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Tobacco Waxman

FAX COVER

**COMMITTEE ON GOVERNMENT REFORM
AND OVERSIGHT**

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DATE: 2-26-98

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FROM: Phil Barnett

SUBJECT: Performance Objectives

NO. OF PAGES 10
(EXCLUDING COVER SHEET)

COMMENT: Tom,

Draft - Confidential - For
technical assist.

Thanks, PB

1 **TITLE ____—PERFORMANCE**
2 **OBJECTIVES**

3 **SEC. ____ SHORT TITLE.**

4 This title may be cited as the “NO Tobacco for Kids
5 Act”.

6 **SEC. ____ CHILD TOBACCO USE SURVEYS.**

7 (a) **ANNUAL PERFORMANCE SURVEY.**—Within 1 year
8 after the date of the enactment of this title and annually
9 thereafter the Secretary shall conduct a survey to deter-
10 mine the percentage of children who use each manufactur-
11 er’s tobacco products.

12 (b) **BASELINE LEVEL.**—The baseline level of each
13 manufacturer is the percentage of children determined to
14 use its tobacco products in the first annual performance
15 survey.

16 **SEC. ____ PERFORMANCE OBJECTIVES.**

17 (a) **PERFORMANCE OBJECTIVES FOR EXISTING**
18 **MANUFACTURERS.**—Each existing manufacturer shall
19 have the following performance objectives:

20 (1) To reduce the percentage of children deter-
21 mined to use its tobacco products in the third and
22 fourth annual performance survey to a percentage
23 which is at least 33 percent below the manufactur-
24 er’s baseline level.

Feb-26-98 10:17am From-

2

1 (2) To reduce the percentage of children deter-
2 mined to use its tobacco products in the fifth and
3 sixth annual performance survey to a percentage
4 which is at least 50 percent below the manufactur-
5 er's baseline level.

6 (3) To reduce the percentage of children deter-
7 mined to use its tobacco products in the seventh,
8 eighth, and ninth annual performance survey to a
9 percentage which is at least 67 percent below the
10 manufacturer's baseline level.

11 (4) To reduce the percentage of children deter-
12 mined to use its tobacco products in the tenth an-
13 nual performance survey and each annual perform-
14 ance survey conducted thereafter to a percentage
15 which is at least 80 percent below the manufactur-
16 er's baseline level.

17 (b) PERFORMANCE OBJECTIVES FOR NEW MANU-
18 FACTURERS.—Any new manufacturer shall have as its
19 performance objective to not increase above the de minimis
20 level the percentage of children determined to use its to-
21 bacco products in each annual performance survey.

22 (c) DE MINIMIS LEVEL.—

23 (1) GENERAL RULE.—The de minimis level is
24 _____ percentage of children.

Feb-26-98 10:17am From-

3

1 (2) ACHIEVEMENT BY EXISTING MANUFAC-
2 Turer.—If the percentage of children determined to
3 use the tobacco products of an existing manufac-
4 turer in an annual performance survey is equal to or
5 less than the de minimis level, the manufacturer
6 shall be considered to have achieved the applicable
7 performance objective.

8 SEC. ____ . ADDITIONAL MEASURES.

9 (a) SECRETARIAL DETERMINATION.—Beginning at
10 the beginning of the third year after the date of the enact-
11 ment of this title and annually thereafter, the Secretary
12 shall, based on the annual performance survey conducted
13 under section ____, determine if each manufacturer has
14 achieved the applicable performance objective under sec-
15 tion ____.

16 (b) MANDATORY PRICE INCREASE.—

17 (1) FIRST FAILURE.—If the Secretary deter-
18 mines that a manufacturer has failed to achieve the
19 applicable performance objective, the manufacturer
20 shall increase the price it charges for each unit of
21 its tobacco products by \$1 multiplied by the non-
22 compliance factor.

23 (2) CONSECUTIVE FAILURES.—If the Secretary
24 determines that a manufacturer has failed to achieve
25 the applicable performance objective in 2 or more

Feb-26- 10:17am From-

4

1 consecutive annual surveys, the manufacturer shall
2 increase the price it charges for each unit of its to-
3 bacco products by \$1 multiplied by (A) the non-
4 compliance factor, and (B) the number of consecu-
5 tive failures.

6 (c) NONMONETARY MEASURES.—

7 (1) CARTON REQUIREMENT.—If the Secretary
8 determines that a manufacturer has failed to achieve
9 the applicable performance objective in 3 consecutive
10 annual performance surveys, no retailer may sell the
11 tobacco products of the manufacturer to consumers
12 in quantities smaller than a carton.

13 (2) GENERIC PACKAGING REQUIREMENT.—If
14 the Secretary determines that a manufacturer has
15 failed to achieve the applicable performance objective
16 in 4 consecutive annual performance surveys, the
17 manufacturer may sell its tobacco products only in
18 packages that bear only black text on a white back-
19 ground, except for warning labels that are required
20 to appear in a different format.

21 SEC. ____ PROCEEDS OF MANDATORY PRICE INCREASES.

22 (a) TOBACCO ENFORCEMENT AND EDUCATION
23 FUND.—A manufacturer that is required to increase
24 prices under section ____ shall pay the proceeds of the
25 price increase into a Tobacco Enforcement and Education

1 Fund in the United States Treasury. The proceeds shall
2 be paid by a manufacturer on a quarterly basis. The first
3 quarter shall begin on the date the Secretary determines
4 that such manufacturer did not achieve the applicable per-
5 formance objective and the payments shall be due within
6 30 days after the end of each quarter.

7 (b) USE OF THE FUND.—Funds in the Tobacco En-
8 forcement and Education Fund shall be available to the
9 Secretary, without fiscal year limitation, to enforce this
10 title and other laws relating to tobacco use by children
11 and for public education and other initiatives designed to
12 discourage children from using tobacco products.

13 SEC. ____ JUDICIAL REVIEW.

14 (a) IN GENERAL.—An action of the Secretary under
15 this title is not subject to judicial review until the Sec-
16 retary has made or failed to make a compliance determina-
17 tion under section ____ that has adversely affected the
18 person seeking the review. An action for review may only
19 be brought in the United States District Court for the Dis-
20 trict of Columbia. In an action seeking review of a compli-
21 ance determination, the manufacturer may prevail only to
22 the extent that the manufacturer demonstrates that the
23 percentage of children using its tobacco products is dif-
24 ferent than the percentage the Secretary used in making
25 the compliance determination.

Feb-26-98 10:17am From-

1 (b) NO STAY.—Section 705 of title 5, United States
2 Code, shall not apply with respect to any action under sub-
3 section (a).

4 (c) INTEREST.—If the judgment of a court in an ac-
5 tion under subsection (a) results in the reduction of a pay-
6 ment paid by a manufacturer under section ____, the
7 manufacturer shall be paid an amount equal to such re-
8 duction and interest on such amount. If the judgment of
9 a court in an action under subsection (a) results in the
10 increase of a payment paid by a manufacturer under sec-
11 tion ____, the manufacturer shall pay to the Tobacco En-
12 forcement and Education Fund an amount equal to such
13 increase and interest on such amount.

14 SEC. __. GENERAL PROVISIONS.

15 (a) ENFORCEMENT.—Section 301 of the Federal
16 Food, Drug, and Cosmetic Act (21 U.S.C. 331) is amend-
17 ed by adding at the end the following:

18 “(x) The failure to comply with any requirement
19 under the NO Tobacco for Kids Act.”.

20 (b) REGULATIONS.—

21 (1) GENERAL RULE.—The Secretary may pro-
22 mulgate regulations for the implementation of this
23 title.

24 (2) ADDITIONAL AUTHORITY.—The Secretary
25 may by regulation establish performance objectives

1 and additional measures for cigars, little cigars, cig-
2 arette tobacco, and pipe tobacco.

3 (c) ADMINISTRATION OF SURVEYS.—

4 (1) STATISTICAL ACCURACY OF SURVEYS.—The
5 annual performance surveys conducted by the Sec-
6 retary under section ____ shall be designed to
7 achieve a 95 percent confidence interval of no great-
8 er than plus or minus 1 percent

9 (2) CONFIDENCE INTERVALS.—In determining
10 the baseline level of a manufacturer in the first an-
11 nual performance survey under section ____, the
12 Secretary shall use the upper bound of the 95 per-
13 cent confidence interval as the baseline level. In de-
14 termining whether a manufacturer has achieved an
15 applicable performance objective in an annual per-
16 formance survey, the Secretary shall use the lower
17 bound of the 95 percent confidence interval to deter-
18 mine the number of children who use its tobacco
19 products.

20 (3) CONDUCT OF THE SURVEYS.—The annual
21 performance surveys shall be household-based sur-
22 veys and shall not be subject to State or local regu-
23 lation.

24 (d) INFLATION ADJUSTMENT.—The amount of the
25 price increase required under section ____ shall be ad-

1 justed annually after the date of the enactment of this
2 title to reflect the changes in the Consumer Price Index
3 from such date.

4 **SEC. ____ DEFINITIONS.**

5 For purposes of this title:

6 (1) **CARTON.**—The term “carton” means a
7 package containing at least 10 units of a tobacco
8 product.

9 (2) **CHILDREN.**—The term “children” means
10 individuals under the age of 18 and above the age
11 of 13.

12 (3) **EXISTING MANUFACTURER.**—The term “ex-
13 isting manufacturer” means a manufacturer which
14 manufactured or imported a tobacco product on or
15 before the date of the enactment of this title.

16 (4) **MANUFACTURER.**—The term “manufac-
17 turer” means any person who manufactures or im-
18 ports a tobacco product.

19 (5) **NEW MANUFACTURER.**—The term “new
20 manufacturer” means a manufacturer which begins
21 to manufacture or import a tobacco product after
22 the date of the enactment of this title.

23 (6) **NONCOMPLIANCE FACTOR.**—

24 (A) **EXISTING MANUFACTURER.**—In the
25 case of an existing manufacturer—

Feb-26-98 10:18am From-

9

1 (i) when the percentage of children
2 determined to use its tobacco products is
3 at ~~the~~ its baseline level, the term "non-
4 compliance factor" means 1;

5 (ii) when the manufacturer has re-
6 duced the percentage of children deter-
7 mined to use its tobacco products below
8 ~~the~~ its baseline level, the term "noncompli-
9 ance factor" means 1 minus the fraction—

10 (I) the numerator of which is the
11 percentage reduction achieved by the
12 manufacturer; and

13 (II) the denominator of which is
14 the percentage reduction required to
15 be achieved;

16 (iii) when the manufacturer has in-
17 creased the percentage of children deter-
18 mined to use its tobacco products above
19 ~~the~~ its baseline level, the term "noncompli-
20 ance factor" means the fraction—

21 (I) the numerator of which is the
22 percentage of children determined to
23 use its tobacco products; and

10

1 (II) the denominator of which is
2 the percentage of children at its base-
3 line level; and

4 (B) NEW MANUFACTURER.—In the case of
5 a new manufacturer, the term noncompliance
6 factor means the fraction—

7 (i) the numerator of which is the per-
8 centage of children determined to use its
9 tobacco products; and

10 (ii) the denominator of which is the
11 percentage of children in the de minimis
12 level.

13 (7) TOBACCO PRODUCT.—The term “tobacco
14 product” means a cigarette or smokeless tobacco.

15 (8) UNIT.—The term “unit” means 20 ciga-
16 rettes in the case of cigarettes and a comparable
17 amount as determined by the Secretary in the case
18 of smokeless tobacco.

19 (9) USE.—A child shall be considered to use a
20 manufacturer’s tobacco product if the manufactur-
21 er’s tobacco product is the usual brand of tobacco
22 product used by the child in the last 30 days.