July 5, 2022

The Honorable Robert M. Califf
Commissioner of Food and Drugs
U.S. Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

RE: Docket No. FDA-2021-N-1349 (Tobacco Product Standard for Menthol in Cigarettes)
RE: Docket No. FDA-2021-N-1309 (Tobacco Product Standard for Characterizing Flavors in Cigars)

Dear Commissioner Califf:

Intro and Background
The Energy Marketers of America (EMA) respectfully file these comments in opposition to the two proposed rules because we believe keeping these products legal and regulated is the better policy choice. We believe licensed retailing is essential to keeping tobacco products out of kids' hands and for advancing other public health goals.

EMA is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. EMA member companies supply 80 percent of all finished motor and heating fuel products sold nationwide including gasoline, diesel fuel, heating fuels and biofuels such as renewable diesel and biodiesel. EMA members also own and operate the majority of gas stations nationwide which are mostly small family-owned and operated businesses who are hurting just as much by high gas prices as the American consumer. The retail motor fuels market is the most competitive marketplace in the country. Retailers post their prices on big signs where a one-penny difference can decide where customers choose to fill up. Because gasoline retailers operate in such a competitive environment, the higher prices climb, the further margins are squeezed. Gas station retailers are also hurt by high fuel prices.

As such, EMA represents many of the tens of thousands of small businesses nationwide that, in addition to providing fuel, include convenience store outlets that derive a substantial percentage of their revenues from tobacco products. **Therefore, we write to vigorously oppose the FDA's Proposed Tobacco Product Standards banning the use of menthol in cigarettes and characterizing flavors of all kinds in cigars.** Not only are these rules not necessary, for the reasons described below, but by the FDA's own admission, these rules would inflict substantial economic damage on American small businesses.

Youth Tobacco Use on the Decline
The government's own surveys show youth usage of these products in a long-term decline that according to the most recent data – the 2021 National Youth Tobacco Survey studiously ignored by FDA – is accelerating dramatically to historic lows. We do not think that it is any coincidence that this stepped-up progress occurred in the wake of the passage of a nationwide Tobacco 21 law. Even the FDA, in the rationale accompanying the flavored cigar rule, admits to "uncertainty about the 2019 Tobacco 21 law's effect on baseline youth initiation."

We are proud of the role the responsible, conscientious, community-minded businesses represented by our member associations have played in bringing about this momentous public-health accomplishment. These establishments have invested millions of dollars and person-hours over decades in youth-prevention training, technology and implementation. Their investments and the dedicated efforts of business owners and proprietors are, without question, working and should be given a chance to succeed further.

FDA Proposed Rule Likely to Lead to Illicit Market

In contrast, the proposed product standards will almost certainly be harmful in many ways besides the public health. FDA relies on extremely limited research based on local flavor bans to assert that a nationwide product standard will reduce initiation and consumption of combustible products and even reduce the likelihood of cross-border sales. Yet FDA knows bootlegging of foreign-sourced products, including counterfeits, is a well-known phenomenon conducted not only by individual smugglers but also organized crime, gangs and even terrorist organizations. Such criminal efforts would represent a wide-open opportunity for new profits in the event of a flavor ban, especially given the growing flood over the U.S. southern border. As supplies make their way to American streets and schools, the gains in youth prevention would be at risk as retailers' youth-prevention efforts are effectively bypassed.

FDA Proposed Rules Likely to Exacerbate Inflation

And shifting these products to illicit markets will come at the expense of legal, licensed retailers who are working every day to sell only FDA-regulated product, and only to adults 21 and older. These tobacco products represent more than 30 percent of a typical convenience store's sales, and that menthol cigarettes and flavored cigars account for more than 30 percent of those sales. For our members – many of whom are small businesses – losing these sales to an illicit market would be a serious blow. These businesses are already devastated by inflation, supply backlogs, labor shortages and the declining real wages of their customers. Now, they would be squeezed on the other end by the loss of a critical sales revenue. And there would be a domino effect: research shows tobacco purchasers shop for other items during their visits. A loss of one revenue source will force retailers to cut jobs, raise prices on other goods, or both.

Additionally, banning the use of menthol in cigarettes and characterizing flavors in cigars would have a cascading effect on EMA member companies who supply fuel to independently owned and operated small business gas stations. Keep in mind that major integrated oil companies have removed themselves from the retail gasoline business. Of the 150,000 U.S. retail gasoline locations, 98 percent are owned by independent motor fuel marketing businesses. While those small businesses may sell a particular brand of gasoline, they do not share in any of the profits (or losses) generated by refiners and oil companies.

Therefore, retailers may have no alternative but to raise gas prices and in-store items to compensate for the loss of revenue due to the menthol/cigar characterizing flavor ban. However, given the magnitude of the proposed rule, we believe many small retailers would likely be forced out of business due to the loss of operating capital necessary to pay for their next load of fuel. This would leave wholesale energy marketers with a substantial account receivables amount which would likely put both the wholesaler and retailer out of business and lead to higher prices at the gas pump due to consolidation.

Conclusion

The energy marketers represented by EMA's member associations stand ready to assist FDA and state and local officials in doubling down on the youth prevention efforts that are successfully reducing underage consumption. That's where FDA should be focused – not banning legal, regulated, and responsible sales to adults 21 and older.

Sincerely,

Rob Underwood
President
Energy Marketers of America