

April 14, 1997

POTENTIAL TOBACCO ACTIVITIES

Enforcement of broadcast advertising ban. Request the Department of Justice to investigate whether there are other situations similar to that addressed in its consent order with Philip Morris (the Marlboro logo placed in a position at Madison Square Garden so that it appeared frequently during telecasts of New York Knicks games) and encourage the Department to continue its efforts to enforce the ban of broadcast advertising of tobacco products. Enforcement would prevent the broadcast of tobacco brand logos during televised events, particularly sporting events. Sporting events, including auto races, are increasingly popular events with families and are therefore seen by large numbers of young people either in person or on television.

Treatment of adolescent nicotine addiction. Direct DHHS to develop and carry out a federal research plan focusing on the prevention and treatment of adolescent addiction to nicotine. To date, virtually all research that has been conducted on nicotine addiction has focused on adults. It is not known whether currently available prevention strategies and treatments are effective with children and adolescents or whether different approaches are necessary for this group.

State assistance. Direct DHHS to provide technical assistance to states to help develop individual action plans focused on preventing and treating adolescent nicotine addiction. This initiative could build on the results of the federal research in this area described above and could include publication and distribution of guides for states - such as smoking cessation materials aimed at adolescents. It could also involve creating or highlighting public-private partnerships with schools or non-profit groups.

Improved teen surveys. Direct the Office on Smoking and Health, Centers for Disease Control and Prevention, DHHS, to expand its research efforts, especially teen surveys, to include more questions concerning teens' tobacco brand preference and advertising awareness. Further direct the Office of Management and Budget (OMB) to expedite the clearance of the questionnaires used in these surveys. Information on teen preference and awareness is essential to the development of more effective addiction prevention and treatment approaches for adolescents. In the past, OMB has refused to allow certain questions concerning teens' tobacco brand preference and awareness of marketing strategies and slogans to be asked, or if asked, to be publicly reported.

State interventions. Fully fund tobacco intervention programs in all 50 states. This would require a minimum budget increase of \$25 million over the President's 1998 budget. Currently, only 17 states participate in NCI's ASSIST program through which each state receives annual awards that range from \$650,000 a year to \$1.8 million. The remaining 33 states receive annual grants ranging from \$75,000 to \$210,000 through CDC's IMPACT program.

Need POTUS to propose.

[REDACTED]

[REDACTED]

April 14, 1997

OTHER POTENTIAL TOBACCO ACTIVITIES

Synar regulations. After consulting with the Department of Justice, direct SAMSHA to revisit its Synar regulations and consider making changes that would tighten the standards that States are required to meet in order to qualify for substance abuse block grants.

Smoke-free federal facilities. Issue an Executive Order making all federal facilities smoke-free. GSA could be involved in implementing the Order. ✓

Smoking in the workplace. Encourage the Department of Labor to issue final regulations addressing smoking in the workplace. ✓

Reimbursement for nicotine addiction treatment. Direct DHHS to reimburse for the treatment of nicotine addiction for Federally-funded health care programs and to encourage private sector coverage as well.

Health-focused foreign policy. Direct the U.S. Trade Representative and the State Department to develop trade and foreign policy that emphasizes the Administration's concerns about the health consequences of tobacco use. ✓

Smoke-free transportation facilities. Direct the Department of Transportation to issue regulations making airports (and other transportation facilities under its jurisdiction) smoke-free. Direct the Department to also begin negotiating with foreign governments to obtain an agreement that international flights to the U.S. be made smoke-free.

Conversion of tobacco crop. Announce a program designed to end the tobacco states' dependence on the tobacco economy. Assist and provide incentives to farmers to convert from tobacco crops to other agricultural products, as well as non-agricultural alternatives.

MEMORANDUM TO ELIZABETH DRYE

FROM: HIMA VATTI

DATE: JULY 9, 1997

SUBJECT: SIMPLE LEGAL EXPLANATIONS

I will provide simplified explanations of the following three legal concepts which have been brought up in recent tobacco meetings by the legal group.

1. First Amendment issue implicated by the advertising restrictions
2. Takings
3. Nexus

First Amendment Question

In the June 26 meeting, counsel mentioned that the First Amendment may not allow the government to bar *all* outdoor advertising. Basically, a state cannot require a citizen or entity to contract out of or repudiate a fundamental constitutional right (commercial speech in this case). Lawyers are referring to this rule when they use terms like "state action." The state governments would argue that the tobacco companies are "volunteering" to give up this right, but the courts might not accept this reasoning. Even if they interpret the settlement as a pure contract, the courts could find that the tobacco companies agreed to give up their speech rights under duress and invalidate those provisions of the settlement. The restrictions on the advertising freedom of retailers and distributors may not create state action problems, because those parties would repudiate commercial speech rights in contracts with the tobacco companies, not state governments.

The Takings Clause

Under the Constitution, if the government takes property, it must provide the owner with just compensation. The situation is not always clear as where the state takes Farmer Brown's land to build a highway and reimburses his loss. Most of the litigation in this area centers around the following two questions: "Did the government's action in this case constitute a taking of X's property?" OR "Did X have a compensable property interest in what the government has taken?" Under the settlement, the government must make sure that various actions against the tobacco companies do not constitute the taking of a property interest. For example, in the July 8 meeting, counsel pointed out that where federal trade secret laws protect the companies less than state law, the federal government might be "taking" trade secrets. To ascertain a taking, courts define the scope of what the plaintiff has lost. If courts define the loss narrowly, i.e. the loss of one trade secret that is hard to price, they are less likely to find a taking. In *Monsanto*, however, the court defined the

property right in a broad manner that was favorable to the plaintiff. The court found that the plaintiff had lost its right to confidentiality, not just the value of one secret. Fortunately, no case has ever found that a plaintiff has a property interest in attorney-client and work product documents, so the government "takes" nothing when it appropriates the information contained within them.

What is a Nexus?

In a deal between the government and another party, there must be a nexus or logical relationship between what the parties agree to do for one another (the point of the *Nollan* and *Dolan* cases mentioned). Suppose I apply to the state for permission to expand my beach-front property in violation of an environmental ordinance. The state agrees to grant me permission only if I finance a new roof for city hall. This is unacceptable, because there is no relationship between the nature of the two exchanges. Instead, the state could demand a higher tax to keep the area around my house clean in exchange for permission to expand.

The concept of nexus relates to the consent decree portion of the settlement in which the tobacco companies would agree to give up certain free speech rights. Counsel speculated that the consent decree might pass the First Amendment test if it was formulated as a plea bargain-type waiver of rights. This would require the government to show that a legitimate governmental interest warrants the speech restrictions, and that a nexus exists between the speech restrictions and the arguments for threatening litigation against the tobacco companies.

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S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To prohibit the use of funds to facilitate the export
or promotion of tobacco products.

IN THE SENATE OF THE UNITED STATES—105th Cong., 1st Sess.

S. _____

(title) _____

_____Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. DURBIN

Viz:

1 At the appropriate place, insert the following new sec-
2 tion:3 SEC. __. PROHIBITION ON USE OF FUNDS TO FACILITATE
4 THE EXPORT OR PROMOTION OF TOBACCO
5 PRODUCTS.6 No funds appropriated by this Act may be used by
7 any officer, employee, department, or agency of the United
8 States—

O:\CRA\CRA97.814

S.L.C.

2

1 (1) to assist or encourage the export, sale, man-
2 ufacture, advertising, promotion, or distribution of
3 cigarettes, cigars, little cigars, snuff, chewing to-
4 bacco products, pipe tobacco, or other similar to-
5 bacco products; or

6 (2) to seek, through negotiation or otherwise,
7 the removal or reduction by any foreign country of
8 any restrictions or proposed restrictions in that
9 country on the importation, sale, manufacture, ad-
10 vertising, promotion, distribution, packaging, label-
11 ing, or taxation, of cigarettes, cigars, little cigars,
12 snuff, chewing tobacco products, pipe tobacco, or
13 other similar tobacco products.

Myers, Gregoire, Moore

7/10/97

"Where you want to be" campaign.

Black Market

= We are trying to say FDA should consider black market [because it was in the comment] —

Dorra — what is level of proof FDA had to have

Greg — "we put 'significant' in there so FDA would define that — wouldn't be 1% - 2% — by rule, consenting w/ law enforcement ... "

— we req FDA to convene advisory board w/in one year. —

Matt — we wanted FDA to get started on this problem early. Science cent. so you would have a science base for going forward.

1
Matt - agreement also designed to
create alternative products. -
req. of licensing cross technology.

- Concept of timeframe - took
from Bessingfield - if in a
decade, you come up with
products, you may become
the standard

- There was this had to be
confirmation of regulatory and
market incentives.

- question was whether canonical
provision would become legal burden.

- our goal was to come up w/
framework - if you think legal
burden will work on that

* "reasonable assurance of safety"

- We wanted an overall reduction
of risk standard that would
withstand judicial scrutiny. . .

oreg - they were adamant along -
wanted something w. consumer
acceptability. The ~~extra~~
We fought it all the way along -
Said we would not accept that.
Consumer provision was ours -
from comments. They didn't
care about it.

- we weren't really preoccupied
w/ nicotine. Cared about tar -
wanted to ↓ that immediately.

Wanted to do more - That's why you see
- safety assessment of all the
ingredients.

- Thought we

- couldn't get a handle right now
on nicotine.

Elena - current std is hard?

Matt - hard to apply to tobacco product
"reasonable assurance of safety."

- one could play with the words -
we're looking for some form of
overall reduction of risk.

- { 4th Circuit ^{decision} - square peg in round
hole }

Wray - talked about fact fact FDA will
be permitted to ban product.

Matt - goal was to come up with a
balance ... even with respect
to formal ratemaking. (there was

with enough resources - could
not do "peanut-butter" process.

wanted to keep Congress from
coming down on your head

What David did well was gradually
build support.

Craig - we hope this will raise dialogue
in public - get sugar on the
entire product.

Shalala - will advertisers, retailers continue
to fight.

Moore - can't get that is through
- consent decrees ... you'll
lose in courts.

Farmers — have tremendous support from
Ad's in tobacco-growing states —
Couldn't reach consensus as
to how to help.

Moore — wanted us not to do
anything on crop (ins.)
subsidies; (2) is there
a way to provide \$
for alternative crops.
Put \$ in there, but didn't
want to be presumptuous
[or give ag. cont. jurisdiction]

Nyers — and Congress wants to be ^{the ones} ~~done~~
to deal w/ problem.

— advertisers, ^{retailers} — not clear what
they'll do. If/If'll are heavier
less than we thought.

Shalala - Change direction "extraordinary circumstances" w/in 3 years.

Matt - looked at year 1 to 2 year implementation before it takes effect.

- access to provisions take time to take effect. want to see if it's working? Goal was to give agency a door. (B) part of phrasing on Code Book was to give them an incentive ^(P) → have to obey rules, and ^(E) not impede it in youth smoking.

Agency could ask for rebate, but would have undercut their case

Grog - tried to put in a long run at 3 years.

Shalala - but don't have state-by-state data on tobacco smoke - have a request in budget —

Shalala - licensing program?

Orey - like an EPA rule - They set minimum std; states adopt and enforce.

Matt - ~~also~~ didn't (get so specific)
so you could say what best
was to divide up state / Fed

Modi - ind. wants licensing - because
~~retailers~~ ^{retailers} ~~industry~~ & are not punished.

- piece in there - if retailers sell
to kids, not going to ~~to~~ sell
cigarettes

— break to help to buy —

Performance goals.

— Targets

Greg — we used 1995 levels — what
they discovered they'd need to cut
by 70% — they said States have
to take on burden as well. —

— For ~~our~~ US — This was — FDA —
were two biggest battles we
fought.

— Their arguments (on cap) was
you've taken away every
tool we have — we decided
to put in a cap, but it
had to be put in sufficient
cap. Some have suggested
\$2 billion was a paltry amount —
then it was an astronomical
amount.

Disclosure ? -

Matt - two parts

① health-related to FOIA - not that hard of fight - broad

② documents that would go to ~~the~~ public was quite a different matter. - We

rushed hard for X year -

1998, 1999, -

what we finally ended up

with - drafted in sig. part

by lawyers fighting for documents

(3) what we got - system to do a couple of things.

① privileged documents in ~~them~~ avail to public

② give any citizen right to challenge claim of priv. -

a lot of lawyers would

~~lose~~ ~~lose~~ interest

AG's made private law that ^{even} if cases settled they would ignore it.

- ③ - so many procedural hurdles - and waived those so we can get straight to the substance
- ④ - in many case when you see proving log, can't tell what docs are.
- ⑤ - indices.

Stalala - how much flex do we have to keep tobacco industry in.

Moore - v. little in some same areas.

If agreement gets charged on 1st, someone will settle its law suits.

Fines or penalties and FDA 105 - not much flexibility - you will lose BAT immediately. They're fragile.

Matt — as long as list of items to be changed is growing / moving target,

... lose momentum ... as

priorities get set (and I hope they will), you can go back to industry and say fix. —

(1) FDA

(2) penalties

(3) some level of payments not tax deductible (from bill).

agree w/ Matt. 2-3 ok. otherwise dead

Greg — The drafting of the actual bill is immensely important. We're undertaking that task -- if you see ambiguities ... it's where we can fix things.

Matt — Our reason for thinking we should draft — is industry is, and is going it to the hell.

Moore — ~~people~~ we ~~don't~~ know
that we'll have two drafts.
we're trying to get ~~two~~ one draft.

Kenn — Bill?

Moore — real lawsuits are real leavers. —
if how now and Jan nothing happens,
nothing will happen

Ind.
Florida, NOLO — reluctant to settle.

Texas. Sept. —

Minn.

Plus if Texas or FL lose — their 50-50
at trial 70-30 on appeal. if we
lose, we're toast.

~~Let~~ Lott has his own ideas — leadership
Gill — few units — 5 stars in House —
have people picked out in House.

- Class action no longer a threat. -
- indiv. suits no longer a threat. -

Shadala - Some courts that do budget do this (not!)

- we're not giving up

- PHA was first step

- This ~~has~~ is a possible second step.

- whether it's technically possible -

to get done given work on budget
etc. . .

- our pt. is that we're going to
work in good faith.

Matt - slightly diff scenarios

in max - 3 months ind. settles

w/ Texas, FL, MISS ? Then

face Minnesota, which is a hurdle
but

Shadala - court's on Senate side not over
confirming people are need confirmed.

Matt - He's used to answer
questions - no matter what
it exposes

- even if we have disagreement
on substance, I hope we
can work together.

Shelata - frankly - going up right
to yell at them...

Matt - I don't think we're
going up right to yell -
finding it.

Craig - I'm persuaded we want the
exact same thing. How can
we help.

Shelata - we're

7/11/97 Elena/Bruce/Lang strategy

ENVIR.

ADVERTISING

- PUNITIVES -

DOCUMENT DISCLOSURE

LICENSING

FDA

Ads

ETS

Incentives/penalties/code books

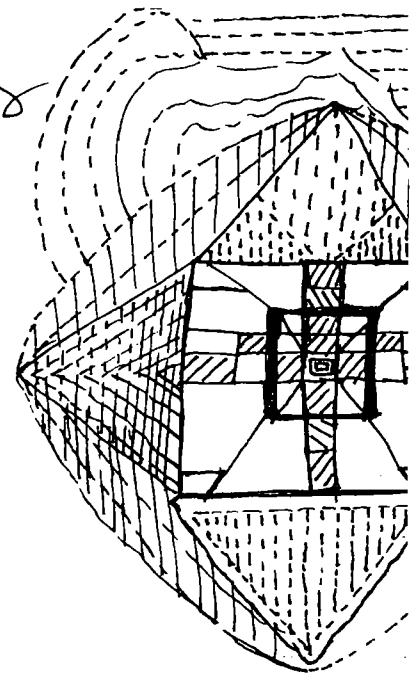
Reduced risk incentives

Budgeting: 1) Harms 2) Research 3) Cessation 4) Kids Health ^{150% of poverty} school health
Int'l. - WHO 5) Appropriations + MOE 6) Farmers

→ LIABILITY / PUNITIVES

→ DOCUMENTS

→ # OF YRS. on NICOTINE



→ Strategy
~~Outreach~~

9/11/97

Indians

~~to~~

Phil Carlton

Myer Corp

Arthur Golden

Jane Hickey?

List of "Real" questions

News — ?

penalties

tax deductible

legislation

— What

— enough of public health community

— AG's with you

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Elana / since / Friday / 7/11/97

Jim

arms
around

EB

FOA - microne

Ads - but not legal question of how it stands

up

penalties - right w/ Lindner's advice -

mention - clarifying

document disclosure / safer agreements

need
more

Framework of settlement + blah, blah, blah
extremely specific -

- document disclosure

FDA

- licensing

EB

- Constitutional challenges

- Penalties (mechanics weird, but pros and cons clear)

- Penalties

- Revenue stream

Certain — research / cessation / education

- farmers -