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Tobacco-Legislation

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

Committee on Government Reform and Oversight
Minority Staff Report
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Executive Summary

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

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

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

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

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

- The government established "a reasonable basis to believe that the crime-fraud exception to the general rule of privilege should be invoked." Plaintiffs made a "*prima facie* case to invoke the crime-fraud exception." *Minnesota v. Philip Morris*, Civ. Action No. C1-94-8565 (Ramsey County, Minn., filed Aug. 18, 1994).
- The plaintiffs established probable cause that "a fraudulent purpose existed" in the tobacco industry's attorney-client documents; these documents "furthered the fraud perpetrated on the public." *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 368 (E.D.N.Y. 1996), *vacated on other grounds*, 167 F.R.D. 6 (E.D.N.Y. 1996).

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

Specifically, these documents show that the Liggett attorneys:

- Recognized that Liggett had developed a new cigarette with "major health benefits" but advised that Liggett not market the cigarette because it "may incite accelerated cancer litigation which may, in turn, result in infinite liability." As an apparent result, Liggett never marketed the new cigarette.
- Censored Liggett's communication of health risks to doctors because such a communication could "knock the props from under us" in future litigation.
- Intervened to prevent Liggett managers from making public statements about human health effects that would contradict "our position that there is no scientific proof of any cause and effect relationship between smoking and human health."
- Reviewed scientific research by Liggett and other companies to insure that it

would not "ricochet to our detriment."

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

1. *Haines v. Liggett Group*

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

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

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

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

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

2. *Florida v. American Tobacco Co.*

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

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

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

3. *Minnesota v. Philip Morris*

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

pages).¹

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

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

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

category of documents to determine the appropriate application of privilege.

4. Other Recent Cases

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

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

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

II. The Liggett Attorney-Client Documents

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

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

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

A. Suppression of the Marketing of a Safer Cigarette

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

1. The "Initial Observations" Memorandum

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

According to the memorandum:

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

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

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

As described by the lawyers, the "principal thrust" of Liggett's research with ADL was "to determine which substance was responsible for this tumorigenic effect and to ascertain a method -- if possible -- by which the tumorigenic effect could be reduced or eliminated."⁴ Lawyers recognized that "[t]he back skin of these specially bred laboratory mice is generally recognized by some medical researchers as having sensitivity characteristics similar to human lung tissue."⁵ Liggett expended \$13 million on this biological testing program through the end of 1978.⁶ In 1997 dollars, this expenditure would be over \$30 million.

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

³ Initial Observations Memo at 2.

⁴ Initial Observations Memo at 2.

⁵ Initial Observations Memo at 5.

⁶ Initial Observations Memo at 2.

⁷ Initial Observations Memo at 2.

⁸ Initial Observations Memo at 3.

mixtures were combusted."⁹

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

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

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

⁹ Initial Observations Memo at 3.

¹⁰ Initial Observations Memo at 3.

¹¹ Initial Observations Memo at 3.

¹² Initial Observations Memo at 3.

¹³ Initial Observations Memo at 3.

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

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

2. The Greer Memorandum

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

¹⁴ Initial Observations Memo at 4.

¹⁵ Initial Observations Memo at 6.

¹⁶ Initial Observations Memo at 6.

¹⁷ Initial Observations Memo at 6.

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

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

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

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

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

¹⁹ Greer Memo at 1.

²⁰ Greer Memo at 8.

²¹ Greer Memo at 10.

result."²²

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

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

²² Greer Memo at 10.

²³ Greer Memo at 8.

²⁴ Greer Memo at 8.

²⁵ Greer Memo at 9.

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

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

B. Censorship of Correspondence to the Medical Community

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

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

²⁶ Greer Memo at 10.

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

²⁸ Keith Filter Memo at 4.

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

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

C. Censorship of Public Statements

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

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

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

³¹ Haas Memo.

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

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

D. Control of Company Funded Research

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

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

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

³³ Fortune Memo.

³⁴ Fortune Memo.

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

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

III. The Attorney-Client Documents that Remain Secret

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

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

³⁶ Washington University Proposal at 3.

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

³⁸ Harvard Project Proposal at 4.

cigarettes.

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

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

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

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

Summary of The Tobacco Accountability Act

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

- The bill establishes an independent board to be known as the Tobacco Accountability Board. The Board will consist of 5 members, appointed by the Secretary of Health and Human Services, with expertise relating to tobacco and public health. The term of service will be six years.
- The bill requires each tobacco manufacturer to submit to the Board a copy of all documents in the manufacturer's possession relating to any health effects caused by the use of tobacco products, the manipulation or control of nicotine in tobacco products, and the sale or marketing of tobacco products to children. The documents required to be submitted must include the 150,000 attorney-client documents that the court has ordered to be produced in Minnesota v. Philip Morris as evidence of a crime or fraud.
- The bill requires the Board to make available to the public the documents submitted by the tobacco manufacturers, subject only to limitations necessary to protect legitimate trade secrets.
- To insure that any future attempts by the tobacco industry to mislead the public are disclosed, the Board is given subpoena power and other investigative authorities and charged with investigating all matters relating to the tobacco industry and public health. The Board must submit an annual report to Congress that discloses any efforts by tobacco manufacturers:
 - to conceal research relating to, or to mislead the public about, the adverse health effects or addiction caused by tobacco products;
 - to sell or market tobacco products to children; or
 - to circumvent or oppose any federal, state, or local law or regulation intended to protect the public from tobacco.
- The bill requires each tobacco manufacturer to permit a representative designated by the Board to participate in all meetings of the board of directors of the tobacco manufacturer. The purpose of this provision is to insure that there is always a public health voice present in future company deliberations.

> 1

1 of 1 items

CQ's WASHINGTON ALERT 06/19/97

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

To establish the Tobacco Accountability Board.

Special typefaces used in this bill version:

// \\ Italic
!! !! Bold roman

Item Key: 4128

105TH CONGRESS
1ST SESSION

H. R. 1881

To establish the Tobacco Accountability Board.

=====
IN THE HOUSE OF REPRESENTATIVES

June 12, 1997

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

=====
A BILL

To establish the Tobacco Accountability Board.

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

!!SECTION 1. SHORT TITLE.!!

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

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

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

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

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

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

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

(1) relating to--

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

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

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

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

} including a-c?

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

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

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

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

- (1) any efforts by tobacco manufacturers to conceal research relating to the adverse health effects or addiction caused by the use of tobacco products;
- (2) any efforts by tobacco manufacturers to mislead the public or any Federal, State, or local elected body, agency, or court about the adverse health effects or addiction caused by the use of tobacco products;
- (3) any efforts by tobacco manufacturers to sell or market tobacco products to children; and
- (4) any efforts by tobacco manufacturers to circumvent, repeal, modify, impede the implementation of, or prevent the adoption of any Federal, State, or local law or regulation intended to reduce the adverse health effects or addiction caused by the use of tobacco products.

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

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

!!SEC. 6. AUTHORITIES.!!

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

!!SEC. 7. ENFORCEMENT.!!

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

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

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

!!SEC. 8. ADMINISTRATION.!!

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

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

!!SEC. 9. DEFINITIONS.!!

For purposes of this Act:

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

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

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

- (A) any person who manufactures a tobacco product; or
- (B) the Tobacco Institute, the Council for Tobacco Research, the Smokeless Tobacco Council, the Center for Indoor Air Research, or any other trade association or entity that is primarily funded by persons who manufacture a tobacco product.

There are no more items to read.

Enter one or more numbers or ALL to display item(s),
Enter another display command and one or more numbers or ALL,
Enter MARK or SAVE and one or more numbers to limit or save your set,
Enter SMARTMATCH and a number to find comparable items,
Or enter BACK, HELP, or STOP

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1 of 1 items

CQ's WASHINGTON ALERT 06/19/97

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

MEASURE: HR1881

SPONSOR: Waxman (D-CA)

BRIEF TITLE: Tobacco Accountability Act.

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

INTRODUCED: 06/12/97

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

COMMITTEES: House Commerce

LEGISLATIVE ACTION:

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

There are no more items to display.

Results: 1 items in BILLTRACK

Search criteria used:

BILL:HR1881

Results are: Bill number as entered

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| 2 REFINE your search on prime topic | 14 ACTION detailed action (no speeches |
| 3 SORT retrieved items | 15 SUMMARY major action only |
| 4 SAVE bill numbers in a list | 16 STATUS most recent major action |
| 5 GRAPH relevance ranking | 17 MILESTONE key action dates table |
| 6 SCAN select from bill citations | 18 COSPONSOR-ALL current cosponsors |
| 7 CITE display bill citations | 19 COSPONSOR-DATE cosponsors by date |
| 8 BROWSE peruse terms in context | 20 SCHEDULE hearing, markup, floor |
| 9 EXCERPT continuous context display | 21 BILLWATCH bill analysis by CQ |
| 10 READ bill analysis and all action | 22 REPORT for custom reports |
| 11 DIGEST bill analysis by CRS | 23 RESEARCH bills in other databases |
| 12 HISTORY all legislative action | |

Enter a number or a command, BACK, HELP or STOP

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M E M O R A N D U M

TO: BRUCE REED, ELENA KAGAN
FROM: TOM FREEDMAN, MARY L. SMITH
RE: POSSIBLE TOBACCO BILLS
DATE: JUNE 30, 1997

I. SUMMARY

The following provides a summary of government programs that provide assistance to tobacco farmers and that provide tax deductions for the tobacco industry. A list of bills from the 104th Congress and 105th Congress that could be used to supplement or amend the tobacco proposal is also included. These bills either affect the tobacco industry in economic terms or apply to tobacco farmers.

II. BACKGROUND ON TOBACCO FARMERS

- Today the subsidies for tobacco farmers are relatively small. Direct subsidies ended in the 1980s. Currently, the subsidies amount to a quota system in which the government licenses the right to grow tobacco and has a federal program to insure farmers against crop losses. The Department of Agriculture has budgeted \$145 million for the insurance in the coming fiscal year. In years with no significant losses, the Department of Agriculture contributes little or nothing to the insurance pool.
- North Carolina produces 52% of all domestically grown tobacco. There are 17,625 tobacco farmers in North Carolina. However, tobacco accounts for only 6.5% of North Carolina's economy, or about \$12 billion annually.
- Federal, state, and local excise taxes collected on cigarettes totaled \$13.1 billion.

III. SOME GOVERNMENT PROGRAMS INVOLVING TOBACCO

1. **Tobacco Price-Support Program.** This is a program that controls both how much tobacco farmers can sell and what price they get for it. In 1995, then Rep. Dick Durbin, in proposing a failed amendment to the Agriculture Department funding bill to eliminate this program, calculated that farmers who own tobacco quotas are allowed to gross \$4,000 to \$5,000 per acre, compared with corn farmers who gross one-tenth of that amount. In 1995, under the program, the Agriculture Department paid \$41.5 million a year for administrative costs for such things as setting the quota, for losses associated with federal crop insurance for tobacco, and for extension services. Opponents argued that if the

tobacco-price support program were eliminated, the government could end up losing \$1 billion on the existing surplus.

2. **Tobacco insurance.** The Federal government provides insurance, reinsurance, and noninsured crop disaster assistance for tobacco.
3. **Favorable tax deductions for tobacco advertising.** The Internal Revenue Code of 1986 allows the tobacco industry to take deductions for its advertising costs.

IV. BILLS

104th Congress

1. **S. 598; Sponsored by Senator Bill Bradley:** Establishes in the Treasury a Tobacco Conversion Trust Fund. Funds from increased taxes on tobacco will be made available to:
 - (1) assist farmers in converting from tobacco to other crops and improve their access to markets for other crops; and
 - (2) provide grants and loans, including assistance to convert from tobacco production, to communities and persons involved in tobacco growing and tobacco product manufacture who are adversely affected by the tax increase.

Last status: referred to Senate Finance Committee.

Copy attached.

2. **H.R. 2962; Sponsored by Rep. Paul McHale (D-PA).** Bill to amend the IRS Code to disallow deductions for advertising expenses for tobacco products.

Last status: referred to House Ways and Means Committee.

105th Congress

1. **H.R. 1323; Sponsored by Rep. McHale (D-PA); 34 co-sponsors.** A bill that amends the IRS Code to disallow deductions for advertising expenses for tobacco products.

Last status: referred to committee.

2. **H.R. 1438 --Rep. Diana DeGette (D-CO), S. 643 - Senator Durbin (D-IL).** A bill to prohibit the Federal Government from providing insurance, reinsurance, or noninsured crop disaster assistance for tobacco.

Last status: referred to committee.

3. **H.R. 1826 - Sponsored by Rep. Elizaebeth Furse (D-OR).** A bill to increase deficit-reduction assessments for participants in the Federal price support program for tobacco and to extend the period during which such assessments will be collected.

Last status: referred to committee.

4. **S.826; Sponsored by Senators Lautenberg (D-NJ), Durbin (D-IL), and Kerry (D-MA).** A bill to amend the Public Health Service Act to protect the public from health hazards caused by exposure to environmental tobacco smoke. This bill basically creates standards for smoke-free public places (which is also covered in the proposed resolution reached by the state attorney generals). Copy attached.

Last status: referred to committee.

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Bill Tracking Report

104th Congress
1st Session

U. S. Senate

S 598

1995 Bill Tracking S. 598; 104 Bill Tracking S. 598

TOBACCO CONSUMPTION REDUCTION AND HEALTH IMPROVEMENT ACT OF 1995

<=1> Retrieve full text version

DATE-INTRO: March 22, 1995

DATE-ACTION-DATE: March 22, 1995

STATUS: Referred to committee

SPONSOR: Senator Bill Bradley D-NJ

TOTAL-COSPONSORS: 1 Cosponsors: 1 Democrats / 0 Republicans

SYNOPSIS: A bill to amend the Internal Revenue Code of 1986 to increase the
excise taxes on tobacco products, and to use a portion of the resulting revenues
to fund a trust fund for tobacco diversification, and for other purposes.

ACTIONS: Committee Referrals:
3/22/95 Senate Finance Committee

Legislative Chronology:

1st Session Activity:

3/22/95 141 Cong Rec S 4365 Referred to the Senate Finance Committee
3/22/95 141 Cong Rec S 4381 Remarks by Sen. Bradley NJ

SHORT-DIGEST: (from the CONGRESSIONAL RESEARCH SERVICE)

Short title as introduced :

Tobacco Consumption Reduction and Health Improvement Act of
1995

Digest :

Tobacco Consumption Reduction and Health Improvement Act of
1995 - Amends the Internal Revenue Code to increase the excise tax

on: (1) cigars; (2) cigarettes; (3) cigarette papers and tubes; (4) snuff; and (5) chewing and pipe tobacco. Imposes a tax on the floor stocks of such tobacco products which are removed before January 1, 1996. Makes an exception to the imposition of such tax for floor stocks of such products held on such date at the place intended to be sold at retail. Imposes such tax on such products entered into the United States from foreign trade zones before such date. Imposes a tax on roll-your-own tobacco manufactured in or imported into the United States.

Establishes in the Treasury the Tobacco Conversion Trust Fund, to which the Secretary of the Treasury shall transfer an amount equivalent to three percent of the net increase in revenues attributable to the tax increases imposed by this Act. Makes Fund amounts available for expenditures for providing: (1) assistance to farmers for conversion from tobacco growing (including Government purchase of tobacco allotments) and improving their access to markets for other crops; and (2) grants and loans to communities and persons involved in tobacco growing and tobacco product manufacture to support economic diversification plans.

IS Index Terms:

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Lautenberg D-NJ

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FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS INTRODUCED IN THE SENATE

S. 598

1995 S. 598; 104 S. 598

NOPSIS:

BILL To amend the Internal Revenue Code of 1986 to increase the excise taxes on tobacco products, and to use a portion of the resulting revenues to fund a trust fund for tobacco diversification, and for other purposes.

DATE OF INTRODUCTION: MARCH 22, 1995

DATE OF VERSION: MARCH 24, 1995 -- VERSION: 1

SPONSOR(S):

SEN. BRADLEY (for himself and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Finance

TEXT:

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tobacco Consumption Reduction and Health Improvement Act of 1995".

SECTION 2. INCREASE IN TAXES ON TOBACCO PRODUCTS.

(a) IN GENERAL.-

(1) CIGARS.-Subsection (a) of section 5701 of the Internal Revenue Code of 1986 (relating to rate of tax on cigars) is amended-

(A) by striking "\$1.125 cents per thousand (93.75 cents per thousand on cigars removed during 1991 and 1992)" in paragraph (1) and inserting "\$5.8125 per thousand"; and

(B) by striking paragraph (2) and inserting the following new paragraph:

"(2) LARGE CIGARS.-ON CIGARS WEIGHING MORE THAN 3 POUNDS PER THOUSAND, A TAX EQUAL TO 65.875 PERCENT OF THE PRICE FOR WHICH SOLD BUT NOT MORE THAN \$155 PER THOUSAND."

(2) CIGARETTES.-Subsection (b) of section 5701 of such Code (relating to rate of tax on cigarettes) is amended-

(A) by striking "\$12 per thousand (\$10 per thousand on cigarettes removed during 1991 and 1992)" in paragraph (1) and inserting "\$62 per thousand"; and

(B) by striking "\$25.20 per thousand (\$21 per thousand on cigarettes removed during 1991 and 1992)" in paragraph (2) and inserting "\$130.20 per thousand".

(3) CIGARETTE PAPERS.-SUBSECTION (C) OF SECTION 5701 OF SUCH CODE (RELATING TO RATE OF TAX ON CIGARETTE PAPERS) IS AMENDED BY STRIKING "0.75 CENT (0.625 CENT ON CIGARETTE PAPERS REMOVED DURING 1991 OR 1992)" AND INSERTING "3.875 CENTS".

(4) CIGARETTE TUBES.-SUBSECTION (D) OF SECTION 5701 OF SUCH CODE

(RELATING TO RATE OF TAX ON CIGARETTE TUBES) IS AMENDED BY STRIKING "1.5 CENTS (1.25 CENTS ON CIGARETTE TUBES REMOVED DURING 1991 OR 1992)" AND INSERTING "7.75 CENTS".

(5) SNUFF.-Paragraph (1) of section 5701(e) of such Code (relating to rate of tax on smokeless tobacco) is amended by striking "36 cents (30 cents on snuff removed during 1991 or 1992)" and inserting "\$1.86".

(6) CHEWING TOBACCO.-Paragraph (2) of section 5701(e) of such Code is amended by striking "12 cents (10 cents on chewing tobacco removed during 1991 or 1992)" and inserting "62 cents".

(7) PIPE TOBACCO.-Subsection (f) of section 5701 of such Code (relating to rate of tax on pipe tobacco) is amended by striking "67.5 cents (56.25 cents on chewing tobacco removed during 1991 or 1992)" and inserting "\$3.4875".

(8) EFFECTIVE DATE.-The amendments made by this subsection shall apply with respect to cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco removed after December 31, 1995.

(b) IMPOSITION OF EXCISE TAX ON MANUFACTURE OR IMPORTATION OF ROLL-YOUR-OWN TOBACCO.-

(1) IN GENERAL.-SECTION 5701 OF THE INTERNAL REVENUE CODE OF 1986 (RELATING TO RATE OF TAX) IS AMENDED BY REDESIGNATING SUBSECTION (G) AS SUBSECTION (H) AND BY INSERTING AFTER SUBSECTION (F) THE FOLLOWING NEW SUBSECTION:

"(G) ROLL-YOUR-OWN TOBACCO.-ON ROLL-YOUR-OWN TOBACCO, MANUFACTURED IN OR IMPORTED INTO THE UNITED STATES, THERE SHALL BE IMPOSED A TAX OF \$1.86 PER POUND (AND A PROPORTIONATE TAX AT THE LIKE RATE ON ALL FRACTIONAL PARTS OF A POUND)."

(2) ROLL-YOUR-OWN TOBACCO.-SECTION 5702 OF SUCH CODE (RELATING TO DEFINITIONS) IS AMENDED BY ADDING AT THE END THE FOLLOWING NEW SUBSECTION:

"(P) ROLL-YOUR-OWN TOBACCO.-THE TERM 'ROLL-YOUR-OWN TOBACCO' MEANS ANY TOBACCO WHICH, BECAUSE OF ITS APPEARANCE, TYPE, PACKAGING, OR LABELING, IS SUITABLE FOR USE AND LIKELY TO BE OFFERED TO, OR PURCHASED BY, CONSUMERS AS TOBACCO FOR MAKING CIGARETTES."

(3) TECHNICAL AMENDMENTS.-

(A) SUBSECTION (C) OF SECTION 5702 OF SUCH CODE IS AMENDED BY STRIKING "AND PIPE TOBACCO" AND INSERTING "PIPE TOBACCO, AND ROLL-YOUR-OWN TOBACCO".

(B) SUBSECTION (D) OF SECTION 5702 OF SUCH CODE IS AMENDED-

(I) IN THE MATERIAL PRECEDING PARAGRAPH (1), BY STRIKING "OR PIPE TOBACCO" AND INSERTING "PIPE TOBACCO, OR ROLL-YOUR-OWN TOBACCO", AND

(II) BY STRIKING PARAGRAPH (1) AND INSERTING THE FOLLOWING NEW PARAGRAPH:

"(1) A PERSON WHO PRODUCES CIGARS, CIGARETTES, SMOKELESS TOBACCO, PIPE TOBACCO, OR ROLL-YOUR-OWN TOBACCO SOLELY FOR THE PERSON'S OWN PERSONAL CONSUMPTION OR USE, AND"

(C) THE CHAPTER HEADING FOR CHAPTER 52 OF SUCH CODE IS AMENDED TO READ AS FOLLOWS:

"CHAPTER 52-TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES".

(D) The table of chapters for subtitle E of such Code is amended by striking the item relating to chapter 52 and inserting the following new item:

CHAPTER 52. Tobacco products and cigarette papers and tubes."

(4) EFFECTIVE DATE.-

(A) IN GENERAL.-THE AMENDMENTS MADE BY THIS SUBSECTION SHALL APPLY TO ROLL-YOUR-OWN TOBACCO REMOVED (AS DEFINED IN SECTION 5702(P) OF THE INTERNAL REVENUE CODE OF 1986, AS ADDED BY THIS SUBSECTION) AFTER DECEMBER 31, 1995.

(B) TRANSITIONAL RULE.-ANY PERSON WHO-

(I) ON THE DATE OF THE ENACTMENT OF THIS ACT IS ENGAGED IN BUSINESS AS A MANUFACTURER OF ROLL-YOUR-OWN TOBACCO OR AS AN IMPORTER OF TOBACCO PRODUCTS OR CIGARETTE PAPERS AND TUBES, AND

(II) BEFORE JANUARY 1, 1996, SUBMITS AN APPLICATION UNDER SUBCHAPTER B OF CHAPTER 52 OF SUCH CODE TO ENGAGE IN SUCH BUSINESS,

MAY, NOTWITHSTANDING SUCH SUBCHAPTER B, CONTINUE TO ENGAGE IN SUCH BUSINESS PENDING FINAL ACTION ON SUCH APPLICATION. PENDING SUCH FINAL ACTION, ALL PROVISIONS OF SUCH CHAPTER 52 SHALL APPLY TO SUCH APPLICANT IN THE SAME MANNER AND TO THE SAME EXTENT AS IF SUCH APPLICANT WERE A HOLDER OF A PERMIT UNDER SUCH CHAPTER 52 TO ENGAGE IN SUCH BUSINESS.

(C) FLOOR STOCKS.-

(1) IMPOSITION OF TAX.-On cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco manufactured in or imported into the United States which is removed before January 1, 1996, and held on such date for sale by any person, there shall be imposed the following taxes:

(A) SMALL CIGARS.-On cigars, weighing not more than 3 pounds per thousand, \$4.6875 per thousand.

(B) LARGE CIGARS.-On cigars, weighing more than 3 pounds per thousand, a tax equal to 53.125 percent of the price for which sold, but not more than \$125 per thousand.

(C) SMALL CIGARETTES.-On cigarettes, weighing not more than 3 pounds per thousand, \$50 per thousand.

(D) LARGE CIGARETTES.-On cigarettes, weighing more than 3 pounds per thousand, \$105 per thousand; except that, if more than 6 1/2 inches in length, they shall be taxable at the rate prescribed for cigarettes weighing not more than 3 pounds per thousand, counting each 2 3/4 inches, or fraction thereof, of the length of each as one cigarette.

(E) CIGARETTE PAPERS.-ON CIGARETTE PAPERS, 3.125 CENTS FOR EACH 50 PAPERS OR FRACTIONAL PART THEREOF; EXCEPT THAT, IF CIGARETTE PAPERS MEASURE MORE THAN 6 1/2 INCHES IN LENGTH, THEY SHALL BE TAXABLE AT THE RATE PRESCRIBED, COUNTING EACH 2 3/4 INCHES, OR FRACTION THEREOF, OF THE LENGTH OF EACH AS ONE CIGARETTE PAPER.

(F) CIGARETTE TUBES.-ON CIGARETTE TUBES, 6.25 CENTS FOR EACH 50 TUBES OR FRACTIONAL PART THEREOF; EXCEPT THAT, IF CIGARETTE TUBES MEASURE MORE THAN 6 1/2 INCHES IN LENGTH, THEY SHALL BE TAXABLE AT THE RATE PRESCRIBED, COUNTING EACH 2 3/4 INCHES, OR FRACTION THEREOF, OF THE LENGTH OF EACH AS ONE CIGARETTE TUBE.

(G) SNUFF.-On snuff, \$1.50 per pound and a proportionate tax at the like rate on all fractional parts of a pound.

(H) CHEWING TOBACCO.-On chewing tobacco, 50 cents per pound and a proportionate tax at the like rate on all fractional parts of a pound.

(I) PIPE TOBACCO.-On pipe tobacco, \$2.8125 per pound and a proportionate tax at the like rate on all fractional parts of a

S. 598 MARCH 24, 1995 -- VERSION: 1

pound.

(2) LIABILITY FOR TAX AND METHOD OF PAYMENT.-

(A) LIABILITY FOR TAX.-A person holding cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco on January 1, 1996, to which any tax imposed by paragraph (1) applies shall be liable for such tax.

(B) METHOD OF PAYMENT.-The tax imposed by paragraph (1) shall be treated as a tax imposed under section 5701 of the Internal Revenue Code of 1986 and shall be due and payable on February 15, 1996, in the same manner as the tax imposed under such section is payable with respect to cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco removed on January 1, 1996.

(3) CIGARS, CIGARETTES, CIGARETTE PAPER, CIGARETTE TUBES, SNUFF, CHEWING TOBACCO, AND PIPE TOBACCO.-For purposes of this subsection, the terms "cigar", "cigarette", "cigarette paper", "cigarette tubes", "snuff", "chewing tobacco", and "pipe tobacco" shall have the meaning given to such terms by subsections (a), (b), (e), and (g), paragraphs (2) and (3) of subsection (n), and subsection (o) of section 5702 of the Internal Revenue Code of 1986, respectively.

(4) EXCEPTION FOR RETAIL STOCKS.-The taxes imposed by paragraph (1) shall not apply to cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco in retail stocks held on January 1, 1996, at the place where intended to be sold at retail.

(5) FOREIGN TRADE ZONES.-Notwithstanding the Act of June 18, 1934 (19 U.S.C. 81a et seq.) or any other provision of law-

(A) cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco-

(i) on which taxes imposed by Federal law are determined, or customs duties are liquidated, by a customs officer pursuant to a request made under the first proviso of section 3(a) of the Act of June 18, 1934 (19 U.S.C. 81c(a)) before January 1, 1996, and

(ii) which are entered into the customs territory of the United States on or after January 1, 1996, from a foreign trade zone, and

(B) cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco which-

(i) are placed under the supervision of a customs officer pursuant to the provisions of the second proviso of section 3(a) of the Act of June 18, 1934 (19 U.S.C. 81c(a)) before January 1, 1996, and

(ii) are entered into the customs territory of the United States on or after January 1, 1996, from a foreign trade zone.

shall be subject to the tax imposed by paragraph (1) and such cigars, cigarettes, cigarette paper, cigarette tubes, snuff, chewing tobacco, and pipe tobacco shall, for purposes of paragraph (1), be treated as being held on January 1, 1996, for sale.

(d) ESTABLISHMENT OF TRUST FUND.-

(1) IN GENERAL.-SUBCHAPTER A OF CHAPTER 98 OF THE INTERNAL REVENUE CODE OF 1986 (RELATING TO TRUST FUND CODE) IS AMENDED BY ADDING AT THE END THE FOLLOWING NEW SECTION:

EC. 9512. TOBACCO CONVERSION TRUST FUND.

S. 598 MARCH 24, 1995 -- VERSION: 1

"(a) CREATION OF TRUST FUND.-THERE IS ESTABLISHED IN THE TREASURY OF THE UNITED STATES A TRUST FUND TO BE KNOWN AS THE 'TOBACCO CONVERSION TRUST FUND' (HEREAFTER REFERRED TO IN THIS SECTION AS THE 'TRUST FUND'), CONSISTING OF SUCH AMOUNTS AS MAY BE APPROPRIATED OR CREDITED TO THE TRUST FUND AS PROVIDED IN THIS SECTION OR SECTION 9602(B).

"(B) TRANSFERS TO TRUST FUND.-THE SECRETARY SHALL TRANSFER TO THE TRUST FUND AN AMOUNT EQUIVALENT TO 3 PERCENT OF THE NET INCREASE IN REVENUES RECEIVED IN THE TREASURY ATTRIBUTABLE TO THE AMENDMENTS MADE TO SECTION 9601 BY SUBSECTIONS (A) AND (B) OF SECTION 2 AND THE PROVISIONS CONTAINED IN SECTION 2(C) OF THE TOBACCO CONSUMPTION REDUCTION AND HEALTH IMPROVEMENT ACT OF 1995, AS ESTIMATED BY THE SECRETARY.

"(C) DISTRIBUTION OF AMOUNTS IN TRUST FUND.-AMOUNTS IN THE TRUST FUND SHALL BE AVAILABLE TO THE SECRETARY OF AGRICULTURE, AS PROVIDED BY APPROPRIATION ACTS, FOR MAKING EXPENDITURES FOR PURPOSES OF-

"(1) PROVIDING ASSISTANCE TO FARMERS IN CONVERTING FROM TOBACCO TO OTHER CROPS AND IMPROVING THE ACCESS OF SUCH FARMERS TO MARKETS FOR OTHER CROPS, AND

"(2) PROVIDING GRANTS OR LOANS TO COMMUNITIES, AND PERSONS INVOLVED IN THE PRODUCTION OR MANUFACTURE OF TOBACCO OR TOBACCO PRODUCTS, TO SUPPORT ECONOMIC DIVERSIFICATION PLANS THAT PROVIDE ECONOMIC ALTERNATIVES TO TOBACCO TO SUCH COMMUNITIES AND PERSONS.

THE ASSISTANCE REFERRED TO IN PARAGRAPH (1) MAY INCLUDE GOVERNMENT PURCHASE OF TOBACCO ALLOTMENTS FOR PURPOSES OF RETIRING SUCH ALLOTMENTS FROM ALLOTMENT HOLDERS AND FARMERS WHO CHOOSE TO TERMINATE THEIR INVOLVEMENT IN TOBACCO PRODUCTION."

(2) CLERICAL AMENDMENT.-The table of sections for such subchapter A is amended by adding at the end the following new item:
sec. 9512. Tobacco Conversion Trust Fund."

AD-DATE: March 27, 1995

1ST DOCUMENT of Level 1 printed in FULL format.

FULL TEXT OF BILLS

105TH CONGRESS; 1ST SESSION
 IN THE SENATE OF THE UNITED STATES
 AS INTRODUCED IN THE SENATE

s. 826

1997 S. 826; 105 S. 826

<=1> Retrieve Bill Tracking Report

SYNOPSIS:

BILL To amend the Public Health Service Act to protect the public from health hazards caused by exposure to environmental tobacco smoke, and for other purposes.

DATE OF INTRODUCTION: JUNE 3, 1997

DATE OF VERSION: JUNE 5, 1997 -- VERSION: 1

SPONSOR(S):

r. LAUTENBERG (FOR HIMSELF, MR. DURBIN, and Mr. KERRY of Massachusetts) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

TEXT:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. *

SECTION 1. SHORT TITLE.

This Act may be cited as the "Smoke-Free Environment Act of 1997".

SEC. 2. SMOKE-FREE ENVIRONMENT POLICY.

The Public Health Service Act (42 U.S.C. 201 et seq.) is amended by adding at the end the following:

"TITLE XXVIII-SMOKE-FREE ENVIRONMENTS

SEC. 2801. SMOKE-FREE ENVIRONMENT POLICY.

"(a) POLICY REQUIRED.-IN ORDER TO PROTECT CHILDREN AND ADULTS FROM CANCER, RESPIRATORY DISEASE, HEART DISEASE, AND OTHER ADVERSE HEALTH EFFECTS FROM BREATHING ENVIRONMENTAL TOBACCO SMOKE, THE RESPONSIBLE AUTHORITY FOR EACH PUBLIC FACILITY SHALL ADOPT AND IMPLEMENT AT SUCH FACILITY A SMOKE-FREE ENVIRONMENT POLICY WHICH MEETS THE REQUIREMENTS OF SUBSECTION (B).

"(B) ELEMENTS OF POLICY.-EACH SMOKE-FREE ENVIRONMENT POLICY FOR A PUBLIC FACILITY SHALL-

"(1) PROHIBIT THE SMOKING OF CIGARETTES, CIGARS, AND PIPES, AND ANY OTHER COMBUSTION OF TOBACCO, WITHIN THE FACILITY AND ON FACILITY PROPERTY WITHIN THE IMMEDIATE VICINITY OF THE ENTRANCE TO THE FACILITY; AND

"(2) POST A CLEAR AND PROMINENT NOTICE OF THE SMOKING PROHIBITION IN APPROPRIATE AND VISIBLE LOCATIONS AT THE PUBLIC FACILITY.

EACH POLICY MAY PROVIDE AN EXCEPTION TO THE PROHIBITION SPECIFIED IN PARAGRAPH (1) FOR ONE OR MORE SPECIALLY DESIGNATED SMOKING AREAS WITHIN A PUBLIC FACILITY IF SUCH AREA OR AREAS MEET THE REQUIREMENTS OF SUBSECTION (B).

"(C) SPECIALLY DESIGNATED SMOKING AREAS.-A SPECIALLY DESIGNATED SMOKING AREA MEETS THE REQUIREMENTS OF THIS SUBSECTION IF IT SATISFIES EACH OF THE FOLLOWING CONDITIONS:

"(1) THE AREA IS VENTILATED IN ACCORDANCE WITH SPECIFICATIONS PROMULGATED BY THE ADMINISTRATOR THAT ENSURE THAT AIR FROM THE AREA IS DIRECTLY EXHAUSTED TO THE OUTSIDE AND DOES NOT RECIRCULATE OR DRIFT TO OTHER AREAS WITHIN THE PUBLIC FACILITY.

"(2) NONSMOKING INDIVIDUALS DO NOT HAVE TO ENTER THE AREA FOR ANY PURPOSE.

"(3) CHILDREN UNDER THE AGE OF 15 ARE PROHIBITED FROM ENTERING THE AREA.

SEC. 2802. CITIZEN ACTIONS.

"(a) IN GENERAL.-AN ACTION MAY BE BROUGHT TO ENFORCE THE REQUIREMENTS OF THIS TITLE BY ANY AGGRIEVED PERSON, ANY STATE OR LOCAL GOVERNMENT AGENCY, OR THE ADMINISTRATOR.

"(b) VENUE.-ANY ACTION TO ENFORCE THIS TITLE MAY BE BROUGHT IN ANY UNITED STATES DISTRICT COURT FOR THE DISTRICT IN WHICH THE DEFENDANT RESIDES OR IS DOING BUSINESS TO ENJOIN ANY VIOLATION OF THIS TITLE OR TO IMPOSE A CIVIL PENALTY FOR ANY SUCH VIOLATION IN THE AMOUNT OF NOT MORE THAN \$5,000 PER DAY OF VIOLATION. THE DISTRICT COURTS SHALL HAVE JURISDICTION, WITHOUT REGARD TO THE AMOUNT IN CONTROVERSY OR THE CITIZENSHIP OF THE PARTIES, TO ENFORCE THIS TITLE AND TO IMPOSE CIVIL PENALTIES UNDER THIS TITLE.

"(c) NOTICE.-AN AGGRIEVED PERSON SHALL GIVE ANY ALLEGED VIOLATOR NOTICE AT LEAST 60 DAYS PRIOR TO COMMENCING AN ACTION UNDER THIS SECTION. NO ACTION MAY BE COMMENCED BY AN AGGRIEVED PERSON UNDER THIS SECTION IF SUCH ALLEGED VIOLATOR COMPLIES WITH THE REQUIREMENTS OF THIS TITLE WITHIN SUCH 60-DAY PERIOD AND THEREAFTER.

"(d) COSTS.-THE COURT, IN ISSUING ANY FINAL ORDER IN ANY ACTION BROUGHT PURSUANT TO THIS SECTION, MAY AWARD COSTS OF LITIGATION (INCLUDING REASONABLE ATTORNEY AND EXPERT WITNESS FEES) TO ANY PREVAILING PARTY, UNLESS THE COURT DETERMINES SUCH AWARD IS APPROPRIATE.

"(e) PENALTIES.-THE COURT IN ANY ACTION UNDER THIS SECTION TO APPLY CIVIL PENALTIES SHALL HAVE DISCRETION TO ORDER THAT SUCH CIVIL PENALTIES BE USED FOR PROJECTS THAT FURTHER THE POLICIES OF THIS TITLE. THE COURT SHALL OBTAIN THE VIEW OF THE ADMINISTRATOR IN EXERCISING SUCH DISCRETION IN SELECTING ANY SUCH PROJECTS.

"(f) DAMAGES.-NO DAMAGES OF ANY KIND, WHETHER COMPENSATORY OR PUNITIVE, SHALL BE AWARDED IN ACTIONS BROUGHT PURSUANT TO THIS TITLE.

"(g) ISOLATED INCIDENTS.-VIOLATIONS OF THE PROHIBITION SPECIFIED IN SECTION 2801(B)(1) BY AN INDIVIDUAL WITHIN A PUBLIC FACILITY OR ON FACILITY PROPERTY SHALL NOT BE CONSIDERED VIOLATIONS OF THIS TITLE ON THE PART OF THE RESPONSIBLE ENTITY IF SUCH VIOLATIONS-

"(1) ARE ISOLATED INCIDENTS THAT ARE NOT PART OF A PATTERN OF VIOLATIONS OF SUCH PROHIBITION; AND

"(2) ARE NOT AUTHORIZED BY THE RESPONSIBLE ENTITY.

SEC. 2803. PREEMPTION.

"Nothing in this title shall preempt or otherwise affect any other federal, state or local law which provides protection from health hazards from environmental tobacco smoke.

SEC. 2804. REGULATIONS.

"The Administrator is authorized to promulgate such regulations as the administrator deems necessary to carry out this title.

SEC. 2805. EFFECTIVE DATE.

"The requirements of this title shall take effect on the date that is 1

year after the date of the enactment of the Smoke-Free Environment Act of 1997.

SEC. 2806. DEFINITIONS.

"In this title:

"(1) ADMINISTRATOR.--THE TERM 'ADMINISTRATOR' MEANS THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY.

"(2) PUBLIC FACILITY.--THE TERM 'PUBLIC FACILITY' MEANS ANY BUILDING REGULARLY ENTERED BY 10 OR MORE INDIVIDUALS AT LEAST ONE DAY PER WEEK, INCLUDING ANY SUCH BUILDING OWNED BY OR LEASED TO A FEDERAL, STATE, OR LOCAL GOVERNMENT ENTITY. SUCH TERM SHALL NOT INCLUDE ANY BUILDING OR PORTION THEREOF REGULARLY USED FOR RESIDENTIAL PURPOSES.

"(3) RESPONSIBLE ENTITY.--THE TERM 'RESPONSIBLE ENTITY' MEANS, WITH RESPECT TO ANY PUBLIC FACILITY, THE OWNER OF SUCH FACILITY, EXCEPT THAT IN THE CASE OF ANY SUCH FACILITY OR PORTION THEREOF WHICH IS LEASED, SUCH TERM MEANS THE LESSEE."

EC. 3. PROHIBITIONS AGAINST SMOKING ON SCHEDULED FLIGHTS.

(a) IN GENERAL.--Section 41706 of title 49, United States Code, is amended to read as follows:

41706. Prohibitions against smoking on scheduled flights

"(a) SMOKING PROHIBITION IN INTRASTATE AND INTERSTATE AIR

TRANSPORTATION.--An individual may not smoke in an aircraft on a scheduled airline flight segment in interstate air transportation or intrastate air transportation.

"(b) SMOKING PROHIBITION IN FOREIGN AIR TRANSPORTATION.--The Secretary of Transportation shall require all air carriers and foreign air carriers to prohibit, on and after the 120th day following the date of the enactment of the Smoke-Free Environment Act of 1997, smoking in any aircraft on a scheduled airline flight segment within the United States or between a place in the United States and a place outside the United States.

"(c) LIMITATION ON APPLICABILITY.--With respect to an aircraft operated by a foreign air carrier, the smoking prohibitions contained in subsections (a) and (b) shall apply only to the passenger cabin and lavatory of the aircraft.

"(d) REGULATIONS.--The Secretary shall prescribe regulations necessary to carry out this section."

(b) EFFECTIVE DATE.--The amendment made by subsection (a) shall take effect on the 60th day following the date of the enactment of this Act.

S. 826 JUNE 5, 1997 -- VERSION: 1

PAGE 5

LOAD-DATE: June 6, 1997

Tobacco - legislation

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Sunshine in Litigation Act of 1997 (Introduced in the Senate)

S 225 IS

105th CONGRESS

1st Session

S. 225

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 28, 1997

Mr. KOHL introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Sunshine in Litigation Act of 1997'.

SEC. 2. PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS RELATING TO PUBLIC HEALTH OR SAFETY.

(a) IN GENERAL- Chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new section:

Sec. 1659. Protective orders and sealing of cases and settlements relating to public health or safety

(a)(1) A court shall enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery or an order restricting access to court records in a civil case only after making particularized findings of fact that--

(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

(B)(i) the public interest in disclosure of potential health or safety hazards is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

(2) No order entered in accordance with the provisions of paragraph (1) shall continue in effect after the entry of final judgment, unless at or after such entry the court makes a separate particularized finding of fact that the requirements of paragraph (1) (A) or (B) have been met.

(b) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

(c)(1) No agreement between or among parties in a civil action filed in a court of the United States may contain a provision that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

(2) Any disclosure of information to a Federal or State agency as described under paragraph (1) shall be confidential to the extent provided by law.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1658 the following:

1659. Protective orders and sealing of cases and settlements relating to public health or safety.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall take effect 30 days after the date of the enactment of this Act and shall apply only to orders entered in civil actions or agreements entered into on or after such date.

not signed up for electronic deposit of their taxes. The IRS had set a July 1 deadline for approximately 1.2 million small businesses to begin electronic filing of their employment and business taxes or face a penalty of 10 percent of their tax bill. The IRS said it will waive the 10 percent penalty through December 31, but said they still must make timely deposits using the existing paper tax coupons. The deadline applies to businesses with more than \$50,000 in Federal payroll taxes in 1995. Acting IRS Commissioner Michael Dolan said today, "We understand that many taxpayers who have not enrolled...may need more time to learn about making electronic tax payments."

- o **White House Notes. Clinton Heavily Involved In Chelsea's Graduation.** President Clinton and First Lady Hillary Rodham Clinton attended several events yesterday leading up to daughter Chelsea's graduation from Sidwell Friends school. Clinton is to deliver the commencement address Friday, but the school says the event will be off-limits to the press. **Cost Of Clinton Knee Injury Split.** The White House said today President Clinton's health insurance paid the bill for his stay overnight in a Florida hospital following his knee injury, but his surgery at Bethesda Naval Hospital and his therapy are being covered by the government. **Gore Presents Small Business Award.** Vice President Gore announced today that David Giuliani, owner of Optiva Corporation of Bellevue, Washington, has been selected Small Businessperson of the Year. Optiva manufactures soundwave-powered toothbrushes. The company grew quickly from 10 to 250 employees and has exceeded \$50 million in yearly sales.
- o **New Smoking Bans To Be Introduced.** Sens. Frank Lautenberg and Dick Durbin, along with Rep. Henry Waxman, will tomorrow introduce their "Smoke-Free Environment Act of 1997." This "second-hand smoke bill" would ban smoking in any public or private building which more than 10 people regularly enter, a Senate source said this morning. Alternatively, the buildings could provide a separate well-ventilated room in which people could smoke. The ban does not apply to residences. The law would also extend Sen. Lautenberg's 1987 law that now bans smoking on all domestic flights of six hours or less. The bill would extend the law to all international or domestic flights originating in the US. They also plan to introduce the "No Tobacco For Kids Act," which would mandate that if smoking amongst teens is not reduced by 90 percent in the next six years, tobacco companies will be fined a yet-undetermined amount of money. The details of both measures were still being worked out this morning.
- o **Elizabeth Dole's New Hampshire Trip Will Not Involve Politics, Aide Says.** Elizabeth Dole is traveling to New Hampshire this week, but it has nothing to do with politics, her aide, Ann Stingle, insists. Mrs. Dole is considered a possible contender for the 2000 Republican presidential nomination. Stingle told the Bulletin this morning that Mrs. Dole, President of the American Red Cross, "is going up to speak to a women's group at the invitation of a friend, and then she's stopping by the [local Red Cross] chapter. It has no significance beyond that. I don't even think it's going to be open to press." Stingle said Dole has "no plans" to visit Iowa in the near future. Added Stingle: "If she had had the request [to speak] in Connecticut, South Carolina, [or] Idaho, she would do the same thing. ... What she does right now is very much dictated by the Red Cross agenda."
- o **Kemp Wows Iowa, But In New Hampshire He's Nowhere To Be Seen.** Coming off this weekend's trip to Iowa - his third since November - Jack Kemp has his supporters there convinced that he will indeed run for president. Republicans elsewhere in the country remain unconvinced, despite the fact that Kemp has seemingly bent over backwards to suggest his "appetite is whetted" for a run.

Kemp was in Iowa for to help raise money for Rep. Greg Ganske in Council Bluffs, and to tape a talk show interview with reporters David Yepsen and Mike Glover in Des Moines. Along the way, Kemp organizer Darrell Kearney told the Bulletin, the former vice presidential nominee met with many of his old 1988 supporters, who came away impressed that Kemp is serious this time. "I have to say that all of the key players that supported him in '88 and '94 and up to March of '95 seem to be pretty well interested in supporting him, or encouraging him to run, or seriously considering supporting him again," Kearney said.

Kearney said Kemp's Iowa supporters were at first extremely skeptical of Kemp's commitment, given



Elizabeth Drye

06/02/97 01:59:35 PM



Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:

Subject: Tobacco

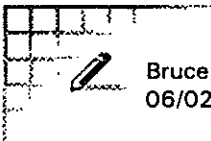
Agree that it's probably time to move forward on the EO. I'm checking status of related second hand smoke activities (e.g. litigation of EPA's second hand smoke risk assessment and OSHA's long-pending workplace standard).

ALSO, Waxman and others are introducing two tobacco bills tomorrow, Tuesday, at 10:00am press conference.

- Waxman/Meehan and Sen. Lautenberg will introduce the "Smoke Free Environment Act," a far-reaching bill they passed out of subcommittee in 1994 with some restaurant, insurance and building industry support. It prohibits smoking in any "public" facility (any building used by more than 10 people), except in specially-designated smoking areas that are ventilated according to EPA-promulgated standards. Citizens can sue to enforce.
- Waxman/Meehan and Sen. Durbin will introduce a kids use performance standard for tobacco brands -- an idea on the table in the settlement talks. Tobacco companies would have to reduce by 90% over 6 years the number of kids using (not buying) any given brand, or face a non-compliance penalty/tax of \$1 per pack in the first year of non-compliance; \$2 per pack in the second year of non-compliance, etc.

These tackle key problems, albeit very aggressively. Do we want to say anything besides "we'll look at them" if asked tomorrow? Should I ask HHS to do talking points?

----- Forwarded by Elizabeth Drye/OPD/EOP on 06/02/97 01:26 PM -----



Bruce N. Reed

06/02/97 11:38:10 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Elizabeth Drye/OPD/EOP

cc:

Subject: Tobacco

I talked to Kevin about the Thurs mtg. He thought it would be great to put a process in place to analyze the settlement, if any. Their recommendation for our opening line is, we haven't seen the agreement, I've asked my public health advisers to study it.

He also said they would probably make a formal recommendation soon that it's time to proceed

~~Liggett~~
tobacco-legislation



Elizabeth Drye

06/11/97 07:29:46 PM



Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:

Subject: Tobacco Talking Pts; Another Waxman Bill

1. Waxman press conference.

FYI Waxman is holding press conference tomorrow to release a minority staff report on Liggett's attorney-client privileged documents (should be newsworthy) and announce a bill on industry accountability. Under the bill, if the industry is shielded from liability, the bill would: set up an independent (non-regulatory) board of 5 HHS appointees charged with investigating the tobacco industry; require companies to turn over all documents relating to marketing and health studies to the board (including 150,000 privileged documents Minnesota has collected), and make public all documents that do not disclose trade secrets. The board would have subpoena powers and report annually to Congress. Also requires tobacco companies to have member of the oversight board sit in on company board meetings. This is Waxman's attempt to put corporate accountability into the mix.

2. McCurry's briefing.

You asked for talking points for McCurry re. our process which I will do in early a.m. once we have closure. Here are McCurry's remarks today. Reuters is apparently reporting based on them that we will wait for Koop-Kessler. But the remarks certainly give us a lot of room.

Excerpt from McCurry's Press Conference:

Q This just in. A source close to the tobacco talks says the Attorneys General expect to have a deal next week. A, has the White House heard this? B, what are you going to do when there is a deal?

MR. MCCURRY: The last we checked before I came out here, and of course I've been out here almost an hour now, so it is conceivable that it is not -- something has happened in that time. (Laughter.) But the last I checked, when we checked with Lindsey prior to this, is that they're about where it was reported today. They've got a lot of work to do and it doesn't look like they're close anywhere to a deal.

Q What's going to happen when they do get a deal? It will come here, right?

MR. MCCURRY: Well, they will be -- we'll know about it because we're in direct contact with the parties and we'll see what it is and see whether we like it or not.

Q Mike, on that, did the President receive a letter from C. Everett Koop and the associated groups yesterday?

MR. MCCURRY: It hasn't come in yet. We heard about it. Dr. Kessler and Dr. Koop both sent a letter down here.

Q Saying don't sign off on anything until health groups have --

MR. MCCURRY: And we don't intend to. I think we would very closely consider the views of the public health advocates in their community prior to rendering any judgment on a bill, but we've been in active contact with them during the process of these discussions so that we can sort of get their sense of what they're hearing and know more about their thinking.

In a sense, a lot of that has already happened.

Press Activities: On May 19, Secretary Cuomo discussed your second term agenda on domestic policies at HUD with *David Broder*.

VETERANS AFFAIRS

- **Memorial Day Activities:** On May 16, VA announced it will mark Memorial Day with ceremonies and public activities at its facilities around the country. The release also included Secretary Brown's endorsement of a nationwide effort by No Greater Love, an organization committed to paying tribute to those lost in service to our country or to acts of terrorism, to have all Americans pause for a minute of silence at 3 p.m. (ET) on Memorial Day.
- **AL Medical Center Merger:** Representative Everett has expressed strong reservations about VA's proposal to merge the Tuskegee and Montgomery, AL, VA Medical Centers, even though it will clearly lead to more efficient use of resources and improve services in the Montgomery area. It appears that Representative Everett possible opposition is based on the concerns of VA employees that they may be let go or transferred from Montgomery to Tuskegee.
- **Military Tobacco Use:** At the May 14 House Veterans' Affairs Subcommittee on Benefits hearing, the Vietnam Veterans of America, and the Disabled American Veterans opposed VA's legislative proposal to disallow compensation claims for disabilities based on illnesses resulting from tobacco. They argued that, since VA considers tobacco addictive, it should not oppose paying compensation to those who became addicted during service -- especially when the Armed Forces were providing free cigarettes and condoning, if not encouraging, smoking. On May 5 and 12 respectively, *Modern Healthcare* and *Army Times* published articles on the VA's proposal. *ABC World News Tonight* is also working on a story regarding the proposed legislation and that may include VA research on smoking cessation and nicotine replacement. An air date is not yet known.
- **Medicare Reimbursement:** Progress on VA's Medicare reimbursement pilot-program legislation is delayed while the Health Care Financing Administration, OMB and VA iron out a MOA for implementing the pilot. Meanwhile, the House Veterans' Affairs Committee (HVAC) introduced their own bill. On May 15, a hearing was held and the HVAC bill was marked-up. VA's major disappointment regarding the HVAC bill is that it omits authority for VA to conduct Medicare HMOs under the pilot program. VA is also concerned about the CBO's surprisingly high -- \$50 million -- PAY-GO estimate for the pilot and the fact that CBO attributes the cost to its belief that VA's proposal would adversely affect the Medicare Trust Fund.

PRELIMINARY IDEAS ON COVERAGE EXPANSIONS

Send to EK
+ return

Tobacco - settlement
and
Tobacco - legislation

OPTION	5-YR COSTS	COVERAGE	DISCUSSION
Premium Assistance for Workers between Jobs	\$12 b (\$2 b / yr)	3 million	All Americans are vulnerable to losing their health coverage when they lose their jobs Gives funds to States to make coverage affordable as well as accessible
Premium Assistance for New Workers (Age 18-24)	\$10 b (\$2 b / yr)	2 million	Addresses large problem: 23% of 18-20 year olds and 32% of 21-24 year olds are uninsured; also young adults were most likely affected by smoking advertising Gives funds to States to provide assistance to purchase basic benefits package
Helping Small Businesses Gain Insurance	\$10 b (\$2 b / yr)	1.5 million	Gives grants to states to develop voluntary purchasing cooperatives and provide premium assistance Addresses both issues of lack of access to group insurance and affordability of coverage for working families
Medicare buy-in for people age 60-64	\$5 b (\$1 b / yr)	0.5 million	Changes in companies retirement benefits policies as well as the high cost of insurance for older Americans has created a growing problem for this group Administered through Medicare which they will eventually join
Accelerate Self-Employed Deductibility Extend Deductibility to Non-Group Coverage	\$15-20 b (\$3 b / yr)	Negligible	Makes tax treatment of self-employed and individuals purchasing insurance in the non-group market equivalent to that of other workers Improves equity, not coverage
Increase public health funding	\$5 b (\$1 b / yr)	None	Helps uninsured and under-insured people through public providers rather than insurance Can target smokers or fund anti-smoking education

Note: Estimates are preliminary & rough; covered people includes only uninsured.

Tobacco-
legislation

Questions and Answers on Tobacco
April 18, 1997

Q. Are you pushing for a tobacco settlement?

A. My staff are staying informed of the talks. From the beginning, we have said we would be willing to consider legislation if it was brought to us and it measured up to the final FDA rule. Any legislation would have to be as strong, comprehensive, and effective as what we are doing. The parties in these negotiations know our bottom line is protecting kids and reducing smoking among youth. And we are focused right now on defending our rule in court and moving forward to implement it.

Q. Should the tobacco companies get immunity as part of a global settlement?

A. I understand that the parties involved in these negotiations have talked about immunity. Any agreement will have to take into account the needs of all who are affected, and it's too early to tell what the terms might be. Let me tell you my focus: protecting children and the public health. That is what we are doing with the FDA rule to restrict access and limit advertising and appeal. We have 3,000 children and young people becoming regular smokers each day, and nearly 1,000 of them will have their lives cut short. We simply have to reduce the number of children who start smoking.

Q. How involved are your staff in these negotiations?

We get regular and frequent updates about the status of the discussions. We have consistently impressed upon the parties that any agreement must be in the public interest and must lead to a reduction in the number of our children who start smoking.

Smoke Signals: Omens of Tobacco Truce Are in the Air

By BRUCE INGERSOLL
And MICHAEL K. FRISBY

Staff Reporters of THE WALL STREET JOURNAL
WASHINGTON — Is a truce at hand in the tobacco wars?

The cigarette industry has fought for decades against legions of antitobacco lawyers and now is girding for a court battle with federal regulators. But since the November elections, some of the combatants have indicated they may be willing to light up the peace pipe. Factions on both sides have signaled growing interest in striking a historic deal: In return for Congress's granting immunity from future liability suits, the industry would accept the Food and Drug Administration's landmark regulations to curb underaged use of tobacco.

There are numerous indications that they aren't just blowing smoke. This month, Steven F. Goldstone, chief executive officer of RJR Nabisco Holdings Corp., reiterated his call for a legislative settlement. Meantime, Thomas Hale Boggs Jr., one of Washington's superlobbyists, has been sounding out leading antitobacco lawyers about the prospects for a deal. His involvement is particularly significant because he represents both tobacco clients and the Association of Trial Lawyers of America.

Possible Advisory Panel

Mr. Boggs also has participated in discussions about appointing an advisory panel of political veterans — retiring Alabama Sen. Howell Heflin, former Senate Majority Leader Howard Baker and Leon Panetta, the departing White House chief of staff — to help broker a legislative compromise that would pass muster with the industry, the plaintiff's bar, smoking foes, the Clinton administration and lawmakers. Sen. Heflin confirms that such a troika is under consideration, but insists it's "premature" to discuss it. Mr. Boggs declines to comment.

At this point, nobody in the administration appears ready to take up the tobacco issue. At the White House, senior officials say that they know nothing about a "three-wise-men" plan, and that Mr. Panetta isn't interested in any peace-making role. They also insist that striking a deal with Big Tobacco isn't a presidential priority. The White House hasn't even found a successor for the chief staffer on tobacco issues, Jennifer O'Connor, who took another administration job last fall.

When tobacco lobbyists call Mr. Panetta, as they have in recent months, his message to them has been: "We want to get kids to stop smoking. We've gone about it the best way we can to make that happen. Do you have a better idea?"

But White House officials caution that the industry shouldn't interpret that to mean Mr. Clinton might be willing to deal. Having fought the battle over FDA regula-

tions last year and won, they say, why would he revisit it? Where is the political upside? The officials say they can envision the president's returning to the matter only if legislation begins moving in Congress. Then, the administration might weigh in with suggestions on the measure's objectives and wording.

In Congress there is equally strong reluctance to take the initiative on tobacco. Last year nobody on Capitol Hill moved to protect the tobacco industry from FDA regulation. What's more, nobody was willing to embrace a proposed watered-down version of the FDA regulations offered by Philip Morris Cos., largely because the No. 1 cigarette maker only had the industry support of U.S. Tobacco Co.

Executives say the industry remains divided on how to proceed with any settlement. On Dec. 5, the Tobacco Institute trade group asked its members for suggestions about a compromise. But mighty Philip Morris reportedly declined to respond, and the proposal wasn't on the Tobacco Institute's Dec. 12 executive committee agenda. The institute declined to comment on its internal workings, and a Philip Morris spokesman said the proposal wasn't on the agenda for reasons that had nothing to do with the company.

Proposal Fails

A sweeping proposal to settle future liability issues advanced by Mississippi Attorney General Mike Moore and trial lawyer Richard Scruggs also went nowhere last year, largely because of overwhelming opposition from health groups and other attorneys general. The proposal would have immunized cigarette makers against liability suits for 15 years and spared them from FDA regulation in return for multibillion-dollar payments to reimburse several states for health costs. The lack of unanimity was more than enough to dissuade Mr. Scruggs's brother-in-law, Senate Majority Leader Trent Lott, from sponsoring such a settlement.

Mr. Scruggs, for one, believes the legal campaign against Big Tobacco has reached a high-water mark. "It's foolish not to settle now," he asserts. But some industry critics doubt that any proposal akin to the one that he and Mr. Moore shopped around last year can succeed. "Why should the tobacco industry be immune, given the harm they've caused?" asks Matt Myers, executive vice president for the National Center for Tobacco-Free Kids.

Loss of Allies

In the House, meantime, Virginia Republican Thomas J. Bliley has made it clear to colleagues that he doesn't want to be known as "the congressman from Philip Morris." In a Dec. 9 speech, the House Commerce Committee chairman left tobacco off his legislative agenda. "You're not going to move legislation unless the administration signs on," he said.

Some in the industry hope the administration might be more amenable to a legislative compromise in the second term than it was in the first. The antitobacco movement will soon lose two important allies — FDA Commissioner David Kessler and Harold Ickes, White House deputy chief of staff. Dr. Kessler's departure raises the possibility of a successor more willing to compromise.

Mr. Panetta, who is going home to California next month, has advocated seeking a peaceful resolution with the cigarette manufacturers, but his aides say he has no interest in serving on any peace-making troika. His successor, North Carolina investment banker Erskine Bowles, isn't expected to differ much from Mr. Panetta. As a tobacco-state native, however, Mr. Bowles has a better understanding of the industry's grave problems.

Heating Up

August 1995

Food and Drug Administration proposes to ban tobacco sales to young people under age 18 and to sharply curtail industry advertising.

March 1996

Liggett Group enters first-ever settlement of tobacco lawsuits.

August 1996

Brown & Williamson Tobacco Co. loses a landmark \$750,000 jury verdict in Florida case.

February 28, 1997

FDA ban on tobacco sales to minors is scheduled to take effect.

Cigarette manufacturers clearly are on the defensive. In March, Liggett Group broke ranks with the rest of the industry and agreed to a multimillion-dollar settlement of several large liability cases. In August, the industry's courtroom invincibility was shattered when Norwood Willner, a Jacksonville, Fla., plaintiff's lawyer, won a shocking \$750,000 judgment against Brown & Williamson Tobacco Corp., prompting other lawyers to go after the industry. Much more costly setbacks may be in the offing. Sixteen states have suits pending against the industry to recoup billions of dollars in Medicaid outlays for smoking-related illnesses.

For now, the industry is focused on its Feb. 28 showdown with the FDA — despite the conciliatory remarks of RJR's Mr. Goldstone in a Dec. 10 appearance before fellow CEOs. The industry has asked a federal judge in Greensboro, N.C., to block the FDA's ban on tobacco sales to smokers under 18 years old and its advertising restrictions.

"We believe the case against the FDA is best made in court," said Thomas Lauria, spokesman for the Washington-based Tobacco Institute.

The impending court battle hasn't diminished the swirl of rumors about a possible legislative compromise. A few weeks ago, John Angell, a top Panetta aide, telephoned Mr. Boggs, the superlobbyist, to find out what all the fuss was about, according to the White House. Mr. Boggs believes, according to several accounts, that the rumors began after Hugh Rodham Jr., a Florida antitobacco lawyer, discussed the industry's huge liability problem with his brother-in-law, President Clinton, over Thanksgiving at Camp David.

Circulating among trial lawyers, however, is a different version of the call, which has Mr. Angell calling Mr. Boggs to take soundings on the attitudes of leading antitobacco attorneys toward a legislative settlement.

Wendell Gauthier, a New Orleans trial lawyer who has assembled a team of 60 lawyers for a massive class-action suit against Big Tobacco, confirms that Mr. Boggs contacted him about 10 days ago. He says he told Mr. Boggs that any settlement with the cigarette manufacturers would have to codify the FDA regulations.

"Our fight with those rascals has to do with them targeting the kids," says Mr. Gauthier. "Settlement discussions are probably premature. We are going to have to have some trials first."

—Milo Geyelin and Suetin L. Hwang
in New York
contributed to this article.

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F.D.A. - Tobacco - April 1997

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A-G. Humphrey Draft

Tobacco Regulation and Public Health Act

FDA Jurisdiction Over Tobacco

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

New National Tobacco Control Programs

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

Industry Reforms

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

No Preemption

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

Fib-Tobacco -
Legislation

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Tobacco Company Payments

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

Reimbursement to States and Private Plaintiffs for Tobacco-Related Damages

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

Effect on Legal Actions

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

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OUTLINE OF THE TOBACCO REGULATION AND

PUBLIC HEALTH ACT OF 1997

Short Title

The Tobacco Regulation and Public Health Act of 1997.

Findings and Purpose

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

Definitions

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

Regulation

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

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

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

Comments: (1) It has been suggested that the proposal specifically define nicotine manipulation as "misbranding". The general sense of the group, however, is to leave the nicotine manipulation issue to the sound discretion of a fully empowered FDA.

(2) The Smoke-Free Environment Act of 1993 was endorsed by a broad coalition of health experts, business organizations, and public officials, including the Attorneys General of AZ, CT, FL, HI, IL, IN, IA, KA, ME, MD, MA, MI, MN, MS, MT, NM, NY, OK, RI, TX, UT, and WA.

(3) In response to comments, this draft of the proposal sets the goal as the "elimination" of under-age smoking, rather than its "substantial elimination".

(4) There was unanimous agreement on the inclusion of triggers for future action against unabated youth smoking.

Appropriation

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

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

Enforcement of FDA Tobacco Advertising and Marketing Regulations

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

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

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

Industry reform

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

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

Comments: (1) The dissolution of industry trade groups is a standard antitrust remedy designed to break up the vehicles of conspiracy. We have used this remedy consistently in cases where the principal purpose of the trade association has been to implement illegal behavior. In order to address the argument that trade associations still perform lawful and useful activities, the industry would be able to form new associations, the activities of which would be limited by any injunctive provisions the States could persuade the DC District Court to order. Any State (or a committee of the original litigating States) could move to enforce.

(2) The next two points, disclosure of trade association papers, and all research and product design information in the hands of the individual companies, go to the heart of our "let's get out the truth once and for all" goal. The research and product information the FDA will need as a basis for its regulation. Given the industry's abuse of the attorney client privilege, in particular, there must be a neutral arbiter of privilege claims.

(3) Enforcement of the FDA regs, and other Industry obligations, through individual state consent decrees is discussed in a separate section, below.

Limitation of actions

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

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

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

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

Preemption

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

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

Compensation for tobacco plaintiffs

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

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

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- For any state which has filed tobacco litigation, or opts in by filing a case within 90 days of the effective date of the Act:
 - Compensation for past damages, in a lump sum. The total past damages should be determined after consultation with appropriate experts and based on the principles of fair compensation, deterrence and unjust enrichment which apply in other law enforcement cases.
 - Future payments of \$ ____ billion per year, adjusted for inflation, toward the future costs of treating tobacco-related, Medicaid-covered illnesses.
- Local governments and private third party payers which filed actions before the cut-off date would also be entitled to past damages and future payments. Others which had not so filed would not be eligible to come in during the 90-day window; only states would.
- In addition to the above, for states, local governments and private third party payers which filed actions before the determined cut-off date, and bore the risk and expense of bringing, Congress, the public and the Industry to terms with this issue:
 - A premium set aside from the past payment, to compensate the litigants who had taken the risks and initiative to earn the recovery--those having filed before the cut-off date to be determined. The premium would be based on:
 - The amount of time the entity had been litigating.
 - The amount of work the entity had put into its litigation.
 - The quality of its contribution to the overall success of the tobacco litigation.
 - The quantity, quality and value of other tobacco control activities undertaken by the entity.
 - Actual amount per litigant to be determined by the District of Columbia District Court.
 - Attorneys fees and costs, to be approved by the courts in the jurisdiction in which each action is pending, in accordance with applicable retainer agreements and applicable law. The amount of attorneys' fees so determined shall be considered as an element of the premium to those states who are so entitled to the premium.
- Individuals with future claims would have the alternative of arbitration through a state claims board or litigating on their own.
- For individual private litigants who filed suits before the cut-off date, an amount to be set aside from the "past damages" lump sum payment, to give private claimants an incentive to opt in. This includes class actions. Attorneys fees for private litigants to come out of their awards in an amount to be determined by the court of jurisdiction.
- Amount set aside also from future payments for injured individuals who prevailed in a optional arbitration proceeding (process to be established). Other private individuals could litigate on their own merits.

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

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

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

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

Use of payments by States

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

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

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

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

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

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Division of payments among companies

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

The Administrator

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

Jurisdiction of the District of Columbia District Court

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

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

Individual State Content Decrees Authorized

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

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

Severability

- Include a severability clause.

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Repealer

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

Effective Date

Effective when signed by the President.

AG:59559 v1