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**Tobacco-Settlement: Public Health
Reports [2]**

Tobacco - settlement -
public health reports

**FINAL REPORT
OF
THE ADVISORY COMMITTEE ON
TOBACCO POLICY AND PUBLIC HEALTH**

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INTRODUCTION BY THE CO-CHAIRS

On May 22, 1997, a bipartisan group of Members of Congress asked us to convene a committee on national tobacco policy. In response to this request, we formed the panel that has met as the Advisory Committee on Tobacco Policy and Public Health. This Committee is composed of representatives of some of the major public health groups that have been leaders in the debate on tobacco control. The selection of organizations to be represented was an especially difficult task, inasmuch as so many highly qualified groups with great expertise are involved in tobacco control; nevertheless, in order to make the Committee of manageable size, we made hard choices to limit the number of members and urged them to consult with a wide range of other organizations and experts.

The Committee has as its mission the development of a comprehensive and rational public health policy toward tobacco, containing clear goals and principles, in order to provide a benchmark against which future public and private activities can be measured.

The Committee has met three times, each time in open session, on June 5, June 18, and June 25. To conduct its work, the Committee resolved itself into five task forces on overlapping topics:

- Regulation of Nicotine and Tobacco Products (Chair: American Cancer Society)
- Youth and Tobacco (Chair: American Academy of Pediatrics)
 - Performance Objectives Subgroup (Chair: Partnership for Prevention)
- Current Users of Tobacco Products (Chair: American Medical Association)
- Environmental Tobacco Smoke (Chair: American Lung Association)
- Future of the Tobacco Industry and Tobacco Control Efforts (Chair: Advocacy Institute)

These task forces conferred independently and made their preliminary reports to the Committee. Each report was discussed in open session and amendments were made. Revised reports were developed and summarized.

We believe that this final report speaks loudly for itself, but it is perhaps appropriate for us to note here what this report does not speak to. This is not a report on past actions of the tobacco industry or on the harm that it has done. It is not intended to recommend how tobacco litigation or compensation programs for past injury should be handled. It is not a report on liability for the past.

Rather, in keeping with the Congressional charge, this is a blueprint for the future of tobacco policy and public health. It is neither incremental nor utopian. The plans outlined are ambitious but they can be achieved within a short time.

Most of all, this report is a document intended to look forward, and to move the Nation from its past injuries to future good health. Its recommendations are to ensure complete ability for the FDA to regulate nicotine and tobacco products, to prevent our children from starting to smoke, to treat those already addicted to tobacco, and to protect nonsmokers from involuntary exposure to smoke. These are the goals for which all new policy should aim. Any approach that fails these goals fails the Nation and fails the future.

We fully recognize that there are billions of dollars at stake here in hospital bills, compensation, and liability costs. While these are important issues, we believe that this debate about the past should not distract us from solid plans for the future. Not one of those compensatory dollars will be well spent if our children repeat their elders' mistakes, if adults continue their addiction, or if we all have smoke in our faces. As the national debate about tobacco continues, we urge all sides to keep their eyes clearly on this extraordinary opportunity for change.

What follows is a summary of the major recommendations of each of the task forces. An appendix has been included that contains the full final report of each of the task forces.

We want to thank and acknowledge our colleagues who have joined us for this daunting task in such a brief amount of time. We appreciate the expertise, commitment, and labor that have been contributed. We are confident that our work together will change the debate for the better.

C. Everett Koop, M.D., Sc.D.

David A. Kessler, M.D.

SUMMARY OF MAJOR RECOMMENDATIONS OF THE TASK FORCE ON THE REGULATION OF NICOTINE AND TOBACCO PRODUCTS

BACKGROUND

“[N]icotine in cigarettes and smokeless tobacco has the same pharmacological effects as other drugs that FDA has traditionally regulated.”¹ Indeed, it is acknowledged that nicotine is extremely addictive and that “the vast majority of people who use nicotine-containing cigarettes and smokeless tobacco do so to satisfy their craving for the pharmacological effects of nicotine; that is, to satisfy their drug-dependence or addiction.”² Many would argue, therefore, that the regulation of nicotine and its delivery is itself the most essential element of tobacco control activities.

Other components of tobacco smoke are also toxic. The tar, carbon monoxide, and additives contained therein are dangerous to the health of those using tobacco and those around them.

RECOMMENDATIONS

Regulatory Policy

- FDA should continue to have authority to regulate all areas of nicotine, as well as other constituents and ingredients, and that authority should be made completely explicit.
- FDA should continue to have the authority to phase out nicotine and remove ingredients that contribute to the initiation of smoking and dependence on cigarettes and other tobacco products (including smokeless tobacco, pipes, cigars, and roll-your-own tobacco), and that authority should be made completely explicit.
- There should be no limitations on or special exceptions to FDA authority to regulate nicotine, other constituents, and ingredients of tobacco products and such a no-limitations policy should be made completely explicit.

¹ 61 Fed. Reg. 168, 44661 (1996).

² *Id.* at 44636 (comments of the American Heart Association, the American Lung Association, and the American Cancer Society).

- The FDA should continue to have authority to regulate further nicotine, other constituents, and ingredients as the evidence suggests. The best science, information, and health policy (and not an arbitrary deadline) should drive FDA regulatory timing and that authority should be made completely explicit.
- The FDA should have the authority to test nicotine levels by brand, based on the best science and that authority should be made completely explicit.
- Regulation of non-tobacco nicotine delivery devices (e.g., nicotine patches, nicotine gum, nicotine inhalers, etc.) should be done in a manner that does not make the development and sale of less hazardous systems difficult and that encourages maximum overall reduction in disease.

Research Policy

- FDA should have the authority and funding to conduct research on nicotine and other components of tobacco products.
- International exchange and scientific conferences on nicotine and other components of tobacco products should be convened among private industry researchers and public researchers (such as those from the FDA, the CDC, the NIH, and the WHO).
- Research should be conducted on the effects of nicotine in children and adolescents.

Fiscal Policy

- FDA should be adequately funded to carry out its regulatory, enforcement, public education, and research activities.

SUMMARY OF MAJOR RECOMMENDATIONS OF THE TASK FORCE ON YOUTH AND TOBACCO

BACKGROUND

More than 90 percent of people who will ever smoke on a regular basis begin doing so prior to the age of 19. Each day, some 3,000 children take up the habit; the average age at which they begin is approximately 12-1/2, although many decide to smoke earlier if they are able. While these children start to use tobacco for a variety of reasons, very quickly they become addicted to the nicotine present in the product, and studies show clearly that children have just as difficult a time quitting as do adults.

There are a number of reasons why children begin to use tobacco. Among these are the remarkably effective advertising and promotion by the tobacco industry and, for many young people, perceived benefits from the use of tobacco, be they adult privileges, appealing images, or the opportunity for rebelliousness.

RECOMMENDATIONS

Regulatory Policy

- Sale and distribution of tobacco products to persons under age 18 should be prohibited.
- Specific and increasingly stringent targets for the reduction of tobacco use by children and adolescents (also known as "performance standards") should be established and become binding on the tobacco industry by brand within the next two years.³ Failure by the tobacco industry to meet

³ In its deliberations, the Advisory Committee recommended that a ten-year plan be established that is *at least* as strong as the following:

<u>At the end of</u>	<u>Reduction target</u>
Year 2	15%
Year 3	20%
Year 4	25%
Year 5	30%
Year 6	40%
Year 7	50%
Year 8	55%
Year 9	60%
Year 10	65%.

these targets should result in predictable financial penalties sufficiently severe to act as a strong deterrent to continued failure.

- Included within this recommendation are such specific proposals as:
 - Penalties should be structured so that failure to meet the targets directly reduces total revenue and affects total shareholder value.
 - Such penalties should not be arbitrarily limited or capped.
 - Additional non-financial penalties should be imposed if tobacco companies fail to meet such targets.
 - Penalties should be assessed, to the maximum extent feasible, on a company-by-company basis.
 - Similar goals and penalties should be established for smokeless tobacco and other tobacco products.

- Marketing, promotion, and advertising of all tobacco products directed at persons under age 18 should be banned.
 - Included within this recommendation are such specific proposals as:
 - Services, goods, and other items that carry tobacco brand names, logos, or imagery should be banned.
 - Sponsorship of any athletic, social, or cultural events using the name of tobacco products present or future should be banned.
 - Promotion in public entertainment, including product placement in movies and television should be banned.

- Sales and distribution of tobacco products through means that might make them available to underage users should be prohibited.
 - Included within this recommendation are such specific proposals as:
 - Sales of tobacco products through vending machines, mail order, Internet and other electronic systems, and self-serve displays should be banned.
 - Sales of tobacco products near schools, playgrounds, and other areas where children congregate should be banned.
 - Sales of tobacco products near health care facilities should be banned.
 - The distribution of tobacco products through free samples or through individual or small sales should be banned.

- States should license all participants in tobacco sales (e.g., manufacturers, distributors, wholesalers, importers, etc.), and penalties for violations of sales to minors should be strict enough to ensure compliance with the law.
- Both State and Local governments should be allowed to enforce violations of such restrictions and licensing requirements.
- The warning and product content labeling on all tobacco products should be strengthened.
- Schools and other child-service institutions should adopt and enforce a “zero-tolerance” policy against tobacco use that applies to both minors and employees.
- Included within this recommendation are such specific proposals as:
 - A zero-tolerance policy should apply not only at school or on-site, but also to all sponsored events and other sanctioned activities.
 - A zero-tolerance policy should include the banning of the wearing and carrying of clothing and other items that include promotional material for tobacco products.

Public Education and Other Public Health Policy

- Broad programs of counter-advertising should be required in all media markets and should be funded or supported by the tobacco industry.
- Schools should implement the Centers for Disease Control and Prevention guidelines to prevent tobacco use and addiction.
- Schools should institute comprehensive tobacco prevention programs from pre-kindergarten through 12th grade, and such programs should be funded or supported by the tobacco industry.
- IMPACT and ASSIST grants⁴ programs should be continued and strengthened.

⁴ IMPACT grants are administered by the Centers for Disease Control and Prevention. ASSIST grants are administered by the National Institutes of Health.

- Partnerships between public entities (such as schools) and businesses should be instituted to help achieve continued reduction in underage use of tobacco products.
- Health care providers should be educated about effective means to prevent children from beginning tobacco use.
- Tobacco use by children and adolescents should be included as an outcome measure in assessing the quality of health care services (e.g., in HEDIS and other NCQA reviews).

Research Policy

- Research should be conducted on the reduction of underage tobacco use.
 - Included within this recommendation are such specific proposals as research on:
 - Methods of identifying children who are likely to begin (or increase) use of tobacco products.
 - The effectiveness of current prevention and education efforts on youth consumption.
 - Children's and parents' attitudes and beliefs about tobacco use and the perception of risk, understanding of addiction, and the long-term consequences of tobacco use by children.

Fiscal Policy

- Excise taxes on tobacco products should be dramatically increased and should be indexed to inflation.⁵
- Fines from performance standards violations should not be tax-deductible.
- Fines from performance standards violations should be used to support activities to reduce tobacco consumption, with emphasis on activities designed to reduce consumption by children and adolescents.

⁵ Economic analyses suggest that children's use of tobacco is significantly affected by price increases of \$2 per pack or more.

- The enforcement of regulations and the initiation of public education, public health, and research efforts should be funded by these excise taxes, fines from performance standards violations, and by other funds from the tobacco industry.
- A new non-profit corporation to support tobacco prevention and control programs should be established in the private sector and should be funded by the tobacco industry, by excise taxes, and by fines from performance standard violations. The start-up of the non-profit corporation and its educational activities should begin at the earliest possible time.

SUMMARY OF MAJOR RECOMMENDATIONS OF THE TASK FORCE ON CURRENT USERS OF TOBACCO PRODUCTS

BACKGROUND

Some 50 million Americans are now addicted to tobacco. One of every three long-term users of tobacco will die from a disease related to their tobacco use⁶ Nicotine, a major constituent of tobacco, is highly addictive and "cigarettes and other forms of tobacco are just as addicting as heroin and cocaine. . . ."⁷ Similarly, withdrawal from this addiction is like withdrawal from other highly addictive substances. About 70 percent of smokers want to quit, but less than one-quarter are successful in doing so.

The Agency for Health Care Research and Policy has issued smoking cessation clinical practice guidelines⁸ that lay out recommendations for primary care clinicians, smoking cessation specialists, and health care administrators, insurers, and purchasers. These guidelines are often cited as the framework for providing and evaluating smoking cessation services.

In a separate but related area, it should be noted that cigarette-caused fires are the leading cause of deaths from residential fires. It is argued that many such fires could be prevented by changes that would reduce the burn characteristics of cigarettes.

RECOMMENDATIONS

Regulatory Policy

- Coverage for tobacco use cessation programs and services should be required under all health insurance, managed care, and employee benefit plans, as well as all Federal health financing programs (e.g., Medicare and Medicaid). Such coverage should be provided as a lifetime benefit rather than as a one-time opportunity to "kick the habit."

⁶ Coalition on Smoking OR Health, Protecting Our Families and Children from Tobacco: Public Policy Activities of the Coalition on Smoking or Health for 1995 and 1996, 2 (1996).

⁷ Addiction Research Foundation, Facts About Tobacco, 2 (undated)(citing the United States Surgeon General's 1988 Report on Smoking).

⁸ Agency for Health Care Policy and Research, Smoking Cessation (Clinical Practice Guideline, Number 18) (1996) (reprinted in 275 J.A.M.A. 16 (April, 24, 1996)).

- Tobacco use cessation programs and services should be available to adults, adolescents, and children who are addicted to tobacco products, regardless of their insurance status or ability to pay.

Public Education and Other Public Health Policy

- The smoking cessation guidelines issued by the Agency for Health Care Policy and Research⁹ should serve as the cornerstone for health care providers engaged in clinical practice.
- Courses on the prevention, treatment, and control of tobacco use, including cessation, should be made a part of the core curriculum in the education of health professionals.
- Tobacco use cessation programs and services should be made widely available. Specific cessation programs and services should be developed for specific populations, including children, women, racial and ethnic minorities, and individuals with limited literacy.
- Substantial public education efforts designed to inform tobacco users about both the health hazards of tobacco and the availability of tobacco use cessation programs and services should be undertaken.
- Policies designed to reduce the number of fires caused by tobacco products should be developed and implemented.

Research Policy

- Research efforts designed to evaluate the effectiveness of tobacco use cessation programs, services and therapeutics should be undertaken.
- Research projects should include work on smokeless tobacco and cigar use as well as cigarette smoking.
- Research projects should focus on the development of tobacco use cessation programs and services for pregnant women, children, and adolescents.

⁹ Agency for Health Care Policy and Research, Smoking Cessation (Clinical Practice Guideline, Number 18) (1996) (reprinted in 275 J.A.M.A. 16 (April, 24, 1996)).

- Research efforts designed to evaluate the effectiveness of public education and public health policies in successfully encouraging current users of tobacco products to attempt cessation efforts should be undertaken.

Fiscal Policy

- Tobacco use cessation programs and services should be funded or supported by the tobacco industry at a level sufficient to ensure that they are provided universally and in a manner most likely to prove effective.
- Research efforts related to the development of effective tobacco use cessation programs and services should be funded or supported by the tobacco industry.

SUMMARY OF MAJOR RECOMMENDATIONS OF THE TASK FORCE ON ENVIRONMENTAL TOBACCO SMOKE

BACKGROUND

Second-hand or environmental tobacco smoke (ETS) is no longer considered just an unpleasant side effect of cigarette smoking. Scientific evidence now indicates that nonsmokers become seriously ill or die because of exposure to the toxic smoke produced by other people's active smoking and the U.S. Environmental Protection Agency has classified ETS as an agent known to cause cancer in humans.¹⁰ ETS is believed to cause tens of thousands of deaths each year and to cause or exacerbate cardiovascular and pulmonary illnesses in hundreds of thousands additional individuals.

ETS is of particular concern with regard to children. Children are powerless to control their exposure to ETS and yet, because of their young age, are most adversely affected by exposure to this agent. The EPA estimates that exposure to ETS from parental smoking alone causes as many as 300,000 lower respiratory infections per year in infants under the age of 18 months.¹¹

Efforts to control second-hand smoke have been undertaken at Federal, State, and Local levels of government. The Federal government has banned smoking in federally-assisted programs for children and on domestic airline flights. Forty-eight States and the District of Columbia have enacted laws that, in some way, restrict smoking in public places. Local governments have usually led the way in these efforts; over 800 local communities have adopted significant restrictions on smoking in public places and workplaces.

RECOMMENDATIONS

Regulatory Policy

- Legislation or regulations should be enacted and enforced by Local, State, and Federal governments to eliminate exposure to second-hand smoke.
- Included within this recommendation are such specific proposals as:

¹⁰ U.S. Environmental Protection Agency, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, (Dec. 1992)(EPA /600/6-90/006F).

¹¹ *Id.*

- Smoking should be banned in all work sites and in all places of public assembly, especially those in places in which children are present.
 - Smoking should be banned in outdoor areas where people assemble, such as service lines, seating areas of sports stadiums, and arenas, etc.
 - Schools should be required to be 100 percent smoke-free in all areas of their campuses.
- Smoking should be banned on all forms of public transportation, including bus, train, commuter services, and flights originating in or arriving at the U.S.
 - Smoking should be banned at all Federal workplaces, including branches of the military and the Department of Veterans' Affairs and its hospitals.

Public Education and Other Public Health Policy

- A comprehensive public education and public awareness program about the dangers of ETS should be funded and implemented by Local, State, and Federal levels of government.
- State and local school boards should revise school health education programs to include information on ETS and its health effects.

Research Policy

- Federal health agencies should complete a risk assessment of the cardiovascular effects of ETS.

Fiscal Policy

- Economic incentives for smoke-free workplaces should be developed.
- Included within this recommendation are such specific proposals as:
 - Insurers should be encouraged to take into account worksite smoke-free policies in assessing appropriate premiums for health insurance, business insurance, and workers' compensation coverage.

SUMMARY OF MAJOR RECOMMENDATIONS OF THE TASK FORCE ON THE FUTURE OF THE TOBACCO INDUSTRY AND TOBACCO CONTROL EFFORTS

BACKGROUND

This task force reviewed three basic areas and made recommendations regarding each one. The three areas were: (1) common threads of domestic tobacco control efforts that cut across all other task force recommendations; (2) activities to aid those Americans who will be disadvantaged through no fault of their own by tobacco control policies; and (3) U.S. activities that can assist in tobacco control internationally.

In the first area, it is clear that many of the problems identified by the other four task forces have common sources and potentially common solutions. Most of these task forces made recommendations, for example, opposing preemption of State and local standards. Rather than repeating these proposals in each task force summary, these suggested actions are consolidated here: They should be read to be a part of each task force, unless specific circumstances dictate a narrower approach as reflected in the respective task force summary.

In the second area, this task force reports that tobacco farmers and farm communities are at severe economic risk as comprehensive tobacco control policies take effect. Most Americans consider the tobacco farmer to be as much an economic victim as a participant in the manufacture of tobacco products and support government efforts to help tobacco farmers find other means of making a living.

In the third area, this task force focused on the need for international tobacco policy to which the U.S. could make a substantial contribution. According to the World Health Organization, in the early 1990's, tobacco use caused three million deaths a year worldwide; WHO goes on to project that within the next twenty to thirty years, this number will rise to ten million deaths a year, with 70 percent of those deaths occurring in developing countries. Many of these deaths and projected deaths can be attributed to the increasingly aggressive marketing efforts of U.S.-based transnational tobacco companies.

RECOMMENDATIONS

Tobacco Control Efforts

Regulatory Policy

- Any Federal or State regulation of tobacco products should contain unambiguous non-preemption provisions, expressly clarifying that higher standards of public health protection imposed by State and Local governments are preserved.
- Federal, State, and Local tobacco control regulations should be aggressively enforced and such enforcement activities should be fully funded and supported.
- All currently available avenues of litigation, both civil and criminal, must be fully preserved.
- All elements of Federal, State, and Local tobacco control policies should be enforceable through lawsuits sought by individual citizens.
- All internal tobacco company documents that bear upon the public health must be disclosed.
- Included within this recommendation are such specific proposals as:
 - Disclosure of the companies' and their affiliates' public relations, advertising, promotion, marketing, and political activities.
 - Disclosure of all information inappropriately shielded by an assertion of attorney-client privilege.
 - Disclosure of all technical and health/safety data (with a possible exception for those true trade secrets that the companies can clearly establish have no health implications).
 - Disclosure of all information related to marketing, including opinion and behavioral research; and the targeting of children, women, and racial and ethnic minorities.
 - Disclosure of all documents relating to the effects of second-hand smoke.

- A Federal oversight board should be established to investigate all matters relating to public health and tobacco products and the tobacco industry.
 - Included within this recommendation are such specific proposals as:
 - The board should have investigative authorities, including subpoena power, necessary to investigate all matters regarding tobacco policy and public health.

Research Policy

- The collection and analysis of comprehensive data on tobacco use, behavior, attitudes (at national, regional, state, and local levels) should be funded or supported.
- Federal agencies and their partners should support programs to research, develop, and disseminate information regarding innovative interventions, including demonstration projects for implementing effective interventions.

Fiscal Policy

- Significant excise taxes (indexed to inflation) should be imposed upon tobacco products, both as a means of reducing consumption¹² and as a means of raising revenues as one source of support for tobacco control activities.
- All tobacco control activities (including education, counter-advertising, smoking cessation, etc.) funded or supported in whole or in part by the tobacco industry should be developed and implemented in a manner entirely independent of the industry.
- Fines, punitive damages, and other forms of financial punishment imposed on the tobacco industry and its affiliates should not be recognized as an ordinary business expense and should not be tax-deductible or given other special tax treatment.

¹² Economic analyses suggest that children's use of tobacco is significantly affected by price increases of \$2 per pack or more.

- Fines collected for failure to meet performance standards or violations of sales and promotion restrictions should be used for tobacco control activities.
- Funding for Federal, State, and Local tobacco control activities (including regulation and enforcement activities) should be sufficient to allow the effective conduct of such efforts.
- Funding for nongovernmental tobacco control activities should be sufficient to allow the effective conduct of such efforts. Particular emphasis should be placed on community programs for racial and ethnic minorities.
- Future smoking cessation programs and services should be entirely financed by the tobacco industry, regardless of location of service delivery or initial source of payment. Individuals and third-party payors (both public and private) should receive full reimbursement (or subrogation, as appropriate) for the costs of all future smoking cessation programs or services, without restriction on extrapolation, aggregation, or other means of consolidation.

Tobacco Farms and Farm Communities

Public Education and Other Public Health Policy

- A blue-ribbon panel should be established to oversee tobacco growing, manufacturing, and marketing policy, including the history of domestic and foreign tobacco purchases. This panel should provide both short- and long-term strategies for reducing the dependence of tobacco-growing States and communities on tobacco, including recommendations for the provision of economic development assistance.

Fiscal Policy

- An economic assistance and development fund should be established (and funded by the tobacco industry) to assist tobacco farmers and their communities in developing alternatives to tobacco farming. Economic conversion funds should also be provided to assist tobacco manufacturing workers and related non-farm workers.
- Federal price support programs for tobacco should be eliminated.

International Tobacco Policy

Regulatory Policy

- The U.S. should actively promote tobacco control worldwide.
- Included within this recommendation are such specific proposals as:
 - The U.S. should actively promote the global adoption of U.S. domestic tobacco control policies through all appropriate international activities.
 - The U.S. should support the development and implementation of tobacco control activities by multilateral organizations, including the Pan-American Health Organization, the World Health Organization, UNICEF, and the Framework Tobacco Control Convention.
 - The U.S. should support the development and implementation of tobacco control activities by non-governmental organizations.
 - The U.S. should support bilateral and multilateral treaties making the Framework Convention legally binding on all countries.
 - The U.S. should remove tobacco products from Section 301 of the 1974 Trade Act and should prohibit U.S. government interference in international activities or the national tobacco control activities of other countries.
 - The U.S. should support the development of a non-governmental International Tobacco Control Commission, governed by public health leaders. Such a commission would (1) monitor international control efforts; (2) develop uniform standards, review procedures, and provide support for non-governmental organizations advocating tobacco control; and (3) administer an international information exchange of all available tobacco industry documents.

Research Policy

- The U.S. should support international research efforts to determine the most effective means of preventing the initiation of tobacco use and of smoking cessation.

Fiscal Policy

- The U.S. should provide financial support for international governmental and non-governmental efforts to control tobacco use.

Congress of the United States
Washington, DC 20515

May 22, 1997

Mr. John Garrison
Managing Director, American Lung Association
1740 Broadway
New York, NY 10019

Dear Mr. Garrison:

We are writing as Members of Congress to ask that you serve on an Advisory Committee on Tobacco Policy and Public Health to be chaired by Dr. C. Everett Koop and Dr. David Kessler. The Advisory Committee will advise us on any tobacco settlement that may be proposed and will work with us to develop a comprehensive and united approach to any tobacco legislation that Congress may consider.

In the talks that are now underway, the tobacco industry is seeking a "global settlement" that would provide the industry with limitations on liability, public legitimacy, and sustained economic health. We are concerned that no one has adequately analyzed the ramifications of the tobacco companies' proposal. Before Congress considers any "global settlement" with the tobacco companies, we believe that it is essential that we obtain input from a public health perspective.

We seek your help in this effort. We must not limit our focus to only one part of the tobacco control agenda. In fact, given the unprecedented nature of the relief being discussed by the negotiators for the tobacco industry, the class-action lawyers, and the attorneys general, we believe we should not necessarily limit our focus to those provisions tobacco control advocates have proposed in the past. Instead, with your help, we want to ask fundamental questions about what -- from the public health perspective -- the future of the industry should be like.

We will fail our responsibilities if we limit our agenda to the issues currently on the table in the so-called "global settlement" talks. We should look at issues such as reducing tobacco exports, significantly raising tobacco taxes, ensuring actual reductions in youth smoking rates, imposing special corporate responsibilities on the industry, and other important public health policies. We ask for your help in identifying the broad range of provisions that should be encompassed in any "global settlement" with the tobacco industry.

If any agreement is reached in the tobacco settlement talks currently underway, it will undoubtedly be closely reviewed and substantially revised by Congress. Indeed, no proposal from outside groups of such a far-reaching nature has ever passed Congress without a great deal of debate and modification. A unified public health position developed by the Advisory Committee will allow us to respond to any weakening amendments effectively -- and to insist on public health amendments to strengthen the legislation.

We are at a turning point in our nation's relationship with the tobacco industry. We hope you will agree to serve on the Advisory Committee on Tobacco Policy and Public Health -- and help us to ensure that any tobacco legislation is in the public health interest of our nation.

Sincerely,

Henry A. Waxman James V. Hansen Marty Meek
Dick Durbin Frank R. Lautenberg For Wye
Paul Wellstone Paul Harkin Stewart Bleich

**THE ADVISORY COMMITTEE ON
TOBACCO POLICY AND PUBLIC HEALTH**

Co-Chairs: C. Everett Koop, M.D., Sc.D. and David A. Kessler, M.D.

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Tobacco Products Liability Project

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Chairman, Tobacco Products Liability Project

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PUBLIC POLICY

B R I E F

Tobacco Industry Bailout¹ July 21, 1997 (ver. 1)

On June 20, 1997, the nation's biggest tobacco companies and state attorneys general announced a settlement of state tobacco lawsuits aimed at recovering Medicaid money the states spend on treating smoking-related diseases. The complex settlement reaches far beyond the scope of the states' individual lawsuits and will need congressional approval. The settlement proposal addresses a variety of issues including the federal Food and Drug Administration's (FDA) authority to regulate tobacco, tobacco advertising and promotion, youth access to tobacco products, environmental tobacco smoke, and immunity for the tobacco industry from future lawsuits.

The American Lung Association believes the settlement falls considerably short of protecting public health. The proposal is wrought with gaping loopholes that can be manipulated by the tobacco industry.

Following is a summary of the American Lung Association's key concerns about the tobacco settlement.

FDA Authority

The settlement stipulates that the FDA can regulate nicotine as a drug but not ban it from cigarettes until 2009 and only then through a "formal" rulemaking process before an administrative law judge. Before reducing nicotine levels, the FDA must prove that its action will result in "a significant overall reduction of health risks," is technologically feasible and will not create "significant demand" for black market or smuggled cigarettes.

Furthermore, the agreement provides that the industry will disclose ingredients to the FDA, but allows it to designate any ingredient as a confidential trade secret, a designation the FDA would have to accept.

CAVEAT: The settlement document is complex. The document is not a draft of legislative language, rather it is a narrative outline of potential legislation. Some sections are vague or open to differing interpretations. This Public Policy Brief is not a comprehensive analysis of the agreement, rather it is an attempt to highlight many of the questions and problems the American Lung Association has found in reviewing the settlement agreement. As ALA continues its analysis, this document will be revised.

American Lung Association July 21, 1997

ALA position

The FDA's authority to regulate tobacco is sacrosanct. No changes in the agency's current authority or limits on future authority are acceptable. The tobacco settlement would make it almost impossible for the FDA to regulate nicotine.

The settlement sets up two unacceptable hurdles for the FDA to regulate the nicotine in tobacco products through its authority over medical devices. First, the agency would be required to use "formal rulemaking" to get the job done. Unlike "notice and comment" rulemaking, which can be concluded in a year or so, formal rulemaking requires a full-scale evidentiary proceeding that can take many years. Second, the settlement would require the agency to prove that lowering nicotine levels will not create a black-market demand for tobacco products with higher nicotine yields. Meeting the final test on black market or contraband sales will be impossible for the agency. Tobacco executives agree. British American Tobacco CEO Martin Broughton said in the Wall Street Journal about the likelihood that FDA would regulate nicotine: "It is an unlikely prospect. The contraband part gives me the most comfort."

For years, public health advocates have argued that the public, especially users of tobacco products, have a right to know what additives the companies put in their products. The settlement does nothing to rectify this problem.

Immunity from Future Liability

The settlement insulates the industry from paying any penalty for past wrongdoing. It provides that "no punitive damages [may be imposed] in individual tort actions." It also strips away the right of individual plaintiffs to band together to bring class-action cases, thereby affording tobacco victims fewer rights than people injured by other consumer products. The settlement also places strict caps on the amount of damages a tobacco company would have to pay in a given year and on the amount an individual could recover in one year.

ALA position

The American Lung Association is adamantly opposed to any immunity or limits on the tobacco industry's future liability. Damages should not be capped. No limitations should be imposed on punitive damages. There should be no ban on class-action lawsuits. As Joan Claybrook of Public Citizen puts it, "Bending the civil justice system to benefit a corporate wrongdoer is unjustified and sets a dangerous precedent that every irresponsible corporation will want to follow."

Advertising & Promotion

All outdoor tobacco advertising (billboards, etc.) would be banned, as would advertising via the Internet. Sports promotions and in-store displays would be banned. Tobacco ads could no longer feature human images or cartoon characters. The cigarette companies would pay for anti-tobacco advertising campaigns. Cigarette packages would carry stronger warnings covering 25 percent of the front of a package.

ALA position

Limits on advertising must be comprehensive. When faced with restrictions in the past, the industry has found creative and successful ways to market its products. This scenario has been the case in other countries that have imposed advertising restrictions. The creative genius of the industry, coupled with that of its high-paid advertising consultants, will come up with a

brand-new world of tobacco marketing to get around the settlement. Options a tobacco company might use include direct mail marketing, tobacco company "outlets" and paying celebrities to smoke their brands in public.

Compliance & Corporate Culture --- "Look Back" Provisions

The settlement would fine the industry if youth smoking rates do not drop by 30 percent in 5 years, 50 percent in 7 years, and 60 percent in ten years. There is a penalty of \$80 million per percentage point by which the target is missed. This figure is based on the estimated profit from a lifetime of smoking if the individual began at age 14. The fine is subject to an annual cap of \$2 billion for the entire industry. After paying the fine, however, the industry can petition the FDA to argue that it pursued all "reasonable available measures" to reduce youth smoking and took no actions to undermine that goal. If the FDA accepts that argument, the companies get 75 percent of their money back; if the FDA does not accept the argument, the companies can appeal the matter in court. The fine is tax deductible as a business expense.

ALA position

The financial penalties are much too low and could be recouped by the industry by raising the price of cigarettes just a few cents per pack -- now at 5 to 8 cents per pack. This program is an industry-wide program with no accountability by individual companies. A program that will really change corporate behavior must require individual companies to take responsibility for the sale of their products to children and sanction those companies for failing to resolve the problem. The fine levied against a company must not be tax deductible and must be severe enough to change behavior. These sanctions must place the offenders at severe and escalating disadvantage for their behavior. Additional nonfinancial "penalties" must be added to ensure youth smoking rates are met, such as plain packaging or a total ban on advertising for companies found to be targeting youth. Also, details are needed on what will constitute "reasonable available measures" that the industry can claim were employed to reduce their non-compliance fee.

Environmental Tobacco Smoke (ETS)

Tobacco use in public places, workplaces of 10 or more persons and fast-food restaurants would be prohibited, except for areas with separate ventilation and through which nonsmokers need not pass. Exemptions include bingo parlors, casinos, prisons and tobacco stores. The legislation would not preempt or otherwise affect any federal rules that restrict smoking in federal facilities.

ALA position

The settlement language dealing with ETS position is weaker than current law in many states. Ventilation systems are not an acceptable alternative. The settlement would not protect restaurant, bar and other hospitality workers -- the very people who often work for hours in smoke-filled environments. The agreement appears to continue exemptions for smoking in the Veterans' hospitals and other federal facilities. As we move into the 21st century, our goal should be "zero" tolerance for tobacco smoke.

Public Health Funding

Tobacco companies would pay \$368.5 billion over 25 years for anti-smoking campaigns and public health efforts. Most would be paid in annual installments starting at \$10 billion and rising to \$15 billion. The money would be divided among the states whose attorneys general sued, public health groups, and a new industry fund to pay for damage claims and treatment cost owed to smokers who are ill.

ALA position

The tobacco industry is getting off lightly. Companies can raise prices and write off the settlement payments as tax deductions, pushing payments onto the taxpayer and tobacco consumer. In the meantime, millions of current smokers will continue to use their deadly products and the industry will continue to lure new, young smokers into nicotine addiction. The settlement provides a stable financial situation for the industry for the next 25 years.

Tobacco Industry Documents

The settlement purports to require the tobacco companies to release documents relating to health effects and research, marketing and children. However, the settlement does not require the industry to disclose a single document that it has not already released in litigation. In fact, the settlement allows the industry to continue pressing the same privilege and confidentiality arguments it has used to block discovery in litigation. The settlement provides that industry lawyers will conduct a document-by-document review of all records withheld as privileged in litigation to reconsider whether they should be released. Only after the review is completed would any independent assessment of the validity of privilege claims be allowed.

ALA position

The proposal will perpetuate decades of tobacco industry cover-up. Exempted would be the millions of pages of information now shielded by "attorney-client" privilege. These documents can reveal a lot about the industry's wrongdoing and would be made public through the legal discovery process if the states' lawsuits are pursued in court.

International Impact

Worldwide sales of cigarettes in 1996 reached a total of \$295.8 billion. Approximately 85 percent of the three million tobacco-related deaths occur each year outside the United States. By the year 2020, the World Health Organization predicts that 10 million people will die annually from tobacco-related disease – 70 percent in the developing world.

The U.S. tobacco settlement excludes the rest of the world. Consequently, the U.S. tobacco companies' strategy will be to continue targeting the overseas market, especially the Third World and Eastern Europe, where they already sell a large majority of their cigarettes.

ALA position

The tobacco settlement ignores the rest of the world and condemns children in other countries to avoidable tobacco addiction, resulting in millions of preventable deaths each year. Promoting the export of tobacco-caused addiction, disease and death is unacceptable.

Tax Provisions

Although the industry will pay \$368.5 billion dollars over 25 years, almost every penny will be deemed a business expense and therefore considered tax deductible. Given the 40 percent marginal tax rate paid by RJR (and presumably by other tobacco companies), the tax deduction would be about \$150 billion.

ALA's position

Expenses incurred by the tobacco industry as part of the settlement should not be underwritten by the American people. In order to change the corporate culture of this industry it must pay for the settlement. And while higher cigarette prices may help reduce youth smoking, the payments described in the settlement will not harm the industry financially – in fact the settlement provide financial stability for the industry for 25 years.

For More Information

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Recommended Reading

The text of the tobacco settlement is available via the Internet at:

www.usatoday.com/news/smoke

Additional information can be found via the following web sites:

www.lungusa.org

www.tobacco.neu.edu

www.washingtonpost.com

www.reuters.com

www.nytimes.com

www.ash.org

www.smokescreen.org

NEWS



FOR IMMEDIATE RELEASE

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AMERICAN LUNG ASSOCIATION CALLS PROPOSED TOBACCO SETTLEMENT ADVERTISING PROVISIONS INEFFECTIVE
Organization Recommends Stricter Advertising, Marketing Guidelines

(WASHINGTON -- July 24, 1997) -- Calling the proposed tobacco settlement's advertising provisions "a mere inconvenience to the tobacco industry," the American Lung Association and a volunteer task force of advertising and marketing experts today issued recommendations for ways to end tobacco advertising and marketing to adolescents.

"Joe Camel and the Marlboro Man may be dead, but cigarette advertising still has an impact on encouraging young people to smoke," said John R. Garrison, Chief Executive Officer of the American Lung Association.

The American Lung Association created a Tobacco Advertising Advisory Committee to analyze the proposed tobacco settlement. Based on that analysis, the Lung Association has developed the following guidelines to ensure that cigarette advertising does not reach young people and contribute to their decision to smoke:

- All tobacco advertising visuals accepted by publications with audiences over the age of 18 should be limited to black-and-white ads showing only the product package. No props or scenery of any kind should be allowed. Except for the warning label, no copy should be allowed.
- All publications that accept tobacco advertising should be required to conduct annual readership studies showing the percentage of their readers under the age of 18. Those with an under-18 readership more than 15 percent should be prohibited

(more)

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LUNG ASSOCIATION ... TOBACCO ADVERTISING/2

from running tobacco advertisements or announcements of tobacco marketing or promotional campaigns.

- Direct and indirect payments for tobacco product placement in movies, TV programs and video games should be banned. So should payments to entertainment or sports figures to smoke "in public" or in the course of their professions, such as in live music performances.

"Human images and cartoon characters were banned from cigarette advertising during last month's proposed tobacco settlements, however there are an infinite number of symbols and images that can be used which are meaningful to adolescents," said Dan Cohen, President of Dan Cohen Marketing/Communications, a member of the Lung Association's advisory panel.

An analysis of a new Camel Lights print advertisement, which adheres to the proposed tobacco settlement's restrictions, reveals the impact symbols and images have on young people. The advertisement, one in a series of ads in a new Camel campaign, appeared in the July 6, 1997 issue of *Sports Illustrated* and contains the headline "Live Out Loud." Depicted in the ad are several symbols that appeal to young people without the use of traditional images such as human figures or cartoon characters.

"The symbols used in the ad—a motorcycle, the wings of an eagle, a camel and the color black—create powerful visual messages that appeal to adolescents," said Penelope Queen, Director of Band Consultancy, TEAM Strategic International, and a member of the Lung Association panel. "The ad demonstrates how easy it is and will be for the tobacco industry to circumvent the tobacco settlement and create powerful advertising to effectively reach a youth audience."

The proposed tobacco settlement recommends new programs for public education and tobacco-use prevention, including counter-advertising campaigns. The American Lung Association's Tobacco Advertising Advisory Committee will review these proposed programs and make recommendations for steps that must be taken to curb the persuasiveness and influence of tobacco imagery in American culture.

The American Lung Association has been fighting lung disease for more than 90 years. With the generous support of the public and the help of our volunteers, we have seen many advances against lung disease. However, our work is not finished. As we look forward to our second century, we will continue to strive to make breathing easier for everyone. Along with our medical section, the American Thoracic Society, we provide programs of education, community service, advocacy, and research. The American Lung Association's activities are supported by donations to Christmas Seals® and other voluntary contributions. You may obtain additional information via our America Online site, keyword: ALA, or Web site at <http://www.lungusa.org>.

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American Lung Association TOBACCO ADVERTISING/MARKETING GUIDELINES

The American Lung Association created a Tobacco Advertising Advisory Committee to assess the future of tobacco advertising under 1) the recommendations made by the Koop/Kessler Advisory Committee on Tobacco and Public Health and 2) the "Proposed Resolution" reached between the tobacco industry and the state attorneys general.

Based on that assessment, following are guidelines the American Lung Association believes should govern any future tobacco product advertisement and marketing campaigns. In general, these guidelines reflect the Lung Association's endorsement of the Koop/Kessler Committee findings. In some instances, the Lung Association's recommendations are even more specific.

LOOPHOLES IN THE "PROPOSED RESOLUTION"

- The advertising requirements of the "Proposed Resolution" will not appreciably inhibit the tobacco industry's ability to reach and influence the 12-17 year-old segment of the U.S. population.
- The Proposed Resolution's ban on the use of human images and cartoon characters in advertising and promotion is a *mere inconvenience to the tobacco industry*. An analysis of the new Camel Lights advertisement (Attachment A and the Harley Davidson logo marked Exhibit B) shows how easily tobacco manufacturers can develop new ads with enormous appeal to people under the age of 18. Killing off Joe Camel and the Marlborough Man may satisfy many of their critics, but the death of these symbols will not seriously diminish the power of tobacco advertising to reach and influence teens and children.

AMERICAN LUNG ASSOCIATION ADVERTISING/MARKETING GUIDELINES

In addition to the recommendations from the Koop/Kessler Advisory Committee on Tobacco and Public Health (Attachment B), the American Lung Association recommends:

- All tobacco advertising visuals accepted in publications for over-18 audiences should be limited to black-and-white ads showing the product package. No props or scenery of any kind should be allowed. Except for the warning label, no copy should be allowed.
- The Koop/Kessler Advisory Committee recommends a ban on advertising, marketing and promotion of tobacco products directed at persons under age 18. As can be seen in Attachment C, many non-youth oriented magazines reach a significant number of teens. Therefore, all publications that accept tobacco advertising should be required to conduct annual readership studies showing the percentage of readers under age 18. Those with an under-18 readership of more than 15% should be prohibited from running tobacco advertisements or announcements of tobacco marketing or promotional campaigns.
- The Koop/Kessler Advisory Committee makes excellent recommendations for banning direct and indirect payments for tobacco product placement in movies, TV programs and video games. The American Lung Association additionally recommends an end to payments to entertainment/sports figures to smoke "in public" or in the course of their professions (i.e., live music performances)

NEXT STEPS

Both the "Proposed Resolution" and the Koop/Kessler Advisory Committee on Tobacco and Public Health recommend significant new programs for public education and tobacco prevention, including counteradvertising campaigns. The American Lung Association's Tobacco Advertising Advisory Committee next will review and make recommendations to ensure that counteradvertising programs successfully affect the pervasiveness of tobacco imagery and influence in our culture.

Tobacco - settlement -
public health reports

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cc: Ek, ED, Jerry

For Release:
July 15, 1997
11:00 a.m. ET

Contact:
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**THE AMERICAN HEART ASSOCIATION CALLS
TOBACCO SETTLEMENT PROPOSAL ONE STEP**

IDENTIFIES AREAS OF CONCERN

Washington, DC -- The American Heart Association announced today its response to the proposed settlement document drafted by the state attorneys general and the tobacco industry.

According to Martha Hill, RN, Ph.D., FAAN, president, American Heart Association, "The proposed settlement document includes a comprehensive set of provisions that the public health community could not have thought possible just months ago. The proposed settlement is not perfect. Nor can it be thought of as a total solution to the death and disease caused by tobacco. But it could serve as a significant instrument to help reduce tobacco use."

Edward F. Hines, Jr., Esq., chair-elect, American Heart Association, led the association's 19-member task force that conducted the review of the proposal. "The AHA believes that the horrendous impact of tobacco use on the health of all people must be dealt with through multiple approaches. These include education; regulatory, legislative and judicial action; accountability by the tobacco industry; and individual responsibility," said Hines.

"The proposed settlement document is quite complex and will require legislative and regulatory action to implement and enforce many of its elements. The AHA has identified a number of areas of concern related to the proposal, and these concerns will guide our actions as the proposal moves forward," added Hines.

The concerns identified in the AHA's review of the proposal include FDA regulation of tobacco, penalties to the tobacco industry, bankruptcy, education, disclosure of industry documents, preemption, and immunity. Additionally, the AHA believes there are other crucial issues related to tobacco control that must be addressed. They include international marketing of tobacco products, tobacco excise taxes, and tobacco farm issues.

-more-

page two, Tobacco Settlement Proposal

- **FDA Regulation of Tobacco**

Regarding the FDA regulation of tobacco, the AHA holds as an absolute principle that the FDA must be guaranteed complete authority over tobacco products, including nicotine, and FDA must be provided appropriate resources to carry out its regulatory role.

- **Penalties to the Tobacco Industry for Addicting Youth Smokers**

The AHA believes that shareholders of tobacco companies should lose money each time they addict a child to tobacco. The penalties to the tobacco industry outlined in the settlement should serve as a floor for Congress in determining how much the industry should pay if youth smoking does not decrease by specified amounts. Provisions should be included to ensure that penalties are painful enough to the tobacco industry to eliminate any economic benefit of addicting children to tobacco.

- **Bankruptcy**

Under the proposed settlement, tobacco companies could escape their obligations and liability through bankruptcy. The AHA feels it is important that, as legislation moves through Congress, provisions are added to prevent this from happening.

- **Public Education**

The proposed settlement sets aside funds for public education, but the AHA believes it is important for these efforts to be conducted by organizations independent of tobacco industry influence. Also, it is important that designated funds be exempt from the traditional appropriations process to ensure that Congress does not divert the funds into other projects.

- **Disclosure of Tobacco Industry Documents**

The settlement provides for disclosure of some but not all tobacco industry documents. In the interest of public health, the AHA would like all tobacco industry documents related to health issues to be fully and openly disclosed.

- **Preemption**

According to the AHA, the tobacco settlement agreement must not preempt the adoption of state or local laws that are more comprehensive in reducing sales, marketing and use of tobacco products, and restricting smoking in public places. The AHA will continue to promote efforts to protect people from environmental tobacco smoke, which causes 30,000 to 60,000 deaths each year. The proposed federal OSHA standards are a minimum that must be met, but stronger state and local policies should not be preempted.

- **Immunity for Wrongdoing**

The AHA feels that the proposed settlement must not grant immunity for past criminal wrongdoing to tobacco companies or their agents.

-more-

page three, Tobacco Settlement Proposal

“Related to our additional concerns,” Hill said, “the AHA believes any actions on tobacco use in which the public health community is involved must consider international use of tobacco products.

“We also believe that the settlement should not preclude the use of tax policy to further decrease consumption of tobacco products.

“And we urge Congress and the White House to actively work to provide tobacco-producing communities viable economic options for diversification out of tobacco growing, production and manufacturing,” added Hill.

“The battle against tobacco is far from over,” said Hines. “As the proposed tobacco settlement document moves forward, its terms must be scrupulously watched to assure that the public’s health is ultimately protected.

“The American Heart Association remains steadfast in its efforts to hold the tobacco industry accountable for the death and disability it has caused. We are committed to assuring that the Congress and regulatory agencies enact appropriate measures to correct past wrongdoing and protect our children and the public’s health.”

AMERICAN HEART ASSOCIATION
Response to the Settlement Proposal
Between the Tobacco Industry and State Attorneys General

Prevention of cardiovascular diseases and stroke remains the primary goal of the *American Heart Association*. The costs in terms of lives lost and health because of tobacco use are staggering. Tobacco use is the single leading preventable cause of death in the United States.

- Tobacco use kills more than 400,000 Americans each year – more people than car accidents, alcohol, homicides, illegal drugs, suicides, and fires combined.
- Each day 3,000 children begin smoking in the United States. Each year another 1 million young people will become regular smokers and approximately one out of every three of these adolescents will die prematurely as a result of tobacco use.
- Children are starting to smoke at earlier and earlier ages. Studies show that the proportion of 8th and 10th graders who reported smoking rose by 33 percent between 1991 and 1995.
- Approximately 3 million American adolescents currently smoke, and an additional 1 million adolescent males use smokeless tobacco.
- Cigarette smoking is the greatest risk factor for sudden cardiac death.
- Chronic exposure to environmental tobacco smoke (secondhand smoke) significantly increases the risk of heart disease.
- Smoking is the biggest risk factor for peripheral vascular disease (narrowing of blood vessels carrying blood to leg and arm muscles). Smokers with peripheral vascular disease are more likely to develop gangrene and require leg amputation.
- Of the fifty million people who smoke cigarettes, an estimated 77 – 92 percent are addicted.
- Some 82 percent of adults who have ever smoked had their first cigarette before age 18, and more than half of them had already become regular smokers by that age.
- The international impact of tobacco on world health is frightening. Between 1992 and 2025 mortality in developed countries will increase from two to three million. In developing countries, where the tobacco industry is concentrating their efforts, mortality will increase from one to seven million by 2025.

The AHA believes that the horrendous impact of tobacco use on the health of all people must be dealt with through multiple strategies. These include community education; government interventions including regulatory, legislative and judicial action; accountability by the tobacco industry; and individual responsibility.

At the forefront of our concerns is protecting the health of our children from the addiction, disease and risk of death from tobacco use.

After a careful review of the proposed settlement document drafted by the state attorneys general and representatives of the tobacco industry, the AHA has identified a number of concerns. These include FDA regulation of tobacco, penalties to the tobacco industry if the terms of the settlement document are not met, bankruptcy, public education, disclosure of tobacco industry documents, preemption, and immunity of the tobacco industry for wrongdoing.

Additionally, the AHA believes there are other crucial elements related to tobacco control that must be addressed by the Congressional and Executive Branches of our government. This response document will highlight those as well. They include international marketing of tobacco products, tobacco excise taxes, and tobacco farm issues.

Part 1 comments on the issues addressed in the proposed settlement document. *Part 2* addresses additional concerns that go beyond the scope of the settlement document, which the AHA believes are vital to the efforts to eliminate tobacco use.

Part 1:

Overview Comments of the Proposed Settlement Document

The AHA views the proposed settlement document as one step in the battle against tobacco use.

The proposed settlement document is not perfect. Nor can it be thought of as a total solution to the death and disease caused by tobacco. But it could serve as a significant instrument to help reduce tobacco use in the United States. Those who have brought the proposal forward with true intent to positively improve the health and lives of all people should be thanked for their efforts.

The proposed settlement document is complex and will require legislative and regulatory action in order to implement and enforce many of its elements. Implementation of the terms of the document demands that the public health community be vigilant in holding both the tobacco industry and our government officials accountable to carry out steps that will reduce and eventually eliminate use of tobacco products in our country.

FDA Regulation of Tobacco

The proposed settlement document sets out detailed provisions for Food and Drug Administration (FDA) regulation of the manufacture, production, sales and marketing of tobacco products. The AHA holds as an absolute principle that the FDA must be guaranteed complete authority, and provided appropriate resources, to carry out its regulatory role over tobacco products in a timely fashion. The FDA must be provided funding and other needed resources as part of the settlement to enable them to conduct appropriate tobacco regulation without interfering with or impeding their regulatory responsibilities over other drugs and devices.

We also support expansion by Congress of the proposal to give the FDA authority to regulate the manufacture, sales and marketing of cigar and pipe tobacco in order to protect the public from the addictive and deadly qualities of these products.

Action by Congress or other government agencies must not create bureaucracy that will prevent or obstruct the FDA's ability to control tobacco products. FDA's control over tobacco and nicotine products must be total, including advertising and promotion, and Congress must commit to ongoing support of the FDA in the control of tobacco products.

We believe that the FDA's control over nicotine and tobacco should be governed by health and science concerns.

Concerns have been expressed that the proposed settlement document, in apparently requiring Formal Rule Making procedures and in requiring specified findings subject to certain evidentiary standards, may hamper the FDA in the discharge of its new duties. These concerns need to be explored and, if valid, addressed.

While the FDA's responsibilities relate only to U.S. consumed products, a strong FDA model for control over tobacco can serve as a useful template for international control over tobacco products.

Penalties to the Tobacco Industry

The AHA is concerned about the health damages of tobacco use, and therefore supports enactment of penalties significant enough to deter tobacco manufacturers from addicting new smokers. The penalties outlined in the settlement document should serve as a *floor* for Congress and others in determining appropriate amounts the tobacco industry should pay if it does not meet the terms of the agreement. Congress should assure there is a mechanism to enforce penalties and should be accountable for assuring the penalties are not reduced.

Penalties need to be painful to the tobacco industry and should eliminate any economic benefit of addicting a young person to tobacco.

Since penalties stated in the proposed settlement document are calculated on current information and data on teenage smoking, the figures must be reevaluated annually and adjusted appropriately. Adjustments must include evaluation of wholesale and retail prices of tobacco products to assure tobacco companies never again profit from sales to children.

It must cost the shareholders of tobacco companies money each time they addict a child to tobacco.

Bankruptcy

As legislation moves through Congress to implement the terms of the proposed settlement agreement, provisions need to be added so that tobacco companies cannot escape their obligations through bankruptcy.

Public Education

The funding of all education programs resulting from the settlement agreement must be under the auspices of independent organizations appointed to handle counter-advertising programs, educational programs and related issues. This does not preclude government organizations from being funded to implement such tobacco-control or education programs.

This should be done in a manner that streamlines implementation of the educational programs, and does not create a bureaucratic quagmire.

Similar structures should be applied to programs earmarked for state and/or local implementation.

The availability of funds shall be removed from traditional appropriations processes.

Disclosure of Tobacco Industry Documents

Documents of the tobacco industries, and persons or organizations under their control, that yield information relevant to the health hazards of tobacco products and their use must be fully and openly disclosed.

Preemption

Any provisions resulting from the proposed tobacco settlement agreement must not preempt the initiation, adoption and/or enforcement of state or local laws that are more severe in reducing sales, marketing and use of tobacco products, and restricting smoking in public places.

The AHA will promote and uphold efforts to protect people from environmental smoke, which accounts for an estimated 30,000 to 60,000 deaths annually, and significantly contributes to diseases including heart disease, cancer, emphysema, chronic lung disease, asthma and sudden infant death syndrome. The AHA advocates strong clean indoor air policies, and we view the proposed OSHA standards as a minimum that must be met. Stronger state and local clean air policies must not be preempted.

Immunity for Wrongdoing

Tobacco companies and their agents should not be granted any immunity for past criminal wrongdoing.

Part 2:

Additional Concerns of the Proposed Settlement Document

The battle against tobacco is far from over. As the proposed tobacco settlement document moves forward, its terms must be scrupulously watched to assure that the public's health is ultimately protected. In addition to the terms contained in the proposed settlement agreement, there are three other items of critical concern to the AHA.

International Marketing of Tobacco Products

There is a significant concern about issues related to the manufacturing, distribution, marketing, sales and use of tobacco outside the United States. The proposed settlement document does not address international issues, and we understand that these issues were not a part of the discussions that led to the proposed settlement document.

However, the AHA believes any actions related to tobacco use in which the public health community is involved must consider international use of tobacco products.

U.S. tobacco companies must be prevented from exporting cigarettes and other tobacco products that are more hazardous than those permitted on the domestic market.

In addition the AHA is concerned that a consequence of reducing U.S. tobacco sales will intensify marketing of tobacco products elsewhere in the world. Therefore the AHA requests that the White House, through executive action, initiate assertive efforts to enable the appropriate international organizations to more aggressively attack international tobacco use.

As a partner with many international health and medical organizations, the AHA believes there is a responsibility to look at tobacco control not only within the U.S., but also worldwide.

Tobacco Excise Taxes

The settlement agreement should not preclude the use of tax policy to further decrease consumption of tobacco products, particularly among our nation's youth. (Independent studies of past tax increases show that for every 10 percent increase in the price of cigarettes, overall smoking rates fall approximately four percent.) Aggressive enactment of federal and state tobacco excise taxes must be maintained.

Tobacco Farm Issues

The AHA recognizes the production of tobacco plays a significant role in the economic maintenance of many American families living in states that grow a large quantity of tobacco. We urge Congress and the Executive Branch to actively work to provide tobacco-producing communities viable economic options for diversification as well as ensuring assistance for economic development. Opportunities must be provided to tobacco growing communities and tobacco farmers which provide for their future economic stability and productivity independent of tobacco production.

The AHA recommends that a portion of tobacco excise taxes include “set-asides” that will provide economic stability for tobacco farmers as they transition out of tobacco crops and into other agricultural ventures.

Summary

The American Heart Association remains steadfast in its efforts to hold the tobacco industry accountable for the death and disability it has caused. We are committed to assuring that the tobacco industry and our government agencies enact appropriate measures to correct past wrongdoing and assure future protection of our children and of the public’s health.

We are committed to our responsibility as the public’s advocate for the elimination of tobacco use. This is crucial to our mission: *the reduction of disability and death from cardiovascular diseases and stroke.*

The mission of the American Lung Association of Maryland is to prevent lung disease and to promote lung health.

Tobacco - settlement -
public health



September 9, 1997

Floyd W. Hartfield
President

Stephen M. Peregoy
Executive Director

Elena Kagan
Deputy Assistant for Domestic Policy

Dear Ms. Kagan:

The American Lung Association of Maryland would like to share with you our reasons for opposing the proposed settlement "deal" with the tobacco industry. We urge you to join us by taking an active role against the proposed "deal."

The American Lung Association, National Office has stated:

"Good public policy would dictate full disclosure of all tobacco related documents relevant to public health, medical research, marketing and advertising, consumer fraud, potential criminal activities, and anti-trust violations on the part of the tobacco industry. We believe that any settlement should not be endorsed prior to full document disclosure."

We do not believe that the tobacco industry's past actions deserve any special treatment by the government of the United States. We believe that the tobacco industry has lied about the safety of their product, has purposely marketed their product to children, and that the industry has manipulated our system of government to protect their financial stability. Because of this, we ask that the tobacco industry be held accountable for their actions. Any limitation to FDA's authority is unacceptable, as is immunity for the tobacco industry.

Development of a national policy on Tobacco and Public Health is necessary and long overdue. The Koop-Kessler Advisory Committee report contains the outline of such a successful policy program. I urge you to join with the American Lung Association in supporting its provisions as a much more viable approach than the "global settlement deal."

We continue to support the Maryland Attorney General's right to settle Maryland's Medicaid costs recovery suit. And we encourage the incorporation of marketing and advertising limitations into any settlement agreement.

We urge you to reject this industry's "deal" which is designed to protect the tobacco companies at the expense of the public's health. Thank you for your consideration of this important issue. Please let us know if we can be of any further assistance to your office.

Sincerely,

Cassandra B. Yutzy
Director of Advocacy



Tobacco - settlement -
public health reports

AMERICAN CANCER SOCIETY

POSITION ON THE PROPOSED

TOBACCO SETTLEMENT

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AMERICAN CANCER SOCIETY**INTRODUCTION**

The American Cancer Society (ACS) believes that the settlement process between 40 Attorneys General and the tobacco industry provides a rare opportunity to make substantial inroads in combating tobacco related illnesses -- the largest cause of death and disease in the United States. More importantly, the proposal has the potential to reverse the frightening increase in teenage tobacco use.

Perhaps because the settlement proposal was adopted without the benefit of significant public scrutiny or debate, it is clear that as currently presented, the settlement is flawed. It includes, in our view, obvious shortcomings that must be addressed by Congress to effectuate important tobacco control policies. We believe that, using the proposed settlement as a platform, Congress can craft balanced legislation that resolves most litigation and ensures adequate public health protection from the devastating effects of tobacco use.

The proposed settlement must be viewed in the context of the devastating effects of tobacco use on health and the continued attempts at the federal, state and local levels to address this important public health problem. Our nation took an important step toward mitigating the harm of tobacco use through the adoption of advertising restrictions and warning labels in the 1960s. Since that time, states have taken the lead in tobacco control through imposing excise taxes on cigarettes and tobacco products, banning billboards, requiring ingredient disclosure, and through policies aimed at protecting non-smokers from the secondary effects of smoking in public places and controlling underage access to tobacco products. The settlement proposal offers the opportunity to build upon these state and local efforts to establish a national policy for tobacco control with a primary goal of protecting our children from ever starting to smoke. ~~However, no single piece of Federal legislation can represent a permanent, long-term approach to the problem of tobacco use.~~ The American Cancer Society will continue to work for adoption of even stronger tobacco control policies by Congress, state legislatures, local governments, and public health officials.

Despite state and local efforts to control underage use of tobacco, the U.S. has witnessed a disturbing increase in the rate of teenage tobacco use. Over 3,000 teenagers become hooked on tobacco for the first time every day. Although the tobacco industry has consistently denied that it attempts to encourage teenage tobacco use, empirical evidence suggests that advertising in youth-oriented publications, use of cartoon characters in advertising, and the steady display of young, healthy models in tobacco advertising all have the effect of increasing rates of teenage tobacco use. The settlement proposal represents an opportunity for Congress to enact legislation to address the problem of underage tobacco use

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through advertising restrictions, education efforts, and industry incentives to decrease the rate of tobacco use among minors.

One of the most pernicious aspects of tobacco products is the addictive effect of nicotine. The scientific community unanimously agrees that nicotine has powerful addictive properties. Indeed, we now know that the tobacco industry has been fully aware of these properties for decades. Reducing or even eliminating nicotine from tobacco is critical to any effective tobacco control policy. The proposed settlement attempts to address this issue through the regulation of tobacco product development and manufacturing. Congressional action on control of nicotine should expand the authority of FDA to regulate the sale, manufacture and marketing for all tobacco products including cigars and pipe tobacco.

The American Cancer Society believes that any evaluation of the settlement proposal must consider the following questions: Is the FDA given appropriate tools to effectuate critical public health goals through regulation of tobacco products? Are regulators, and the public, given appropriate access to industry information on the health effects of tobacco? Are the roles of state and local governments in implementing tobacco control policies properly enhanced and preserved? Does the proposal include sufficient incentives for the reduction of tobacco consumption and the development of less hazardous products?

These recommendations are, to a large extent, based upon the Analysis and Review of the Tobacco Settlement that was also drafted and disseminated by the ACS. Based on the work of experts in law, economics, medical ethics and public health, the Analysis and Review includes separate sections on: a summary of the current FDA rule; a special legal analysis of the United States District Court case upholding, in part, the FDA rule; a special legal analysis of the proposed authority for the FDA to regulate nicotine content of tobacco products; an economic analysis of the rule; and a discussion of important constitutional issues raised by the settlement. In addition, we provide important factual information about public health and tobacco. Specific information in these documents supplements our recommendations.

The following document outlines our recommendations for the Congressional response to the settlement proposal. Most, but not all, provisions are analyzed. We have placed the most emphasis on seven principal provisions which we believe are the most important to public health. Our review includes a summary of the various provisions, an analysis of them, and recommended changes to legislation that would implement the proposed settlement. We invite critical comment and analysis of our findings and recommendations and look forward to working with our colleagues in efforts to develop what could become the most important public health legislation enacted in this century.

AMERICAN CANCER SOCIETY**ANALYSIS OF PRINCIPAL TERMS OF
THE PROPOSED TOBACCO SETTLEMENT****I. INDUSTRY PAYMENTS**

- **Summary of Settlement Provisions (pp. 34-35)**

The settlement requires the tobacco industry to make total payments of \$368.5 billion (in unadjusted dollars) over 25 years. This amount includes a lump sum payment of \$10 billion due immediately upon the signing of the statute, followed by annual base payments ranging between \$8.5 billion and \$15 billion. The amount of each year's scheduled base payment will be increased over the previous year's payment by the greater of 3% or the Consumer Price Index ("CPI"). In addition, the payments shall be adjusted according to changes in the domestic volume of tobacco product sales. Any decrease in the scheduled annual payment, however, will be offset by a surcharge of 25% of any increase in the industry's profits from domestic sales compared to its "base year" profits.

In order to maximize the reduction in youth tobacco use, the settlement requires tobacco manufacturers to pass on the costs of these payments to tobacco consumers by increasing product prices. The settlement will permit tobacco companies to deduct these expenses from their federal income tax liabilities as ordinary and necessary business expenses.

- **ACS Analysis**

From a public health perspective, the substantial industry payments are highly desirable as a means of funding public health programs. In addition, the requirement that tobacco companies pass along the payments to consumers in higher prices will likely reduce tobacco consumption almost immediately, especially among minors. The proposal, however, has several serious shortcomings that must be addressed.

First, the amount of the required industry payments may be too small to produce significant reductions in youth tobacco use. In his recent economic analysis of the settlement, Professor Jeffrey E. Harris, M.D., Ph.D. of the Massachusetts Institute of Technology and Massachusetts General Hospital concludes that the present discounted value of the required \$368.5 billion payments is actually only \$194.5 billion. ^{1/} As a result, Dr. Harris argues that the payments

^{1/} Harris, J.E., Economic Analysis of the Proposed Settlement, American Cancer Society Analysis and Review of the Tobacco Settlement, July 24, 1997. This analysis is at Tab 16 of the ACS Analysis and Review.

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would produce a 41-cent per pack increase in the price of cigarettes in Year One. This price increase would gradually grow to 62 cents per pack (in 1996 dollars) by Year Five and would remain at that level indefinitely.

Secondly, the tax treatment of settlement costs will further reduce the economic impact upon the tobacco industry and will have a negative impact upon federal income tax revenues. Because the required payments are tax deductible to the tobacco companies, the payments will reduce the industry's federal income tax liability and will reduce the governments revenue receipts. Thus, much of the burden of the required payments would be transferred from the tobacco industry to the federal government, partially transforming the settlement into a federally funded program.

There is widespread agreement among health economists and policy analysts that almost no other public health strategy would exhibit the speed and cost-effectiveness of impact achieved by increasing the price of tobacco products. Increases in price will decrease both participation (the number of smokers) and daily consumption amounts (the number of cigarettes per person per day). Economists have estimated that a 10% increase in the price of cigarettes will reduce overall smoking among adults by about 4% and will reduce smoking initiation by about 6.75% among minors (this does not include decreases in consumption among minors).

Many public health advocates, including the Koop/Kessler commission have argued that an even larger price increase, as much as \$2 per pack, is desirable to reduce tobacco consumption as much as possible while still remaining economically feasible. In previous research, Dr. Harris concluded that the tobacco industry could sustain price increases of more than \$2 per pack and that it could afford to make damage payments sufficient to produce such price increases. By producing only a 62-cent price increase, the settlement falls far short of the possible reduction in youth tobacco use that can be attained by a greater increase in price.

- **Recommended Change**

Congress must design a payment scheme that will raise the price of tobacco products by requiring additional payments to be made by the industry and/or consumers of tobacco. This will have the effect of collecting additional money for compensation and for public health programs and will fulfill the more important goal of decreasing the youth tobacco consumption rate as much as possible. We strongly recommend that, as part of legislation implementing the proposed settlement, the cigarette excise tax should be raised by at least \$2.00, with proportionate increases in the tax on cigars and pipe tobacco.

AMERICAN CANCER SOCIETY**II. FDA REGULATION OF NICOTINE AND OTHER TOBACCO CONSTITUENTS****• Summary of Settlement Provisions (pp. 15-18)**

For *twelve years*, the FDA is permitted to adopt performance standards that require the modification of existing tobacco products, including a gradual reduction (but not the elimination) of nicotine and the possible elimination of other harmful components of tobacco products. These modifications may be required based on a finding that such changes:

- (a) will significantly reduce health risks;
- (b) are technologically feasible, and
- (c) will not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard.

The authority to require any product modification during this initial twelve-year period must be based on a showing of "substantial evidence" that is documented in an administrative record and developed through a formal rulemaking process, including a hearing. Manufacturers of tobacco products that would be affected by any proposed modification have a right of judicial review. Congress also may intervene if it so chooses.

After the initial twelve year period, the FDA is permitted to set product safety standards that go beyond the standards it is authorized to set during the first twelve years. Specifically, the FDA is permitted to require the alteration of tobacco products, including the elimination of nicotine or other harmful components of tobacco products based on a finding that:

- (a) the safety standard will result in a significant overall reduction of the health risks to tobacco consumers as a group,
- (b) the modification is technologically feasible, and
- (c) the modification will not result in the creation of a significant demand for contraband or other tobacco products that do not meet the safety standard.

According to the agreement, given the significance of such an action, the FDA may require the elimination of nicotine based on a "preponderance of the evidence" pursuant to, at a manufacturer's election, a hearing or notice and comment rulemaking with a right of judicial review. Furthermore, any such action must be phased in, and the phase-in period may not begin for two years in order to permit Congressional review.

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Importantly, in any judicial review of the FDA's action, deference to the FDA's findings will depend on the extent to which the matter at issue is within the agency's field of expertise.

- **ACS Analysis**

The 1996 FDA rule asserted the agency's jurisdiction over cigarettes under the current medical device law. A federal district court affirmed this assertion of authority in the Coyne Beahm case. Because the FDA rule does not seek to control the development or manufacturing of tobacco products or impose limitations on the nicotine content of these products, the district court decision did not address the specific question of whether FDA can impose these restrictions.

The ACS believes that the procedural hurdles imposed by this section are wholly unjustified from a legal or public health perspective. Requiring the FDA to engage in "formal rule making" before it can adopt performance standards to modify tobacco products (including reduction of nicotine) may enable a single tobacco company to complicate and encumber the administrative process for years in order to delay a rule from going into effect. Additionally, the burden on the agency to demonstrate that it meets specified statutory findings by a "preponderance of the evidence" before it may ban nicotine altogether introduces a new, and presumably higher, standard into administrative law proceedings. Finally, it would be difficult for FDA to demonstrate the negative finding that "significant demand for contraband products" will not result from changes to current tobacco products. This requirement could be interpreted to prevent the ~~FDA from acting even~~ if the benefits of the rule far exceeded the costs of black market sales in high nicotine cigarettes.

- **Recommended Changes**

1. *Specifically authorize FDA, after notice and opportunity for comment under 5 U.S.C. § 553, to develop performance standards for tobacco products designed to reduce or eliminate any constituent, including nicotine.*
2. *Delete the provision governing FDA activities after 12 years and apply a single standard that would apply from the effective date of the Act forward as follows.*
3. *Eliminate the proposed heightened standards of proof ("substantial evidence" and "preponderance of the evidence") required for agency action and allow traditional administrative law to apply.*

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4. *Delete requirements that FDA demonstrate that any modification in tobacco products must be based on a finding that the modification will not result in significant contraband.*
5. *Federal requirements to reduce nicotine must apply to cigars and pipe tobacco, as well as cigarettes.*

III. PUBLIC DISCLOSURE OF PAST AND FUTURE INDUSTRY DOCUMENTS

- **Summary of Settlement Provisions (Appendix VIII, p. 64)**

The settlement requires manufacturers to establish and maintain a centralized depository for documents "produced" in pending litigation. The documents will be available to Congress, state and federal agencies, and the public under certain conditions. The industry is permitted, however, to withhold any documents it considers to be "privileged" and any materials it considers to represent trade secrets. Materials regarding research on health, safety and less hazardous products also will be included, with the exception of legitimate trade secrets.

Upon settling the AG suits, the companies are permitted to re-review all documents claimed as privileged and create a new inventory of privileged documents. Anyone wishing to challenge the industry's assertion of privilege or trade secret must file a claim, which will be decided by a three-judge panel.

- **ACS Analysis**

It is clear that the tobacco industry has not disclosed all it knows about the dangers and addictive properties of tobacco products. During a period when millions of Americans contracted lung cancer or other tobacco-induced diseases, the industry did not release its own internal research regarding the harmful effects of tobacco use. Thus, complete disclosure of industry research regarding the effects of tobacco use is essential to a national tobacco control policy.

The settlement proposal provides no explicit deadline for the production of the limited number of documents the industry has already agreed to produce. More importantly, the settlement does not compel tobacco manufacturers to turn over hundreds of thousands of documents, representing millions of pages, currently protected by attorney-client privilege. Many of these documents might have come to light through litigation. The documents are believed to contain incriminating evidence on marketing research, strategies to induce teenagers to use tobacco products, studies on the health dangers of tobacco, and political strategies.

Although the settlement proposal includes a mechanism for resolving disputes over privileged documents, this process is overly cumbersome and

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extremely time-consuming. Companies could potentially stall review of any challenged material through the three-judge panel by insisting on a line-by-line review of the documents. Thus, what is potentially the most critical information may not reach the public for years, if ever.

The ACS believes that all information on the harmful effects of smoking -- whether or not it is privileged or trade secret information -- should be provided to FDA for use in development of Product Standards and reduced risk products. The FDA has strict requirements relating to non-disclosure of trade secrets and has vast experience in regulating products on the basis of confidential information to review documents that are currently protected under attorney-client privilege or are trade secrets.

★ **Recommended Changes**

1. Congress should ensure that both state and federal courts have jurisdiction to quickly resolve privilege claims. The burden should be on industry to demonstrate why documents should not be disclosed.
2. Federal legislation regarding disclosure of industry documents should also explicitly require the industry to release to the FDA all information -- including research and marketing data -- that is relevant to public health, safety, and the development of less hazardous tobacco products.

IV. SCOPE AND EFFECT / PREEMPTION

- **Summary of Settlement Provisions (pp. 32-33; 26-27)**

The settlement preserves state and local authority to:

- (a) restrict or eliminate underage access to and consumption of tobacco;
- (b) further restrict or eliminate ETS exposure in the workplace and "other public and private places and facilities;" and
- (c) restrict or eliminate the sale or distribution of tobacco products.

The terms of the settlement document "preserve" current federal law providing for national uniformity of warning labels, packaging and labeling requirements and advertising and promotion requirements related to tobacco and health. In addition, the preemption provisions of section 521 of the Food, Drug, and Cosmetic Act (FDC Act), designed to provide uniform regulation of medical devices, would apply to tobacco products since they will be regulated as devices.

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However, under the "Penalties and Enforcement" provisions of the settlement proposal, state enforcement actions may not impose obligations beyond those imposed by the Act (except where the Act does not specifically preempt additional state law obligations) and is limited to the penalties listed. Thus, it appears that the settlement would preempt state and local laws with respect to penalties and enforcement.

- **ACS Analysis**

The Federal Cigarette Labeling and Advertising Act (the "Labeling Act") requires cigarette manufacturers to include specified warning labels on cigarette packages, and it bans cigarette advertising on television, radio, and other media subject to the jurisdiction of the Federal Communications Commission. The Labeling Act also contains a provision preempting state and local laws to the extent that they impose: (1) a requirement or prohibition, (2) based on tobacco use and health, (3) with respect to advertising or promotion. (See Cipollone v. Liggett Group, Inc.). All three of these criteria must be met in order for the state or local law to be preempted.

Although the Labeling Act's preemptive force has been construed narrowly by the United States Supreme Court, many state and local regulations fall under its scope. For example, any state or local regulation which restricts tobacco advertising or promotions with the goal of protecting health is preempted. In addition, many common law tort claims are preempted. For example, if a plaintiff claims that post-1969 advertising or promotions should have included additional, or more clearly stated warnings or information, these claims are preempted by the Labeling Act.

Similarly, in Medtronic, Inc. v. Lohr, the court narrowly construed the preemption provisions of the FDC Act, which preempts requirements that are "different from, or in addition to any requirement applicable under this Act to the device" and which relate to safety or effectiveness of the device or other matter included in such requirement. Noting that throughout our history, the states have exercised their police powers to protect the health and safety of their citizens "because these are primarily and historically . . . matter[s] of local concern" the court held that the provision does not preempt state common law negligence actions. The court appears to hold that only if FDA promulgates a requirement, and a state imposes a specific duty on a device manufacturer that is "different from, or in addition to" the FDA requirement, does preemption take place.

- **Recommended Changes**

As noted in the introduction, state and local governments have undertaken significant efforts to control underage use of tobacco, through imposing excise taxes, restrictions on sales to minors, labeling and disclosure requirement and

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policies protecting citizens from secondary effects of smoking. ACS believes that as a general rule, states and localities should be authorized to enact laws that are the same as, or more stringent than, federal tobacco control laws. The following changes would implement this policy:

1. *The "Penalties and Enforcement" provision would preempt state laws governing penalties and enforcement. These provisions appear to contradict provisions found elsewhere in the proposed settlement. Legislation should provide that state and local enforcement authority and penalties may be more stringent than federal law.*
2. *In addition, the ACS recommends that Congress carefully review the implications of any new federal law regulating tobacco products as medical devices and clearly specify instances, such as requirements for modification of tobacco products or good manufacturing practice requirements, in which preemption is warranted. Requirements under the Federal Food, Drug and Cosmetic Act for labeling and advertising of devices should not serve as barriers to additional state and local requirements as long as they do not conflict with requirements imposed by the FDA.*
3. *Because the Labeling Act precludes many state and local health requirements implementing the initiatives as well as many common law tort claims, the ACS recommends that the legislation include a provision amending the preemptive language of the Labeling Act. Such an amendment should permit states and localities to enact laws which enhance and supplement the goals of the Labeling Act.*

V. REDUCING UNDERAGE TOBACCO CONSUMPTION AND "LOOK BACK" PROVISIONS

• **Summary of Settlement Provisions (pp. 24-25)**

The "look-back" provision sets specific targets for the reduction of underage smoking and use of smokeless products over the next ten years. These targets are as follows:

Smoking Reduction	Smokeless Reduction	Year
30%	25%	5th
50%	35%	7th
60%	45%	10th

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If the targets are not met, the FDA may impose a mandatory surcharge on the relevant industry (i.e., cigarette or smokeless tobacco) based on the estimated profit the industry would earn over the lives of all underage users in excess of the target. The surcharge is subject to an annual cap of \$2 billion for the cigarette industry and a proportional cap for the smokeless tobacco industry.

Manufacturers are eligible to receive a partial abatement, up to 75%, of the surcharge. To receive the refund, a company must prove:

- (a) it "acted in good faith" and in full compliance with all laws;
- (b) it pursued "all reasonably available measures" to attain the targets; and
- (c) there is no evidence it took action to undermine achievement of the goals.

Additionally, states are required to have a "no sales to minors" law. Each state must conduct 250 random, unannounced inspections per one million population annually to ensure retailer compliance. The FDA must determine, on an annual basis, whether each state has "pursued all reasonably available measures" to enforce the ban on tobacco sales to minors. Further, FDA must presume that a state has not met this standard if the following compliance rate targets are not met:

Year	Retail Compliance Rate
5th	75%
7th	85%
10th	90%

States that fail to meet enforcement targets will lose Medicaid-related funds from the settlement for each percentage point it exceeds a target, up to a maximum of 20%. The FDA must refund up to 75% of the withheld funds, however, if the state shows:

- (a) it acted in good faith and full compliance with all laws;
- (b) it pursued "all reasonably available measures to attain" the targets; and
- (c) there is no evidence it took action to undermine the achievement of the goals.

• **ACS Analysis and Recommended Changes**

While the *concept* is sound, the effect of the "look back" provisions may be limited. As written, the proposal does not include sufficient economic incentive to ensure that industry will meet the targets established in the proposed settlement. However, properly crafted, "look back" provisions can provide a strong motivation for the industry to comply with other aspects of the settlement and to

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take seriously their responsibility and role in decreasing underage tobacco consumption. As they are included in the settlement proposal, however, the provisions are seriously flawed and should be amended. Proposed changes include the following:

1. Lower targets should not be allowed for smokeless tobacco products than for cigarettes or other tobacco products. Over the past 10 years, the increase in use of smokeless products among teenage boys has outpaced that of cigarettes.

Recommended Change: Raise the targets for smokeless tobacco products to the same level as cigarettes. Any legislation should include all tobacco products; i.e. cigars, pipe tobacco as a target objective.

2. There is insufficient incentive for an individual manufacturer to curb its own marketing efforts to attract potential underage users, since it will not be proportionally accountable for any violation of the targets.

Recommended Changes

a. Remove the perverse incentive for tobacco companies to gain a disproportionate share of the underage market by imposing the surcharge on each company individually based on brand-specific youth consumption.

b. Appropriate sales data, by brand, must be provided by the companies to allow evaluation of performance by individual companies.

3. An economic analysis of the tobacco industry by Jeffrey Harris, M.D., Ph.D., an economist at the Massachusetts Institute of Technology, indicates that the present value of the \$80 million surcharge and the \$2 billion cap are too low to serve as an effective deterrent. ^{2/} According to Dr. Harris, even under optimistic assumptions, the industry could pass along a \$2 billion surcharge to consumers by increasing prices only 8 to 10 cents per pack. The surcharge must be high enough to ensure vigorous efforts to meet statutory targets.

^{2/} See Tab 16 of the ACS Review and Analysis.

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Recommended Change: *The \$2 billion cap should be eliminated, and surcharge payments should be at a rate to provide an effective incentive for industry to help achieve results.*

4. The rebate provision is so broadly worded that it could be interpreted to allow a rebate even if a manufacturer took only token efforts to meet targets. Moreover, the reward so high (mandatory 75% refund) that the industry has a much stronger incentive to fight for the rebate than to achieve the youth reductions, thus completely undermining the intent and effectiveness of the "look-back" provisions.

Recommended Change: *Eliminate the rebate altogether.*

5. In an effort to minimize the effectiveness of random, unannounced inspections by local authorities, the tobacco industry has succeeded in passing laws in many localities banning the use of minors as straw purchasers.

Recommended Change: *Implementing legislation should explicitly authorize state and local governments to use minors in compliance checks.*

6. The Secretary of Health and Human Services has estimated that three-fourths of the approximately one million tobacco outlets sell tobacco to minors.

Recommended Change: *With this many outlets, it is critical that any "no sales to minors" law must require the licensing authority to conduct, or to arrange for, periodic compliance checks at every licensed store. These checks should be conducted, at a minimum, two or three times annually. 3/*

VI. DISCLOSURE AND REGULATION OF NON-TOBACCO INGREDIENTS

- **Summary of Settlement Provisions (pp. 19-20)**

Under the Comprehensive Smoking Education Act ("Smoking Education Act"), each manufacturer, packer or importer of cigarettes must annually

3/ See No Sale: Youth, Tobacco and Responsible Retailing: Developing Responsible Retail Sales Practices and Legislation to Reduce Illegal Tobacco Sales to Minors. Findings and Recommendations of a Working Group of State Attorneys General.

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provide the Secretary with a list of ingredients added to cigarettes during their manufacture. The list may not identify the company which uses the ingredients or the brand of cigarettes which contains them. The Secretary is to transmit to Congress a report based on such information of a summary of research activities and their findings, on the health effects of the ingredients, and information on any ingredient which, in the judgment of the Secretary poses a health risk to cigarette smokers.

The settlement proposes adoption of legislation that would supersede the reporting requirements of the Smoking Education Act and replace them as follows:

1. Manufacturers would be required to provide FDA on a confidential basis a list of non-tobacco ingredients, by brand.
2. Within 5 years of enactment of the legislation, manufacturers would be required to submit for each ingredient, a safety assessment demonstrating that "there is a reasonable certainty in the minds of competent scientists that the ingredient (up to a specified amount) is not harmful" under intended conditions of use. FDA must review the safety and approve or disapprove the use of the ingredient. If FDA takes no action within 90 days, the ingredient would be deemed approved.
3. New ingredients, or the addition of current ingredients beyond the specified amount, would be subject to comparable requirements to submit a safety assessment.
4. The settlement contemplates treatment of some ingredient information as confidential, and protects ingredient information not subject to disclosure under federal food law. For 5 years, such information would not be required to be disclosed unless FDA disproves the safety of an ingredient.

• **ACS Analysis**

Overall, the proposal for the first time would require submission of specific information on tobacco ingredients, by brand, to FDA and require a demonstration of safety of the ingredient, much like that required of a food additive.

The description of the confidentiality provisions is somewhat unclear, however, since as a general rule there is no trade secret provision under food law that protects disclosure of ingredients. Percentages of ingredients are protected, as are flavors and manufacturing processes. But the existence of an ingredient is not regarded as trade secret information.

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- **Recommended Changes**

- * 1. *"Ingredients" must include all additives and other substances derived from tobacco, as well as non-tobacco ingredients.*
- * 2. *There is no justification for denying the public access to information on the existence of ingredients in tobacco and legislation including such a provision should be rejected.*
- 3. *The legislation should specifically provide FDA with the authority and responsibility to establish safety standards to serve as the basis for the safety assessment.*
- 4. *The provision authorizing inclusion of an ingredient in tobacco if a safety assessment is not acted upon within 90 days should be deleted.*
- 5. *The legislation should make it clear that a safety assessment must include an evaluation of ingredients used in combination with each other, as well as the fact that ingredients are altered through burning.*

VII. REDUCED RISK PRODUCTS / "SAFER CIGARETTES"

- **Summary of Settlement Provisions (pp. 14-15)**

The proposed agreement would bar tobacco product manufacturers from making claims that state or imply a reduced health risk, unless it can demonstrate to the FDA that the product in fact "significantly reduces the risk to health" compared to ordinary tobacco products. Additionally, the FDA has authority to approve all health claims made in advertisements in order to "prevent the public from being misled."

With regard to tobacco products that the agreement refers to as "less hazardous," the FDA may permit scientifically-based health claims. In addition, the FDA can provide exceptions to the advertising restrictions that apply to other products if it determines that to do so would "reduce harm and promote the public health."

If a manufacturer develops or acquires technology that reduces the risk from tobacco products, it is required to notify FDA and cross license such technology for a reasonable fee to other manufacturers. Procedures to resolve license fee disputes and assurance of protection of confidential data during the development process are contemplated.

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Importantly, in any judicial review of the FDA's action, deference to the FDA's findings will depend on the extent to which the matter at issue is within the agency's field of expertise.

- **ACS Analysis**

Mandatory licensing of trade secret data has been successfully accomplished through amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1972 and 1978. Under current law, when pesticide research data submitted to EPA are considered by the agency in support of another company's registration, compensation of the company that first submitted the data is required. Initially, EPA hearing examiners determined what constituted "reasonable" compensation; this responsibility was transferred to private arbitrators in 1978.

FIFRA's mandatory data licensing and compensation scheme has survived a constitutional challenge as a governmental "taking" of private property without just compensation in violation of the Fifth Amendment. Ruckelshaus v. Monsanto Co. In Thomas v. Union Carbide Agricultural Products Co., the Supreme Court concluded that the delegation of adjudicatory power to arbitrators, rather than the courts, did not violate the "separation of powers" required by the Constitution.

- **Recommended Changes**

Legislation implementing this proposal must be carefully crafted to ensure that --

- 1. FDA is provided the authority, and the resources, to establish an appropriate means of measuring risk, and determining reduced risk.*
- 2. Approval by FDA as a "reduced risk" product must be based on both reduced risk and whether it makes a contribution to reducing addiction.*
- 3. The "reduced risk" program should be balanced by efforts to facilitate, and expedite, development and approval of pharmaceutical products to treat tobacco dependence.*

AMERICAN CANCER SOCIETY**ANALYSIS OF REMAINING TERMS OF
THE PROPOSED TOBACCO SETTLEMENT****VIII. AG'S RECOMMENDED ALLOCATION OF PUBLIC HEALTH FUNDS**

- **Summary of Settlement Provisions (pp. 36-38)**

Of the \$368.5 billion in payments that will be received from the tobacco companies over twenty-five years, the Agreement recommends that approximately \$93 billion, or roughly 25% of the total payments, be used to fund public health programs, as follows:

- **HHS will receive \$125 million for the first three years, and \$225 million annually thereafter to fund youth prevention, adult cessation, research and other programs.**
- **FDA will receive \$300 million annually to carry out its obligations and to enforce the provisions of this settlement.**
- **State and local governments will receive \$75 million for the first two years, \$100 million the third year, and \$125 million annually thereafter to fund community-based prevention programs.**
- **\$100 million per year will be dedicated to fund research and development of tobacco prevention and cessation methods.**
- **Sports teams and events that lose tobacco industry sponsorship will receive \$75 million per year for the first 10 years following the effective date of the settlement. After 10 years, these funds will be reallocated to other public health programs.**
- **An independent, non-profit organization to be formed will receive \$500 million per year to fund multi-media public education campaigns.**
- **A newly formed Tobacco Cessation Trust Fund will receive \$1 billion per year for the first four years and \$1.5 billion per year thereafter. The fund, which will be managed by the Secretary of HHS, will be used to assist existing smokers in their efforts to quit smoking.**
- **A Public Health Trust Fund under the control of a Presidential Commission will receive \$25 billion to fund specific tobacco-related medical research. Representatives from the**

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public health community and state Attorneys General will serve on the Commission.

- **ACS Analysis**

Overall, these provisions appear promising, but they represent only the recommendations of the participating state Attorneys General. Ultimately, the President and Congress will be charged with deciding how to allocate these funds. The ACS is confident that the President and Congress will perform this function faithfully, holding the best interests of the national public health as its foremost objective.

Of greater concern, however, is the fact that these provisions only account for approximately 25% of the total industry payments. The settlement does not explicitly provide for the allocation of the remaining 75% of the payments. Presumably, these funds will be used to settle certain private law suits, to pay legal fees, and to compensate states for tobacco-related Medicaid costs.

- **Recommended Changes**

The ACS would prefer to have a greater percentage of the industry payments explicitly devoted to fund public health programs. Congress should conduct hearings to determine how much funding is needed for these public programs and which programs are most effective in achieving the stated public health goals.

While the ACS trusts that states will use the unallocated funds to pay for tobacco-related medical expenses and public health programs, the ACS believes that the settlement should provide greater detail regarding how the unallocated funds are to be used.

IX. NATIONAL TOBACCO CONTROL PROTOCOL AND CONSENT DECREES

- **Summary of Settlement Provisions (pp. 27-28)**

In order to insure that the settlement will benefit all states, including those that are not participating in the settlement, the industry will enter into a "national tobacco control Protocol" (the "National Protocol") that will embody certain terms of the Act. The National Protocol will be a binding contract enforceable by the federal government and all states, and it will not be subject to facial constitutional challenge.

In addition, the tobacco industry and the participating states will enter into consent decrees, that will reiterate, in identical language, the terms of the Act governing:

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1. advertising, marketing, and youth access restrictions;
2. trade associations;
3. lobbying restrictions;
4. disclosure of tobacco smoke constituents;
5. disclosure of non-tobacco ingredients;
6. disclosure of industry research "relating to health, toxicity and addiction;"
7. compliance and corporate culture;
8. payments to the states;
9. obligations to deal only with complying distributors/retailers;
10. warnings, labeling and packaging; and
11. dismissal of other pending litigation specified by the parties.

The consent decrees will not include the terms of the agreement governing:

1. product design, performance or modification
2. manufacturing standards and good manufacturing practices
3. testing and regulation of toxicity and ingredients approval; and
4. the national FDA look back provisions.

The settlement requires that the consent decrees be construed in conformance with the Act and the National Protocol, and with each other. The parties shall expressly waive all constitutional challenges to the consent decrees, and the terms of the consent decrees shall remain binding upon the parties even if corresponding provisions of the Act are declared unconstitutional.

- **ACS Analysis**

Although the content of the National Protocol is not clearly defined, this provision will serve the important function of extending the settlement to the ten non-participating states. Thus, the ACS supports this provision as a means of establishing and maintaining a nationally unified campaign to reduce tobacco use and improve public health.

The ACS also supports the Consent Decree provisions because they provide an important "back-up" system which will remain effective even if portions of the Act are declared unconstitutional. Although the parties to the settlement will not have standing to challenge its constitutionality, the Act is likely to face numerous constitutional challenges from third parties.

- **Recommended Changes**

The consent decrees must also provide for the achievement of agreed-upon public health goals as a "safety net" in case federal legislation flounders.

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Congress should also require the parties to submit draft consent decrees and a draft National Protocol in the early stages of developing federal legislation so Congress can determine whether these three pieces "fit" together, and determine how conflicts in enforcement, claimed rights, and procedures can be resolved.

X. LICENSING OF RETAILERS

- **Summary of Settlement Provisions (pp. 12-13)**

The provisions to eliminate youth access to cigarettes and smokeless tobacco are enhanced by a requirement that the Federal government establish minimum standards for a retail licensing program financed through funding provided by industry payments. The licensure program would apply to all manufacturers, distributors, wholesalers, retailers, and importers of tobacco products. It would be enforced by federal, state and local authorities. The new licensing program:

- Prohibits the sale of tobacco products to consumers by an unlicensed seller;
- Requires that applicants and holders of a license comply with all federal statutes and regulations governing tobacco products;
- Imposes licensing fees to cover costs incurred by states to administer the licensing program;
- Establishes comparable Federal licensing provisions for the military and other U.S. Government operations and for Indian tribes.

The settlement also specifies penalties for violation of the licensing laws. Any person who sells tobacco products without a license is subject to criminal sanctions, including a \$1,000 fine, six months imprisonment, or both. For corporations, the settlement calls for a maximum fine of \$50,000. States may impose more severe penalties than those set forth under federal law.

Civil sanctions for violating state licensing laws governing the sale of tobacco to minors could result in fines and license suspension or revocation, depending on the number of offenses committed within a two-year period. Each state must enact an enforcement scheme that provides "substantially similar standards" to the federal minimum. Civil penalties are as follows:

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<u>Offense w/in 2 yr. pd</u>	<u>Maximum Civil Penalty</u>
First	\$500, 3 day license suspension, or both
Second	\$1,000, 7 day suspension, or both
Third	\$2,000, 30 day suspension, or both
Fourth	\$5,000, 6 month suspension, or both
Fifth	\$10,000, one year suspension, or both
Sixth - Ninth	\$25,000 or mandatory revocation for 3 years
Tenth	Mandatory license revocation

- **ACS Analysis**

If adequately funded and administered, a national licensing system can help reduce illegal sales to minors. However, research of local enforcement schemes for both tobacco and alcohol demonstrate that license suspension and revocation are much more effective deterrents to reducing illegal sales to minors than financial penalties.

While states may impose more severe criminal penalties, the civil penalties are clearly stated and states are required to enact laws imposing similar penalties. This penalty scheme would expressly preempt more stringent and effective state and local sanctions, such as required license revocation.

The requirement that state and local governments enforce the licensure provisions would be allowed under tenth amendment analysis. In Printz v. United States and New York v. United States, the Supreme court makes clear that the federal government may not commandeer states to carry out federal objectives, despite Congress' power to pass laws under the Commerce Clause. That is, the federal government cannot impose unfunded mandates on states. However, in this case, the requirements are funded by tobacco industry payments, and therefore, the provisions requiring enforcement of licensure provisions are Constitutional.

- **Recommended Change**

Delete the option of financial penalties for second and subsequent offenses, make the escalating schedule of suspensions mandatory, and require license revocation after the third offense.

XI. NATIONAL CLEAN INDOOR AIR STANDARDS

- **Summary of Settlement Provisions (pp. 30-31)**

The proposed settlement agreement restricts indoor smoking in "public facilities" (a building entered by 10 or more people at least one day per week) to

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negatively pressurized areas ventilating directly to the outside. Employees shall not be required to enter the smoking area while smoking is occurring. Restaurants (other than "fast food restaurants"), bars, private clubs, hotel guest rooms, casinos, bongo halls, tobacco merchants and prisons are exempted. The settlement would require OSHA to issue regulations to implement and enforce these standards, with enforcement costs paid by the industry, but would become effective within one year regardless of OSHA's actions. *June*

The act would not preempt or otherwise affect any other state or local law that impose the same or more stringent restrictions on smoking in public facilities. Similarly, the agreement does not preempt or otherwise affect any federal rules that restrict smoking in federal facilities.

- **ACS Analysis**

These provisions summarize H.R. 1771, "To Amend the Public Health Act to Protect the Public from Health Hazards Caused by Exposure to Environmental Tobacco Smoke," introduced by Representative Waxman on June 3, 1997. There is no federal preemption provision in the bill.

- **Recommended Change**

The ACS supports H.R. 1771 and recommends its adoption as part of the legislation implementing the settlement agreement. See section III on ACS recommendations regarding preemption.

XII. RESTRICTIONS ON MARKETING AND ADVERTISING

- **Summary of Settlement Provisions (pp. 8-9)**

The Settlement proposal includes the following restrictions on marketing and advertising:

- Authorize only black and white, text-only ads in publications with 15%+ youth readership;
- Ban brand-name event sponsorship, such as concerts and sports;
- Ban all billboards, outdoor signs, and signs in arenas;
- Ban all human images and cartoon characters from advertising and packaging;
- Ban advertising on non-tobacco products, like caps, jackets and bags;

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- Ban use of non-tobacco brand names on tobacco products;
 - Ban offers of non-tobacco items or gifts based on proof of purchase;
 - Require ads to carry FDA-mandated statement "Nicotine Delivery Device;"
 - Prohibit point-of-purchase ads in all facilities other than adult-only stores and tobacco outlets (with very limited exceptions);
 - Ban advertising on the Internet, unless "designed to be inaccessible in or from the [U.S.];"
 - Prohibit payments to place products in movies, TV programs and video games, or "to 'glamorize' tobacco use in media appealing to minors," including records and concerts;
 - Require disclaimer in ads with "product descriptors (e.g., 'light' or 'low tar')"; and
 - Require FDA review of all new ads and labels concurrent with introduction.
- **ACS Analysis and Recommended Changes**

Overall, ACS strongly supports all of the proposed marketing and advertising restrictions, which appear to have the potential to impact public health in a positive way. However, there are several shortcomings and weaknesses that need to be corrected.

1. In the first five years, the FDA may alter or strengthen these marketing restrictions only under "extraordinary circumstances," even though the industry may develop new, unanticipated or even unintentional marketing techniques that continue to appeal to minors.

Recommended Change: *Delete the condition that FDA can make changes only under "extraordinary circumstances".*

2. Cigars and pipes are exempt from advertising restrictions, even though cigar use among minors is climbing fast.

Recommended Change: *Apply the advertising and marketing restrictions to "all tobacco products."*

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3. The industry may continue using traditional product "descriptors" such as "light" and "mild" simply by adding a disclaimer in their ads, even though surveys show 60% of smokers wrongly believe such cigarettes are less harmful. On the other hand, a new and genuine reduced-risk product may not list such claims unless the manufacturer "demonstrates scientifically" that the product "significantly" reduces health risk.

Recommended Change: Require traditional product "descriptors" like "light" and "mild" to meet the same health claim standards established for new, reduced-risk products.

XIII. RESTRICTIONS ON YOUTH ACCESS TO TOBACCO

- **Summary of Settlement Agreement (pp. 11-12)**

Under the settlement agreement, FDA would be provided explicit authority to:

- Ban sales to kids under 18;
- Require photo i.d. for anyone under 27 and a face-to-face transaction;
- Ban all vending machines;
- Require minimum pack of 20;
- Ban sale of single cigarettes and free samples;
- Prohibit mail order sales except with proof of age, with FDA review after two years; and
- Ban self-service displays, except in adult-only facilities, and tobacco must be behind the counter, under lock, or if on the counter not visible or accessible.

- **ACS Analysis**

ACS strongly supports these needed measures, but recognizes that without adequate enforcement, they will be of little use. Recently, Congress cut the administration's proposed budget for enforcing the current FDA rule from \$34 million to \$15 million.

- **Recommended Change**

Insure that industry funds earmarked for enforcement may not be cut by appropriations committees.

AMERICAN CANCER SOCIETY**XIV. WARNINGS, LABELING AND PACKAGING**

- **Summary of Settlement Provisions (pp. 9-11)**

Under the settlement agreement, manufacturers of cigarette packs would be required to rotate eight explicit warnings, including "cigarettes are addictive," "cigarettes cause cancer," and "smoking can kill you" on a large label covering 25% of the upper front panel. Smokeless tobacco would carry four similar warnings. Warnings must cover 20% of all advertisements. FDA may "require label and advertising disclosures relating to 'tar' and nicotine, [and] disclosures by other means relating to other constituents."

- **ACS Analysis**

These are significant improvements over the existing warning labels. However, under the proposal:

1. Only the front of packages require warnings.
2. Industry package designers may develop new ways to minimize the impact of the warning labels.

- **Recommended Changes**

1. *Require warnings on the back of packages as well.*
2. *Require FDA to issue regulations on warning labels that prevent manufacturers from using packaging or design techniques that reduce the impact of the warnings.*

AMERICAN CANCER SOCIETY**ECONOMIC ANALYSIS OF THE
PROPOSED TOBACCO SETTLEMENT 1/**

It has been widely reported that U.S. cigarette manufacturers will be required to pay a total of \$368.5 billion during the first 25 years of the tobacco industry-wide Proposed Resolution. 2/ This characterization of the settlement payments, however, substantially overstates the real value of the amount that will actually be paid.

- The reported 24-year total of \$368.5 billion does not take into account the "adjustment for volume" provisions in the Proposed Resolution. 3/ This provision essentially pegs all payments to the volume of cigarettes sold, and therefore renders the payment scheme equivalent to a unit tax on cigarettes. As the Proposed Resolution contemplates, 4/ this virtual tax will be passed on to consumers in the form of higher prices. As a result, the volume of cigarettes sold will decline, and therefore total industry payments will decline, too.
- Based on a conservative economic model of the relation between cigarette consumption and cigarette prices, 5/ I estimate that the real price of a pack of cigarettes (in 1996 dollars) will rise by \$0.41 per pack in 1996 dollars at the outset. This virtual tax will gradually increase to \$0.62 per pack (in 1996 dollars) by the fifth settlement year, and remain at that level indefinitely.

1/ Prepared by Jeffrey E. Harris, M.D., Ph.D. of the Massachusetts Institute of Technology and Massachusetts General Hospital. The views expressed here are those of the author. They do not necessarily represent the position of the Massachusetts Institute of Technology or the Massachusetts General Hospital.

2/ "Proposed Resolution: For Settlement Discussion Purposes Only. 6/20/97, 3:00 p.m. DRAFT." 68 pp.

3/ "Proposed Resolution... Title VI, B5," at p. 34.

4/ "Proposed Resolution... Title VI, B7," at p. 35.

5/ See Harris, J.E. "Comments on: Proposed Resolution: For Settlement Discussion Purposes Only. 6/20/97, 3:00 p.m. DRAFT." 68pp." Commissioned by the American Cancer Society, June 26, 1997. My model assumes that current price elasticity of demand is -0.4, and that, even in the absence of price increases, cigarette consumption will decline at a background rate of 0.6% annually.

AMERICAN CANCER SOCIETY

- If the virtual tax is fully passed on to American smokers, as I expect it will, then total U.S. cigarette consumption will fall from 24.2 billion packs annually to 22.3 billion packs in the base year of the settlement, and continue to decline gradually to 18.4 billion packs by the 25th year. Applying the volume adjustment provision, I estimate that the face value of industry payments would amount to \$304.3 billion over 25 years. 6/
- The face value of industry payments, however, does not reflect their *present discounted value*, that is, the amount that investors would be willing to pay today for a portfolio of 25-year corporate bonds that promised to pay exactly what the Proposed Resolution mandates. Based on an interest rate comparable to the long-term rates on corporate bonds and U.S. Treasury obligations, I estimate that the present discounted value of volume-adjusted industry payments would be \$194.5 billion over 25 years. 7/

The Proposed Resolution imposes financial penalties on cigarette manufacturers if the proportion of 13- to 17-year-olds who smoke cigarettes every day does not reach specified target levels within 5 to 10 years. 8/ While economic research suggests that teenagers' smoking rates may be especially responsive to price, the increase in cigarette price anticipated from the Proposed Resolution would be insufficient by itself to reach the specified targets.

- Based upon my analyses of data from the University of Michigan's "Monitoring the Future" Study, I estimate that the "base percentage" of underage daily smokers (that is, the 1986-1996 historical average) is 15.2% 9/

6/ This computation does not include the drop in Federal excise tax revenues and state excise and sales tax revenues on cigarettes that would result from falling cigarette consumption. For example, even if states raised their excise and sales taxes to keep pace with inflation, the loss in state revenue would have a face value of \$43.2 billion over 25 years.

7/ My calculations of present discounted value took into account the "inflation protection" provision (Title VI, B.4) of the Proposed Resolution.

8/ See Appendix V of the Proposed Resolution.

9/ See "Monitoring the Future" Study. *Cigarette Statistics Table I: Long-Term Trends in Prevalence of Cigarettes for Eighth, Tenth, and Twelfth Graders*. Ann Arbor: Univ. Michigan, 1997. I estimate the base percentages to be: 8.5% for 8th graders; 14.7% for 10th graders; and 19.2% for 12th graders. The population-weighted average, as specified in Appendix V, A.1 of the Proposed Resolution, would then be 15.2%.

AMERICAN CANCER SOCIETY

Hence, the five-year goal of a 30% reduction in underage smoking prevalence would mean a target rate of 10.6% daily smokers. This target actually amounts to a 58% reduction from the current 1996 prevalence of 18.2% among eighth- to twelfth-graders. 10/

- Based upon the most recent economic research on the responsiveness of youth smoking to increases in cigarette prices, 11/ I estimate that the expected \$0.62 increase in the real price of cigarettes would translate into an 18% reduction in teenage smoking from its 1996 level, that is, to about 14.9% daily smokers, which is well above the calculated target rate of 10.6% daily smokers. 12/

I compared the effect of the Proposed Resolution on cigarette consumption and governmental revenues with that of an inflation-adjustable increase in the Federal excise tax on cigarettes. A \$1.00-per-pack tax, levied by Congress in the base year and adjusted to keep pace with inflation, would yield approximately 60% more revenues over 25 years than the Proposed Resolution. An inflation-adjusted \$1.50-per-pack tax would yield more than twice the revenues expected from the Proposed Resolution. A \$1.50-per-pack price increase, I estimate, would be sufficient by itself to reduce the 13- to 17-year-old daily smoking rate to the target level contemplated by the Proposed Resolution.

10/ The 1996 rates of daily smoking in the "Monitoring the Future" Study were: 10.4% for 8th graders; 18.3% for 10th graders; and 22.2% for 12th graders. The population-weighted average, as specified in Appendix V, A.1, would then be 18.2% for 1996.

11/ See Chaloupka FJ, Grossman M. "Price, Tobacco Control Policies and Youth Smoking," Working Paper No. 5740. Cambridge MA: National Bureau of Economic Research, Sept. 1996. These authors estimated the "participation price elasticity," which captures the effect of price on the proportion of youth who smoke, to be -0.6. The "overall price elasticity," which also includes the effect of price on the number of cigarettes that youth smokers consume, was estimated to be -1.3.

12/ Under the surcharge provisions of Appendix V, the resulting smoking prevalence would amount to only a 2% reduction from the "base percentage" of 15.2%. Hence, the reduction in underage smoking rates would fall 28 percentage points below the 30-percent target. While provisions B.1(b)(1)-(3) of Appendix V (pp. 53-54) are complex, it appears that the resulting surcharge would reach the \$2 billion cap imposed by provision B.1(b)(4)(p.54). If this surcharge were passed onto all consumers in the form of higher retail prices, the effect would be about \$0.08 per pack.

AMERICAN CANCER SOCIETY

- If Congress raised the cigarette excise tax by \$1.00 per pack and periodically revised the tax to keep pace with inflation, then the face value of industry payments would be \$480.1 billion over 25 years, as compared to \$304.3 billion under the Proposed Resolution. The present discounted value would be \$314.4 billion, as compared to \$194.5 billion under the Proposed Resolution. By year 24, total U.S. cigarette consumption would be 17.1 billion packs, as compared to 18.4 billion under the Proposed Resolution. The daily smoking rate among 13- to 17-year-olds would decline to 12.9%, as compared to the 14.9% rate expected under the Proposed Resolution. 13/
- If Congress raised the cigarette excise tax by \$1.50 per pack and periodically revised the tax to keep pace with inflation, then the face value of industry payments would be \$653.2 billion over 25 years, as compared to \$304.3 billion under the Proposed Resolution. The present discounted value would be \$427.8 billion, as compared to \$194.5 billion under the Proposed Resolution. By year 25, total U.S. cigarette consumption would be 15.5 billion packs, as compared to 18.4 billion under the Proposed Resolution. 14/ Thus, an inflation-adjustable tax of \$1.50 per pack would, by itself, result in a decline in youth smoking sufficient to achieve the target rate of 10.9% contemplated by the Proposed Resolution.

13/ Since cigarette consumption would decline, there would be a reduction in state excise and sales tax receipts equal to \$59.6 billion in face value and \$37.0 billion in present discounted value over 25 years. See footnote 6.

14/ Since cigarette consumption would decline, there would be a reduction in state excise and sales tax receipts equal to \$77.5 billion in face value and \$48.7 billion in present discounted value over 25 years. See footnote 6.

Tobacco - settlement -
public health



SMOKEFREE EDUCATIONAL SERVICES, INC.

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Phone: (212) 912-0960 Fax: (212) 488-8911

e-mail: SESTalk@aol.com

MEMO

To: ELENA KAGAN

From: JOSEPH W. CHERNER

Date: 9/9/97

Subject: National Tobacco Settlement

We urge you to oppose the terms of the tobacco settlement currently under consideration and support much stronger measures to protect the next generation from tobacco addiction.

The tobacco cartel has lied to the American public for 40 years. It still refuses to admit that smoking and secondhand smoke cause cancer or that nicotine is addictive. It still refuses to admit that it targets young people.

We urge you to demand that any settlement includes, 1) public disclosure of any secret internal tobacco cartel documents, 2) full regulatory authority of tobacco products by the FDA, 3) severe annual penalties against the tobacco cartel for failure to reduce youth tobacco addiction, 4) a warning on every cigarette pack stating: "This product contains nicotine, a highly addictive drug," and 5) a smoke-free work environment for all workers, including restaurant workers, because no one should be forced to breathe smoke to have a job.

History will remember the Clinton administration in large part for its leadership on this issue. We are counting on you to bring the tobacco cartel to justice.

Thank you for your attention.



SMOKEFREE EDUCATIONAL SERVICES, INC.

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New York, NY 10280

Phone: (212) 912-0960

Fax: (212) 488-8911

Strengthen the Settlement with the Tobacco Cartel

The proposed settlement between Attorneys General and the tobacco cartel does not go far enough to hold the tobacco cartel accountable. In particular:

1. The tobacco cartel should have to admit that a) Smoking causes disease, b) Secondhand smoke causes disease, and c) Nicotine is addictive.
2. The tobacco cartel should have to turn over "privileged" documents detailing what it knew about tobacco-caused diseases and nicotine addiction, and when.
3. Tobacco smoke pollution should be prohibited in all public places and work places. Restaurants, bars, casinos, bingo parlors, and prisons should not be exempt. The health of restaurant workers, bartenders, casino workers, bingo parlor workers, and prison guards is just as important as everyone else's.
4. The tobacco cartel should not be given five more years of unpenalized access to children. In five years, there will be a new president and a new congress that may have a different position on tobacco. The tobacco cartel should be held accountable every year and face significant fines if youth smoking does not decline.
5. The fines stipulated in this agreement if youth smoking rates do not decline are insufficient to deter the tobacco cartel from targeting youth. In other words, the tobacco cartel has a financial incentive to continue targeting youth.
6. Every cigarette pack should contain the following warning: "This product contains nicotine, a highly addictive drug."
7. The FDA's control over nicotine should not be compromised. The FDA should determine, without obstacles, when and if nicotine levels need to be reduced. This is current law. So anything less would be a step backward.
8. Fines paid by the tobacco cartel should not be lowered if the cartel addicts fewer people. Doing so would be like telling a serial murderer that he will get a lighter sentence if he kills fewer people.
9. The \$5 billion annual compensatory cap should be raised significantly and increased each year by the cost of living.
10. The present value of \$368 billion dollars paid over 25 years is far less than \$368 billion. All annual payments made by the tobacco cartel should be increased each year by the cost of living.

TOM HARKIN
IOWA

Tobacco - settlement -
recompiment

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United States Senate

WASHINGTON, DC 20510-1502

COMMITTEES:
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SMALL BUSINESS
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RESOURCES

FAX COVER SHEET

TO: Bruce Reed
FR: Sabrina Corlette
Number of Pages to Follow: 6

COMMENTS:

① Harkin amdt
② Draft Hatch/Chafee language

If there is a problem with this transmission,
please call:
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FAX: (202) 228-0404

THANK YOU

Amendment by Senator Harkin to the Amendment by Senator Hutchison:

Strike the text and insert in lieu thereof the following: :

Section 1903(d) of the Social Security Act (42 U.S.C. 1396b(d)) is amended by adding at the end thereof the following new paragraph:

"(7)(A) In determining the amount to which a State is entitled under subsections (a) and (b), the Secretary shall, in the case of a State that has complied with subparagraph (B), waive the applicability of paragraph (2)(B) and paragraph (3) of this subsection with respect to amounts that the State has recovered from manufacturers of tobacco products pursuant to the settlement of litigation filed prior to January 1, 1999, by or on behalf of States against such manufacturers for harm caused by tobacco products.

"(B) In order to comply with this paragraph, a State shall annually certify, in such form as the Secretary may require, that it is carrying out a plan to spend not less than 25 percent of the amounts the State recovered pursuant to the litigation described in subparagraph (A) on activities to reduce tobacco use. Such activities shall:

"(i) consist of such tobacco use prevention programs (including counter-marketing, school and community-based prevention programs, smoking cessation programs, enforcement of laws relating to tobacco products, ongoing evaluation) and such other activities as the Secretary determines are reasonably designed to reduce tobacco use; and

"(ii) supplement and not supplant funds already being spent on similar activities in the State.

"(C) The Secretary shall monitor the use of amounts recovered pursuant to the litigation described in subparagraph (A). If the Secretary determines that a State did not spend funds in the manner described in the certification provided pursuant to subparagraph (B), the Secretary shall revoke the waiver granted to such State pursuant to subparagraph (A) and shall revise payments made to the State under this section accordingly."

106TH CONGRESS
1ST SESSION

S. _____

effective date ?

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title XIX of the Social Security Act to permit the Secretary of Health and Human Services to waive reconpmnt under the medicaid program of certain funds received by a State from manufacturers of tobacco products if a State uses a portion of such funds for tobacco use prevention and reduction programs.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "_____ Act of
5 1999".

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

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DISCUSSION DRAFT

R.L.C.

2

1 (1) Tobacco products are the foremost prevent-
2 able health problem facing America today. More
3 than 400,000 individuals die each year as a result
4 of tobacco induced illnesses and conditions.

5 (2) Virtually all new users of tobacco products
6 are under legal age. Every day, 3,000 young people
7 become regular smokers. Of these children, 1,000
8 will die prematurely from a tobacco-related disease.

9 (3) Tobacco products are inherently dangerous
10 and cause cancer, heart disease, and other serious
11 adverse health effects.

12 (4) Medicaid is a joint Federal-State partuer-
13 ship program designed to provide health care to citi-
14 zens with low-income.

15 (5) On average, the Federal Government pays
16 57 percent of the costs of the medicaid program,
17 and no State must pay for more than 50 percent of
18 the cost of the program in that State.

19 (6) The comprehensive settlement of November
20 1998 between manufacturers of tobacco products (as
21 defined in section 5702(d) of the Internal Revenue
22 Code of 1986) and States, and the individual State
23 settlements reached with such manufacturers, in-
24 clude claims arising out of the medicaid program.

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DISCUSSION DRAFT

S.L.C.

3

1 (7) It is in the interest of the public health to
2 target a portion of the funds received by States as
3 a result of such settlements towards combatting the
4 problem of youth smoking.

5 **SEC. 8. WAIVER OF RECOUPMENT UNDER THE MEDICAID**
6 **PROGRAM OF TOBACCO-RELATED FUNDS.**

7 (a) IN GENERAL.—Section 1903(d)(3) of the Social
8 Security Act (42 U.S.C. 1396h(d)(3)) is amended—

- 9 (1) by inserting “(A)” before “The”; and
10 (2) by adding at the end the following:

11 “(B) The Secretary shall waive the applicability of
12 subparagraph (A) and paragraph (2)(B) with respect to
13 amounts recovered or paid to a State as part of the com-
14 prehensive settlement of November 1998 between manu-
15 facturers of tobacco products (as defined in section
16 5702(d) of the Internal Revenue Code of 1986) and
17 States, or as part of any individual State settlement or
18 judgment reached in litigation initiated or pursued by a
19 State against one or more such manufacturers, if, with
20 respect to a fiscal year, the State—

21 “(1) certifies that at least 25 percent of such
22 amounts received during the fiscal year will be ex-
23 pended on activities to reduce tobacco use described
24 in subparagraph (C);

1 “(ii) includes as part of such certification a
2 written description of how such amounts will be ex-
3 pended; and

4 “(iii) supplements and does not supplant the
5 level of funds expended by the State as of July 1,
6 1999 for similar activities in the State.

7 “(C) For purposes of subparagraph (B)(i), activities
8 to reduce tobacco use consist of tobacco use prevention
9 and reduction programs, including—

10 “(i) counter-marketing;

11 “(ii) counter-advertising;

12 “(iii) school and community-based education
13 and prevention programs;

14 “(iv) smoking cessation programs (including
15 training for health care professionals and providers
16 on how to conduct such programs);

17 “(v) enforcement of laws relating to tobacco
18 products; and

19 “(vi) evaluation and surveillance of the effec-
20 tiveness of such programs and activities.

21 “(D) Nothing in subparagraph (B) shall be construed
22 as limiting the authority of the Secretary under this title
23 to—

24 “(i) require reports under section 1902(a)(6) ⁷
25 and conduct investigations to ensure that a State is

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DISCUSSION DRAFT

S.L.C.

5

1 complying with a certification submitted under that
2 subparagraph and clause (iii) of that subparagraph;
3 or
4 “(ii) limit or deny Federal payments under this
5 section to a State that has failed to so comply.”

Tobacco - supplement - recruitment

CAMPAIGN For TOBACCO-FREE Kids

NATIONAL CENTER FOR TOBACCO-FREE KIDS

TO: Bruce Reed
FROM: Matthew L. Myers
DATE: 03/08/99
SUBJECT: Draft Language

Bruce -We put together some draft language. It is similar to language several Republicans on the Hill had been drafting. We put this together quickly so it may be flawed, but it contains the basic concept. Twenty percent of the money for programs to reduce tobacco use; no other strings; no need for the states to apply or seek permission from the federal government in advance of spending the money; flexibility as to how the money is spent within agreed upon parameters.

We are not wedded to the specific language, but I wanted you to see it even if it is something we just put together quickly. If you have problems, let me know. We want to be with you on this.

This does not include the concept of rewarding a state that does well that Chris Gregoire has discussed. Our informal idea on that concept was that if a state reduces tobacco use among kids by 50% after 5 years they could reduce the total spent on these programs to 15%; if the state reduces tobacco use among kids by 70% they could reduce the annual expenditures on these programs to 10%. If, however, tobacco use among children begins to rise and goes back up above these levels, spending levels would have to be restored.

DRAFT RECOUPMENT WAIVER LANGUAGE

1 SEC. _____. (a) Section 1903(d)(3) of the Social Security Act (42
2 U.S.C. 1396b(d)(3)) is amended--

3 (1) by inserting "(A)" before "The"; and

4 (2) by adding at the end the following:

5 “(B) The Secretary shall waive the applicability of subparagraph (A)
6 and paragraph (2)(B) with respect to amounts recovered or paid to a State
7 as part of the comprehensive settlement of November 1998 between
8 manufacturers of tobacco products (as defined in section 5701(d) of the
9 Internal Revenue Code of 1986) and States, or as part of any individual
10 State settlement or judgment reached in litigation with respect to harm
11 caused by tobacco products initiated or pursued by a State against one or
12 more such manufacturers, if, with respect to a fiscal year, the State--

13 “(i) certifies that at least 20 percent of such amounts received
14 during the fiscal year will be expended on activities to reduce
15 tobacco use described in subparagraph (C);

16 “(ii) includes as part of such certification a written description
17 of how such amounts will be expended; and

1 “(iii) ensures that any amounts expended under clause (i)
2 supplement and do not supplant the level of funds expended by the
3 State as of July 1, 1999 for similar activities in the State.

4 “(C) For purposes of subparagraph (B)(i), activities to reduce tobacco
5 use consist of tobacco use prevention and reduction programs, including—

6 “(i) public education, counter-marketing and counter-
7 advertising;

8 “(ii) school and community-based education and prevention
9 programs;

10 “(iii) smoking cessation programs (including training for health
11 care professionals and providers on how to conduct such programs);

12 “(iv) enforcement of laws designed to reduce tobacco use and
13 protect against the harms caused by tobacco products; and

14 “(v) evaluation and surveillance of the effectiveness of such
15 programs and activities.

16 “(D) Nothing in subparagraph (B) shall be construed as limiting the
17 authority of the Secretary under this title to—

18 “(i) require reports and conduct investigations to ensure that a
19 State is complying with a certification submitted under that
20 subparagraph and clause (iii) of that subparagraph; or

1 “(ii) limit or deny Federal payments under this section to a
2 State that has failed to so comply.”.

**STATE PLANS AND PROPOSALS:
STATE TOBACCO SETTLEMENT
MARCH 12, 1999**

State	Governor	Legislature	Amount/Year	Legislative Session
Alabama	Gov. Siegelman proposes to spend the money on Children First, which provides health insurance for children and teens, pays for more than 100 new juvenile probation officers. <u>Montgomery Advertiser, 1/18/99</u>	Legislation has been proposed to reserve the first \$85 million for the Children First Trust Fund <u>Associated Press, 12/4/98</u>	\$3.2b/25 years \$520m/2003 \$117m per year	3/2-6/14
Alaska	Gov. Knowles proposes to divide the first payment of \$22 million between \$4.5 million to expand Medicaid coverage, \$1.7 million for new child protection workers, \$1 million for training young parents, and other programs to curb substance use, juvenile delinquency, and tobacco use. <u>Anchorage Daily News, 12/12/98</u>	The Legislature says introducing new government programs isn't necessarily the right solution. Instead, they are advocating saving money for the future. <u>Anchorage Daily News, 12/12/98</u>	\$670m/25 years \$110m/2003 \$24.8m per year	1/19-5/19

Tobacco -
settlement -
recapment

State	Governor	Legislature	Amount/Year	Legislative Session
Arizona	<p>Gov. Hull proposes spending the money on a range of health care programs including the building of a new state mental hospital, giving counties grants for local health needs, and expanding preventive health care programs for low-income families.</p> <p><u>The Arizona Republic</u>, 1/31/99</p>	<p>House Democrats want to implement the Healthy Arizona Initiative--enabling Arizonans earning below the federal poverty line to qualify for state health aid. On the other hand, fiscal conservatives propose using the money for tax cuts. Support for Hull's proposed new mental hospital remains strong across party lines.</p> <p><u>The Arizona Republic</u>, 1/31/99. <u>Associated Press</u>, 1/21/99</p>	<p>\$2.8b/25 years \$470m/2003 \$106m per year</p>	1/11-4/24
Arkansas	<p>Gov. Huckabee pledges to save the money solely for health-care programs.</p> <p><u>Associated Press</u>, 1/22/99</p>	<p>Legislative leaders agree with Huckabee. They would like to put the money in a trust fund and reserve it all for health-care, including tobacco prevention programs.</p> <p><u>Associated Press</u>, 1/22/99</p>	<p>\$1.6b/25 years \$260m/2003 \$60m per year</p>	1/11-3/11
California	<p>Gov. Davis proposes that the money be used for general purposes such as filling a projected budget deficit.</p> <p><u>The San Francisco Examiner</u>, 1/18/99</p>	<p>The Legislature has virtually ignored the settlement money. Some members have proposed giving half to cities and counties to use at their discretion.</p> <p><u>The San Francisco Examiner</u>, 1/18/99</p>	<p>\$25b/25 years \$1.4b/2003 \$926m per year</p>	1/4-9/15

State	Governor	Legislature	Amount/Year	Legislative Session
Colorado	Gov. Owens proposes to spend 40% of the settlement money on new reading programs for elementary schools, 20% on health care for uninsured children, and the rest invested into an endowment for future programs. <u>The Denver Post</u> , 2/11/99	The Legislature has seen three bills introduced with proposals for the settlement money. One bill would invest the entire settlement and only allow interest to be available for spending. Others would fund a laundry list of programs now, including children's basic health. <u>The Pueblo Chieftain</u> , 2/11/99	\$2.68b/25 years \$440m/2003 \$99m per year	1/6-5/5
Connecticut	Gov. Rowland figured the settlement money into a broad range of programs within his budget proposal for 1999 including municipal aid and schools. <u>Associated Press</u> , 2/12/99		\$3.6b/25 years \$600m/2003 \$135m per year	1/6-6/9
Delaware	Any settlement money will go directly into Delaware's general fund to be budgeted by Gov. Carper and the state General Assembly. <u>Associated Press</u> , 11/20/98		\$774m/25 years \$120m/2003 \$28m per year	1/12-6/30

State	Governor	Legislature	Amount/Year	Legislative Session
Florida	<p>Gov. Bush proposes spending \$450 million on health insurance for children, protection of abused kids, and at-home care for the elderly. Bush intends to spend another \$61.5 million on Florida's campaign against smoking. In addition, he intends to set aside \$1.1 billion of tobacco revenue to start a Lawton Chiles Tobacco Endowment for Children and Elders.</p> <p><u>Miami Herald</u>, 2/7/99</p>		<p>\$13.4b/25 years \$3.76b/2003 \$536m per year</p>	3/2-4/30
Georgia	<p>Gov. Barnes has pledged to use all of the settlement funds on health care, possibly including Medicaid reimbursements.</p> <p><u>The Atlanta Journal</u>, 1/9/99</p>	<p>Republican legislators want settlement money to go towards cutting taxes.</p> <p><u>State Capitols Report</u>, January 19, 1999</p>	<p>\$4.8b/25 years \$790m/2003 \$178m per year</p>	1/11-3/15
Hawaii	<p>Gov. Cayetano proposes to spend a minimal amount of the settlement money on anti-smoking and smoking education programs. Cayetano plans to use most of the money to establish a "rainy day" fund to help tide Hawaii over in tough economic times.</p> <p><u>Associated Press</u>, 11/18/98</p>		<p>\$1.18b/25 years \$190m/2003 \$43.7m per year</p>	1/20-Early May

State	Governor	Legislature	Amount/Year	Legislative Session
Idaho	Gov. Kempthorne is proposing to use the first two installments of settlement money for the Budget Stabilization Fund. AG Lance claims that Kempthorne also intends to increase the pay of the attorneys in the AG's office. <u>The Post Register</u> (Idaho Falls), 1/14/99	The Legislature appears to be very split on where the tobacco money should be allocated. Proposed spending includes school construction, tax cuts, health care for the poor, anti-smoking campaigns, and college scholarships for substance-free students. <u>The Idaho Statesman</u> , 11/19/98	\$711m/25 years \$118m/2003 \$26.4m per year	1/11-
Illinois	AG Ryan proposes spending settlement money to fund prevention efforts, public education initiatives, and the enforcement of underage smoking laws. <u>Copley News Service</u> (Peoria), 12/3/98	Legislators have introduced spending plans that place public health and insurance for the working poor as top priorities. <u>Chicago Tribune</u> , 1/29/99	\$9.1b/25 years \$1.5b/2003 \$337m per year	1/13-
Indiana	Gov. O'Bannon proposes using settlement funds for additional police enforcement. Additional excise police officers could play an integral role in reducing youth access to tobacco. <u>The Indianapolis Star</u> , 3/5/99		\$4b/25 years \$660m/2003 \$148m per year	1/11-5/30

State	Governor	Legislature	Amount/Year	Legislative Session
Iowa	Gov. Vilsack proposes to allocate \$17.7 million of the tobacco settlement towards discouraging teens from smoking through school and community anti-smoking programs, a similar media campaign, and by devoting \$2 million to enforce tobacco laws. <u>Des Moines Register</u> , 2/19/99	Conservatives in the House are advocating returning the settlement money to the taxpayers and not spending it on government programs. <u>Des Moines Register</u> , 12/9/98	\$1.7b/25 years \$280m/2003 \$63.1m per year	1/11-Late April
Kansas	Gov. Graves proposes spending \$14.6 million of the settlement money on children's programs in the coming budget year. <u>The Kansas City Star</u> , 1/16/99	The Legislature appears united under the idea of not spending any settlement money until Kansas actually receives it. After this occurs, Republicans are pushing towards investing the money in a trust fund. <u>Topeka Capital Journal</u> , 1/29/99	\$1.6b/25 years \$270m/2003 \$60.5m per year	1/11-5/10
Kentucky	Gov. Patton tentatively proposes using the money to help farmers absorb the economic impact of the settlement. <u>The Courier-Journal</u> (Louisville), 2/26/99	The Legislature doesn't have a regular session scheduled until next year and there are no plans for a special session. <u>The Courier-Journal</u> (Louisville), 2/26/99	\$3.5b/25 years \$570m/2003 \$127m per year	1/11-

State	Governor	Legislature	Amount/Year	Legislative Session
Louisiana	Gov. Foster has proposed raising cash to pay off the state's debt by selling off its tobacco settlement to the highest bidder. <u>The Times-Picayune</u> (New Orleans), 1/10/99.	Two new proposals for placing the money in a trust fund have been introduced. One consists of establishing trusts for each public school system in the state. The other suggests putting half of the settlement money into parish trust funds. <u>The Times-Picayune</u> (New Orleans), 1/10/99	\$4.4b/25 years \$730m/2003 \$163m per year	3/29-6/2
Maine	Gov. King stated, in his budget proposal, that the settlement money may be used to increase funding for some state departments and agencies. He stated that education would be his top priority in spending. <u>Associated Press</u> , 2/11/99		\$1.5b/25years \$251m/2003 \$55.8m per year	12/2-6/16
Maryland	Gov. Glendening used \$54 million from the settlement to balance his proposed budget. He opposes earmarking the funds for specific purposes as he feels it would tie the hands of the executive in the future. <u>Associated Press</u> , 2/24/99	The Legislature is planning on making a statement that the tobacco money should go to public health programs and nothing else. <u>Associated Press</u> , 2/24/99	\$4.4b/25 years \$730m/2003 \$164m per year	1/13-4/12

State	Governor	Legislature	Amount/Year	Legislative Session
Massachusetts	Gov. Cellucci proposes establishing a trust fund and using the settlement money to pay for existing health care programs. His only new initiative is \$500,000 to study tobacco control programs. <u>Boston Globe, 2/11/99</u>	Democrat legislators claim that settlement money should be used to fund the state's acclaimed tobacco control program rather than Cellucci's plan to substitute current state spending on public health programs. <u>Boston Globe, 2/11/99</u>	\$7.9b/25 years \$1.3b/2003 \$293m per year	1/6-
Michigan	Gov. Engler proposes to use a significant portion of the settlement funds for college scholarships to students who excel on state-achievement tests. He is willing to use some of the money for health programs-on a one time basis but he wants to ensure that the money is available for scholarships first. <u>The Detroit News, 2/11/99</u>	The Republican-controlled legislature is expected to approve Engler's plan. However, Democrat legislators are advocating splitting the money between health care, education initiatives such as class size reduction and after-school programs, and only one-third on the governor's scholarship proposal. <u>The Detroit News, 2/11/99</u>	\$8.5b/25 years \$1.4b/2003 \$315m per year	1/13-

State	Governor	Legislature	Amount/Year	Legislative Session
Minnesota	Gov. Ventura proposes placing the money in an endowment and spending the earnings in three main areas: the Minnesota Families Foundation (to help individuals reduce their dependency on government), support for local public health networks, and support for medical research at Universities and hospitals. <u>Star Tribune</u> , 3/3/99	A bipartisan effort in the Legislature plans to invest \$1.3 billion into permanent funds for smoking prevention, early childhood development, and medical education and research. However, conservative Republicans still are holding out for tax cuts. <u>Star Tribune</u> , 1/21/99	\$6.2b/25 years \$2.24b/ 2003 \$246m per year	1/5-5/17
Mississippi	Lt. Musgrove proposes saving the settlement money for health care purposes, but suggests looking at how neighbors are spending their money before making a final decision. <u>Associated Press</u> , 3/3/99	The Legislature is proposing to place at least 75% of the settlement proceeds into a permanent trust fund. The House desires the entire check to be invested. However, the Senate favors reserving 25% of the proceeds for ordinary budget appropriations. <u>The Advocate</u> (Baton Rouge), 3/1/99	\$4.2b/25 years \$1.7b/2003 \$168m per year	1/5-4/4
Missouri	Gov. Carnahan has yet to unveil his proposal on spending the settlement money. <u>St. Louis Post-Dispatch</u> , 1/4/99	The Legislature is debating whether the settlement money should go back to the tax-payers or towards anti-smoking programs. <u>St. Louis Post-Dispatch</u> , 1/4/99	\$4.5b/25 years \$730m/2003 \$165m per year	1/6-5/30

State	Governor	Legislature	Amount/Year	Legislative Session
Montana	Gov. Racicot proposes to use the settlement money for new government economic development programs. <u>Associated Press</u> , 12/29/98	State legislators have filed 14 bills proposing different ways to spend the settlement money. Generally, Democrats are advocating setting up a trust fund while Republicans are looking to earmark the money for tax relief. <u>Associated Press</u> , 1/20/99	\$832m/25 years \$130m/2003 \$30m per year	1/4-4/15
Nebraska	Gov. Nelson played an active role in pushing legislation through to create a public health trust fund in 1998. This act of foresight means that tobacco funds are already earmarked for public health. <u>The Omaha-World Herald</u> , 11/24/98	An initiative passed through the Legislature in 1998 created the Excellence in Health Care Trust Fund. This fund assures that all tobacco settlement proceeds will go towards public health issues. <u>The Omaha-World Herald</u> , 11/24/98	\$1.2b/25 years \$190m/2003 \$43m per year	1/6-Early June
Nevada	Gov. Guinn proposes providing college scholarships of up to \$2500 for every Nevada high school graduate with a "B" average. <u>Sun Capital Bureau</u> (Las Vegas), 2/18/99	Democrat legislators propose to spend 25% of the settlement on college scholarships and reserve the remainder of the money for health programs. In addition, Democrats want conditions attached to the scholarships making sure they are need-based and adding a minimum GPA requirement that must be maintained in order to ensure future funding. <u>Sun Capital Bureau</u> (Las Vegas), 2/18/99	\$1.2b/25 years \$190m/2003 \$44m per year	2/1-5/31

State	Governor	Legislature	Amount/Year	Legislative Session
New Hampshire	Gov. Shaheen signed into law an education funding plan to increase school aid by \$62 million by utilizing settlement proceeds. Shaheen has also proposed that some money be used to combat smoking. <u>The Union Leader</u> (Manchester), 11/21/98	The Legislature passed the educational funding bill in 1998, which plans to use tobacco money. <u>The Union Leader</u> (Manchester), 11/21/98	\$1.3b/25 years \$210m/2003 \$48m per year	1/6-Late June
New Jersey	Gov. Whitman strongly suggests that some of the money be earmarked for public health programs but plans to hold off on spending it until the federal government finishes with their claim. <u>The Record</u> (Bergen County, NJ), 12/5/98 <u>The Record</u> , 1/21/99	Some legislators have suggested that the funds be applied to other programs, such as school construction. <u>The Record</u> (Bergen County, NJ), 12/5/98	\$ 7.6b/25 years \$1.25b/2003 \$280m per year	1/12-
New Mexico	Gov. Johnson proposes setting aside the tobacco money in a trust fund. <u>Albuquerque Tribune</u> , 2/6/99	Legislators, for the most part, agree with investing the money in a trust fund. There is some debate on how to spend the interest, however. Possible programs include smoking-prevention education, health care, disease-research programs, and/or extracurricular programs in public schools. <u>Albuquerque Journal</u> , 2/9/99	\$1.2b/25 years \$190m/2003 \$43m per year	1/19-3/20

State	Governor	Legislature	Amount/Year	Legislative Session
New York	<p>Gov. Pataki proposes using 75% of the settlement dollars to fund capital projects in an effort to reduce the state's debt.</p> <p><u>Times Union</u> (Albany), 2/4/99</p>	<p>Legislators have sharply criticized Pataki's proposal, stating that funds should be used to help combat youth smoking and fight addiction.</p> <p><u>Times Union</u> (Albany), 2/4/99</p>	<p>\$25b/25 years \$190m/2003 \$43m per year</p>	1/6-
North Carolina	<p>AG Easley proposed the creation of a fund entitled the Tobacco Foundation. This fund, intended to help the areas hurt by the tobacco settlement, will be controlled by a board. The 15 members of the board are to be appointed by Gov. Hunt, president pro-tem of the Senate, and the speaker of the House.</p> <p><u>News & Record</u> (Greensboro, NC), 2/14/99</p>	<p>State legislators are not entirely happy with this proposal. They say the General Assembly should have more say over how the foundation would spend the tobacco money.</p> <p><u>The News and Observer</u> (Raleigh, NC), 2/25/99</p> <p>A compromise between the House and Senate plans to divide the settlement money three ways: 50% to help tobacco-dependent communities, 25% to provide financial assistance to tobacco farmers and workers, and 25% to a health trust fund.</p> <p><u>The News Observer</u>, 3/10/99</p>	<p>\$4.6b/25 years \$750m/2003 \$161m per year</p>	1/27-Late July

State	Governor	Legislature	Amount/Year	Legislative Session
North Dakota	Gov. Schafer proposes dividing 90% of the settlement funds between the Common Schools Trust Fund-- an existing fund that makes annual disbursements to the state's school districts-- and property tax rebates. The remaining 10% would be spent on local public health programs. <u>The Bismarck Tribune, 2/6/99</u>	The majority of the bills already introduced advocated setting up a trust fund of some sort and spending the settlement dollars on health and/or education programs. For the most part, the Legislature seems to favor Gov. Schafer's plan. <u>The Bismarck Tribune, 2/6/99</u>	\$717m/25 years \$110m/2003 \$26m per year	1/5-5/28
Ohio	Gov. Taft plans to appoint a bipartisan task force to recommend how to spend the state's settlement money. <u>Enquirer Columbus Bureau, 3/10/99</u>	GOP leaders are vowing to preserve tax cuts for Ohio's taxpayers. <u>Enquirer Columbus Bureau, 3/10/99</u>	\$9.9b/25 years \$1.6b/2003 \$366m per year	1/4-
Oklahoma	Gov. Keating's Task Force is urging the Legislature to allocate \$54.5 million annually for tobacco reduction programs. <u>The Daily Oklahoman, 1/15/99</u>	A myriad of bills have been introduced. One proposes to use the settlement funds to payoff turnpike bonds. Another advocates allocating money to the Teachers' Retirement Fund. <u>The Daily Oklahoman, 1/15/99</u>	\$2b/25 years \$330m/2003 \$75.2m per year	2/1-5/28

State	Governor	Legislature	Amount/Year	Legislative Session
Oregon	Gov. Kitzhaber does not want the settlement spent on any new government programs. Kitzhaber did not include the tobacco money in his proposed 1999-2001 budget, but said it could be used to replace declining tobacco tax revenues. <u>The Oregonian</u> , 1/29/99	Republican leaders have proposed to lock the settlement money away in a trust fund. Gov. Kitzhaber is calling the plan intriguing. <u>The Oregonian</u> , 1/29/99	\$2.248b/25 years \$370m/2003 \$83m per year	1/11-Early June
Pennsylvania	Gov. Ridge proposed investing settlement funds into state health care programs. <u>Pittsburgh Post-Gazette</u> , 2/14/99	Republican legislators are suggesting putting the money in a trust fund. Democrats are advocating spending the funds on prevention, treatment, and research of tobacco-related illnesses and/or other programs such as youth access enforcement and health care for the disadvantaged. <u>Pittsburgh Post-Gazette</u> , 2/14/99	\$1.4b/25 years \$1.86b/2003 \$417m per year	1/5-
Rhode Island	Gov. Almond balanced his projected budget by using almost all of the money from the first tobacco settlement installment. Almond also plans to use tobacco funds to phase out local car taxes. <u>Journal State House Bureau</u> , 2/11/99 <u>The Providence Journal</u> , 2/27/99		\$1.4b/25 years \$230m/2003 \$56m per year	1/5-Late June

State	Governor	Legislature	Amount/Year	Legislative Session
South Carolina	Gov. Hodges is assuring tobacco farmers that they will receive their cut from the settlement money. Meanwhile, he is urging them to diversify their crops. <u>Associated Press</u> , 3/4/99		\$2.3b/25 years \$380m/2003 \$85m per year	1/12-6/3
South Dakota	Gov. Janklow is not proposing to use any of the funds in this year's budget. Janklow has stated that he believes the money should be earmarked for medical equipment and supplies. <u>Associated Press</u> , 12/6/98	The Legislature has proposed several ways of spending the settlement money. Some are advocating placing the money in a trust fund and only spending the interest earnings on programs. <u>Associated Press</u> , 12/6/98	\$683m/25 years \$110m/2003 \$25.3m per year	1/12-3/5
Tennessee	Gov. Sundquist has suggested investing the money in a trust fund and loaning it to local school systems for the construction of new buildings. <u>Chattanooga Times Free Press</u> , 1/18/99	There are a variety of proposals being introduced, although the consensus remains that the money should be used for health care and to protect the farmers hurt by the agreement. <u>The Commercial Appeal</u> (Memphis), 2/17/99	\$4.8b/25 years \$790m/2003 \$77m per year	2/2-Late May
Texas	Gov. Bush and budget writers are planning on using settlement funds for health-related projects over the next two years in the upcoming budget. A good portion of this allocation would go to the Children's Health Insurance Program (CHIP). <u>The Dallas Morning News</u> , 2/23/99, <u>Austin American-Statesman</u> , 1/29/99		\$17.3b/25 years \$2.9b/2003 \$628m per year	1/12-5/31

State	Governor	Legislature	Amount/Year	Legislative Session
Utah	Gov. Graham discussed earmarking funds for health and tobacco prevention programs. <u>The Deseret News</u> (Salt Lake City), 2/04/99	Republicans are backing a bill with the <i>intent</i> language that the Legislature will give "serious and careful consideration" to funding tobacco prevention and health programs. In general, Republicans are advocating "securing" the funds, not spending them. Meanwhile, Democratic legislators are adamant that the funds be earmarked for health programs. <u>The Deseret News</u> (Salt Lake City), 2/26/99	\$836m/25 years \$140m/ 2003 \$32m per year	1/18-3/3
Vermont	Gov. Dean stated that deciding how to spend the settlement money should be the prerogative of the 2008 Legislature and the 2008 governor. <u>Associated Press</u> , 3/10/99	Many legislators argue that the settlement money should go towards reducing smoking and initiating new ventures, not be spent on existing programs. <u>Associated Press</u> , 2/12/99	\$805m/25 years \$130m/2003 \$29m per year	1/6-Early May
Virginia	Gov. Gilmore planned to set up a special trust fund separate from the normal budget but was rejected by the Legislature. <u>The Richmond Times Dispatch</u> , 3/3/99	The Legislature and Gilmore closed a deal on 2/27 to reserve 50% of the settlement money to aid tobacco growers and their communities. Another 10% will be earmarked for the prevention of youth smoking. <u>The Richmond Times Dispatch</u> , 3/3/99	\$4b/25 years \$660m/2003 \$148m per year	1/13-2/27

State	Governor	Legislature	Amount/Year	Legislative Session
Washington	Gov. Locke wants to set aside \$155 million to establish an anti-smoking endowment and to create an independent board to oversee the spending of that money. The board would be chaired by AG Gregoire. <u>The Tacoma News Tribune</u> , 2/25/99	The Senate passed a bill to place the first \$323 million from the settlement in a special account to be used only for anti-smoking campaigns and health care programs. However, Republicans are still advocating that some of the funds be reserved for education purposes. <u>The Tacoma News Tribune</u> , 2/25/99	\$4.02b/25 years \$660m/2003 \$149m per year	1/11-4/25
West Virginia	Gov. Underwood suggested that the money should be spent on health care. AG McGraw is strongly pushing a plan to establish a trust fund and invest the settlement funds. <u>The Charleston Gazette</u> , 12/10/99	The House Finance Committee spent none of the expected tobacco settlement in this year's budget. <u>Associated Press</u> , 3/10/99	\$1.7b/25 years \$28m/2003 \$64m per year	1/13-3/13
Wisconsin	Gov. Thompson proposes to spend 56% of the settlement funds on health care programs, including provisions to offset the state's share of Medicaid costs. Thompson does not think the creation of a separate trust fund is necessary. Thompson's plan is drawing criticism because it only allocates \$5.2 million directly for smoking prevention. <u>Journal Sentinel</u> (Madison), 3/9/99	The Legislature and AG Doyle are advocating creating a separate trust fund for the settlement money. <u>Journal Sentinel</u> (Madison), 3/9/99	\$4.1b/25 years \$670m/2003 \$160m per year	1/4-

<p>Wyoming</p>	<p>Gov. Geringer proposes spending funds on health programs such as early prevention, intervention, and wellness education, particularly for youth. <u>Wyoming Tribune-Eagle</u>, 11/21/98</p>		<p>\$486m/25 years \$80m/2003 \$18m per year</p>	<p>1/12-Early March</p>
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