NLWJC - Kagan
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Tobacco-Settlement: New Legislation-McCain Bill

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Ready for editor
5-8, Fri 12:15 pm

May 8, 1998

The Tobacco Bill and New Government

A Snapshot of What's Brand New in the Tobacco Bill

The "tobacco bill," S. 1415, was reported from committee on May 1. This paper is a snapshot of that bill — and a black-and-white snapshot at that. Listed below are the new programs that we've found in the bill; we do *not* list those numerous cases in which current programs are given billions of dollars in additional funding. In short, this snapshot lists "the new" *and not* "the more". This paper could be given to GSA with an order for the new nameplates that will have to go on new doors in the vast corridors of the Federal Government.

New Funds

The **National Tobacco Settlement Trust Fund** [section 401, page 397] will receive hundreds of billions of dollars from tobacco companies, see §§403, 404, 406, 202, and disburse such funds. This major Fund (NTSTF) is "off-budget" and contains three separate accounts: The Compliance Bonus Account for States and Retailers [sec. 211, p. 361] which provides five percent of NTSTF for States and retailers when 95 percent of kids are stopped from buying tobacco. The State Litigation Settlement Account [sec. 402, p. 399] provides$196.5 billion over 25 yrs from NTSTF to be paid to States for costs of treating tobacco-related illnesses. The Global Public Health and Education Resource Account [sec. 1132(c)(2), p. 608] which provides $150 million per year from NTSTF for international programs.

The **Tobacco Community Revitalization Trust Fund** [sec. 1011, p. 489] which receives tens of billions of dollars from the NTSTF and from tobacco companies based on market share and then makes payments for programs in tobacco communities. Dump

The **International Tobacco Control Trust Fund** [sec. 1131, p. 601] which receives hundreds of millions of dollars from licensing fees to be used for international programs. Dump

The **Tobacco Asbestos Trust Fund** [sec. 1202, p. 642] which will receive $21 billion from NTSTF by the year 2014 for disbursement to asbestos-tobacco victims. Dump

The **Department of Veterans Affairs Tobacco Recovery Fund** [sec. 1301-"9101(c)", p. 666], a revolving fund for monies obtained from tobacco companies in tort actions on behalf of veterans, and to pay for programs for veterans.

The **"Tort Trust Fund"**. There is a "place holder" for another fund. On page 44 of its

report, the committee says, "This section [section 710] establishes a Tort Trust Fund, as requested by the Administration, to ensure that individual claimants have a source for payment of judgments and settlements against the tobacco companies. This section is a place holder and will be revised." There is no section 710 in the bill itself.

New Programs Within the Department of Health and Human Services

The **Tobacco Products Scientific Advisory Committee** [sec. 101(b)-"915", p. 328] is a nine-member committee to give the Secretary technical advice on nicotine and related matters. The **National Smoking Cessation Program** [sec. 221, p. 369] authorizes the Secretary to award grants to groups and individuals for cessation programs. The **Tobacco-Free Education Board** [sec. 222(a), p. 372] is a nine-member board to award contracts for education and information. The **National Tobacco-Free Public Education Program** [sec. 222(b), p. 374] authorizes the Secretary to establish programs for education and information. The **National Community Action Program** [sec. 223, p. 378] authorizes the Secretary to establish program for grants to States and localities for anti-tobacco programs. The new **Block grant program** [sec. 224, p. 378] authorizes the Secretary to make grants to States that license tobacco retailers. The **Tobacco Agreement Accountability Panel** [sec. 801, p. 458] authorizes the Commissioner of FDA to appoint a three-member panel to review compliance with Act, and it has power to declare an emergency. The **National Tobacco Task Force** [sec. 1106(a)-"2802", p. 589] authorizes the Secretary to establish a nine-member group to coordinate medical research, health services, etc. The **Tobacco-Related Research Initiative** [sec. 1106(a)-"2804(b)", p. 593] authorizes the Secretary to establish a program of tobacco research with $2.5 billion authorized annually through FY 2008. The **Office of Tobacco-Related Research** [sec. 1106(a)-"2804(h)", p. 595] authorizes the Secretary to establish an office in NIH to coordinate research projects.

Newly Created Private, Nonprofit Corporations

The **American Center on Global Health and Tobacco** (ACT) [sec. 1132(b), p. 606] sets up a 25-member board to oversee international effort against tobacco with $150 million per year.

The **Tobacco Vending Reimbursement Corporation** [sec. 1191(b)(2), p. 634] is an organization to reimburse to owners the fair market value of their vending machines.

Newly Created Hybrid Arrangement for Documents

The **National Tobacco Documents Depository** [sec. 903, p. 469] requires tobacco manufacturers to establish and maintain a document depository in the Washington, D.C. area. The **National Tobacco Document Review Board** [sec. 906, p. 477] is a five-member public board to oversee depository and make decisions about evidentiary privileges, trade secrets, etc.

We have listed every *new* program that we found, but we are not so bold as to say we have found them all. Additionally, there appears to be about an equal number of current programs that are enlarged.

Staff Contact: Lincoln Oliphant, 224-2946

Tobacco now bill - McCain

Cessation, Prevention, and Education Program Estimates

State Population Estimates and Number of People who would not be served with Loss of Public Health Funding

							Population Receiving Services with Full Funding			Population Losing Services with 80% Reduction in Funding		
	Total Population (1,000)	Aged 5-17 (1,000)	Aged 12-17 (1,000) (estimated for states)	Ages 18+ years (1,000)	1995 Smoking Prevalence (BRFSS)	Estimated Number of Smokers (18+) (1,000)	Cessation Services (10% of Smokers) (1,000)	Counter-Advertising (80% of 12-17 year olds) (1,000)	School-Based Prevention (100% of 5-17 year olds) (1,000)	Cessation Services Adults aged 18+ (1,000)	Counter-Advertising Youth aged 12-17 (1,000)	School-Based Prevention School-aged Youth (1,000)
US Total	265284	48975	22861	215525	25.7	47837	4784	20395	48975	3827	16316	39180
Alabama	4273	780	361	3493	24.5	856	86	325	780	68	260	624
Alaska	607	135	62	472	25.0	118	12	56	135	9	45	108
Arizona	4428	807	373	3621	22.9	829	83	336	807	66	269	646
Arkansas	2510	484	224	2026	25.2	511	51	202	484	41	161	387
California	31878	6131	2837	25747	15.5	3991	399	2553	6131	319	2043	4905
Colorado	3823	728	337	3095	21.8	675	67	303	728	54	243	582
Connecticut	3274	575	266	2699	20.8	561	56	239	575	45	192	460
Delaware	725	126	58	599	25.5	153	15	52	126	12	42	101
District of Columbia	543	75	35	468	15.0	70	7	31	76	6	26	60
Florida	14400	2467	1141	11933	23.1	2757	276	1027	2467	221	822	1974
Georgia	7353	1401	648	5952	20.5	1220	122	583	1401	98	467	1121
Hawaii	1184	215	99	969	17.8	172	17	90	215	14	72	172
Idaho	1189	258	119	931	19.8	184	18	107	258	15	86	206
Illinois	11847	2241	1037	9608	23.1	2219	222	933	2241	178	747	1793
Indiana	5841	1089	504	4752	27.2	1293	129	453	1089	103	363	871
Iowa	2852	537	248	2315	23.2	537	54	224	537	43	179	430
Kansas	2572	507	235	2065	22.0	454	45	211	507	36	169	406
Kentucky	3884	710	329	3174	27.8	882	88	296	710	71	237	568
Louisiana	4351	906	419	3445	25.2	868	87	377	906	69	302	726
Maine	1243	228	105	1015	26.0	254	25	95	228	20	76	182
Maryland	5072	927	429	4145	21.2	879	88	386	927	70	309	742
Massachusetts	6092	1031	477	5061	21.7	1098	110	429	1031	88	343	825
Michigan	9594	1865	863	7729	25.7	1986	199	777	1865	159	621	1492
Minnesota	4658	931	431	3727	20.5	764	76	388	931	61	310	745
Mississippi	2716	552	255	2164	24.0	519	52	230	552	42	184	442
Missouri	5358	1027	475	4332	24.3	1053	105	428	1027	84	342	822
Montana	879	177	82	702	21.1	148	15	74	177	12	59	142
Nebraska	1652	328	152	1323	21.9	290	29	137	328	23	110	263
Nevada	1603	293	136	1310	26.3	345	34	122	293	28	98	234
New Hampshire	1162	220	102	942	21.4	202	20	92	220	16	73	176
New Jersey	7988	1415	655	6573	19.2	1262	126	589	1415	101	471	1132
New Mexico	1713	365	169	1348	21.2	286	29	152	365	23	122	292
New York	18185	3219	1489	14966	21.5	3218	322	1341	3219	257	1072	2575
North Carolina	7323	1321	611	6002	25.8	1549	155	550	1321	124	440	1057
North Dakota	644	127	59	517	22.7	117	12	53	127	9	42	102
Ohio	11173	2089	967	9084	26.0	2362	236	870	2089	189	696	1671
Oklahoma	3301	653	302	2648	21.7	575	57	272	653	46	218	522
Oregon	3204	597	276	2607	21.8	568	57	249	597	45	199	478
Pennsylvania	12056	2133	987	9923	24.2	2401	240	888	2133	192	711	1706
Rhode Island	990	172	80	818	24.7	202	20	72	172	16	57	138
South Carolina	3699	684	316	3015	23.7	715	71	285	684	57	228	547
South Dakota	732	153	71	579	21.8	126	13	64	153	10	51	122
Tennessee	5320	958	443	4362	26.5	1156	116	399	958	92	319	766
Texas	19128	3869	1790	15259	23.7	3618	362	1611	3869	289	1289	3095
Utah	2000	490	227	1510	13.2	199	20	204	490	16	163	392
Vermont	589	111	51	478	22.1	106	11	46	111	8	37	89
Virginia	6675	1177	545	5498	22.0	1210	121	490	1177	97	392	942
Washington	5533	1051	486	4482	20.2	905	91	438	1051	72	350	841
West Virginia	1826	315	146	1511	25.7	388	39	131	315	31	105	252
Wisconsin	5160	1008	465	4154	21.8	906	91	419	1006	72	335	805
Wyoming	481	102	47	379	22.0	83	8	42	102	7	34	82

The Washington Times
MONDAY, JUNE 15, 1998

Butler, Aziz agree on plan for scrapping of weapons

Deal is reached on final verification

By Dominic Evans
REUTERS NEWS AGENCY

BAGHDAD — Chief U.N. weapons inspector Richard Butler said yesterday that Iraq had agreed on a two-month plan aimed at speeding up final verification that it has scrapped its weapons of mass destruction.

"We have completed some very searching talks and agreed upon a schedule of work, a work program for the next two months," Mr. Butler, chairman of the U.N. Special Commission (Unscom), said after more than three hours of talks last night with Iraq's Deputy Prime Minister Tariq Aziz.

Neither man gave any details of their deal, reached despite repeated Iraqi criticism of Mr. Butler's proposed "road map" of requirements, which he said could help him wrap up Iraq's seven-year disarmament verification by October.

"The aim of this activity is to bring to an end as soon as possible, but legitimately, validly, the work of the disarmament of Iraq's proscribed weapons of mass destruction," Mr. Butler added.

Work to verify that Iraq has scrapped all chemical, biological and long-range ballistic missiles in compliance with the 1991 Gulf war cease-fire has dragged out for years.

Impatient for the work to be completed so that it can push for an end to economic sanctions, Iraq has accused Unscom of deliberately extending its work to prolong Iraqi suffering.

Mr. Butler and Mr. Aziz, leading protagonists in past Iraq-U.N. crises, stood side by side to make a rare joint statement and thanked each other for their efforts.

Mr. Aziz confirmed the two sides had agreed a schedule of work and gave a positive assessment of their talks.

"We had a very fruitful meeting these two days. The exchange of views and discussions were businesslike and professional," he said. "We will meet again in August and we have made good progress."

Iraq triggered a crisis with Unscom four months ago when it barred U.S. weapons inspectors from working and denied Unscom access to eight "presidential sites."

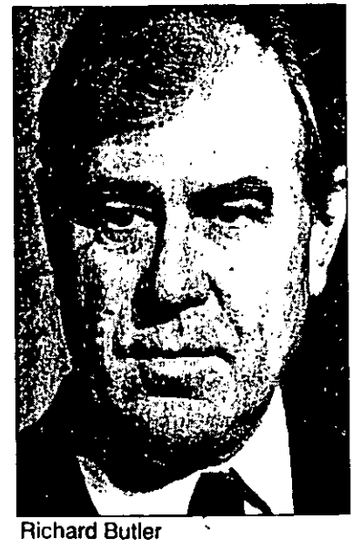
U.S. military forces threatened to strike Iraq and Mr. Butler was vilified by Iraqi government officials who said he was helping stir up anti-Iraqi sentiment.

Before Mr. Butler arrived in Baghdad on his latest mission Mr. Aziz described his proposals as a political game.

One Unscom official said the two sides were "building bridges" during their four rounds of weekend talks.

"I'm glad to be able to join with Mr. Aziz tonight and say we achieved this," Mr. Butler said after the talks.

His "road map" calls for Iraq to provide information including its missile "material balance," information on efforts to produce the chemical agent VX, and details of its acquisition of material for its biological program.



Richard Butler

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The Washington Times
MONDAY, JUNE 15, 1998

Tobacco bill is packed with programs, agencies

By Nancy E. Roman
THE WASHINGTON TIMES

The tobacco bill moving through Congress would spend $350 million per year for the first five years and as much "as may be necessary" for each year after that to promote smoking awareness abroad.

The foreign-aid program is one of many new government functions created in a tobacco bill that raises $92 billion over five years by taxing cigarettes by $1.10 per pack, and uses about $65 billion of that over five years to pay for things ranging from child care to college tuition.

The bill would also create new Medicare pilot projects, ban smoking outside public entrances, create new causes for litigation and spend up to $18,800 per American Indian to help them stop smoking.

Under the latest printed version of the tobacco bill, a whopping 480-page tome that few have read, the secretary of health and human services is directed to "promote efforts to share information and provide education internationally about the health, economic, social and other costs of tobacco use . . ."

Part of the $350 million for each year through 2004 would be used to "support the development of appropriate governmental control activities in foreign countries."

The bill would also:

• Ban smoking inside — and even outside — of public buildings involved in interstate commerce, including almost all retail facilities except restaurants. The bill prohibits smoking "within the immediate vicinity of the entrance to the facility." The only alternative is for facilities that set up a separate smoking section where the air is "directly exhausted to the outside."

• Create a right to sue in federal court for individuals who believe that owners of buildings where they work or live violate this provision. Under the bill, individuals must notify the building owner of his or her intention to sue. After 60 days, if the owner has not corrected the situation, the individual may sue. Civil penalties of up to $5,000 per day may be awarded under the bill. That would be a $1.65 million fine for a one-year violation.

• Provide up to $1,700 per year in college tuition for tobacco farmers and their family members, including brothers, sisters, stepbrother's stepsisters, sons-in-law, and daughters-in-law. There are currently two sections of the bill dealing with farmers, and one will have to be struck.

• Provide as much as $7.6 billion to help American Indians stop smoking, or about $18,800 per American Indian smoker.

Under the bill, between 3 percent and 7 percent of the public health trust fund, or as much as $7.6 billion, is set aside for smoking-cessation programs for American Indians, as defined by the Department of the Interior.

Under that definition, there are about 1.4 million American Indians, about 406,000 of whom are adult smokers who would qualify. Assuming 39.2 percent of them smoke (the average rate of smoking among American Indians), that would be about $18,800 for each.

The original tobacco bill created about 17 new agencies, boards and commissions.

New functions for government include setting up a national tobacco document depository, creating tobacco smuggling prevention programs and countering advertising programs.

The bill would spend about $13.6 million over five years to consider topics like the effects of smoke on pregnant women and further research on second-hand smoke.

A Senate aide who helped draft the bill said research has demonstrated that smoking damages fetuses and that secondhand smoke is dangerous, but it has not shown how it damages fetuses.

The bill would require states to license retailers that sell tobacco and bar those retailers from selling cigarettes to minors.

All 50 states have already outlawed selling tobacco to minors. However, this bill requires them to conduct "monthly, random, unannounced inspections of sales or distribution outlets in the state."

The states must then submit annual reports to the federal government detailing how it enforced the laws, the extent of the success achieved, how the inspections were conducted and the methods used to identify outlets.

One-quarter of the $24.6 billion the states receive under the bill must be spent on child care programs, including those for school-age children.

The bill sets targets to reduce teen smoking — by 15 percent after four years, by 30 percent after six years, by 50 percent after eight years and by 60 percent after 10 years.

Tobacco companies are charged a surcharge if those targets are not met and it is the government that determines whether those targets are met, based on "prevalence of tobacco products for the industry."

If the bill passes, the federal government will determine whether the targets have been met.

WHAT'S IN THE TOBACCO BILL

The tobacco bill is so big that few understand all that is in it. The tobacco bill before the Senate would:

- **Ban** smoking around entrances of public buildings.
- **Allow** citizens to sue owners of buildings that do not ban smoking or set up a room that is ventilated to the outside.
- **Pay** college tuition for family members of farmers — including tuition to study abroad.
- **Require** states to conduct monthly sting operations of tobacco stores and to report on them in detail to the federal government.
- **Spend** as much as $18,000 per person on smoking cessation programs for Indian tribes.
- **Require** insurance companies to cover all stages of reconstruction of the breast, and require a minimum hospital stay as determined by the doctor.
- **Spend** $16 billion over five years on anti-drug efforts.

The Washington Times

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Public Health Benefits of the McCain Bill

- 5 million smokers each year would receive cessation services to help them quit smoking. This would assist all the smokers likely to participate in a major national cessation campaign each year (10 percent of the 50 million current smokers).

- Ninety percent of young people aged 12 - 17 -- a total of more than 20 million people -- would be exposed to effective counter-advertising and counter-promotional campaigns to discourage them from taking up this deadly habit.

- 50 million children in grades K-12 would take part in school-based prevention programs that will establish and strengthen policies to address tobacco use in schools and implement age-appropriate curricula proven to be effective in preventing youth tobacco use.

- All 50 states would implement comprehensive state-based prevention programs such as those now in place in California and Massachusetts. These states will assist local communities in developing programs for parents and their children to prevent tobacco use, support laws that prohibit the sales of tobacco products to minors, and collaborate with minority populations to develop culturally sensitive tobacco prevention programs.

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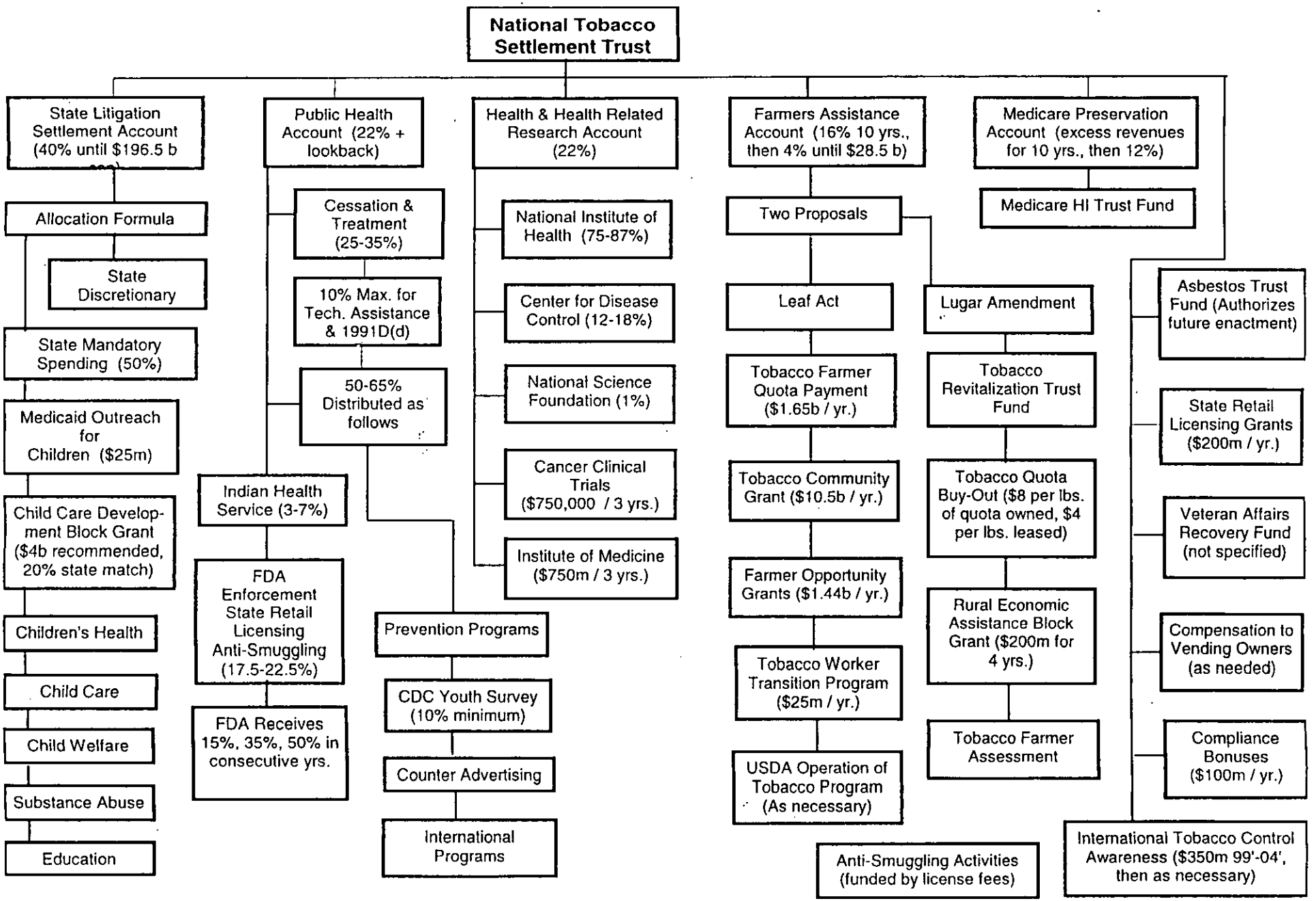

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Status of Tobacco Bill
June 17, 1998

	McCain Manager's Amendment	Where We Are Today
Price Increase	$1.10 over 5 years	Unchanged
Penalties: 1. Industry	Industry penalties are based on the number of percentage points missed: $80 million (1-5 points); $160 million (6-10 points); $240 million (11 points or more). Penalties are capped at $4 billion.	Durbin amendment reduced these penalties: $40 million for the first five percentage points by which the industry misses the target, and $120 million for each point missed thereafter. Penalties are capped at $2 billion.
2. Company Specific	$1000 per teen by which the company misses its youth smoking reduction target. This figure (which is equivalent to about $64 million per percentage point) represents twice the forgone profits of hooking a teen. No cap on penalties.	Durbin amendment increased these penalties: $80 million per percentage point for the first 5 percentage points, and $24 million per percentage point thereafter. This figure represents approximately 2.5 times the forgone profits for the first five percentage points, and about 7.5 times the forgone profits for the next 19 percentage points. Penalties are capped at $5 billion.
Youth Smoking Reduction Targets	Reduces youth smoking by 60% over 10 years.	Durbin amendment increased targets to 67% over 10 years.
Full FDA Authority	Provides full authority in a separate title.	Unchanged.
Advertising and Access Provisions	Codifies advertising and access provisions in the FDA rule and adds additional restrictions through a consent protocol.	Unchanged.
Protections of Tobacco Farmers	Includes Sen. Ford's LEAF Act which includes compensation (buyout and/or subsidies) for producers; continues a price support program.	Bill now contains both the LEAF Act and Senator Lugar's proposal to end the subsidy program. Votes are likely to occur to resolve this conflict.

	McCain Manager's Amendment	Where We Are Today
Comprehensive Plan to Use Tobacco Revenue to Protect Public Health and Assist Children	Revenues would be divided as follows: 22% for medical research; 22% for public health efforts; 40% for the states (half unrestricted and half for designated purposes); and 16% for farmers.	Funding percentages remain unchanged after revenues are deducted from the tobacco trust fund for a tax cut (see below). Public health efforts expanded to include anti-drug efforts (see below). Half of designated state funds must be used for child care (Kerry-Bond amendment).
Environmental Tobacco Smoke Provision	Includes provisions to protect against environmental tobacco smoke; allows states to opt out only if they have state laws that are equally protective.	Unchanged.
Liability Protections for Industry: 1. Liability Cap	$8 billion cap.	Gregg amendment struck the $8 billion cap.
2. Bar on Class Actions	None	Unchanged.
3. Bar on Punitive Damages	None	Unchanged.
Anti-Drug Provisions	At their option, states could use their restricted funds for Substance Abuse Treatment and Prevention programs and Safe and Drug Free Schools.	Same, plus Coverdell amendment would authorize a number of drug programs that will compete with public health funding for counteradvertising, smoking cessation, licensing and enforcement.
Tax Relief	None	Gramm amendment would provide tax relief to married couples earning less than $50,000, and a health insurance tax cut for the self-employed. Cost: $16 billion over 4 years, $30 billion over following 5 years, and one-third of tobacco trust fund revenues (plus other non-tobacco funds) thereafter. (If youth smoking targets are met and youth smoking declines by 67% over the next decade, the tax cut can use one-half, rather than one-third, of the tobacco trust fund dollars.)

	McCain Manager's Amendment	Where We Are Today
Attorneys' Fees	Set by arbitration panel.	Set by court, but cannot exceed: $4000 per hour for actions filed before 12/31/94, $2000 per hour for actions filed between 12/31/94 and 4/1/97, $1000 per hour for actions filed between 4/1/97 and 6/15/98, and $500 for actions filed after 6/15/98

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McCain bill

THE WHITE HOUSE

WASHINGTON

May 19, 1998

TOBACCO EVENT

DATE:	May 20, 1998
LOCATION:	South Lawn
BRIEFING TIME:	9:15 am
EVENT TIME:	9:45 am
FROM:	Bruce Reed

I. PURPOSE

To endorse Senator McCain's Manager's Amendment and urge the Senate to pass this comprehensive tobacco legislation this week.

II. BACKGROUND

This is an opportunity to applaud the Senate for taking up comprehensive, bipartisan legislation to dramatically reduce teen smoking, and to announce your support for the McCain bill. You will urge the Senate to move swiftly to pass Senator McCain's Manager's Amendment, which is currently before the Senate, and announce that you would be pleased to sign it into law. Specifically, you will announce your strong support for the improvements made to the McCain bill which will help reduce youth smoking and protect the public health.

You will be surrounded by 1400 youth ages 10-14 from the local D.C. area who participate in the National Campaign for Tobacco-Free Kids and will be holding a rally to push for tobacco legislation on the steps of the Capitol with Senators McCain and Conrad following this event. Approximately 150 public health advocates, tobacco control advocates, tobacco farmers, and Members of Congress will also be in the audience.

The specific improvements made to the McCain bill that you support, include:

- Tough industry-wide and company-specific surcharges that will finally make reducing youth smoking the tobacco companies' bottom line;

- Protection for all Americans from the health hazards of secondhand smoke in public buildings;

- No antitrust exemption for the tobacco industry;

- Strong licensing and anti-smuggling provisions to prevent the emergence of a contraband market and prosecute violators;

- A dedicated trust fund to provide for a substantial increase in health research funding as we move into the 21st Century, a nationwide counteradvertising campaign to reduce youth smoking, effective state and local programs in tobacco education, prevention, and cessation, law enforcement efforts to prevent smuggling and crack down on retailers who sell tobacco products to children, assistance for tobacco farmers and their communities, and funds for the states to make additional efforts to promote public health and protect children; and

- A higher, $8-billion-a-year cap on legal damages, which will only be available to tobacco companies that finally change the way they do business, by agreeing to accept sweeping restrictions on advertising, continue making annual payments and lookback surcharges even if those provisions are struck down, make substantial progress toward meeting the youth smoking reduction targets, prevent their top management from taking part in any scheme to promote smuggling, and abide by the terms of the legislation rather than tying it up in court.

III. PARTICIPANTS

Briefing Participants:
The Vice President
Secretary Shalala
Bruce Reed

Event Participants:
The Vice President
Tara Lipinsky, 1998 Gold Medal Figure Skater and Spokesperson for the National Campaign for Tobacco Free Kids.
Emily Broxterman, Campaign for Tobacco Free Kids National Youth Advocate Winner, Overland, Kansas

Meet and Greet Participants:
The Vice President
Secretary Shalala
Tara Lipinsky and family
Emily Broxterman and family
Michael Higgins Regional Youth Advocate Winner from Monroeville, NJ
Deanna Durett, Regional Youth Advocate Winner from Louisville, KY
16 students representing each of the eight schools participating in the event
Bill Novelli, President of the Campaign for Tobacco-Free Kids

Matt Myers, Executive Vice President and General Counsel for the Campaign for Tobacco-Free Kids
Cass Wheller, Chief Executive Officer, American Heart Association
Marilyn Hunn, Chairman of the Board, American Heart Association

IV. PRESS PLAN

Open Press.

V. SEQUENCE OF EVENTS

- You will briefly meet with members of the Campaign for Tobacco-Free Kids.
- You will be announced into the South Lawn accompanied by the Vice President and 20 students from the Campaign for Tobacco-Free Kids.
- The Vice President will make remarks and introduce Tara Lipinsky.
- Tara Lipinsky will make remarks and introduce Emily Broxterman.
- Emily Broxterman will make remarks and introduce you.
- You will make remarks and then depart.

VI. REMARKS

Remarks provided by Speechwriting.

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McCain bill

The Commerce Committee Manager's Package will Dramatically Reduce Youth Smoking

The Commerce Committee manager's package contains significant improvements over the underlying bill which will help to reduce youth smoking and to protect the public health. With these improvements, the bill meets each of the President's principles for comprehensive tobacco legislation. The improvements include:

Tougher Lookback Surcharges:

- The manager's amendment contains an uncapped company-specific surcharge of $1,000 per youth smoker for every youth smoker by which the company misses its youth smoking targets. This surcharge represents twice the lifetime profits that a company earns from any youth smoker. The companies will not be able to pass these company-specific surcharges onto price, because any price differential between companies will dramatically affect their share of the adult market.

  At the levels specified in the manager's amendment, company specific penalties will reduce profits by $640 million for every 10 points. The Treasury Department and OMB estimate that a 20-point miss in 2003 would represent one-third of total industry profits. By affecting their bottom line in this dramatic fashion, the company-specific penalties in the manager's amendment will provide a significant incentive for tobacco companies to change their behavior and reduce sales to children.

- The manager's package also raises the cap on industry-wide lookback surcharges from $3.5 billion per year to $4 billion per year. The Treasury Department and OMB estimate that if targets are not met and the full $4 billion industry-wide penalty is levied, the price of a pack of cigarettes will rise by about 35 cents.

Enhanced Environmental Tobacco Smoke Protections:

- The manager's package provides that a state can opt out of the national environmental tobacco smoke standard only if the state is able to demonstrate to OSHA that it has an ETS standard at least as protective of the public's health.

Spending:

- The manager's package contains key provisions to fund important public health programs, health research, and assistance for farmers. It also provides funding to states to be used for a variety of programs, including child care.

- Approximately 22 percent of expected revenues from the legislation will go to fund research at NIH, CDC, and AHCPR. Another 22 percent will fund smoking cessation programs, prevention and education programs, international tobacco control efforts, and a variety of enforcement efforts at both the federal and state levels to minimize smuggling

and crack down on retailers who sell tobacco products to children. All proceeds from lookback penalties will go to prevention and education programs.

- Forty percent of expected revenues will go to states, with half unrestricted and half to be used for designated purposes -- the Child Care and Development Block Grant, the Safe and Drug-Free Schools Program, Eisenhower Grants, child welfare programs (Title IV-B), the Maternal and Child Health Bureau's Title V Program, Substance Abuse grant programs, and a limited match for the Children's Health Insurance Program. This entire list is directed at the health and well-being of children and families most in need of assistance.

- The remainder of expected revenues from the legislation will go to protect tobacco farmers and to provide assistance to their communities, through the mechanisms of the LEAF Act.

- Excess revenues will go to the Medicare program.

Improved Liability Provisions:

- The manager's package ensures that the bill's liability provisions (i.e., the settlement of state lawsuits and the annual damages cap) apply only to companies that agree to accept sweeping advertising restrictions and to comply with important provisions of the law (i.e., lookbacks and annual payments), even if those provisions are invalidated by the courts.

- The manager's package raises the annual liability cap from $6.5 to $8 billion (indexed for inflation), the same amount as the cap in the Chafee-Harkin bill. It also removes liability protections for parent companies and affiliates; ensures that the industry's attorneys will be subject to suit as under current law; and allows plaintiffs claiming injury from disease to use evidence of addiction in their lawsuits.

- The manager's package strengthens the provisions in the bill that link liability protections to the achievement of youth smoking targets. Under the amended legislation, a company that misses its targets by 20 percent or more has the burden of showing both that it did not engage in affirmative misconduct and that it used best efforts to reduce youth smoking in order to escape the loss of liability protections.

Elimination of Antitrust Exemption:

- The manager's package eliminates the blanket antitrust exemption contained in the underlying bill, which was not necessary to achieve the goals of the legislation and could have had anticompetitive effects.

Stronger Anti-Smuggling Provisions:

- The manager's amendment will strengthen the anti-smuggling provisions in the bill, so as to prevent the emergence of contraband markets. The bill, as amended, will create a "closed distribution system" for tobacco products so that only licensed entities can sell or buy products; it will provide states with resources to establish or improve retail licensing systems; it will require manufacturers to mark packages for export to prevent their diversion; and it will establish and enforce strong penalties for violations. A very similar system has worked to control smuggling of alcoholic beverages for over sixty years.

Tob - acr - new legis - McCain bill

Tobacco Companies Charges regarding McCain Bill are False and Misleading

In order to protect their interests and turn public opinion against comprehensive tobacco legislation designed to reduce youth smoking and improve the public health, the tobacco industries have made false and misleading claims about the McCain bill. The facts demonstrate that the industry is once again trying to mislead the public, as it has done for decades regarding the dangers of smoking.

Are the companies correct in saying that the McCain bill will raise the per pack price of cigarettes to $5?

No. The McCain bill itself will raise the per pack price of cigarettes by $1.10. By 2003, under the McCain bill, the real price of cigarettes will rise to $3.20. (This price includes $1.10 because of the McCain bill and 15 cents because of the excise tax increase in the 1997 Balanced Budget Act. The current retail price is $1.95 per pack.) The price increase will not approach the level suggested by the industry.

Are the companies correct in saying that the price increase in the McCain bill is regressive and will increase average costs for smokers from $300 to $1700 per year?

Higher cigarette prices will mean more payments by all Americans who continue to smoke, including low-income Americans. The unfortunate reality is that smoking is a regressive habit and takes a regressive toll, in large part because the industry has spent billions of dollars marketing to low-income and minority communities. That is why it is important to use funds raised by tobacco legislation to help all smokers quit.

The companies say that only 2 percent of smokers are children, and that the McCain bill is penalizing the 98 percent of smokers who are adults. Is this true?

No. Of all Americans who smoke, about 10 percent are under the age of 18. And that's the problem. American children are getting hooked. Nearly 90 percent of adult smokers began before they were 18. The average age of smoking initiation is 14.5 years old. The average age when kids begin to smoke daily is 17.7 years old. And the adult smokers will tell you why the industry is wrong because 70 percent of adult smokers want to quit, and 80 percent of adults regret that they ever began. That is why it is so important to prevent youth from smoking, to ensure that they don't get hooked and suffer potentially lifelong consequences.

The tobacco companies say that the McCain bill would create 17 new federal bureaucracies. Is that true?

No -- this isn't about big government. What the bill does is to ensure that the federal government has the authority to regulate tobacco products in order to reduce youth smoking, as well as the ability to target tobacco revenues to strong public health and research efforts. The so-called "bureaucracies" that the industry is now complaining about are nothing more than what's necessary to protect the public health in this way -- to ensure that cigarettes are not sold to minors, to promote effective education, and to encourage smoking cessation. The proof that this is an industry "smoke screen" is clear: almost all these provisions were in the June 1997 proposed settlement put forward by 41 state attorneys general, which the industry agreed to. The industry is criticizing these provisions now only because the political tide has turned against it, and certain other aspects of the legislation have gotten stronger.

Tob-acc-new legis-
McCain

May 27, 1998

Dear Colleague:

The Senate has an historic but fleeting opportunity to pass comprehensive tobacco legislation to stop kids from smoking, and settle state cases against the industry collectively and efficiently.

Every living Surgeon General, Republican and Democrat, has called on Congress to pass a strong, effective and comprehensive tobacco bill this year. The tobacco companies don't want that to happen and are now engaged in a campaign of diversion to change the subject and return to business as usual.

Big tobacco companies want you to forget:

--**decades of lying** to Congress and the American people
--**manipulating nicotine** levels to hook kids early
--**marketing to children** in a systematic and organized manner
--**3000 kids a day start** the smoking habit, of whom
--**1000 will die prematurely** from smoking related disease.

--big tobacco companies tax **American families $50 billion** per year in smoking related health care costs, including **Medicare**

--**418,000 Americans a year die** from smoking related illness. The number one killer by far.

Big tobacco companies want you to think that S. 1415 is about taxing, spending and big government. They don't want you to know that:

--**S. 1415 contains much the same framework the industry agreed to last summer**, including:

** restrictions on tobacco marketing to kids
** annual settlement payments to satisfy state suits
** youth tobacco use reduction targets
** industry assessments for non-attainment of targets
** enhanced FDA authority over nicotine
** public document disclosure of unprotected papers

--**S. 1415 creates no new federal Bureaucracies**, simply three part-time advisory panels that entail little or no additional federal cost.

--S. 1415 would give the bulk of the money back to states to reimburse their taxpayers for Medicaid losses.

--S. 1415 would use settlement revenue for public health purposes, including vital health research; youth smoking prevention and cessation, and; tobacco farmer assistance.

--The tobacco companies agreed to a cigarette price increase of 65 cents over five years. They would now have us believe that an extra 10 cents per year--to do what experts say is necessary to deter youth consumption--will create a vast black market, drive the industry into bankruptcy and is the difference between enlightened public policy and "tax and spend" government.

--S. 1415 would help tobacco farmers who the industry left behind at the table.

--If this legislation is not passed, states will go back to court and the price of cigarettes will increase just as much after costly and time consuming state-by-state suits, judgements and settlements.

Is S. 1415 perfect? No. It is a bi-partisan solution to a pressing national problem, and the one chance Congress has to seize an historic opportunity to move the process forward.

It's time to act in this short window of opportunity to improve the measure and pass a bill that achieves our national goals efficiently and cost-effectively.

Attached is information about how tobacco affects the children in your state. Let's not let Congress get bogged down in politics, let's focus on doing something good for our children.

Sincerely,

_____ _____

_____ _____

NATIONAL TOBACCO POLICY ANDYOUTH SMOKING REDUCTION ACT

TITLE I – FDA AUTHORITY OVER TOBACCO PRODUCTS

--Establishes separate chapter of Food, Drug and Cosmetic Act confirming FDA authority over tobacco products, including product adulteration; misbranding; performance standards advertising to children; youth access; safer tobacco products. FDA has asserted jurisdiction over tobacco under its current legal authorities. June 20th settlement agreed to by the industry included broad FDA authorities over tobacco.

--Separate chapter protects non-tobacco drugs and devices; FDA has no authority over farms and cannot ban particular class of retail sale. National Association of Convenience Stores has signed off.

TITLE II -- REDUCTIONS IN UNDERAGE TOBACCO USE

Sets targets for the reduction of underage tobacco use. Targets are same as those agreed to by the industry in the June 20th agreement.

Failure to meet targets triggers industry assessment on the industry, and a company specific assessment for companies that do not meet their individual targets. Companies pay nothing if they meet the targets.

Industry assessments are $80 million for each percentage point missed between 1 and 5 (as agreed to by the industry); $160 million for each percentage point missed between 6 and 10; and $240 million for each percentage point thereafter. Capped at $4 billion. Company assessment of $1,000 per underage use above company's share of the reduction target.

PART B: Establishes state retail tobacco licensing program (like alcohol) to be paid for by settlement. NGA has expressed support for provision's flexibility. National Association of Convenience Stores supports licensing to punish bad actors who sell to kids, and protect good operators who do not.

PART C: Provides for the distribution and use of tobacco trust fund revenue for smoking prevention; cessation, counter-advertising and health research. 90% of prevention and cessation monies are block granted to the states.

TITLE III -- WARNING LABELS AND SMOKE CONSTITUENT DISCLOSURE

Requires new explicit tobacco product warning labels in bold type (as agreed to in June 20th) and permits FDA to update warnings based on science.

Requires manufacturers to test and publicly report health impacts of cigarette ingredients.

TITLE IV-- NATIONAL TOBACCO TRUST FUND

--establishes a single trust fund, on budget, to receive and disburse receipts under this act. out of four accounts:. State settlement Account; Health Research Account; Public Health Account and Farmer Assistance Account

--requires manufacturers (and importers) to make annual payments into the fund. Payments to be volume adjusted to effect $1.10 increase (real) over five years. Anticipated revenue available for Trust Fund $62 billion over five years.

--Establishes yearly payout from fund by percentage of annual receipts and caps yearly disbursements. Any monies, except for the states, beyond anticipated revenues used to preserve Medicare..

--Percentages are as follows States - 40%; Public health--22%, including smoking prevention, cessation, counter-advertising, international and administration and enforcement; Health research - 22%; Farmer Assistance - 16%

--50% of state money may be used for any purpose the state desires.
--50 % of state money is tied a menu of items the State may spend it on. Menu is approved by the National Governors Association.

--subcategories have a range of spending percentages and a cap to ensure oversight, competition and fiscal responsibility. Authorization Committees authorize the yearly percentage and Appropriations Committee's fund the percentage)

TITLE V – STANDARDS TO REDUCE INVOLUNTARY EXPOSURE TO TOBACCO SMOKE

--Requires public facilities to have designated, ventilated smoking areas.
No structural changes are required. Option is to ban smoking in the building

--Exemptions include residences; restaurants (except for fast food); private clubs; hotel guest rooms or common areas, casinos, tobacconist shops or prisons.

--State is given two years to opt-out, but must have its own program that is as protective of human health (as opposed to exposure), based on best available science.

TITLE VI--APPLICATION OF TOBACCO-RELATED PROVISIONS TO NATIVE AMERICANS

--Applies law on tribal land; exempts religious and ceremonial use of tobacco
--Requires that payment pass through to price of cigarettes occur for tobacco products sold on Indian land.
--Treats tribes as states for purpose of enforcing the law and grants.

TITLE VII--CIVIL LIABILITY OF TOBACCO PRODUCT MANUFACTURERS

--Provides $8 billion cap on yearly liability to manufacturers that participate in the settlement. (Amended by Greg Amendment); -No longer contains provisions protecting parent companies from liability; eases burden of proof for individual plaintiffs seeking compensation in accordance with the *Broin* decision. .

TITLE VIII--TOBACCO INDUSTRY COMPLIANCE AND EMPLOYEE PROTECTION FROM REPRISALS

--Provides for the Surgeon General, Director of the CDC, and HHS officials to review yearly report from tobacco manufacturers on each company's efforts to reduce teenage consumption of tobacco; Provides protection to tobacco company whistleblowers.

TITLE IX--PUBLIC DISCLOSURE OF TOBACCO INDUSTRY DOCUMENTS

--Requires industry to make documents available, except those with legitimate attorney-client privilege. Managers' amendment removes requirement that industry sets up a depository and moves it to Title XIV making this a requirement only for consenting manufacturers.

TITLE X--LONG-TERM ECONOMIC ASSISTANCE FOR FARMERS

*tobacco buyout and quota payments
*Farmer transition grants
*Education grants
*Farm Community block grant

--Bill includes both LEAF and Lugar tobacco farmer provisions.

TITLE XI--INTERNATIONAL; SMUGGLING AND VENDING MACHINES

International

--Authorizes multi-lateral and bi-lateral agreements regarding tobacco marketing and advertising to kids; Prohibits use of federal funds to facilitate exportation or promotion of tobacco; Authorizes and International Tobacco Control Awareness Program

Managers amendment: deleted licensing fee; American Center for Health and Tobacco; Duty free shop restrictions; military base restrictions; and extraterritorial legislation

Smuggling

--requires label marker to distinguish licensed product from contraband; requires manufacturers and wholesalers (like retailers) to have licenses to distribute tobacco so that s tobacco transactions occur between licensed entities;

Vending machines

--establishes a private, non-profit corporation to reimburse vending machine owners, subject to appropriations; audits and limitations.

TITLE XII--ASBESTOS

--authorizes appropriations from the Trust Fund to compensate asbestos victims should Congress establish a process for so doing. (Managers amendment deleted special asbestos trust funds)

TITLE XIII-- VETERANS' BENEFITS

--permits the veterans administration to sue tobacco manufacturers to recoup cost of treating veterans with smoking related illness.

TITLE XIV--PARTICIPATING MANUFACTURERS (New title)

--Sets out the responsibilities of participating manufacturers which desire to settle state cases including; sign state protocols and national consent decrees to effect settlement; agree to abide by additional advertising; marketing and point-of-sale restrictions prescribed in June 20th agreement; agree make share of $10 billion upfront payment as per June 20th agreement; fund document depository; agree not to challenge requirements of the act or protocols; receive yearly liability cap of $8 billion referred to in Title VII (To be modified as per Gregg Amendment).

###

Tob-nr-new bpi -
McCain bill

STATUS REPORT ON NEGOTIATION ISSUES
(Stipulated that nothing is agreed to until all things are agreed to)

International Cleanup

- No more licensing fee
- no licensing program
- no restrictions on duty free
- eliminate military provisions
- no ad or marketing restrictions marketing abroad
- no Extra-territorial application of criminal provisions
- eliminate American Center

What's in

- no federal market promotion (Doggett provision)
- $ for international tobacco control
- Labeling requirement
- multi-lateral negotiation on marketing (new)

State Funds

- Agree they get fixed percentage and menu will obtain NGA sign-off.

- A portion of state funds will be unrestricted and available for tax cuts or any other purpose.

- Another portion (federal medicaid portion) to be used for menu for health and children. Menu to be determined.

Bureaucracies

- No new federal bureaucracies will be created.

- Eliminated: National Smoking Cessation Program; tobacco free education board; National Tobacco free education program; National Community Action Program; Tobacco Agreement Accountability Panel; National Tobacco Task Force; Office of Tobacco Related Research; American Center on Global Health and Tobacco. (Functions will be folded into existing authorities)

- Two non-profit corps. remain: one for vending machines and the other for document depository.

Second Hand Smoke

- (Tentative agreement) Retain state opt out. Those states which do opt out must demonstrate to OSHA their own second hand smoke program is at least as effective in improving health (as opposed to exposure)

- If states have their own program, they enforce. If they opt into federal overlay, State can enforce under contract with OSHA.

- (Will run by NGA and OSHA)

Entitlement spending

- (Tentative) no new entitlement spending

Look-Back
- Between $3.5-5 billion cap for industry
- $500 per kid, company by company, not subject to cap

- Burden of proof for loss of liability cap: companies show by the preponderance of evidence that they didn't violate or undermine the act and took best efforts to reduce youth smoking.
- New survey to establish baseline.

LEAF Act
- intensive White House support for the LEAF Act

Liability:
- $8 billion liability cap as volume adjusted
- half of up-front payment to be used to endow the tort account with the National Tobacco Settlement Trust Fund (Other half goes to states)
- upon depletion of the inital balance in the tort account, 50% of annual liability exposure paid for from the annual industry payments
- no protections for parent or affilate corporations or entities
- clarify: use of evidence of addiction or dependancy in personal injury cases; the reduced-risk provision

Volume Adjustment

- (Tentative)Adjust payments to volume beginning second year rather than from year six.

Convenience Stores

will brief

Spending

- awaiting recommendation list from administration.
- (Tentative) Agree to direct spending, by percentage of yearly intake into the fund, for the following purposes:

  1) States
  2) Public health (prevention, cessation, international)
  3) Research
  4) Farmers

  Any other expenditures must be allocated by appropriations.

Tort Fund

Emily Shohetoff

219-6104

4(e) fed std
enforce members
can do? Yes, by
ST law

ST police
ST DOC
health inspectors

alternate enf scheme
also has to be as protective

States that have

at least as effective

protective of people's health

UN own std.
UN own enf. mech (written into state law)

- The bill takes the Settlement Trust Fund off-budget. It also exempts the receipts and disbursements of this fund from any general budget limitation imposed by law – the spending and revenues associated with this bill would be exempt from:
  - the Budget Enforcement Act's discretionary spending caps and its pay-as-you-go requirement for direct spending and tax legislation;
  - the Budget Act and the annual Congressional budget resolution that is enforced by 60 votes in the Senate;
  - the Senate's 10 year "pay-as-you-go" rule; and,
  - the Line Item Veto Act.
- The language taking the tobacco trust fund off-budget violates section 306 of the Budget Act, which prohibits consideration of legislation affecting the budget process unless reported by the Budget Committee. It takes 60 votes in the Senate to waive this point of order.
- CBO does not take into account "directed scoring" provisions in proposed legislation, such as the language taking the tobacco trust fund off-budget, until the bill becomes law. As a result, CBO will score this bill as though it were on-budget until it becomes law. Based on preliminary information, this bill will clearly violate the FY 1998 budget resolution's aggregate spending levels and cause the Commerce Committee to exceed the resolution's allocation of budget authority and outlays. Both of these violations make the bill subject to a 60 vote point of order.

A BAD AUDIT: The 1997 Consolidated Financial Statement of the US Government

- The first comprehensive financial statement of the US Government using new federal accounting standards was transmitted to the Congress on March 31, 1998.
- The financial statement for 1997 was prepared by the Department of the Treasury and audited by GAO. The Acting Comptroller General in a letter of transmitted to the Congress concluded-- "deficiencies prevented us from being able to form an opinion on the reliability of the consolidated financial statements".
- Major problems identified in the audit reported by GAO include the federal government's inability to:
  - properly account for and report billions of dollars of property, equipment, materials, and supplies;
  - properly estimate the cost of most federal credit programs and the related loans receivable and loan guaranteed liabilities;
  - estimate and reported material amounts of environmental and disposal liabilities and related costs;
  - determine the proper amount of various reported liabilities, including post retirement health benefits for military and federal civilian employees, veterans compensation benefits, accounts payable, and other liabilities;
  - accurately report major portions of the net costs of government operations;
  - determine the full extent of improper payments that occur in major programs and that are estimated to involve billions of dollars annually;
  - properly for billions of dollars of basic transactions, especially those between governmental entities; ensure that the information in the consolidated financial statements is consistent with agencies financial statements;
  - properly account for billions of dollars of basic transactions, especially those governmental entities;
  - ensure that the information in the consolidated financial statements is consistent with agencies' financial statements;
  - ensure that all disbursements are properly recorded;
  - effectively reconcile the change in net position reported in the financial statements with budget results.

For more details, informed budgeteers can refer back to *Bulletin* issue no. 9: April 6 and the entire report is available at www.gao.gov.

BUDGET QUIZ

Question: How can the appropriations process proceed in the Senate, if there is no budget resolution?

Answer: In general, section 303© prohibits consideration of appropriations bills in the Senate unless a budget resolution has been agreed to and section 302(a) allocations have been made. This prohibition is enforced by a majority point of order.

However, on April 2, 1998 when the Senate agreed to S. Con. Res. 86 (the Senate version of the FY 1999 budget resolution) the Senate also agreed to S. Res. 209 a "deeming resolution". This resolution had the effect of making a 302(a) allocation to the Appropriations Committee until a conference report on the budget resolution for FY 1999 is adopted. The levels set out in the deeming resolution are within the section 251 statutory caps on discretionary spending. So at this point, the Senate appropriators are free to proceed.

Question: How can the appropriations proceed in the House of Representatives, if there is no budget resolution?

Answer: Pursuant to section 302(a)(5) of the B[illegible] if a budget resolution is not adopted by April 15th, the Chairman of the Budget Committee shall submit to the House a 302(a) allocation for the Appropriations Committee which is consistent with the discretionary spending levels most recently agreed to budget resolution for the appropriate fiscal year. To date, this has not occurred.

Once a 302(a) allocation is so made, the Appropriations Committee is then authorized to report the subcommittee allocations. In addition after May 15th, pursuant to section 303(b)(2), the section 303 majority point of order which would lie against the consideration of an appropriations bill before a budget resolution is agreed to is no longer applicable. It is noteworthy that section 307 requires the Appropriations Committee to report all of its bills by June 10th; although there is no sanction for failure to do so. However, section 309 prohibits the House from adjourning for more than 3 days during the month of July unless the House has approved all annual appropriations bills.

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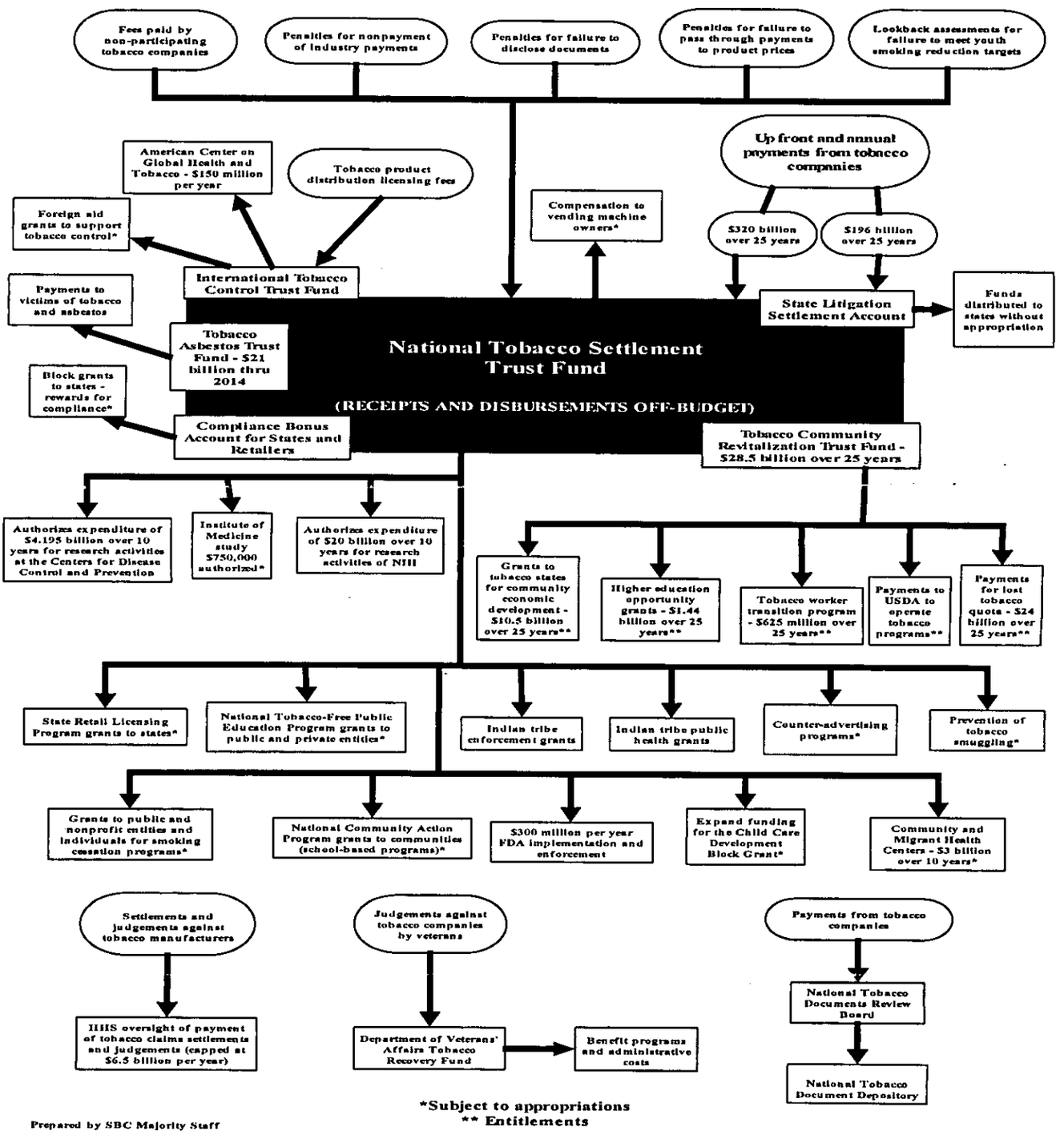
105th Congress, 2nd Session: No. 12

May 11, 1998

INFORMED BUDGETEER

Structure of the National Tobacco Policy and Youth Smoking Reduction Act Reported by Senate Commerce Committee 5/1/98



TOBACCO LEGISLATION - WHAT A DRAG

- Senate Republican Leadership asked Senator McCain, Chairman of the Commerce Committee to report to the full Senate a bi-partisan, comprehensive tobacco bill based on the framework of the June 20, 1997 States Attorneys General tobacco agreement. The Commerce Committee ordered reported a bill on April 1, 1998 by a vote of 19-1. The bill, S. 1415, and report became available to the public on May 1.

- The flow chart above represents the *Bulletin's* interpretation of the Commerce Committee bill's sections. Income into the various funds is represented by ovals; payments out of funds and special accounts are represented by shaded rectangles.

- An official cost estimate of the bill has not yet been produced. In general, receipts to a National Tobacco Settlement Trust Fund would total between $660 and $840 billion over the next 25 years; $110 billion over then next 5 year-- not inculding behavioral efects that could substantially reduce these amounts.

AN ANALYSIS OF SELECTED PROVISIONS OF THE McCAIN COMMITTEE BILL (S. 1415rs)

Working Paper #8 in a Series on Legal Issues in the Proposed Tobacco Settlement

May 11, 1998

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An Analysis of Selected Provisions of the McCain Committee Bill (S. 1415rs)

In the following pages the Tobacco Control Resource Center (TCRC)[1] presents its analysis of selected provisions of the May 1, 1998 version of the McCain Committee bill (S. 1415rs, the "National Tobacco Policy and Youth Smoking Reduction Act"). Our analysis focuses on the following areas.

Judicial Federalism and Civil Liability

Advertising Restrictions and the First Amendment

Constitutionality of the "Look-back" Provisions

State and Local Regulatory and Enforcement Powers

Retail Licensing and Related Provisions

In an effort to provide a timely report in a changing landscape, our methodology and analysis are limited to the particular provisions of the bill identified and discussed in each section of the working paper. In many instances particular provisions of the McCain Committee bill are compared to an earlier (March 29, 1998) committee draft, which was our initial baseline for analysis. Due to the need for rapid dissemination of our report we did not scrutinize the bill in its entirety. Thus, there may be provisions of the legislation that we have not reviewed which may affect our interpretations and conclusions.

[1] The research and analysis underlying this Working Paper were supported by National Institutes of Health/National Cancer Institute Grant Award No. RO1 CA67805-01 Titled "Legal Interventions to Reduce Tobacco Use." Any opinions, findings and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the prime sponsor.

JUDICIAL FEDERALISM AND CIVIL LIABILITY

Judicial Federalism and the Civil Liability Provisions of the McCain Committee Bill

By Professors Richard A. Daynard and Wendy E. Parmet

Northeastern University School of Law

Introduction

Title VII of the McCain Committee bill pertains to civil liability actions for tobacco-related injuries. Following the broad outlines of last summer's proposed settlement ("proposal") between the state attorneys general and the tobacco companies, Title VII purports to "settle" or prohibit some liability actions, while maintaining the ability of individual litigants to seek damages for health injuries caused by tobacco manufacturers. The damages such individuals may collect, however, are to limited by the annual cap established by sec. 706.

Although last summer's proposal purported to leave state tort actions in state courts, the proposal regulated state court procedures by prohibiting class actions and joined claims. It also permitted defendants to remove state law claims to federal court when state courts violated these procedural limitations. *See* proposal at p. 39. This apparent "federalization" of state court actions raised numerous constitutional issues.[1]

The McCain Committee bill avoids many of these constitutional problem by more clearly and fully federalizing civil liability actions. Sec. 705(d) "deems" all civil liability actions against tobacco companies as actions arising under federal law. The bill thereby avoids the problems the original drafters faced in trying to maintain civil actions as state actions while prohibiting class actions and permitting a federal forum for the resolution of such claims. By claiming that all civil actions are federal actions, the committee bill does not need to engage in stealth federalism. Instead, it can rely on tried and true methods of federal preemption. As a result, many of the more convoluted and dubious provisions of the original proposal (which are more fully explained in *Working Paper #3)* are absent in the McCain Committee bill.

On the other hand, a significant price has been paid for the constitutional cleanliness of the new bill. The McCain Committee bill more clearly treats all tort claims against tobacco manufacturers as federal actions. Thus the bill would result in an enormous preemption of state law, removing from the states a broad swath of their traditional police powers. By so doing, the bill removes many of the constitutional infirmities inherent in the earlier proposal. But it also enlarges the displacement of state power and eases the ability of Congress to enact future limitations on the rights of civil

[1] *See* Wendy E. Parmet, *Judicial Federalism and the Proposed Tobacco Settlement, Working Paper #3 in a Series on Legal Issues in the Proposed Tobacco Settlement*, Tobacco Control Resources Center, August 6, 1997 (hereinafter "Working Paper #3").

litigants. The bill would also expand the role of the federal courts, at the expense of the state courts. In an era of devolution, in which there is a renewed respect for the role of the states, these aspects of the bill are somewhat surprising.

Secs. 703 and 705: Preemption and the Federalization of Tobacco Tort Law

The basic structure of the civil liability provisions of the McCain Committee bill follow those laid out in the proposed national settlement. While settling the claims of the governmental entities, as well as the Castano class action litigants (*see* sec. 704), the bill purports to maintain the ability of private parties to bring tort claims (except those based purely on the fact of addiction -- *see* sec. 705(c)) against tobacco manufacturers (but not other entities, *see* sec. 705(b)). Damages awarded to plaintiffs in such actions will be subject to the annual liability cap, which may not exceed $6,500, 000, 000 (sec. 706(c)). Jurisdiction is to be concurrent between state and federal courts (sec. 705(a)). Importantly, in contrast to the proposal, there is no attempt to bar class actions or joined claims.

The bill's primary approach to federalism is to federalize all tobacco tort claims. This is apparent first from sec. 703, entitled "Preemption and Relationship to Other Law." It initially bars any "civil action involving a tobacco claim to which this title applies" except in "accordance with this title." This provision is complemented by sec. 705(a) which states that "Any tobacco claim in any civil action to which this title applies shall be deemed to arise under this section and shall be governed by the provisions of this title....." Hence, the drafters clearly want to assert that all tobacco liability claims shall be claims under the Act and shall be considered federal claims. Given the fact that tobacco is a good bought and sold in interstate commerce, the general ability of Congress to preempt state law claims should not be constitutionally troubling, even after the Supreme Court's more restrictive reading of the commerce clause in *United States v. Lopez*, 514 U.S. 549 (1995).

What is troubling about secs. 703 and 705, however, is the fact that their occupation of the field of tobacco liability is somewhat fictitious. Like the original proposal, the drafters appear to want to maintain the use of state law as the substantive law of decision in tobacco liability cases while otherwise federalizing tobacco claims. Thus after broadly preempting state law in sec. 703, the committee bill goes on to say that "This title supersedes State law only to the extent that State law is inconsistent with this title." *See* sec. 703(b). Since there are few substantive tort standards set forth in the statute, state tort standards will generally not be found inconsistent with the title and will clearly govern in tort claims. This conclusion is further supported by the fact that sec. 705(a) states that "the substantive rules of decision for such claim shall be derived from the law of the State or Tribe that would have been applicable but for the operation to this section, to the extent that such law is not inconsistent with the provisions of this title."

These limitations on the reach of federal law raise the question of whether sec. 705's initial attempt to "deem" all tobacco liability actions as federal actions is

disingenuous. In essence the bill is attempting to call an action a federal action even though the overwhelming bulk of law to be applied will be state law. This raises the constitutional issue of whether the attempt to "deem" an action as a federal action will be sufficient to make it one that is "arising under" federal law for the purposes of Article III. If it is not, the bill's attempt to provide for concurrent jurisdiction between the federal and state courts will not succeed, except when there is diversity of citizenship.

While sec. 705 clearly pushes against the outer boundaries of Article III, it is likely that a court would find it constitutional. First, while most of the law applied will come from state law, there will be some federal issues potentially involved in all tobacco claims, such as whether the defendant is a proper party under sec. 705(b), or whether evidence has been produced within the meaning of sec. 705(d) (governing production of documents produced to the national depository established by the bill). Likewise, the ability of a plaintiff to collect upon any damages awarded will be governed by the liability cap provisions set forth in sec. 706. The fact that these possible federal issues could arise in any tobacco liability case is probably sufficient to establish Article III jurisdiction. *See Osborne v. Bank of United States,* 22 U.S. (9 Wheat.) 738 (1824). Moreover, a court may well that rule that the state's laws of decision that are to be applied under sec. 705 are to be applied as federal common law rules and hence can support the assertion of Article III jurisdiction. *See Textile Workers Union v. Lincolm Mills,* 353 U.S. 448 (1957)(state law rules are to be applied under sec. 301 of the Labor Management Relations Act as federal common law).

Nevertheless, even if the assertion of federal jurisdiction is constitutional, it remains problematic. In essence, the bill is asking federal courts to assume a new jurisdiction over issues of state law. This is troubling because as the Supreme Court has recently reminded us, federal courts cannot be the final arbiters of state law. *Arizonans for Official English v. Arizona,* ___U.S. ___, 117 S.Ct. 1055 (1997). Of course, federal courts are forced all the time, especially in diversity cases, to render decisions under state law. But in most situations, federal courts can rely on the decisions rendered by state courts to instruct them as to the meaning and content of state law. This may not be possible in the case of tobacco liability if the McCain Committee bill is enacted. In the past, the tobacco manufacturers have shown a substantial preference for federal forums, removing cases virtually whenever removal is possible. Under Sec. 705 removal will always be possible. Hence, *every* tobacco liability case may be adjudicated in federal court, leaving the federal courts without any state court tobacco decisions upon which to rely. While this would not be unconstitutional, it certainly would be inefficient and detrimental to the development of state common law.

Sec. 704: Scope of Coverage and Immunity

Sec. 704 of the committee bill specifies who may bring tobacco liability claims. Sec. 704(a) bars all claims brought by states, their political subdivisions, Indian tribes, or other entities operating in parens patriae. There are two exceptions: claims "to enforce the terms of the Master Settlement Agreement or a consent decree," sec. 704(b), and claims

by any state which elects within one year of the date of enactment to opt out of receiving its share of the $196.5 billion in payments under section 401 of the bill. Sec. 702(c). Arguably, the latter exception means that sec. 704(a) should not be thought of as providing industry immunity but simply a facility for the settlement of state cases. However, there is nothing voluntary about the relinquishment of claims by political subdivisions and Indian tribes.

In addition, sec. 704(c)(1) settles "those claims asserted in the Castano Civil Actions, and all bases for any such claim under the laws of any State are preempted (including State substantive, procedural, remedial, and evidentiary provisions)." While "Castano Civil Actions" are not defined, and while some claims made in cases brought by the Castano Plaintiffs' Legal Committee could be interpreted as including personal injury or wrongful death claims, that is presumably not the intent. Thus, the following sentence provides that "The Castano Civil Actions shall be dismissed with full reservation of the rights of individual class members to pursue claims not based on addiction or dependency in civil actions in accordance with this Act." The remaining ambiguity is resolved by the definition of "Addiction claim; dependence claim" in sec. 701(1): "The term 'addiction claim' or 'dependence claim' refers only to any claim for relief which is predicated upon claims of addiction to, or dependence on, tobacco products, but neither term includes claims based upon manifestation of tobacco-related diseases."

Sec. 704(c)(1) states the quid pro quo for settling these claims as the smoking cessation grant program established in sec. 221 of the bill, and the various research activities envisioned elsewhere in the bill. An important additional benefit to putative class members in the various Castano class actions is that, if the statutes of limitations and repose which would otherwise be applicable to them had not run at the time of the filing of the relevant Castano class action, they will have one year from the effective date of the Act to file an individual action. Since the original Castano class action was a nationwide class action filed in March, 1994, this provision effectively extends the statutes of limitations and repose by at least five years. In light of this substantial benefit, in combination with the preservation of personal injury and wrongful death actions, sec. 704(c) may fairly be seen as a settlement, rather than an immunity provision.

The same cannot be said for the two remaining types of immunity provided in the bill.

The third such provision, sec. 706(c), provides that "The aggregate payments made by all participating tobacco product manufacturers in any calendar year may not exceed $6,500,000,000." This is an outright gift to the industry, perhaps in recognition of its extraordinary perverse achievements. While there is no stated quid pro quo, the argument is frequently made that this sweetener is needed to get the industry to agree to a "voluntary" protocol and to consent decrees, which in turn are needed to sustain the constitutionality of the bill's advertising restrictions and look-back provisions. This argument is discussed, and rebutted, in the sections of this paper which discuss these two sets of provisions.

This $6.5 billion cap does not (contrary to some published reports) increase in future years if not fully spent in past ones. Thus, if the industry pays only $5 billion in year one, it is capped at $6.5 billion (rather than $8 billion) in year two. If the annual cap was supposed to be measured by the industry's ability to pay, there is no reason why the industry should not be required to put the unused caps into a reserve. Furthermore, there is no reason even to believe that this cap exhausts the industry's ability to pay. Nor is there any reason why this industry, alone among all industries, should be protected from the ordinary legal consequences (including possible bankruptcy) of its fraudulent and outrageous conduct.

Finally, while the $6.5 billion liability cap will tend to protect the companies from bankruptcy, sec. 705(b), the fourth immunity provision, has the perverse effect of greatly increasing the likelihood that "tobacco companies" will declare bankruptcy. This section restricts "permissible defendants" in civil actions based on tobacco claims to "a tobacco product manufacturer" or its successor. Section 701(14), in conjunction with sec. 701(2), effectively defines "tobacco product manufacturer" to include only the domestic tobacco subsidiaries of the tobacco conglomerates. Despite the fact that these conglomerates purchased their other assets – Kraft, Nabisco, Philip Morris' international operations, etc. – with profits from sales to U.S. smokers, the bill effectively immunizes these other assets, leaving a drastically smaller asset and income base for use in paying off American tobacco claims. Thus if bankruptcy is a genuine concern, the bill's immunization of the great majority of "big tobacco's" asset base lowers the bankruptcy threshold to a fraction of what it would otherwise be. These sections, along with sec. 705(e)(1), also remove from the table the assets of other appropriate contributors to the industry's debt to its victims, such as co-conspiring law firms.

For the reasons discussed more fully in Working Paper #4,[2] these last two immunity provisions undermine the social purposes served by tort law: general deterrence, specific deterrence, and compensation.

Sec. 706 and the Injunction of State Courts

Section 706 establishes the procedures for implementing the liability cap and paying settlement and damage awards. Under sec. 706(d) a tobacco manufacturer can "commence an action to enjoin any State court proceeding to enforce or execute any judgment or settlement where payment has not been authorized under this section." Presumably this means a judgment that has not been registered with the Secretary of the Treasury as required under sec. 706(a), and is not above the cap established by sec. 706(c). However, the exact meaning of the phrase "not been authorized under this section" is not absolutely clear.

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[2] *See* Richard A. Daynard and John Rumpler, *Changes to the Civil Justice System Under the Proposed Tobacco Settlement, Working Paper #4 in a Series on the Legal Issues in the Proposed Tobacco Settlement*, Tobacco Control Resource Center, August 13, 1997.

In contrast to S. 1530, however, sec. 706 does not appear to give any federal executive official the authority to review state court judgments.[3] Moreover, under the McCain Committee bill, the federal court would appear to be authorized to issue an injunction only against a state court action in violation of sec. 706. This would appear to indicate that the federal court could not review, as it should not, the underlying validity of any state judgment. Moreover, the McCain Committee bill, in contrast to S. 1530, does not attempt to abrogate traditional doctrines of abstention or res judicata. Presumably a federal court would be free to apply these traditional doctrines to preserve appropriate respect and comity for state courts. Indeed, traditional application of those doctrines would suggest that only in unusual circumstances should federal courts intervene to enjoin an ongoing state procedure. This raises the question as to why the availability of injunctive relief is necessary here at all. After all, under the Act defendants have the ability to remove all civil claims against tobacco companies to federal court in the first place. Moreover, state courts are bound under the Supremacy Clause to apply federal law in all actions, including actions to execute judgments against tobacco companies. Finally, the appropriate relief for error by state courts is appeal through the state court systems and ultimately a petition for certiorari to the Supreme Court. Why the drafters of the McCain Committee bill believed that these typical mechanisms should not suffice in the case of tobacco claims, and why tobacco manufacturers require the ability to enjoin state actions to execute upon judgments is left unexplained.

Conclusion

The McCain Committee bill avoids many of the constitutional problems related to the treatment of state courts inherent in the proposed settlement between state attorneys general and tobacco manufactures. For the most part, the McCain Committee bill resolves these problems by disregarding complex and constitutionally dubious devices to federalize state court procedures in favor of the simpler and more traditional approach of simply preempting state liability actions. While the constitutionality of this approach is fairly secure, lawmakers reviewing the committee bill should still consider the implications of the extraordinarily broad preemption of state tort actions that would rescued from the committee bill's enactment. Furthermore, the immunity provisions of the McCain Committee bill undermine the social purposes served by tort law: general deterrence, specific deterrence, and compensation.

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[3] *See* Wendy E. Parmet, *Judicial Federalism and S. 1530, Working Paper #5 in a Series on Legal Issues in the Proposed Tobacco Settlement*, Tobacco Control Resource Center, February 17, 1998.

ADVERTISING RESTRICTIONS AND THE FIRST AMENDMENT

First Amendment Analysis of Tobacco Advertising and the McCain Committee Bill

By Robert L. Kline

A. Congress Has The Constitutional Power To Regulate Commercial Speech

The Supreme Court has a large body of case law setting forth the standards to which the government must adhere in order to regulate commercial speech.[1] Federal tobacco advertising restrictions meeting those standards would be constitutional. Section 121 and 122 of the McCain Committee bill set forth advertising restrictions to be included in "Protocols" to be entered into by the Secretary of Health and Human Services with the participating tobacco product manufacturers. These "Protocols" are essentially contractual agreements between the federal government and the tobacco companies.[2] Congress has the power to directly limit tobacco advertising and need not be confined to setting forth terms of a protocol. This paper will discuss the power of Congress to regulate commercial speech in the context of tobacco advertising regulation.

Tobacco advertising can be regulated, but the regulations must conform to the four-part commercial speech test set forth by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 328 (1980). First, the speech must qualify for constitutional protection (e.g., cannot be obscene or fraudulent). Second, the restriction must further a substantial state interest. Third, the restriction must directly and materially advance the government interest. Fourth, there must be a reasonable fit between the method chosen and the state interest. It need not be the least restrictive alternative, but it must be "sufficiently tailored to its goal." Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1593 (1995).

The McCain Committee bill's advertising regulations are constitutional. These regulations include limitations on outdoor advertising, advertising in publications with a significant youth readership, and advertising on the Internet. Central Hudson requires that the government regulation materially and directly advance the government interest and that the restriction be no more extensive than necessary. Existing social science evidence shows that the restrictions will directly and materially advance the government interest in preventing children from being enticed by tobacco advertising to try a dangerous product. The current congressional restrictions will *directly* advance the government interest because the research shows that advertising is an important factor in

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[1] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 328 (1980); 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495(1996).

[2] See section 6 (24), "The term "Protocol" means the agreement to be entered into by the Secretary of Health and Human Services with the participating tobacco product manufacturers under this Act."

a child's decision to begin using tobacco products.[3] Curtailing tobacco advertising that appeals to children will reduce children's experimentation with tobacco products.

The McCain Committee bill regulations *materially* advance the government interest because the advertising regulations will significantly reduce the number of children who would try tobacco products.[4] Since the FDA published its Final Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents in August 1996, additional information from tobacco industry files released during litigation, as well as from social science studies, has proven beyond contradiction that the industry targeted children through its advertising and promotion and that these activities were effective in achieving their intended goal of increasing cigarette consumption by our youth.[5]

The "narrowly tailored" test in the commercial speech context requires that the legislation be no more extensive than necessary. This is *not* to be confused with the "least restrictive alternative" test that is employed in cases of strict scrutiny by the courts. Meeting this lesser standard is possible with a carefully crafted statute. The proposed advertising restrictions are no more extensive than necessary because they limit advertising in forums where parents are unable to protect children from viewing tobacco advertising including outdoor advertising and advertising using cartoon, human and animal figures. The McCain Committee bill restricts outdoor advertising[6] and prohibits

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[3] See e.g., Pierce, et al., Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising, 271 JAMA 608 (1994). Researchers reported a strong link between tobacco promotion and the decision by adolescents to begin to smoke, Pierce, et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511 (1998), and that brands popular among young adolescents advertise more heavily in magazines with high youth readership. King, et al., Adolescent Exposure to Cigarette Advertising in Magazines, 279 JAMA 516 (1998). Also, six year olds recognize Joe Camel as readily as Mickey Mouse. Fischer, et al., Brand Logo Recognition by Children Aged 3 to 6 Years Old: Mickey Mouse and Old Joe the Camel, 266 JAMA 3145 (1991). They also know Old Joe is associated with cigarettes.

[4] See FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Federal Register Vol. 61 page 44475.

[5] After the introduction of the Joe Camel ad campaign in the late 1980s the market share of Camel cigarettes in the teen market increased at least 20-fold, and the previous decline in teenage smoking was reversed. Changes in the Cigarette Brand Preferences of Adolescent Smokers - United States, 1989-1993, 272 JAMA 843 (1994). The rise in young girls smoking habits after the tobacco industry decided to go after girls as a target market has also been documented. Pierce, et al., Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising, 271 JAMA 608 (1994). Pierce, et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511 (1998), Researchers have also documented that brands popular among young adolescents advertise more heavily in magazines with high youth readership. King, et al., Adolescent Exposure to Cigarette Advertising in Magazines, 279 JAMA 516 (1998).

[6] "The protocol shall require that no tobacco product will be sold or distributed in the United States unless its advertising and labeling (including the package) . . . are not outdoor advertising, including advertising in enclosed stadia and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment." Section 122(a)(1)(B).

cartoon, human and animal figures from being used in tobacco advertising[7]. It also restricts advertising in publications with at least 15 % youth readership or that are read by at least two million youth (e.g., Sports Illustrated) to the aptly named "tombstone advertising" (black text only on a white background). The restrictions would allow color advertising in those publications that have less than 15% youth readership and that are read by less than two million youth.[8] These limited restrictions would still allow the tobacco industry to place color advertising of its products in magazines and newspapers with a mostly adult readership (e.g., Time, Newsweek, daily newspapers) and would allow tombstone style tobacco advertising in other forums. The tobacco industry would still have many ways to reach its alleged target audience of adult smokers.

Section 122(a)(1)(A) requires that tobacco advertising "contain no human image, animal image, or cartoon character." This is a loophole that the tobacco industry is already slipping through. Recent tobacco industry advertising shows, for example, cute anthropomorphic cigarettes, and cleverly positioned chili peppers that resemble a pair of lips smoking a cigarette. (See "Tobacco Ads Seek Glamour Without Camels, Cowboys", Wall Street Journal, B1 2/20/98). Such advertising is eye-catching, appealing, and completely legal under the proposed legislation. To close this loophole, tobacco advertising in all media would need to be limited to tombstone format.

B. Courts Have Upheld Tobacco Advertising Regulations

The highest court to review tobacco advertising restrictions, the Fourth Circuit Court of Appeals, has twice upheld Baltimore's outdoor tobacco advertising restriction. In Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 862 F. Supp. 1402 (D. Md. 1994) the District Court held that Baltimore's regulation of tobacco advertising did not violate the First Amendment. Baltimore used a zoning-based model to limit outdoor tobacco advertising to non-residential areas where it was less likely that minors would view the advertising. The substantial government interest was protecting minors from being induced to engage in the illegal activity of acquiring cigarettes.

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[7] "The protocol shall require that no tobacco product will be sold or distributed in the United States unless its advertising and labeling (including the package) contain no human image, animal image, or cartoon character." Section 122(a)(1)(A).

[8] "The protocol shall require that no tobacco product will be sold or distributed in the United States unless its advertising and labeling (including the package) . . . (G) use only black text on white background, other than (i) those locations where self-service displays are permitted under subsection 123, if the advertising is not visible from outside the establishment and is affixed to a wall or fixture in the establishment, and (ii) advertisements appearing in any publication which the tobacco product manufacturer, distributor, or retailer demonstrates to the Secretary is a newspaper, magazine, periodical, or other publication whose readers under the age of 18 years constitute 15 percent or less of the total readership as measured by competent and reliable survey evidence, and that is read by less than 2 million persons under the age of 18 years as measured by competent and reliable survey evidence. Section 122(a)(1)(G).

The Fourth Circuit Court of Appeals upheld this decision in Penn Advertising of Baltimore v. Mayor and City Council of Baltimore, 101 F.3d 332, 333 (1996). The Fourth Circuit specifically held that the Baltimore ordinance was no more extensive than necessary because it only addressed residential areas where the advertising was more likely to be seen by minors.

It is important to note that the Fourth Circuit reaffirmed its decision in Penn Advertising *after* the Supreme Court had asked it to review its decision in light of the Supreme Court's decision in 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495(1996). (complete ban on liquor price advertising aimed at adults was unconstitutional where entire topic was banned and the government's goal of reducing consumption was not sufficiently related to the commercial speech restriction). The Fourth Circuit noted several differences between the liquor price advertising restriction in 44 Liquormart and the limited restrictions in the Baltimore ordinance. 44 Liquormart dealt with a total ban on speech directed to adults and the Supreme Court held that there was not a close enough tie between the government's goals and its methods. The Fourth Circuit in Penn Advertising, by contrast, held that the Baltimore ordinance was a partial restriction of speech which targeted children. The court also held there was a close connection between the government's goals of preventing teen participation in illegal transactions and the limited speech restriction. See Anheuser-Busch v. Schmoke, 63 F.3d 1305 (4th Cir. 1995) (companion case to Penn Advertising addressing Baltimore's regulation of billboard liquor advertisements).

The Fourth Circuit specifically stated "[w]e have read the opinion in 44 Liquormart and have considered its impact on the judgment in this case. . . we conclude that 44 Liquormart does not require us to change our decision in this case." Penn Advertising of Baltimore v. Mayor and City Council of Baltimore, 101 F.3d 332, 333 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997). Although the Fourth Circuit decision is not controlling law in other parts of the country, it demonstrates that a tobacco advertising restriction can be drafted to be constitutional and can withstand close judicial scrutiny.

C. A Restriction Based on a Commercial Government Interest Survives Challenge With or Without Central Hudson

In 44 Liquormart, Justice Stevens suggested Central Hudson should be revisited on some issues, but would be retained where the commercial speech restriction is based on the government's interest in commercial matters.[9] Under Justice Stevens approach, the

[9] "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining

Central Hudson analysis is still valid for economic matters and should be employed to prevent the aggressive sales practice of marketing a dangerous, addictive drug to consumers while denying its dangerous and addictive qualities. Thus far the Court has upheld speech restrictions limiting the aggressive sales practices of in-person attorney solicitations and direct mail by attorneys targeting injured parties or their survivors. Florida Bar v. Went-For-It, Inc., 115 S. Ct.2371 (1995); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). The tobacco industry's expensive, well-researched advertising campaigns employ aggressive sales practices in purposefully luring consumers into a drug habit. This is particularly true where the targets of the ad campaigns are minors.

Justice Stevens' opinion in 44 Liquormart strongly suggests that the Court may in the future employ a stricter test than Central Hudson when considering prohibitions on speech which are aimed at achieving a non-commercial government purpose by keeping the public ignorant of truthful information. There are three ways to avoid this potential problem in the tobacco advertising context. First, the proposed legislation should not be a prohibition; it should allow the dissemination of truthful, non-misleading information about the product if it is presented using tombstone lettering. The industry can continue to advertise its product to adults. Second, the restrictions should not affect truthful information about the product. Tobacco advertisements should still be allowed to address the factual qualities and "benefits" of the product, including levels of tar and nicotine, and price. Third, the goal of the regulation should be related "to the preservation of a fair bargaining process," thus implicating the government's interest in the commercial realm. One of the stated government goals should be the rebalancing of the uneven bargaining process between the deceitful manufacturer of an addictive drug and minors and others who have been manipulated by previous advertisements and public statements into dependence on that drug.

All proposed tobacco advertising legislation should include economic consumer protection as one of its goals. This could include rebalancing the respective bargaining positions of the parties because of the lack of truthfulness of the manufacturer as to the health impact on the consumer. The industry's failure to notify consumers of nicotine's addictive qualities and the industry's strenuous and deceitful denial of the harmful qualities of the product led consumers to make choices without being fully informed. Consumers need not make the most informed or the "best" decision, but when the manufacturer purposely misleads the consumer the ability of the government to set the bargaining process aright is clear. Congress should employ the rationale that advertising that entices children to use a product that it is illegal for them to purchase is an unfair advertising practice. See Mangini v. R. J. Reynolds Tobacco Co., 20 Cal. Rptr. 2d 232 (Cal. App. 1st 1993); aff'd 875 P.2d 73 (Cal. 1994).

Thus the McCain Committee bill should include language in the legislative "purposes" or "goals" section of the legislation specifically setting forth that the

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process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 44 Liquormart, 116 S. Ct. at 1505.

legislation is intended to rebalance the bargaining position of the tobacco industry and its consumers by restricting tobacco advertising. If the Supreme Court were to take a more protective view of commercial speech regulation in the future, it would likely still allow commercial speech regulation that was based on the government's interest in the commercial sphere. Therefore it is important to include in the findings and purposes sections of legislation that the government's goal in regulating advertising includes economic and commercial interests. These could include prevention of unfair advertising (advertising dangerous addictive products to youth), or rebalancing inequitable bargaining positions between the seller of an addictive drug and the addicted consumer as a matter of economic (as opposed to health-based) consumer protection. For example, the Findings or Purposes section of the bill could state: "It is in the government's interest to prevent unfair and illegal advertising practices. The tobacco industry has purposely targeted minors with sophisticated advertising practices, thus enticing minors to purchase or otherwise acquire tobacco products. The government must exercise its economic consumer protection role by restricting the tobacco industry's commercial advertising practices which are aimed at minors who are too young to use tobacco products and too young to make the decision to use tobacco products."

D. Constitutional Internet Advertising Regulation

Reno v. ACLU, 117 S.Ct. 2329 (1997), the famous "indecency on the Internet" case, does not prevent Congress from regulating tobacco industry advertising on the Internet. Reno is a case involving restrictions on political speech which receives the strictest scrutiny by the courts. Tobacco advertising restrictions are commercial speech and would not receive the same level of scrutiny, making Reno an inappropriate analogy.

The McCain Committee bill's section 122(a)(1)(F) restricts tobacco advertising on the Internet unless it "is designed to be inaccessible in or from the United States to all individuals under the age of 18."[10] This provision is constitutional if it is taken literally and interpreted to apply to advertising and not to all tobacco industry speech. In Reno, the Court found the Communications Decency Act unconstitutional. The government could not restrict "indecent" speech on the Internet because 1) "indecency" was defined vaguely, 2) the statute would silence many voices because of the broad amount of speech affected, and 3) speakers would self-censor because they could not know the age of the recipient of the message. In the present case, it is clear that only a limited number of speakers and type of speech (e.g., tobacco industry advertising) would be affected. The tobacco industry would still be able to communicate information over the Internet by maintaining its own websites; it just could not *advertise* on other websites.

[10] "The protocol shall require that no tobacco product will be sold or distributed in the United States unless its advertising and labeling (including the package) . . . (F) do not appear on . . . the Internet, unless such advertising is designed to be inaccessible in or from the United States to all individuals under the age of 18 years." Section 122(a)(1)(F).

Communication would not be interrupted; just the opportunity to use advertising gimmicks to entice children to try tobacco products.

Also, the drafters must clarify Section 122(a)(6).[11] This subsection appears to address promotional items or merchandise that bear cigarette brand names. Yet, it is not clear what (6)(B) refers to - is it the Internet? A medium yet to be created? Advertising in movie theaters? Concerts? Would all of these be covered by the language in (6)(A) regarding "nonpoint-of-sale promotional material (including direct mail), point-of-sale promotional material"? Section 122(a)(6)(B) provides that the tobacco manufacturer give the Secretary notice of the intent to advertise in the medium, but does not authorize the Secretary to act on that information.

E. Mandating "Voluntary" Protocols Violates the Unconstitutional Conditions Doctrine

Advertising restrictions included in existing consent decrees settling actual litigation between the states and the tobacco industry would be enforceable between those parties without further action by Congress. The separate agreements reached by Mississippi, Florida and Texas with the tobacco industry are enforceable already. Similar settlements reached in the future would also be enforceable.

Ironically, congressional action granting the industry any measure of protection from the normal consequences of the civil justice system in exchange for "voluntarily" accepting restrictions on advertising may raise "unconstitutional conditions" doctrine problems. Although the government may grant benefits to parties (here, immunity for the tobacco companies), the government may not condition the availability or access to those benefits upon the relinquishment of constitutional rights (voluntarily waiving what the industry perceives as its First Amendment rights). Speiser v. Randall, 357 U.S. 513 (1958) (premising an otherwise available property tax exemption on disavowing a belief in overthrowing the government is unconstitutional); Perry v. Sindermann, 408 U.S. 593 (1972); FCC v. League of Women Voters of California, 468 U.S. 364 (1984). The legislative history is already rife with comments regarding giving the industry a "quid pro quo" and making a "deal."

[11] "The protocol shall require that no tobacco product will be sold or distributed in the United States . . . (6)(A) except as provided in subparagraph (B) if advertising or labeling for such product that is otherwise in accordance with the requirements of this section bears a tobacco product brand name (alone or in conjunction with any other word) or any other indicia of tobacco product identification and is disseminated in a medium other than newspapers, magazines, periodicals or other publications (whether periodic or limited distribution), nonpoint-of-sale promotional material (including direct mail), point of sale promotional material, or audio or video formats delivered at a point of sale; but
(B) not withstanding subparagraph (A), advertising or labeling for cigarettes or smokeless tobacco may be disseminated in a medium that is not specified in paragraph (1) if the tobacco product manufacturer, distributor, or retailer notifies the Secretary not later than 30 days prior to the use of such medium, and the notice describes the medium and the extent to which the advertising and labeling may be seen by persons under the age of 18 years." Section 122(a)(6)(A)and (B).

The difference between the enforceable promises in state settlements and the doubtfully enforceable promises in a legislative "protocol" is the powerful judicial policy favoring case settlements. Individuals make choices to plea-bargain away their liberty in criminal cases everyday, but that does not mean that Congress can legislatively impose a system of rewards designed to inhibit the exercise of constitutional rights by an entire category of right-holders (arguably extinguishing a method of speech on a particular topic by all potential speakers). Tobacco companies that sign the "Protocols" are granted exemptions from the civil justice system that place the signatories at an enormous competitive advantage compared to non-signatories. The economic need to maintain litigation parity with competing tobacco companies makes the "voluntary" waiver of First Amendment rights coercive. This argument is enhanced by the industry's recent claims that the failure to grant it the immunity it seeks will lead to bankruptcies.

If Congress has the constitutional authority to restrict tobacco advertising it need not bargain away injured plaintiffs' rights to compensation from the industry. If Congress does not have constitutional authority, then receiving the industry's permission may not insulate the restriction from challenge under the unconstitutional conditions doctrine. The benefit of the bargain to the government would be to buy peace based on the promise by the major tobacco companies not to challenge the First Amendment restrictions. But there are many other parties who have standing to bring suit including billboard companies (such as Penn Advertising, the plaintiff in the Baltimore billboard case), advertising agencies (such as Coyne-Beahm, the first plaintiff in the FDA challenge), small tobacco companies and convenience store owners. A successful challenge could conceivably result in the entire advertising restriction section being found unconstitutional.

F. Non-Severability of Advertising Restrictions and Civil Liability Section

In the face of concerns that the advertising restrictions contained in the bill may violate the First Amendment, the McCain Committee bill seeks to preserve the implicit "quid pro quo" behind the bill by means of a provision explicitly linking the advertising restrictions to the bill's limitations on tobacco companies' civil liability. Specifically, section 8 (entitled "Liability Limitations Disappear If Tobacco Product Manufacturer Challenges Advertising Limits") stipulates that, if a tobacco manufacturer or anyone acting on behalf of a tobacco manufacturer brings a suit to challenge the advertising restrictions, then the liability limitations of Title VII will become inoperative for that manufacturer.

This linkage provision itself is likely to face constitutional attack, on the ground that it impermissibly interferes with the due process right of affected parties to seek judicial review of the constitutionality of provisions that burden them. The tobacco companies are adversely affected by the advertising restrictions and would ordinarily be entitled to challenge their constitutionality in the courts. Here, however, they face a

severe financial penalty, in the form of the loss of the liability limitation, for simply asserting their legal rights. The imposition of such a burden as the price for asserting a constitutional claim is sure to invite close judicial scrutiny.

The current non-severability section is also likely to face a challenge on the additional ground that it penalizes tobacco companies, by denying them the benefits of the liability limitations, for conduct over which they have no control, if the First Amendment challenge to the advertising restrictions is brought, not by the tobacco company, but by some other interested party, such as a publisher, advertising agency, or "consumer" of tobacco advertising, who is alleged to have acted "on behalf of" the tobacco company. A large loophole exists, however, if some other interested party brings such a challenge and succeeds in having the advertising restrictions enjoined; section 8 still allows the tobacco industry to benefit from the civil liability limitations if it maintains "plausible deniability" that it did not encourage the legal action.

A more conventional approach to the linkage between advertising restrictions and liability limitations would be far less problematic. The bill could simply incorporate a declaration of the congressional intent that these two portions of the bill not be severable from one another. Such a declaration would simply reflect the actual congressional understanding of the quid pro quo relationship between these two elements of the bill. Such a declaration of congressional intent will routinely be honored by the courts, by striking down the two elements together if either does not pass constitutional muster.

Thus, such a non-severability declaration would achieve much the same effect as section 8. If the advertising restrictions were found unconstitutional, the tobacco companies would lose their liability limitations as well.[12] But this consequence would operate, not as a penalty for challenging the advertising restrictions, but rather as a simple recognition of the congressional understanding that these two elements of the bill constituted a single, inseparable package. This approach would also deny the benefits of the civil liability section to all tobacco companies if any company or its surrogate challenged the First Amendment provisions.

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[12]Of course, under this approach, the liability limitations would remain intact until the advertising restrictions were invalidated, whereas under section 8's approach, the limitations would expire as soon as a challenge to the advertising restrictions was filed. The drafters may have been attempting to address a concern that, absent a provision like section 8, the tobacco companies could, for several years, derive benefit from a preliminary injunction barring application of the advertising restrictions, while continuing to enjoy the protection of the liability limitation, since there might still be no final judicial determination that the advertising restrictions were unconstitutional. However, a court confronted with a clear congressional declaration of the linkage between the two elements would likely hesitate to grant an injunction barring application of one element without enjoining application of the other element as well. Congress should explicitly provide that the non-severability section applies in the case of an injunction. In all likelihood, a strong non-severability provision would ensure the desired linkage between the application of the two elements.

G. Preemption

Congress should also specifically repeal the preemptive language of the Federal Cigarette Labeling and Advertising Act (FCLAA) 15 U.S.C. 1334 and the Comprehensive Smokeless Tobacco Health Education Act of 1986 (CSTHEA) (15 U.S.C. 4401). These statutes preempt state and local efforts to regulate tobacco advertising based on the government's interest in smoking and health, even though tobacco use is the greatest public health threat in America. Freeing state and local governments to participate in regulating tobacco advertising is not a constitutional issue and can be achieved by simply amending a prior statute. Indeed, an earlier version of the McCain Committee bill specifically repealed the preemptive provisions of the FCLAA and CSTHEA. See Section 118 "Repeals" of S.1414 (the 1997 bill filed by Senator McCain). The anti-preemption language in Section 5 of the McCain Committee bill does not apply to the FCLAA because it refers only to the McCain Committee bill and the Federal Food, Drug and Cosmetic Act of 1938. In addition, Title III of the McCain Committee bill, Tobacco Product Warnings and Smoke Constituent Disclosure, specifically amends the warning label aspects of FCLAA but fails to amend the preemptive language of FCLAA.

Section 101 of the McCain Committee bill amends the Federal Food, Drug and Cosmetic Act of 1938. These amendments generally address the FDA regulations. Section 914, *inter alia*, of the amendments to the 1938 Act addresses the issue of preemption of state and local authority to regulate tobacco advertising.[13] Section 914(2)(A) lists areas where state and local governments are preempted and Section (2)(B) lists exceptions to (2)(A) setting forth topics specifically not preempted.[14] The exceptions to preemption in (2)(B) include the advertising and promotion of a tobacco product. However, since this anti-preemption provision is included as an amendment to the 1938 Act it may apply to the 1938 Act only and not to the McCain Committee bill itself.

H. Conclusion

The Supreme Court has repeatedly upheld commercial speech restrictions if they pass intermediate level judicial scrutiny. A carefully crafted tobacco advertising statute

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[13] See State and Local Authority section of this working paper.

[14] Sec. 914(a)(2) Preemption of certain state and local requirements.

(A) Except as provided in subparagraph (B), no State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement applicable under the provisions of this chapter relating to performance standards, premarket approval, adulteration, misbranding, registration, reporting, good manufacturing standards, or reduced risk products.

(B) Subparagraph (A) does not apply to requirements relating to the sale, use, or distribution of a tobacco product including requirements related to the access to, and the advertising and promotion of, a tobacco product. (emphasis added)

can achieve this goal without the need to bargain with the tobacco industry or establish industry-government "protocols". The McCain Committee bill needs to be strengthened to limit tobacco advertising to a tombstone format to prevent the tobacco industry from enticing youth to experiment with an addictive drug. The tombstone format will allow communication of information to adult consumers and will meet the Supreme Court's Central Hudson test for commercial speech regulation.

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CONSTITUTIONALITY OF THE "LOOK-BACK" PROVISIONS

Constitutional Analysis of the "Look-back" Provisions of the McCain Committee Bil

By Richard A. Daynard

I. Description of the look-back provisions.

There are two "look-back" provisions in the McCain bill.

A. The first such provision, section 202, establishes a "penalty" for failure by the industry to meet stated annual percentage reduction goals for underage tobacco use, with the proceeds to be used by government agencies "to reduce further the use of tobacco products by persons under the age of 18 years." Sec. 202(d). The penalty is "a joint, several, and strict obligation" of all cigarette manufacturers (or, separately, against all smokeless tobacco products manufacturers). Sec. 202(c).

The penalty is allocated among the manufacturers "based on actual federal excise tax payments," sec. 202(d)(1). However, companies with less than 1% market share are exempt from paying any portion of the penalty so long as their market share among underage users is less than their total market share. Sec. 202(d)(2).

The goals for reducing underage tobacco use are set out in sec. 201. In the case of cigarettes they range from 15% in the third year after enactment to 60% in the tenth year and thereafter. In the case of smokeless tobacco, the goals range from 12.5% to 45% over the same period. The baseline in the case of cigarettes is a defined weighted average of adolescent smoking rates from 1986 to 1996. Sec. 204(3)(A). In the case of smokeless tobacco the baseline is drawn from studies done in 1995 and 1996. Sec. 204(3)(B).

The question of whether the industry has failed to meet the goal is to be determined either by a survey methodology set forth in the bill, or by a modification of that methodology adopted by the Secretary of Health and Human Services after a 5 U.S.C. sec. 553 notice and comment rulemaking procedure. Sec. 202(a).

The cigarette industry's penalty under sec. 202 is determined by multiplying the non-attainment percentage (required reduction in underage sales, minus actual reduction in underage sales) by $80 million for the first five percent, by $160 million for the second five percent, and by $240 million for the next 10%. If the non-attainment percentage exceeds 20%, the penalty is fixed at $3.5 billion. In the March 29, 1998 Committee draft exceeding 20% would also have triggered the loss by the industry of the benefit of the $6.5 billion liability cap for the year in question. This sanction was apparently eliminated by an amendment accepted at the April 1 mark-up, and does not appear in the final May 1 version of the bill. Sec. 202(b). The smokeless tobacco industry's penalties are set at 10% of those levels. Again, the draft provision removing the liability cap if the 20% non-attainment percentage is exceeded disappeared in the final version.

The word "strict" in sec. 202(c) is not defined, but is probably intended to convey that the penalty is being assessed without regard to the fault of either individual manufacturers or of the industry as a whole. Nonetheless, the bill provides that "any penalty paid by a tobacco product manufacturer under this section shall not be deductible as an ordinary and necessary business expense or otherwise...." Sec. 202(f).

While fault is not relevant in determining the penalty owed the government, any liable manufacturer may recover "contribution or reimbursement" from another manufacturer if it proves "by a preponderance of the evidence that the defendant manufacturer, through its acts or omissions, was responsible for a disproportionate share of the non-attainment penalty as compared to the responsibility of the plaintiff manufacturer." Sec. 202(g)(2). In such an action, the "manufacturer shall be held responsible for any act or omission of its attorneys, advertising agencies, or other agents that contributed to that manufacturer's responsibility for the penalty...." Sec. 202(g)(3).

B. The second "look-back" provision in the McCain bill, section 203, is very different. This section authorizes the Secretary to bring an action against the manufacturer of any brand of cigarettes or smokeless tobacco if in any year the non-attainment percentage for that brand exceeds 20%. The methodology for determining the non-attainment percentage is similar to that required by sec. 202, except that it is brand-specific and uses a base year (1999) that is likely to be more favorable to the manufacturers. Sec. 203(a)(2).

The sec. 203 action is to be brought in a three-judge U.S. District Court for the District of Columbia. If the court determines by a preponderance of the evidence that the manufacturer "(1) has failed to comply substantially with the provisions of the Act regarding underage tobacco use, of any rules or regulations promulgated thereunder, or of any other applicable Federal, state, or local law, rules, or regulations; (2) has taken any material action to undermine the achievement of the required percentage reduction for the tobacco product in question; or (3) has failed to comply with all recommendations of the Tobacco Agreement Accountability Panel established under section 801", then the manufacturer loses the benefit of the annual liability cap. Sec. 203(c) and (d). The decision is reviewable only by the Supreme Court through a writ or certiorari.

The Tobacco Agreement Accountability Panel, mentioned in sec. 203, is to "consist of the Surgeon General, the Director of the Center for Disease Control or the Director's delegate, and the Director of the Health and Human Services Office of Minority Health." The Panel is charged to receive and evaluate annual plans by tobacco manufacturing companies for meeting the underage use reduction targets, and to "recommend, where necessary, additional measures individual tobacco companies should undertake to meet those targets."

A manufacturer which loses its liability cap under sec. 203 can get it back only if the Secretary determines in a future year that the non-attainment percentage for the brand in question is less than 20%, or if the manufacturer demonstrates to a similar three-judge

court at least two years after the initial judgment that it is now in compliance with the relevant legal rules, that it has done nothing further to undermine the achievement of the percentage reduction goals, and that it "has pursued substantial additional measures reasonably calculated to attain the required percentage reduction for the tobacco product in question." Sec. 203(g).

A companion provision to sec. 203 is sec. 801(d), which allows the Commissioner of Food and Drugs, even prior to the first "look-back," to seek a judicial determination under sec. 203 that the actions or inactions or a particular manufacturer create a "clear and present danger" that the underage use goals will not be met. If the three-judge federal district court so finds, it may suspend that company's liability cap. The "clear and present danger" standard, which had been developed in the First Amendment context for determining when political speech can be suppressed, is extremely difficult to meet.

II. Constitutional Analysis

Section 202 could easily have been drafted as a tax provision, rather than as a penalty provision. In the exercise of its plenary power over interstate commerce, Congress can tax any activity at any rate in wishes. "Sin taxes" have long been justified as deterring undesirable conduct. Underage smoking is certainly undesirable, excise taxes on tobacco products are generally believed to deter underage smoking, and setting tax rates specifically to deter this behavior is certainly unobjectionable. Nor is there any conceivable objection to Congress saying, "We think the tax rates we are currently setting, and other programs we are putting in place, will drop underage smoking to acceptable levels; but if these deterrents turn out not to be adequate, we will raise the taxes by additional specified increments."

The next question is whether Congress' calling the specified future payments "penalties" rather than "taxes", assessing them upon manufacturers (by market share) rather than upon the retail product, and making them non-tax-deductible, changes this result.

The references to "penalties" in this section should not be decisive, since these assessments do not turn on any misbehavior by the manufacturers, and indeed may not be entirely within the manufacturers' control. The mechanism of assessing manufacturers rather than taxing consumers directly is also not very meaningful in context, since the June 20 agreement relied upon market-share-based manufacturer assessments throughout the agreement (not just in look-backs) to raise the price of tobacco products, and thereby discourage underage consumption. The denial of tax deductibility for these "penalties" does, however, suggest that the bill's drafters had something more than a hidden tax increase in mind.

But even if the industry is to be "penalized" for failing to reduce underage tobacco consumption sufficiently, the question remains, so what? As a matter of substantive due process, there is no constitutional requirement for a "good faith" defense in civil penalty cases. While the tobacco industry is not solely responsible for teenagers desiring their

products, it is largely responsible for this demand; and while it probably could not extinguish this demand entirely through creative counter-advertising, it could doubtless go a long way towards doing so. It would therefore be rational for Congress to place the financial responsibility on the industry for seeing that the underage percentage reduction goals are met. Assuming that these penalties are sufficiently severe, they would likely evoke efforts by the industry (either collectively or on the part of the largest player or players) that would substantially contribute to the compelling public interest in reducing underage smoking. And, on the other hand, there is simply no way for Congress to know in advance precisely how much the industry could accomplish by way of reducing underage smoking, other than to provide the incentives and watch what happens!

Nor would this be a bill of attainder. Congress is not seeking to punish the industry for what it has done in the past, but for what it does or fails to accomplish in the future. It is clear that Congress does not even have a covert purpose of punishing past misbehavior through the "look-back" provisions, since it can exact any measure of such punishment it wishes in a far more certain and immediate fashion by assessing fees and taxes for the year immediately following the enactment of the bill.

Section 202 also does not trigger any procedural due process problems. While the government is indeed proposing to deprive industry members of their property if the industry as a whole fails to meet certain standards, it is not proposing to do so on grounds specific to individual companies. Section 202's penalties are to be based on rates of underage use of tobacco products generally, not on the use of particular brands. Generic actions based upon "legislative facts" do not trigger due process hearing rights. *See Bi-Metallic Investment Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915); *Heckler v. Campbell*, 461 U.S. 458 (1983).

Since allocation of penalties among manufacturers is determined by actual excise tax payments, a matter of public record, even this individualized determination would not trigger any hearing right. A manufacturer with less that 1% market share would, however, have a right to contest in some appropriate manner a determination by the Secretary of Health and Human Services that it was not entitled to an exemption because its market share among underage users was not less than its overall market share.

Section 203, on the other hand, clearly raises procedural due process issues. But, having raised them, it resolves them in the most traditional way possible. No company will be subject to the specified penalty (abrogation of its liability cap) unless and until it is found to have misbehaved by a three-judge federal district court. While it is not clear whether the statute contemplates the court taking evidence as to the accuracy of the survey which "found" the triggering event (to wit, defendant's brand missed the underage percentage reduction goal by more than 20%), the court would certainly do so if it thought it necessary to preserve the constitutional validity of the statute. In any event, survey evidence is an exception to the hearsay rule, so the dispute about the survey results would be limited to issues of methodology and execution.

III. Conclusions

As a constitutional matter, neither the industry-wide (sec. 202) nor the company-specific (sec. 203) look-back provisions requires the consent of the industry or its members. It is an entirely separate question as to whether either provision, or both together, will achieve their objective of substantially reducing underage smoking.

The maximum annual penalty for the entire cigarette industry under section 202 is $3.5 billion. Since this would not be tax deductible, the industry, which has a 35% marginal tax rate, would require $5.38 billion of additional revenue to come out even. Assuming that a total of 15 - 20 billion packs of cigarettes are sold in the year in which the penalty is being assessed (down from about 24 billion packs today), this penalty could be recouped with a 27 to 36 cent per pack increase. The price elasticity of overall demand for cigarettes is generally accepted to be -.42; the price elasticity of demand by teenagers is generally believed to be around -.1. Since the McCain bill as a whole is expected to raise cigarette prices to above $3.50 per pack, such an increase would amount at most to about 10% of the pack price, which would result in a 4% drop in overall sales, and hence profits. In contrast to the March 29 draft, which promised to hold the industry's attention by threatening the elimination of liability caps for missing the target by 20% or more, this potential 4% profit drop would have a negligible deterrent effect on industry behavior. The drop in consumption among youth could be expected to be somewhat larger, in the order of about 10%, but still not large enough to guarantee that the stated goals for reducing underage smoking will be achieved.

Section 203 is somewhat more promising, since it does threaten to eliminate part of the liability protection (caps, but not parental immunity) offered by the bill. But this section is more useful for deterring egregious misbehavior by tobacco companies (e.g. the Joe Camel campaign, and perhaps the "heroin chic" models which replaced it) than it is for encouraging efforts by them to "demarket" cigarettes to young people. While section 202 penalties are mandatory, actions under section 203 are discretionary with the Secretary. Furthermore, all three triggers for Secretarial action under section 203 require evidence of actual corporate misbehavior. While one of them, failure to comply with a recommendation of the Tobacco Agreement Accountability Panel, could conceivably involve the failure to demarket a cigarette favored by teenagers, it is unlikely that such a recommendation could be phrased in a way that forces the manufacturer to make the "right" creative decisions, rather than permitting it to "go through the motions" by running humdrum and ineffective "counter-advertisements".

The residual effects of past industry misbehavior, in terms of near-record level cigarette consumption by teenagers, may persist through the next decade. The March 29 version of the bill, which provided a substantial market incentive for the industry to find ways to demarket its products to teenagers and pre-teens, dealt with the problem. The current version does not.

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STATE AND LOCAL REGULATORY AND ENFORCEMENT POWERS

State and Local Regulatory and Enforcement Powers

Under the McCain Committee Bill (S. 1415rs)

By Peter D. Enrich and Patricia A. Davidson

In a number of respects, the McCain Committee bill reflects a greater sensitivity to the protection of state and local autonomy in the regulation of tobacco products then did prior legislative proposals or the original proposed settlement agreement. However, at a number of key points, S.1415 continues to pose serious threats to state and local regulatory and enforcement authority, and at a number of other points the statutory drafting raises problematic questions concerning its purpose and effect. In the following sections, we review the impacts of several key elements of the McCain Committee bill.

1. Findings and Purpose Sections

The Findings section of the McCain Committee bill (sec. 2) could be greatly improved by including additional references to the roles of states and localities in tobacco control. For example, paragraphs (7) and (8), which contain the only express references to state authority, do not mention local authority. A number of other subsections, such as those referring to the need to curtail youth sales and the importance of marketing and advertising restrictions, should expressly embrace state and local authority as well as federal action. (*See, e.g.*, subparagraphs (15), (28), (29), (31)).

The Purpose section of the McCain Committee bill (sec. 3), which is an improvement over its predecessors, expressly refers to state and/or local authority in a number of subsections. (*See, e.g.*, paragraphs (2), (3), (4), (11), (14)). However, some of these provisions, such as subsection (4), refer only to state authority, raising questions about the scope of local authority recognized by the bill. Paragraph 18's silence about the roles of state and local governments in ensuring that tobacco products "are not sold or accessible to underage purchasers" is also troubling, although the general non-preemption language of section 5(a) should help quell any doubts about state and local authority.

However, the exclusive reference to national standards and federal authority over the manufacturing of tobacco products and over the identification and public disclosure of ingredients in paragraph (6) may buttress preemption arguments regarding manufacturing standards, ingredients reporting and disclosure and advertising. (*See* discussion of section 914, in section 3, *infra*).

2. General Non-Preemption Provision

Section 5 of the McCain Committee bill contains a general non-preemption provision, an approach we have called for in our previous working papers. However, while the March 29th

draft closely tracked the non-preemption language we recommended in a working paper analyzing S. 1530,[1] the current version omits several provisions. First, paragraph (a) dropped the remaining reference to the Food and Drug Administration Modernization Act of 1997, as amended. Second, the reference, to "or rules promulgated under such Acts", which would have expressly protected state and local laws "that further restrict or prohibit tobacco product sale to, use by, and accessibility to persons under the legal age of purchase" from preemption by rules or regulations under the Federal Food, Drug, and Cosmetic Act and the Modernization Act, was also omitted. While arguably, the reference to the Modernization Act could be dropped as surplus (since it amended FDCA), this rationale does not explain the omission of paragraph (a)'s express reference to rules and regulations, particularly since paragraph (b)'s non-preemption provisions include an express reference to rules promulgated under both the McCain bill ("this Act") and FDCA.

Third, language in the March 29th version of the McCain Committee bill providing that "[s]ection 521 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 360k) and subchapter F of chapter VII of that Act (21 U.S.C. 751 et seq.) shall not apply to any law, rule, regulation or other measure enacted, adopted, promulgated, or enforced by a State or its political subdivisions or the government of an Indian tribe with respect tobacco products" was dropped. This omission could undermine the preemption protection afforded under section 5 because, unlike the more general language of paragraph (b), the protection provided by the deleted sentence was unqualified.

The basic preemption provision of section 5(b), on the other hand, builds in an exception:

"(b) Additional Measures.- *Except as otherwise expressly provided in this Act*, nothing in the Act, the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.), or rules promulgated under such Acts, ..." is preemptive. (Section 5(b), emphasis added).

If the intention of the drafters was to completely shield state and local initiatives from the preemptive effect of the statutory provisions referred to in the deleted language then the language should be reinstated.[2]

3. Food Drug Administration (FDA) Authority

The March 29th draft of the McCain Committee bill set forth a puzzling maze of potentially contradictory directives in section 914.[3] The version of the bill released on May 1,

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[1] *See* Peter Enrich and Patricia Davidson, "Impact of S. 1530 on State and Local Regulatory and Enforcement Authority," Working Paper #7 in a Series on Legal Issues in the Proposed Tobacco Settlement, Tobacco Control Resource Center, p.25 (April 6, 1998)(hereinafter "Working Paper #7"). Section 5 of S. 1415, however, has omitted, in both drafts, a recommended explicit reference to the Food and Drug Administration Modernization Act of 1997.

[2] Section 5(c) of the current version of the McCain Committee bill includes a new provision that appears to be intended to protect state authority to expend funding provided under the McCain Committee bill. Since a timely analysis of the funding provisions of the bill is beyond the scope of this working paper we do not comment on paragraph (c) at this time.

1998 clarified some of our earlier concerns. Although the May 1st version provides stronger preemption protection than its predecessors, there is still room for considerable improvement if the goal of the drafters is to limit preemption to a narrowly defined set of issues. Section 914's preemption provisions are described below.

First, section 914(a)(1) sets forth the following anti-preemption provision.

"In general. Except as provided in paragraph (2), nothing in this Act shall be construed as prohibiting a State or political subdivision thereof from adopting or enforcing a requirement applicable to a tobacco product that is in addition to, or more stringent than, requirements established under this chapter."

Although this language is relatively straightforward,[4] the breadth of the exception is problematic.

Second, subparagraph (A) of paragraph (2) prohibits states and localities from adopting or continuing in effect "with respect to a tobacco product any requirement which is different from, or in addition to, any requirement applicable under the provisions of this chapter relating to performance standards, premarket approval, adulteration, misbranding, registration, reporting, good manufacturing standards, or reduced-risk products." These eight categories cut a very wide preemption swath.[5] For example, under section 914 the numerous misbranding requirements of section 903 are preemptive. Although an analysis of the substantive provisions of section 903 is beyond the scope of this working paper, one question which arises is whether the sections cross-referenced in 903, such as sections 904, 907, 908, 909 and 912 are also thereby rendered preemptive.[6] This type of cross-referencing in other preemptive sections (*see, e.g.,* section 902, which covers adulterated tobacco products) also raises broader preemption concerns.

The ill-defined scope of preemption of reporting requirements under section 914 is particularly troubling. Several states, dissatisfied with the federal reporting system, have recently adopted their own more stringent ingredients reporting and disclosure laws.[7] It appears that these laws would be negated under section 914 (unless a state applied for and was granted an exemption). In addition to dismantling existing state laws, preemption of reporting requirements

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[3] Section 914, entitled "Preservation of State and Local Authority," is part of a new chapter of the Food, Drug and Cosmetic Act (FDCA) regulating tobacco products to be added to FDCA by the McCain Committee bill. (*See* Title I, Subtitle A, sec. 101(b) of the McCain Committee bill.) Thus, references to "this Act" in section 914 apparently refer to FDCA.

[4] We note that language in the previous version of the McCain Committee bill expressly providing that state and local requirements that are more stringent than those established under chapter IX trump the federal requirements has been dropped. Perhaps the drafters viewed the language as surplusage.

[5] The exception language has been greatly improved, however, by the omission of startlingly broad "catch-all" categories which appeared in the March 29th version of the McCain Committee bill.

[6] *See* section 903(a)(9). Some of these sections are expressly preempted by section 914 (*see e.g.,* section 907). Others are arguably not included (*see, e.g.,* sections 908, 912).

[7] *See, e.g.,* Mass. G.L. Ch. 94, sec. 307B; Minn. Stat. sec. 461.17. The tobacco industry has challenged each of these statutes. *See also* Peter D. Enrich and Patricia A. Davidson, "Local and State Powers Under the Proposed Tobacco Settlement," Working Paper # 1 in a Series on Legal Issues in the Proposed Tobacco Settlement, pp. 11-13 (July 31, 1997); Working Paper # 7, pp. 19-20.

will undoubtedly also have a chilling effect on the development of more stringent requirements in other states.

Third, on the positive side, the May 1st version of the McCain Committee bill clarified that preemption (under subparagraph (A)) "does not apply to requirements relating to the sale, use or distribution of a tobacco product *including requirements related to the access to, and advertising and promotion of, a tobacco product.*" (Section 914(a)(2)(B), emphasis added). The addition of language clarifying that requirements related to access and advertising and promotion[8] are not preempted is a major step forward, particularly in the area of advertising and promotion. Nonetheless, this language could help to mitigate the negative effect of preemption language under the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) on state and local initiatives to limit tobacco product advertising and promotion. Repeal of FCLAA (as it pertains to cigarettes) and CSTHEA, which appeared in the original McCain bill, would be consistent with this approach. (*See* section 4 below).

Fourth, while section 914(c) provides for waivers of state or local measures that are otherwise preempted by subparagraph (a), both the cumbersome nature of the waiver process and lack of clarity about the scope of areas preempted under section 914 suggest that relying on a waiver mechanism will not be adequate to protect state and local authority in this ill-defined area.

Finally, however, the rule of construction set forth in subparagraph (b) of section 914 appears to be a satisfactory protection of the viability of state product liability law.

In short, while the language of section 914 is, on balance, an improvement over its predecessor (by limiting preemption to eight categories and clarifying that state and local requirements related to access to and advertising and promotion of tobacco products are not preempted), it nonetheless raises troubling questions. First, the eight preemptive categories are quite broad. Second, in at least some areas, such as reporting, preemption will negate existing state efforts to hold the tobacco industry to more stringent product ingredient reporting and disclosure requirements. The general non-preemption principles espoused in section 5 could be undermined by the apparently wide scope of section 914 preemption.

4. Federal Cigarette Labeling and Advertising Act (FCLAA) and Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) Preemption

A provision which appeared in a previous version of the McCain bill (S. 1414)[9] repealing both FCLAA and CSTHEA appears to have been dropped from the committee bill. Despite

[8] However, since the general anti-preemption provision of section 914 amends FDCA and does not expressly apply to provisions of the McCain Committee bill itself, this language apparently only to FDCA provisions.-

[9] Section 118 of S. 1414 would have repealed FCLAA and CSTHEA. Senate 1530, which we analyzed in Working Paper #7, also proposes repealing CSTHEA and the cigarette portions of FCLAA. *See* S. 1530, Title IV, sections 402(a) and 402(b).

recent inroads,[10] the preemption provisions of FCLAA and CSTHEA have historically been a serious obstacle to state and local regulation of advertising. An express repeal of the preemptive provisions of FCLAA and CSTHEA would be consistent with the non-preemption approach of section 5 as well as new language appearing in section 914(a)(2)(B), and it should be restored.

5. Environmental Tobacco Smoke (ETS)

The non-preemption provision applicable to the ETS title of the McCain committee bill provides straightforward protection:

"Nothing in this title shall preempt or otherwise affect any other Federal, State, or local law which provides greater protection from health hazards from environmental tobacco smoke" (Section 504).

However, the ETS title also includes a state choice provision allowing states to opt out by enacting a law declaring that the ETS title does not apply in their jurisdiction. (Section 507). Unlike the preemption language, which applies only to laws providing greater protection, it appears that under section 507 states may choose to provide less protection from ETS hazards than the McCain Committee bill. The language on its face would appear to permit a state to provide no protection from ETS, provided it passed a law declaring that the federal ETS title does not apply. This interpretation is supported by paragraph (11) of the Purpose section of the bill. (*See* section 3).

The state choice provision of the McCain Committee bill, allowing states to simply opt out of ETS requirements, is a step backward from both a preemption and substantive law perspective and it should be removed.

6. Enforcement Actions and the Civil Liability Limitations

The apparent intent of Title VII of the McCain Committee bill is to limit the liabilities of tobacco companies from civil suits concerning the health effects of tobacco products, including the suits brought by the states. However, the language of this Title raises serious concerns that it could also interfere significantly with the ability of state and local governments to use the courts to seek civil penalties or injunctive relief against tobacco companies or tobacco retailers who violate state or local laws regulating the sale or use of tobacco products.

In particular, section 704(a), with limited exceptions, forbids state and local governments from filing or maintaining "any civil action involving a tobacco claim." If this provision merely bars state and local suits seeking compensatory damages for health care costs occasioned by tobacco products, then it is consistent with the generally understood thrust of Title VII. But the

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[10]Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 862 F. Supp. 1402)Md. D. Ct. 1994); aff'd, 63 F.3d 1318 (4th Cir. 1995); cert. granted and judgment vacated by Penn Advertising v. Schmoke, 116 S.Ct. 2575 (1996); aff'd on remand, 101 F.3d 332 (4th Cir. 1996); cert. denied, 117 S.Ct. 1569 (1997).

bill's definition of "tobacco claim" to include any "claim directly or indirectly arising out of, based on, or related to the health-related effects of tobacco products" (sec. 701(12)) raises the spectre of a far broader application.

In particular, any action brought to enforce a state or local tobacco regulation would arguably fit within this definition, on the ground that the underlying regulation was "based on, or related to the health-related effects of tobacco products."[11] If this reading of the definition is right, then, for example, a state attorney general's consumer protection suit to enjoin improper tobacco marketing practices or a city's suit to recover fines from a local establishment for violations of an ordinance governing sales to minors would be barred by Title VII.[12]

While it might be argued that the language of sections 704(a) and 701(12) is not intended to sweep this broadly, several other provisions of Title VII appear consistent with a broad reading of the prohibitions contained in these sections. First, section 703(c) declares that nothing in Title VII limits the criminal liability of tobacco companies or retailers, a limitation that would hardly seem necessary if the Title's restrictions were not intended to apply more broadly than to compensatory claims for health care costs. Moreover, section 704(b) introduces an exception to 704(a)'s prohibition, which permits states to maintain civil actions to enforce consent decrees or the master settlement agreement contemplated by Title VII. Again, such an exception would scarcely appear necessary unless section 704(a) were meant to otherwise bar state and local enforcement actions.

In any case, the language of sections 704(a) and 701(12) is open-ended enough that it will surely invite tobacco producers and retailers to raise challenges to state and local enforcement actions, thereby creating an additional impediment to state and local efforts to engage in the types of independent regulatory strategies that section 5 of the bill appears intended to protect. If Congress does not wish the liability limitations of Title VII to also constrain state and local enforcement efforts, then the language of Title VII must be more narrowly crafted.

7. Enforcement Actions and the Consent Decrees

As we have observed in earlier working papers,[13] one of the problematic ways that prior proposals for comprehensive tobacco legislation have constrained state and local enforcement efforts was by limiting such efforts to actions brought to enforce the consent decrees entered into

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[11] Actions brought by a state (although apparently not by a locality) to enforce provisions of S.1415 itself are expressly exempted from section 704(a)'s prohibition. *See* sec. 702(b)(5).

[12]Section 704(a) allows an exception for states who choose, pursuant to the provisions of section 702(c), to opt out of the provisions of Title VII. But this exception appears only to authorize opting-out states to continue their existing civil actions against the tobacco companies, and does not appear to provide a way to preserve the authority to bring new civil enforcement actions. In any case, the price of opting out is the loss of all state payments from the Tobacco Settlement Trust Fund, a cost no state is likely to incur for the sake of preserving its civil enforcement powers.

[13]*See* Working Paper #1 at 18 (discussing original settlement proposal); Working Paper #7 at 10-11 (discussing S.1530).

between the states and the tobacco companies in furtherance of the settlement legislation. This problematic approach reappears in section 704(b) of the McCain Committee bill.

Unlike some of its predecessors, which spelled out in great detail the matters to be covered by the consent decrees, and by the Protocol to be subscribed to by the tobacco companies, the McCain Committee bill says very little about the scope or content of these documents, leaving that subject to be addressed outside of the legislation.[14] The McCain Committee bill likewise delineates far less than did the original settlement proposal or S.1530 about the mechanics and functions of these various types of "voluntary" agreements. Thus, it is difficult to determine the extent to which the concerns raised in our prior working papers relating to the preemptive effects of these devices may recur under the Committee bill. It is noteworthy, however, that the Protocol under S.1415 appears not to implicate the states as parties, as did the version in S.1530, thus avoiding some of the impacts on state autonomy that were threatened by S.1530.

Section 704(b), however, does retain some of the significant preemptive problems of its predecessors. Section 704(b) authorizes the states to enter into consent decrees or a master settlement agreement with the tobacco manufacturers in resolution of the pending state tobacco lawsuits. And it authorizes the states, notwithstanding section 704(a)'s broad prohibition on state civil actions involving tobacco claims, to use civil actions "to enforce the terms of the Master Settlement Agreement or a consent decree." But at the same time, section 704(b) stipulates that a state which has entered into a consent decree can "maintain a civil action involving a tobacco claim only to the extent necessary to permit continuing court jurisdiction over the consent decree."

This is the only language in Title VII which purports to allow states to bring civil actions involving tobacco claims and to avoid the prohibition on such actions in section 704(a). Thus, as discussed above, it may afford the sole remaining avenue for judicial enforcement actions in furtherance of state and local regulatory policies. But section 704(b) suffers two significant shortcomings in playing this role. First, like its predecessor in Title IIIB of the original settlement proposal, this provision restricts state enforcement actions to the terms of the consent decrees and does not allow for enforcement of any more extensive or restrictive provisions of state or local law.[15] Second, section 704(b)'s authorizations apply only to states, and thus offer no help to municipalities and other local entities which have historically played significant roles in tobacco control enforcement efforts.[16] Thus, section 704(b) provides only a very limited grant of state enforcement authority, and one which falls far short of the needs of effective state and

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[14]*See* secs. 6(5) (defining "consent decree"); 6(21) (defining "master settlement agreement"); 6(24) (defining "protocol"). *See also* secs. 121-123 (placing the bill's advertising restrictions in the Protocol).

[15]Section 704(b) appears to avoid another of the significant problems of its predecessors, in that it does not stipulate that a state must first obtain an injunction ordering compliance with the consent decree before seeking penalties for non-compliance with such an injunction. Thus, the McCain Committee bill appears to avoid the guarantee of two bites at the apple before penalties can be imposed for consent decree violations.

[16]Unlike prior proposed legislation to implement the tobacco settlement, which defined "State" to include political subdivisions of a state, S.1415 restricts the definition of "State" to include only the states themselves (along with the District of Columbia and various U.S. territories and possessions). *See* sec. 6(18).

local capacity to further the independent state and local regulatory regimes that the McCain Committee bill purports to support.

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RETAIL LICENSING AND RELATED PROVISIONS

An Analysis of the McCain Committee Bill's State Retail Licensing Program and Related Provisions

by

Graham Kelder, J.D.[1]

1: Introduction

On June 20, 1997, a group of state attorneys general presented a tobacco settlement proposal ("the settlement proposal") to the American public. The settlement proposal purports to settle all pending class action lawsuits against the tobacco industry and all pending actions against the industry brought by states and other governmental entities. On November 7, 1997, Senator John McCain (R-AZ) – the chairman of the Senate Committee on Commerce, Science and Transportation ("the Commerce Committee") – introduced – for himself and Senators Hollings (D-SC), Breaux (D-LA), and Gorton (R-WA) – S. 1414, a bill that sought, in part, to embody many aspects of the proposed national settlement in the form of the Congressional legislation necessary to give it the force of law. The Commerce Committee endorsed a preliminary version of a substitute bill, S. 1415, on March 30, 1998, by a vote of 19 to 1. On May 1, 1998, the final committee version – S. 1415rs ("the McCain Committee bill") – was reported by Senator McCain to the full Senate.[2]

What follows is an analysis of the McCain Committee bill's state retailer licensing scheme and related provisions.[3] In general, this retailer licensing scheme and the provisions related to it 1) replace the Synar amendment with a law that repeats many of the amendment's mistakes and delays enforcement of the law; 2) require states to give half of their state enforcement incentive block grant money to tobacco retailers; 3) provide another set of opportunities for the tobacco industry and its allies to pass preemptive statewide legislation; 4) may deprive local governments of their most effective enforcement tool: the permitting or licensing of tobacco retailers; 5) allow states to comply with its provisions merely by enacting weak civil penalties for retailers who violate the law; 6) require judicial review that is more cumbersome than existing administrative review procedures before a retailer's license can be suspended or revoked; and 7) establish penalties for youth possession of tobacco that may be inimical to the McCain Committee bill's stated goal of reducing youth access to tobacco.

2: Replacing the Synar Amendment with a Law that Repeats Synar's Mistakes and Delays Enforcement

In 1992, Congress passed 42 USC 300x-26 ("the Synar amendment"). In 1994, regulations were promulgated under this statute and codified at 45 CFR 96.130 ("the

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[1]Managing Attorney, the Tobacco Control Resource Center, Inc.

[2]The official short title of S. 1415rs is the "National Tobacco Policy and Youth Smoking Reduction Act." Sec. 1.

[3]The author herein analyzes sections 211-214, 221-224, and 1191 of the McCain Committee bill.

Synar regulations"). This federal law requires states to enforce their own state youth access measures or risk losing federal substance abuse block grants. All fifty states have passed laws that prohibit the sale of all tobacco products to minors.

Section 213 ("State Enforcement Incentives") of the McCain Committee bill parallels the language used in the Synar amendment (42 USC 300x-26;[4] *see also* 45 CFR 96.130),[5] and is meant to replace it.[6] Section 211 of the McCain Committee bill establishes "within the National Tobacco Settlement Trust Fund established by section 401 [of the bill] a separate account to be known as the Compliance Bonus Account for States and Retailers. There are authorized to be appropriated from such account such amounts as may be necessary to carry out the provisions of this subtitle." Sec. 211(a). Subtitle B ("State Enforcement Incentives") of the McCain Committee bill includes sections 211-214 of the bill. Section 212 of the McCain Committee bill states that "The Secretary [of Health and Human Services] shall award block grants to States determined to be eligible under subsection (b)."[7] Sec. 212(a). Under section 212(c)(3) of the McCain Committee bill,

> Each State that receives a grant under this section shall distribute half of the amount received among retail outlets of tobacco products that, for fiscal year for which the State met the requirements of subsection (b), have outstanding records of compliance with the restrictions on underage sales of tobacco products.

Sec. 212(c)(3) (emphasis supplied). So, states would have to give half of their block grants away to tobacco retailers under the McCain Committee bill. In addition, states that fail to meet the requirements of section 213(a) of the McCain Committee bill (discussed in the next several paragraphs of this analysis) will have a portion of their block grant withheld.[8]

The Synar regulations mandate that states that wish to receive block grants "shall, at a minimum, conduct annually a reasonable number of random, unannounced inspections of outlets to ensure compliance with the law and plan and begin to implement any other actions which the State believes are necessary to enforce the law." 45 CFR 96.130(c). Section 213 would require states that wish to receive block grants to conduct "monthly random, unannounced inspections of sales or distribution outlets in the State to ensure compliance with a law prohibiting sales of tobacco products to individuals under

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[4]*See* 42 USC 300x-26(a)(1), (b)(1)-(2), and (c).

[5]*See* 45 CFR 96.130(b)-(c), (d)(1)-(2), and (e)(5).

[6] Section 213 of the McCain Committee bill is clearly meant to replace the Synar Amendment as Section 214 of the McCain Committee bill repeals "[the Synar Amendment:] Section 1926 of the Public Health Service Act (42 U.S.C. 300x-26)."

[7]*See* section 212(b)(1)-(2) of the McCain Committee bill.

[8]*See* section 213(b)(1)-(2) and 213(c) of the McCain Committee bill.

18 years of age." Sec. 213(a)(1)(A).[9] The Synar regulations require that "[t]he random inspections...cover a range of outlets (not preselected on the basis of prior violations) to measure overall levels of compliance as well as to identify violations." 45 CFR 96.130(d)(1). Section 213 of the McCain bill provides:

> In order to meet the requirements of paragraph (1)(A), inspections conducted by the State shall include at least 250 random, unannounced inspections of retail sale outlets annually for each 1,000,000 persons resident in the State, as most recently determined by the Bureau of the Census. Such inspections shall cover a range of outlets (not preselected on the basis of prior violations) to measure overall levels of compliance as well as to identify violations, and shall be conducted to provide a probability sample of outlets. The sample must reflect the distribution of the population under the age of 18 years throughout the State and the distribution of the outlets throughout the State accessible to youth. Indian tribes shall conduct such inspections monthly of at least 1 retail outlet subject to their jurisdiction for each 4,000 reservation residents. Except as provided in this paragraph, any reports required by this paragraph shall be made public. As used in this paragraph, the term "outlet" refers to any location that sells at retail or otherwise distributes tobacco products to consumers, including to locations that sell such products over-the-counter.

Sec. 213(a)(2).

Although these changes appear to tighten the requirements currently imposed by the Synar regulations, the McCain Committee bill actually weakens those requirements by postponing the dates by which states would have to begin enforcing the law. Under the Synar amendment and its attendant regulations, states had to begin their enforcement efforts in fiscal year 1994,[10] and states could be penalized for not enforcing the law as early as that year.[11] Under the McCain Committee bill, states would not have to begin their enforcement efforts until 1999,[12] and states could not be penalized for failing to do so until 2003.[13]

Section 213 of the McCain Committee bill also repeats some of the mistakes found in the Synar amendment and the Synar regulations. The Synar amendment and Synar

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[9] Subsections 213(a)(1)(B) and (C) provide for numerous annual reporting requirements. Section 213 (a)(1)(C)(ii), for example, requires States to report "the identity of the single State agency designated by the Governor of the State to be responsible for the implementation of the requirements of this section," including the conducting of compliance checks.

[10] 42 USC 300x-26(a)(1); 45 CFR 96.130(b). Enforcement efforts began in some states in 1992, after the passage of the Synar amendment and prior to the passage of the Synar regulations.

[11] 42 USC 300x-26(c)(1); 45 CFR 96.130(i).

[12] This assumes passage of the McCain Committee bill in 1998. *See* sections 212 and 213 of the McCain Committee bill.

[13] This again assumes passage of the McCain Committee bill in 1998. *See* section 213(b)(2)(A) of the McCain Committee bill.

regulations do not mandate that the compliance inspections they require involve enforcement of the law in the form of penalties for retailers and others who sell tobacco to minors. The McCain Committee bill repeats this mistake. The Synar regulations state that:

> (j) States may not use the Block Grant to fund the enforcement of their statute, except that they may expend funds from the primary prevention setaside of their Block Grant allotment under 45 CFR 96.124(b)(1) for carrying out the administrative aspects of the requirements such as the development of the sample design and the conducting of the inspections.

45 CFR 96.130(j). Although this mistake is not repeated in section 213, it is also not corrected, thus, leaving the Secretary free to forbid states once again to use their block grant funds for enforcement. In fact, mandating that states use a large percentage of their block grants from section 212 of the McCain Committee bill for enforcement would greatly benefit efforts to reduce youth access to tobacco.

The Synar regulations state that: "The random inspections shall cover a range of outlets (not preselected on the basis of prior violations) to measure overall levels of compliance as well as to identify violations." 45 CFR 96.130(d)(1). Section 213(a)(2) of the McCain Committee bill provides: "Such inspections shall cover a range of outlets (not preselected on the basis of prior violations) to measure overall levels of compliance as well as to identify violations, and shall be conducted to provide a probability sample of outlets." It would help efforts to reduce youth access laws if the random inspections involved enforcement of the law and allowed state or local officials to target repeat offenders.

Finally, the Synar amendment and Synar regulations do not prevent states from using 12 and 13-year-olds to test compliance, and the McCain Committee bill does nothing to correct this. States that use young teens as opposed to 17 and 18-year-olds to measure compliance will report inaccurate and inflated compliance rates.

In order to be eligible for a block grant under section 212 of the McCain Committee bill, a state must, "with respect to the year involved, demonstrate to the satisfaction of the Secretary that fewer than 5 percent of all individuals under 18 years of age who attempt to purchase tobacco products in the State in such year are successful in such purchase." Sec. 212(b)(2). While such a high compliance rate is a laudable goal, states can achieve it more easily by using young teens and pre-teens. This is an unfortunate loophole in the McCain Committee bill, because using older teens (17 to 18-year-olds) is the best way to encourage real compliance with the law, effective enforcement and a true reduction in youth smoking rates.

As will be discussed below in section 3.4.1, a second danger inherent in the abolishment of the Synar amendment and its replacement with state laws implementing the requirements of section 213 of the McCain Committee bill is that it provides another opportunity for the tobacco industry and its allies to pass preemptive statewide legislation. Preemption remains one of the most serious threats to community-based tobacco control efforts.

3: Preemption and Pseudo-preemption

3.1: Introduction

The McCain Committee bill would shift the focus of tobacco control efforts from the local and municipal level to the state level by requiring states that wish to receive block grants from the Secretary of Health and Human Services to pass a state retailer licensing law. The academic literature, most analysts and the vast majority of tobacco control professionals strongly suggest that the McCain Committee bill's shifting of the focus of tobacco control efforts to the state level would be inimical to its stated goal of reducing youth access to tobacco because local enforcement of local laws has proved to be the most effective means of regulating the sale and use of tobacco.[14] This is true, in large part, because the tobacco industry is most vulnerable to regulation by cities and towns. Because of this weakness, local governments – city councils, town meetings, county governments, local health boards and local health programs – have led the way in developing innovative, effective and enforceable measures regulating the sale, distribution and use of tobacco products. Local governments have pioneered a variety of tobacco control measures, for example, designed to reduce tobacco use by children – such as cigarette vending machine bans and limitations on some types of tobacco advertising and promotion.

3.2: The Effectiveness of Local Action

Local action is far more effective than statewide action for several reasons.[15] These reasons are discussed in depth in Working Paper #6: An Analysis of Section 302 ("Model State Law" of The "Tobacco Use By Minors Prevention Act") of S. 1530. To summarize: 1) "local legislation remains far easier to pass than state or federal tobacco control measures, and has been adopted at a much faster rate;"[16] 2) local ordinances,

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[14] *See, e.g.*, Jacobson, Peter D., and Wasserman, Jeffrey, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT (RAND 1997); Siegel, et al., "Preemption in Tobacco Control: Review of an Emerging Public Health Problem," JAMA (September 10, 1997 - Vol. 278, No. 10); Macdonald, Heather R., and Glantz, Stanton A., "Political Realities of Statewide Smoking Legislation: The Passage of California's Assembly Bill 13," TOBACCO CONTROL (Spring 1997); American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and the National Center for Tobacco-Free Kids, ACTIONS SPEAK LOUDER THAN WORDS: THE TOBACCO INDUSTRY'S STEALTH STRATEGY IN STATE LEGISLATURES (May 28, 1996); Freyman, Russ, "Butting In: The Tobacco Industry Shows No Sign of Flickering in its Push to Move Smoking Regulation Out of City Halls and into Statehouses," GOVERNING (November 1995).

[15] The tobacco industry hates local action in tobacco control, precisely because it is so effective. As Raymond Pritchard, former Chairman of the Board of the Brown & Williamson Tobacco Company, put it on July 17, 1986, "Our record in defeating state smoking restrictions has been reasonably good. Unfortunately our record with respect to local measures...has been somewhat less encouraging.... Over time, we can lose the battle over smoking restrictions just as decisively in bits and pieces – at the local level – as with state or federal measures." American Cancer Society, *infra* note 16, at 1. As Victor Crawford put it, "We [the tobacco industry] could never win at the local level." American Cancer Society, *infra* note 16, at 5. *See also* Siegel, et al., *infra* note 16, at 859-860.

[16] American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and the National Center for Tobacco-Free Kids, ACTIONS SPEAK LOUDER THAN

bylaws and health board regulations are "almost always stronger and more comprehensive than corresponding state and federal tobacco control legislation;"[17] and 3) measures passed at the local level enjoy broad community support, because "[a] powerful educational process unfolds as a local community considers a [tobacco] control [measure]. ...[T]own hall meetings and public hearings...ensue. In the process, the community is left...with a strong, enforceable law bolstered by public support...[and]...an increased understanding of tobacco issues."[18]

Compliance rates are also higher for local tobacco control measures. This is primarily because "[l]ocal enforcement agencies provide an easily accessible enforcement mechanism, particularly when compared to often distant enforcement agencies for state or federal laws."[19] Peter D. Jacobson and Jeffrey Wasserman have conducted an extensive study funded by the Robert Wood Johnson Foundation of the enforcement of tobacco control measures. In general, their results do not augur well for public health measures that depend on state-level enforcement as the McCain Committee bill's state retailer licensing scheme does:

> ...a local or regional enforcement strategy appears to be preferable to a state-level one. Many of our respondents noted that state-level enforcement of state laws is often inefficient or ineffective. Typically, at least with respect to tobacco control, local law enforcement officials are well aware of the places in their communities that are engaged in illegal tobacco sales and are prepared to intervene.... In general, local communities have a greater incentive vis-à-vis states to monitor compliance with public health laws. And, as previous studies have shown, the tobacco industry is considerably more powerful at the state, than at the local, level.... Based on our site visits, we believe that local enforcement is a critical ingredient to the success of virtually any tobacco control effort, regardless of whether it revolves around clean indoor air or teen access.[20]

Numerous cities, towns, counties and boards of health across the United States have passed ordinances, bylaws or regulations which prohibit the sale of tobacco products to minors and/or require permits for the sale of tobacco products. These local ordinances, regulations and bylaws – most of which are stronger and more comprehensive than corresponding state and federal tobacco control measures[21] – already apply to

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WORDS: THE TOBACCO INDUSTRY'S STEALTH STRATEGY IN STATE LEGISLATURES (May 28, 1996)at 6. *See also* Siegel, et al., "Preemption in Tobacco Control: Review of an Emerging Public Health Problem," JAMA (September 10, 1997 - Vol. 278, No. 10).

[17] American Cancer Society, *supra* note 16, at 7; Siegel, et al., *supra* note 16, at 861-862.

[18] American Cancer Society, *supra* note 16, at 7; Siegel, et al., *supra* note 16, at 862.

[19] American Cancer Society, *supra* note 16, at 7.

[20] Jacobson, Peter D., and Wasserman, Jeffrey, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT (RAND 1997) at 94.

[21] There are numerous federal and state laws that are intended to prohibit the sale of tobacco products to minors. The FDA's new rule, for example, prohibits the sale of cigarettes and smokeless tobacco to minors

approximately 80% of the population of Massachusetts, and additional measures are being contemplated by the communities in Massachusetts that have not yet acted.[22]

In light of existing federal, state and local laws – and the fact that localities all across the country could, if not prevented from doing so, use the monies disbursed under any comprehensive federal tobacco legislation to pass their own local restrictions on youth access to tobacco products – enactment of the state retailer licensing scheme required by the McCain Committee bill offers limited benefits and would impose a significant cost if such laws were to preempt stronger local measures that are presently in place or may be enacted in the future. This would be especially true in Massachusetts and California, two states which already have numerous local youth access restrictions in place.

3.3: Preemption and Pseudo-preemption

Any proper discussion of the preemption and pseudo-preemption problems presented by the McCain Committee bill's state retailer licensing scheme and related provisions, must begin with a short, general introduction to these tobacco industry tools for blunting local action.[23] Preemption in this context can be defined as the legal doctrine whereby a state or federal law can restrict "the power of lower jurisdictions to enact or enforce their own legislation regulating a specified topic."[24]

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and provides for stringent identification of the age of prospective purchasers of such products. 29 C.F.R. §§ (14) (a) & (b). The FDA is presently contracting with numerous states to enforce these federal restrictions. In addition, another federal law, known as the Synar Amendment, requires states to enforce their own state youth access measures or risk losing federal substance abuse block grants. All fifty states have passed laws that prohibit the sale of all tobacco products to minors. *See, e.g.*, Mass. Gen. Laws ch.270, §§ 6, 7 (prohibiting sales of tobacco products to minors); Mass. Gen. Laws ch. 64C, § 10 (prohibiting sales of tobacco products to minors and sales of tobacco products to minors from vending machines).

[22] All Massachusetts boards of health possess the legal authority under current state law to regulate the sale of tobacco products to minors and to require permits for the sale of tobacco products. Mass. Gen. Laws ch.111, §31; *See, e.g., Take Five Vending, Ltd. v. Provincetown*, 415 Mass. 741 (1993). Some boards have opted not to exercise their current authority.

[23]This issue is discussed in more depth in Working Papers #1, #6 and #7.

[24] American Cancer Society, *supra* note 16, at 1. There are two kinds of preemption: "field" preemption and "conflict" preemption. "Field" preemption means that Congress may legislate in a field which the States have traditionally occupied in such a way as to make reasonable an inference that it was Congress' purpose to leave no room for the States to supplement the federal legislation. *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947). When Congress does this it is said to have preempted the field of regulation. This might be true, for example, in the case of a field "[where] the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941)). "Conflict" preemption rests on the sound proposition that the effectiveness of federal statutes ought not be undercut or obstructed by inconsistent state legislation. It would be impossible, for instance, to comply with contradictory prescriptions of federal and state law. In such a case, the state law must yield to the federal. Alternatively, the state law might operate as an obstacle to the achievement of the full purposes of the federal law, and so again the state law would be required by the Supremacy Clause to recede. In many states, the same doctrine applies with state laws vis-à-vis local laws.

Where it cannot achieve true preemption, the industry tries to pass weak, loophole-ridden laws with weak substantive provisions and/or weak enforcement mechanisms at the state level,[25] knowing that even if these bills aren't technically preemptive, they will have a pseudo-preemptive effect, i.e., they will chill local action on the particular subject being regulated.[26] This happened recently in California with the passage of Assembly Bill 13 ("AB13"), where for example, some health groups were willing to accept state preemption in order to attract the support of the state restaurant association for a bill, AB13, which mandated 100% smoke-free workplaces. Enactment of AB13 was associated with a slowing of all tobacco control legislation, including youth access legislation.[27] This also occurred in Massachusetts, where the New England Convenience Store Association began showing up at local public hearings in 1996 with a copy of a weak, statewide youth access bill, telling local boards of health and municipal officials that this was what the Department of Public Health wanted them to pass and urging them not to pass more restrictive measures, even though the bill had an anti-preemption clause.

In 1992, the Synar amendment was passed. This federal law requires states to enforce their own state youth access measures or risk losing federal substance abuse block grants. All fifty states have passed laws that prohibit the sale of all tobacco products to minors. As will be discussed more fully below, the tobacco industry and its allies used some of the state laws mandated by the Synar amendment as vehicles to pass preemptive statewide laws.[28]

3.4: General Preemption[29] and Pseudo-preemption Problems with the McCain Committee Bill's State Retailer Licensing Scheme and Related Provisions

The drafters of the McCain Committee bill appear to want to preserve the ability of state and local governments to enact stricter youth access provisions. Section 5 of the McCain Committee bill contains a general anti-preemption clause.[30] Section 914 of the

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[25] American Cancer Society, *supra* note 16, at 1.

[26]These pseudo-preemptive bills almost always have the appearance of being good tobacco control legislation, but would actually accomplish nothing to control the sale, distribution and use of tobacco. The industry achieves pseudo-preemption by aggressively promoting legislation that is "nothing more than window dressing designed to look like tobacco control" or by hijacking and distorting otherwise legitimate tobacco control legislation. American Cancer Society, et al., *supra* note 8, at 1-3. The issue of pseudo-preemption is discussed at greater length in Working Paper #6.

[27] *See* Macdonald, Heather R., and Glantz, Stanton A., Political Realities of Statewide Smoking Legislation: The Passage of California's Assembly Bill 13, TOBACCO CONTROL (Spring 1997).

[28]*See* Siegel, et al., *supra* note 16, at 860-861.

[29]This working paper will contain a section drafted by Peter Enrich and Patricia Davidson that addresses the general state and local regulatory preemption issues presented by the McCain Committee bill. This section addresses only those preemption issues presented by the state and federal retailer licensing schemes contained in the McCain Committee bill.

[30]*See* the section of this working paper by Peter Enrich and Patricia Davidson on state and local regulatory and enforcement authority.

McCain Committee bill makes clear that its express preemption of certain state and local requirements in subparagraph (A) "does not apply to requirements relating to the sale, use, or distribution of a tobacco product including requirements related to the access to, and the advertising and promotion of, a tobacco product." Sec. 914(a)(2)(B).

Section 223 of the McCain Committee bill (the National Community Action Program) also contemplates the preservation of local action in that it calls for the Secretary of Health and Human Services to

> ...establish a program...under which the Secretary may award grants to eligible State and local governmental entities to carry out community-based tobacco control efforts that are designed to encourage community involvement in reducing tobacco product use.

Two provisions of the McCain Committee bill – Subtitle B ("State Enforcement Incentives") and section 224 ("State Retail Licensing Program") – present problems, however, vis-à-vis the preservation of local action and community-based tobacco control efforts.

3.4.1: Preemption and Pseudo-preemption Problems with Subtitle B ("State Enforcement Incentives")

As mentioned above, a second danger inherent in the abolishment of the Synar amendment and its replacement with state laws implementing the requirements of section 213 of the McCain Committee bill is that it provides another opportunity for the tobacco industry and its allies to pass preemptive statewide legislation. The tobacco industry and its allies used some of the state laws mandated by the Synar amendment to advance state preemption legislation.[31] In the wake of the Synar amendment, the tobacco industry intensified its efforts in state legislatures and "attempted to convince state legislatures that enactment of preemptive state legislation is necessary to comply with the provisions of the Synar regulations."[32] The tobacco industry will do the same thing in the wake of section 213 of the McCain Committee bill and its attendant regulations.

3.4.2: Preemption and Pseudo-preemption Problems in Section 224 ("State Retail Licensing Program')

Requiring a license to sell tobacco, with penalties that include escalating fines and suspension or revocation provides localities with an effective mechanism to enforce merchants' compliance with laws prohibiting tobacco sales to minors.[33] Merchants more carefully monitor tobacco sales to minors when such sales jeopardize their licenses to sell tobacco to adults.[34] For example, in Woodridge, Illinois, a licensing ordinance has been found extremely effective in reducing tobacco sales to minors, particularly over-the-

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[31] Siegel, et al., *supra* note 16, at 860-861.

[32] *Id.* at 861.

[33]National Institutes of Health, "Major Local Tobacco Control Ordinances in the United States (May 1993) at 15.

[34]*Id.*

counter sales. Not only have the sales rates to children fallen since passage of the ordinance, but a survey of seventh-and-eighth grade students found a 50-percent decrease (from 46 percent to 23 percent) in experimentation with cigarettes and a 69-percent decrease (from 16 percent to 5 percent) in the number of regular smokers.[35]

Section 224 ("State Retail Licensing Program") of the McCain Committee bill, however, contains some problematic provisions that may deprive local governments of their most effective enforcement tool: the permitting or licensing of tobacco retailers. Section 224(a)(1) states that the Secretary of Health and Human Services shall provide a block grant to each State that has in effect a law that "provides for the licensing of entities engaged in the sale or distribution of tobacco products directly to consumers." Sec. 224(a)(1)(A). Section 224(a)(2) further provides that, in order to receive a block grant under the McCain Committee bill, a State:

> (A) shall enter into an agreement with the Secretary to assume responsibilities for the implementation and enforcement of a tobacco retailer licensing program;
>
> (B) shall ensure compliance with the Youth Access Restrictions regulations promulgated by the Secretary (21 C.F.R. 897.1 et seq.).

Section 224(a)(2)(C) provides that each State shall also establish to the satisfaction of the Secretary of Health and Human Services that it has a law or regulation that includes, among other things, the following:

> (i) Licensure and notice. A State license is required for each retail establishment involved in the sale or distribution of tobacco products to consumers. That State has a program under which notice is provided to such establishments and their employees of all licensing requirements and responsibilities under State and Federal law relating to the retail distribution of tobacco products.

The tobacco industry is very good at influencing state legislatures. The State laws that are passed to comply with the McCain Committee bill's state licensure requirements may, therefore, be 1) preemptive or 2) weak, loophole-ridden, pseudo-preemptive laws. Section 224 of the McCain Committee bill does not require states to include some kind of anti-preemption clause in their state retailer licensing law. In many states, absent an express anti-preemption provision, the retailer licensing scheme that would be contained in such a state law may occupy the field of permitting, and, therefore, preempt existing licensing schemes at the local level. Even in a state that voluntarily placed anti-preemption language in its State retailer licensing scheme, retailers would still need to acquire a State license according to the contemplated State law. This alone may be enough to discourage local action.

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[35] *Id.* As of August, 1996, 122 local jurisdictions in Massachusetts, for example, had enacted licensing provisions that provide a mechanism for revoking or suspending a tobacco license for selling tobacco to minors.

This is not strictly a technical concern. The teeth in most local youth access measures is the threat of permit suspension or revocation. Existing local laws may, thus, lose their most important enforcement component, and all local governments would essentially be locked into the same state enforcement scheme. This would have a seriously deleterious effect on community-based tobacco control efforts.

States that choose to forego the receipt of block grant money may not even succeed in freeing their local governmental bodies to continue their permitting and licensing activities as section 224 of the McCain Committee bill contemplates federal action in the absence of state action:

> (c) Non-participating States Licensing Requirements. For retailers in States which have not established a licensing program under subsection (a), the Secretary may promulgate regulations establishing a Federal retail licensing program for retailers engaged in tobacco sales to consumers in those States. The Secretary may enter into agreements with States for the enforcement of those regulations. A State that enters into such an agreement shall receive a grant under this section to reimburse it for costs incurred in carrying out that agreement.

In general, if, as section 223 would suggest, the true aim of the drafters of the McCain Committee bill is to preserve the ability of state and local governments to continue to regulate in the area of youth access to and possession of tobacco products, they have done so in an extraordinarily convoluted fashion and have probably not achieved that aim. As will be discussed, the McCain Committee bill's state licensing provisions present other problems as well.

4: Section 224 of the McCain Committee Bill Punishes Minors Who Purchase or Possess Tobacco, but May Protect Tobacco Retailers Who Sell Tobacco to Minors

4.1: Introduction

Section 224 of the McCain Committee bill may protect tobacco retailers, because 1) its civil penalty requirements are vague and open-ended, and 2) it requires judicial review before a retailer's license can be suspended or revoked. Section 224 also establishes penalties for youth possession of tobacco that may be inimical to the McCain Committee bill's stated goal of reducing youth access to tobacco.

4.2: Criminal and Civil Penalties that May Protect Tobacco Retailers

Section 224 of the McCain Committee bill requires states to provide for

- criminal penalties for those who sell tobacco without a State license, sec. 224(a)(2)(C)(ii)(I);
- civil penalties for those who sell tobacco in violation of State law "that include graduated fines and suspension or revocation of licenses for repeated violations," sec. 224(a)(2)(C)(ii)(II).

With regard to criminal penalties, the only conduct for which the state law required by section 224 of the McCain Committee bill would provide criminal sanctions is the sale of tobacco products without a license. This is true also of the June 20th Agreement. *See* Appendix II of the June 20th Agreement. If the state law envisioned by Section 224 does not contain an express anti-preemption clause, it may, in many states, make no allowance for state or local criminal penalties for any other violation.

As discussed above, the civil penalties required by section 224(a)(2)(C)(ii)(II) of the McCain Committee bill may preempt local permitting, fining, suspension and revocation schemes, thus obliterating the most effective local enforcement tools. In addition, the tobacco industry and its allies may try to pass state retailer licensing schemes that protect tobacco retailers by doing things like

- shifting the focus of penalties to retail clerks as opposed to retail tobacco merchants and adult employers;
- specifically excluding sales to minors as a valid reason for suspending or revoking such a retail tobacco license.

The National Convenience Store Association made sure that these provisions appear in the Model State Law of S. 1530, the bill introduced by Senator Orrin Hatch in November, 1997.[36] The tobacco industry and its allies will certainly make every attempt to ensure that the civil penalties contained in the state laws implementing the requirements of section 224 are as weak as possible.

In order to be eligible for a block grant under the McCain Committee bill, a state must also ensure that: "Judicial review procedures are in place for an action of the State suspending, revoking, denying, or refusing to renew any license under its program." Sec. 224(a)(C)(iii). This requirement would significantly harm youth access enforcement efforts. In many states, administrative procedures and administrative review procedures are currently utilized when suspending, revoking, denying, or refusing to renew tobacco retailer licenses or permits. These procedures are usually simpler and more streamlined than judicial review procedures.

In Massachusetts, for example, many of the statutes authorizing board of health regulations specify the fines that may be imposed for violations of those regulations.[37] Boards of health can also establish their own penalties as long as they are not greater than those set by state statutes.[38] Many boards of health in Massachusetts have enacted regulations that require businesses to obtain board of health permits in order to be able to sell tobacco products. Many of these regulations also provide for the suspension or revocation of these permits if a retailer repeatedly sells tobacco to minors in violation of

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[36] *See* Working Paper #6: An Analysis of Section 302 ("Model State Law" of the "Tobacco Use by Minors Prevention Act") of S. 1530.

[37] *See Cochis v. Board of Health*, 332 Mass. 721, 726, 127 N.E.2d 575, 579 (1955) (boards of health lack authority to set greater monetary penalties than those specified by statute).

[38] *Id.*

the law.[39] Administrative procedures are used for these suspensions and revocations, and these regulations also establish administrative review procedures in conformity with the due process requirements of both the United States and Massachusetts Constitutions. These administrative procedures and administrative review procedures offer boards of health a less cumbersome method of suspending or revoking retailers' tobacco sale permits and reviewing such suspensions and revocations. These procedures also have the benefit of not overburdening the courts with these suspension and revocation matters.

A second set of administrative enforcement procedures available to local boards of health are embodied in the so-called non-criminal disposition process, which is set forth in section 21D of chapter 40 of the Massachusetts General Laws. While local health agencies have the authority to levy fines, the ultimate enforcement of such fines would ordinarily be by means of criminal proceedings in the district courts. The non-criminal disposition process offers boards of health a less cumbersome method of administering and collecting fines.

Under this non-criminal disposition process, the officer responsible for enforcement of a provision may deliver to any violator of the provision a simple notice charging him with the violation and directing him to appear before the clerk of the district court. The charged violator may either confess to the offense, either by mail or in person, and pay the prescribed penalty (up to $300), or, alternatively, he may request a non-criminal hearing before a district court judge or clerk to determine whether he committed the offense charged. If the charged violator fails either to pay the prescribed penalty or to request a hearing, or if he fails to pay after a finding at the hearing that he had committed the offense, then the enforcing officer may resort to the criminal process.[40]

Similar administrative procedures and administrative review procedures are available to enforcement agents in many other states. The McCain Committee bill would require states to preempt these less cumbersome administrative procedures with the requirement for judicial review embodied in section 224(a)(C)(iii) of the bill. This would make suspensions and revocations of tobacco retailer licenses much more difficult and would also overburden the courts with these matters.

4.3: Penalization of Minors that May be Inimical to the Goal of Reducing Youth Access to Tobacco Products

Section 224 of the McCain Committee bill also requires states to provide for other programs to be in place, "including such measures as fines, suspension of driver's license privileges, or community service requirements, for underage youths who possess, purchase, or attempt to purchase tobacco products." Sec. 224(a)(2)(C)(ii)(III).

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[39] As of August, 1996, 122 local jurisdictions in Massachusetts had enacted permitting provisions that provide a mechanism for revoking or suspending a tobacco permit for selling tobacco to minors.

[40] *See* Mass. Gen. Laws ch. 40, §21D.

As discussed in detail in Working Paper #6,[41] the tobacco control community is thoroughly divided on the question of whether penalizing youth possession of tobacco would deter such possession or actually encourage it. Very little research has been done on the topic of penalizing youth purchase and possession of tobacco.[42] More research is needed before policy makers can make truly informed decisions about whether penalizing youth possession of tobacco will serve as an effective deterrent to teenage tobacco use. Section 224 of the McCain Committee bill would short circuit this process by ignoring the controversy and requiring states to adopt youth anti-possession measures such as "fines, suspension of driver's license privileges, or community service requirements, for underage youths who possess, purchase, or attempt to purchase tobacco products." Sec. 224(a)(2)(C)(ii)(III).

Proponents of youth possession measures believe that they are an effective and essential deterrent.[43] Those who advocate penalizing youth possession believe that youth anti-possession measures will signal disapproval of youth smoking and providing cigarettes to minors and may also encourage closer monitoring by parents of youth smoking. Supporters of penalizing youth possession of tobacco feel that teens may choose not to smoke or to smoke less often because of perceptions of decreased social acceptability or increased risks from parental or legal authorities. Those who champion youth anti-possession measures also believe that once children find out that it is illegal to be caught with tobacco they will be less likely to want to be caught with it, especially if they know that punishment is something like temporary suspension of their driver's license or some other valued privilege. Backers of such measures feel that this will be especially true of largely law-abiding kids.

More recently, some have argued for the penalization of youth possession of tobacco as a simple vehicle whereby police or other enforcing agents can simply confiscate any tobacco possessed by minors. Many police departments advocate the passage of local laws penalizing youth possession and allowing for the confiscation of cigarettes, because they have no legal recourse when they encounter a group of smoking teenagers in the absence of such laws.[44] Section 224, however, clearly does not require states to penalize youth possession and purchase primarily as a means to allow the police and other enforcing agents to confiscate tobacco possessed by minors.

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[41] *See also* Graham Kelder, "The Perils, Promises and Pitfalls of Criminalization of Youth Possession of Tobacco,"TOBACCO CONTROL UPDATE, Vol. 1, Issues 1 & 2 (Winter 1997). This article can be found on the internet at http://tobacco.neu.edu/tcu/3-97/YPFINAL.HTM

[42] Joseph Cismoski, "Blinded by the Light: The Folly of Tobacco Possession Laws Against Minors," WISCONSIN MEDICAL JOURNAL, November 1994.

[43] The literature supporting these measures emphasizes how these measures are congruent with alcohol control policies, are an effective deterrent, create parental involvement because of greater accountability, and reinforce positive values in adolescent society.

[44] D.J. Wilson, "Considering Local Youth Tobacco Laws," *The Beacon*, December, 1996.

Those who are skeptical of the likely effectiveness of penalizing youth possession of tobacco[45] argue that perceptions of decreased social acceptability or increased risks from parental or legal authorities will not deter most young people from smoking.[46] Indeed, a strong argument can also be made that teenagers most at risk to become smokers are not the kind of kids who are going to respond to decreased social acceptability or increased risk from authorities.[47]

Skeptics believe that, because youth anti-possession measures are rarely enforced, they may actually create a climate of disrespect for the law and a counter-culture of law-breaking teens (i.e., a deviant subculture of individuals who gain self-esteem and the admiration of their peers by flaunting adult authority).[48] Critics of youth anti-possession measures are also quick to point out that the tobacco industry – which has a long history of supporting ineffective youth access restrictions that often contain hidden agendas – supports such measures. Why? The tobacco industry knows that penalization of youth possession does not work and only serves to deflect attention away from law-breaking tobacco retailers.[49]

Indeed, the available research to date indicates that tobacco youth anti-possession laws are almost never enforced. This is especially true when one looks at rates of enforcement as compared to the prevalence of violations.

The experience of communities that penalize youth possession of alcohol is also not promising. One of the best analogies available to tobacco control advocates may be the penalization of youth possession of alcohol. What has the experience been with these laws? While raising the drinking age from 18 to 21 has been an enormous public health success, attaching penalties to youth possession of alcohol has, in general, produced mixed results. These laws are not enforced very stringently. An estimated 2 of every 1,000 occasions of illegal drinking by youth under 21 result in an arrest.[50] Why are these laws not stringently enforced? Most researchers point to 1) a lack of enforcement

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[45] *See generally*, Joseph Cismoski, "Blinded by the Light: The Folly of Tobacco Possession Laws Against Minors," WISCONSIN MEDICAL JOURNAL, November 1994 at 591; Julia Carol, "It's a Good Idea to Criminalise Purchase and Possession of Tobacco by Minors – NOT!" TOBACCO CONTROL, Vol. 1, 1992, at 296-297; James F. Mosher, "The Merchants, Not the Customers: Resisting the Alcohol and Tobacco Industries' Strategy to Blame Young People for Illegal Alcohol and Tobacco Sales," JOURNAL OF PUBLIC HEALTH POLICY, Vol. 16, No. 4, at 412-432.

[46] *Id.*

[47] *See generally*, Cismoski, *supra* note 45; Carol, *supra* note 45; and Mosher, *supra* note 45.

[48] Critics of these programs argue that criminalizing possession is a form of victim-blaming. Municipalities may be creating a deviant subculture of individuals who gain self-esteem by contempt for the law. Another fear is that criminalizing tobacco possession may romanticize the practice of smoking among young people. Still others fear that enforcement will selectively be based upon gender, race, or class variables. *See, e.g.*, Cismoski, *supra* note 45, at 591.

[49] *See generally*, Cismoski, *supra* note 45; Carol, *supra* note 45; and Mosher, *supra* note 45.

[50] Mark Wolfson, et al., "Law Officers' Views on Enforcement of the Minimum Drinking Age: a Four-State Study," PUBLIC HEALTH REPORTS, Vol. 110, No. 4 (July-August 1996), at 429.

personnel; 2) the unwillingness of most police departments to commit substantial resources to this issue; 3) lack of juvenile detention facilities; 4) lack of enforcement follow-through in the courts ("slaps on the wrist"); and 5) selective enforcement (i.e., these laws are enforced against juveniles perceived as "bad apples" by law enforcement personnel, but not against kids who are perceived as otherwise "good" youths).[51]

Many researchers believe that attaching penalties to youth drinking has resulted in a mistaken focus on underage lawbreakers as opposed to those who violate the law to provide alcohol to them. For every 1,000 arrests of a minor for youth possession of alcohol, only 130 retail outlets have any action taken against them and only 88 adults are arrested for furnishing alcohol to youth.[52]

Penalizing or criminalizing youth possession of tobacco also makes it more difficult for enforcement authorities to use minors in conducting compliance checks of tobacco retailers. Unless minor participation in compliance checks is specifically exempted from youth possession penalties, minors engaged in such enforcement activities could find themselves subject to fines or criminal prosecution! The only other avenue for preserving the ability to use minors in compliance inspections would be the cumbersome process of obtaining special immunity for them from local or state law enforcement officials.

In summary, the McCain Committee bill's penalization of minors who possess, purchase, or attempt to purchase tobacco products would short circuit debate on the issue of whether such penalization will reduce youth smoking rates. It would also make it more difficult for enforcement authorities to use minors in compliance inspections of tobacco merchants.

5: The McCain Committee Bill Strengthens the FDA's Ban on Vending Machines But Also Compensates the Owners and Operators of Such Vending Machines for Lost Business

The McCain Committee bill establishes a ban on vending machines that is stronger than the analogous provision in the FDA's new rule. The FDA's new rule states that retailers may not use vending machines to sell cigarettes or smokeless tobacco except when the machines are located "in facilities where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time." 21 C.F.R. § 897.16(c). Section 1191 of the McCain Committee bill provides:

> (a) Ban of Sale of Tobacco Products Through the Use of Vending Machines. Effective 12 months after the date of enactment of this Act, it shall be unlawful to sell tobacco products through the use of a vending machine.

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[51] *Id. See also*, Alexander C. Wagenaar and Mark Wolfson, "Enforcement of the Legal Minimum Drinking Age in the United States," JOURNAL OF PUBLIC HEALTH POLICY, Spring 1994; Cismoski, *supra* note 45, at 591.

[52] *Id.*

It should be noted, however, that, unlike the FDA's new rule, the McCain Committee bill compensates the owners and operators of cigarette vending machines:

> (b) Compensation for Banned Vending Machines.
>
> (1) In general. The owners and operators of tobacco vending machines shall be reimbursed for the fair market value of their businesses, including the cost of banned vending machines, compensation for lost profits, unexpired contracts, and for the owner's or operator's plant and equipment related only to the production of tobacco vending machines.

This provision seems odd in that it diverts money away from enforcement and toward an industry that formerly supplied minors with one of their chief means for obtaining tobacco products.

6: Conclusion

The McCain Committee bill replaces the Synar amendment with a law that repeats many of the amendment's mistakes and delays enforcement of the law. Although the changes mandated by the McCain Committee bill appear to tighten the requirements currently imposed by the Synar amendment and its regulations, the McCain Committee bill actually weakens those requirements by postponing the dates by which states would have to begin enforcing the law. Under the Synar amendment and its attendant regulations, states had to begin their enforcement efforts in fiscal year 1994, and states could be penalized for not enforcing the law as early as that year. Under the McCain Committee bill, states would not have to begin their enforcement efforts until 1999, and states could not be penalized for failing to do so until 2003.

Section 213 of the McCain Committee bill also repeats some of the mistakes found in the Synar amendment and the Synar regulations. Like the Synar amendment and Synar regulations, the McCain Committee bill 1) does not mandate that the compliance inspections it requires involve enforcement of the law in the form of penalties for retailers and others who sell tobacco to minors; 2) does not mandate that states use a large percentage of their Department of Health and Human Services block grants for enforcement of the law; 3) does not allow its compliance inspections to target repeat offenders; and 4) does not prevent states from using 12 and 13-year-olds to test compliance.

A second danger inherent in the abolishment of the Synar amendment and its replacement with state laws implementing the requirements of section 213 of the McCain Committee bill is that it provides another opportunity for the tobacco industry and its allies to pass preemptive statewide legislation. Preemption remains one of the most serious threats to community-based tobacco control efforts.

Section 224 of the McCain Committee bill also contains some problematic provisions that may deprive local governments of their most effective enforcement tool: the permitting or licensing of tobacco retailers. This section requires states to have a law or regulation that requires state licensure of each retail establishment involved in the sale or distribution of tobacco products to consumers. The tobacco industry is very good at

influencing state legislatures. The State laws that are passed to comply with the McCain Committee bill's state licensure requirements may, therefore, be 1) preemptive or 2) weak, loophole-ridden, pseudo-preemptive laws.

Section 224 of the McCain Committee bill does not require states to include some kind of anti-preemption clause in their state retailer licensing law. In many states, absent an express anti-preemption provision, the retailer licensing scheme that would be contained in such a state law may occupy the field of permitting, and, therefore, preempt existing licensing schemes at the local level. Even in a state that voluntarily placed anti-preemption language in its state retailer licensing scheme, retailers would still need to acquire a state license according to the contemplated state law. This alone may be enough to discourage local action. States that choose to forego the receipt of block grant money may not even succeed in freeing their local governmental bodies to continue their permitting and licensing activities as section 224 of the McCain Committee bill contemplates federal action in the absence of state action.

These are not strictly technical concerns. The teeth in most local youth access measures is the threat of permit suspension or revocation. Existing local laws may, thus, lose their most important enforcement component, and all local governments would essentially be locked into the same state enforcement scheme. This would have a seriously deleterious effect on community-based tobacco control efforts.

In general, if, as section 223 would suggest, the true aim of the drafters of the McCain Committee bill is to preserve the ability of state and local governments to continue to regulate in the area of youth access to and possession of tobacco products, they have done so in an extraordinarily convoluted fashion and have probably not achieved that aim. The McCain Committee bill's state licensing provisions present other problems as well.

Section 224 of the McCain Committee bill may protect tobacco retailers, because 1) its civil penalty requirements are so vague and open-ended, and 2) it requires judicial review before a retailer's license can be suspended or revoked. Section 224 also establishes penalties for youth possession of tobacco that may be inimical to the McCain Committee bill stated goal of reducing youth access to tobacco.

With regard to criminal penalties, the only conduct for which the state law required by section 224 of the McCain Committee bill would provide criminal sanctions is the sale of tobacco products without a license. If the state law envisioned by section 224 does not contain an express anti-preemption clause, it may, in many states, make no allowance for state or local criminal penalties for any other violation.

As discussed above, the civil penalties required by section 224(a)(2)(C)(ii)(II) of the McCain Committee bill may preempt local permitting, fining, suspension and revocation schemes, thus obliterating the most effective local enforcement tool. In addition, the tobacco industry and its allies may try to pass state retailer licensing schemes that protect tobacco retailers by doing things like

- shifting the focus of penalties to retail clerks as opposed to retail tobacco merchants and adult employers;

- specifically excluding sales to minors as a valid reason for suspending or revoking such a retail tobacco license.

The National Convenience Store Association made sure that these provisions appear in the Model State Law of S. 1530, the bill introduced by Senator Orrin Hatch in November, 1997. The tobacco industry and its allies will certainly make every attempt to ensure that the civil penalties contained in the state laws implementing the requirements of section 224 are as weak as possible.

In order to be eligible for a block grant under the McCain Committee bill, a state must also ensure that: "Judicial review procedures are in place for an action of the State suspending, revoking, denying, or refusing to renew any license under its program." Sec. 224(a)(C)(iii). This requirement strikes a serious blow to youth access enforcement efforts. In many states, administrative procedures and administrative review procedures are currently utilized when suspending, revoking, denying, or refusing to renew tobacco retailer licenses or permits. These procedures are usually simpler and more streamlined than judicial review procedures.

The McCain Committee bill would require states to preempt these less cumbersome administrative procedures with the requirement for judicial review embodied in section 224(a)(C)(iii) of the bill. This would make suspensions and revocations of tobacco retailer licenses much more difficult and would also overburden the courts with these matters.

Section 224 of the McCain Committee bill also requires states to provide for other programs to be in place, "including such measures as fines, suspension of driver's license privileges, or community service requirements, for underage youths who possess, purchase, or attempt to purchase tobacco products." Sec. 224(a)(2)(C)(ii)(III). The tobacco control community is thoroughly divided on the question of whether penalizing youth possession of tobacco would deter such possession or actually encourage it. Very little research has been done on the topic of penalizing youth purchase and possession of tobacco. More research is needed before policy makers can make truly informed decisions about whether penalizing youth possession of tobacco will serve as an effective deterrent to teenage tobacco use. Section 224 of the McCain Committee bill would short circuit this process by ignoring the controversy and requiring states to adopt youth anti-possession measures such as "fines, suspension of driver's license privileges, or community service requirements, for underage youths who possess, purchase, or attempt to purchase tobacco products." Sec. 224(a)(2)(C)(ii)(III).

Penalizing or criminalizing youth possession of tobacco also makes it more difficult for enforcement authorities to use minors in conducting compliance checks of tobacco retailers. Unless minor participation in compliance checks is specifically exempted from youth possession penalties, minors engaged in such enforcement activities could find themselves subject to fines or criminal prosecution. The only other avenue for preserving the ability to use minors in compliance inspections would be the cumbersome process of obtaining special immunity for them from local or state law enforcement officials on a case-by-case basis.

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Tob - sec - new legislation - McCain

From Humphrey

PRELIMINARY ANALYSIS OF PROBLEMS WITH THE MCCAIN DRAFT

(Mar. 29, 1998, Draft)

Unprecedented Protections for the Tobacco Industry

Taxpayer-Funded Immunity from Litigation. Although the draft bill omits the details of the civil liability protections to be granted to the industry, it does provide that if any judgment is entered against a tobacco company in litigation, the company can reduce the amount of its annual payment by 80% of the judgment (pp. 96-97). This provision is without precedent and is tantamount to giving the industry taxpayer-funded immunity from lawsuits. In effect, this provision allows a tobacco company to offset the cost of any judgment against it through an 80% tax credit.

The net effect of this provision and the tax deductibility provisions is to force the taxpayer – not the company – to pay 87% of any judgment entered against a tobacco company. Under the McCain draft, this extraordinary protection would exist even if the industry received no other special treatment, such as liability caps or limitations on punitive damages and class actions.

Extensive Antitrust Immunity. The draft bill gives the tobacco industry broadly worded immunity from federal antitrust laws (pp. 290-91). The antitrust exemption uses exactly the type of language that the FTC has said could lead to monopolistic behavior and inflated tobacco industry profits. In fact, according to the FTC, this kind of antitrust exemption could cause the tobacco industry to make billions more in profits than the industry would make in the absence of any legislation.

Failure to Protect Public Health

Ineffectual Youth Reduction Requirements. Some of the most important provisions that could be included in tobacco control legislation are provisions that require tobacco companies to reduce the number of children using their tobacco products. Unfortunately, the provisions in the McCain draft are extremely weak. In fact, the draft is virtually no improvement over the discredited provisions in the June 1997 settlement. Among the many problems with the youth reduction provisions in the McCain draft are the following:

The requirements are not company-specific. The effective way to change tobacco industry incentives is to make the youth-reduction requirements company-specific, so that companies that fail to achieve the targets are placed at a competitive disadvantage. Like the settlement, however, the draft bill establishes only industry-wide reduction requirements, thereby eliminating any economic incentives for individual companies to reduce the number of children using their products.

The so-called "penalties" are too small to affect company behavior. The maximum annual payment by the industry for failure to achieve the performance targets is capped at $3.5 billion. Based on current sales of 24 billion packs per year, the maximum payment is equivalent to a per-pack price increase of less than 15 cents. This small price increase will be viewed by the tobacco industry as a minor cost of doing business, not a real deterrent.

The reduction targets are too low. Earlier this month, the Senate Labor Committee voted on a bipartisan basis to require tobacco companies to reduce youth tobacco use by 80% over 10 years. The McCain draft has far lower goals, requiring only a 60% reduction in cigarette use and only a 45% reduction in smokeless tobacco use.

Insufficient Price Increase. The draft bill requires a $1.10 per pack price increase that is phased in over 5 years. This price increase is less than the $1.50 price increase that the Administration has sought and that is included in many other bills, including the Kennedy bill (S. 1491), the Conrad bill (S. 1638), the Lautenberg bill (S. 1343), the Fazio bill (H.R. 3474), and the soon-to-be-introduced Harkin-Chafee bill. Moreover, the gradual phase-in of the price increase over 5 years will undermine its effectiveness.

Weak Environmental Tobacco Smoke Provisions. The ETS provisions in the draft bill are substantially weaker than those adopted 4 years ago in the Waxman subcommittee. The McCain draft has new exemptions and allows tobacco-friendly states to opt-out of any ETS protection at all (pp. 109, 114). Despite the positive experiences in states and hundreds of cities, restaurants are exempted from smoke-free requirements. In effect, these provisions are a step backwards.

Repeal of FDA Authority to Require Expanded Health Warnings. Under current law, FDA has broad authority to require warnings on cigarette advertisements. For example, FDA can require tobacco warnings that are as detailed as those required for prescription drugs. In the McCain draft, this authority is eliminated. FDA cannot require warnings that exceed 20% of the size of an advertisement (p. 79). In addition, FDA can no longer require ingredient disclosure on the face of advertisements (p. 87).

Ineffective Document Disclosure Provisions. The document disclosure provisions in the McCain draft allow the industry to keep secret all "trade secrets," regardless of their importance to public health. The definition of "trade secret" is broadly defined to include "any commercially valuable" information (p. 155). Under this sweeping definition, few of the important documents that have emerged in the Minnesota litigation would be disclosed to the public.

Failure to Provide for Sufficient Oversight of Future Conduct. While the bill includes an accountability board to oversee future industry behavior, it is essential that this oversight board be given basic investigatory authorities (such as subpoena authority) that are necessary for discovering and disclosing future industry wrongdoing. The McCain draft omits these elementary investigative authorities.

Failure to Allow Significant State and Local Regulation. When the Federal Cigarette Labeling and Advertising Act was passed over 30 years ago, the tobacco industry obtained broad federal preemption of state and local tobacco control measures. The McCain bill fails to repeal these out-dated preemption provisions.

Failure to Cover Cigars and Other Tobacco Products. Recent studies have shown that cigar use by teenagers is surging due to the industry's campaign to associate cigars with success and glamour. Given these trends, cigars and other tobacco products should be included in any comprehensive tobacco control legislation, not excluded as in the McCain draft (p. 23).

Tob-set-new legislation - McCain

KENT CONRAD
NORTH DAKOTA
202-224-2043

COMMITTEES
AGRICULTURE, NUTRITION, AND FORESTRY
FINANCE
BUDGET
INDIAN AFFAIRS

cc: EK CR x return

United States Senate

WASHINGTON, DC 20510-3403

MEMORANDUM

TO: The Vice President
FROM: Senator Kent Conrad
DATE: April 23, 1998
RE: TOBACCO LEGISLATION

Working together, we have an opportunity to enact good, tough tobacco legislation this year. It would be a tragedy if we instead end up with a weak bill that condemns tens of thousands of children each year to eventual premature death at the hands of the tobacco industry.

McCain Bill

We need to keep momentum behind the process McCain has started. But we must send a clear message that the McCain bill, in its current form, will not achieve the youth smoking reduction targets the industry has agreed to. The bill must be improved to protect our children. The McCain bill contains the following serious flaws:

- Inadequate price increase. We need at least $1.50 in no more than three years.
- Weak look-back. We need large, company-specific penalties.
- No funding for tobacco control programs.
- Special legal protection for the tobacco industry that goes far beyond just caps.

Strategy for Strengthening McCain

We are having good success in lining up Republicans for bipartisan amendments on key issues. But we don't have enough Republican support to guarantee victory. We need the Administration to support our strong public line that ties opponents to the tobacco industry. Without generating political heat, we won't win the substantive victories we need to make this a good tobacco bill.

Specific Requests

Message: clarify message on McCain to emphasize the need for improvements to protect children (not that McCain is good enough). Clarify message on liability to emphasize that the Administration prefers no special protection for this industry (not that this "isn't a deal breaker").
Research: We need the benefits of the Administration's research on bankruptcy, black market, and constitutionality of advertising and look-back to counter the industry's attacks.

Conclusion

We need to draw a very clear line behind protecting children and push in unified fashion for a stronger bill. If we do, Democrats will achieve a clear victory for our children and reap the political benefits of this victory. If we fail to generate the political heat to strengthen the McCain bill in the Senate, we play into the hands of those who want only a narrow tobacco bill and risk an ineffective result that will too many of our children victims of Big Tobacco. This would allow Republicans to claim credit for passing legislation yet open Democrats to criticism from the public health community for not achieving an acceptable public health outcome.

Tob - SCT - new legislation
~~note~~ McCain

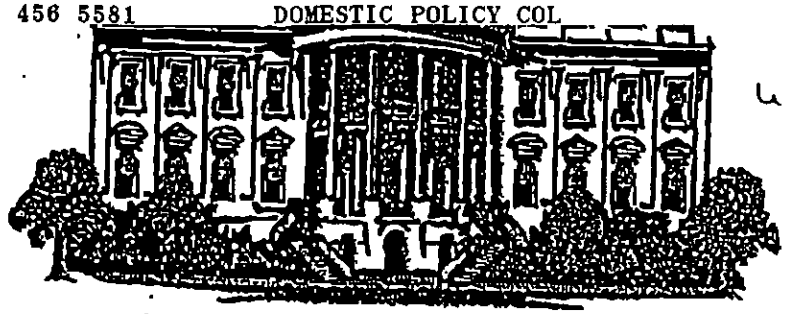
1. Convenience store — Mtg next week
   - FDA auth (2 yr rule)
   - comp advan - adult-only + tobacco stores.
2. Spending - "subj to approps"
   Take language out.
   Use our budget estimates - 25/10/10 etc.
3. Smokeless - Fed amend - only raises price by 10¢ a tin.
   - instead: auth Secy of Ag to figure out conversion
   otherwise, just say in report: need to change
4. Inflate the lookback
5. Nichols - Gotbaum respected

Next week:

1. Current / non-current
2. Figure out test fund - pay w/ upfront fee for 1st 5?
3. Lookbacks

Mtg Hen - cute staff - "dance that boil"

Tob-acc- new
Legislation - McCain



THE WHITE HOUSE

Domestic Policy Council

DATE: _____

FACSIMILE FOR: Elena Kagan

FAX:
PHONE: 62878

FACSIMILE FROM: Cynthia Rice, Special Assistant to the President for Domestic Policy

FAX: 202-456-7431
PHONE: 202-456-2846

NUMBER OF PAGES (INCLUDING COVER): 10

COMMENTS: Final Copy of Technicals sent to Raidt / Schlagn

Technical Amendments
to March 29th Staff Working Draft/S. 1415 Substitute

Payments: The inflation adjustor on p. 96 for annual payments starts too soon, making the 25 year payments $564 billion instead of $505 (excluding the $10 billion up-front payment). See attachment 1 for change to fix this problem. The language also has a separate $2.1 billion per year fund for farmers, which as drafted is in addition to the annual payments on page 96 (section 1012(1)(2) on page 164, line 17).

Definition of Participating Manufacturer: Participating manufacturers should be defined as any manufacturer that sells tobacco products in the U.S. so that companies importing cigarettes into the U.S. must pay the annual assessment as well. Otherwise, imported cigarettes will become much cheaper than ones manufactured domestically. (Specific edit is not attached because this title was not yet available.)

Trust Fund Payments: There is no need to mandate a pass through of payments (p. 95).

Budgetary Treatment: Declaring the tobacco trust fund off-budget (section 408(d)(1), p. 106) for purposes of Congressional and Executive Branch Budgets raises concerns. Related to the off-budget status, the provision for no transfers between the tobacco trust fund and the general fund (section 408(d)(2), p. 106) means that the trust fund could not earn interest on its holdings of Treasury securities. It also means that the trust fund could not fund programs outlaid from another account in the budget.

No Paygo Offset. The transfers to the trust fund in section 401(b), p. 90, need to be 75 percent of the amounts paid by the industry, to reflect reductions in other taxes.

State Enforcement Initiatives: Subtitle B, page 54 -- see attachment 2 for technical edits.

Cesssation: This draft adds a new provision from the Conrad bill without deleting the prior provision. Thus, Section 221 (p. 61-63) should be deleted and replaced with the newly added Section 1174 (p. 296-97). Also, the section references in section 1174 need to be changed to reflect the McCain bill -- as currently drafted, section 1174 refers to section 101(d)(5)(C), which is a Conrad bill reference.

State Retail Licensing Program: Suggested amendment to section 235 (p. 68-71) are in attachment 3.

Warning Labels: Section 4(b)(3) (p. 79) -- See attachment 4 for technical edits.

Tar and Nicotine Testing Procedure: In subtitle B (p. 88) delete 12 month time limit for FDA to reform tar and nicotine testing procedure.

Document Disclosure: Documents categories (section 903(b) p.137-140) should be broadened. (See attachment 5 for proposed list.) All manufacturers, not just participating manufacturers, should be included. Section 903(c) (p. 140) regarding future documents should be deleted. Section 909(a) regarding FDA access to trade secret documents should be deleted (p 151 line10 through p. 152 ln7) because it duplicates section 908(f).

Federal Licensing of Tobacco Product Distribution: The activities in section 1121 (p.261-263) should be conducted by the Secretary of the Treasury, not HHS.

Miscellaneous: See attachment 6.

Attachment 1

any State, for any failure to pass through the amount described in the subsection.

SEC. 403. ADJUSTMENTS.

(a) IN GENERAL.—The applicable base amount for a given calendar year shall be adjusted as follows in the determining the annual payment for that year:

(1) INFLATION.—The applicable base amount shall be increased by the greater of 3 percent or an increase in the Consumer Price Index for all urban consumers for the prior year. ~~The annual base amount payment for year 1 shall be increased pursuant to this paragraph.~~

Beginning in Year 6 and for each subsequent year,

(2) VOLUME ADJUSTMENTS.—Commencing in 2005, the applicable base amount shall be adjusted for changes in volume of domestic sales by multiplying the applicable base amount by the ratio of the actual volume to the base volume.

(b) CREDITS FOR TORT LIABILITY.—The applicable base amount for any year shall be reduced, after making the adjustments set forth in subsection (a)(1) and (a)(2), by 80 cents for each dollar paid by any participating manufacturer during the year for which the annual payment is being calculated on judgments or settlements entered in civil actions to which section 708 applies.

Attachment 1

Title II

Subtitle B Section 211 Page 54

Page 54, line 12: Remove the word "monthly". Sentence should start: "Conduct random..."

Page 56, line 8 through line 18. Delete the entire sentence "Inspections conducted under...a probability sample of outlets". Insert the sentence: "Inspections conducted under this paragraph must be in sufficient number as to provide a representative probability sample of a range of outlets (not preselected on the basis of prior violations) in the state in order to measure the overall level of compliance."

Page 56, line 23. Remove "monthly", insert "annually"

Page 56, lines 24 and 25. Delete line 24 and line 25 up to "Ex-" Insert on line 24 "...of a sufficient number of outlets using a representative probability sample in order to measure the level of compliance on each reservation."

Page 57, line 7. Insert "... and vending machines." after "...over-the-counter."

Page 57, line 20. Change "...fifth and sixth..." to "...fourth and fifth..."

Page 58, line 13. Change "...20 percent..." to "...40 percent..."

Attachment 3

Section 235, state retail licensing program. As drafted, this could be inconsistent with FDA regulatory efforts. In addition, the parameters of the requirements should be modified. Suggest replacing 235(a)(2)(A) with the following language—

"(2) STATE AGREEMENT REQUIRED—In order to receive a block grant under this section, a State shall have in place a program that meets or exceeds (as determined by the Secretary the requirements of the Model State Program Described in paragraph (3)."

Delete (B) and (C), and replace with the following—

"(3) MODEL PROGRAM.--Not later than 12 months after the date of enactment of this subchapter, the Secretary shall promulgate a model State program. Such model State program shall at a minimum—

"(A) provide for the collection of licensing fees by the State or locality to defray the costs of administering the program;

"(B) prohibit retailers from selling or otherwise distributing tobacco products directly to consumers in a State unless such retailers have in effect tobacco licenses issued or renewed in accordance with State or local laws;

"(C) provide for the notification of every person in the State who is engaged in the distribution at retail of tobacco products of the license requirement and of the date by which such person shall have obtained a license in order to continue to distribute such products;

"(D) prohibit licensed retailers from selling or otherwise distributing tobacco products to minors, consistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register);

"(E) provide for penalties of up to $50,000 for each violation of the requirements under such program relating to the sale or distribution of tobacco products without a license and for appropriate penalties for other violations of laws relating to youth access to tobacco products;

"(F) require retailers to comply with the applicable requirements of this section and any regulations relating to this section;

"(G) provide for the suspension or revocation of a license in the case of a retailer that repeatedly sells or distributes tobacco products to individuals in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), or otherwise in violation of State or local law; and

"(H) provide for penalties that are consistent with the following:

"(i) RETAILERS.--In the case of a retailer who distributes a tobacco product to a minor in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), the regulations shall provide for notice of wrongdoing for the first violation, followed by the application of a civil money penalty of at least—

This penalty level matches FDA's.

"(I) $250 for the 2nd violation;

"(II) $1,500 for the 3rd violation;

"(III) $5,000 for the 4th violation; and

"(IV) $10,000 for the 5th violation.

"(ii) EMPLOYEES OF RETAILERS.--In the case of an employee of a retailer who distributes a tobacco product to a minor in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), the regulations may provide for the application of a civil money penalty of—

"(I) $25 for the 1st violation;

"(II) $50 for the 2nd violation; and

"(III) $150 for the 3rd and subsequent violations.

"(iii) MINORS.—In the case of a minor who purchases or attempts to purchase

a tobacco product (other than a minor engaged in an authorized sting or a law enforcement operation), the regulations shall permit the States to impose civil money penalties, loss of driving privileges, or other penalties.

Subsection (c), lines 7-8: replace "Federal program of license requirements, enforcement measures, and penalties" with "Federal retail licensing program."

Attachment 4

Title III, Tobacco Product Warning and Smoke Constituent Disclosures

1. FCLAA Section 4(b)(3), Insert the bold words into the second sentence, "The text of any such label statements or disclosures **under this section** shall be required to appear only within the 20 percent area of cigarette advertisements provided by paragraph (2) of this subsection."

   [The problem with the draft is that it restricts all disclosures in advertising to 20 percent of the ad. The section refers not only the mandated health warnings but also to tar and nicotine disclosures and any "other disclosures required" under the Act. This is too restrictive. It will reduces the size of the mandated health warning every time FDA adds any required labeling disclosure and restricts the size of any required FDA disclosures to a preset amount of the ad.]

2. It may be appropriate to repeal both the FCLAA and the Smokeless Act. This section is written as amendments to the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Comprehensive Smokeless Tobacco Health Education Act (Smokeless Act). Therefore, those Acts stay in effect. Since the Acts were written at different times, they provide different rules for each industry. Those differences are continued and continue to favor the cigarette industry (e.g. states are preempted from passing restrictions on advertising and providing certain tort relief against cigarette manufacturers, but not against smokeless companies.). Further, because responsibilities are being shifted to FDA, these provisions would be more appropriately located in the FDCA (with appropriate misbranding and prohibited act sections in the FDCA also added).

   If FCLAA and the Smokeless Act are repealed (as they are in some other bills) and these provisions are shifted to the FDCA, would need to be sure the electronic media advertising bans in these two statutes is included in legislation (15 USC 1335 and 15 USC 4402(f)). In addition, it may be appropriate to include the requirements for annual FTC reporting to Congress on industry advertising practices (15 USC 1337(b) and 15 USC 4407(b)).

3. In section 305, tar and nicotine, new (4)(C), in the second sentence, add the bold words: "Any such disclosure may be required if the Secretary determined that disclosure would be of benefit to the public health, or otherwise would increase consumer awareness of the health consequences of the use of tobacco products, except that, **unless otherwise required by FDCA**, no such prescribed disclosure shall be required on the face . . . ."

   [Concern here is that it could be read to limit FDA authority]

4. Subtitle B, section 311(a), regulation requirement—12 months is not adequate time to promulgate regulations for testing, reporting, and disclosure or smoke constituents. Should allow 2 years to issue proposed regulations.

Attachment 5

(1) DOCUMENT CATAGORIES. — Within __ days after the enactment of this Act, each manufacturer of a tobacco product shall submit to the Depository every existing document (including any document subject to a claim of attorney-client privilege, attorney work product, or trade secret protection) in the manufacturer's possession, custody, or control —

(A) relating, referring, or pertaining to —

(i) any studies, research, or analysis of any possible health or pharmocological effects in humans or animals, including addiction, associated with the use of tobacco products or components of tobacco products;

(ii) the engineering, manipulation or control of nicotine in tobacco products;

(iii) the sale or marketing of tobacco products;

(iv) any research involving safer or less hazardous tobacco products;

(v) studies of tobacco use by minors;

(vi) the relationship between advertising or promotion and the use of tobacco products;

(B) produced, or ordered to be produced, by the tobacco product manufacturer in any health-related civil or criminal proceeding, judicial or administrative; or

(C) that the National Tobacco Documents Review Board, as described in subsection (c) below, determines is appropriate for submission to the Depository.

Attachment 6

Technical Amendments

P. 9, subsection (18) -- Insert "each year" after "60,000 early deaths"

P. 25, subsection (25) -- Change "sales to" to "use by"

P. 14, subsection (9) -- Remove the word "all" both times that it appears

P. 33, subsection (E) -- Insert at the end "and implementing regulations"

P. 72, subsection (a) -- Remove "or his or her delegate" after "the Center for Disease Control"; this should cure any issue related to the Appointments power

P. 127, subsection (e) -- this appears duplicative of the provisions on p. 72

p. 146, subsection (c) -- Rewrite -- "The Board shall apply the attorney-client privilege, the attorney work-product doctrine, and trade secret protection in a manner consistent with federal law."

P. 147, Section 902(a) -- Insert "aggrieved" between "Any" and "person"

Tob-sct-new leg-
McCain

Cynthia A. Rice 04/09/98 11:32:46 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia Dailard/OPD/EOP, Laura Emmett/WHO/EOP

cc:
Subject: Conrad Priorities on McCain

---------- Forwarded by Cynthia A. Rice/OPD/EOP on 04/09/98 11:32 AM ----------

Richard J. Turman
04/09/98 10:36:31 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Senate Dem e-mail on Tobacco

We received a copy of the attached e-mail, that was sent to Senate Dem staff by Sen. Conrad's staff. It includes a current sense of their plans, and a summary they prepared of concerns about Sen. McCain's bill. It would be best if Sen. Conrad's staff did not know we received it -- thanks.

Subject: Preparation for Tobacco Floor Action
Author: Tom Mahr
Date: 4/8/98 5:59 PM

As most of you probably know, Senator Lott has indicated that he intends to take up tobacco legislation on the floor in late May. We are starting to gear up for Senate floor action and wanted to make sure we touched base with other offices that might want to be involved.

Our analysis is that, while it is good that a tobacco bill will be taken up on the floor, the McCain bill falls very short of meeting the public health goals that I think all of our bosses share. Attached is a preliminary critique that explains why the McCain bill is not a good, strong tobacco bill that will succeed in protection kids from tobacco.

We have talked with public health groups to identify priority areas where the bill needs to be significantly strengthened, and we are starting to reach out to Republican offices to try to set up bipartisan working groups to help us develop amendments that would win a majority on the floor and make the bill acceptable in these areas. Here are the areas that we intend to concentrate on:

1) $1.50 price increase within no more than three years
2) strong, company-specific look-back penalties
3) full, dedicated funding for tobacco control programs
4) no special liability protections for the tobacco industry
5) Strong second-hand smoke provisions
6) No pre-emption of stronger State or local tobacco control measures
7) No anti-trust protection for the tobacco industry
8) Full disclosure of all relevant tobacco industry documents.

We think it makes sense to make sure that people who have an interest in these issues work together rather than working at cross-purposes or developing competing approaches, none of which then can generate a majority on the floor. If your Senator is interested in working on any of the above issues, could you please let me know. Then we'll make sure that everyone with an interest is included in any working group that develops on the issue.

Also, if you have contacts with Republican offices and know of Republican Senators who may be interested in taking an active role on any of these issues, that would be very helpful information as we move forward. Please let me know.

mccainsu.wp

Message Sent To:

Joshua Gotbaum/OMB/EOP
Melany Nakagiri/OMB/EOP
Wm G. White/OMB/EOP
Marc Garufi/OMB/EOP
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Jill M. Pizzuto/OMB/EOP
Cynthia A. Rice/OPD/EOP

Preliminary Analysis of the Commerce Committee Bill

The Commerce Committee bill, although it improves upon the deficient June 20th proposal, falls short on key public health requirements while giving the tobacco industry unprecedented legal liability protection. It does not include a sufficient price increase or look-back penalties. The FDA title, while passable, leaves FDA regulation unnecessarily open to legal challenge. The retailer compliance provisions are weak. The document provisions are cumbersome. An unnecessary anti-trust exemption creates an opportunity for the industry to dramatically increase its profits. And States and localities remain limited in their ability to enact tougher tobacco control laws.

Price Increase is Inadequate

Public health experts and economists agree that a healthy price increase is the single most effective way to significantly reduce youth smoking rates. They have concluded that it takes a price increase of at least $1.50 per pack to get within range of the youth smoking reduction targets set out in the legislation.

The McCain bill provides a price increase of only $1.10 per pack in the fifth year and thereafter. This means that, each year, more than 150,000 youths will start smoking who would not have started if the price had been increased the full $1.50 per pack. More than 50,000 of these children who start smoking each year because of the inadequate price increase will eventually die prematurely of a tobacco-related disease --or about the same number of Americans as died during the entire Vietnam War.

Although the tobacco industry and others have asserted that a $1.10 real price increase at the manufacturer level will somehow turn into a $1.50 real price increase at retail, the Treasury Department, Federal Trade Commission and the vast majority of economists and industry analysts agree that there will be no significant mark-up. In fact, some analysts predict that manufacturers would respond to a price increase of $1.10 by squeezing retailer and distributor margins. Similarly, although the tobacco industry tries to raise the specter of a black market, Treasury and BATF say there is no more significant likelihood of a black market with a $1.50 price increase than with a $1.10 price increase.

Look-back Provisions are Weak and Ineffective

Effective look-back penalties can change the current incentives that drive tobacco manufacturers to market to children. Currently, manufacturers know that children are the only available source of "replacement smokers" to take the place of the 2 million American smokers who quit or die each year. If someone doesn't start smoking as a child, he or she is extremely unlikely to start smoking as an adult. Moreover, tobacco manufacturers know that smokers are very loyal to the first regular brand smoked. Taken together, these facts mean that tobacco manufacturers would not be serving their shareholders' interests if they didn't market to children because they would be giving up their future market. Strong look-back penalties turn this incentive structure upside-down. They create an affirmative market incentive for tobacco manufacturers to put to good use the knowledge they

have accumulated about how to get children to start smoking and instead get children not to use tobacco products.

Unfortunately, the McCain look-backs will not do this. First, they do not impose the penalties on a company specific basis. Imposing them industry wide creates a perverse disincentive for companies to reduce youth smoking of their brands because they will still be penalized if the rest of the industry builds future market share by continuing to sell to children. Second, the penalties are too small. They amount to only 1/3 of 1 cent per pack for the first five percentage points by which the targets are missed, 2/3 cent for the next five percentage points, and 1 cent for the next 10 percentage points. They are capped at $3.6 billion, or 15 cents per pack. This small penalty can easily be absorbed by the companies or passed along to consumers, and is not sufficient to change companies' behavior. Finally, the methodology used in calculating the look-backs is skewed to under-report youth smoking rates.

FDA Authority Opens FDA to Unnecessary Legal Challenges

The Chairman's mark attempts to transfer authority over tobacco products from the drug/device Chapter of FDA law into a new Chapter. This could prove to be a full employment act for tobacco industry lawyers. It will create new openings for the tobacco industry to challenge the FDA rule because it was promulgated under the drug/device authority. And it will create additional opportunities to challenge any regulations necessary to implement the new Chapter, because it will not have the benefit of decades of agency practice, case law, interpretations, or any other history to which the Courts generally give great deference. There is no reason to run this risk; tobacco products should be regulated as drugs and devices.

Tobacco Control Programs

The mark includes authorization for a variety of tobacco control programs. Although Senator McCain repeatedly said that he intended to fund these programs from tobacco revenues and not leave them subject to annual appropriations, that is not reflected in the current draft. Fully funding these programs is critical to the success of tobacco legislation.

Youth Access Restrictions Not Tough Enough

Research shows that unless the retailer compliance rate reaches at least 90%, children will continue to have easy access to tobacco products. It's just too easy for children to go to the retailers that are known to sell to minors. A compliance rate of 95% is necessary to produce significant reductions in youth access to tobacco products. The McCain mark only provides for 75% compliance in year 5, 85% compliance in year 7, and 90% compliance in year 10. These compliance targets are not tough enough to serve as an effective complement to the other provisions in the bill. In fact, they increase the likelihood that the youth smoking reduction targets will not be reached and put an increased burden on manufacturers. These targets, and the penalties for missing the targets, should be strengthened to ensure that retailers and the States do their part in reducing youth tobacco use.

Environmental Tobacco Smoke Protections are Weak

Recent studies confirm that ETS causes significant and lasting health damage. Yet the McCain bill fails to set a minimum Federal floor to protect against ETS exposure. It allows States to opt-out of these minimum standards. In addition, it exempts all non-fast food restaurants from the provisions

and provides no special protections for facilities --such as schools or day care centers --where children are most likely to be exposed to ETS. Finally, the non-pre-emption language fails to override inconsistent provisions of OSHA law, and would therefore prohibit many States from enacting tougher ETS laws.

Anti-Trust Exemption Could Vastly Increase Industry Profits

Although the provision is described as a limited anti-trust exemption, its provisions would appear to allow companies to collude and fix prices to comply with the Act. In fact, when coupled with the pass-through requirement and penalties for failing to pass through the price increases, the McCain mark appears to create an incentive for companies to conspire to increase prices above the amount necessary to achieve the price increases set out in the mark. As the Federal Trade Commission analysis of the proposed settlement concluded last year, this would allow the companies to earn monopoly profits far in excess of those they currently earn. The FTC has testified that the anti-trust exemption is unnecessary and dangerous. It should be dropped.

State and Local Pre-emption Fails to Allow States to Act

Although the McCain mark purports not to pre-empt stronger regulation at the State or local level, this non-preemption is in fact quite limited. It fails to override existing preemptive language in Federal statutes, such as the Federal Cigarette Labeling Act.

Document Disclosure Is Cumbersome

The tobacco industry has hidden behind misuse of the attorney-client privilege for years. The Court in Minnesota has ruled that the industry has abused this privilege to shield thousands of documents, and has ordered them released to the State of Minnesota in its trial. Particularly given that the McCain bill gives the industry partial legal immunity, the public has a right to know what the industry has known and done about the health effects of tobacco products, the addictiveness of nicotine, and marketing aimed at children. The McCain bill, though, sets up a cumbersome process whereby documents for which the industry claims attorney-client privilege --including those that have been ordered produced in Minnesota --could continue to be shielded for years. The bill also gives extraordinary deference to industry claims of trade secret protection, giving the industry yet another defense against the production of documents that could reveal critical public health information.

International and Anti-Smuggling

The McCain mark provided strong international provisions to protect children overseas from the danger of tobacco products. It also includes anti-smuggling provisions that will help prevent the development of a black market for tobacco products in this country. These provisions are opposed by Senators Ford and Hollings. At the end of the Committee mark-up, agreement was reached that Senators Hollings, Ford and Wyden would try to reach agreement on this language. It is not clear what will happen if no agreement is reached, but they may be dropped from the bill.

Liability Limits Give Industry Unprecedented Protection

The full Senate voted overwhelmingly (79-19) on the budget resolution for an amendment expressing the sense of the Senate that tobacco legislation should not provide immunity to the

tobacco industry, yet the McCain bill provides unprecedented legal protection to the tobacco industry.

The tobacco industry, of all industries, does not deserve this special, privileged protection. It has misled the American public and the Congress about the health effects of tobacco use, the addictiveness of nicotine and its manipulation of nicotine to make it more addictive, and its efforts to market its products to children. It is supremely ironic that the proposal limits victims' rights for recovery --and asks them to pay for the privilege through higher prices on tobacco products.

Caps

Liability caps will inevitably delay or deny justice to victims of the tobacco industry. By limiting the recovery for those who die from tobacco-related diseases to an average of just $16,250 per death, a $6.5 billion cap severely discounts the value of human life. Moreover, it plays into the industry's strategy of protracted legal battles that become too expensive for plaintiffs to pursue.

In addition, the $6.5 billion cap amounts to pennies on the dollar compared to the potential liability of the tobacco industry. The Treasury Department recently estimated that tobacco costs our society $130 billion each year. The potential liability exposure of the tobacco industry for damages based on past actions of the companies could easily exceed $2 trillion dollars, excluding punitive damage claims. At $6.5 billion per year, it would take 300 years for the tobacco industry to pay these damages in full.

These caps will provide a huge financial windfall to the tobacco companies. Wall Street analysts report that tobacco stock prices include a "litigation discount" that reduces their value. Providing certainty by imposing caps will reduce this discount, providing a windfall to company executives and shareholders. That is, rather than putting the industry's extensive assets to work for its victims, it increases the industry's assets by protecting them from the victims.

Finally, administering the caps fairly and rationally would be extremely difficult. Who would decide which judgment or settlement awards get priority and which ones are delayed?

Other Issues

In addition to the problems created by the caps, the McCain proposal contains several other troubling features. First, it bars all addiction and dependence claims. Although the intent of this provision is not clear (particularly when viewed in conjunction with the "general causation assumption" that stipulates that nicotine is addictive), it would appear to block any argument or evidence based on addiction. This has very important implications. It rules out the only possible argument that can be used to counter the industry's "assumption of risk" argument. (The industry argues that because smokers should have known of the danger but continued to use the product, they assumed the responsibility for anything that happened and the industry cannot be held liable; the only counter to this argument is that the smoker was not able to exercise any choice because he or she was addicted. It is not clear how the "general causation assumption" would affect the assumption of risk argument. Certainly, the industry would appear to be able to use the assumption of risk argument so long as it can rebut specific claims of addiction. If an individual cannot make a claim of addiction, it would be hard to counter the industry's claim that addiction was not present in a specific, individual case.)

This would appear to give the industry a virtually invincible defense against all individual cases or class actions.

Second, the McCain proposal bars the use of any evidence relating to the development of reduced risk products after the date of enactment. If the industry could have produced a reduced risk product but chose not to, this is a very material fact in proving that the industry was reckless or negligent in designing a defective product. Even though this applies only to future development efforts, the very fact that the industry could easily develop a reduced risk product would be relevant to a jury's decision on a company's past behavior --particularly if the discovery were to uncover references to previous research on similar efforts that were abandoned as "infeasible" or "unpromising." Barring this evidence adds yet another layer to the industry's armor.

Third, the McCain proposal appears to limit punitive damages for future conduct by the industry, giving it a safe harbor if it complies with the terms of the McCain bill. This safe harbor would appear to apply even in cases of misconduct that was not anticipated by the McCain bill.

Fourth, the Commerce Committee bill appears to allow domestic tobacco companies to sever their affiliation with domestic non-tobacco corporate parents and siblings and international tobacco operations. This would allow the tobacco industry to shield tens of billions of dollars in assets from victims.

Finally, although some assert that caps are necessary, none of the arguments put forward in support of this assertion withstand careful scrutiny. First, some argue that the companies will go bankrupt if we do not cap their liability, and then victims will be left with nothing. This is just not true. The industry has such substantial assets, that bankruptcy is an extremely unlikely prospect. Even if an individual company were to go bankrupt, however, this does not mean that "victims get nothing." Under bankruptcy, the company's assets would be organized for the benefit of victims; under a cap, as noted above, the company's assets are enriched at the expense of victims. Second, some argue that there will be a "rush to the Courthouse" if we do not impose caps. In fact, caps may discourage lawsuits, because the limit on recovery would make the expense of litigating against the tobacco industry a poor investment. Third, some argue that we need to give the industry this liability protection in order to obtain its cooperation on advertising restrictions. However, the industry has made clear that it will oppose the Commerce Committee bill and will not cooperate, so we may be buying nothing with these caps. Most likely, the industry is bluffing; we believe that the industry would sign consent decrees for the far more limited purpose and protection of resolving just governmental claims. In any case, even if the industry signs consent decrees, there is no guarantee that these consent decrees will be Constitutional or enforceable. If not, the Congress will have given the industry an extraordinary benefit and gained nothing in return. This is not a gamble the Congress should take.

Mitigating Factors

The McCain proposal includes a "general causation presumption" that nicotine is addictive and that certain diseases are caused by tobacco. This is an important move in the direction of providing balance to the proposal. However, it does not offset the effect of the caps on liability or other special legal protections provided to the industry.

Tob - pt
new legislation - McCain

Ron Klain @ OVP
03/30/98 06:28:26 PM

Record Type: Record

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

cc: Kay Casstevens/OVP @ OVP, Toby Donenfeld/OVP @ OVP, Donald H. Gips/OVP @ OVP, John Podesta/WHO/EOP

Subject: Tobacco Bill

Gephardt put out a statement blasting the McCain bill, FYI. He called it "strike one" in Congress' attempt to protect kids from tobacco. I guess it's not hard to figure out where he is headed, huh?

Tab - scr - new legislation - McCain bill

3/29/98
2:00 pm

SUMMARY OF "NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT"

PURPOSE: *To prevent youth from using tobacco products*
To inform the public of the dangers of smoking
To ensure that tobacco products are appropriately regulated to protect public health
To implement a comprehensive national strategy to reduce the adverse public health, economic and social impacts of tobacco use
To assist tobacco farmers and tobacco dependent communities

TOPIC	DRAFT COMMITTEE MARK
MARKETING AND ADVERTISING RESTRICTIONS	Calls for National and State protocols by which industry agrees to no outdoor advertising; no human images or cartoon characters, black and white text only advertising (except in adult periodicals and venues); No animal figures. No color ads on the back face of adult magazines. Limits advertising to FDA/FTC specified media. Restricts glamorization of tobacco. Any advertising that violates the statute or protocol is considered "false and misleading" under FTC's Section 5 authorities. Liability limits eliminated if tobacco companies challenge or are no longer bound by advertising restrictions. Places size, color, number, and placement restrictions on point-of-sale advertising and displays. Provides for no additional point-of-sale advertising for companies with higher market share. Federal and state regulatory authority over tobacco product advertising.

WARNINGS, LABELING AND PACKAGING	Requires new, explicit warning labels in bold type. Requires alternating black on white; white on black warning labels. Allows FDA to update warnings at any time based on science.
YOUTH ACCESS RESTRICTIONS	Federal prohibition of sales to minors under 18; requires photo ID if under age 27; requires face to face transactions; bans vending machines and self-service sales except in adult-only facilities, permits mail-order sales subject to FDA review. Administered by FDA.
CESSATION AND PREVENTION	Authorizes National Community Action Program; National Cessation Research Program; National Tobacco Free Public Education Program; National Smoking Cessation Program; various studies; and creation of Tobacco Use and Cessation Board.
UNDERAGE TOBACCO USE TARGETS	Sets reduction targets of underage use: cigarettes: smokeless 3 yrs – 15% 12.5% 5 yrs – 30% 25% 7 yrs – 50% 35% 10 yrs – 60% 45% ** Assumed base of 4.5 million youth smokers

INDUSTRY PENALTIES	Requires industry to pay tiered monetary penalties (non-tax deductible) for falling short of youth reduction targets. **1 - 5 percentage points short:** $80 million per point **6 - 10 percentage points short:** $160 million per point **10 and above percentage points short:** $240 million per point Yearly cap of 3.5 billion with no tax deductibility of penalty payments. Joint, several & strict liability for penalties. Provides legal actions for company's against another for financial liability. If any company misses its share of target by more than 20 points, company's liability cap is waived for 2 years or until goal is met, whichever is later, with due process. Liability cap is waived for criminal convictions of violations under this act. Creates Tobacco Agreement Accountability Panel comprised of FDA, CDC and HHS to oversee individual company's compliance plan with requirements of this act. Panel submits annual report on industry and company specific compliance. Panel may submit information to a court in cases of serious non-compliance and the court may lift liability protections.
LICENSING OF RETAILERS	Requires state, tribal and federal licensing program to be funded from settlement. FDA would draft model state program in consultation with state and local officials.

AUTHORIZES FDA TO REGULATE TOBACCO PRODUCTS AND NICOTINE	Gives FDA broad authority over tobacco including advertising, youth access, and new products. FDA authority over tobacco is separate chapter of FD&C Act to assure FDA authority over tobacco will not affect FDA authority over other regulated products. Provides for FDA authority over youth access. FDA approval of new products. Any ban on nicotine, retail sales, or category of tobacco products would require Presidential notification to Congress and include two-year waiting period for Congress to act. If Congress does not act ban goes into effect. No FDA authority over farmers FDA rules must take into account the impact of actions on demand for unregulated contraband products.
CORPORATE CULTURE AND COMPLIANCE, LOBBYISTS AND WHISTLE BLOWERS	Calls for national and state protocols requiring an industry plan to comply with all new laws on the manufacture and distribution of tobacco. Protects industry whistle blowers. Requires lobbyists to comply with the act and agree not to support or oppose any federal or state legislation without consent of manufacturers. Disbands the Tobacco Institute and the Council for Tobacco Research. Industry plan would include specific assessment mechanism and enforcement standards of industry plan to be included in the protocols.
SMOKING RESTRICTIONS IN PUBLIC FACILITIES	Restrict smoking public facilities to to enclosed areas. Specifies that employees may not be required to enter smoking areas. Exempts restaurants (other than fast food), bars, private clubs, hotel guest rooms, casinos, bingo parlors, tobacco outlets, and prisons. Allows states two years to opt out. Authorizes incentive grant program for states.

ESTABLISHMENT OF TOBACCO TRUST FUND AND ANNUAL INDUSTRY PAYMENTS	Establishes National Tobacco Settlement Trust Fund. Calls for industry to pay $10 billion up-front. Calls for per pack licensing fee according to following schedule: **1999 – 65 cents per pack** **2000 – 70 cents per pack** **2001 – 80 cents per pack** **2002 – $1 per pack** **2003 – $1.10 per pack** ** MEETS ADMINISTRATION BUDGET REQUEST FOR REAL $1.10 INCREASE IN 5 YEARS Yearly payments required of industry: **1999 – $14.4 billion** **2000 – $15.4 billion** **2001 – $17.6 billion** **2002 – $21.2 billion** **2003 – $23.6 billion** **2004–2024 – yearly $23.6 billion in dollars beginning in 2004 (real) and adjusted to inflation:** Payments are volume adjusted: increased if consumption volume increases and decreased if volume decreases from 2004 levels. **TOTAL INDUSTRY PAYMENT EXPOSURE OVER 25 YEARS. (Minus look back penalties)** Not volume adjusted: **$506 billion (real)** Volume reductions achieved: **$489 (real)**
TRUST FUND EXPENDITURES	TO BE DETERMINED ON FLOOR

CONSENT DECREES AND NATIONAL PROTOCOL	Manufacturers and states enter into consent decrees that include many of the provisions of the Act, and include a waiver of Constitutional claims. Within 6 months of enactment requires each manufacturer to enter into a legally binding and enforceable contract (The National Tobacco Control Protocol)on both the federal and state level. Federal protocol to be executed with U.S. Attorney General in consultation with the Secretary of HHS. State protocol to be executed with State Attorney General in consultation with state Governor.
NON-PARTICIPATING MANUFACTURERS	Denies non-participating manufacturers liability protection and imposes user fees on them, as well as annual payments into a reserve fund to settle liability claims.
ATTORNEYS' FEES	All attorney's fees and costs paid by industry outside the payments made under this act. Three member arbitration panel in which plaintiff representative and defendant representatives pick a third member.
STATE ENFORCEMENT OF YOUTH ACCESS LAWS	Compliance goals set for state and tribal governments. Funding from settlement for enforcement efforts.
CIVIL LIABILITY RESTRICTIONS	(STILL UNDER NEGOTIATION)

INDUSTRY DOCUMENT DISCLOSURE	Creates National Tobacco Document Depository Expands the availability of documents in a public depository for use by plaintiffs in actions against the industry and provides for efficient use of these documents. Requires manufacturers to deposit: 1)all deposition of corporate representatives; 2) depositions of all expert and fact witnesses; 3) answers to interrogatories in all cases; 4) court orders on substantive issues; 5) all documents provided in recent specified lawsuits; 6) all health research documents; 7)document indexes maintained by the industry. Allows manufacturers to determine and withhold documents protected by attorney-client privilege. Requires manufacturers to deposit a detailed, itemized log of privileged documents. Establishes a three-judge federal arbitration panel to settle disputes over making privileged documents public.
AGRICULTURE AND RURAL COMMUNITY ASSISTANCE	Includes Leaf Act: Creates Tobacco Community Revitalization Trust Fund from payments by industry The fund pays for lost tobacco quota, administrative costs of the tobacco program, to tobacco community Economic Development Grants, Farmer Opportunity Grant Program, and the Tobacco Worker Transition Program. Offers farmers opportunity to stop producing tobacco by selling their quotas. Provides tobacco farmers with educational and economic assistance to find another means of living. Provides general immunity for tobacco producers and warehouse owners.
NATIVE AMERICANS	Provides that the requirements of this Act relating to the manufacture, distribution, and sale of tobacco products apply on tribal lands. Considers tribes as states for the purposes of eligibility for public health funding.
NO STATE OR LOCAL PREEMPTION	Allows state and local governments to impose any additional tobacco product control measures that are not inconsistent with the provisions of this Act.

INTERNATIONAL TOBACCO CONTROL	Creates non-profit corporation and provides funds for international tobacco control programs. Prohibits use of federal funds to promote U.S. tobacco exports or to seek to remove nondiscriminatory restrictions on tobacco products by foreign countries. Prohibits U.S. employees of tobacco companies from marketing to children overseas. Requires tobacco product exports to carry warning labels.
MANDATED PASS THROUGH PAYMENTS	Limited anti-trust exemption to permit industry to comply with requirement that they pass through payments to cigarette prices and to adopt industry plan to comply with law and protocol.
FUNDING PRIORITIES	Sense of the Senate that the funds raised by this act should be used to support the following priorities: 1. Tobacco use prevention and cessation. 2. Tobacco related health research 3. Assist tobacco farmers and tobacco dependent Communities 4. Reimburse public health care financing programs for tobacco related costs, including Medicare. 5. Settle with and reimburse states for tobacco related health care costs and damages, including Medicaid.

htb - nt -
new legis - McCain

JOSHUA
GOTBAUM
03/30/98 08:59:41 AM

Record Type: Non-Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc: Cynthia Dailard/OPD/EOP, Richard J. Turman/OMB/EOP, Wm G. White/OMB/EOP
Subject: McCain bill: Waxman concerns

Phil Barnett called to report on their view of the shortcomings of the McCain bill, hoping the Administration will have similar views.

Very concerned with:

- Liability limitations: eliminates both punitive damages and class actions
- Lack of company-specific youth lookback

Other points of contention:

- Environmental smoking: Waxman wants national standard; bill provides state opt-out
- Document disclosure ??
- Antitrust: exemption for any "joint action to reduce youth smoking", which could include price setting
- FDA: repeal authority to do additional warnings, other limitations

Tob sur - new legis — McCain bill

Revised

Technical Amendments
to March 29th Staff Working Draft/S. 1415 Substitute

Payments: The inflation adjustor on p. 96 for annual payments starts too soon, making the 25 year payments $564 billion instead of $505 (excluding the $10 billion up-front payment). See attachment 1 for change to fix this problem. The language also has a separate $2.1 billion per year fund for farmers, which as drafted is in addition to the annual payments on page 96 (section 1012(1)(2) on page 164, line 17).

Definition of Participating Manufacturer: Participating manufacturers should be defined as any manufacturer that sells tobacco products in the U.S. so that companies importing cigarettes into the U.S. must pay the annual assessment as well. Otherwise, imported cigarettes will become much cheaper than ones manufactured domestically. (Specific edit is not attached because this title was not yet available.)

Trust Fund Payments: There is no need to mandate a pass through of payments (p. 95).

Budgetary Treatment: Declaring the tobacco trust fund off-budget (section 408(d)(1), p. 106) for purposes of Congressional and Executive Branch Budgets raises concerns. Related to the off-budget status, the provision for no transfers between the tobacco trust fund and the general fund (section 408(d)(2), p. 106) means that the trust fund could not earn interest on its holdings of Treasury securities. It also means that the trust fund could not fund programs outlaid from another account in the budget.

No Paygo Offset. The transfers to the trust fund in section 401(b), p. 90, need to be 75 percent of the amounts paid by the industry, to reflect reductions in other taxes.

No Adjustment for Loss in Current Excise Taxes -- Add to the spending section of the bill "Of the amounts available in the Trust Fund provided in section XXX, 8 percent shall be reserved for the Treasury to offset the loss of current excise taxes that result for the decrease in total sales of tobacco products."

State Enforcement Initiatives: Subtitle B, page 54 -- see attachment 2 for technical edits.

Cesssation: This draft adds a new provision from the Conrad bill without deleting the prior provision. Thus, Section 221 (p. 61-63) should be deleted and replaced with the newly added Section 1174 (p. 296-97). Also, the section references in section 1174 need to be changed to reflect the McCain bill -- as currently drafted, section 1174 refers to section 101(d)(5)(C), which is a Conrad bill reference.

State Retail Licensing Program: Suggested amendment to section 235 (p. 68-71) are in attachment 3.

Warning Labels: Section 4(b)(3) (p. 79) -- See attachment 4 for technical edits.

Tar and Nicotine Testing Procedure: In subtitle B (p. 88) delete 12 month time limit for FDA to reform tar and nicotine testing procedure.

Document Disclosure: Documents categories (section 903(b) p.137-140) should be broadened. (See attachment 5 for proposed list.) All manufacturers, not just participating manufacturers, should be included. Section 903(c) (p. 140) regarding future documents should be deleted. Section 909(a) regarding FDA access to trade secret documents should be deleted (p 151 line10 through p. 152 ln7) because it duplicates section 908(f).

Federal Licensing of Tobacco Product Distribution: The activities in section 1121 (p.261-263) should be conducted by the Secretary of the Treasury, not HHS.

Miscellaneous: See attachment 6.

Attachment 1

any State, for any failure to pass through the amount described in the subsection.

SEC. 403. ADJUSTMENTS.

(a) IN GENERAL.—The applicable base amount for a given calendar year shall be adjusted as follows in the determining the annual payment for that year: Beginning in Year 6 and for each subsequent year,

(1) INFLATION.—The applicable base amount shall be increased by the greater of 3 percent or an increase in the Consumer Price Index for all urban consumers for the prior year. ~~The annual base amount payment for year 1 shall be increased pursuant to this paragraph.~~

(2) VOLUME ADJUSTMENTS.—Commencing in 2005, the applicable base amount shall be adjusted for changes in volume of domestic sales by multiplying the applicable base amount by the ratio of the actual volume to the base volume.

(b) CREDITS FOR TORT LIABILITY.—The applicable base amount for any year shall be reduced, after making the adjustments set forth in subsection (a)(1) and (a)(2), by 80 cents for each dollar paid by any participating manufacturer during the year for which the annual payment is being calculated on judgments or settlements entered in civil actions to which section 708 applies.

Title II

Subtitle B Section 211 Page 54

Page 54, line 12: Remove the word "monthly". Sentence should start: "Conduct random..."

Page 56, line 8 through line 18. Delete the entire sentence " Inspections conducted under...a probability sample of outlets". Insert the sentence: "Inspections conducted under this paragraph must be in sufficient number as to provide a representative probability sample of a range of outlets (not preselected on the basis of prior violations) in the state in order to measure the overall level of compliance."

Page 56, line 23. Remove "monthly", insert "annually"

Page 56, lines 24 and 25. Delete line 24 and line 25 up to "Ex-" Insert on line 24 "...of a sufficient number of outlets using a representative probability sample in order to measure the level of compliance on each reservation."

Page 57, line 7. Insert "... and vending machines." after "...over-the-counter."

Page 57, line 20. Change "...fifth and sixth..." to "...fourth and fifth..."

Page 58, line 13. Change "...20 percent..." to "...40 percent..."

Attachment 3

Section 235, state retail licensing program. As drafted, this could be inconsistent with FDA regulatory efforts. In addition, the parameters of the requirements should be modified. Suggest replacing 235(a)(2)(A) with the following language—

"(2) STATE AGREEMENT REQUIRED—In order to receive a block grant under this section, a State shall have in place a program that meets or exceeds (as determined by the Secretary the requirements of the Model State Program Described in paragraph (3)."

Delete (B) and (C), and replace with the following—

"(3) MODEL PROGRAM.--Not later than 12 months after the date of enactment of this subchapter, the Secretary shall promulgate a model State program. Such model State program shall at a minimum—

"(A) provide for the collection of licensing fees by the State or locality to defray the costs of administering the program;

"(B) prohibit retailers from selling or otherwise distributing tobacco products directly to consumers in a State unless such retailers have in effect tobacco licenses issued or renewed in accordance with State or local laws;

"(C) provide for the notification of every person in the State who is engaged in the distribution at retail of tobacco products of the license requirement and of the date by which such person shall have obtained a license in order to continue to distribute such products;

"(D) prohibit licensed retailers from selling or otherwise distributing tobacco products to minors, consistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register);

"(E) provide for penalties of up to $50,000 for each violation of the requirements under such program relating to the sale or distribution of tobacco products without a license and for appropriate penalties for other violations of laws relating to youth access to tobacco products;

"(F) require retailers to comply with the applicable requirements of this section and any regulations relating to this section;

"(G) provide for the suspension or revocation of a license in the case of a retailer that repeatedly sells or distributes tobacco products to individuals in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), or otherwise in violation of State or local law; and

"(H) provide for penalties that are consistent with the following:

"(i) RETAILERS.--In the case of a retailer who distributes a tobacco product to a minor in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), the regulations shall provide for notice of wrongdoing for the first violation, followed by the application of a civil money penalty of at least—

"(I) $250 for the 2nd violation;

"(II) $1,500 for the 3rd violation;

"(III) $5,000 for the 4th violation; and

"(IV) $10,000 for the 5th violation.

This penalty level matches FDA's.

"(ii) EMPLOYEES OF RETAILERS.--In the case of an employee of a retailer who distributes a tobacco product to a minor in a manner inconsistent with the age restrictions promulgated by the Secretary on August 28, 1996 (Vol. 61, No. 168, Federal Register), the regulations may provide for the application of a civil money penalty of—

"(I) $25 for the 1st violation;

"(II) $50 for the 2nd violation; and

"(III) $150 for the 3rd and subsequent violations.

"(iii) MINORS.—In the case of a minor who purchases or attempts to purchase

a tobacco product (other than a minor engaged in an authorized sting or a law enforcement operation), the regulations shall permit the States to impose civil money penalties, loss of driving privileges, or other penalties.

Subsection (c), lines 7-8: replace "Federal program of license requirements, enforcement measures, and penalties" with "Federal retail licensing program."

Attachment 4

Title III, Tobacco Product Warning and Smoke Constituent Disclosures

1. FCLAA Section 4(b)(3), Insert the bold words into the second sentence, "The text of any such label statements or disclosures **under this section** shall be required to appear only within the 20 percent area of cigarette advertisements provided by paragraph (2) of this subsection."

   [The problem with the draft is that it restricts all disclosures in advertising to 20 percent of the ad. The section refers not only the mandated health warnings but also to tar and nicotine disclosures and any "other disclosures required" under the Act. This is too restrictive. It will reduces the size of the mandated health warning every time FDA adds any required labeling disclosure and restricts the size of any required FDA disclosures to a preset amount of the ad.]

2. It may be appropriate to repeal both the FCLAA and the Smokeless Act. This section is written as amendments to the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Comprehensive Smokeless Tobacco Health Education Act (Smokeless Act). Therefore, those Acts stay in effect. Since the Acts were written at different times, they provide different rules for each industry. Those differences are continued and continue to favor the cigarette industry (e.g. states are preempted from passing restrictions on advertising and providing certain tort relief against cigarette manufacturers, but not against smokeless companies.). Further, because responsibilities are being shifted to FDA, these provisions would be more appropriately located in the FDCA (with appropriate misbranding and prohibited act sections in the FDCA also added).

   If FCLAA and the Smokeless Act are repealed (as they are in some other bills) and these provisions are shifted to the FDCA, would need to be sure the electronic media advertising bans in these two statutes is included in legislation (15 USC 1335 and 15 USC 4402(f)). In addition, it may be appropriate to include the requirements for annual FTC reporting to Congress on industry advertising practices (15 USC 1337(b) and 15 USC 4407(b)).

3. In section 305, tar and nicotine, new (4)(C), in the second sentence, add the bold words: "Any such disclosure may be required if the Secretary determined that disclosure would be of benefit to the public health, or otherwise would increase consumer awareness of the health consequences of the use of tobacco products, except that, **unless otherwise required by FDCA**, no such prescribed disclosure shall be required on the face . . . ."

   [Concern here is that it could be read to limit FDA authority]

4. Subtitle B, section 311(a), regulation requirement—12 months is not adequate time to promulgate regulations for testing, reporting, and disclosure or smoke constituents. Should allow 2 years to issue proposed regulations.

Attachment 5

(1) DOCUMENT CATAGORIES. — Within __ days after the enactment of this Act, each manufacturer of a tobacco product shall submit to the Depository every existing document (including any document subject to a claim of attorney-client privilege, attorney work product, or trade secret protection) in the manufacturer's possession, custody, or control —

(A) relating, referring, or pertaining to —

(i) any studies, research, or analysis of any possible health or pharmocological effects in humans or animals, including addiction, associated with the use of tobacco products or components of tobacco products;

(ii) the engineering, manipulation or control of nicotine in tobacco products;

(iii) the sale or marketing of tobacco products;

(iv) any research involving safer or less hazardous tobacco products;

(v) studies of tobacco use by minors;

(vi) the relationship between advertising or promotion and the use of tobacco products;

(B) produced, or ordered to be produced, by the tobacco product manufacturer in any health-related civil or criminal proceeding, judicial or administrative; or

(C) that the National Tobacco Documents Review Board, as described in subsection (c) below, determines is appropriate for submission to the Depository.

Attachment 6

Technical Amendments

P. 9, subsection (18) -- Insert "each year" after "60,000 early deaths"

P. 25, subsection (25) -- Change "sales to" to "use by"

P. 14, subsection (9) -- Remove the word "all" both times that it appears

P. 33, subsection (E) -- Insert at the end "and implementing regulations"

P. 72, subsection (a) -- Remove "or his or her delegate" after "the Center for Disease Control"; this should cure any issue related to the Appointments power

p. 127, subsection (e) -- this appears duplicative of the provisions on p. 72

p. 146, subsection (c) -- Rewrite -- "The Board shall apply the attorney-client privilege, the attorney work-product doctrine, and trade secret protection in a manner consistent with federal law."

p. 147, Section 902(a) -- Insert "aggrieved" between "Any" and "person"

Tobacco - settlement -
~~McCain~~
new legislation -
McCain bill

Comments on S.1415, "Universal Tobacco Settlement Act"

This memorandum describes Senator McCain's tobacco bill, S. 1415, title by title. It also summarizes the agency arguments against S. 1415 provisions and the reasons for suggested changes.

Section 1. Short Title; Table of Contents

The table of contents will need to be updated to reflect the edits throughout the bill.

Section 2. Findings

DoJ and FDA recommend substantial edits to the Congressional findings to better support FDA's rule. Strengthening the findings will reinforce the government's position in court. The current findings are deficient in two primary ways. First, Congress should make the findings itself, not merely cite the conclusions of other entities (e.g., FDA has found that youth tobacco use is a problem; the medical community has found tobacco use causes disease). Second, Congress should beef-up significantly the findings on advertising issues. FDA has provided 11 additional advertising-related findings to be put in the bill.

Section 3. Purposes

DoJ and FDA recommend rewriting most of the expressed "purposes" of the bill to reflect the administration's goals and objectives for comprehensive tobacco legislation. The purposes currently reflect the June 20th proposed settlement.

Title I - Regulation of the Tobacco Industry

This title, and its six subtitles, propose a new statutory framework for the regulation of tobacco products and the tobacco industry. The title would restrict advertising and marketing, packaging and labeling, and access to tobacco products; establish a state licensing scheme for the sale of tobacco products; regulate tobacco product development and manufacturing; and reform how the tobacco industry is able to interact with elected and appointed government.

FDA and DoJ prefer to strike the five subtitles that would regulate advertising, access, packaging, the product, and the industry, and insert instead language reaffirming FDA's jurisdiction over tobacco products and FDA's tobacco rule. This approach would provide FDA the flexibility that it believes is essential to meet the youth smoking goals. FDA, DoJ, and Treasury recommend striking the sixth subtitle on licensing and replacing it with their proposal to establish a federal registration system for retailers, distributors, wholesalers, importers, and manufacturers that would address smuggling concerns and bolster FDA's enforcement of its rule.

DoJ and FDA have provided extensive line edits in case we must amend rather than strike and replace the five subtitles governing advertising, access, packaging, the product, and the industry.

The key issues include: 1) Constitutional concerns raised by advertising restrictions that go beyond the FDA rule and new restrictions on how industry and government interact; 2) whether tobacco products should be regulated by the drug and device sections of the Federal Food, Drug, and Cosmetic Act (FFDCA) (our preference) or should a new regulatory scheme for tobacco be added as a new FFDCA title (Jeffords bill) or should there be a varient of these two approaches (McCain and Conrad bills); 3) whether a new title replicates the effectiveness and flexibility of the FDA rule; and 4) enforcement of a new FFDCA title.

Title II - Reduction in Underage Tobacco Use

This title establishes lookback penalties. Treasury, HHS, and OMB recommend replacing this title with their stronger package of lookback penalties.

Title III - Standards to Reduce Involuntary Exposure to Tobacco Smoke

S. 1415 includes a fairly strong proposal to limit exposure to environmental tobacco smoke, although it would exempt bars, restaurants (except fast food restaurants), casinos, private clubs, hotel guest rooms, bingo parlors, tobacco merchants, and prisons. It otherwise covers all public facilities, which are defined as any building regularly entered by 10 or more individuals at least once a week, including buildings owned or leased by federal, state, or local government. In contrast, OSHA's pending ETS rule covers only non-governmental workplaces. The bill also provides for citizen suits to help enforce ETS restrictions and does not preempt federal, state, or local ETS laws (stronger or weaker).

OSHA, HHS, and DoJ have proposed line edits and raised some issues that still need to be resolved. The key issue is what, if any, portion of the hospitality industry should be covered by ETS restrictions. OSHA favors the broad exemption included in S. 1415 based on the vigorous opposition it received to its rule from the hospitality industry. HHS is arguing for narrow or no exemptions based on public health risks (e.g., bar employees have among the highest workplace exposures). We are meeting next week.

Title IV - Public Health and Other Programs

Title IV establishes a number of public health spending programs. It would create a public health trust fund to be administered by the HHS Secretary and overseen by the Secretary and the FDA Commissioner. States would receive block grants from this fund that would: 1) reimburse states for tobacco-related Medicaid costs; 2) reimburse states for other tobacco-related health costs; 3) provide health coverage for uninsured children; 4) establish a state tobacco products liability judgment and settlement fund; 5) reimburse states for setting up and running a tobacco licensing system; and 6) carry out other activities the state chooses.

Title IV also establishes a: 1) National Smoking Cessation Program; 2) National Reduction in Tobacco Usage Program; 3) National Tobacco-Free Public Education Program; 4) National Event Sponsorship Program; 5) National Community Action Program; and National Cessation Research Program.

HHS and OMB are reviewing the new spending prorgams.

Title V - Consent Decrees, Non-Participating Manufacturers, and State Enforcement

This title establishes far-reaching consent decrees between the tobacco industry and government for enforcing a wide variety of the restrictions proposed throughout the legislation, including, for example, limits on advertising, access, trade associations and lobbying, and document and ingredient disclosure. In order to receive federal payments, states must enter into consent decrees. Similarly, in order to receive protection from liability tobacco manufacturers and distributors must enter into consent decrees. This title also contains the "national protocol" and deals harshly with tobacco manufacturers who elect not to enter into the consent decrees (e.g., such manufacturers must pay user fees and are not eligible for the liability protections in Title VI).

DoJ has raised a number of serious concerns about this title. Currently, OLC cannot see a way to clear the Constitutional hurdles the title raises. DoJ is continuing to study the matter.

Title VI - Provisions Relating to Tobacco-Related Civil Actions

This title spells out the legal immunity provided the tobacco industry under this legislation.

Title VII - Public Disclosure of Health Research

Title VII establishes a National Tobacco Document Depository and provides for its operation. In order to receive the legal immunity in Title VI the tobacco industry must establish and maintain this depository, and must deposit certain specified documents. A Dispute Resolution Panel of Article III judges is established to resolve all disputes involving claims of attorney-client, work product, or trade secret privilege.

DoJ and FDA have determined that the proposal for document disclosure in Title VII is deficient in a number of important ways and have proposed a substitute provision. Under the substitute, a depository and a national documents review board would be established. But unlike Title VII the board would operate parallel to rather than replace existing document discovery procedures in courtrooms across the country. Consistent with FDA's current authority over drugs and devices, FDA would have access to all trade secret material.

Title VIII - Assistance to Tobacco Growers and Communities

Title VIII incorporates Senator Ford's proposal to help tobacco farmers and their communities. USDA reports that representatives of flue-cured and burley tobacco are continuing to develop a legislative proposal based on Title VIII and legislation proposed by Senator Robb. Senator Ford's staff planned to meet with growers on March 16th to complete work on the specifications for a unified growers proposal. New bill language should be available within a week of an agreement.

Title IX - Effective Dates and Other Provisions

Title IX establishes effective dates for all of the provisions contained in S. 1415, provides for the applicability of S. 1415 to Indian tribes, and preserves the right of State and local governments to impose additional tobacco control measures.

FDA finds the effective dates to be generally acceptable, but needs to review them more carefully. FDA also recommends that the preemption section be written more clearly and enable states to impose measures equal to as well as in addition to the requirements in S. 1415.

why?