

NLWJC - Kagan

DPC - Box 047 - Folder-006

**Tobacco-Settlement: Local
Government Suits**

Tobacco and Local Governments

Preemption of Local Lawsuits

- During our negotiations with the Hill, we recommended including language in S.1415 which treats local governments fairly. Specifically, we proposed requiring states to adopt procedures that equitably allocate funds to local governments within two years. Under this scheme, local governments could receive reimbursement for Medicaid, indigent care, and other health care expenditures that the State deems appropriate. Unfortunately, we did not prevail on that point.

Future Conduct

- While Title XIV of the McCain originally prevented local governments from suing to enforce their laws related to the future conduct of the tobacco industry, the amendment offered by Senator Gregg and adopted by the full Senate changed this. Specifically, the Gregg amendment prevents the preemption of claims based on future conduct. Additionally, the amendment allows local governments who have sued the industry to opt out of the legislation.

Feinstein Amendment

- The Feinstein amendment says that in order for states to receive their state funding under the tobacco legislation, they would need to provide a portion of that funding to those local governments which had filed suit prior to June 20, 1997. We are currently in the process of taking a close look at this amendment.



June 5, 1998

The Honorable William J. Clinton
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the National Association of Public Hospitals and Health Systems, and the International Municipal Lawyers Association, we are concerned about the serious negative impacts that the McCain tobacco bill (S.1415) would have on local governments. We urge your Administration to use its influence in future negotiations to resolve two major local government problems in the Senate bill.

First, S.1415 would settle all local government lawsuits without providing any compensation to local governments. Local governments have incurred substantial tobacco related health care costs that are distinct from the costs incurred by the states under the Medicaid program. Any comprehensive tobacco legislation which settles local government claims should provide compensation for these costs. At a minimum, those local governments that have sued the industry should be allowed to share in the proceeds of the bill. Senator Feinstein has prepared an amendment (No. 2443) to the bill that would accomplish this objective. We urge your support for this amendment.

Second, under Title XIV of Senator McCain's bill, local governments might be prevented from suing to enforce their laws relating to the future conduct of the tobacco industry. This defect in the bill would be corrected if certain provisions from the Gregg/Leahy amendment are incorporated in the final legislation. Specifically, section 1408(c)(1) of the amendment prevents the preemption of claims based on future conduct. In addition, section 1408(b)(4) of the amendment allows local governments who have sued the industry to opt out of the legislation. Even if your Administration opposes the overall provisions in the Gregg/Leahy amendment, we urge you to support the provisions of the amendment relating to local government suits.

Thank you for your attention to our concerns. If your staff has any questions about our positions, please have them contact Tom Joseph, NACo Deputy Legislative Director at 202/942-4230; Kristin Cormier, NLC Legislative Counsel at 202/626-3173; Jubi Headley,

The Honorable William J. Clinton
June 5, 1998
page 2

USCM Assistant Executive Director at 202/861-6707; Charles Lubinsky, NAPH Legislative Counsel at 202/624-7215; or Henry W. Underhill, Jr., IMLA Executive Director/General Counsel at 202/466-5424.

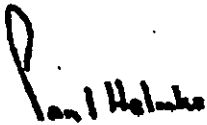
Sincerely,



Randy Johnson, President, NACo
Commissioner, Hennepin County, MN



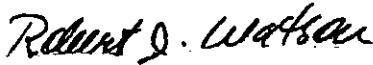
Brian O'Neill, President, NLC
Councilman, Philadelphia, PA



Paul Helmke, President, USCM
Mayor, Fort Wayne, IN



Larry Gage, President, NAPH



Robert J. Watson, President, IMLA
City Attorney, Overland Park, KS

Tab - rec - local swt sub



FAX from . . .

Senator Dianne Feinstein

of California

331 Hart Senate Office Building
Washington, DC 20510
(202) 224-3841

DATE: 5/19

TIME: 5:45 p.m.

TO: Elena Kagar
White House DPC 456-2878

FROM: Louise Nenne / Owen Clements
S.F. City Attorney

COMMENTS: It was good to talk w/ you!
As Louise mentioned, we're forwarding
the proposed Amendment and related
materials. I will send the preemption
language tomorrow morning

Owen
5

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): 5

NOTE: The information contained in this facsimile is confidential. If you receive this transmission in error, please notify the sender immediately.

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S.L.C.

AMENDMENT NO. _____

Calendar No. _____

Purpose: To ensure that, in order to be eligible for funds under the Act, a State shall resolve pending tobacco-related civil actions brought by cities and counties within the State.

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

S. 1415

To reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco use, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. FEINSTEIN, BOXER

Viz:

1 In section 451(a)(4), insert before the period the fol-
2 lowing: “, except that in order to be eligible to receive such
3 amounts, a State shall resolve, through agreement be-
4 tween the State and local government entities within that
5 State, any pending health and smoking-related civil action
6 by or on behalf of a local government entity within that
7 State against tobacco product manufacturers, distributors,
8 or retailers that was commenced on or before June 20,

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S.L.C.

2

1 1997 (including actions by the City and County of San
2 Francisco and related cities and counties, Los Angeles
3 County, New York City, Erie County, Cook County, and
4 the City of Birmingham)".



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY

LOUISE H. RENNE
City Attorney

**SUMMARY OF SAN FRANCISCO'S
LITIGATION AGAINST THE TOBACCO INDUSTRY**

In June 1996, San Francisco became the first local jurisdiction in the nation to sue the tobacco companies. The cities of Los Angeles and San Jose, fifteen other counties,¹ and four California public health organizations joined San Francisco.² These prosecuting entities currently have two actions against the tobacco companies: a federal action (City and County of San Francisco, et al. v. Philip Morris Inc., et al.) and a state action (People v. Philip Morris, et al.). The actions seek to stop the tobacco companies from targeting minors, misleading the public about the addictive nature of their product, manipulating nicotine levels, and engaging in other misconduct.

The federal action demands recovery of the counties' medical costs of caring for indigent persons and public employees who have been treated for tobacco-related diseases. The lawsuit in state court, on behalf of the people of the state of California, demands hundreds of millions of dollars in refunds of company profits as well as civil penalties and injunctive relief.

A third lawsuit by the cities and counties against R.J. Reynolds was resolved in September 1997. Under the terms of the settlement, private plaintiff Janet Mangini's action was dismissed. The claims of the intervening cities and counties were consolidated into their state action (People v. Philip Morris). In return, RJR paid \$10 million to the cities and counties and entered into an enforceable agreement ending the Joe Camel campaign in California. R.J. Reynolds admitted that the Mangini case was a "substantial factor" in phasing out the Joe Camel campaign. The company also released internal documents publicly revealing for the first time their efforts to create a youth market.

A fourth suit, filed March 31, 1998 in San Francisco Superior Court charges the makers and sellers of smokeless tobacco, known as chew and snuff, of illegally marketing their products to minors and of violating the health warning requirements of Proposition 65, a 1986 California initiative. Co-plaintiff in the suit with San Francisco is the Oakland-based Environmental Law Foundation.

Despite the important role played by cities and counties in the tobacco litigation, they were excluded from the negotiations that led up to the proposed national settlement between the tobacco companies and the state attorneys general being considered by Congress. San Francisco has taken an active role in the effort to see that Congressional legislation allows cities and counties to continue to sue to enforce local laws and to recover tobacco-related health care costs.

¹ The counties joining in at least one suit against the tobacco companies are the Counties of Alameda, Contra Costa, Marin, Riverside, Sacramento, San Bernardino, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Ventura, Monterey, and Shasta. Together, these cities and counties constitute over 50% of California's population.

² The four California non-profit medical plaintiffs are: American Cancer Society (California Division, Inc.), American Heart Association (California affiliate), California Medical Association, and the California District of the American Academy of Pediatrics.

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LOUISE H. RENNE

City Attorney

**CITIES' AND COUNTIES' CONCERNS REGARDING
PROPOSED LEGISLATIVE SETTLEMENT OF TOBACCO LITIGATION****BACKGROUND**

Local governments have been an early, driving force in litigation against the tobacco industry. Beginning with San Francisco in June 1996, at least twenty local governments around the nation — including other cities and counties in California and in New York, Illinois and Alabama — filed suit before the proposed "global settlement" was announced. R.J. Reynolds acknowledged that the California cities' and counties' lawsuit against its Joe Camel ads was crucial to its decision to end those ads nationwide. RJR also paid the California cities and counties \$10 million to fight youth smoking and agreed to disclose internal company documents about targeting kids.

Local governments were excluded from the talks between the Attorneys General and the tobacco industry leading to the Proposed Resolution. Yet it would kill off local government suits without any compensation to cities and counties and could preempt and hobble local enforcement. Any legislation must address the following issues of critical concern to cities and counties around the nation:¹

DIRECT COMPENSATION TO LOCAL GOVERNMENTS FOR THEIR TOBACCO-RELATED EXPENSES

Local governments spend millions on tobacco-related health care separate from state Medicaid Payments. California's counties spend an estimated \$200 million or more per year to treat tobacco-related diseases of uninsured patients at public health facilities, and for employee health care. Many states require their counties to shoulder a portion of state Medicaid costs. In New York State, counties pay half of the state's share of Medicaid. In the aggregate, local governments spend over \$26 billion annually to provide health care. A significant portion of these expenses is directly attributable to tobacco-related diseases. The resolution proposed by the Attorneys General ignores these expenses.

Any legislation should provide for direct compensation to local governments for these costs.

NO PREEMPTION OR HOBBLING OF LOCAL GOVERNMENT TOBACCO CONTROL AND ENFORCEMENT

Several provisions of the proposed resolution could prevent enforcement of state and local laws. Any legislation should include clear language specifying that it does not preempt state and local laws. Any legislation should also make clear that state laws with tougher remedies for unfair, illegal and deceptive business practices than the remedies provided in national legislation continue to apply to the tobacco industry. For example, California's consumer protection statutes provide for disgorgement of profits and stiff civil penalties. The tobacco industry should not be granted a special exemption from these provisions.

¹ Obviously, the primary objective of any legislation must be to reduce smoking, especially among young people. Public health advocates have raised numerous concerns about whether the proposed resolution will be effective in this regard. The cities and counties share these concerns.



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LOUISE H. RENNE
City Attorney

Tobacco - local govts suits

**EFFECT OF WHITE HOUSE TOBACCO SUBSTITUTE ON
LOCAL GOVERNMENT SUITS AND ENFORCEMENT**

- Under the White House substitute proposal, tobacco companies and retailers could sell tobacco products to children; and local governments could arguably do nothing about it! Why? Because the combination of Secs. 701 and 1405 of the White House proposal would allow the tobacco companies to argue that local governments cannot enforce their own local laws or the provisions of this legislation.
- Local government was responsible for the Joe Camel victory and the release of documents that proved that tobacco companies target kids. Yet under the White House substitute, lawsuits like this could not be brought.
- Local governments sued the tobacco companies before 30 of the 40 State Attorneys General had sued: In California, the California chapters of the American Cancer Society, the American Heart Association, the American Pediatric Association and the California Medical Association joined the lawsuit filed by the cities of San Francisco, San Jose, Los Angeles and 15 California counties. Yet, those lawsuits along with New York and Chicago's would be wiped out by the White House substitute without any compensation whatsoever for the smoking costs incurred. This is unfair and quite possibly, unconstitutional.

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LOUISE H. RENNE
City Attorney

MAY 15, 1998

LOCAL GOVERNMENT CONCERNS ABOUT
TOBACCO PRODUCTS CONTROL ACT OF 1998
(Bill as Reported May 1, 1998)

COMPENSATION TO LOCAL GOVERNMENTS**1) Tobacco-Related Health Costs****Background:**

Local governments have been an early, driving force in litigation against the tobacco industry. Beginning with San Francisco in June 1996, at least 20 local governments around the nation filed suit before the proposed global settlement was announced, including other cities and counties in California; Erie County, N.Y.; New York City; Cook County, IL; and Birmingham, AL.

Local governments incur their own costs for treatment of tobacco-related illnesses. They should therefore receive an equitable share of amounts paid to a State under any tobacco legislation as compensation. Local tobacco-related costs include amounts contributed by local governments to a) the State share of Title XIX; and b) local health facilities (e.g. city and county hospitals and clinics) for uncompensated care of the medically indigent.

McCain Bill:

The McCain bill, as presently configured, does not specify how the proceeds of the legislation will be spent. However, two provisions of the bill recommend that a portion of the proceeds be given to the States to compensate them for their tobacco-related health costs. However, other provisions of the bill would settle State and local government tobacco claims. [Sections 703(a), 704(a).] In light of these provisions, it is unconscionable (and arguably unconstitutional) for the legislation not to provide any compensation to local governments.

For this reason, those sections of the McCain bill that recommend compensation to States should be expanded to include local governments, too:

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City Attorney

MAY 15, 1998

Recommended Language for Inclusion in Present Bill: (suggested additions in **BOLD**)

Purpose, Section 3(13), bill at p. 253, line 21-23:

(13) to establish a mechanism to compensate the States **and local governments** in settlement of their various claims against tobacco product manufacturers.

Sense of the Senate, Section 1181(5), bill at p. 633, lines 15-17:

(5) settling with and reimbursing States **and local governments** for their tobacco-related health care costs and damages, including Medicaid **and indigent care expenses**.

Modification of McCain Bill on or Before Floor Vote:

It is anticipated that more specific provisions relating to spending the proceeds of the McCain bill will be added to the bill before it reaches the floor, or during floor action. Such provisions should ensure that local governments receive an equitable share of the proceeds of the legislation, to compensate them for their tobacco-related medical costs.

One way to accomplish this goal is to require each State to adopt a plan that provides an equitable share of funds to local governments. Language to this effect was already included in section 111 of the Conrad / Fazio bill. Such language should be inserted into the McCain bill.

Recommended Language for Inclusion in Final Bill:

This language could be added to end of section 402(c)(3), p. 401 lines 3:

Provided, however, that in order to be eligible to receive funds under this Title, a State shall have adopted procedures to provide an equitable portion of funds to local governments within the State that can demonstrate that such entities incurred tobacco-related health costs through--

- (1) contributions to the program under Title XIX of the Social Security Act; or
- (2) the provision of indigent care.

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City Attorney

MAY 15, 1998

2) **Public Health and Education Activities**

Background:

Through the nation's nearly 2,900 local health departments, local governments have the infrastructure and experience to deliver effective anti-tobacco education, prevention and cessation programs. A portion of any increase in federal funding for public health and education efforts should be targeted to local public health and education activities.

McCain Bill:

Again, the present version of the McCain bill is not specific concerning how the bulk of the proceeds of the legislation will be spent. The bill would establish national funding for:

- 1) cessation programs (Sec. 221),
- 2) anti-tobacco education campaigns (Sec. 222)
- 3) community-based tobacco control programs (Sec. 223), and
- 4) special grants to reduce teen smoking (Sec. 410(a)(1)).

States, local government entities, and non-profits could apply for grants from these programs. Local governments have historically taken leading roles in these areas. Local governments are also best situated to conduct programs that are targeted to and effective with differing local community groups. Legislation that funds such programs should contain language similar to that set forth below:

Recommended Language:

Each State, in order to receive funds, shall have adopted procedures to allocate funds to local governments within the State for local government anti-tobacco education, prevention, cessation and counter-advertising activities.

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LOUISE H. RENNE
City Attorney

MAY 15, 1998

3) Funding for Obligations Imposed by Federal Law**Background:**

Federal tobacco legislation may impose monitoring and enforcement obligations on the States. For example, States may be required to systematically monitor and enforce state laws against sale of tobacco products to minors. Many of these enforcement and monitoring functions will in fact be performed by local officials. To avoid imposing an unfunded mandate on local governments, federal legislation should ensure that local governments receive adequate funding to perform these activities.

McCain Bill:

The McCain bill sets forth an extensive program of state enforcement incentives to reduce the rate of tobacco sales to minors (Sections 211-213). These enforcement activities will likely be carried out by States and their political subdivisions. To avoid imposing unfunded mandates on local governments, the bill should require that enforcement monies be provided to local governments to carry out these activities.

Recommended Language:

This language could be added as a new subsection 212(b)(3), p. 362 line 20:

To the extent that enforcement, monitoring, compliance, or other duties imposed by this Act are performed by local government entities, local governments shall receive funding from the revenues generated by this Act, in order to ensure adequate resources for local governments to conduct all necessary or appropriate enforcement activities.

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LOUISE H. RENNE
City Attorney

MAY 15, 1998

ANTI-PREEMPTION**1) Non-Preemption of Stricter State and Local Laws Relating to Tobacco****Background:**

Federal tobacco legislation should set nationwide floor requirements relating to tobacco advertising, youth access to tobacco, exposure to second hand smoke, and similar issues. The federal floor requirements should not preempt state and local governments from enacting and enforcing stricter requirements.

McCain Bill:

In general, the McCain bill does a good job of preventing preemption of stricter state and local laws (as opposed to law suits -- see subsection 2 below). Section 5(b) of the bill generally allows stricter state and local regulation by States and local governments. That section also explicitly states that FDA regulations will not preempt stricter state and local laws, notwithstanding the broad preemption provisions of FDCA § 521, which would otherwise be applicable.

Section 101 of the bill sets forth a new title within the FDCA to regulate tobacco products. Section 914 of that new title would preempt state and local regulation relating to the manufacturing, labeling, and safety of tobacco products. This section would give the FDA primary jurisdiction over tobacco product manufacturing and safety. However, state and local restrictions on the sale, use or distribution of products approved by the FDA would not be preempted. Moreover, state and local governments could apply for a waiver of FDA preemption relating to safety issues. In sum, sections 5(b) and 101 / "914(a)" of the McCain bill strike an appropriate balance between FDA regulation and state and local autonomy.

However, the McCain bill does not address one important preemption issue -- repeal of current federal law that preempts state and local laws regulating cigarette advertising and promotion based on health considerations. 15 U.S.C. 1334(b). This provision was adopted as part of the Federal Cigarette Labeling Act of 1969. This outdated preemption provision should be repealed, to make existing federal law consistent with the general approach taken by sections 5(b) and 914(a) of the McCain bill.

Recommended Language:

This language could be added as new subsection 5(d), p. 257, line 10:

Subsection (b) of section 5 of the Federal Cigarette Labeling And Advertising Act (15 U.S.C. 1334(b)) is hereby repealed.

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LOUISE H. RENNE
City Attorney

MAY 15, 1998.

2) No Preemption of State and Local Remedies

Background:

The proposed global settlement originally provided extremely limited means for policing the future conduct of the tobacco industry. Although the proposed settlement was not entirely clear on this point, it appeared that only the Department of Justice and State Attorneys General would have standing to sue for violation of the agreement. Furthermore, the primary remedy available in such future suits would be injunctive relief. This remedy would be exclusive of the monetary remedies that would otherwise be available under state and local laws.

This proposed enforcement mechanism is inadequate. Much of the progress made in bringing the tobacco industry to the negotiating table is directly due to the powerful remedies available under state consumer protection statutes (e.g., treble damages, disgorgement of profits). Federal legislation should preserve state and local authority to obtain such remedies.

McCain Bill:

The enforcement provisions of the McCain bill contains the same basic flaws as the original proposal. Section 704(a) unambiguously precludes States and local governments from bringing "tobacco claims" now and in the future. Section 704 provides only two exceptions to this total claim preemption: (1) States who opt out of the provisions of the Act, pursuant to Section 702(c); and (2) States who seek to enforce a consent decree or settlement agreement under Section 704(b). Neither of these exceptions apply to local governments.

Section 704(b) of the McCain bill gives States the exclusive authority to enforce the terms of settlement agreements and consent decrees with the tobacco industry. Local governments may therefore be unable to challenge future tobacco industry behavior which violates the Act. If a State Attorney General does not vigorously enforce the terms of the legislation, localities and their residents will simply be out of luck.

Moreover, much of the good that is done by the general anti-preemption provisions of the bill (sections 5(b) and 914(a), discussed above) may be undone by the broad definition of a "tobacco claim." Section 701(12) defines "tobacco claim" as:

"a claim directly or indirectly arising out of, based on, or related to the health-related effects of tobacco products, including without limitation a claim arising out of, based on, or relating to allegations regarding any conduct, statement, or omission respecting the health-related effects of such products."

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LOUISE H. RENNE
City Attorney

MAY 15, 1998

This broad language may foreclose many future suits that seek to enforce stricter state and local laws regulating tobacco. As drafted, this provision would appear to apply to suits seeking to regulate the conduct of the tobacco industry, as well as suits seeking to recover tobacco-related health care costs. So long as a suit is arguably based on any tobacco industry "conduct, statement, or omission" relating to health effects, the industry will argue that the suit should be barred.

For example, San Francisco recently filed a suit against the smokeless tobacco industry for failing to comply with California Proposition 65. That proposition requires manufacturers and sellers of products that contain toxic materials to provide certain specified warnings (including point-of-sale warnings) to consumers. In theory, this is the type of stricter state law that should be allowed by the anti-preemption provisions of sections 5(b) and 914(a). Although the law would not be preempted, a suit to enforce the law arguably would be, since the failure to warn is an "omission" relating to the health effects of tobacco products.

The combined effect of these sections is to preclude all past, present and future "tobacco claims" by local government. As stated above, no compensation is provided to local governments in exchange for their valid tobacco claims. The McCain bill thus works a forfeiture on local governments.

These provisions of the McCain bill should be altered in several important respects. First, the definition of "tobacco claims" should be narrowed to allow future regulatory suits. Second, local governments should be given standing to bring suit to enforce the Act. Third, local governments who have sued the tobacco industry should be given the same opt out rights as the States. Fourth, local governments who have sued the tobacco industry should have the same right to require participating manufacturers to enter into binding consent decrees and settlement agreements. Finally, the Act should be amended so that remedies provided by the Act for future violations are cumulative with remedies that already exist under state and local law.

Recommended Language:

Section 701(12) [p. 433, lines 11-17] should be revised to define "tobacco claim" more narrowly, so that the claim preemption of section 704(a) is limited to suits in which government entities seek to recover medical expenses or similar relief. Suits seeking to regulate the future conduct of the industry should not be preempted:

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LOUISE H. RENNE
City Attorney

MAY 15, 1998

"The term 'tobacco claim' means a claim for personal injury, wrongful death, or for reimbursement of medical expenses, directly or indirectly arising out of, based on, or related to the health-related effects of tobacco products, including without limitation a claim arising out of, based on or relating to allegations regarding any conduct, statement, or omission respecting the health-related effects of such products; provided, however, that a claim filed against a tobacco product manufacturer, based on conduct occurring after the date of enactment of this Act, and seeking to enforce this Act or the requirements of State or local laws applicable to the conduct of a tobacco product manufacturer, shall not be deemed to be a "tobacco claim."

Section 702 (b)(5) [page 437, lines 19-21] should be revised, to allow suits:

"brought under this title by a State, a local government, or a participating tobacco product manufacturer to enforce this Act;"

Section 702(c) [page 438, line 17 to page 439, line 2] should be revised, to provide that:

"a State, or a local government that filed a tobacco claim prior to June 20, 1997, may . . . [opt out of the legislation and pursue its tobacco claim]."

Section 704(b) [page 439, line 22 to page 440, line 7] should be revised, to provide that:

"any State, or a local government that filed a tobacco claim prior to June 20, 1997, may request that tobacco product manufacturers enter into the Master Settlement Agreement or a consent decree. If a State or a local government makes such a request and enters into a consent decree, it may [obtain continued court jurisdiction over the consent decree and sue to enforce its terms]."

A new section [704(c), page 440 line 7] should be added, stating:

"The remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under state and local laws including, without limitation, remedies or penalties available under state and local laws relating to unfair business practices and deceptive advertising, and remedies or penalties available under state and local laws regulating the sale, display, distribution, advertising, promotion, or use of tobacco products."

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



LOUISE H. RENNE
City Attorney

OWEN J. CLEMENTS
Deputy City Attorney

DIRECT DIAL: (415) 554-3944
FACSIMILE: (415) 554-3837

May 29, 1998

BY FAX AND MAIL
(202) 456-7878

Elena Kagan
Domestic Policy Council
Executive Offices of the President
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Elena:

I enjoyed speaking with you last week. I look forward to future conversations under less hectic circumstances.

As we discussed, I am forwarding a copy of a memorandum concerning preemption problems created by the manager's amendment of the McCain bill (S. 1415). The memo sets forth the concerns that local governments have with certain portions of that bill. As you suggested, I am sending a copy of the memo to Tom Perrelli at the DOJ as well.

Many of the preemption problems noted in the memo will be resolved if the Gregg/Leahy amendment is approved. Although the debate over that amendment focused on the elimination of the liability cap, the amendment also contains language that would be very helpful to local governments. Section 1408(c)(1) of the amendment prevents the bill from barring local government claims that are based on future industry misconduct. This section would eliminate any argument that the preemption of "tobacco claims," as broadly defined in the McCain bill, could apply to future local government lawsuits brought to enforce state and local laws. Further, section 1408(b)(4) of the amendment allows local governments who sued the industry prior to June 20, 1997, to opt out of the legislation and pursue their existing suits against the industry.

As you know, a direct vote on the Gregg/Leahy amendment has yet to occur. Even if the amendment is not approved, or if liability caps or other protections are added back into the bill in the future, we hope that the Administration will support the inclusion of language similar to the Gregg/Leahy non-preemption and opt-out language in any final tobacco legislation.

We also hope that the Administration will support an amendment to the McCain bill to allow local governments who have sued the industry to share in the proceeds of the legislation.

Letter to Elena Kagan

Page 2

May 29, 1998

We forwarded a draft of that amendment to you last week. I am enclosing the final version of the amendment (No. 2443) from the Congressional Record for your reference.

Please give me a call if you have any questions or if you need any further information. I look forward to working with you on these issues.

Very truly yours,

A handwritten signature in black ink, appearing to read "Owen", written in a cursive style.

OWEN J. CLEMENTS
Deputy City Attorney

S5342

CONGRESSIONAL RECORD—SENATE

May 21, 1998

annually to the Secretary. In such manner and such form as the Secretary shall require, on the use of the funds received under this section and overall smoking trends within their State.

**FEINSTEIN (AND OTHERS).
AMENDMENT NO. 2443.**

(Ordered to lie on the table.)

Mrs. FEINSTEIN (for herself, Mrs. BOXER, Mr. DURBIN, Mr. D'AMATO, and Ms. MOSELEY-BRAUN) submitted an amendment intended to be proposed by them to the bill, S. 1415, supra; as follows:

On page 193, between lines 15 and 17, insert the following:

(4) ELIGIBILITY.—

(A) IN GENERAL.—To be eligible to receive amounts under this subsection, a State shall, through agreements entered into with local government entities described in subparagraph (B), provide such entities with a portion of the amounts received by the State under this subsection as consideration for the resolution or termination of civil actions under title XIV.

(B) LOCAL GOVERNMENT ENTITIES.—A local government entity described in this subparagraph is a city or county that commenced a health or smoking-related civil action against one or more participating tobacco product manufacturers, distributors, or retailers on or before June 20, 1997 (including actions by the City and County of San Francisco and related cities and counties, Los Angeles County, New York City, Erie County, Cook County, and the City of Birmingham).

NOTICES OF HEARINGS

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. MURKOWSKI. Mr. President, I would like to announce for the public that a hearing has been scheduled before the full Committee on Energy and Natural Resources.

The hearing will take place on Thursday, June 4, 1998, at 9:30 A.M. in room SD-368 of the Dirksen Senate Office Building in Washington, D.C.

The purpose of this hearing is to receive GAO's preliminary comments on its review of the Administration's Climate Change Proposal and to hear the Administration's response to GAO's comments.

Those wishing to testify or who wish to submit written statements should write to the Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510. For further information, please call Kristine Svinicki at (202) 224-7833.

SUBCOMMITTEE ON FORESTS AND PUBLIC LAND MANAGEMENT

Mr. GRAIG. Mr. President, I would like to announce for the public that a field hearing has been scheduled before the Subcommittee on Forests and Public Land Management of the Senate Committee on Energy and Natural Resources.

The hearing will be held in Grand Junction, Colorado at the Avalon Theater on Saturday, June 6, 1998, at 8:30 a.m. The Avalon Theater is located at 845 Main Street, Grand Junction, Colorado.

The purpose of this hearing is to receive testimony on the Bureau of Land Management's ongoing wilderness review efforts within the State of Colorado.

The Subcommittee will invite witnesses representing a cross-section of views and organizations to testify at the hearing. Others who wish to testify may, as time permits, make a brief statement of no more than 2 minutes. Those wishing to testify should contact Senator ALLARD's office (202) 224-5941 or Kevin Studer of Senator CAMPBELL's office (202) 224-5852 or the Committee on Energy and Natural Resources in Washington, DC at (202) 224-6170. The deadline for signing up to testify is Friday, May 29, 1998. Every attempt will be made to accommodate as many witnesses as possible, while ensuring that all views are represented.

Those who wish to submit written statements should write to the Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510. For further information, please call Mike Menge at (202) 224-6170.

SUBCOMMITTEE ON ENERGY RESEARCH, DEVELOPMENT, PRODUCTION AND REGULATION

Mr. NICKLES. Mr. President, I would like to announce for the public that a hearing has been scheduled before the Subcommittee on Energy Research, Development, Production and Regulation of the Committee on Energy and Natural Resources.

The hearing will take place Thursday, June 11, 1998 at 10 a.m. in room SD-368 of the Dirksen Senate Office Building.

The purpose of this hearing is to conduct oversight on the federal oil valuation regulations of the Minerals Management Service.

Those wishing to testify or who wish to submit written statements should write to the Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510. For further information, please call Michael A. Poling at (202) 224-8278.

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. MURKOWSKI. Mr. President, I would like to announce for the public that an oversight hearing has been scheduled before the Committee on Energy and Natural Resources.

The hearing will take place on Thursday, June 11, 1998 at 2 p.m. in room SD-368 of the Dirksen Senate Office Building in Washington, DC.

The purpose of this oversight hearing is to receive testimony on the Recreational Fee Demonstration Program.

Those wishing to testify or who wish to submit written statements should write to the Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C. 20510. For further information, please call Kelly Johnson at (202) 224-3329.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ARMED SERVICES

Mr. GREGG. Mr. President, I ask unanimous consent that the Committee on Armed Services be authorized to meet in Executive session during the session of the Senate on Thursday, May 21, 1998 at 2:30 p.m. to consider possible amendments relating to Bosnia.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON ENERGY AND NATURAL RESOURCES AND THE COMMITTEE ON FOREIGN RELATIONS

Mr. GREGG. Mr. President, I ask unanimous consent that the Committee on Energy and Natural Resources and the Committee on Foreign Relations be granted permission to meet during the session of the Senate on Thursday, May 21, for purposes of conducting a joint committee hearing which is scheduled to begin at 9:30 a.m. The purpose of this oversight hearing is to receive testimony on the subject of Iraq: Are Sanctions Collapsing?

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS

Mr. GREGG. Mr. President, I ask unanimous consent that the full Committee on Environment and Public Works be granted permission to conduct a business meeting to consider pending business Thursday, May 21, 9:30 a.m., Hearing Room (SD-406).

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS AND THE COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. GREGG. Mr. President, I ask unanimous consent that the Committee on Foreign Relations and the Committee on Energy and Natural Resources be authorized to meet during the session of the Senate on Thursday, May 21, 1998, at 10 a.m. to hold a hearing.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS

Mr. GREGG. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, May 21, 1998 at 2 p.m. to hold a hearing.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON INDIAN AFFAIRS

Mr. GREGG. Mr. President, I ask unanimous consent that the Senate Committee on Indian Affairs be authorized to meet during the session of the Senate on Thursday, May 21, 1998 at 1 p.m. to conduct an oversight hearing on the Unmet Health Care Needs in Indian Country. The Committee will meet in room 106 the Dirksen Senate Office Building.

The PRESIDING OFFICER. Without objection, it is so ordered.



LOUISE H. RENNE
City Attorney

MAY 29, 1998

LOCAL GOVERNMENT CONCERNS ABOUT CLAIM PREEMPTION
CREATED BY THE NATIONAL TOBACCO POLICY AND YOUTH SMOKING
REDUCTION ACT ("THE McCAIN BILL," S. 1415)

(Bill as reported after manager's amendment, May 18, 1998)

1) Non-Preemption of Stricter State and Local Laws Relating to Tobacco

Background:

Federal tobacco legislation should set nationwide floor requirements relating to tobacco advertising, youth access to tobacco, exposure to second hand smoke, and similar issues. The federal floor requirements should not preempt state and local governments from enacting and enforcing stricter requirements.

McCain Bill:

In general, the McCain bill does a good job of preventing preemption of stricter state and local laws (as opposed to law suits -- see subsection 2 below). Section 5(b) of the bill generally allows stricter state and local regulation by States and local governments. That section also prevents FDA regulations from preempting stricter state and local laws, notwithstanding the broad preemption provisions of FDCA § 521. Section 5(b) of the bill states, in relevant part:

Except as otherwise expressly provided in this Act, nothing in this Act, the Federal Food Drug and Cosmetic Act (21 U.S.C. 301 et seq.), or rules promulgated under such Acts, shall limit the authority of a Federal agency (including the Armed Forces), a State or its political subdivisions, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, or use of tobacco products by persons of any age that are in addition to the provisions of this Act and the amendments made by this Act.

The only provisions of the McCain bill that expressly preempt local law are found in Title I, Subtitle A. That portion of the bill sets forth a new title within the FDCA, to govern FDA regulation of tobacco products. Section 914 of the new title would preempt state and local regulation relating to the manufacturing, labeling, and safety of tobacco products. This section would give the FDA primary jurisdiction over tobacco product manufacturing and safety. However, state and local restrictions on the sale, use or distribution of products approved by the FDA would not be preempted. Moreover, state and local governments could apply for a waiver of FDA preemption relating to other issues. In sum, sections 5(b) and "914(a)" of the McCain bill strike an appropriate balance between FDA regulation and state and local autonomy.



LOUISE H. RENNE
City Attorney

MAY 29, 1998

The manager's amendment to the McCain bill accomplishes another important anti-preemption objective: section 301(b) of the bill repeals current federal law that preempts state and local laws regulating cigarette advertising and promotion based on health considerations (15 U.S.C. 1334(b)). This outdated preemption provision was adopted as part of the Federal Cigarette Labeling Act of 1969.

2) **Non-Preemption of State and Local Remedies**

Background:

The proposed global settlement originally provided extremely limited means for policing the future conduct of the tobacco industry. Although the proposed settlement was not entirely clear on this point, it appeared that only the U.S. Department of Justice and State Attorneys General would have standing to sue for violation of the agreement. Furthermore, the primary remedy available in such future suits would be injunctive relief. This remedy would be exclusive of the monetary remedies that would otherwise be available under state and local laws.

This proposed enforcement mechanism is inadequate. Much of the progress that has been made in regulating tobacco is the direct result of vigorous enforcement of local tobacco ordinances. State laws of general application, many of which are enforced by local governments, also provide a powerful deterrent to tobacco industry misconduct. For example, state consumer protection statutes provide for treble damages and disgorgement of profits. The threat of these strong remedies is what brought the tobacco industry to the bargaining table in the first place. Federal legislation should preserve state and local authority to obtain such remedies in cases based on future misconduct.

McCain Bill:

The enforcement provisions of the McCain bill contain the same basic flaws as the original proposal. Section 1407(a) precludes States and local governments from bringing "tobacco claims" now and in the future. Section 1407(a) provides only two exceptions to this total immunity: (1) States who seek to enforce a consent decree or settlement agreement under Section 1407(b); and (2) States who opt out of the provisions of the Act, pursuant to Section 1407(c). Neither of these exceptions apply to local governments.

Section 1407(b) of the McCain bill gives States the exclusive authority to enforce the terms of settlement agreements and consent decrees with the tobacco industry. Local governments may therefore be unable to challenge future tobacco industry behavior which violates the Act. If a State Attorney General does not vigorously enforce the terms of the legislation, localities and their residents will simply be out of luck.



LOUISE H. RENNE
City Attorney

MAY 29, 1998

Moreover, much of the good that is done by the general anti-preemption provisions of the bill (sections 5(b) and 914(a), discussed above) may be undone by the broad preemption of any present or future local government "tobacco claim." Section 701(7) defines "tobacco claim" to mean:

"a claim directly or indirectly arising out of, based on, or related to the health-related effects of tobacco products, including without limitation a claim arising out of, based on, or relating to allegations regarding any conduct, statement, or omission respecting the health-related effects of such products."

This broad language may foreclose many future suits that seek to enforce stricter state and local laws regulating tobacco. As drafted, this provision would appear to apply to suits seeking to regulate the conduct of the tobacco industry, as well as suits seeking to recover tobacco-related health care costs. So long as a suit is arguably based on any tobacco industry "conduct, statement, or omission" relating to health effects, the industry will argue that the suit should be barred.

For example, San Francisco recently filed a suit against the smokeless tobacco industry for failing to comply with California Proposition 65. That proposition requires manufacturers and sellers of products that contain toxic materials to provide certain specified warnings (including point-of-sale warnings) to consumers. In theory, this is the type of stricter state law that should be allowed by the anti-preemption provisions of sections 5(b) and 914(a). Although the law would not be preempted, a suit to enforce the law arguably would be, since the failure to warn is an "omission" relating to the health effects of tobacco products.

Similarly, the broad definition of "tobacco claim" might also preempt any future local lawsuits to stop tobacco companies from illegally selling to minors, or from misrepresenting the adverse health impacts of their products. Such suits would arguably be based on conduct relating to the health effects of tobacco, and hence preempted by the McCain bill.

The general anti-preemption language of section 5(b) would not save such regulatory actions from preemption as "tobacco claims." Section 5(b) applies "except as otherwise expressly provided in this Act." The specific preemption of tobacco claims set forth in section 1407(a) would therefore override the Act's general non-preemption provisions.

To prevent preemption of local government suits, the McCain bill should be altered in several important respects. First, the definition of "tobacco claims" should be narrowed to allow future regulatory suits. Second, the anti-preemption language of section 5(b) should govern future regulatory suits. Third, local governments should be given standing to bring suit to enforce the Act. Fourth, local governments who have sued the tobacco industry should be given the same opt out rights as the States. Fifth, local governments who have sued the tobacco



LOUISE H. RENNE
City Attorney

MAY 29, 1998

industry should have the same right to require participating manufactures to enter into binding consent decrees and settlement agreements. Finally, the Act should be amended so that remedies provided by the Act for future violations are cumulative with remedies that already exist under state and local law.

Recommended Language:

1) Section 701(12) should be revised to define "tobacco claim" more narrowly, so that the claim preemption of section 1407(a) is limited to suits in which government entities seek to recover medical expenses or similar relief. Suits seeking to regulate the future conduct of the industry should not be preempted:

"The term 'tobacco claim' means a claim directly or indirectly arising out of, based on, or related to the health-related effects of tobacco products, including without limitation a claim arising out of, based on or relating to allegations regarding any conduct, statement, or omission respecting the health-related effects of such products. **Actions filed to enforce this Act, or to enforce the requirements of State or local laws relating to conduct occurring after the date of enactment of this Act, which do not include any claim for damages based on personal injury, wrongful death, or reimbursement of medical expenses, shall not be considered 'tobacco claims.'"**

2) The exception to the general non-preemption language of section 5(b) should be restricted to only reference those other sections of the Act that are actually designed to preempt future local enforcement actions. The only section that appears to fall into this category is Title 1, new section 914 (limited preemption of state and local regulation relating to performance standards, premarket approval, adulteration, misbranding, registration, reporting, good manufacturing standards, or reduced risk products):

Except as otherwise expressly provided in **section 914** of this Act, nothing in this Act, the Federal Food Drug and Cosmetic Act (21 U.S.C. 301 et seq.), or rules promulgated under such Acts, shall limit the authority of a Federal agency (including the armed forces), a State or its political subdivisions, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, or use of tobacco products by persons of any age that are in addition to the provisions of this Act and the amendments made by this Act. . . .



LOUISE H. RENNE
City Attorney

MAY 29, 1998

- 3) Section 702 (b)(5) should be revised, to allow suits:

“brought under this title by a State, a **local government**, or a participating tobacco product manufacturer to enforce this Act;”

- 4) Section 702(c) should be revised, to provide that:

“a State, or a **local government that filed a tobacco claim prior to June 20, 1997**, may . . . [opt out of the legislation and pursue its tobacco claim].”

- 5) Section 704(b) should be revised, to provide that:

“any State, or a **local government that filed a tobacco claim prior to June 20, 1997**, may request that tobacco product manufacturers enter into the Master Settlement Agreement or a consent decree. If a State or a **local government** makes such a request and enters into a consent decree, it may [obtain continued court jurisdiction over the consent decree and sue to enforce its terms].”

- 6) A new section [704(c)] should be added, stating:

“The remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under state and local laws including, without limitation, remedies or penalties available under state and local laws relating to unfair business practices and deceptive advertising, and remedies or penalties available under state and local laws regulating the sale, display, distribution, advertising, promotion, or use of tobacco products.”

Tobacco-local gov suits



FAX from ...

Senator Dianne Feinstein

of California

331 Hart Senate Office Building
Washington, DC 20510
(202) 224-3841

DATE: 5/21

TIME: 3:30

TO: Elena Kagan

White House - OPC 456-2878

FROM: Queen Clementia

(202) 224-9653

COMMENTS: Enclosed is a revised version of
the local government Amendment
We would appreciate any support
the Administration can offer.

I hope to send the preemption piece
over tomorrow.
Thanks for your attention to this.

Queen

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): 3

NOTE: The information contained in this facsimile is confidential. If you receive this transmission in error,
please notify the sender immediately.

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S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To ensure that, in order to be eligible for funds under the Act, a State shall agree to provide funds to certain cities and counties within the State.

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

S. 1415

To reform and restructure the processes by which tobacco products are manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco use, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. FEINSTEIN
(for herself, Mrs. BOXER, Mr. DURBIN, Mr. D'AMATO,
and Ms. MOSELEY-BRAUN)

Viz:

- 1 On page 193, between lines 16 and 17, insert the fol-
- 2 lowing:
- 3 (4) ELIGIBILITY.—
- 4 (A) IN GENERAL.—To be eligible to receive
- 5 amounts under this subsection, a State shall,
- 6 through agreements entered into with local gov-
- 7 ernment entities described in subparagraph (B),

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S.L.C.

2

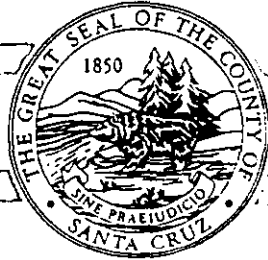
1 provide such entities with a portion of the
2 amounts received by the State under this sub-
3 section as consideration for the resolution or
4 termination of civil actions under title XIV.

5 (B) LOCAL GOVERNMENT ENTITIES.—A
6 local government entity described in this sub-
7 paragraph is a city or county that commenced
8 a health or smoking-related civil action against
9 one or more participating tobacco product man-
10 ufacturers, distributors, or retailers on or before
11 June 20, 1997 (including actions by the
12 City and County of San Francisco and related
13 cities and counties, Los Angeles County, New
14 York City, Erie County, Cook County, and the
15 City of Birmingham).

Elena

Tob - not - local govt suits

BOARD OF SUPERVISORS



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GOVERNMENTAL CENTER

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SECOND DISTRICT

MARDI WORMHOUDT
THIRD DISTRICT

RAY BELGARD
FOURTH DISTRICT

JEFF ALMQUIST
FIFTH DISTRICT

June 2, 1998

Bruce Lindsey
Deputy Counsel to the President
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Lindsey:

I am writing to express the concern of the Santa Cruz County Board of Supervisors about the serious negative impacts that the McCain tobacco bill would have on local governments. It is our understanding that the Administration was deeply involved in the negotiations that led up to the most recent draft of the McCain bill. It is our hope that the Administration will use its influence in future negotiations to cure the following two major deficiencies in the McCain bill.

First, the McCain bill would settle all local government lawsuits without providing any compensation to local governments. Local governments have incurred substantial tobacco related health care costs that are distinct from the costs incurred by the states under the Medicaid program. Any comprehensive tobacco legislation which settled local government claims should provide compensation for these costs. At a minimum, those local governments that have sued the industry should be allowed to share in the proceeds of the bill. Senator Feinstein has prepared an amendment (No. 2443) to the McCain bill that would accomplish this objective, and we would ask that the Administration support this amendment.

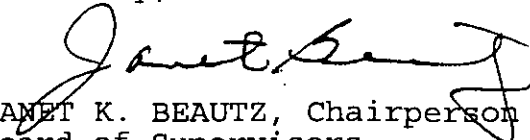
Second, under Title XIV of the McCain bill, local governments might have been prevented from suing to enforce their laws relating to the future conduct of the tobacco industry. This defect in the McCain bill would be cured if certain provisions from the Gregg/Leahy amendment are incorporated in the final bill. Specifically, Section 1408(c)(1) of the amendment prevents the preemption of claims based on future conduct. In addition, Section 1408(b)(4) of the amendment allows local governments which have sued the industry to opt out of the legislation. Even if the Gregg/Leahy amendment is not ultimately successful in

June 2, 1998
Page 2

eliminating all liability protections from the bill, the provisions of the Gregg/Leahy amendment relating to local government suits should be included in any final legislation.

If these concerns are addressed, local governments may finally be able to support the proposed comprehensive tobacco legislation.

Sincerely,



JANET K. BEAUTZ, Chairperson
Board of Supervisors

JKB:ted

cc: Clerk of the Board
County Counsel
Lynn Cutler, Deputy Director, Intergovernmental Affairs

08693A6

Tob - set - local govt funds



June 5, 1998

The Honorable William J. Clinton
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the National Association of Public Hospitals and Health Systems, and the International Municipal Lawyers Association, we are concerned about the serious negative impacts that the McCain tobacco bill (S.1415) would have on local governments. We urge your Administration to use its influence in future negotiations to resolve two major local government problems in the Senate bill.

First, S.1415 would settle all local government lawsuits without providing any compensation to local governments. Local governments have incurred substantial tobacco related health care costs that are distinct from the costs incurred by the states under the Medicaid program. Any comprehensive tobacco legislation which settles local government claims should provide compensation for these costs. At a minimum, those local governments that have sued the industry should be allowed to share in the proceeds of the bill. Senator Feinstein has prepared an amendment (No. 2443) to the bill that would accomplish this objective. We urge your support for this amendment.

Second, under Title XIV of Senator McCain's bill, local governments might be prevented from suing to enforce their laws relating to the future conduct of the tobacco industry. This defect in the bill would be corrected if certain provisions from the Gregg/Leahy amendment are incorporated in the final legislation. Specifically, section 1408(c)(1) of the amendment prevents the preemption of claims based on future conduct. In addition, section 1408(b)(4) of the amendment allows local governments who have sued the industry to opt out of the legislation. Even if your Administration opposes the overall provisions in the Gregg/Leahy amendment, we urge you to support the provisions of the amendment relating to local government suits.

Thank you for your attention to our concerns. If your staff has any questions about our positions, please have them contact Tom Joseph, NACo Deputy Legislative Director at 202/942-4230; Kristin Cormier, NLC Legislative Counsel at 202/626-3173; Jubi Headley,

The Honorable William J. Clinton
June 5, 1998
page 2

USCM Assistant Executive Director at 202/861-6707; Charles Lubinsky, NAPH Legislative Counsel at 202/624-7215; or Henry W. Underhill, Jr., IMLA Executive Director/General Counsel at 202/466-5424.

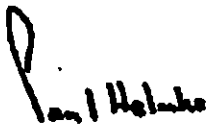
Sincerely,



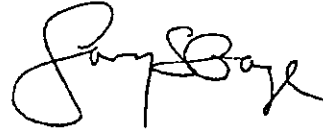
Randy Johnson, President, NACo
Commissioner, Hennepin County, MN



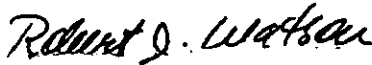
Brian O'Neill, President, NLC
Councilman, Philadelphia, PA



Paul Helmke, President, USCM
Mayor, Fort Wayne, IN



Larry Gage, President, NAPH



Robert J. Watson, President, IMLA
City Attorney, Overland Park, KS

Tob - set - local govt suits

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RAY BELGARD
FOURTH DISTRICT

JEFF ALMQUIST
FIFTH DISTRICT

June 2, 1998

Bruce Reed
Assistant for Domestic Policy
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Reed:

I am writing to express the concern of the Santa Cruz County Board of Supervisors about the serious negative impacts that the McCain tobacco bill would have on local governments. It is our understanding that the Administration was deeply involved in the negotiations that led up to the most recent draft of the McCain bill. It is our hope that the Administration will use its influence in future negotiations to cure the following two major deficiencies in the McCain bill.

First, the McCain bill would settle all local government lawsuits without providing any compensation to local governments. Local governments have incurred substantial tobacco related health care costs that are distinct from the costs incurred by the states under the Medicaid program. Any comprehensive tobacco legislation which settled local government claims should provide compensation for these costs. At a minimum, those local governments that have sued the industry should be allowed to share in the proceeds of the bill. Senator Feinstein has prepared an amendment (No. 2443) to the McCain bill that would accomplish this objective, and we would ask that the Administration support this amendment.

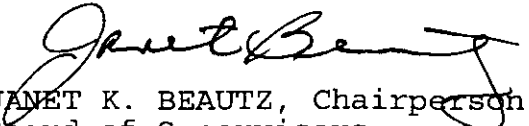
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June 2, 1998
Page 2

eliminating all liability protections from the bill, the provisions of the Gregg/Leahy amendment relating to local government suits should be included in any final legislation.

If these concerns are addressed, local governments may finally be able to support the proposed comprehensive tobacco legislation.

Sincerely,



JANET K. BEAUTZ, Chairperson
Board of Supervisors

JKB:ted

cc: Clerk of the Board
County Counsel
Elena Kagan, Deputy Assistant for Domestic Policy

08693A6

LOCAL GOVERNMENT RECOVERY

The following language, to be inserted as a new section in Title IV, is designed to require states to provide an equitable allocation of funds for local governments, but without any threat that the state will not receive its money.

SECTION 4__

Each state, within two years after receiving funds, shall adopt procedures to provide an equitable allocation of funds to local government entities within the state that can demonstrate that such entities incurred tobacco-related health costs through --

- (1) contributions to the program under Title XIX of the Social Security Act;
- (2) the provision of indigent care;
- (3) such other means as the State may deem appropriate.

Tobacco - local govt suits



JAMES K. HAHN
CITY ATTORNEY

May 29, 1998

VIA FACSIMILE & U.S. MAIL

Bruce Reed
Assistant for Domestic Policy
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Reed:

I am writing to express my concern over the serious negative impacts that the McCain tobacco bill would have on local governments. I am particularly interested in the bill, since my office is co-counsel in pending tobacco litigation involving local government prosecutors throughout California. It is my understanding that the Administration was deeply involved in the negotiations that led up to the most recent draft of the McCain bill.

First, the McCain bill would settle all local government lawsuits without providing any compensation to local governments. Local governments have incurred substantial tobacco related health care costs that are distinct from the costs incurred by the States under the Medicaid program. Any comprehensive tobacco legislation which settles local government claims should provide compensation for these costs. At a minimum, those local governments that have sued the industry should be allowed to share in the proceeds of the bill. Senator Feinstein has prepared an amendment (No. 2443) to the McCain bill that would accomplish this objective. On behalf of NACo, NLC, the U.S. Conference of Mayors, and other local government representatives, we seek the Administration's support for this amendment.

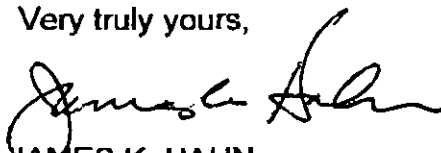
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Bruce Reed
Page 2
May 29, 1998

bill, the provisions of the Gregg/Leahy amendment relating to local governments suits should be included in any final legislation.

It is my belief that if the above concerns are addressed, local governments may finally be able to support the proposed comprehensive tobacco legislation.

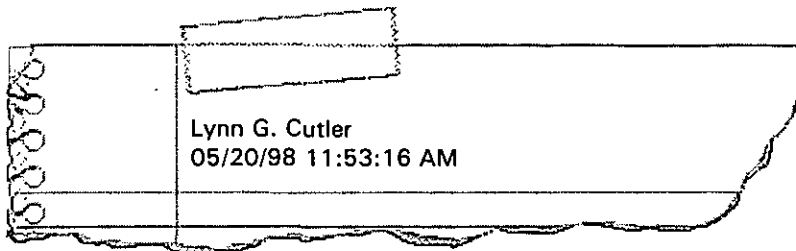
Very truly yours,



JAMES K. HAHN
City Attorney

cc: Elena Kagan

Tob - ser - local govt
suits



Record Type: Record

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

cc: Carole A. Parmelee/WHO/EOP, Fred DuVal/WHO/EOP

Subject: local govt. and tobacco

I am getting calls from the counties, cities, about the lack of clarity on the obligation of states to pass through funds to local govts. who have incurred costs in their health expenditures. There is a feeling out there that the Administration is not being clear on this point. I have repeated what Elena told me, but the anxiety level is high at the moment. Can you give me more to say? On the local lawsuit issue, Sen. Feinstein is offering an amendment that would allow the locals who began suits by 1977 to go forward. I hope we will not oppose that. The National League of Cities had written saying they would not support the bill if that provision were not in--I pushed back and they will simply work hard on Feinstein and see what happens.

Tobacco -
local govts suits



Cynthia A. Rice

04/21/98 06:33:47 PM

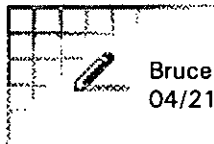
Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
cc: Cynthia Dailard/OPD/EOP
bcc:
Subject: Re: local govts.tobacco

I met with NaCo and with Louise Renne to discuss (Cutler wasn't there, but one of her staff was). I must say I am sympathetic -- the McCain bill, like the settlement, would wipe out local lawsuits without providing compensation to local governments, and would preempt local lawsuits in the future. However, as you know, we have other priorities.

I've asked DOJ for their advice -- at first blush, they seem to think it's somewhat unfair, but they are going to get back to me.

Bruce N. Reed



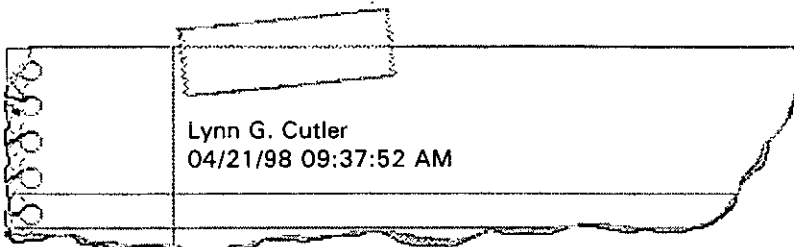
Bruce N. Reed
04/21/98 04:45:25 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Cynthia Dailard/OPD/EOP
cc:
Subject: local govts.tobacco

we have to figure out where we are on this

----- Forwarded by Bruce N. Reed/OPD/EOP on 04/21/98 04:47 PM -----

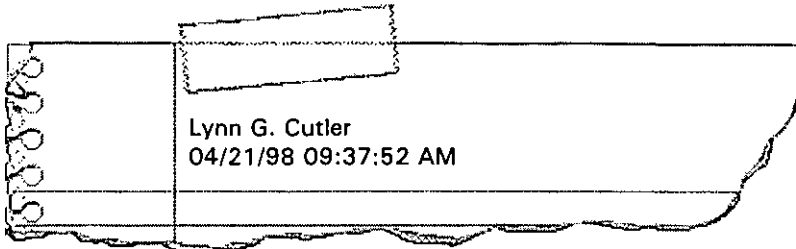


Lynn G. Cutler
04/21/98 09:37:52 AM

Record Type: Record

To: Peter G. Jacoby/WHO/EOP
cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Mickey Ibarra/WHO/EOP
Subject: local govts.tobacco

Tob - rec -
local govts suits



Record Type: Record

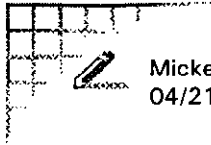
To: Peter G. Jacoby/WHO/EOP

cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Mickey Ibarra/WHO/EOP

Subject: local govts.tobacco

The problem you describe that is raised by Sen. Feinstein that the McCain bill eliminates the right of local governments to sue the tobacco companies . is is a very big deal for several cities. In fact, San Francisco had sued RJR long before the AG's did. I've asked Mickey to help relay to Bruce and Elena the scope of the problem so that Erskine might be able to raise it with McCain today.

Tob - xCT -
local govt suits



Mickey Ibarra
04/21/98 09:41:17 AM

Record Type: Record

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

cc:

Subject: Senator Feinstein's Tobacco Concerns

The issue below is of more concern that only California. USCM, NACo, and NLC have expressed the same view. What is our response? Thanks.

----- Forwarded by Mickey Ibarra/WHO/EOP on 04/21/98 09:40 AM -----

PETER G. JACOBY

04/20/98 06:58:50 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Mickey Ibarra/WHO/EOP

cc: Lawrence J. Stein/WHO/EOP, Elena Kagan/OPD/EOP, Jessica L. Gibson/WHO/EOP, Cathy R. Mays/OPD/EOP

Subject: Senator Feinstein's Tobacco Concerns

Senator Feinstein called earlier today to express her concern with the provisions of the McCain bill that preempt local governments from being able to sue tobacco companies to recover tobacco-related Medicaid expenses paid by those governments. The Senator would like our support for reversing these provisions in our discussions with Senator McCain. Additionally, she would like Bruce to call Louise Renne, the San Francisco City Attorney at 415-554-4288 to discuss our position on this issue. Please call if you need any information. Peter

Tob - ext - local government suits

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY



LOUISE H. RENNE
City Attorney

DIRECT DIAL: (415) 554-4288

cc: Bruce

APRIL 9, 1998

M.I. -
Working
on it
with
Bruce?

VIA FACSIMILE AND MAIL

Lynn Cutler
Deputy Director
Intergovernmental Affairs
Old Executive Office Building
Room 106
Washington, DC 20502

Re: Proposed Federal Tobacco Legislation

Dear Lynn:

Thank you for taking my call yesterday to discuss the status of tobacco legislation. I wanted to send you this letter to ask for your help, and the help of the Administration, to make sure that the proposed national tobacco litigation addresses the needs of local governments.

As you know, San Francisco was the first local government in the country to sue the tobacco industry. We filed suit in June, 1996, prior to all but 10 of the State Attorneys General. Our suits have been joined by the cities of San Jose and Los Angeles, and 15 major California counties. Together, these local governments represent over half of the population of the State. Local governments in several other states have sued as well.

In September of last year, the California cities and counties forced RJR to enter a binding agreement to stop its Joe Camel campaign. As part of the settlement of the Mangini case, California cities and counties also received \$10 million for anti-tobacco education. More importantly, RJR was required to release its marketing documents. I participated in the release of those documents, alongside Congressman Waxman, in Washington this January. The public disclosure of these documents, which made clear that RJR had deliberately targeted teenagers, greatly increased the momentum for strong and comprehensive tobacco legislation.

Despite their early and leading role in the tobacco litigation, local governments were shut out of the settlement talks between the industry and the State Attorneys General. The national settlement proposed on June 20, 1997, therefore neglected several issues of vital concern to local governments. Unfortunately, the McCain bill that was recently approved by the Senate Commerce Committee was modeled on the original settlement and suffered from most of the same defects. Two of these are of special concern. >

Letter to Lynn Cutler
Page 2
April 9, 1998

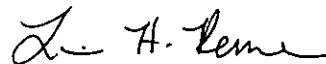
First, the McCain bill would wipe out local government law suits without providing a dime of compensation to local governments. The unfairness of this provision is demonstrated by the situation in California. Despite the fact that San Francisco sued over a year before Attorney General Lungren, our law suit would be terminated, and his suit would become the exclusive means for compensation and enforcement in California. That result would not be good law nor good politics.

Second, the McCain bill would preempt local government suits in the future. The consent decrees contemplated by the bill could only be enforced by the State Attorneys General. These provisions of the bills could prevent us from filing suits, like our successful Mangini case, aimed at stopping the future unlawful practices of the tobacco industry.

The McCain bill should be modified to provide compensation to local governments, and to allow local governments to play their traditional role in policing the tobacco industry. I am hopeful that these modifications can be made to the McCain bill before the bill reaches the floor, and I ask for the Administration's help in that regard.

Thank you for your attention to this matter. I look forward to working with you in the future on these issues.

Very truly yours,



LOUISE H. RENNE
City Attorney

cc: Karen Skelton
Cynthia A. Rice

P.S. I just heard the news that R. J. Reynolds is "pulling out" of the proposed settlement. Still, if legislation moves forward, our lawsuits should not be "wiped out"!