17

CIGAR
MAGAZINE

WINTER 2010

68

29

75

Cover images courtesy of Perry Hansen and Siegel Auction Galleries.

MENTHOL WARS

by Sam Kazman
Images from Photos.com/Getty Images.

So cool. So refreshing. *So* politically endangered.

They're menthol cigarettes, and their future is shaping up to be the first major controversy under the US Food and Drug Administration's new power over tobacco. In advertising lingo, it's the battle of "cool and refreshing" smokes versus a "new and improved" FDA. But this isn't a clash between products or companies; it's between smokers and a federal agency. **Don't expect a fair fight.**

A Short History of Menthol

Cool and *refreshing* have been advertising buzzwords for menthol cigarettes from the time they were first introduced in 1925. This popular style of smokes was invented by Lloyd Hughes, an Ohio cashier who inhaled menthol vapors for his asthma. One night, he stored his cigarettes next to his container of menthol crystals, and awoke the next morning to find that he'd created a much-improved smoke. Thus was born the first "mentholated" brand—Spuds, which promised to make you feel "mouth-happy." Eight years later, Spuds got its first competition in the form of Kool cigarettes, priced at 15 cents a pack (a nickel less than Spuds), and promising to "give your throat a Kool vacation."

The menthol market began to grow in the 1950s with the introduction of Salem, the first filter-tipped menthol ("refreshing as springtime itself"). Menthols had about 10 percent of the market by 1960 and, today, they make up nearly 30 percent of all cigarettes sold in the US. They're especially popular among African-Americans; over three-quarters of black smokers use menthol cigarettes, compared to about one-quarter of white smokers. Menthol smokers like the cool taste and the reduced harshness of their smoke. At least when it comes to taste, menthol advertising is pretty accurate.

What, then, is the problem? Cigarettes are legal, so what's wrong with a cigarette that some people like better?

For starters, there's now a newly empowered federal agency that oversees tobacco. If you're tempted to ask why a federal case should be made out of this, then you're at least 15 years behind the times.

FDA: "New and Improved"

The power to regulate tobacco is something that FDA had craved for a long time. It's not because the agency didn't have much else to do—au contraire. Even without tobacco, FDA's powers are huge: regulating medical drugs and devices; setting safety standards for most foods and soft beverages; overseeing cosmetics, dietary supplements, and radiation-emitting electronic items such as microwaves and color televisions. By some estimates, one quarter of every consumer dollar is spent on FDA-regulated products.

But, for decades, FDA didn't regulate tobacco because Congress had never expressly granted it that power. Then, in 1995, FDA decided to engage in a bit of self-help and confer that power on itself. Sigmund Freud may have said that a cigar is just a cigar, but FDA suddenly declared that cigarettes were medical devices—specifically, that they were "nicotine-delivery systems"—and that smoking was a pediatric disease. With this logic, FDA could pigeonhole cigarettes into its traditional power over medicine and public health.

A cute argument… but the Supreme Court didn't buy it and ruled against the agency in 2000. But while FDA's regulatory thrust at tobacco was short-lived, it helped fuel the growing antitobacco campaign being waged at that time by activists, plaintiffs' lawyers, and state attorneys general. The main argument against this campaign was that adults knew the potential risks of smoking and had the right to take those risks. But FDA's effort demonstrated the power of two new counterarguments to smooth the path to government control: first, that children were the true "victims" of tobacco, and, second, that smoking was a question of public health rather than individual rights.

Nine years after the Supreme Court's decision, a Democrat-controlled Congress and a new president finally gave FDA the clear authority over tobacco that it had previously lacked. The law, named the "Family Smoking Prevention and Tobacco Control Act," was signed by President Obama in June of

Menthol isn't a new candy flavoring,

but a long-established type of cigarette.

nearly 30 percent of the US cigarette market would be wiped out in one fell swoop, seriously undercutting the claim that cigarettes in general wouldn't be prohibited. There was also the fact that, even though the bill was opposed by most cigarette makers, it did have the support of the largest company, Philip Morris. A menthol ban might well push Philip Morris to switch sides, further jeopardizing the bill's odds of passage.

So the menthol exception stayed in the bill with little notice—until, that is, a *New York Times* story in 2008, which criticized the exemption. This quickly triggered charges of racism, as several prominent African-American spokesmen argued that the health of black people was being disregarded. Dr. Louis Sullivan, former Secretary of Health and Human Services, claimed that the exception gave "the appearance that the lives of black youngsters are valued less than white youngsters." The National African American Tobacco Prevention Network, which had backed the bill before, withdrew its support, as did the Black Congressional Caucus.

Reason magazine columnist Jacob Sullum, a longtime critic of government restrictions on tobacco, was amused by this sudden turn in events: "For years I've argued that a bill authorizing the Food and Drug Administration (FDA) to regulate tobacco products is bad for consumers. I've said the Family Smoking Prevention and Tobacco Control Act, which Congress is once again considering, would stifle competition, raise prices, reduce variety, block the flow of potentially lifesaving information, and impede the introduction and promotion of safer tobacco products," he wrote, following up with, "Now I realize my mistake: I should have said the bill was racist."

But, he went on, "there are other ways to look at it. Given that white menthol smokers outnumber black menthol smokers by three to one, maybe this isn't such a black thing after all. Alternatively, since the bill allows blacks to smoke the cigarettes they prefer, a freedom it doesn't allow whites who like clove cigarettes or Camel Cremas, you could argue that it discriminates *in favor* of blacks. People who want to ban flavored cigarettes, of course, believe that letting smokers have what they want is a hostile act. But if so, the fact that the bill allows tobacco companies to continue selling the nonmentholated cigarettes overwhelmingly preferred by

2009. (Note that the president himself smokes, but he does it secretively; you won't find him huddled outside his office building, grabbing some puffs the way most smokers do during their workday.)

Thirteen Blacklisted Flavors and One Big Exception

The new law gives FDA broad power to control cigarette advertising and labels, to approve or disapprove new tobacco products, and to set cigarette nicotine levels. FDA cannot prohibit nicotine entirely, however, nor can it ban cigarettes.

The law expressly prohibits flavored cigarettes, including "strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee." (How's that for congressional attention to detail?) But this provision has a major exception—the most popular cigarette flavor of all, menthol, *isn't* prohibited. Instead, the issue is left to FDA, which has the assistance of a "Tobacco Products Scientific Advisory Committee" that will investigate menthol and report back by March of 2011.

This exemption for menthol has been controversial. Candy-flavored cigarettes were viewed as a new method for seducing kids, nullifying the growing advertising restrictions being imposed on the industry. And yet here Congress exempted what was by far the most widespread flavor.

On the other hand, menthol isn't a new candy flavoring, but a long-established type of cigarette. In the years leading up to the law's enactment, one of its key selling points for moderates, and for the public at large, was that it wouldn't lead to a ban on cigarettes. But if menthol were banned outright,

whites suggests that it blatantly discriminates against *European Americans.*" (Italics added.)

Sullum coined a nice term for all this: flavoritism.

For the Good of the Kids

The impact of the flavor ban itself is pretty questionable. Clove cigarettes, for example, had somewhat of a cult following in the US. Once it became clear that they would be prohibited, some of their manufacturers turned them into clove-flavored small cigars by wrapping them in tobacco instead of paper. Since the congressional flavor ban applies only to cigarettes, clove cigars are legal—at least for now.

Some government bureaucrats seemed to think that flavored cigarettes were the cause of all underage smoking. At a press conference in September of 2009, on the day the ban took effect, one Health and Human Services official claimed that this "will break the cycle for 3,600 young people who start smoking daily."

as the clove cigarette you are smoking." But, then again, clove isn't what you'd call a candy flavor. And as for Goths themselves, many of them switched over to little clove cigars.

Even those, however, might not be around for long. The congressional ban applies only to cigarettes, but FDA has the power to treat as a cigarette any cigar that is supposedly perceived by consumers to be cigarette-*like*. It can do so on the basis of such factors as "its appearance, the type of tobacco used in the filler, or its packaging and labeling." Agency officials have been described as "deliberately vague" regarding what this means, raising some well-founded concerns among cigarmakers and retailers.

Menthol Under Fire

With Congress having left menthol's future to FDA, the matter is now heating up at the agency. This past July, the agency's scientific advisory committee held a two-day public hearing on menthol. Even before it got started, however,

What, then, is the problem?

Cigarettes are legal, so what's wrong with a cigarette that some people like better?

But as Dr. Joel Nitzkin, who heads the American Association of Public Health Physicians' Tobacco Control Task Force, points out, that 3,600 figure is the *total* number of teens who start smoking daily. If the HHS official knew what he was talking about, then the flavor ban solved the entire problem of teen smoking and we should all go home. Would that we were so lucky!

In fact, rather than solving the entire teen smoking problem, the ban may well solve none of it. According to Dr. Gilbert Ross of the antitobacco American Council on Science and Health (ACSH), "children are not affected at all by this. Young people shun candy-flavored products, since they crave being perceived as grown-up, cool. Candy-flavored products connote the opposite, which is why banning such flavoring will have zero impact on initiation of smoking in teens."

Clove cigarettes appear to be a partial exception. They appeal to members of that post-punk, semi-morbid, black-clad youth subculture known as Goth. Just check out step three in "How To Be Goth in 7 Easy Steps" on the Web: "While lurking in eerie, shadowy corners, your posture must be theatrical, vibrating with a melancholy that is as tangible

With Congress having left menthol's future to the FDA,

the matter is now heating up at the agency.

the panel's makeup came under attack. Journalist Timothy P. Carney reported that several of the panel's members have ties to pharmaceutical companies involved in developing and marketing smoking-cessation products; one of them actually holds patents on a nicotine chewing gum. These are clear conflicts of interest, because what FDA does on menthol can greatly affect the outlook for these products. Their market will expand if, as a result of FDA rules, menthol smokers find their favorite brands getting more expensive, less satisfying, or disappearing altogether. In Carney's words, "It's an ugly game, this use of regulation to kill competitors and guarantee business."

The game, however, goes on.

Antimenthol advocates raise several major arguments: that menthol cigarettes are riskier because their cooler-tasting smoke encourages deeper inhalation; that menthol is a tool for unfairly targeting minorities; that the "cool" and "refreshing" nature of menthol ads conveys a false image of health; and, perhaps the most potent point, that it entices young people to start smoking.

Unsurprisingly, there's evidence on both sides. By some accounts, black smokers, who heavily favor menthol, seem to suffer more than white smokers from smoking-related illnesses. But other analyses show that this difference becomes insignificant once socioeconomic status is taken into account. And biomarker studies on the levels of absorbed smoking by-products find no real differences.

Even if such differences in risk do exist, there would seem to be a simple regulatory fix—just change the warnings on cigarette packs and in ads to reflect the added risk. Whether FDA has enough respect for smokers to entrust them with this knowledge is another question.

The false advertising claim is more nebulous. Decades ago, the industry expressly claimed that menthol was healthier, suggesting, for example, that nonmenthol smokers switch in order to "combat a cough." Over time, the argument goes, this approach slowly morphed into (in the words of the antismoking American Legacy Foundation) the use of "code words like 'smooth' and 'refreshes' and the colors of blue and green." The result is a "fraudulent health reassurance message" that continues to deceive people.

If this critique sounds squishy, that's because it *is* squishy. Just about every tobacco industry use of healthy-looking people and lush landscapes has been criticized as an attempt to conceal the risks of smoking. Nonetheless, since the 1960s, federally mandated warnings on cigarette packs have made those risks clear to everyone. Thus, you can hardly argue that every inviting portrayal of smoking constitutes fraud. Are ads for ski slopes deceitful because they don't show broken bones?

The most serious issue is the youth-enticement argument. According to the American Legacy Foundation, menthol cigarettes are a "starter product for youth" in that they mask the taste of tobacco, which is especially harsh for new smokers who aren't used to it, and that their cooling effect reduces throat irritation. Manufacturers supposedly "manipulate" menthol levels "to facilitate initiation and dependence among young people." A 2008 study, for example, concluded that, in recent years, Newport (the largest-selling menthol cigarette brand) had lowered its menthol concentration in order to attract young smokers.

The manufacturers dispute this. Lorillard, for example, attacks the 2008 study as being based on inadequate sampling, and contends that there's been no change whatsoever in its Newport brand. A review of published studies by ACSH concludes that menthol isn't associated with any trend toward smoking at a younger age.

More importantly, disputes such as this mask some basic

questions. "Manipulation" of menthol levels sounds like a nefarious practice, but bear in mind that menthol isn't naturally present in tobacco products; its presence at any level whatsoever in a cigarette is manipulation of some sort.

(By the way, there's nothing new about manipulating tobacco. When the first Europeans arrived in North America, they found the natives smoking tobacco mixed with powdered seashells. Why? Because the lime from the shells sped up the absorption of nicotine. Can we blame this "manipulation" on Big Tobacco or Madison Avenue?)

Moreover, it appears that older, longtime smokers prefer higher concentrations of menthol, while younger smokers, or those just starting to smoke, prefer lower levels. If manufacturers raise their menthol levels, they'll be accused of trying to hook their longtime customers even more strongly; if they reduce their menthol, they'll be accused of enticing new smokers. And if the only allowable course is to leave current menthol levels unchanged, that means we can forget about product improvements. (Even keeping menthol levels unchanged, for example, can require changes. Lorillard describes how, when it made its cigarettes self-extinguishing to comply with fire standards, its new cigarette paper emitted more tar. That, in turn, had to be offset by new filters, and those new filters necessitated adding menthol to the tobacco in order to keep the same amount of menthol in the smoke.)

Need a drink to take all this in? That brings up another new FDA issue.

Care for a Caffeinated Cocktail to Go With That Menthol Ban?

The debate over menthol resembles another ongoing FDA crackdown—its campaign against "alcohol energy drinks" such as Joose, Four Loko, and Rockstar 21. These premixed beverages, containing both alcohol and caffeine, became popular in the last decade after nonalcoholic energy drinks such as Red Bull began to be used as cocktail mixers. In the fall of 2009, our new and improved FDA contacted over two dozen manufacturers of these drinks and demanded that they "prove" their safety. Given that alcohol and caffeine have long been consumed in combination (think rum and Coke, Irish coffee, Black Russian), the safety of these drinks would seem beyond question. Nonetheless, because of the byzantine nature of FDA's food safety regs, the proof that FDA was suddenly demanding could be incredibly expensive to produce, and some companies may well pull out of this market.

Caffeine is a stimulant while menthol is a mild anesthetic. Despite that contrast, the arguments raised against alcohol energy drinks are almost identical to those raised against menthol cigarettes: like menthol and tobacco smoke, caffeine supposedly masks the effects of alcohol, leading to overconsumption by people who don't realize they're intoxicated; the beverage containers are packaged to look like nonalcoholic drinks that attract kids; and so on.

Once upon a time, if there were products that we wanted to keep away from kids, we barred their sale without proof of age. *Period.* It wasn't a perfect approach, but it was far better than this incessant regulatory creep.

A Good Smoke Becomes a Bad Smoke

Fundamentally, the very notion of product improvement—of producing a better smoke—is despised by the antitobacco activists. One researcher put it this way: "Although the primary goal is to promote or maintain nicotine addiction, new products can also enhance appeal, facilitate nicotine dosing … and mask toxic and irritating effects." Under this view, there's no room for improvements that actually reduce toxic effects and give us safer cigarettes. And there's even less room for the notion of *more satisfying cigarettes.* Either of these developments might attract more people to smoking, and so they're simply anathema.

As for FDA, the new legislation lets it go pretty far in this direction as well. In the dry words of the statute, FDA shall consider "the increased or decreased likelihood that those who do not use tobacco products will start using such products." In short, make tobacco as lousy, expensive, and toxic as possible, because that will keep new smokers away.

So much for "new and improved."

It's been decades since I was a regular smoker, and I don't know if I'll ever become one again. But, personally, I'll take a smooth and refreshing cigarette over the new and improved FDA any day. *CM*

Sam Kazman is general counsel of the Competitive Enterprise Institute (www.cei.org), a free-market advocacy organization in Washington, DC.