

# Prohibition is Not the Answer: FDA Should Not Ban the Legal Sale of Menthol Cigarettes and Flavored Cigars to Adults 21 and Older

Retailers today are facing major challenges – rising gas prices, a supply chain crisis, labor shortages, economic uncertainty, and increasing crime in their communities.

Yet FDA plans to finalize its ban on the legal sale of menthol cigarettes and flavored cigars through licensed, regulated stores to adults 21 and older. FDA has said it will move forward with this ban even after nearly 250,000 stakeholders submitted comments to the agency during a public comment period last year.

This Prohibition-based policy makes no sense. It will:

- Push these products to illegal markets where sellers don't follow the law or check ID
- Put \$29 billion in retail sales at risk
- Increase crime in the neighborhoods legal retailers serve

FDA has better options that don't hurt licensed retailers – like education, cessation support, and underage prevention. That's what FDA should focus on – not Prohibition.

## 1. Licensed retailers follow the law and age-verify

Licensed retailers make sure only adults of legal age can buy tobacco products that are in full compliance with all laws. Licensed retailers:

- Age-verify to prevent sales to anyone under 21
- Sell only FDA-regulated products made by FDA-regulated manufacturers
- Comply with all federal and state marketing restrictions
- Pay taxes



## 2. Licensed retailers have helped drive underage use to historic lows

The retail community has been key to reducing underage tobacco use. Today:<sup>1</sup>

- 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 be made without responsible retailers checking for ID and stopping kids' access to tobacco products. That's why it's so important to **keep these products in licensed stores.**

## 3. A total ban will push these products to illegal sellers who don't follow the law

This ban won't end availability of these products. It will just shift them to illegal sellers who:

- Don't age verify
- Sell products *not* regulated by FDA
- Don't report anything to government regulators
- Don't submit to inspections or audits
- Don't pay taxes

<sup>1</sup> ALCS analysis of National Survey on Drug Use and Health 2002-2020 combined; state is 12- to 17-year-olds who report past 30-day use.

## 4. This ban will impose major economic harm on responsible retailers

This total ban will shift products to illegal sellers, at a heavy cost to retailers and their employees:

- Convenience stores support 2.38 million jobs<sup>2</sup>
- Tobacco is the top revenue generator: 34.7% of in-store sales nationwide<sup>3</sup>
- Menthol cigarettes make up 37% of all retail cigarette sales<sup>4</sup>
- Menthol cigarettes generate \$29 billion in annual retail sales<sup>5</sup>
- Flavored cigars generate between \$4 to 5 billion in annual retail sales<sup>6</sup>
- For every \$1 an adult smoker spends on cigarettes, they spend an additional 25¢ on ancillary sales<sup>7</sup>
- Retailers could be forced to cut as many as 150,000 jobs<sup>8</sup>
- More crime in communities retailers serve

Retailers are at the center of community and the economy. Retailers that sell tobacco are often small businesses: of 253,000 convenience stores, grocery stores, and other outlets selling tobacco, 136,000 are single-store owners (54%).<sup>9</sup>

## 5. There is a better path forward – harm reduction, not Prohibition

FDA has better options for protecting public health which **keep these products within the licensed, regulated system**. FDA should focus on education, cessation, underage prevention, and providing adult consumers 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
- Don't lead to more illegal sales and crime
- Don't hurt responsible retailers

**Contact Members of Congress and tell them: Prohibition doesn't work. It creates illicit markets. It hurts underage prevention. And it will hurt licensed retailers.**

<sup>2</sup> NACS, "Convenience Store Sales Return to Record Level", at <https://www.convenience.org/Media/Press-Releases/2022-Press-Releases/US-Convenience-Store-Sales-Performance-at-Pre-Pand#.YI6xUtvMI2x>.

<sup>3</sup> NACS State of the Industry Report – 2020, National Association of Convenience Stores, 34th Edition.

<sup>4</sup> Federal Trade Commission Cigarette Report for 2020, p. 29,

<https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2020-smokeless-tobacco-report-2020/p114508fy20cigarettereport.pdf>.

<sup>5</sup> Calculation based on volume and price data in Orzechowski & Walker, "Tax Burden on Tobacco," FY2021, p.43, 223; menthol share from FTC supra note 4.

<sup>6</sup> Calculation for large cigar market. Based on volume and flavored share data from Cigar Association of America; retail price data from MSAi.

<sup>7</sup> Path to Purchase, 2017 Adult Tobacco Consumer Experience.

<sup>8</sup> Estimate of the National Association of Tobacco Outlets

<sup>9</sup> Store Tracking and Analytical Reporting System (STARS) FY2020 data