

Equitable Approaches to Menthol Tobacco Use Reduction: Rethinking a Blanket Ban

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INTRODUCTION

The 2009 Family Smoking and Tobacco Control Act charged the US Food and Drug Administration (FDA) with comprehensive tobacco regulation.¹ Since then, the FDA has attempted to ban the menthol flavor but has been unsuccessful. The FDA announced in 2021 that it intends to ban menthol-flavored cigarettes and all flavored cigars. In that announcement, the FDA highlighted the racial disparities of menthol tobacco use and stated that it intends to ban the menthol flavor in part because of this racial disparity. In particular, the FDA noted that 85% of all Black smokers are menthol cigarette smokers compared with 30% of all White smokers. Additionally, from 2011 to 2018, despite a decline in menthol cigarette use among non-Hispanic White youth, use among Black and Hispanic youth remained unchanged.²

In a previous commentary, we reviewed the history of the FDA's attempt at menthol regulation and highlighted the disproportionate use of menthol-flavored tobacco in the Black community. We described in detail how the racial disparity seen today was not an accident but a direct product of a long-standing, concerted marketing effort by the tobacco industry. Although we agreed with the scientific rationale of the FDA's menthol ban, we were concerned that a ban formulated to address racial disparities would not be the best mechanism to achieve its stated goals and could have unintended consequences. We argued that the ban is a paternalistic government action disproportionately affecting a single racial group (ie, Black smokers), leading to menthol product criminalization with the potential to worsen racial inequities in the criminal justice system, and that prohibition without using other proven community-level interventions will likely have limited success.³ Although it must be acknowledged that when

a menthol ban was implemented in other countries, including Canada, England, and the European Union, there was evidence to suggest that menthol smokers were able to achieve higher rates of tobacco cessation.⁴⁻⁶

Of note, the proposed ban has received mixed reviews by organizations advocating for minorities and civil liberties. The National Association for the Advancement of Colored People, The Center of Black Health & Equity, and most of the Congressional Black Caucus, to name a few, have supported the menthol ban. On the other hand, the American Civil Liberties Union and a number of other small or regional civil rights groups have raised concerns regarding the proposed ban, especially regarding its potential to worsen racial inequities in the criminal justice system.³

Since our commentary, the FDA has published its proposed rule, and we anticipate that the final rule on the menthol flavor ban will be forthcoming once the gathered public comments are reviewed and addressed by the agency.⁷ We further anticipate that implementation of the final ban will be delayed because of the litigation that is certain to follow. In the interim, we highlight our continued concerns with the ban and propose alternative and complimentary approaches as part of a concerted national effort to combat menthol-flavored tobacco product use that can achieve many of the FDA's well-intentioned goals while avoiding unintended consequences. To be clear, we are not categorically against a menthol ban; rather, we are advocating for other alternative and complimentary approaches to minimize unintended consequences.

EXACERBATING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

In addition to our philosophical objection to the ban based on its inherent paternalism, our immediate pragmatic concern remains the proposed ban's potential to exacerbate

racial disparities in the criminal justice system. Although the FDA continues to reassure stakeholders that it lacks the intention (and the authority) to enforce a ban on individual possession and use of menthol-flavored tobacco products, the fact remains that the sale and distribution of banned cigarettes is a federal crime punishable as a felony. A complete ban on menthol-flavored tobacco products will certainly create an illegal market for these products, leading to increased law enforcement action within Black communities. Increased policing risks the repetition of recent tragic tobacco-related police interactions, such as the death of Eric Garner. Criminalization can exacerbate existing disparities in the criminal justice system and transform a public health issue into a policing matter. History has shown that criminalization as a public health response usually leads to failure, as seen with the War on Drugs movement. Although we welcomed the FDA's recent acknowledgment of the potential for a negative impact on equity and community safety because of this proposed ban, the FDA has thus far failed to address this issue in any meaningful way.^{3,7,8} Before implementing a ban on menthol-flavored tobacco products, the federal and state governments should, at a minimum, take appropriate steps to decriminalize the low-level sale and distribution of banned cigarettes. Although this could potentially lead to a slightly less effective ban, this risk is significantly lower than the risk of exacerbating preexisting racial inequities in the criminal justice system.

HARM REDUCTION STRATEGIES

Harm reduction involves employing a set of practical tactics to reduce negative consequences associated with harmful activities and needs to be incorporated into any effective tobacco prevention strategy. Following are some recommendations on harm reduction strategies for reducing menthol-flavored tobacco use that could be employed in lieu of the proposed ban.

Menthol-Flavored Electronic Nicotine Delivery System Products

Recently, the FDA has authorized multiple tobacco-flavored Electronic Nicotine Delivery System (ENDS) products, concluding that

“the likely benefit for adult smokers who significantly reduce their cigarette use (or who switch completely, and experience cigarette use cessation) outweighs the risk to youth.”⁹ However, the FDA continues to deny authorization to menthol-flavored ENDS products.^{10,11} The FDA justifies this dichotomy by highlighting the risk of youth access and exposure to other flavored ENDS products in part on the basis of the 2021 National Youth Tobacco Survey. This survey showed that most middle school and high school students using ENDS products use flavored ENDS products; although, menthol was the least preferred flavor among flavored ENDS products.¹² However, this online survey is more indicative of the preferences of youth smokers when various flavor options are available rather than necessarily proving that in the absence of flavored ENDS products, these youth smokers will not initiate tobacco use.

Moreover, data from the United Kingdom, where ENDS products have been in use for more than a decade, mainly as a national strategy to promote smoking cessation, show that vaping is positively associated with quitting cigarette smoking and that it has the potential to reach more people who smoke than nicotine replacement therapy or varenicline.¹³

Although data on long-term use of ENDS products are lacking, to authorize tobacco-flavored ENDS products as a risk reduction strategy and then to withhold the same strategy for menthol smokers on the basis of at best shaky data is a disservice to menthol smokers, most of whom are Black.^{14,15}

Gradual Reduction in Menthol Content

Another tobacco harm reduction strategy, initially proposed in the 1990s, is the gradual reduction of nicotine content over time to a level at which it is considered “less-addictive.”¹⁶ In 2022, the FDA finally announced plans to establish a maximum nicotine level to reduce the addictiveness of cigarettes and certain other combusted tobacco products.¹⁷ Although the fine details of this plan are unknown as of the writing of this article, there is no reason why a similar strategy cannot be adopted for mentholated tobacco products instead of an outright ban. Specifically, the FDA could gradually phase out the menthol flavor over time by setting a maximum

menthol level that decreases annually rather than its current all-or-nothing approach. This would allow menthol smokers more time to adapt and a more gradual cessation strategy.

Gradual Increase in Tobacco Purchase Age

Rather than a blanket ban on menthol-flavored tobacco products that disproportionately deprives certain groups of choice, another option would be to gradually phase out the legal purchase of such products. New Zealand has provided a roadmap of how this could be done through its age-based prohibition on smoking. The country enacted a policy that, starting in 2027, will raise the legal smoking age year after year. This in effect means that those born after 2008 will never be allowed to legally purchase tobacco products. This policy was motivated by tobacco-use disparities similar to those seen in the United States with menthol-flavored tobacco products; although 11.5% of the general population in New Zealand smoke cigarettes, more than 29% of the Indigenous Māoris smoke. Although, both New Zealand's ban and a federal menthol ban have similar goals, New Zealand's strategy can achieve its aims without limiting the choice of current smokers.¹⁸

Combating Tobacco Industry Advertising Tactics

Much of the disparity in menthol use by Black Americans is a result of the tobacco industry's deliberate targeting of the community through aggressive marketing campaigns dating back to the 1950's.¹⁹ Despite limits on advertising and promotion that have progressively tightened after the Master Settlement Agreement (MSA) of 1998 and the Tobacco Control Act, the industry continues to creatively spend money in ways that perpetuate these racial disparities. For instance, although tobacco advertising in traditional media has waned, the industry has increasingly used price discounts for cigarette retailers to decrease the cost to consumers, spending \$6.06 billion on this type of promotion in 2020 alone.²⁰ This point-of-sale approach is more than twice as likely to be employed in neighborhoods with the highest proportion of Black Americans than in those with the lowest proportion.¹⁹ As a result, menthol cigarettes are often significantly less expensive in predominantly Black

communities.³ Decreasing consumption through increased cost of tobacco products has long been a key tobacco control policy measure. Combating the industry's attempts to undercut this policy measure through point-of-sale discounts, especially in Black communities, should be an integral part of any strategy to reduce racial disparities in tobacco use.

Investing in Tobacco Prevention and Cessation

In addition to limiting the industry's ability to promote menthol-flavored tobacco products, more advertising on the harms of menthol and discouraging its use is needed. There has been a longstanding underinvestment in marketing to decrease tobacco use, including menthol products. Although the MSA was designed to provide resources for tobacco cessation, of the more than \$126 billion paid by tobacco companies to states between its inception in 1998 and 2017, less than 1% of those funds have been allocated to tobacco prevention.²¹ Furthermore, although the tobacco industry spent \$7.84 billion on advertising and promotion in 2020 alone, funding for tobacco cessation and community engagement has lagged by orders of magnitude.^{19,21}

Instead, states have used MSA payments to plug holes in general budgets, with the percentage devoted to tobacco control steadily decreasing over time to the point that by 2017, 17 states devoted none of their MSA funding toward tobacco prevention. States on average spend far below both Centers for Disease Control and Prevention (CDC)-advised minimum and recommended funding levels for comprehensive tobacco control programs despite evidence that this spending leads to significant returns on investment.²¹

There are numerous national organizations devoted to tobacco cessation, with the Truth Initiative being chief among them. Born out of the MSA and funded through state contributions, donations, and proceeds from investments, the Truth Initiative is tasked with reducing tobacco usage through nationwide and community-level outreach. Its Truth advertising campaign has had significant success in reducing smoking rates over the past 2 decades, especially among youth.^{22,23} However, the organization's 2020 spending was

only \$105.26 million compared with the \$7.84 billion spent by the tobacco industry on advertising and promotion.^{20,22} The Truth Initiative lists menthol use as one of its top priorities; however, it does not provide details on what share of its budgets or efforts are devoted specifically to combating menthol-flavored tobacco products. Whether through increased state MSA contributions or fresh federal funding, campaigns such as the Truth Initiative need more firepower and an increased focus on menthol-flavored cessation to tackle racial disparities in menthol use.

COMMUNITY ENGAGEMENT/CDC

Menthol use disproportionately affects Black communities because of a history of the tobacco industry targeting these communities. Any solution to these inequities should target and empower these same communities. In its Best Practices guidance from 2014, the CDC noted that a key goal of tobacco control policy should be “[a]chieving equity by reducing tobacco-related disparities” through partnerships with community-based organizations and using culturally competent outreach. Community-level action is stressed as synergistic with state and national efforts. The agency’s recommendations emphasize that “the active and coordinated involvement of a wide range of societal and community resources must be the foundation of sustained solutions to pervasive problems such as tobacco use.”²⁴

There are already encouraging examples of community-level action to decrease menthol use. In 2015, Minnesota funded a grant of \$200,000 to address the disproportionately high use of cigarettes by Black Americans, particularly the use of menthol-flavored cigarettes.²⁵ In a similar vein, the Center for Black Health & Equity established “No Menthol Sunday” as an annual day for faith communities to confront the negative impact of menthol. The organization empowered local efforts by providing toolkits with talking points, promotional materials, and event support all while bolstering nationwide awareness through social media.²⁶ Both the CDC’s own guidance and these examples highlight the importance of grassroots engagement and community support for tobacco regulation as an essential part of the success of any

top-down policy approach, such as a federal menthol ban.

CONCLUSION

A menthol ban may eventually be part of an effective tobacco control policy in this country. However, that moment should come when structural legal concerns have been addressed, other harm reduction strategies have been employed, and community engagement has been fully optimized. To implement a ban prematurely and without buy-in from the community is a top-down paternalistic approach that risks creating unintended consequences worse than what it aims to address.

POTENTIAL COMPETING INTERESTS

The authors report no competing interests.

Abbreviations and Acronyms: CDC, Centers for Disease Control and Prevention; ENDS, Electronic Nicotine Delivery System; FDA, US Food and Drug Administration; MSA, Master Settlement Agreement

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