



COOL, MINTY & TOXIC Mike Freiberg, J.D. & Kerry Cork, J.D.

What to Do About the Problem of Menthol in Tobacco Products

FEDERAL REGULATION: 2009

Congress adopts Family Smoking Prevention and Tobacco Control Act.

- Act prohibits cigarettes from containing characterizing flavors, but exempts menthol and tobacco. 21 U.S.C. § 387g(a)(1)(A)
- Act directs Tobacco Products Scientific Advisory Committee to report on "the impact of the use of menthol in cigarettes on the public health." 21 U.S.C. § 387g(e)(1)

MARCH 2011

TPSAC report concludes that "removal of menthol cigarettes from the marketplace would benefit public health in the United States."

JUNE 2011

FDA announces its internal experts are conducting another independent review of the science on menthol.

APRIL 12, 2013

Tobacco Control Legal Consortium et al. files Citizen Petition asking the FDA to prohibit menthol as a characterizing flavor in cigarettes.
Public submits comments.



JULY 23, 2013

FDA report concludes that "... adequate data suggest that menthol use is likely associated with increased smoking initiation by youth and young adults. Further, the data indicate that menthol in cigarettes is likely associated with greater addiction. [It is] likely that menthol cigarettes pose a public health risk above that seen with nonmenthol cigarettes."

JULY 23, 2013

FDA issues an Advance Notice of Proposed Rulemaking to take public input on menthol in cigarettes. Public submits comments.

NOVEMBER 2013

Docket closes.



The Trouble with Menthol

- Menthol is an ingredient produced synthetically or found organically in plants of the mint family. Its cooling properties, which make it a popular additive in toothpaste, cold remedies, and peppermint candies, also reduce the harshness of tobacco smoke and the irritation of nicotine in cigarettes. As a result, menthol cigarettes are a popular choice for those first starting to smoke.

- Approximately 19 million Americans (more than a quarter of the U.S. cigarette market) smoke menthol cigarettes.

- Tobacco manufacturers have used menthol cigarettes for years to target vulnerable populations. In fact, according to national surveys, menthol cigarettes are the source of addiction for nearly half of all teen smokers.

- Menthol cigarettes are also used disproportionately in communities of color. According to the combined 2004–2008 National Survey on Drug Use and Health data, menthol cigarettes are used at higher rates by racial and ethnic minority smokers, including African Americans (82.6 percent), Native Hawaiian or Pacific Islanders (53.2 percent), Hispanics or Latinos (32.3 percent) and Asian Americans (31.2 percent), relative to White smokers (23.8 percent).

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LOCAL & STATE REGULATION

Under the Tobacco Control Act, the FDA can adopt a regulation containing a tobacco product standard only if the standard would be "appropriate for the protection of the public health." Although state and local governments cannot adopt regulations relating to tobacco product standards, they can regulate the sale and distribution of tobacco products.

Policy Options

Prohibit Sale of Menthol in Tobacco Products

Courts have found that states have the authority to prohibit the sale of flavored tobacco products. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *National Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

EXAMPLE: On January 15, 2014, a bill (HB 1522) was introduced in the Hawaii Legislature to prohibit the sale of menthol flavored cigarettes.

Restrict Sale of Menthol Tobacco Products to Certain Locations

Mentholated tobacco products pose a risk for youth tobacco initiation, so prohibiting the sale of these products to adult-only facilities, or within a certain number of feet of schools or other youth-oriented facilities might be an option.

EXAMPLE: Chicago recently passed an ordinance that prohibits anyone from selling, giving away, bartering, exchanging, or otherwise dealing in flavored (including menthol) tobacco products, samples of such products, or accessories for such products within 500 feet of the property line of any public, private or parochial elementary, middle or secondary school located in the City of Chicago. Chicago, Ill., Municipal Code § 4-64-098 (2013)

Restrict Point-of-Sale Advertising and Product Displays of Mentholated Tobacco Products

- Marketing in the retail environment is associated with increased youth and adult tobacco use.
- The Tobacco Control Act allows state and local governments to restrict the time, place and manner, but not the content, of cigarette advertising.
- States and communities could consider going beyond nationwide marketing regulations to impose additional restrictions on point-of-sale advertising of menthol tobacco products. These restrictions could include:
 - Limiting ads in certain store locations, such as within close proximity to schools
 - Enforcing existing content-neutral advertising laws
 - Prohibiting self-service displays for other tobacco products

NOTE: Any restrictions on tobacco advertising at the point of sale are likely to face legal challenges on First Amendment grounds and will need to be carefully drafted, and draw on a strong base of scientific evidence, to withstand legal scrutiny.

Tax Menthol Tobacco Products at Higher Rate than Non-Mentholated Products

- Research shows that raising the price of tobacco products by increasing taxes or implementing other pricing policies leads to a reduction in tobacco use.
- Most tobacco tax increases are implemented at the state and federal, rather than local, levels.
- Arguments could arise that taxing mentholated products is regressive, since mentholated products are more popular than non-mentholated products in low income communities.

Other Policy Options?

- Other price-related regulations, such as prohibitions on multi-pack discounts, and restrictions on the redemption of coupons that lower the price of mentholated tobacco products
- Information reporting, such as requiring tobacco companies to disclose data that would help indicate whether menthol tobacco products are being targeted to low income or other priority populations in a jurisdiction
- Raising the age to purchase menthol tobacco products