Eliz. D.

Summary of
The Tobacco Accountability Act

The Tobacco Accountability Act will establish an independent board to investigate all matters relating to tobacco industry and public health and report annually to the Congress. For four decades, the tobacco companies have concealed evidence of the consequences of tobacco use and have deliberately misled the public. In particular, the companies abused the attorney-client privilege to shield their most damaging documents from public disclosure. Under this bill, the industry will no longer be able to deceive the public. Specifically, the legislation does the following:

- The bill establishes an independent board to be known as the Tobacco Accountability Board. The Board will consist of 5 members, appointed by the Secretary of Health and Human Services, with expertise relating to tobacco and public health. The term of service will be six years.

- The bill requires each tobacco manufacturer to submit to the Board a copy of all documents in the manufacturer's possession relating to any health effects caused by the use of tobacco products, the manipulation or control of nicotine in tobacco products, and the sale or marketing of tobacco products to children. The documents required to be submitted must include the 150,000 attorney-client documents that the court has ordered to be produced in Minnesota v. Philip Morris as evidence of a crime or fraud.

- The bill requires the Board to make available to the public the documents submitted by the tobacco manufacturers, subject only to limitations necessary to protect legitimate trade secrets.

- To insure that any future attempts by the tobacco industry to mislead the public are disclosed, the Board is given subpoena power and other investigative authorities and charged with investigating all matters relating to the tobacco industry and public health. The Board must submit an annual report to Congress that discloses any efforts by tobacco manufacturers:

  - to conceal research relating to, or to mislead the public about, the adverse health effects or addiction caused by tobacco products;

  - to sell or market tobacco products to children; or

  - to circumvent or oppose any federal, state, or local law or regulation intended to protect the public from tobacco.

- The bill requires each tobacco manufacturer to permit a representative designated by the Board to participate in all meetings of the board of directors of the tobacco manufacturer. The purpose of this provision is to insure that there is always a public health voice present in future company deliberations.

> 1

1 of 1 items CQ's WASHINGTON ALERT 06/19/97

HR1881 Waxman (D-CA) 06/12/97 (168 lines)
Introduced in House

To establish the Tobacco Accountability Board.

Special typefaces used in this bill version:
// \\ Italic
!! !! Bold roman
Item Key: 4128

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105TH CONGRESS
1ST SESSION

H. R. 1881

To establish the Tobacco Accountability Board.

==========

IN THE HOUSE OF REPRESENTATIVES

June 12, 1997

Mr. WAXMAN introduced the following bill; which was referred to the Committee on Commerce

==========

A BILL

To establish the Tobacco Accountability Board.

//Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,\\

!!SECTION 1. SHORT TITLE.!!

This Act may be cited as the "Tobacco Accountability Act".

!!SEC. 2. TOBACCO ACCOUNTABILITY BOARD.!!

(a) ESTABLISHMENT.--There is established an independent board to be known as the Tobacco Accountability Board.

(b) MEMBERSHIP.--The Board shall consist of 5 members with expertise relating to tobacco and public health. The members, including the chair, shall be appointed by the Secretary of Health and Human Services. The initial members of the Board shall be appointed by the Secretary within 30 days of the date of the enactment of this Act. A member of the Board may be removed by the Secretary only for neglect of duty or malfeasance in office.

(c) TERMS.--The term of office of a member of the Board shall be 6 years, except that the members first appointed shall have terms of 2, 3, 4, and 5 years, respectively, as determined by the Secretary.

!!SEC. 3. DISCLOSURE OF TOBACCO INDUSTRY DOCUMENTS.!!

(a) SUBMISSION BY MANUFACTURERS.--Not later than 3 months after the date of the enactment of this Act and thereafter as required by the Board, each tobacco manufacturer shall submit to the Board a copy of all documents in the manufacturer's possession--

(1) relating to--

(A) any health effects, including addiction, caused by the use of tobacco products;

(B) the manipulation or control of nicotine in tobacco products; or

(C) the sale or marketing of tobacco products to children; or

(2) produced, or ordered to be produced, by the tobacco manufacturer in the case entitled State of Minnesota v. Philip Morris, Inc, Civ. Action No. C1-94-8565 (Ramsey County, Minn.) including attorney-client and other documents produced or ordered to be produced for in camera inspection.

(b) DISCLOSURE BY THE BOARD.--Not later than 6 months after the date of the enactment of this Act and thereafter as required by the Board, the Board shall, subject to subsection (c), make available to the public the documents submitted under subsection (a).

(c) PROTECTION OF TRADE SECRETS.--The Board, members of the Board, and staff of the Board shall not disclose information that is entitled to protection as a trade secret unless the Board determines that disclosure of such information is necessary to protect the public health. This subsection shall not prevent the disclosure of relevant information to other Federal agencies or to committees of the Congress.

!!SEC. 4. INVESTIGATION AND ANNUAL REPORTS.!!

The Board shall investigate all matters relating to the tobacco industry and public health and report annually on the results of the investigation to Congress. Each annual report to Congress shall, at a minimum, disclose--

(1) any efforts by tobacco manufacturers to conceal research relating to the adverse health effects or addiction caused by the use of tobacco products;

(2) any efforts by tobacco manufacturers to mislead the public or any Federal, State, or local elected body, agency, or court about the adverse health effects or addiction caused by the use of tobacco products;

(3) any efforts by tobacco manufacturers to sell or market tobacco products to children; and

(4) any efforts by tobacco manufacturers to circumvent, repeal, modify, impede the implementation of, or prevent the adoption of any Federal, State, or local law or regulation intended to reduce the adverse health effects or addiction caused by the use of tobacco products.

!!SEC. 5. TOBACCO MANUFACTURER BOARD MEETINGS.!!

Each tobacco manufacturer shall permit a representative designated by the Board to attend and participate in all meetings of the board of directors of the tobacco manufacturer, including any executive session or committee meetings thereof. Each tobacco manufacturer shall provide the representative designated by the Board a copy of all documents or other information provided by the tobacco manufacturer to any director of the manufacturer who is not an employee of the manufacturer.

!!SEC. 6. AUTHORITIES.!!

The Board, any member of the Board, or staff designated by the Board may hold hearings, administer oaths, require the testimony or deposition of witnesses, the production of documents, or the answering of interrogatories, or, upon presentation of the proper credentials, enter and inspect facilities.

!!SEC. 7. ENFORCEMENT.!!

(a) RESPONSIBILITIES OF TOBACCO MANUFACTURERS.--Notwithstanding any other provision of law, tobacco manufacturers shall provide any testimony, deposition, documents, or other information, answer any interrogatories, and allow any entry or inspection required pursuant to this Act, except to the extent that a constitutional privilege protects the tobacco manufacturer from complying with such requirement.

(b) PROHIBITED ACT.--Section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331) is amended by adding at the end the following:

"(x) The failure to comply with any requirement under the Tobacco Accountability Act.".

!!SEC. 8. ADMINISTRATION.!!

(a) STAFF.--The Chair shall exercise the executive and administrative functions of the Board and shall have the authority to hire such staff as may be necessary for the operation of the Board.

(b) SALARIES.--The members of the Board shall receive such salary and benefits as the Secretary deems necessary, except that the salary of the Chair shall not be less than level III of the Executive Schedule (5 U.S.C. 5314).

!!SEC. 9. DEFINITIONS.!!

For purposes of this Act:

(1) BOARD.--The term "Board" means the Tobacco Accountability Board.

(2) MANUFACTURE.--The term "manufacture" means the manufacturing, including repacking or relabeling, fabrication, assembly, processing, labeling, or importing of a tobacco product.

(3) TOBACCO MANUFACTURER.--The term "tobacco manufacturer" means--

(A) any person who manufactures a tobacco product; or

(B) 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.

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Or enter BACK, HELP, or STOP
>

> 12

1 of 1 items CQ's WASHINGTON ALERT 06/19/97

*** HISTORY REPORT -- ALL LEGISLATIVE ACTION, COSPONSORS, SPEECHES ***

MEASURE: HR1881

SPONSOR: Waxman (D-CA)

BRIEF TITLE: Tobacco Accountability Act.

OFFICIAL TITLE: A bill to establish the Tobacco Accountability Board.

INTRODUCED: 06/12/97

COSPONSORS: 0 (Dems: 0 Reps: 0 Ind: 0)

COMMITTEES: House Commerce

LEGISLATIVE ACTION:

06/12/97 Referred to Committee on Commerce (CR p. H3796)

There are no more items to display.

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Search criteria used:
BILL:HR1881
Results are: Bill number as entered

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Secret Attorney-Client Documents Are Evidence of Potential Crimes or Fraud by the Tobacco Industry

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Committee on Government Reform and Oversight
Minority Staff Report
June 12, 1997

TABLE OF CONTENTS

Executive Summary

In the last three years, Congressional hearings, FDA's investigation, and litigation have disclosed numerous internal documents from the tobacco industry. These documents have revealed extensive industry efforts to manipulate and control nicotine levels in cigarettes, as well as tobacco company research on marketing tobacco products to children. Yet despite these extensive disclosures, little evidence has emerged about the role played by the tobacco industry's lawyers in concealing information from the public.

Now new evidence is emerging that suggests that secret documents, which the companies claim are protected by the attorney-client privilege, may be the most damaging tobacco industry documents of all. This evidence suggests that tobacco attorneys created and participated in an elaborate scheme to defraud and deceive the American public for over 30 years.

To date, the involvement of the tobacco lawyers has been hidden from the public by the companies' invocation of the attorney-client privilege. Courts that have reviewed portions of these documents *in camera*, however, have concluded that they contain evidence of a decades-long crime or fraud. Recently, courts have found:

- Industry attorney-client documents "revealed the most explicit admissions" that tobacco company lawyers participated in a "program to further the alleged ongoing fraud and deception" and that the tobacco companies and their lawyers "specifically abused the attorney-client privilege in their efforts to effectuate their allegedly fraudulent scheme." *Haines v. Liggett Group Inc.*, 140 F.R.D. 681, 695 (D.N.J. 1992), *vacated*, 975 F.2d 81 (3rd Cir. 1992).

- Tobacco company lawyers carried out and planned "fraudulent activities and

undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking." *State of Florida v. American Tobacco Co.*, Civ. Action No. CL 95-1466 AH (Palm Beach County, Fla., filed Feb. 21, 1995).

- The government established "a reasonable basis to believe that the crime-fraud exception to the general rule of privilege should be invoked." Plaintiffs made a "*prima facie* case to invoke the crime-fraud exception." *Minnesota v. Philip Morris*, Civ. Action No. C1-94-8565 (Ramsey County, Minn., filed Aug. 18, 1994).

- The plaintiffs established probable cause that "a fraudulent purpose existed" in the tobacco industry's attorney-client documents; these documents "furthered the fraud perpetrated on the public." *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 368 (E.D.N.Y. 1996), *vacated on other grounds*, 167 F.R.D. 6 (E.D.N.Y. 1996).

The minority staff of the Committee on Government Reform and Oversight has obtained a small number of the secret attorney-client documents. The documents obtained and analyzed by the minority staff are some of the attorney-client documents of Liggett & Myers Tobacco Company. These documents contain important evidence of one tobacco company's efforts to conceal health information from the public – and they illustrate the central role played by tobacco lawyers in these efforts.

Specifically, these documents show that the Liggett attorneys:

- Recognized that Liggett had developed a new cigarette with "major health benefits" but advised that Liggett not market the cigarette because it "may incite accelerated cancer litigation which may, in turn, result in infinite liability." As an apparent result, Liggett never marketed the new cigarette.

- Censored Liggett's communication of health risks to doctors because such a communication could "knock the props from under us" in future litigation.

- Intervened to prevent Liggett managers from making public statements about human health effects that would contradict "our position that there is no scientific proof of any cause and effect relationship between smoking and human health."

- Reviewed scientific research by Liggett and other companies to insure that it

would not "ricochet to our detriment."

Despite their significance, these documents may not be the most important Liggett documents. For example, they do not contain any of the so-called "joint defense" documents, which describe the joint legal strategies of Liggett and other tobacco companies.

Although the documents described in this report are only a tiny fraction of the tobacco industry's attorney-client documents, their import is substantial. They appear to be evidence of potential significant corporate crime or fraud. The policy implication is clear: the attorney-client documents still being held secret by the tobacco industry should come to light. Until these attorney-client documents are made public, the full truth about the tobacco industry's attempt to defraud the public will never be known.

Discussion

I. Recent Court Rulings on Crimes or Fraud by the Tobacco Industry

It appears that lawyers have been at the heart of a tobacco industry strategy to cast doubt on whether smoking causes cancer and to keep detrimental research on human health effects from the public. Lawyers can function largely out of view, because they can shield their work product behind the attorney-client privilege. Several courts, however, have recently been presented with attorney-client documents for *in camera* review. These courts have determined that the tobacco industry's attorney-client documents contain evidence of a tobacco industry crime or fraud -- and should therefore be disclosed.

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

The attorney-client privilege protects confidential communications between an attorney and a client for the purpose of obtaining legal advice. This privilege extends solely to legal advice given by a legal advisor acting in the capacity of a lawyer. Scientific information does not become privileged merely because it is incorporated into a communication between an attorney and client. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

The joint defense privilege is an extension of the attorney-client privilege. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). The joint defense privilege

protects communications between different persons or entities "when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'" *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3rd Cir. 1985), *cert. denied*, 474 U.S. 946 (1985).

However, neither the attorney-client nor joint defense privilege provide an absolute protection from disclosure. The crime-fraud exception to these privileges is a legal concept that prevents lawyers from using the privileges as a shield behind which they participate in an ongoing crime or fraud. The attorney-client privilege "'ceases to operate ... where the desired advice refers not to prior wrongdoing, but to future wrongdoing.' It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989).

Courts have held that the crime-fraud exception applies to substantial abuses of the attorney-client relationship, continuing illegality, false suggestions and the suppression of truth, other misconduct, and any form of deception or deceit. *See, e.g., In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *International Telephone and Telegraph Corp. v. United Telephone Company of Florida*, 60 F.R.D. 177, 180 (M.D. Fla. 1973); *In Re Westinghouse Electric Corporation Uranium Contracts Litigation*, 76 F.R.D. 47, 57 (W. D. Pa. 1977); *Volcanic Gardens Management Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App. 1993); *Central Constr. Co. v. Home Indemnity Co.*, 794 P.2d 595, 598 (Alaska 1990).

B. Judicial Rulings on the Participation by the Tobacco Industry's Lawyers in Crime or Fraud

Recently, both federal and state courts have found that a significant number of privileged tobacco documents fall within the crime-fraud exception to the attorney-client privilege. In the words of one judge, these documents "speak for themselves in a voice filled with disdain for the consuming public and its health." At least five different courts have recently ruled that the tobacco industry's attorney-client documents contain evidence of a crime or fraud by the tobacco industry.

1. *Haines v. Liggett Group*

The first court to consider whether the tobacco industry's attorney-client documents are evidence of a crime or fraud was the federal district court in the *Haines* case. The judge in this case conducted an *in camera* review of a set of 1500 attorney-client documents from the tobacco industry. *Haines v. Liggett Group, Inc, et al.*, 140 F.R.D. 681 (D.N.J. 1992), *vacated.* 975 F.2d 81 (3rd Cir. 1992), *on remand,* 814 F. Supp. 414 (D.N.J. 1993). This court found that its *in camera* inspection of selected documents "supports plaintiff's contentions of the explicit and pervasive nature of the alleged fraud by defendants and defendants' abuse of the attorney-client privilege as a means of effectuating that fraud." *Id.* at 689.

The court's review "revealed the most explicit admissions" that the tobacco company lawyers participated in a "program to further the alleged ongoing fraud and

deception." *Id.* at 695. The court found that the tobacco companies and their lawyers "specifically abused the attorney-client privilege in their efforts to effectuate their allegedly fraudulent scheme." *Id.* at 695.

The judge concluded that "the documents speak for themselves in a voice filled with disdain for the consuming public and its health." *Id.* at 684. According to the court, "despite the industry's promise to engage independent researchers to explore the dangers of cigarette smoking and to publicize their findings, the evidence clearly suggests that the research was not independent: that potentially adverse results were shielded ...; that the attorney-client privilege was intentionally employed to guard against such unwanted disclosure: and that the promise of full disclosure was never meant to be honored, and never was." *Id.* at 684.

The *Haines* court held that certain tobacco documents being withheld as secret demonstrated a fraud on the public perpetrated by lawyers and that these documents should be available for use at trial. The case. however, never went to trial, because tobacco company appeals, which vacated the ruling on procedural grounds, and other legal tactics delayed the action. Ultimately, the plaintiff's counsel, which had incurred millions of dollars in fees, could no longer afford to pursue the case.

2. *Florida v. American Tobacco Co.*

In the last two years, renewed attempts have been made in litigation to disclose the secret attorney-client documents. Once again. courts have found that the crime-fraud exception applies after reviewing the documents.

For example, on April 9, 1997, the special master in the *State of Florida v. American Tobacco Co.*, Civ. Action No. CL 95-1466 AH (Palm Beach County, Fla., filed Feb. 21, 1995), ordered the production of certain privileged Liggett documents because they demonstrate that the tobacco company "engaged in extensive efforts to hide ... the health hazards associated with cigarettes" from the public and that it "misled and defrauded the public and public health officials regarding the relationship between smoking and health." The master found that the documents also show that the tobacco company lawyers carried out and planned "fraudulent activities and undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking."

The special master's ruling was upheld by the Circuit Court judge in April 1997.

3. *Minnesota v. Philip Morris*

The most important lawsuit to date considering the evidence of crime or fraud in the attorney-client documents is the lawsuit brought by the Minnesota Attorney General. In *State of Minnesota v. Philip Morris Inc.*, Civ. Action No. C1-94-8565 (Ramsey County, Minn., filed Aug. 18, 1994), the State of Minnesota and Blue Cross and Blue Shield of Minnesota sued all the major cigarette companies. Although the defendants' document production in this case is far from complete, the tobacco companies claim over 150,000 documents are privileged (amounting to over ½ million

pages).[1]

Based on a review of the privilege logs and the documents produced to date, the Minnesota court concluded that the state had established "a reasonable basis to believe that the crime-fraud exception to the general rule of privilege should be invoked." The court found that the tobacco companies released public statements "intended to minimize or reduce fears that smoking is dangerous to one's health." According to the court, it would be improper to permit the tobacco industry's use of "health-related research which supports [its] economic interests" in "advertising and public relations campaigns" while at the same time allowing the industry to assert claims of "privilege for research which may lead to the opposite conclusion." The court concluded that the tobacco companies have an "obligation to disclose" the hazards of tobacco products, which "cannot be eliminated by the assertion of attorney-client privilege."

Because of the compelling evidence of crime or fraud, the court in Minnesota required the companies for the first time to submit all 150,000 documents to the court for *in camera* review. To balance efficiency and due process in reviewing these documents, the court fashioned a review process. The allegedly privileged documents will be divided into categories based on the type of privilege claimed (e.g., opinion work product, fact work product, attorney-client, or joint defense), the subject matter, author and recipient. Once categorized, the special master will conduct a hearing on each

[1] As of May 9, 1997, none of the Defendants (except Liggett) had finished their privilege logs. At least one of these companies had at that time apparently listed less than 20% of its attorney-client documents on a privilege log.

category of documents to determine the appropriate application of privilege.

4. Other Recent Cases

Several other recent cases have also rejected the tobacco industry's assertion of attorney-client privileges. For example, in *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 365 (E.D.N.Y. 1996), *vacated on other grounds,* 167 F.R.D. 6 (E.D.N.Y. 1996), the federal magistrate ruled that Liggett had wrongly asserted 123 documents were privileged when they were not. Finding that the plaintiffs "sustained their burden of establishing probable cause that a fraudulent scheme existed and that the documents ... are in furtherance of that fraud," the magistrate in *Sackman* concluded that the crime-fraud exception obviates the assertion of privilege and "mandates disclosure." *Id.* at 369.

The court in *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 142 (D. Kan. 1996), also found that a *prima facie* case of fraud had been established. In a subsequent ruling, the magistrate also rejected R.J. Reynold's claims of privilege for memoranda relating to research and development, letters from outside counsel on scientific research, literature reviews prepared by scientists at the direction of counsel, a letter from a consultant for outside counsel, minutes of a research-related meeting, and notes made by employees at industry meetings on smoking and health research. 170 F.R.D. 481, 490 (D. Kan. 1997). The court found that some of these documents "may contain evidence that R.J.R. knew, during the relevant time period, that nicotine was addictive." *Id.* at 490.

Similarly, in *Butler v. Philip Morris*, Civ. Action No. 94-5-53 (Jones County, Miss., filed May 12, 1994), the trial judge reviewed Liggett documents identified as joint defense documents and ordered their production.

II. The Liggett Attorney-Client Documents

To date, there has been virtually no public disclosure of the attorney-client documents that the courts have ruled contain evidence of crime or fraud. As the *Haines* case demonstrates, tobacco companies have guarded their secret attorney-client documents fiercely and employed legal tactics to delay the production of these documents in litigation.

This report pierces this veil of secrecy -- at least to a small extent -- by analyzing some of the attorney-client documents. The minority staff has obtained a set of some of the attorney-client privileged documents of Liggett & Myers Tobacco Company. These secret documents may not be the most important Liggett documents, because they do not include documents showing the joint defense of Liggett and the other tobacco companies. Nevertheless, they suggest that Liggett, acting on the advice of its lawyers, knowingly blocked the marketing of safer tobacco products.

These documents also show that lawyers representing Liggett censored correspondence with the medical community and public statements made by employees. They also show that Liggett's lawyers determined whether scientific research would be funded based on whether it would show cigarette smoking to be dangerous.

A. Suppression of the Marketing of a Safer Cigarette

Two previously secret Liggett attorney-client documents illustrate the role played by lawyers representing Liggett in suppressing the marketing of a "safer" cigarette that the lawyers conceded would "dramatically reduce the incidence of both non-cancerous and cancerous tumors in test mice as compared to the tumor incidence produced by conventional cigarettes." These documents show that Liggett's lawyers advised against marketing the safer cigarette because the cigarette "may incite accelerated cancer litigation which may, in turn, result in infinite liability."

1. The "Initial Observations" Memorandum

The first attorney-client document is an undated memorandum marked "Confidential" and entitled "Some Initial Observations on the Patented Cigarette Project."[2] This document describes Liggett's extensive efforts to determine what constituents of tobacco smoke cause tumors and to develop a safer cigarette that eliminated these hazardous constituents.

According to the memorandum:

> In 1954, Liggett began a contractual relationship with Arthur D. Little, Inc. ("ADL") under which Liggett's Tobacco Research Center and ADL's Life Sciences research laboratory in Cambridge, Massachusetts undertook to jointly investigate the supposed correlation between cigarette smoking and cancer. This research was initiated in the wake of the 1953

[2] Undated memorandum marked "Confidential" and entitled "Some Initial Observations on the Patented Cigarette Project" (hereinafter referred to as the "Initial Observations Memo"). The Initial Observations Memo is included as attachment 1 to this staff report.

demonstration by Wynder, Graham and Croninger that cigarette smoke condensate produces tumors on the skin of susceptible mice when painted on the skin in large amounts.[3]

As described by the lawyers, the "principal thrust" of Liggett's research with ADL was "to determine which substance was responsible for this tumorigenic effect and to ascertain a method -- if possible -- by which the tumorigenic effect could be reduced or eliminated."[4] Lawyers recognized that "[t]he back skin of these specially bred laboratory mice is generally recognized by some medical researchers as having sensitivity characteristics similar to human lung tissue."[5] Liggett expended $13 million on this biological testing program through the end of 1978.[6] In 1997 dollars, this expenditure would be over $30 million.

Through this research, Liggett learned that "the tumor-causing activity of cigarette smoke condensate is primarily initiated by the polycyclic aromatic hydrocarbon [PCAH] fraction of the condensate."[7] As a result, Liggett initiated "an effort ... to reduce the quantity of the PCAH fraction in smoke condensate."[8] According to Liggett's lawyers, "several hundred materials were added to tobacco and the

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[3] Initial Observations Memo at 2.

[4] Initial Observations Memo at 2.

[5] Initial Observations Memo at 5.

[6] Initial Observations Memo at 2.

[7] Initial Observations Memo at 2.

[8] Initial Observations Memo at 3.

mixtures were combusted."[9]

Liggett's efforts ultimately proved successful, according to Liggett's lawyers. The memorandum states that Liggett learned that "[p]alladium, an inert metal, apparently inhibits the formation of PCAH molecules by blocking molecular linkage of carbon, hydrogen, and oxygen."[10] According to the lawyers, the "palladium catalyst was the most effective in reducing the amount of the PCAH fraction in the [smoke] condensate."[11]

Liggett also learned through this research that "use of tobacco blends high in nitrogen found in burley, and conventional tobacco blends supplemented with nitrogen in the form of nitrate salts similar to those in burley, further reduced the PCAH fraction of the condensate."[12] Tests of smoke concentrates "showed that a treated tobacco level of 0.75% nitrate nitrogen combined with a palladium catalyst of 400 ppm (between 0.01% and 0.1% of the tobacco weight) achieved an effective reduction of up to 88% of non-cancerous tumors and up to 100% of cancerous tumors in comparison to concentrates from untreated control cigarettes."[13]

According to the lawyers, Liggett conducted extensive additional research. Liggett developed "a special filter to remove the increased nitrogen oxide and other

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[9] Initial Observations Memo at 3.

[10] Initial Observations Memo at 3.

[11] Initial Observations Memo at 3.

[12] Initial Observations Memo at 3.

[13] Initial Observations Memo at 3.

irritant substances from the palladium-treated cigarette's smoke."[14] Liggett also determined that "the amount of palladium carried by the smoke through the filter is virtually nonexistent."[15] In fact, the document notes that "even at slightly higher levels, there is no indication that the palladium has any toxic effect" and that palladium has not "been shown to produce toxic effects even among workers in palladium refining or manufacturing operations."[16]

Thus, Liggett's lawyers concluded their analysis of the palladium cigarette by stating that "it seems clear that some major health benefits can be predicted."[17]

2. The Greer Memorandum

Although Liggett's lawyers were apparently convinced that the palladium cigarette offered significant health benefits, the lawyers were not convinced that the product should be marketed. To the contrary, as a second attorney-client document demonstrates, they argued strenuously against the marketing of the cigarette because of their concern that such an effort would imply that other Liggett products were dangerous. The second document is a draft memorandum from Joseph H. Greer, Liggett's Vice President and General Counsel, to Robert Hooker, another Liggett

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[14] Initial Observations Memo at 4.

[15] Initial Observations Memo at 6.

[16] Initial Observations Memo at 6.

[17] Initial Observations Memo at 6.

lawyer.[18] The Greer Memo provides Liggett's legal analysis of whether:

> In the event that this Corporation manufacturers, markets and advertises a cigarette containing a blend of tobacco treated with a catalyst which purportedly substantially reduces the biological effect of 'tar' ... as proven by mice painting tests that reduced the number of carcinogenic tumors appearing on the catalyst-blend painted mice as compared to the controls, what risks does this Corporation take with regard to governmental and civil action and possible resulting liability?[19]

The Greer Memo demonstrates that Liggett's chief lawyer advised Liggett that there were serious and perhaps overwhelming litigation risks associated with marketing the palladium cigarette. Specifically, Mr. Greer concluded that "in the case of civil litigation aimed at cancer of the lung, emphysema, heart disease, etc., the running of a catalyst cigarette advertisement making reference specifically or impliedly to reductions in health hazards may incite accelerated cancer litigation which may, in turn, result in infinite liability."[20]

Liggett's lawyer also expressed the concern that marketing of the new cigarette "may further substantiate that this Corporation has a great deal more scientific and medical knowledge concerning lung cancer and cancer in general that it previously had."[21] The consequences would be that "a more significant warning could be required for our present products to the public or negligence on this Corporation's part would

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[18] Draft Memorandum of Law dated October 18, 1977, from Joseph H. Greer to Robert Hooker (hereinafter referred to as the "Greer Memo"). The Greer Memo is included with this staff report as attachment 2.

[19] Greer Memo at 1.

[20] Greer Memo at 8.

[21] Greer Memo at 10.

result."[22]

Mr. Greer noted that in two of the most recent smoking health cases in which Liggett had been involved, Liggett argued "that such mouse painting tests by Wynder and others were invalid because of a lack of replication and further invalid as a scientific test based on acceptable methodology."[23] Liggett's lawyer postulated that "if this Corporation presented evidence ... that the catalyst-painted mice received 80% fewer carcinogenic tumors than the controls painted with the regular Chesterfield blend, then this Corporation has obliterated its defense."[24]

The Greer memo also indicates that the Liggett lawyers anticipated serious problems with the FTC if the company tried to market the palladium cigarette with "health-related" claims. The lawyers noted that the FTC would require substantiation of any advertising claims and this substantiation would be "a collateral implication that the catalyst cigarette does reduce a health hazard concerning lung cancer."[25] Liggett's lawyers warned that if Liggett made any mouse-painting claims in its ads and had to substantiate the claims in a public FTC hearing, "the claims in cancer litigation as well as in emphysema litigation may be enlarged" and the company's "defenses of contributory negligence and assumption of risk may have been diminished" resulting in

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[22] Greer Memo at 10.

[23] Greer Memo at 8.

[24] Greer Memo at 8.

[25] Greer Memo at 9.

"enormous risks" and potentially "vast amounts of monetary liability."[26]

The recommendation of Liggett's lawyers not to market the palladium cigarette apparently prevailed within the company. Despite the company's conclusion that the new cigarette offered "major health benefits," the palladium cigarette was never sold commercially.

B. Censorship of Correspondence to the Medical Community

The documents obtained by the minority staff also show that Liggett's lawyers determined the appropriate language that could be used by Liggett scientists and company employees when communicating with doctors. Under the guise of privileged communications, Liggett's counsel censored company statements to eliminate statements that conveyed knowledge of adverse health effects caused by smoking.

In the 1960s, Liggett discovered that hydrogen cyanide present in the gas phase of cigarette smoke inhibited ciliary transport in the lungs. Ciliary transport is one of the main mechanisms by which the lungs clear themselves of physical irritants such as smoke particles. Liggett's research director initiated a search for a filter that could capture hydrogen cyanide in the gas phase.[27] This initiative resulted in the Keith filter, which was used in the LARK cigarette.[28]

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[26] Greer Memo at 10.

[27] March 15, 1963, Memorandum entitled "Development of the Three Piece Keith Filter" (hereinafter referred to as the "Keith Filter Memo"). The Keith Filter Memo is included with this staff report as attachment 3.

[28] Keith Filter Memo at 4.

Liggett wanted to market LARK to medical doctors by providing them with information supporting the filter's success removing materials that "are largely responsible for the inhibitory effect on the cilia induced by unfiltered and conventionally filtered cigarette smoke,"[29] but Liggett's lawyers intervened to censor the company's communication with the doctors. In a privileged memo of September 16, 1963, Liggett's lawyers commented on a proposed letter to U.S. medical doctors promoting the LARK cigarette.[30] One of Liggett's lawyers, Mr. Haas, who subsequently became Liggett's general counsel, stated:

> As I have stated with respect to other releases in the past there is one feature of the current proposal which could serve to 'knock the props from under us' in future litigation. We have consistently maintained in court that the results of animal experimentation cannot be directly extrapolated to human beings. In my opinion the doctors receiving the suggested letter in its present form would get the impression, and rightly so, that the Company now says that animal experimentation in the cilia studies is of definite benefit to man.[31]

C. Censorship of Public Statements

Liggett's lawyers also prevented company employees from making statements to the press linking smoking with human health. For example, in a memo dated January 16, 1969, Liggett's lawyer Fred Haas wrote to Liggett executives J. Old and S. White

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[29] Draft Liggett letter to physicians, enclosed with transmittal letter dated March 8, 1963, from William W. Bates, Jr. to Charles J. Kensler (hereinafter referred to as the "Draft Letter"). The Draft Letter is included with this staff report as attachment 4.

[30] Memorandum dated September 16, 1963, from Fred P. Haas to Frank H. Horan (hereinafter referred to as the "Haas Memo"). The Haas Memo is included with this staff report as attachment 5.

[31] Haas Memo.

about a quote in *Fortune* attributed to a Liggett official. According to Mr. Haas, a Liggett official told *Fortune* that "it's gas, not tar. that is the major cigaret health hazard."[32] Mr. Haas wrote that this statement was contrary to Liggett's position that "there is no scientific proof of any cause and effect relationship between smoking and human health."[33] Mr. Haas then stated that Liggett should take steps to prevent such statements from being made in the future:

> I have spoken with the Marketing people along these lines since the beginning, and it is disturbing that such a remark could be attributed to anyone here. I think it incumbent upon us to find out if anyone in the Company actually did make this statement and to caution Brand Management once again.[34]

D. Control of Company Funded Research

Liggett's attorneys were also actively involved in reviewing the outside research projects funded by the company. Their goal, as revealed in the attorney-client documents, was to insure that the outside research funded by Liggett did not demonstrate a link between smoking and any health problem.

For example, in a memo to Liggett executives M.E. Harrington and K. McAllister dated February 2, 1971, Liggett's general counsel Fred Haas recommended that Liggett fund a Washington University research proposal on immunologic aspects of

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[32] Memorandum dated January 16, 1969, from F.P. Haas to J. Old, Re: Page 6 Relative to LARK Brand (hereinafter referred to as the "Fortune Memo"). The Fortune Memo is included with this staff report as attachment 6.

[33] Fortune Memo.

[34] Fortune Memo.

cancer.[35] Mr. Haas stated that funding this research "warrants our serious consideration" and that he did "not see how it could ricochet to our detriment since the smoking habit has no part in the study and, as I said at the outset, the project is not involved in finding causation."[36]

Mr. Haas also wrote an internal memo to Liggett executives M.E. Harrington and K. McAllister on a research proposal submitted by Harvard's Channing Laboratory to be sponsored as a "special project" of the Council of Tobacco Research, an industry trade group.[37] In his memo recommending the funding, Mr. Haas stated that the main researcher at the Harvard Project, Dr. Gary Huber, "made it clear that no research would be based on the hypothesis that smoking causes any disease."[38]

III. The Attorney-Client Documents that Remain Secret

The secret attorney-client documents reviewed in this staff report provide just a glimpse of the central role played by tobacco industry lawyers in blocking the marketing of "safer" tobacco products and concealing information about the health risks of

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[35] Memorandum dated February 2, 1971, from F.R. Haas to M.E. Harrington and K. McAllister, Re: Proposal on Research Dealing With Immunologic Aspects of Cancer (hereinafter referred to as the "Washington University Proposal"). The Washington University Proposal is included with this staff report as attachment 7.

[36] Washington University Proposal at 3.

[37] Memorandum dated July 6, 1972, from F.P. Haas to M.E. Harrington and K. McAllister, Re: Proposed Research Project - Channing Laboratories (hereinafter referred to as the "Harvard Project Proposal"). The Harvard Project Proposal is included with this staff report as attachment 8.

[38] Harvard Project Proposal at 4.

cigarettes.

The minority staff has obtained an index of over 3,500 Liggett attorney-client documents that discuss joint legal strategies between Liggett and other tobacco companies.[39] The volume of these "joint defense" documents far exceeds the number of documents reviewed by the minority staff. However, none of the Liggett documents that discuss Liggett's joint defense strategy have been reviewed by the minority staff, nor have any of these documents been made public.

Moreover, the Liggett documents themselves are only a small part of the universe of the secret attorney-client documents. According to the judge in the Minnesota litigation, there are more than 150,000 attorney-client documents that need to be reviewed for evidence of a crime or fraud, but have never been released to the public.

Until the entire set of attorney-client documents of the tobacco industry are disclosed, the full truth about the tobacco industry's attempt to defraud the public will never be understood.

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[39] The index containing the joint defense documents is available for inspection at the minority office of the Committee on Government Reform and Oversight, room B-350A Rayburn House Office Building.

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HENRY A. WAXMAN
20th District, California

Committees:
Commerce
Government Reform and Oversight

Philip M. Schiliro
Administrative Assistant

TELEFAX COVER SHEET

TO: ELIZABETH

FROM: PHIL

Number of pages including cover sheet: 4

If you have any problems reading this material, please call (202) 225-3976.

Internal company documents tell the real story of the tobacco industry. Here's a look at what one of their negotiators might be writing today about the merits of the current settlement talks.

To understand the merits of the proposed agreement, I'll briefly assess the threats we face if we do nothing and describe what we get and what we give.

To be blunt, our current position is deteriorating rapidly. We're fighting dozens of state lawsuits that seek billions in damages. Minnesota's case is particularly strong, and we are being compelled there to hand over thousands of our most damaging attorney-client documents. Everyone should remember that these documents can expose us to both civil and criminal liability.

Florida is bad news because state laws eliminate our best defense (assumption-of-risk) and other states might copy the law if the state wins. We are also fighting a new front in the flight attendant/second-hand smoke suit, and a California private attorney general lawsuit on Joe Camel. And there's no point in describing the all-too-familiar headaches the class-action suits are giving us.

On the regulatory side, we got battered by the North Carolina decision on FDA--the unpleasant reality is that the Agency now has the potential power to regulate us out of existence. The FTC has just weighed in on advertising, and cities and states are banning billboards and eliminating smoking in public places.

And looming out there is our ultimate nightmare--Justice Department indictments of some of our top people who then cut their own deal and turn state's evidence. If that happens, every one of us is at risk.

Any one of these scenarios would be devastating. But, as bizarre as it might seem, there's salvation in federal legislation. The right bill can not only save us from civil and criminal disaster, but it can deliver liability and regulatory relief that seemed unthinkable even six months ago.

Limiting our liability exposure to our customers has always been our unattainable Holy Grail. Now it's here--the deal we've crafted will eliminate future class action suits against us and cap both individual damages and our annual liability. That financial certainty will send our stock prices soaring, and will make many of our senior people holding stock options very rich.

As good as that is, it gets better. For the first time ever we're having to deal with a FDA that has unlimited jurisdiction over us. The deal sharply limits what FDA can do and gives us as much regulatory relief as we can reasonably expect.

The bill will also keep our secrets secret. All our attorney-client documents will remain protected and away from the public.

Best of all, this deal will likely immunize all of us--past and present--from the Justice Department's criminal investigation. We're getting positive signs that all will be forgiven once legislation is enacted.

Three other important points. The deal does nothing to restrict our exports around the world and doesn't even require us to reduce domestic sales. And it doesn't impose any new corporate obligations to make us more accountable or any restructuring. So we limit our liability but aren't required to act in any fundamentally different way.

Additionally, there's not a single effective "outcome specific" provision. By this I mean that we would agree to a new list of "don'ts," but are still able to invent new ways around the rules.

I know some of you are worried about the so-called performance standard that requires us to reduce sales to kids. But here's the good news--if we fail, the penalty is only a nickel a pack. If we raised prices a dime we come out over $1 billion ahead and none of our present economic incentives are affected.

What we give up to get all this is amazingly modest. We have to agree to many of the specific regulatory restrictions the public health community has advocated, but this has the benefit of being great PR and is something we'd eventually be forced to do anyway.

Our other big concession is the over $300 billion in compensation we would agree to pay. It's a lot of money, of course, but think of it as a business expense, like advertising. We spend about $6 billion a year on ads now and over 20 years, indexed for inflation, that's close to $150 billion. So we're paying roughly double our advertising budget to get permanent liability protection.

Also keep in mind that we can easily offset that cost by the increased profits unlimited and aggressive exporting will bring.

In short, this deal snatches defeat from the jaws of victory for the public health community. We gain the liability and regulatory protections outlined above, and inoculate ourselves from a generation of future legislation and the ongoing attacks that have turned us into pariahs.

At the time of our greatest risk, we are in a position to ensure future growth and viability. This deal is good for business and good for our reputation, and I recommend that we get it done before the other side figures this out.

> 1

1 of 1 items CQ's WASHINGTON ALERT 06/19/97

HR1881 Waxman (D-CA) 06/12/97 (168 lines)
Introduced in House

To establish the Tobacco Accountability Board.

Special typefaces used in this bill version:
// \\ Italic
!! !! Bold roman
Item Key: 4128
--- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- ---

105TH CONGRESS
1ST SESSION

H. R. 1881

To establish the Tobacco Accountability Board.

==========

IN THE HOUSE OF REPRESENTATIVES

June 12, 1997

Mr. WAXMAN introduced the following bill; which was referred to the Committee on Commerce

==========

A BILL

To establish the Tobacco Accountability Board.

//Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,\\

!!SECTION 1. SHORT TITLE.!!

This Act may be cited as the "Tobacco Accountability Act".

!!SEC. 2. TOBACCO ACCOUNTABILITY BOARD.!!

(a) ESTABLISHMENT.--There is established an independent board to be known as the Tobacco Accountability Board.

(b) MEMBERSHIP.--The Board shall consist of 5 members with expertise relating to tobacco and public health. The members, including the chair, shall be appointed by the Secretary of Health and Human Services. The initial members of the Board shall be appointed by the Secretary within 30 days of the date of the enactment of this Act. A member of the Board may be removed by the Secretary only for neglect of duty or malfeasance in office.

(c) TERMS.--The term of office of a member of the Board shall be 6 years, except that the members first appointed shall have terms of 2, 3, 4, and 5 years, respectively, as determined by the Secretary.

!!SEC. 3. DISCLOSURE OF TOBACCO INDUSTRY DOCUMENTS.!!

(a) SUBMISSION BY MANUFACTURERS.--Not later than 3 months after the date of the enactment of this Act and thereafter as required by the Board, each tobacco manufacturer shall submit to the Board a copy of all documents in the manufacturer's possession--

(1) relating to--

(A) any health effects, including addiction, caused by the use of tobacco products;

(B) the manipulation or control of nicotine in tobacco products; or

(C) the sale or marketing of tobacco products to children; or

(2) produced, or ordered to be produced, by the tobacco manufacturer in the case entitled State of Minnesota v. Philip Morris, Inc, Civ. Action No. C1-94-8565 (Ramsey County, Minn.) including attorney-client and other documents produced or ordered to be produced for in camera inspection.

(b) DISCLOSURE BY THE BOARD.--Not later than 6 months after the date of the enactment of this Act and thereafter as required by the Board, the Board shall, subject to subsection (c), make available to the public the documents submitted under subsection (a).

(c) PROTECTION OF TRADE SECRETS.--The Board, members of the Board, and staff of the Board shall not disclose information that is entitled to protection as a trade secret unless the Board determines that disclosure of such information is necessary to protect the public health. This subsection shall not prevent the disclosure of relevant information to other Federal agencies or to committees of the Congress.

!!SEC. 4. INVESTIGATION AND ANNUAL REPORTS.!!

The Board shall investigate all matters relating to the tobacco industry and public health and report annually on the results of the investigation to Congress. Each annual report to Congress shall, at a minimum, disclose--

(1) any efforts by tobacco manufacturers to conceal research relating to the adverse health effects or addiction caused by the use of tobacco products;

(2) any efforts by tobacco manufacturers to mislead the public or any Federal, State, or local elected body, agency, or court about the adverse health effects or addiction caused by the use of tobacco products;

(3) any efforts by tobacco manufacturers to sell or market tobacco products to children; and

(4) any efforts by tobacco manufacturers to circumvent, repeal, modify, impede the implementation of, or prevent the adoption of any Federal, State, or local law or regulation intended to reduce the adverse health effects or addiction caused by the use of tobacco products.

!!SEC. 5. TOBACCO MANUFACTURER BOARD MEETINGS.!!

Each tobacco manufacturer shall permit a representative designated by the Board to attend and participate in all meetings of the board of directors of the tobacco manufacturer, including any executive session or committee meetings thereof. Each tobacco manufacturer shall provide the representative designated by the Board a copy of all documents or other information provided by the tobacco manufacturer to any director of the manufacturer who is not an employee of the manufacturer.

!!SEC. 6. AUTHORITIES.!!

The Board, any member of the Board, or staff designated by the Board may hold hearings, administer oaths, require the testimony or deposition of witnesses, the production of documents, or the answering of interrogatories, or, upon presentation of the proper credentials, enter and inspect facilities.

!!SEC. 7. ENFORCEMENT.!!

(a) RESPONSIBILITIES OF TOBACCO MANUFACTURERS.--Notwithstanding any other provision of law, tobacco manufacturers shall provide any testimony, deposition, documents, or other information, answer any interrogatories, and allow any entry or inspection required pursuant to this Act, except to the extent that a constitutional privilege protects the tobacco manufacturer from complying with such requirement.

(b) PROHIBITED ACT.--Section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331) is amended by adding at the end the following:

"(x) The failure to comply with any requirement under the Tobacco Accountability Act.".

!!SEC. 8. ADMINISTRATION.!!

(a) STAFF.--The Chair shall exercise the executive and administrative functions of the Board and shall have the authority to hire such staff as may be necessary for the operation of the Board.

(b) SALARIES.--The members of the Board shall receive such salary and benefits as the Secretary deems necessary, except that the salary of the Chair shall not be less than level III of the Executive Schedule (5 U.S.C. 5314).

!!SEC. 9. DEFINITIONS.!!

For purposes of this Act:

(1) BOARD.--The term "Board" means the Tobacco Accountability Board.

(2) MANUFACTURE.--The term "manufacture" means the manufacturing, including repacking or relabeling, fabrication, assembly, processing, labeling, or importing of a tobacco product.

(3) TOBACCO MANUFACTURER.--The term "tobacco manufacturer" means--

(A) any person who manufactures a tobacco product; or

(B) 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.

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1 of 1 items CQ's WASHINGTON ALERT 06/19/97

*** HISTORY REPORT -- ALL LEGISLATIVE ACTION, COSPONSORS, SPEECHES ***

MEASURE: HR1881

SPONSOR: Waxman (D-CA)

BRIEF TITLE: Tobacco Accountability Act.

OFFICIAL TITLE: A bill to establish the Tobacco Accountability Board.

INTRODUCED: 06/12/97

COSPONSORS: 0 (Dems: 0 Reps: 0 Ind: 0)

COMMITTEES: House Commerce

LEGISLATIVE ACTION:

06/12/97 Referred to Committee on Commerce (CR p. H3796)

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OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT SECTION

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Attorney General

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NUMBER OF PAGES (including cover page): 16

COMMENTS: I've included a cover sheet that went to the public health folks - these documents also went to the 20 other AG. who are litigating

See you Thursday! 612

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MINNESOTA'S FIRST NEWSPAPER

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14 SECTIONS, 612 PAGES
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PioneerPlanet SUNDAY www.pioneerplanet.com

States draw line on tobacco settlement

Court to hear challenge to rules that would limit smoking by youths. Story, Page 6A

Humphrey details goals if firms seek win in Congress

DAVID SHAFFER STAFF WRITER

State attorneys general led by Hubert Humphrey III of Minnesota have told members of Congress they would settle tobacco lawsuits if the industry paid billions of dollars in damages and submitted to stricter regulation, including an unprecedented effort to wipe out youth smoking.

The proposal, initially drafted by Humphrey, is a response to reports that Congress may offer a compromise to the tobacco industry, possibly affecting 21 state lawsuits against tobacco companies and the fate of new U.S. Food and Drug Administration rules on cigarette advertising.

Humphrey said Saturday that attorneys general have presented their proposal to a small number of lawmakers over the past two months. The proposal has not been discussed with tobacco companies, he added.

A 13-page outline of the legislative package, stamped "confidential," was released late last week after an earlier draft was leaked to national news organizations. Its key provisions would:

- Require tobacco companies to pay billions of dollars into a litigation settlement fund. The amount isn't specified, but the proposal notes a stock analyst has suggested that guaranteeing the future of the U.S. cigarette market might be worth $60 billion to industry leader Philip Morris.
- Launch a national campaign, using some of the tobacco industry settlement money, to virtually wipe out smoking by children over the next decade.
- Force the tobacco industry to submit to FDA regulations that restrict advertising and the placement of cigarette vending machines.
- Allow states and individuals to continue suing the tobacco industry, but give

TOBACCO CONTINUED ON 6A ▶

TOBACCO

▼ CONTINUED FROM 1A

them incentives to settle for a share of the settlement fund.

■ Require tobacco companies to disclose most internal documents on smoking and health and to dissolve trade associations, which have been accused of spreading misinformation about the dangers of smoking.

Humphrey and attorneys general from two other states said they are not pushing for a settlement of state lawsuits seeking reimbursement of costs for treating smoking-related illnesses.

Instead, officials said the proposal grew out of concerns that pro-industry lawmakers will revive a plan to give cigarette makers immunity from liability suits. The plan, disclosed last August, has not been enacted.

"I think there are clear things the attorneys general are concerned about. One of them is their concern regarding children. . . . We have to realize that (nicotine) is addictive and that children are very vulnerable.""

CHRISTINE GREGOIRE
ATTORNEY GENERAL
WASHINGTON STATE

"We are fully preparing for trial, and I believe that is the appropriate forum for resolution of this case," Humphrey said. "I don't want that effort taken away from us because of some quick deal, some fast-track legislation that is introduced."

Connecticut Attorney General Dick Blumenthal described the proposal of the attorneys general as "almost an anchor or a ballast that we can use when the political winds get heavy as we expect they will in Congress.

"Our instinct was that at some point, folks in Congress might say to us, in essence, 'What is your bottom line?' " said Blumenthal, who is one of the attorneys general suing the tobacco industry.

Attorneys general met in Washington before Christmas to review a first draft of the proposal and showed it to several lawmakers and public health advocates, according to officials who attended the meetings.

"I think we have a consensus," said Christine Gregoire, attorney general for Washington state. "I think there are clear things the attorneys general are concerned a . . . of them is their concern regarding children. . . . We have to realize that (nicotine) is addictive and that children are very vulnerable."

Peggy Carter, spokeswoman for No. 2 cigarette maker R.J. Reynolds, said the company was not part of the discussions and had no comment.

It was unclear whether Republican leaders in Congress had seen the proposal. Humphrey and others would not say which lawmakers had been given copies of the outline. Congressional leaders could not be reached Saturday.

A proposal that surfaced last August in Congress would have forced the tobacco industry to pay $100 billion over the next 15 years in return for partial immunity from lawsuits. That proposal was drafted mainly by lawyers from Mississippi suing the cigarette companies.

At the time, attorneys general assailed the plan as too soft on the industry. The latest proposal calls for tobacco companies to make an unspecified lump-sum pay , followed by annual payments that could increase if goals to reduce youth smoking are not met. Those payments would be in addition to the $5 billion collected annually in federal excise taxes on cigarettes.

People and states suing the to :o industry, including Minnesota and Wisconsin, could continue their liti ıtion under the proposal. But the creation of a settlement fund would give them an incentive to settle — rather than to risk losing in court. A federal judge w ld oversee settlements.

Humphrey said attorneys general are universally opposed to any effort by Congress to pre-empt states' rights to press their lawsuits.

Under the new proposal, 10 per . of any tobacco industry settlement w d be spent by the FDA on tobacco-control efforts, including anti-smoking advertising, medical research, smoking cessation programs and control of environmental tobacco smoke. The goal would be to reduce the number of underage smokers by 30 percent every three years.

The plan also calls for passage of a federal law requiring owners of nonresidential buildings used by the public t ban smoking or restrict it to adequately ventilated rooms.

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Ken Warner

Date: Feb 10, 1997

16 pages
incl

As you know, Minnesota looks forward to going to trial against the tobacco companies. Those 26 million pages of documents are very interesting!

However, you may have read in today's Washington Post about an effort among some attorneys general to be able to answer the question "What's our bottom line?" if we are asked by Congress.

The attached documents that begin to answer that question are a work in progress. We very much want your input so that, when asked, we can articulate the strongest possible public health agenda as part of any settlement framework.

Please contact me with your thoughts and responses, formal or informal. Thanks!

Luanne Nyberg
Senior Public Health Advisor on Federal and State Tobacco Issues
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Humphrey

DRAFT

Tobacco Regulation and Public Health Act

FDA Jurisdiction Over Tobacco

- Confirms FDA's jurisdiction over tobacco products under the Food, Drug and Cosmetic Act.
- Fully incorporates FDA's 1996 Rule on tobacco marketing to children, and permits enforcement by states and private parties, as well as FDA.
- Incorporates terms of the proposed Smoke-Free Environment Act of 1993, requiring owners of all non-residential buildings entered by the public to ban indoor smoking or provide separately-ventilated smoking rooms.
- Gives Dept. of Health and Human Services broad power to regulate the manufacture, promotion and sale of tobacco products, comparable to the regulation of other products
- Provides for disclosure of cigarette additives, new warnings about environmental tobacco smoke and additional labeling requirements.
- Does not allow any outright ban of tobacco products.

New National Tobacco Control Programs

- Earmarks $___ billion annually (ten percent of industry's annual payments under the Act) for new national tobacco control initiatives.
- Dedicates this fund for counter-advertising and other public education; medical research; policy advocacy; cessation programs and efforts to control environmental tobacco smoke.
- The allocation of funds among these and similar activities would be specified in the bill after consultation with the public health community.

Industry Reforms

- Dissolves trade associations because of their role in years of conspiracy.
- Provides for a consent decree to govern the conduct of any new trade associations.
- Requires disclosure of industry's internal documents on smoking and health, with exceptions for genuine trade secrets and true attorney-client privileges.
- Requires tobacco companies to share their technologies for making cigarettes less hazardous.
- Voids "gag" agreements that silence former tobacco company employees.
- Criminalizes the intentional concealment of information on tobacco and health.

No Preemption

- Does not preempt state or local laws.
- Repeals preemptive provisions of Cigarette Labeling Act that currently limit states' ability to regulate advertising or require warning labels.
- Does not abrogate existing lawsuits against tobacco companies without consent of the parties, but provides incentives for voluntary settlement.
- Does not abrogate future private lawsuits, but does provide incentives for voluntary settlement.

DRAFT

Tobacco Company Payments

- Requires tobacco companies to pay an initial $ ___ billion, and annual payments of $ ___ billion thereafter.
- Ninety percent of these revenues will be used to compensate those litigating states and private plaintiffs who choose to settle, and ten percent of these revenues will be used to fund major new health-related initiatives at the state and national levels, as described above.

Reimbursement to States and Private Plaintiffs for Tobacco-Related Damages

- Creates a fund for reimbursement of those litigating states that choose to settle their claims for health-care expenditures attributable to tobacco, and for reimbursement of private plaintiffs who choose to settle voluntarily.
- Requires an initial payment into the fund of $___ billion by manufacturers, as compensation for past conduct, followed by annual payments of $__ billion.
- Requires manufacturers to pay in proportion to their market share.
- Allows states to recover in proportion to their damages, with some additional premium, to be set by a federal district court, for states that filed cases before 1997.
- Requires states to set aside ten percent of their recoveries for tobacco control at the state and local level, but permits the states to use the remaining funds as they choose.

Effect on Legal Actions

- Pending cases are not abrogated against the wishes of the parties.
- Future legal actions by private parties are not abrogated against their wishes.
- Future actions by additional states, asserting claims based on the industry's past conduct, must be filed within 90 days after the Act takes effect.
- No restrictions on future civil lawsuits, public or private, for any future misconduct by the industry.
- No restrictions on prosecution for any individual crimes, whether committed in the past or future.

February 7, 1997

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OUTLINE OF THE TOBACCO REGULATION AND PUBLIC HEALTH ACT OF 1997

Short Title

The Tobacco Regulation and Public Health Act of 1997.

Findings and Purpose

To be incorporated largely from the 1993 "Fair Regulation of Nicotine and Tobacco Act" authored by Rep. Synar in the House and by Sen. Bingamon in the Senate (hereinafter "Synar/Bingamon") with necessary factual updates and amplifications to address the litigation. The findings and purpose sections should set out the compelling public interests in regulating tobacco products and reducing tobacco usage, including findings of historical industry misconduct, and should also specify what the tobacco companies get in return.

Definitions

To the extent available, to be based on the FDA regulations or other existing sources such as Synar/Bingamon.

Regulation

The bill would incorporate tobacco regulations from three sources: the current FDA regulations, Synar/Bingamon, and the proposed Smoke-Free Environment Act of 1993 (H.R. 3434/S. 1680). In addition, the bill contain its own innovative provision to progressively tighten practices contributing to youth smoking. Incorporating the FDA rules, Synar/Bingamon and the Smoke-Free Environment Act permits the States to advocate existing models to achieve our public health aims. Synar/Bingamon, through amendments to the Federal Food, Drug and Cosmetic Act, would grant broad rule making authority to the Secretary of Health and Human Services, while prohibiting a ban on the sale of tobacco products. The 1993 bill's approach is fundamentally fair: It would require regulation of tobacco products "which are consistent with the manner in which other products which are ingested into the body are regulated." This proposal, in the aggregate, would:

- Authorize the Secretary of Health and Human Services to promulgate regulations "governing the manufacture, distribution, sale, labeling, and advertising and promotion of tobacco products which are consistent with the manner in which other products which are ingested into the body are regulated...."
- Prohibit an outright ban on tobacco products
- Deem product as misbranded unless labeled with a warning about environmental tobacco smoke.

- Deem product as misbranded if the label does not contain a list of chemical additives and constituents of tobacco smoke.
- Prohibit implied or direct health claims through the use of listed words *unless* approved by the Secretary, who may do so if she/he believes that the claim "will have a significant impact on the health consequences associated with cigarette smoking and other tobacco use."
- Grant additional, flexible authority to meet future developments.
- As proposed in the Smoke-Free Environment Act of 1993, require the owners or lessees of "public facilities" (nonresidential buildings entered by ten or more persons) to provide a smoke-free environment to building occupants by either banning indoor smoking or restricting smoking to adequately ventilated rooms.
- Specify the intent of Congress to eliminate the use of tobacco products by persons under the age of 18. Upon the effective date of this Act, and every three years thereafter, until and including 2012, the Secretary shall conduct a study of tobacco product use by brand and age, by persons under the age of 18. If the study shows that under-age smoking has not declined by 30% in the aggregate after the first three three-year periods, as measured against the baseline number of under-age smokers shown in the original study (i.e. 60% after six years, 90% after nine), the Secretary shall adopt such additional regulations as he deems necessary to meet the aggregate target goals by the end of the next three-year period. Such industry-wide regulations may include additional restrictions on the advertising and marketing of tobacco products generally. With respect to specific brands which show less than the required percentage decrease in consumption, there shall be imposed an additional, substantial per-sales-unit (pack, pouch, etc.) surcharge. In addition, the Secretary may (1) adopt additional restrictions on advertising and marketing, (2) ban all advertising for repeat offenders, and (3) mandate a decrease in effective nicotine yield.

Comments: (1) It has been suggested that the proposal specifically define nicotine manipulation as "misbranding". The general sense of the group, however, is to leave the nicotine manipulation issue to the sound discretion of a fully empowered FDA.
(2) The Smoke-Free Environment Act of 1993 was endorsed by a broad coalition of health experts, business organizations, and public officials, including the Attorneys General of AZ, CT, FL, HI, IL, IN, IA, KA, ME, MD, MA, MI, MN, MS, MT, NM, NY, OK, RI, TX, UT, and WA.
(3) In response to comments, this draft of the proposal sets the goal as the "elimination" of under-age smoking, rather than its "substantial elimination".
(4) There was unanimous agreement on the inclusion of triggers for future action against unabated youth smoking.

Appropriation

- Earmark 10% off the top of payments received from the tobacco industry, to be granted by the FDA for new, national tobacco-related initiatives, programs, grants, or research.

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- Input from public health and tobacco control communities to determine how money should best be used to further tobacco-related public health goals.
- Estimate funding needed for Administrator's operation; and provide for that amount to come out of the 10%. Any residuum in 2012 to be granted to public health organizations.

Enforcement of FDA Tobacco Advertising and Marketing Regulations

The States, as well as the FDA, should be able to enforce the advertising and marketing restrictions, *and* obtain meaningful relief. In addition, individuals should have standing as "little attorneys general" to enforce the Act in a manner analogous to the False Claims Act.

- The Attorney General or the chief health officer of each State may enforce the tobacco advertising and marketing provisions of the FDA Act or Rules in state or federal court
- If State prevails, the court shall enter an order enjoining the violations, *and* grant the State its actual costs and reasonable attorneys fees.
- Civil penalty of up to $100,000 per violation
    - "Per violation" defined so that each placement of forbidden advertising or marketing materials is a separate violation
- Money damages to injured parties.
- Individual rights of action, similar to those provided in the False Claims Act, after notice of a violation to the State enforcement authorities and State failure to act.

Comment: The costs, fees and civil penalty provisions are necessary to deter industry violations and make the States whole for costs of enforcement. Permitting enforcement by the state attorney general, chief health officer of the state and private individuals will decrease the likelihood of non-enforcement by a single, pro-industry enforcer. Private actions may be the only way to get enforcement in some states.

Industry reform

- Dissolution of the Tobacco Institute, the Council for Tobacco Research, and the Smokeless Tobacco Institute.
- Upon application of the States, a consent decree could contain injunctions against specific anti-competitive acts, limiting the activities of any new trade association which may be formed. The D.C. District Court would be vested with jurisdiction for this purpose. The industry would give the States notice that it intends to form a new trade group, and the States would then, within a given period of time, move the court for any orders.
- All papers of the three trade organizations and their current or former affiliates, including all research, to be turned over to the Administrator to be made public in a central depository. This includes material in the possession and control of industry lawyers, and extends to the

books and records of any current or former affiliate or subsidiary of any of the trade associations.

- The Tobacco Manufacturers, their current or former affiliates, subsidiaries, agents, attorneys and grantees to turn over to the FDA all previously unpublished information in their possession regarding tobacco use and health. This information must include not only final research reports, but all documents relating to the reports, and any other document responsive to a document request served on the industry in any past or present smoking and health litigation. All information except trade secret information relating to current and proposed products must be public. Commissioner may challenge the industry's classification of anything as "trade secret"; disputes settled by D.C. District Court. Disputed claims of attorney client privilege determined the same way. *(Alternative: Given the Industry's past abuse of the attorney-client privilege, forbid its use to conceal any smoking and health related information.)*
- Release current and former employees from secrecy and non-compete agreements.
- Felony to knowingly withhold or conceal information required to be produced under this section.
- Mandatory cross-licensing of safer cigarette technology.

Comments: (1) The dissolution of industry trade groups is a standard antitrust remedy designed to break up the vehicles of conspiracy. We have used this remedy consistently in cases where the principal purpose of the trade association has been to implement illegal behavior. In order to address the argument that trade associations still perform lawful and useful activities, the industry would be able to form new associations, the activities of which would be limited by any injunctive provisions the States could persuade the DC District Court to order. Any State (or a committee of the original litigating States) could move to enforce.
(2) The next two points, disclosure of trade association papers, and all research and product design information in the hands of the individual companies, go to the heart of our "let's get out the truth once and for all" goal. The research and product information the FDA will need as a basis for its regulation. Given the industry's abuse of the attorney client privilege, in particular, there must be a neutral arbiter of privilege claims.
(3) Enforcement of the FDA regs, and other Industry obligations, through individual state consent decrees is discussed in a separate section, below.

Limitation of actions

Any global settlement legislation should create incentives for States, individuals and other injured parties to participate *without* preempting or limiting their claims, except for a limitation on public entity and private third party payer claims after a reasonable opt-in period.

- No limitation of individual acts (but opt-in incentives to be provided-see "Compensation").

- Opt-in "window" period for non-litigating states (see "Compensation", below). After the window closes, no new "Medicaid-type actions" by states, other governmental entities or other third party payers *for past tobacco company misconduct.*
- No limitation on legal actions for *post-effective date* tobacco company misconduct, or any limitations on the States' ability to enforce their laws against conduct occurring after the date of the Act.
- No criminal actions for enumerated offenses such as perjury, obstruction of justice, false statements to Congress or regulators, against any corporation which complies with the full disclosure provisions--but *no* criminal immunity for individuals.

Comment: From the beginning, some Attorneys General felt strongly that no limitations of private actions were appropriate. Accordingly, only future Medicaid-type actions by non-participating States, or by local governments, or private third party payers which had not already filed, would be preempted or limited.

Preemption

The only existing lawsuits preempted under this Act would be Industry lawsuits against the states, such as the "preemptive" suits and the challenge to the Massachusetts ingredient disclosure law.

- No preemption or abrogation of existing lawsuits against tobacco companies.
- Industry lawsuits against States (e.g. preemptive suits) would be preempted.
- No preemption of state or local ordinances except as specified in the current FDA regulations.
- Some preemptive provisions of the Cigarette Labeling Act, preventing States from regulating cigarette advertising, would be repealed.

Compensation for tobacco plaintiffs

Compensation for the litigants should be determined after consultation with appropriate experts. Material information would include, for example, the Bernstein Research analysis by Gary Black who calculates, in his report titled "Litigation Myopia: Damages Should Be Viewed As Expenses - Not Liabilities," that "Philip Morris now discounts $60 billion in litigation risks." In other words, a settlement which permits continued sale of cigarettes would be worth an immediate $60 billion to the owners of just one of the tobacco defendants.

The compensation provisions of the bill must provide for past damages; future compensation, in the form of periodic payments, to offset the continuing costs of the use of tobacco products; attorneys fees and costs.

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- For any state which has filed tobacco litigation, or opts in by filing a case within 90 days of the effective date of the Act:
  - Compensation for past damages, in a lump sum. The total past damages should be determined after consultation with appropriate experts and based on the principles of fair compensation, deterrence and unjust enrichment which apply in other law enforcement cases.
- Future payments of $____ billion per year, adjusted for inflation, toward the future costs of treating tobacco-related, Medicaid-covered illnesses.

- Local governments and private third party payers which filed actions before the cut-off date would also be entitled to past damages and future payments. Others which had not so filed would not be eligible to come in during the 90-day window; only states would.

- In addition to the above, for states, local governments and private third party payers which filed actions before the determined cut-off date, and bore the risk and expense of bringing, Congress, the public and the Industry to terms with this issue:
  - A premium set aside from the past payment, to compensate the litigants who had taken the risks and initiative to earn the recovery--those having filed before the cut-off date to be determined. The premium would be based on:
    - The amount of time the entity had been litigating.
    - The amount of work the entity had put into its litigation.
    - The quality of its contribution to the overall success of the tobacco litigation.
    - The quantity, quality and value of other tobacco control activities undertaken by the entity.
    - Actual amount per litigant to be determined by the District of Columbia District Court.
  - Attorneys fees and costs, to be approved by the courts in the jurisdiction in which each action is pending, in accordance with applicable retainer agreements and applicable law. The amount of attorneys' fees so determined shall be considered as an element of the premium to those states who are so entitled to the premium.

- Individuals with future claims would have the alternative of arbitration through a state claims board or litigating on their own.
- For individual private litigants who filed suits before the cut-off date, an amount to be set aside from the "past damages" lump sum payment, to give private claimants an incentive to opt in. This includes class actions. Attorneys fees for private litigants to come out of their awards in an amount to be determined by the court of jurisdiction.
- Amount set aside also from future payments for injured individuals who prevailed in a optional arbitration proceeding (process to be established). Other private individuals could litigate on their own merits.

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- The companies' obligations under this Act are not dischargeable in bankruptcy proceedings, under section 523 of the Bankruptcy Code, and have priority under section 507 of the Code.
- The companies' payments under this Act are not tax deductible.

Division of payments among eligible public entities and private third-party payers

- State shares divided in a manner to be calculated. See *Comment*, below.
- States and local governments can keep entire award, notwithstanding the normal federal right to reimbursement for recoveries under the Medicaid law. (States need not pay back the federal share of Medicaid expenditures.)
- Private third-party payers having filed before the cut-off receive their expenditures for smoking attributable diseases.
- The administrator notifies each tobacco manufacturer and each eligible, state, local government, or insurer, of the amount the manufacturer owes to the eligible entity by April 30.

Comment: There have been three proposals for dividing the money among the States: based on each State's percentage of the total Medicaid population (a formula which would allocate more to states with large Medicaid populations and low reimbursement rates); based on percentage of state-share Medicaid payments (which favors states having high reimbursement rates); and based on each state's percentage of total--i.e. state and federal--Medicaid payments (which tends to balance the two). There is no need to decide among these formulae at this time.

Use of payments by States

This bill would impose minimal restrictions on the States' use of the money, mandating a percentage for controlling tobacco use but with the States free to use the remainder any way they wish (as long as it did not trigger increased federal spending obligations). Note that there would be no restrictions or limitations on the use of a jury award. Under this proposal the Administrator would act only as a convenient recipient who performs services in connection with the distribution of money.

- At least ten percent of the money would be used by States for specified tobacco control activities such as smoking cessation research and programs, anti-tobacco-use advertising and underage sales compliance checks. Specific programs to be determined after consultation with public health and tobacco control communities. The States would be able to choose from a menu of programs and activities determined effective by the FDA and public health advocates.
- No restrictions on use of the rest of the money, except that the money can't be used to increase the State's share of any program which would require the federal government to

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increase its spending to match. Conversely, there shall be no reduction in federal funding to state and local governments to offset recoveries from the tobacco litigation.

- States make annual report to Administrator showing compliance with this mandate.

Note: The proviso regarding matching share programs, together with the amount appropriated from the fund to the Administrator, are designed to make this bill revenue neutral for the federal government.

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Division of payments among companies

Each company's payment for past damages would depend on its market share as of the effective date. Payments for future costs based on sales, as provided above.

The Administrator

- Appointed by the President.
- Background in tobacco control.
- Within the Department of Health and Human Services.
- Receives money from tobacco industry and pays out money to states (non-discretionary).
- Determines the appropriateness of companies' designation of information as trade secret or attorney/client privileged.
- Reviews and certifies States' compliance with the requirement that the States use 10% of the money for tobacco control activities.
- Custodian of records of the dissolved tobacco industry trade associations.

Jurisdiction of the District of Columbia District Court

There are a number of decisions which, on an ongoing basis, are probably more appropriately made by a court than by the Administrator. To provide a central location in a court which will develop some expertise in tobacco industry matters, the D.C. District Court seems a logical, and unbiased, choice. Matters for the court:

- Determining the amounts of the settlement "premium".
- Hearing State petitions for any injunctive relief limiting the activities of any new industry trade association.
- Reviews Administrator's determinations of trade secret and privilege status of disputed documents.

Individual State Content Decrees Authorized

- As a condition of immunity from future "Medicaid-type" actions, the Industry would have to consent to entry of state-by-state consent decrees, to ensure future enforcement of terms.

Comment: A number of Attorneys General have asked for inclusion of such a provision to help ensure that the settlement will remain enforcement even in there is future, adverse action in Congress.

Severability

- Include a severability clause.

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Repealer

- Repeal inconsistent provisions of federal law, including the problem parts - e.g. preemption - of the cigarette labeling and advertising act, __ U.S.C. __. See also the Synar Bill.

Effective Date

Effective when signed by the President.

AG:59559 v1

To: Elizabeth Drye
Rm. 222

→ See #39

Sherman Boone
X65316

- Unmoved

To by

- OVP -

- June 18th
AG.

Final

June 11, 1997

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Bruce Lindsey
Rahm Emanuel

SUBJECT: Tobacco Settlement Review Process

We have reached agreement with HHS on a process to review and evaluate the possible tobacco settlement with relevant agencies, to seek input from the public health community, and to present recommendations to the President. Our goal is to prepare a memo for the President later this month that: (1) defines the public health and public interest objectives of a global settlement; (2) weighs the settlement's strengths and weaknesses against those objectives and proposes possible modifications; (3) assesses the likely reactions of the public health community and other affected parties; and (4) lays out options for how to respond to a settlement announcement.

Interagency Review

This review will be carried out by (1) our existing tobacco group, which will examine the public health and liability issues, and (2) a DPC-NEC health care team led by Chris Jennings, which will assess how to spend recovered Medicaid revenues. These teams will look at the Administration's overall public health and public interest goals; what will happen with the proposed settlement, what will happen with no settlement; and what changes we might want in any global settlement.

o Public Health and Liability Team

We expect to receive a draft of the possible settlement documents tomorrow or Friday from Attorney General Mike Moore. We will hold a White House meeting Friday or Monday with representatives from the major agencies (HHS, Justice, Treasury, USDA, Labor, OMB) and White House offices (DPC, NEC, OVP, OSTP, Counsel, Leg. Affairs, Intergovernmental, Public Liaison) to begin review of these documents. The principal issues will be:

1. FDA regulation of product, access, and labeling
2. Advertising restrictions / public education
3. Environmental tobacco smoke
4. Smoking cessation

5. Farmers
6. Liability and litigation
7. Drafting and enforcement issues in codifying a potential agreement

We will ask these representatives to respond with preliminary recommendations by Thursday, June 19. At the same time, we will ask a smaller group of agencies (HHS, USTR, State, Commerce, NEC, NSC, DPC) for their views on U.S. responsibility in addressing the growth of smoking worldwide.

o Medicaid Spending/Children's Health Team

Chris Jennings' group (HHS, Treasury, Labor, OMB, DPC, NEC) will begin meeting tomorrow to explore options for using the Federal government's share of recovered Medicaid funds for health care investments. This is an effort we had already planned to undertake to evaluate Hatch-Kennedy or similar legislation.

Outreach

Over the next two weeks, we will reach out to public health organizations and individuals and to members of Congress. Key public health contacts include: Action on Smoking and Health; American Cancer Society; American Heart Association; American Medical Association; American Academy of Pediatrics; American Public Health Association; Americans for Nonsmokers' Rights; National Center for Tobacco-Free Kids; Dr. Kessler; and Dr. Koop. We will also meet with other affected parties (states, farmers, small businesses) as appropriate.

Schedule

We have planned the following schedule, but note that adherence to this timetable is highly dependent on agency cooperation.

June 12:	Teams begin meeting.
June 18:	Teams report back with initial findings and outstanding issues.
Week of June 16:	White House and HHS host meetings with public health groups.
Week of June 23:	Develop options for outstanding issues; hold principals meeting.
June 27:	Send memo to the President.

Mike Moore told us today that the parties to the negotiations will meet Monday and try to reach agreement by mid-week.

Elizabeth Drye
06/12/97 12:45:40 PM

Record Type: Record

To: Joshua Silverman/WHO/EOP, Darby E. Stott/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Tobacco Q&A. Re. Adminstration review of settlement


Q&Aset3.tob

Message Copied To:

Elena Kagan/OPD/EOP
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STATEMENT OF CONGRESSMAN HENRY A. WAXMAN

June 3, 1997

Today I am pleased to join with my colleagues in introducing two bills that will protect children and nonsmokers from the hazards of tobacco. Tobacco is the leading cause of preventable death, and we must begin to take steps now to create an effective tobacco control policy.

The "NO Tobacco for Kids Act" fights youth smoking by reordering the economic incentives of tobacco manufacturers. Tobacco companies have long targeted teenagers for the profits a lifetime of addiction can bring. What these companies know is that the younger one starts smoking regularly, the greater the likelihood of chronic use as an adult. A child hooked today is a permanent customer in the future.

The NOT for Kids Act will change the companies' calculus. The economic incentives the industry now has to addict kids will be replaced by new economic incentives to not addict kids.

This bill sets a strict timetable to reduce actual youth tobacco use. Over a period of six years, every tobacco company will be required to reduce the number of children using its products by 90 percent. If a company fails to meet the performance standard, it will be required to pay a noncompliance fee of $1 per pack on all its tobacco sales in the subsequent year. For the first time ever, it will be in the companies' interest to comply with -- not circumvent -- restrictions on sales and marketing to children. The industry will have an economic reason to focus their marketing genius and resources on persuading kids not to smoke.

The second bill we are introducing today, the Smoke-Free Environment Act, will protect all of us -- children and adults alike -- from the dangers of secondhand smoke. Environmental tobacco smoke can cause heart disease and lung cancer. It is a special risk to children, triggering asthma attacks that can keep children out of restaurants and other public places.

The Smoke-Free Environment Act will fight the deadly effects of secondhand smoke. It requires that owners of non-residential buildings either ban smoking entirely or restrict smoking to separately ventilated rooms. The requirements of the bill are enforced through citizen suits, avoiding the creation of a new federal bureaucracy.

These bills are not a comprehensive tobacco control program. We have asked Dr. Kessler and Dr. Koop to head an Advisory Committee on Tobacco Policy and Public Health that will inform us on the provisions that should be in a comprehensive program. The bills that we are introducing today, however, should be elements of any effective and rational tobacco control policy.

The NOT for Kids and Smoke-Free Environment Acts have been endorsed by a wide range of health and consumer groups, including the American Lung Association, the American Heart Association, the American Cancer Society, the National Parents & Teachers Association, Action on Smoking and Health, and the U.S. Public Interest Research Group. The Smoke-Free Environment Act has also been endorsed by the Building Owners and Managers Association.

Summary of
The NO Tobacco For Kids Act ("NOT For Kids")

The NO Tobacco for Kids Act ("NOT For Kids") will establish a clear performance standard for the reduction of youth smoking in America. For too many years, the tobacco companies have claimed they oppose youth smoking and spit tobacco use while continuing to hook new generations of kids on their deadly products. This bill sets out a schedule to reduce actual youth tobacco use and contains provisions that for the first time will give individual tobacco companies an economic incentive to stop marketing their products to children. Specifically, the bill provides:

- Within one year after enactment, the Secretary of HHS will conduct a survey to determine the number of children who used each manufacturer's tobacco products within the previous 30 days.

- Each manufacturer will then face penalties if it does not reduce the number of children who use its tobacco products by specified percentages from the baseline level over the succeeding years. The performance standard for each manufacturer is as follows:

  Year 1: no standard, baseline survey is taken
  Year 2: 20% reduction from the baseline
  Year 3: 40% reduction from the baseline
  Year 4: 60% reduction from the baseline
  Year 5: 80% reduction from the baseline
  Year 6: 90% reduction from the baseline
  Subsequent years: 90% reduction from the baseline

- Manufacturers that reduce youth tobacco use to a de minimus level (one-half percent of the current number of youth smokers) will be deemed in compliance.

- If a manufacturer violates the performance standard, that manufacturer must pay a noncompliance fee of $1 per pack, pouch, can, etc. on all of their tobacco sales in the subsequent year (not just on sales to youth). If the manufacturer violates the performance standard for two or more consecutive years, the noncompliance fee is increased by $1 for each consecutive year of violation. A manufacturer who comes within 10% of the required reduction for a particular year will have its noncompliance fee reduced on a pro rata basis.

- The first $1 billion of noncompliance fees collected in any fiscal year will go into a fund for enforcement and public education to discourage children from using tobacco products. Any additional fees will go to the Treasury for deficit reduction.

Summary Of
The Smoke-Free Environment Act of 1997

Environmental tobacco smoke (ETS) is a dangerous pollutant. Regular exposure to ETS nearly doubles a woman's risk of heart disease and causes as many as 60,000 heart attack deaths each year in nonsmokers, according to a Harvard study released just a few weeks ago. According to EPA, there is a cause and effect link between passive smoking and lung cancer and an estimated 3,000 nonsmoking Americans die of lung cancer each year because of their long-term exposure.

Children are the population most vulnerable to ETS. According to EPA, even brief exposure to ETS can damage a child's lungs. ETS exposure in childhood can cause many serious health problems, including asthma attacks, respiratory infections, such as pneumonia and bronchitis, and middle ear effusion. Studies have also shown that ETS exposure during pregnancy reduces the birth weight of infants and may cause problems with speech, language, and attention span.

Summary of Major Provisions

- This Act protects the public from involuntary exposure to ETS by requiring the "responsible entity" (the owner or lessee) of "public facilities" (nonresidential buildings regularly entered by 10 or more persons) to provide a smoke-free environment.

- The responsible entity is given two compliance options. It may prohibit smoking inside the building or restrict smoking to specially designated smoking areas, which have separate ventilation systems.

- This Act also amends federal transportation law to prohibit smoking on all scheduled airline flight segments in interstate and intrastate air transportation. It also requires all domestic and foreign air carriers to prohibit smoking on any scheduled airline flight within the United States or between a place in the United States and a place outside of it. Current law prohibits smoking on domestic flights of six hours or less.