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WHITE HOUSE STAFFING MEMORANDUM

CM014

Date: 9/30/98 ACTION / CONCURRENCE / COMMENT DUE BY: 10/1/98

Subject: FEDERAL TOBACCO CLAIMS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McCURRY	<input type="checkbox"/>	<input type="checkbox"/>
BOWLES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	NASH	<input type="checkbox"/>	<input type="checkbox"/>
PODESTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	REED	<input type="checkbox"/>	<input type="checkbox"/>
ECHAVESTE	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RUFF	<input type="checkbox"/>	<input type="checkbox"/>
LEW	<input type="checkbox"/>	<input type="checkbox"/>	SMITH	<input type="checkbox"/>	<input type="checkbox"/>
BEGALA	<input type="checkbox"/>	<input type="checkbox"/>	SOSNIK	<input type="checkbox"/>	<input type="checkbox"/>
BERGER	<input type="checkbox"/>	<input type="checkbox"/>	SPERLING	<input type="checkbox"/>	<input type="checkbox"/>
BLUMENTHAL	<input type="checkbox"/>	<input type="checkbox"/>	STEIN	<input type="checkbox"/>	<input type="checkbox"/>
EMANUEL <i>comments attached</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	STERN	<input type="checkbox"/>	<input type="checkbox"/>
IBARRA	<input type="checkbox"/>	<input type="checkbox"/>	STRETT	<input type="checkbox"/>	<input type="checkbox"/>
KLAIN	<input type="checkbox"/>	<input type="checkbox"/>	VERVEER	<input type="checkbox"/>	<input type="checkbox"/>
LANE	<input type="checkbox"/>	<input type="checkbox"/>			
LEWIS	<input type="checkbox"/>	<input type="checkbox"/>			
LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>			
MARSHALL	<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>			

10/26/98

Phil - Should we continue to hold or destroy - Hold Destroy

Hold for Justice

REMARKS: COMMENTS TO STAFF SECRETARY

RESPONSE:

THE WHITE HOUSE
WASHINGTON

September 30, 1998

MEMORANDUM FOR THE PRESIDENT AND VICE PRESIDENT

FROM: Bruce Reed
Elena Kagan

SUBJECT: Federal Tobacco Claims

Over the last few months, we and Bruce Lindsey have had many conversations with Department of Justice attorneys regarding the feasibility of bringing suit against the tobacco companies for Medicare and other losses stemming from the use of tobacco products. We also have asked DOJ lawyers to consult with a number of law professors and trial attorneys who have considered the viability of a lawsuit.

The Department now has concluded that it should not bring suit against the companies. Almost everyone at DOJ agrees that such a suit could be brought consistent with Rule 11 (*i.e.*, with minimum professional standards). Most DOJ lawyers also acknowledge that given the size of the claim and other factors, the companies might well choose to settle the suit (as they are settling state claims) for a substantial sum of money plus public health concessions. DOJ attorneys believe, however, that they should not bring suit unless they would stand a reasonable prospect of actually winning the suit at trial and on appeal (*i.e.*, putting aside all settlement possibilities). The attorneys have concluded that under existing law governing Medicare and other potential federal claims, they cannot meet this standard. The lawyers principally argue that current law precludes the federal government from aggregating (*i.e.*, bringing in a single suit) claims for each Medicare beneficiary's tobacco-related health care costs.

At the same time, most DOJ attorneys appear amenable to settling federal claims against the tobacco companies without bringing a prior lawsuit. (The lawyers reason that although they cannot bring suit against the companies for want of an effective aggregation device, they do in fact have millions of individual claims against the companies, which they could settle all at once.) Under this approach, the government would enter into negotiations with the tobacco companies to resolve potential federal claims; if an agreement were reached, the parties would file in court a settlement agreement and proposed consent decree, which would release federal claims against the tobacco companies in exchange for some combination of monetary damages and injunctive relief. No legislation would be necessary.

We have some reason to believe that the companies -- at least Philip Morris and Lorillard -- would have an interest in entering into this kind of negotiation in the wake of a settlement with the states (which, as you know, is rumored to be in the offing). The principal outside counsel for Philip Morris (Meyer Koplow) recently suggested to Elena that his client wants to resolve all

79716



government claims against it, including potential claims by the federal government. He implied that a potential settlement agreement could include money, FDA jurisdiction, and marketing restrictions.

The prospects of actually reaching a good agreement with the companies are uncertain. We know that the companies want to rid themselves of potential government litigation, primarily so they can spin off non-tobacco assets. But without an actual suit against the companies, we would have relatively little leverage in negotiations. Moreover, we could encounter serious legal difficulties in trying to achieve some of our objectives -- particularly, an assurance of FDA jurisdiction -- through a non-legislated settlement.

We believe the Administration should attempt to engage the companies in such a negotiation, but we wanted your approval first. There is always some risk that Democrats will fret that we are letting the companies off too easily. However, they will be reassured somewhat by the Justice Department's involvement in these negotiations -- and the only relief the companies can get out of these talks is from a suit we have not brought. The advantage of entering into negotiation is that we might be able to get something done on tobacco without Congress -- and if not, we could lay the groundwork for legislative action next year.

Approve: _____

Disapprove: _____

Let's Discuss: _____

98 SEP 30 PM5:47

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EMANUEL →	<input checked="" type="checkbox"/>	<input type="checkbox"/>	STERN	<input type="checkbox"/>	<input type="checkbox"/>
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LINDSEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MARSHALL	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MOORE	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
McGINTY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

COMMENTS TO STAFF SECRETARY

RESPONSE:

I SUPPORT, PROCEED. [RE]

CLOSE HOLD

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Approve: _____

Disapprove: _____

Let's Discuss: _____

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ORM OPTICAL DISK NETWORK

ID# 279716 SS

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Comments:
