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Tobacco: McCain S. 1415: McCain 1415 [3]

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DoJ

PUBLIC DISCLOSURE OF TOBACCO INDUSTRY DOCUMENTS

FINDINGS. — The American tobacco industry has made claims of attorney-client privilege, attorney work product, and trade secrets to protect from public disclosure thousands of internal documents sought by civil litigants. A number of courts have found that these claims of privilege were not made in good faith. To promote understanding by the public of the tobacco industry's research and practices, Congress finds that a prompt and full exposition of tobacco documents will further the purposes of this Act.

(a) APPLICABILITY. — This Title shall apply to all manufacturers of tobacco products as a necessary requirement of participation in the American tobacco market.

(b) NATIONAL TOBACCO DOCUMENT DEPOSITORY. — Manufacturers of tobacco products shall, within __ days after the enactment of this Act, establish and maintain a National Tobacco Document Depository (the Depository) in the Washington, D.C. area.

(1) DOCUMENT CATAGORIES. — Within __ days after the enactment of this Act, each manufacturer of a tobacco product shall submit to the Depository every existing document in the manufacturer's possession, custody, or control —

(A) relating, referring, or pertaining to —

(i) any health effects in humans or animals, including addiction, caused by the use of tobacco products or components of tobacco products;

(ii) the engineering, manipulation or control of nicotine in tobacco products;

(iii) the sale or marketing of tobacco products;

(iv) any research involving safer or less hazardous tobacco products;

(v) studies of smoking habits of minors;

(vi) the relationship between advertising or promotion and youth smoking;

(B) produced, or ordered to be produced, by the tobacco product manufacturer in any health-related civil or criminal proceeding, judicial or administrative; or

(C) that the National Tobacco Documents Review Board, as described in subsection (c) below, determines is appropriate for submission to the Depository.

(2) DOCUMENT IDENTIFICATION AND INDEX. — Documents shall be sequentially numbered and marked to identify the tobacco manufacturer. Within __ days of submission of documents to the Depository, each tobacco manufacturer shall supply the Depository with a comprehensive document index which references the applicable

document catagories contained in section (b)(1)(A) of this subtitle.

(3) PRIVILEGE AND TRADE SECRET CLAIMS. — Any document that is subject to a claim by a tobacco manufacturer of privilege or trade secret protection shall be so marked and shall be submitted separately to the Depository. Compliance with this section shall not be deemed to be a waiver of any applicable claim of privilege or trade secret protection.

(A) PRIVILEGE AND TRADE SECRET LOGS.-- Within __ days after the enactment of this Act, each manufacturer shall submit to the Depository a comprehensive log which identifies on a document-by-document basis all documents produced to the Depository for which the manufacturer asserts attorney-client privilege, attorney work-product, or trade secrecy. The determination of privilege shall be the result of the manufacturer's good faith de novo review of all documents for which it previously has asserted one or more of the aforementioned privileges or trade secret protection. In making such a claim, the manufacturer shall adopt the standards set forth in subsection (c)(2) below.

(i) The log shall be organized in numerical order based upon the document identifier assigned to each document. For each document, the log shall contain: (a) a description of the document, including type of document, title of document, name and position or title of each author, addressee and other recipient (e.g., cc's), document date, document purpose and general subject matter; (b) an explanation why the document or a portion of the document is privileged or subject to trade secret protection; and (c) a statement whether any previous claim of privilege or trade secret was denied and, if so, in what proceeding. Within ___ days of receipt of such a log, the Depository shall make it available for public inspection and review.

(ii) Each manufacturer shall submit a declaration, pursuant to 28 U.S.C. Section 1746, by an individual with responsibility for the de novo review of documents, preparation of the privilege log and knowledge of its contents. The declarant shall attest to the manufacturer's compliance with the requirements of this Title pertaining to the review of documents and preparation of a privilege log.

(4) DISCLOSURE BY THE DEPOSITORY. -- Within __ days of receipt of a document that is not subject to a claim of attorney-client privilege, attorney work product, or trade secret protection, the Depository shall make the document available to the public using the Internet and other means.

(c) NATIONAL TOBACCO DOCUMENTS REVIEW BOARD. — There shall be a National Tobacco Documents Review Board (the Board) consisting of ___ members each of whom shall be appointed by the President and confirmed by the Senate. Any person who is a citizen of the United States and who has attained the age of thirty years shall be eligible to serve as a member of the Board. Each Board member shall be appointed for a term of seven years and shall be eligible for reappointment. The Board shall have the power, not subject to judicial review, to hire such staff and establish such operating procedures as it deems necessary to carry out its functions as specified hereunder.

(1) RESPONSIBILITY FOR DEPOSITORY. — The Board, in consultation with the General Services Administration, shall establish guidelines and procedures for the establishment and operation of the Depository, including guidelines for the immediate disclosure of documents that are not subject to unresolved claims of privilege or trade secrecy. The Depository shall be open to the public and maintained in a manner that permits it to be used as a resource for litigants, public health groups, and persons with an interest in tobacco industry records and research concerning smoking and health, addiction or nicotine dependency, safer or less hazardous cigarettes, and underage tobacco use and marketing.

(2) RESOLUTION OF DISPUTED PRIVILEGE AND TRADE SECRET CLAIMS. — The Board shall determine whether to uphold or reject disputed claims of attorney client privilege, attorney work product, or trade secret protection with respect to documents submitted to the Depository. Any person may petition the Board to resolve a claim that a document submitted to the Depository may not be disclosed to the public. Such determination shall be made by a single member of the Board, in writing, and shall be subject to judicial review as specified in this Title. All such determinations shall be made solely on consideration of the subject document and written submissions from the person claiming that the document is privileged and/or protected by trade secrecy and from any person seeking disclosure of the document.

(A) PRIVILEGE.-- The Board shall apply the attorney-client privilege and the attorney work-product doctrine in a manner consistent with federal law.

(B) TRADE SECRET.-- The Board shall define "trade secret" as "any commercially valuable plan, formula, process or device that is used for making or preparing trade commodities and that can be said to be the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process."

(3) FINAL DECISION — The Board may uphold a claim of privilege or protection in its entirety or, in its sole discretion, it may redact that portion of a document that it determines is protected from public disclosure under (C)(2) above. Any decision of the Board shall be final unless judicial review is sought as specified in subsection (c)(4) of this Title. In the event that judicial review is so sought, the Board's decision shall be stayed pending a final judicial decision.

(4) PETITION; RIGHT OF APPEAL. — Any ~~interested~~ person may obtain judicial review of a final decision of the Board by filing a petition for review with the United States Court of Appeals for the Federal Circuit within __ days after the entry of such decision. A copy of the petition shall be transmitted by the Clerk of the Court to the

Board. The Board shall file in the court the record of the proceedings on which the Board based its decision (including any documents reviewed by the Board *in camera*) as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall have exclusive jurisdiction to affirm or set aside the Board's decision, except that until the filing of the record the Board may modify or set aside its decision.

(A) ADDITIONAL EVIDENCE AND ARGUMENTS. — If the petitioner applies to the court for leave to adduce additional evidence or arguments respecting the decision being reviewed and shows to the satisfaction of the court that such additional evidence or arguments are material and that there were reasonable grounds for the failure to adduce such evidence or arguments in the proceedings before the Board, the court may order the Board to provide additional opportunity for the presentation of evidence or arguments in such manner and upon such terms as the court deems proper. The Board may modify its findings or make new findings by reason of the additional evidence or arguments and shall file with the court such modified or new findings, and its recommendation, if any, for the modification or setting aside of the decision being reviewed.

(B) STANDARD OF REVIEW; FINALITY OF JUDGMENTS. — The Board's findings of fact, if supported by substantial evidence on the record taken as a whole, shall be conclusive. The court shall review the Board's legal conclusions *de novo*. The judgment of the court affirming or setting aside the Board's decision shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) PUBLIC DISCLOSURE AFTER FINAL DECISION.-- Within __ days of a final decision by the Board that a document, as redacted by the Board or in its entirety, is not protected from disclosure by a claim of attorney-client privilege, attorney work product, or trade secret protection, the Board shall direct the Depository to make the document available to the public.

(d) SANCTIONS.--

(1) Each tobacco manufacturer must act in good faith and have a readily understood claim of privilege or trade secret protection based on fact and law as set out in subsection (c)(2) of this Title. If the Board determines that a tobacco manufacturer has not acted in good faith with full knowledge of the truth of the facts asserted and with a reasonable basis under existing law, the manufacturer shall be assessed costs, which shall include the full administrative costs of handling the claim of privilege, and all attorneys' fees incurred by the board and any party contesting the privilege. The Board may also impose civil penalites of up to $ ___ per violation if it determines that the manufacturer knowingly acted with the intent to delay, frustrate, defraud, or obstruct the Board's determination of privilege, attorney work product, or trade secret protection claims.

(2) A failure by a tobacco manufacturer to produce indexes and documents in

compliance with the schedule set forth in this Title shall be punished by a civil penalty of up to $ _____ per violation. A separate violation occurs for each document the manufacturer has failed to produce in a timely manner. The maximum penalty under this subsection for a related series of violations is $____. In determining the amount of any civil penalty, the Board shall consider the number of documents, length of delay, any history of prior violations, the ability to pay, and such other matters as justice requires. Nothing in this Title shall replace or supercede any criminal sanction under Title 18 or any other Title of the United States Code.

(e) FDA AUTHORITY. — No assertion that a document constitutes or contains trade secret material, and no determination by the Board that a document constitutes or contains trade secret material, shall limit in any way the ability of the Food and Drug Administration to obtain such a document from or through the Board. Provided that, unless and until it is finally determined pursuant to this Title, either through judicial review or because the time for judicial review has expired, that such a document does not constitute or contain trade secret material, the Food and Drug Administration shall treat the document as a trade secret in accordance with the Federal Food, Drug, and Cosmetic Act and the regulations promulgated thereunder. In no event shall the Food and Drug Administration disclose such a document, and the only recourse to obtain such a document shall be to the Board. Nothing herein shall limit the authority of the Food and Drug Administration to obtain and use, in accordance with any provision of the Federal Food, Drug, and Cosmetic Act and the regulations promulgated thereunder, any document constituting or containing trade secret material.

(f) OTHER.-- For the purposes of this Title,

(1) the term "DOCUMENT" shall include originals and drafts of any kind of written or graphic matter, regardless of the manner of production or reproduction, of any kind of description, whether sent or received or neither, and all copies thereof that are different in any way from the original (whether by interlineation, receipt stamp, notation, indication of copies sent or received or otherwise) regardless of whether "confidential", "privileged", or otherwise, including any paper, book, account, photograph, blueprint, drawing, agreement, contract, memorandum, advertising material, letter, telegram, object, report, record, transcript, study, note, notation, working paper, intra-office communication, intra-department communication, chart, minute, index sheet, routing sheet, computer software, computer data, delivery ticket, flow sheet, price list, quotation, bulletin, circular, manual, summary, recording of telephone or other conversation or of interviews, or of conferences, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, regardless of the manner produced or reproduced. Such term shall also include any tape, recording, videotape, computerization, or other electronic recording, whether digital or analog or a combination of the two;

(2) the term "MANUFACTURER OF A TOBACCO PRODUCT" also includes the Tobacco Institute, the Council for Tobacco Research, the Smokeless Tobacco Council, the Center for Indoor Air Research, or any other trade association or entity that is primarily funded by persons who manufacture a tobacco product;

(3) any action undertaken pursuant to this Title, including but not limited to, the search, indexing, and production of documents, is deemed to be a "proceeding" before the executive branch of the United States.

(4) the disclosure process in this Title is not intended to affect the Federal Rules of Civil or Criminal Procedure or any federal law which requires the disclosure of documents or which deals with attorney-client privilege, attorney work product, or trade secret protection.

USDA

ANALYSIS OF S. 1415 - UNIVERSAL TOBACCO SETTLEMENT ACT

A bill (S.1415) entitled "Universal Tobacco Settlement Act" was introduced on November 7, 1997 "to reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed; to prevent the use of tobacco products by minors: to redress the adverse health effects of tobacco uses; and for other purposes." Although not specified in the bill, it has been estimated that the equivalent of a 62 cent per pack of 20 cigarettes increase in Federal excise taxes would be needed to cover payments agreed to in the June 20, 1997, proposed Tobacco Settlement.

In addition to the hike in cigarette prices, S.1415 would place additional prohibitions on advertising, would require stronger warning labels and would ban smoking in most public places. Although most of the impact on consumption would result from higher cigarette retail prices, these additional measures could also be a factor in reduced cigarette consumption.

An increase in cigarette prices of 62 cents per pack over about 8 years would cause consumption to decline 8 to 12 percent, assuming a price elasticity of -.25 to -.4. U.S. consumption would decline by about 50 billion cigarettes solely because of the settlement costs. A decline of this magnitude would drop both flue-cured and burley quotas by about 50 million pounds below baseline levels annually by 2006. Lost income to flue-cured and burley producers would total around $180 million annually. In addition, quota owners would lose about $40 million, warehouse operators might lose $8 million and other input suppliers and hired farm workers could lose $50 million or more in income annually.

The original provisions of S. 1415 incorporated the farm component of what is commonly referred to as the "Ford Bill". Under this provision, the tobacco price support-production control

program would remain intact. Price supports, quota levels, and assessments would be calculated the same as they are now. However, beginning in 1999, compensation would be made to eligible quota owners, quota lessees, and quota tenants for lost tobacco quota resulting from a decline in demand for domestically produced tobacco.

Annual payments for lost quota would be $4.00 per pound times the amount by which quota falls below the 1994-1996 base quota average. Quota lessee and quota tenant payments are calculated by formula to equal about one-half the amount paid the quota owner.

In addition to funds earmarked specifically for tobacco farmers, the Ford Bill would create the "Tobacco Community Revitalization Trust Fund" for tobacco producers and growing communities for the purpose of adjusting to the impact of the legislation. The proposal would earmark $2.1 billion per year for the Fund for years 1 through 10; $500 million per year for years 10 through 25; and amounts sufficient to cover tobacco program costs, as calculated annually by the USDA for years 26 and after.

The USDA would administer the Fund, which would be used for payments for lost tobacco quota and other costs. Payments for lost tobacco quota cannot exceed $1.6 billion in any calendar year. By 2001, quotas would decline to the point that the $1.6 billion cap would become effective. By 2009, cumulative payments could total more than $15 billion.

Based on what we have been able to determine, there is still a lack of agreement on how the farm component of the Tobacco Settlement will be structured. However, the tobacco farm leadership appears to be nearing a compromise on parts of the Ford and Robb Bills. The problems in flue-cured tobacco, our largest quota kind of tobacco, seem to be in two main areas: 1) whether there will be price support reductions for flue-cured tobacco - - there appears to be strong resistance to this among some groups and individuals, including Senator Helms, and 2)

finding an agreeable procedure for getting flue-cured tobacco quota transferred to actual producers. We also understand that the burley tobacco leadership will basically push for the "Ford Bill".

Based on a conversation with personnel at the Flue-Cured Tobacco Cooperative Stabilization Corporation on March 12, they, along with the burley tobacco leadership, plan to meet with Senator Ford's staff on March 16 to review their recommendations for the farm component of the Tobacco Settlement. If recommendations are delivered to Senator Ford's office on March 16, it may well be March 19-20 before recommendations are converted to bill language.

TPD/TPAS/3/11/98

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FAX

Health Division

Office of Management and Budget
Executive Office of the President
Washington, DC 20503

TO: Cynthia Rice

cc: Karl Scholz; John Talisman; John Kitchen; Joe Minarik; Roz Rettman; Patrick Locke; Rusty Moran; Randy Lyon

FROM: Marc Garufi

Date: March 9, 1998

Fax #: DPC: 6-
OTA: 622-0605
OEP: 622-1294

Pages (excluding this cover sheet): 2

COMMENTS:

Attached is sample legislative language for the revenue section of a tobacco bill. This language, which reflects Treasury's input, is similar to the McCain bill but is generically constructed. Note, if incorporated into a particular bill, the language would have to be used in all sections related to revenues (e.g., in the McCain, it would have to be incorporated in both the main revenue section and the section on Farmers).

Please let us know if you have questions.

OMB

SAMPLE LEGISLATIVE LANGUAGE

TITLE __--NATIONAL YOUTH SMOKING AND HEALTH TRUST FUND

SEC. ___. ESTABLISHMENT OF TRUST FUND.

(a) CREATION-

(1) IN GENERAL- There is established in the Treasury of the United States a trust fund to be known as the 'National Youth Smoking and Health Trust Fund', consisting of such amounts as may be appropriated or credited to the Trust Fund.

(2) TRUSTEES- The trustees of the Trust Fund shall be the Secretary of Health and Human Services, the Secretary of Treasury, and the Attorney General.

(b) TRANSFERS- There are hereby appropriated and transferred to the Trust Fund 75 percent of--

(1) amounts repaid or recovered under section ___, including interest thereon;

(2) amounts equivalent to amounts received under section ___; and

(3) amounts paid as fines or penalties, including interest thereon, under section ___.

SEC. ___. PAYMENTS OF ASSESSMENTS.

(a) DEFINITION OF ASSESSMENT SHARE- In this section, the term 'assessment share' means the ratio of--

(1) the number of units produced or imported for domestic consumption by a tobacco product manufacturer or tobacco product importer for the preceding calendar year; to

(2) the number of units produced or imported for domestic consumption by all tobacco product manufacturers or tobacco product importers for the preceding calendar year.

(b) DETERMINATIONS- Not later than September 30 of each calendar year, the Attorney General shall--

(1) determine--

(A) the assessment share of each a tobacco product manufacturer or tobacco product importer for the calendar year;

(B) the total amount of annual payments for the calendar year under subsection (c)(2); and

(C) the amount of an assessment payable by a tobacco product manufacturer or tobacco product importer for the fiscal year under subsection (c)(2); and

(2) notify each tobacco product manufacturer or tobacco product importer of the determinations made under paragraph (1) with respect to the manufacturer or importer.

(c) TOTAL AMOUNT OF PAYMENT-

[(1) INITIAL PAYMENT- Each industry source shall pay to the Trust Fund on the date of enactment of this Act, $_____________ for 1998.]

[Some bills provide for an up-front payment, though the Budget does not; defer on issue]

(2) ANNUAL ASSESSMENTS- Each tobacco product manufacturer or tobacco product importer shall pay to the Trust Fund for each calendar year, beginning on January 1 of the year following the year in which this Act is enacted, and each January 1 thereafter, an annual payment equal to such tobacco product manufacturer or tobacco product importer's assessment share of--

(A) with respect to the first year for which payments are to be made, an amount of $13,000,000,000;

(B) with respect to the second year for which payments are to be made, an amount of $16,000,000,000;

(C) with respect to the third year for which payments are to be made, an amount of $18,000,000,000;

(D) with respect to the fourth year for which payments are to be made, an amount of $19,000,000,000;

(E) with respect to the fifth year for which payments are to be made, an amount of $22,000,000,000; and

(F) with respect to the sixth year and each subsequent year, the amount shall be adjusted each year to reflect the increase in the Consumer Price Index for all urban consumers (as published by the Bureau of Labor Statistics) from the second preceding calendar year to the preceding calender year, whichever is greater.

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OMB

Three primary concerns regarding McCain's tobacco bill are highlighted below.

(1) Spending Does Not Align with the Budget. The Budget funds certain priority items that McCain's bill does not address. These include:

- Child Care ($7.5 billion over 5 years in the Budget)
- Class Size ($7.3 billion over 5 years)
- Medicaid Outreach ($.9 billion over 5 years)
- Research Fund for America ($25.3 billion over 5 years)
- Cancer Clinical Trials ($.8 billion over 5 years)

Spending is higher in McCain's bill than the Budget for unrestricted payments to States (+$6.3 billion over 5 years), which could be redirected to some of the above activities.

(2) Revenues are too "Tax-Like." Compared to some other bills (e.g., Kennedy, Conrad), the revenue provisions in McCain are less "tax-like," but they still need to be modified per our marked-up language which has been forwarded previously. McCain's revenue provisions contain the following elements:

"Non-Tax" Elements

- McCain creates a Trust Fund for tobacco company assessments, whose Trustees are the Secretary of HHS and the FDA Commissioner, as opposed to the IRS Commissioner or the Secretary of Treasury.
- Bill does not mention any administrative structures for collecting revenues similar to an excise tax.

"Tax-Like" Elements

- McCain penalties are assessed on the basis of sales volume, which is arguably similar to the per unit structure of excise taxes.

(3) Needs a Firm-Specific Penalty. Similar to the Tobacco Settlement, McCain imposes an industry-wide rather than a firm-specific penalty. The legislation should include a combination of both industry-wide and company-specific penalties.

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U.S. DEPARTMENT OF AGRICULTURE
FARM SERVICE AGENCY
STOP 0514
1400 INDEPENDENCE AVE SW
WASHINGTON DC 20250-0514

DATE: 3/13 **TIME:** ______

TO: Mary Smith

FAX: 456-7431

FROM: Doug Richardson - Vernon Greise

OFFICE OF DIRECTOR, FSA, TPD
STOP 0514
1400 INDEPENDENCE AVE SW
WASHINGTON DC 20250-0514

FAX: (202) 690-2298

NUMBER OF PAGES (INCLUDING COVER): 4

SUBJECT: S. 1415

COMMENTS: As Requested.

REPORT INCOMPLETE OR ILLEGIBLE TRANSMISSIONS TO: 202-720-5988

TITLE I—REGULATION OF THE TOBACCO INDUSTRY

Subtitle A—Restriction on Marketing and Advertising

FDA
DoJ

Subtitle B—Warnings, Labeling and Packaging

FDA
DoJ
Treas

Subtitle C—Restriction on Access to Tobacco Products

FDA

Subtitle D—Licensing of Retail Tobacco Sellers

FDA
DoJ
Treas

Subtitle E—Regulation of Tobacco Product Development and Manufacturing

FDA

Subtitle F—Compliance Plans and Corporate Culture

FDA
DoJ

TITLE II—REDUCTION IN UNDERAGE TOBACCO USE

CDC
FDA
Treas

TITLE III—STANDARDS TO REDUCE INVOLUNTARY EXPOSURE TO TOBACCO SMOKE

OSHA
EPA

TITLE IV—PUBLIC HEALTH AND OTHER PROGRAMS

Subtitle A—Public Health Block Grant Program

HHS

Subtitle B—Other Programs

HHS

TITLE V—CONSENT DECREES, NON-PARTICIPATING MANUFACTURERS, AND STATE ENFORCEMENT

DOJ
FDA

Subtitle A—Consent Decrees and Non-Participating Manufacturers

Subtitle B—State Enforcement

TITLE VI—PROVISIONS RELATING TO TOBACCO-RELATED CIVIL ACTIONS

DoJ

SEC. 2. FINDINGS.

(a) GENERAL FINDINGS.—Congress makes the following findings:

(1) The Food and Drug Administration and other public health authorities view the use of tobacco products by the nation's children as a "pediatric disease" of epic and worsening proportions that

3/5 DRAFT 6:00pm

Key Concerns about S. 1415

The Administration applauds the Commerce Committee's efforts to forge a bipartisan consensus to enact comprehensive tobacco legislation this year. To ensure that this effort meets our goals of dramatically reducing teen smoking, S. 1415 should be amended as follows:

Include the Price Increases Needed to Reduce Youth Smoking. In September, the President called for a combination of industry payments and penalties to increase the price of cigarettes by up to $1.50 a pack over the next decade as necessary to meet youth smoking reduction targets. Research shows that increasing the price of cigarettes is the best way to reduce youth smoking. S. 1415 would raise the price by only about $.62 cents per pack when fully phased in.

Strengthen Penalties Tied to Youth Smoking. The Administration believes legislation should impose severe financial penalties on tobacco companies that fail to meet ambitious youth smoking reduction targets. S. 1415 should be amended to ensure that the penalties fall both on the industry as a whole and on particular companies, that the penalties increase as a result of continued or severe noncompliance, and that they are sufficiently high to deter marketing and selling tobacco products to minors.

Reaffirm FDA's Full Authority to Regulate Tobacco Products. The Administration supports federal legislation that affirms efforts by the Food & Drug Administration (FDA) to regulate tobacco like any other drug or device and that provides FDA with sufficient flexibility to meet changing circumstances. S. 1415 should be amended to make explicit that the FDA has the ability to regulate tobacco products ~~as a~~ like any other drug or device, without ~~pre~~ new procedural hurdles, and including the ability to regulate advertising of such products. At the same time, the amendment could replace the safety and efficacy standard for tobacco products with a public health standard.

Create a Strong Nationwide Licensing System. A strong licensing system is needed to ensure compliance with the law forbidding sales of tobacco products to minors, as well as to prevent smuggling of tobacco products. This system should run from the manufacturer all the way down to the retail level.

Strengthen International Efforts to Control Tobacco. The Administration strongly believes that one of the elements of any comprehensive bipartisan tobacco legislation must be the strengthening of international efforts to control tobacco. In particular, the Administration supports efforts to address the health risks associated with tobacco use at an international level by funding multilateral and bilateral efforts.

Guarantee Broad Document Disclosure. Legislation should provide for broad and expeditious disclosure of tobacco industry documents to the public and the FDA, while preserving attorney-client privilege. All disclosure provisions should serve as a supplement to, rather than a replacement for, normals ways of obtaining documents in litigation.

Provide for the Needs of Minority Communities. The Administration believes that there should be provisions in comprehensive legislation to address the particular needs of ~~adversely effected groups including~~ minorities, many of whom have been targeted by tobacco marketing campaigns. These concerns should be addressed by appropriately targeting programs in areas such as: counter-advertising, research, provision of health services, and prevention and cessation programs.

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OFFICE OF SCIENCE AND TECHNOLOGY POLICY
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Executive Office of the President
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FAX TRANSMITTAL SHEET

DATE:

TO: Kevin Burke

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FROM: Mando

NUMBER OF PAGES (INCLUDING COVER SHEET): 4

Kevin - Please suggest changes if I have missed who should be reviewing each section.

CDC
FDA
Treas
OMB

TITLE III—STANDARDS TO REDUCE INVOLUNTARY EXPOSURE TO TOBACCO SMOKE

CDC
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NIH HHS
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RETAILER REGISTRATION/LICENSING ISSUES

Elements of a Registration System

- Retailers of tobacco products will be required to "register" with AFT prior to engaging in the retail sale of tobacco products. AFT would be responsible for ensuring that only registered retailers sell tobacco products.

- Manufacturers, importers and wholesalers may distribute tobacco products only to registered retail dealers. AFT would be responsible for enforcing this requirement.

- Registration will be conditioned upon compliance with Federal laws regulating the distribution of tobacco products, including payments of industry payments/taxes.

- AFT would be responsible for taking action against retailers who violate distribution requirements (e.g., sell to unregistered retailers).

- Registration would be subject to suspension and/or revocation automatically upon a determination by FDA that retailer's violations warrant such action.

- FDA would continue its national enforcement strategy of contracting with state and local agencies to conduct compliance checks.

- FDA would have authority to develop a penalty schedule under which retailers who sell to minors would be subject to escalating civil money penalties and registration suspension and/or revocation (e.g., civil money penalties start with first violation; registration subject to 30 day suspension after 3 violations).

- HHS/FDA would be responsible for providing administrative process for retailers charged with violations of access provisions. Statutory provisions should be structured so that suspension/revocation would be automatic once the HHS/FDA process is complete.

- Treasury proposes to pay for ATF system/activities through the imposition of either registration fees or occupational taxes.

- HHS/FDA state contract contracting program and its staffing of the enforcement process would be funded through annual appropriations.

- *Unresolved issue*: Because retailers can appeal the administrative actions of AFT and HHS/FDA to the court of appeals, there could be significant delay before the suspension goes into effect. Should there be expedited procedures?

- *Unresolved issue:* How will registration suspension be policed? Will AFT monitor all suspensions/revocations, or will monitoring need to be included in FDA's contracts with the states?

- *Unresolved issue:* Should registrations be subject to suspension and/or revocation for violations of access requirements other than the prohibition on sale to minors (e.g., repeated violations of the prohibition on self-service modes of sale)?

Role of State Licensing

- At minimum, state and local licensure requirements should not be preempted. State and/or local licensure programs would provide additional mechanism to help reduce sales to minors.

- Although state and local licensing programs would add value, it is not clear that the benefits of requiring states to enact such programs would outweigh the costs (e.g., the need to provide the states something in return, federalism concerns, administrative responsibilities of ensuring that states have appropriate programs in place).

- *Unresolved issue:* Some legislative proposals, although not the current McCain draft, contain provisions that would fine clerks who sell to minors and/or minors themselves. As a general matter, FDA does not enforce against individual users/recipients of a product. In addition, its current enforcement approach does not record the identity of the clerk. If adopted by Congress, these requirements — particularly fines against minors who purchase tobacco products — should be administered and enforced at the state or local level, and should not be made part of the FDA program or statute.

U.S. Department of Agriculture

DATE: MAR 12 1998

FROM: Dallas Smith
Deputy Under Secretary
Farm and Foreign Agricultural
Services

TO: Mary Smith
The White House

RE: Analysis of McCane S.1415

We will continue talking with Rob Mangas and as we get more details on compromises between Senator Ford proposals and Senator Robb proposals we will supplement our analysis.

Thank you.

Attachment

ANALYSIS OF S.1415 - UNIVERSAL TOBACCO SETTLEMENT ACT

A bill (S.1415) entitled "Universal Tobacco Settlement Act" was introduced on November 7, 1997 "to reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco uses, and for other purposes." Although not specified in the bill, it is assumed that the Federal excise tax would be raised by $1.50 per pack of 20 cigarettes over 3 years to accomplish the objective of reducing U.S. cigarette consumption, especially youth smoking. A number of health officials have proposed this level of tax increase to accompany other measures and it appears to be the operating figure and timetable at this point.

In addition to the large jump in the Federal excise tax, S.1415 would place additional prohibitions on advertising, would require stronger warning labels and would ban smoking in most public places. Although most of the impact on consumption would result from higher cigarette retail prices, these additional measures could also be a factor in reduced cigarette consumption.

A jump in cigarette prices of 50 cents a pack annually for 3 years would result in an increase in the retail price of cigarettes of 75 percent. Assuming a price elasticity of demand for cigarettes of -.3 to -.4, U.S. cigarette consumption would decline from 20 to 30 percent. U. S. consumption would drop from about 475 billion cigarettes to around 360 billion cigarettes annually. A decline of this magnitude would lower flue-cured use by about 135 million pounds per year and burley use by about 100 million pounds. Lost income to flue-cured and burley producers would total about $400 million annually.

Based on what we can determine at this point, the procedure for setting flue-cured and burley quotas would not change. The original provisions of S.1415 incorporated the farm component of what is commonly referred to as the "Ford Bill". This farm component includes provisions to compensate quota owners, quota lessees and quota tenants for lost income due to reduced demand for domestic tobacco as a result of retail price increases.

Based on what we have been able to determine, there is still a lack of agreement on how the farm component of the Tobacco Settlement will be structured. The problems seem to be in two main areas: 1) whether there will be price support reductions for flue-cured tobacco - - there appears to be strong resistance to this among some groups and individuals, including Senator Helms, and 2) finding an agreeable procedure for getting flue-cured tobacco quota transferred to actual producers. (Note: These two problem areas were identified in a conversation between Keith Pitts and Rob Mangas on 3/11/98.)

We understand the different tobacco groups were working on compromise provisions as late as mid-afternoon, March 11, 1998. Based on a conversation with personnel at the Flue-Cured Tobacco Cooperative Stabilization Corporation at 4:30 pm on March 11, they plan to meet with Senator Ford's staff on March 16 to review their recommendations for the farm component of the Tobacco Settlement. If recommendations are delivered to Senator Ford's office on March 16, it may well be March 19-20 before recommendations are converted to bill language. According to Keith Pitts, Rob Mangas will provide the Department copies of any draft legislation for comment.

OFFICE OF THE ATTORNEY GENERAL

TO

FAX Number ~~456-7431~~ 7028

Name: Cynthia Rice

Telephone Number:

Organization: DPC

Building, Room Number, etc.

Number of Pages Transmitted (including cover sheet)

FROM

FAX Number:

Name: Tom Perrelli 514-2267

Telephone Number : Date:

Building, Room Number, etc. MAIN JUSTICE - ROOM

COMMENTS

(NOTE: If the receiver did not receive the correct number of pages, please call the transmitter and request retransmission)

Cynthia,

Here's a draft of DOJ's comments on the McCain bill. We are still working on a couple of things that we will finish in the morning and other people here need to read it, but I wanted to get you something to work with. If you intend this to go outside the administration, let us know so that we can get it cleaned up.

Tom

DRAFT -- 3/10/98, 10 PM

COMMENTS ON S. 1415

This memorandum provides preliminary views on the constitutional concerns raised by the Universal Tobacco Settlement Act, S.1415. Where possible, this memorandum offers suggestions for minimizing the risk of constitutional challenge posed by the provisions contained in S.1415. We are still in the process of completing the review of the provisions in S.1415 that concern licensing and document disclosure.

Sec. 2. Findings: In light of the provisions contained in Title I that would restrict the marketing and advertising of tobacco products, the legislation should adopt and incorporate the findings that support the Food and Drug Administration's analogous restrictions on marketing and advertising. <u>See</u> 61 Fed. Reg. 44396 (Aug. 28, 1996).

Sec. 3. Purposes: We recommend amending subsections (2), (4) and (7) of section 3 as follows:

Subsection (2) provides that it is a purpose of the bill to "ban all outdoor tobacco advertising and ban all cartoon figures and human figures used in connection with tobacco advertising." As discussed below, such categorical restrictions would go beyond the FDA's rule limiting the advertising of tobacco products and would therefore raise significant constitutional concerns that are not presented by the FDA rule. Accordingly, subsection (2) should be amended to accord with our suggested amendments to the substantive provisions of S.1415 that would ban all outdoor tobacco advertising and ban all cartoon figures and human figures used in connection with tobacco advertising.

Subsection (4) provides that it is a purpose of the bill to "subject the tobacco industry to severe financial penalties in the event that underage tobacco usage does not decline radically over the next 10 years[.]" However, the relevant substantive provisions of S.1415 refer to the payments that manufacturers would be required to make as "surcharges." <u>See, e.g.</u>, Section 205. The purpose section should be amended to accord with the substantive provisions.

Subsection (7) provides that it is a purpose of the bill to "require the manufacturers of tobacco products to disclose <u>all</u> present and future non-public internal laboratory research regarding tobacco products." (emphasis added). The substantive provisions of the bill regarding the disclosure of documents are not as broad as the statement suggests. The relevant provisions would permit manufacturers to assert privileges against the disclosure of certain documents that fall within this category. <u>See</u> Title VII. Accordingly, we recommend deleting the word "all" from subsection 7.

In addition, we note that although subsections (9) through (12) make reference to the National Tobacco Settlement Trust Fund, which S.1414 would have established, S.1415 does not establish such a fund.

Title I–Regulation of the Tobacco Industry; Subtitle A–Restriction on Marketing and Advertising: Subtitle A contains a number of provisions that would impose restrictions on the advertising and marketing of tobacco products. Many of these provisions track those set forth in the recently promulgated FDA regulations. The Administration believes, as the Department of Justice has explained at length in the FDA litigation, that the FDA's regulations that restrict the advertising of tobacco products are consistent with the First Amendment, under the currently controlling framework for First Amendment review of restrictions on advertising, set out by the Supreme Court in Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n, 447 U.S. 557 (1980), and subsequent cases. The FDA restrictions would, if implemented, substantially advance the Government's wholly legitimate and compelling interest in curtailing minors' demand for and use of tobacco products by reducing minors' exposure to tobacco product advertising. For these reasons, the advertising restrictions contained in S.1415 that track the FDA regulations are constitutional. Other provisions in S.1415, however, would impose restrictions on the advertising of tobacco products that are broader than those contained in the FDA regulations. These broader provisions raise significant constitutional concerns that they are not appropriately tailored to serve the government's interest in curtailing underage tobacco use through restricting youth exposure to tobacco product advertising.

1. Section 101(a)(1) provides that "[n]o manufacturer, distributor, or retailer may use any form of outdoor tobacco product advertising, including bill boards, posters, or placards." This restriction would go beyond the FDA regulation restricting the outdoor advertising of tobacco products. The FDA regulation bans all outdoor advertising of tobacco products within 1000 feet of a school or playground but otherwise requires only that such outdoor advertising be confined to so-called "tombstone advertising," i.,e., black letters on a white background. 21 C.F.R. § 897.30(b). The FDA regulation's restriction on the outdoor advertising of tobacco products is appropriately tailored to serve the government's wholly legitimate and compelling interest in preventing underage consumers' exposure to advertising about products that may not lawfully be sold to them.

The greater breadth of the ban on outdoor advertising contained in section 101(a)(1) gives rise to significant constitutional concerns that are not presented by the FDA regulation. The provision should be redrafted to alleviate these concerns. Instead of imposing a complete ban, the provision could simply confirm the FDA's authority to regulate the outdoor advertising of tobacco products. In addition to confirming the FDA's regulatory authority, the bill could also adopt the existing FDA restriction on outdoor advertising or extend the FDA restriction in a more tailored manner. For example, the provision could impose a general requirement that outdoor advertising appear in a tombstone format and then extend the FDA's ban on such outdoor advertising to include geographic areas that are not mentioned in the FDA regulation but that are frequented by children.

2. Section 101(b) of S.1415 provides that "[n]o manufacturer, distributor or retailer may use a human image or a cartoon character or a cartoon-type character in its advertising, labelling, or promotional with respect to a tobacco product." This restriction would go beyond the FDA regulation restricting the use of images in the advertising of tobacco products, which provides that, in general, tobacco advertising must take the form of tombstone advertising but permits images to be used without restriction in certain circumstances, for example, in an "adult publication," one which has a readership that is at least 85 percent adult and that includes less than 2 million children. 21 C.F.R. § 897.32(a)(2)(I)-(ii).

Section 101(b)'s broader restriction on the use of images in the advertising of tobacco products would raise significant constitutional concerns that the FDA regulation does not present. These concerns could be alleviated by confirming the FDA's authority to regulate in this area or by extending the FDA restriction in a more tailored manner. For example, the bill could adjust the definition of an "adult publication" by lowering the number of child readers below 2 million and then incorporate the newly-defined "adult publication" exception. We also note that the restriction on the use of "human images" might be underinclusive, as the use of image advertising depicting animals is not restricted, even though such image advertising would be likely to attract children. <u>See</u> <u>Rubin v. Coors Brewing Co.</u>, 514 U.S. 467, 488-490 (1995) (explaining concerns raised by underinclusive restrictions on commercial speech). Accordingly, the restriction on image advertising should be extended to include images of both human and animal figures.

3. Section 101(c) provides that "[n]o manufacturer, distributor, or retailer may use the Internet to advertise tobacco products unless such an advertisement is inaccessible in or from the United States." Insofar as the complete ban on Internet advertising would be for the purpose of diminishing minors' exposure to such advertising, it would raise significant constitutional concerns, because there might be more narrowly tailored means of achieving such a governmental objective. <u>Cf.</u> <u>Reno v. ACLU</u>, 117 S.Ct. 2329, 2346-48 (1997) (discussing less restrictive alternatives to a ban on Internet transmission of indecency in a manner available to minors). Congress should consider whether, in light of available technology, there may be

means short of a complete ban that would serve the government's interest in protecting underage consumers from advertising about products that may not lawfully be sold to them. In order to ensure that the government retains necessary flexibility to regulate the advertising of tobacco products on the Internet, however, we recommend that the bill simply provide express statutory confirmation of the FDA's existing authority to regulate such advertising. This approach would ensure that any future regulatory restrictions are targeted at appropriate forms of Internet advertising and are fashioned in a manner that is appropriately sensitive to First Amendment concerns.

4. Section 101(d) would, in general, limit each manufacturer of tobacco products to the display of not more than two separate point-of-sale advertisements in any location at which tobacco products are sold, and would limit each retailer to the display of one-point-of-sale advertisement relating to the retailer's or wholesaler's contracted retailer or private label brand product. The bill would also require that these point-of-sale advertisements consist only of black letters on a white background, and not be larger than a prescribed size. However, the bill would include a significant exception to this limitation for "adult-only stores and tobacco outlets." Sec. 101(d)(2). We note that section 101(d)'s exception permitting manufacturers with a greater market share to engage in more point-of-sale advertising than their competitors raises significant constitutional concerns. It appears inconsistent with the government's asserted interest in restricting such advertising because it would appear to be unrelated to the objective of reducing youth tobacco use, and it constitutes a speaker-based preference for certain manufacturers. As the Supreme Court recently explained in striking down a commercial speech restriction, if the government imposes advertising constraints on some commercial speakers, but declines to impose those same restrictions on an analogous class of speakers, the disparate treatment can "undermine and counteract" the effects of the imposition, and suggest that the government is not truly or fully committed to advancing its claimed interest. Rubin v. Coors, 514 U.S. 467, 488-490 (1995).

5. Section 102(c) provides that "[n]o payment shall be made to any manufacturer, distributor, or retailer for the placement of any tobacco product or tobacco product package or advertisement . . . as a prop in any television program or motion picture produced for viewing by the general public; . . . or in a video or on a video game machine." This provision could reach forms of expression other than commercial speech that would be subject to infringement only by regulations that were narrowly tailored to serve a compelling governmental interest. See Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-474, 482 (1989) (describing commercial speech). To ensure that this restriction does not impermissibly limit fully protected, non-commercial speech, the provision should be redrafted to prohibit the placement of "any

brand-name tobacco product or brand-name tobacco product package or any tobacco product advertisement."

6. Section 102(d) provides that "[n]o direct or indirect payment shall be made by any manufacturer, distributor or retailer to any entity for the purpose of promoting the image or use of a tobacco product through print or film media that appeals to individuals under 18 years of age or through a live performance by an entertainment artist that appeals to such individuals." The scope of the restriction is unclear. For example, is the provision intended only to restrict attempts to promote brand names of tobacco products or is it intended to restrict the promotion of smoking generally? If the latter were the case, the provision would appear to restrict some non-commercial speech, raising significant constitutional concerns. In addition, the phrase "appeals to individuals under 18 years of age" is unclear and could be subject to challenge on vagueness grounds. These concerns could be alleviated by limiting the provision's scope to commercial speech and substituting a more objective definition of the media or types of entertainment that would appeal to underage consumers. For example, the provision could be amended to read: "[n]o direct or indirect payment shall be made by any manufacturer, distributor or retailer to any entity for the purpose of advertising a tobacco product or of promoting the image or use of a brand-name tobacco product through an adult publication, film media that has been rated R through G, or their equivalent, by the motion picture industry, or through a live performance by an entertainment artist that persons under the age of 18 are permitted to attend."

Title I—Regulation of the Tobacco Industry; Subtitle F—Compliance Plans and Corporate Culture: Under section 152(b)(8), manufacturers of tobacco products would be required to "promulgat[e] corporate policy statements that express and explain the commitment of" the manufacturer to, inter alia, "(A) compliance with applicable Federal, State, and local laws"; and "(B) reducing the use of tobacco products by individuals who are under 18 years of age." If this simply would require companies to publish a commitment not to engage in certain proscribed conduct, it would not appear to raise serious constitutional problems. But insofar as manufacturers would be required not only to state what they are doing and will do as required by law, but also to state that they are doing so because of "polic[ies]" to which they are "committ[ed]," that would raise problems of compelled speech. Accordingly, this provision should be amended to clarify that companies would not be required to swear to a belief that certain conduct is not only mandated, but morally correct. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943). Cf. Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986).

Section 154(b) provides that a manufacturer, distributor, or retailer of a tobacco product shall require that any lobbyist or lobbying firm employed or retained by the manufacturer, distributor, or retailer, or any other individual who performs lobbying activities on behalf of the manufacturer, distributor, or retailer, as part of the employment or retainer agreement refrain from supporting or opposing any Federal or State legislation, or otherwise supporting or opposing any governmental action on any matter without the express consent of the manufacturer, distributor, or retailer." The Supreme Court has stated that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." First National Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.31 (1978) (citing California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972); Eastern R.R. Presidents Conf. v. Noerr Motors Freight, Inc., 365 U.S. 127, 137-38 (1961). Section 154(b) would impose a lobbying restriction on tobacco companies that is not imposed on any other persons or entities -- namely, the requirement that the lobbyists for such companies obtain "express consent" of their principal before "supporting or opposing" any governmental action. In other words, tobacco companies -- unlike all other persons and entities -- would be uniquely disadvantaged by being prohibited from giving their lobbyists a general warrant to petition on their behalf. Assuming that traditional First Amendment scrutiny would apply, discrimination against the lobbying activity of a single type of corporate entity, such as that proposed in Section 154(b), likely would be subject to strict scrutiny. In that free-speech context, certain speaker-based discriminations are permissible. See Regan v. Taxation With Representation of Washington, 461 U.S. 540, 550-551 (1983). But such speaker-based distinctions are presumptively impermissible if "based on the content or messages of [the] groups' speech," Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 834 (1995), or on "the identity of the interests that spokesmen [for the disfavored entities] may represent in public debate over controversial issues," Bellotti, 435 U.S. at 784. Accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990). In order to survive strict scrutiny, the speaker-based restriction must be narrowly tailored to serve a compelling state interest. Austin, 494 U.S. at 657. It is not apparent that section 154(b) would survive such strict constitutional scrutiny.

Section 154(c)(4) would require lobbyists for tobacco-product manufacturers, retailers and distributors to enter into a signed agreement providing that such a lobbyist will "fully comply with the business conduct policies and commitments (including those relating to the prevention of underage tobacco use) of the manufacturer, distributor, or retailer involved." The scope of this provision might depend in large part on how the "commitment" requirement in section 152(b)(8) is construed. See above. If section 154(c)(4) were construed to prohibit manufacturers and/or their lobbyists from lobbying to achieve certain ends that might be inconsistent with "prevention of underage tobacco use," it would appear to violate such manufacturers' First Amendment right to petition. See, e.g., City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991).

Section 155(a) provides that "[n]ot later than 90 days after the date of enactment of this Act, manufacturers, distributors, or retailers of tobacco products shall provide for the termination of the activities of the Tobacco Institute and the Council for Tobacco Research, U.S.A., and the Institute and Council shall be dissolved." The provisions expressly naming certain institutions and prohibiting them from conducting business would be subject to substantial constitutional challenge as a Bill of Attainder. See Nixon v. Administrator of General Services, 423 U.S. 425 (1977); Cummings v. Missouri, 71 U.S. 277 (1866) ("Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment); SBC Communications, Inc. v. FCC, 981 F.Supp. 996 (W.D. Tex. 1997). In addition, to the extent that such trade organizations are principally engaged in protected expressive activities, their compelled dissolution would infringe upon First Amendment rights of expression and expressive association, unless such dissolution were necessary to address a compelling state interest. See Roberts v. United States Jaycees, 468 U.S. 609 (1984); Sanitation Recycling Industry, Inc. v. City of New York, 107 F.3d 985, 998-1000 (2d Cir. 1997).

Section 155(b) restricts the manner in which "manufacturers, distributors, or retailers of tobacco products may form or participate in any trade organization of other industry association only in accordance with this subsection." The provision limits the persons who may serve on the board of directors of any industry association. Sec. 155(b)(2). It also limits the persons with whom the association may consult for legal advice. Sec. 155(b)(2)(C). In addition, it limits the companies with whom the association may meet and how internal meetings must proceed. Sec. 155(b)(3). Finally, it provides the Attorney General and, as appropriate, state antitrust authorities, with "access to all books, records, meeting agenda and minutes, and other documents maintained by the association or organization." To the extent that this provision would apply to industry associations that are principally engaged in protected expressive activities, this provision raises significant constitutional concerns. It would appear to preclude the tobacco industry from forming a trade association for the purpose of advocating legislative reform or political views that would be free from substantial governmental interference. See Roberts v. United States Jaycees, 468 U.S. 609 (1984); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); Sanitation Recycling Industry, Inc. v. City of New York, 107 F.3d 985, 998-1000 (2d Cir. 1997).

Title III—Standards to Reduce Involuntary Exposure to Tobacco Smoke: Section 1302 provides that the "responsible entity for each public facility shall adopt and implement at such facility a smoke-free environment policy which meets [certain requirements.] Section 301(2) defines a "public facility" as "any building regularly entered by 10 or more individuals at least 1 day per week, including any such building owned by or leased to a federal, State, or local government entity." The term does not include buildings or portions of buildings "regularly used for residential purposes," nor does it include buildings which are used as restaurants (other than a fast food restaurant), bars, private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants, or prisons. Notwithstanding the finding set forth in subsection of section 3 of S.1415, we find that the provision should be limited to apply to entities that are either "in or affecting" interstate commerce or whose activities are "in or affecting" interstate commerce in order to minimize the risk that the provision would be challenged as exceeding the scope of Congress's power under the Commerce Clause. See United States v. Lopez, 514 U.S. 549 (1995)

Title IV—Public Health and Other Programs; Subtitle B—Other Programs: Section 413 provides that the Secretary of Health and Human Services shall establish "an independent board to be known as the Tobacco Free Education Board' (referred to in this section as the 'Board') to enter into contracts with or award grants to eligible public and nonprofit private entities to carry out public informational and educational activities designed to reduce the use of tobacco products." Section 413 further provides that the Board shall be comprised of nine members, three "of whom shall be individuals who are heads of a major public health organization."

Because the board members would be responsible for awarding federal grants, they would exercise "significant authority" for purposes of the Appointments Clause. See generally Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). As a result, they would have to be appointed in accordance with the requirements of that Clause. The requirement that three members of the Board must be "heads of a major public health organization" would unduly restrict the constitutionally vested appointment discretion of the Secretary. Accordingly, that limitation should be deleted.

Title V—Consent Decrees, non-Participating Manufacturers, and State Enforcement: Section 511(a) provides that States, in order to receive certain federal payments, and tobacco manufacturers or distributors, in order to receive certain protection from liability, shall enter into consent decrees. The provision does not, however, describe what, if any, litigation the contemplated decrees would resolve. In the absence of a pending lawsuit, state courts would likely not possess, and federal courts certainly would not possess, the jurisdiction to enter a consent decree. See Firefighters v. Cleveland, 478 U.S. 501, 525-526 (1986). In addition, although section 511 is presumably intended to condition the receipt of federal benefits on the resolution of only certain types of lawsuits between states and tobacco manufacturers or distributors, section 511(a) does not specify the class of lawsuits that must be resolved by decree. The provision should therefore be amended to specify the kind of litigation that, if outstanding on a certain date, must be resolved in order for the parties to them to qualify for federal benefits. For example, the provision could state that the federal benefits are conditioned upon States and tobacco manufacturers or distributors entering into consent decrees to resolve any outstanding litigation regarding claims by the States that the tobacco manufacturers or distributors are liable for costs related to the health consequences of smoking. The provision could then reference the claims that were at issue in the Florida, Texas, and Mississippi settlements as an example of the type of litigation that must be resolved by consent decree in order for the parties to them to be eligible for receipt of the federal benefits.

Section 511(b) provides that the consent decrees referred to in section 511(a) "shall contain provisions to clarify the application and requirements of this Act (and the amendments made by this Act), including provisions relating to" a variety of aspects of S.1415. Section 511(b) could be subject to substantial challenge under the "unconstitutional conditions" doctrine to the extent that it would condition the protections from liability for tobacco manufacturers and distributors on the requirement that they enter into consent decrees that contain otherwise unconstitutional restrictions on expressive activities. Even though the provisions referencing the consent decrees would not directly impose restrictions on speech, they might be subject to substantial constitutional challenge if they would permit a manufacturer or distributor to qualify for federal benefits only by agreeing in consent decrees with the States to refrain from exercising First Amendment rights. In arguably analogous contexts, the Court has struck down statutes that conditioned the receipt of federal benefits on the requirement that the recipient of the benefit refrain from engaging in protected expressive activities. See, e.g., F.C.C. v. League of Women Voters, 468 U.S. 364 (1984). Although cases such as League of Women Voters did not involve restrictions on commercial speech, the lead opinion in the recent case of 44 Liquormart Inc. v. Rhode Island, 116 S.Ct, 1495 (1996), expressly applied the unconstitutional conditions doctrine to strike down a restriction on commercial speech. See id. at 1513 (opinion of Stevens, J.).

Section 511(b)(3) provides that the "terms and conditions contained in the consent decrees described in subsection (a) shall include a provision waiving the federal or State constitutional claims of the parties and providing for severability of the provisions of the decree." The requirement that the consent decrees include a waiver of constitutional claims as a condition of the receipt of federal benefits would itself be subject to substantial constitutional challenge under the "unconstitutional conditions" doctrine. Cf. Louisiana Pacific Corp. v. Beazer Materials & Services, Inc., 842 F. Supp. 1243, 1250-1255 (E.D. 1994) (applying heightened scrutiny to a settlement with the government that included a private party's waiver of a right to bring a constitutional challenge in the future); Clark v. County of Placer, 923 F. Supp. 1278, 1287-1288 (E.D Cal. 1996) (striking down provision in a settlement with the government that precluded a private party from bringing a constitutional challenge in the future.) Indeed, the risk would arguably be greater here than in the settlement context generally because the federal government would be conditioning the receipt of federal benefits by the manufacturers on their willingness to include waivers of their right to bring constitutional challenges to speech restrictions that would be adopted in settlements to which the federal government is not even a party. For that reason, the federal government arguably would be unable to rely on the unique settlement context to justify the condition. Accordingly, the requirement that such a waiver of the right to bring a constitutional challenge be included in the decrees would not alleviate the significant constitutional concerns that would be presented by a requirement that the decrees also contain otherwise unconstitutional speech restrictions in order for the manufacturers to qualify for such benefits. Such a requirement might serve only to increase the grounds for constitutional challenge.

Sections 513(b) and 514 appear to heighten the risk of constitutional challenge under the "unconstitutional conditions" doctrine to the provisions concerning the consent decrees. These provisions would impose additional fees on manufacturers that do not enter into either a consent decree of the type contemplated by section 511 or the National Tobacco Control Protocol described in section 512. The provisions would therefore arguably serve to "penalize" manufacturers that chose not accept the otherwise unconstitutional speech conditions as a term of their consent decrees with the States.

As to manufacturers that do not enter into the consent decrees described in section 511, section 512 provides that "each tobacco manufacturer to which this Act applies shall enter into a National Tobacco Protocol that shall be "developed by the Secretary as a binding and enforceable contract that embodies the terms of this Act[.]" It appears that, notwithstanding the mandatory language of section 512, manufacturers would have the option of electing not to enter into the protocol, and thus that the protocol is intended to serve as a mechanism by which manufacturers may qualify for liability protections without entering into a consent decree with a State.[1] In addition to the protections that would be conferred

[1] We note that S.1415 is somewhat confusing on this point both because section 512 contains mandatory language and because it does not identify the federal benefits that manufacturers would receive

on participating manufacturers by Title VI, Sections 513 and 514 provide additional incentives for manufacturers to enter into the protocol by subjecting non-participating manufacturers to "an annual fee" of an unspecified amount to be determined by the Secretary and by requiring them to make higher payments into a Settlement Reserve Fund.

To the extent that the protocol would contain terms and conditions that would place restrictions on expressive activity that would violate the First Amendment if imposed directly by statute, it, too, would be subject to substantial constitutional challenge under the "unconstitutional conditions" doctrine. Manufacturers would be required to comply with certain speech restrictions in order to be exempt from the increased payments to the federal government that they otherwise would be required to pay under sections 513 and 514 and to qualify for the liability protections described in Title VI. Accordingly, both the manufacturers who entered into the contracts and later wished to break them, and the manufacturers who did not wish to agree to the terms of the protocol in return for the federal benefits, would be positioned to challenge the terms of these provisions.

Title VI–Provisions Relating to Tobacco-Related Civil Actions: By virtue of section 511(a), manufacturers who enter into the consent decrees referenced in Title V would apparently receive the liability protections set forth in Title VI. In addition, Title VI would apparently provide manufacturers that had entered into the National Tobacco Protocol with the same protections against liability from claims arising from the use of a tobacco product. Insofar as these protections would preempt state rules of procedure for state law causes of action in state court, they may be subject to federalism based constitutional challenges.

As an initial matter, section 601(a)(1) extinguishes pending "[c]ivil actions that have been commenced by a State or local governmental entity, or on behalf of such an entity against a manufacturer, distributor, or retailer that is a signatory to the National Tobacco Control Protocol. . . . ."[2] The provision should be amended to define with greater specificity the types of pending "civil actions" that would be extinguished. We recommend incorporating the language used in section 601(a)(2): "all claims arising from the use of a tobacco product."

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upon entering into the protocol. The benefits are instead set forth in Title VI, which confers liability protections only on manufacturers that have entered into the protocol.

[2] We note that the provision makes an erroneous cross-reference to section 612. The cross-reference should be amended to refer to section 512 in order to conform with the provision in S.1415 that establishes the protocol.

Section 601(b) then extinguishes all pending "[c]lass actions for claims arising from the use of a tobacco product" against a manufacturer, and grants manufacturers that sign the protocol immunity from all such future actions. Section 602(c) further provides that "[n]o class action suits, joinder of parties, aggregation of claims, consolidation of actions, extrapolations, or other devices to resolve cases other than on the basis of individual actions shall be permitted without the consent of the defendant." These provisions would bar the use of class actions and other state court procedures for consolidating actions in connection with state law claims brought in state court.

Although there is no Supreme Court precedent on point concerning the constitutionality of federally-imposed prohibitions on state court procedures for state law causes of action in state court, we believe that they would be constitutional under the principles set forth in FERC v. Mississippi, 456 U.S. 742 (1982). The Court has repeatedly noted, however, that "the general rule, bottomed deeply in the belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Johnson v. Fankell, 117 S.Ct. 1800, 1805 (1997). There are therefore risks that the provisions would be challenged on federalism grounds.

We believe that the risks of federalism-based challenges that are raised by these provisions could be reduced if a state's compliance with them were made a condition on the State's receipt of federal funds, see South Dakota v. Dole, 483 U.S. 203 (1987), New York v. United States, 505 U.S. 144 (1992) or as a limited condition of the federal government's permitting states to continue to sell cigarettes, see FERC, supra. For example, the provision could state that the sale of cigarettes at other than adults-only locations is preempted unless a State prohibits class actions against participating manufacturers and complies with the other provisions granting such manufacturers protections from liability.

We believe that the risk could be further minimized by establishing a federal fund from which all payments of claims by smokers against manufacturers, whether state or federal causes of action and whether brought in state or federal court, would be paid. The statute could then establish a series of recovery rules that would apply to the money in the federal fund in order to ensure allocational equity within the substantive caps that would apply to the fund: including the rules that would preclude payments for claims that were brought as part of a class action or that were made pursuant to a finding of punitive damages.

Finally, the provisions that would permit participating manufacturers to remove consolidated state law causes of action involving non-diverse parties to federal court would raise concerns regarding whether federal courts would possess "federal question" jurisdiction under Article III to hear them. See Verlinden B.V. v.

Central Bank of Nigeria, 461 U.S. 480 (1993); In re TMI, 940 F.2d 832 (3d. Cir. 1991), cert. denied sub nom. Gumby v. General Public Utility Corp., 503 U.S. 906 (1992). The risk would be reduced by providing for minimal diversity in such cases rather than for removal in all cases without regard to the diversity of parties.