



CIGAR ASSOCIATION OF AMERICA, INC.

Summary of March 15, 2022 CAA Meeting with OIRA re Proposed Tobacco Product Standard for Characterizing Flavors in Cigars

The Cigar Association of America, Inc. (“CAA”) submits this summary with reference to its E.O. 12866 Meeting with the Office of Information and Regulatory Affairs and Office of Management and Budget on the Proposed Tobacco Product Standard for Characterizing Flavors in Cigars (“Proposed Product Standard”).

The Cigar Association of America, Inc. (“CAA”) is a leading national trade association representing the interests of cigar manufacturers, importers, distributors, retailers and major suppliers to the industry. CAA was founded in 1937 as a non-profit trade organization. Today, its member companies come from all sectors of the industry and include manufacturers of both hand-made premium cigars and machine-made cigars. CAA members manufacture a significant share of the large, premium, little, and filtered cigars sold in the United States, and include internet retailers of cigars, as well as leaf and other suppliers to the cigar industry. CAA is a key stakeholder in the implementation of any regulation of cigars as these regulations significantly affect its members’ ability to conduct business. CAA and its members take the obligation to responsibly market and sell cigars incredibly seriously. CAA and its member companies have a zero-tolerance policy regarding youth usage of their products and conduct themselves accordingly. CAA and its member companies believe cigars are a product only to be enjoyed by adult consumers and that adult cigar consumers should continue to have a range of choices in the products they use – including flavored cigars.

In order to put a product standard in place the Center for Tobacco Products must demonstrate that the potential product standard is appropriate for the protection of the public health, taking into consideration scientific evidence concerning (i) the risks and benefits to the population as a whole; (ii) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (iii) the increased or decreased likelihood that those who do not use tobacco products will start using such products. Tobacco Control Act §907(a)(3).

Using this standard, there is no scientific or legal basis to prohibit characterizing flavors in cigars. Four specific factors mitigate against it: (i) youth usage of cigars has been declining and is at an all-time low; (2) such a product standard may not be used to address purported health disparities in adult subpopulations; (3) the economic consequences would be enormous and outweigh any incalculable benefit; and (4) the likely unintended consequences resulting from the Proposed Product Standard.

First, youth usage of all cigars, and specifically flavored cigars, has been continually declining and is at an all time low across all national surveys. This is even without CTP having issued implementing regulations to enforce compliance with a minimum age of purchase of 21 years old.

- *National Survey of Drug Use and Health (NSDUH)*¹
 - 2014 – 2.1% of youth currently used cigars
 - 2020 -- 0.8% of youth currently used cigars
- *Monitoring the Future (MTF)*²
 - 2014 – 3.9% of youth currently used large cigars; 7.4% of youth currently used little flavored cigars
 - 2021 – 1.5% of youth currently used large cigars; 1.5% of youth used little flavored cigars
- *National Youth Tobacco Survey (NYTS)*³
 - 2019 – 5.3% of youth currently used cigars (first year a combined high school and middle school number)
 - 2021 – 1.4 % of youth currently used cigars
 - 2021 – of the 1.4 % only 44.4% used a flavored cigar (0.6% of all youth)

Additionally, youth usage of cigars is significantly lower than youth usage of other illicit products. The 2021 Monitoring the Future data shows that 15.1% of youth use alcohol; 11.0% of youth use cannabis and 15.9% of youth currently use vaping products.

Second, FDA cannot impose a product standard because certain subpopulations of adults use legal products. FDA has stated this Proposed Product Standard is necessary because “most of the users of flavored cigars are from under-served communities and/or at-risk populations.... As such, reducing the appeal and use of cigars by eliminating characterizing flavors is also expected to decrease tobacco-related disparities and promote health equity across population groups.” While CAA agrees that decreasing health disparities and promoting health equity are important goals, they are not an enumerated legal or scientific basis to restrict adult choice regarding legally marketed products through a Proposed Product Standard. This is certainly true when one looks at flavored cigar use in the adult population. Wave 4 of the Population Assessment of Tobacco and Health (“PATH”) data shows that 50.3 % of non-premium cigar users use flavored cigars; 55.7% of cigarillo users use flavored cigars; and 48.4% of filtered cigar users use flavored cigars.⁴

Third, the economic consequences of the Proposed Product Standard would be enormous and disruptive both to the domestic and certain international economies. CAA members represent all segments of the cigar industry from the largest manufacturers, to distributors, importers, and retailers. For some of the larger manufacturers, depending on the definition of “characterizing flavor,” 50 % or more of their portfolios could be at risk. This puts at risk US jobs as well as jobs (and many other benefits, such as health care, meals, education, etc.) of their employees in the Caribbean Basin at risk. Further, a ban on flavored products would have a downstream effect on distributors, wholesalers and retailers. Many retailers, for instance, will lose foot traffic and sales

¹<https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf> Table A.2B

² <http://www.monitoringthefuture.org//pubs/monographs/mtf-overview2021.pdf> , Table 3

³ https://www.cdc.gov/mmwr/volumes/71/ss/ss7105a1.htm?s_cid=ss7105a1_w

⁴ The National Academies Press, Premium Cigars: Patterns of Use, Marketing and Health Effects (2022); Appendix D at Table D-3.

of other products if flavored cigars are removed from their stores. Additionally, certain US manufacturers are small businesses, and they could be dramatically affected by the Proposed Product Standard. Further, just two years ago CTP required manufacturers to spend millions to submit substantial equivalence reports to ensure that products that entered the market between 2007 and 2016 could stay on the market. CTP has yet to issue orders on almost all of these substantial equivalence reports while the Proposed Product Standard would prohibit the sale of the very products industry spent millions seeking approval to market.

In addition to the effect on industry, there would be large effect on government revenues if the Proposed Product Standard was to be finalized. In 2020, the cigar category paid \$631,680,899 in federal excise taxes. Were the Proposed Product Standard put in place, this could potentially reduce federal excise tax collections by \$232,000,000. Further, cigars are subject to both excise and sales tax in nearly all states with excise tax rates ranging from no tax to 95% of the wholesale price. While it is difficult to estimate the entire burden a ban on flavored cigars would have at the state level, some states included revenue notes in their legislation to attempt to prohibit flavors in tobacco products. For instance, California estimated it would lose \$218 million in excise taxes and an addition \$53 million in sales tax revenue were its ban on all flavored tobacco products to go into effect.⁵ Similarly, for the flavor ban being considered currently in Colorado, the fiscal note estimates decreased tax revenues of \$37-38 million.⁶ Finally, Washington D.C. proposed and passed an Ordinance to prohibit flavored tobacco products, but it never went into effect as the District could not offset the projected \$11.6 million loss in tax revenue.⁷

Another economic impact of the Proposed Product Standard would be a change in the allocation between classes of how CTP user fees are paid. While CTP receives a static amount of money each year regardless of how industry is regulated, a change with as drastic economic consequences as that in the Proposed Product Standard will shift the allocation. For instance, currently the cigar category pays 12.1564% of the user fees for CTP. If cigar federal excise taxes were to decrease by the above referenced \$231 million (and all other things stayed equal) this would change the cigar share to 8.057%. This would ultimately influence all other product categories that pay CTP user fees (with the obvious exclusion of e-cigarettes which do not pay user fees).

Fourth, the Proposed Product Standard will have drastic unintended consequences, including creation of an illicit market. The Massachusetts prohibition on the sale of flavored tobacco products proves a useful example. In the year following the Massachusetts prohibition data has shown that consumer behavior in terms of usage of tobacco products has not changed, the only thing that changed is where the consumers obtained the same products. The Massachusetts Multi-Agency Task Force on Illegal Tobacco Products issued a report which found the following “Several neighboring states, including New Hampshire, Rhode Island, and Vermont, have reported an increase in tobacco revenue related to cigarettes and OTP during the past year. For example, cigarette excise tax revenue increased approximately 15% between FY20 and FY21 in New

⁵ https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793

⁶ https://leg.colorado.gov/sites/default/files/documents/2022A/bills/fn/2022a_hb1064_00.pdf

⁷ http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/FIS%20Bill%2024-20%20Flavored%20Tobacco.pdf

Hampshire while OTP excise tax revenue increased approximately 56%.⁸ There is every reason to think a federal prohibition will have similar results. Rather than change consumer behavior, instead consumers will seek to obtain counterfeit or black-market products, or in an even more extreme example seek to create the products themselves.

For all of the foregoing reasons, CAA submits that there are no scientific or legal justifications to issue the Proposed Product Standard.

⁸ <https://www.mass.gov/doc/task-force-fy22-annual-report/download>