COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	IIA	203(c)	354	In any action taken by the Secretary against a manufacturer, the court must determine whether the manufacturer failed to comply with the Act's provisions regarding underage tobacco use or took material action to undermine the achievement of the required percentage reduction.	A subjective assessment about industry behavior should not be added to the objective test of whether or not targets are met. Such a subjective assessment would necessitate much closer federal government review of all of the business and marketing practices of the industry in order to determine whether the industry or specific manufacturers substantially contributed to youth use above the targets. Placing such a burden on the government would likely delay the imposition of surcharges and would leave the lookback system subject to endless litigation over industry behavior.	
Policy	IIA	204	358	The underage cigarette use baseline may underestimate youth use. Baseline is based on an average number of daily youth smokers over the past 5-10 years.	The baseline should not be based on a 5-10 year average or on a daily measure of tobacco use. The use of such an average along with a daily measure of tobacco use will tend to understate youth smoking because many youth smoke but are not daily users and the prevalence of youth smokers has increased over the last decade.	ASPE/ HHS

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Technical	II A	204(1)	358	Does not use correct term to describe "base incidence percentage" of underage tobacco use.	Substitute "prevalence" for "incidence." Incidence only includes new tobacco users while prevalence includes all users.	ASPE/ HHS
Technical	IIA	204(l)	358	Definition of "baseline incidence percentage"	Strike 204(l) and insert: "(1) The term "baseline prevalence percentage" means, with respect to each type of tobacco product, the percentage of young individuals determined to have used such tobacco product in the first annual performance survey specified in section 202(a)."	
Policy	III	302	388	Regulatory authority to revise warnings is narrow and is inconsistent with the broader authority provided for revision of smokeless warning labels	Page 389 strike lines 11 to 5 and replace with "of title 5, United States Code, revise the text, format, size, placement, or any other aspect of the warning label statements required by subsection (a) of this section, and to require other relevant information on cigarette packages."	CDC

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Technical	III, Tobacco product warning and smoke constituent disclosure	304 CSTHE Act	393	The text of the bill is ambiguous as to whether the portions of the CSTHEA section 3 that are not amended by section 303 or 304 remain in effect. Section 3(f) is the media ad ban. Subsections (c), (d) and (e) are not expressly repealed and are inconsistent with (a) and (b) as amended.	Page 393, line 13, after "further amended" strike "by adding at the end the following" and insert "by deleting subsections (c), (d), and (e), renumbering subsections "(f)" as "(d)"."	FDA

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	III, Tobacco product warning and smoke constituent disclosures		395	The preemption problems of FCLAA are not addressed (15 USC 1334). Under FCLAA, the federal government is preempted from putting additional health warning requirements on the package, and States are also preempted from imposing advertising restrictions based on smoking and health. In addition, this provision has been construed by courts to preempt certain tort actions. This should be addressed by deleting the preemption portions of the FCLAA.	Insert a new section as follows— "Section 5(b) of the Federal Cigarette and Labeling and Advertising Act (15 USC 1334(b)) is amended by striking the entire subsection. Section 5(a) of the Federal Cigarette and Labeling and Advertising Act (15 USC 1334(a)) is amended by striking the "(a)" and inserting at the end before the period, "by any State or local authority".	FDA

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
	III, Tobacco product warning and smoke constituent disclosures	303-304 CSTHE Act	395	The preemption problems of the CSTHEA are not addressed. The CSTHEA preempts states and localities from requiring statements related to health on advertisements.	Insert a new section as follows— Section 7 of the Comprehensive Smokeless Tobacco Health Education Act (15 USC 4406) is amended by deleting subsection "(a)" in its entirety, renumbering "(b)" and "(c)" and "(a)" and "(b)", respectively, and after "any package" striking the words "or in any advertisement (unless the advertisement is an outdoor billboard advertisement)".	

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	501(2)(B)	416	Definition of exclusions needs clarification to ensure that restaurants frequented by children are not excluded from the Title's requirements. Protections for nonsmokers can be easily installed in newly constructed or renovated hotel guest rooms, are covered in section 502(e). Retrofitting existing hotel guest rooms with separate ventilation systems is considered to be infeasible.	Amend definition to read: "(B) Exclusion. Such a term does not include a building or portion thereof which is used as a restaurant (other than a fast food **or family-style** restaurant), bar, private club, hotel guest room, tobacconist's shop, or prison."	

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	Title V	Sec 501 (2)(C) "Fast Food Restaurants "	416	Fast food restaurants are narrowly defined as McDonald's type facilities and does not include "family style" restaurants such as Olive Garden, Old Country Buffet, and Cracker Barrel which may not cater "largely to individuals under 18 years of age," but which are frequented by families with children.	Recommend that family style restaurants be covered by the restrictions and not exempted under the restaurants exception.	CDC/ DOL

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	Modify 501(3)	416	Only lessees that exercise control over their leased space should be held responsible.	Line 13-17. Amend the term "responsible entity" as follows: " . . . with respect to any public facility, the owner of such facility except that in the case of any such facility or portion thereof **that** is leased **to a lessee that exercises control over the leased space, including the ventilation system**, such term **may also mean** the lessee.	DOL

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	503(b) & (c)	418	Need to clarify the difference between actions brought by private citizens and enforcement actions taken by OSHA against employers.	Amend to read as follows: "CITIZEN ACTIONS **AND ENFORCEMENT** . . . (b) Notification and Venue. **Any person aggrieved by a violation of a smoking restriction provision shall notify the alleged violator. If the violation has not been corrected after 60 days from the date of notification, and the alleged violator is not an employer subject to the OSH Act, the aggrieved person may file an action** in any United States District Court for the district in which the defendant resides or is doing business to enjoin any violation of this title or to impose a civil penalty of any such violation in the amount of not more than $5,000 per day of violation. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce this title and to impose civil penalties under this title **to require compliance**."	

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	503(c)	419	In order to fully realize the intent of Congress in enacting this Title, there must be a clear enforcement mechanism for the smoking restrictions.	Amend to read as follows: **"If an alleged violator is an employer subject to the Occupational Safety and Health Act and is endangering employees protected by the OSH Act, the Secretary of Labor will enforce the smoking restriction provisions of this Title as a mandatory occupational safety and health standard in accordance with the OSH Act . The 60-day notice requirement in paragraph © applies only to suits by aggrieved persons; employers violating this Title are subject to administrative enforcement by OSHA without such notice necessarily being given."**	DOL
Technical	V	505	420	The EPA should have input regarding OSHA's regulation of ETS.	Amend section 505 to read as follows: "The Assistant Secretary is authorized to promulgate, **in consultation with the Administrator of the Environmental Protection Agency**, such regulations as the Assistant Secretary deems necessary to carry out this title.	

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	new	420	Funding should be available for public education and activities designed to reduce children's exposure to environmental tobacco smoke.	Add the following as a new section: (a) The Administrator of the Environmental Protection Agency may enter into contracts with or award grants to eligible and appropriate public and nonprofit private entities and to states to carry out public informational and educational activities designed to reduce exposure of children to secondhand tobacco smoke. (b) There are authorized to be appropriated from the National Tobacco Settlement Trust Fund, other than from amounts in the State Litigation Settlement Account, such sums as may be necessary to carry out this section.	EPA

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	V	new	420	As part of the industry settlement with flight attendants (Broin et al. V. Phillip Morris Inc) reached October 9. 1997, the industry agreed to support the enactment of appropriate federal legislation prohibiting smoking on segments of regularly scheduled international flights originating or terminating in the United States. This should be codified.	49 USC 41706 should be amended to incororate this agreement to read: "Sec.41706. Prohibitions against smoking on scheduled flights. (a) General.-An individual may not smoke in an aircraft on an airline flight segment in air transportation or intrastate air transportation that originates or terminates in any State of the United States, District of Columbia, Puerto Rico, or the Virgin Islands. This clause applies to all flights originating or terminating in any of the above jurisdictions, whether domestic or international in origin or destination, and whether operated by a domestic or foreign carrier. (b) Regulations.-The Secretary of Transportation shall prescribe regulations necessary to carry out this section."	CDC
Policy	VI: Indian Tribes	603(a)	421	Provisions states that the title will apply to Indian reservations or lands; this definition should refer to the statutory definition of Indian country (18 U.S.C. 1151), as well as Alaska Native Villages	Change "Indian reservation or lands" to "Indian reservations or lands, including all lands defined as "Indian Country" under section 1151 of Title 18, United States Code, and land held by Alaska Native village corporations and land held communally by Alaska Native villages,"	
Technical	VI, Indian tribes	603(b)(2)	422	technical	Line 23, strike "chapter IX" and insert "the provisions"; Line 24, before the period, insert "for tobacco products.".	FDA

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	VI: Indian Tribes	603(d) (3)(A)	424	Provisions as currently drafted is confusing because it compares tribal government functions with state and local government functions and fails to recognize that Indian tribes have a distinct legal status as "domestic dependent nations"	Change to: "the tribe has government institutions that are capable of carrying out regulatory functions and has a tribal court or dispute resolution procedure"	
Policy	VI	603(f)	427	Provision does not make clear what happens to tribes that cannot administer their own programs; suggested amendment ensures that IHS receives the funds to administer the program	-Language be added that would clarify, in the absence of a tribally approved plan, that IHS would have responsibility for administering programs on behalf of such tribes Lines 19-22: ". . . shall award a grant to each Indian tribe or tribal organization that has an approved anti-smoking plan, or transfer such amounts to the IHS on behalf of such tribe, for the fiscal year involved under paragraph (2) in an amount equal to the amount determined under paragraph (3)"	

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	VI: Indian Tribes	603(d)(3)(A)	424	Provisions as currently drafted is confusing because it compares tribal government functions with state and local government functions and fails to recognize that Indian tribes have a distinct legal status as "domestic dependent nations"	Change to: "the tribe has government institutions that are capable of carrying out regulatory functions and has a tribal court or dispute resolution procedure"	
Policy	Amendments	604	430-431	Require Indian tribes to collect Federal and State tobacco tax	Strike section 604. Provision would run counter to a Supreme Court ruling in 1991 stating that the doctrine of sovereign immunity bars states from suing tribes to collect taxes. The amendment would remove incentives for tribes and states to enter into tax collection agreements. Such agreements are in force between roughly 200 tribes and 18 states.	
Policy	IX, document disclosure	903	469	Requirement to disclose currently existing documents should apply to all manufacturers who market in the United States not just "participating manufacturers."	Strike lines 9-12.	FDA

COMMENTS ON SENATE COMMERCE COMMITTEE BILL -- 5/12/98

Type of Change	Bill Title	Section Number	Page Number	Description of Issue	Proposed Change	Agency
Policy	VI: Indian Tribes	603(d)(3)(A)	424	Provisions as currently drafted is confusing because it compares tribal government functions with state and local government functions and fails to recognize that Indian tribes have a distinct legal status as "domestic dependent nations"	Change to: "the tribe has government institutions that are capable of carrying out regulatory functions and has a tribal court or dispute resolution procedure"	
Policy	IX, document disclosure	903(b)	469	Listing of categories of documents is too narrow.	Insert section 404(d)(1) from S. 1889.	FDA
Const'l	IX: Document Disclosure	911(2)	485	Taking risk raised by the definition of "trade secret."	The definition appears to require implementation of a uniform federal standard of information that is entitled to protection as a trade secret, which may afford less protection than otherwise applicable state law. The risk could be reduced by aligning the uniform federal standard with the most restrictive existing state law standards.	DOJ

The Washington Post
THURSDAY, APRIL 30, 1998

House GOP Leaders Reject Tobacco Proposal

By SAUNDRA TORRY
Washington Post Staff Writer

The House Republican leadership has rejected a much-anticipated bipartisan tobacco proposal that included broad federal regulation of tobacco, strict youth smoking curbs and far-reaching limits on smoking in public places.

The action, which occurred late Tuesday in a closed leadership meeting, leaves House Republicans with no major bill to compete with a tough Senate measure steaming toward probable action on the Senate floor before the end of May.

Unsettled and uncertain, the House leadership, in the view of numerous observers, seems to be groping for a legislative proposal on what has become one of this session's most pressing, and contentious, issues—establishment of a comprehensive national tobacco policy. The House's scattered approach contrasts with the Senate, where even lawmakers who are at odds in the tobacco debate have joined to press for action on a bill crafted by Sen. John McCain (R-Ariz.).

Yesterday, for instance, six Senate Republicans and Democrats held a news conference outside the Capitol. "We're here to . . . emphasize the need for comprehensive legislation to aggressively attack tobacco use," said Sen. John H. Chafee (R-R.I.).

But House Republicans remain sharply divided over how, or even whether, to deal with the issue. At one end of the spectrum are those like Rep. John Linder (R-Ga.), who said yesterday that drug use is the "biggest threat" to America's youth and wondered, "Why are we talking about tobacco?"

At the other end are lawmakers such as Rep. James V. Hansen (R-Utah), who is drafting a tough tobacco bill that would raise cigarette prices by $1.50 per pack in three years. House Speaker Newt Gingrich (Ga.) and others have been pushing a narrower approach that would focus on curbing underage smoking as part of an attack on drug use.

"You've got too many people that feel really strongly and differently [on tobacco] in the House," said a Republican lobbyist involved in the tobacco debate. "And there is nobody that can act as McCain did and . . . put one thing on the table and say, 'This is it.' "

Many had been looking to Commerce Committee Chairman Thomas J. Bliley Jr. (R-Va.), a longtime tobacco ally who lately has turned on the industry, to provide a solution, perhaps by working with Rep. Henry A. Waxman (D-Calif.), the House's leading smoking foe. Standing at the two poles of the long-running debate, the duo were seen by many as a focal point for its resolution.

But on Tuesday, when Bliley described to leadership the tobacco proposal he had negotiated with Waxman, it "went over like a lead balloon," according to one source familiar with the proposal. Senior Republicans thought it put too much authority in the hands of the Food and Drug Administration—too "far-reaching," said Rep. John A. Boehner (R-Ohio), who was at the meeting. It also failed to settle the state lawsuits against the industry that provided much of the impetus for tobacco legislation, other sources said.

In particular, Republican nerves were hit by restrictions on smoking in restaurants, part of the proposal's effort to stem the effects of secondhand smoke, several sources said. "It was definitely seen as a Waxman thing, very anti-Republican . . . very anti-small business," said one Republican.

Some top Republicans also were angered by what they said was a Democratic demand, conveyed by Bliley, that they accept or reject the proposal within 24 hours. "We will not be pressured into making a foolish decision overnight," said Majority Whip Tom DeLay (Tex.).

DeLay and others insisted the Bliley proposal was not dead. "We expect to take time to look at it," DeLay said. Bliley declined to comment, even when asked to describe his proposal. "I don't think so, thank you," he said, walking away.

Waxman was moving on to new approaches, saying it was "extraordinary" that Republican leaders had turned down a bipartisan effort crafted by one of their own chairmen. "All the action is over in the Senate, and the House is just flailing around doing nothing," Waxman said. "But it appears that Speaker Gingrich and the Republican leadership is more responsive to the tobacco industry contributors than to their own members and the American people."

Meanwhile, Rep. Deborah Pryce (R-Ohio), whom Gingrich designated to oversee the tobacco issue, is working to produce what some are calling a "slimmed down" tobacco bill. Hansen, a conservative Republican and a vocal tobacco opponent, is set to roll out his bill next week, joined by liberal Democrat Rep. Martin T. Meehan (Mass.)—and, since yesterday, by Waxman. That bill will treat the tobacco industry far more harshly than the Bliley-Waxman effort, sources said. "Hopefully, we'll fill the vacuum that's been on the House side," said Hansen aide Brian Williams.

BY JUANA ARIAS—THE WASHINGTON POST

REP. THOMAS J. BLILEY
. . . leadership rejected his plan

The Washington Post
THURSDAY, APRIL 30, 1998

Big Tobacco to Fight Legislation With Ad Blitz, Lobbying Network

By CECI CONNOLLY
Washington Post Staff Writer

In their battle to kill anti-smoking legislation, cigarette makers are about to launch a new advertising blitz and activate a national network of well-connected political operatives.

The industry plans to roll out a television commercial and a newspaper ad this week warning that legislation aimed at curtailing smoking will result in bigger government, bigger taxes and a widespread black market.

These ads, and a pair of spots that aired last week, mark the first time in decades the tobacco industry has taken to the airwaves to make its case on public policy. Industry officials refused to say how much money is being spent on the ad campaign but acknowledged the commercials will run in 40 to 45 media markets, including Chicago and New York. They are also buying space in about 20 newspapers around the country.

"The most phenomenal thing about the television advertising is it is the first time the tobacco industry has been on electronic media probably since '72 or '73," said one tobacco official. "People recognize and understand the message despite the fact it is brought to them by the tobacco companies."

Three weeks ago, the five major tobacco companies announced they were abandoning negotiations on Capitol Hill and adopting a battle mode instead. Cigarette executives said a $516 billion comprehensive anti-smoking bill approved by the Senate Commerce Committee would bankrupt them and called it a back-door attempt by greedy politicians to raise new tax revenue.

The first two industry commercials complained: "Instead of a reasonable debate, Washington is proposing the same old tax and spend." The new spots take the argument one step further. In one, the companies warn that if cigarettes climb to $5 per pack in America, a single tractor-trailer driving over the border could net a smuggler a cool $1 million.

Some in the industry considered airing a more graphic TV spot that would have illustrated the black market problem with a dramatization showing flashing lights, handcuffs and a truckload of cigarettes. But the companies could not agree on the approach and for now the spot remains on the shelf.

At the same time, one company lobbyist said, the industry is tapping a network of political professionals with the ability to pick up the telephone and call a U.S. senator directly. The plan is for the operatives, about a dozen of them new to the tobacco wars, to enlist 30 to 40 state leaders who can personally lobby lawmakers as they prepare to vote on comprehensive tobacco legislation.

"They have asked us to provide the companies with the names of opinion leaders, some elected officials and prominent citizens that have congressional contacts," said one state tobacco lobbyist who has been enlisted in the effort.

In many cases, Big Tobacco is reviving a long-dormant list of allies for what it describes as a battle for its very survival. "The existing government affairs networks are being activated," said industry spokesman Scott Williams. But in several instances the companies plan to hire new operatives with extensive campaign résumés and gold-plated Rolodexes to help in the effort.

One Republican consultant in Washington said the cigarette companies were trying to hire David Carney, a political strategist in the Bush White House with strong New Hampshire ties. Efforts to reach him last night for comment were unsuccessful. In Florida, according to one tobacco company strategist, the plan is to hire two Republican consultants to target Sen. Connie Mack and a Democrat to lobby Sen. Bob Graham.

Another company official said cigarette makers had contacted a major convenience store owner who worked as the campaign finance chairman of one Republican senator.

Both the advertising and the lobbying are aimed at influential community leaders. In Tallahassee, Fla., for instance, the TV ads are running on news and cable shows that generally reach a more informed, more politically active audience.

"The technique is a fairly familiar one," said Paul Huard, the lobbyist for the National Association of Manufacturers. "In terms of persuasiveness, it is much more effective if they hear from a guy who employs 250 people in his district."

The National Smokers Alliance, an industry-funded smokers' rights group, has also stepped up its Feet on the Street program in which volunteers canvas the sidewalks for smokers willing to join the effort.

"It's the oldest political method in the country," said organizer Tom Humber.

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

ON ADVERTISING, MARKETING AND ANTITRUST ISSUES IN

THE GLOBAL TOBACCO SETTLEMENT

PRESENTED BY
ROBERT PITOFSKY, CHAIRMAN

BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

MARCH 3, 1998

Mr. Chairman and members of the Committee, I am here at the request of the Committee to present the testimony of the Federal Trade Commission ("FTC" or "Commission")[1] on two subjects related to the global tobacco settlement. First, I will address proposed restrictions on the advertising, marketing and sale of tobacco products, as well as possible areas for FTC involvement. Second, I will discuss our concerns about any antitrust exemption in the context of a proposed settlement.

FTC Jurisdiction and Historical Overview

The FTC has a long history of reviewing many aspects of the tobacco industry and its advertising and marketing practices. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Under Section 5, one of the FTC's major responsibilities is the regulation of national advertising, including the advertising and promotion of cigarettes, smokeless tobacco, and other tobacco products. The FTC also enforces Section 12 of the FTC Act, which prohibits the dissemination of false advertisements for food, drugs, devices, or cosmetics.[3] In its regulation of food, over-the-counter drugs, medical devices, and cosmetics, the

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[1] This written statement represents the views of the Federal Trade Commission, with Commissioner Mary L. Azcuenaga not participating. My oral presentation and response to questions are my own, and do not necessarily represent the views of the Commission or any other Commissioner.

[2] 15 U.S.C. § 45.

[3] 15 U.S.C. § 52.

Commission shares jurisdiction with the Food and Drug Administration ("FDA"). FTC and FDA work closely with one another in these areas. For nearly 30 years the two agencies have operated under a Memorandum of Understanding that gives primary responsibility over the advertising of these products, with the exception of prescription drugs, to FTC, and primary responsibility over labeling to FDA.[4]

The FTC's law enforcement activities involving tobacco advertising and promotion date back to the 1930s.[5] In 1962, the FTC's request for technical guidance from the U.S. Public Health Service was among the factors that led the Surgeon General to establish an advisory panel to undertake a comprehensive analysis of the data on smoking and health. This advisory panel in turn led to the historic 1964 Report of the Surgeon General finding that cigarette smoking presented significant health risks. In that year, the Commission concluded that in light of the mounting evidence of the serious health risks caused by cigarette smoking, the failure of the cigarette manufacturers to warn consumers of such a danger violated Section 5 of the FTC Act. As a result, the Commission decided to require tobacco companies to inform the

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[4] Since adoption of the Memorandum of Understanding, FDA has also been granted express jurisdiction over the advertising of restricted medical devices. Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976). The FTC, however, retains concurrent jurisdiction over the advertising of restricted medical devices under Section 5 of the FTC Act and, with the exception of the power to regulate statutorily mandated statements of intended use, under Section 12. *See In re Dahlberg,* 1995-1 Trade Cas. (CCH) ¶ 70,963 (D. Minn. 1995).

[5] *See, e.g., Julep Tobacco Co.*, 27 F.T.C. 1637 (1938) (stipulation prohibiting claims that Julep cigarettes help counteract throat irritations due to heavy smoking and never make the throat dry or parched).

public about the dangers of smoking.[6] This trade regulation rule, which would have required warnings in cigarette advertising and on tobacco packages, eventually was superseded in 1965 by passage of the Federal Cigarette Labeling and Advertising Act ("Cigarette Act"), which required warnings on tobacco packages.[7] In 1972, pursuant to its Section 5 authority, the FTC issued consent orders mandating for the first time that the major cigarette manufacturers place health warnings in cigarette advertisements.[8]

Today, the FTC has a number of tobacco-related responsibilities in addition to its Section 5 authority. These include the statutory authority to administer the Cigarette Act, and to administer and enforce the Comprehensive Smokeless Tobacco Health Education Act ("Smokeless Tobacco Act").[9] The Cigarette Act authorizes the Commission to ensure that the Surgeon General's mandated health warnings are displayed in alternating sequence on cigarette packaging and advertising in the United States. It also directs the Commission to publish an

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[6] *See* Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8354 (1964).

[7] Pub. L. No. 89-92, 79 Stat. 282 (1965), *as amended by* Pub. L. No. 98-474, 98 Stat. 2204 (1984), and by Pub. L. No. 99-92, § 11, 99 Stat. 393, 402-04 (1985), *current version at* 15 U.S.C. § 1331 (1994).

[8] *See Lorillard et al.*, 80 F.T.C. 455, 460-65 (1972) (consent orders). Under the orders entered into with six tobacco manufacturers, the companies were required to disclose the Surgeon General's warning in identified forms of advertising. The consent orders were modified in 1981, when the Commission sought civil penalties in federal district court against each of the cigarette companies for failure to comply with the 1972 orders. *See United States v. Lorillard*, No. 76-Civ. 814 (JMC) (S.D.N.Y. July 13, 1981). In 1984, Congress amended the Cigarette Act to require rotational warnings for both advertising and package labeling.

[9] 15 U.S.C. §§ 4401 *et seq.*

annual report to Congress on cigarette advertising and promotion.[10] The Smokeless Tobacco Act directs the Commission to promulgate regulations governing the health warnings on packaging and advertising for smokeless tobacco products and to publish a biennial report to Congress on smokeless tobacco advertising and promotion. The Commission has issued regulations specifying the placement and rotation of the warnings, and requiring companies to submit plans setting forth their rotation schedule.[11] In addition, tar, nicotine and carbon monoxide yields for cigarettes are currently determined pursuant to the "FTC method," a uniform testing methodology adopted by the Commission more than thirty years ago; these ratings are then disclosed to consumers in certain forms of advertising pursuant to a voluntary agreement among industry members. The Commission also publishes an annual report listing the tar, nicotine, and carbon monoxide yields of domestic cigarettes. Finally, the FTC enforces the ban on broadcasting smokeless tobacco advertisements on radio and television.

Recent Activities

Consumer Protection

The FTC's tobacco advertising program is an important part of the agency's consumer protection mission. The Commission has taken a number of actions in this area in the past year. Last May, for example, the Commission issued a complaint against R. J. Reynolds

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[10] Although the Commission administers the Cigarette Act, the Department of Justice enforces it.

[11] 16 C.F.R. § 307. Unlike the Cigarette Act, the Smokeless Tobacco Act gives the Commission authority to enforce the health warning requirement.

Tobacco Co. alleging that the company's Joe Camel advertising campaign induced many young people to begin or continue to smoke, or increased the risk that they would do so, and as a result caused, or was likely to cause, significant injury to their health and safety.[12] The FTC is also in the process of reviewing its tar and nicotine testing methodology to determine what changes are necessary to ensure that the test more accurately reflects smokers' actual experience smoking low tar and nicotine cigarettes.

Competition

The FTC also addresses tobacco issues as part of its competition mission and has many years of experience examining the competitive structure of the tobacco industry. The Commission has, for example, investigated the competitive practices of cigarette firms and challenged the 1994 merger between The American Tobacco Company and Brown & Williamson, a challenge that was subsequently settled by a negotiated order.[13] In addition, this

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[12] The *R. J. Reynolds* matter is currently pending before the agency in litigation before an administrative law judge. Accordingly, the Commission cannot discuss the merits of these allegations. Any decisions in this matter must be based solely on the record of the proceeding and the facts presented therein.

Other law enforcement actions brought by the Commission in recent years include *American Tobacco Co.*, FTC Docket No. C-3547 (Jan. 3, 1994) (consent order settling allegations that advertisements misrepresented the relative amount of tar that smokers of Carlton cigarettes would take in); *Alan Phan*, FTC Docket No. C-3417 (March 12, 1993) (consent order settling allegations that advertisements misrepresented the health risks of smoking certain non-tobacco cigarettes); *Pinkerton Tobacco Co.*, FTC Docket No. C-3364 (Jan. 9, 1992) (consent order settling allegations that smokeless tobacco company's sponsorship of televised truck and tractor pull violated ban on television advertising of smokeless tobacco products).

[13] *FTC v. B.A.T. Industries p.l.c.*, 94 Civ 7849 (motion for preliminary injunction filed Oct. 31, 1994, S.D.N.Y.); *B.A.T. Industries p.l.c.*, FTC Docket No. D.9271 (consent order 1995). Under the April 1995 settlement, BAT agreed to divest certain assets, including brand names

(continued...)

past September, in response to a request from members of the Congressional Task Force on Tobacco and Health, Commission staff prepared an analysis of the potential impact of the proposed tobacco settlement on competition, prices, industry profits and government revenues.[14] In October 1997, the Commission also testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition on the competitive and economic implications of the antitrust exemption proposed in the settlement.

Proposed Advertising and Marketing Restrictions in the Proposed Global Tobacco Settlement

As part of the effort to prevent underage use of tobacco, the proposed global tobacco settlement and the various proposed implementation bills would impose significant restrictions on the advertising, marketing and promotion of tobacco products. These restrictions would be either enacted directly by Congress or achieved through consensual agreements between the tobacco industry and the state and federal governments. The proposed restrictions include

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[13](...continued)
(Montclair, among others) and production facilities. That divestiture was completed in October 1996.

[14] Federal Trade Commission, "Competition and the Financial Impact of the Proposed Tobacco Industry Settlement," Report prepared by the staff of the Bureaus of Economics, Competition and Consumer Protection at the request of the Congressional Task Force on Tobacco and Health, September 1997 ("Staff Report"). The Staff Report concluded that several features of the settlement, most notably the broad antitrust exemption, might allow cigarette manufacturers to realize substantial profits by increasing the prices of cigarettes beyond the level needed to satisfy the annual payments included in the settlement. Although government revenues associated with the settlement would also be substantial, the cigarette firms would be able to retain about two-thirds of the financial benefits that would flow from any enhanced coordination associated with the antitrust exemption. In November, FTC staff submitted a supplemental evaluation to Congress addressing issues raised by the tobacco industry regarding the September Staff Report.

banning all outdoor and Internet tobacco advertising; prohibiting brand-name tobacco sponsorship of sporting events; excluding human or cartoon figures from all tobacco advertising; limiting tobacco ads to black-and-white text when they appear in publications with a significant underage readership; banning the use of the name or logo of a tobacco brand on non-tobacco merchandise; and prohibiting the use of any non-tobacco brand name as a brand name for a tobacco product.

The FTC strongly supports the goal of reducing tobacco use by minors. As has been reported by other agencies, tobacco products pose significant health risks, causing an estimated 400,000 deaths each year. Moreover, studies report that most of those who use tobacco products begin when they are under 18, when they are less likely to fully understand the serious long-term health effects posed by tobacco use.[15] By the time these individuals are older and can better assess the health consequences, they are likely to be addicted.[16] Therefore, one effective means of reducing the death and disease caused by tobacco is to prevent tobacco use by minors.

Through its 1992 amendments to the Public Health Service Act, Congress already has recognized that serious public health concerns warrant restricting the sale of tobacco products to

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[15] *See, e.g.*, U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General,* Atlanta, Georgia: U.S. Department of Health and Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1994 ("1994 Surgeon General's Report"); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (1995) ("FDA proposed tobacco regulations") and 61 Fed. Reg. 44.396 (1996) ("FDA final tobacco regulations").

[16] *See, e.g.*, 1994 Surgeon General's Report at 104; FDA proposed tobacco regulations; FDA final tobacco regulations.

minors.[17] We believe that limiting the advertising, marketing and promotion of tobacco products directed to children can be an appropriate and necessary part of a comprehensive approach to reducing youth tobacco use. Such limitations can serve as an important complement to other strategies, such as access restrictions and public education, to reduce underage tobacco use.

The FTC further believes that any effort to restrict tobacco advertising to young people must be sufficiently broad to be effective. The FTC each year issues a report on the advertising and promotional expenditures of U.S. cigarette manufacturers. Those reports show that after cigarette manufacturers were prohibited from advertising on television and radio in 1969 (a prohibition that was intended, in part, to protect children), they put tens of millions of dollars into print advertising to sell their products. In more recent years, the cigarette manufacturers have shifted an increasing amount of money away from traditional advertising and into sponsorships and so-called "trinkets and trash" — T-shirts, caps, and other logo-adorned merchandise — that some believe are very attractive to young people.[18] To prevent simply another such shift in marketing strategy, a set of advertising and marketing restrictions that addresses the many different ways in which tobacco may be marketed and advertised to minors is necessary.

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[17] Section 1926 of the Public Health Service Act conditions a state's receipt of the full amount of Federal block grants for prevention and treatment of substance abuse upon the recipient state's having in effect "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. § 300x-26(a)(1).

[18] *See, e.g.*, Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*, pp. 108-110 (Barbara S. Lynch and Richard J. Bonnie, eds., 1994).

Finally, the advertising and marketing restrictions contained in the proposed global settlement involve a number of complex Constitutional issues. A full discussion of these issues is beyond the scope of this testimony. Nonetheless, the FTC articulated the position in its 1996 comment on FDA's proposed tobacco regulations that restrictions that are appropriately tailored to prevent the advertising and marketing of tobacco to minors will withstand First Amendment scrutiny.[19]

The FTC's Role

Preventing underage use of tobacco products will require concerted and coordinated effort by the various agencies of the federal government, as well as by states and localities. The FDA has compiled a record concerning the harm done by tobacco products and has issued regulations to address these problems. We believe that FDA's efforts have been valuable in promoting public health and that Congress should affirm FDA's authority to regulate tobacco products as it would any other drug or device.

We also believe that the FTC can make a significant contribution to any post-settlement regulation of tobacco advertising. As discussed earlier, the FTC has extensive experience in administering and enforcing the laws that regulate advertising in general and tobacco advertising in particular. Moreover, the FTC is a civil law enforcement agency with investigative and enforcement tools that are well-adapted to regulating tobacco advertising. The Commission, for example, has the power to subpoena documents and testimony, and can issue administrative

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[19] Comment of the Federal Trade Commission, *In the Matter of Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents*, Department of Health and Human Services, Food and Drug Administration, Docket No. 95N-0253 (January 1996).

complaints and conduct administrative proceedings that may result in the issuance of cease and desist orders against practices found to be unfair or deceptive.[20] In proper cases, the Commission also has statutory authority to file suit directly in federal district court to obtain preliminary and permanent injunctive relief, redress for injured consumers, or disgorgement of ill-gotten gains.[21]

At minimum, we therefore believe that it is important that any legislation contain an express reservation of the FTC's Section 5 and Section 12 jurisdiction, *i.e.*, that nothing in the legislation is intended to alter or amend the FTC's authority over unfair or deceptive acts or practices or the dissemination of false advertisements.[22] A provision expressly preserving FTC's authority ensures that the Commission will be able to continue to bring the kinds of cases it has always brought in the tobacco area. It also enables the FTC to address unfair or deceptive acts and practices in the advertising or marketing of tobacco products that might not otherwise be covered by the settlement, or for which the FTC Act provides better or more flexible enforcement tools. For example, the FTC recently received a petition complaining about the advertising of "no additive" cigarettes and suggesting that such ads make a deceptive health

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[20] 15 U.S.C. § 45. A practice is "deceptive" if it makes a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material. *See* Letter from the Commission to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983); *reprinted in Cliffdale Associates, Inc.*, 103 F.T.C. 110, appendix (1984). A practice is "unfair" if it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n).

[21] 15 U.S.C. § 53(b).

[22] The proposed tobacco settlement negotiated by the state attorneys general provides that the FTC is "to retain existing authority, except for 'tar,' nicotine, and carbon monoxide testing."

claim. Although FDA under the settlement legislation would likely also have authority over such a claim, it might have to initiate a lengthy rulemaking proceeding to address the general use of "no additive" claims, whereas the FTC can directly investigate a particular advertiser and, if the complaint is borne out, take appropriate enforcement action.

Should Congress, as part of the tobacco legislation currently being considered, determine that the FTC has a role to play in administering the settlement's advertising provisions, the Commission's considerable experience with advertising regulation and the tobacco industry will make it possible to carry out such enforcement responsibilities vigorously and competently.

In contrast, to the extent that there are responsibilities set out in the tobacco legislation that depend on scientific knowledge rather than familiarity with advertising practices or the structure of the marketplace, we believe that such responsibilities are most appropriately undertaken by agencies like the Department of Health and Human Services ("HHS"), through either FDA or one of its other health agencies, whose staff possess such expertise. For example, measuring tar, nicotine, and other smoke constituent yields involves complex scientific and methodological questions. Accordingly, the Commission supports proposals that would transfer responsibility for determining such smoke constituent yields to HHS.

We would further observe that we have carried out other Congressionally-mandated responsibilities in close cooperation with other federal agencies and with state authorities. We would take the same approach with any additional legislative authority. As noted earlier, there are many areas in which we share jurisdiction with FDA and work closely with it, dividing our responsibilities for the regulation of foods, drugs, devices, and cosmetics based on our respective areas of expertise.

Moreover, the FTC regularly coordinates its enforcement efforts with state officials. We share a common enforcement approach with the states on many fronts, with many states enforcing consumer protection statutes and rules patterned after those enforced by the Commission. Separately, recent legislation has expressly granted states the authority to enforce three of the FTC's most prominent consumer protection laws and regulations -- the Telemarketing Sales Rule,[23] the 900-Number Rule,[24] and the Fair Credit Reporting Act.[25] Joint state and federal enforcement in these and other areas has been highly successful, resulting in more extensive and effective enforcement than would otherwise have been possible.[26]

The state attorneys general have played a critical role in bringing forth a comprehensive tobacco settlement. Should that settlement be enacted, the state attorneys general will, and should, continue to play an important role in enforcing its terms. Based on our experience, we strongly support the dual federal-state enforcement scheme contemplated by the proposed settlement. Coordinated federal-state enforcement of the proposed restrictions on tobacco

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[23] 16 C.F.R. § 310.

[24] Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308.

[25] 15 U.S.C. § 1681 *et seq.*

[26] For further information on recent efforts by the FTC and state officials to coordinate enforcement activities, *see generally* Federal Trade Commission, *The Power of Partnerships: FTC-State Cooperative Efforts* (Bureau of Consumer Protection, March 1996); Federal Trade Commission, *Report to Congress Pursuant to the Federal Trade Commission Act Amendments of 1994* (February 1995).

advertising and marketing seems particularly appropriate as many of the proposed restrictions have specific, local applications.[27]

Antitrust Exemption

Let me now turn to the industry's request for an antitrust exemption for activities relating to the settlement. Any proposal for antitrust immunity is a serious matter and deserves careful examination. Antitrust immunity that is unnecessary, imprecise or excessively broad can enable firms to engage in collusive arrangements that could harm consumers. As a general matter, immunity from the antitrust laws is exceptional and disfavored – there are few industries or competitive situations in which the antitrust laws do not apply.[28]

As noted earlier, on October 29, 1997, I presented the Commission's testimony on this issue before the Senate Judiciary Committee's Subcommittee on Antitrust, Business Rights, and Competition. That testimony addressed the proposed antitrust exemption contained in the June 20, 1997, proposed tobacco settlement and our analysis was based on our understanding of the

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[27] Although much tobacco advertising is most efficiently monitored and enforced on a national basis — for example, advertising on the Internet or in national magazines — restrictions on other forms of advertising or marketing, such as point-of-sale advertising and the use of local media (e.g., local newspapers) to advertise tobacco products, are more likely to be effectively enforced if there is a clear grant of enforcement authority to the states.

[28] *See generally* ABA Section of Antitrust Law, Antitrust Law Developments 1135 (4th ed. 1997) ("With few exceptions, the antitrust laws apply to all industries.").

industry's antitrust liability concerns at that time.[29] We stated that an antitrust exemption is not required in order to achieve the goals outlined in the proposed settlement.

At the same October 29 hearing, an industry representative, Mr. Meyer G. Koplow, presented testimony in support of an antitrust exemption, outlining five possible reasons an exemption might be needed.[30] Today, I would like to revisit the Commission's October 29 testimony and discuss some additional matters raised by the industry's October 29 testimony and subsequent events.

The fundamental issue is whether the implementation of any terms of the settlement or of any statutory provisions would require collaborative conduct on the part of the tobacco product manufacturers, or whether unilateral compliance with such provisions would suffice. If Congress determines that collaborative conduct is reasonably needed for any legitimate purpose, any antitrust exemption should be narrowly drawn to cover only that conduct.

The immunity provision contained in the proposed global tobacco settlement is very broad. It reads as follows:

> In order to achieve the goals of this agreement and the Act relating to tobacco use by children and adolescents, the tobacco product manufacturers may, notwithstanding the provisions of the Sherman Act, the Clayton Act, or any other federal or state antitrust law, . . .

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[29] FTC staff had previously examined the proposed immunity provision in detail and presented its analysis in an appendix to the Staff Report on the proposed settlement. *See* Staff Report, *supra* note 14.

[30] Testimony of Meyer G. Koplow before the Subcommittee on Antitrust, Business Rights, and Competition (October 29, 1997).

> jointly confer, coordinate or act in concert, for this limited purpose.[31]

At the time of the Commission's October 29 testimony, it appeared that the tobacco product manufacturers wanted the proposed immunity provision to protect them in three hypothetical situations. First, manufacturers suggested that they might need to discuss and agree on issues relating to the pass-through of Annual Payment amounts. Second, manufacturers contended that they might need to agree to implement privately the proposed marketing and advertising restrictions in the event that statutory provisions are invalidated on First Amendment grounds. Third, manufacturers stated that they might find it necessary to join forces to deal with retailers that undermine efforts to reduce underage smoking.

Mr. Koplow's October 29 testimony addressed the first and third issues but did not discuss any possible need for private implementation of marketing and advertising restrictions in the event of a successful First Amendment challenge to statutory restrictions. Rather, Mr. Koplow stated that an antitrust exemption was needed because "[t]he industry is agreeing, pursuant to a protocol— a contract with the federal government and the states — not to engage in various forms of advertising, marketing, and promotion . . . ."[32] In addition to this issue and the issues relating to the pass-through of Annual Payment costs and joint dealings with uncooperative retailers, Mr. Koplow's testimony also discussed a need for an exemption for the allocation of annual payment amounts and tort liability costs on a market share basis, as well as

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[31] Proposed Global Tobacco Settlement, Appendix IV, part C.2.

[32] Testimony of Meyer G. Koplow, supra note 30, at 2.

for "further actions going forward on an industry-wide basis that could be necessary to reduce underage incidence."

The following is a discussion of whether any of these situations warrants a grant of immunity.

(1) Collaboration on the Pass-Through of Annual Payment Amounts

The industry's October 29 testimony acknowledged that an antitrust exemption might not be needed for this purpose if a pass-through requirement is enacted as part of the statute. Thus, the industry agrees with the Commission's view. If a pass-through provision were enacted, manufacturers could comply individually with the statutory requirement. Moreover, even without a legal requirement to pass on the Annual Payment amounts, the industry's historical record, as well as economic logic, demonstrates that firms would pass on the Annual Payment amounts without needing to engage in an agreement requiring an antitrust exemption.[33]

A related issue is whether an antitrust exemption would be necessary for the purpose of allocating shares of the Annual Payment amounts and tort liability costs. If an appropriate statutory mechanism were provided, however, the tobacco firms would not have to enter into agreements for that purpose. For example, if the Annual Payment amounts are to be allocated according to each manufacturer's share of sales or some similar method, the statute could specify the mechanism for doing so. A neutral third party could be assigned the task of determining the

[33] The Annual Payments would be treated as an added (marginal) cost of business and would be taken into account in setting price. In fact, certain studies have shown that tobacco product manufacturers historically have been able, without any apparent express collaboration, to impose price increases that exceed any additional costs they may have incurred. Staff Report at v, 25-26.

allocations, and the manufacturers could be directed to transmit sales information to that third party. Such an approach would obviate the need for any agreement among the manufacturers.

(2) Collaboration on Marketing and Advertising Restrictions

Some have also argued that certain marketing or advertising restrictions might have to be implemented by agreement among the manufacturers in the event that statutory provisions containing such restrictions are invalidated on First Amendment grounds. The Commission's October 29 testimony stated that the call for antitrust immunity was premature since we could not predict the likelihood and outcome of any First Amendment challenge. In addition, we noted that it would be necessary to more closely examine whether the embodiment of the marketing and advertising restrictions in state and possibly federal consent decrees -- or, as Mr. Koplow has suggested, in a protocol with the states or the federal government -- might in fact obviate the need for an antitrust exemption. The Commission continues to believe that the industry has not demonstrated a need for an antitrust exemption on these grounds.

(3) Joint Action to Address Problems with Uncooperative Retailers

Another reason advanced for antitrust immunity is that the manufacturers might need to join forces to deal with retailers that undermine the manufacturers' efforts to reduce underage smoking by not complying with restrictions on access to tobacco products by underage consumers. As I testified on October 29, although retailer compliance with access restrictions is a valid concern, it does not appear that manufacturers would have to engage in potentially anticompetitive conduct, such as a group boycott, to address the problem of an uncooperative retailer.

First, the proposed legislation, as contemplated by the settlement, would contain incentives for the manufacturers to respond individually to non-complying retailers. The strong penalties for not meeting target reductions in underage smoking could be abated to some extent under the proposed legislation if a manufacturer acted in good faith and took all reasonable steps to achieve the required reduction.[34] A unilateral decision to reduce or stop dealing with a non-complying retailer should be evidence of good faith, and hence a manufacturer would have an incentive to take such action. Therefore, no antitrust immunity would be required to achieve this result.

Second, the proposed legislation would provide additional mechanisms for state enforcement if a retailer failed adequately to control sales to minors. For example, the state could suspend or revoke the retailer's license to sell cigarettes, or it could assess other penalties.[35] Assuming state enforcement is rigorous, private agreement among the manufacturers to engage in self-help enforcement appears unnecessary.[36]

(4) Catch-all Provision for Future Agreements

Finally, the Commission is especially concerned about the proposal for a catch-all immunity provision, such as the one contained in the proposed global tobacco settlement. The industry's broad-based proposed immunity provision seeks to address purely hypothetical situations and presents a significant risk of price increases (and industry profits) higher than

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[34] *See* Proposed Global Tobacco Settlement, Title II and Appendix IV.

[35] *See id.*, Title I, Part D, and Appendix II.

[36] Self-help enforcement by agreement among the manufacturers also would raise serious questions about the rights of third parties who are targeted by the manufacturers.

those contemplated by the settlement. Moreover, this provision is inconsistent with most instances where antitrust exemptions have been used. In the rare cases where Congress has conferred a statutory grant of immunity for joint action of competitors, the provisions have more typically excluded specific classes of commerce from the antitrust laws or have exempted a specific transaction or agreement that has been approved by a federal agency, usually in the context of a regulated industry.[37] In contrast, the immunity proposed in the tobacco settlement does not seek to exempt defined categories of transactions or agreements.

The Commission believes that the overall proposed immunity provision is problematic in that it is limited only by the general reference to the goals of the settlement agreement and the proposed implementing statute.[38] Because one of the goals of the settlement is to discourage underage smoking through higher prices that reflect a pass-through of the Annual Payment amounts,[39] the immunity provision might be construed to permit the manufacturers to agree on the actual prices of their cigarettes, not simply on the amount of their Annual Payments. Although the proposed immunity provision does include a requirement of prior approval by the

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[37] *See* Staff Report at A-3 - A-4. Prior approval of an agreement by a federal agency has not been required where the scope of the immunity was very limited, but broader grants of immunity have been accompanied by strict controls on the development and implementation of agreements. *Id.* at A-4 - A-5.

[38] Manufacturers are left to determine on their own, in the first instance, what joint activity may be appropriate to carry out the purposes of the statute. Although those determinations are subject to review, the resolution of any disputes over the manufacturers' determinations may require costly litigation.

[39] Proposed Global Tobacco Settlement, Title VI, part B.7.

Department of Justice for "any plan or process for taking action pursuant to this section,"[40] the proposed provision presents significant risks of unintended or inconsistent effects. Even a limited discussion among the manufacturers could result in impermissible "signaling" and result in anticompetitive price increases or other harm to consumers. It would also be difficult to monitor and control the scope of such discussions.

Further, the type of exemption mechanism proposed by the industry, requiring approval by either the Commission or the Department of Justice for proposed courses of action, would thrust upon the specified agency an unwarranted and unrealistic regulatory function. The proposed provision is extremely broad and has no limiting principles based on real and identified needs for an exemption. As a result, the agency would be faced with the possibility of a large number of applications covering a wide range of conduct that in theory might be linked to some goal of the settlement. Each application would require the agency to study the effects on the industry, consumers, and third parties, and determine whether the proposed exemption would be consistent with statutory goals and the public interest. This would detract from the agencies' core mission of enforcing the antitrust laws.

I also would like to discuss an antitrust immunity provision that we have not previously addressed -- an exemption for newly-formed tobacco industry trade associations, subject to

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[40] *Id.*, Appendix IV, part C.2. There is a major exception to that requirement, however. Under the proposal, prior approval would not be required for "specific actions taken in accordance with an approved plan." *Id.* Since the specific actions need not be disclosed, a number of anticompetitive agreements could take place without the government's knowledge. Although Mr. Koplow's testimony noted that the industry's application for an exemption under this provision would provide details of the proposed action, that would not obviate our remaining concerns.

oversight by the Attorney General. The Commission sees no apparent justification for such an exemption. The antitrust laws are flexible enough to accommodate the many legitimate activities of trade associations, which also occasionally enter into agreements that are anticompetitive and harm consumers. Over the years, the Commission has brought a number of enforcement actions involving various kinds of trade associations. The proposed exemption for any new tobacco trade association is not necessary and could set an unfortunate precedent.

Accordingly, the Commission believes that the industry has not established a need for any antitrust exemption in order to implement the proposed settlement. Although we firmly believe that the tobacco companies ought not to be subject to increased exposure to potentially damaging private antitrust suits as a result of the settlement, they have not demonstrated that to be a likely outcome. Of course, if the tobacco companies ever do establish the need for an antitrust exemption, the issue can be addressed at that time. The Commission is available to work with the Committee if that need arises.

Summary

In light of the FTC's expertise in consumer protection and competition matters, the Commission believes it can make a substantial contribution to any post-settlement regulation of tobacco advertising and to consideration of other issues raised by the proposed settlement.

Dallas ... 2016 — Br Senators

(2) Tob. farmers

(1) Privacy — HA / VP. — Internet privacy — VP.

Unpinned 200,001 in NYC — conf.

WRFA — Follow meeting w/ 9/P. 16th

— Marshall — Unions collective bargaining

(4) Child Nut. bill — Child care — food 16 yrs older

WOTC

(3) TV

(1) Equal Pay

Jean's law

Sammy ...

SSP — ...

... ...

...

Tobacco FTC

Federal Trade Commission

Facsimile Transmittal Sheet

To:	Tom Freedman Domestic Policy Council Fax number: 456-7431	Total number of pages sent (including this cover sheet):
From:	Lorraine Miller Congressional Relations Federal Trade Commission Washington, D.C. 20580 Telephone: (202) 326-2195 Facsimile: (202) 326-3585	Sending Organization Code: 0309 Date: 3/2/98 Time:
Subject:	FTC Testimony Before Senate Commerce re: the Global Tobacco Settlement	
Note:		

State Tobacco Control Highlights 1996

U.S. TOBACCO STATISTICS
INTERNATIONAL & DOMESTIC

1) GLOBAL PERSPECTIVE

A) GLOBAL PRODUCTION OF LEAF TOBACCO (1995)

[European Commission, 1996]

North America	13.2%
Central & South America	9.6%
European Union	5.4%
Eastern Europe & FSU	2.0%
sub-Saharan Africa	6.1%
Asia minus China	19.7%
China	36.9%
Middle East	4.2%
Other Regions	2.9%
TOTAL	100.0%

B) CIGARETTE CONSUMPTION IN SELECT COUNTRIES

[ERC Statistics International, 1990, 1992]

	Consumption per person over 18	Population
Far East		
Japan	3150	125
S Korea	2200	47
Taiwan	1700	20
China	1450	1210
India	*	950
Philippines	1200	74
Australia	1000	18
Thailand	750	60
Western Hemisphere		
United States	2100	265
Canada	1650	29
Brazil	1050	163
Argentina	1000	35
Europe		
Greece	2800	11
Hungary	2450	10
Poland	2350	39
Switzerland	2350	6
Spain	2000	42
Germany	1900	84
Czech & Slovakia	1850	10+2
Britain	1700	58
Italy	1700	58
France	1600	57
Israel	1600	5
Netherlands	1150	15
Algeria	800	30

Former Soviet Union	1600	303

* not available (hand rolled)

2) U.S. INTERNATIONAL TOBACCO TRADE

[1996 Tobacco Trade Barometer, Tobacco Merchants Assoc., Inc.]

A) U.S. EXPORTS & IMPORTS

	Products		Leaf	
	Cigarettes (in millions)	All Mfgd Prods (in millions)	Total Leaf (in millions)	Total Tobacco Trade
Exports	4735.8	5327.6	1390.1	$6717.7
Percent.	(70.5%)	(79.3%)	(20.7%)	(100.0%)
Imports	68.6	279.4	1052.5	$1331.9
Percent.	(5.2%)	(21.0%)	(79.0%)	(100.0%)
			Trade Surplus	$5385.8

B) U.S. TRADING PARTNERS

	Exports	Imports
Western Hemisphere	5.5%	50.7%
European Union	34.7%	10.9%
FSU & Sphere	8.5%	23.6%
Asia	38.7%	7.1%
Middle East	10.7%	0.9%
Africa	1.8%	6.8%

C) TOBACCO'S IMPACT ON U.S. TRADE BALANCE

	U.S. Total Trade (in billions)	U.S. Tobacco Trade (in billions)	Tobacco pct U.S. Total
Exports	624.8	6.7	1.1%
Imports	791.4	1.3	0.17%
deficit	166.6	surplus 5.4	surplus 3.2%

3) TOBACCO IN U.S. AGRICULTURE

[State Tobacco Control Highlights - 1996]

	Agriculture			Manufacturing	
	Acres 000	Revenue in mill.	Ag Total pct	Revenue in mill.	GSP Total pct.
N. Carolina	243.2	$943	14.8%	10,378	6.5
Kentucky	187.0	$786	24.1%	1,923	2.54
Tennessee	60.4	$248	11.5%	238	.22
S. Carolina	47.0	$172	12.7%	15	.02
Virginia	46.4	$168	7.7%	4,944	3.21

37% 28%

% of total ag. in state.

Georgia	37.0	$136	2.9%	835	.54
Ohio	8.5	$33	0.7%	1	-
Indiana	7.1	$29	0.6%	8	.01
Florida	6.5	$27	0.5%	61	.02
Connecticut	1.6	$24	5.1%	76	.8
Pennsylvania	9.0	$21	0.6%	38	.01
Maryland	8.5	$19	1.4%		
West Virginia	2.0	$7	1.6%	8	.03
Alabama	-	-	-	24	.03
Total	664.2	$2613		$18,549	
					pct GDP
U.S. Total	676.16	$2651	1.5%	$19,316	.32

22
P, VP, USDA,
Clayton
Rocky
Waters

Invitees for 12/17 POTUS meeting with small, limited resource, and minority farmers

Harold L. Volkmer
Chair, Small Farms Commission

Mr. Volkmer, Chair, lives in Hannibal, **Missouri**, and is an attorney. He was a Member of the Missouri House of Representatives from 1967 to 1976, and the United States House of Representatives from 1977 to 1996. In the U.S. House, Mr. Volkmer served on the House Agriculture Committee's Livestock, Dairy, and Poultry Subcommittee, which he chaired in the 103rd Congress.

Kathleen Sullivan Kelley
Vice Chair, Small Farms Commission

Ms. Kelley is a self-employed farmer/rancher in Meeker, **Colorado**. She raises wheat, barley, and cattle. She also served in the Colorado Legislature from 1980-1982, and is a member of several Colorado farm and agriculture associations, including the Rocky Mountain Farmers Union.

Douglas G. Henderson

Mr. Henderson of Beresford, **South Dakota**, is the owner-operator of a family farm. He is a member of the Mid-Am Milk Coop, the LOL Milk Coop, the National Farmers Union (County President), the Small Farms Commission, and served on the State Extension Advisory Board.

Toulu Thao

Mr. Thao of Fresno, **California**, is Executive Director of the Hmong American Community, Inc., a community based nonprofit organization. He farmed fruits and vegetables from 1983 to 1993, and was a project engineer from 1986 to 1997. He is a member of the Small Farms Commission.

Karen S. Armstrong-Cummings

Ms. Armstrong-Cummings of Frankfort, **Kentucky**, is managing director of the Commodity Growers Cooperative Association in Lexington, Kentucky. She is a member of several Kentucky agriculture associations, including the Kentucky Leadership for Agricultural and Environmental Sustainability. She is asjo a member of the Small Farms Commission

Robert M. Daniels, II

Mr. Daniels operates a 640-acre family farm in Sedgwick County, **Kansas** and produces dryland soybeans, corn, sorghum, and wheat. He is a board member of the Kansas Agricultural and Rural Leadership, Inc., and is a member of the Small Farms Commission.

Greg T. Gunthorp

Mr. Gunthorp of LaGrange, **Indiana**, owns and operates a hog farm, and specializes in pasture-based livestock systems. He is a member of the LaGrange County Farm Bureau and participated in the State Farm Bureau Young Farmer program. He is also a member of the Small Farms Commission.

education, and research activities.

Summary of Major Recommendations of the Task Force on Youth and Tobacco

BACKGROUND

More than 90 percent of people who will ever smoke on a regular basis begin doing so prior to the age of 19. Each day, some 3,000 children take up the habit; the average age at which they begin is approximately 12-1/2, although many decide to smoke earlier if they are able. While these children start to use tobacco for a variety of reasons, very quickly they become addicted to the nicotine present in the product, and studies show clearly that children have just as difficult a time quitting as do adults.

There are a number of reasons why children begin to use tobacco. Among these are the remarkably effective advertising and promotion by the tobacco industry and, for many young people, perceived benefits from the use of tobacco, be they adult privileges, appealing images, or the opportunity for rebelliousness.

RECOMMENDATIONS

Regulatory Policy

- Sale and distribution of tobacco products to persons under age 18 should be prohibited.
- Specific and increasingly stringent targets for the reduction of tobacco use by children and adolescents (also known as "performance standards" should be established and become binding on the tobacco industry by brand within the next two years.[3] Failure by the tobacco industry to meet these targets should result in predictable financial penalties sufficiently severe to act as a strong deterrent to continued failure.
  - Included within this recommendation are such specific proposals as:
    - Penalties should be structured so that failure to meet the targets directly

reduces total revenue and affects total shareholder value.
- Such penalties should not be arbitrarily limited or capped.
- Additional non-financial penalties should be imposed if tobacco companies fail to meet such targets.
- Penalties should be assessed, to the maximum extent feasible, on a company-by-company basis.
- Similar goals and penalties should be established for smokeless tobacco and other tobacco products.

- Marketing, promotion, and advertising of all tobacco products directed at persons under age 18 should be banned.
  - Included within this recommendation are such specific proposals as:
    - Services, goods, and other items that carry tobacco brand names, logos, or imagery should be banned.
    - Sponsorship of any athletic, social, or cultural events using the name of tobacco products present or future should be banned.
    - Promotion in public entertainment, including product placement in movies and television should be banned.

- Sales and distribution of tobacco products through means that might make them available to underage users should be prohibited.
  - Included within this recommendation are such specific proposals as:
    - Sales of tobacco products through vending machines, mail order, Internet and other electronic systems, and self-serve displays should be banned.
    - Sales of tobacco products near schools, playgrounds, and other areas where children congregate should be banned.
    - Sales of tobacco products near health care facilities should be banned.
    - The distribution of tobacco products through free samples or through individual or small sales should be banned.
    - States should license all participants in tobacco sales (e.g., manufacturers, distributors, wholesalers, importers, etc.), and penalties for violations of sales to minors should be strict enough to ensure compliance with the law.
    - Both State and Local governments should be allowed to enforce violations of such restrictions and licensing requirements.

- The warning and product content labeling on all tobacco products should be strengthened.

- Schools and other child-service institutions should adopt and enforce a "zero-tolerance" policy against tobacco use that applies to both minors and employees.
  - Included within this recommendation are such specific proposals as:
    - A zero-tolerance policy should apply not only at school or on-site, but

also to all sponsored events and other sanctioned activities.
- A zero-tolerance policy should include the banning of the wearing and carrying of clothing and other items that include promotional material for tobacco products.

Public Education and Other Public Health Policy

- Broad programs of counter-advertising should be required in all media markets and should be funded or supported by the tobacco industry.
- Schools should implement the Centers for Disease Control and Prevention guidelines to prevent tobacco use and addiction.
- Schools should institute comprehensive tobacco prevention programs from pre-kindergarten through 12th grade, and such programs should be funded or supported by the tobacco industry.
- IMPACT and ASSIST grants[4] programs should be continued and strengthened.
- Partnerships between public entities (such as schools) and businesses should be instituted to help achieve continued reduction in underage use of tobacco products.
- Health care providers should be educated about effective means to prevent children from beginning tobacco use.
- Tobacco use by children and adolescents should be included as an outcome measure in assessing the quality of health care services (e.g., in HEDIS and other NCQA reviews).

Research Policy

- Research should be conducted on the reduction of underage tobacco use.
  - Included within this recommendation are such specific proposals as research on:
    - Methods of identifying children who are likely to begin (or increase) use of tobacco products.
    - The effectiveness of current prevention and education efforts on youth consumption.
    - Children's and parents' attitudes and beliefs about tobacco use and the perception of risk, understanding of addiction, and the long-term consequences of tobacco use by children.

Fiscal Policy

- Excise taxes on tobacco products should be dramatically increased and should be indexed to inflation.[5]
- Fines from performance standards violations should not be tax-deductible.
- Fines from performance standards violations should be used to support activities to reduce tobacco consumption, with emphasis on activities designed to reduce consumption by children and adolescents.
- The enforcement of regulations and the initiation of public education, public health, and research efforts should be funded by these excise taxes, fines from performance standards violations, and by other funds from the tobacco industry.
- A new non-profit corporation to support tobacco prevention and control programs should be established in the private sector and should be funded by the tobacco industry, by excise taxes, and by fines from performance standard violations. The start-up of the non-profit corporation and its educational activities should begin at the earliest possible time.

Summary of Major Recommendations of the Task Force on Current Users of Tobacco Products

BACKGROUND

Some 50 million Americans are now addicted to tobacco. One of every three long-term users of tobacco will die from a disease related to their tobacco use.[6] Nicotine, a major constituent of tobacco, is highly addictive and "cigarettes and other forms of tobacco are just as addicting as heroin and cocaine. . . ."[7] Similarly, withdrawal from this addiction is like withdrawal from other highly addictive substances. About 70 percent of smokers want to quit, but less than one-quarter are successful in doing so.

The Agency for Health Care Research and Policy has issued smoking cessation clinical practice guidelines[8] that lay out recommendations for primary care clinicians, smoking cessation specialists, and health care administrators, insurers, and purchasers. These guidelines are often cited as the framework for providing and evaluating smoking

cessation services.

In a separate but related area, it should be noted that cigarette-caused fires are the leading cause of deaths from residential fires. It is argued that many such fires could be prevented by changes that would reduce the burn characteristics of cigarettes.

RECOMMENDATIONS

Regulatory Policy

- Coverage for tobacco use cessation programs and services should be required under all health insurance, managed care, and employee benefit plans, as well as all Federal health financing programs (e.g., Medicare and Medicaid). Such coverage should be provided as a lifetime benefit rather than as a one-time opportunity to "kick the habit."

- Tobacco use cessation programs and services should be available to adults, adolescents, and children who are addicted to tobacco products, regardless of their insurance status or ability to pay.

Public Education and Other Public Health Policy

- The smoking cessation guidelines issued by the Agency for Health Care Policy and Research[9] should serve as the cornerstone for health care providers engaged in clinical practice.

- Courses on the prevention, treatment, and control of tobacco use, including cessation, should be made a part of the core curriculum in the education of health professionals.

- Tobacco use cessation programs and services should be made widely available. Specific cessation programs and services should be developed for specific populations, including children, women, racial and ethnic minorities, and individuals with limited literacy.

- Substantial public education efforts designed to inform tobacco users about both the health hazards of tobacco and the availability of tobacco use cessation programs and services should be undertaken.

- Policies designed to reduce the number of fires caused by tobacco products should be developed and implemented.

Research Policy

- Research efforts designed to evaluate the effectiveness of tobacco use cessation programs, services and therapeutics should be undertaken.
- Research projects should include work on smokeless tobacco and cigar use as well as cigarette smoking.
- Research projects should focus on the development of tobacco use cessation programs and services for pregnant women, children, and adolescents.
- Research efforts designed to evaluate the effectiveness of public education and public health policies in successfully encouraging current users of tobacco products to attempt cessation efforts should be undertaken.

Fiscal Policy

- Tobacco use cessation programs and services should be funded or supported by the tobacco industry at a level sufficient to ensure that they are provided universally and in a manner most likely to prove effective.
- Research efforts related to the development of effective tobacco use cessation programs and services should be funded or supported by the tobacco industry.

Summary of Major Recommendations of the Task Force on Environmental Tobacco Smoke

BACKGROUND

Second-hand or environmental tobacco smoke (ETS) is no longer considered just an unpleasant side effect of cigarette smoking. Scientific evidence now indicates that nonsmokers become seriously ill or die because of exposure to the toxic smoke produced by other people's active smoking and the U.S. Environmental Protection Agency has classified ETS as an agent known to cause cancer in humans.[10] ETS is believed to cause tens of thousands of deaths each year and to cause or exacerbate cardiovascular and pulmonary illnesses in hundreds of thousands additional individuals.

ETS is of particular concern with regard to children. Children are powerless to control their exposure to ETS and yet, because of their young age, are most adversely affected by exposure to this agent. The EPA estimates that exposure to ETS from parental smoking alone causes as many as 300,000 lower respiratory infections per year in infants under the age of 18 months.[11]

Efforts to control second-hand smoke have been undertaken at Federal, State, and Local levels of government. The Federal government has banned smoking in federally- assisted programs for children and on domestic airline flights. Forty-eight States and the District of Columbia have enacted laws that, in some way, restrict smoking in public places. Local governments have usually led the way in these efforts; over 800 local communities have adopted significant restrictions on smoking in public places and workplaces.

RECOMMENDATIONS

Regulatory Policy

- Legislation or regulations should be enacted and enforced by Local, State, and Federal governments to eliminate exposure to second-hand smoke.
    - Included within this recommendation are such specific proposals as:
        - Smoking should be banned in all work sites and in all places of public assembly, especially those in places in which children are present.
        - Smoking should be banned in outdoor areas where people assemble, such as service lines, seating areas of sports stadiums and arenas, etc.
        - Schools should be required to be 100 percent smoke-free in all areas of their campuses.
- Smoking should be banned on all forms of public transportation, including bus, train, commuter services, and flights originating in or arriving at the U.S.
- Smoking should be banned at all Federal workplaces, including branches of the military and the Department of Veterans' Affairs and its hospitals.

Public Education and Other Public Health Policy

- A comprehensive public education and public awareness program about the dangers of ETS should be funded and implemented by Local, State, and Federal levels of government.
- State and local school boards should revise school health education programs to include information on ETS and its health effects.

Research Policy

- Federal health agencies should complete a risk assessment of the cardiovascular effects of ETS.

Fiscal Policy

- Economic incentives for smoke-free workplaces should be developed.
  - Included within this recommendation are such specific proposals as:
    - Insurers should be encouraged to take into account worksite smoke-free policies in assessing appropriate premiums for health insurance, business insurance, and workers' compensation coverage.

Summary of Major Recommendations of the Task Force on the Future of the Tobacco Industry and Tobacco Control Efforts

BACKGROUND

This task force reviewed three basic areas and made recommendations regarding each one. The three areas were: (1) common threads of domestic tobacco control efforts that cut across all other task force recommendations; (2) activities to aid those Americans who will be disadvantaged through no fault of their own by tobacco control policies; and (3) U.S. activities that can assist in tobacco control internationally.

In the first area, it is clear that many of the problems identified by the other four task forces have common sources and potentially common solutions. Most of these task forces made recommendations, for example, opposing peremption of State and local standards. Rather than repeating these proposals in each task force summary, these suggested actions are consolidated here: They should be read to be a part of each task force, unless specific circumstances dictate a narrower approach as reflected in the respective task force summary.

In the second area, this task force reports that tobacco farmers and farm communities are at severe economic risk as comprehensive tobacco control policies take effect. Most Americans consider the tobacco farmer to be as much an economic victim as a participant in the manufacture of tobacco products and support government efforts to help tobacco farmers find other means of making a living.

In the third area, this task force focused on the need for international tobacco policy to which the U.S. could make a substantial contribution. According to the World Health Organization, in the early 1990's, tobacco use caused three million deaths a year worldwide; WHO goes on to project that within the next twenty to thirty years, this number will rise to ten million deaths a year, with 70 percent of those deaths occurring in developing countries. Many of these deaths and projected deaths can be attributed to the increasingly aggressive marketing efforts of U.S.-based transnational tobacco companies.

RECOMMENDATIONS

Tobacco Control Efforts

Regulatory Policy

- Any Federal or State regulation of tobacco products should contain unambiguous non-preemption provisions, expressly clarifying that higher standards of public health protection imposed by State and Local governments are preserved.
- Federal, State, and Local tobacco control regulations should be aggressively enforced and such enforcement activities should be fully funded and supported.
- All currently available avenues of litigation, both civil and criminal, must be fully preserved.
- All elements of Federal, State, and Local tobacco control policies should be enforceable through lawsuits sought by individual citizens.
- All internal tobacco company documents that bear upon the public health must be disclosed.
    - Included within this recommendation are such specific proposals as:
        - Disclosure of the companies' and their affiliates' public relations, advertising, promotion, marketing, and political activities.
        - Disclosure of all information inappropriately shielded by an assertion of attorney-client privilege.
        - Disclosure of all technical and health/safety data (with a possible exception for those true trade secrets that the companies can clearly establish have no health implications).

- Disclosure of all information related to marketing, including opinion and behavioral research; and the targeting of children, women, and racial and ethnic minorities.
- Disclosure of all documents relating to the effects of second- hand smoke.

- A Federal oversight board should be established to investigate all matters relating to public health and tobacco products and the tobacco industry.
  - Included within this recommendation are such specific proposals as:
    - The board should have investigative authorities, including subpoena power, necessary to investigate all matters regarding tobacco policy and public health.

Research Policy

- The collection and analysis of comprehensive data on tobacco use, behavior, attitudes (at national, regional, state, and local levels) should be funded or supported.

- Federal agencies and their partners should support programs to research, develop, and disseminate information regarding innovative interventions, including demonstration projects for implementing effective interventions.

Fiscal Policy

- Significant excise taxes (indexed to inflation) should be imposed upon tobacco products, both as a means of reducing consumption[12] and as a means of raising revenues as one source of support for tobacco control activities.

- All tobacco control activities (including education, counter- advertising, smoking cessation, etc.) funded or supported in whole or in part by the tobacco industry should be developed and implemented in a manner entirely independent of the industry.

- Fines, punitive damages, and other forms of financial punishment imposed on the tobacco industry and its affiliates should not be recognized as an ordinary business expense and should not be tax- deductible or given other special tax treatment.

- Fines collected for failure to meet performance standards or violations of sales and promotion restrictions should be used for tobacco control activities.

- Funding for Federal, State, and Local tobacco control activities (including regulation and enforcement activities) should be sufficient to allow the effective conduct of such efforts.

- Funding for nongovernmental tobacco control activities should be sufficient to allow the effective conduct of such efforts. Particular emphasis should be placed on community programs for racial and ethnic minorities.

- Future smoking cessation programs and services should be entirely financed by the tobacco industry, regardless of location of service delivery or initial source of payment. Individuals and third-party payors (both public and private) should receive full reimbursement (or subrogation, as appropriate) for the costs of all future smoking cessation programs or services, without restriction on extrapolation, aggregation, or other means of consolidation.

Tobacco Farms and Farm Communities

Public Education and Other Public Health Policy

- A blue-ribbon panel should be established to oversee tobacco growing, manufacturing, and marketing policy, including the history of domestic and foreign tobacco purchases. This panel should provide both short- and long-term strategies for reducing the dependence of tobacco-growing States and communities on tobacco, including recommendations for the provision of economic development assistance.

Fiscal Policy

- An economic assistance and development fund should be established (and funded by the tobacco industry) to assist tobacco farmers and their communities in developing alternatives to tobacco farming. Economic conversion funds should also be provided to assist tobacco manufacturing workers and related non- farm workers.

- Federal price support programs for tobacco should be eliminated.

International Tobacco Policy

Regulatory Policy

- The U.S. should actively promote tobacco control worldwide.

    - Included within this recommendation are such specific proposals as:

        - The U.S. should actively promote the global adoption of U.S. domestic tobacco control policies through all appropriate international activities.
        - The U.S. should support the development and implementation of tobacco control activities by multilateral organizations, including the

Pan-American Health Organization, the World Health Organization, UNICEF, and the Framework Tobacco Control Convention.

- The U.S. should support the development and implementation of tobacco control activities by non-governmental organizations.
- The U.S. should support bilateral and multilateral treaties making the Framework Convention legally binding on all countries.
- The U.S. should remove tobacco products from Section 301 of the 1974 Trade Act and should prohibit U.S. government interference in international activities or the national tobacco control activities of other countries.
- The U.S. should support the development of a non- governmental International Tobacco Control Commission, governed by public health leaders. Such a commission would (1) monitor international control efforts; (2) develop uniform standards, review procedures, and provide support for non- governmental organizations advocating tobacco control; and (3) administer an international information exchange of all available tobacco industry documents.

Research Policy

- The U.S. should support international research efforts to determine the most effective means of preventing the initiation of tobacco use and of smoking cessation.

Fiscal Policy

- The U.S. should provide financial support for international governmental and non-governmental efforts to control tobacco use.

Footnotes

[1] 61 Fed. Reg. 168, 44661 (1996).

[2] *Id.* at 44636 (comments of the American Heart Association, the American Lung Association, and the American Cancer Society).

[3] In its deliberations, the Advisory Committee recommended that a ten-year plan be established that is *at least* as strong as the following:

At the end of	Reduction target
Year 2	**15%**
Year 3	**20%**
Year 4	**25%**
Year 5	**30%**
Year 6	**40%**
Year 7	**50%**
Year 8	**55%**
Year 9	**60%**
Year 10	**65%**

[4] IMPACT grants are administered by the Centers for Disease Control and Prevention. ASSIST grants are administered by the National Institutes of Health.

[5]Economic analyses suggest that children's use of tobacco is significantly affected by price increases of $2 per pack or more.

[6]Coalition on Smoking OR Health, Protecting Our Families and Children from Tobacco: Public Policy Activities of the Coalition on Smoking or Health for 1995 and 1996, 2 (1996).

[7]Addiction Research Foundation, Facts About Tobacco, 2 (undated)(citing the United States Surgeon General's 1988 Report on Smoking).

[8]Agency for Health Care Policy and Research, Smoking Cessation (Clinical Practice Guideline, Number 18) (1996) (reprinted in 275 J.A.M.A. 16 (April, 24, 1996)).

[9]Agency for Health Care Policy and Research, Smoking Cessation (Clinical Practice Guideline, Number 18) (1996) (reprinted in 275 J.A.M.A. 16 (April, 24, 1996)).

[10] U.S. Environmental Protection Agency, Respitory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, (Dec. 1992)(EPA /600/6-90/006F).

[11]*Id.*

[12]Economic analyses suggest that children's use of tobacco is significantly affected by price increases of $2 per pack or more.

Appendix 1

Congress of the United States
Washington, DC 20515

May 22, 1997

Mr. John Garrison
Managing Director, American Lung Association
1740 Broadway
New York, NY 10019

Dear Mr. Garrison:

We are writing as Members of Congress to ask that you serve on an Advisory Committee on Tobacco Policy and Public Health to be chaired by Dr. C. Everett Koop and Dr. David Kessler. The Advisory Committee will advise us on any tobacco settlement that may be proposed and will work with us to develop a comprehensive and united approach to any tobacco legislation that Congress may consider.

In the talks that are now underway, the tobacco industry is seeking a "global settlement" that would provide the industry with limitations on liability, public legitimacy, and sustained economic health. We are concerned that no one has adequately analyzed the ramifications of the tobacco companies' proposals. Before Congress considers any "global settlement" with the tobacco companies, we believe that it is essential that we obtain input from a public health perspective.

We seek your help in this effort. We must not limit our focus to only one part of the tobacco control agenda. In fact, given the unprecedented nature of the relief being discussed by the negotiators for the tobacco industry, the class-action lawyers, and the attorneys general, we believe we should not necessarily limit our focus top provisions tobacco control advocates have proposed in the past. Instead, with your help, we want to ask fundamental questions about what - - from the public health perspective -- the future of the industry should be like.

We will fail our responsibilities if we limit our agenda to the issues currently on the table in the so-called "global settlement" talks. We should look at issues such as reducing tobacco exports, significantly raising tobacco taxes, ensuring actual reductions in youth

smoking rates, imposing special corporate responsibilities on the industry, and other important public health policies. We ask for your help in identifying the broad range of provisions that should be encompassed in any "global settlement" with the tobacco industry.

If any agreement is reached in the tobacco settlement talks currently underway, it will undoubtably be closely reviewed and substantially revised by Congress. Indeed, no proposal from outside groups of such a far-reaching nature has ever passed Congress without a great deal of debate and modification. A unified public health position developed by the Advisory Committee will allow us to respond to any weakening amendments effectively -- and to insist on public health amendments to strengthen the legislation.

We are at a turning point in our nation's relationship with the tobacco industry. We hope you will agree to serve on the Advisory Committee on Tobacco Policy and Public Health -- and help us to ensure that any tobacco legislation is in the public health interest of our nation.

Sincerely,

Congressman Henry A. Waxman
Congressman James V. Hanson
Congressman Marty Meehan
Senator Dick Durbin
Senator Frank R. Lautenberg
Senator Ron Wyden
Senator Paul Wellstone
Congressman Sherrod Brown

Appendix 2

The Advisory Committee on Tobacco Policy and Public Health

Co-Chairs: C. Everett Koop, M.D., Sc.D. and David A. Kessler, M.D.

Panel Members

Action on Smoking and Health
John F. Banzhaf III, Executive Director

Advocacy Institute
Michael Pertschuk, J.D., Co-Director

American Academy of Family Physicians
Robert Graham, M.D., Executive Vice President

American Academy of Pediatrics
Richard B. Heyman, M.D., Chair, Committee on Substance Abuse
George D. Comerci, M.D., Past President, AAP

American Cancer Society
John R. Seffrin, Ph.D., Chief Executive Officer

American College of Chest Physicians
D. Robert McCaffree, M.D., F.C.C.P., President-Elect

American College of Preventive Medicine
George K. Anderson, M.D., M.P.H., President-Elect

American Heart Association
Dudley H. Hafner, Chief Staff Executive Officer

American Lung Association
John R. Garrison, Chief Executive Officer

American Medical Association
Nancy Dickey, M.D., President-Elect
Randolph Smoak, Jr., M.D., Vice-Chair, Board of Trustees

American Medical Women's Association
Eileen McGrath, J.D., C.A.E., Executive Director

American Public Health Association
Mohammad N. Akhter, M.D., M.P.H., Executive Director

Americans for Nonsmokers' Rights
Julia Carol, Co-Director

Association of State and Territorial Health Officials
Donald E. Williamson, M.D., President-Elect
Martin Wasserman, M.D., Maryland Secretary of Health

Maine Department of Human Services, Bureau of Health
Randy H. Schwartz, M.S.P.H., Director, Division of Community and Family Health

National Center for Tobacco-Free Kids
William D. Novelli, President
Matthew L. Myers, J.D., Executive Vice President

National Medical Association
Randall C. Morgan, M.D., President
Yvonnechris Smith Veal, M.D., Past President

The Onyx Group
Rev. Jesse W. Brown, Jr., M. Div., Vice President

Partnership for Prevention
Jonathan E. Fielding, M.D., M.P.H., M.B.A., Vice-Chair

Science and Public Policy Institute
Jeff Nesbit, President

Smokeless States National Program
Thomas P. Houston, M.D., Director of Smokeless States National Program Office

Stop Teenage Addiction to Tobacco
Judy Sopenski, M.Ed., Executive Director

Tobacco Products Liability Project
Richard A. Daynard, J.D., Ph.D., President, Tobacco Control Resource Center; Chairman, Tobacco Products Liability Project

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The Advisory Committee on Tobacco Policy and Public Health

Task Force Members

Task Force on the Regulation of Nicotine and Tobacco Products:

1. American Cancer Society (**John Seffrin—Chair**)
2. National Center for Tobacco-Free Kids (William Novelli/Matthew Myers)
3. Stop Teenage Addition to Tobacco (Judy Sopenski)
4. Tobacco Products Liability Project (Richard Daynard)

Task Force on Youth and Tobacco:

1. American Academy of Pediatrics (**Richard Heyman—Chair**)
2. American Academy of Family Physicians (Robert Graham)
3. American Cancer Society (John Seffrin)
4. American College of Chest Physicians (Robert McCaffree)
5. American Public Health Association (Katherine McCarter for Mohammed Akhter)
6. Association of State and Territorial Health Officials (Donald Williamson)
7. National Center for Tobacco-Free Kids (William Novelli)
8. National Medical Association (Yvonnechris Veal for Randall Morgan)
9. Partnership for Prevention (Jonathan Fielding)
10. Smokeless States National Program (Thomas Houston)
11. Stop Teenage Addition to Tobacco (Judy Sopenski)

Task Force on Current Users of Tobacco Products:

1. American Medical Association (**Randolph Smoak for Nancy Dickey—Chair**)
2. American Academy of Family Physicians (Robert Graham)
3. American Academy of Pediatrics (Richard Heyman)
4. American College of Chest Physicians (Robert McCaffree)
5. American College of Preventive Medicine (George Anderson)
6. National Medical Association (Yvonnechris Veal for Randall Morgan)
7. The Onyx Group (Jesse Brown)
8. Smokeless States National Program (Thomas Houston)

Task Force on Environmental Tobacco Smoke:

1. American Lung Association (**John Garrison—Chair**)
2. Action on Smoking and Health (John Banzhaf)
3. American College of Preventive Medicine (George Anderson)

4. American Heart Association (Dudley Hafner)
5. American Public Health Association (Katherine McCarter for Mohammed Akhter)
6. Americans for Non-smokers Rights (Julia Carol)
7. Association of State and Territorial Health Officials (Donald Williamson)

Task Force on the Future of the Tobacco Industry and Tobacco Control Efforts:

1. Advocacy Institute (**Michael Pertschuk—Chair**)
2. American Heart Association (Dudley Hafner)
3. American Lung Association (John Garrison)
4. American Medical Association (Randolph Smoak for Nancy Dickey)
5. Americans for Non-smokers Rights (Julia Carol)
6. National Center for Tobacco Free Kids (Matthew Myers)
7. The Onyx Group (Jesse Brown)
8. Partnership for Prevention (Jonathan Fielding)
9. Tobacco Products Liability Project (Richard Daynard)

The Advisory Committee on Tobacco Policy and Public Health

Staff to the Committee

Jeff Nesbit, Staff Director
Timothy M. Westmoreland, J.D., Counsel
Ruth J. Katz, J.D., M.P.H., Counsel

Michael D. Beauvais, Legal Associate
R. Scott Foster, J.D., Legal Associate
Susan E. O'Donnell, M.A., Public Affairs
Martha Ross, Senior Program Associate
Mary Supley, Public Affairs

Appendix 3A

Report of the Task Force on the Regulation of Nicotine and Tobacco Products

This report establishes public health benchmarks developed by the Subcommittee on Nicotine and Product Regulation. This compilation is not all inclusive, but rather a summary of the most serious concerns expressed by committee members to date with the advice and consent of nationally recognized experts:

I. Health Consequences of Nicotine Addiction, Withdrawal, Treatment, and Cessation Issues

With 50 million addicted tobacco users and other Americans who are impacted by smoking, the health policy developed through legislation, settlement, or regulation must address the needs of this population. Aside from compensation issues, these people will need help and funds from the industry should pay for their treatment. The FDA must have the authority to regulate nicotine, but not just in the context of future addicts. Any solution that does not address the needs of current users is inadequate. The costs and administration of a program to assist with this population must be coordinated with Federal, State, and Local agencies. It must be systematic and available throughout the country. Principles of a cessation program include:

- Multi-component program, utilizing all treatment options within the existing framework of nicotine replacement.
- A standard list of approved modalities, with reimbursement guidelines.
- A lifetime benefit, rather than a single or one time opportunity for help. Addiction to nicotine is a chronic disease, many individuals will need treatment more than once. A few will benefit from extensive help. There must be no arbitrary cap on number or cost of treatment that an individual may receive.
- An assessment of existing programs throughout the US, in order to maximize funds for coordinated effort.
- Quality control to ensure high standards.
- Adequate funding for research, particularly for children and special populations.

- Agency for Health Care Policy and Research guidelines provide a sound basis for describing for the range of services that should be actively supported initially, but additional modalities and interventions should be explored through clinical research.

- Both treatment and prevention services should be made available through state contracts.

II. Extent of Jurisdiction Over Nicotine, Other Constituents, and Ingredients

Much has been documented about the addictive qualities of nicotine, and the focus on the drug and its delivery device is the basis for FDA assertion of jurisdiction. Yet regulation of the myriad other constituents and ingredients has been less prevalent in the discussion of FDA authority. Full FDA authority in the regulation of nicotine is not sufficient. The authority to regulate, disclose, and if necessary prohibit other constituents and ingredients must be addressed in any public health policy. Tobacco additives, carcinogens, dyes, product enhancers, and preservatives all play a key role in the cigarette as a delivery device and must be scrutinized in addition to nicotine. Nicotine makes the product addictive, the toxins make it deadly, and the additives make it more consumer acceptable, like sweetening a poison. While the current FDA rules may not hold sway over each of these content areas, any regulatory scheme should include the consideration of these critical cigarette components. ETS and the OSHA regulations cannot be excluded in a comprehensive plan which assures protection of workers, children, and the public.

The authority to regulate cannot be construed as tantamount to regulating. Enforcement of regulation is a key component to any FDA action. Granting the FDA the right to regulate content, nicotine levels, and other ingredients must be coupled with the funds to do so. Ancillary FDA regulatory issues: labeling, disclosure of content, manufacturing, and marketing should be included in any public health policy. Other specific recommendations include:

- Explicit authority to regulate nicotine levels, other toxic constituents, and ingredients, including the authority to phase out nicotine and remove ingredients that contribute to the onset of smoking and dependence on cigarettes.

- Ability to test nicotine levels by brand based on the best science.

- Prohibition on use of marketing terms and brand names, such as "light, low, and mild" unless science supports claim and the public is proven not to be misled.

- Regulate nicotine in a way that is consistent with all other nicotine delivery systems (e.g., gum, patch, inhaler, etc.) All nicotine delivery devices, whether produced by tobacco companies or by pharmaceutical companies, should be evaluated and regulated by the FDA using a consistent set of standards.

- No limitations or special exceptions on FDA authority to regulate nicotine, other

constituents and ingredients.

- Adequate funding for FDA research on nicotine to ensure appropriate regulation.
- Any burden of proof placed on the FDA regarding its authority to regulate should not be excessive; rather the lion's share of the burden of proof should rest with the tobacco industry in all areas of jurisdiction.
- Information exchange and scientific conference of industry and NIH researchers in a public national forum.
- Inclusion of pipes, cigars, roll-your-own cigarette tobacco, and smokeless in regulatory framework.
- Consideration of generic packaging for all cigarettes.

III. Timing of Jurisdiction Over Nicotine, Other Constituents, and Ingredients

Pragmatic consideration of FDA regulation roll out and enforcement should be addressed in a meaningful way. One option: to assign an arbitrary trigger for further restriction (a set number of years before agency can ban nicotine.) Yet another option: establish a standard of proof and mechanism of discovery necessary before FDA can take additional action. A realistic plan should be developed. The consensus of the committee:

- The best science, information, and health policy, and not an arbitrary deadline, should drive FDA regulatory timing.
- The FDA should take appropriate steps to protect public health and be able to *further* regulate nicotine, other constituents, and ingredients as the evidence suggests necessary.
- Jurisdiction by the FDA should not circumvent state and local communities from further assertion of regulation.

IV. Disclosure of Relevant Research

The need for full disclosure of both scientific and market data is necessary not only by the industry, but its associations, law firms, and service providers to the extent that such information will ensure complete and effective product regulation. Research on the health effects of the product, on why people initiate use, on the effects of marketing must be disclosed. All industry based research should be made available to the FDA for review. Data on ETS and its impact on the non smoker should be turned over as well. Penalties, both civil and criminal, for nondisclosure should be developed. A mechanism for document production must be adopted and could also serve as a trigger for additional

FDA action.

- Research on nicotine levels is not enough - all science and information regarding pricing, additives, market strategy, addictiveness, toxicity, ease of use, attractiveness and consumer behavior must be made available to the FDA, and when appropriate, the public.

- Information includes all past, current, and future research.

V. Review of Regulatory Framework for All Nicotine Devices

The framework for regulation should bring to market less dangerous products and expose known science regarding "less hazardous" alternative delivery systems in full public view. But, in the broader context, a review of the requirements of all nicotine delivery devices, including pharmaceutical devices, is necessary to ensure the standard for cigarettes will achieve maximum overall reduction in disease rather than continue to give regulatory advantages compared to less toxic forms of nicotine delivery. State and local jurisdictional issues and antitrust considerations must be addressed in the context of the regulatory framework. The regulation of the tobacco industry should be on par with all other producers of regulated drugs. The regulatory framework must create an environment which yields less hazardous products and a reduced public health impact of tobacco use. Safety should be measured on the societal as well as the individual level.

- Equity and a consistent standard for all nicotine devices is necessary.

VI. International Implications Including Manufacturing and Market Issues

While international regulatory issues are not the primary purview of the FDA, consideration of the world market and the effects of US regulation deserves examination. Restricting Federal agencies from assisting tobacco companies internationally, reviewing funding and research support for the WHO, and considering compacts protecting developing countries from unfair and deceptive trade are beginning components of international regulation. Production of tobacco abroad by domestic corporations should be addressed to both protect world health and ensure US regulation contributes to that end.

- Funding of a international information exchange whereby all documents associated with the domestic Federal regulation of smoking is shared with international community.

- No use of Section 301 of the Trade Act for tobacco.

Conclusion

The strongest health policy will treat currently addicted Americans, fund research in order to develop the less hazardous alternative nicotine delivery systems, give FDA immediate authority to regulate all areas of nicotine, other constituents, and ingredients, disclose all industry information regarding all aspects of the product including pricing and market data, build a regulatory framework that is equitable and consistent with all nicotine devices, and is mindful of the international implications of domestic regulation.

Through each of these components is the overarching need to fund each aspect of this policy. Without adequate funding: regulation, research, disclosure, prevention, and treatment will not be possible. Whether these issues are addressed by regulation, legislation, or settlement: the tobacco industry will have to pay for the damage its product has inflicted on the American public. In the context of this subcommittees charge, that means the industry must fully fund these policies. Anything less is not acceptable.

Appendix 3B

Report of the Task Force on Youth and Tobacco

More than ninety percent of people who will ever smoke on a regular basis begin doing so prior to the age of nineteen. Each day some 3,000 children take up the habit, and the average age at which they begin is about 12-1/2. While these children begin to use tobacco for a variety of reasons, they very quickly become addicted to the nicotine present in the product and studies show clearly that children have just as difficult a time quitting as do adults. Furthermore, the exposure of children to environmental tobacco smoke creates major health hazards for this age group just as it does for adults.

There are a number of reasons why children begin to use tobacco. Some perceive it as "normal," thanks in part to the media's portrayal of tobacco use. Some identify it as an adult privilege, and use it as a way to be more adult-like. Many are influenced by the barrage of advertising that depicts tobacco users as sexy, popular, "cool," macho, independent, sexy, thin and successful and feel that by using a particular brand they can

incorporate these images as well. Some see tobacco use as a legal risky behavior that allows them to appear rebellious and "tough" without directly flouting the law. Others simply take up tobacco use because they are bored or their friends are doing it and they want to be "part of the crowd." The clever and accurate research conducted by the industry over the years has led to remarkably effective advertising and promotion which, in turn, has created for many young people a perceived value to the use of tobacco. Given that tobacco harms one's health, costs money, is offensive to others and fosters chemical dependency, there really is no true value to its use, save perhaps to the tobacco industry.

The nation's long term policy must focus intently on youth uptake and attack the problem from every possible angle. Advertising and promotion must be eliminated. The industry must be regulated, access controlled, excise taxes increased and price supports removed. The public must be educated about the true addictiveness and dangers of tobacco use, and outcome studies must be conducted to monitor the success of our prevention efforts.

POLICY OPTIONS

Promotion

Promotion and marketing of nicotine-containing products (cigarettes, cigars, snuff, smokeless and pipe tobacco) by the tobacco industry has been extremely successful through such methods as advertising, accessibility, product placement in movies and television, event sponsorship and enticing graphics on packaging. By purposefully targeting adolescents and young adults, women, and special populations, the industry has been able to replace those who quit and the over 400,000 smokers who die each year from tobacco-related causes.

Policy Recommendations:

- Prohibit marketing, promotion and advertising of all tobacco products, and services, goods and other items that carry tobacco brand names, logos or imagery.
- Prohibit tobacco manufacturers, distributors, or retailers from sponsoring any athletic, social or cultural events using the name of any tobacco product.
- Prohibit sale and distribution of tobacco products to persons under age 18.
- Ban all tobacco vending machines.
- Ban sale of all tobacco products near [within 1,000 ft of] schools, playgrounds, youth centers, day care centers, pharmacies, hospitals, and other health centers.
- Ban all self serve displays by requiring all tobacco products be located behind the counter, inaccessible to the customer.
- Ban all marketing and sale of tobacco products through mail-order or on Internet and other electronic systems.

- Prohibit free samples.
- Institute a minimum package size for tobacco products (e.g., 20 cigarettes would be the minimum package size).
- Strengthen warning and product content labeling on all tobacco (e.g. by enlarging labels, placing them in the center of the pack, using bright colors and bold type, etc.). Warnings should reflect nicotine addiction, risks from second-hand smoke and the increased health dangers resulting from smoking during pregnancy.

Enforcement

- Dual enforcement authority with both the FDA and the State Attorneys General, each being able to enforce these provisions. In addition, the FDA will have the power to contract with other state and local authorities to assist in enforcing the rules.
- Enforce prohibition on tobacco sales to minors through a national enforcement program consisting of the following elements:
  - -- routine unannounced compliance testing enforcement through decoy "sting operations;"
  - - require licensing of tobacco retailers with licensing fees, and provide for fines, license suspension and revocation for repeated sales to minors;
  - - target penalties primarily to store owners;
  - - require display of warning sign at cash register stating legal age-of-sale, ID required to purchase tobacco, and a toll-free number for customers to report illegal tobacco sales;
  - - use civil, administrative hearings rather than the criminal justice system for violators;
  - - require tobacco companies to assist merchants by installing electronic scanners which require identification with every sale. This may require that identification is required with every sale but may be essential to achieve our goals.
- Enforcement funded by a combination of moneys paid by tobacco industry, tobacco licensing fees, taxes or surcharges;
- Ongoing education of retailers and distributors about tobacco regulations and restrictions is an essential component of compliance.

Advertising

Adolescents are particularly susceptible to tobacco advertising as they strive for autonomy and social acceptance, and work toward an identity of their own. Young people

evaluate advertising messages indirectly with their emotions as opposed to making logical analyses of its content. The billions of advertising dollars spent by the tobacco industry have been disproportionately successful with teenagers. (Reference: American Psychological Association comment. Fed Reg. 1996;61:44396-44468)

Policy Recommendations:

- Counter-advertising should take place in all media markets, requiring at least $500 million per year (in 1997 dollars) to be provided by the industry but managed by an independent panel of public health experts.
- Broadcast counter-advertisement should appear on all cable and commercial broadcast channels during prime time when children are watching television or listening to the radio.
- Counter-advertising must highlight the negative health effects and addictiveness of nicotine and tobacco, and be written at age appropriate levels.
- The possibility of using a coalition of movie stars, sports celebrities, television stars, and popular musicians, particularly ones who are popular with the target audience, as spokespeople for the tobacco-free message should be explored.
- Prohibit all tobacco advertising and promotion in public entertainment. This includes product placement in movies and on television.
- Prohibit the payment of fees or "in kind" services in exchange for placement or use of tobacco products in movies or television.

Public Education

It is essential that there be well-funded, effective and sustained educational programs for youth, parents, and the public in schools, in homes, in health care offices and hospitals, in the community and in the media.

There are a number of tenets that must be included in effective public education programs. These include: child-centered family-focused efforts; long-term and repeated prevention and intervention strategies; age appropriate, developmentally appropriate, and culturally sensitive content; increasing social competency such as communication skills, peer relationships, self-efficacy, assertiveness, critical thinking skills, media literacy, and other protective factors. Religious and "community-specific" organizations, businesses, government, schools, and other community organizations must play an active and visible role in strengthening the norms against tobacco use.

Policy Recommendations:

Industry

- Tobacco manufacturers would be required to provide and maintain adequate

financial support for a national educational campaign -- with a major reliance on television, radio, print and Internet messages -- in order to counter pervasive imagery and reduce the appeal created by decades of pro-tobacco messages. (Fed Reg. 8/11/95, p. 41326)

- The program must be national in scope and require companies purchase certain times and places on television programming (e.g., at least 50 percent of television programs rated by a national rating service as being in the top 20 for persons between the ages of 12 and 17). The buy could ensure that the message reach an average of 70 to 90 percent of all persons between the ages of 12 and 17 years five to seven times per each 4-week period. There shall be an evaluation tool developed to be certain this is accomplished.

- Messages shall change over time to remain novel and of interest to young people.

Schools

- All schools should adopt and implement the Centers for Disease Control and Prevention (CDC) guidelines to prevent tobacco use and addiction. (IOM Rpt.)

- Schools should serve as a focal point for a community-wide effort promoting non-use of tobacco.

- Ban the wearing and carrying of apparel with tobacco names, logos, and insignia while on school property or while attending school-sponsored events.

- Schools should institute a "zero tolerance" policy against tobacco use within 200 feet of school property that applies equally to both students and staff not only at school, but at all school-sponsored and sanctioned activities. Penalties for noncompliance should be clear and enforced, and alternative programs for students excluded from school must be available.

- Schools should institute tobacco prevention programs in pre-kindergarten through 12th grade. Ideally, the program should be incorporated into the existing school curricula with financial support from the tobacco industry, for curriculum development and its implementation. Tobacco use prevention can also be included in the curriculum as a stand-alone program, as part of a substance abuse program or as part of a comprehensive school health education curriculum. As students transition from elementary school to junior high or middle school (sixth and seventh grade), the educational program should emphasize the social factors that influence smoking onset, short-term consequences and refusal skills. Students should be involved with the development and delivery of the program. Parental involvement should be encouraged. Teachers should be adequately trained. The programs should be socially and culturally acceptable to each community. (SGR Report 1994, p. 219)

- Schools should seek public/private partnerships to sponsor non-smoking events that are considered "cool", i.e. concerts.

- Schools should facilitate cessation programs for students, faculty and staff.

Community Programs

- There must be the continuation nationwide of IMPACT and ASSIST-like coalition grants that allow for local autonomy and creativity for involving young people in these positive programs.
- Families need full information regarding the risks of exposure to environmental tobacco smoke and the risks to fetuses for maternal smoking.
- Communities should institute a "zero tolerance" policy against tobacco use that applies equally to parents and care givers as well as staff at child care centers, community health clinics, family planning centers, pre-school, camps and other programs for children. This would apply not only at the site, but at all activities sponsored and sanctioned by the group. Penalties for noncompliance should be clear and enforced.
- Communities should form partnerships between business and schools to develop community service media campaigns against smoking.
- Youth-serving organizations can provide youth with the skills and experience to take meaningful local action against the tobacco problem. A number of states have successfully involved youth in solving the problems of youth use and access. These programs need to be recognized and the lessons from them disseminated to other communities.
- Special attention and funding must be given to pre- and post-natal smoking cessation programs to assure a healthy start for all babies and to protect them from environmental tobacco smoke.
- Develop and test educational materials for every hospital waiting room, doctor and dentist office for smoking and non-smoking parents and their children.

Health Professionals

- Inquiry into tobacco use should be a routine part of prenatal visits and regularly as part of pediatric visits.
- The health care providers should routinely counsel children and youth to prevent their initiation of tobacco use and to help those that have started to quit.
- Providers should receive education about how to effectively counsel children to prevent tobacco use and to help those who have started using to stop.
- Tobacco use behavior by children/youth should be included as outcome measures in assessing the quality of health care services.

Fiscal

Data indicate that children and youths are more price-sensitive than adults, and that pricing has a strong and immediate impact on reducing sales of tobacco products overall. Increasing the price puts a higher barrier between youths and easy access (affordability) to the products, and therefore between youths and sustained tobacco use. A number of studies suggest that a two dollar increase in the price of a package of cigarettes will lead to a fifty percent reduction in teen use. Thus, this barrier will delay the initiation and reduce the number of new tobacco users. (IOM Rpt. 1994) "In economic terms, improved health and life-years saved is valued at from $28 to $43 billion per year." (Kessler, et al, PEDIATRICS June 1997, pp 884- 887)

Policy Recommendations:

- Increased excise taxes on the sale of tobacco products should be established by placing the tax at a rate higher than taxes among other industrial nations. The price of a package of cigarettes or container of smokeless tobacco should be raised by two dollars per package in 1997 dollars and this amount should be adjusted for inflation as appropriate. Cigar prices should be raised a proportional amount.

- Federal subsidies to tobacco farmers should be redirected to alternative crops and to maintenance of the "family farm." (Dr. David Altman, Bowman Grey School of Medicine)

- Some of the state funds collected from tobacco liability shall be designated to support state and local anti-smoking programs.

- Tobacco taxes should be increased periodically to assure funding of enforcement, counter- messages and education.

- The net price of tobacco products must rise consistent with inflation and excise tax increases.

- A portion of the Federal excise tax revenue should be set aside to establish an endowed foundation with the explicit function of developing and funding tobacco prevention and control programs and activities, with a percentage of this revenue going directly to support prevention programs.

Regulation

Tobacco products have been consistently exempted from coverage under consumer safety, food and drug legislation, and as a result have been largely unregulated. This lack of regulation stands in stark contrast to other products that have far less disastrous long-term health implications than the use of tobacco products such as over-the-counter drugs. (IOM Rept. 1994)

Policy Recommendations:

- The issuance of the FDA tobacco regulations in August 1996 are the cornerstone of national tobacco policy and must be retained and strengthened.

- Congress should repeal the Federal law that precludes State and Local governments from regulating tobacco promotion and advertising occurring entirely within a state's borders.

- States should license retailers, manufacturers, distributors, wholesalers and importers with graduated penalties and license suspension for violating access laws, using fees to pay for enforcement in limiting youth access.

- Communities should work toward smoke free environments and receive assistance from state and local public health agencies to develop ordinances and implementation strategies.

- States and local jurisdictions should ban smoking in environments where children are present, especially in restaurants and where youth live, work and play.

- The National Cancer Institute should be particularly active in designing, promoting and evaluating tobacco control strategies.

- State and Local governments should not be preempted from enacting stronger laws.

- The Centers for Disease Control and Prevention shall provide sufficient funds to ensure statewide, community-based tobacco use prevention and control programs.

- The warning on packages should be moved to the front of the cigarette package and the most prominent side of the smokeless tobacco product package.

- The industry should be subject to penalties if youth tobacco use fails to drop by 15 percent in 2 years, 30 percent in 5 years, 50 percent in 7 years and 60 percent in ten years. The penalty would be based on the value of a teen tobacco user to the industry over the lifetime of the individual. It would be worth approximately $80 million per percentage point by which the target was not met. At a minimum, the FDA should incorporate the following criteria into its rulemaking process for establishing performance based penalties:
  - -- give the industry powerful incentives to meet the targets,
  - -- not limit the potential liability for failing to reach the targets,
  - -- take into consideration the economic costs of all sectors of society of not meeting the targets,
  - -- be based on the estimates of independent financial experts with full disclosure of economic assumptions used,
  - -- become effective in the first two years after completion of the FDA rulemaking process.
  - -- consider a variety of penalties including the enforcement of plain packaging without the use of color and logos.

Research

Youth tobacco use is a complex, multi-faceted problem which requires an intense research agenda which goes beyond reducing access and restricting advertising. Youth live in families and communities where they are exposed to the dangers of environmental tobacco smoke at home, in restaurants, in public buildings and other places in the community. The acceptability of tobacco use among children and teens may be fostered by parents, siblings, other family members, adult role models, friends and peers. Strategies to change these social norms must be developed and evaluated.

Policy Recommendations:

- Research the effects of environmental tobacco smoke on human growth and development and develop health policies that stress the benefits of the smoke-free home for children, including studies of the effectiveness of incentives for families with asthmatic children (e.g. testing child for nicotine metabolites and rewarding families with coupons, discounts at local stores).

- Secure access to industry research on nicotine and other chemicals found in tobacco products relating to use by children and teens.

- Research the effects of nicotine and how it medicates youth anxiety, social malaise, weight control, and provides pre-packaged social rebellion.

- Research attitudes, turning points and developmental markers which may identify youth at risk for initiating tobacco use or progressing to more regular use.

- Research the progression of youth from non-smoker to experimental smoker to regular tobacco user to addicted user with a goal of identifying effective and targeted interventions for youth of different ages and different stages of use.

- Research the role of health providers in children's lives -- look at the effectiveness of person- to-person educational interventions with children and their care givers in preventing the uptake of tobacco use. (Perhaps prescriptions for smoke-free space)

- Research myths and misconceptions held by children and their parents/caregivers about the perception of risk, understanding of addiction, and the long-term consequences of early tobacco use.

- Research adolescent and maternal tobacco use cessation interventions.

- Research on effective school tobacco curriculum and what the goal of the education is: knowledge of health effects, implementation of healthy behaviors, media literacy and advocacy. Knowledge-based programs are insufficient without policy in place to address epidemic levels of tobacco use.

- Research what constitutes effective public education. All aspects of society need re-education on tobacco including knowledge and attitudes/beliefs which have been shaped by the tobacco industry and tobacco industry dollars for 60 years. Professional health organizations must educate their membership on the need to

transfer their knowledge to the general public. All health education materials must be reviewed for accuracy. The media must be included as a group which needs education.

- Research the effect of subliminal messages in early childhood and among elementary school- aged children and how the social context influences future smoking and other tobacco use.
- Secure funding for the research agenda from the tobacco "settlement."

Appendix 3C

Report of the Task Force on Current Users of Tobacco Products

Reducing the prevalence of tobacco use is vital to subsequent reductions in morbidity and mortality from tobacco use, currently the leading cause of death in America. The World Health Organization projects that, by the year 2025, 10 million people annually will die of tobacco-related diseases; it should be noted that this projection counts only current tobacco users. Helping current tobacco users stop not only promises to reduce the severity of the tobacco pandemic, but also will reduce the onset of smoking by youth, as they change their beliefs about tobacco use as the norm in society.

At the outset, the subcommittee recognizes that a wide definition of the population of tobacco users should be dealt with in this report, and that this discussion and the recommendations refer to persons who smoke cigarettes, cigars, pipes, and "roll-your-own" products, as well as those who use smokeless tobacco products. The report is divided into the following sections:

- Smoking cessation programs
- Education and public awareness
- Environment issues
- Research

I. Smoking Cessation Programs

The subcommittee recognizes that excellent clinical guidelines on smoking cessation have been produced by the Agency for Health Care Policy and Research; other groups such as the American Academy of Family Physicians, the American Medical Association, and the National Cancer Institute have also produced materials that have been very useful for clinicians in helping patients stop smoking. These guidelines should become a cornerstone of clinical practice, and tobacco use cessation should become a routine part of care.

We recognize that a variety of barriers to this goal exist, including education of clinicians, medical office systems that are not geared to providing clinical preventive services, and coverage of tobacco use cessation services by insurance, among others. A discussion of some of these follows; however, a detailed analysis is beyond the scope of this report.

- There should be widespread, readily available clinical services for treatment of nicotine dependence for both adults and youth. Better access to cessation programs is essential, and information on program availability is critical.

- Services should be wide in scope, including self-instruction courses such as those from 1-800-4-CANCER; over-the-counter products and support services offered by pharmaceutical companies, brief clinical interventions as detailed in the AHCPR guidelines; group and individual counseling services; and a mix of intensive services that can be provided to hospitalized patients in general hospital settings, psychiatric and drug treatment facilities, and inpatient nicotine dependence centers.

- Reimbursement for tobacco use cessation and appropriate use of pharmacotherapy should be covered by all insurance, managed care, and employee benefit plans, including Medicaid and Medicare. A lifetime benefit, rather than a single or one-time opportunity for cessation is essential. Nicotine dependence is a chronic disease, and should be addressed as such by both clinicians and payors. Most individuals will require more than one attempt at cessation for ultimate success, so there should be no arbitrary cap on the number of sessions or cost of treatment.

- Tobacco companies should be required to contribute to and provide financial support for cessation programs for both adults and youth who are nicotine dependent.

- Funds that are set aside from tobacco companies for cessation should be managed in the most efficient way possible, with maximum flexibility regarding clinical needs and options for treatment, administered by a responsible group, and shielded from political influence. Specific attention to the uninsured might be a priority for the use of this fund.

II. Education and Public Awareness

Although primary prevention in tobacco use is crucial, current tobacco users must be

informed as to the need to stop tobacco use and to seek help in cessation, using the most powerful means available. Behavior change is the goal, and creating public demand for and acceptance of tobacco use cessation is key in the effort to forge such changes.

- Public awareness programs should be broadly used, and directed toward specific populations and subgroups such as persons of color, Native Americans, women, youth, and those with special occupational hazards that produce morbidities with tobacco use. Pharmaceutical companies should partner with others in the health community to provide such messages, communicating much more than "brand share" information.

- As part of the public education program, tobacco manufacturers should be required to discuss and encourage the participation of tobacco users in cessation programs.

- Tobacco use prevention and control subjects, including cessation, must become a standard series of courses taught in undergraduate medical and nursing schools, in postgraduate residency training programs, and as a part of life-long learning in continuing medical education courses.

- Innovative programs in providing information and assistance to tobacco users should be encouraged and funded, such as using pharmacies and pharmacists as a source for tobacco use prevention and cessation, effective school-based education/treatment programs, use of the Internet, recreational and church- based organizations, and other non-traditional venues for tobacco control.

III. Environmental Issues

As important as the measures outlined above are to the individual tobacco user, societal norms must also change in order to support and encourage cessation. Public attitudes about tobacco use are key in this regard. Tobacco sales in pharmacies, for example, sends mixed messages to the public, particularly youth, about tobacco and health. Pharmacies should stop selling tobacco products, as one of several strategies to change the consumer culture related to tobacco use. As this applies to cessation, the public must understand that tobacco use is not a matter of "sin," that failure to stop use is not lack of "will power," and that tobacco use cessation is not an impossible task.

Among environmental issues, specific areas include the following:

- The price of tobacco products must increase dramatically, as this provides both an incentive for tobacco users to stop, and a deterrent for youth who might start.

- Widespread restrictions on environmental tobacco smoke (ETS) exposure should be enacted, since this has been shown not only to protect the nonsmoking majority from the hazards of ETS, but also to increase the rate of cessation among employees whose workplaces have become smokefree. ETS restrictions also provide societal modeling for youth showing that smoking is not the norm.

- Differential rates for health, life, and other related insurance premiums should be widely enacted as an incentive for cessation as well as to adequately cover the costs of tobacco use.

IV. Research

Well-funded research is essential to solving the personal health, medical care delivery, and public health problems related to tobacco use. Several areas of research pertain to cessation, and should target therapies and standards for nicotine dependence interventions that establish their validity and effectiveness.

- Epidemiological information regarding tobacco use, its patterns in specific populations (youth, women, communities of color), brand uptake, use of different types of tobacco products, and the effect of cessation programs is critical.
- Sustained, high level research funding on a broad range of tobacco cessation programs and therapeutics is needed, including funding for innovative behavioral approaches and non-pharmacological therapies, as well as research into new pharmacotherapy.
- Specific population groups must be a focus of well-funded cessation research and demonstration projects: adolescents, women, communities of color, and recent immigrants are a few of these.
- Research should target smokeless tobacco and cigar use, particularly among adolescents and young adults.
- Rapid dissemination of the best available tobacco use cessation tools is paramount.
- Tobacco manufacturers should be required to support and fund effective research related to cessation programs that address both adolescent and adult tobacco users.
- Adolescent tobacco cessation should be a special priority for research, including investigations of the origins and onset of tobacco use, the transition from experimentation to regular use, and a wide range of cessation modalities.

Appendix 3D

Report of the Task Force on Environmental Tobacco Smoke

Environmental Tobacco Smoke (ETS) has been classified as a Group A (known *human)* carcinogen by the U.S. Environmental Protection Agency. This classification is traditionally reserved for the most dangerous of cancer-causing agents, including asbestos, benzene and radon. In its landmark 1992 risk assessment, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, EPA estimated that 3,000 lung cancers deaths per year in nonsmokers are attributable to ETS. Similarly, the National Institute for Occupational Safety and Health in their *Current Intelligence Bulletin 51* found ETS to be a potential occupational carcinogen, the agency's most significant warning. In addition, the American Heart Association estimates that ETS is responsible for up to 60,000 deaths yearly from cardiovascular disease. Moreover, tens of millions of American have medical conditions, including asthma, bronchitis, emphysema, allergies, sinusitis, rhinitis, and laryngitis which cause them to suffer very severe and often-life threatening reactions upon exposure to ETS.

The Committee is particularly concerned about the effect of ETS on children. Children are powerless to control their exposure to ETS and yet they are the group most adversely affected by exposure. Children are at risk simply because they are young--they take in more air (and more pollution) relative to their body weight and lung surface area, their lungs are still developing and their biologic defenses against pollution are not fully mature. ETS exposure is associated with additional episodes and increased severity of symptoms in children with asthma. ETS exposure exacerbates symptoms in approximately 20 percent of this country's 4.8 million asthmatic children. The EPA estimates that exposure to ETS from parental smoking causes 150,000 to 300,000 lower respiratory tract infections per year in children under 18 months of age, resulting in 7,500 to 15,000 hospitalizations. Sudden Infant Death Syndrome, the leading cause of death in infants between one month and one year of age, has been linked to exposure to ETS.

Federal, State, and Local governments as well as the courts have all provided important protections for nonsmokers.

- At the Federal level, the 1994 Pro-Children Act banned smoking in all facilities providing services to children that receive Federal aid including schools, day care centers, certain health care facilities and libraries. The Airline Smoking Ban has virtually eliminated smoking on all domestic flights and the U.S. has been supportive of the International Civil Aviation Organization resolution encouraging member nations to prohibit smoking on their international flights. However, President Bush failed to respond to a proposal from HHS Secretary Louis Sullivan for an executive order requiring Federal agencies to be smoke free and the Clinton Administration has not pursued such an order. OSHA remains mired in a regulatory process to address smoking in workplaces under its jurisdiction.

- State and Local governments have also taken action. Forty eight states and the District of Columbia have laws that in some way restrict smoking in public places. These laws range from limited prohibitions, such as no smoking on school buses, to

comprehensive clean indoor air laws that limit or ban smoking in virtually all public places. Twenty two states and the District of Columbia restrict smoking in some way in private workplaces. (Attached are several appendices detailing State and local clean indoor air laws)

- The courts have acted on a case-by-case basis in 15 states to provide legal protections for children especially sensitive to environmental tobacco smoke. These cases, generally, have involved action to protect children from parental smoke.

Policy Concerns

Each level of government can make unique contributions to protection for nonsmokers. The goal of any such regulation is to change the behavior of smokers in order to eliminate the exposure of nonsmokers to ETS by prohibiting smoking, and it is the effectiveness of a given regulatory approach in actually changing smokers' behavior, rather than simply the comprehensiveness of regulations enacted, that determines the extent of protection provided nonsmokers. The effectiveness of any law in changing the behavior of smokers is heavily influenced by the norms for expected behavior among smokers and nonsmokers, by the support and peer enforcement within a given community, and by the awareness of smokers and nonsmokers that the "rules" have changed.

In determining where to direct efforts to regulate smoking, the following issues must be considered:

1. Each jurisdiction should take action to eliminate exposure to ETS by prohibiting smoking.
2. Each jurisdiction should take action to provide the most effective enforcement of the prohibitions on smoking.

Goals

The Committee believes that all Americans are entitled to a smoke free environment. The Committee recommends that Federal/State/Local legislation and regulations be enacted to protect all Americans from the physical irritation, disease, disability and death attributable to ETS. Accomplishing this goal will also require renewed education efforts to increase the public awareness of the health effects of exposure to ETS.

To accomplish these goals, the committee recommends the following:

1. All jurisdictions enact and enforce legislation and regulations to eliminate exposure to ETS by prohibiting smoking. Policy actions include but are not limited to actions listing below (not in order of priority):

    - Congress should enact legislation, to the full extent of its jurisdiction, to prohibit smoking in all work sites and in all places of public assembly. Such

action must not preempt or otherwise limit or preclude state and local jurisdictions from acting similarly. Further, Congress should enact regulations to protect all of its employees from exposure to ETS by prohibiting smoking in all work sites and places of public assembly directly within its jurisdiction.

- State and Local governments should enact legislation, regulations and ordinances requiring the prohibition of smoking in all work sites. Such regulations should also include requirements for public awareness campaigns related to the health effects of exposure to ETS.

- State governments should establish comprehensive clean indoor air legislation that prohibits smoking in all public places, including outdoor areas where people assemble and congregate, without preemption of local mandates. In those statutes where preemption exists, states should act to remove the preemptive clauses. Such regulations should also include requirements for public awareness campaigns related to the health effects of exposure to ETS.

- State and local school boards should enact regulations requiring all elementary and secondary schools to be 100% smoke free in all areas of the campus. Such regulations should also include requirements for education of students and faculty regarding the health effects of exposure to ETS.

- State and local school boards should revise comprehensive school health education programs and general health education programs to include subject matter on the health effects of exposure to ETS.

- The Congress should enact legislation, to the full extent of its jurisdiction, to implement the International Civil Aviation Organization resolution by requiring all international airline flights originating from or landing in the United States or its territories be 100% smoke free. Similarly, federal law should prohibit smoking on any bus, train or cruise ship which originates or arrives at any point in the United States.

- The government (EPA, CDC, NIOSH) should complete a risk assessment of the cardiovascular health effects of exposure to ETS.

2. Economic incentives for smoke free workforces should be developed.

   - Insurers should be encouraged to differentially rate work sites by their no smoking policies, including smoke free work sites and opportunities for employee smoking cessation, for purposes of providing health insurance, business insurance, and workers compensation.

3. To complement the laws and regulations prohibiting smoking as well as adoption of additional restrictions imposed by the private sector, adequate funds should be provided for a program of education and public awareness about the dangers of ETS. A secondary benefit of such education and public awareness programs is the growing recognition that this type of program can also serve as another mechanism

for the prevention of youth smoking.

In addition to the above recommendations, the Subcommittee urges the full Committee to request, immediately, the President sign an executive order making federal workplaces, including all branches of the military and the Department of Veterans Affairs hospitals, 100% smoke free. Such an action would demonstrate the continued support of the Administration for a tobacco free society.

Appendix 3E

Report of The Task Force on the Future of the Tobacco Industry and Tobacco Control Efforts

RECOMMENDATIONS

I. Sustaining Essential Tobacco Control Efforts

Tobacco control advocates, the State Attorneys General, the Food and Drug Administration, the Federal Trade Commission, private tort claimants in class actions and in individual cases, and state and local legislative initiatives have brought a wide and effective range of forces to bear on the tobacco industry. After thirty years of virtually unconstrained marketing abuses, subversion of public health regulation, and anti-democratic political activities, these forces have at last placed the industry on the defensive.

These forces include not only the first judicially sustained assertion of comprehensive tobacco regulatory authority by a Federal agency, but the high promise of pending civil litigation. They include the emerging strength and moral authority of the tobacco control

movement and the eruption of public antipathy towards the tobacco industry -- the product of unprecedented mass media coverage and exposure of tobacco industry wrongdoing.

The President and Congress need to be fully mindful of the actual and potential benefits from, as well as the limitations of, the forces at work under existing law.

It is the Committee's firm conviction that the White House and Congress must assure the continuity of those forces which remain essential counterweights to the economic and political power of the tobacco industry.

This requires:

1. Unambiguous non-preemption provisions in any Federal regulation of tobacco, expressly disclaiming any intent of, or authority from, Congress to preempt the imposition of higher standards by states and local jurisdictions, except to the extent that such standards violate constitutional constraints.

2. Funding for Federal, State, and Local government and non-government tobacco control activities at levels equivalent to those in states, such as California, Massachusetts, Arizona, and Oregon, which have dedicated portions of cigarette excise tax increases to such efforts. Such funds must be made available for:

   A. Support of diverse tobacco control coalitions and watchdog advocacy organizations in all states to promote tobacco control broadly, including the freedom and resources to monitor and oversee government enforcement of legislation and regulation and to continue monitoring and exposing any future industry efforts to undermine reforms and regulation. It is particularly important that funds be available to strengthen those culturally diverse, community-based organizations working in and for those populations at greatest risk.

   B. Support for local and state health departments and other agencies, as well as Federal agencies in maintaining active tobacco control programs, including the aggressive enforcement of tobacco control regulations.

   C. Support for Federal and State programs to provide communications infrastructure, technical assistance, training, and other resources to build the capacity of both public and private non-profit organizations, including the ability to provide assistance for advocacy and assistance for conducting litigation.

   D. Support for the collection and analysis of comprehensive data on tobacco use, behavior, and attitudes, down to the local level.

   E. National Cancer Institute leadership among National Institutes of Health to establish a coordinated program of tobacco control research and development.

   F. Support through appropriate Federal agencies and their partners in chronic disease prevention for comprehensive, policy-focused, state-wide innovative

intervention research, development, and dissemination, including demonstration programs for implementing effective interventions.

Such funding must be structured to assure such programs will be as free as possible from tobacco industry and political censorship or constraints, including the freedom to advocate the enactment of tobacco control policies, to expose tobacco industry wrongdoing and to challenge the failure of government entities to carry out the law, whether the funds are allocated to government agencies, such as state health departments, or to non-government organizations.

One potential approach: a portion of available funds flowing into a trust administered, as in the Australian model, by a state-chartered, but independent, state Health Foundation, governed by a board composed of the leaders of health and other non-government organizations who are not recipients of funding.

3. Mandated disclosure of all internal tobacco company documents which bear upon the public health, including past and present acts to undermine public health, such as (but not limited to) the following:

   A. Full disclosure of the funding and activities of industry front groups.

   B. All technical and health/safety data, with a possible exception for those true trade secrets which the companies can clearly establish have no health implications.

   C. All information relating to marketing, including opinion and behavioral research; the targeting of persons under age 18, women, and minorities; and all marketing information after a brief, specified period, since without such information, it is much more difficult to design an effective anti-tobacco program.

   D. Full disclosure of all documents relating to the effects of secondhand smoke.

There must be a waiver of any claims of attorney-client and work-product privilege for any documents except those recently created, since those privileges have been seriously abused and any information that may have been properly privileged is unlikely to continue to be sensitive (or even relevant in litigation) now.

4. The establishment and funding support for a Federally-funded data collection and analysis, and an electronic data bank to enable and facilitate regulators, health groups and litigants to obtain the information described above and other relevant materials.

5. The full preservation of all currently available avenues of litigation, both civil and criminal, involving the tobacco industry, with no special rules of any kind, substantive or procedural.

6. Fundamental campaign finance reform as essential tobacco control policy, since the tobacco companies, more than any other industry, have flooded the political process at all levels of government with millions of campaign dollars in the sustained effort

to resist all necessary and reasonable public health measures, such as restraining tobacco marketing practices.

7. Before accepting any comprehensive legislation, the President and the Congress must obtain firm commitments from all U.S. tobacco companies that they and organizations affiliated with them will cease all lobbying resistance and will actively support all Federal, State and local efforts to achieve the uniform adoption and enforcement of laws and regulations consistent with the blueprint embodied in the legislation.

II. Support for Those Economically Disadvantaged, Without Fault, by Tobacco Control Policies

Tobacco farmers and farm communities will be at severe economic risk should comprehensive tobacco control policies be enacted and take full effect. Most Americans consider the tobacco farmer as much an economic victim as perpetrator of tobacco-related disease, and support Federal government efforts to help farmers find other ways of making a living. The Committee therefore supports:

1. The establishment of a high-level blue-ribbon panel either appointed through an Executive Order or mandated through legislation. Such a panel should have as its mandate a thorough review of the domestic and international tobacco growing, manufacturing and marketing operations and trends of the U.S. tobacco companies and U.S. leaf dealers; a review of the current tobacco program as administered by the Department of Agriculture; and a thorough review and understanding of the economies of the tobacco-growing states and their communities. The panel should conduct extensive field hearings to ensure the involvement of the tobacco-growing communities in the process. It would then report back to the Congress and the President with specific recommendations for short-term and long-term strategies for reducing the dependence of tobacco-growing states and communities on tobacco, including funding recommendations for providing short-term and long-term economic development assistance.

2. The establishment of an "economic assistance and development fund" funded by the tobacco companies and administered by the tobacco-growing groups that in the short term assists tobacco farmers and their communities to implement model and pilot programs for supplementing the production of tobacco with other on-farm activities as well as other alternatives and incentives to reduce the growing of tobacco. These pilot programs could provide critical information and recommendations to the task force established under (1) above. The fund could then be used to implement some of the longer-term objectives and recommendations made by the blue ribbon panel established under (1).

3. Elimination of the Federal government's economic involvement and support for programs and projects that relate to maintenance and expansion of tobacco production. Funds presently being expended to maintain and support the programs and activities could at least for the short term be allocated for funding the

aforementioned blue ribbon panel as well as funding pilot projects and programs for economic development, creation of alternative economic infrastructures and agricultural supplementation and diversification.

4. The Committee also believes that a portion of available fund should be allocated for economic development assistance to other groups who, without fault, will suffer economic risk and dislocation if the policies urged by the Committee are put in place, to include:

   A. Compensation to Native Americans who will lose reservation revenues to which they are constitutionally entitled if they adhere to non-reservation sales and marketing standards.

   B. Compensation to cultural, civic, and sports organizations now dependent on tobacco industry philanthropy and sponsorship.

   C. Economic conversion funds to assist tobacco manufacturing and related tobacco non-farm workers.

III. Maximizing the Influence of U.S. Policies and Resources on Raising International Tobacco Manufacturing and Marketing Standards to U.S. Levels

According to the World Health Organization, tobacco use is estimated to have caused around 3 million deaths a year worldwide in the early 1990s, and is projected to cause ten million deaths a year worldwide by the 2020s or early 2030s, with 70 percent of those deaths occurring in developing countries. Many of these deaths will result from the increasingly aggressive marketing efforts of U.S.-based transnational tobacco companies.

The adoption of comprehensive national legislation governing tobacco will constitute a national finding that no civilized society can do less to stem the toll of disease and death from tobacco use. Since the marketing abuses which the U.S. seeks to control at home are practiced without restraint abroad -- by U.S.-based companies -- the U.S. government has both a public health and a moral obligation to do all within its power to see that the protections it extends to its own citizens are extended to all.

This must include adherence to the following principles:

1. The U.S. should use the broad range of its international activities and influence to actively promote tobacco control, including the adoption of U.S. domestic tobacco control standards as at least minimum global standards.

2. The U.S. must insist that public health concerns overrule trade concerns in all trade negotiations and related proceedings.

3. The U.S. should allocate substantial resources to fund effective international government and non-government institutions engaging in tobacco control activities.

4. The U.S. must obtain and enforce commitments from U.S.-based transnational companies to support, not undermine, these efforts.

Both the executive and legislative branches of the Federal government can do much, within reason, to promote these principles and bring about worldwide adoption of tobacco manufacturing and marketing standards at least as comprehensive and stringent as those enforced within the United States.

Key measures include:

1. An executive order from the President to all Departments, including State, Commerce, and the United States Trade Representative to promote actively the global adoption of U.S. domestic tobacco control policies and standards through all international interventions including diplomatic communications, export initiatives, Aid for International Development programs, U.S. information programs, and fiscal support for international bodies. The White House should also establish an Interagency Task Force, chaired by the Secretary of Health and Human Services, to oversee and implement the executive order.

2. Specific executive orders and White House support for legislation to accomplish the following:

   A. The development and implementation of the Framework Tobacco Control Convention by the World Health Organization, and efforts by UNICEF to eradicate tobacco use among children.

   B. In all dealings with or pertaining to the World Trade Organization, recognition of the preeminence of public health concerns over normal trade concerns, as is done for child labor. This includes support for the framing of World Trade Organization Agreements (such as the Sanitary and Phytosanitary Agreements) to support the Framework Tobacco Control Convention, not to promote tobacco trade.

   C. Initiation and support for bilateral and multilateral treaties making the Framework Convention legally binding on all countries.

   D. Removal of tobacco products from Section 301 of the 1974 Trade Act, combined with prohibitions against Federal agencies interfering in any efforts by international or national public health authorities to control tobacco use.

3. White House directives to the Office on Management and Budget to allocate at least $150,000,000 in appropriated or other funds, and support from Congress for such funding for international tobacco control efforts, including:

   A. Funding support to WHO allocated to the development, adoption, and enforcement of the Framework Tobacco Control Convention and other tobacco control initiatives.

   B. Funding support for UNICEF to promote youth-oriented tobacco control

initiatives.

C. Funding support for the development of a non-government International Tobacco Control Commission, governed by senior public health leaders to: 1) Monitor international tobacco control efforts, issuing annual report on progress around the world; 2) Develop uniform standards, review procedures and provide grants to international and national non-governmental organizations advocating tobacco control; 3) Administer an international information exchange for sharing all disclosed tobacco industry documents.

D. Funding for active, aggressive efforts, by all appropriate Federal agencies, including Health and Human Services, to promote tobacco control internationally.

E. Funding for domestic and international public health investments that support tobacco control. This includes supporting research of benefit to all countries on the most effective means of quitting smoking and preventing people from starting to smoke; developing global surveillance systems to support global tobacco control strategies and to monitor implementation of the planned Convention; and funding for the development of human and institutional capacity, non-government as well as government, to promote tobacco control in developing countries.

4. The President and the Congress must obtain firm commitments from all U.S. tobacco companies that they and organizations affiliated with them will fully support the uniform international application and enforcement of laws and regulations embodied in U.S. domestic tobacco control legislation and regulation. This must include a promise to cease and desist from all attempts to influence governments and other stakeholders, domestic or international, that are inconsistent with any such legislation or regulation. U.S. tobacco companies found engaging in such practices should be subject to civil penalties based on the amount that they spend on these efforts, just as U.S. companies are now subject to fines for giving bribes abroad --even if bribery is not forbidden in that country.

5. The White House should support and Congress should enact legislation providing for the surveillance and prevention of international tobacco smuggling, including strict penalties for companies shown to be supporting smuggling.

Appendix: Background and Discussion of the Recommendations Made by the Task Force on the Future of the Tobacco Industry and Tobacco Control Efforts

Overview

Tobacco control advocates, the State Attorneys General, the Food and Drug Administration, the Federal Trade Commission, private tort claimants in class actions and in individual cases, and state and local legislative initiatives have brought a wide and effective range of forces to bear on the tobacco industry. After thirty years of virtually unconstrained marketing abuses, subversion of public health regulation, and anti-democratic political activities, these forces have at last placed the industry on the defensive.

These forces include not only the first judicially sustained assertion of comprehensive tobacco regulatory authority by a Federal agency, but the high promise of pending civil litigation. They include the emerging strength and moral authority of the tobacco control movement and the eruption of public antipathy towards the tobacco industry -- the product of unprecedented mass media coverage and exposure of tobacco industry wrongdoing.

These forces have been and remain an essential counterweight to the vast array of economic and political abuses which the tobacco industry and its allies continue to commit: lobbying excesses; gross campaign financing largess; public relations distortions and propaganda; seductive political advertising; the co-opting of communities through promotional supports; the propping up with cash infusions to phony fronts; the buying of corrupt science; the perversion of philanthropy to buy the silence of those desperate for resources; and the abuse of processes designed to serve basic citizen interests, such as "SLAP" law suits and the use of Freedom of Information Act demands as instruments of intimidation.

So, before embracing any proposed legislation which purports to offer a comprehensive framework for tobacco control, the President and Congress need to be fully mindful of the actual and potential benefits from, as well as the limitations of, the forces at work under existing law.

It is the Task Force's firm conviction that no legislation should be supported which does not assure the continuity of those forces which must remain essential counterweights to the economic and political power of the tobacco industry.

Therefore, this report first assesses the current and potential impact of pending civil litigation on tobacco control, the present and future role of the tobacco control movement, and the effect of sustained mass media focus on tobacco industry wrongdoing. It looks at the likely consequences for each of these forces if legislation which otherwise meets the standards elsewhere set forth in this blueprint are met. The report also examines the implications of comprehensive legislation for international tobacco control, and the reasonable economic conversion needs of tobacco farmers and others.

I. Sustaining Essential Tobacco Control Efforts

By the mid 1990's the nation's tobacco control movement was beginning to come of age as a powerful advocacy force for tobacco control policy and an effective counterweight to the tobacco lobby. This is a movement which has now welded together layer upon layer of diverse citizen organizations and public health authorities. At its foundation are the laser-beam-focused local non-smokers rights groups and the great national voluntary health associations -- Cancer, Heart, Lung -- who reach out to their millions of volunteers with increasingly energetic and effective calls to action on public policy issues relating to tobacco.

In turn, these groups have joined forces against the tobacco lobby with medical and scientific organizations, consumer advocates, education and children's advocates. And they have been newly committed and successful in reaching out and drawing into partnership ethnic minority and women's advocacy organizations.

To the energy of citizen volition has been added the fuel of new outside resources to build a movement infrastructure -- though still far less than the profits tobacco companies gain from illicit sales to children. But, for now, there is substantial funding and professional staff support for broad state citizen coalitions from the National Cancer Institute, the Centers for Disease Control, the Robert Wood Johnson Foundation and others, and, by ballot initiative, directly from the voters of California, Massachusetts, Oregon, and Arizona.

And what essential functions do these groups and coalitions perform? They are visible across the spectrum, from apolitical public health education campaigns, which keep a public focus on America's "brown plague," to the wildfire spread of grass roots community campaigns for local clean indoor air ordinances and billboard and vending machine bans -- laws which can count on community support in enforcement because they are born of community engagement.

At the state legislatures, where tobacco lobbyists burrow in, these coalitions have exposed and overcome the tobacco lobby's stealthy efforts to gain enactment of weak laws that preempt strong local action -- and they have launched successful statewide campaigns to raise cigarette excise taxes, most recently in Alaska, boosting the state tax to $1.00 a pack, highest in the nation.

At all levels of government, these watchdog coalitions track and expose tobacco campaign contributions, tobacco lobbyists, and ethically compromised government officials and law- makers. And after they succeed in promoting sound laws and regulations, and the focus of public attention shifts, the advocates and the coalitions remain to make sure enforcement matches promise.

But perhaps the greatest achievement of the tobacco control movement in the last decade has been its triumph in mass media advocacy -- in skillfully assuring in a hundred different ways, with a hundred different stories -- that tobacco industry fraud, deceit, conspiracy, and corruption has occupied prime space and prime time in the national news media. To be sure, this task has been amply abetted by tobacco industry whistle blowers, leaked documents, active Congressional oversight (until 1995), campaign financing reporting, and the systematic unearthing of revealing secret industry documents through the litigation discovery process.

But the frequency of such stories and their spotlight on industry wrongdoing owe much to the media advocacy skills of tobacco control advocates - both through strategic approaches to the news media and reinforcement through selective paid advertising. This media effect can be seen clearly in polling data which show dramatic increases in public recognition of tobacco as an addictive drug, public belief that tobacco companies deliberately target kids in their ads, and public support for criminal prosecution of tobacco executives for lying to Congress.

This focus of public opprobrium helps explain why this Congress, despite huge tobacco industry campaign contributions, has thus far been inhibited from attempting to enact what the tobacco industry has eagerly sought: legislation eviscerating FDA's asserted jurisdiction over tobacco products -- and legislation shielding the tobacco industry from liability under cover of "tort reform." The tobacco industry no doubt fears, too, that prospective jurors, who have been reluctant to hold tobacco companies accountable, may now be among the majorities who view them more negatively than before. So the storm of media criticism, in reinforcing greatly the threat of ruinous litigation and punitive damages, has driven the tobacco industry to the bargaining table and towards accepting demands that exceed the most optimistic policy goals of public health advocates just a few years ago.

There is also reason to believe that the continuous media coverage of the litigation and other investigative disclosures of tobacco industry practices, including the effect of future jury findings of industry culpability in civil, as well as possible criminal trials, will have a direct public health benefit in changing peoples' attitudes towards tobacco use, and, eventually, their behavior.

It is, of course, uncertain that current levels of media attention on tobacco and tobacco company behavior will continue indefinitely under existing conditions -- at some point the media may run out of newsworthy revelations, at least as to past misbehavior. And, at some point, other issues and stories will gain attention and dominate the news.

But a comprehensive legislated "settlement" -- even legislation that meets the regulatory standards set forth in other parts of the Committee report -- will threaten the virtual disappearance of such media coverage. It will do so for two reasons:

1. Passage of such legislation will convey to most Americans, including journalists, opinion leaders, and policymakers, the impression that the tobacco problem in this country has been "solved." Not only that, but the tobacco industry will be seen as a willing partner to the solution. This will mean that tobacco, and the past culpability of the tobacco industry, is no longer "news." (Of course, criminal prosecutions, not within the scope of any limitation of liability, will produce powerful media images and messages.)

2. Passage of such legislation will deflate the tobacco control movement, enervate tobacco control advocates, and shrink funding for tobacco control advocacy. This is true, even though, given the 46 million smokers remaining, tobacco use will remain our number one public health threat for many years, providing a strong rationale for funding tobacco control efforts.

So the enactment of a comprehensive blueprint of substantive provisions for tobacco

control, as delineated by the other Task Forces, will not be sufficient unless there are also provisions to assure the continuation of a vigorous, adequately funded tobacco control movement and infrastructure.

Unless that happens, the tobacco industry will be relatively free to revert to undermining tobacco control policies through its lobbying practices quietly and out of the spotlight -- a major setback for the public health. This will be doubly true if there is no fundamental reform of campaign financing laws which have allowed the tobacco companies grossly to tilt the electoral and legislative process against the unfunded public interest in preventive health.

Unless the settlement legislation provides for adequate funding to sustain the nation's tobacco control infrastructure, the vital local grass roots organizations will be parched for basic resources, and we will have rendered the national tobacco control movement an emaciated watchdog, inadequate to keep pressure on regulators to regulate vigorously, politicians to focus on public health rather than campaign money, and the tobacco lobby from renewing its dirty work.

Impact of Litigation

We wouldn't be where we are today without the power of litigation. The individual actions by smokers and their families began the process, starting the trickle of evidence that is now becoming a tidal wave. Cippolone, although eventually dropped, deeply probed the use of third parties to hide the mounting evidence of harm from smoking, and the Supreme Court knocked out enough of the preemption defenses to enable others to come back and fight another day. Sean Marsee lost his suit over smokeless tobacco, but the court case brought a whole new awareness that smokeless was not harmless. Castano, in which the class was decertified, hung around long enough to rally the trial lawyers and to start to shift the momentum. The flight attendants' class action is paving new roads for victims of secondhand smoke, and the state class actions and the Medicaid suits by the State attorneys general are what has brought the industry to the bargaining table. And all of this has occurred without the industry paying a single penny to any plaintiff.

Of course, the ultimate goal of these and other lawsuits is to recover billions of dollars from the tobacco industry, either in the form of direct payments to individuals, the states, or others, or establishing and funding programs to deal with those who are already addicted and to educate our youth about the dangers of tobacco. Some day, in the not-too-distant future, there may be payments, perhaps modest at the start, but ever increasing in amounts, whether by judgments or settlements, and eventually, unless Congress steps in, everyone who has been injured by tobacco will have the opportunity to take their case to court and try to prove their damages.

However, on a more cautionary note, it is well to remember that only one successful liability lawsuit filed on behalf of a smoker has yet been prosecuted, and that over time, as juries deem smokers fully informed of the hazards of tobacco use and the unreliability of any representations by the industry, juries may be even less likely to sympathize with tobacco users. In any event it may well be years before even initially successful litigation can begin to change tobacco companies' behavior on such matters as marketing.

In the meantime, the litigation process will go forward, and with every day, the public will learn more and more of the industry's misdeeds and of the means that it devised to hook our young. Unlike legislative hearings and agency proceedings, where subpoena power is either lacking or rarely used, the industry must both respond to specific allegations by taking a position -- if you thought tobacco was not dangerous, how could you have adequately warned the public if it turned out to be harmful ? -- and disclose its documents and produce its witnesses, at least eventually. Not only does the public become aware of the truth, but attitudes change -- about tobacco addiction and the inability of many people to quit, no matter how hard they try, about marketing directed at kids, about the use of industry fronts and law firms to cover up damaging research, and about the industry's deliberate manipulation of the levels of nicotine to assure continued use of tobacco -- without which juries will not side with victims, and legislators will learn that the public will no longer countenance their taking money from Big Tobacco and doing its bidding.

The process of litigation is far from running its course. Even if the industry were to fully fund all the programs anyone can imagine, including compensating all of its victim (which it will never agree to do), the process should continue until all the facts are out and the American people truly understand the magnitude of the wrongdoing that has taken place. The Federal government also must be allowed to continue its criminal investigations so that individuals and corporations that violated the law are held accountable as well. And if the evidence shows the kind of outrageous conduct for which the law awards punitive damages, as surely seems to be the case, those claims must not be cut off by legislative fiat, not only because doing that would allow the industry to escape liability, but because it would make it far more difficult to respond to similar pleas for leniency from other businesses, most of whose wrongdoing pales by comparison with that of the tobacco companies.

There is another category of lawsuits that is vital to the long-term health of the tobacco control movement. Today, the FDA is run by individuals who are dedicated to preventing tobacco from addicting our youth and killing those that are already addicted. But that will not always be the case. Like all regulators, the FDA has been guilty of industry capture in the past, and it would be a miracle if that phenomenon did not repeat itself for tobacco at some time in the future. Therefore, to protect the public, the law must provide for citizens suits against the FDA, with attorneys' fees for prevailing plaintiffs to assure that these cases are brought since there is no money in them for trial lawyers. Similarly, when the inevitable industry resistance to new FDA regulations arises, funding must be available to non-profit public health advocates to assure that they are heard at the agency and in the courts. Simply knowing that citizens are there, watching over FDA, ready and able to go to court to enforce the agency's duties upon it, may not be enough to prevent all FDA backsliding, but it may make resort to litigation less necessary.

Lawsuits are means to achieve ends, in tobacco control as elsewhere. The measure of a lawsuit's importance is not limited to the bottom line of who won, who lost, and how much. The Supreme Court has recognized that litigation is an activity protected by the First Amendment, because it is a form of political expression and one of the essential means by which our citizens petition their government for a redress of grievances. It is often messy and unpleasant, but it has been and must continue to be a vital tool in the tobacco control movement.

The most significant current litigation is one that most tobacco control advocates never dreamed would be brought: the industry is challenging the authority of the FDA for its rules issued in August 1996 that would, for the first time, provide meaningful regulation over tobacco products. The first round was largely won by FDA, even though the industry hand-picked the judge, but the case being appealed over two issues: whether the FDA has the authority to treat tobacco products as drugs and medical devices and whether it has the authority to issue rules governing advertising directed at children. There is reason for guarded optimism (even including the First Amendment issues that have yet to be addressed), but the courts could strike down the entire effort.

Current litigation against the tobacco industry might have a range of impacts, but the two most important to consider are at the extremes: the companies might win almost all of the major cases, or the industry might lose those cases in a way to cause either or both Philip Morris or RJR to file for bankruptcy protection under Chapter 11. A result in the middle is unlikely to alter the current dynamics of tobacco control significantly.

It is difficult to assess the likelihood of success, including what size judgments might be awarded, in any of the major cases without a detailed review of the evidence (which is largely under seal or not disclosed) and of the law, which varies from state to state and among the three basic types of actions (Medicaid, statewide class-action, and individual suits). There is also the inevitable unpredictability of juries and the fact that the Mississippi case will be tried to a judge, not a jury. Even if the information were available, along with the time to do the analysis, case- by-case predictions are fraught with difficulty. Nonetheless, it seems reasonable to assume that, among the individual cases, some plaintiffs will prevail, but that overall their success is unlikely to bring the industry to its knees, largely because juries have very skeptical of these claims, as mentioned above.

While an assessment of the class actions and Medicaid suits is little more than an educated guess, it is difficult to imagine a scenario in which either extreme results. The presence of the industry at the bargaining table suggests that it is concerned about both types of cases, in large part because it rather than the individual smoker will be the focus of the litigation and because there is now so much evidence of the industry's knowledge and cover-up of tobacco's dangers. Still, the industry has very able lawyers, and the cases are not easy, on the facts or the law. Moreover, counsel for the states and the class plaintiffs must know that even if they were awarded astronomical actual or punitive damages, that were upheld on appeal, the companies could go into Chapter 11, which would tie the matter up for years, and make it impossible for the plaintiffs (and their lawyers) ever to get paid anywhere near what they were awarded.

On the other hand, despite its threats, there are several reasons why the industry is very unlikely to go into Chapter 11 unless the situation becomes dramatically worse. First, a company loses much of its freedom and of its control over access to its files. There will be an examination, and it is possible that a trustee would be appointed who would be able to waive various privileges the company might have.

Second, although it is possible to sell non-tobacco parts of a company while in Chapter 11, the court must approve the sale, which includes asking whether the creditors will be as well off with the proceeds rather than keeping the operating entity. (If such a sale took

place now, the proceeds could be passed onto the stockholders, but any buyer at this time would have to be very concerned about the possibility of successor liability, a risk that is reduced under Chapter 11.)

Third, going into bankruptcy puts the company in play, which means that someone could come in and buy it all, leaving management without jobs, perks etc. Fourth, it is not at all clear that Chapter 11 could rid the company of claims from smokers who are not yet sick, let alone from those who will start/continue to smoke in the future, assuming the company continues in the tobacco business. There is also some possibility that the Court might curtail some of the company's lobbying or issue/product advertising, but only if someone could convince the Court that it was better for the creditors (including smoking victims) to do so.

Furthermore, once Chapter 11 is sought, existing creditors cannot collect a penny until a plan to settle all claims has been confirmed, which would take many years. In short there are many reasons why Chapter 11 will not be attractive for anyone, which makes it likely that, before that point is reached, everyone will see the need for a settlement of the major litigations, perhaps on an individual or group basis, because there is too much to risk on both sides. This does not mean that a settlement will necessarily come soon or that it will go beyond money issues, which for the class actions could include establishing smoking cessation programs and other ancillary relief.

From a tobacco control perspective, one advantage of a settlement (with a consent order injunction) plus legislation, rather than just legislation, is that having the industry agree to limitations on aggressive marketing practices avoids the chance of a First Amendment challenge. Thus, billboard operators or the media could not sue since the consent order would prevent all U.S. companies from advertising even if the legislative restrictions were struck down. There remains the possibility of a non-U.S. company, not subject to any consent orders, coming into the U.S. market and replicating what the U.S. industry did in the past by buying and rejuvenating old domestic brands. One fairly easy way to discourage this is to make sure that the court orders apply to anyone who acquires any tobacco company or any right to make a product or use a trademark of that company.

The more difficult situation to confront would involve a wholly foreign company and its products. Such a company would have to plan to make a massive investment in advertising and promotion (assuming that the media would be willing to carry tobacco ads for non-U.S. tobacco companies) and would have to conclude that its costly advertising would benefit its sales, and not primarily those of its existing U.S. competitors. In addition, it would have to bring and win a lawsuit to overturn the statutes that would replicate the court orders, a result that seems unlikely for most of the rules that are likely to be imposed. Congress could also impose tariffs on non- complying companies that can create major barriers to entry, assuming that GATT and various treaties do not forbid them. Therefore, although there are steps that must be taken to guard against a major non-U.S. tobacco invasion, the likelihood that foreign products will undermine tobacco control is small.

One of the principal concerns about any possible "global" settlement at this time is that many of the key facts are not yet public. Counsel for the states and the class action plaintiffs may have enough information to make informed judgments about the extent of the industry's wrongdoing and the type of relief needed to remedy it, but the public does

not because much of that information is still under seal. Continuation of litigation would help assure that this information came out at trial, although some of it may not because of relevance or privilege claims. Any legislation and settlement must make certain that all such information is fully disclosed to the public.

II. Support for Those Economically Disadvantaged, Without Fault, by Tobacco Control Policies

Tobacco Farmers

Except for efforts made in recent years, and following some ground breaking efforts by President Jimmy Carter and the Carter Center in 1985, the public health community has all but ignored the tobacco farmer and the difficult situation that many of the tobacco farmers have found themselves in. The public health community has to a large extent viewed the farmers as part of the tobacco "family" carrying out the political agenda of the tobacco companies. Although the farmers have often defended the industry and the production and marketing of tobacco, their motivations, their beliefs, and reasons are in many cases significantly different than those of the tobacco companies.

Over the years the economic stability of the tobacco farmer has continued to decline while the tobacco companies have continued to flourish both domestically and internationally. There is no reason to believe that this scenario will change in the future, although the tobacco companies can be expected to continue to provide economic incentives to the growers to keep them allied with the companies' interests. Several examples support this conclusion of a continuing long-term decline in spite of tobacco company efforts to assure the farmers of economic stability. In 1969, U.S.-manufactured cigarettes contained 90% American grown tobacco. By the 1990's, that figure has dropped to barely 60%. The number of U.S. tobacco farms has also dropped dramatically, from 512,000 in 1954 to 124,000 in 1992. And the contribution that tobacco makes to the various tobacco producing states, though significant, has also been dropping. In North Carolina for example, tobacco's contribution to the economy has dropped from 11.3 % in 1960 to 7.8 % in 1993.

Farmers and tobacco allotment holders are increasingly aware of these realities. A 1997 survey of tobacco growers and tobacco allotment owners conducted by the Bowman Gray School of Medicine in North Carolina and the Center for Sustainable Systems in Berea, Kentucky found that over 70 % of the respondents have taken steps to learn about on-farm alternatives to tobacco. Fully 66 % have discovered that on-farm alternatives can be profitable. But the survey also noted important barriers. Between 64 % and 79 % of those surveyed said that few processing plants connecting farmers to consumers, lack of capital for new business ventures, no places to sell new products, and few low-interest loans or grants for new business ventures were just some of the barriers to change.

And finally, the poll indicated that 66% of those surveyed believed that the Federal government should actively help farmers find other ways of making a living.

Serious efforts to reduce the use and consumption of tobacco products in the United

States must address the issue of the tobacco farmers, their families and the economic viability of their communities. Not unlike many smokers who know the dangers of tobacco but got seduced and "hooked" on the product and cannot quit, the American tobacco farmer and the economic infrastructures of tobacco states are and have been for a long time "tobacco dependent." They are a part of the deeply imbedded economic and political system that the tobacco companies have established and maintained to protect the companies' interests. In many of these communities tobacco is a way of life, often the only way of life, going back generations. As organizations concerned about public health and the general well being of our society we must be willing to recognize and accept our responsibilities in helping to reduce this dependence as part of our overall efforts to reduce tobacco use as a public health matter. The public health community, religious organizations and other civic organizations need to work cooperatively and collaboratively to effect positive change.

It is not enough to suggest that tobacco farmers merely transition to an alternative crop. There are complex issues that must be assessed before any short term or long term strategies are implemented, taking into account both domestic as well as international considerations. Tobacco production, size of plots, type of land, and product varies significantly from state to state. The public health community's role should be to provide the necessary vision and leadership and to serve as a catalyst for effecting the necessary short term and long term change that must occur in order for us to be successful in helping wean the tobacco farmer and their communities off their tobacco dependence. We must make the tobacco farmer, his family and his community a part of the "solution" not the problem. A significant side benefit in establishing a short term and long term plan to deal with these issues is that politically, the power of the tobacco companies can be significantly reduced, and that policy decisions could therefore be made that benefit public health and the tobacco growers rather than the tobacco industry. Tobacco state politicians and policy makers who have often carried out the agenda of the tobacco companies under the pretense of protecting their tobacco farming constituencies have in some ways done more harm than good in maintaining the "status quo." They also should begin to provide new visionary thinking and leadership for effecting change.

In discussions and dialogues with farmers, organizations representing the interests of the tobacco farmer as well as public health groups in the primary tobacco growing states, there is a cautious optimism that there can be productive solutions that seek to reduce tobacco use in this country as a major public health problem while at the same time working to ensure the economic viability and vitality of those states and those communities. But it must be stressed that finding the various options and implementing them will take time.

Intrinsically tied to the future fate of the tobacco farmer is what happens not only in the domestic growing arena but in the international growing, manufacturing and marketing arena as well. It is clear that agricultural production and marketing of tobacco is increasing world wide and that the quality of the crop in foreign countries is increasingly comparable to the quality of U.S. product -- often the result of assistance from U.S. companies and leaf dealers. American tobacco companies and leaf dealers are increasingly doing business in those countries including buying and importing foreign leaf into the United States, and pumping up the economies and dependency of those countries through intensifying investments. It makes good business sense for the companies but represents a serious threat to the health of the rest of the world as well as

towards tobacco- related issues or loyalty towards the industry on the part of the beneficiary. Given that, the industry's notable generosity towards women's, minority, arts and community service organizations is particularly shrewd. The industry positions itself as a valuable friend and sponsor of these worthy groups often in sore need of funds, and polishes its image by its link with groups promoting civil rights, social justice, and artistic freedom and innovation.

The blueprint calls for a ban on tobacco sponsorship and philanthropy to prevent tobacco companies from using them as tools to buy innocence by association and create new advertising outlets. However, the organizations abruptly cut off from such funding will no doubt suffer economically, which is why the Committee calls for compensation to such groups.

Australia has already instituted such a policy. The government taxes tobacco companies and directs the proceeds to state-level Health Promotion Foundations, which sponsor arts and sporting events.

V. The International Impact of Comprehensive U.S. Legislation

According to the World Health Organization, tobacco use is estimated to have caused around 3 million deaths a year worldwide in the early 1990s, and is projected to cause ten million deaths a year worldwide by the 2020s or early 2030s, with 70 percent of those deaths occurring in developing countries. Many of these deaths will result from the increasingly aggressive marketing efforts of U.S.-based transnational tobacco companies.

The adoption of comprehensive national legislation governing tobacco will constitute a national finding that no civilized society can do less to stem the toll of disease and death from tobacco use. Since the marketing abuses which the U.S. seeks to control at home are practiced without restraint abroad -- by U.S.-based companies -- the U.S. government has both a public health and a moral obligation to do all within its power to see that the protections it extends to its own citizens are extended to all.

This must include adherence to the following principles:

1. The U.S. should use the broad range of its international activities and influence to actively promote tobacco control, including the adoption of U.S. domestic tobacco control standards as at least minimum global standards.

2. The U.S. must insist that public health concerns overrule trade concerns in all trade negotiations and related proceedings.

3. The U.S. should allocate substantial resources to fund effective international government and non-government institutions engaging in tobacco control activities.

4. The U.S. must obtain and enforce commitments from U.S.-based transnational companies to support, not undermine, these efforts.