

Cigar Flavor Bans: Impacts from Illicit Market Activity

The U.S. Food and Drug Administration's [proposed ban](#) on characterizing flavors in cigars would have [devastating economic impacts](#) and interfere with adult's right to choose. And, because [youth usage rates are already at historic lows](#), any further reductions would be limited, can be achieved by other means, and cannot justify the other negative consequences as illicit markets develop for flavored cigars. These negative consequences are discussed below.

I. Prohibition will only create criminals.

If FDA's proposed ban were to go into effect, a previously legal activity would become illegal. But just as we have learned from alcohol and marijuana prohibitions, banning a product does not eliminate *demand* for the banned product, but rather criminalizes it.

- The proposed ban will lead to heightened policing efforts to enforce it. As the Congress of Racial Equality (CORE) recently pointed out in comments opposing the flavor ban, FDA claims that it will only enforce the ban against manufacturers and retailers and not against individuals.ⁱ
- Nearly all states, however, have cigar excise taxes. States will have an interest in policing untaxed products. Thus, the ban will be enforced by state and local police against persons participating in the illegal market.

II. This kind of police enforcement has in the past disproportionately impacted certain communities.

- The CORE comments go on to point out that the deaths of Eric Garner and Michael Brown at the hands of police involved tobacco enforcement. Michael Brown's initial infraction was related to cigars and Eric Garner's to the sale of untaxed tobacco.
- In comments to the FDA, the National Black Chamber of Commerce noted:

"...enforcement of local laws against these transactions (flavored cigars) will certainly bring African Americans, already the subject of over policing, into further confrontations with law enforcement personnel."ⁱⁱ

III. Collateral consequences are also damaging.

While tragic deaths get the public's attention, the collateral consequences of arrests over low level offenses are extensive.ⁱⁱⁱ

- Such arrests result in loss of time and money by individuals who attend court hearings, miss work, and possibly meet bail.
- For individuals who end up incarcerated, the consequences include loss of educational opportunities, income, employment, and housing.
- Families can be disrupted as children are often removed from their homes due to a parent being convicted or arrested for even minor offences.

IV. Law enforcement is opposed to enforcing flavored cigar bans.

Law enforcement is overwhelmingly against such bans. Since FDA cannot be responsible for enforcement of state and local laws against untaxed flavored cigars, it should heed the warnings of law enforcement officials when it comes to flavor bans.

- Law enforcement organizations representing nearly 700,000 law enforcement officers filed comments opposing FDA's proposed flavored tobacco ban.^{iv}
- The same group notes that "we don't enforce FDA law, but we do enforce state laws ..." State laws require that excise taxes be paid on cigars and all 50 states have laws that treat unlicensed tobacco sales as a crime.
- Law enforcement resources are limited. Shifting resources to police a new crime – sale of untaxed flavored cigars – mean reduced efforts to combat other criminal activity. The need to enforce a ban on flavored cigars will necessarily draw limited resources away from other enforcement efforts. Criminals will observe diminished police activity and increase their criminal activity in response.

V. Illegal/counterfeit products will damage public health.

The existing regulatory system is intended to ensure that legal tobacco products are manufactured to meet established standards, undergo quality control measures, and prevent inclusion of unregulated ingredients that could pose health hazards to consumers.

Imposing a prohibition on flavored cigars would ensure that only *illegal* actors participate in the flavored cigar market. Illegal manufacturers and retailers have little regard for the health and safety of their customers. The evidence shows that illegal/counterfeit products can be extremely hazardous. Consider:

- In 2019 illegal counterfeit cigarettes smuggled into the United Kingdom contained asbestos and rat and human feces.^v
- Also, in 2019 an outbreak of Vaping Use-Associated Lung Injury was caused by Vitamin E acetate in unregulated THC vape liquids sold through illicit markets. Over 2,800 people were hospitalized and there were 68 confirmed deaths in the U.S.

VI. Illegal international operators are already well established. FDA’s proposed flavored cigar ban would only increase their market opportunities.

Some argue that a nationwide ban would eliminate opportunities for illegal cross border state to state traffic. However, illegal international markets are already established.

- High tax rates for tobacco products already create opportunities for criminals, allowing them to “buy low” in low tax jurisdictions and sell illegally into high tax jurisdictions. Basic economic principals work across state lines and across international borders.
- A report by the Tax Foundation showed that around 1 in 6 packs of cigarettes smoked in California were smuggled in from an international outlet.^{vi}
- A recent letter from Senators Marco Rubio, Tom Cotton, Rick Scott, Bill Hagerty and Bill Cassidy to Treasury Secretary Janet Yellen warned Secretary Yellen that Cartel de Jalisco Nueva Generacion (CJNG), a group already sanctioned by the United States for its role in trafficking narcotics and fentanyl, has been involved in the sale of tobacco products to generate a new revenue stream.^{vii}

ⁱ Comments submitted on behalf of the Congress of Racial Equality to U.S. Food and Drug Administration. Docket No. FDA-2021-N-1309 by Niger Innis, June 2, 2022.

ⁱⁱ Comments submitted by Charles DeBow, Chief Executive Officer, National Black Chamber of Commerce. Docket No. FDA-2021-N-1309.

ⁱⁱⁱ Jashnani, Bustamante, and Stoudt, “Legal Process as Racialized Punishment.”

^{iv} Comments submitted on behalf of the Federal Law Enforcement Officers Association Foundation, National Association of Police Organizations, National Narcotics Officers Association Coalition, National Organization of Black Law Enforcement Executives, National Troopers Coalition, Police Athletic League and Police Benevolent Association of the New York State Troopers to Xavier Becerra (Secretary of U.S. Dept. of Health and Human Services), Robert Califf (Commissioner, U.S. Food and Drug Administration), Charles E. Schumer (Majority Leader, U.S. Senate) and Mitchell McConnell (Minority Leader, U.S. Senate). Docket Nos. FDA-2021-N-1349 and FDA-2021-N-1309.

^v Unless otherwise noted, information in this report was taken from “Supplemental Report on the Economic Impacts of FDA’s Proposed Rule, Tobacco Product Standard for Characterizing Flavors in Cigars,” Policy Navigation Group, February 8, 2023.

^{vi} See [California Flavored Tobacco Ban: Details & Analysis | Tax Foundation](#)

^{vii} See [Rubio, Colleagues Urge Biden Administration to Sanction International Tobacco Company Linked to Mexican Cartels - Press Releases - U.S. Senator for Florida, Marco Rubio \(senate.gov\)](#)