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Legacy Response to Compass Lexecon Report “Estimating Consequences of a Ban on the Legal Sale of Menthol Cigarettes”

Legacy makes this submission to assist the Tobacco Products Scientific Advisory Committee (TPSAC) in its evaluation of the Compass Lexecon Report, “Estimating Consequences of a Ban on the Legal Sale of Menthol Cigarettes” (Report) dated December 29, 2010 and commissioned by the Lorillard Tobacco Company. Slides and testimony regarding the Report were presented at TPSAC’s January 10, 2011 meeting.

A review of the Report demonstrates that its analysis underestimates the likely public health benefit of a menthol ban and overstates the likely scope of a black market and the attendant risks. In so doing, it omits important, relevant information, relies on questionable analogies and comes to unsupported conclusions. We highlight our principal concerns below. Rather than repeat information we have already provided to TPSAC, we incorporate by reference our November 19, 2010 letter from Stephenie Foster to Jonathan M. Samet, M.D., M.S. (Foster) showing that the issuance of a ban on menthol would be appropriate for the protection of the public health as set out in the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). See, in particular, the discussion of the black market issues at pp. 14-15.

- 1. The Report relies on assumptions regarding the price-based inelasticity of demand for cigarettes without factoring in either the effects of a product ban or research addressing the specific intentions of menthol smokers.**

Based almost entirely on the general economics literature regarding the price inelasticity of cigarette demand, the Report assumes without any further analysis that the same principles would apply in the event of a menthol ban. That is, it does not address the impact on demand of making a product illegal. Rather, in a circular analysis, it asserts that the great majority of menthol smokers will not quit, makes arbitrary assumptions about increases in price that would occur on a black market and then, solely based on price, examines how those increases would impact demand. However, as discussed in Legacy’s prior submission, it is likely that making menthol cigarettes illegal would, of itself, reduce demand.

Interestingly, the Report’s discussion of price inelasticity does not acknowledge that, even within its assumption that price is the only variable that really matters, youth smokers are notably more sensitive to price. Research shows that for every 10 percent

increase in price of cigarettes, we would expect a 7 percent reduction in youth uptake. Tauras JA, O'Malley PM, Johnston LD. Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis. ImpacTeen - YES! Research Papers. April 2001. As a result, just based on increases in the effective price of cigarettes caused by a black market, we would fully expect a notable decline in youth smoking in the event of a menthol ban.

The likelihood that demand will decline for reasons other than just price in the event of a menthol ban is buttressed by other findings set out in Legacy's prior submission. In addition, recent data from the 2010 TUS – CPS shows that 39% of current menthol smokers say they would quit smoking in response to a menthol ban. This includes 46.8% of the non-Hispanic black smokers and 40.6% of smokers aged 18 to 44 years. "What Menthol Smokers Report They Would Do If Menthol Cigarettes Were No Longer Sold", Presentation by Anne M. Hartman, National Cancer Institute, to the Tobacco Product Scientific Advisory Committee, January 10-11, 2011, It is not necessary to conclude that each and every one of these smokers would quit in the event of the ban – which of course they will not – in order to cast serious doubt upon the Report's assumption that almost all menthol smokers would continue to smoke and that price is the only relevant factor.

Finally, even Lorillard's consultants concede, that based on their assumptions a ban on menthol could cause a 1-3.5% decline in overall smoking. (Report, p.2). Legacy demonstrates in its earlier submission (Foster, p. 13) that just a 1% decline in menthol smokers only would amount to 195,213 fewer U.S. smokers. A 1% decline in all smokers would amount to more than three times that amount. This alone would be a major public health victory.

2. The Report's reliance on the Canadian experience is misplaced.

The Report relies extensively on what it describes as a tax-avoidance driven Canadian black market in the early 1990's to support its claims regarding the emergence and consequences of a U.S. black market in menthol cigarettes. The Canadian experience, however, offers virtually no support for these conclusions.

First, far from supporting the inevitability of the emergence of a U.S. black market in menthol cigarettes, the Report explains that the Canadian cigarette manufacturers played an active role in the development of the Canadian black market (Report, pp.13, fn 5; 19). This only reinforces the conclusion that Lorillard and the other menthol cigarette manufacturers will have a great deal to do with whether there is the emergence of a black market in menthol cigarettes. (Foster, pp. 14-15).

According to the Report, the Canadian companies exported popular Canadian brands to the U.S. which were then purchased by Canadian consumers in the U.S. and brought back to Canada. (Report, p.19) With the great majority of the Canadian population living within easy driving distance of the U.S. and its consumer markets, the export/consumer

re-importation model utilized by the Canadian cigarette companies was highly efficient. But even if the U.S. manufacturers were to so brazenly seek to circumvent a U.S. menthol ban this model has little applicability to the U.S. market. The great majority of Americans live nowhere near the Canadian border. Similarly, the cross-border Indian lands that facilitated the sale of non-taxed cigarettes in Canada (Report, pp.18, 19) have very limited reach in the U.S.

Second, the Report's effort to link increases in youth smoking in Canada in the early 1990's (35% in Ontario and 14% in Quebec from 1991 to 1994) to the emergence of the black market is no more successful. (Report, p. 43). Quite simply, it ignores the fact that these increases were consistent with contemporaneous trends in youth smoking in the U.S. – *in the absence of any significant black market*. According to the Youth Risk Behavior Survey, 27.5% of 9th to 12th graders smoked cigarettes on at least one day during the thirty days prior to the survey in 1991 while 34.8% did so in 1995. This represents an increase of 26.5%.

http://www.cdc.gov/HealthyYouth/yrbs/pdf/us_tobacco_trend_yrbs.pdf. (YRBS did not conduct a survey in 1994). Monitoring the Future shows increases in 30 day prevalence from 1991 to 1994 of 30% for 8th graders, 22% for 10th graders, and 10% for 12th graders. Johnston, O'Malley and Bachman, National Survey Results on Drug Use from the Monitoring the Future Study, 1975-1994. Volume I Secondary School Students. <http://www.eric.ed.gov/PDFS/ED387776.pdf>. Table 15, p. 122.

3. The sale by New York State Indian tribes of untaxed cigarettes has no bearing on the potential development of a black market for banned menthol cigarettes.

The other “natural experiment” invoked by the Report is the sale by New York State Indian tribes of untaxed cigarettes. (Report, pp. 21 – 23). However, this sheds no more light on the likely development of a menthol black market than does the Canadian experience. Without diminishing the importance of the policy questions raised by this still ongoing dispute, it involves a different question entirely. The New York State Indian tribes are asserting that the state has no right to *tax* cigarettes sold on the Indian reservations. The tribes are not selling or seeking to sell *illegal* products – which menthol cigarettes would be in the event of a ban. By ignoring this fundamental difference and inaccurately conflating a dispute over taxation with the question of the sale of an illegal product, the Report's argument that this is a model for a likely black market in menthol cigarettes is unpersuasive.

4. What the “New York experience” really illustrates is that increasing cigarette prices reduces smoking rates.

Contrary to the suggestion of the Report, the history of smoking rates in New York City suggests that a menthol ban is likely to significantly reduce menthol smoking rates. The Report focuses on the development of a tax-driven black market after New York increased tobacco tax rates in the early 2000s. The report explains that tobacco sales dropped dramatically and that “this large reduction in legal sales of cigarettes has been

attributed primarily to a diversion toward black market cigarettes and not to a reduction in cigarette smoking by New Yorkers of anything close to that magnitude.” (Report, p. 23) But the Report fails to note that, while some portion of cigarette sales may have moved to the black market, these tax increases *did* result in dramatic decreases in New York City smoking rates, including among youth. Adult smoking rates fell from 21.5% in 2002 to 15.8% in 2008. New York City Department of Health and Mental Hygiene, Community Health Survey, available at <https://a816-healthpsi.nyc.gov/epiquery/EpiQuery/>. In addition, New York City’s youth smoking rate was cut in half between 2001-2007. Today, the city’s youth smoking rate *is less than half of the national rate*. New York City Department of Health and Mental Hygiene, Youth Risk Behavior Survey, available at <https://a816-healthpsi.nyc.gov/epiquery/EpiQuery/>; U.S. Centers for Disease Control and Prevention, Trends in the Prevalence of Tobacco Use: National YRBS, 1991-2009, available at http://www.cdc.gov/HealthyYouth/yrbs/pdf/us_tobacco_trend_yrbs.pdf. The clear lesson from the New York experience, a remarkably public health success story, is that raising cigarette prices reduces smoking. So, the Report’s assertion that banning menthol would raise the effective price of menthol cigarettes strongly suggests that a ban would result in reduced smoking rates, satisfying the Tobacco Control Act’s statutory standard and saving numerous American lives.

- 5. The Report fails to factor in the recent prohibition of using the U.S. mail and other widely used carriers to transport cigarettes as well as other important law enforcement developments to counter black market cigarettes.**

Finally, we note that despite the dire warnings of the criminal enterprise that would accompany the development of a black market in menthol cigarettes, the Report does not take into account serious impediments to the development of a large scale black market. Under the PACT Act, Public Law No: 111-154, 124 STAT. 1087, cigarettes may no longer be shipped via U.S. mail, with only minor exceptions, and other major carriers, for example, Federal Express no longer ship cigarettes to individuals. See <http://www.fedex.com/us/service-guide/terms/express-ground/>. Indeed, these developments are imposing serious limitations on the ability of the New York Indian tribes to maintain their previously large sales. The PACT Act also provides other strong disincentives to the illegal smuggling of tobacco products. (Foster, pp. 14-15) The Report’s predictions of organized crime and related violence, including vague assertions about already existing black markets in “many products” in inner city areas (Report, p. 30) add nothing of substance to the record.

For all these reasons, the Compass Lexecon Report offers no credible basis for TPSAC to conclude that a menthol ban would not be appropriate for the public health.