

**HEALTH
SCIENCE
ANALYSIS
PROJECT**

Policy Analysis No. 13

**ADVERTISING REGULATION
IN TOBACCO PREVENTION AND CONTROL**

By

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and

Gerald J. Thain, J.D., University of Wisconsin Law School

May, 1998

With a comment by

Donald W. Garner, J.D., Southern Illinois University School of Law

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EXECUTIVE SUMMARY

The paper addresses the constitutionality of federal government efforts to restrict tobacco advertising and outlines suggestions for crafting federal legislation based on *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*. In that landmark decision, the U.S. Supreme Court outlined criteria for judging when and if various forms of commercial speech merit First Amendment protection. Tobacco advertising to youth does not qualify for First Amendment protection because it fails to meet the requirements of *Central Hudson*. The illegality of underage tobacco use provides Congress with a compelling reason to restrict advertising of tobacco products through comprehensive tobacco legislation.

Regulation of tobacco advertising can be implemented through regulation, legislation and/or consent decrees. The paper supports the efficacy and constitutionality of the Food and Drug Administration (FDA) advertising regulations as well as the additional advertising and promotion restrictions in the Tobacco Settlement Agreement between the state Attorneys General and the tobacco industry representatives. Stress is placed on the importance of placing any restrictive language in statutory provisions rather than consent decrees to insure swift and certain action if provisions are violated. Congress should provide both the FDA and the Federal Trade Commission (FTC) with concurrent authority to exercise oversight regarding tobacco

product marketing that is similar to the rules and regulations that are used for other drugs and drug-delivery devices.

Federal legislation should not preempt local governments. Advertising restrictions in federal law should serve as a "floor" rather than as a "ceiling," allowing localities to enact and enforce additional restrictions on tobacco advertising and marketing as long as those restrictions are legal and meet the test of constitutionality.

While the authors believe reasonable restrictions on tobacco advertising and promotions are constitutional, a caution is raised that there may still be legal challenges on free speech grounds, particularly from advertising and tobacco-related entities that were not part of the Tobacco Settlement negotiations. Suits may be filed asserting First Amendment rights even if the tobacco companies voluntarily agree to forgo certain forms of advertising and promotion through a consent decree process. However, given the federal government's substantial interest in limiting tobacco advertising that reaches youth as detailed in *Central Hudson*, it is likely that the constitutionality of the proposed restrictions will be upheld by the courts.

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INTRODUCTION

This paper looks at advertising issues in the context of legislation for comprehensive tobacco control. It specifically addresses issues included in bills that have been introduced in the United States Senate as a response to the Tobacco Settlement Agreement between the tobacco companies and the state Attorneys General as well as issues that are likely to be included in other bills yet to be introduced.

The scientific basis for restrictions on advertising and promotions as a way to impact tobacco use draws on a number of different disciplines – health education, medicine, psychology, marketing, communications, and law. Each of these disciplines uses its own yardstick to measure the effectiveness of various advertising and promotion interventions on behavior and/or product sales. Within the health community, a fairly strong case has been made that advertising influences the use of tobacco, especially by children and teenagers. An even stronger case has been made for the effectiveness of counter-advertising in reaching youth with health messages on the importance of remaining tobacco-free and in advertising that exposes the efforts of the tobacco industry to lure youth into tobacco use before they are old enough to make adult decisions.

The 1994 Surgeon General's Report entitled *Preventing Tobacco Use Among Young People* devoted Chapter 5 to a detailed discussion of "The Role of Advertising and Promotion in the Marketing of Tobacco Products." That Report cited studies that identified the fear of losing advertising as an

inhibiting factor in the coverage of the health risks of smoking.ⁱ According to the 1994 Report, diverse sources credited cigarette advertising for expanding sales and accelerating market-broadening social trends, such as smoking among women.

With respect to the impact of tobacco advertising on youth, the Report focused on the effectiveness of image advertising, especially through the use of human models and cartoon characters. The authors found that cigarette advertising "... appears to affect young people's perceptions of the pervasiveness, image and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risks of smoking."ⁱⁱ

Despite the disclaimers of those in the tobacco industry who insist otherwise, there is considerable data that says tobacco advertising is quite effective in generating tobacco sales, particularly among young people. As Richard Pollay noted in a 1997 article on the impact of tobacco advertising, "Given the many various analyses and diversity of evidence, it seems an inescapable conclusion that cigarette advertising plays a meaningful role in influencing the perceptions, attitudes and smoking behavior of youth."ⁱⁱⁱ

For 1993, the most recent year for which complete figures are available, total cigarette-industry advertising and promotional spending in the United States was more than \$6 billion, with additional spending for other tobacco products such as cigars, spit tobacco and pipe tobacco, according to the FTC. With tobacco (as with other consumer products),

there is usually a correlation between the amount of money spent on advertising and the purchases of the products that are advertised.

Tobacco companies insist that their primary reason for advertising cigarettes, cigars, pipe tobacco and spit tobacco is to keep and build their consumer base by confirming people who are already smokers in their brand loyalty and by encouraging smokers to switch brands. In fact, there is exceptionally strong brand loyalty among smokers. The small numbers of smokers who do switch from one brand to another are far more likely to switch from one brand of the same company to another brand of that company than to a brand of a competing company.^{iv}

It is far more likely that the tobacco companies advertise their products to the public for three other reasons:

- to create an environment in which smoking is normal and usual and tobacco products are not necessarily harmful or unhealthy;
- to continually remind smokers and other tobacco users of the “pleasures” of tobacco, making it far more difficult for them to quit; and
- to bring in new smokers by enticing them with images that portray tobacco use as sexy, sophisticated, manly (or womanly), and decidedly adult.

The fact that young people, despite limitations in their available finances, smoke the most advertised (and most expensive) brands is testimony to the effectiveness of tobacco advertising to young audiences. The increase in women’s smoking rates after the introduction of massive advertising for women’s cigarette brands shows a clear cause and effect, as does the abrupt drop in sales of Camel cigarettes after the company pulled its Joe Camel advertising campaign in the third quarter of 1996.^v

According to a recent study published in the

Journal of the American Medical Association, advertising is more influential than either parents or peers in determining whether a child will smoke or not -- even though young people often do not recognize the sway of advertisements over them and are more likely to cite peers as their strongest influence.^{vi} The clear health risks that have emerged as a direct result of the impact of tobacco marketing on children and youth and the subsequent costs associated with the increases in tobacco users that will be paid by the federal government provide compelling reasons for Congress to act to limit tobacco advertising and marketing with the constitutional guidelines that have been established by the courts.

HISTORY OF TOBACCO ADVERTISING

Advertising is important to many industries, but it has been the lifeblood of cigarettes, cigars and spit tobacco. Indeed, the dramatic growth of the advertising industry in the United States over this century has closely paralleled the growth of the tobacco industry. The repositioning of Marlboro from a woman’s cigarette to the “macho” cigarette is one of the advertising industry’s major success stories.^{vii} The Marlboro Cowboy, 44 years after its introduction by the Philip Morris Company, is still one of the most recognized advertising images in the world.

In 1988, the R.J. Reynolds Tobacco Company took a similar action. Reynolds repositioned Camels which was one of its oldest brands and had come to be viewed as cigarette brand that was smoked by old men. With the introduction of new formulations and a dynamic, new advertising image — the cartoon icon “Smooth Joe” Camel a.k.a. “Old Joe” — the brand gained a new market, teenagers and preteens.

When Philip Morris introduced

Virginia Slims in 1968, it was as pivotal an image-making event as when Edward L. Bernays (known as the “father of public relations”) convinced suffragettes in the early part of this century to carry lit cigarettes in parades as symbolic “torches of freedom,” signifying the importance of women’s rights. Through the creative use of advertising symbols, backed with a huge advertising budget, a market was built for women’s cigarette brands and legitimacy was provided for smoking by women using liberation themes.

Not all advertising efforts have been successful for U.S. tobacco companies. Reynold’s attempt to mimic Philip Morris’ successful “women-only” brand with a heavily advertised “Black-only” brand called Uptown, was thwarted by community opposition. But two smaller companies — Brown & Williamson and J.P. Lorillard continue to reach out to African-American tobacco consumers with targeted advertising. These companies focus on their menthol brands — Kool and Newport — and provide an array of promotional tie-ins like jazz festivals and achievement awards designed for the Black community.

The tobacco industry’s awareness of the importance of advertising was shown by the speed with which it embraced a brand-new advertising medium — television — which began to emerge in the late 1940s. Cigarette companies were among the first to advertise heavily on this new medium. In 1950, “Your Hit Parade” sponsored by Lucky Strike, became one of the first hits on television, followed by shows like “I Love Lucy,” sponsored by Philip Morris. By 1970, cigarette advertising constituted more than 10 percent of all commercials on network broadcasting at an average frequency of two per hour.

COMPARISON OF ADVERTISING PROVISIONS IN TOBACCO LEGISLATION

The issue of advertising restrictions in comprehensive tobacco legislation has tended to be an adjunct to broader discussions about immunity/limited liability and designation of regulatory powers over tobacco to the FDA. For example, in response to the introduction of S.1638, the major tobacco companies issued a statement which said, “many of the advertising and marketing restrictions . . . contained in the resolution would be unconstitutional.” In response, Senator Conrad, the bill’s sponsor, said that he was willing to forgo advertising concessions from tobacco companies and take his chances with the courts. Concerns have been voiced by some public health advocates that if the Federal Trade Commission (FTC) retains any of its current authority over tobacco advertising, then Food and Drug Administration (FDA) authority over tobacco would be diluted and that FTC lacks the broad scientific expertise to regulate tobacco effectively.

The differing weight that is given to advertising in the various bills before Congress is not unusual or unanticipated. In tobacco control, issues of youth access to tobacco, higher taxation of tobacco products and cessation policies and practices have been frequently given far more importance than advertising regulation in terms of action steps — especially with respect to federal legislation. This has occurred even though advertising images like Joe Camel and the Marlboro Man have attracted a lot of negative media attention for the tobacco industry.

The clearest indication of the ambivalence of many tobacco control advocates regarding advertising restrictions was demonstrated in 1997 by the decision of the advisory committee of tobacco control

experts and activists convened by Drs. Koop and Kessler not to endorse the broad advertising restrictions in the settlement proposed by the tobacco industry and state Attorneys General on June 20, 1997. Instead, the advisory committee report opposed only the "marketing, promotion, and advertising of all tobacco products directed at persons under age 18." In contrast to the proposed tobacco settlement, no action steps were included in the Koop-Kessler report that would assist in meeting that goal beyond support of the advertising regulations put forth by the FDA and there was no specific condemnation of target marketing of tobacco products directed toward people of color or women.^{viii}

Most of the bills that have been introduced place tobacco advertising issue in its own separate subtitles. By contrast, S.1492 does not delineate tobacco advertising issues separately but assigns the responsibility to the FDA, which has issued regulations that are currently being litigated in federal court. S.1638 addresses advertising and promotion in a series of "Agreements" in the chapter entitled "Terms and Conditions." S.1648 legislates advertising restrictions directly while S.1648 handles advertising restrictions through a series of consent decrees, but without the extent of liability protections that provided the trade off in the June 20th proposed settlement negotiated by the Attorneys General.

In the view of some tobacco control advocates, the look-back provisions serve as a fail-safe, which can be used to justify stricter advertising and marketing controls in the future if rates of tobacco use by youth do not fall to specified levels. This approach is used to justify bills that contain restrictions on tobacco advertising and promotions that are not as extensive as those proposed in the June 20th proposed settlement. However, the importance of maintaining free speech as a constitutional right serves as a check on how far tobacco advertising can be regulated by

governmental entities without infringing on the prerogatives of adults. While the failure of advertising restrictions to bring down youth rates significantly could be used to bolster efforts to strengthen advertising restrictions, it is just as likely that failure of those restrictions to bring about change could be viewed as sufficient reason to look at factors other than advertising to achieve the desired end.

GOVERNMENT REGULATION OF TOBACCO ADVERTISING

Tobacco products have been among the least regulated products in the United States and that lack of regulation has extended to advertising. Most of the federal restrictions on tobacco advertising that did apply, such as the inclusion of warning messages on print advertisements in 1965 and the elimination of tobacco advertising from broadcast media in 1971, were negotiated with the support of the tobacco industry in return for other concessions — notably, the preemption of state and local governments from instituting more stringent advertising restrictions.

In the United States, advertisements for most consumer products are regulated in some way, generally by the Federal Trade Commission (FTC) and/or the FDA. These regulations cover what messages can be communicated through advertising vehicles, the types of health and safety claims that can be made, and related items. Historically, the Federal Trade Commission has been the agency with primary authority over marketing misconduct of business in general. The FDA has had specific medical and scientific marketing authority over pharmaceuticals, medical devices, biologics, food, veterinary medicines and cosmetics. In the case of the tobacco industry, the position of the FDA from 1906 to 1996 was that tobacco products did not fall under their jurisdiction.^{ix} This left

the field of federal regulation of tobacco advertising regulation to the FTC.

With respect to advertising regulations concerning most foods, drugs and similar products, the FTC and the FDA work cooperatively, using regulations and guidelines that are detailed in the two-volume *FDA Advertising and Promotion Manual*.^x For cigarettes and smokeless tobacco, the most logical division would be to replicate this division of labor, allowing the FTC to maintain its traditional authority over general deceptive or unfair advertising and promotional practices and allowing the FDA to exercise authority over issues that relate to its role as the agency with the scientific and medical expertise to evaluate and control the marketing of new or substantially altered products.^{xi}

Currently, through its Division of Advertising Practices, the FTC has jurisdiction to enforce laws that protect consumers from false, deceptive and unsubstantiated advertising with respect to many products, including tobacco products. The FTC law enforcement activities that are pertinent here cover:

- Review of tobacco and alcohol advertising, including monitoring for unfair practices or deceptive claims, and reporting to Congress on cigarette and smokeless tobacco labeling, advertising, and promotion;
- Advertising claims for food and over-the-counter drugs, particularly those relating to nutritional or health benefits of foods and safety and effectiveness of drugs or medical devices;
- General advertising at the national and regional level, particularly advertising making objective claims that are difficult for consumers to evaluate.

The Cigarette Act and the Smokeless

Tobacco Act require manufacturers and importers to submit a packaging and advertising plan for FTC approval for each brand of cigarette or smokeless product, whether manufactured in the United States or imported here. The law requires that a health warning appear in a conspicuous location in tobacco advertising. Both laws require the FTC to report to Congress — annually for cigarettes and every two years from smokeless tobacco products.

Amendments to the Federal Cigarette Labeling and Advertising Act in 1971 and 1973 banned cigarette and little cigar advertising from broadcast media and the Comprehensive Smokeless Tobacco Health Education Act of 1986 extended that broadcast advertising ban to smokeless tobacco. While the FTC's authority over advertising has been clarified through various legislative acts, the scope of FDA's authority over advertising matters has not been decided.

Over the years, tobacco has marched to its own drummer with respect to advertising regulation. As noted, it has not been under the jurisdiction of the FDA at all and has had limited oversight by the FTC. In the absence of strict regulation over tobacco marketing by government agencies, the tobacco industry has been governed largely by its own set of advertising guidelines, which were not necessarily followed. The strictly voluntary guidelines included items like not using models who appeared to be less than 25 years of age in cigarette advertising and restricting tobacco advertising on billboards to distances that were a minimum of 500 feet from schools and playgrounds.

It was the public position of the tobacco companies, until the negotiation of the June 20th proposed settlement, that such voluntary agreements were sufficient and that there was no need for additional governmental oversight. This is not a universally held view among advertising professionals, however. The National Advertising Review Council has

said that it is not feasible for the tobacco industry to try to regulate itself and a survey of advertising executives by the Initiative on Tobacco Marketing to Children found that 60 percent of advertising executive do not believe that the tobacco industry is able to effectively enforce voluntary guidelines over tobacco advertising

On April 25, 1997, Federal District Court Judge William Osteen upheld the FDA's assertion of jurisdiction over cigarettes and smokeless tobacco in *Coyne Beahm v. U.S. Food & Drug Administration*, 958 F. Supp. 1060 (M.D.N.C. 1997). However, in that ruling, Judge Osteen made note of "the court's finding that the FDA lacks authority under the FDCA [Food, Drugs and Cosmetics Act] to restrict the promotion and advertising of tobacco products."^{xii} His position was that the FDA's jurisdiction over certain forms of tobacco as combination products (the drug/device category to which it assigned cigarettes and smokeless tobacco) did not give the agency power to implement marketing regulations that Congress had specified in the FDCA for drugs, since in other areas the agency had opted to regulate tobacco under the device provisions only.^{xiii} That decision is currently on appeal.

If Congress or the courts permit the FDA to regulate tobacco as a drug – either independently or as a combination drug/device – the FDA can and should utilize its traditional regulatory tools with respect to drug advertising. However, until Congress acts to provide clarity or the *Coyne Beahm* decision is overturned, that is in abeyance since the FDA has been held to lack authority over advertising and marketing practices of the nature asserted in its regulations regarding tobacco.

The public health community has advocated strongly for the designation of the FDA as the regulatory agency for tobacco products. Although there is some logical satisfaction in having Congress designate a

single agency with basic power over the tobacco industry, there are clear benefits to a system of complementary, regulatory authority of the FDA and the FTC with respect to tobacco advertising. A major virtue of such an approach is that it would be more difficult for the industry to capture two separate agencies rather than one.

While some localities have attempted to place their own restrictions on tobacco advertising, many of those efforts have been preempted by the federal government based on language in the 1969 Cigarette Act which does not allow any other jurisdictions to regulate tobacco advertising and promotion based on health. That power was left to the sole discretion of the Congress. Because language in the June 20th proposed settlement is silent on the preemption issue, passage of legislation based on that Agreement should not affect action by states to limit or preclude avenues for tobacco advertising, for example local efforts to eliminate in-store tobacco signage. This is an important issue, since the tobacco industry has typically pushed for preemptive language in federal legislation on tobacco advertising and promotion.

The FTC, in its role as the nation's monitor of tobacco advertising, issues reports from time to time on items related to tobacco advertising – some as mandated by law, others in response to important public issues. On January 3, 1996, the FTC issued its comments with respect to the FDA regulations on tobacco advertising that were due to go into effect on August 28, 1997, but were challenged by the tobacco companies in federal district court.

In its comments on the FDA's regulations regarding tobacco, the FTC stated that it supported the FDA's goal of reducing tobacco use among children and adolescents and the proposed regulations that would impose appropriate advertising and promotion restrictions designed to reduce the appeal and use of these products by children and

adolescents. The FTC reviewed the June 20th proposed settlement but took no position on whether or not the agreement was in the public interest. The FTC staff report, titled "Competition and the Financial Impact of the Proposed Tobacco Industry Settlement," stated that a limited antitrust exemption similar to the one that was outlined in the proposed settlement "might be justified . . . in order to permit the companies to cooperate in limiting advertising and marketing so as to achieve the public health goals."

Although rare, actions have been taken against tobacco products for their advertising. In 1996, the FTC issued a complaint against R.J. Reynolds Tobacco Company for its Joe Camel campaign, seeking to eliminate the use of the cartoon character and to require that the tobacco company fund a program to educate youth to the health hazards of smoking. This complaint was issued even though two years earlier, FTC Commissioners had decided against such a complaint regarding Joe Camel. Reynolds responded by removing the Joe Camel campaign from the market.

The rarity of sanctions against tobacco companies creates a level of apprehension among many health advocates who are concerned that the industry will not be held accountable. It is important, therefore, that any statutory provisions restraining the advertising and marketing practices of tobacco companies contain language that insures swift and certain action if any of the provisions are violated.^{xiv} This will require that the agency or agencies charged with overseeing the advertising restrictions engage in continual monitoring of the advertising and marketing practices of the tobacco industry — not only to be alert for violations of practices prohibited by statute but to be vigilant regarding new practices that may be cause for concern.

The importance of the First Amendment issues related to tobacco advertising virtually requires that Congress, as

the elected voice of the people, provide the framework for any restrictions. Even though individual states have implemented advertising restrictions based on their own settlement arrangements with tobacco companies, those Attorneys General have continued to call for restrictions on tobacco advertising to youth that would be far-ranging and encompass the entire country. Delegating the authority to the rule-making processes of a federal agency such as the FTC and/or the FDA or to the individual states will not insulate those decisions from legal challenge or from political pressure. Despite the extensive rule-making process that the FDA undertook prior to releasing its tobacco regulations in 1996, the advertising portion did not take effect in August 1997 as originally planned, due to litigation.

The role of Congress should be to codify into law, at a minimum, the provisions related to advertising and marketing that are contained in the FDA regulations since those already have been narrowly crafted to meet Constitutional challenges. Those provisions should serve as a "floor" rather than a "ceiling," allowing state and local authorities to take regulatory actions in response to tobacco marketing practices as long as those local actions were constitutional. Congress also should provide the FDA and the FTC with sufficient latitude to make regulatory decisions regarding tobacco marketing the way that decisions are made regarding other drugs without being required to get Congressional approval.

COMMERCIAL FREE SPEECH

It is probably not accurate to say that the U.S. Supreme Court has a theory or doctrine of commercial speech. Rather, there are differing clusters of justices who gather around certain propositions to which they do

not necessarily adhere in subsequent cases.

Still, any evaluation of the constitutionality of a proposed advertising regulation or prohibition must consider the doctrine in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* 477 US 557 (1980) because language in that case is the mantra that the Supreme Court uses as a central reference on this issue. *Central Hudson* was decided in 1980. This was four years after the U.S. Supreme Court first determined in a Virginia case that there was some limited First Amendment protection for “pure” commercial speech — that is, speech with the sole purpose of urging purchase of a product, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

In *Central Hudson*, the Court set forth a four-prong criterion to determine whether or not commercial speech was entitled to that limited First Amendment protection.

- The speech must concern lawful activity and not be misleading.
- The asserted governmental interest must be substantial.
- The regulation must directly advance the asserted governmental interest.
- The regulation must not be more extensive than is necessary to serve that interest.

Tobacco advertising to children clearly fails to meet the first requirement of *Central Hudson*. Since it is illegal to sell cigarettes to minors, it cannot be said that there is any legitimate concern about total prohibition — let alone regulation — of messages which are specifically directed to youngsters.

The limited First Amendment Protection the U.S. Supreme Court has given to commercial speech over the last two decades is not extended to the advertising of illegal services or illegal products. Nor does it extend to false or misleading advertisements

for legal products. Consequently, if it can be demonstrated that cigarette advertising uses Joe Camel or other icons to illegally address messages to children, then no successful legal challenge can be raised to prohibition of that advertising under the First Amendment.

It has been the position of the tobacco companies for some time that they do not aim their advertising with Joe Camel or other similar kinds of artifacts to children. There are three major difficulties with the industry’s argument that would tend to indicate a direct effort toward including under age individuals as part of the target market for cigarette advertising:

First, recently-released internal documents from the cigarette companies clearly show that certain cigarette advertising messages and marketing campaigns have been developed to appeal to what often is euphemistically referred to in intra-company memoranda as “young smokers.” However some of these memos are more specific and refer to youth as young as 13 and 14 years old.^{xv}

Second, it would be clearly against the self-interest of the tobacco companies not to attempt to appeal to minors. The Center for Disease Control and Prevention (CDC) estimates that approximately 436,000 people die each year from health problems related to cigarette smoking and a more than a million more quit smoking cigarettes each year. A cigarette company looking at those figures knows it must replace those lost smokers in order to continue to survive as a company, let alone to continue to flourish.^{xvi}

Third, the data demonstrate a clear relationship between tobacco use by children and youth and tobacco products that are widely advertised with images that appeal to youth. Before the Smooth Joe Camel campaign in 1988, only ½ of 1 percent of the underage market was smoking Camel cigarettes. After the campaign had been in effect for three years, the underage market for

Camels was 13.3%.^{xvii}

It is clear that the tobacco companies have a strong incentive to direct their advertising messages toward children and youth — directly or indirectly — so as to encourage them. And it would follow that those advertisements would carry at least an implicit representation that smoking is appropriate for children and youth, contrary to the laws of all 50 states. Advertisements that appear to give legitimacy to underage smoking are misleading. They are probably unfair as well, under the Supreme Court's decision in *Federal Trade Commission v. Sperry & Hutchinson Co.* 405 US 233 (1972) regarding S & H Green Stamps.^{xviii}

In theory, showing that advertising does not satisfy the first prong of *Central Hudson* should be sufficient to demonstrate that such advertising does not fall within the constitutional definition of commercial free speech. However, courts have been reluctant to stop at that and generally have used all four prongs in making a determination.^{xix}

The second prong of *Central Hudson* asks if the asserted government interest is substantial. Approximately 25% of the adult U.S. population smokes cigarettes today and there has been an increase in recent years in smoking by underage youth. This increase has been closely correlated to the rise of advertising and marketing practices by tobacco companies that have reached substantial youth audiences. Estimates are that each day, 3,000 youths become regular smokers and one-third of that group will die as a result of a tobacco-related illness — most of them prematurely. The costs of tobacco-related illnesses are frequently borne by government-funded insurance programs. Since government has an overall responsibility in providing for the health of its citizens and tobacco is the largest single contributor to poor health in this country, this constitutes a substantial government interest.

The third prong asks if the regulation

in question directly advances the asserted governmental interest. The regulations that have been put forward in the FDA Regulations and the Agreement between the Attorneys General and representatives of tobacco companies were crafted specifically to address issues related to youth and smoking. Every effort was made to use language that would not be so encompassing that the regulations would significantly limit access by adults who legally are allowed to use tobacco. This is an important consideration. Even if there is a substantial interest in something which is otherwise unlawful, a regulation on advertising will not pass constitutional muster unless it is a direct and material advancement of the governmental interest asserted.

The prohibitions and restrictions in the June 20th proposed settlement and the FDA Regulations concerning advertising and similar legislative proposals, are entirely consistent with the Supreme Court's assumptions that advertising not only is intended to stimulate demand — at least in the aggregate, if not necessarily for a specific product — but further, that advertising generally is successful in that effort. Language in various cases indicates that the Court will give heavy weight to a restriction that is necessary in order to limit sales in a way that achieves the warranted objective, which in this case is elimination of underage tobacco use.

The fourth prong of the *Central Hudson* test asks whether the regulation is narrowly tailored to achieve the desired objective. This is the area that concerns not only those who manufacture and market tobacco products but others who are concerned about what they fear might be attempted with respect to restrictions on advertising and prohibitions of commercial speech for other products. The narrow tailoring requirement is clearly met since the restrictions proposed to date do not even go as far as the evidence against tobacco products would justify. There is no other product

which poses such a massive health threat nor one that has been advertised intentionally to minors -- an audience that cannot legally purchase the product. Such a record justifies the strictest possible action. Yet no proposal to date would impose more than limited restraints on the marketing of these products.

Some have expressed concern that the language in the FDA regulations, the proposed June 20th settlement and the legislation now before Congress may be stronger than necessary and, as a result, places unnecessary barriers on free speech. Those who take this stand generally interpret *Central Hudson* as requiring that the least restrictive alternative be used to reach the desired goal. On closer view, it appears that *Central Hudson* may actually allow more latitude than was thought by legal scholars when the ruling was first announced in 1980. Recent Supreme Court decisions have stated that it is only necessary to demonstrate that the alternative put forth is reasonable and not excessively restrictive and that other approaches will not necessarily be more successful.

It is also important to remember, when one looks at the constitutional doctrines of limited protection for commercial speech, that cigarettes are a unique product. The *sui generis* nature of such products was noted and discussed at length by the Federal Trade Commission in 1964, in its Statement of Basis and Purpose for its proposed rule requiring disclosure of health hazards in all cigarette advertising and labeling. At that time, cigarettes were deemed the *only* dangerous product which provided no utility (other than the pleasure a smoker might derive from it) to its user or to society and also the only product for which there is no recognized safe level of use. Thus, it is the position of the federal government that actions against the advertisement of tobacco products are not automatically exportable to other products, services and situations and so will not create a precedent for similar actions against

advertisements of other products that lack the *sui generis* aspect of tobacco products noted by the FTC more than 30 years ago.

There is a powerful message in the words of Supreme Court Justice Blackmun who said that he believed "free speech" would never protect child pornography or cigarette advertising, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J. concurring). Even within the advertising industry, there are many who believe that commercial free speech does not extend to tobacco in the same way as it extends to other, non-deadly products.^{xx} The forms of speech that are directed solely to adult audiences or that have literary, scientific or other kinds of merit are not at issue here. Instead, the advertising that is being curtailed represents the efforts of selling a product to a market in which purchase by the targeted audience is illegal.

In the past, the tobacco industry has voluntarily relinquished advertising rights for other concessions. In 1969, tobacco companies agreed to a federal ban on television and radio advertising. In return, anti-smoking public service advertisements that began airing when the FCC Fairness Doctrine (no longer in existence) was first applied to cigarette advertising two years earlier suddenly stopped. This was an early demonstration of the willingness of the tobacco industry to sign away many of their advertising options in return for various protections -- such as limited immunity and predictability in litigation -- is part of the political reality of the June 20th proposed settlement..

It certainly can be argued that through the consent decree process contained in the proposed settlement, tobacco companies can waive any rights they may have under the rubric of commercial speech. This was the thinking of the Attorneys General in insisting that consent decrees on advertising be included as part of the individual agreements that each state would make with the tobacco companies as part of any settlement of Medicaid suits.

However, non-tobacco companies or other tobacco-related entities that are not party to the agreements may still institute legal challenges based on First Amendment issues.

This provides strong rationale for the advertising restrictions to be placed in a statute rather than in consent decrees, since neither approach would provide insulation from a legal challenge by those outside the tobacco industry who would be affected by the restrictions. The industry's stated position is that its willingness to enter into consent decrees on this point represents a significant concession that justifies reduced liability or immunity from suits in return. However, this position simply does not withstand analysis. Another problem is that consent decrees would require constant policing to ensure enforcement by the courts. Our judicial system is designed primarily to issue decisions that decide disputes between parties. It is not structured to engage in continuing oversight of existing prohibitions or sanctions; that role historically has been the province of the administrative agencies. Since industry consent would not preclude legal challenges to the restrictions and would create difficulties in enforcement through the courts, there is no need for Congress to sidestep its standard means of operation – the passage of legislation.

MAGAZINES AND NEWSPAPERS

The impact of First Amendment issues related to tobacco advertising generally is seen as most intrusive with respect to government-imposed limitations on publications because such actions supposedly chill the rights of the nation's free press. Government entities have been reluctant to place restrictions on what newspapers and magazines can or cannot publish. The FDA was mindful of this tradition and specifically limited any restrictions on tobacco advertising to the impact on persons under age 18. The print

restrictions in its regulations on tobacco did not extend to publications as a whole.

If enacted, the FDA regulations would permit black-and-white text-only advertising in publications with significant youth readerships.^{xxi} The June 20th proposed settlement negotiated by the Attorneys General went even further and eliminated *all* tobacco advertising that used cartoon symbols and all tobacco advertising using people. This meant that, under the proposed settlement, images like Joe Camel and the Marlboro man would not be permitted in any publications. This was a concession agreed to by the tobacco companies in return for limited immunity. Of the tobacco bills that have been introduced in the United State Senate, S.1492 supports the narrower restrictions on newspaper advertising contained in the FDA Regulations, while S.1530 and S.1414 include the broader restrictions that are included in the proposed settlement.

Regardless of which approach is followed with respect to limiting tobacco advertising in publications, it is critical that the measure of what constitutes a publication with "significant youth readership" use the age of readers as the measurement tool rather than age of subscribers. While readership as a measure is less exact than subscriptions, it is more reflective of how many persons who are underage actually are exposed to the advertising contained in the various publications. Many publications that are oriented entirely to children and youth under age 18 have subscription percentages that are significantly adult because adults generally are the purchasers of magazine and newspaper subscriptions for their children. In many families, the readers of general market publications include large numbers of children, even though the actual subscriptions may be in the name of one of the parents.

BILLBOARDS AND OTHER OUT-OF-HOME MEDIA

There are two approaches to billboards in the current bills. Some follow the language of the June 20th proposed settlement in banning all tobacco billboards; others would enact into law the somewhat narrower restrictions contained in the FDA regulations.^{xxii} The FDA regulations would ban tobacco billboards within 1,000 feet of any school or playground. Since the goal of regulation is to limit the total amount of tobacco advertising on billboards and out-of-home locations that underage individuals view, a restriction of at least 1,000 feet will significantly reduce the number of billboards that can legally carry tobacco advertising.^{xxiii}

Many communities already have laws on the books that limit the placement of tobacco billboards and tobacco companies use a voluntary guideline of 500 feet. However, when community activists have gone out and measured distances, they have found many tobacco billboards in clear violation of either the city and county regulations for placement or the tobacco company's own rules. Furthermore, schools and playgrounds are not the only places where children spend large amounts of time. Day care centers, churches with children's programming, and community centers are also deserving of guidelines that would prevent them from having tobacco billboards near their premises.

Tobacco billboards have been a major issue in many urban communities because such advertising has tended to be far more extensive in low-income neighborhoods than in other neighborhoods — especially the smaller versions (called eight-sheets) that are on the sides of buildings. Also, tobacco advertising messages are frequently on public transit which is used by large numbers of low-income people, and especially children in major cities.

Recently, *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3rd 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997), a local Baltimore ordinance that restricted tobacco billboard advertising, twice survived appeal to the Federal courts.^{xxiv} In that ruling, it was held that limited First Amendment protection for commercial speech did not cover billboard advertisements for cigarettes because advertisements reached a large child audience. Because the locality was regulating the medium on which the advertisements appeared rather than the messages of the billboard, the court said that the state was on firm legal ground (and not preempted by federal legislation) in restricting the placement of billboards that carried alcohol and tobacco advertisements.^{xxv} Other communities have restricted tobacco advertising on publicly-owned property and transit systems.^{xxvi} The decision in *Penn Advertising* rejected the argument that the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) precludes bans of billboard advertising. (That case held that a prohibition of advertising of prices of alcoholic beverages to be violative of the First Amendment.) The emphasis on protection of minors in *Penn Advertising* differentiated that case from *44 Liquormart*.

An earlier Supreme Court decision, *Packer Corp. v. State of Utah*, 285 U.S. 106 (1932), which remains good law today, supports prohibitions on billboard advertising as constitutional. In that case, the Court upheld a ban by the state of Utah on all outdoor signs and most point of purchase advertising for tobacco products. The Court emphasized the impact of such messages on minors to whom sale of tobacco products was illegal. In the words of Justice Brandeis, "The young as well as the adults have the message of the billboard thrust upon them . . ." The state of Utah was not required to present evidence that billboards in fact induced children to smoke or to demonstrate that it

had tried other, less restrictive approaches to no avail (such as higher taxes or educational programs) before legislating the ban. It was sufficient that Utah had outlawed the sale of cigarettes to minors.

While the recent Baltimore victory in the Supreme Court has spurred other communities to ban tobacco billboards, each time a ban is enacted there are inevitable First Amendment challenges. Furthermore, any local or effort to ban print tobacco advertising that adheres to the federal guidelines established in the 1965 Federal Cigarette Labeling and Advertising Act (modified in 1984), the Cigarette Act of 1969 or the Comprehensive Smokeless Tobacco Health Education Act of 1986 is in violation of federal preemption if it attempts to restrict advertising based on health. As a result, the localities that have enacted legislation to restrict tobacco advertising have done so based on the ability of localities to limit advertising that encourages infractions of local and state laws — such as laws that prohibit youth access to tobacco products — rather than on health concerns.

In the past, the tobacco industry has established a voluntary code of standards that has set 500 feet as the closest that a tobacco billboard can be to a school. However, this rule has been largely ignored and is generally adhered to only when people in communities identify billboards that are in violation of the voluntary agreement and bring the violation to the attention of the outdoor advertising companies and/or the tobacco company whose product is being advertised. Some localities have also established regulations that limit the proximity of billboards to locations like schools, churches and playgrounds where youth are likely to congregate. Restricting the placement of billboard advertising to locations at specific distances from schools and playgrounds does not necessarily limit the accessibility of the advertising with respect to persons under age 18, since young people are

likely to see tobacco advertising in locations throughout their communities that are beyond the established limitations of 500 and 1,000 feet. What these restrictions do, however, is to limit overall the amount of tobacco billboard advertising, especially in urban communities where schools are likely to be on major thoroughfares rather than on isolated campuses as is the case in many rural and suburban communities.

The outdoor advertising industry has its own concerns with the unpredictability of tobacco advertising. Tobacco companies used billboards and other print media extensively in the decades before television and then moved much of their advertising to television from 1950 to 1969. Then, when the ban on television and radio advertising took effect, the tobacco companies moved back to billboards and became major advertisers in that medium. However, beginning in the late 1980s, tobacco companies began to switch larger percentages of their marketing expenditures away from print advertising (billboards, magazines and newspapers) and into promotional items, direct mail and couponing.

While outdoor advertising company owners are understandably unhappy about banning the use of their media for any product, the impact with respect to tobacco is not as great as it would have been five or ten years ago, since tobacco advertising now has a much smaller percentage of overall out-of-home advertising (including billboards) than was the case in the past. The issues relating to tobacco billboard advertising have less to do with actual revenue losses and more to do with the establishing of precedents that could be extended to other products. It is important, therefore, that any limitations on billboard advertising of tobacco are created with language that specifies why tobacco is being singled out for these restrictions to decrease the possibility of establishing precedents that could be more wide-ranging.

PROMOTIONAL ITEMS AND OTHER TOBACCO MARKETING

The ban of broadcast advertising led tobacco companies to seek other forms of marketing that did not fall under the traditional definition of advertising. For example, after tobacco commercials were banned officially from broadcast media in the United States, tobacco images continued to appear on television in many ways — as part of the Virginia Slims tennis tournaments and Winston racing cup events. These special events often were accompanied by items with tobacco logos. Over the past decade, tobacco marketers have released a stream of promotional logos of various cigarettes on all sorts of gear.

In recent years, tobacco companies have shifted funds to promotional materials while advertising in standard media — outdoor advertising and publications — has declined. Promotional items are particularly popular with young people and even when worn by adults, give a message of acceptability for tobacco. These include items that are giveaways or that are obtained in exchange for purchase of tobacco products. Cigarette companies have been able to use promotional items — which do not carry health warning labels — as a way to advertise their products. Bills currently under discussion would prohibit the use of tobacco logos and selling messages on non-tobacco products such as caps, T-shirts, jackets, backpacks, and CD carriers. Elimination of promotional items that advertise tobacco brands should be seen as an essential part of comprehensive legislation with respect to tobacco and youth.

While the FDA regulations ban promotional items, the Tobacco Settlement goes further:

- Prohibition of tobacco product advertising on the Internet unless such

advertising is totally inaccessible to or from the United States.

- Establishment of restrictions on point-of-sale advertising with a view toward minimizing the impact of such advertising on persons under age 18.
- Prohibition of direct and indirect payments for tobacco product placement in movies, television programs and video games.
- Prohibition of direct and indirect payments that glamorize tobacco use in media that appeals to minors, including recorded and live performances of music.

Some of these items, like prohibition of payments for product placement in movies, television programs and video games, have not been litigated and so the position of the courts with respect to their constitutionality has not been fully determined. However, in *Reno v. ACLU*, 117 S. Ct. 2329 (1997), the U.S. Supreme Court did strike down a statutory prohibition of all "indecent" material on the Internet on the grounds that there were less restrictive alternatives to achieve the announced goal of limiting access of youth to such material; therefore, the prohibition violated the First Amendment.

TARGET MARKETING TO WOMEN AND PEOPLE OF COLOR

For ethnic and racial minorities and women, the process of target marketing is generally accomplished through the use of visual images in advertising. Tobacco advertising that is oriented toward African Americans generally includes African Americans. Tobacco advertising that is oriented toward women frequently uses images of women. If the visual imagery in

advertising is removed entirely from all publications and out-of-home media, it will be difficult for the tobacco industry to continue its ethnic, racial and gender targeting toward vulnerable populations.

Millions of young people read minority-oriented magazines that are defined as adult under the FDA guidelines. In the Black community, for example, it is often difficult to determine actual readership levels since many of the measuring tools are based on standards that have not been validated with non-White audiences. The practical result of this is that none of the Black-oriented general market magazines meet the FDA's youth-readership standard of more than 15 percent and so magazines like *Ebony*, *Jet* and *Essence* would not see youth-oriented tobacco advertising. However, prohibition of cartoons and people in tobacco advertising would mandate text-only and black-and-white in all publications — even those that are classified as adult in their readership. This would prohibit the tobacco companies from targeting their tobacco advertising to Black audiences in billboards and magazine advertisements through the use of visual images.

Similarly, many women's magazines do not meet the youth-readership standard outlined in the FDA regulations but nonetheless count large numbers of teenage girls among their most avid readers. It is likely that preteen and teenage girls would continue to see tobacco advertisements in adult publications. Eliminating the images of women from tobacco advertising would decrease dramatically the amount of target advertising toward women — especially photographs of ultra-slim women in cigarette advertisements that send a message of slenderness, which is highly prized by many adolescent girls.

CONCLUSION

A strong case can be made that tobacco advertising and promotion do drive tobacco use, particularly among youth. This provides sufficient rationale for Congress to pass legislation and to institute rules and regulations with respect to tobacco advertising and marketing. Despite claims of commercial free speech, there is precedent indicating that some restriction of tobacco advertising and marketing is likely to meet the constitutional test established by *Central Hudson* and other relevant court decisions. The basis would be that certain tobacco advertising clearly targets children and youth who are not legally able to smoke cigarettes or cigars or use other forms of tobacco products.

Since it is reasonable to believe that whatever is passed by Congress with respect to tobacco advertising and promotion will face some sort of legal challenge, there is no reason to for legislators to craft weak marketing regulations or rely on consent decrees granted by the tobacco industry simply to avoid the prospect of litigation on First Amendment issues. Legislatively mandated restrictions on tobacco marketing, which can be shown to provide reasonable protection against unlawful activity and misleading advertising, are likely to be held constitutional by the federal courts. It is clear, therefore, that tobacco advertising restrictions, crafted as part of comprehensive tobacco legislation, are justified and necessary to address issues of "substantial government interest" — protection of children and public health.

END NOTES

¹Citations in the 1994 Surgeon General's Report included "Cigarette advertising and magazine coverage of the hazards of smoking: a statistical analysis" by K.E. Warner, L.M. Goldenhar and C.G. McLaughlin in the *New England Journal of*

Medicine (1992); "Women's Magazines' coverage of smoking related health hazards" by L. Kessler in *Journalism Quarterly* (1989) and "Buying Silence: self-censorship of smoking and health in national newsweeklies" by J.B. in *World Smoking and Health*, (1990).

ⁱⁱ*Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, US Department of Health and Human Services, Public Health Service, 1994, pg. 195.

ⁱⁱⁱ"Hacks, Flacks and Counter-Attacks," by Richard Pollay, *Journal of Social Issues*, Volume 53, #1 (1997), pp. 53-74.

^{iv}According to an internal marketing document from the R.J. Reynolds Tobacco Company that was recently released through court order, "the brand loyalty of 18-year-old smokers far outweighs any tendency to switch with age."

^vSix weeks after R.J. Reynolds Tobacco Co. halted its Camel advertising campaign featuring old Joe, the brand's volume fell flat. (*Advertising Age*, February 2, 1998, pg. 8.)

^{vi}A new study, published in the February 18, 1998 edition of *The Journal of the American Medical Association (JAMA)*, found that tobacco industry advertising and promotional activities influence teens to start smoking and that 34 percent of teen smoking could be attributed to tobacco promotional activities.

^{vii}*Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health and the Unabashed Triumph of Philip Morris* by Richard Kluger, Alfred A. Knopf, Inc., New York, NY, pp. 292-97.

^{viii}The strongest voices in favor of vigorous legal action to reign in tobacco advertising have tended to come from groups that focus on the concerns of special populations — women, youth, people of color: STAT (Stop Teenage Addiction to Tobacco), NAAAPI (National Association of African Americans for Positive Imagery), National Center for Tobacco-Free Kids, LCAT (Latino Council on Alcohol and Tobacco) and NOW (National Organization for Women).

^{ix}In 1905, the listing for nicotine was removed from the proposed U.S. Pharmacopoeia — the official government listing of drugs — paving the way for the passage of the Food and Drug Act the following year with no oversight on tobacco products. As a result, none of the advertising restrictions that the Food and Drug Administration (FDA) placed on other drugs applied to tobacco products.

^xThe *FDA Advertising and Promotion Manual* is a loose-leaf publication that includes regular updates and monthly bulletins and covers the entire range of marketing channels: the Internet, scientific symposia, network television ads, print ads, retailers, video news releases, sponsored studies, celebrity endorsements, media tours, press releases and teleconferences.

^{xi}In conjunction with this, activities like the ongoing measuring of tobacco products and their ingredients -- such as that undertaken by the FTC in setting up its smoking laboratory in the 1960s in the absence of action by any other agency -- would be placed in the hands of the FDA.

^{xii}The district court did rule that the FDA lacked authority to impose restrictions on advertising and promotion of tobacco productions. But this ruling, still on appeal, does not flow from constitutional concerns. Rather, the ruling indicated that measures could be taken that might overcome the court's finding of no FDA authority over tobacco advertising such as allowing the FDA to use a different section of the Food & Drug Act as the basis for jurisdiction.

^{xiii}In his ruling, Judge Osteen wrote: "...the court declines to determine whether the promotion and advertising restrictions violate the First Amendment."

^{xiv}Punitive actions can include fines, cease and desist orders and jail terms.

^{xv}One tobacco company, Liggett & Meyers, has conceded, in settlement of legal actions against it that it directed advertising messages to minors and that this was the general industry practice among all tobacco companies.

^{xvi}Recently released internal documents have stated clearly that brand preferences are fixed fairly early in life and that a cigarette company is more likely to have a life-long customer for a particular cigarette brand if the smoker is recruited as a teenager. Thus a cigarette company that attempted to limit its advertising appeal to persons of legal age would likely face a steep and continuing decline for the product over time.

^{xvii}Preventing Tobacco Use Among Young People: A Report of the Surgeon General, U.S. Department of Health and Human Services, 1994.

^{xviii}The FTC has consistently stated that regulatory practices that injure consumers, either economically or physically, constitute illegal unfairness.

^{xix}This is particularly true in situations when, as is the case with the tobacco companies, vigorous arguments are made that there is no implicit deception and there is no specific marketing to children. (See International Harvester. Co. 104. FTC 949 (1984).

^{xx}A survey of advertising executives conducted in December 1996 by the Initiative on Tobacco Marketing to Children, an advertising industry group, showed that 79 percent of respondents approved of plans by the FDA to restrict the "style and placement of tobacco advertising to minimize its impact on children and teenagers."

^{xxi}For the purposes of the FDA regulation, significant youth readership was defined as publications in which more than 15 percent of the readers were under age 18 or where more than two million of the readers were under age 18 (even if the percentage of readers overall was less than 15 percent.) This language is repeated in all of the tobacco bills that have already been introduced, either explicitly in the language of the bill or through reference to the FDA regulations that contain this language.

^{xxii}The FDA regulations for tobacco out-of-home advertising are similar to those for publications and would require all billboard advertising to be black-

and-white text, which would eliminate use of ethnic and racial images and cartoon figures.

^{xxiii}Data supporting this conclusion are detailed at 61 Fed. Reg. 44501-08.

^{xxiv}Anheuser-Busch, Inc. v. Schmoke, 101 F. 3rd 325 (4th Cir. 1996), *cert. denied*, 117S. Ct. 1569(1997), a companion ordinance which restricted alcohol advertising was also upheld on appeal.

^{xxv}Garner & Whitney, "Protecting Children from Joe Camel & his Friends: A New First Amendment & Federal Preemption Analysis of Tobacco Billboard Regulation" 46 Emory L.J. 479 (1997).

^{xxvi}The Federation of Advertising Industry Representatives has filed a suit in US District Court in Chicago, charging that Chicago's ordinance curbing tobacco and alcohol outdoor billboards is unconstitutional because it violates the First Amendment rights of advertisers. (*Advertising Age*, November 3, 1997, pg. 3.)

ADVERTISING REGULATION IN TOBACCO PREVENTION AND CONTROL

COMMENT BY DONALD W. GARNER

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This comment seeks to respectfully dissent from two implications that might be drawn from the Sutton-Thain paper, namely, that advertising restraints must a) serve only the interests of children and b) cannot serve the interest of public health.

First, a short argument will be made in favor of the authority of the people to constitutionally regulate tobacco advertising for the benefit of all citizens. Then will follow a mercifully quick tour of federal preemption law that will seek to demonstrate that state and local advertising restraints need not be based solely on non-health policies such as preventing violation of juvenile tobacco access laws. These two points are not insubstantial. In the future, tobacco control may not be so fixated on youth smoking, but may return to the labor of helping addicted adults. Also state and local involvement in tobacco control will be powerfully advanced if county health boards are legally entitled to regulate tobacco advertising based on explicit health interests.

FIRST AMENDMENT

When the United States Supreme Court spoke for the first and last time on the constitutionality of tobacco advertising restrictions, America was in the midst of the Great Depression and World War II had yet to be fought. Indeed, when the high court in 1932¹ upheld Utah's comprehensive prohibition against publicly visible tobacco advertising, the First Amendment had not yet been applied to advertising at all. Now commercial speech receives some protection but the depth and scope of that protection is as murky as the Potomac. Thus caution should

mark the path of anyone who attempts to predict the judicial fate of the FDA and 6/20/97 tobacco settlement resolution advertising regulations. Professor Thain and Ms. Sutton are appropriately hesitant to endorse only the strongest of cases - protecting small children from Big Tobacco.

But protecting children is only half the story. In fact, it is less than 5% of the story. Smoking kills adults, not children, and more than 40 million adults smoke. Were the nation to turn its regulatory attention to the task of diminishing the suffering of the legions of grown-up smokers in America, the constitutional hurdles would doubtless be higher. It is, after all, a free country and we all have the right to choose to go to hell in our own hand baskets. But that is just the point. Nicotine addiction compromises free choice and tobacco advertising reinforces that addiction. Why should a self-governing people which prizes the blessing of personal freedom be absolutely foreclosed from fostering personal freedom among the millions of citizens who smoke? Suffice to say the constitutional argument is strong enough that we should not slink away from the adult addiction battle even before we have taken to the field.

The first point that needs to be made is that whether written to protect parent or child, every court has rejected every constitutional claim when the object of regulation has been those forms of tobacco advertising that unavoidably assault everyone who ventures from their bedroom. Even though the commercial speech doctrine was not yet born, the Utah Supreme Court threw out the legislature's sweeping prohibition of all tobacco advertising as it related to books

and magazines. However, it did uphold the prohibition against the most egregiously intrusive advertising media - billboards and in-store displays. The Utah prohibition on tobacco billboards and displays was not just about kids, but about the right of all members of the public to be free of smoking messages being rammed down their throats. When the case was appealed to the U.S. Supreme Court, the justices unanimously rejected every constitutional argument that advertisers could dream up in the 1930s. Their decision is the fountainhead of the just distinction between advertising that is voluntarily viewed by the public and that which is imposed on the public. The court took judicial notice of the fact that "[b]illboards, street car signs, and placards and such are in a class by themselves" because, unlike newspaper and magazine ads, they "thrust" their message on the viewer, robbing citizens young and old of any real choice over whether to receive the message.²

There are now three cases upholding advertising restraints based on the need to protect children from intrusive forms of tobacco advertising. In 1969 Congress outlawed cigarette ads on TV and radio and in 1972 the Supreme Court upheld, without opinion, that prohibition.³ In 1997, Baltimore's first-in-the-nation municipal ban on tobacco and alcohol billboards was finally upheld after two trial court hearings, four opinions by the Fourth Circuit and two failed efforts to involve the Supreme Court.⁴ The latest case is *Lindsey v. Tacoma Pierce County Board of Health*, decided this spring.⁵ It was a unique regulation in two respects. First, in content, because it not only banned billboards near schools but also banned all tobacco advertising that was not reduced to tombstone format in the rest of the county. Second, in origin, because it was a board of health, not a municipal government, that passed the ordinance and the ordinance was, of course, based on public health grounds. Without ever having lost any intrusive tobacco advertising

case, we need not simply assume that a thoughtfully drafted regulation that is tied to intrusive tobacco advertising is doomed to failure if it is designed to aid adult smokers.

Second, it is not just that the judicial record so far has been unanimously supportive, but the modern commercial speech doctrine is built on standards that are flexible enough to accommodate narrowly-drawn tobacco regulations even though they do not serve only the interests of children

Let us suppose that Congress were to pass a comprehensive "Freedom from Tobacco Addiction for All Americans" program that, among other things, distributed free nicotine gum to adult smokers, prohibited tobacco advertising in bars, and restricted all advertising in any media to a tombstone format. If Congress were to pass such a law, there is no constitutional trip-wire in *Central Hudson*, 44 *Liquormart*, or any other Supreme Court case that would necessarily blow up the advertising restraints. Just because smoking is legal and not all tobacco advertising is deceptive, does not mean that there are no compelling values served by eliminating some of the more flagrant inducements used by the tobacco industry to keep their customers hooked.

Central Hudson asks a series of common sense questions, and the first one is whether the state is trying to do something that is really important. With funeral homes filled daily by over a thousand dead smokers, there is probably nothing wrong and almost everything right about assisting all addicted citizens to give up the habit before they give up their life. When adolescents grow up and find themselves addicted to cigarettes they have lost no small part of their autonomy and choice. Primo Levi, in his remembrances of the Auschwitz death camp, reminds us of the devilish dependence that is created by nicotine. While starvation was rampant, bread was regularly traded by inmates for tobacco. With almost all current smokers wishing to

quit, the prospect for an immense public health victory is at hand were seductive and unavoidable tobacco advertising to be swept away from the eyes of all.

The next question asked by *Central Hudson* is whether the prohibition will work. The recent scholarship points strongly to the connection between advertising and adolescent smoking, yet the scientific record is ample enough to support a determination by the people that slick cigarette ads tighten the garrote of addiction. The Surgeon General has reported that "advertising and promotion could reduce current tobacco users' motivation to quit. Tobacco ads, with their attractive imagery and implicit alleviation of fear (Altman et al. 1987), could diminish users' cessation intentions. Advertising of low-tar and -nicotine cigarettes may, in particular, have this effect (Popper 1988; Davis 1987). Promotion could weaken current tobacco users' resolve to quit by reducing the financial cost of smoking (Popper 1986b)."⁶

When the issue is life or death, the courts should be especially supportive of the reasonable decisions made by our democratic institutions. But whether about life or death, the Supreme Court has regularly supported the people's right to pass laws based on the not-so-exotic proposition that advertising works to build customer loyalty. In *Central Hudson* itself, the Supreme Court was satisfied that a New York energy-saving regulation that prohibited advertising by electric utilities would in fact work to reduce electricity use in New York.

The final question asked by the Supreme Court under *Central Hudson* is whether there is a 'reasonable fit' between the means and the end of the rule. This has been the swamp that the courts have used to drown most of the more foolish ad bans. Ad bans that are too narrow (e.g., singling out one kind of newspaper for a littering fine), ad bans that are too sweeping (e.g., in *44 Liquormart*, that keep liquor customers totally in the dark

about where to get the cheapest alcohol), and bans that are just plain stupid, such as the ATF rule that kept alcohol content off beer bottles, for fear of setting off a strength war,⁷ are good examples of the good that courts do in applying the commercial speech doctrine.

The alcohol cases decided by the Supreme Court are particularly helpful in making the case for the hypothetical "Freedom from Addiction" tobacco advertising regulation. In so far as the regulation would allow critical price, availability and content information to be received by smokers, its constitutionality is enhanced. In so far as it prevents image and lifestyle ads from being involuntarily forced on smokers, justice is enhanced.

The heart of the commercial speech doctrine is consumer protection. The First Amendment's application to advertising has never been to ensure the unfettered right of the seller to speak, but instead is a protection that runs in favor of the buyer to hear. The distinction is critical. In the very first case to apply the First Amendment to commercial advertising, the Supreme Court struck down a Virginia rule that abused prescription drug buyers. Virginia prohibited price advertising by pharmacies on the articulated ground of building professionalism. Of course, the real effect of the law was to prevent price competition by pharmacies and thereby to raise the price of ethical drugs to the sick of Virginia. Justice Blackmun did not say that Virginia's law interfered with any right of the pharmacists to advertise his price, but instead said the law would interfere with the needs of the poor to find the cheapest price. The Supreme Court knows the difference between the marketplace of ideas and the marketplace.

So long as smokers can freely receive critical consumer information about where to find the cheapest smokes, or where they are sold, or what is in them, or other product attributes, then every Supreme Court precedent is satisfied. By limiting all tobacco

advertising to print, nothing is done to compromise the right of smokers to know what they need to know. Image ads are not information ads, and thoughtful programs to aid smokers to regain their personal freedom do not undermine any constitutional freedom enjoyed by smokers to receive factual information.

PREEMPTION

With regard to federal preemption of state advertising restrictions the law will remain unsettled until the Supreme Court squarely addresses the issue. Nevertheless, it is now clear that the lower courts are adopting a common-sense approach to the issue that is not keyed to whether the ordinance is based on health.

A little background on this arcane issue may be helpful. In 1964 Surgeon General Luther Terry issued his famous first report documenting the lung cancer risk for male smokers. Congress immediately moved to mandate a warning on cigarette packs and in advertising. The gentle 'may be hazardous to your health' warning was coupled with a prohibition against any state or federal agency requiring the inclusion of any other 'statement' on cigarette packs (5a) and cigarette advertising (5b). For example, the FTC could not force the industry to add a warning about addiction on cigarette packages, and the states could not require that cigarette advertising bear a message that it is illegal to sell cigarettes to minors. In 1969, Congress strengthened the warning and prohibited cigarette advertising on TV and radio. It also restated its restriction against state regulation of cigarette advertising by cryptically changing Sec. 5b to read "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."⁸

The modern crop of city advertising regulations do not mention health, but instead are all based on the non-health goal of preventing the industry from stirring juvenile demand and thereby subverting the observance of laws preventing the sale of tobacco to juveniles. This law enforcement goal, along with other non-health interests such as preserving the innocence of children, reinforcing the authority of parents, and preventing racial strife, are all honestly served by eliminating cigarette advertising that assaults all who use the streets. Minority neighborhoods do have a double dose of tobacco and alcohol billboards and some parents really do object, on grounds far more fierce than health, to having their love, advice and discipline mocked by seductive ads targeted at their children.

The Sutton-Thain paper is correct to point out that the Baltimore ordinance and others were written to serve the goal of law enforcement and not health. However, it is incorrect to say that "it is a violation of federal preemption if [a local government] attempts to restrict advertising based on health" (Sutton-Thain at 14). A fair reading of the fascinating legislative history behind the enactment of the Cigarette Labeling and Advertising Acts of both 1965 and 1969 leads to the firm conclusion that Congress was not trying to destroy the police power of the states to control the location and format of tobacco advertising. What was preserved for federal regulation was control over the wording of the ads, and there is nothing in the voluminous legislative record to indicate that Congress wanted to wrench from the states power to regulate things such as the placement of tobacco advertising or its size, color, etc. The only thing the 1969 Act did was to ensure that control over the *wording* of tobacco ads remained in the industry's hands. The states still have the authority to say that a neon Joe Camel ad cannot be placed in cancer wards, on city buses, near schools, etc.

This limited reading of the scope of federal preemption makes perfect sense when it is remembered that it was Senator Frank Moss, an ardent anti-smoking foe, who ushered the 1969 Cigarette Labeling and Advertising bill through the Senate. Frank Moss was from Utah, which had enforced for 40 years the prohibition against in-store and billboard cigarette advertising that was upheld by the Supreme Court in *Packer* in 1932. If there was even a remote possibility that the Moss bill would preempt his own state from continuing to enforce its venerable cigarette advertising law, surely Senator Moss would have realized it and spoke against it or at least spoke about it. In fact, no one in the entire Congress ever intended Sec. 5b to prohibit states from exercising their authority to protect their citizens from harm by regulating the placement and format of cigarette advertising.

This view of the scope of federal preemption was presented to the Fourth Circuit Federal Court of Appeals by way of an amicus curiae brief⁹ when it was considering the Baltimore tobacco billboard ordinance. The lower court had ruled that the ordinance was not preempted because it was based on promoting observance of youth access law and not on health. The Fourth Circuit however, upheld the ordinance on the more direct and decisive ground that since Baltimore only regulated the 'location' of billboards (none in neighborhoods, okay on freeways) and did not regulate the 'content' or "nature of the message communicated" its ordinance was not preempted.

When the tobacco and brewing interests appealed the Fourth Circuit's twin rulings on First Amendment and federal preemption to the Supreme Court they won a temporary victory. The Supreme Court had just decided 44 *Liquormart*, and the commercial speech portion of the Baltimore decisions was vacated and remanded back to the Fourth Circuit for reconsideration. That

reconsideration was undertaken by the Fourth Circuit and Baltimore's ordinances were upheld again against claims that the commercial speech doctrine had been violated.

Significantly, the Supreme Court never disturbed the Fourth Circuit's ruling on preemption. It was never vacated, never criticized, and never accepted for review, even though two appeals were made.¹⁰

There is a good reason the Fourth Circuit's sharp distinction between content regulation and media location was never questioned by the Supreme Court. It perfectly captured the real intent and meaning of federal preemption. Under 5b, the "no requirement" language clearly means that state governments may not add warnings or statements to tobacco advertisements. 5b's "no prohibition" language clearly means that state governments may not prohibit a particular advertising message.¹¹ Thus, RJR is free to continue to advertise Winston's in tombstone format with its new tough guy talk: "Kissing up isn't in my job description." But federal prohibition of state interference with what the tobacco companies choose to say about their product does not mean that states are prevented from keeping tobacco ads away from junior high schools.

This rational reading of federal preemption takes the federal courts out of the mind-reading business of trying to determine municipal motive or purpose, and creates a bright line for the states to follow. The virtue of this interpretation was endorsed in *Lindsey v. Tacoma Pierce Health Board* - the latest case to consider the scope of federal preemption of a local authority over cigarette advertising. As noted above, this was an explicit health-based regulation of both the location of cigarette billboards (not within 1000 feet of schools) and the ad's format (only tombstone throughout the rest of the county). The Washington Federal District judge drew upon the holding by the Fourth Circuit in Baltimore and declared that since the Tacoma

rule "does not impact the content,"¹² there was no preemption. The regulation only restricts "the location and manner of outdoor advertisements."¹³

The point is that while some localities may choose to relate their advertising bans to non-health purposes, the courts are upholding local rules because they judiciously do not touch the written content of the cigarette ads. Health or non-health purpose is, by this analysis, irrelevant. So long as the wording of the ads is left to the imagination of Madison Avenue, Main Street USA is left with its inherent authority to preserve the health and well-being of its citizens.

¹Packer Corp. v. Utah, 285 U.S. 105 (1932).

²*Id.* at 110 (quoting state court opinion). UTAH CODE ANN. § 76-10-102(1) (1993). The current version makes it a class B misdemeanor to advertise a tobacco product "on any billboard, streetcar sign, streetcar, bus, placard, or on any other object or place of display." *Id.* It retains the same exception for storefront signs that merely inform consumers that tobacco products are sold inside. *Id.*

³Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), *aff'g without opinion* Capital Broad. Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971). In *Mitchell*, a broadcasting company challenged Congress's ban on tobacco advertising in the broadcast media. The District Court rejected the company's Fifth Amendment Due Process Clause challenge, partly because "substantial evidence showed that [radio and TV tobacco ads] were particularly effective in reaching a very large audience of young people."

⁴Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402 (D. Md. 1994) (*Penn Advertising I*) *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S.

Ct. 2575 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996) (*Penn Advertising II*), *cert. denied*, 117 S. Ct. 1569 (1997); Anheuser-Busch, Inc. v. Mayor of Baltimore, 855 F. Supp. 811 (D. Md. 1994) (*Anheuser-Busch I*), *aff'd sub nom.* Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *modified*, 101 F.3d 325 (4th Cir. 1996) (*Anheuser-Busch II*), *cert. denied*, 117 S. Ct. 1569 (1997).

⁵Lindsey v. Tacoma Pierce County Health Dept. Case # C97-5076 RJB, 1998).

⁶Reducing the Health Consequences of Smoking, 25 Years of Progress, a Report of the Surgeon General, 1989, p. 498.

⁷See generally, Garner & Whitney, "Protecting Children from Joe Camel & His Friends: A New First Amendment & Federal Preemption Analysis of Tobacco Billboard Regulation," 46 Emory L.J. 479 (1997).

⁸Public Health Cigarette Smoking Act of 1969 § 5(b).

⁹See Brief of Amicus Curiae, Maryland Congress of Parents and Teachers Inc., by Donald Garner.

¹⁰See note 4 *supra*.

¹¹See generally, Garner, 275 JAMA, April 24, 1996.

¹²Lindsey (preemption decision, Nov. 6, 1997, at 11).

¹³*Id.*

**HEALTH
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PROJECT**

Policy Analysis No. 14

**Special Populations:
Implications for National Tobacco Policy**

By

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EXECUTIVE SUMMARY

A comprehensive tobacco policy should include a special emphasis on the needs of populations that have been disproportionately affected by tobacco use. These populations primarily include women, racial and ethnic minorities, and persons of low-socioeconomic status (SES).

To effectively address the needs of these groups, national tobacco policy must:

- Earmark significant resources for research, demonstration, implementation, and dissemination of cessation and prevention programs tailored to the specific needs of racial and ethnic minorities and other special populations
- Focus significant tobacco control research efforts on divergent tobacco use and prevalence patterns among special populations
- Fund prevention and education programs geared specifically toward women, racial and ethnic minorities, and persons of low SES and allow for community involvement in the development of such programs
- Improve access to effective, affordable cessation programs for those who face barriers to such treatment
- Take accurate measure of youth readership of magazines, accounting for fluctuations in readership patterns among youth, ethnic, and language-specific publications
- Allow for counteradvertising campaigns to be locally and nationally tailored to minority groups or populations
- Compensate women and racial and ethnic minority groups for the loss of tobacco sponsorship funds and other economic support
- Mandate full disclosure of internal tobacco company documents, especially as they pertain to targeted marketing to women and racial and ethnic minorities.
- Develop accountability mechanisms to ensure that funds reach the targeted populations

Most comprehensive tobacco proposals introduced in the Senate to date do not specifically address the needs of special populations. Rather, they allow broad room for interpretation in the administration of any future policy. It is crucial that the aforementioned policy elements be made explicit in tobacco legislation, and supported by adequate appropriation, so that high-risk demographic subgroups do not fall between the cracks of a one-size-fits-all tobacco policy.

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INTRODUCTION

The comprehensive legislative proposals on tobacco now before Congress each set out a blueprint for the future of tobacco control policy in the United States. For optimum effectiveness, this blueprint should be designed to meet the needs of the populations that are currently high-risk for tobacco use. High-risk groups include: women and racial and ethnic minority populations, whose tobacco use rates are holding relatively steady or, among some subgroups, are increasing compared with those of white males, whose rates are on the decline. They also include populations of low socioeconomic status (SES), within which women and minorities are disproportionately represented. Low-SES populations are also more likely than other people to be exposed to secondhand smoke in their place of work.

This paper draws from the series of tobacco policy analyses prepared for the Health Science Analysis Project, and from other resources, to consider the provisions within a comprehensive tobacco policy that will affect special populations. It offers recommendations designed to address the needs of special populations as part of comprehensive tobacco legislation. This paper is intended to provide an overview of tobacco policy issues as they relate to special populations; the other papers in this series offer further detail on these issues and how they have been addressed in tobacco policy legislative proposals.

CURRENT STATUS

While tobacco use is a pervasive national health problem, its extent and impact differs among various segments of the nation's population. Smoking among white males has declined overall in the past several decades, but smoking patterns among other populations are slower to decline, and youth smoking is on the rise. Several trends in smoking prevalence are cause for particular concern. While lung cancer rates among men have decreased, rates of lung cancer are on the rise among women.ⁱ Since 1987, lung cancer has surpassed breast cancer as the top fatal cancer among American women.ⁱⁱ In 1997, the American Lung Association announced a "crisis of lung health among African-Americans." African-Americans have the second-highest rate of smoking prevalence of all ethnic groups in the United States at 27.2 percent, with death rates from lung cancer almost twenty percent higher than those of whites. And at 42.2 percent, Native Americans and Alaskan natives have the leading smoking prevalence rate in the US.ⁱⁱⁱ

The US Surgeon General's recently-released report, *Tobacco Use Among US Racial/Ethnic Groups*, is the first comprehensive source of information on tobacco use patterns related to four major ethnic and minority groups in the United States: African Americans, Native Americans and Alaska Natives, Asian Americans and Pacific Islanders, and Hispanics. The chief

findings of the report include the following points:

- Cigarette smoking is a major cause of disease and death in each of the four groups studied, with African-Americans currently bearing the greatest health burden;
- American Indians and Alaska Natives have the highest prevalence of tobacco use, while African American and Southeast Asian men also have high smoking prevalence rates;
- Among teens, cigarette smoking prevalence increased in the 1990s among African Americans and Hispanics after several years of decline - an increase that is particularly striking given that during the 1970s and 80s, African American teens exhibited the greatest decline in prevalence of the four ethnic/minority groups studied;

The report concluded that “[r]igorous surveillance and prevention research are needed on the changing cultural, psychosocial, and environmental factors that influence tobacco use to improve our understanding of racial/ethnic smoking patterns and identify strategic tobacco control opportunities. The capacity of tobacco control efforts to keep pace with patterns of tobacco use and cessation depends on timely recognition of emerging prevalence and cessation patterns and the resulting development of appropriate community-based programs to address the factors involved.”^{iv}

Historically, tobacco companies have exploited the unique social and cultural circumstances of African-Americans, women, and other special populations, through targeted marketing strategies to promote tobacco consumption within these groups. As a result of the industry’s practices of

segmented marketing among these populations, some communities have been particularly hard-hit by tobacco-related disease.

Furthermore, tobacco companies have bought silence among some of the groups through sponsorship and heavy advertising activities. The Surgeon General’s Report on *Tobacco Use Among US Racial/Ethnic Minority Groups* notes that the tobacco industry’s long history of providing support to some racial/ethnic groups may undermine tobacco prevention and control efforts. The Report lists some of the range of activities and festivals tobacco companies have supported, including: Mexican rodeos, American Indian powwows; racial/ethnic parades and festivals; Chinese New Year festivities; Cinco de Mayo festivities; racial/ethnic minority dance companies; and activities related to Black History Month, Asian/Pacific American Heritage Month, and Hispanic Heritage Month.^v As a result of this kind of support, some communities have come to rely on tobacco companies’ patronage.

A comprehensive tobacco policy must address both the specific needs of these high-risk populations and counter the special efforts made by the industry to encourage tobacco use within their communities. *Prevention and cessation/treatment programs should be implemented that are resonant with the needs of the communities they serve.* Their goal should be not simply to provide services, but to build tobacco prevention and control infrastructure within these communities. Unless such demographically-focused efforts are made part of our national tobacco control strategy, high-risk groups may not be reached with effective prevention and treatment; their health, and thus the nation’s, will suffer.

RESEARCH

Strong policies to address the tobacco control needs of special populations must be grounded in a firm foundation of science-based research. Issues such as tobacco use initiation, consumption and prevalence, brand preference, perceptions of tobacco use, and knowledge and attitudes about health risks, among many others, are critical to shaping effective policy. Unfortunately, there are currently significant gaps in tobacco use data with regard to subgroups of these special populations. Researchers have identified, for example, the need for information on the smoking prevalence of low-SES adults, African American youth, and other population segments.^{vi} The trend of increased smoking among some of these groups highlights the urgency of accelerating research that has been neglected in the past. Research conducted to date on the needs of different sociodemographic populations has identified differences in tobacco use, brand preference, and perceptions of tobacco use. Further desegregated data will allow health professionals to better tailor tobacco control programs to the needs of different communities.

Some policy areas require particular research efforts to be made fully effective. For example, to implement and evaluate youth access regulations, it will be necessary to research the use patterns of racial and ethnic minority youth in school settings and of dropouts, and of girls of high school age and younger, in particular. One study found, for instance, that retailers are more likely to sell cigarettes to girls than to boys.^{vii} Another under-researched area concerns disparate tobacco dependence patterns that exist among different populations. Research into this area will help in developing effective cessation drugs and programs targeted to specific communities. Tobacco policy should ensure that research funds can be used to explore such

divergent sales and use patterns among special populations as part of an ongoing process to develop optimally effective policy measures. Such research should be conceived and implemented by those who are sensitive to values of diversity and the cultural needs of communities across all demographic segments, especially community-based organizations serving racial and ethnic minority communities.

DOCUMENT DISCLOSURE

Like research, the release of internal tobacco company documents can provide important information on tobacco use and prevalence patterns among various demographic subgroups. In recent months, a number of documents have come to light through internal company leaks, congressional subpoenas, and lawsuits against the tobacco industry. A few examples illustrate the importance of full disclosure to strong public health policy.

Some of the most intriguing information to emerge from these documents concerns tobacco industry efforts to market to special populations, including African Americans, Hispanics, Asian Americans and Pacific Islanders, and women. The new information could help researchers uncover some of the reasons behind differences of tobacco use prevalence and brand preference within different communities.

A recently released 1973 internal Brown & Williamson document, for example, recommended spending more money to promote Kool brand cigarettes on public transportation. The document noted: "With this additional transit effort, Kool will cover the top 25 markets in terms of absolute Negroes." The same document noted that 17 percent of Brown & Williamson's promotional budget for Kools was spent on marketing to African Americans, who make

up only 10 percent of the population.^{viii} The document is especially intriguing in light of the fact that African Americans tend to prefer menthol cigarettes^{ix}, like Kool, and that a 1986 survey found Kool to be the second most preferred cigarette brand among African Americans.^x

These and similar discoveries emphasize the importance of internal tobacco company documents in understanding industry practices and their relationship to tobacco use within minority communities and other special populations. Efforts to reduce tobacco use must take into account the historical factors that influenced use rates and brand preferences within specific groups and communities. Internal documents showing industry strategies to target these groups help significantly to explain these patterns. Furthermore, tobacco companies' extensive marketing research on special, as well as mainstream, populations will be useful in developing counteradvertising strategies to discourage tobacco use in the future.

For these reasons, it is crucial that comprehensive policy mandate the release of any relevant internal documents on research, advertising, and marketing as they relate to special populations. Any special restrictions or exemptions on the release of such documents could undermine the efforts of those struggling to battle tobacco use within these communities.

ADVERTISING

Magazines

Differences in brand and tobacco use preferences between sociodemographic subgroups appear to correlate with patterns in magazine tobacco advertising as well. Comparisons of magazines preferred by whites and by African Americans showed the

percentage of menthol cigarette advertisements in primarily-African American magazines such as *Essence*, *Ebony*, and *Jet* was 65.9 percent, compared to the 15.4 percent of menthol cigarette advertisements in general market publications such as *Time*, *Newsweek*, and *People*.^{xi} Researchers have concluded that this advertising campaign by the tobacco industry has led to the disproportionate use of menthol cigarettes by African Americans.^{xii} In 1986, 75.5 percent of African American smokers reported using menthol cigarettes compared with 23.1 percent of whites.^{xiii}

Different markets targeted by tobacco advertising should be considered in designing legislative restrictions on tobacco advertising in magazines. The proposed June 20th tobacco settlement stipulated that magazines with specific youth readership levels would have more restrictive advertising limits. However, the measures used to determine mainstream readership of publications have been found to be less effective when applied to certain groups, including women and African Americans. Youth in these groups, and others, may have a higher readership of certain magazines that continue to include tobacco ads, because standard measurements do not take their particular readership patterns into account.^{xiv} Tobacco legislation must take such differences into account when determining youth readership levels, lest regulations on tobacco advertising in magazines be applied indiscriminately. Special emphasis should be placed on magazines in English and Spanish that target the young Latina market as well as Asian magazines that target Asians.

Other Advertising Issues

As Sutton and Thain point out, health advocates have noted that leaders in minority communities are some of the strongest supporters of restrictions on visual imagery in tobacco advertising.^{xv} These leaders recognize that visual imagery is one of the most effective

ways to target a specific population. Philip Morris' Virginia Slims "You've Come A Long Way, Baby" ad campaign of the 1970s, for example, effectively targeted women through ads that contrasted pictures of 19th-century women leading lives of drudgery with laughing, relaxed contemporary women. Through the use of such visual imagery, the ads effectively linked the Virginia Slims' brand with women's freedom and a modern lifestyle.

Communities that have been most directly targeted through ads with strong visual imagery would have a large stake both in reducing such imagery in advertising, and in restricting cigarette packaging to its plainest form, in order to discourage tobacco use. To serve the needs of communities most heavily impacted by visual imagery, tobacco policy should incorporate strong restrictions on advertising.

COUNTERADVERTISING

Counteradvertising campaigns are one of the strongest tools available to combat tobacco use within specific communities. Just as tobacco advertising targeted to certain sociodemographic groups has driven up the numbers of smokers within those groups, effective counteradvertising can reduce smoking within those communities. But to be effective, Cummings and Clarke argue, such counteradvertising campaigns need to be specifically targeted and consistently sustained over the long term.

Counteradvertising campaigns should be specifically tailored to different populations. A number of communities have initiated campaigns incorporating language and culture-appropriate messages. Researchers have observed that in order to be culturally appropriate, a tobacco control campaign of any kind must meet the following requirements:

- It must be based on the cultural values of its target group;
- The strategies of the program must reflect the subjective culture (attitudes, expectancies, norms) of the group;
- the components that make up these strategies must reflect the behavioral preferences and expectations of the group's members.^{xvi}

In the past, counteradvertising has been found to be an effective deterrent against tobacco use. According to Cummings and Clarke, counteradvertising's greatest effect is in shifting public knowledge and attitudes about tobacco use. While it is too early to judge many of the US counteradvertising efforts, studies have found some of these efforts to have achieved gains in affecting smoking behavior. Cummings and Clarke find that to be effective, counteradvertising must contain three components: it must be frequent, broad-reaching, and of long duration.^{xvii} Any tobacco policy must incorporate these elements. Tobacco legislation must also ensure that counteradvertising campaigns are directed by an independent board of public health experts, and free of political tobacco industry influence. These campaigns should include radio and television ads.

SPONSORSHIP & PROMOTION

In the HSAP paper on advertising, Sutton and Thain note that minority groups and organizations have historically been some of the prime beneficiaries of sponsorship funding from tobacco companies.^{xviii} A number of women's groups and organizations have long received tobacco funding as well.^{xix}

Some have argued that this funding has been used by the industry to foster goodwill among these groups and discourage anti-tobacco activism. Tobacco companies' funding of these events and organizations has existed for years alongside the industry's targeted niche marketing of these sociodemographic groups.

For example, RJ Reynolds' "Salem Freshside Salute," an advertising campaign to salute African-Americans working to improve conditions in the inner-city, appeared in primarily black publications nationwide in 1993. As part of the campaign, the firm gave out \$5,000 donations in support to projects and individuals. One donation recipient noted that although she would not personally endorse cigarette use, she did not consider rejecting RJR's funding, as it was the only company that responded to her request to help fund a martial arts school in Philadelphia.^{xx} This kind of support buys goodwill for the tobacco industry in disadvantaged communities, and may make it harder for those who depend on their financial support to speak out about the health risks of tobacco use, and the targeted marketing efforts of tobacco firms.

Tobacco company sponsorship, which may provide financial solvency for some groups that rely on tobacco funds, will have to be addressed under tobacco legislation that rules out the industry as a future funding source. Tobacco policy should thus include funding to prevent these groups from undue financial stress resulting from a loss of tobacco sponsorship under comprehensive tobacco legislation.^{xxi} Groups receiving such funding should be required to incorporate strong antismoking messages into their activities. In this manner, some of the promotional funds groups have relied upon will be replaced by funding that carries with it messages to counter the omnipresent tobacco industry advertising within their communities.

DEPENDENCE TREATMENT & MANAGEMENT

An effective national tobacco policy should make smoking cessation and treatment programs accessible, affordable, and relevant to at-risk populations. Though much progress in the treatment of nicotine addiction has been achieved in recent years, some groups have not benefited from these advances. Low-SES populations, in particular, continue to face significant barriers to getting effective treatment for nicotine addiction. These populations, which now have some of the highest prevalence rates for smoking, tend to have less access to managed care and/or lack health insurance altogether. Important barriers to adequate managed care include the difficulty of finding transportation to individual and group programs as well as prohibitively high costs of prescription drugs.

In the HSAP paper on managing and treating tobacco dependence, Hatsukami and Lando recommend a number of measures to meet the needs of special populations. A policy that covers tobacco treatment costs for low-income tobacco users and finds ways to broaden access to these users, for instance, would eliminate important barriers that currently impede effective dependence treatment.

Another group of individuals in need of special attention is the prison population. Tobacco use prevalence in prisons is consistently high, with smoking rates in state prisons as high as 80 percent.^{xxii} More research into the use patterns of incarcerated individuals is needed, as well as strategies to address the cessation needs of this population.

Hatsukami and Lando note that tobacco dependence management and treatment programs should address the special needs of women who quit smoking. Treatment protocols should be sensitive to issues such as tobacco use during pregnancy,

implications for osteoporosis, and weight and stress-related issues.

To ensure effectiveness, cessation and treatment materials should be available in languages other than English and should use culturally appropriate messages. In addition, the content of the materials should be accessible to individuals with low literacy skills.^{xxiii}

Developing specific strategies will require additional research and testing. Earmarking significant funding for the purpose of developing tailored cessation protocols and broadening access to effective cessation programs are necessary first steps toward these goals.

ENVIRONMENTAL TOBACCO SMOKE (ETS)

While policies to ensure clean indoor air are an important national priority, they are more likely to affect persons of low socioeconomic status (SES) than any other segment of society. In the regulation of clean indoor air in the workplace, the population most at risk is the working poor – a group in which minorities and women are disproportionately represented. Brownson's paper on ETS notes that, currently, workers in bars, restaurants, and other blue-collar professions are the least likely of any part of the workforce to be covered by a clean indoor air policy.^{xxiv} Most of the tobacco bills currently pending in Congress exempt most or all of the hospitality industry from clean indoor air legislation. As Brownson argues, this represents a significant gap in health protection, because workers not covered by indoor air policy are 8 times as likely to be exposed to ETS, and sociodemographic groups such as minorities and low-SES populations are at highest risk for exposure to secondhand smoke.^{xxv} A recent study of smokefree work environments found

that the percentage of service and blue-collar workers who reported working in a smokefree environment was well below the national average. Hispanic workers were the least likely to report that their employer had a policy restricting smoking in their place of work.^{xxvi}

In recent years, as the health risks of secondhand smoke have been documented, the need to ensure clean indoor air for all has grown ever more clear. Those who work in restaurants, nightclubs, and bars deserve the full health protections provided workers in other industries.

TAXES

The legislative proposals on tobacco introduced thus far include different versions of an increase of the federal tax on cigarettes, ranging from \$1.10 to \$1.50 per pack, implemented over two to five years. The debate over an increase in the federal excise tax centers around the question of whether such taxes are regressive, or unfairly burdensome, on low-SES populations who would be most hit by a price increase. Chaloupka addresses this issue in an HSAP paper on the effects of raising tobacco prices, in which he cites evidence from a Congressional Budget Office (CBO) study that the tax would not, in fact, be overly regressive to lower-income populations. The study found that the increase appeared to impact lowest income groups most heavily relative to annual income. However, the increased tax burden would be distributed roughly evenly among different income levels as measured relative to families' annual expenditures, which may be a better measure of long-term income.

Chaloupka argues further that any regressivity in levying the tax is compensated by the progressivity of the health effects of such a tax. Those with low incomes are more likely than other segments of the population

to respond to price increases by reducing tobacco consumption. Therefore, the health benefits of reductions in smoking that would result from large cigarette tax increases would be disproportionately larger in the lowest income populations. This tends to counterbalance the economic burdens that a tax increase could impose.^{xxvii}

Because racial and ethnic minority populations, however, are likely to be disproportionately affected by cigarette price increases, it is especially important that federal and state governments use the tax proceeds from such increases to fund culturally-sensitive and language-appropriate tobacco prevention and treatment programs. This will help to mitigate any potential regressivity of the tax increases for racial and ethnic minority communities.

ALLOCATION OF FUNDS FOR TOBACCO CONTROL

Targeting resources effectively is among the most important components of any future tobacco policy. Sufficient funding for programs and policies targeted to special populations will play a crucial role in the support systems of these communities as they work to reduce tobacco use in the years following the implementation of a national tobacco policy.

The tobacco legislation now before the Senate does not sufficiently address the needs of women, racial and ethnic minorities, and persons of low SES, mentioning them only as part of an overall strategy of federally-coordinated tobacco control research and policy. For example, S. 1415 proposes that block grants be the primary mechanism for funding tobacco prevention and treatment programs. With no funds earmarked for specific populations, there is no mechanism to ensure that programs serving disadvantaged

communities will receive appropriate levels of funding to be effective. Legislation should ensure that block grant funding provides specific allocations for racial and ethnic minority communities, reflecting the size of these communities and the special costs of providing effective services to disadvantaged and low-SES populations. Legislation should also include accountability mechanisms, such as performance-based criteria for assessing the needs of and allocating resources to women, racial and ethnic minorities, and persons of low SES, to ensure that these programs are well-funded and effective.

In addition, legislation should support an inclusive funds allocation/policy planning process that allows coordination and shared input between federal, state, and local health authorities. The Office on Smoking and Health, CDC's Office of Minority Health, and other Federal agencies should work closely with their partners in state health departments, especially state-level minority health entities, to plan and implement programs that focus on the specific needs of groups within each state. Furthermore, the responsibilities of the Office on Minority Health should be expanded to include providing technical assistance and policy guidance for the review and approval of state block grant plans.

CONCLUSION

Current prospects for tobacco control legislation present an important opportunity to address the national problem of tobacco use in a comprehensive manner, rather than through piecemeal efforts. To be effective, tobacco control policy must address the particular areas of challenge that exist in reducing and preventing tobacco use among women, racial and ethnic minorities, and persons of low SES. Such challenges reflect both long-standing and persistent socio-

economic disadvantages, and years of targeted efforts from the tobacco industry to maintain and encourage tobacco use. Legislation should address these unique circumstances by setting strong policies, allocating research and program funds to make these policies effective, and focusing significant effort on the specific causes and effects of tobacco use within these communities.

NOTES:

ⁱStolberg, Sheryl Gay, "New Cancer Cases Decreasing In US As Deaths Do, Too," *New York Times*, March 13, 1998; Brown, David, "New Cancer Cases Decline In US," *Washington Post*, March 13, 1998.

ⁱⁱNational Center for Health Statistics; Bureau of the Census, *Washington Post*, February 18, 1992.

ⁱⁱⁱ Manning, Anita, and Painter, Kim, "Lung Disease A 'Crisis' Among Blacks," *USA Today*, February 6, 1997.

^{iv} US Department of Health and Human Services, Tobacco Use Among US Racial/Ethnic Groups, A Report of the Surgeon General, Centers for Disease Control, 1998.

^v US Department of Health and Human Services, Tobacco Use Among US Racial/Ethnic Groups, A Report of the Surgeon General, Centers for Disease Control, 1998, pps. 218, 240.

^{vi} Robinson, R., Pertschuk, M., and Sutton, C., "Smoking and African Americans," Improving the Health of the Poor: Strategies for Prevention, Henry J. Kaiser Family Foundation, May 1992, p. 123-181.

^{vii} Cohen, Stanley, et. al, "Illegal Sales of Cigarettes to Minors in North Carolina," *North Carolina Medical Journal*, January 1995, p. 59.

^{viii} Meier, Barry, "Data On Tobacco Show A Strategy Aimed At Blacks," *New York Times*, February 6, 1998, p. A1.

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**HEALTH
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Policy Analysis No. 15

ENVIRONMENTAL TOBACCO SMOKE

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ENVIRONMENTAL TOBACCO SMOKE

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EXECUTIVE SUMMARY

Exposure to environmental tobacco smoke (ETS) should be regulated for five major reasons:

- ETS causes acute and chronic diseases in otherwise healthy nonsmokers;
- the majority of the public experiences annoyance and discomfort from ETS exposure and views ETS as a health hazard;
- most nonsmokers do not take personal action to avoid exposure to ETS when smokers light up in their vicinity;
- employers may realize lower maintenance and repair costs, insurance costs, and higher nonsmoker productivity when smoking is prohibited in the workplace; and
- restricting smoking in public settings increases the likelihood that smokers in these settings smoke fewer cigarettes or quit smoking entirely.

There are three major policy options available to address ETS exposure:

- Policies that allow designated smoking areas
- Policies that allow smoking only in separately ventilated areas
- Policies requiring a complete smoking ban

Among these options, total smoking bans are the most efficient and effective in reducing ETS exposure on a population basis.

Presently, five major pieces of legislation are pending before the US Congress. Four of these have the following common features:

- The Administrator of the OSHA is given authority to establish standards for separately ventilated smoking areas
- Smoking is prohibited or limited to separately ventilated areas in most worksites in the United States
- Posting of a clear and prominent notice of smoking prohibition is required
- Some form of an enforcement mechanism is put in place

Additional implementation and enforcement issues should be taken into account, including:

- The need to ensure no preemption of stronger state and local laws and regulations addressing ETS exposure
- Enforcement mechanisms that include both federal, state, and local components
- Methods to encourage educational efforts from existing state and local tobacco control coalitions

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INTRODUCTION

Over the past two decades, the health hazards resulting from exposure to environmental tobacco smoke (ETS) have been increasingly recognized. Among the best-established of these health effects are lung cancer in healthy adult nonsmokers and childhood disorders such as respiratory tract ailments². ETS is a complex mixture of nearly 5,000 chemical compounds, including 43 chemicals that are known human or animal carcinogens³.

In 1986, the US Surgeon General and the National Academy of Sciences reached similar conclusions regarding the relationship between ETS and lung cancer: ETS is a cause of lung cancer in healthy nonsmokers⁴. Presently, there are 37 studies on the relationship between ETS exposure and lung cancer in nonsmokers. The most recent meta-analysis of these studies showed a statistically significant excess risk of 24% among nonsmokers who lived with a smoker⁵.

Strong evidence has shown that children who are exposed to ETS in their home environment are at considerably higher risk for acute lower respiratory tract illnesses⁶. Data also are supportive of a causal relationship between ETS exposure and middle-ear disease, including acute otitis media and persistent middle-ear effusion. In addition, there is considerable evidence that ETS is a cause of heart disease in nonsmokers, with nonsmokers' exposure resulting in an approximate 30% increase in

heart disease risk.⁷ ETS may account for as many as 62,000 annual ischemic heart disease deaths in the United States.⁸

As scientific knowledge of the health risks due to ETS exposure has increased, public understanding of such risks also has increased. For example, studies among diverse populations indicate that the public is well aware of the health hazards of ETS exposure. There have been substantial changes in attitudes toward ETS since the 1970s. In a 1978 Roper Organization survey, 58% of respondents considered ETS hazardous.⁹ In contrast, a 1993 survey found that 72% of Americans believed that ETS causes cancer and other serious diseases in nonsmokers¹⁰. Included in the change in public attitudes toward ETS is the re-framing of smoking as a wider public health and social issue beyond a personal behavior. Public policies to eliminate ETS exposure have similarly increased in frequency and scope over the past decade—perhaps more than any other tobacco control policy, clean indoor air laws have benefited nonsmokers in their day-to-day lives.

Numerous studies have shown substantial levels of exposure to ETS among the US population. Several investigators have examined employees' exposure to ETS in the workplace, some of whom have used the biochemical marker cotinine to validate exposure. In a review of existing studies¹¹, wide variation was noted in ETS concentrations by location, measured by mean levels of nicotine in the ambient air of offices ($4.1 \mu\text{g}/\text{m}^3$), restaurants ($6.5 \mu\text{g}/\text{m}^3$), bars ($19.7 \mu\text{g}/\text{m}^3$), and residences ($4.3 \mu\text{g}/\text{m}^3$)

with at least one smoker. Other studies have examined exposure on a population-wide basis. US data have shown that 37% of adult non-tobacco users lived in a home with at least one smoker or reported ETS exposure at work.¹² Among non-tobacco users, 88% had detectable serum cotinine levels, indicating widespread exposure to ETS in the US population.¹³ In a recent study of US indoor workers, 46% reported their worksite did not permit smoking in any public or common areas (a total smokefree policy), yet the majority of blue collar and service workers were not adequately protected from ETS exposure.¹⁴

The major source of exposure to ETS among young children is from smoking by parents in the home. One national study, based on 5,300 interviews, found that approximately 49% of children ages 5 years and younger were exposed to ETS in the home.¹⁵ Recent data show that among US children, aged 2 months to 11 years, 43% lived in a home with at least one smoker.¹⁶ For more than a quarter of the children, ETS exposure begins before birth.¹⁷

California data indicate that nonsmokers employed in workplaces with no policy or a policy not covering the workplace were eight times more likely to be exposed to ETS than those employed in smokefree workplaces.¹⁸ Among subgroups, younger persons, males, Hispanics, and persons with less than a high school education have shown higher workplace exposure to ETS.¹⁹

The primary purposes of this review are to describe: 1) approaches and effectiveness of policies to reduce exposure to ETS, 2) the merits of specific legislative proposals before the US Congress, and 3) enforcement issues related to these proposals.

DESCRIPTION

Governmental efforts to regulate exposure to ETS have occurred at the federal, state, and local levels. To date, most of the activity to restrict public smoking has occurred at the state and local levels.

Overview of Governmental Actions

Federal. Presently, the most notable federal regulation of ETS is the ban on smoking on domestic airline flights. The ban was first enacted in 1988 as a ban on smoking on flights of two hours or less and was renewed in 1989 as a six-hour ban. Other federal actions have included bans on smoking in federal office buildings, the ban on smoking in the White House, and bans on smoking in childcare facilities that receive federal funds. The Occupational Safety and Health Administration (OSHA) has proposed regulations that would either prohibit smoking or limit it to separately ventilated areas.²⁰

State. Forty-eight states and the District of Columbia require smoke-free indoor air to some degree or in some public places, although these restrictions vary widely from limited restrictions on public transportation to comprehensive restrictions in workplaces and public places. Among state clean indoor air laws and amendments, workplace restrictions have consistently been more common than restaurant regulations. In 18 states, the tobacco industry has successfully countered clean indoor air efforts by supporting passage of "preemptive" state laws that prohibit local jurisdictions from enacting restrictions more stringent than the state law. The trend in tobacco industry-supported preemption laws has accelerated dramatically in the past several years. These preemption laws are detrimental to the health of the public.²¹

Local. Clean indoor air ordinances at the local level first appeared in the early 1970s. Following release of the 1986 Surgeon General's report, the rate of passage of local ordinances accelerated. By 1988, nearly 400 local ordinances to restrict smoking had been enacted throughout the United States.²² The trend toward smoke-free local ordinances has accelerated since 1990, although since 1996 this trend has leveled. Currently, there are over 800 local ordinances that restrict public smoking. Among existing local ordinances, enforcement is addressed through a variety of agencies including health departments or boards of health (50.8%); city managers (29.0%); police and sheriffs' departments (4.7%); environmental health agencies (1.8%); fire departments (1.8%); and an assortment of other agencies (11.9%). Comprehensive data are currently lacking on the relative effectiveness of various enforcement mechanisms. However, it appears that self-enforced no-smoking laws are generally effective.²³

Policy Options

Policies that allow designated smoking areas. Designated smoking sections within a restaurant, workplace, or other public place have often been used as a method to address ETS exposure. In restaurants, for example, these designated smoking areas are often part of the same room as nonsmoking areas. When there is no physical separation of smokers and nonsmokers, ETS rapidly diffuses throughout the room resulting in substantial exposure among nonsmokers.²⁴ Other attempts have been made to establish smoking areas in physically separated rooms on the same ventilation system. The notion underlying this approach is that the air volume of the building and the associated "dilution factor" will reduce ETS exposures to acceptable levels. Unfortunately,

approximately one million square feet of building area per smoker is required to achieve minimal, acceptable exposure levels among nonsmokers.²⁵ Recirculation of ETS in central ventilation systems results in unacceptably high levels of exposure.

Policies that allow smoking only in separately ventilated areas. In some cases, designated smoking areas have been established in rooms with separate ventilation systems. In order to avoid "backstreaming" of ETS, these rooms must maintain an adequate amount of negative air pressure with respect to nonsmoking areas. When these conditions are met and designated smoking areas do not leak, these provide adequate protection for nonsmokers. However, there are two concerns with these smoking areas. First, there is preliminary evidence that designated smoking areas may increase risk of lung cancer among smokers.²⁶ And second, installation of separately ventilated smoking lounges is extremely costly.

Policies requiring a complete smoking ban. Complete bans on smoking in buildings have become increasingly popular in recent years and are the only way to completely eliminate ETS exposure among nonsmokers. Workplace smoking bans have been effective in reducing nonsmokers' exposure to ETS. A recent study of 25 Massachusetts workplaces²⁷ found a strong correlation between distributions of nicotine concentrations and smoking policies. Median nicotine concentrations varied from 8.6 $\mu\text{g}/\text{m}^3$ in open offices that allowed smoking, to 1.3 $\mu\text{g}/\text{m}^3$ in workplaces that restricted smoking, to 0.3 $\mu\text{g}/\text{m}^3$ in sites that banned smoking. It has been estimated that these concentrations would need to be reduced to 0.0075 $\mu\text{g}/\text{m}^3$ in order to correspond to a minimal risk from ETS.²⁸

Effectiveness of smoking bans.

Effectiveness of smoking bans has been measured by the perceived air quality in the workplace following a smoking ban and by active measurement of nicotine vapor. In studying the effects of a smoking ban in the Johns Hopkins Medical Institutions, nicotine vapor concentrations declined in all areas except restrooms at 1 to 8 months following the ban. In most areas, nicotine concentrations were below the detectable level of $0.24 \mu\text{g}/\text{m}^3$.²⁹

Workplace smoking bans have been shown to decrease smoking intensity and prevalence among affected employees. Numerous studies of these effects have been conducted in health care settings, government agencies, insurance companies, telecommunication companies, and among random samples of the working population. Most of the hospital- and HMO-based studies show a decrease in the average number of cigarettes smoked per day. In addition, several of the hospital studies show significant declines in the overall prevalence of smoking among employees with 6 to 20 months follow-up.³⁰ Studies of smoking behavior in other industries have shown similar results, with most studies showing lower daily consumption and/or reduced overall smoking prevalence at 6 to 20 months after the smoking ban.

Numerous studies have shown that the vast majority of nonsmokers and smokers favor restrictions on smoking in public places.³¹ In studies of hospital smoking bans, patients, employees, and physicians overwhelmingly support the policy.

Costs and Benefits of Workplace Smoking Bans

There also are likely cost savings to employers by implementing smoke-free workplace policies. Such savings include those associated with fire risk, damage to

property and furnishings, cleaning costs, workers' compensation, disability, accidents, life insurance, absenteeism, productivity losses, and occupational risks related to synergism with other risk factors such as asbestos.³² In a recent report on the savings associated with a nationwide, comprehensive clean indoor air, the US EPA estimated such a law would save \$4 billion to \$8 billion per year in operational and maintenance costs of buildings.³³ The EPA analysis concluded that a national ban on smoking in the workplace would be a highly cost-beneficial social investment, with benefits exceeding costs by \$39 to \$72 billion per year.³⁴

EVALUATION

This section briefly describes the merits and limitations of five major pieces of legislation currently before the US Congress. Each of the bills included several similarities—most importantly four of these ban smoking in most worksites in the United States. In addition, there are important differences between the bills in the extensiveness of regulation and in enforcement approaches.

S. 1414 – The Universal Tobacco Settlement Act

S. 1414 would ban smoking or restrict it to separately ventilated smoking areas in most public buildings and worksites. It includes several important exclusions that are outlined below.

The merits of S. 1414:

- A total smoking ban is permitted in affected areas.
- The Administrator of OSHA is given authority to establish standards for separately ventilated smoking areas. General specifications for these areas

specify that air must be directly exhausted to the outside and that negative pressure must be maintained in the smoking areas.

- Posting of a clear and prominent notice of smoking prohibition is required.
- Actions related to violations of the act can be brought by any aggrieved person, state or local government agency, or by the Administrator of OSHA. In any US district court, civil penalties of up to \$5,000 per day of violation may be levied.
- State and local laws are not preempted from enacting stronger protections from ETS.

Limitations of S. 1414:

- Excluded from these standards are restaurants (other than fast food restaurants), bars, casinos, bingo parlors, prisons, and businesses whose primary function is tobacco product sales. Lack of regulation of these locations would result in substantial ETS exposure in the population.
- Smokefree policies for schools, school grounds, and child care providers are not specifically outlined.
- Although action can be brought for violations as outlined above, these must be acted on through US District Courts. With extensive backlogs in many of these courts, it is unlikely that complaints could be handled on an expeditious time line.

S. 1492 - The Healthy and Smokefree Children Act

S. 1492 would ban smoking or restrict it to separately ventilated smoking areas in most public buildings and worksites. It includes several exclusions that are outlined below.

The merits of S. 1492:

- A total smoking ban is permitted in affected areas.
- The Administrator of OSHA is given authority to establish standards for separately ventilated smoking areas. General specifications for these areas would require that air must be directly exhausted to the outside and that negative pressure must be maintained in the smoking areas.
- All types of tobacco use are prohibited for schools, school grounds, and non-home based child care providers.
- All types of tobacco use are prohibited on public transportation, including bus, rail, aircraft, or boat.
- Posting of a clear and prominent notice of smoking prohibition is required.
- State and local laws are not preempted from enacting stronger protections from ETS.

Limitations of S. 1492:

- Excluded from these standards are bars, tobacco merchants, hotel guest rooms, or prisons.
- Enforcement of the provisions of this title is delegated to the states with little detail on how this enforcement is carried out. If a state does not carry out effective enforcement funds under title XXVIII of the Public Health Service Act are put in jeopardy.

S. 1530 - The PROTECT Act

S. 1530 would ban smoking or restrict it to separately ventilated smoking areas in most public buildings and worksites. It includes several important exclusions that are outlined below.

The merits of S. 1530:

- A total smoking ban is permitted in affected areas.
- The Administrator of the OSHA is given authority to establish standards for separately ventilated smoking areas. General specifications for these areas specify that air must be directly exhausted to the outside and that negative pressure must be maintained in the smoking areas.
- All types of tobacco use are prohibited for schools, school grounds, and non-home based child care providers.
- Posting of a clear and prominent notice of smoking prohibition is required.
- State and local laws are not preempted from enacting stronger protections from ETS.

Limitations of S. 1530:

- Excluded from these standards are bars, casinos, bingo parlors, businesses whose primary function is tobacco product sales, and restaurants with indoor seating capacities of 50 or fewer individuals. Excluding these types of worksites and public places would thousands of individuals at substantial risk of ETS exposure.
- Enforcement of the provisions of this title is delegated to the states with little detail on how this enforcement is carried out. Within 6 months of the enactment of this act, the Administrator of OSHA is called upon to promulgate regulations specifying how enforcement will be carried out.

S. 1638 – The Healthy Kids Act

S. 1638 would ban smoking or restrict it to separately ventilated smoking areas in most public buildings and worksites. It amends the OSHA Act of 1970 and includes

several important exclusions that are outlined below.

The merits of S. 1638:

- A total smoking ban is permitted in affected areas.
- Specifications are to be established by the Secretary of Labor, in Consultation with the Administrator of the Environmental Protection Agency. General specifications for these areas require that air must be directly exhausted to the outside and that negative pressure must be maintained in the smoking areas.
- Posting of a clear and prominent notice of smoking prohibition is required.
- Schools and other facilities serving children are specifically required to adopt and implement smoke-free policies.
- State and local laws are not preempted from enacting stronger protections from ETS.

Limitations of S. 1638:

- Excluded from these standards are restaurants that seat fewer than 50 individuals (other than fast food restaurants), bars, casinos, bingo parlors, hotel guest rooms, prisons, and businesses whose primary function is tobacco product sales. Lack of regulation of these locations would result in substantial ETS exposure in the population.
- Enforcement may be diffuse since states are required to enforce the provisions of this legislation. States that fail to meet enforcement standards become ineligible to receive funds under the Healthy Kids Act.

S. 1648 – The PAST Act

S. 1648 has a very brief mention of measures to reduce ETS exposure. The bill

simply amends the OSHA Act of 1970 by adding the following:

“Not later than 12 months after the date of enactment of this subsection, the Secretary shall promulgate a final standard on indoor air quality in indoor work environments in accordance with subsection (b). Such standard shall include provisions addressing control of environmental tobacco smoke in both industrial and nonindustrial indoor or enclosed worksites.”

Limitation of S. 1648:

- This legislation depends entirely on OSHA to promulgate and carry out restrictions on smoking in worksites. This is a *severe limitation* and many more details are needed.

Overall Implementation and Enforcement Issues

It is also important to note that at least four bills specifically prohibit preemption of stronger laws and regulations at the state and local level. Specific detrimental effects of preemption have been noted:³⁵ 1) elimination of local control of public health policy; 2) establishment of weak public health standards that can never be strengthened; 3) elimination of community-based tobacco control interventions; and 4) division of tobacco control coalitions. Despite the anti-preemptive language in each bill, the establishment of federal law, especially OSHA regulation, may result in *de facto* preemption in some areas. In addition, unless the OSHA Act is amended, OSHA standards may preempt local worksite policies. All bills except the Kennedy bill would not override *existing* preemptive state legislation. The policies that allow smoking only in separately ventilated areas will create a

myriad of monitoring and compliance issues, making a total smoking ban preferable.

Earlier public health experience has shown that many laws and regulations related to ETS are self-enforcing. However, violations will occur and the optimal method for dealing with these infractions should be determined. One viable approach to evaluation may be a “mixed” approach in which certain powers rely with OSHA and others are delegated to state and local public health agencies (provided that these mandates are adequately funded). Since OSHA already has extensive purview over the workplace, promulgation and enforcement of rules by the Administrator of OSHA is sensible. In addition, state and local public health agencies already conduct extensive inspection of certain public places such as restaurants. The inspection of the restaurants for compliance to ETS regulations would not appear to be an undue burden.

Implementation and education related to any bill enacted by Congress should be closely coordinated with existing tobacco control coalitions in states and localities. These coalitions have largely resulted from three major programs: ASSIST (from NCI), IMPACT (from CDC), and Smokeless States (from RWJ). While these coalitions may not be directly involved in the enforcement of new federal laws, they can provide invaluable assistance in educating the public, state and local policy makers, the media, and business owners about ETS regulations.

CONCLUSIONS

In summary, there are five major reasons for eliminating ETS exposure:³⁶

- ETS causes acute and chronic diseases and death in otherwise healthy nonsmokers;
- the majority of the public experiences annoyance and discomfort from ETS

exposure and views ETS as a health hazard;

- many nonsmokers do not take personal action to avoid exposure to ETS when smokers light up in their vicinity;
- employers may realize lower maintenance and repair costs, insurance costs, and higher nonsmoker productivity when smoking is prohibited in the workplace; and
- restricting smoking in public settings increases the likelihood that smokers in these settings smoke fewer cigarettes or quit smoking entirely.

The body of scientific evidence is large and clearly sufficient to warrant comprehensive actions to restrict smoking in areas where nonsmokers may be exposed to ETS. In light of these issues and the current policies under consideration, several conclusions are warranted:

1. Despite population-based data showing declining ETS exposure in the workplace over time, ETS exposure remains a common public health hazard that is entirely preventable.

2. Certain sociodemographic subgroups such as minorities, men, persons of lower socioeconomic status, and rural residents are at highest risk for ETS exposure. These groups should be specifically targeted for policy and risk reduction efforts.

3. Exposure to ETS among children in the home environment remains widespread. Since public smoking regulations do not cover the home, new research is needed to determine the most effective intervention strategies for decreasing youth ETS exposure in the home.

4. State and local clean indoor air laws currently in place reduce, but do not

eliminate, nonsmokers' exposure to ETS; total smoking bans are the most effective method for reducing ETS exposure.

5. Beyond eliminating ETS exposure among nonsmokers, smoking bans have additional synergistic benefits including reduced smoking intensity, reduced smoking prevalence, and cost savings to employers.

6. The tobacco industry strategy of supporting preemptive tobacco control regulations at the state and local levels undermines public health. Any new legislation must contain anti-preemptive language.

7. Most of the bills pending in Congress exempt all or part of the hospitality industry. These workers in restaurants, nightclubs, bars, and casinos should be afforded the full health protections available to workers in other industries.

8. More research on ETS is needed, specifically on the dose of ETS to nonsmokers in areas where policies are enacted and in the home environment.

NOTES

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SCIENCE
ANALYSIS
PROJECT**

Policy Analysis No. 16

POLICIES TO REDUCE YOUTH ACCESS TO TOBACCO

By

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June 4, 1998

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EXECUTIVE SUMMARY

In order to start smoking, young people must have access to tobacco products. There is abundant evidence that children can easily buy tobacco from stores and vending machines despite laws in all 50 states that ban the sale of tobacco to minors, because tobacco retailers do not comply with these laws and the laws are not enforced. The majority of cigarettes consumed by young people come from illegal sales to underage youths. Active enforcement of tobacco sales laws has the potential to curtail young people's access to tobacco products and thereby reduce the number of youths who take up smoking. Policies with this goal are widely advocated, have strong public support, and are a focus of federal, state, and local tobacco control efforts. There have been two actions at the federal government level. In 1992, Congress passed legislation (the so-called Synar amendment) requiring states to take action to reduce the sale of tobacco to minors in order to be eligible for substance abuse block grant funding. In 1996, the Food and Drug Administration issued regulations that established age 18 as the nationwide minimum age of sale for tobacco products.

The available evidence suggests that enforcement programs which achieve a high level of merchant compliance with tobacco sales laws may reduce youth access to tobacco and youth tobacco use. However, this requires

strict law enforcement. If even 20% or less of merchants are breaking the law, youths will have little problem buying tobacco and enforcement will have no effect on tobacco use. Carefully enforced restrictions on youth access are an important component of any comprehensive strategy to reduce tobacco use among youths. However, youth access to tobacco is only one part of the complex problem of youth smoking. Efforts to reduce the supply of tobacco to youths are, by themselves, unlikely to be as effective as the same efforts combined with policies that reduce the demand for tobacco through increased price and comprehensive restrictions on advertising and promotion. A youth access policy by itself might have relatively little impact on youth smoking and is not an acceptable substitute for the broader group of policies being considered by the Congress.

Despite state laws and now federal regulations, tobacco retailers continue to make over \$1 billion in illegal sales to minors each year. A carefully designed enforcement program will be necessary to withstand the strenuous efforts of tobacco retailers and the tobacco industry, both of whom have opposed past efforts. Essential features of an effective enforcement program include:

- 1) licensing of vendors;
- 2) civil disposition of violations;
- 3) effective penalties;
- 4) frequent conduct of realistic inspections to test compliance with the law;
- 5) a mandated compliance rate of over 95%;
- 6) multiple layers of enforcement authority;
- 7) adequate and guaranteed funding; and
- 8) restrictions on self-service of tobacco.

be expected to provide public health benefit for at least ten years. Furthermore, the bill does not provide a coherent enforcement scheme. It is unlikely that the McCain bill will result in meaningful limits on youth access to tobacco products.

This paper analyzes current legislative proposals against these standards. Of these, only the Conrad bill (S.1638) provides a sound structure for the effective enforcement of youth access laws at the state and federal levels. The youth access aspects of this bill are nearly ideal with only three important oversights which could be addressed without changing the structure of the bill. Adoption of the youth access portions of this bill would represent a tremendous public health advance. In contrast, the youth access portion of the Hatch bill (S.1530) would effectively alleviate corporate retailers of responsibility for the billions of dollars of illegal sales made by their employees. This bill would not reduce youth access to tobacco and might in fact be counterproductive to that goal. The Jeffords bill (S.1648) codifies the current FDA restrictions on youth access without giving the FDA authority to regulate tobacco. There is no provision for any federal enforcement of the restrictions and only small and temporary incentives for states to do so. This bill could represent a step backwards from the status quo on youth access. The Kennedy bill (S.1492) ignores the problem of youth access, but by providing the FDA with authority and funding it would represent a small improvement over the status quo. The compliance rate goals set by the McCain bill (S.1415RF) are extremely modest and could not

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INTRODUCTION

Preventing young people from starting to smoke is a major public health priority.^{1,3} These efforts must focus on children, because 88 percent of smokers start by the age of 18.³ In the past, most public health efforts to reduce smoking among young people focused on reducing their *demand* for tobacco products. These efforts, which included school health education programs and mass media programs discouraging tobacco use, have had at best modest success and have been overwhelmed by environmental forces, such as tobacco advertising that appeals to children.³ As a result, adolescent smoking rates have risen, increasing by 32% between 1991 and 1997.^{4,5} Over the past decade, the public health community has developed a new approach to preventing youth smoking: reducing the *supply* of tobacco to youth.^{6,7} Policies with this goal are widely advocated, have strong public support,⁸ and are a focus of federal, state, and local tobacco control efforts.^{6,7,9} This paper reviews the current legislative proposals in light of what is known about these policies and their impact, and it identifies the elements needed to implement restrictions on youth access to tobacco.

SOURCES OF TOBACCO FOR YOUTHS

In order to interrupt the supply of tobacco to young people, it is important to understand how children obtain tobacco. In surveys, almost all children say that they get their first cigarette from a friend or sibling.¹⁰ After the first cigarette, friends are the major source of tobacco.¹⁰⁻¹³ As nicotine dependence develops, there is a need to find a more reliable source of tobacco. At this point, the young smoker typically begins to purchase his or her own tobacco and in turn provides it to friends. When a youngster finds a merchant who will make an illegal sale, he or she may tell their friends, who may then return regularly to the same store. Some youths learn that certain clerks within a store will sell while others will not. One 11 year old smoker told the first author that he had memorized the work schedule of the clerk at the drug store who would sell him cigarettes. Thus, even if only a few merchants in a community are willing to break the law, youths living in that community may experience little difficulty obtaining tobacco.¹⁴ It is also important to understand that even though half of young smokers list friends as a frequent source of tobacco, most of these friends are buying their tobacco from retailers. Thus, the majority of cigarettes

consumed by youths come from illegal sales to underage youths.

Another source of tobacco for young smokers is shoplifting tobacco from stores. Up to 50% of young smokers admit to shoplifting tobacco at least once,¹⁰ and this source may become more prominent in the future if the purchase of tobacco becomes more difficult for youths. Self-service displays make tobacco available to shoplifters and may also make it easier for minors to purchase tobacco because they require the youth to have less interaction with a store clerk. A youth need not speak to the clerk if he or she can take the tobacco from a display and put it on the counter. Only 10% of young smokers report that parents and older relatives are a regular source of tobacco, and these are typically the older teenagers who have been smoking for years.¹⁰

In summary, the great majority of young tobacco users rely on tobacco retailers as their source of tobacco, either directly by purchasing or stealing the product, or indirectly by having their friends buy it. Reducing the sale of tobacco to children and curtailing shoplifting of tobacco ought to decrease young people's access to tobacco and thereby decrease their tobacco use. Underage youths were estimated to consume \$1.25 billion worth of tobacco in 1988.¹⁵ Since then, both the price of tobacco and the prevalence of smoking among youths have increased substantially. This potential revenue provides a strong incentive to merchants to sell tobacco to children, even at the risk of a fine. Regulatory efforts to eliminate self-service displays, which could reduce shoplifting and make tobacco less accessible to youth, have been strongly opposed by retailers, who receive promotional allowances from tobacco manufacturers for putting self-service displays in their stores.

EFFECT OF STATE AND LOCAL ACTIONS TO REDUCE TOBACCO SALES TO YOUTHS

All 50 states and US territories prohibit tobacco sales to minors, but these laws have rarely been enforced.^{9,16} The purchase, possession or use of tobacco by young people has not been restricted until recently, when several states and communities enacted youth possession laws. Despite the universal existence of state laws banning tobacco sales to minors, multiple studies over the past decade have demonstrated that merchant compliance with these laws is low and that children can easily purchase tobacco from stores and vending machines.^{3,17-22}

Improving compliance with tobacco sales laws has the potential to reduce the availability of tobacco to young people and thereby discourage smoking. The first efforts to do this focused on educating tobacco vendors about tobacco sales laws. This approach produced only partial improvement in merchant compliance and the effect was not sustained over time.²³⁻²⁵ Consequently, public health strategies shifted from educating merchants to actively enforcing the laws restricting tobacco sales to minors. Enforcement programs generally employ minors, who are supervised by public health authorities, to make periodic attempts to purchase tobacco from stores and vending machines. Merchants who violate the law are fined and for repeated offenses can face suspension of their license to sell tobacco. Enforcement programs conducted by public health departments in several communities have consistently reduced the proportion of merchants who sell tobacco illegally to minors.^{6,7,9,26}

Whether this translates into reducing young people's access to tobacco products or their tobacco use is less certain, in part because these programs are new and have received

relatively little scientific study. So far, the results of these studies are mixed. Uncontrolled studies in several individual communities have found that enforcing tobacco sales laws reduces the prevalence of smoking among youths.^{6,7,27} In Woodridge, Illinois, strict enforcement against merchants and penalties for underage users resulted in a 69% decline in the smoking rate among young teens.⁶ Five years later, when the youths were 18 years old, smoking rates were reduced by 50% over rates in surrounding communities.²⁸ This occurred despite the fact that by the age of 16 or 17, Woodridge youths could drive to the next town to buy tobacco. The fact that this intervention was effective even as the youths grew older suggests that many youths who were willing to try tobacco at the age of 13 or 14 may have matured beyond this susceptibility by age 16 or 17. Experiences similar to that in Woodridge have been reported in Leominster, Massachusetts, where smoking rates among young teenagers fell by 42%, and in communities in Washington, Minnesota and California.^{7,27}

However, a recent controlled study in Massachusetts failed to demonstrate the effectiveness of enforcing tobacco sales laws.¹⁴ The study compared three Massachusetts communities which enforced a tobacco sales law with three communities that did not. It reported that enforcing the law for two years had no effect on teen smoking rates. Merchants' compliance with tobacco sales laws improved more in towns that enforced the law than in those that did not, but over two years adolescents living in towns with enforcement reported little drop in their ease of tobacco purchase and no decline in tobacco use. In short, enforcing a tobacco sales law for 2 years improved merchants' compliance but did not alter youths' access to tobacco or smoking behavior. An explanation for this discrepancy proposed by the authors is that reducing the accessibility of tobacco to youth requires a higher degree of merchant compliance with

tobacco sales laws than was achieved in the study. Implementing an enforcement program proved to be more complex for communities than had been anticipated. Political, bureaucratic, legal, and logistical obstacles, including strong pressure from tobacco retailers, prevented health departments from conducting inspections as frequently as planned in the study design and from imposing penalties as aggressively as was intended by statute. As a result, 20% of the merchants in the communities were still selling tobacco to minors after two years of enforcement and this degree of compliance with the law was not enough to reduce the supply of tobacco to children.

In contrast to the Massachusetts study, another new study, an experiment involving 14 small rural communities in Minnesota, found that communities which adopt and implement policies to restrict youth access to tobacco do affect young people's access to tobacco and tobacco use.²⁹ Seven towns in the study were randomly assigned to participate in a community organizing effort whose goal was to change local policy and merchant behavior in order to reduce youth access to tobacco. The other seven towns received no special attention. After 32 months, the organizing effort led all seven towns to pass comprehensive local ordinances to limit youth access to tobacco, and the level of merchant compliance rose to 95%. Students in grades 8-10 in those towns had a slower rise in the rate of tobacco use over time, compared to students in the towns where no youth access efforts were being made. They made fewer attempts to purchase tobacco illegally and felt that tobacco was less accessible to them. The fact that merchant compliance exceeded 90% may explain why this study found an effect on youth smoking while the Massachusetts study did not. This intervention in the Minnesota study was also a broader one, consisting of community organizing, while in Massachusetts the intervention was limited to law enforcement only. Finally, it is possible

that youth access policies work differently in different settings; in Minnesota, the setting was small rural towns while in Massachusetts it was larger urban communities.

It has been suggested that there may be a threshold effect to enforcement efforts; that is, if more than 5-10% of merchants in a community continue to break the law, youths will still find it easy to buy tobacco. This is supported by the observation that merchant compliance rates exceeded 90% in the two towns where reductions in teen smoking are best documented.^{6,7} If this is true, enforcement must be carried out with sufficient vigor to ensure that fewer than 5-10% of merchants are breaking the law in order to produce any public health benefit. This would also imply that states and communities that reduce the proportion of law breaking merchants to 20% have actually had little effect on the ability of youths to purchase tobacco, despite the apparent progress made. The threshold effect would also imply that banning cigarette vending machines alone would be expected to have little effect on youth access. Youths can easily switch to stores as their source of tobacco if vending machines are eliminated and stores continue to make illegal sales.

Taken together, the available evidence suggests, but does not definitely prove, that there is a relationship between reductions in illegal sales to minors and decreases in youth tobacco use. However, more research is needed. Previous studies do suggest that enforcement which achieves very high levels of merchant compliance with tobacco sales laws can reduce young people's access to tobacco and their tobacco use. The data do not support the conclusion that restricting youth access to tobacco is a policy which can, all by itself, solve the problem of teen smoking. This is not surprising, since access is only part of the complex problem of youth tobacco use. What is needed is a comprehensive multifaceted strategy that can decrease both the supply of cigarettes to children and their demand for

them. While some tobacco control advocates question the efficacy of youth access restrictions at all,³⁰ most agree that the evidence on youth access restrictions is sufficient to include this policy as a valuable part of a comprehensive strategy to reduce tobacco use.

POSSESSION LAWS

Many current laws do not prohibit minors' use or possession of tobacco products. Laws that prohibit tobacco possession by youths have been proposed and enacted in some states and communities. Proponents of these laws argue that the fact that the possession of tobacco is legal contradicts the health message given to youths about tobacco. Youths frequently question how tobacco can be so dangerous if it is legal for youths to use it. School officials have advocated penalties for youths to allow them to prevent crowds of young smokers from congregating outside of school property, creating a nuisance, and setting a bad example younger students. Police have advocated possession laws because of the high incidence of tobacco use among delinquent youths. To combat crime by delinquent youths, police stop youths for possession of tobacco, and then search them for other drugs, alcohol and weapons. The tobacco industry also supports possession laws. Tobacco control advocates assert that this support is based on self-interest; i.e., that laws making it illegal for youths to possess tobacco also make it more difficult for authorities to conduct compliance tests for law enforcement or research. Special immunity must be obtained from the prosecuting attorney and in some cases this has been denied. The tobacco industry has introduced legislation that relieves store owners of responsibility for illegal sales while placing the punishment on the underage smokers.(HR 2034, S.1530) The shifting of blame from the retailers and manufacturers to the children has been a common theme of industry sponsored

legislation.³¹ Indeed, many bills provide for more severe penalties for the youngsters than for the corporations. Few in the public health community advocate that the possession of tobacco be made illegal for minors.³² No study has evaluated whether the passage or enforcement of tobacco possession laws has a positive effect on youth's attitudes or behavior regarding tobacco. In the absence of any scientific evidence that making the possession of tobacco illegal is beneficial, it would be premature to adopt this approach as federal law.

OBSTACLES TO ENFORCEMENT OF TOBACCO SALES LAWS

In practice, effective enforcement of tobacco sales laws has been very difficult to implement due to a lack of secure funding and intense opposition from the tobacco industry and retailer trade associations. Although state governments were estimated to collect \$173 million in state excise taxes in 1988 from the illegal sale of tobacco to minors,¹⁵ using some of that revenue to fund the enforcement of tobacco sales laws is not entertained. Furthermore, despite rhetoric to the contrary, a case can be made that tobacco manufacturers and retailers have made it a priority to obstruct the enforcement of these laws.³¹ Doing so is clearly in their financial self-interest for several reasons. Retailers have been illegally selling over \$1 billion of tobacco to minors each year, and a sizable minority of retailers do not want to relinquish this income.¹⁵ Retailers also receive large revenues from promotional allowances for putting tobacco in self-service displays. In the long term, widespread enforcement of youth access laws could translate into a sizable reduction in the number of adult smokers and therefore in tobacco industry revenues.

The tobacco industry has led an often successful campaign to undermine efforts to

enforce restrictions on the sale of tobacco to minors. Pro-tobacco forces have successfully advocated legislation in many states that hampers enforcement efforts.³¹ Several provisions are common to many of these bills. They frequently strip all local law enforcement officials of their authority to enforce the law. Sometimes, only a single person in the state is authorized to enforce the law. Preemption strips communities of the authority to address the problem through local laws. Loopholes are included to make prosecutions all but impossible. For example, many laws now require that prosecutors prove that the merchant "knowingly and intentionally" sold tobacco to a minor. Many laws prohibit enforcement agencies from freely using standard enforcement techniques. As a result of these tobacco industry successes, enforcement officials in many states face an impossible task. In some states, enforcement is hampered by the lack of tobacco vendor licensing. In other states, licensing is done by the revenue department, which treats lists of vendors as privileged information that cannot be shared with law enforcement officials. In most states, the sale of tobacco to minors must be prosecuted as a criminal offense through the court system rather than being handled administratively as a civil offense.

Opposition to enforcement has also come from retailers. Retailers have mounted legal challenges to many laws that seek to address the problem of youth access. In many cases, the challenges have delayed enforcement in those communities. Additionally, the threat of legal challenges have been used successfully to intimidate communities from enacting these laws in the first place. Once laws have been enacted and enforced, retailers have mounted frivolous court challenges to their citations that tie up enforcement personnel and delay further enforcement activities. Merchant complaints and political pressure have resulted in many enforcement agencies conducting compliance tests using youths who are too young to be

effective. A study has demonstrated that about half of merchants who are violating the law will make illegal sales only to youths who appear to be sixteen years of age or older.³² These violators go undetected when youths who appear younger than 16 are used to conduct compliance tests. The only way to protect older adolescents from illegal sales is to use older adolescents to conduct the compliance tests.

While most merchants respond to enforcement by training their personnel to obey the law, others appear to direct their energies into circumventing the law. Since youths used for compliance testing are often forbidden from lying about their ages, some merchants have learned to expose these youths by asking for their age instead of proof of age. Some merchants coax kids by saying "if you say you are 18, I can sell them to you." If the youth will not lie about his or her age, the merchant concludes that the youth is part of a law enforcement activity and will not sell to that youth. Merchants have developed phone networks to tip each other off when they suspect that compliance tests are underway. Some merchants have learned to avoid prosecution by not selling tobacco to unfamiliar children. Since law enforcement programs do not send underage buyers into stores where they are known, some merchants will say "If you are under 18, I can't sell them to you unless I know you".

When retailers have been prosecuted they have sometimes used their political clout to retaliate against enforcement agencies. Elected officials who are pro-retailer have threatened and cut the budgets for the enforcement agencies as punishment for enforcing the law. In some instances, this political intimidation has decimated enforcement programs.

CURRENT FEDERAL POLICIES TO REDUCE TOBACCO SALES TO YOUTHS

The Federal government has taken two actions to address youth access to tobacco: the Synar amendment and the FDA regulations. First, in 1992, Congress adopted legislation to encourage states to reduce the availability of tobacco to minors.³³ This so-called Synar Amendment makes the receipt of federal block grants for substance abuse and mental health programs contingent upon states adopting and enforcing restrictions on the sale of tobacco to minors in a manner which can be "reasonably expected" to reduce the availability of tobacco to youth.³³ Implementation of this law was delayed for over three years awaiting regulations issued by the Department of Health and Human Services.^{34,35} These regulations only require states to achieve an 80% merchant compliance level.³⁵ Research cited above has demonstrated that compliance rates of 80% cannot be "reasonably expected" to reduce the availability of tobacco to youths. While the idea of encouraging states to enforce their laws is a good one, the DHHS regulations are likely to do little or nothing to reduce youth access to tobacco.¹⁴ Furthermore, the Synar amendment has proved to be awkward to implement. The federal government does not provide states with funding for this purpose and specifically prohibits the use of block grant funds for enforcement. The state agencies that are at risk of losing their funding have no enforcement authority. The state agencies that do have enforcement authority have no incentive to enforce the law and no funding to do so.

The second federal government action is contained in the 1996 FDA regulations that address many aspects of youth access.³⁵ These include the following provisions: (1) cigarette vending machines are banned from locations where youths are allowed; (2) all tobacco products must be inaccessible to customers; (3)

the free distribution of tobacco products is prohibited; (4) tobacco sales to customers under age 18 are prohibited; and (5) vendors must obtain photographic proof of age from any customer under 27 years of age. The FDA is currently enforcing only the last two (minimum age and ID) requirements while the other provisions are in litigation. The FDA is contracting with individual states to conduct compliance tests on their behalf for enforcement purposes. To enforce all of its tobacco regulations, the FDA has been budgeted \$39 million, a sum inadequate to enforce the law fully in all 50 states. Funding for FDA enforcement in future years is not guaranteed, which makes these activities politically vulnerable. While the current FDA staff is motivated to do an excellent job, a change in leadership could result in a complete halt to enforcement activities because the FDA is under no statutory mandate to adequately enforce the youth access provisions of its regulations.

RECOMMENDED FEDERAL STRATEGY TO CURTAIL TOBACCO SALES TO MINORS

Federal legislation should institutionalize and mandate effective enforcement at both the state and federal levels. Permanent protected funding for enforcement at the state and federal levels is necessary to avoid political efforts to weaken enforcement. Barriers to enforcement erected at the state level should be removed. Steps should be taken to make it easier for clerks to identify underage customers. State cooperation should be obtained by rewarding good efforts through increased funding. The following are elements of a model federal strategy:

1) The federal law should affirm the FDA's authority to regulate the marketing and

sale of tobacco and should extend the current restrictions to ban all vending machines, free sampling, mail orders, and self-service of tobacco.

2) The federal minimum age for tobacco sales should be increased to 21 years, the same age as for alcohol. At the very least it should be increased to 19 to keep tobacco out of the high schools.

3) A true federal licensing system should be created and administered by the FDA through subcontracts with states. Violations of the federal law should be penalized by the FDA through administrative fines and license suspensions. The license list should be public information.

4) Permanent funding for FDA enforcement should be provided by establishing an annual license fee of \$400 per location, indexed to inflation. This fee should be split evenly between the FDA and the states to be used only for tobacco enforcement. This will provide a permanent enforcement fund for state enforcement as well. This fund will grow or shrink in proportion to the number of tobacco vendors.

5) Federal law should remove all obstacles to federal enforcement. This would include preventing states from restricting who can do compliance tests or the manner in which they are done. States should be prevented from making it a crime for youths to participate in compliance tests. A national fund should provide liability insurance to compensate any youth who might be harmed while employed to perform compliance tests, and to provide indemnity to officials who are supervising compliance tests. A federal law should make it a misdemeanor to detain, harm, intimidate, threaten or otherwise harass anyone who is conducting compliance tests.

6) The FDA should be authorized to contract with state or private agencies to conduct compliance tests. The FDA should be mandated to maintain merchant compliance

between 95% and 100% in each state using youths just below the permissible age of sale.

7) The current Synar approach should be replaced with one that rewards states with block grants from the settlement dollars. The block grants should be on a per capita basis with increasing generosity based upon achieving progressively higher compliance rates. The block grant sums should be modest for compliance rates below 90% and increase substantially for rates between 95% and 100%. The additional funding could be used by states to fund the enforcement of alcohol access laws.

8) Compliance rates can continue to be measured through a scientific survey, as is now done for the Synar regulations, but 17 year old youths must be used to test compliance and the same standard protocol must be used in all states. If the legal age is raised above 18, the youths used for the survey should be just under the legal age. States should not be responsible for conducting this survey. To ensure fairness and accuracy, part of the license fee should be used to have the state compliance surveys performed by the federal government or a disinterested third party.

9) In order to qualify to share the federal license fee, states must meet certain minimal requirements designed to facilitate the enforcement of these laws. The Department of Health and Human Services will determine if states meet the minimum qualifications. In the event that a state does not meet the minimum requirements, the state would receive only an appropriate compensation for administering the license and any remaining license funds will revert to the FDA to enforce the law in that state. Minimum requirements should include the following:

- A) Establish a minimum age equal to or higher than that established under federal law.
- B) Adopt the FDA restrictions regarding vending machines, free sampling, self-service, minimum package size, out of

pack sales and point of purchase advertising. These two provisions will allow state and local authorities to use state law to enforce the federal restrictions.

- C) Establish a state enforcement authority that would administer the license, directly receive federal funding, have primary responsibility to enforce the law and perform civil administrative disposition of violations.
- D) Ensure that government issued identifications such as driver's licenses carry some easily recognized indication that the person is under age. Some states do this with color, in others, the photo is in profile instead of face forward. These licenses greatly simplify the task of determining whether a person is old enough to buy tobacco. Some of the settlement dollars could be provided to states to facilitate any transition costs.
- E) All state and local law enforcement officials must be allowed to enforce the state law.
- F) Penalties for violations should primarily target store owners. Minimum penalties should be established as follows: First and all subsequent offenses against the clerk, \$250 fine. First offense against the license holder, \$500 fine. Second offense in a two year period, \$1000 fine. Third offense in a two year period, \$1000 fine and a three business day suspension of the tobacco license. Fourth offense in a two year period, \$1000 fine and a one year loss of the tobacco license.
- G) Require state compliance rates to be above 90% within two years of the date of enactment.
- H) Require signs at each cash register stating the legal minimum age and providing a toll-free number to report illegal sales.

- I) Require government issued photographic proof of age for any customers under 27.
- J) Require that youths be prohibited from entering any tobacco-only stores, which are often exempt from smoking regulations and marketing restrictions.

10) The federal government should convene a national consensus panel of law enforcement personnel and technical experts to standardize the inclusion of a computerized representation of the birth date, either in the form of a bar code or a magnetic strip that will allow technology to be used to determine a customer's age. This technology would work with computerized lock out programs on cash registers that would require the clerk to enter the customer's birth date before a tobacco sale could be rung up. The same approach could be used for alcohol sales as well.

11) Consideration should be given to providing states with larger block grants if they take the additional step of increasing their minimum age above that of the federal government.

COMPONENTS OF EFFECTIVE ENFORCEMENT

Given the many obstacles to enforcing tobacco sales laws, it may seem unrealistic to get 95% of merchants to obey the law. However, communities like Woodridge, Illinois, have found that with a serious enforcement effort, it is possible to reach an approach 100% merchant compliance in a short period of time.⁶ A model for the effective and efficient enforcement of youth access laws based on the experience of cities in Massachusetts has been developed.³⁷ According to this model, public health authorities license tobacco merchants, educate them about tobacco sales laws, and warn them that their compliance with the law will be

tested. Then, compliance with the law is routinely tested by employing minors to attempt to purchase tobacco. The minors are closely supervised by adults during these activities. If an illegal sale is made, the vendor receives a citation. Penalties include fines and possible suspension of the license to sell tobacco for repeated violations.

For a federal initiative to be successful, tobacco industry opposition to enforcement efforts must be anticipated, and a system must be designed to guarantee that effective enforcement will occur. The essentials of a model enforcement system are described below, in conjunction with additional features that would enhance the effectiveness of federal legislation. These criteria provide a structured format with which the legislative initiatives can be compared.

Licensing. Effective and efficient enforcement requires the licensing of tobacco vendors. Without a license, an enforcing agent does not know where tobacco is sold, who is responsible for violations, and where to mail a citation. It is estimated that enforcement inspections consume double the resources when vendors are not licensed (DiFranza, personal communication). License fees are a fair and convenient way to fund enforcement activities since the cost of enforcement is borne by those who profit from the activity being regulated. Retailers sometimes oppose using license fees to fund enforcement out of fear that the licensing agency will continuously boost the fee out of financial self-interest, but there is no evidence that this has occurred.³⁸ State and federal enforcement have been significantly hampered by the fact that in many states it is difficult to obtain a list of tobacco vendors. This information is sometimes considered confidential tax information that cannot be disclosed to anyone. Indeed, the actual number of tobacco retailers is uncertain. The FDA estimates a total of 400,000 vendors, while the tobacco industry estimates 1,000,000. Two

national industry groups estimate the number of tobacco vending machines at either 110,000 or 300,000.^{39,40} Accurate figures are needed to plan enforcement inspections and estimate their cost.

A federal enforcement system will require the creation of a new licensing system. A federal system could be implemented by contracting with each state to license vendors. Several states do not currently license tobacco retailers and the retailers themselves in several states have fought very hard to oppose any form of licensing.³⁸ If the federal enforcement effort depends on licensing by states, there must be a plan to handle licensing in those states that either do not license tobacco vendors or refuse to share their lists of licensees.

Civil disposition. The enforcing agency must be capable of dealing with infractions through administrative civil action against the license holder. Criminal prosecution wastes governmental resources and ties up the courts. It also reduces the certainty of punishment for violators if, for example, overburdened courts dismiss charges in order to clear their dockets.

Penalties. The law must provide for meaningful penalties against the license holder. FDA enforcement should focus on the owner of the establishment because it is the owner who is responsible for all health and safety issues. In light of the large potential income a vendor can make from illegal tobacco sales, the penalties must be substantial and should include provisions for license suspension and revocation for repeat offenses. While there is no argument against also penalizing the clerk who makes the sale, license holders must be held accountable for the actions of their employees. The question is not "what is a fair penalty for selling tobacco to children?", but "what kind of penalty will it take to finally convince retailers to obey the law?". Minimum but not maximum penalties should be codified into law.

Compliance testing. The enforcing agency must be authorized to conduct realistic compliance tests without restrictions on how often these tests can occur or the manner in which they are conducted. The more often compliance tests are conducted, the greater the proportion of merchants who stop violating the law.⁴¹ In several communities, it has been discovered that every merchant must be tested four times each year in order to maintain acceptable compliance rates. Youths employed as decoys should be able to act as real youths do. It is important that federal law not place any constraints on who can conduct compliance tests. Indeed, there are three good reasons to adopt a federal law that would prohibit states from banning or limiting compliance testing. First, a state ban on compliance tests may prevent the FDA from enforcing its regulations. Second, it will not be possible to determine if a state is submitting fraudulent compliance rate reports if only state authorities are permitted to conduct compliance tests. Third, if researchers cannot conduct compliance tests, it will be impossible to conduct further public health experiments to determine if enforcing the law will reduce youth tobacco use.

Funding. The enforcing agency must have permanent funding sufficient to the task. As the funding requirements are directly proportional to the number of vendors, an annual licensing fee collected from each retailer is the most logical source of permanent funding. Part of this fee could be shared with states for their role in administering the licenses and collecting the fees. If only funds from any proposed tobacco settlement are used to fund enforcement, the enforcement system will have only a temporary base.

Minimum permissible compliance rates. Many youth access laws are not enforced at all and research has shown that half-hearted enforcement efforts will do not reduce tobacco

use among youths.⁵ The enforcing agency should have a mandate to enforce the law with sufficient vigor to maintain compliance above 95%.

Enforcement redundancy. The enforcement system must have built-in redundancy. States and communities must be capable of enforcing the law in the event that the federal system fails to do an adequate job. The federal law should not preempt state or local officials from enforcing state laws. The model state law should include a provision that all state and local law enforcement agencies are authorized to enforce the law. State legislation sponsored by the tobacco industry typically strips local law enforcement officials of their authority to enforce the law.³¹

Minimum age. The minimum age for the purchase of tobacco should be set through regulation rather than legislation. This would permit future changes to be made more easily if circumstances require it. It has been argued that 18 is not the ideal minimum age of tobacco purchase since it allows high school seniors to purchase tobacco. Minimum ages of 19, 20 or 21 would be more effective at keeping tobacco out of the high schools. Many retailers would like to see the same minimum age for alcohol and tobacco, i.e., age 21. Increasing the minimum age will be more easily accomplished through new regulations rather than another act of Congress. States should not be preempted from increasing the minimum age and should be rewarded for doing so.

Self-service. The law should eliminate vending machines, free sampling and self-service of all tobacco products. This should be done by authorizing the FDA to regulate this area. This will allow the FDA to adapt its regulations if the tobacco industry attempts to circumvent the restrictions or the restrictions prove inadequate to the task.

Impediments. States should be prohibited from restricting federal enforcement of the law. The FDA currently does not know how it can enforce the federal law in states that have passed anti-compliance test laws. There should be no other impediments to enforcing the law or prosecuting merchants as discussed below. Any model state legislation should prohibit any impediments to law enforcement.

Preemption. There should be no preemption of state or local authority to enact or enforce their own restrictions other than the preemption over anti-compliance testing provisions discussed above.

ASSESSMENT OF THE CURRENT LEGISLATION

Each of the 5 major Senate bills proposed are analyzed against the criteria outlined above. The remainder of the paper is a detailed evaluation of each bill.

OVERVIEW

S.1530 (THE HATCH BILL) Under the Hatch bill, responsibility for illegal sales is shifted from the top of the corporate ladder to the minimum wage clerks at the bottom. Underage youths, however, are given the harshest penalties, implying that it is the children who are to blame for the illegal sale of tobacco. This bill includes a variety of provisions designed to hamper the enforcement of youth access laws. The enactment of this legislation would not be expected to reduce youth access to tobacco and might in fact be counterproductive.

S.1415RF (THE MCCAIN BILL) most closely resembles the settlement agreement and reflects the lack of attention which that document gives to the issue of youth access. This bill suffers from inattention to critical

details. Although this bill sets compliance rate goals, the goals themselves are extremely modest and would not be expected to provide any public health benefit for at least ten years.

S.1492 (THE KENNEDY BILL)
Despite its emphasis on the welfare of youth, this bill does almost nothing to address the problem of youth access to tobacco. Indeed, youth access is never mentioned in the bill. The bill does not require states to enforce youth access laws, nor does it provide them with funding or an incentive to do so. The bill does authorize the FDA to regulate tobacco and provides the funding that would allow the FDA to do an excellent job of enforcement. However, since the bill does not mandate effective enforcement at any level of government, there is no guarantee that future administrations will choose to enforce the law.

S.1648 (THE JEFFORDS BILL)
addresses the youth access issue by incorporating the current FDA regulations into law without giving the FDA the authority to regulate tobacco. Penalties for violating the federal law are not provided. There is no mechanism to enforce the federal law, no funding for federal enforcement and no mandate for enforcement. States are provided a weak incentive to enforce the law but federal funding for state enforcement activities are inadequate and short lived.

S.1638.(THE CONRAD BILL)
provides a sound structure for the effective enforcement of youth access laws at the state and federal levels. States are provided with funding for enforcement and a mandate to achieve 95% compliance within a short time frame. The FDA is given authority to regulate tobacco marketing, authority to enforce its regulations and generous funding for enforcement. The FDA regulations could be tightened in future years without going through Congress. States would be required to adopt model legislation to be drafted by DHHS. The Conrad bill is the only bill to provide the resources and structure for state and federal

enforcement of youth access laws. This bill does the best job of addressing the youth access issue. Of the legislation reviewed here, only the Conrad bill is likely to lead to enforcement of tobacco sales laws. Unless excellent compliance rates are achieved and maintained, children will still be able to buy tobacco easily and enforcement efforts will not reduce youth tobacco use rates.

As demonstrated in this review, designing an effective enforcement scheme is a complex undertaking that demands attention to detail. The absence of a critical detail can result in an enforcement system that does not reduce youth's ability to buy or use tobacco. A flawed system could be worse than no system at all because it produces the illusion that the problem of illegal tobacco sales has been solved while allowing the problem to continue.

EVALUATIONS OF INDIVIDUAL BILLS (IN ALPHABETICAL ORDER)

S.1638-THE CONRAD BILL

The Secretary of DHHS will be required to issue a model state law within one year, and require states to meet or exceed the provisions of the model law in order to qualify to receive funding.(Sec 577(b)1) The bill outlines the minimum provisions of such a model law but allows the Secretary of DHHS and states to be more stringent.(Sec 577(b)3) As described in the bill, the model law applies only to licensing and license suspension/revocation. The outline of the model law is sketchy.

Licensing. In order to qualify to receive funding through this act, states will be required to have in place a mechanism for local or state licensing of tobacco vendors.(Sec 577(b)3A) The bill does not provide for federal licensing of tobacco vendors with the exception of those

located on federal property.(Sec 577(g)) The bill does not specify that lists of licensees be made available to the federal government, state law enforcement agencies or the public.

Civil disposition. Currently DHHS, through the FDA, has established federal civil penalties. By confirming FDA authority to regulate tobacco, the bill would enable the FDA to continue to enforce these penalties. The model state bill would make violations a civil offense. The bill should streamline the current cumbersome FDA appeals process by creating a special appeals process for tobacco sales.

Penalties. The bill does not specify federal penalties for violating the federal prohibition on the distribution of tobacco to minors. These penalties are currently established through FDA regulation and that is the preferable approach because it would allow the FDA to increase those penalties if the current penalties prove ineffective. The bill requires states to establish penalties for distributing tobacco without a license.(Sec 577(b)3E) The regulations for the model state law will require states to provide for license suspension or revocation.(Sec 577(b)3G) States would be required to adopt the penalties described in Sec 577(c). The penalties for retailers are reasonable but it is not clear when retailers would be responsible for illegal sales made by their clerks. Also, the time period over which cumulative offenses will be counted is not specified.(Sec 577(c)3) The penalties for sales clerks are far too lenient, starting at only \$25. Penalties for minors who are caught purchasing or attempting to purchase tobacco are provided.(Sec 577(c)2) However, the bill does not state that these actions are a federal crime. This implies that these activities will be addressed in the model state law. The penalties for minors are potentially more severe than those provided for the adults who sell them tobacco.(Sec 577(c)1) There is no scientific basis

for requiring states to implement possession laws at this point.

Compliance testing. DHHS is authorized to contract with states to conduct compliance tests.(Sec 577(d)1) States that contract with DHHS will be required to perform compliance tests. DHHS may issue regulations to assure the accuracy of compliance tests.

Funding. The model state law will provide that the state collect a licensing fee to offset the cost of licensing.(Sec 577(b)3A) DHHS will be able to provide states with grants to fund enforcement.(Sec 577(d)1) These grants will be contingent upon states conducting compliance tests and maintaining compliance above 95% within three years.(Sec 577(d)1) The bill also provides DHHS with \$300 million funding for enforcement of the FDA regulations which include restrictions on youth access.(Sec 101(d)5A) This funding is guaranteed from year to year.

Minimal permissible compliance rates. Funding to states for enforcement and for all other activities under this bill will be contingent upon states conducting compliance tests and maintaining compliance above 95%.(Sec 577(d)1) If the state has not attained 95% compliance within three years or has not enacted a model law, their allotment will be reduced in proportion to the non-compliance rate.(Sec 577(e)) The bill does not specify the age of the youths to be used to determine the compliance rate. Also, it is not specified that DHHS must maintain compliance above 95% in each state through enforcement of the FDA regulations.

Enforcement redundancy. Both the states and federal government are authorized to enforce the federal restrictions on sales to minors. The state enforcement is primary, but the federal agency is authorized, but not compelled, to

conduct enforcement within the state if state efforts are inadequate.

Minimum age. The bill repeatedly refers to minors, but I did not see any reference to the age of majority. Current federal law under the FDA regulations prohibits the sale of tobacco to individuals under the age of 18. Presumably, this lack of specificity is intended to leave the FDA free to raise the minimum age in future years without going through Congress.

Impediments. The bill does not remove state erected impediments to enforcement such as a ban on conducting compliance tests. If the federal government were to charge a merchant caught in a compliance test, the merchant could argue that the federal government is violating state law by conducting compliance tests. The bill includes no impediments to enforcement. Youths involved in an "authorized sting or law enforcement operation" would not be penalized.(Sec 577(c)2)

Self-service. The FDA's jurisdiction to regulate self-service of tobacco through displays and vending machines is affirmed in this bill.

Summary. This bill meets almost all of the major requirements for a comprehensive youth access bill. It provides funding for state and federal enforcement. It designates a federal enforcement agency. It mandates that states achieve 95% compliance within three years. It authorizes DHHS to promulgate model state laws and issue additional federal restrictions on the marketing of tobacco to youths. It provides states with both a carrot, (e.g., enforcement grants), and a stick (e.g., a reduced share of the settlement). However, it has several major oversights:

1) There is no mandate that DHHS maintain 95% compliance in every state. DHHS must penalize states for not reaching 95% compliance and DHHS is authorized to enforce the FDA

regulations in each state, but there is no requirement that DHHS enforce the FDA regulations in a manner that will maintain 95% compliance. The tobacco industry may convince future administrations to halt enforcement of the FDA regulations unless DHHS is mandated to achieve 95% compliance.

2) The law does not specify that youths just under the legal age be used to measure compliance. This is such a crucial factor in the effectiveness of the law, in the accuracy of the compliance tests, and in the fairness of state to state comparisons that it must be specified.

3) This bill fails to solve the problem of states banning federal officials and public health researchers from conducting compliance tests. The bill does not require DHHS to conduct compliance tests, so there is no implied federal preemption on this issue. The FDA does not currently know how they are going to deal with this problem when it arises.

4) The penalties for clerks are too low, much lower than existing penalties for minors in many states. A \$25 fine sends clerks the message that this is a trivial crime.

5) There is no scientific data to support making the possession of tobacco a federal crime. If a possession provision is included, language should be included to ensure that it does not relieve tobacco manufacturers and retailers of civil liability for their actions.

6) The law should require states to make their license lists available to law enforcement agencies and the public.

This bill is lacking in many details. If too many details are spelled out in the law, it leaves the FDA with less flexibility to respond to future changes in tobacco industry tactics. The bill does provide a mechanism whereby

these details could be addressed in subsequent regulations. The model state law should:

- restore enforcement authority to all state and local law enforcement agencies.
- remove any restrictions on the conduct of compliance tests.
- specify that licensees are responsible for all illegal sales made by their employees.
- specify that youths employed by any responsible adult to conduct compliance tests will be immune from prosecution.

This bill would supplant the Synar requirements, but it does not remove the Synar statute.

S.1530-THE HATCH BILL

The Hatch bill has been presented as representing the agreement worked out with state Attorneys General. The youth access portion of this bill lacks nearly every major feature required to ensure effective enforcement. The youth access portion of this bill was drafted by the National Association of Convenience Stores and introduced as H.R. 2034 on June 25, 1997. It will have the effect of freeing owners from liability, citations, prosecution, and penalties for illegal sales made in their stores and instead rest blame on store clerks and youths. Several features of this bill are designed to impede enforcement and make it easier for merchants to spot youths who are working for enforcement agencies. It deviates from the agreement substantially by making the possession of tobacco by minors illegal and by establishing penalties on children that are far more severe than those imposed upon the adults who sell them tobacco. The bill withholds settlement funds from states unless they replace their current law with a "model" law written by the convenience store lobby.

Licensing. This bill provides for state-administrated licensing of all tobacco vendors with a substantial license fee of \$500 annually with the proceeds directed toward enforcement.(Sec 301(c), Sec 302.9(b)) However, the bill does not specify that license lists shall be made available to the public or to other governmental agencies.

Civil disposition. The model state bill provides for civil disposition.

Penalties. The penalties in this bill are weak and misdirected. The penalties against underage minors (up to \$150 and loss of the driver's license, Sec 302.2.(a)) are more severe than the maximum penalty for a first offense of selling to a minor (\$100, Sec 302.1(a)). An owner's only responsibility is to have employees sign a brief statement that they have been informed about the law. Owners bear no responsibility for illegal sales made by employees who have signed this statement.(Sec 302.1(b)) The bill is unfair to small vendors because illegal sales made by owners who work behind the counter will endanger their license but this is not the case for convenience store chains where hundreds of illegal sales could be made by different clerk employees and never count against the licensee.

Compliance testing. The bill requires underage inspectors to tell the truth about their age, thus allowing merchants to identify them as working for law enforcement.(Sec 302.8(b)4) The bill also requires underage inspectors to be strangers, allowing merchants to continue to sell to underage youths whom they know.(Sec 302.8(b)3) Since these restrictions on compliance testing are greater than those currently in effect in almost every state, this bill would weaken enforcement in many states.(Sec 302.11) The bill prohibits researchers, health officials, journalists or the general public from performing compliance tests.(Sec 302.8.(d))

This provision would make it difficult to document that illegal sales are occurring. If the state were to falsify its reports to the federal government, or rig its compliance tests, there would be no independent way of detecting this.

Funding. This bill provides permanent and generous funding for state enforcement through license fees.(Sec 301.(c)) There is no funding specified for federal enforcement of the law.

Minimal permissible compliance rates. This bill establishes no criteria whatsoever for effective enforcement. Nor does it establish any time frame. It does not specify how the annual surveys are to be conducted. For example, the age of the youths used to measure compliance is not specified. Since states are under no obligation to produce results, they could do no enforcement at all and still qualify for their share of settlement funds. The lack of compliance goals is not an oversight since the settlement included a provision that states be allowed ten years to reach 90% compliance.

Enforcement redundancy. This bill reduces the number of people who have enforcement authority. It does not provide for federal enforcement of the law. It prohibits state agencies other than the state police from enforcing the law.(Sec 302.8(a)) Alcoholic beverage agencies who typically enforce the law would not be allowed to do so under this bill. Health departments would also be stripped of enforcement authority. Special tobacco enforcement agencies could not be established. Local law enforcement could not enforce the state law without express permission of the state police.(Sec 302.8(a)) States would not be allowed to determine the most efficient and effective state agency to handle enforcement.

Minimum age. The bill establishes a minimum age of 18. It appears that states would be preempted from establishing a higher

age without first obtaining a waiver from the Secretary of DHHS.(Sec 301(e))

Self-service. The bill does prohibit self-service of tobacco but does not specifically address vending machine sales.(Sec 302.6) The bill permits free sampling in locations that are forbidden under the FDA regulations.(Sec 302.4)

Impediments. This bill makes it impossible to prosecute a merchant unless the youth is also prosecuted.(Sec 302.1(d)) This would require a parent to turn their child in for prosecution in order to complain about a merchant who is illegally selling tobacco to their child. Retailers are rewarded for appealing judgments by giving them immunity from further prosecution until each matter is completely adjudicated.(Sec.10(d)) Additional impediments are listed above.

Preemption. The bill is preemptive in that states are forced to replace their existing laws with a bad law in order to receive funding.

Summary. The youth access sections of this bill represent almost everything the tobacco industry could hope for in a youth access bill. It guts existing state bills and shields corporate retailers from responsibility for illegal sales. While store owners enjoy the profits from illegal sales, their minimum wage clerks bear the entire burden of enforcement. Owners are freed from any responsibility for supervising their employees and have no incentive to do so since they cannot be penalized. The bill hampers enforcement efforts by helping merchants identify underage inspectors, by stripping many agencies of enforcement authority, and by requiring the simultaneous prosecution of underage youths. It redirects enforcement efforts away from the tobacco industry and onto children who face much harsher penalties. The bill contains no standardized measure of enforcement and no

standard against which state performance can be compared. A special provision to prohibit compliance testing by the public will hide the criminal activities of retailers from the public eye. This bill does nothing to ensure that enforcement will be effective.

S.1648-THE JEFFORDS BILL

This bill incorporates many of the marketing restrictions provided by current FDA regulations but does not provide the FDA with authority to regulate tobacco. These provisions address broken pack sales, minimum pack size, self-service, vending machines, proof of age and free sampling.(Sec 908) Any changes in these regulations would presumably require an act of Congress, making it exceedingly difficult for the government to react to changes in tobacco industry marketing strategies in a timely fashion. States are also required to incorporate these marketing restrictions but not to enforce them.(Sec 2823(sec 3)) Section 913 states that the youth access portion of this bill is not preemptive over state or local authority, but several other sections of the bill are preemptive. States would be required to enact and enforce a model state law to receive federal funding through the year 2008 after which point there does not appear to be any federal mandate or incentive for enforcement to continue.(Sec 2822(a)) This bill incorporates the requirements of the Synar Amendment but does not appear to rescind the Synar amendment.(Sec 2822(b)) States would be required to enact but not enforce civil penalties for possession of tobacco.(Sec 2823(sec 6)) The law states that retailers must check ID on anyone under 27, but the signage requirements under the model state law indicate that IDs will be checked for anyone under 21.(Sec 2823(sec 10))

Licensing. DHHS would be required to license tobacco vendors on federal property and provide for penalties.(Sec 103) States would be

required to license retailers but there are no provisions to ensure that lists of licensees are available to enforcement personnel, the federal government or the public.

Civil disposition. The model state bill calls for civil disposition.(Sec 2823) There is no provision for civil disposition of violations of the federal law.

Penalties. I could find no reference to any mechanism to enforce the federal restrictions laid out in this bill. There is no federal agency designated to enforce the law, no designated funding for federal enforcement, no penalties for violations of the federal law, no mechanism for prosecuting violators, no appeals mechanism, and of course, no mandate for federal enforcement, even on federally owned property. Rather, states will be given a financial incentive to adopt and enforce the federal restrictions with all funding for this activity ceasing in the year 2008. If any state or tribe elects not to adopt or enforce the federal restrictions, either immediately, or after the year 2008 there will be no enforcement of the federal law in those areas. The model state bill provides for civil penalties for both the clerk and licensee.(Sec 2823(sec 5)) Penalties for a first offense for the clerks are trivial, \$25. Penalties for minors are potentially more severe than those for the clerks, \$150 and/or loss of the driver's license.(Sec 2823(sec 6))

Compliance testing. States would be required to conduct a Synar type survey to determine their compliance rates, but are not required to actually conduct compliance tests.(Sec 2822)

Funding. There does not appear to be any provision to fund federal enforcement of the federal restrictions. States could use funds received under section 203 to enforce the law. Sec 2824 provides for \$65 million for state enforcement annually through the year 2008 only. This funding will very likely prove

inadequate. States are instructed to use license fees to fund the licensing activities.(Sec 2823 (Sec 4)) After the year 2008 all federal support for youth access enforcement and all federal incentive for states to enforce the law will disappear. If states rely heavily on the federal funding, the entire enforcement bureaucracy can be expected to collapse in the year 2009.

Minimal permissible compliance rates. To receive funding, states would be required to achieve 90% compliance for all individuals under 18 years of age.(Sec 2821(b)) This is not the same as requiring 90% compliance for 17 year old youths. There is no mandated federal enforcement of the federal restrictions.

Enforcement redundancy. States would be required to designate a state law enforcement agency.(Sec 2822 (b)1) If states are not in compliance, the Secretary of DHHS is to "take such actions as may be necessary to ensure compliance", but the nature of such actions is unspecified.(Sec 2822(e) There does not appear to be any provisions for the federal government to enforce the federal restrictions on the distribution of tobacco to minors.

Minimum age. The bill sets a minimum federal age for tobacco sales at 18.(Sec 908(b)) Raising the federal age would require an act of Congress.

Impediments. The bill contains a novel provision that a licensee may not be penalized for a second violation by an employee if he or she had not been informed about the first violation. This would prevent enforcement personnel from conducting several compliance tests to establish a pattern of illegal activity prior to prosecuting.(Sec 2823(sec 5)) This law enforcement technique has been used to prosecute merchants in California for engaging in unfair business practices. This bill does nothing to remove the obstacles to the

enforcement of the law that have been erected by the tobacco industry.

Self-service. All tobacco products must be kept out of reach of customers with exceptions for mail orders, and vending machines in facilities where minors are not allowed. Since these restrictions are established through legislation rather than through FDA regulations, any changes would require an act of Congress.

Summary. The youth access aspects of this bill are very weak. The FDA is given no authority over the problem. Any additional measures would be very difficult to enact. There is no federal enforcement. There is an incentive but no mandate for states to enforce the federal restrictions. Funding to states is inadequate and short-lived. This bill has so many shortcomings in the area of youth access that its adoption would be considered to be counterproductive.

S.1492-THE KENNEDY BILL

This bill does not address youth access. It gives full authority to the FDA to regulate tobacco.(Sec 202) The FDA is currently enforcing a minimum age of 18 and under the Kennedy bill would have authority to prohibit free sampling, self-service and vending machines. The Kennedy bill provides generous funding to the FDA to enforce its tobacco provisions.

Licensing. None

Civil disposition. Under existing FDA regulations only.

Penalties. None specified.

Compliance testing. None specified.

Funding. This bill does not include enforcement as an activity that state funds can be used for, therefore, it does not provide

funding for enforcement of state or local laws.(Sec 2826) With the additional funding provided by this bill, the FDA could expand its contracts with states to enforce the FDA regulations.

Minimal permissible compliance rates. None. States receive their funding regardless of whether they are making any effort to enforce the law. The bill does not mandate that the FDA do an adequate job of enforcing the law.

Enforcement redundancy. None. This bill does not guarantee federal enforcement of the law, nor does it require any level of state enforcement. States are not required to cooperate with the FDA and might even adopt laws that would hinder the FDA from enforcing the law.

Minimum age. None

Impediments. None

Self-service. Affirms FDA jurisdiction to regulate self-service.

Summary. The Kennedy bill ignores the problem of youth access to tobacco. FDA authority to regulate youth access has already been affirmed by the lower courts. The only measure in this bill that would impact on youth access is the increased funding to the FDA. This bill does not require the FDA to enforce the youth access regulations and does not mandate that the FDA achieve a level of compliance that would benefit the public health. Were a future administration to appoint as FDA commissioner a person who is opposed to compliance testing, all compliance testing and enforcement could come to a halt. There is no funding or incentive for state level enforcement of youth access laws. A narrow reading of this bill would forbid states from using their block grant money for enforcing the law. States will get all of their funding if they

do nothing to address this problem or if they pass laws that prevent the FDA from enforcing its regulations through compliance testing. Nothing in this bill will facilitate the enforcement of youth access laws at the state level.

S.1415RF-THE MCCAIN BILL

When states negotiated the terms of the settlement with the tobacco industry, they shaped an agreement that actually reduced their obligation to the Federal government to reduce youth access to tobacco. This agreement was originally embodied in S.1415RF. S.1415RF has since been modified in the Senate Commerce Committee to further reduce the likelihood that youth access laws can or will be enforced effectively. In the area of youth access, the current bill represents a significant blow to efforts to reduce youth access to tobacco.

The Synar Amendment has been unpopular with states because the Federal government will not allow SAMHSA block grant funds to be used to fulfill the Federal mandate for effective enforcement of state youth access laws. States also dislike the potential loss of block grant funds if enforcement is not effective. Rather than fix the problem by supplying States with enforcement funds, S.1415RF reduces the pressure on states to enforce their laws. First, S.1415RF resets the starting date for states to begin their enforcement efforts from 1992 to 1999. Second, it postpones by many years the date by which states have to reach 80% compliance. Third, it postpones the date when states can first be penalized for not enforcing their laws from 1993 to 2003. States will have been given an eleven year period (1992-2003) during which they would not have to do any meaningful enforcement. Fourth, it reduces the current penalty of a guaranteed 40% reduction in SAMHSA funding to a penalty of 1% to 20%. Fifth, S.1415RF still allows states to use

young teens and pre-teens to measure compliance. States can report very high compliance rates simply by using 12 and 13 year old youths to measure compliance. S.1415RF provides authority for federal officials to address the youth access problem, but does not require that any action be taken. Hence political pressure or budget cuts could halt all enforcement of these measures.

The original version of S.1415RF allowed for federal licensing of tobacco vendors only on federal property. The current version lacks the provision for licensing on federal property but does allow DHHS to license retailers in states that lack their own licensing. However, there is no mandate for DHHS to license any retailers, and it is not clear if it would have the authority to license retailers in states that already have licensing, or who adopt licensing in the future. There is no mandate for the FDA to enforce the law in any manner. Indeed, under this bill, states could prevent the FDA from enforcing the law by banning compliance tests, and making possession illegal, as many have already done. A provision for local licenses has been eliminated, raising the specter that effective local enforcement programs will be eliminated by removing their authority to control tobacco sales.

There is no requirement for states to adopt anything resembling a model law. States would be allowed to adopt laws with loopholes that make enforcement impossible. They would also be allowed to strip local governments of the authority to police tobacco sales within their borders. States will be required to allow judicial review before revoking a license. This is a serious blow to effective enforcement since the most efficient method of enforcement is through administrative procedures. Administrative appeals prevent the courts from being overwhelmed with tobacco cases and drastically reduces the cost of enforcement. By requiring states to go to court to revoke a license, S.1415RF will place a tremendous burden on

states. States would not be required to adopt any of a variety of measures that make enforcement easier, or measures that would make it easier for merchants to obey the law. States are not required to adopt any minimum penalties for merchants who break the law, but they are required to make the possession of tobacco by minors illegal, an action that may do more harm than good.

States are required to enact a law which includes licensing, civil penalties, and penalties on minors who possess tobacco. The penalties for states that do not have a youth access law have been reduced from 100% of the settlement allotment to not getting a block grant of unspecified amount. The penalties for states are so ambiguous that it is impossible to determine what it is that states stand to lose if they do not act responsibly.

A new requirement in the bill requires states to conduct "random unannounced inspections" every month to include a total of 250 outlets per million population per year. The implication is that these inspections represent enforcement, but they do not. There is no requirement that the inspections involve any form of law enforcement, and indeed, very few states actually penalize the vendors who make illegal sales during these inspections. To effectively enforce the law, the number of inspections would have to be about 12 times greater. Also, the law prohibits states from targeting known law offenders during the inspections, which is exactly what one would do to enforce the law effectively. For the purpose of scientifically measuring compliance, a sample size this large is not needed. Since the age of the youths used to do the tests is left open, these inspections lack scientific validity. Increasing the sample size will not make the results valid. This requirement represents an unfunded federal mandate for states to waste resources because it does not get the law enforced and the results are not scientifically valid.

A systematic examination of the essential features of youth access legislation follows.

Licensing. S.1415RF provides for voluntary state licensing of vendors. No license fee is specified. No provision is made to require states or localities to make the license lists public or to share them with the FDA or other enforcement agencies. DHHS is not required to license any tobacco vendors, and it is implied that DHHS will not have the authority to license vendors in states that have their own licensing system. The FDA will not be able to obtain lists of tobacco vendors from each state.

Civil disposition. S.1415RF does not make it a federal crime to sell tobacco to anyone under 18, but by affirming FDA authority it will allow FDA to enforce its regulations through civil penalties. The current FDA appeal mechanism needs to be changed to efficiently deal with tobacco sales. States would have to adopt civil penalties and license revocation.

Penalties. There are no penalties specified for violating the FDA prohibition on the sale of tobacco to minors. This will allow FDA to change its penalties without going through Congress. States are not required to adopt any minimum penalties.

Compliance testing. There is no requirement in this bill that states prosecute merchants who sell tobacco to minors. The requirement to make it illegal for minors to possess tobacco represents a major impediment to enforcement. States are required to conduct monthly random unannounced inspections but very few states actually prosecute merchants who make illegal sales during the official state inspections. Requiring random unannounced inspections does not require any enforcement of the law. The bill allows states to ban the FDA from conducting compliance tests and still qualify for full Federal funding.

Funding. The FDA is given \$300 million per year for 25 years to conduct enforcement. This should be adequate. States are to receive some kind of block grant, but the amount of the grant and the purpose of the grant is not specified. There is no federal funding dedicated for state enforcement. State enforcement agencies would have to fight each year for funding from the state budget.

Minimum permissible compliance rates. The method used to measure compliance rates is conspicuously absent. The FDA is not mandated to maintain any level of compliance with the law. For states, the bill includes the minimum compliance rates specified in the settlement. There are no minimum requirements for the first five years after enactment. By the sixth year, states have to reach compliance rates that have already been achieved by most states today. Thereafter, states are allowed another five years to reach a compliance rate goal of 90%. Even these very weak requirements are meaningless because states could meet those rates now by using 12 year old youths to purchase tobacco.

Enforcement redundancy. There is a provision for federal enforcement and funding for it. There is no mandate for federal enforcement and no requirement that the FDA maintain good compliance rates in every state. There is a very weak requirement for states to enforce their laws, but states are still allowed to strip state and local law enforcement officials of their authority.

Minimum age. The bill does not state a minimum federal age, which would allow the FDA to increase it.

Impediments. States must adopt a law making the purchase or possession of tobacco by minors under 18 a state crime. By requiring states to make the possession of tobacco illegal, this bill makes it more cumbersome to enforce

the law, to conduct the annual compliance survey and to conduct research. Special immunity from prosecution would have to be obtained in every jurisdiction where compliance tests would be conducted. Since prosecuting attorneys do not have to grant immunity, they can obstruct enforcement. This has already occurred in some places. The FDA also would be required to obtain immunity for youths from state law enforcement officials. If the officials refuse to cooperate, the FDA will be blocked from enforcing its regulations. Some states have banned compliance tests and this might also prevent the FDA from enforcing its regulations. A new requirement for judicial review prior to license revocation represents a serious obstacle to efficient enforcement.

Preemption. The law states that it is not preemptive.

Summary. The only strong youth access provision in S.1415RF is to provide the FDA with authority and funding. Even so, FDA enforcement could be sabotaged by tobacco industry sponsored state restrictions on compliance testing and possession. The bill does not place any mandate on the FDA to enforce its youth access regulations. Future administrations may halt all enforcement of these regulations. S.1415RF does not provide the national licensing system promised in the settlement agreement. Most state licensing agencies will not disclose their lists of vendors or cooperate with enforcement authorities. S.1415RF does not resolve this impasse. Many provisions of S.1415RF make it more difficult to enforce the law. States are not required to adopt model language into their current laws. There is no funding earmarked for state enforcement and no mechanism to guarantee perpetual funding. The measurement of state compliance rates is not standardized and is therefore subject to fraudulent manipulation. The compliance goals are extremely modest and

represent a step backwards from the already inadequate standards that are now in effect under Synar. Making the possession of tobacco by minors illegal adds a barrier to conducting compliance tests. Requiring judicial review for revoking a license adds a burden to enforcement. It is unlikely that S.1415RF will result in any reduction in tobacco use by youths through the mechanism of limiting youth access to tobacco.

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**HEALTH
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Policy Analysis No. 9

THE IMPACT OF PROPOSED CIGARETTE PRICE INCREASES

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EXECUTIVE SUMMARY

All major national tobacco legislative proposals call for significant increases in cigarette prices, up to \$1.50 per pack, to be phased in over two to five years. This paper reviews the theory and evidence concerning the impact of price increases on cigarette smoking, and estimates the likely impact of the proposed increases on youth and adult smoking. It concludes that large cigarette price increases will lead to substantial reductions in cigarette smoking, particularly in the prevalence of cigarette smoking among youth. When combined with other tobacco control activities, including prevention and cessation programs, counteradvertising, and enforcement of youth access limits, even larger reductions in youth and adult smoking could be achieved.

Economic Theory and Cigarette Price Increases

While it is a fundamental law of economics that as the price of a product rises, demand for the product falls, the demand for tobacco products is different from the demands for most other consumer goods because of the addictive substance - nicotine - they contain. The main implication that addiction has for demand is that current consumption decisions will depend on past choices. For example, to the addicted smoker, one of the benefits of continued smoking is preventing nicotine withdrawal; therefore, past use tends to encourage consumption, while past avoidance does not.

With respect to price, the key prediction of this model is that lower rates of consumption today due to price increases will lead to even greater reductions in the future.

Economic theory also suggests that youth and young adults will be more responsive to changes in the price of cigarettes than adults, for a number of reasons:

- the share of disposable income that a youthful smoker spends on cigarettes is likely to exceed that spent by an adult smoker;
- peer influences are much more important for youth smoking than for adult smoking; reductions in teen smoking due to price will be amplified by additional reductions due to the lower prevalence rates themselves;
- youth smokers are likely to be less addicted than adult smokers are, and those who do not yet smoke are not addicted at all. The reduced significance of addiction among youths makes the impact of price on choosing whether or not to smoke more important;
- young people generally give less weight to future concerns, and may also be more likely to underestimate the health consequences and potential for dependency than adults. Therefore, current factors such as changes in price are likely to have a greater impact on youth than on adults.

Estimates of the Impact of Cigarette Prices on Adult Cigarette Smoking

The single most consistent finding from numerous econometric studies of the issue is that increases in cigarette prices will lead to significant reductions in cigarette smoking. The consensus estimates imply that a ten-percent increase in cigarette price would reduce overall cigarette consumption by three to five percent.

Estimates of the Impact of Cigarette Prices on Youth and Young Adult Smoking

While some studies differ about the impact of price on youth and young adult smoking, most studies have supported the prediction that youth and young adults would be more sensitive to price than adults. A 1996 study by Chaloupka and Grossman confirmed findings from earlier studies that youth are about three times more sensitive to price than adult smokers are. This estimate implies that a ten-percent increase in the price of cigarettes would reduce overall youth cigarette smoking by over 13 percent, while reducing youth smoking prevalence by nearly seven percent. Several recent studies generally support this finding.

Caveats

Several caveats should be considered in evaluating the effects of cigarette price increases on youth and adult cigarette demand:

- For the reductions in youth and adult smoking resulting from a cigarette price increase to be sustained over time, the cigarette price increase must be sustained in real terms, i.e. adjusted for inflation
- Some research implies that large cigarette price increases would lead some smokers to substitute other tobacco products,

including chewing tobacco and snuff, for cigarettes, unless comparable price increases are made for those products.

- The estimates described above are based on experience with excise taxes in the U.S. The price increases currently being discussed are much larger than have been enacted in the past. Anecdotal evidence from Canada, and recent behavioral economic research, suggest that the effects of large price changes are likely to be at least as significant as those estimated based on relatively smaller changes.
- Recent studies find that the long-run effect of a price increase on overall cigarette demand is about double the short-run effect. This implies that the long-run increases in revenues from large tax increases will be smaller than the short-run increases. However, the long-run reductions in cigarette smoking and the associated health benefits will be larger.

Evaluating the Impact of Different Proposals

The author estimates the impact of several recently-proposed cigarette price increases as follows:

- The estimated 62 cents-per-pack increase under the terms of the June 20, 1997 settlement proposal would reduce overall cigarette demand in the U.S. by approximately 12 percent, while reducing youth smoking prevalence by over 20 percent. Additional price increases imposed by the industry could substantially increase these reductions in overall and youth smoking. Because this price increase would be initiated by cigarette producers, Federal tax revenues would decline by over \$650 million; state tax revenues would also decline.

- Proposals calling for price increases of \$1.50 per pack to be phased in over a relatively short period of time, and then indexed to the rate of inflation, would lead to about a 30 percent reduction in overall cigarette consumption, while cutting the prevalence of youth smoking about in half. In addition, a tax or licensing fee of this magnitude would increase annual federal revenues by about \$22.5 billion.
- The recent Commerce Committee proposal (S. 1415), a \$1.10 increase phased in over five years and then adjusted for inflation, would reduce overall cigarette demand by about 20 percent, while lowering the prevalence of youth smoking by nearly one-third. A tax or licensing fee of this size would lead to a net increase in federal revenues of approximately \$19.5 billion per year.
- Others, including the Institute of Medicine and numerous public health groups have called for price increases of \$2.00 or more per pack. A sustained price increase of this magnitude would produce a 40 percent drop in overall cigarette demand while cutting the prevalence of youth smoking by approximately two-thirds.

Regressivity and Smuggling

Opponents of large increases in cigarette taxes argue that cigarette and other tobacco taxes are regressive, since they fall most heavily on lower-income groups, and that higher taxes will create an incentive for cross-border smuggling and result in a substantial black market in cigarettes. Each issue is explored below:

Regressivity: Evidence from the Congressional Budget Office (CBO) suggests that the regressivity of tobacco and other excise taxes are overstated. A 1990 CBO

report concluded, if annual family expenditures are more reflective of lifetime income than annual family income, then expenditures on tobacco are only slightly regressive over income classes.

The CBO also examined the effect of tax increases and concluded that such increases were approximately proportional rather than regressive, and in fact somewhat progressive. This finding is supported by other recent studies that conclude that people in the lowest income groups, and those with less education (closely correlated with income) were most responsive to price increases, and thus most likely to reduce consumption rather than pay higher prices in response to a price increase. These estimates also imply that the health benefits of the reductions in smoking that would result from large cigarette tax increases would be disproportionately larger in the lowest income populations.

Smuggling: Some argue that large cigarette price increases will necessarily lead to rampant smuggling and a large black market in cigarettes. However, the U.S. has one of the lowest average prices and taxes on cigarettes among industrialized countries. Even a \$1.50 increase in the average cigarette price in the U.S. would be insufficient to put the U.S. in the top 15 countries globally in terms of cigarette prices. Moreover, recent research suggests that other factors, such as weak anti-smuggling policies, can be as important as price differences in spawning cigarette smuggling.

Canadian prices would remain higher than American prices under the proposed increases, so smuggling from that country is unlikely. A price increase would increase the incentive to smuggle from Mexico; however, significant price differences already exist, and there is no empirical evidence that this has led to significant cigarette smuggling.

THE IMPACT OF PROPOSED CIGARETTE PRICE INCREASES

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INTRODUCTION

All major proposals for national tobacco legislation call for significant increases in cigarette prices. The June 20, 1997 settlement proposed by the tobacco industry and states' Attorneys General called for the costs of the settlement to be passed on to smokers in the form of higher prices. Harris (1997) estimates that this pass-through would lead to a 62-cent per pack increase in cigarette prices. Based on evidence concerning the pass-through of past cigarette tax increases, the Federal Trade Commission (1997) suggests that the pass-through of settlement costs could be even higher if the tobacco industry was to coordinate the price increases to more than cover costs. Recently proposed legislation calls for larger price increases, ranging from \$1.10 per pack to \$1.50 per pack, to be phased in over two to five years. Some of these proposals would achieve these price increases by raising federal cigarette excise taxes while others would impose a licensing fee for each pack of cigarettes produced.

Regardless of how the increase is achieved, the final result will be to significantly reduce cigarette smoking in the United States, with disproportionately large reductions in smoking among youth and young adults. This paper reviews the economic theory and econometric evidence concerning the impact of cigarette price increases on cigarette smoking, and estimates the likely impact of the large cigarette price increases under consideration on youth and adult cigarette smoking.

ECONOMIC THEORY AND CIGARETTE PRICE INCREASES

One of the fundamental laws of economics is that of the "downward-sloping demand curve," implying that as the price of a product rises, the quantity demanded of that product falls. Economists use the term *price elasticity of demand* to reflect the impact of changes in prices on the use of a product; this is defined as the percentage change in consumption that results from a one-percent increase in price.

The demand for tobacco products, however, is different from the demands for most other consumer goods because of the addictive substance - nicotine - contained in these products. The key implication that addiction has for demand is that current consumption decisions will depend on past choices. For example, to the addicted smoker, one of the benefits of continued smoking is the avoidance of nicotine withdrawal. Not that long ago, many researchers viewed addictive consumption as an irrational behavior not conducive to standard economic analysis (for example, Elster, 1979; Schelling, 1984). This view implied that the demands for tobacco products did not follow the basic laws of economics, including that of the downward sloping demand curve. Numerous econometric studies of cigarette demand and other tobacco use, however, confirm that the basic principles of economics do apply to the demands for these products. The concept of a downward sloping demand curve is actually fairly universal. Laboratory experiments, for

example, that require addicted animals to work to get a dose of a drug (including nicotine) find the same inverse relationship between price (the amount of work required) and consumption of an addictive substance (Bickel and DeGrandpre, 1996).

Many of the most recent studies of cigarette demand explicitly model the addictive nature of cigarette smoking (Mullahy, 1985; Chaloupka, 1991; Keeler, et al., 1993; Becker, Grossman and Murphy, 1994; Sung, et al., 1994). Many of these studies are based on a model applying the standard, rational-utility-maximizing paradigm of economics to the consumption of addictive substances (Becker and Murphy, 1988). While many non-economists and some economists are uncomfortable with some of the assumptions of this model of "rational addiction," it is gaining an increasing number of adherents. This theory emphasizes the links between past, present, and future behavior in the consumption of an addictive substance, capturing the acquired tolerance, reinforcement, and withdrawal associated with addiction. In particular, it highlights the dependence of current smoking decisions on past smoking. With respect to price, the key prediction of the economic models of addiction is that the long-run effects of price on cigarette demand will be larger than the short-run effects. That is, given the addictive nature of cigarette smoking, the effects of permanent changes in cigarette prices will grow over time.

Economic theory suggests several reasons for expecting youth and young adults to be more responsive to changes in the price of cigarettes than adults (Grossman and Chaloupka, 1997). First, the share of disposable income that a youthful smoker spends on cigarettes is likely to exceed the corresponding portion of income spent by an adult smoker. Economic theory implies that the price sensitivity of demand rises with the share of income spent on a good.

A second factor is that peer influences are much more important in the case of youth smoking than they are for adult smoking. Interestingly, peer pressure has a positive multiplying effect when looking at the impact of cigarette price increases on youth smoking. In addition to the reduced smoking that directly results from a price increase, youth smoking is also indirectly reduced through the impact of the price increase on peer consumption; that is, if fewer teens are smoking, then other teens will want to emulate them, thereby increasing the impact of a price increase.

In addition, youth smokers, because they have been smoking for a relatively short time, are likely to be less addicted than adult smokers are. Similarly, among youth, changes in the number of young people who smoke are primarily due to changes in smoking initiation. In contrast, among adults, changes in the number of smokers occur primarily because current smokers quit. Given the addictive nature of smoking, quits will be inversely related to past consumption while starts are independent of past consumption. Thus, the effect of price on choosing whether or not to smoke should be larger for young people than for adults.

Finally, young people tend to discount the future more heavily than older people do. The "full" cost of cigarette smoking includes not only the monetary costs of cigarettes, but also the health and other future consequences of smoking. Given that young people generally give less weight to future concerns and may also be more likely to underestimate the health consequences and potential for dependency than adults, they are likely to place more weight on current factors when making current smoking decisions. Thus, changes in prices are likely to have a greater impact on youth than on adults.

ESTIMATES OF THE IMPACT OF CIGARETTE PRICES ON ADULT CIGARETTE SMOKING

The single most consistent finding from the numerous econometric studies of the demand for cigarettes is that increases in cigarette prices will lead to significant reductions in cigarette smoking (National Cancer Institute, 1993; U.S. Department of Health and Human Services, 1989, 1994, forthcoming). The consensus estimates from studies of cigarette demand using a wide variety of individual level and aggregate, cross-sectional, and time-series data and a variety of econometric methods is that the price elasticity of demand for cigarettes is in the range from -0.3 to -0.5. This implies that a ten-percent increase in cigarette price would reduce overall cigarette consumption by three to five percent.

The effects of increases in cigarette prices are not limited to reductions in cigarette consumption by continuing smokers, but also include significant reductions in smoking prevalence, reflecting increased smoking cessation among smokers and reduced smoking initiation among young smokers (NCI, 1993). Evans and Farrelly (1996), for example, using data from 13 of the National Health Interview Surveys conducted from 1976 through 1992, estimate that approximately half of the impact of price on adult smoking is on the decision to smoke. Similarly, Douglas (1998) estimates that a permanent ten-percent increase in the price of cigarettes would lead to a reduction in the duration of a smoker's habit of approximately ten-percent.

Several recent econometric studies of cigarette demand in the context of economic models of addictive behavior confirm the predictions of these theories. Chaloupka (1991) using individual level data, Becker, Grossman, and Murphy (1994) using pooled

annual time-series state-level cross-sectional data, and Keeler, et al. (1993) using time-series data from California, among others, confirm that cigarette smoking is an addictive behavior in that past smoking decisions have a significant impact on current choices. In addition, these studies conclude that smoking is not characterized by myopic behavior, implying that increases in the perceived future costs of smoking would lead to reductions in current smoking. Finally, these studies conclude that the long-run effect of price on cigarette demand is about double the short-run effect. Thus, the long-run price elasticity of demand is centered on -0.8; a ten percent price increase, maintained over the long term, should ultimately result in an approximate 8% reduction in smoking.

ESTIMATES OF THE IMPACT OF CIGARETTE PRICES ON YOUTH AND YOUNG ADULT SMOKING

The earliest studies of cigarette demand by youth and young adults supported the prediction described above that youth and young adults would be more sensitive to price than adults. Lewit, Coate, and Grossman (1981) used data on over 5,300 youth from Cycle III of the Health Examination Survey to examine the impact of cigarette prices and various other factors on cigarette smoking among youth ages 12 through 17 years. They estimated that the price elasticity of overall youth cigarette demand was -1.44, implying that a ten-percent increase in price would reduce youth cigarette smoking by over 14 percent. Moreover, they estimated that most of the impact of a cigarette price increase on youth smoking is on the decision to smoke; they estimate a price elasticity of youth smoking participation of -1.20, implying that a ten-percent price increase would reduce the prevalence of youth smoking by 12 percent.

Finally, they estimated modest reductions in average cigarette consumption among youth that continue to smoke (a price elasticity of conditional cigarette demand of -0.25).

Lewit and Coate (1982) confirmed their finding of an inverse relationship between the price elasticity of cigarette demand and age. Using data on over 19,000 individuals ages 20 through 70 years from the 1976 National Health Interview Survey, Lewit and Coate estimated an overall price elasticity of demand for cigarettes of -0.42 and a price elasticity of smoking participation (prevalence) of -0.26. In addition, they estimated separate demand equations for different age groups, concluding that younger persons were more sensitive to price changes than older person. For example, they estimated a price elasticity of cigarette demand of -0.89 for 20 through 25 year olds, with a comparable estimate for 26 through 35 year olds of -0.47.

Two studies from the early 1990s, however, cast some doubt on the inverse relationship between price elasticity and age. Both studies used data on relatively small samples of youth and young adults taken from the Second National Health and Nutrition Examination Survey conducted in the late 1970s. Wasserman, et al. (1991), concluded that there was no significant difference between the price elasticity of demand for teens and that for adults. Chaloupka (1991) reached a similar conclusion for demand among young adults (persons ages 17 through 24 years).

These mixed findings and the growing interest in using increased cigarette excise taxes to discourage smoking prompted several recent studies of the impact of cigarette prices on youth and young adult cigarette demand. Chaloupka and Grossman (1996) used data on over 110,000 youth taken from the 1992, 1993, and 1994 Monitoring the Future surveys of eighth, tenth, and twelfth grade students. In addition to examining the impact of cigarette prices on youth smoking, they also looked at

the effects of a comprehensive set of tobacco-related policies, including restrictions on smoking in various public places and private worksites, limits on youth access to tobacco products, and others, as well as numerous socioeconomic and demographic factors related to youth cigarette demand. Chaloupka and Grossman confirmed the findings from earlier studies that youth are about three times more sensitive to price than adult smokers are. They estimate an overall price elasticity of cigarette demand of -1.313, with approximately half of the impact of price on the decision to smoke (a price elasticity of smoking participation of -0.675). Their estimates imply that a ten-percent increase in the price of cigarettes would reduce overall youth cigarette smoking by over 13 percent, while reducing youth smoking prevalence by nearly seven percent.

Several recent studies, including those by Evans and Huang (1998), DeCicca, Kenkel, and Mathios (1998), and Lewit, et al. (1997) generally support this finding. Evans and Huang use state level measures of smoking prevalence among high school seniors over the period from 1977 through 1992 aggregated from the data collected in the Monitoring the Future Surveys. Controlling for unmeasured state-specific influences likely to affect youth cigarette demand, as well as a variety of other factors, they estimate a price elasticity for youth smoking participation of -0.20 for the entire time period. However, they conclude that this has increased over time, estimating a price elasticity of youth smoking participation of -0.50 for the 1985 through 1992 period.

Lewit et al. (1997), use data for ninth grade students in 1990 and 1992 taken from surveys conducted in the 22 North American communities in the Community Intervention Trial for Smoking Cessation (COMMIT). In addition to price, they also examine the impact of limits on youth access, restrictions on smoking, exposure to tobacco education, exposure to pro- and counter-cigarette

advertising, and a variety of other factors on both youth decisions to smoke and intentions to smoke. They find that both youth smoking participation and youth intentions to smoke are inversely related to cigarette prices, with estimated price elasticities of -0.87 and -0.95 respectively.

DeCicca, Kenkel, and Mathios use data from the 1988, 1990, and 1992 waves of the National Education Longitudinal Survey to estimate youth cigarette demand. Treating each wave as a separate cross-section, they estimate price elasticities for youth smoking prevalence of -0.68, -0.52, and -0.48 for eighth, tenth, and twelfth grade students, respectively. Taking advantage of the longitudinal data, the authors go on to explore the determinants of changes in youth smoking behavior over time, concluding that price has little effect on smoking initiation among those who had not started by the eighth grade. While this analysis is a useful first step in exploring the determinants of youth smoking initiation, it also has several limitations that recommend substantial caution in accepting and interpreting its findings. For example, the use of state cigarette taxes as a proxy for price ignores much of the significant industry initiated changes in price that occurred during the time period covered by the data. Likewise, dropping youth who were smoking in the eighth grade - many of whom are from low tax and price states and are at an age where price sensitivity is expected to be highest - from the initiation analysis will significantly bias the estimated effects of taxes on smoking initiation towards zero. Similarly, the econometric methods employed to examine initiation do not adequately capture the process of initiation and do not fully exploit the longitudinal nature of the data. Much more research needs to be done with this type of longitudinal data before rejecting the substantial evidence from cross-sectional analyses that concludes that increases in

cigarette prices lead to significant reductions in the prevalence of youth smoking.

Recent studies of young adult smoking conclude that young adults are also more responsive to price than older adults. Chaloupka and Wechsler (1997) estimate an overall price elasticity of demand for cigarettes of -1.11 and a participation elasticity of -0.53 for college students using data taken from the 1993 Harvard College Alcohol Survey. Similarly, Evans and Farrelly (1996), estimate an overall price elasticity of demand for young adults, ages 18 through 24 years, that is 50 percent larger than their estimate for adults ages 25 through 39 years, and nearly 3 times as large as their estimates for their full sample.

Given that nearly all smoking initiation occurs by the time of high school graduation and that smoking habits become firmly established during early adulthood, these estimates suggest that substantial sustained cigarette tax increases are potentially the most effective means of achieving long-run reductions in smoking in all segments of the population.

CAVEATS

Several caveats should be noted before evaluating the effects of cigarette price increases on youth and adult cigarette demand. First, for the reductions in youth and adult smoking resulting from a cigarette price increase to be sustained over time, the cigarette price increase must be sustained in real terms, i.e. adjusted for inflation. If the price increases are not sustained in inflation-adjusted, terms, then inflation will eventually erode the value of the price increase and smaller reductions in cigarette smoking would be attained. Most of the proposed increases in cigarette prices resulting from cigarette tax increases or licensing fees on cigarette

producers recognize this and call for the price increases to be indexed to the rate of inflation.

Second, recent research by Ohsfeldt, Boyle and Capilouto (1997) implies that large increases in cigarette prices alone would lead at least some smokers to substitute other tobacco products, including chewing tobacco and snuff, for cigarettes. This substitution would at least partially offset the health benefits of the increased prices. The substitution of smokeless and other tobacco products for cigarettes could be discouraged by comparable increases in the prices of these products as well. Again, many recent proposals call for increases in prices for all tobacco products.

Third, the estimated price elasticities described above are based on the relatively small changes in excise taxes over time and the relatively small differences in excise taxes across states and communities observed in the U.S.. The price increases currently being discussed are much larger than what is observed in the data on which these estimates are based. Anecdotal evidence from Canada, however, suggests that the effects of large price changes are likely to be consistent with those estimated based on relatively smaller changes. Moreover, recent behavioral economic research (for example, Bickel and Madden, 1997) suggests that, if anything, the effects of large price increases are likely to be disproportionately larger than what is implied by the estimates described above.

Finally, recent empirical studies that account for the addictive nature of smoking find that the long-run effect of a price increase on overall cigarette demand is about double the short-run effect. This implies that the long-run increases in revenues from large tax increases will be smaller than the short-run increases. However, the long-run reductions in cigarette smoking and the associated health benefits will be larger.

DISCUSSION

Taken together, these estimates imply that the large increases in cigarette prices contained in recent proposals will lead to large reductions in adult cigarette smoking, resulting from both increased smoking cessation among adults as well as reductions in average cigarette consumption among adults who continue to smoking. Large increases in price resulting from either large increases in federal cigarette taxes or the imposition of large license fees on cigarette manufacturers will generate substantial increases in Federal revenues from cigarette taxes or licenses. In addition, these estimates imply that the large price increases will lead to disproportionately large reductions in youth cigarette smoking, including sizable reductions in the prevalence of youth smoking.

Using the Chaloupka and Grossman (1996) estimate for the price elasticity of youth smoking participation of -0.675, and assuming an average price per pack for cigarettes of \$2.00 (the average price in the U.S. as of November 1, 1997 [Tobacco Institute, 1998]), the impact of several recently-proposed cigarette price increases on youth cigarette smoking can be estimated. Based on these estimates and recent estimates from the CDC (1996) on future smoking related deaths among current youth, the health benefits of cigarette price increases can be predicted. Based on recent prevalence estimates, the CDC predicted that 16,620,878 youth in the 1995 cohort of 0 through 17 year olds would eventually become smokers. Given their estimate that 32 percent of regular smokers eventually die from a smoking-related disease, CDC estimates that 5,318,681 of these persons will die prematurely from smoking-related illnesses. Similarly, using a price elasticity for overall cigarette demand of -0.4, the revenue implications of federal cigarette excise tax

increases (or other revenue-generating mechanisms) can be evaluated.

Harris (1997) predicts that real cigarette prices would increase by 62 cents per pack under the terms of the June 20, 1997 settlement proposal. Similarly, the Congressional Budget Office (1998) estimates that this agreement would raise price by 63 cents per pack. These estimated price increases essentially pass through the industry payments called for in the "global settlement" to smokers in the form of higher prices, and depend on estimates of the price elasticity of overall cigarette demand and assumptions about the cigarette industry's response to the settlement. A price increase of this magnitude would reduce overall cigarette demand in the U.S. by approximately 12 percent, while reducing youth smoking prevalence by over 20 percent. Given recent estimates, the price increase would keep nearly 3.5 million youth in the 1995 cohort of 0 through 17 year olds from becoming regular smokers as adults and over 1.1 million fewer of them would die prematurely from smoking related illnesses. Given that this price increase would be initiated by cigarette producers, federal and state cigarette excise tax revenues would decline significantly as a result of the price increase. Federal tax revenues, for example, would decline by over \$650 million (1997 dollars).

The Harris and CBO estimates of the price increase resulting from the settlement also depend on assumptions about the nature of competition in the industry. The FTC (1997), for example, suggested that the settlement could result in more coordinated industry price increases that would exceed the cost of the settlement. Based on evidence concerning the effects of past state and federal cigarette tax increases on price, the FTC suggests that cigarette prices could increase by as much as \$1.20 per pack in five years as a result of the proposed settlement. This prediction is consistent with the cigarette

industry's estimates that prices would increase by at least \$1.50 in ten years as a result of the settlement (Lorillard Tobacco Company, et al., 1997). A price increase of this size would produce nearly double the reductions in overall and youth smoking described above.

Several other proposals, including those of Senators Kennedy (S. 1492), Conrad (S. 1638), Harkin (S. 1889), and Jeffords (S. 1648), call for price increases of \$1.50 per pack to be phased in over a relatively short period of time and then indexed to the rate of inflation. Price increases of this magnitude would lead to about a 30 percent reduction in overall cigarette consumption, while cutting the prevalence of youth smoking about in half. This translates into over 8 million fewer adult smokers in the 1995 cohort of 0 through 17 year olds, and approximately 2.5 million fewer smoking-related premature deaths in this cohort. In addition, a tax or licensing fee of this magnitude would generate an annual net increase in federal revenues of about \$22.5 billion (1997 dollars).

Senator McCain's recent proposal (S. 1415), a \$1.10 increase phased in over five years in 65, 5, 10, 20, and 10 cent increments and then adjusted for inflation would have a somewhat smaller impact, reducing overall cigarette demand by about 20 percent, while lowering the prevalence of youth smoking by nearly one-third. As a result, over 5.3 million fewer persons in the 1995 cohort of 0 through 17 year olds would become regular smokers and over 1.7 million fewer of them would die prematurely from smoking. A tax or licensing fee of this size would lead to a net increase in federal revenues of approximately \$19.5 billion per year (1997 dollars).

Others, including the Institute of Medicine and numerous public health groups have called for price increases of \$2.00 or more per pack. A sustained price increase of this magnitude would produce a 40 percent drop in overall cigarette demand while cutting the prevalence of youth smoking by

approximately two-thirds. This would reduce the number of adult smokers in the 1995 cohort of 0-17 year olds by over 11 million and extend nearly 3.6 million lives that would have been cut short by smoking.

ADDITIONAL ISSUES

Opponents of large increases in cigarette taxes make two primary arguments: first, that cigarette and other tobacco taxes are regressive, since they fall most heavily on lower-income groups, and second, that higher taxes will create an incentive for cross-border smuggling and result in a substantial black market in cigarettes.

A 1990 report by the Congressional Budget Office, using data from the 1984-1985 Consumer Expenditure Survey, examined the issue of the regressivity of tobacco and other excise taxes. The report noted that expenditures on tobacco products increased with income except for those in the highest income quintile, but that as a percentage of post-tax income, spending on tobacco was highest in the lowest income quintile and fell almost proportionately with increased income. However, when expenditures on tobacco as a percentage of all expenditures were examined, the share of tobacco expenditures fell gradually over the first four income quintiles (from 1.6 to 1.1 percent) and dropped sharply only in the top quintile (to 0.7 percent). Thus, the CBO concluded, if annual family expenditures are more reflective of lifetime income than annual family income, then expenditures on tobacco are only slightly regressive over income classes.

The CBO went on to examine the distributional impact of cigarette tax increases on consumers by simulating the effects of a doubling of the then-16-cent Federal cigarette excise tax. At first glance, the simulated increase appeared to fall most heavily on the

lowest income groups. However, when income tax brackets and transfer payments were indexed to account for the price increases associated with the excise tax increase, the apparent regressivity of the tax was reduced. When looking at the tax increase relative to expenditures rather than income, the CBO concluded that cigarette taxes were approximately proportional rather than regressive. Finally, the CBO noted that the largest share of the simulated tax increase was paid for by families in the third and fourth income quintiles and that the smallest share was paid by families in the lowest income quintiles implying the tax increase would be somewhat progressive.

The possibility that cigarette tax increases could be progressive, in that the burden of the tax increase would fall more heavily on higher income groups, is supported by a few recent studies examining differences in price sensitivity by income. Townsend and her colleagues (1994), using data from the British General Household Survey, concluded that people in the lowest income groups were most responsive to price increases. Similarly, Chaloupka (1991), using U.S. data, found that less-educated persons were more responsive than more educated persons to changes in cigarette prices. Given the high correlation between education and income, this finding also implies that smoking among those in the lowest income groups would be most reduced by substantial increases in cigarette taxes and prices. This is confirmed by Farrelly, et al.'s (1998) recent analysis of data on cigarette smoking taken from 13 of the National Health Interview Surveys conducted since 1976. They estimate a price elasticity of cigarette demand for persons with incomes below the median that is roughly 50 percent higher than their estimate for the full sample. Together, these estimates imply that the health benefits of the reductions in smoking that would result from large cigarette tax increases would be

disproportionately larger in the lowest income populations.

To the extent that racial and ethnic minorities fall disproportionately into lower income groups, recent studies by Chaloupka and Pacula (1998), Farrelly, et al. (1998) and Evans and Huang (1998) also imply that the regressivity of large cigarette tax increases is overstated. Chaloupka and Pacula, for example, find that smoking prevalence among African American youth is about twice as sensitive to price as smoking prevalence among white youth. Similar findings are obtained by Evans and Huang for white and non-white youth and Farrelly, et al., for white, African American, and Hispanic adults.

Finally, as the CBO report pointed out, the U.S. system contains a mix of many different taxes and transfer programs that could be altered to offset any potential regressivity of an increase in cigarette and other tobacco taxes. To the extent that a significant portion of revenues generated by large cigarette tax increases would be spent on programs targeting low-income populations (as suggested in many recent proposals), the possible regressivity of the tax increases would be mitigated.

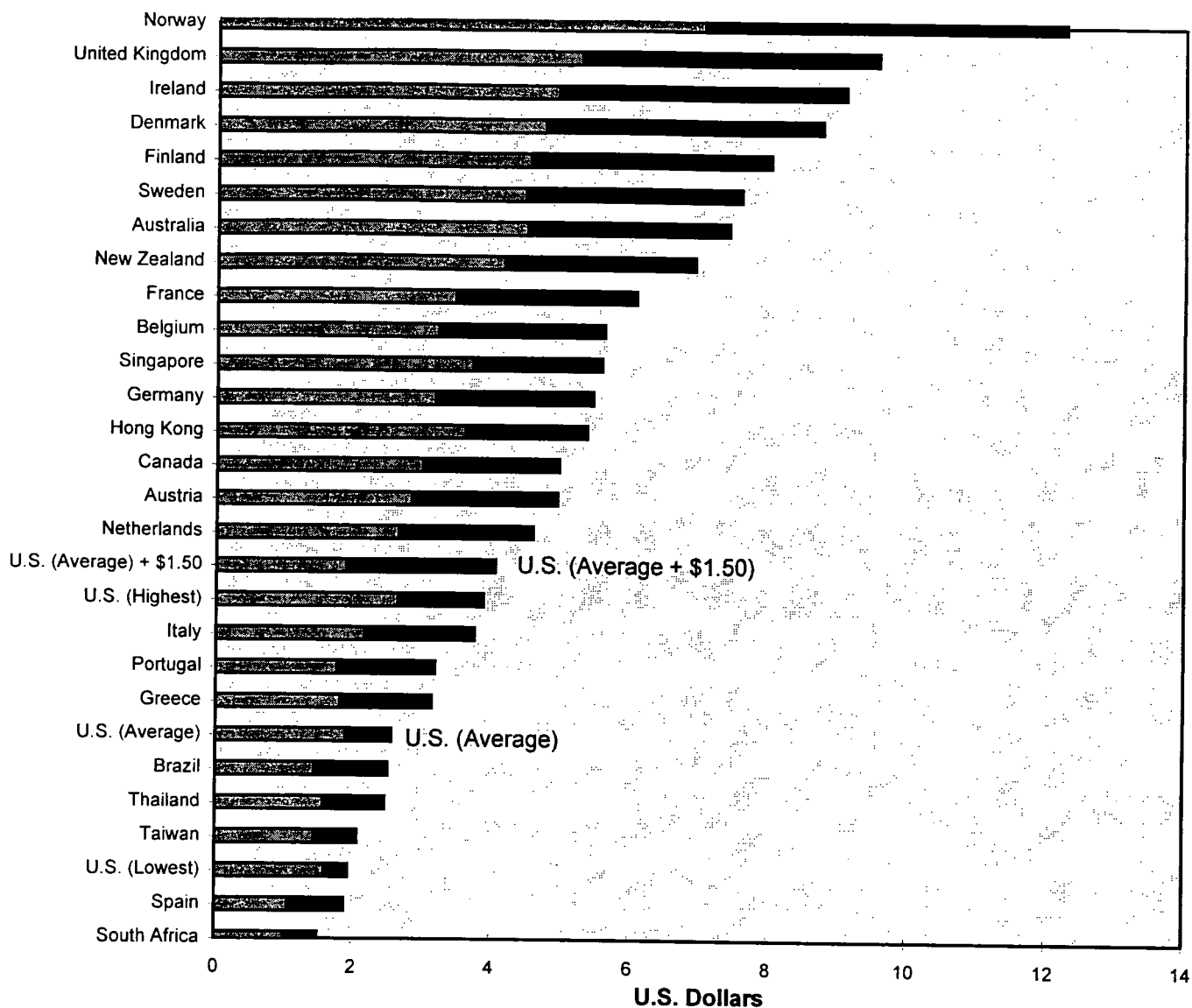
The second argument, that large cigarette price increases will necessarily lead to rampant cigarette smuggling and a large black market in cigarettes in the U.S., is the focus of a recent industry-sponsored advertising campaign. This argument is based on the hypothesis that large tax increases will produce large differences in cigarette prices between the U.S. and other countries that will create opportunities for profit from illicit trade in cigarettes. However, among industrialized countries around the world (as shown in Figure 1, page 10), the U.S. has one of the lowest average prices and taxes on cigarettes. Even a \$1.50 increase in the average cigarette price in the U.S. would be insufficient to put the U.S. in the top 15 countries globally in terms of cigarette prices.

Moreover, recent research by Joossens and his colleagues on the European experience (Joossens and van der Merwe, 1997; Joossens and Raw, 1995) suggests that the presence of an informal distribution network, nonexistent or weak policies concerning cigarette smuggling and their lack of enforcement, and other factors can be as important as price differences in spawning cigarette smuggling. They note, for example, that there is little evidence of cigarette smuggling in some high-priced European countries (including France and the U.K.), while there is extensive evidence of smuggling in those with relatively low cigarette prices (including Spain and Italy). Joossens and his colleagues suggest that much of the cigarette smuggling that does occur in Europe and globally is actually encouraged by the large, multinational tobacco companies.

The Canadian experience during the 1980s and early 1990s is used as evidence that widespread cigarette smuggling would result from large increases in U.S. cigarette taxes. As a result of significant increases in Canadian cigarette taxes beginning with the adoption of an *ad valorem* cigarette tax in 1980 and culminating with Federal tax increases of 2 cents per cigarette in 1989 and another 3 cents per cigarette in 1991, the average tax per pack of cigarettes in Canada at the start 1994 was more than five times the average U.S. tax. This large disparity in taxes and, consequently, prices led to substantial smuggling of cigarettes from the U.S. to Canada. This problem was exacerbated by the long stretches of unmonitored border between Canada and the U.S., relatively weak border controls, and the high concentration of the Canadian population living near the U.S. (Sweanor and Martial, 1994).

Moreover, there is evidence that Canadian tobacco companies encouraged and participated in this cigarette smuggling. Much of the black market trade was in Canadian-produced cigarettes that had been exported to the U.S. and then smuggled back into Canada;

Global Cigarette Taxes and Prices (U.S. Dollars)



Average retail cigarette price and total taxes per pack (U.S. Dollars/Pack), Selected Countries, December 31, 1996. U.S. average = state average + 24 cent federal tax. Source: David Sweanor, Smoking and Health Action Foundation, April 30, 1997.

■ Total Taxes Per Pack
 ■ Average Retail Cigarette Price

relatively little involved cigarettes produced in the U.S., since these cigarettes contain a different blend of tobacco that is less desired by Canadian smokers (Sweanor and Martial, 1994).

At least partially in response to an aggressive industry-sponsored advertising campaign, the federal tax on cigarettes in Canada was sharply reduced in 1994 and the government agreed to additional reductions to match provincial reductions in cigarette taxes. These cuts led to sizable reductions in Canadian cigarette prices and to a sharp decline in cigarette smuggling into Canada.

Nevertheless, average Canadian cigarette prices are still well above average prices in the U.S., and would remain higher even if the any of the proposals for large increases in U.S. taxes was adopted (see Figure 1). Given this, it is very unlikely that there would be widespread smuggling of cigarettes from Canada into the U.S. in response to sizable increases in U.S. cigarette prices. Indeed, given the support for tobacco control in Canada and the past increases in taxes, it is likely that an increase in U.S. taxes would be followed by an increase in Canadian taxes.

Cigarette prices in Mexico, however, are well below those in the U.S., and large increases in U.S. prices might make this a lucrative avenue for illicit trade in cigarettes. To date, however, there is no empirical evidence that supports the contention that there is significant cigarette smuggling from Mexico into the U.S. in response to existing price differences. Furthermore, unlike the Canadian-U.S. border, the border between the U.S. and Mexico is relatively short and heavily guarded, making it much more difficult to smuggle large quantities of a bulky product like cigarettes.

Finally, several relatively easy to implement policies could be adopted that would make it much more difficult to smuggle cigarettes (Joossens and van der Merwe, 1997). These include requiring prominently displayed

tax-paid markings on all tobacco products and sizable increases in the penalties for tobacco smuggling. The Advisory Commission on Intergovernmental Relations (1985), for example, concluded that the Trafficking in Contraband Cigarettes Act of 1978 (PL 95-575) which prohibited the transportation, receipt, shipment, possession, distribution, or purchase of large quantities of cigarettes that did not bear the tax indicia of the state in which the cigarettes are found, led to a significant reduction in interstate cigarette smuggling resulting from interstate differences in cigarette taxes and prices. A comparable, well-enforced policy dealing with cigarettes originating outside the U.S. could be adopted.

CONCLUSIONS

A large literature from economics clearly indicates that large cigarette price increases will lead to substantial reductions in cigarette smoking, particularly in the prevalence of cigarette smoking among youth. When combined with other tobacco control activities, including prevention and cessation programs, counter-advertising, comprehensive and aggressive enforcement of limits on youth access, and more, even larger reductions in youth and adult smoking could be achieved.

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