2020) would also be informative, yet there is no evidence FDA has commissioned research regarding the effects of that ban.
- vi. Moreover, FDA should collect up-to-date, science-driven information regarding this issue. In that regard, it should assign the following questions to appropriate study groups and solicit research and data, incl., e.g.:
  1. *What happened to quitting rates in these jurisdictions? Were there differences by race/ethnicity? Were there differences among vulnerable populations?*
  2. *What approaches to public education regarding the ban were deployed in advance of it being implemented? Were they effective? What would those places do differently if anything?*

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<sup>23</sup> Chaiton MO, Schwartz R, Choen JE, Soule E, Zhang B, Eissenberg T. The use of flavour cards and other additives after a menthol ban in Canada. *Tob. Control*. 2021 Sep;30(5):601-602.

<sup>24</sup> <https://taxfoundation.org/massachusetts-flavored-tobacco-ban/> (“Massachusetts sales plummeted, but not because people quit smoking—only because those sales went elsewhere.”)

<sup>25</sup> <https://taxfoundation.org/massachusetts-flavored-tobacco-ban-sales-jama-study/>

<sup>26</sup> <https://doi.org/10.1016/j.abrep.2020.100273>.

<sup>27</sup> Carpenter & Nguyen, “INTENDED AND UNINTENDED EFFECTS OF BANNING MENTHOL CIGARETTES,” Nat’l Bur. Econ. Research (2020), available at <https://www.nber.org/papers/w26811>.

3. *What quitting strategies were employed? Were those programs tailored to address specific subpopulations? Were they effective? What would those places do differently if anything?*
  4. *What was the impact in terms of illicit trade? What were the primary sources of contraband? What was the need for increased local law enforcement resources, training to address this illicit market?*
  5. *Were there criminal justice concerns stemming from the disproportionate impact of enforcement?*
  6. *What were the economic impact(s) of the ban? What were the losses of state/local tax and related-sales taxes?*
  7. *What were the impacts on vulnerable populations?*
  8. *Was there product self-mentholation or issues with adulterated products?*
- vii. FDA Must Investigate What Resources Are Necessary to Properly Enforce a Menthol Ban
1. Menthol cigarettes are currently sold at several hundred thousand retail locations in the U.S. as well as by non-brick and mortar sellers.
  2. Illicit cigarette sales are already an extensive problem in the U.S.<sup>28</sup>
  3. FDA has expressed concern that there will be a market for illicit menthol cigarettes and noted the problem could be significant.<sup>29</sup>
  4. The illicit cigarette market will be dramatically expanded if the government bans the legal sale of menthol cigarettes, currently smoked by 1/3 of adults who smoke (FDA ests. to be 18.6M adults).<sup>30</sup>
  5. FDA has only given the issue of illicit trade caused by a ban on menthol cigarettes cursory study and has not done so recently.
    - a. FDA prepared a “draft” report on the impact of a menthol cigarette ban on illicit trade in 2018,<sup>31</sup> the report is brief and fails to address many key issues, including how to enforce a total menthol ban and the resources that would be necessary to do so.

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<sup>28</sup> National Academies of Sciences, Engineering, And Medicine, *Understanding The U.S. Illicit Tobacco Market: Characteristics, Policy Context, And Lessons From International Experiences* (2015) (estimating that 8.5%-20% of all US sales are illicit, approx. 1.25-2.91 billion packs annually, and lost tax revenue of \$2.95-6.92 billion).

<sup>29</sup> Id. at 23 (“Depending upon the standard, there might remain strong, legal demand for components that, while intended for legal products outside the scope of the standard, could be used to make an illicit product”).

<sup>30</sup> <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#:~:text=In%20the%20U.S.%3A,current%20smokers%20of%20menthol%20cigarettes.&text=Nearly%2085%20percent%20of%20African,White%20smokers%20smoke%20menthol%20cigarettes>

<sup>31</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

6. In the context of FDA's regulation of vapor products, it has been criticized for failing to adequately police retailer compliance with the law.<sup>32</sup>
7. FDA has provided few details regarding how it will do so in the context of the much larger market for menthol cigarettes.
8. This issue is critically important because illicit trade in menthol cigarettes causes a host of adverse unintended consequences, incl., e.g.:
  - a. Increased crime;
  - b. Criminal justice concerns stemming from the disproportionate impact of enforcement against those in communities of color;
  - c. The need for increased local law enforcement resources, training to address this illicit market;
  - d. The losses of state/local tax and related-sales taxes, as well as Master Settlement Agreement payments;
  - e. Adverse economic impacts to retailers;
  - f. The risks to consumers from exposure to adulterated products;<sup>33</sup>
  - g. The risks of increased youth access to cigarettes via illicit cigarette sellers.
9. FDA should collect up-to-date, science-driven information to assess its planned enforcement approach in conjunction with a menthol cigarette ban. In that regard, it should assign the following questions to appropriate study groups and solicit research and data, incl., e.g.:
  - a. *How large can the government reasonably expect the illicit market for menthol cigarettes to be?*
  - b. *What strategies would best be implemented to reduce that illicit trade?*
  - c. *What would be the specific roles to be played by FDA and state/local authorities?*
  - d. *How will state/local authorities be able to fund these enforcement efforts?*
  - e. *How will FDA manage local jurisdictions that are not able to prioritize enforcement of illicit menthol sales laws?*
  - f. *How will FDA manage enforcement by other federal government agencies, such as Customs and Border Patrol?*
  - g. *How will FDA mitigate anticipated criminal justice issues of disproportionate impact of enforcement on communities of color*

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<sup>32</sup> <https://oversight.house.gov/news/press-releases/subcommittee-chair-krishnamoorthi-calls-on-fda-to-crackdown-on-puff-bar-for>

<sup>33</sup> E.g., CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, available at [cdc.gov](https://www.cdc.gov); various news media (Fall 2019); [https://www.realclearpolicy.com/articles/2020/07/02/e-cig\\_flavor\\_ban\\_grows\\_10\\_billion\\_manchester\\_black\\_market\\_497817.html](https://www.realclearpolicy.com/articles/2020/07/02/e-cig_flavor_ban_grows_10_billion_manchester_black_market_497817.html)

*where menthol cigarettes are comparatively more popular among adult consumers?*

**d. FDA Must Study the Impact of a Menthol Cigarette Ban in the Context of Post-Covid Impacts in the U.S.**

- i. The ongoing Covid-19 pandemic has resulted in a wide array of economic and personal impacts, including job losses, supply chain disruptions, inflation, and widespread health-related impacts.
- ii. *FDA must study the timing of a menthol ban relative to these many impacts to determine that a menthol ban does not exacerbate existing economic and personal impacts.*

**2. Banning menthol cigarettes will result in widespread, negative consequences**

**a. Introduction**

- i. This is the most substantial regulatory intervention in the U.S. taken regarding cigarettes since requiring warnings in 1966; FDA estimates it will directly affect nearly 18.6M US adult menthol smokers.<sup>34</sup>
- ii. The ban is not race neutral in terms of impact – FDA notes that minorities disproportionately prefer menthol (i.e., nearly 85% of African American smokers, 47.7% of Hispanic smokers, 41.1% of Asian smokers vs. 30.3% of White smokers).<sup>35</sup>
- iii. It is widely accepted that a menthol cigarette ban will also produce an array of negative consequences, many of which that will be borne disproportionately by communities of color given the comparatively greater popularity of menthol cigarettes in those communities.
- iv. Under the law, FDA must demonstrate that a menthol cigarette ban is “appropriate for the protection of public health.”
- v. In doing so, FDA must fully account for these negative consequences in “balancing” them against the asserted benefits of a menthol ban.

**b. Adverse Impacts re Illicit Trade**

- i. A menthol ban will further expand the already well-established national illicit cigarette market.
  1. Illicit cigarette sales are already an extensive problem in the U.S.
    - a. For example, a 2015 report by the National Academies of Sciences, Engineering, And Medicine, entitled “Understanding The U.S. Illicit

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<sup>34</sup> <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#:~:text=In%20the%20U.S.%3A,current%20smokers%20of%20menthol%20cigarettes.&text=Nearly%2085%20percent%20of%20African,White%20smokers%20smoke%20menthol%20cigarettes>

<sup>35</sup> *Id.*

Tobacco Market: Characteristics, Policy Context, And Lessons From International Experiences”<sup>36</sup> estimates that:

- i. 8.5%-20% of all U.S. sales are illicit
  - ii. Illicit sales amount to 1.25-2.91 billion packs annually
  - iii. And cost lost tax revenue of \$2.95-6.92 billion
- b. In fact, the illicit market is supported by a well-developed international smuggling infrastructure, along with well-established and profitable networks for the unlicensed manufacture and distribution of cigarettes.<sup>37</sup> The mechanisms by which illicit cigarettes are produced and distributed is well-documented.<sup>38</sup>
- c. Given the existing substantial network that supports illicit trade, it is logical to conclude that menthol will now be added to the products being sold.
- d. Massachusetts banned the sale of menthol cigarettes in 2020 and it resulted in massive illicit trade, as was recently reported in the latest annual report by the Massachusetts Illegal Tobacco Task Force.<sup>39</sup> For example,
- i. “The increase in seizures of flavored ENDS products and menthol cigarettes combined with the decrease in revenue for cigarettes and OTP likely indicates increased cross-border smuggling of these products. Several neighboring states, including New Hampshire, Rhode Island, and Vermont, have reported an increase in tobacco revenue related to cigarettes and OTP during the past year. For example, cigarette excise tax revenue increased approximately 15% between FY20 and FY21 in New Hampshire while OTP excise tax revenue increased approximately 56%.”
  - ii. “[T]he Task Force now identifies the cross-border smuggling of untaxed flavored ENDS products, cigars, and menthol cigarettes as the primary challenge for tobacco enforcement in the Commonwealth. Inspectors and investigators are routinely encountering or seizing menthol

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<sup>36</sup> National Academies of Sciences, Engineering, And Medicine, Understanding The U.S. Illicit Tobacco Market: Characteristics, Policy Context, And Lessons From International Experiences (2015) (estimating that 8.5%-20% of all US sales are illicit, approx. 1.25-2.91 billion packs annually, and lost tax revenue of \$2.95-6.92 billion).

<sup>37</sup> U.S. State Dep’t, The Global Illicit Trade in Tobacco: A Threat to National Security 12 (Dec. 2015), available at [tinyurl.com/650w2ytw](https://tinyurl.com/650w2ytw) (describing FBI investigation that uncovered supply route that “ran from China directly to United States ports” from which smugglers would distribute illicit cigarettes and other contraband “throughout the United States and Canada”)

<sup>38</sup> U.S. GAO, Illicit Tobacco: Various Schemes Are Used to Evade Taxes, Report to Congressional Committee 15 (2011), available at <https://tinyurl.com/4yfm54dw> (describing how cigarettes are diverted from the legal supply chain to the illicit supply chain)

<sup>39</sup> <https://www.mass.gov/doc/task-force-fy22-annual-report/download>

cigarettes, originally purchased in surrounding states, and flavored ENDS products and cigars purchased from unlicensed distributors operating both within and outside the Commonwealth.”

2. The illicit cigarette market will be dramatically expanded if the government bans the legal sale of menthol cigarettes, currently smoked by 1/3 of adults who smoke (FDA ests. to be 18.6M adults).<sup>40</sup>
3. FDA has only given the issue of illicit trade caused by a ban on menthol cigarettes cursory study and has not done so recently.
  - a. FDA prepared a “draft” report on the impact of a menthol cigarette ban on illicit trade in 2018,<sup>41</sup> the report is brief and fails to address many key issues (e.g., criminal justice, enforcement against individual consumers at the state level, federal and state-level financial impacts of illicit trade).
  - b. Indeed, in the conclusion of this “draft” report, FDA referred to it as only an “initial” step in addressing this significant issue.<sup>42</sup> Despite conceding this work was merely preliminary, FDA has not published any further analysis of this issue to date.
  - c. On the critical question of how large the illicit market would be given the size of the legal market, FDA states: **“There is no way to determine with certainty the prevalence and extent to which an illicit market will occur after any particular tobacco product standard is in place, nor how long such a market might be sustainable.”**<sup>43</sup>
  - d. Notwithstanding this, FDA notes, e.g., that “The actual sale of illicit products would likely happen in one of two ways: online or person-to person (e.g., street, tribal, international/duty free, gifts from family/friends). . . . It is also likely that the probability that consumers will seek to purchase illicit tobacco products online versus person-to-person will depend on geography, possibility of other types of sales, such as via mail order or phone . . . .”<sup>44</sup>
  - e. At the same time, FDA noted the problem could be significant.<sup>45</sup>

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<sup>40</sup> <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#:~:text=In%20the%20U.S.%3A,current%20smokers%20of%20menthol%20cigarettes.&text=Nearly%2085%20percent%20of%20African,White%20smokers%20smoke%20menthol%20cigarettes>

<sup>41</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

<sup>42</sup> Id. at 24.

<sup>43</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

<sup>44</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

<sup>45</sup> Id. at 23 (“Depending upon the standard, there might remain strong, legal demand for components that, while intended for legal products outside the scope of the standard, could be used to

- f. Notably in the context of the 2009 federal ban on clove cigarettes with a comparatively miniscule market presence, the U.S. Trade Representative stated that “[b]anning all cigarettes—or any type of cigarette favored by a large portion of U.S. smokers— could significantly increase the existing black market for cigarettes and all the attendant contraband trafficking and other illegal activity.”<sup>46</sup>
- ii. Illicit cigarette sales will aggravate many inter-related problems, e.g.:
  1. Increased crime;
  2. Criminal justice concerns stemming from the disproportionate impact of enforcement against those in communities of color;
  3. The need for increased local law enforcement resources, training to address this illicit market;
  4. The impact of illicit menthol cigarettes on FDA resources;
  5. The losses of state/local tax and related-sales taxes;
  6. Loss of urban retailers, and related loss of employment;
  7. Loss of business revenues (from both cigarettes as well as other products that would have been purchased at the same time);
  8. The impact on vulnerable populations, e.g. in drug treatment;
  9. The impact of loss of menthol sales on retailer costs and prices;
  10. The risks to consumers from exposure to adulterated products;<sup>47</sup>
  11. The risks of increased youth access to cigarettes via illicit cigarette sellers.
- iii. Cigarettes sold on the illicit cigarette market could pose more health risks because they are not subject to quality controls and FDA regulatory oversight.
  1. In its “initial” draft report on illicit trade, FDA noted “Consumer reporting of illicit products is more likely in cases where the products have other defects or are poorly manufactured, as well as being illicit.”<sup>48</sup>
  2. The Bureau of Alcohol, Tobacco, Firearms and Explosives has explained that “[w]hile 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

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make an illicit product”).

<sup>46</sup> United States, MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES (2010).

<sup>47</sup> E.g., CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, available at [cdc.gov](https://www.cdc.gov); various news media (Fall 2019); [https://www.realclearpolicy.com/articles/2020/07/02/e-cig\\_flavor\\_ban\\_grows\\_10\\_billion\\_manchester\\_black\\_market\\_497817.html](https://www.realclearpolicy.com/articles/2020/07/02/e-cig_flavor_ban_grows_10_billion_manchester_black_market_497817.html)

<sup>48</sup> <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>

sand and packaging materials. Counterfeit cigarettes pose a greater health risk to consumers and cost taxpayers millions in lost revenue.”<sup>49</sup>

3. Media and scientific research reference various issues with cigarettes in this regard, e.g.,
  - a. Lee Moran, “Fake Cigarettes Containing Human Feces, Rat Droppings Flood British Market: Report,” New York Daily News, November 11, 2014.<sup>50</sup>
  - b. Keith McLeod, “Sick Crooks Push Cheap Cigarettes on Facebook Laced with Potentially Life-Threatening Chemicals,” Daily Record, November 19, 2014.<sup>51</sup>
  - c. Oliver Bennett, “How counterfeit cigarettes containing pesticides and arsenic make it to our streets,” Independent (Aug. 7, 2018).<sup>52</sup>
  - d. Smokers of illicit tobacco report significantly worse health than other smokers, Campbell et al., Nicotine & Tobacco Research, Vol. 8 (Aug. 2009), pp. 996-1001
  - e. Source and Health Implications of High Toxic Metal Concentrations in Illicit Tobacco Products, Stephens et al., Environmental Science & Technology, Vol. 39, No. 2, 2005, pp. 479-488.
  - f. Cadmium, lead, and thallium in smoke particulate from counterfeit cigarettes compared to authentic US brands, by R.S. Pappas et al., Food and Chemical Toxicology 45 (2007) 202–209, pp. 202-209.
  - g. Trace Metals Analysis of Legal and Counterfeit Cigarette Tobacco Samples Using Inductively Coupled Plasma Mass Spectrometry and Cold Vapor Atomic Absorption Spectrometry, by K. Swamia et al., Spectroscopy Letters 42:479–490, 2009.
- iv. An increased illicit cigarette market will benefit gangs and other criminal organizations, leading to broader increases in criminal activity.
  1. The news is replete with examples of criminal gang involvement in the illicit cigarette business. For example,
    - a. “Gangs are making millions smuggling menthol cigarettes to beat an EU ban,” Daily Mirror (July 27, 2020).<sup>53</sup>

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<sup>49</sup> Fact Sheet – Tobacco Enforcement, Bureau of Alcohol, Tobacco, Firearms and Explosives (May 2018), available at [tinyurl.com/3hj02ak4](https://tinyurl.com/3hj02ak4).

<sup>50</sup> <http://www.nydailynews.com/news/world/fake-cigarettes-humanfeces-hit-uk-market-report-article-1.2006457>

<sup>51</sup> <http://www.dailyrecord.co.uk/news/crime/sick-crookspush-cheap-cigarettes-4658440>

<sup>52</sup> [https://www.independent.co.uk/news/long\\_reads/smuggling-cigarettes-tobacco-counterfeit-illicit-trade-black-market-crime-a8479021.html](https://www.independent.co.uk/news/long_reads/smuggling-cigarettes-tobacco-counterfeit-illicit-trade-black-market-crime-a8479021.html)

<sup>53</sup> <https://www.mirror.co.uk/news/uk-news/gangs-making-millions-smuggling-menthol-22416137>

- b. US Atty Press Release, “25 Individuals Charged in Rocky Mount Cigarette Smuggling and Money Laundering Operation” (Nov. 5, 2021).<sup>54</sup>
  - c. “The number of crimes committed at specialty retail outlets has grown dramatically over the past few years” (Mar. 1, 2022) (“Every year, hundreds if not thousands of cannabis dispensaries, vape shops and tobacco outlets are robbed or burglarized in the U.S.”).<sup>55</sup>
  - d. “Burglars stealing lotto tickets, cigarette cartons” (Feb. 17, 2022).<sup>56</sup>
  - e. “Three charged in 'smash-and-grab' burglaries in area” (Nov. 9, 2021).<sup>57</sup>
  - f. “Gangs, Terrorists, Mafia Make Huge Profits Selling...Cigarettes,” CNBC (May 24, 2012).<sup>58</sup>
  - g. “6 million pounds of tobacco were smuggled into Canada — with NC farmer’s help, feds say,” Charlotte News & Observer (May 21, 2021).<sup>59</sup>
  - h. “Cigarette Taxes Are Fueling Organized Crime,” Wall St. Journal (May 7, 2008).<sup>60</sup>
  - i. Also illustrative is the most recent report from the Massachusetts Task Force on Illicit Tobacco, which lists several of its large criminal matters for 2021-22 (at pg. 12-13).<sup>61</sup>
- 2. China and North Korea are significant sources of counterfeit cigarettes in the U.S.<sup>62</sup>
  - 3. Even terrorist groups are reported to benefit from sourcing illicit cigarettes into the U.S.<sup>63</sup>
    - a. “Tobacco smuggling also provides a lucrative source of funding for terrorists and other criminal organizations. In January of this year, ICE dismantled the largest nationwide tobacco smuggling

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<sup>54</sup> <https://www.justice.gov/usao-ednc/pr/25-individuals-charged-rocky-mount-cigarette-smuggling-and-money-laundering-operation>

<sup>55</sup> <https://tobaccoreporter.com/2022/03/01/unintended-consequences-7/>

<sup>56</sup> <https://kdvr.com/news/local/burglars-stealing-lotto-tickets-cigarette-cartons/>

<sup>57</sup> <https://13wham.com/news/local/three-charged-in-smash-and-grab-burglaries-in-area>

<sup>58</sup> <https://www.cnn.com/id/41785506>

<sup>59</sup> <https://www.newsobserver.com/news/state/north-carolina/article251585428.html>

<sup>60</sup> <https://www.wsj.com/articles/SB121012081570272357>

<sup>61</sup> <https://www.mass.gov/doc/task-force-fy22-annual-report/download>

<sup>62</sup> Congressional Research Service Report to Congress: North Korean Crime-for-Profit Activities by Raphael Perl and Dick K. Nanto, February 16, 2007.

<sup>63</sup> DHS House Testimony: ICE Authorization for Fiscal Year 2005 and 2006 by Michael J. Garcia, Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security Before House Ways and Means Committee, Subcommittee on Trade, available at <http://www.thecre.com/ccsf/?p=144>; [https://gtitraining.org/news\\_101211.htm](https://gtitraining.org/news_101211.htm).

organization to date and arrested 15 defendants. ... The organization was responsible for the movement of more than 10,000 cases of counterfeit and contraband cigarettes....”

v. An increased illicit cigarette market will make it easier for youth to obtain cigarettes.

1. For example, in a recent analysis in the U.K. data shows that illegal tobacco is a common source for youth: “The figures, from the 2017 North East Illegal Tobacco Survey, found that 55% of children aged 14 and 15 who smoke say they buy illegal tobacco from shops or “tab houses” – while 73% say they have been offered illegal tobacco at some point.”<sup>64</sup>

c. Adverse Economic Impacts

i. Illicit trade has diverse adverse economic impacts

1. **National retailers, wholesalers, and manufacturers will be hit hard by the proposed ban.** While consumers would be punished, the nation’s retailers, wholesalers, manufacturers, their suppliers, and their employees are likely to experience serious economic pain.
2. **The nation’s convenience stores will bear significant economic damages, as cigarette and tobacco products are the number one in-store sales item for these stores.** Nationally, the average C-Store sells \$728,000 in cigarette and tobacco products.<sup>65</sup>
3. **The menthol ban would put nearly \$30 billion in retail sales at risk.** Nationally, menthol cigarette volume was estimated at approximately 3.95 billion packs with an estimated retail value of nearly \$30 billion for FY2021.<sup>66</sup>
4. **National retail tobacco sales support 651,000 jobs in tobacco retailing, wholesaling, manufacturing and the suppliers to those sectors.** Wages and compensation for those jobs is approximately \$41 billion. A menthol ban could lead to serious job and wage losses since menthol cigarettes command such a high share of the national cigarette market.<sup>67</sup>

ii. The ban will cause indirect costs such as increased law enforcement outlays.

iii. Shifting of menthol sales to the illicit market will cause federal, state, and local governments to suffer a significant loss of tax revenue, and states may also suffer a significant loss of Master Settlement Agreement payments. That, in turn, will lead to cuts in valuable programs, including those that promote public health.

1. Federal, State and Local Governments could see big revenue losses.

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<sup>64</sup> <http://www.freshne.com/in-the-news/pr/item/2182-illegal-tobacco-hooking-teens.html>

<sup>65</sup> National Association of Convenience Stores.

<sup>66</sup> Estimated from MSAi shipment to retailer data, and Orzechowski and Walker, The Tax Burden on Tobacco, Vol. 56, 2021.

<sup>67</sup> John Dunham and Associates, “Economic Contribution of the Tobacco Industry,” New York, New York, 2019.

- a. The federal government collected nearly \$11.1 billion in cigarette excise taxes in FY2021.<sup>68</sup>
- b. State governments collected \$16.7 billion in state excise taxes on cigarettes and another \$3.9 billion in sales taxes on cigarettes in FY2021.
- c. Settlement payments from tobacco manufacturers to the states totaled nearly \$8 billion in FY2021.
- d. Local governments collected \$1.7 billion in excise and local sales taxes on cigarettes.<sup>69</sup> A national menthol cigarette ban would cause those governments to lose from \$205 million to \$308 million in excise and sales tax revenues.
- e. The menthol share of those cigarette revenues would be 36% or nearly \$15 billion. These revenues would be at risk with a national ban on menthol cigarettes.

## 2. The Massachusetts Experience

- a. In the United States, Massachusetts is the only state that has implemented a flavor ban.<sup>70</sup> The ban went into effect in June of 2020, and the results have been a lose-lose proposition for the state.
  - i. From June 2020 through May 2021, tax-paid (i.e., legal) sales of cigarettes collapsed by 23.9% compared to the same 12-month period in 2019/2020.
  - ii. Massachusetts has lost an estimated \$137 million in cigarette excise tax and sales tax revenue in the twelve months after the ban.<sup>71</sup>
  - iii. Massachusetts lost an additional \$10.6 million in OTP excise tax revenues over that same period.
- b. A recent report by the Commonwealth of Massachusetts Multi-Agency Illegal Tobacco Task Force indicates that the smuggling of menthol (and other flavored tobacco products) has become a

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<sup>68</sup> Based on a federal fiscal year (October 1 – September 30). All tax revenue data is from Orzechowski and Walker, The Tax Burden on Tobacco, Vol. 56, 2021.

<sup>69</sup> Few states allow local excise taxes on cigarettes, so the losses would be concentrated in the following states: Alabama, Alaska, Colorado, Illinois (specifically Cook County and Chicago and few cities near Cook County) Missouri, New York (New York City only) Ohio (Cuyahoga County only) and Virginia. Local sales taxes however, exist in most states.

<sup>70</sup> Tax-paid sales data for Massachusetts and neighboring states is collected from the relevant state revenue departments by Orzechowski and Walker.

<sup>71</sup> This does not include the loss of cigarette tax revenues in the spring, when industry data suggested that Massachusetts menthol share was dropping in advance of the June 1 ban. This makes sense, as in-state wholesalers would not be expected to continue purchasing menthol products when they would be stuck with unsellable inventory once the ban went into effect.

problem. The report states:

“Based upon...data and discussions with the inspectors and investigators conducting the enforcement actions, the Task Force now identifies the cross-border smuggling of untaxed flavored ENDS products, cigars, and menthol cigarettes as the primary challenge for tobacco enforcement in the Commonwealth. Inspectors and investigators are routinely encountering or seizing menthol cigarettes, originally purchased in surrounding states, and flavored ENDS products and cigars purchased from unlicensed distributors operating both within and outside the Commonwealth.”<sup>72</sup>

- c. Moreover, the ban has not stopped Massachusetts consumers from purchasing flavored products, it has only stopped them from purchasing them within Massachusetts’ state lines. Tax-paid sales data clearly indicate that consumers are simply crossing the borders of Massachusetts and purchasing menthol products in neighboring states, in particular, New Hampshire and Rhode Island. Even Vermont has benefited.
  - i. Tax-paid sales from June 2020 through May 2021 in New Hampshire were up 22.1%.
  - ii. Tax-paid sales from June 2020 through May 2021 in Rhode Island were up 18%.
  - iii. Tax paid sales from June 2020 through May 2021 in Vermont were up 6.0%.
  - iv. Massachusetts lost 33 million packs in the 12-months after the menthol ban. New Hampshire, Rhode Island, and Vermont nearly made up all of that difference, selling nearly 30 million packs in that time.
- iv. Third, shifting of menthol sales to the illicit market will also harm retailers and farmers, leading to job losses.
  - 1. Generally - Tobacco sales are important to the nation’s retailers. U.S. stores sold approximately 10.96 billion packs of cigarettes in FY 2021, with a gross retail value of nearly \$81.2 billion.<sup>73</sup> Menthol cigarettes took 36% of this activity or 3.95 billion packs with a retail value close to \$30 billion.
  - 2. Loss in Cigarette Sales Volume – It is estimated that menthol ban would cause national sales volume by 12% to 18%. National cigarette volume would fall from 1.32 billion packs to nearly 2 billion packs. The retail loss would range from \$9.8 billion to \$14.6 billion

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<sup>72</sup> Commonwealth of Massachusetts, Annual Report of Multi-Agency Illegal Tobacco Task Force, 1 March 2022.

<sup>73</sup> Federal volume data and pricing data comes from the *Tax Burden on Tobacco*, vol. 56, 2021 by Orzechowski and Walker and the U.S. Treasury’s Alcohol and Tobacco Tax and Trade Bureau.

3. Lost Gross Profits - Gross profits, or the value added, lost to the nation's retailers and wholesalers could range from \$2.2 billion to \$3.2 billion.
4. Lost Jobs - It is estimated that from 43,650 to 65,400 tobacco industry jobs could be displaced due to a national menthol ban. This would include from 2,400 to 3,650 lost tobacco grower jobs, and from 4,100 to 6,190 lost tobacco manufacturing jobs.<sup>74</sup> Between 37,100 to 55,600 tobacco retailing and wholesale jobs could be displaced. Another 34,500 to 51,800 jobs could be lost in the industry sectors that directly supply the core industries mentioned above.<sup>75</sup>
5. Regional Impact - In the six major tobacco producing states of Georgia, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia, it is estimated that from 9,230 to 13,850 jobs could be lost in those sectors directly involved in the agriculture, manufacturing, wholesaling, and retailing of such products. Another 9,800 to 14,700 jobs could be displaced in the suppliers to those sectors.
6. According to another estimate prepared in 2019, would also result in a loss of 264,000 jobs, direct and indirect costs of \$15.1 billion.<sup>76</sup>
7. According to the National Association of Convenience Stores, menthol cigarettes account for approximately 28% of all in-store sales.<sup>77</sup>

d. Timing

- i. Ban would be all the more disruptive in the midst of the ongoing pandemic, high inflation, and a supply-chain crisis.

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<sup>74</sup> Job losses estimated from a recent economic analysis of the tobacco industry entitled, "Economic Contribution of the Tobacco Industry to the United States 2019," by John Dunham and Associates, New York, New York.

<sup>76</sup> <https://reynoldsamerican.guerrillaeconomics.net/reports/b36700de-a7ae-4c34-aecb-c65a19a7c9f3?>

<sup>77</sup> <https://cstoredecisions.com/2022/03/07/are-cigarettes-back-to-normal/>