

1 on lands within the jurisdiction of an Indian tribe or tribal
2 organization.

3 (b) TRADITIONAL USE EXCEPTION.—

4 (1) IN GENERAL.—In recognition of the reli-
5 gious, ceremonial, and traditional uses of tobacco
6 and tobacco products by Indian tribes and the mem-
7 bers of such tribes, nothing in this Act shall be con-
8 strued to infringe upon the right of such tribes or
9 members of such tribes to acquire, possess, use, or
10 transfer any tobacco or tobacco products for such
11 purposes ~~or to infringe upon the ability of miners~~
12 ~~to participate and use tobacco products for religious,~~
13 ~~ceremonial, or traditional purposes~~

Do not strike
stet
ce

14 (2) APPLICATION OF PROVISIONS.—Paragraph

15 (1) shall apply only to those quantities of tobacco or
16 tobacco products necessary to fulfill the religious,
17 ceremonial, or traditional purposes of an Indian
18 tribe or the members of such tribe, and shall not be
19 construed to permit the general marketing of to-
20 bacco or tobacco products in a manner that is not
21 in compliance with chapter IX of the Federal Food,
22 Drug, and Cosmetic Act.

23 (3) LIMITATION.—Nothing in this Act shall be
24 construed to permit an Indian tribe or member of
25 such a tribe to acquire, possess, use, or transfer any

1 tobacco or tobacco product in violation of section
2 2341 of title 18, United States Code, with respect
3 to the transportation of contraband cigarettes.

4 (c) PAYMENTS TO TOBACCO TRUST FUND.—Any In-
5 dian tribe ~~or tribal organization~~

tribe

6 that engages in the manu-
7 facture of tobacco products shall be subject to liability for
8 any annual fee payments that are levied on other manufac-
9 turers for purposes of any tobacco trust fund. Any Indian

tribe

10 tribe ~~or tribal organization~~ that does not pay such fees
11 shall be considered a nonparticipating manufacturer and
12 shall be subject to surcharges made applicable to such
13 nonparticipating manufacturers under this Act.

14 (d) APPLICATION OF FEDERAL FOOD, DRUG, AND
15 COSMETIC ACT REQUIREMENTS.—

16 (1) IN GENERAL.—The Secretary, in consulta-
17 tion with the Secretary of Interior, shall promulgate
18 regulations to provide for the waiver of any require-
19 ment of the Food, Drug, and Cosmetic Act (21

20 U.S.C. 301 et seq.) with respect to tobacco products
21 *provisions of this Act and the*
sale of tobacco products shall apply on Indian lands as defined in 18 U.S.C.
and on other trust lands subject to the jurisdiction of an Indian Tr
rior boundaries of Indian reservations or on lands
To the extent that an Indian tribe engages in the manufacture,
distribution or sale of tobacco products, the provisions of this Act sh
apply to such tribe.

22 (2) JURISDICTION.—With respect to tobacco-re-
23 lated activities that take place within the exterior
24 in ~~an~~ Indian ~~lands~~ ^{country} as defined in 18 U.S.C. § 1151 or on trust
25 lands

1 ~~boundaries of Indian reservations or on lands~~ within
2 the jurisdiction of an Indian tribe, the responsibility
3 for enforcing the regulations promulgated pursuant
4 to paragraph (1) shall be vested in—

5 (A) the Indian tribe ~~or the tribal organiza-~~
6 ~~tion~~ involved;

7 (B) the State within which the lands of the
8 Indian tribe or tribal organization are located,
9 pursuant to a voluntary cooperative agreement
10 entered into by the State and the Indian tribe
11 or tribal organization; or

12 (C) the Secretary.

13 (3) ELIGIBILITY FOR ASSISTANCE.—Under the
14 regulations promulgated under paragraph (1), the
15 Secretary, in consultation with the Secretary of the
16 Interior, shall provide assistance to an Indian tribe
17 ~~or tribal organization~~ in meeting and enforcing the
18 requirements under such regulations ^{including grant funds,} if—

19 (A) the tribe or tribal organization has a
20 governing body that has powers and carries out
21 duties that are similar to the powers and duties
22 of State or local governments;

23 (B) the functions to be exercised through
24 the use of such assistance relate to activities
25 conducted ~~within the exterior boundaries of In-~~
~~in an Indian~~ ^{country} ~~land~~ as defined in 18 U.S.C. § 1151, and on
other trust lands subject to the jurisdiction of an
~~the~~ Indian tribe; and

1 ~~dian reservations or on lands within the juris-~~
2 ~~isdiction of the tribe or tribal organization in-~~
3 ~~volved, and~~

4 (C) the tribe ~~or tribal organization~~ is rea-
5 sonably expected to be capable of carrying out
6 the functions required by the Secretary.

7 (4) DETERMINATIONS.—Not later than 60 days
8 after the date on which an Indian tribe ~~or tribal or-~~
9 ~~ganization~~ submits an application for assistance
10 under paragraph (3), the Secretary shall make a de-
11 termination concerning the eligibility of such tribe ~~or-~~
12 ~~organization~~ for such assistance.

13 (5) IMPLEMENTATION BY THE SECRETARY.—If
14 the Secretary determines that the Indian tribe ~~or~~
15 ~~tribal organization~~ is not willing or not qualified, ~~including that~~
16 administer the requirements of the regulations pro-
17 mulgated under this subsection, ^{or if the tribe is a nonparticipating} the Secretary, in ^{manufacturer}
18 consultation with the Secretary of the Interior, shall
19 implement and enforce such regulations on behalf of
20 the tribe ~~or tribal organization~~.

21 (6) DEFICIENT APPLICATIONS; OPPORTUNITY
22 TO CURE.—If the Secretary determines under para-
23 graph (4) that a tribe is not eligible for assistance
24 under this subsection, the Secretary shall—

1 (A) submit to such tribe ~~or organization~~
 2 in writing, a statement of the reasons for such
 3 determination; and

4 (B) shall assist such tribe in overcoming
 5 any deficiencies that resulted in the determina-
 6 tion of ineligibility.

7 After an opportunity to review and cure such defi-
 8 ciencies, the tribe ~~or organization~~ may re-apply to
 9 the Secretary for assistance under this subsection.

10 (e) RETAIL LICENSING REQUIREMENTS.—

11 (1) IN GENERAL.—The requirements of the
 12 Federal Food, Drug, and Cosmetic Act (21 U.S.C.
 13 301 et seq.) and this Act with respect to the licens-
 14 ing of tobacco retailers shall apply to retailers that
 15 sell tobacco or tobacco products ~~within the exterior~~
 16 ~~boundaries of Indian reservations or on lands within~~
 17 ~~the jurisdiction of an Indian tribe or tribal organiza-~~
 18 ~~tion.~~
in Indian lands as defined in
18 U.S.C. § 1151, or on trust lands within the jurisdiction of the Indian
tribe.

19 (2) MINIMUM FEDERAL STANDARDS.—

20 (A) IN GENERAL.—Not later than 180
 21 days after the date of enactment of this Act,
 22 the Secretary shall promulgate regulations to
 23 authorize an Indian tribe ~~or tribal organization~~
 24 to implement a tribal tobacco product licensing
 25 program ~~within Indian reservations or on lands~~
in Indian lands as defined in 18 U.S.C. § 1151, or
on trust lands within the jurisdiction of the Indian tribe.

1 ~~within the jurisdiction of an Indian tribe or~~
2 ~~tribal organization~~

3 (B) MINIMUM STANDARDS.—In order for
4 an Indian tribe ~~or tribal organization~~ to assume
5 responsibility for the licensing and regulation or
6 tobacco-related activities conducted ^{on Indian lands as defined} ~~within the~~
7 ~~in 18 USC § 1151, and on other trust lands subject to the jurisdic~~
8 ~~exterior boundaries of Indian reservations or on~~
9 ~~lands within the jurisdiction of~~ ^{of} an Indian tribe,
10 ~~or tribal organization~~, the Indian tribe ~~or tribal~~
11 ~~organization~~ shall establish terms, conditions,
12 and standards similar to those described in sec-
13 tion 235 of this Act for a State licensing law.

14 (C) WAIVER.—An Indian tribe ~~or tribal or~~
15 ~~organization~~ shall have the same right to apply
16 for waiver and modification of the law described
17 in subparagraph (B) as a State pursuant to the
18 Act involved.

19 (3) IMPLEMENTATION BY THE SECRETARY.—If
20 the Secretary, in consultation with the Secretary of
21 the Interior, determines that the Indian tribe ~~or~~
22 ~~tribal organization~~ is not qualified to ~~administer the~~
23 ~~relevant requirements of the Federal Food, Drug,~~ ^{meet the minimum}
24 ~~and Cosmetic Act (21 U.S.C. 301 et seq.) or the~~
^{standards of Section 603(c)(2)(B),} Secretary, in consultation with the Secretary of the

1 Interior, shall implement such requirements on be-
2 half of the Indian tribe ~~or tribal organization~~.

3 (f) ELIGIBILITY FOR PUBLIC HEALTH PAYMENTS.—

4 (1) GRANT.—

5 (A) IN GENERAL.—For each fiscal year the
6 Secretary shall award a grant to each Indian
7 tribe ~~or tribal organization~~ that has an ap-
8 proved anti-smoking plan for the fiscal year in-
9 volved under paragraph (2), ~~in an amount equal~~
10 ~~to the amount determined under paragraph (3).~~

11 (B) REDUCTION IN STATE AMOUNTS.—

12 With respect to any State in which the service
13 area or areas of an Indian tribe ~~or tribal orga-~~
14 ~~nization~~ that receives a grant under subpara-
15 graph (A) are located, the Secretary shall re-
16 duce the amount otherwise payable to such
17 State, under this Act.

18 (2) TRIBAL PLANS.—To be eligible to receive a
19 grant under paragraph (1), an Indian tribe ~~or tribal~~
20 ~~organization~~ shall prepare and submit to the Sec-
21 retary an anti-smoking plan and shall otherwise
22 meet the requirements of subsection (e). The Sec-
23 retary shall promulgate regulations providing for the
24 form and content of anti-smoking plans to be sub-
25 mitted under this paragraph.

1 (3) AMOUNT DETERMINED.—Except as pro-
2 vided in this subsection, the amount of any grant for
3 which an Indian tribe ~~or tribal organization~~ is eligi-
4 ble under paragraph (1) shall be determined by the
5 Secretary based on the product of—

6 (A) the ratio of the total number of indi-
7 vidual residing on or in such tribe's or tribal or-
8 ganization's reservation, jurisdictional lands, or
9 the active user population, relative to the total
10 population of the State involved; and

11 (B) the amount allocated to the State for
12 such public health purposes.

13 (4) USE.—Amounts provided to a tribe ~~or tribal~~
14 ~~organization~~ under this subsection shall be used to
15 reimburse the tribe for smoking-related health ex-
16 penditures, to further the purposes of this ~~title~~ Act
17 and in accordance with a tribal anti-smoking plan
18 approved by the Secretary. Indian tribes ~~and tribal~~
19 ~~organizations~~ shall have the flexibility to utilize such
20 amounts to meet the unique health care needs of
21 persons within their service populations within the
22 context of tribal health programs if such programs
23 meet the fundamental Federal goals and purposes of
24 Federal Indian health care law and policy.

1 (5) REALLOTMENT.—Amounts set aside and
2 not expended under this subsection shall be realloc-
3 ted among other eligible Indian tribes, ~~and tribal or-~~
4 ~~ganizations.~~

5 (g) OBLIGATIONS OF MANUFACTURERS.—Manufac-
6 turers ~~participating in, or covered under this any Act shall~~
7 ~~not engage in any activity on lands within the jurisdiction~~
8 ~~of an Indian tribe or tribal organization that is prohibited~~
9 ~~by this title or such other Act.~~
*including Indian tribes, participating in, or covered under this Act or any
Act shall not engage in any activity on lands within the jurisdiction
of an Indian tribe that is prohibited by this Act.
→ Indian country as det in 18 U.S.C. § 1151 and on a trust subject*

10 (h) USE OF TRUST FUND PAYMENTS.—Amounts
11 made available from the tobacco trust fund pursuant to
12 any Indian health provisions of this Act shall be provided
13 to the Indian Health Service and, through the provisions
14 of the Indian Self Determination and Education Assist-
15 ance Act (25 U.S.C. 450b et seq.) to Indian tribes ~~or tribal-~~
16 ~~organizations~~ to be used to reduce tobacco consumption,
17 promote smoking cessation, and to fund related activities
18 including—

19 (1) clinic and facility design, construction, re-
20 pair, renovation, maintenance, and improvement;

21 (2) health care provider services and equipment;

22 (3) domestic and community sanitation associ-
23 ated with clinic and facility construction and im-
24 provement;

25 (4) inpatient and outpatient services; and

1 (5) other programs and services which have as
2 their goal raising the health status of Indians.

3 (i) PREEMPTION.—

4 (1) IN GENERAL.—Except as otherwise pro-
5 vided in this section, nothing in this Act shall be
6 construed to prohibit an Indian tribe ~~or tribal orga-~~
7 ~~nization~~ from imposing requirements, prohibitions,
8 penalties, or other measures to further the purposes
9 of this title that are in addition to the requirements,
10 prohibitions, or penalties required by this title or
11 ~~such other~~ Act.

12 (2) PUBLIC EXPOSURE TO SMOKE.—Nothing in
13 this title shall be construed to preempt or otherwise
14 affect any Indian tribe ~~or tribal organization~~, rule or
15 practice that provides greater protections from the
16 health hazards of environmental tobacco smoke.

17 (3) NATIVE AMERICANS.—A State may not im-
18 pose obligations or requirements relating to the ap-
19 plication of this title or any other Act enacted in
20 order to give effect to the national tobacco settle-
21 ment agreement of June 20, 1997, to Indian tribes
22 and tribal organizations.

Section 604.

Bryan
#1

Sever Jones
reports

An Indian tribe or tribal corporation shall collect any excise or sales tax imposed by a State, within the exterior borders of which the sale occurs, on non-members of the Indian tribe as a consequence of the purchase of tobacco products by the non-member from the Indian tribe or tribal corporation. The Indian tribe or tribal corporation shall remit such taxes collected to the Treasury of the United States, which shall, in turn, remit the taxes to the State in which they were collected.

Substitute for

10-9 Gordon

y N

Gorton Amendment:

Add Section 604 as follows:

Sec. 604. STATE TOBACCO EXCISE TAX COMPLIANCE

#1

(a) An Indian tribe or tribal corporation shall collect and remit to a State, any tobacco excise or sales tax imposed by the State on non-members of the Indian tribe as a consequence of the purchase of tobacco products by the non-member from the Indian tribe or tribal corporation.

(b) A State may bring an action in a district court of the United States to enforce the requirements under subsection (a).

Amendment No. _____

Calendar No. _____

Amendment to Committee Amendment to S. 1415

Adopted

Purpose: to require that, in the event tobacco product manufacturers are unable to make the payments required under this Act, parties may seek recovery from available insurance coverage

In the Committee on Commerce, Science, and Transportation

Amendment to be proposed by Mr. Breaux

Add to Section 705(b):

(3) if any time the tobacco product manufacturers cannot make the payments required under this Act, all claims against an insurer, whether by direct action or otherwise, including past, pending and future claims, arising from, or caused by, the use of a tobacco product shall be preserved. Nothing in this subsection, shall expand or abridge state law.

Agreed
vote vote

Amendment No. _____

Calendar No. _____

Amendment to Committee Amendment to S. 1415

Purpose: to require that a determination of attorneys fees by an arbitration panel under this Act offset any potential state liability for attorneys fees

In the Committee on Commerce, Science, and Transportation

Amendment to be proposed by Mrs. Hutchison

Viz:

On page __, line __, insert the following:

In the case of a state that has pursued independent civil action against tobacco manufacturers, and that may be liable for attorneys fees, the total amount of any determination of attorneys fees to be paid by tobacco manufacturers through arbitration by state and/or federal proceedings shall be applied as a dollar-for-dollar offset against any potential state liability for attorneys fees.

Brownback

AMENDMENT NO. _____

Calendar No. _____

withdrawn

Purpose: To provide for certain limitations on attorneys' fees under any global tobacco settlement.

will raise on floor

IN THE SENATE OF THE UNITED STATES—105th Cong., 2d Sess.

(no.) _____

(title) _____

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. BROWNBACK

Viz:

1 At the appropriate place, insert the following:

2 **SEC. ____ . LIMITATIONS ON ATTORNEYS' FEES.**

3 (a) GENERAL LIMITATION.—Notwithstanding any
4 other provision of law, a State that receives funds under
5 this Act may not pay attorneys' fees (on behalf of attor-
6 neys for the plaintiffs) in connection with an action main-
7 tained by a State against one or more tobacco companies
8 to recover tobacco-related medicaid expenditures, or for

1 other causes of action involved in the settlement arrange-
2 ment, at a rate that exceeds \$250 per hour.

3 (b) FEE ARRANGEMENTS.—Subsection (a) shall
4 apply to attorneys' fees provided for or in connection with
5 an action of the type described in such subsection under
6 any—

7 (1) court order;

8 (2) settlement agreement;

9 (3) contingency fee arrangement;

10 (4) arbitration procedure;

11 (5) alternative dispute resolution procedure (in-
12 cluding mediation); or

13 (6) other arrangement providing for the pay-
14 ment of attorneys' fees.

15 (c) EXPENSES.—The limitation described in sub-
16 section (a) shall not apply to any amounts provided for
17 the attorneys' reasonable and customary expenses.

18 (d) REQUIREMENTS.—No award of attorneys' fees
19 shall be made under any national tobacco settlement until
20 the attorneys involved have—

21 (1) provided to the Governor of the appropriate
22 State, a detailed time accounting with respect to the
23 work performed in relation to any legal action which
24 is the subject of the settlement or with regard to the
25 settlement itself; and

1 (2) made public disclosure of the time account-
2 ing under paragraph (1) and any fee agreements en-
3 tered into, or fee arrangements made, with respect
4 to any legal action that is the subject of the settle-
5 ment.

6 (e) EFFECTIVE DATE.—The limitation on the pay-
7 ment of attorneys' fees contained in this section shall be-
8 come effective on the date of enactment of any Act provid-
9 ing for a national tobacco settlement.

referred to

vote

AMENDMENT NO. _____

Calendar No. _____

Purpose: To provide for the establishment and funding of a National Institutes of Health Trust Fund for Health Research.

IN THE SENATE OF THE UNITED STATES—105th Cong., 2d Sess.

S. 1415

To facilitate implementation of the settlement reached between the Attorneys General of the several States and manufacturers of tobacco products, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. DORGAN

Viz:

1 Subtitle E of title XXVIII of the Public Health Serv-
2 ice Act, as added by section 1106(a), is amended by add-
3 ing at the end the following:

4 **SEC. 2805. NATIONAL INSTITUTES OF HEALTH TRUST FUND**
5 **FOR HEALTH RESEARCH.**

6 “(a) CREATION OF TRUST FUND.—There is estab-
7 lished in the Treasury of the United States a trust fund
8 to be known as the ‘National Institutes of Health Trust
9 Fund for Health Research’ (hereafter referred to in this

1 section as the 'Trust Fund'), consisting of such amounts
2 as may be appropriated or transferred to the Trust Fund
3 as provided in this section.

4 “(b) FUNDING.—There shall be transferred to the
5 Trust Fund each fiscal year an amount equal to 21 per-
6 cent of the amount paid to the Tobacco Settlement Trust
7 Fund for such year to carry out this section in such fiscal
8 year.

9 “(c) OBLIGATIONS FROM TRUST FUND.—

10 “(1) IN GENERAL.—Subject to the provisions of
11 paragraph (4), with respect to the amounts made
12 available in the Trust Fund in a fiscal year, the Sec-
13 retary shall distribute during any fiscal year—

14 “(A) 2 percent of such amounts to the Of-
15 fice of the Director of the National Institutes of
16 Health to be allocated at the Director's discre-
17 tion—

18 “(i) for carrying out the responsibil-
19 ities of the Office of the Director, including
20 the Office of Research on Women's Health
21 and the Office of Research on Minority
22 Health, the Office of Alternative Medicine,
23 the Office of Rare Disease Research, the
24 Office of Behavioral and Social Sciences
25 Research (for use for efforts to reduce to-

1 bacco use), the Office of Dietary Supple-
2 ments, and the Office for Disease Preven-
3 tion; and

4 “(ii) for construction and acquisition
5 of equipment for or facilities of or used by
6 the National Institutes of Health;

7 “(B) 2 percent of such amounts for trans-
8 fer to the National Center for Research Re-
9 sources to carry out section 1502 of the Na-
10 tional Institutes of Health Revitalization Act of
11 1993 concerning Biomedical and Behavioral Re-
12 search Facilities;

13 “(C) 7.5 percent of such amounts to be
14 used for research into the prevention and cure
15 of cancer;

16 “(D) 7.5 percent of such amounts to be
17 used for research into the prevention and cure
18 of heart disease, stroke, and other cardio-
19 vascular diseases;

20 “(E) 1 percent of such amounts to be used
21 for prevention research programs at the Centers
22 for Disease Control and Prevention;

23 “(F) 1 percent of such amounts to be used
24 for quality and health outcomes research at the

1 Agency for Health Care Policy and Research;
2 and

3 “(G) the remainder of such amounts to
4 member institutes and centers, including the
5 Office of AIDS Research, of the National Insti-
6 tutes of Health in the same proportion to such
7 remainder, as the amount of annual appropria-
8 tions under appropriations Acts for each mem-
9 ber institute and center for the fiscal year bears
10 to the total amount of appropriations under ap-
11 propriations Acts for all member institutes and
12 centers of the National Institutes of Health for
13 the fiscal year.

14 “(2) PLANS OF ALLOCATION.—The amounts
15 transferred under paragraph (1)(G) shall be allo-
16 cated by the Director of the National Institutes of
17 Health or the various directors of the institutes and
18 centers, as the case may be, pursuant to allocation
19 plans developed by the various advisory councils to
20 such directors, after consultation with such
21 directors.

22 “(3) GRANTS AND CONTRACTS FULLY FUNDED
23 IN FIRST YEAR.—With respect to any grant or con-
24 tract funded by amounts distributed under para-
25 graph (1), the full amount of the total obligation of

1 such grant or contract shall be funded in the first
2 year of such grant or contract, and shall remain
3 available until expended.

4 “(4) TRIGGER AND RELEASE OF MONIES AND
5 PHASE-IN.—

6 “(A) TRIGGER AND RELEASE.—No ex-
7 penditure shall be made under paragraph (1)
8 during any fiscal year in which the annual
9 amount appropriated for the National Institutes
10 of Health is less than the amount so appro-
11 priated for fiscal year 1999.

12 “(B) PHASE-IN.—The Secretary shall
13 phase in the distributions required under para-
14 graph (1) so that—

15 “(i) 25 percent of the amount in the
16 Trust Fund is distributed in the first fiscal
17 year for which funds are available;

18 “(ii) 50 percent of the amount in the
19 Trust Fund is distributed in the second
20 fiscal year for which funds are available;

21 “(iii) 75 percent of the amount in the
22 Trust Fund is distributed in the third fis-
23 cal year for which funds are available; and

24 “(iv) 100 percent of the amount in
25 the Trust Fund is distributed in the fourth


1 and each succeeding fiscal year for which
2 funds are available.”.

HUTCHINSON AMENDMENT

Congressional Review — In accordance with section 801 of title 5, United States Code, Congress shall review, and may disapprove, any rule proposed under the Tobacco Products Control Act.

AMENDMENT BY SENATOR HOLLINGS
TO STRIKE SUBTITLES A, B, AND C OF TITLE XI

Viz: Strike all on page 310, line 12, through page 342, line 20.



Ford Amendment #28: To apply existing penalties related to FDA in the event of the unauthorized release of documents received from the Depository.

(1) On page 91, after line 19, INSERT

“(dd) The failure of any person to comply with Section 906(c)

(2) On page 44, line 4 after “section” INSERT

“or under Title IX of the Tobacco Products Control Act”

(3) On page 219, after line 9 INSERT

“(c) The using by any person to his own advantage or the disclosure of information other than as authorized by this Act shall be a prohibited act under 21 USC Sec. 331.”

Ford Amendment #2. Purpose: to reduce annual payment amounts to those contained in Clinton budget

On page 158, strike lines 10 through 15 and insert the following:

"(1) year 1 — \$ 9,800,000,000;

(2) year 2 — \$ 11,800,000,000;

(3) year 3 — \$ 13,300,000,000;

(4) year 4 — \$ 14,500,000,000; and

(5) year 5 and each subsequent year —

\$ 16,100,000,000."

Ford Amendment #45. Purpose: To limit "real" annual payments to \$506 billion over 25 years, as the legislation has been publicly described .

On page 158, strike lines 10 through 15 and insert the following:

"(1) year 1 — \$ 10,500,000,000;

(2) year 2 — \$ 12,000,000,000;

(3) year 3 — \$ 14,500,000,000;

(4) year 4 — \$ 18,000,000,000; and

(5) year 5 and each subsequent year —

\$ 21,000,000,000."

Ford Amendment #46. Purpose: To limit "real" annual payments to \$506 billion over 25 years, as the legislation has been publicly described

On page 161, line 13, add the following new subsection:

“(h) Notwithstanding the previous provisions of this section, the total payments required under this section during the first 25 years in which this section is in effect, prior to any adjustments required under section 403, shall not exceed \$506,000,000,000.”

Tobacco
McCain
Bill

A MODEL FOR LEGISLATION THAT DOES NOT DEPEND ON INDUSTRY CONSENT

The McCain bill, which draws heavily on the bill proposed by the state Attorneys General, was drafted with the assumption that the tobacco companies would participate. Thus, although it has provisions for non-participating manufacturers and imposes most of its requirements on all manufacturers, the bill was not intended to operate in a world without the manufacturers' consent. Given the industry's current threat to walk away from the table, it becomes critical to draft a bill that not only achieves the President's five goals without the industry's consent, but also includes provisions which would permit the companies to return to the table.

Our vision is a single piece of legislation with two parts -- a tough comprehensive package that applies to all tobacco manufacturers and a separate "deal" that further advances the President's goals while giving the tobacco industry a significant inducement to participate. This approaches closer to the sort of bill that one would have drafted had there been no prospect of or interest in industry participation at the outset. The first part is a stand-alone piece of legislation. It could be enacted alone. The second part is in the nature of an inducement to the industry not to challenge the law because it offers the liability protection that the industry wants.

As the Administration has noted, the McCain bill is in need of substantial revision on both technical and policy grounds. In addition, as we have noted in our chart outlining concerns with the McCain bill, various provisions of the legislation raise significant constitutional concerns. These constitutional concerns may generally be satisfied through modest modifications, although in some instances -- such as the provisions that purport to restrict non-commercial speech -- we believe deletions are necessary. However, the reshaping the McCain bill into the two-part structure that we discuss here would not require enormous modifications. It would be necessary to remove the consent-based provisions throughout the bill and gather them (or some subset thereof) in a separate Title that embodies the "deal." The result, however, would be a simpler, clearer bill that deals more effectively with both scenarios -- consent and no consent.

There are a number of advantages to this model:

- * It is less complicated and therefore easier to administer than the present bill, particularly in the face of industry opposition
- * The bulk of restrictions do not rely on cumbersome consent mechanisms, such as consent decrees, settlement agreements and protocols

- * There is no basis for an antitrust exemption in the stand-alone portion of the bill because there will be no "agreement" to effectuate (we continue to believe that there should be no antitrust exemption under any circumstances)
- * The bill can easily be modified if it becomes clear the industry will never consent by removing the final title and will be more effective if some, but not all, manufacturers decide to participate

We have done a quick review of the McCain bill and identified the changes that would need to be made to modify it as described. Further study will be required to make sure all of the pieces fit together.

THE MODIFIED MCCAIN BILL

Part One: The Industry-Wide Package *Stand alone*

- * Increases the price of cigarettes by \$1.10 per pack over 5 years *Assessment vs. tax*
- * Full FDA Authority
McCain's version or an administration substitute
- * Marketing Restrictions
The FDA Regulations + narrowly tailored extensions (but not the additional restrictions barring all outdoor advertising, advertising on the Internet, and the use of human images and cartoons).
- * Expansion of smoking cessation and prevention programs and the reduction of secondhand smoke
- * Protection for tobacco farmers and their communities
The LEAF bill or a substitute
- * Significant ~~look-back~~ penalties *Search charge*
McCain or an administration substitute
- * Extensive labelling and constituent disclosure requirements
- * Licensing and registration provisions
McCain or an administration substitute
- * Disclosure of all non-privileged documents

*Medicaid
lawsuits*

Part Two: The Deal *- Participating manufacturers*

→ Title 12

- * The Additional marketing restrictions (such as the restrictions barring outdoor advertising, the use of human or animal images and cartoons, etc.)
- * Compliance with all of the marketing restrictions contained in the industry-wide package, which would be set forth as independent terms of the protocol so that they would still apply to the participating manufacturers even if they were held invalid as to non-participants
- * Civil liability provisions
- * Some enforcement provisions that rely on withdrawal of liability protections for egregious conduct
- * Attorneys fees provision (if necessary)
- * The Look-back provisions in the industry-wide package, which

Severability

would be set forth as independent terms of the protocol so that they would still apply to the participating manufacturers even if they were held invalid as to non-participants

THE DEAL

I. Problems in the current McCain bill

The current McCain bill is confusing, in large part because it incorporates several different consent mechanisms. The bill contemplates the following:

- 1) a Protocol, apparently between tobacco companies and the federal government;
- 2) multiple consent decrees, probably between individual companies and individual states, though the bill also suggests that the consent decrees are between companies;
- 3) a Master Settlement Agreement;
- 4) a Trust Agreement of unclear scope.

The bill does not clearly connect these consent mechanisms to each other or to the liability provisions. Moreover, the bill intersperses these consent mechanisms throughout the bill, making severability difficult.

II. A Better Consent-based Bill

Some of the complexities of the McCain bill can be avoided if one assumes a bill with two fundamental parts -- a freestanding set of statutory provisions that contains most of the relevant provisions that can be imposed consistent with the constitution (a modified version of Titles I-XI of McCain) and an additional title (Title XII) that contains all of the provisions of "the deal." Tobacco companies that decide not to participate will simply continue to be subject to the provisions of Titles I-XI, as will the companies that do participate. By contrast, participating companies will receive the benefits of Title XII, even though they would remain subject to the restrictions set forth in Titles I-XI. The bill would be designed to ensure that Title XII was wholly severable from the remainder of the bill; if any aspect of Title XII were struck down, Titles I-XI would remain in force and would provide a coherent regulatory framework for the future (There remain, however, substantial questions as to whether the converse should be true and how severability should work as a general matter.).

The bill would not use the term "non-participating manufacturer." A non-participating manufacturer would simply comply with Title I-XI (one could create additional incentives, such as bonding requirements, but the greater such incentives are, the more likely Title XII will be struck down as an unconstitutional condition).

Title XII (the deal) would contain two principal sections: 1) how a tobacco manufacturer qualifies for the deal (e.g., by agreeing to advertising restrictions and look-back assessments) and

2) the liability limitations that a participating manufacturer would receive in exchange. In contrast to McCain, which places the qualifications throughout the bill in a series of enforcement provisions, the qualifications would be in a single place. We would propose that the qualifications should be the definition of "participating tobacco product manufacturer." As this bill would be designed, that term would have meaning only in Title XII.

As we have previously discussed, additional marketing restrictions would be most likely to survive constitutional challenge if the qualifications for being a "participating tobacco product manufacturer" were speech-neutral. If it is necessary to specify advertising restrictions, the preferred consent mechanism is a Protocol between the federal government and the tobacco industry. A Protocol signed by the Secretary of Health and Human Services ensures that the federal government can enforce all relevant provisions, avoids the initial judicial approval that would be required under a consent decree approach, and does not require the federal legislation to condition the receipt of any state funding on their willingness to enter into settlements that include constitutionally suspect advertising restrictions. For these reasons, the Protocol may be the best choice.

A bill that used a Protocol would not preclude the existence of state court consent decrees. Indeed, such a bill could require the state suits to be settled, but it would not require any particular terms in those settlement agreements (other than, perhaps, payment of attorneys fees, see below).

The qualifications for becoming a participating tobacco product manufacturer can be extensive. They should ensure that there will be minimal litigation over the marketing restrictions and other provisions in the law and that bad actors and those who do not meet their youth smoking reduction targets do not get the liability protections. Thus, we would propose that participating manufacturers must be subject to all of the marketing restrictions (the FDA restrictions plus narrowly tailored extensions plus additional, broader restrictions that would raise constitutional concerns if imposed directly).

III. Open Policy Issues

There remain a number of fundamental policy issues with respect to this proposal, including:

A. Impact of Invalidation of Part of the Deal on Liability Limits

There are a variety of difficult questions concerning the loss of liability protection by bad actors, implicating both legal and policy concerns. We have set forth some general options for provisions that would define the circumstances under which

participating tobacco manufactures would lose liability protection due to judicial invalidation of those restrictions and burdens.¹

We note at the outset that severe practical concerns arise if the loss of liability protection is tied to the judicial invalidation of certain burdens and restrictions. We have previously referred to concerns similar to these as the "spigot" problem. One key problem is figuring out when a provision has been invalidated, given appeal rights and multiple federal jurisdictions where different rulings might be returned. To alleviate these concerns, we recommend that the legislation provide that all constitutional challenges to the act be brought in a single forum - - such as the United States District Court for the District of Columbia -- with direct review (on an expedited basis) as of right to the Supreme Court. This approach will minimize litigation delay and avoid the problems that would result from conflicting lower court decisions, as such conflicts would make it very difficult to determine whether the liability protections were in force at a given moment.

1. General Points -- A primary benefit of a liability protection bargain is that it would weaken the incentive for participating manufacturers to raise constitutional objections not only to the burdens and restrictions contained in that bargain but also to the similar burdens and restrictions that would be contained in the accompanying stand alone legislation. To the extent that the burdens and restrictions on tobacco manufacturers -- such as the conditional assessments imposed through the lookback provisions and the advertising restrictions currently found in the FDA regulation -- appeared both in the bill's mandatory, industry-wide provisions and in the bargain, participating manufacturers might have sufficient incentives not to challenge the direct imposition of the burdens or restrictions that they had accepted in exchange for liability protection. They would continue to be subject to the similar (and perhaps even more expansive) restrictions contained in the bargain even if a challenge to their direct imposition succeeded.

¹We do not discuss how the bill should handle the general question of severability, i.e., which portions of the stand alone legislation should survive invalidation of other portions of that legislation. One option for addressing this problem would be to rely on conventional severability language. But conventional severability language is not well suited to defining when judicial invalidations should result in the loss of liability protection. This section address that problem.

There are two distinct sets of circumstances under which the judicial invalidation of various burdens and restrictions might cause participating manufacturers to lose liability protection.

(1) Courts could invalidate some of the burdens and restrictions that the stand-alone portion of the bill would impose directly on all tobacco manufacturers. These rulings would not necessarily affect the application of these burdens and restrictions to participating manufacturers if such burdens and restrictions were also set forth as independent terms of the bargain. However, there may be policy reasons for tying the continued availability of the bargain to the continued validity of the burdens and restrictions contained in the stand alone portion of the legislation. For instance, if courts struck down the direct imposition of important restrictions on youth advertising by non-participating manufacturers, the public health benefits that could be obtained from a bargain that required participating manufacturers to comply with similar, or even more expansive, restrictions might be too small to justify the liability protection.

(2) Courts could invalidate some or all of the burdens and restrictions that would be included as independent terms of the liability protection bargain itself. Manufacturers who elected to participate presumably would not bring a challenge to these burdens and restrictions, but other parties might. For instance, a non-participating manufacturer might object to the liability protection enjoyed by its competitors; or a distributor who wishes to advertise might challenge the legal incentive that prompted a participating supplier to insist that a distributor cease advertising its brands.

In sum, the bill's provisions respecting the loss of liability protection for participating manufacturers must account for two types of potential judicial rulings: (1) invalidation of key elements of the statutory regime affecting non-participating manufacturers in a manner that could undermine the basis for the bargain and (2) invalidation of important aspects of the government's bargain with participating manufacturers.

If drafters of the bill determined, as a policy matter, that the liability protection bargain will only benefit the public if all manufacturers, whether participating or not, remain subject to critical burdens and restrictions, then the protocol should be structured so that the liability protections are withdrawn upon a holding that either some or perhaps all of the

advertising restrictions that have been imposed directly are unconstitutional. There are, however, real costs to such an approach: It would permit a third party, by bringing a successful challenge to the direct imposition of advertising restrictions, to nullify the conditional portion of the legislation.

2. Options -- With these points in mind, we offer several options for providing for the termination of liability protection in response to holdings that certain of the advertising restrictions are unconstitutional.

Option 1: Specify in the statute which burdens and restrictions must remain in force (a) under the bargain, and/or (b) under the stand alone legislation in order for liability protections to remain in place.

Pros: Clearly sets forth the conditions for retaining liability protection.

Cons: Requires an extremely difficult present day judgment as to the future conditions under which the offer of liability protection should be withdrawn. Also, requires that the statute define what counts as "invalidation" of the specified burdens and restrictions -- e.g., Would a successful as applied challenge constitute "invalidation" of a particular provision?

Option 2: Provide for presumptive withdrawal of liability protection if specified burdens and restrictions are invalidated (a) as to the bargain, and/or (b) as to the stand alone legislation, with the proviso that the Secretary of HHS could prevent the withdrawal of liability protection based on a determination that the invalidation in question would not significantly interfere with the attainment of the Act's purposes, taking into account whether regulations could be promulgated in lieu of the invalidated restriction. The Secretary's determination shall not be subject to judicial review.

Pros: Provides flexibility to account for the varying significance of judicial holdings invalidating certain provisions

or portions thereof.

Cons: May place enormous political/appropriations pressure on the Secretary. HHS understandably has this concern. (Consideration could be given to substituting the President for the Secretary of HHS in order to minimize appropriations pressure.)

Option 3: Provide for presumptive withdrawal of liability protection if specified burdens and restrictions are invalidated (a) as to participating manufacturers, and/or (b) as to non-participating manufacturers, unless a court determined that the invalidation would not substantially interfere with the attainment of the Act's purposes.

Pros: Avoids present-day judgment as to the future conditions under which the offer of liability protections should be withdrawn and political pressures presented by Option 2.

Cons: Leaves the decision largely to the courts unless the standard is crafted in a manner that imposes real constraints. In addition, this approach could raise concerns about impermissible delegations of policy discretion to the courts. Again, this concern could perhaps be accommodated through crafting of a sufficiently specific standard.

B. Settling the State Suits

We have always been concerned about inequities in bargaining power permitting one side or another to hold up settlement of the state suits. If states have all of the incentives to settle (to get federal money), then tobacco manufacturers will find some way to get a good deal. If the reverse is true (because tobacco companies need the settlements to become participating manufacturers), the states may impose arduous conditions. These concerns may be alleviated by simply providing that states that agree not to pursue certain claims against tobacco companies may receive federal funds and that manufacturers must simply agree to the terms of the protocol in order to get liability protections, without regard to whether they have settled with the states. In other words, a tobacco company could be a signatory to the protocol and still be subject to suit by a state that was willing to forgo

the federal money.

Attorneys Fees

Attorneys fees remain a thorny problem. We continue to question whether we need to do anything. Our analysis of the state contracts suggests that very few of the attorneys have any argument that they recover under their contracts in the event of federal legislation; they may have quantum meruit and other claims. It might be easier to leave well enough alone. Indeed, settlement of the state lawsuits, including attorneys fees, was the centerpiece of the June 20th settlement. It becomes difficult to see where the fees issue fits in when federal laws become central.

One option is to require payment of the attorneys fees and participation in an arbitration process as a separate condition of being a participating manufacturer. It would not be linked to the settlement of the law suits and thus would not allow the tobacco companies to hold up the states for lower attorneys fee payments.

EW

McCain TOBACCO BILL (S 1415) - DRAFT
MAJOR PROVISIONS1

ISSUE	COMMERCE COMMITTEE MARK
MARKETING AND ADVERTISING RESTRICTIONS	<p>Calls for National and State protocols by which industry agrees to no outdoor advertising; no human images or cartoon characters, black and white text only advertising (except in adult periodicals and venues); no animal figures. No color ads on the back face of adult magazines.</p> <p>Limits advertising to FDA/FTC specified media. Restricts glamorization of tobacco.</p> <p>Any advertising that violates the statute or protocol is considered "false and misleading."</p> <p>Liability limits eliminated if tobacco companies challenge or are no longer bound by advertising restrictions.</p> <p>Places size, color, number, and placement restrictions on point-of-sale advertising and displays. Provides for no additional point-of-sale advertising for companies with higher market share.</p> <p>Preemption of further restrictions on advertising or package labeling requirements remains in the Federal Cigarette Labeling and Advertising Act (CLAA).</p> <p>Requires health warnings on advertisements.</p>
WARNINGS, LABELING AND PACKAGING	<p>Requires new, explicit warning labels in bold type. Requires alternating black on white; white on black warning labels for packages. Requires health warnings.</p> <p>Allows FDA to update warnings at any time based on science. Requirements for package warnings other than those set by FDA are preempted by the CLAA.</p>
YOUTH ACCESS RESTRICTIONS	<p>Federal prohibition of sales to minors under 18; requires photo ID if under age 27; requires face to face transactions; bans vending machines and self-service sales except in adult-only facilities, permits mail-order sales subject to FDA review. Administered by FDA.</p>
VENDING MACHINE OWNER COMPENSATION	<p>Bans the sale of tobacco products through the use of vending machines and authorizes a system to compensate the owners of such machines.</p> <p>No funding specified.</p>
CESSATION AND PREVENTION	<p>No funding specified.</p> <p>Authorizes a National Community Action Program; National Cessation Research Program; National Tobacco Free Public Education Program; National Smoking Cessation Program; various studies; counter-advertising and creation of Tobacco Use and Cessation Board.</p>

<p>UNDERAGE TOBACCO USE TARGETS</p>	<p>Sets reduction targets of underage use based on the number of years after enactment of the legislation.</p> <table border="1" data-bbox="579 252 1409 441"> <thead> <tr> <th></th> <th>Cigarettes</th> <th>Smokeless</th> </tr> </thead> <tbody> <tr> <td>3 yrs. --</td> <td>15%</td> <td>12.5%</td> </tr> <tr> <td>5 yrs --</td> <td>30%</td> <td>25%</td> </tr> <tr> <td>7 yrs --</td> <td>50%</td> <td>35%</td> </tr> <tr> <td>10 yrs --</td> <td>60%</td> <td>45%</td> </tr> </tbody> </table> <p>No targets are set for underage use of other tobacco products, such as cigars, little cigars, roll-your-own, or pipes.</p>		Cigarettes	Smokeless	3 yrs. --	15%	12.5%	5 yrs --	30%	25%	7 yrs --	50%	35%	10 yrs --	60%	45%
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<p>LOOK-BACK PENALTIES</p>	<p>Industry-wide penalties only (no firm-specific). Requires HHS to annually determine through surveys (beginning in 3rd year after enactment) the underage daily use of cigarettes and smokeless tobacco during the preceding year. Requires Industry to pay tiered monetary penalties (non-tax deductible) for falling short of youth reduction targets. 1-5 percentage points short: \$80 million per point. 6-10 percentage points short: \$160 million per point. 11 and above percentage points short: \$240 million per point. Yearly cap of 3.5 billion with no tax deductibility of penalty payments. Joint, several & strict liability for penalties. Provides legal actions for companies against another for financial liability. If any company misses its share of target by more than 20 points, company's liability cap is waived for 2 years or until goal is met, whichever is later, with due process. Liability cap is waived for criminal convictions of violations under this act.</p>															
<p>USE OF PENALTY AMOUNTS</p>	<p>Transfers 90% of penalty receipts to grants for states/local governments to further reduce youth smoking. Secretary may retain up to 5% of penalty receipts for administration of the look-back assessment. The final 5% of receipts is for a compliance bonus to reward states and retailers who prevent youths (less than 5%) from successfully purchasing tobacco products. Secretary may withhold 5% of any state's grant if state fails to enforce compliance with youth access restrictions.</p>															

<p>STATE ENFORCEMENT OF YOUTH ACCESS LAWS</p>	<p>Compliance goals set (see above Use of Penalty Amounts) for state and tribal governments. Funding from settlement for enforcement efforts.</p> <p>Repeals the 1992 Synar Amendment, which was an earlier effort to set targets for the percentage of youths who successfully purchase tobacco products. Percentage of funding withheld for non-compliance is greater in Synar (ranging from 20- 40%, although difference in absolute dollar values are not known). This amendment is no longer needed because these requirements replace it.</p>
<p>LICENSING OF RETAILERS</p>	<p>Requires state, tribal and federal licensing program to be funded from settlement. FDA would draft model state program in consultation with state and local officials.</p>
<p>FDA REGULATION OF TOBACCO PRODUCTS AND NICOTINE</p>	<p>Recognizes FDA has broad authority over tobacco including advertising, youth access, and new products.</p> <p>FDA authority over tobacco is separate chapter of FD&C Act to assure FDA authority over tobacco will not affect FDA authority over other regulated products.</p> <p>Provides for FDA authority over youth access. FDA approval of new products.</p> <p>Any ban on nicotine, retail sales, or category of tobacco products would require Presidential notification to Congress and include two-year waiting period for Congress to act. If Congress does not act ban goes into effect.</p> <p>No FDA authority over farmers (e.g., would be no control over genetic manipulation of tobacco leaf).</p> <p>FDA rules must take into account the impact of actions on demand for unregulated contraband products.</p>
<p>CORPORATE CULTURE AND COMPLIANCE, LOBBYISTS AND WHISTLE BLOWERS</p>	<p>Calls for national and state protocols requiring an industry plan to comply with all new laws on the manufacture and distribution of tobacco. Protects industry whistle blowers.</p> <p>Requires lobbyists to comply with the act and agree not to support or oppose any federal or state legislation without consent of manufacturers. Disbands the Tobacco Institute and the Council for Tobacco Research. Industry plan would include specific assessment mechanism and enforcement standards of industry plan to be included in the protocols.</p>

<p>SMOKING RESTRICTIONS IN PUBLIC FACILITIES (ETS)</p>	<p>Restrict smoking in public facilities to enclosed areas. Specifies that employees may not be required to enter smoking areas. Exempts restaurants (other than fast food), bars, private clubs, hotel guest rooms, casinos, bingo parlors, tobacco outlets, prisons, private residences and any building with any of the above facilities/functions in them. Allows states to opt out. Authorizes incentive grant program for states.</p>
<p>INDUSTRY PAYMENTS</p>	<p>Establishes National Tobacco Settlement Trust Fund. Calls for industry to pay \$10 billion up-front. Yearly payments required of industry: 1999 -- \$14.4 billion 2000 -- \$15.4 billion 2001 -- \$17.7 billion 2002 -- \$21 billion 2003 -- \$23.6 billion Each year thereafter, \$23.6 billion in real dollars (though the bill has a misprint and says the 2004 amount is \$21.0 billion.) Payments are volume adjusted -- increased if consumption volume increases and decreased if volume decreases from 2004 levels. Payments are tax deductible. Nominal Net Receipts (FY99-03) -- \$71.1 billion Implied Per-Pack Equivalentents (Real 1999 \$): 1999 -- 65 cents per pack 2000 -- 70 cents per pack 2001 -- 80 cents per pack 2002 -- \$1 per pack 2003 -- \$1.10 per pack</p>

<p>SPENDING FROM TRUST FUND</p>	<p>Most spending decisions are left to the floor of the Senate. Committee mark specifies funding for:</p> <table data-bbox="579 254 1300 562"> <tr> <td></td> <td style="text-align: right;">5-Year Funding</td> </tr> <tr> <td>FDA:</td> <td style="text-align: right;">\$2 billion</td> </tr> <tr> <td>States:</td> <td style="text-align: right;">\$26 billion (OMB estimate)</td> </tr> <tr> <td>Farmers:</td> <td style="text-align: right;">\$11 billion</td> </tr> <tr> <td>International:</td> <td style="text-align: right;">\$1 billion</td> </tr> <tr> <td>Total Spending:</td> <td style="text-align: right;">\$39 billion</td> </tr> <tr> <td>Receipts Less Spending:</td> <td style="text-align: right;">\$32 billion</td> </tr> </table> <p>Although it is not clearly indicated in the bill, we understand that McCain intended to allow manufacturers to deduct 80% of the \$6.5 annual liability cap (see liability section below) from their annual payments. This could reduce the net receipts by an additional \$26 billion over 5 years.</p> <p>The bill also authorizes funding for NIH, CDC, and AHCPR research using language from the Conrad bill, which included \$17 billion for these activities.</p>		5-Year Funding	FDA:	\$2 billion	States:	\$26 billion (OMB estimate)	Farmers:	\$11 billion	International:	\$1 billion	Total Spending:	\$39 billion	Receipts Less Spending:	\$32 billion
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International:	\$1 billion														
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Receipts Less Spending:	\$32 billion														
<p>FUNDING PRIORITIES</p>	<p>In absence of specific funding recommendations, the bill includes a "Sense of the Senate" amendment indicating that the funds raised by this act should be used to support the following priorities:</p> <ol data-bbox="579 1020 1396 1472" style="list-style-type: none"> 1. Tobacco use prevention and cessation. 2. Tobacco related health research. 3. Assist tobacco farmers and tobacco dependent communities. 4. Reimburse public health care financing programs for tobacco related costs, including Medicare. 5. Settle with and reimburse states for tobacco related health care costs and damages, including Medicaid. 6. Create a Tobacco Asbestos Trust Fund. 7. Provide funding for the Federal Black Lung Program. 8. Child Care 9. Clinical Trials at NIH. 10. Veterans. 														
<p>CONSENT DECREES AND NATIONAL PROTOCOL</p>	<p>Manufacturers and states enter into consent decrees that include many of the provisions of the Act, and include a waiver of Constitutional claims.</p> <p>Within 6 months of enactment requires each manufacturer to enter into a legally binding and enforceable contract (The National Tobacco Control Protocol) on both the federal and state level. Federal protocol to be executed with U.S. Attorney General in consultation with the Secretary of HHS. State protocol to be executed with State Attorney General in consultation with state Governor.</p>														

NON-PARTICIPATING MANUFACTURERS	Denies non-participating manufacturers liability protection and imposes user fees on them equal to the annual assessment paid by participating manufacturers. In addition, non-participating manufacturers must make annual payments into a reserve fund to settle liability claims; the amount is equal to 150% of the payment it would have paid under the bill if the manufacturer had actually been a party to the Settlement.
ATTORNEYS' FEES	All attorney's fees and costs paid by industry outside the payments made under this act. Three member arbitration panel in which plaintiff representative and defendant representatives pick a third member.
CIVIL LIABILITY RESTRICTIONS	Establishes a \$6.5 billion cap on annual industry payments for individual liability claims against participating manufacturers. Permits suits by private plaintiffs (incl. class actions and third-party suits), and claims by the federal government, but preempts suits brought by states, local governments and Indian tribes. Permits punitive damages for past conduct (within the cap) and punitive damages for future conduct (outside the cap). Prohibits addiction and dependence claims. Creates a federal cause of action with concurrent jurisdiction in state and federal courts for tobacco-related health injuries. Requires courts to sever trials involving participating and non-participating manufacturers. Creates rebuttable presumptions that: 1) nicotine is addictive; and 2) certain specified diseases are caused by use of tobacco products. The bill does not appear to establish a fund of money from which judgements and settlements are paid (although this may have been intended). Instead, the bill requires the Secretary of the Treasury to keep a record of payments made and judgments and settlements. By rule, the Secretary is to establish a mechanism for ensuring that payments are made to all entitled in the year which the award was made or in a subsequent year. The press release accompanying the bill suggests that the drafters of the bill intended to include the 80% payment; the bill, as drafted, however, does not clearly establish such a fund and makes no reference to the 20%/80% model.

<p>INDUSTRY DOCUMENT DISCLOSURE</p>	<p>Creates National Tobacco Document Depository Expands the availability of documents in a public depository for use by plaintiffs in actions against the industry and provides for efficient use of these documents. Requires manufacturers to deposit: 1) all deposition of corporate representatives; 2) depositions of all expert and fact witnesses; 3) answers to interrogatories in all cases; 4) court orders on substantive issues; 5) all documents provided in recent specified lawsuits; 6) all health research documents; 7) document indexes maintained by the industry. Allows manufacturers to determine and withhold documents protected by attorney-client privilege. Requires manufacturers to deposit a detailed, itemized log of privileged documents. Establishes a three-judge federal arbitration panel to settle disputes over making privileged documents public.</p>
<p>AGRICULTURE AND RURAL COMMUNITY ASSISTANCE</p>	<p>Specifies \$11 billion over 5 years and \$25 billion over 25 years. Includes the LEAF Act sponsored by Senator Ford. Creates Tobacco Community Revitalization Trust Fund from payments by industry The fund pays for lost tobacco, quota, administrative costs of the tobacco program, to tobacco community Economic Development Grants, Farmer Opportunity Grant Program, and the Tobacco Worker Transition Program. Offers farmers opportunity to stop producing tobacco by selling their quotas. Provides tobacco farmers with educational and economic assistance to find another means of living. Provides general immunity for tobacco producers and warehouse owners.</p>
<p>NATIVE AMERICANS</p>	<p>Provides that the requirements of this Act relating to the manufacture, distribution, and sale of tobacco products apply on tribal lands. Considers tribes as states for the purposes of eligibility for public health funding. Requires Indian tribes to collect any tobacco excise or sale taxes on non-members of the tribes. The Indian tribe shall remit such taxes to the U.S. Treasury, which shall, in turn remit the taxes to the State in which they were collected.</p>
<p>NO STATE OR LOCAL PREEMPTION</p>	<p>Allows state and local governments to impose any additional tobacco product control measures that are not inconsistent with the provisions of this Act. However, preemption is imposed in various sections of the Act for certain issues (e.g., packaging and labeling; advertising restrictions; product standards).</p>

INTERNATIONAL TOBACCO CONTROL	Creates non-profit corporation and provides funds for international tobacco control programs. Prohibits use of federal funds by federal officials to promote U.S. tobacco exports or to seek to remove nondiscriminatory restrictions on tobacco products by foreign countries. Prohibits U.S. employees of tobacco companies from marketing to children overseas. Requires tobacco product exports to carry the same warning labels required on products sold in the U.S.
ANTI-TRUST EXEMPTION	Antitrust laws of the U.S. do not apply to the joint discussion, consideration, review, action, agreement, or understanding by or among any participating manufacturers, for the purposes of, and limit to -- (1) entering into and complying with the Protocol, Trust Agreement, or Consent Decree; (2) refusing to deal with a distributor, retailer, or other seller of tobacco products who distributes such products for sale to, or offers for sale or sells such products to, underage persons, or who otherwise fails to comply with the applicable requirements for the Act, the Protocol, or Consent Decree; or (3) submitting an application relating to a plan or program submitted to the U.S. Attorney General for approval that is designed to reduce the use of tobacco products by underage individuals.
MANDATED PASS THROUGH PAYMENTS	Requires industry to pass through 100% of payments to cigarette prices and to adopt industry plan to comply with law and protocol.
VETERANS	Includes an Amendment sponsored by Sen. Rockefeller that authorizes the Veteran's Administration to sue liable third parties for reimbursement of paying monthly disability compensation for tobacco-related diseases.

Administration Announced New Rules To Improve Safety of Juice. On Sunday, we leaked the announcement of two proposed regulations by the Food and Drug Administration (FDA) to improve the safety of fruit and vegetable juices. The first regulation would require that all fruit and vegetable juice processors implement a Hazard Analysis and Critical Control Point (HACCP) system which will ensure that processors take extra steps to reduce the numbers of microorganisms that may be in their products. Retailers of packaged juice, as well as processors who sell less than 40,000 gallons of fresh juice per year, would be exempt from this requirement. The second proposed rule would require any packaged untreated juice to be labeled with a warning statement advising consumers of the potential risks of juice that has not been processed to eliminate dangerous bacteria. This requirement will apply to retail and other processors who package untreated juice for consumption off-site --such as grocery stores that squeeze and bottle juice for home use. But retail sellers of juice for consumption on-site --such as restaurants and children's lemonade stands --will be exempt from this labeling requirement. Although 98 percent of juice sold in the United States is pasteurized, the FDA estimates that there are up to 48,000 juice-related illnesses per year. In 1996, one sixteen-month-old girl died, and at least 66 others were sickened in the western United States and Canada from drinking untreated Odwalla brand apple juice. The Administration received three days of positive press on this announcement, including coverage on ABC News, CNN, every major newspaper, and a lead story on CBS News on Tuesday.



U.S. SENATE COMMITTEE ON
Commerce, Science, and Transportation

JOHN McCAIN, Chairman

www.senate.gov/~commerce

Tobacco - McLain Questions - kw

FAX

CC: EK
Tom
JRM
+ return

TO: Bruce Reed

OFFICE: _____

FAX NO: 456-2878

DATE: 2/2/98 TIME: 1:23 pm

PAGE 1 OF: 11

FROM: John Raitt (202) 224- 1251

SUBJECT: _____

69297

2/4/98 - Sen. McCain

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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-8125

JOHN RAJOT, STAFF DIRECTOR
VAN A. SCHLAGER, DEMOCRATIC CHIEF COUNSEL AND STAFF DIRECTOR

February 2, 1998

The Honorable William Clinton
The White House
Washington, DC 20500

Dear Mr. President:

As you know, Congress intends to consider comprehensive tobacco legislation during the upcoming legislative session.

The issues raised by the global tobacco settlement and involved in the crafting of legislation to implement responsible national tobacco policy, are extremely diverse and intensely complex.

As I stated in my letter to you of six weeks ago, it's imperative that Congress and the administration work together in a cooperative and bi-partisan fashion if we are to craft a bill that will gain public support, Congressional approval and your signature.

In that regard, it will be particularly important for the Administration to exercise its executive responsibilities by providing Congress with detailed assessment of the provisions of pending tobacco legislation, and your specific policy and legislative recommendations.

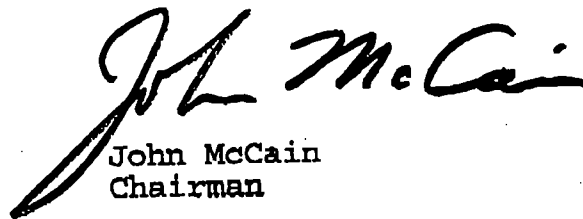
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These are the first in a series of questions to which we must have answers if we are to properly assess global tobacco settlement legislation, and move forward with the most effective and appropriate bill.

With the advice and expertise of the executive branch, we can ensure that federal tobacco legislation is based on a firm understanding of the facts, grounded in a solid understanding of the true consequences of our actions, and formulated by consensus. Most importantly, these disciplines will enhance our ability to achieve our most important goal of dramatically reducing youth smoking.

Thank you for your assistance in providing the Committee and Congress with the information requested. With regards,

Sincerely,



John McCain
Chairman

JM/jr

QUESTIONS REGARDING GLOBAL TOBACCO SETTLEMENT LEGISLATION

THE FOLLOWING IS THE FIRST SET IN A SERIES OF QUESTIONS PERTAINING TO S. 1415, LEGISLATION IMPLEMENTING THE GLOBAL TOBACCO SETTLEMENT PROPOSAL AGREED TO BY THE ATTORNEYS GENERAL OF THE VARIOUS STATES AND THE TOBACCO INDUSTRY.

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4. What specific changes, if any, in the legislative language implementing the ban would the administration propose? Please provide specifics.

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The agreement (bill page 15) bans the use of human figures and cartoons in tobacco advertising.

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The agreement (bill page 16) bans tobacco advertising on the internet.

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4. Is it appropriate to grant companies with greater cigarette market share additional point-of-sale advertising rights? If so, why? If not, why not?

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The agreement (bill page 17) includes a prohibition on arrangements to limit the ability of a retailer to display permissible point-of-sale advertisement or promotional material originating with another manufacturer or distributor.

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2. Does the administration believe that the threshold for the restriction of two million readers is the appropriate threshold?

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1. Can the marketing and advertising restrictions envisioned in the settlement be constitutionally imposed, with or without the industry's consent? Please discuss.

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The agreement, (bill page 26- 28), authorizes a variety of new warning labels for tobacco products.

1. Does the administration believe that these are appropriate warning labels?

2. Does the administration possess data suggesting that these warning will effectively reduce smoking, particularly youth smoking?

3. What data suggests that the various new warnings will

be as or more effective than the current warning requirements?

4. Does the administration support the provisions authorizing specific new labels? If so, why? If not, why not?

5. What specific changes, if any, in the legislative language implementing this provision would the administration propose? Please provide specifics.

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The agreement (bill page 28-29) specifies, the size, placement and print type of the various tobacco warning labels.

1. What data does the administration have to suggest that these specifications will reduce smoking, particularly youth smoking?

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3. Does the administration support the exception (page 29) provided for flip-top cigarette packages? If so, why? If not, why not?

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The agreement (bill page 34) provides for various new warning label options for smokeless tobacco

1. What data does the administration have to suggest that the various new warning labels will effectively reduce the use of smokeless tobacco, particularly among youth?

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The agreement (bill page 36-37) provides for the enforcement of advertising, marketing and labeling restrictions.

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The agreement (bill page 38) prohibits state and local requirements related to the packaging or advertising of cigarettes or smokeless tobacco.

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The agreement (bill page 40) exempts exports from the packaging, labeling and advertising requirements.

1. Does the administration support this exemption? If so, why? If not, why not?

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3. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

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The agreement (bill page 40-41), prohibits the sale of tobacco products to individuals under 18 years of age; requires that retailers verify the age of individuals purchasing tobacco; and exempts individuals 27 years of age or older from the photo identification requirement.

1. Does the administration support these provisions? If so, why? If not, why not?

2. How does the administration envision that this provision will be enforced and can it be enforced effectively?

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The agreement (bill page 41) prohibits the sale of less than a full pack of cigarettes.

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2. What entity does the administration envision would enforce the licensure requirement if a state should be unable or unwilling to implement the licensure program?

3. Has the administration developed or formulated the cost of a licensure program?

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The agreement, (bill page 94), provides anti-trust exemption for the tobacco industry.

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1. Under the agreement, and the implementing legislation, what is the assurance that new entrants into the tobacco industry will comply with the statute and any related consent agreements not to challenge the legality of the agreement implementation legislation.

###



U.S. SENATE COMMITTEE ON

Commerce, Science, and Transportation

JOHN McCAIN, Chairman

www.senate.gov/~commerce

*Tobacco -
McCain Questions - HW*

FAX

*CC: EK
Tom
JRM
+ return*

TO: Bruce Reed

OFFICE: _____

FAX NO: 456-2878

DATE: 2/2/98 TIME: 1:23 pm

PAGE 1 OF: 11

FROM: John Ridd (202) 224 - 1251

SUBJECT: _____

JOHN MCCAIN, ARIZONA, CHAIRMAN

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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-8125

JOHN RAJOT, STAFF DIRECTOR
NANA SCHLAGER, DEMOCRATIC CHIEF COUNSEL AND STAFF DIRECTOR

February 2, 1998

The Honorable William Clinton
The White House
Washington, DC 20500

Dear Mr. President:

As you know, Congress intends to consider comprehensive tobacco legislation during the upcoming legislative session.

The issues raised by the global tobacco settlement and involved in the crafting of legislation to implement responsible national tobacco policy, are extremely diverse and intensely complex.

As I stated in my letter to you of six weeks ago, it's imperative that Congress and the administration work together in a cooperative and bi-partisan fashion if we are to craft a bill that will gain public support, Congressional approval and your signature.

In that regard, it will be particularly important for the Administration to exercise its executive responsibilities by providing Congress with detailed assessment of the provisions of pending tobacco legislation, and your specific policy and legislative recommendations.

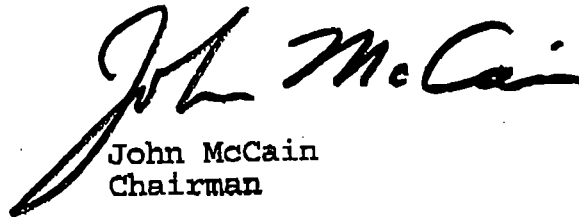
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###

Draft Agenda for 2/5/98

I. Developments

- * Conrad bill
- * Today's news/cmtee hrngs
- * Budget (hand out)
- * Farmers-- USDA progress report, Glickman to KY.-- OPL
- * McCain letter (TF)

II. Upcoming

- * VP events → 2/20 Phoenix Forum
- * Radio address on Doggett
- * Other

Licensing - Friday
Downs - Monday
Morrison

Klein -
danger of kid's health

- Clarke/Martin

- Match hrngs → Civil liability & 1st amendment

Koop →

→ Compulsory legislative jurisdiction - necessity of prior notice

JOHN MCCAIN, ARIZONA, CHAIRMAN	CHRIST P. HOLLINGS, SOUTH CAROLINA
TED STEVENS, ALASKA	DANIEL K. INOUE, HAWAII
CONRAD BURNS, MONTANA	WENDELL H. FORD, KENTUCKY
BLAKE GORTON, WASHINGTON	JOHN D. ROCKWELLER IV, WEST VIRGINIA
TRENT LOTT, MISSISSIPPI	JOHN P. KERRY, MASSACHUSETTS
KAY BAILEY HUTCHISON, TEXAS	JOHN B. BREAUX, LOUISIANA
OLYMPIA J. SNOWE, MAINE	RICHARD H. BRYAN, NEVADA
JOHN ASHCROFT, MISSOURI	BYRON L. DORGAN, NORTH DAKOTA
BILL FRIST, TENNESSEE	RON WYDEN, OREGON
SPENCER ABRAHAM, MICHIGAN	
RAM BROWNBACK, INDIANA	

JOHN RAJY, STAFF DIRECTOR
 IVAN A. SCHLAGER, DEMOCRATIC CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510-8129

December 15, 1997

*Tobacco
 settlement
 SW*

*Tom/John
 what
 response?
 BR*

The Honorable William Clinton
 The White House
 Washington, DC 20500

Dear Mr. President:

Shortly before adjournment of the congressional session last November, Senator Hollings and I, among others, introduced legislation, S. 1414 and S. 1415, which would implement the proposed global tobacco settlement reached between the State Attorneys General and the tobacco industry.

The legislation will serve as a vehicle for analysis, debate and action on how to best achieve federal tobacco policy goals. The Senate committees which have jurisdiction over tobacco policy issues will be holding extensive hearings on the legislation and relevant matters in the coming session.

The Senate Committee on Commerce, Science and Transportation has a large portion of the jurisdiction on issues touched by the settlement. As Chairman of the panel I intend to hold a series of hearings in February and March on the tobacco settlement issues within the Committee's jurisdiction, and we envision the Administration playing a key role in those hearings.

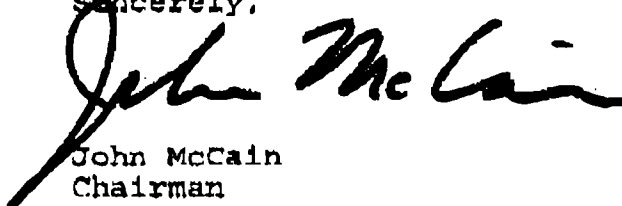
We're confident that you will agree, consensus is critical if we are to enact a bill that will win public support and best serve the interests of the nation.

In order to build such consensus, and to properly develop the best possible legislation, we believe it's essential that the Administration be prepared to testify with detail and specificity on the terms of the pending tobacco bill, and to make specific proposals regarding whether and how bill language should be modified to most appropriately and effectively achieve federal tobacco policy goals.

I would like to ensure that the appropriate administration representative is prepared to testify at those hearings and to provide the Committee with the Administration's analysis, specific policy positions and legislative proposals. We respectfully request your assistance and leadership in ensuring that the Administration takes what actions are necessary to fully prepare for that effort.

Thank you for your consideration and assistance. I'm confident that, working together, Congress and the Administration can produce a bill that will help us meet federal tobacco policy goals--the most vital of which is to reduce, dramatically, the number of children and youth who smoke.

Sincerely,

A handwritten signature in black ink that reads "John McCain". The signature is written in a cursive, flowing style. The first name "John" is written with a large, prominent initial "J". The last name "McCain" is written in a similar cursive style, with the "M" being particularly large and stylized. The signature is positioned above the typed name and title.

John McCain
Chairman

JM/jr



U.S. SENATOR • ARIZONA

DEC 16 11:10

JOHN McCAINwww.senate.gov/~mccain**PRESS RELEASE****FOR IMMEDIATE RELEASE
MONDAY, DECEMBER 15, 1997****CONTACT: PIA PIALORSI 202-224-2670
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McCAIN CALLS FOR "SPECIFICS" FROM WHITE HOUSE AT TOBACCO HEARINGS

WASHINGTON, D.C. – Senator John McCain (R-AZ), Chairman of the Committee on Commerce, Science, and Transportation, today requested that the Administration participate in a series of tobacco hearings to be held early next year to provide detailed analysis and specifics of the tobacco settlement. McCain believes that the Administration's input is critical to build congressional consensus and public support on the issue, in addition to effectively achieving federal tobacco policy goals.

"I want to ensure that an Administration representative is prepared to testify at our hearings, and provide the Committee with the Administration's analysis, specific policy position and legislative proposals," McCain said in a letter to President Clinton today.

"There's little to be gained from another recitation of the problem or reiteration of general goals by the Administration," McCain said. "What Congress and the public need are specific comments and recommendations on the terms of the global tobacco settlement and to what extent they should be amended to best meet our public health objectives."

In November, Senators McCain, Ernest Hollings (D-SC), Slade Gorton (R-WA), and John Breaux (D-LA) introduced legislation, S.1414 and S.1415, which would implement the proposed global tobacco settlement reached between the State Attorneys General and the tobacco industry.

"I fear the White House may simply opt to provide general observations, and evade the tougher, specific direction we need," McCain said. "In order to gain the public support necessary to move such sweeping legislation, the Administration's leadership and expertise is absolutely necessary."

The Senate Committee on Commerce, Science and Transportation has a large area of jurisdiction including marketing, advertising, labeling and liability issues. To date, the Committee has held three hearings including the Global Settlement of Tobacco Litigation on July 29, Tobacco Marketing and Youth on September 16, and the Public Health Benefits of a Global Settlement of Tobacco Litigation on October 9.

(letter attached)

FEB. 2, 1958

Tobacco Settlement

QUESTIONS REGARDING GLOBAL TOBACCO SETTLEMENT LEGISLATION

THE FOLLOWING IS THE FIRST SET IN A SERIES OF QUESTIONS PERTAINING TO S. 1415, LEGISLATION IMPLEMENTING THE GLOBAL TOBACCO SETTLEMENT PROPOSAL AGREED TO BY THE ATTORNEYS GENERAL OF THE VARIOUS STATES AND THE TOBACCO INDUSTRY.

QUESTIONS RELATED TO SPECIFIC LEGISLATIVE LANGUAGE SHOULD USE S. 1415 AS THE REFERENCE. ADDITIONAL QUESTIONS WILL FOLLOW.

I. BAN ON OUTDOOR ADVERTISING, INCLUDING IN STADIA AND ARENAS

The agreement (bill page 15) bans outdoor tobacco product advertising, and tobacco advertising in stadia and arena.

HHS 1. What data does the administration have to substantiate that a ban on outdoor advertising, including stadia and arenas will reduce smoking and, in particular, youth smoking?

HHS 2. To what extent do you believe such restrictions be expected to reduce smoking?

DoJ? HHS 3. Does the administration support such a ban. If so, why? If not, why not?

DoJ? HHS
Legal Dept
POT 4. What specific changes, if any, in the legislative language implementing the ban would the administration propose? Please provide specifics.

II. BAN ON HUMAN FIGURES AND CARTOON FIGURES IN ADVERTISING

The agreement (bill page 15) bans the use of human figures and cartoons in tobacco advertising.

HHS 1. What data does the administration have to substantiate that barring the use of human figures and cartoon advertising will reduce smoking, in particular, youth smoking?

HHS 2. To what extent do you believe such restrictions can be counted on to reduce smoking?

Courts 3. What entity would you propose to determine what constitutes a human image or cartoon character?

4. What penalty do you believe is appropriate and should accrue for a violation of the prohibition on material containing figures deemed to be human or cartoon?

5. Does the administration support this ban. If so, why? If not why not?

6. What specific changes, if any, in the legislative language implementing the ban would the administration propose? Please provide specifics.

DoJ
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III. BAN ON INTERNET ADVERTISING

The agreement (bill page 16) bans tobacco advertising on the internet.

1. Does the administration support such a ban? If so, why? If not, why not?

DoJ
Legal
Staff

2. How can and should a ban on internet advertising of cigarettes be enforced?

3. What, if any, concerns does the administration have regarding Constitutional free speech issues raised by any such ban?

DoJ

4. What specific changes, if any, in the legislative language implementing the ban would the administration propose?

DoJ

IV. BAN ON POINT-OF-SALE ADVERTISING

The agreement (bill page 16) bans point-of-sale tobacco except for advertisements which comply with that certain restrictions.

1. What data does the administration have to substantiate that a ban on point-of-sale advertising would reduce smoking, in particular, youth smoking?

HHS

2. Does the administration support such a ban? If so, why? If not, why not?

DoJ
HHS

3. Is the exemption of point-of-sale advertisement for adult stores and tobacco outlets appropriate?

DoJ

4. Is it appropriate to grant companies with greater cigarette market share additional point-of-sale advertising rights? If so, why? If not, why not?

DoJ

5. Does such a privilege constitute a statutorily granted competitive advantage? Please discuss.

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DoJ

6. Does the administration support this grant? If so, why? If not, why not?

DoJ

7. What specific changes, if any, in the legislative language implement the ban would the administration propose? Please provide specifics.

DoJ
HHS

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V. LIMITATIONS ON POINT-OF-SALE ADVERTISING

The agreement (bill page 17) specifies the size and design of permissible point-of-sale advertising.

HHS 1. What data does the administration possess to suggest that such limitations will reduce smoking, particularly among youth?

DOT 2. Does the administration support this provision? If so, why? If not, why not?

3. If so, what is the justification for statutorily determining a particular size limitation and for the particular size and restrictions proposed?

DOT 4. What specific changes in legislative language, if any, does the administration propose? Please provide specifics.

VI. BAN ON ADVERTISING RESTRICTION AGREEMENTS

The agreement (bill page 17) includes a prohibition on arrangements to limit the ability of a retailer to display permissible point-of-sale advertisement or promotional material originating with another manufacturer or distributor.

DOT 1. Are such agreements currently against federal or state law? If so, is such a provision necessary?

DOT 2. Does the administration support such a provision? If so, why? If not, why not?

DOT 3. Does the administration support the limitation. If so, why? If not, why not?

DOT 4. What specific changes, if any, in the legislative language implement the ban would the administration propose? Please provide specifics.

VII. GLAMORIZATION OF TOBACCO

The agreement, (bill page 20) prohibits payments to glamorize or promote the image or use of tobacco through pint, films or live performance that appeals to individuals under 18 years of age.

HHS 1. What data does the administration possess to indicate whether and to what extent this provision will reduce smoking, particularly among youth?

HHS
COURT? 2. What entity does the administration propose will determine what activity constitutes promoting the image or use of a tobacco produce?

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DOT

- 3. How does the administration envision such a ban will be enforced?
- 4. Does the administration support such limitations?
- 5. What specific changes, if any, in the legislative language would the administration propose? Please provide specifics.

VIII. RESTRICTION ON COLOR ADVERTISEMENTS

The agreement (bill page 21) prohibits the use of color advertising except in adult publications.

- 1. What data does the administration have to substantiate that a ban on color ads, except in publications with limited youth readership, will reduce smoking, particularly youth smoking?
- 2. Does the administration believe that the threshold for the restriction of two million readers is the appropriate threshold?
- 3. How does the administration envision readership demographics being determined?
- 4. How would this restriction be enforced?
- 5. Does the administration support this restriction? If so, why? If not, why not?
- 6. What specific changes, if any, in the legislative language implementing the restriction does the administration propose? Please provide specifics.

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IX. GENERAL QUESTION REGARDING MARKETING/ADVERTISING BAN

- 1. Can the marketing and advertising restrictions envisioned in the settlement be constitutionally imposed, with or without the industry's consent? Please discuss.

DOT

X. WARNING LABELS

The agreement, (bill page 26- 28), authorizes a variety of new warning labels for tobacco products.

- 1. Does the administration believe that these are appropriate warning labels?
- 2. Does the administration possess data suggesting that these warning will effectively reduce smoking, particularly youth smoking?
- 3. What data suggests that the various new warnings will

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be as or more effective than the current warning requirements?

HHS, DOT
4. Does the administration support the provisions authorizing specific new labels? If so, why? If not, why not?

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HHS
5. What specific changes, if any, in the legislative language implementing this provision would the administration propose? Please provide specifics.

IX. WARNING LABEL SIZE AND LOCATION REQUIREMENTS

The agreement (bill page 28-29) specifies, the size, placement and print type of the various tobacco warning labels.

HHS
1. What data does the administration have to suggest that these specifications will reduce smoking, particularly youth smoking?

DOT
2. Does the administration support these particular specifications? If so, why? If not why not?

DOT
3. Does the administration support the exception (page 29) provided for flip-top cigarette packages? If so, why? If not, why not?

DOT
4. What specific changes, if any, in the legislative language to implement these restrictions would the administration propose? Please provide specifics.

X. SMOKELESS TOBACCO ALTERNATIVE LABELS

The agreement (bill page 34) provides for various new warning label options for smokeless tobacco

HHS
1. What data does the administration have to suggest that the various new warning labels will effectively reduce the use of smokeless tobacco, particularly among youth?

DOT
2. Does the administration support the use of these alternative labels?

DOT
3. What changes, if any, to the legislative language implementing this provision would the administration propose? Please provide specifics.

XI. ENFORCEMENT OF ADVERTISING, MARKETING AND LABELING RESTRICTIONS

The agreement (bill page 36-37) provides for the enforcement of advertising, marketing and labeling restrictions.

DOT 1. Does the administration support the enforcement provisions regarding advertising, marketing and labeling? If so why? If not, why not?

DOT 2. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specific language.

XII. PREEMPTION OF STATE AND LOCAL ACTION

The agreement (bill page 38) prohibits state and local requirements related to the packaging or advertising of cigarettes or smokeless tobacco.

DOT 1. Does the administration support such preemption? If so, why? If not, why not?

DOT 2. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specific language.

XIII. EXEMPTION OF EXPORTS

The agreement (bill page 40) exempts exports from the packaging, labeling and advertising requirements.

State USTR USDA DOT 1. Does the administration support this exemption? If so, why? If not, why not?

State USTR DOT 2. What ramifications does this provision have in the area of foreign relations?

DOT 3. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

XIV. RESTRICTION ON ACCESS TO TOBACCO PRODUCTS

The agreement (bill page 40-41), prohibits the sale of tobacco products to individuals under 18 years of age; requires that retailers verify the age of individuals purchasing tobacco; and exempts individuals 27 years of age or older from the photo identification requirement.

HHS, DOT 1. Does the administration support these provisions? If so, why? If not, why not?

HHS, DOT 2. How does the administration envision that this provision will be enforced and can it be enforced effectively?

DOT 3. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

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XV. PROHIBITION ON SALE OF LESS THAN A FULL PACK OF CIGARETTES

The agreement (bill page 41) prohibits the sale of less than a full pack of cigarettes.

DOT 1. Does the administration support this prohibition? If so, why? If not, why not?

DOT 2. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

XVI. STATE LICENSURE TO SELL TOBACCO

The agreement, (bill page 44) requires states to license sellers of tobacco products.

HHS 1. What data, if any, does the administration have to indicate that licensure will effectively reduce access to tobacco by minors?

DOT 2. What entity does the administration envision would enforce the licensure requirement if a state should be unable or unwilling to implement the licensure program?

HHS 3. Has the administration developed or formulated the cost of a licensure program?

HHS DOT 4. Does the administration support the licensure program? If so, why? If not, why not?

DOT HHS 5. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

XVII. ANTI-TRUST EXEMPTION

The agreement, (bill page 94), provides anti-trust exemption for the tobacco industry.

DOT 1. Does the administration support such an exemption? If so, why? If not, why not?

DOT 2. Could such an exemption be used to set prices beyond those necessary to deter youth smoking, but to increase profits for the industry?

DOT 3. What changes in legislative language, if any, does the administration recommend regarding this provision? Please provide specifics.

XVIII. APPLICABILITY TO NEW ENTRANTS IN TOBACCO INDUSTRY

1. Under the agreement, and the implementing legislation, what is the assurance that new entrants into the tobacco industry will comply with the statute and any related consent agreements not to challenge the legality of the agreement implementation legislation.

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White House, McCain Agree on Amendments to Tobacco Bill

By JOHN F. HARRIS
and SAUNDRA TORRY
Washington Post Staff Writers

Days before the Senate is to vote on comprehensive tobacco legislation, President Clinton is ready to bless a Republican-drafted bill that extends limited protection from lawsuits to cigarette companies, and his aides are busily trying to line up support for the measure from anti-smoking activists.

Following several days of feverish negotiations, Sen. John McCain (R-Ariz.) and senior White House officials said yesterday they have reached broad agreement on amendments to the McCain-drafted bill that is set for debate in the Senate as early as Monday.

The amendments would increase the maximum liability of cigarette makers to civil lawsuits and set terms for how the \$65 billion—the amount the bill is predicted to raise in its first five years—would be

disbursed among states, the federal government and tobacco farmers.

The changes, according to senior administration officials, would strengthen the bill sufficiently for Clinton to sign it—a commitment the White House had never stated previously. Aides to McCain and Clinton cautioned that the two sides reached agreement only in principle, and that specific language is still being drafted.

Even so, both sides felt confident enough to declare a breakthrough.

"We are in agreement," McCain said in an interview. "We aren't opposing each other, and I think it strengthens our position to have that agreement."

"As discussions stand now, this legislation achieves the president's principles and it makes strong, bipartisan, comprehensive anti-youth smoking legislation definitely within reach and doable," said White House senior adviser Rahm Emanuel.

At the urging of White House Chief of Staff Erskine B. Bowles and domestic policy adviser Bruce Reed, who have been shepherding tobacco negotiations for the administration, McCain agreed to changes in several broad categories.

For the first time, McCain's bill would specify how the proceeds from tobacco legislation would be divided. Forty percent of the money, about \$26 billion over five years, would go to states. Twenty-two percent, or \$14.3 billion, would be spent on federal medical research. Another 22 percent would go to anti-tobacco efforts, including counter-advertising and programs to help smokers quit. The balance of \$10.4 billion, or 16 percent, would go to help tobacco farmers whose livelihood suffers as smoking declines.

Another critical area of agreement is on liability caps for the tobacco industry. McCain's original bill guaranteed cigarette makers

that they would pay no more than \$6.5 billion a year from losses in civil lawsuits. Under the amendments McCain will offer to his own bill, the cap would rise to \$8 billion.

There are also tougher provisions if the major cigarette companies fail to meet targets to reduce youth smoking. The bill anticipates a 30 percent reduction over five years, and 60 percent over a decade. If the industry fails to meet these targets, it could pay as much as \$4 billion annually—a figure up modestly from the \$3.5 billion McCain originally proposed.

Perhaps more important, individual companies would have to pay additional fines if market surveys showed young people smoking their brands in disproportionate numbers. For each additional youth smoker, a firm would have to pay a fee twice the estimated lifetime profits it makes from a typical smoker.

McCain and the White House

also agreed to changes that would require states to accept federal guidelines for curbing secondhand smoke or demonstrate that they have their own equally effective rules. And they agreed to narrow other protections the original bill would have given the tobacco industry from antitrust and civil liability laws.

From the White House vantage point, the critical question is whether the changes Bowles and Reed won from McCain will satisfy other Democrats and anti-smoking activists, who have fretted that Clinton may be too eager to strike a deal. Reed and Bowles met at the White House yesterday with several public health advocates, winning a modestly positive response.

The White House has "significantly strengthened our [public health] issues," said Linda Crawford of the American Cancer Society. "Let's say the glass is half-full and not half-empty at this point."

David A. Kessler, former head of the Food and Drug Administration, was cautious. "There's still a substantial way to go," said Kessler, who wants to strip all liability protections. Former surgeon general C. Everett Koop called the changes "an improvement, but let's go further."

Administration officials said that nothing in their agreement with McCain requires them to offer other amendments that would be even tougher on tobacco. Senators, for example, want to increase cigarette taxes to raise the per-pack price by \$1.50 over three years, compared with the \$1.10 over five years that McCain is seeking.

"The White House has hoped move the ball in the right direction," said Sen. John F. Kerry (D-Mass.). Sen. Kent Conrad (N.D.), who has led a Democratic task force on tobacco, agreed, adding, "But is it the end of the process? No."

John McCain