

CIGARETTE INDUSTRY INITIATIVES AGAINST YOUTH SMOKING

Cigarette manufacturers oppose youth smoking. The industry has a long history of efforts to discourage youth smoking and to address related concerns about cigarette advertising and promotion.

On cigarette advertising and promotion:

- In 1963, cigarette manufacturers ended advertising and promotion in college publications and on campuses.
- In 1964, the cigarette manufacturers adopted a code prohibiting advertising and promotion in publications directed primarily to persons under 21. The code also forbids the use of testimonials by sports or celebrity figures and requires models in ads to be, and appear to be, at least 25 years old.
- In 1981, a code of cigarette sampling practices was adopted. The code included provisions to refuse to give a sample to anyone known to be under 21 years of age or who, without reasonable identification to the contrary, appears to be less than 21 years of age. No sampling was done in any public place within two blocks of centers of youth activities such as playgrounds or schools.
- In 1990, the cigarette manufacturers strengthened the advertising and promotion code to include provisions that strictly limit the distribution of product samples, prohibit billboards advertising cigarettes within 500 feet of schools and playgrounds; eliminate paid movie product or cigarette advertising placements in movies produced for viewing by the general public; and place strict limitations on the distribution of non-tobacco premium items.

Concerning activities to discourage youth smoking:

- In 1982, on the behalf of the industry, The Tobacco Institute conducted a nationwide advertising campaign that reached 110 million Americans with the message, "Do tobacco companies want kids to smoke? No. As a matter of policy? No. As a matter of practice? No. As a matter of fact? No."
- In 1984, The Institute launched its "Responsible Living" program, offering a free parental guidebook, "Helping Youth Decide." Another booklet, "Helping Youth Say No," followed. Both provide guidance on family communication to enable parents to help youngsters develop decision-making skills needed to deal wisely with everyday choices and with lifestyle decisions such as smoking. More than 700,000 booklets have been distributed nationwide.
- The Institute expanded the "Responsible Living" program in 1986 by providing unrestricted grants to fund Community Alliance Programs at the rate of ten a year. Towns and cities throughout the United States used the grants for broad community-based efforts to improve parent-youth interaction, using the booklets.

- In 1990, the tobacco industry pledged support for raising the minimum age for the sale of cigarettes to 18 in those states with no minimum age or one lower than 18. Today, those laws are on the books in every state.
- Also in 1990, The Tobacco Institute launched "It's the Law," a program for the retail community to encourage support for and compliance with those minimum age laws. Working with more than 130 co-sponsoring retail groups nationwide, about 2.4 million pieces of "It's the Law" materials have been distributed. The Institute's member companies continue to promote "It's the Law" and other programs to work with retailers.
- The Institute also expanded efforts to reach parents and other adults in 1990 by promoting, through national advertising and other efforts, "Tobacco: Helping Youth Say No." The booklet gives adults tools to work with youngsters in resisting the negative peer pressure to smoke. "Tobacco: Helping Youth Say No" was a joint project of The Tobacco Institute and the Family COURSE Consortium, a group of educators and experts in children's issues. The Family COURSE Consortium also promoted the materials through television public service announcements (PSAs). Those PSAs were aired by more than 600 television stations across the country. To date, more than 353,000 copies of "Tobacco: Helping Youth Say No" have been distributed.

TAX DEDUCTIBILITY OF TOBACCO ADVERTISING EXPENSES

Some policymakers in Washington propose legislation that would disallow tax deductions for tobacco product advertising and promotion expenses. Because such a proposal would target tobacco product advertising and promotion uniquely and exclusively, based solely on official disapproval of its expressive content or communicative impact, the proposal would violate the First Amendment.

- **By eliminating the tax deductions for tobacco advertising, the measure would effectively restrict speech on the basis of its content, thus violating the First Amendment.** Recently, the Supreme Court reaffirmed that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S.Ct. 501 (1991).
- **Disallowing the tax deduction for advertising of tobacco products would set a dangerous precedent.** If we begin to use the tax code to penalize disapproved speech or to tax speech as an instrument of social policy, there is no logical stopping point. Proposals already have been introduced in previous sessions of Congress to disallow tax deductions for beverage alcohol advertising expenses and arms-sale promotion expenses, just to name two examples. What would stop Congress from deciding next year to remove the advertising exemption from wine or beer, red meat, sugared cereals or any other product that some segment of the population disapproves of?
- **Restricting information does not lead to better decisions, only controlled ones.** The proposal's basic flaw is that it would effectively suppress truthful speech concerning lawful products based on the paternalistic belief that the government should control the flow of commercial information.
- **The advertising deduction cannot be rationalized as a "subsidy."** The tax system is based on the premise that only net income should be taxed, with deductions permitted for costs reasonably incurred in producing that income. The deduction for advertising expenses simply implements the net income concept. It no more provides a "subsidy" for advertising than the deduction for payroll expenses provides a "subsidy" for hiring workers.
- **Any effort to limit commercial speech of a legal product, whether directly or indirectly, is a challenge to the First Amendment.** For this reason, previous attempts to disallow tax deductions for tobacco advertising have been opposed by groups as diverse as the American Civil Liberties Union, the Washington Legal Foundation, the Freedom to Advertise Coalition, the Association of National Advertisers and the American Association of Advertising Agencies.

TOBACCO PRODUCTS AND THE FOOD & DRUG ADMINISTRATION

Legislation has been introduced in several recent Congresses to give the Food & Drug Administration new authority to regulate tobacco products. Such proposals received heightened attention in 1994 when the FDA commissioner began a campaign to obtain a special Congressional mandate to regulate tobacco products, expanding FDA's existing authority.

In the past, FDA has asserted jurisdiction over cigarettes as a "drug" under the Federal Food, Drug, and Cosmetic Act when health claims were made by vendors or manufacturers, and the courts have sustained the agency's assertions of jurisdiction. **Cigarettes have been treated no differently from other products in this regard.**

The proposals recently advanced, by contrast, would give FDA authority to regulate tobacco products as drugs regardless of whether they are marketed as drugs. Some of these proposals would give FDA broad power to regulate tobacco product design, sales, labeling and advertising -- subject only to the limitation that FDA not attempt to ban tobacco products completely.

Subjecting tobacco products to a regulatory regime designed for products marketed as drugs obviously would lead down the path to Prohibition. Proposals under consideration would apply to tobacco products the regulatory scheme for prescription drugs. But those regulations assume a product for which therapeutic claims are made. Applying those regulations to the labeling and advertising of a product for which therapeutic claims are not made produces absurd results. Under the requirements that apply to prescription drugs, tobacco advertising in outdoor and point-of-sale media would be practically impossible. Such requirements might not specifically ban the sale of tobacco products, but they certainly would lead to severe restrictions on product choice and advertising.

FDA is ill-equipped to undertake major new regulatory responsibilities, especially in an area where it has no pertinent experience or expertise. The agency's staff already is stretched too thin. While its resources declined during the past decade, more than a dozen laws imposed new responsibilities on FDA. As a result, approval of new medicines and vaccines for life-threatening illnesses, such as AIDS, often is significantly delayed. Adding tobacco product regulation to FDA's agenda would further slow review and approvals of important new drugs.

In testimony in the House, moreover, FDA Commissioner Kessler made clear that his real interest lies in preventing young people from smoking -- a goal strongly supported by the tobacco industry. The sponsors of such legislation also have suggested that this is their principal object. As Dr. Kessler himself recognized, this goal does not automatically require FDA to regulate tobacco products. He indicated that this goal might be achieved by tightening restrictions on youth access to tobacco products.

For all these reasons, proposals to give FDA new authority to regulate tobacco products should be rejected.

EFFORTS TO DEVELOP A 'FIRE-SAFE' CIGARETTE

The perception that careless smoking causes many accidental fires has prompted the introduction of bills to require cigarettes to be "fire-safe" -- to "self-extinguish" if not smoked within a certain period or to be designed in some unstated way, so that they are less likely to start fires if dropped on upholstered furniture or mattresses.

- **Fire prevention and public education have proven to be the most effective methods to decrease fire-related deaths.** There are no national laws anywhere in the world mandating "fire-safe" cigarettes. Many industrialized nations, even those with **higher per capita smoking rates** than in the United States, such as Japan, have **far lower fire death rates** than the United States. These countries have effectively concentrated resources on fire prevention and public education.
- **A satisfactory technology for producing commercially acceptable "fire-safe" cigarettes has not yet been developed.** In 1984, Congress enacted the Cigarette Safety Act, establishing the Interagency Committee on Cigarette and Little Cigar Fire Safety and a Technical Study Group (TSG) to address the issue. The study group was under the direction of the Consumer Product Safety Commission (CPSC).

The TSG concluded in September 1987 that it is "technically feasible" and may be "commercially feasible" to develop cigarettes that will have a significantly reduced propensity to ignite upholstered furniture or mattresses. The report also emphasized that much additional research was required before any final conclusions could be reached.

In December 1987, the Interagency Committee submitted its recommendations to Congress, calling for further development and testing of prototype cigarettes for consumer acceptability and smoke chemistry and development of a standardized ignition propensity test method.

- **Further research was pursued under the Fire Safety Cigarette Act of 1990, passed with support of the tobacco industry.** The Act directed completion of research under the leadership of CPSC. A new Technical Advisory Group (TAG) was established, including scientific and technical representatives from several federal agencies, fire services organizations and voluntary health organizations, as well as representatives from the tobacco and furniture industries.
- **In its report to Congress in August 1993, CPSC stated, "While the Commission concludes that it is practicable to develop a performance standard to reduce cigarette ignition propensity, it is unclear that such a standard will effectively address the number of cigarette-ignited fires. Further, the effort to achieve such an objective is beyond both the jurisdiction and the technical capability of the agency."**

- The "test" of cigarette ignition propensity developed by the TAG and researchers at the National Institute for Standards and Technology (NIST) fails to take into consideration real-life upholstery materials and air current variables. The test used by NIST involves cotton duck, a canvas-like fabric seldom used as furniture upholstery. No effort was made by NIST to test real-world materials. In addition, the testing took place in a controlled environment, with air coming in from the bottom and escaping through the top. No cross currents or other real-life variables were considered.
- **Despite CPSC's report to Congress, and the inability to develop performance standards to reduce cigarette ignition propensity, the push for "fire-safe" cigarette legislation has continued.** The new CPSC Chairman, Ann Brown, has reversed the agency's position and now wants to regulate cigarette fire safety. Chairman Brown has not even attempted to explain how the CPSC would overcome the impediments described in the CPSC report that was issued just prior to her taking office. Those impediments cannot be wished away or simply ignored, as Chairman Brown appears to believe.
- **Representatives of the tobacco industry have been integral parts of the ten-year attempt to develop a "fire-safe" cigarette.** Industry representatives were members of both the Technical Study Group and the Technical Advisory Group. The industry also has its own group of scientists trying to develop a feasible test for a "fire-safe" cigarette through a unique joint venture. The joint venture's research is shared with CPSC. The industry will continue to cooperate in every reasonable way with the federal government in the development of cigarettes having a reduced ignition propensity.
- **Accidental fires attributed to careless smoking are a major concern of the tobacco industry.** According to U.S. Fire Administration and Consumer Product Safety Commission data, the incidence of cigarette-related fires in the United States has decreased significantly over the past several years. But more can be done. The Tobacco Institute has a Fire Safety Education Program, designed to address the U.S. fire problem through public education materials. The program centers around funding and distributing -- free of charge -- fire safety educational materials developed by the fire service for use by the fire community. These materials have been created to fill gaps in available public fire safety education.

MEDICARE AND MEDICAID THIRD PARTY LIABILITY ACT

Legislation was introduced in the 103rd Congress to authorize the federal government to sue tobacco product manufacturers to recover Medicare, Medicaid, veterans or other health care costs for illnesses "caused, in whole or in part, by the use of tobacco products" as determined by statistical association. Similar legislation is likely to be refiled in the 104th Congress. Regardless of one's opinion on the use of tobacco products, this legislation should be rejected as an unsound means of financing health care, an inequitable manipulation of tort law, and a dangerous precedent for makers of other consumer products. Finally, such a proposal is currently being tested in the courts.

This legislation represents a frivolous approach to a serious issue: health care. Members of Congress and the Administration have spent two years debating the best means for funding health care coverage. It would be irresponsible for duly elected representatives to abandon their decision-making to the uncertainties of the civil court system. Litigation is not the appropriate means of providing health care for the poor, the aged, and the nation's veterans. The Members who proposed this bill also supported raising tobacco excise taxes to fund health care. It is illogical to rely on tobacco taxes for financing health care while seeking to enact legislation specifically aimed at destroying the American tobacco industry. Back-door attempts at Prohibition should not be cloaked in the guise of recouping Medicare and Medicaid costs.

This proposal sets up an unfair and inequitable process for determining the liability of one industry. First, it creates a new and suspect standard for liability "by statistical analysis or epidemiological evidence" applicable only to tobacco manufacturers. This would allow the federal government -- unlike any private party -- to escape the obligation of proving that the injury suffered was caused by the particular acts or omissions of the defendant. Second, this measure provides for broad class action lawsuits without any requirement for identification of the persons for whose treatment the claim is made. Similarly, the proposal would provide for damages to be apportioned based on "market share theory." These theories are so extreme that they have been rejected in many states, and together they create a system of liability that is not the law anywhere. It is grossly unfair to torture the civil justice system in such a way in order to attack a single industry.

This measure would open the door for future legislation authorizing similar lawsuits against manufacturers of virtually any consumer product or service. What would be next? Beer, wine or other alcoholic beverages? Automobiles? Electrical utilities? Candy and sugared soft drinks? Artificially sweetened soft drinks? The list of potential targets for filling gaps in health care funding is endless.

Finally, this proposal is already being tested in the courts. State Attorneys General in Minnesota, Mississippi and West Virginia have filed lawsuits against tobacco companies using claims similar to those put forth in this proposed legislation. It would be prudent for Members of Congress to allow the constitutionality of such claims to be tested before throwing the federal government into costly legal wrangles.

**THERE IS NO TOBACCO SUBSIDY:
THE TOBACCO PRICE SUPPORT & PRODUCTION CONTROL PROGRAM**

Legislation is proposed in Congress nearly every year to repeal the tobacco price support program. Its critics wrongly call it a "subsidy" for tobacco growers and argue that the program conflicts with the federal government's efforts to discourage smoking. There is no government subsidy to tobacco farmers, however. The program is self-supporting. Furthermore, the price support and production control program actually limits the quantity of tobacco grown in the United States.

The tobacco price support and production control program guarantees farmers a minimum price for their tobacco in return for strict limits on production -- much as programs do for corn, rice, peanuts, cotton and several other commodities. To participate, tobacco growers agree to acreage and poundage allotments set annually by the U.S. Department of Agriculture, based on the amount the USDA estimates is necessary to meet the needs of the domestic tobacco industry, foreign buyers and inventory set by law.

The program sets a minimum price for tobacco sold at auction, which is especially important to the tens of thousands of farm families who grow tobacco on acreage so small that no other crop could support the family. If a grower's tobacco fails to bring an auction bid of at least one cent per pound over the minimum, and the grower meets USDA requirements, he is eligible for a government-backed loan based on the support price. The tobacco is taken as collateral by the grower's cooperative, processed and stored for future sale. When the cooperative sells the tobacco, the loan is repaid with interest.

Since 1982, tobacco growers have contributed to their cooperative fund to ensure loan repayment, making this program have "no net cost" to the American taxpayer. In the past, the Commodity Credit Corporation has incurred some expense in the program, for example, when changes in the prevailing interest rates caused gaps between the rate set by the CCC at the start of the year and the rate at which the CCC borrowed from the Treasury for producer loans later in the year. Variable rate loans, begun in 1981, now minimize this gap.

Also, the USDA incurs some administrative costs for agents who track allotments, marketing and other program operations, totalling about \$15 million annually. In general, however, these costs are not separable from those incurred by work with other crop support programs.

As of 1992, the CCC books covering half a century of price supports showed a net loss of only \$81.5 million on tobacco loans. By comparison, the corn and wheat price support programs each lost more than \$3 billion, and cotton more than \$2 billion. Furthermore, unlike corn, wheat and cotton, tobacco products generate federal, state and local excise tax revenues -- totalling more than \$254 billion in that 50-year period.