

FDA ban on menthol is likely to survive tobacco industry lawsuits

15 April 2019

A proposed ban of menthol combustible tobacco products by the U.S. Food and Drug Administration (FDA) will likely be upheld in court, albeit a lengthy legal process, a Rutgers paper found.

The paper appears in *Public Health Reports*.

The 2009 Family Smoking Prevention and Tobacco Control Act provided the FDA with broad authority to regulate the manufacturing, marketing, and distribution of [tobacco](#) products, including banning flavored cigarettes, to protect [public health](#). However, the Act did not ban [menthol](#) cigarettes, which are used disproportionately by adolescents, women, LGBT populations and racial/ethnic minority groups, particularly African Americans.

The research, conducted by the Rutgers School of Public Health Center for Tobacco Studies, anticipates arguments the tobacco industry is likely to use in a lawsuit challenging the FDA's authority to ban menthol cigarettes. It then weighs the strength of the scientific evidence justifying a menthol ban. Finally, it considers the potential for illicit trade to undermine the effectiveness of a menthol ban.

Considering those factors, this paper concludes that an FDA rule banning menthol cigarettes is likely to survive a lawsuit. The FDA has sought public comments on menthol two previous times this decade without following through.

In late 2018, then FDA Commissioner Scott Gottlieb showed commitment to a menthol ban late in 2018 that had not been displayed by the FDA before. There is no indication that his surprise resignation in March 2019 will alter the FDA's course or priorities.

"All cigarettes are deadly. Menthol cigarettes are particularly nefarious because the [tobacco industry](#) designed them as 'starter products' that mask the harshness of smoking, leading to more smokers

overall.

Additionally, menthol cigarettes are even harder to quit than nonmenthol cigarettes," said lead author Kevin Schroth, member of the Rutgers Center for Tobacco Studies. "This paper shows that right now the FDA has the scientific evidence and legal power to pull these deadly products from the market, saving thousands of lives, especially in communities that have been targeted historically by menthol marketing," continued Schroth, who is also a faculty member at the Rutgers School of Public Health.

Even if the FDA proceeds expeditiously, the rulemaking process may take at least two years without including potential litigation delays. In the meanwhile, local jurisdictions like San Francisco have banned the sale of menthol and other flavored tobacco products. "New Jersey should not wait for FDA action and move forward with proposed legislation which was approved by the state Assembly's Health and Senior Services Committee," said co-author Cristine Delnevo, and Director of Rutgers Center for Tobacco Studies. "New Jersey has led nationally on sound tobacco control policies to protect vulnerable populations and should continue to lead and become the first state to ban [menthol cigarettes](#)." A New Jersey law would be justified by the same scientific evidence that supports an FDA rule. Even though the legal analysis differs for a state law, similar laws in other jurisdictions have been upheld consistently.

More information: Kevin R. J. Schroth et al, Why an FDA Ban on Menthol Is Likely to Survive a Tobacco Industry Lawsuit, *Public Health Reports* (2019). [DOI: 10.1177/0033354919841011](https://doi.org/10.1177/0033354919841011)

Provided by Rutgers University

APA citation: FDA ban on menthol is likely to survive tobacco industry lawsuits (2019, April 15) retrieved 19 November 2019 from <https://medicalxpress.com/news/2019-04-fda-menthol-survive-tobacco-industry.html>

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