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Tobacco Industry Documents [2]

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This memorandum sets forth our evaluation of the legal and policy ramifications of Appendix VIII to the proposed tobacco settlement, as well as possible alternatives to that proposal that would provide a mechanism to resolve privilege claims over documents otherwise required to be placed in a national tobacco document depository. Part I addresses the proposal contained in Appendix VIII, part II addresses legislation proposed by Congressman Waxman, the Tobacco Accountability Act, and parts III and IV discuss other alternatives.

I. APPENDIX VIII

As currently drafted, Appendix VIII establishes, through legislation, a national tobacco document depository available to the public and consisting of tobacco industry documents concerning various smoking and health-related issues. Privileged and trade secret materials are exempt from disclosure into the depository. The proposal establishes a three-judge panel to resolve conclusively all privilege claims over documents otherwise required to be placed in the depository. The legislation is intended to "provide for binding, streamlined and accelerated judicial determinations with nationwide effect . . . over the legitimacy of claims of privileges or protections."

By way of background, we understand it has been the widespread practice of at least some of the tobacco manufacturers to cloak what are essentially scientific documents and studies under the attorney-client or work product privileges. Upon the allegations of crime or fraud by various plaintiffs, courts have conducted in camera reviews of some of these documents and concluded that the privileges were improperly invoked to shield evidence of crime or fraud. It is therefore the goal, of at least the plaintiffs and the FDA, that Appendix VIII provide an effective mechanism to pierce fraudulent, or at least improper, claims of privilege.

The efficacy of Appendix VIII is difficult to evaluate fully because the proposal is vague in certain key respects . First, while the depository would include all documents produced to the plaintiffs by the manufacturers in specified actions, it would also include certain additional existing documents of unspecified "manufacturers or trade associations." Moreover, the proposal does not anticipate the possibility that one or more of the specified plaintiffs may opt out of the settlement. The confusion about who is covered by the proposal's requirements is compounded by the provision that the determinations of the three-judge court "shall be binding upon all federal and state courts in all litigation in the United States," and the requirement that all disputes concerning privilege claims, except those in pending cases that can be resolved prior to the three-judge court's review, be resolved through the process set forth in the Appendix -- provisions that, on their face, do not appear to be limited to the parties to the settlement..

Second, the proposal does not define key terms, including "privileged," "trade secret," and "confidential." While the proposal refers, for example, to the Uniform Trade Secrets Act, 18 U.S.C. § 1905, as providing controlling law for the three-judge panel, section 1905 does not provide a definition of the terms used in this proposal, but rather makes release of confidential information by a federal employee a federal crime.

Third, it is unclear whether the mechanism described in this proposal would override the

FDA's existing authority, under the FDCA, to obtain access to documents containing trade secret, confidential, or privileged information.

Fourth, while the proposal creates a judicial body authorized to resolve conclusively all privilege claims over the documents, it does not specify which law the panel is to apply.

Aside from these ambiguities, which may simply be the result of careless drafting, there are substantive problems with the proposal. First, the three-judge panel would consist of Article III judges appointed by the Judicial Conference. It is not clear, however, whether there would be "cases or controversies" over which this panel would have jurisdiction. For example, paragraph 4 purports to create a process of accelerated judicial review for "any public or private person or entity" to challenge "any claims of privilege or trade secrecy before the three-judge panel." These challenges could arise outside the context of litigation.

Second, the proposed three-judge panel is an inappropriate use of Article III judges that is not warranted by the nature of the responsibilities they would have. The Department has historically opposed the creation of three-judge panels as clumsy procedures that only generate more litigation about whether a particular action is properly heard by the panel in question. These objections apply equally to this proposal.

Third, the proposed preclusive effect of the panel's rulings (subject to review only through certiorari) is particularly troubling from a legal and policy perspective. It seems fundamentally unfair to bind all future litigants who are not parties to this settlement and who may not be parties to any specific dispute resolved by the panel. This is particularly so where the privilege in question is qualified (such as work product) and would require the panel to balance the need of a particular litigant for the document against the purpose served by the privilege to determine whether the document should be disclosed. In addition, counsel for the Minnesota Attorney General has advised us that, if this provision requires all of their pending or future privilege disputes to be resolved by this panel, the effect would be an inordinate delay in the trial of their case (Minnesota v. Philip Morris Inc., No. C1-94-8565 2d Dist.), to their detriment. There a special master is currently conducting an in camera review of over one million pages of documents based on the crime-fraud exception, and the pace of that review is geared toward their trial date. The panel, by contrast, would not have the same incentive to resolve any privilege disputes at issue in their litigation in a timely manner that would ensure their current trial schedule is met.

Finally, we question whether the proposal would provide an effective mechanism to pierce fraudulent or improper claims of privilege. Toward that end, the legislative proposal would create an accelerated process with a right of intervention by any member of the public, and would authorize in camera review without any prima facie showing as a prerequisite (unlike the procedure used in the crime-fraud exception, which requires the contesting party to first make a showing that such review may reveal evidence of crime or fraud). Given the volume of documents that are likely to be subject to in camera review (in the Minnesota action over one million documents are currently under review by a special master), it is unrealistic to expect that such review will streamline the process; if anything it is likely that resolution of privilege disputes will be delayed as the panel wades through an enormous volume of documents.

Moreover, the proposal in essence accepts the status quo. The tobacco manufacturers can continue to claim privilege with the same ease and over the same documents they have withheld as privileged in pending litigation. The proposal would require them to prepare a privilege log with all of the descriptive detail required by the Minnesota court, but the Federal Rules of Civil Procedure currently impose this requirement. And we have been advised by counsel for the Minnesota Attorney General that their court's privilege log standard should not be the standard, as it is grossly deficient. Apart from providing for accelerated and easily accessible in camera review, the proposal does not alter substantively the requirements the manufacturers must meet to sustain a privilege claim.

II. CONGRESSMAN WAXMAN'S PROPOSED "TOBACCO ACCOUNTABILITY ACT"

On June 12, Representative Waxman introduced a bill in the House of Representatives (H.R. 1881 or "Waxman Bill"), which, like Appendix VIII, would require tobacco manufacturers to submit documents relating to the health effects of tobacco products and the marketing of such products to children to a central body, to be made available to the public. But, rather than providing a central judicial or quasi-judicial procedure for addressing the manufacturers' claims that certain of these documents are protected by the attorney-client privilege, the Waxman Bill would simply abrogate the manufacturers' right to assert that privilege (as well as their right to assert the work product privilege). Although this proposal certainly streamlines the process of resolving privilege claims (by ruling them out legislatively), it raises significant constitutional and policy concerns, particularly with respect to its abrogation of the attorney-client privilege.

A. The Waxman Bill

The Waxman Bill would establish a "Tobacco Accountability Board," consisting of five members with expertise on tobacco and public health, appointed for six-year terms by the Secretary of Health and Human Services. H.R. 1881 § 2. The Bill requires the tobacco manufacturers to submit to the Board all documents relating to the health effects of tobacco products, the manipulation of nicotine in tobacco products, and the sale or marketing of tobacco products to children. Id. § 3(a). The Bill also requires the manufacturers to submit the 150,000 "attorney-client" documents which the manufacturers have been ordered to produce to the court for in camera review in the Minnesota tobacco litigation.

The Waxman Bill would require the Board to make all of the documents submitted by the manufacturers available to the public, with the exception only of trade secret information, H.R. 1881 § 3(b) & (c), thereby eliminating the manufacturers' existing right to protect attorney-client communications from disclosure.[1]

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[1] In addition, the Bill would vest the Board with broad power to investigate all matters relating to the tobacco industry and public health; it would give the Board enforceable subpoena power

A staff report accompanying the Bill, entitled "Secret Attorney-Client Documents are Evidence of Potential Crimes or Fraud by the Tobacco Industry," explains that the Bill's abrogation of the manufacturers' right to assert the attorney-client privilege is based on: (1) a handful of attorney-client documents from Liggett & Myers Tobacco Company which appear to contain evidence of crime or fraud on the part of the manufacturers; and (2) rulings of several courts in tobacco litigation, finding that tobacco manufacturers and their attorneys have abused the attorney-client privilege to shield from the public important evidence of the dangerous health effects of smoking.

B. The Attorney-Client Privilege and the Crime-Fraud Exception

The attorney-client privilege is based in common law and, as the Supreme Court has emphasized, is essential "to encourage full and frank communication between attorneys and their clients" and that the privilege thereby promotes "broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The privilege, however, does not protect attorney-client communications made in order to "get[] advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563 (1989). This "crime-fraud exception" is meant to prevent parties from abusing the attorney-client privilege to shield unlawful activity.

The Supreme Court has held that in camera inspection is an appropriate mechanism for determining the applicability of the crime-fraud exception, and that such inspection is permissible if the party raising the crime-fraud exception makes an initial showing to support a good faith belief that such review may reveal evidence of crime or fraud. Zolin, 491 U.S. at 572. However, regardless of whether a court engages in in camera review, courts have held that, because of the importance of protecting attorney-client communications, the party asserting the privilege must be given an opportunity to present evidence and argument in its defense, before a court may order disclosure of those communications under the crime-fraud exception. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992).

C. Constitutional Concerns

Because the Waxman Bill eliminates tobacco manufacturers' existing right to protect legitimate attorney-client communications, with no opportunity for judicial review, based on a congressional finding that certain of the manufacturers' documents are subject to the crime-fraud exception, the Bill presents a potential violation of the Constitution's Bill of Attainder Clause (Art. I, § 9). A bill of attainder is a law that "legislatively determines guilt and inflicts punishment without provision of the protections of a judicial trial." Selective Service System v. Minnesota PIRG, 468 U.S. 841, 846-47 (1984). The Clause is based on separation of powers principles and reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness and of,

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and the authority to conduct full evidentiary hearings; and it would require the Board to report annually to Congress. H.R. 1881 §§ 4, 5, 7.

and levying appropriate punishment upon, specific persons." United States v. Brown, 381 U.S. 437, 444 (1965).

Legislation which, like H.R. 1881, applies to a specific class of persons and deprives them of a previously enjoyed right without the protections of a judicial trial may be a bill of attainder if, given "the type and severity of the burdens imposed," it cannot be said to further nonpunitive goals. One could argue that the purpose of the Waxman Bill is not to punish the manufacturers, but to make important evidence of fraud available to the public and to protect the public from future attempts by the manufacturers to withhold evidence of the dangers of tobacco products. Those goals assume, however, that the manufacturers are guilty of such fraud; and, as such, could be construed as punitive within the meaning of the Bill of Attainder Clause, especially in light of the burden imposed — mandatory disclosure of all attorney-client communications and all work product material. See Brown, 381 U.S. at 458-59 (punishment barred by Bill of Attainder Clause includes inflicting deprivation on some blameworthy individual in order to prevent his future misconduct).

The congressional staff report accompanying the Waxman Bill, which conveys the staff's determination that certain attorney-client documents are subject to the crime-fraud exception and therefore that the manufacturers should lose the very important right to assert that privilege, is further indication that the bill would constitute a "legislative determin[ation] of guilt that inflicts punishment . . . without provision of the protections of a judicial trial." Selective Service, 468 U.S. at 846.

It should be noted, however, that legislation which achieved the same end but was premised instead on a congressional finding that the public's need for these documents outweighed the manufacturers' need to maintain their privileged status would probably pass constitutional muster, particularly because the attorney-client and work product privileges are not constitutionally based.

In addition to presenting a possible bill of attainder, the Waxman Bill might also implicate the manufacturers' Sixth Amendment right to effective assistance of counsel, to the extent that the Bill might require the manufacturers to reveal attorney-client communications regarding potential criminal proceedings against the manufacturers. In light of the Supreme Court's recognition that the attorney-client privilege is essential to the administration of justice, the Bill could be seen as hindering the manufacturers' right to obtain effective legal representation in criminal cases[2].

D. Policy Concerns

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[2]In addition, at least one court has suggested that interference with the ability to protect essential attorney-client communications might raise basic due process concerns. See Haines v. Liggett Group, 975 F.2d 81, 97 (3d Cir. 1992). We question that conclusion, however, as the right to assert the privilege in the first place is not of constitutional dimension, but arises from common law.

Even if the Bill's potential constitutional infirmities could be overcome, any legislative abrogation of the attorney-client privilege may raise policy concerns within the government. As discussed above, the attorney-client privilege is essential to ensure full and open communication between clients and their legal counsel. The privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn, 449 U.S. at 389. The government, no less than private litigants, relies on this privilege to protect and promote the ability of government agents to communicate openly with government attorneys. These concerns would be minimized, however, if the legislation were based on a specific finding that the health concerns raised by tobacco manufacturers' products and the corresponding need of the public to have access to documents that deal with those concerns outweigh the manufacturers' need to protect attorney-client communications.

The Waxman Bill's abrogation of the manufacturers' right to assert the work product privilege — which protects confidential written materials prepared by attorneys or their agents in the course of legal representation — should raise similar policy concerns within the government. Unlike the attorney-client privilege, the work product privilege is qualified and may be overcome by a showing of substantial need for the materials. See, e.g., Fed. R. Civ. P. 26(a)(3). Thus, the Waxman Bill's abrogation of work product privilege is less likely to engender the same degree of constitutional concern as its abrogation of the attorney-client privilege. Nonetheless, as the Supreme Court has noted, the work product doctrine is crucial to enable attorneys to represent clients well, and is based on "strong public policy." Upjohn, 449 U.S. at 398 (citations omitted). The government most likely would oppose any congressional attempt to restrict its ability to invoke this privilege.

For all of these reasons, the Waxman Bill, or any similar proposal to abrogate the tobacco manufacturers' right to assert the attorney-client privilege or the work product privilege, does not appear to be a wise approach.

III. ALTERNATIVE PROPOSAL TO CREATE TOBACCO DOCUMENT DEPOSITORY AND REVIEW BOARD

As an alternative to Appendix VIII and the Waxman Bill, we have come up with a rough outline for legislation which would provide a central, public tobacco document depository and would create a central process to streamline evaluation of the manufacturers' privilege claims, without denying them their existing right to judicial review of those claims.

The principal elements of such legislation are:

- Creation of a central "Article II" Board, consisting of [3] members with expertise in tobacco and health, appointed by [either the Secretary of Health and Human Services or by FDA] for [ ] year terms.

- The tobacco manufacturers must submit to the Board all documents in their custody or control that relate in any way to: (1) any health effects caused by or associated with the use of tobacco products; (2) the use of nicotine in tobacco products; or (3) the sale or marketing of tobacco products to children. These submissions must be made within 90 days of the passage of this Act. Thereafter, tobacco manufacturers shall be under a continuing obligation to submit to the Board any newly-created documents that fall under any of the above three categories.

- The manufacturers must include with their submission to the Board a separate submission of any material which they claim to be subject to the attorney-client, attorney work product, or trade-secret privileges. Those submissions of allegedly privileged material must be segregated, if feasible, into the following initial categories: attorney-client communications; opinion work product; ordinary or "fact" work product; trade-secret privilege. Where appropriate, the Board will consider whether these documents must be further divided into sub-categories, such as those ordered by the court in Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct., 2d Dist., filed May 22, 1997), including, for example:

    -all documents as to which a previous claim of privilege was denied.

    -all documents that on their face show no evidence that they were written or received by an attorney.

    -all scientific research or reports on smoking and health or information relating to smoking and health, and memoranda regarding the same.

- Along with any submission of allegedly privileged documents, manufacturers must provide a detailed privilege log which includes, for each document as to which a privilege is claimed, a description of the document, including author, person(s) to whom it is addressed, purpose of the document, and general subject matter, along with an explanation for why the document, or a portion of it, is privileged and a statement as to whether any previous claim of privilege was denied. This privilege log must be signed and sworn by a person with knowledge of the contents, pursuant to 28 U.S.C. § 1746.

- As soon as practicable, the Board will make available to the public all documents as to which the manufacturers do not claim a privilege.

- The Board will review any privilege claims asserted by a manufacturer, and, applying federal privilege law, will make a determination as to whether the material is subject to the claimed privilege. In conducting this review, the Board may, in its discretion, engage in in camera review of any documents. The Board will notify the manufacturer in writing of its final determination, and will include in that notification a brief explanation of the basis for that determination.

- A manufacturer may obtain judicial review in federal district court [in the District of Columbia? or any federal district court, subject to venue requirements of 28 U.S.C. § 1391] of any final Board determination. The Board's findings of fact shall be reversed by the court only if clearly erroneous. The Board's legal conclusions shall be reviewed de novo by the court. Judicial review under this section must be sought within 60 days of the date of the Board's final determination.

▸ If, after a manufacturer has obtained judicial review and has pursued all appeal rights, the final judgment is that a document is not privileged, the Board will disclose that document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding. If a manufacturer fails to seek timely judicial review of a final determination by the Board that a document is not privileged, the Board will disclose the document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding.

▸ If the Board determines that a document is privileged, the Board may not disclose it to the public, and the document shall be returned to the submitting manufacturer. Current or future litigants who seek to challenge a manufacturer's assertion of that privilege in any legal proceeding will not be bound by the Board's final determination.

▸ Nothing in this section precludes the disclosure of relevant information, including information that is privileged or a trade secret, to other federal agencies, as permitted or required by any other provision of federal law.

▸ Any person who violates a requirement of this chapter shall be liable to the United States for a civil penalty in an amount not to exceed [$10,000] for each such violation, and not to exceed [$1,000,000] for all such violations adjudicated in the same proceeding. Civil penalties under this paragraph shall be assessed by the Board, by an order made on the record after the opportunity for a hearing. A party against whom the Board assesses a civil penalty under this paragraph may seek judicial review of that penalty in federal district court, as provided in Paragraph [ ] of this Section.

This approach has several advantages. First, it does not raise the same constitutional concerns; no privilege is abrogated and the manufacturers are provided a process to resolve all privilege claims, with full review in the district and appellate courts. Moreover, the panel's conclusion that a particular document is privileged does not have a preclusive effect, but leaves future litigants free to challenge the claim of privilege in subsequent litigation.

Second, the panel would consist of Article II officials, not Article III judges, and the effectiveness of its review would be reinforced by its sanction authority. Moreover, as with Appendix VIII of the proposed settlement, our alternative would permit in camera review without first requiring a showing of potential crime or fraud. This review would be facilitated by the requirement that the manufacturers produce to the panel all documents in their possession and control, even those over which they claim a privilege. Although such review could be enormously time-consuming, given the vast quantity of documents potentially involved, it would be concurrent with any judicial review in pending litigation and would not, therefore, delay the trial schedules of ongoing cases. In addition, to facilitate in camera review and resolution of privilege claims, the panel would be authorized to require manufacturers to segregate their privileged documents into substantive categories that are most likely to correspond to categories of documents where the privilege has been improperly invoked.

Third, this alternative makes it clear that the FDA would retain its ability under existing law to access privileged or trade-secret protected information.

Notwithstanding these advantages, we question whether, in the final analysis, such a panel would meet one of the stated goals of Appendix VIII — providing a mechanism for accelerated and streamlined determinations over privilege claims. As the Minnesota Attorney General's office has pointed out, review of this volume of documents by an outside panel that need not accommodate trial schedules is unlikely to result in timely determinations.

IV. <u>RETAIN THE STATUS QUO</u>

Finally, there is at least a serious question whether any legislation is warranted. The experience in the Minnesota action illustrates that courts currently have the ability to review and resolve privilege claims over large volumes of documents in an expeditious manner. The crime-fraud exception provides an effective mechanism to pierce the privilege. Even where fraud or crime is not at issue, the Federal Rules of Civil Procedure authorize sanctions for misuse of the discovery process, which would include improper use of privileges. Moreover, where these privilege issues arise in multi-district litigation, discovery disputes are transferred to one judge for resolution.

By contrast, Appendix VIII, the Waxman Bill, and our proposed alternative all present fairly cumbersome vehicles by which to resolve privilege questions that do not ultimately ensure any greater success in piercing improper privilege claims or streamlining the dispute resolution process.

FAX COVER

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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FROM: Elizabeth Drye

SUBJECT: Nicotine Quotes

NO.OF PAGES 5
(EXCLUDING COVER SHEET)

COMMENT: Notes on Footnotes:
"JD fn. 500" is FDA Jurisdiction Document footnote 500. etc.

IF THERE IS A PROBLEM WITH THIS TRANSMITTAL. PLEASE CALL OFFICE A.S.A.P.

QUOTES SHOWING THAT TOBACCO COMPANIES KNOW THAT NICOTINE IS ADDICTIVE

INDUSTRY DOCUMENTS RECOGNIZE NICOTINE IS ADDICTIVE

1962: "What we need to know above all things is what constitutes the hold of smoking, **that is, to understand addiction**." (BATCo research proposal, 1962; MN Tr. Ex. 11,938)

"Smoking is **a habit of addiction**." (Ellis C, science advisor to BATCO board, 1962; JD fn. 500)

1963: "**Nicotine is addictive** ... **We are, then, in the business of selling nicotine, an addictive drug**." (Yeaman AY, B&W general counsel, 1963; JD fn. 510)

1967: "Smoking is **an addictive habit** attributable to nicotine." (BATCo researchers, 1967; JD fn. 512)

1969: "**[T]he cigaret will even preempt food in times of scarcity on the smoker's priority list**. ... The question is 'Why?' ... We are of the conviction ... that the ultimate explanation for the perpetuated cigaret habit resides in the pharmacological effect of smoke upon the body of the smoker." (Presentation by Wakeham H, Philip Morris vice president for R&D, to Philip Morris Board of Directors, 1969; JD fn. 418)

1975: "In summary, it appears that **most workers who are not directly concerned with the tobacco industry use the terms 'addiction'** or 'dependence' rather than 'habituation', and can be considered **quite correct in doing so**. ... If cigarette smoking is as addictive as the evidence suggests, it is not surprising that anti-smoking campaigns are so ineffective ...." (Comer AK, BATCO researcher (check), 1975; MN Tr. Ex. 10,999)

1978: "**Very few consumers are aware** of the effects of nicotine, i.e. **its addictive nature and that nicotine is a poison**." (B&W Memo from Steele HD to McCue MJ, 1978; MN Tr. Ex. 13,677)

1978: "**The strong addiction to cigarette[s]** removes freedom of choice for many individuals." (Green SJ, BATCO director of research, 1978, JD fn. 523)

1982: "Nicotine is the **addicting agent** in cigarettes. (B&W document on getting smokers to switch brands, 1982; MN Tr. Ex. ___)

1994: "Of course **it's addictive**. That's why you smoke." (Johnson FR, former RJR CEO, 1994; JA fn. 230)

SIGNIFICANCE OF NICOTINE ADDICTION TO TOBACCO INDUSTRY

1972: "If ... we ... move toward reduction or **elimination of nicotine** in our products, then we shall **eventually liquidate our business**." (Teague C, senior RJR researcher, 1972; MN Tr. Ex.12,408)

1978: "Dr. Seligman brought up the grant by Dr. Abood in which one of the stated aims was to make a **clinically acceptable antagonist to nicotine**. This goal would have the **potential of putting the tobacco manufacturers out of business**." (Osdene TS to file, 1978; MN Tr. Ex. 10,227)

1980: "Goal -- **Determine the minimum level of nicotine that will allow continued smoking**. We hypothesize that below some very low nicotine level, diminished physiological satisfaction cannot be compensated for by psychological satisfaction. At this point, smokers will quit ...." (Smith RE to Ave JR, Flinn JG, and Spears AW, Lorillard executives, 1980; MN Tr. Ex. 10,170)

QUOTES SHOWING THAT TOBACCO COMPANIES KNOW THAT NICOTINE IS A DRUG AND TOBACCO PRODUCTS ARE NICOTINE DELIVERY DEVICES

QUOTES FROM THE FDA RULE

1962: "[N]icotine is **a very remarkable beneficent drug**." (Ellis C, science advisor to BATCo. Board, 1962; JD fn. 501)

1967: "[W]e are in **a nicotine rather than a tobacco business**." (Ellis C, science advisor to BATCo. Board, 1967; JD fn. 511)

1968: "A good part of the tobacco industry is concerned with **the administration of nicotine to consumers**." (Green SJ, BATCo. Director of research, 1968; JD fn. 513)

1972: "In a sense, **the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry**. ... Our Industry is then based upon **design, manufacture and sale of attractive dosage forms of nicotine**." (Teague CE, RJR assistant director of research, 1972; JD fn. 459)

1972: "A tobacco product is, in essence, **a vehicle for delivery of nicotine**, designed to deliver the nicotine in a generally acceptable and attractive form." (Teague, CE, RJR assistant director of research, 1972; JD fn. 456; MN Tr. Ex. 12,408)

1972: "Think of the cigarette as **a dispenser for a dose unit of nicotine**." (Dunn, WL, Philip Morris scientist, 1972; JD fn. 419; MN Tr. Ex. 18,089)

1972: "Tobacco products, uniquely, contain and deliver nicotine, **a potent drug** with a variety of physiological effects. ... Nicotine is known to be **a habit-forming alkaloid**." (Teague, CE, RJR assistant director of research, 1972; JD fn. 452-53; MN Tr. Ex. 12,408)

1976: "[N]icotine ... is known to be **pharmacologically active in the brain**." (BATCo. Researchers, 1976; JD fn. 521)

1976: "[C]igarettes serve as **a narcotic, tranquilizer, or sedative**." (Udow A, Philip Morris researcher, 1976; JD fn. 421)

1980: "[N]icotine is **an extremely biologically active compound** capable of eliciting a range of pharmacological, biochemical and physiological responses in vivo." (BATCo. Researchers, 1980; JD fn. 524)

1980: "Nicotine is **a powerful pharmacological agent** with multiple sites of action," (Charles JL, Philip Morris researcher who subsequently became vice president for research and development, 1980; JD fn. 423)

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1981: "In a nutshell, our approach has been to regard nicotine as **a drug**." (Tobacco Advisory Council, a trade association representing U.K. tobacco manufacturers, 1981; JD fn. 525)

1984: "[I]n its simplest sense puffing behavior is **the means of providing nicotine dose in a metered fashion**." (BATCo. Researchers, 1984; JD fn. 533)

1992: "Nicotine ... is **a physiologically active ... substance**. ... The nicotine alters the state of the smoker by becoming **a neurotransmitter and a stimulant**." (Philip Morris, "Project Table", approx. 1992; JD fn. 448; MN Tr. Ex. 11,559)

1992: "**Nicotine delivery devices** range from snuff, chewing tobacco, cigars, pipes and conventional cigarettes to ... patches, aerosol sprays, and inhalers." (Philip Morris, "Project Table", approx. 1992; JD fn 449; MN Tr. Ex. 11,559)

MINNESOTA TRIAL DOCUMENTS

1969: "[D]o we really want to tout **cigarette smoke as a drug**? **It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls.** (Dunn WL, senior Philip Morris researcher to Wakeham H, another senior Philip Morris researcher, 1969; MN Tr. Ex. 10,539)

1980: "A cigarette as a '**drug' administration system** for public use has very very significant advantages. ... Other 'drugs' such as marijuana, amphetamines, and alcohol are slower and may be mood dependant. ... Thus we have an emerging picture of **a fast, highly pharmacologically effective and cheap 'drug'**, tobacco, which also confers flavour and manual and oral satisfaction to the user. (Greig C, BATCo researcher, approx. 1980, MN Tr. Ex. 10,683)

1980: "Although permitted to continue the development of a three-pronged program to study the **drug nicotine**, we must not be visible about it." (Philip Morris, Dunn WL to Seligman RB, 1980; MN Tr. Ex. 26,227)

1980: "I believe **the thing we sell the most is nicotine**." (Philip Morris memo from Osdene TS, Philip Morris Director of Research to Seligman RB and Directors, 1980; MN Tr. Ex. 10,255)

1984: "Taken together, the evidence suggest that **self-administration of nicotine may be the primary motivation for smoking**. ... Primarily, nicotine is taken for its effects on the CNS [central nervous system]." (BAT Research Report, 1984; MN Tr. Ex. 13,534)

1984: "Nicotine is the **key pharmacological component** of cigarette smoke ...." (BATCo R&D Views on Potential Marketing Opportunities, 1984; MN Tr. Ex. 11,275)

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1990: "We have shown that there are optimal cigarette nicotine deliveries for producing the **most favorable physiological and behavioral responses**." (Philip Morris memo from Gulotta FP et al. to Ellis CK, 1990; MN Tr. Ex. 11,771)

TOBACCO COMPANIES AS DRUG COMPANIES

1980: "B.A.T. should learn to look at itself as a **drug company** rather than as a tobacco company." (BATCo memo, 1980; MN Tr. Ex. 11,361)

1992: "Can Philip Morris build a world-class **nicotine delivery device** that can **compete successfully with conventional cigarettes** as well as pharmaceutical company cessation products." (Philip Morris, "Project Table", approx. 1992; JD fn 449; MN Tr. Ex. 11,559)

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CALIFORNIA ACTION PLAN

The New Year is several weeks away, yet we are already experiencing what the health groups, fueled by their $500 million Prop 99 infrastructure, will be up to in 1995. As predicted, it is evident that Prop 99 funds will aggressively target:

1. Implementation and enforcement of AB 13,
2. Exceeding the limits of AB 13 at the local level by promoting total smoking bans in taverns and bars, and perhaps other exempt venues, and
3. Severe point of sale restrictions and bans.

The following is a revised proposal by the Dolphin Group, Inc. for political consulting and public relations services to Philip Morris in California. This proposal, called the "California Action Plan," is comprised of three distinct programs designed to:

1. Educate California's hospitality industry in ways to accommodate smoking patrons within the boundaries of AB 13,
2. Safeguard bars and taverns against the threat of a total smoking ban, and
3. Protect and support PM point of sale retail/marketing strategies, visibility and promotion.

ELEMENT 1: AB 13 RESTAURANT ACCOMMODATION PROGRAM

I. OBJECTIVE

Educate California's hospitality industry in ways to accommodate smoking patrons within the boundaries of AB 13.

II. OVERVIEW

AB 13 goes into effect January 1, 1995. Health group representatives will undoubtedly play "cop" in an effort to penalize those businesses who do not comply with AB 13. Rather than have the hospitality industry accept AB 13 as fate accompli, it is important that restaurants and bars become educated on ways they can legally comply with AB 13, however still accommodate their smoking patrons, particularly in key, isolated markets.

III. ORGANIZATION

Dolphin proposes the following components for Element 1: AB 13 Restaurant Accommodation Program:

1. Prior to the January 1st implementation of AB 13, write and produce an initial "AB 13 Bulletin" which illustrates ways in which restaurants and bars can continue to serve their smoking patrons. The Bulletin will be a self-mailer sent to CBRA's mailing list with certain regions (Marin and Contra Costa Counties, for example), omitted.
2. Write and produce a consumer letter urging smokers to discuss with restaurant owners the importance of accommodating smokers under AB 13.
3. Follow-up the bulletin with an "Accommodation Newsletter" which further outlines the loopholes in AB 13. The newsletter will contain a "bounceback" card so that businesses can easily notify CBRA of business losses, hardships, and other comments associated with the implementation of AB 13.
4. Produce an informational video which defines AB 13 and the situations which allow business owners the ability to continue to cater to their smoking patrons. The Accommodation video will be distributed to target audiences and shown during the seminars (see #5).
5. Organize a series of seminars within key markets featuring Q & A, handout materials, and a presentation of the Accommodation video. Dolphin will explore combining the seminars in conjunction with local existing restaurant associations meetings and/or utilizing Chambers and other business organizations.
6. Initiate and publicize an 800 number to field AB 13 questions, negative impacts, and comments.
7. Supervise Media Affairs, including:

   a. Identifying, recruitment, training and briefing of an AB 13 Accommodation spokesperson on economic impacts and other salient arguments.
   b. Develop statements and releases.
   c. Explore possible paid cooperative advertising with restaurateurs stressing Accommodation.

ELEMENT 2: CALIFORNIA TAVERN ASSOCIATION

I. OBJECTIVE

Safeguard bars and taverns against the threat of a total smoking ban.

II. OVERVIEW

There are several regional Bar and Tavern Associations within California, including the San Diego Tavern & Restaurant Association, the Northern California Bar & Tavern Association, and Tavern Owners United for Fairness. Although these organizations have been instrumental in the fight against AB 13 on a regional level, none have the resources or ability to evolve into a statewide organization capable of:

1. Laying the groundwork to pressure CAL-OSHA and the State Legislature into developing workable standards for bars under AB 13; and
2. Fighting at the local level any attempts to exceed the limitations set by AB 13 to include bars and taverns.

III. ORGANIZATION

Dolphin recommends that a new, statewide organization be created to spearhead efforts to establish CAL-OSHA standards for bars and fight local attempts to exceed the limitations set by AB 13. To this end, Dolphin proposes to:

1. Create and manage the California Tavern Association (CTA).
2. Establish a list of CTA member services.
3. Provide an Executive Director of CTA who will be utilized as an Association spokesperson and media contact.
4. Supervise Media Affairs, including:
   a. Training and briefing of the Executive Director/spokesperson on the economic impacts and other salient arguments.
   b. Develop statements and releases.
5. Maintain an 800 number for members questions, comments, and problems with AB 13.
6. Supervise the writing and production of membership mailings including Action Alerts and quarterly Association newsletters.
7. Write and produce membership materials including, but not limited to, sample CAL-OSHA and State Legislator letters Letters to the Editor for submission to local papers, and a "Call to Action" information packet which clearly and briefly defines AB 13 and its impact on bars.
8. Identify key industry leaders and representatives and coordinate their efforts to apply pressure on CAL-OSHA and State Legislators to establish reasonable standards for bars and taverns in an expeditious manner.

9. Organize regional bar and tavern meetings aimed at educating and activating bar owners, operators and employees.

10. Within cities that have enacted standards that exceed AB 13, we will identify and utilize businesses who have encountered negative experiences and economic hardship. These owners can be used to testify at public hearings, included as stories within CTA newsletters, direct mail, and showcased in the "Call to Action" packet.

11. Supervise phonebanks, direct mail, batch fax programs, and door-to-door campaigns as needed.

12. Identify and monitor cities and counties that have proposed ordinances designed to exceed limitations set by AB 13 and activate membership to oppose such legislation.

ELEMENT 3: POINT OF SALE PROTECTION PROGRAM

I. OBJECTIVE

Pre-empt future groundswell of severe local level point of sale (POS) restrictions, protect PM point of sale retail/marketing strategies, visibility and promotion.

II. OVERVIEW

Dolphin/CBRA has established a relationship with the California Grocer's Association and the Mexican American Grocer's Association. Working initially with these two organizations, Dolphin will work toward facilitating the introduction, discussion and approval of a model ordinance within targeted cities and counties. In cities and regions where restrictive ordinances are already proposed or in the pipeline, we will work toward defeating the proposals by utilizing these organizations coupled with grassroots opposition. During the course of our work, we will continue to expand our contacts to include the Korean Grocer's Association, Northern California Grocer's Association, local Chambers of Commerce, and other organizations.

III. ORGANIZATION

Dolphin proposes the following components for Element 3: Point of Sale Protection Plan.

1. Assist in drafting a model point of sale ordinance.
2. Identify and monitor cities where strict point of sale restrictions are most likely to occur and/or where key PM markets are at risk.

3. Research current City Council/elected officials and their positions on tobacco marketing/sales legislation.

4. Organize and educate business owners and operators including, but not limited to:

   a. Distributors
   b. Grocers
   c. Convenience Store Operators
   d. Retailers
   e. Supermarket Operators
   f. Gas Station Operators
   g. Pharmacy Operators
   h. Wholesale Store Operators

5. Establish a Local Government Alert & Action System to train key PM employees and retailers on how to be good local government monitors and government relations communicators.

6. Design and implement a Company Civic Action Element aimed at increasing PM's effectiveness in communicating its concerns at the local level.

7. Implement Philip Morris' "It's the Law" program.

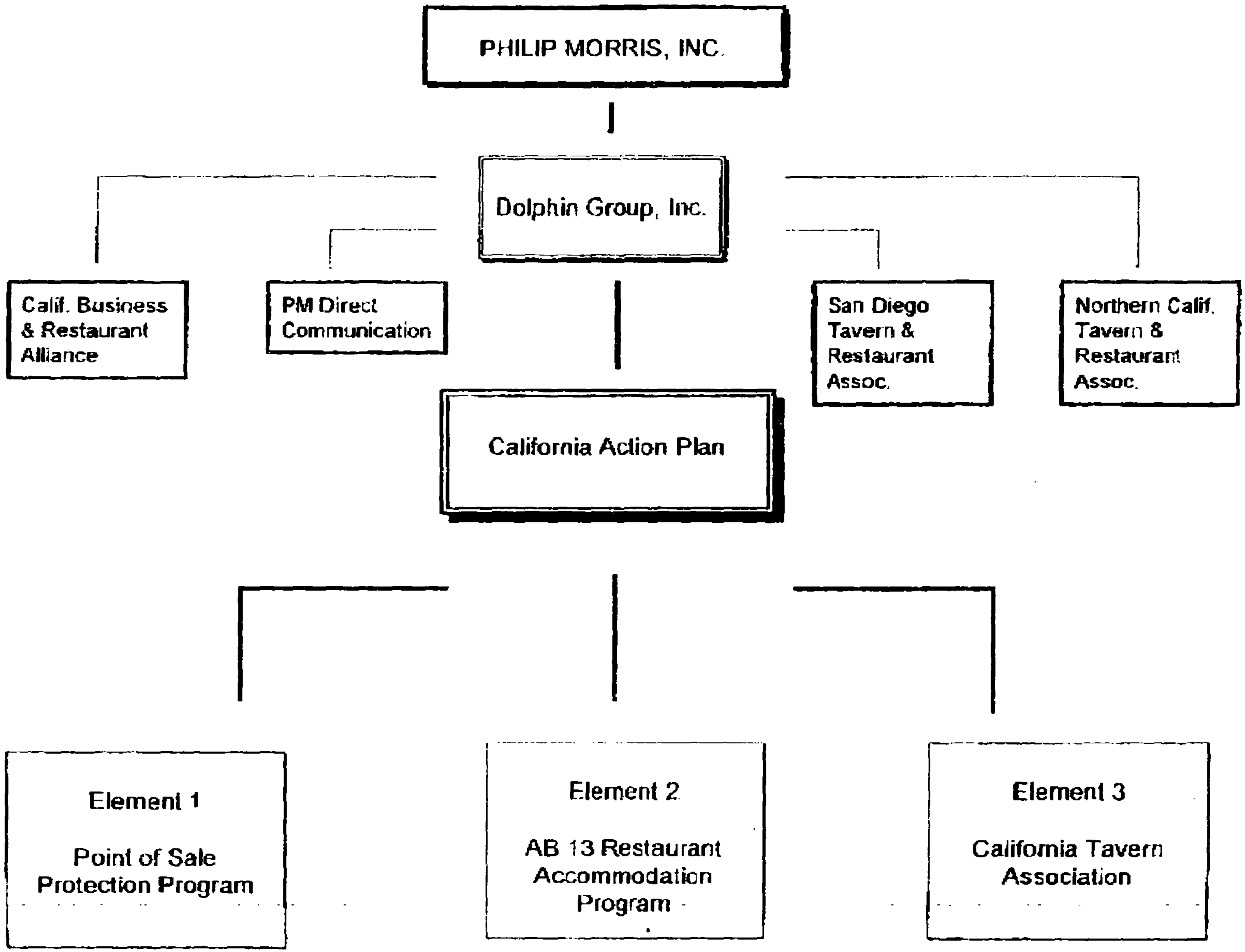
8. Identify and utilize business owners within cities with POS restrictions who have encountered negative experiences and economic hardship.

9. Supervise phonebanks, direct mail, batch fax programs, and door-to-door campaigns.

10. Supervise Media Affairs, including:

    a. Identifying, recruitment, training and briefing of a POS spokesperson on economic impacts and other salient arguments.
    b. Develop statements and releases.

~~CONFIDENTIAL~~: MINNESOTA TOBACCO LITIGATION



First Cities to Adopt 100% Restaurant Smoking Bans

CITY	COUNTY	ADOPTED
Beverly Hills *	Los Angeles	Mar-87
Ross	Marin	Dec-89
San Luis Obispo	San Luis Obispo	Jun-90
Grass Valley	Nevada	Oct-90
Lodi	San Joaquin	Nov-90
Bellflower *	Los Angeles	Jan-91
Paradise	Butte	May-91
Roseville	Placer	Aug-91
Visalia	Tulare	Sep-91
El Cerrito	Contra Costa	Oct-91
Auburn	Placer	Oct-91
Martinez	Contra Costa	Nov-91
Whittier	Los Angeles	Nov-91
Placerville	Placer	Nov-91
Sacramento	Sacramento	Nov-91
Los Gatos	Santa Clara	Nov-91
Lathrop	San Joaquin	Dec-91
Hercules	Contra Costa	Apr-92
Walnut Creek	Contra Costa	Apr-92
Madera	Madera	Jul-92
Solana Beach	San Diego	Aug-92
Novato	Marin	Sep-92
Colfax	Placer	Sep-92
Palo Alto	Santa Clara	Sep-92
Albany	Alameda	Oct-92
Berkeley	Alameda	Nov-92
Chico	Butte	Nov-92
Tiburon	Marin	Nov-92
Laguna Beach	Orange	Nov-92
Loma Linda	San Bernardino	Nov-92
Mill Valley	Marin	Dec-92
COUNTIES		
Sacramento		Jul-91
Contra Costa County		Sep-91
Butte County		Nov-92
Shasta County		Jan-93
Stanislaus County		Feb-93
Madera County		Mar-93

* Ban repealed by the City Council

Cities and Counties to Watch- 1995

CITY	COUNTY
Albany	Alameda
Antioch	Contra Costa
Auburn	Placer
Berkeley	Alameda
Biggs	Butte
Brentwood	Contra Costa
Burlingame	San Mateo
Chico	Butte
Chino Hills	San Bernardino
Clayton	Contra Costa
Concord	Contra Costa
Dana Point	Orange
Danville	Contra Costa
Davis	Yolo
Del Mar	San Diego
El Cajon	San Diego
El Cerrito	Contra Costa
Fresno	Fresno
Gridley	Butte
Hercules	Contra Costa
Huntington Beach	Orange
Lafayette	Contra Costa
Laguna Beach	Orange
Loma Linda	San Bernardino
Long Beach	Los Angeles
Los Angeles	Los Angeles
Los Gatos	Santa Clara
Madera	Madera
Martinez	Contra Costa
Menlo Park	San Mateo
Moorpark	Ventura
Moraga	Contra Costa
National City	San Diego
Oakland	Alameda
Oceanside	San Diego
Ojai	Ventura
Orinda	Contra Costa
Oroville	Butte
Palo Alto	Santa Clara
Paradise	Butte
Pasadena	Los Angeles
Pinole	Contra Costa
Pittsburg	Contra Costa
Pleasant Hill	Contra Costa
Pleasanton	Marin
Poway	San Diego
Rancho Palos Verdes	Los Angeles
Redding	Shasta
Richmond	Contra Costa
Sacramento	Sacramento

Cities and Counties to Watch-1995

San Diego	San Diego
San Francisco	San Francisco
San Juan Capistrano	Orange
San Mateo	San Mateo
San Pablo	Contra Costa
San Ramon	Contra Costa
Santa Monica	Los Angeles
Santa Rosa	Sonoma
Thousand Oaks	Ventura
Vista	San Diego
Walnut Creek	Contra Costa
West Hollywood	Los Angeles
Whittier	Los Angeles

COUNTIES
Butte County
Contra Costa
Madera County
Shasta County

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TO: Roger Mozingo and Hurst Marshall
FROM: A-K Associates, Inc.
Paul Kinney
SUBJECT: Status and Campaign Plan for Tobacco Tax Initiative
DATE: September 24, 1987

This report is organized into two distinct yet inseparable areas. These areas consist of: (1) Summary of Activities to Date; (2) Strategy Through Initiative Qualification Deadline.

I. SUMMARY OF ACTIVITIES TO DATE

The initial effort in regard to this issue was the defeat of ACA 14 and the "trailer" bill, AB 2408, before the Assembly Revenue and Taxation Committee. In order to accomplish our anti-initiative strategy to discourage support for the pro-initiative coalition, we felt it was imperative to attain a decisive victory in the first committee to show strength and resolve on the part of the opponents to the proposed tax increase. In fact, when these two bills were heard before the Revenue and Taxation Committee, they were dealt a "crushing" defeat. Neither received a motion, much less, a single affirmative vote.

Our major goal of weakening potential support and showing strong opposition was certainly accomplished. The California Medical Association was shocked that their intense lobbying effort could not receive one "aye" vote in the Committee, considering their campaign support for the members of the Revenue and Taxation Committee (Organized Medicine-$80,300 vs. TI-$17,750 during 1986). The minutes of the proponent's June 17, 1987 organizational meeting even makes reference to this defeat. "Despite all this work and volunteer letters, the bill died on May, 19, 1987. There was not even a motion on the bill..."

Briefly, what was specifically accomplished during the legislative phase of the anti-initiative campaign April 15 thru May 19, 1987):

-The California Chamber of Commerce, California Taxpayers Association, California Retailers Association and California Manufacturers Association all were recruited and went on record as being opposed to ACA 14. This allowed us the opportunity to meet with and brief the "key" people within each of these groups in order to educate them about ACA 14 and the possible statewide initiative. These groups are now on record and can be expected to be a valuable resource if needed to actually fight an initiative.

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-Hispanic Lobbying Associates was retained to generate hispanic opposition to ACA 14. The Mexican American Political Asociation, American G.I. Forum, Latino Peace Officers Association, California Hispanic Chamber of Commerce, California Hispanic Womens Forum and the Latin American Pacific Trade Association all officially went on record in opposition to ACA 14. These groups are still with us awaiting our signal to be turned loose against the tax Initiative.

-A very successful letter writing campaign to "key" legislators by companies and TI was orchestrated and effectively carried out.

-Personal lobbying of organized medicine began even during the lobbying efforts on ACA 14 in the Legislature. These included personal meetings with the following California Medical Association leaders:

- -Bob Elsner, Executive Director.
- -Jay Michael, Director of Government Relations.
- -Dr. Gladdin Elliott, Immediate Past President.
- -Allen Pross, CALPAC Director.
- -Dr. Kai Kristensen and Dr. Phillips Gausewitz, San Diego area.
- -Frank Clark, Executive Director of the Los Angeles Medical Society.
- -Dr. Manny Abrams and Dr. David Olch, Los Angeles area.
- -Dr. Frank Glanz and Dr. Marshall Ganns, Orange County area.
- -Dr. Ed Hendricks and Dr. Pierce Rooney, central valley area.
- -Dr. Michael Lopiano, Santa Barbara area.
- -Dr. Paul Dugan, northern California rural area.
- -Dr. Tom Elmendorf and Dr. James Moorfield, Sacramento area.
- -Dr. Fred Achermann and Dr. Roberta Fenlon, San Francisco area.

-Met with "key" black political leaders to solicit and begin solidifying black support among state legislators for the anti-initiative campaign. We met personally with the following black state legislators or legislative staff:

- -Willie Brown, Speaker of the Assembly.
- -Maxine Waters, Majority Whip.
- -Curtis Tucker, Chairman of the Assembly Health Committee.
- -Dodson Wilson, Staff to Speaker Willie Brown.

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-Met with David Kim re Korean community and advise re other possible Asian consultants.

-Met with Assemblyman Dick Floyd, Tommy Hunter (Calif. State Pipe Trades) and Jack Henning regarding the proposed tax initiative.

-Met continuously with Jack Kelly to coordinate testimony and lobbying activity.

Upon the defeat of ACA 14 and AB 2408, the true "interim initiative" campaign began. The tobacco industry prudently recognized that effort and resources spent in keeping the proposed tobacco tax Initiative off the ballot had many benefits. If successful, it would save the industry the many millions that would have to go into the initiative campaign fight. Even if unsuccessful, the relatively small amount of resources expended on the organizational efforts to keep the initiative off the ballot would place the industry miles ahead for the general campaign. This unique and innovative approach of actively fighting to keep an initiative off the ballot would only reinforce to the potential anti-tobacco forces that it will always be a long and grueling battle when you take on tobacco.

Recognizing that the most effective approach to any such battle is to contain and, if possible, take away potential resources from the proponents, our initial goal was to contain the California Medical Association, who had already pledged $1 million to qualify the initiative. With this kind of resources, there is no way the initiative could be kept off the ballot. A game plan was formulated to discourage and keep the CMA out of the initiative. This included possible counter anti-medicine initiatives and legislation, as well, as the use of A-K's considerable contacts within organized medicine. Having already expended considerable effort in this area during the Legislative phase of the program we turned our attention almost full time to dissuading CMA from joining the fray.

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We were immensely successful in this regard. CMA, after considerable pressure, decided to "tokenize" the tax initiative campaign with, at best, a $25,000 contribution and the possible use of their mailing list for a solicitation letter. To date CMA has not actually given the proponents any campaign money. The decision was made that no punitive action would be taken in regard to anti-medicine initiatives or legislation as long as the CMA maintained this non-participatory attitude toward the tobacco tax initiative. Following are the major activities that have taken place to date:

-Met with key organized medicine leaders to continue to dissuade them from actively participating in the proposed tobacco tax initiative.

-Generated some well placed and vocal complaining from organized rank and file membership throughout the state to the CMA's Council (organized medicine's governing body in California).

-Arranged for the Council to take the policy position that all requests for political issue contributions of either staff or resources must first go to their Finance Committee for approval before the Council can take action. This effectively took the tobacco tax initiative issue out of the hands of the current CMA leadership and placed it in the hands of the "old guard". This placed a hugh roadblock in front of people like Dr. Armstrong, the current CMA President, who is an avowed anti-tobacco crusader and was one of the major witnesses in support of ACA 14 in the Assembly Revenue and Taxation Committee hearings.

-Made multiple trips to San Francisco to meet with "key" CMA executive staff to firm up their opposition to CMA's participation in the initiative.

-Arranged for the Golden State Medical Society (statewide black physicians organization) to object to the CMA's participation in the initiative.

-Met with several legislators who are anti-medicine for various personal and political reasons to have anti-medicine legislation drafted and leaked to the right CMA leaders.

To date organized medicine has stayed out of the initiative fight. In all honesty, luckily, the CMA's primary objective was tort reform and they planned to use the bulk of their resources in sponsoring a tort reform Initiative at the same time as the tobacco tax Initiative would be on the ballot if it should qualify. Obviously, we used this to our great advantage in convincing CMA to stay out of the tax initiative. During the last day of the 1987 California legislative session, the trial attorneys and the proponents of tort reform came to a political compromise which was subsequently enacted by the legislature. As part of this compromise there was an agreement to a five year moratorium on tort reform initiatives agreed to by all parties, including the CMA. This could potentially open up the CMA to re-thinking their position in regard to the proposed tobacco tax initiative. We are duplicating all of our previous efforts to assure that this does not happen.

When the CMA bowed out of the initiative, the proponents were placed in a very tenuous position. They had counted on the CMA's publicly pledged $1 million to qualify the initiative. After regrouping the proponents of the initiative began seeking other sources of funding. Lloyd Connelly, being a strong and respected member of the liberal political community, personally sought help from the Hayden/Fonda machine and organized labor. Recognizing the need to keep informed of liberal activities from an intelligence point of view and to be in a position to dissuade the typical liberal sources of funding to stay out of this initiative, we built a campaign team that is not only extremely talented, experienced and effective, but has great liberal credentials. Following are our major activities in this area:

-Privately approached Hayden/Fonda through Fairbank, Bregman and Maullin, our polling firm, at the same time as Connelly was approaching them to quietly attempt to dissuade Hayden/Fonda from simply funding the entire qualification effort. Hayden owes Connelly, who was a major co-sponsor of the Toxics Initiative and a heavy contributor. To date we have been successful in convincing Hayden that there is little advantage to him personally or politically to get involved in the Connelly tobacco tax Initiative. Hayden/Fonda has pledged a modest $25,000 to the tax Initiative.

-Paul Kinney, who is assisting us in the overall campaign management and will be doing the media portion of the campaign, has a professional and personal relationship with Connelly's Chief of Staff. Through this relationship, Paul has been able to pick up invaluable inside information as to the proponents strategies.

-We met with Jack Henning (AFL-CIO) to dissuade him from accepting Connelly's offer to Amend the unions Cal-OSHA initiative into the tobacco tax initiative. This would have given Connelly and the other anti-tobacco activists access to organized labor's war chest. Fortunately, Henning turned Connelly down flat.

-Paul Kinney is assisting Henning and organized labor with their efforts to get organized to qualify their own Cal-OSHA Initiative.

Having sucessfully kept the CMA and the Hayden/Fonda organizations involvement at a minimum "token" level and having convinced Jack Henning (organized labor) to stay out of the proposed tobacco tax initiative completely, we have tremendously damaged the proponents of the initiative and we have greatly enhanced our odds of successfully stopping the initiative from qualifying. Any one of the three groups mentioned above could have financed a successful initiative qualification drive by themselves.

Faced with the reality that their hoped for financing for the qualification drive had dried up, the proponents of the initiative met in San Francisco on June 17, 1987. Several very important decisions came out of the meeting. Having been promised less than $250,000 in pledges only, combined with serious organizational difficulties, they decided to abandon their original goal of qualifying the initiative for the June 1988 ballot and postponed the effort to the November 1988 ballot. Not having the resources to hire a professional qualifying firm, they decided on a voluntary qualification drive using their own people to circulate petitions. They hired Mr. Jack Nichols, recently resigned former director of Hayden's Campaign California. Mr. Nichols will pose a real problem as he is well connected with the liberal Hollywood crowd and could be very effective for them. Nichols is being paid only $48,000, but has a hefty performance bonus should the Initiative qualify.

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With the decision by the proponents to postpone their election date goal to November 1988, and their inability to raise any significant campaign dollars, media and public relations activities have been at a minimum on their part. We have been reticent to engage in an active media or public relations campaign for fear of giving them free opportunities to gain access to the press. We commissioned a comprehensive poll which has just been completed and gives us the tools needed to build an extremely effective and well directed campaign to do everything possible to stop this initiative from qualifying for the ballot. The Fairbank, Bregman and Maullin poll also tends to give credence to our decision to keep a low profile in terms of media, P.R. and special interest consultant activity. Comparing the three polls results on this Initiative in 1987 (CMA-Charlton Research-Jan. 1987 / TI-Tarrance-March 1987 / Fairbank, Bregman and Maullin-Aug. 1987), it appears that the "strongly favorable" and "somewhat favorable" group drops from 66% to 60% while the "undecided" raised from 6% to 12%.

Although we consciously chose to keep the campaign at a low key personal level (lobbying CMA, labor, Hayden/Fonda, etc.) there was a great deal of activity on our part besides the areas already discussed:

-Retained Hispanic Lobbying Associates (Gene Reyes) to consult with us on Hispanic activities in the campaign to keep the initiative off the ballot.

-Retained Fairbank, Bregman and Maullin to conduct an extensive poll on the issue.

-Retained O'Donnell and Gordon to explore all avenues to of the appropriateness of the Heart, Lung and Cancer societies and thereby cause expenditure of time, effort and resources on their part. Every ounce of effort they have to expend defending themselves is effort they do not have to help in qualifying the Initiative.

-Agreed to retain Myrlie Evers to assist with building strong black opposition to the initiative.

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-Met with David Kim many times to discuss possible Asian involvement in our efforts.

-Met with Mario Obledo re possible involvement in our efforts and his willingness to particiapate as a "key" consultant in our efforts to mobilize hispanics.

-Met with Cruz Reynoso re possible involvement in our efforts to mobilize Hispanics to vocally oppose the proposed Initiative.

-Numerous meetings with friendly liberal legislators close to Connelly to gain their assistance in trying to convince Connelly that this Initiative is not a good vehicle for him in his aspirations for statewide office in 1990. Although we have been unable to knock Connelly off the Initiative to date, our sources inform us that Connelly has become somewhat engrossed in another "long-term care" initiative and our efforts may have softened him somewhat. Our best political judgement at the time indicated that we had pushed Connelly as far as we reasonably could without causing a backlash from the liberal political community.

-Kept all other legislators out of the Coalition and helped to isolate the group on the left.

-Researched every legal obstacle we can place in the way of the proponents from exploiting opportunities in the state law regarding initiatives to checking the vulnerabilities in their non-profit charitable contribution status.

-Built a tentative list of committee members for our anti-initiative committee.

-Met with friends in the Attorney Generals office to set up the battle over the Initiative's language and title.

-Met with Bill Hauck and Rick Brandsma of Information For Public Research (formerly California Research) to solicit them to assist in the background document to be given to the Legislative Analyst's Office. Brandsma was former Chief Deputy to the Legislative Analyst and both Brandsma and Hauck have served in numerous prestigious posts in state government. Anything that would come out of this group would be given every consideration by the Legislative Analyst's office.

-Met with Dave Doerr (former Chief Consultant to the Revenue and Taxation Committee) to solicit him to help and co-sign the document to be prepared by Hauck and Brandsma

-Multiple meetings with "key" black leaders, including:
- -Willie Brown, Speaker
- -Curtis Tucker, Chairman, Assembly Health Committee
- -Maxine Waters, Majority Whip
- -Dodson Wilson, Staff to the Speaker
- -Tom Bradley, Mayor of Los Angeles
- -Mariam Golikely, Senior black leader
- -Myrlie Evers, Bd. of Directors, NAACP

-Multiple meetings with labor leaders, including:
- -Jack Henning, AFL-CIO.
- -Tom Hunter, plumbing and pipe unions.
- -John Harrington, union financial advisors.
- -Brian Hatch, firefighters.
- -Dick Floyd, Assemblyman.
- -Jerry Matthews, independent firefighters.

-Regular written and verbal communications with TI staff.

-Assisted in the preparation of the poll format and questions.

-Consulted with Reynolds re their suggested additions to the poll.

-Meetings with the California Working Group to review and strategies on efforts to keep the Initiative off the ballot.

-Contacted the two major professional qualification firms to discuss retaining them to assist us with a withdrawal petition drive and to keep them from being available to the proponents of the initiative.

-Held almost daily person-to-person and telephone meetings between Kinney, Allen, Konovaloff, Fairbank, Gordon.

-Almost daily contact with the CMA to keep them out of the initiative, especially now that the tort reform issue has disappeared for 1988.

-Met with Chip Neilsen re campaign committee requirements.

-Prepared legal arguments for Attorney General's Title and Summary in written form. O'Donnell and Gordon had primary responsibility for this in consultation with A-K, TI, and Kinney.

-Continued working meetings with Bill Hauck (former Chief of Staff to Speaker Willie Brown) and Rick Brandsma (ten year veteran of the Legislative Analyst's office) providing them with background information on the initiative and the regressive nature of excise taxes. Due to the necessity for prompt attention to this matter it was decided not to use Dave Doerr at this time. This document is being prepared now for delivery to the Legislative Analyst's office in mid-to-late October.

I[illegible] STRATEGY THROUGH THE INITIATIVE QUALIFICATION DEADLINE

October
(See Attached Calendar)

With the postponement of their target election date to November 1988, the interim initiative phase has been expanded by approximately five months (June to November). Our earlier time projections, based on the June 1988 election date, would have placed the end of the interim initiative phase in the Fall or at the latest January of 1988. With the new potential election date of November 1988, we are looking at a last possible day for qualification of this issue of June 22, 1988.

Following are our strategies and estimated budget for the anti-qualification campaign. We know you are cognizant of the expenditures to date and the accomplishments generated by those prudent expenditures, but it should be pointed out that it is our feeling that this ambitious anti-qualification campaign plan can be carried out within the resources already approved by the Executive Committee.

We have catagorized the elements of the anti-qualification campaign into four broad areas for easier presentation, however, we should be cognizant that all of these broad catagories and their specific elements overlap into a total, integrated program. These areas are: (1) Special Interest and Ethnic Group Outreach Program; (2) P.R./Media Campaign; (3) Resource Limitation Campaign; and, (4) Consulting/Administration.

SPECIAL INTEREST AND ETHNIC GROUP OUTREACH PROGRAM

This program involves the use of hispanics, blacks, orientals, seniors, labor, etc. in going into their respective communities, among their peers, to present the anti-tobacco tax initiative campaign educational program. This program is essential to solidifying support in these areas and keeping these areas from becoming initiative signers for the proponents.

-Recruitment of additional minority, senior and labor field reps and provide each with a schedule of activities, as well as, all necessary backgroud material and educational tools.

COST: $5,000 (Expenses)

-Organize our field operation directed by the minority senior and labor consultants with plans to speak before community groups, distribute literature, meet with editorial boards and raise small contributions against the proposed tobacco tax Initiative.

COST: $4,000 (Expenses)

-Write and print a generic brochure chronicling the inequities and threat of the proposed tobacco tax Initiative for the use of our field operation beginning distribution in November.

COST: (based on 30,000 pieces)
- -design and typesetting....$1,600
- -photography...............$1,500
- -printing.................$5,200

-Begin development and production of a 12 to 15 minute video chronicling the inequities and threat of the proposed tobacco tax Initiative for use by the field consultants, minorities and community supporters for use before groups.

COST: $35,000

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P.R./MEDIA CAMPAIGN

Although this particular catagory, for the most part could just as easily be placed under the "Resources Limitation Campaign" catagory it is unique in that it deals with techniques such as direct mail, advertising and money solicitation. All of the techniques discussed here are critical to cutting into the potential supporters, either economically or by signature, of the proponents of the proposed Initiative.

-Acquisition of various special interest group lists including:
- -Liberals (ACLU, Sierra Club, Mother Jones, Prop. 65, People for the American Way).
- -Seniors (AARP, Modern Maturity).
- -Labor (AFL-CIO).
- -Hispanics (MAPA, LULAC, GI Forum).
- -Asians (JACL).

The compilation of these lists will form an invaluable resource that can effectively be used in a direct mail and anti-qualification campaign.

COST: $105,000

-Begin development and production of a direct mail program aimed at our target groups previously identified and by November 1, 1987 be in the mail to each. This will be very productive in creating confusion among those elements the proponents think they will easily get to sign the petitions. We will be creating confusion, concern and doubt in those areas that we know they will work first and the hardest.

COST: (based on 775,000 pieces)
- -design of logos..............$ 7,500
- -production..................$127,000
- -postage.....................$ 76,930

-Begin coordinated effort with the companies to educate, organize and solicit contributions from the companies "smokers" mailing lists.

COST: companies plus return envelope production and shipping of $9,500.

PERSONAL AND ~~CONFIDENTIAL~~

-Begin locating ads in special interest periodicals in our target groups, such as, senior publications, labor bulletins, liberal journals and minority papers. The ads should begin appearing in early November.

COST:
- -design........................$ 4,000
- -placement......................$35,000

-Sign up and officially release the names of our committee to ensure compliance with all applicable statutes.

RESOURCE LIMITATION CAMPAIGN

Although a very positive and successful program in this area has already taken place we must re-double our efforts to withhold any potential resources they could possibly garner and cut into their current resources by causing them to expend their resources on something other than qualifing the tobacco tax Initiative. Just because we have successfully convinced organized medicine, Hayden/Fonda and labor to stay out of this issue, does not mean we can rest on our laurels. As the proponents become more desperate they will exert ever increasing pressure on these and other groups to financially assist them. We must effectively counter their efforts at every turn.

-Continue daily campaign to keep CMA, Hayden/Fonda and Labor out of the Initiative.

-Contract with the two largest signature gathering firms to keep them away from the proponents of the Initiative. Investigate the possibility of using these firms to develop a "withdrawal petition" drive disqualifying those already signed up by the Initiative proponents. This is a very exciting concept. Although it has been done in a limited sense at the local level, it has never been done at the statewide level. We would basically send our pros behind the proponent's amatuers and convince people to sign withdrawal petitions, removing their names from the proponents petition. This could be devastating to the proponents.

PERSONAL AND ~~CONFIDENTIAL~~

It should be noted that there is definitely a potential downside to this program. Regardless, we need to tie up these two signature gathering firms so that the proponents will be precluded from using them last minute in an attempt to get the Initiative qualified.

COST: $50,000 to $75,000 (Funds needed to preempt American Petition Consultants and Kimball Management, Inc.).

-Meet with Jack Henning of the AFL-CIO and explore the possibility of reaching a mutual understanding between the Cal-OSHA Initiative and the tobacco tax Initiative.

COST: $10,000

-Shift legal component to charitable contribution analysis mode through challenges to their expenditure process. It is our intention to throw up every roadblock we can and cause the proponents to expend as much time and resources as possible on things other than the Initiative.

COST: $25,000

CONSULTING/ADMINISTRATION

Includes fees for overall management and coordination by A-K Associates, campaign consulting by Paul Kinney and various consulting fees paid to special interest and ethnic consultants. This allocation also includes use of Chip Neilsen's law firm to coordinate and administer all reporting requirements to assure that we comply with all appropriate election laws.

COST: $60,000

November

SPECIAL INTEREST AND ETHNIC GROUP OUTREACH PROGRAM

-Begin monthly organizational meetings of our anti-tax troops to coordinate strategy and execution of our disqualification plan. Included in group will be leadership team, minority/special interest, field consultants and petition company representatives.

COST: $4,000 (Expenses)

-Continue grassroots program with accelerated speakers group appearances.

COST: $4,000 (Expenses)

P.R./MEDIA CAMPAIGN

-Create and distribute to all major California media a press kit that includes our brochure, opposition list, list of our committee members, fiscal analysis and implications, arguments against and previous press.

COST: $2,500

-Establish strict guidelines and mechanisms for handling press inquiries.

-Complete direct mail program.

-Begin ad placement program.

RESOURCE LIMITATION CAMPAIGN

-Continue efforts with CMA, Hayden/Fonda, Labor and similar groups.

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-Begin to identify their petition circulation patterns and possibly begin withdrawal/signature disqualification program.

-Continue to explore and implement legal avenues regarding non-profit organizations activities in the campaign.

COST: $15,000

CONSULTING/ADMINISTRATION

COST: $60,000

<u>December Thru Qualification Deadline</u>

(Approximate Date June 1, 1988)

SPECIAL INTEREST AND ETHNIC GROUP OUTREACH PROGRAM

-Hold regular, frequent field meetings to continuously evaluate and guide consultants and petition company representatives.

COST: $25,000 (Expenses)

-Continue community outreach program.

COST: $25,000(Expenses)

PERSONAL AND ~~CONFIDENTIAL~~

P.R./MEDIA CAMPAIGN

-By late February, replace ad program.

COST: $35,000

-By early February, commission a second poll to test movement of support/opposition to tobacco tax Initiative. This is critical to test movement and to assess arguments to determine which issues are most effective for each side in order to either strengthen our attack or undermine their campaign.

COST: $22,000

-Build a personal response file from our community program, mail a solicitation to all those expressing interest in supporting the anti-tax campaign. Create a voter file of names for use in future ads.

COST: (Based on 28,325 names, or approximately 1.5% of original mail universe).

- -production..................$3,700
- -postage.....................$6,232

-Reduce our universe with each mailing to those having expressed support for the anti-tax effort following receipt of direct mail, mail additional solicitation for financial assistance.

COST: (Based on 11,625)

- -production.................$3,100
- -postage....................$2,558

-Continue disqualification campaign right up to the final day of signature gathering.

-Continue to solicit and educate "smokers" through companies lists and communication capabilities.

COST: Companies plus $7,500 data development and envelope production and shipping.

PERSONAL AND ~~CONFIDENTIAL~~

RESOURCES LIMITATION CAMPAIGN

-Continue to lobby groups like CMA, Hayden/Fonda and Labor to limit the proponents resources.

-Legal involvement program to occupy time and resources of non-profit proponents.

COST: $[illegible],000

CONSULTING/ADMINISTRATION

COST: $2[illegible],000

-Initiative "KILL" fee. Bonus to Paul Kinney if tobacco tax Initiative fails to qualify for the ballot. This is standard in the business.

COST: $75,000

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NAME: Cynthia Rice, Cynthia Daillard, Frank Seidl

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FROM: Ripley Forbes
Senior Advisor to the Assistant Secretary for Health

Total Number of Pages (Including Cover): 20

Additional Comments:

Technical Assistance Meeting
Retrieving, Cataloguing, and Analyzing Tobacco Industry Documents

LOGISTICS FACT SHEET

The meeting will be held on September 11,1998, at the Hubert H. Humphrey Building, 200 Independence Avenue SW, **Room 705A**, Washington, DC. The meeting will convene at **9:00 a.m. and adjourn at 5:30 p.m.**

In preparation for the September 11 Technical Assistance Meeting, please find attached information outlining in greater detail the major issues to be addressed.

These materials include:

1) Discussion Paper
2) 7/17/98 Statement by President Clinton

Executive Order
To Increase the Public Availability of Tobacco Documents: Discussion Paper

On July 17, 1998, the President issued an Executive Order highlighting the importance of increasing the accessibility of tobacco industry documents that have been released as a result of recent tobacco litigation and congressional subpoenas. Citing the potential value of these documents to the public health community, the Executive Order directed the Secretary of Health and Human Services to do the following:

1 *Propose a method for coordinating review of the documents and making available an easily searchable index and/or digest of the reviewed documents.*

2 *Propose a plan to disseminate widely the index and/or digest as well as the documents themselves, including expanded use of the Internet.*

3 *Provide a strategy for coordinating a broad public and private review and analysis of the documents to gain critical public health information. Issues to be considered as part of this analysis include: nicotine addiction and pharmacology; biomedical research, including ingredient safety; product design; and youth marketing strategies.*

This paper discusses the background issues relevant to the Executive Order.

A. 1. Background for Objectives 1 and 2 [Document Review, Indexing, and Accessibility]

As the Executive Order states, "court cases and congressional subpoenas have forced the tobacco companies to make many of their documents public." While an enormous number and range of documents have become public, gaining access to them is extremely difficult. The vast majority of documents are available only in paper format at the document depository in Minneapolis, Minnesota. A smaller number of documents, most of which are in the Minnesota depository, are available through at least four primary sites on the Internet. The challenges in accessing the documents in a manner useful to researchers include:

- a huge volume of documents
- duplicate documents
- public documents merged with internal industry documents
- no way of searching documents by subject or key word
- no way to perform full-text document searches
- documents are separately sorted by company requiring several databases to be searched for each area of interest.

Minnesota Document Depository

The Minnesota Document Depository, negotiated and established as part of the settlement reached in May 1998 between the Minnesota Attorney General and tobacco companies, contains documents acquired through discovery in the Minnesota litigation. In addition, an important element of Minnesota's settlement is that it specifies that other documents released or disclosed in any other U.S. smoking and health litigation are to be delivered to the Minnesota depository within 30 days of their production in the other cases. This provision essentially turns Minnesota into a "national repository" of tobacco industry documents.

Although there is a rudimentary electronic search engine that accesses an index (the "4B Index") to these documents that can be used only at the depository, the documents themselves are not in electronic format. Visitors to the depository can have documents copied or electronically scanned at their own expense.

The depository holds approximately 26,000,000 pages stored in 11,600 boxes. This translates to approximately 3,833,038 documents, broken down by company as follows:

Philip Morris	1,433,802 documents
RJ Reynolds	780,825 documents
Brown & Williamson	516,566 documents
American Tobacco	488,110 documents
Lorillard	305,246 documents
Ctr for Tobacco Res	204,063 documents
Tobacco Institute	104,453 documents

There are also 170 boxes of Liggett Group documents that are not indexed by the 4B Index and are not listed above.

The Minnesota documents can be further subdivided into more specific groupings based on their usage in the trial. The plaintiff's attorneys selected approximately 1 - 2% of the total 33,000,000 pages to use in the trial (26,000,000 pages are stored in the Minnesota depository and 7,000,000 pages are stored in Guildford, England). These were copied and further processed by the firm representing Minnesota (Robins, Kaplan, Miller & Ciresi), and these documents are referred to as the Minnesota Select Set. It has been reported that the Minnesota Select Set has been obtained by Texas and that a consortium of AG's offices have put the documents on CD-ROM for use by other states involved in litigation. Many of the Minnesota trial exhibits (approximately 3,000) used by the plaintiffs were selected from the Minnesota Select Set.

Internet Sites

The four primary Internet sites are the ***House of Representatives Commerce Committee Site***; ***University of California*** site for Brown & Williamson documents; the ***Tobacco Resolution*** site; and the ***Blue Cross/Blue Shield of Minnesota*** site. Most documents at these sites are found in hard copy at the Minnesota depository, with the exception of the approximately 39,000 privileged documents on the House of Representatives Commerce Committee Site; various small caches of documents; 7,000,000 pages of British American Tobacco (BAT) documents only available for viewing at the depository in Guildford, England; and the "Category II" trade secret documents returned to the companies by Minnesota.

A. 2. Background for Objective 3 [Analysis]

Releasing and cataloguing tobacco industry documents will only be useful if they undergo systematic analysis and this results in publication in the scientific and lay literatures. The previously secret information could be reviewed and analyzed by scientists from a wide range of disciplines. The reports that result from this analysis would be helpful in shaping future tobacco control policies and programs. Publication of these analyses could also make major contributions to the science of tobacco control.

A few such analyses have already been prepared[1,2,3,4,5,6]. The first analysis, which described documents from the Brown and Williamson Tobacco Company, concluded:

> "These documents ... show that B&W and BAT recognized more than 30 years ago that nicotine is addictive and that tobacco smoke is "biologically active" (e.g., carcinogenic)."[1]

The public health research community has examined the health effects of tobacco use and particularly cigarette smoking. Cigarette smoking has been causally linked to a variety of cancers, lung diseases and cardiovascular diseases. Exposure to tobacco smoke has been linked to increased respiratory illness among infants and to lung cancer in nonsmoking adults. The addictive nature of nicotine has been well documented. This research has advanced in the absence of knowledge of the content of tobacco products and the industry's product research and design data.

The tobacco industry has maintained a visible and often not-so-visible presence in tobacco-related policy arenas at the National, state and local levels. Knowledge of the extent to which tobacco industry influence has reached decision makers may lead to a better understanding of the formulation or lack of formulation of sound public health policy. This includes policies on advertising and promotion of tobacco products, tobacco taxation and pricing, and agriculture.

B. 1. Challenges to Objectives 1 and 2

Specific to the Documents

Bibliographic Control (document identification and duplication) - One of the greatest problems with both the Minnesota documents and the documents on the web is uncertainty as to the actual number of unique documents. Because the documents were provided individually by company, there is considerable cross-company duplication. Additionally, individual companies provided what appears to be multiple copies of many documents, but there may be minor but significant changes among what appears to be the same document. The inability to determine the number of unique documents in the depository or on the Internet is known as lack of bibliographic control.

Subject Control (document scope and subject content) - Another significant challenge is lack of subject control of or subject access to the documents. The only way to search documents by subject (except for B & W documents available at UCSF) is to search the title field of the index or the specific Request Number field when available (the Request Number field refers to the subject nature of the request for discovery made during the Minnesota trial). The Request Number field is of limited value because in many instances the requests for discovery were very broad and the request numbers were coded and provided on the index by the companies themselves. The documents are <u>not</u> full-text searchable either via the Internet or through the 4B Index at the Minnesota depository.

Public Domain Documents - Many of the documents provided by the companies are publicly-available such as government reports and journal articles. These public domain documents clutter the collection, making it more difficult to find documents not previously made public. These public documents need to be deleted to improve usefulness or a criteria established for determining which public domain documents to keep.

Specific to the Process of Making the Documents Publicly Accessible

Competition - Several public and private organizations are, to various degrees, working to make the documents more easily searchable and accessible. However, it is not clear to what extent these efforts will benefit the public.

A number of private electronic publishers are attempting to convert some documents to a format that allows for full-text searching and display of the documents. We are unsure as to which documents (e.g., privileged documents, Minnesota Select Set documents, trials exhibits, etc.) are being converted and the success of these ventures. We do know that these electronic publishers are trying to sell document subsets on CD-ROM for several thousand dollars each. This price may be prohibitive to many users.

It is our understanding that law firms representing Minnesota and other states have organized the Minnesota Select Set into database(s) which allow them to search for specific types or subjects of documents. Other law firms representing private litigants have also developed databases to assist them in using the documents successfully in court. These databases are considered proprietary to the firms who produced them and become part of each firm's unique capabilities to market themselves as litigators against the industry. Additionally, the databases and indexes developed for litigation purposes may not be ideally suited for tobacco control researchers and the public.

Researchers and advocates also have competitive interests and are looking at this wealth of information on the industry as an opportunity for research and publication.

Resources - The ultimate electronic accessibility of all of the documents in a format useful to researchers will be extremely expensive and labor-intensive. Estimates for automated efforts such as scanning and optical character recognition (OCR) vary from .50 to $1.00 per page. However, using individuals to code or subject index documents is also very labor intensive and expensive. On the average about 2-3 documents can be subject coded/indexed per hour; simple indexing with unique number, date, and document type may be accomplished at the rate of 7-8 documents per hour. Duplicate checking alone is a massive task. These estimates do not address the costs involved in making the eventual index to the documents or the documents themselves available and searchable on the Internet. This would require document management software and database search and retrieval software to be available on an Internet server.

B. 2. Challenges to Objective 3

Complete analysis of documents currently available will take years, or perhaps decades to complete. A thoughtful understanding of this extensive task should guide the development of the cataloguing task discussed in the previous section. Consideration of likely topics for analysis and the top priorities for this undertaking will determine the major categories of the cataloguing and abstracting process.

The Minnesota court decision ordered tobacco industry documents be designated to twelve categories among which the following categories may be of specific interest to DHHS: science, attorney-related involvement in smoking and health; public statements made by a defendant or by the industry regarding smoking and health, documents referring to children, documents relating to government regulatory activity; documents relating to patents or the EPA. It may be difficult to initially assess interest in other categories of documents because of the generality of the categorization, i.e. documents that on their face do not indicate they were written or received by an attorney.

C. 1. Ways to Achieve Objectives 1 and 2

1. Develop standardized procedures for document processing (indexing, abstracting, and classification).

With analysis and processing of documents already ongoing by various entities, guidelines need to be developed and shared to ensure consistency in processing. Guidelines are needed for formatting these existing and future analyses and processing records into a common database structure. These include guidelines for data elements, field structure, content of abstracts, consistent language for subject indexing and/or classification assignment, a unique numbering system, and other data elements deemed as necessary to uniquely describe each document. The guidelines developed could be disseminated to all researchers and technical information specialists/librarians working with the documents, and consensus for standardization of the process could be sought. Additionally, a long-term system for the ongoing processing and dissemination of documents may need to be established in order to process new documents as released.

With regard to indexing, the indexing guidelines could build on CDC's Office on Smoking and Health Thesaurus.

2. Leverage legal routes to increase document accessibility.

The Minnesota settlement set a precedent in negotiating the document depository. State Attorneys General could be encouraged to negotiate even greater document accessibility in future settlements by demanding convenient access to documents electronically, optimally in a full-text searchable format with subject and other indexing provided.

Other legal cases may be in a position to consider document accessibility as part of settlements and could be encouraged to pursue this. In addition, national legislation may once again be proposed and could present an opportunity to include assurances of increased document accessibility. The guidelines described above could be used to guide policy makers as they negotiate terms of document release and formulate policy.

3. **Consolidate and enhance value of existing electronic information.**

Although there are difficulties in using the Internet sites currently available, some valuable documents can be found relatively easily. While these sites will not meet all of the needs of researchers involved in-depth research projects, they do provide access to information of value to many in the public health community. One problem with the sites is knowing their location, content and limitations, and knowing how best to use them. A single Internet site that provides general descriptions of the nature of documents they contain, guidelines for their use, and offers links to the sites could greatly improve their value.

4. **Convene and coordinate Federal agencies to ensure sharing of resources and information.**

A number of Federal departments and agencies have expertise to offer in many of the areas involved in this issue, such as document processing, archiving, and indexing. These agencies include the Department of Justice, National Archives, National Institutes of Health (including the National Library of Medicine), and the Centers for Disease Control and Prevention. Additionally, some Federal agencies are already taking steps to increase document accessibility. An inventory of Federal expertise and activity needs to be compiled to ensure coordination of efforts, efficient use of resources, and standardized procedures.

5. **Monitor and coordinate activities of other agencies and organizations.**

Much expertise and activity on document accessibility also exists outside of the Federal government. As discussed above, state governments (especially the Minnesota Attorney General), private for-profit organizations, law firms, and not-for-profit groups have an interest in and have begun to develop strategies to better utilize the documents. These efforts could be monitored, coordinated to the greatest degree possible, and encouraged to follow standardized procedures.

6. **Monitor new technologies to gauge applicability to document accessibility.**

The technical issues involved in the management of such a massive universe of documents are complex and constantly changing. Interest of private for-profit firms in providing this technology is high. Technological developments and the capacities of various private entities need to be constantly monitored to understand capabilities and costs.

C. 2 Next Steps for Achieving Objective 3

Tobacco Industry documents could be analyzed to gain scientific and technical knowledge in at least the following areas: nicotine pharmacology, nicotine addiction, health consequences of tobacco use, tobacco product additives, tobacco product design and manufacturing, product packaging, advertising and promotion, agriculture, marketing research, disruption of public health programs and intervention activities, manipulation of scientific processes, environmental tobacco smoke, and policy research. Scientists in the above disciplines could review the industry documents and assess the scientific validity and the application of the industry's findings.

Initially, experts could be identified who are currently analyzing or planning to analyze tobacco industry documents. A centralized inventory of analyses in the scientific literature could be maintained to monitor progress toward the Department's goals.

D. Discussion of Technical Options Related to Objectives 1 and 2

This Executive Order calls for a method for coordinating review of the documents and making them available through an easily searchable index and/or digest of the reviewed documents. There are at least two methods that could be used to "review" and "index" the documents. The first one is to convert the documents into a machine-readable format using automated technology such as OCR (Optical Character Recognition). Although many errors can result from OCR, this process would allow for searching the entire text of documents. The second method is to have individuals read and index the documents and prepare machine-readable document records that contain subject indexing terms and other unique elements to describe each document. Once loaded into a search and retrieval database system on the Internet, either of these methods would enable researchers and the public to gain meaningful access to the documents. Other possible processes for document "review" include use of innovative, emerging technologies which need to be explored. Below are various technical options which employ the traditionally used processing methods in various combinations:

1. *Full-text* Searchable Database on the Internet:

1a) Process all 26,000,000 pages of the Minnesota documents into a full-text searchable database
Requirements: Scanning, OCR, Document Management Software, Search software
Advantages: Would be able to classify documents into broad categories for further research and would enable the public to have access to the documents without much individual processing of documents.
Disadvantages: Large proportion of documents may not be OCR'd because of poor document quality or handwritten- how to handle these? Extremely resource intensive and may not be necessary for research needs.

1b) Exclude publicly available documents from Option 1 and process as above.
Advantage: Database is easier to use with fewer documents.
Disadvantage: More resources needed to weed out the public documents.

1c) Process a subset of the Minnesota documents available into a full-text searchable database.
Requirements: Determine which subset is most valuable, e.g. Minnesota Select Set, Bliley privileged documents, trial exhibits? Scanning, OCR, Document Management Software, Search software
Advantages: Provides a useful sample of the documents to the public; maybe useful for leveraging resources as those in tobacco control and others would see the importance of this document collection. Would require fewer resources than above. Would provide a basis for the research community to continue to further review and analyze.
Disadvantages: No assurance that the subset selected would contain the most valuable documents. Would still leave a majority of the documents less accessible.

2. Database Searchable on the Internet by *Index Terms* or *Classification*

2a) Scan images of documents and index entire Minnesota depository collection using common indexing language, excluding publicly available documents. Subject indexing would allow searches on specific subject terms using Boolean logic.
Requirements: Scanning, intensive labor, thesaurus of common index terms, database management software and search software
Advantages: Provides specific subject accessibility of the documents
Disadvantages: Resource intensive

2b) Scan images of documents and classify entire Minnesota depository collection into broad topics, excluding publicly available documents. Classification would allow searches for documents on a few broad subject topics such as nicotine addiction or advertising.
Requirements: Scanning, labor, broad classification scheme, database management software and search software
Advantages: Enables searching by broad topic areas and allows researchers to apply index terms when reviewing and analyzing the broad topic areas.
Disadvantages: Difficult to access specific topics or cross-categorical documents

2c) Develop common guidelines for indexing, abstracting, classifying, and analysis (as discussed in Guiding Principles above) and disseminate among researchers.
Advantages: Promotes coordination and reduces redundancy of efforts. Could create a broader interest in the documents among various academic disciplines, e.g.. library science, marketing, information technology
Disadvantages: Without sufficient agreement from researchers, could result in a piecemeal system. No guarantee that guidelines will be uniformly applied or consistently used.

3. Consolidate and Enhance Documents Currently Available Electronically

3a) Consolidate and facilitate searching of the Minnesota documents by merging the 4B Indexes, "deduping" the Minnesota documents, developing a criteria for inclusion of publicly available documents, and loading the 4B Index on the Internet.
Requirements: Electronic version of 4B Index; labor to review merged indexes and make determination of duplicates and publicly available documents.
Advantages: Makes searching the Minnesota depository possible for anyone with access to the web.
Disadvantages: Users must still go to Minnesota to view the results of their search or request copies of documents prior to viewing the documents.

3b) Download scanned images of documents currently available on the Internet, convert into a database structure using indexing and classification guidelines, and transfer to CD-ROM.
Advantages: Many functions can be performed from remote sites.
Disadvantages: Can only work with what is available on the web. Can become overwhelming and time intensive to download lots of images. Must "dedupe" the documents across Internet sites.

3c) Add value to existing websites by creating a single site with links to the existing website along with search hints for using the sites and general description of the scope of documents available from each site.
Advantages: Builds on existing access mechanism; less resource intensive
Disadvantages: A large portion of documents are not currently accessible on the web.

4. Combination Plan of *Full-text* Searchable Database with *Indexing* and *Subject Classification*

4) Hybrid plan which combines full-text searching along with indexing since a portion will not be processed by OCR technology without error (poor quality print, handwritten notes, etc.)
Advantages: Provides most effective means of searching the documents because user can use index terms and text words to limit search.
Disadvantages: Extremely resource intensive.

E. QUESTIONS TO ADDRESS - OBJECTIVES 1 and 2:

1) Would an "Internet road map" to the various web sites be a good first step to undertake?

2) Can improved document accessibility (including providing scanned indexed images) be put on the table in ongoing settlement negotiations between state Attorneys General and tobacco companies?

3) Can guidelines to improve document accessibility be incorporated into future proposed national tobacco legislation?

4) Can Minnesota make public an electronic version of the 4B Index?

5) Can each company's 4B Index be merged into one index? Is this a viable option to assist document "deduping" of the complete collection?

6) Does the entire universe of documents need to be processed or would it be useful to process subsets such as the Minnesota Select Set, trial exhibits, or any other small subset collection incrementally?

7) How can the documents be sorted by broad classification scheme so they would fit into the larger collection but stand alone as a subset that individual researchers could then further catalogue, subject index, and abstract according to specific criteria?

8) Can the Minnesota AG negotiate further to obtain more services from the defendants, such as merging the 4B Index or scanning of the documents? For example, the Minnesota depository is overseen by the presiding judge and is currently being run similarly to its operation prior to being a public facility. The conditions of its operation potentially could be altered to better serve the needs of the public health community.

9) What venues can be used to disseminate the documents and resulting research to the public?

QUESTIONS TO ADDRESS - OBJECTIVE 3:

11) What are the appropriate analyses to be undertaken? How should they be prioritized?

12) Who should conduct the analyses?

13) What analyses are currently under way?

14) How should analysis of documents be coordinated?

15) What incentives can be used to ensure analysis of the documents? How should these incentives be provided?

16) Who should be the audience(s) for dissemination of document review findings?

17) How can review and analysis of documents best serve public health programs and interventions?

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THE WHITE HOUSE AT WORK

Friday, July 17, 1998

PRESIDENT CLINTON: PROTECTING AMERICA'S YOUTH FROM TOBACCO

Let's agree on at least one thing: Children are not the future of our tobacco companies. They are the future of America. We must not let their future, or America's future, go up in smoke.

President Bill Clinton
July 17, 1998

Today, President Clinton signs an Executive Memorandum directing the Secretary of Health and Human Services (HHS) to coordinate a public health review of tobacco industry documents and develop a plan to make the documents more accessible to researchers and the public. The President also announces that the Department of Justice will file a brief in support of the State of Minnesota's efforts to make the tobacco industry's own, currently existing, computerized index to these documents available to the public. Through these actions, we can use the industry's darkest secrets to save a new generation of children from this deadly habit.

Most Tobacco Documents Are Not Readily Accessible. For decades, the tobacco companies sought to hide from the public the truth about the dangers of smoking and the industry's own efforts to target children. Documents that have been released show that even as tobacco companies denied the addictive nature of nicotine, they conducted secret research in their labs and devised marketing strategies to addict children to smoking. These documents are the tobacco companies' legacy of shame; however, most of these documents are not readily accessible by the public.

A Presidential Plan For Public Access To Tobacco Industry Documents. President Clinton is directing the Department of Health and Human Services to devise a plan to make these documents more accessible for all Americans. The President is calling on HHS to create a plan that would:

- *Propose a strategy for coordinating the review of tobacco documents* and make them available through an easily searchable index and/or digest of the reviewed documents;
- *Devise a plan to widely distribute the index and/or digest* as well as the documents themselves, including expanded distribution on the Internet;
- *Provide a strategy for coordinating a broad public and private review* and analysis of the documents to gain critical public health information. As part of this analysis, issues to be considered include, an analysis of nicotine addiction and pharmacology, biomedical research, product design, and youth marketing strategies.

Access To Documents Will Lead To Additional Research. By making these documents widely available, the public and private sector will benefit:

- Public health experts can design more effective anti-smoking strategies by studying marketing plans in these documents;

by the tobacco industry for use during litigation. The tobacco industry has fought to prevent the release of this index. It is the industry's road map to its own documents and could improve significantly the ability of public health experts, scientists, State and Federal officials, and the public to search through industry documents.
The bipartisan comprehensive tobacco legislation recently considered in the Senate contained strong provisions for public disclosure of tobacco industry documents. While I will continue to fight to enact comprehensive tobacco legislation, I am determined to move forward to protect America's children from tobacco.

more

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Therefore, I hereby direct you, working with the Attorney General, the States, public health professionals, librarians, and other concerned Americans, to report back to me in 90 days with a plan to make the tobacco industry documents more readily accessible to the public health community, the scientific community, the States, and the public at large. This plan should:

(1) Propose a method for coordinating review of the documents and making available an easily searchable index and/or digest of the reviewed documents.

(2) Propose a plan to disseminate widely the index and/or digest as well as the documents themselves, including expanded use of the Internet.

(3) Provide a strategy for coordinating a broad public and private review and analysis of the documents to gain critical public health information. Issues to be considered as part of this analysis include: nicotine addiction and pharmacology; biomedical research, including ingredient safety; product design; and youth marketing strategies.

To help ensure greater access to these documents, the Department of Justice plans to file an amicus brief in the trial court in support of the State of Minnesota's motion to unseal the industry-created 4-A index.

I remain committed to using every power of my office to protect children from the dangers of tobacco. Through these actions, we can use the industry's darkest secrets to save a new generation of children from this deadly habit.

WILLIAM J. CLINTON

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Jerold R. Mande

10/08/98 12:17:02 PM

Record Type: Record

To: Cynthia Dailard/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc:
Subject: Documents

The report could be improved by editing it to speak to a broader public audience including the press. The current document spends too much time insuring HHS is not committing to do more work than it believes it can promise or maybe not offending those outside government already working on this matter, and thus is not as affirmative as it could be in its tone. For example, why uses phrases such as "organize the establishment" in II. 1. A., or why in the sixth bullet, does the word "ultimately" appear? Why not just say we will establish or initiate an Internet site and we are going to provide the search engine. The goal should be to lead policy in this area by providing a crisp, compelling vision, not to insure that we can't be criticized for promising more than we deliver. There seems to be little harm in being bold.

To make a compelling case, the document should provide a compelling presentation of the problem. A better discussion of what the world used to look like, and what it looks like today, should lead the reader to anticipate and thus support our vision of the future. Adding a graphic presentation of the problem that illustrates the current world and the future world, would reinforce the text presentation. An illustration could be added picturing the scattered locations of the documents today and how many are in each place and then there could be a picture of a someone at a computer terminal with all of the separate boxes from the first illustration linked together.

We should add a new section to next steps designed to make certain that no important class of documents is sitting in a box while we go about automating the documents we know already to be important. It could be entitled: insuring the discovery of important documents. It should include a component where documents identified as important during the review of current documents could be sought even if it means going back to the industry.

I'm reluctant to propose more without consulting more knowledgeable individuals, but I am reluctant to contact them for fear of giving the impression of a process outside the one HHS is running.