APPROPS —

TOBACCO

Appropriations – Tobacco

DESCRIPTION

Underage Youth Smoking is a Major Health Problem

Every year over 400,000 Americans die of smoking-related diseases. Almost 90 percent of adult smokers began smoking at or before age 18. Over 4.1 million children aged 12 to 17 are *already* smokers. 37 percent of high school seniors smoke, the highest level in 19 years. Adolescents who smoke are 16 times more likely to drink heavily than nonsmoking youths and 11 times more likely to use illicit drugs. Teenagers also underestimate the addictiveness of nicotine -- 75 percent of daily smokers who expect to quit are still smoking five years later.

We Must Do More to Prevent Another Generation of Teenagers from Smoking

All sectors of society must be held accountable for reducing youth smoking. The Federal government funds tobacco prevention programs through the Centers for Disease Control, and works with states to ensure that every state enforces its laws banning cigarette sales to minors. Private organizations work in communities across America to educate youth about the dangers of smoking.

But this is not enough. For decades, the tobacco industry has marketed cigarettes to children. The millions of industry documents made public in recent years make clear that companies knew long before the public that nicotine is addictive, and they designed cigarette promotion campaigns to lure children into smoking so they could become, as one document put it, "replacement smokers." To stop the epidemic of teen smoking, we must give the tobacco industry an incentive to reduce it.

This Proposal will Give Companies an Incentive to Reduce Teen Smoking

This proposal will hold tobacco companies accountable for teen smoking and will give them an incentive to do everything they can to stop it. It would impose graduated assessments for failing to reduce the number of underage smokers. The more companies reduce youth smoking, the lower their assessments can be.

This proposal will give companies a powerful incentive to do more to reduce teen smoking. There are many things tobacco companies can do, such as halting advertising and marketing campaigns that appeal to minors, ensuring retailers who sell their cigarettes don't sell them to minors, and funding independently designed and operated public education campaigns to encourage young people not to smoke.

This proposal will ensure tobacco companies work together with Federal, state, and community leaders to prevent another generation of children from beginning to smoke – and becoming addicted – before they are old enough to understand the consequences of their actions.

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This proposal will hold tobacco companies accountable for teen smoking and will give them an incentive to do everything they can to stop it. For each smoker aged 12 to 17, companies would be charged $1,425 -- the lifetime profits companies make from each child smoker. In effect, it would take the profit out of introducing smoking to underage kids.

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This assessment will ensure tobacco companies work together with Federal, state, and community leaders to prevent another generation of children from beginning to smoke – and becoming addicted – before they are old enough to understand the consequences of their actions.

DRAFT LANGUAGE FOR INSERTION INTO L/HHS APPROPRIATIONS BILL

SECTION XXX

(1) Whereas recent survey data find that there are 4.1 million children aged 12 to 17 in the United States who smoke;

(2) Whereas the Congress believes that domestic cigarette manufacturers should pay an assessment of $1,425 in fiscal year 2000 for each child who smokes, to eliminate any profit from encouraging smoking by underage youth, provide tobacco companies with an incentive to do everything they can to stop youth smoking, and to decrease smoking among young people. This assessment should be in addition to the payments being made to states to reimburse states for smoking-related costs; and

(3)Whereas the amount of future assessments, if Congress chooses to impose them, will be allocated to each domestic cigarette manufacturer based on surveyed reductions in smoking by underage youth.

(4)ASSESSMENT -- For fiscal year 2000, domestic cigarette manufacturers shall deposit in the Treasury a total assessment of $5,800,000,000 to be used only to reduce the Federal debt held by the public. This amount shall be paid in three payments, the last of which shall be no later than September 30, 2000, as prescribed by the Secretary of Health and Human Services. Each domestic cigarette manufacturer shall be liable to, and shall be assessed by the United States for a share of each payment. Each such share of each payment due from each manufacturer shall be equal to the ratio that domestic cigarette sales of the manufacturer bears to the total of all such sales of all such manufacturers, as determined by the Secretary of Health and Human Services. Each share shall be calculated by the Secretary of Health and Human Services based on a date or period chosen by the Secretary that is (a) within fiscal year 2000, and (b) after the date of enactment of this Act. The determinations and calculations of the Secretary under this section shall be published in the Federal Register and shall not be subject to judicial review. For purposes of this section, the term "domestic cigarette manufacturers" means manufacturers that sell cigarettes in the United States.

(5) NO CONTRIBUTION FROM OTHER TOBACCO PRODUCT MANUFACTURERS – No other tobacco product manufacturer shall be required to contribute to the payment required by this section.

(6) NO TAX BENEFIT – Any payment made by a domestic cigarette manufacturer under this section shall not be deductible as an ordinary and necessary business expense or otherwise under the Internal Revenue Code of 1986.

RESPONSES TO CONCERNS ABOUT THE PROPOSAL (For Internal Use Only)

In developing tobacco revenue offset proposals for the Labor/HHS appropriation over the past few months, several concerns have been raised:

(1) Potential **interaction with State Tobacco Settlement offset provision**, if the proposal triggered a reduction in tobacco company payments to states;

(2) **CBO scoring and point of order issues**; and

(3) Informal **DOJ staff concerns about the retrospective nature of the tobacco company assessment and its lack of linkage to company conduct**.

(4) **Precedent:** Whether the government makes any other such assessments

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1) Potential Interaction with State Tobacco Settlement – Section X of the State Tobacco Settlement establishes *a dollar-for-dollar offset for tobacco industry payments to states should new Federal legislation be enacted that distributes tobacco receipts to states* in certain ways. Subsection (b) of the provision states that the offset applies to "that portion of Federal Funds, if any, that are either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco...(other than that portion of Federal Funds, if any, that is specifically applicable to tobacco growers or communities dependent on the production of tobacco of Tobacco Products."

The appropriations language in this proposal is designed to avoid triggering the offset by specifying that the tobacco penalty receipts are "to be used only to reduce the Federal debt held by the public", being explicit that the payments are not intended for states.

2) Scoring and Committee Jurisdictional Points of Order

BRD and OMB General Counsel staff has advised that this appropriations language proposal would score as an offset to the Labor/HHS appropriations bill from the standpoint of OMB scoring.

However, CBO can be expected not to score the payments as an offset to discretionary spending, because CBO's practice is NOT to score as discretionary offsets changes in receipts, even when done in appropriations bills. If the language were added and CBO were asked to score the L/HHS bill, they would likely say it exceeded the L/HHS 302(b) allocation and it would therefore be subject to a point of order. However, the point of order could be circumvented if the Budget Committees each overruled CBO's scoring, adopting their own or OMB's instead. This could be adopted as part of an overall agreement.

It is also worth noting that a jurisdictional point of order could be raised, in that this is clearly authorizing on an appropriations bill; Ways and Means and Finance in particular would have standing to object. Again, this risk could be eliminated if this is part of an overall agreement.

3) Addressing Previous DOJ Staff Concerns

The proposal includes an assessment on the tobacco companies in FY 2000 that is based on an estimated number of underage smokers times a charge per smoker. Justice had previously expressed concern on an earlier version of this proposal; we have modified it to address these concerns.

Justice staff expressed concern that the original proposal determined tobacco company payments based on past (e.g., 1998) market share data, and that there was no meaningful opportunity to reduce exposure through post-enactment conduct. We have modified the proposal by basing it on contemporaneous market share.

A second concern they raise is that there is isn't a good fit "between any redress of harm rationale and the use of the assessments," since rather than using the funds to, say, finance NIH, CDC, FDA, and SAMHSA tobacco-related efforts, they are used for "reducing the public debt." The concern re: the State Settlement offset provision outweighed this concern.

A third concern they raised about the original proposal was a "poor fit between any conduct modification rationale and the incidence of the assessments," in that companies would not be rewarded for having steered clear of the youth market. To address this, we have included another "whereas" clause to signal Congress' intent to tie any future such assessments to individual companies efforts to reduce youth smoking.

DOJ staff concluded by noting that the payments appear to operate as a one-time order to four or five companies to pay a total of $5.8 billion. We have modified the proposal to impose the assessments on all domestic cigarette manufacturers, not just those who were party to the November 1998 multi-state Settlement (which, for example, excludes Liggett who had already settled).

4) Have there been other Federal Assessments?

We are aware of one limited precedent for industry assessments. The Federal government, through the Internal Revenue Code, imposes a "gas guzzler" fee on purchases of automobiles with low mileage ratings.

Cynthia A. Rice 10/28/99 05:20:39 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP

cc: J. Eric Gould/OPD/EOP@EOP, Eugenia Chough/OPD/EOP@EOP
Subject: Update on technical issues with the Harkin lookback proposal

The technical issues are actually more serious than I thought they would be. If we revise the proposal to use overall youth smoking data for the target and industry-wide market share for dividing the penalty by companies, that helps a lot. But a bigger problem is the feisbility of collecting data on youth smoking in FY 2000 in time to measure if the youth smoking goal has been met in time to collect the penalty in FY 2000.

Neither of the existing surveys (University of Michigan's Monitoring the Future or HHS's SAMHSA survey) will be reporting 2000 data in FY 2000. The language actually calls for a new survey to be done in a manner consistent with the 1999 Monitoring the Future survey. HHS is adamant that it is infeisable to conduct a survey of large enough size given the time constraints, in particular because the federal government forbids any other household survey from taking place from March to May 2000 when the Census is underway. We're still trying to figure out if there's a fallback, but I wanted you to know where things stand.

---------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 10/28/99 05:00 PM ---------------------------

Cynthia A. Rice 10/28/99 12:29:27 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP

cc: J. Eric Gould/OPD/EOP@EOP, Eugenia Chough/OPD/EOP@EOP
Subject: Are you comfortable with Harkin lookback proposal if we can work out technical issues?

Gotbaum's thinking we should substitute it for ours. I was thinking we should get it ready so if we could use it if it really has more legs, i.e., we'd have two options to shop.

OMB staff note that it's not clear if CBO assumed a $6 billion penalty because they assumed companies would reduce youth smoking by between 6 and 10 percent, or if they assumed they'd reduce by 5 percent or less and the $8 billion is reduced by the 25% tax offset.

---------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 10/28/99 12:20 PM ---------------------------

Cynthia A. Rice 10/28/99 10:10:04 AM

Record Type: Non-Record

To: eric p. liu/opd/eop@eop
cc: bruce n. reed/opd/eop@eop, j. eric gould/opd/eop@eop, eugenia chough/opd/eop@eop
bcc: Records Management@EOP
Subject: Damn-- sent Eric wrong info on his Q on Harkin

Now that I've read the legislative language carefully I see it does have a graduated penalty:

$8 billion if youth smoking is reduced by 5 percent or less
$6 billion if youth smoking is reduced by between 6 and 10 percent
$4 billion if youth smoking is reduced by between 11 and 14 percent

Thus the CBO score assumes the companies reduce between 6 and 10 percent and $6 billion will be collected in FY 2000. Then there are some small offsets, totalling $407 million mostly in the out years, for lost excise taxes.

The penalty would be divided by company based on youth market share. A company that met the 15 percent goal would pay nothing.

Data would be based on a new survey measuring monthly smoking that HHS would have to conduct after date of enactment and complete by 8/21/00. This data would be compared to the 1999 Monitoring the Future data and results by company would be published by the Secretary by 8/31/00. Companies would pay by 9/10/00. Penalties would be nondeductible. There is a complicated judicial review process.

I'm going to have DOJ, HHS, and Treasury scrub this so we can use it if we want.

I think the only possible real problem is that I believe the brand specific data captured in the Monitoring the Future aren't from a large enough sample to give us percentage point differences with precision, but I need to find out really how much of a problem this is. DOJ will also I think want to make some changes to guard against constitutional challenges and to fix the judicial review section. OMB will want to add the "proceeds go to reduce the debt" to guard against triggering the state settlement offset provision. Treasury will love it -- they are still fond of company-specific penalties, more so in their current staff incarnation.

Cynthia A. Rice

Cynthia A. Rice 10/27/99 06:43:30 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP
cc: bruce n. reed/opd/eop@eop, j. eric gould/opd/eop@eop, eugenia chough/opd/eop@eop
bcc: Records Management@EOP
Subject: Re: Conversation with Peter Reinecke/Harkin

A flat 15% to be achieved between now and next August.
Eric P. Liu

Eric P. Liu
10/27/99 06:37:28 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP@EOP
cc: bruce n. reed/opd/eop@eop, j. eric gould/opd/eop@eop, eugenia chough/opd/eop@eop
bcc:
Subject: Re: Conversation with Peter Reinecke/Harkin

Does their proposal still have the stepwise penalty for reductions of 0-5%, 5-10 and 10-15? Or is just now based on failure to meet the flat 15%?
Cynthia A. Rice

Cynthia A. Rice 10/27/99 06:28:05 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP
cc: J. Eric Gould/OPD/EOP@EOP, Eugenia Chough/OPD/EOP@EOP
Subject: Conversation with Peter Reinecke/Harkin

I spoke to Peter Reinecke about our assessment idea (Jack Lew had faxed Harkin a draft). He had two points 1) he wanted more info on why isn't this a tax (OMB's working on a write up) and 2) wouldn't we be better off structuring it as more of an incentive during FY 2000 as they did? Their proposal imposed an $8 billion penalty on the industry unless it reduced youth smoking by 15 percent over the next year. They recently got CBO to score it at $5.6 billion (was news to OMB).

Peter wasn't opposed to our proposal, he just thought theirs would sell better. He said Domenici and Harkin spoke today, with Domenici saying our proposal was just a repackaged tax and Harkin told him "no, there's a way to do this as a real lookback."

I will check out their proposal more closely. It is based on brand-specific data on youth smoking and would require HHS to do a new survey in 2000 to compare to 1999 Monitoring the Future survey data (whose reliability on by brand HHS has always questioned).

Cynthia A. Rice 10/05/99 01:00:32 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Eric P. Liu/OPD/EOP@EOP
cc: J. Eric Gould/OPD/EOP@EOP, Sarah A. Bianchi/OVP@OVP
bcc:
Subject: How about this for possible VP quote re: Synar

OMB's OK with a VP statement, but wants to see the language. I'm still reaching HHS, but I'm sure they'll be fine. I will also talk to ONDCP about the Harkin amendment but not the statement.

Bruce/Eric -- How about this for a quote? Sarah is this the kind of thing your folks have in mind?

Draft Quote from VP on Harkin Synar Amendment

"I am pleased that with Senator Harkin's leadership we've found a way to ensure states like Iowa can receive their full substance abuse block grant so long as they commit new funds to fighting youth smoking. This is a win-win situation: we will help prevent children from purchasing cigarettes while funding our war on drugs."

Sarah A. Bianchi@OVP

Sarah A. Bianchi@OVP
10/04/99 04:39:09 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP, J. Eric Gould/OPD/EOP@EOP
cc:
Subject: Synar Announcement/Iowa/Thursday

???? help

sb

---------------------- Forwarded by Sarah A. Bianchi/OVP on 10/04/99 04:36 PM ---------------------------

Monica M. Dixon
10/04/99 03:54:45 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Charles W. Burson/OVP@OVP, Kay Casstevens/OVP@OVP, Matthew L. Bennett/WHO/EOP@EOP
Subject: Synar Announcement/Iowa/Thursday

As most of you know, Senator Harkin has an amendment to fix the Synar language that will be included in the Managers Amendment at the close of the Labor HHS bill (probably Thursday). [Summary of this issue below.]

This is a big issue in Iowa and if we could put paper out on Thursday after this happens I think it would play well. Harkin wants to go first, so we need to coordinate with him -- and he thinks it would be great for the VP to do. Matthew -- I assume someone is giving Vilsack a heads up on the fact that the Administration will support Harkin's change? Would be a nice VP call if it hasn't been done yet.

Sarah -- can you get information to our communications team? Thanks.

[BACKGROUND: Bond and Harkin plan to add the amendment to the Labor-HHS approps bill. Beside Bond and Harkin, Frist, Kennedy, Durbin, Thomas, and Enzi have apparently agreed to the language.

The language would:

1) Apply to FY 2000 only
2) Not cut states' SAMSHA block grant if they spend a certain amount of state funds on enforcement of laws prohibiting the sale of tobacco products to minors. The amount each state would have to spend would be based on how much the state failed its access targets by. For example, a state that missed its target by 10 percent would have to spend an amount equal to 10 percent of its SAMSHA block grant on enforcing access laws. States would probably use tobacco settlement funds for this.
3) The language gives the Secretary discretion to lower the amount a state would have to spend and to not require any state spending until July 31, 2000. HHS hates these provisions, but individual Senators are insisting upon them and Harkin hasn't been able to get them out.]

Message Sent To:

Sarah A. Bianchi/OVP@OVP
David W. Beier/OVP@OVP
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For Internal Use Only
October 13, 1999

Q&A on Synar Enforcement Study

Q: The Substance Abuse Policy Research Program released a study today reporting that the states and HHS have not effectively enforced the Synar Amendment, thus failing to ensure that young Americans cannot purchase tobacco. What is your reaction?

A: The Substance Abuse Policy Research Program report is based on 1996 Synar enforcement data. Synar enforcement data over the past three years since 1996 unmistakably shows the Synar program has been extremely successful in achieving its goals. All states now have laws making it illegal to sell or distribute tobacco to minors. All have developed methods for measuring statewide compliance with tobacco access laws and have conducted random, unannounced inspections of outlets and they are enforcing their state youth tobacco control laws.

In addition, states continue to improve their laws. For example in 1998, 22 states reported changes in their youth access laws. Eight of those States made extensive changes to their laws to provide a comprehensive approach to prohibiting sales of tobacco products to minors. The remaining legislative changes were amendments to existing laws designed to strengthen them by clarifying responsibility for enforcement activities; defining violations and penalties; or restricting vending machine sales.

Average retailer sales rates to minors, as measured by the states annually, have been reduced. The average sales rate for FY 1998 was approximately 25 percent, down from approximately 40 percent in FY 1997. The estimated rate prior to 1996 was between 60-90 percent, based on a variety of community studies from that period. These numbers not only reflect a substantial decline in retailers' sales to children, but also the swift and dramatic change in state tobacco enforcement programs, which, in most states, were minimal prior to the Synar program.

We expect all states to achieve the Synar Regulation goal (an inspection failure rate of 20 percent or less of outlets accessible to youth) by the year 2003. As a matter of fact, 19 states have already achieved the 20 percent goal.

Before I begin, I would like to say just a few words about reports that, after years of denial and deception, Philip Morris has admitted that cigarette smoking causes lung cancer and other diseases. This news makes clear what I've been saying for years: It is time for the tobacco companies to answer for their actions in court. Again, I urge the tobacco companies to stop marketing their products to children and to do more to reduce youth smoking.

Message Sent To:______________________________