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To: Members of the Tobacco Products Scientific Products Advisory Committee

As an appointee of President Ronald Reagan to the U.S. Consumer Product Safety Commission, where I served six years, including service as chairman during President Reagan's second term, I appreciate the difficulty in reviewing products; evaluating the conflicting science and making decisions that impact the health and safety of the American people.

With this background, I have been following your deliberations on the issue of menthol in cigarettes with interest. As members of the Tobacco Products Scientific Advisory Committee, you have a complex and important responsibility as you examine the use of menthol in cigarettes.

As a former public official who once led a regulatory agency, I am pleased to submit these observations about the task ahead of you. My thoughts are grounded in my experiences dealing with a host of important regulatory issues important to consumers and the public at large as the head of a regulatory agency. My strong cautionary note to you is that this Committee should ensure that it devotes enough time to considering the unintended consequences of a ban on menthol.

Unintended Consequences in Government Actions

Recent regulatory history and historical examples show numerous instances in which government believes it has taken an action to benefit consumers that has, in fact, backfired.

The overall lesson is compelling. Even relatively simple regulatory interventions in complex social, economic and environmental systems can create significant unintended consequences. When regulatory actions impose a new set of circumstances upon consumers, governments cannot always predict how the market (ie.- people) will react and these unintended consequences are often more harmful than the problem they intended to solve. In some cases the outcomes are precisely the opposite of what government sought to achieve through the intervention.

That is to say, it might be a cliché to cite the “law of unintended consequences.” But indeed there is truth to the statement.

This written testimony is not meant to address Prohibition in detail – one of the best-documented examples of unintended consequences in the last century – but it certainly deserves a mention. For 13 years, beginning in 1920, the sale, manufacture and transportation of alcohol was banned in the United States. Surely this Committee is familiar with the social, criminal and other ramifications of this attempt to ban a previously legal product. As an advisory body mandated to study the implications of your recommendation on contraband, a major part of your report must delve deeply into the history of Prohibition as part of an honest, good-faith effort if the Committee votes to recommend a ban of menthol.

Prohibition, however, is not the only government program that backfired and did not achieve the anticipated result. The Alar controversy of 1989 unnecessarily created a food scare that cost apple farmers and the U.S. taxpayers millions of dollars, but later the scare was found to be baseless. In the wake of allegations that “Tris,” a flame retardant, spread cancer, there was a hysteria fueled by the mass media. Based on this unfounded research, Tris was banned, leaving consumers with limited options for fire-proof sleepwear. The ban on DDT has led to a resurgence of malaria. Biofuels are now widely believed to have exacerbated the harms they were meant to solve. There are many other examples of unintended consequences that come to mind.

Questions the Committee Must Ask and Answer

With that in mind, it would be irresponsible for TPSAC to not consider the unintended consequences of any attempt to ban menthol. A recommendation to ban menthol cigarettes would ban one-third of the U.S. cigarette market. While I am not a scientist, it is incumbent upon this Committee to consider the unintended consequences of banning menthol in cigarettes.

To be credible and thorough, I believe this Committee must ask and answer the following questions in its public report:

- There have been several high-profile illustrations of the fact that the FDA has not had sufficient resources to meet its primary responsibility to ensure the safety of the nation’s food and drugs in recent years. If menthol were to be banned, would this divert the attention of agency leaders from issues like food safety? Does the FDA have the regulatory capacity to handle all the associated issues?
- If TPSAC recommends banning menthol, especially if the public believes this is a decision that disregards the conclusions of rigorous, peer-reviewed scientific studies, what are the consequences of having the Committee’s conclusions widely questioned or disregarded by the FDA or public at large?
- If menthol is banned, would the explicit message that menthol is worse than non-menthol encourage smokers to regard such an edict as a *de facto* statement that non-menthol

cigarettes are a safer smoke and an endorsement of the “reduced-harm” theory that TPSAC and the FDA has thus far rejected?

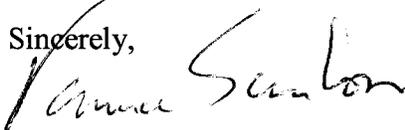
- If menthol is banned, wouldn't millions of menthol smokers turn to a black market in contraband cigarettes than already exists in many parts of the country? How effective has tobacco contraband enforcement been to date? What can be done to make it more effective? What would the costs be to law enforcement?
- Would a ban in truth affect overall smoking rates if most menthol smokers merely change brands or seek menthol cigarettes in the black market? And, specifically, what would happen to youth smoking rates if one examines the experience in Canada where cheaper contraband cigarettes are widely available from the black market.

Conclusion

With the enactment of the new tobacco law, the Tobacco Products Scientific Advisory Committee has been handed serious responsibilities.

I encourage you to carefully study the complex web of interrelated issues. There are massive uncertainties about whether banning menthol is wise, and there are significant indications that a ban on menthol would go awry. As the Committee continues its work, there is need for a clear discussion and analysis that takes into account all potential ramifications. A precipitous action could have significant adverse consequences.

Sincerely,



Terrence Scanlon