



March 3, 2011

Caryn Cohen, M.S.
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Food and Drug Administration
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Re: TPSAC Report and Recommendation on Menthol Cigarettes

Dear Chairman Samet and Members of TPSAC:

Please accept the following comments of the National Association of Convenience Stores ("NACS") in connection with the Tobacco Product Safety Advisory Committee's ("TPSAC's") proceedings related to menthol in cigarettes. This submission is intended to become part of TPSAC's March 17 meeting materials.

TPSAC was formed almost a year ago. At your initial meeting on March 30, 2010, FDA Commissioner Margaret Hamburg said TPSAC's overarching mission was "to provide the advice, information and recommendations necessary to effectively regulate tobacco products." NACS respects the enormous task before you as a scientific advisory committee, and appreciates the opportunities last year to testify and submit written testimony.

As TPSAC nears the time to submit its report and recommendation, NACS wanted to take this final opportunity to reiterate and summarize our conviction that a ban of menthol cigarettes, if that is what TPSAC recommends, would spark a black market with grave ramifications on public health, the availability of contraband cigarettes for youths, and other problems.

Given the construct provided by Dr. Hamburg, TPSAC should first start with information – the facts. NACS is concerned that TPSAC has not commissioned studies about the black market or sought the testimony from federal and state officials who deal with the black market to adequately inform itself of these facts, much less to understand the issue well enough to make a valid recommendation to the FDA.

In the absence of a meticulous and purposeful inquiry by TPSAC into the countervailing effects of a ban, however, there should be no debate about the facts of the matter.

First, there is a black market in tobacco today in this country. This is a fact, and it must be the starting point of any discussion. A black market currently exists in the United States and in fact around the world. NACS has been very involved in trying to reign in the U.S. black market, working with Congress and federal agencies to close loopholes that allow illicit, unregulated sales to flourish through the Internet, mails or via Native American sources. A 2009 Inspector General report for the Department of Justice said the diversion of tobacco today costs federal and state governments more than \$5 billion a year in unpaid excise taxes. Other reports say enforcement efforts have not kept pace with increasing complex schemes.

Second, there is the capacity overseas to produce contraband menthol cigarettes that could flood the United States. Numerous studies, reports and other sources point to robust contraband manufacturing capabilities in countries like China and in regions like Eastern Europe. Among other resources, I recommend a series of articles by the public interest group, Center for Public Integrity, that shines a spotlight on the tobacco underground. <http://www.publicintegrity.org/investigations/tobacco/articles/>

Third, a decision to ban menthol cigarettes will cause a significant expansion of the current black market for cigarettes in the United States. Common sense tells you that if there is a market for an existing product – and if that product is made illegal – some portion of that existing market will go to the black market. A menthol ban will undoubtedly lead to a black market in menthol cigarettes because of the broad consumer base that exists among adult smokers. NACS firmly believes that a ban on menthol would provide a spark that the black market needs to push it into a more burgeoning problem in our country.

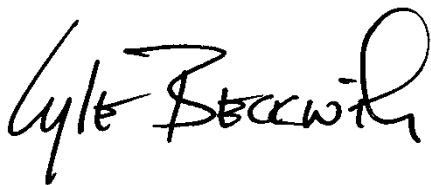
And what are the facts regarding the ramifications of expanded black market?

Fourth, a ban on menthol will aggravate, not mitigate, underage smoking problems. The purveyors of menthol cigarettes, operating outside of the law, will not discriminate among their customers based on age. This is not speculation or supposition. Canada today suffers from an extensive contraband market where sales occur at doorsteps and street corners. Studies concluded that those under 19, who are prohibited from purchasing licit cigarettes, have no trouble getting their hands on cheap, illegal cigarettes. Because smugglers don't care about age verification, contraband sales undercut the efforts of retailers to prevent minors from purchasing tobacco.

And fifth, a black market will create other health concerns. Overall, one in three cigarettes purchased in Canada is illegal. My colleague Dave Bryans of the Canadian Convenience Stores Association calls it a "cautionary tale for the United States." In his testimony to TPSAC, he outlined how the Canadian government's inability to curb illicit tobacco undermines public health policies. Today in the United States, manufacturers operate within the full scrutiny of the FDA in satisfying customer demand. Illegal manufacturers, obviously, will not, meaning that cigarette contents, purity, nicotine and tar levels, to name just a few issues, all will subject to their whims. Congress specifically recognized in the Tobacco Control Act that the FDA should play a role in regulating the manufacture of cigarettes; banning menthol will eliminate the important public health safeguards that Congress intended in that Act.

These are the facts. The fear is very real that banning menthol will make an unregulated, unhealthy and illicit tobacco trade much worse. In the name of public health, NACS and our convenience store members hope this fear does not become a reality.

Respectfully,

A handwritten signature in black ink, reading "Lyle Beckwith". The signature is fluid and cursive, with the first name "Lyle" and last name "Beckwith" clearly distinguishable.

Lyle Beckwith
Sr. Vice President, Government Relations