THE TOBACCO INSTITUTE
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October 4, 1993

Mr. Mark Levine
Executive Director
Melo-Tone Vending, INc.
130 Broadway
Somerville, MA 02143

Dear Mark:

In 1992, Congress added a provision to the Public Health Service Act that requires each state to have in effect a law prohibiting the sale or distribution of tobacco products to persons under the age of 18, and to enforce this law "in a manner that can reasonably be expected to reduce the availability of tobacco products" to such persons. States that do not comply with this law risk losing federal block grants for substance abuse prevention and treatment.

The new provision of the Public Health Service Act is Section 1926. It was added by Congress in the ADAMHA Reorganization Act of 1992. On August 26, the U.S. Department of Health and Human Services (HHS) published proposed rules that purport to implement this new law. In fact, the proposed rules would go far beyond what Congress required.

Retailers are the target of the proposed rules. The proposed rules would subject retailers to costly and onerous state licensing schemes and endless harassment by antismoking groups. The law, as interpreted by the HHS proposed rules, will cost the retail trade industry an additional $150 million a year in new license fees and costs, and could make your retail outlets vulnerable to repeated sting operations conducted by anti-tobacco zealots.

Attached for your information is a document entitled "ADAMHA TALKING POINTS FOR RETAILERS" that describes the impact of the proposed rules on retailers.

**We are urging the retail community to submit comments to HHS outlining the negative impacts of the proposed rules on retailers. To assist you and your members with comment submissions, I have enclosed the following:**

- **a copy of the HHS proposed rules**
- **retailer objections to the proposed rules**
- **two sample letters for retailers**

**Written comments must be received by HHS by October 25, 1993, and should be sent to the following address:**

**Ms. Gale A. Held**
**Director**
**State Prevention Systems Program**
**Center for Substance Abuse Prevention**
**Rockwall II Building, 9th Floor**
**5600 Fishers Lane**
**Rockville, MD 20857**

**We encourage you and your members to include in your comments any other problems the proposed rules would impose on retailers that are unique to your state or region. With your help, I believe we can convince HHS to craft reasonable regulations that will implement the statute enacted by Congress.**

Please don't hesitate to contact me should you have any questions or need additional information.

Sincerely,

Donald D'Errico
Regional Vice President

Enclosures

September 24, 1993

# THE PROPOSED ADAMHA REGULATIONS CONTRAVENE CONGRESSIONAL INTENT, VIOLATE FEDERALISM AND ARE ILL-ADVISED

On August 26, 1993, the Department of Health and Human Services published proposed rules implementing Section 1926 of the Public Health Service Act (42 U.S.C. 300x-26), added by the ADAMHA Reorganization Act of 1992, Pub. L. No. 102-331, 106 Stat. 394 (1992). 58 Fed. Reg. 45,156. Key provisions of the proposed rules contravene congressional intent, violate basic principles of federalism and are ill-advised.

## SUMMARY

- Only Congress may use the federal spending power to regulate the states' exercise of their historic police powers. When it does, the conditions being imposed must be stated clearly and unambiguously in the pertinent federal statute. Funding conditions may not be imposed by federal agency fiat. Thus, for example, when Congress conditioned highway project funding on the states' adoption of a 55 m.p.h. speed limit, it expressly required the states to demonstrate a 50 percent compliance rate. 23 U.S.C. 154(f). DOT's implementing regulations duly incorporate that condition. 23 C.F.R. Part 659.

- The proposed ADAMHA rules would violate this fundamental principle of federalism by imposing two funding conditions not mentioned in the statute passed by Congress. First, they would require the states, as a condition of ADAMHA funding, to enact a series of tobacco sales laws in addition to the minimum age law required by Section 1926 (§ 96.130(c)(2)). Second, they would require the states, as a condition of funding, to achieve specified compliance rates nowhere mentioned in the statute (§ 96.130(f)(1)). In its comments on the proposed rules, moreover, HHS encourages the states to increase cigarette excise taxes and enact other laws to ensure compliance with the proposed rules.

- Not only do the proposed rules impermissibly redefine the funding conditions expressly prescribed by Congress; the new conditions were considered and rejected by Congress during consideration of the ADAMHA reauthorization legislation. The proposed rules would negate the legislative compromise embodied in Section 1926.

- The proposed rules also would place HHS in the untenable and unacceptable position of legislating for the states and micro-managing state law enforcement efforts. The proposed rules would make HHS the ultimate judge of the adequacy of state laws and state law enforcement efforts relating to tobacco and youth.

- Administering and enforcing the laws specified in the proposed rules – which HHS estimates could impose costs of over $50 million annually on the states – would drain funds from vital state and local programs and impose substantial new fiscal burdens on the states at a time when unfunded federal mandates already are overwhelming state and local

governments. These costs would come on top of $15 billion in unfunded federal mandates that the National Conference of State Legislators estimates the states currently must bear.

- HHS suggests that the states might shift these costs to retailers through license fees. In many states, however, this would be politically infeasible, since retailers themselves already would have to bear up to $100 million nationally in estimated compliance costs. Retailers are not required to bear state law enforcement costs generally (not even for enforcement of alcoholic beverage laws) and they should not be required to assume the costs of enforcing laws mandated by HHS.

- Perversely, the compliance rates set forth in the proposed rules would reward states for not unearthing violations of their laws prohibiting tobacco sales to individuals under the age of 18. To ensure vigorous state enforcement, HHS itself might well be forced to manage the law-enforcement programs of the 50 states, the District of Columbia and the territories.

- The detailed management of state law-enforcement programs implied by the HHS' proposed rules seems particularly ironic and ill-timed in view of Vice President Gore's National Performance Review, which calls for greater flexibility for the states in the administration of federal programs as well as limits on unfunded mandates.

## THE STATUTE

Section 1926 requires every state, as a condition of receiving substance abuse block grants for FY 1994 and subsequent fiscal years, to do four things:

(1) Have in effect a law prohibiting the sale or distribution of tobacco products to any individual under the age of 18. Section 1926(a)(1).

(2) Enforce that law "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18." Section 1926(b)(1).

(3) Annually conduct random, unannounced inspections to ensure compliance. Section 1926(b)(2)(A).

(4) Submit annually to the Secretary a report describing:

"(i) the activities carried out by the state to enforce such law during the fiscal year preceding the fiscal year for which the state is seeking the grant;

"(ii) the extent of success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18; and

"(iii) the strategies to be utilized by the state for enforcing such law during the fiscal year for which the grant is sought." Section 1926(b)(2)(B).

If the Secretary determines that a state has not complied with these requirements in the fiscal year preceding the fiscal year for which a substance abuse block grant is sought, the Secretary is directed to withhold grant funds. Section 1926(c).

## THE PROPOSED RULES

The proposed rules go beyond these four requirements in two significant respects.

### Additional laws – § 96.130(c)(2)

Under the proposed rules, it is not enough for a state to have in effect a minimum-age law, as Section 1926(a) requires. To enforce that law in the manner required by Section 1926(b)(1), the state additionally "shall" have in place, "at a minimum, * * * other well-designed procedures for reducing the likelihood or prevalence of violations, such as, for example, a tobacco sales or distribution licensing system similar to that used for alcoholic [beverage] sales, a graduated schedule of penalties for illegal sales or distribution culminating in loss of license, controls on tobacco vending machines in locations accessible to youth, publication of the names of outlets making illegal sales, or use of local enforcement to supplement central enforcement." § 96.130(c)(2).

In its comments on the proposed rules, moreover, HHS encourages the states to pass a "model law" that the agency implies would satisfy § 96.130(c)(2). 58 Fed. Reg. at 45,156, 45,159. Similarly, if a state wishes to make retailers assume the cost of enforcing the laws required by HHS, as HHS suggests (see id. at 45,160), adopting revenue-generating licensing systems would be practically unavoidable. HHS also "suggests" that the states sharply increase cigarette excise taxes to reduce sales to minors (and increase state revenues). See id. at 45,162. The message is clear: A state can help ensure that it will be found in compliance with Section 1926, and thus avoid a funding cutoff, if it adopts these laws, which are nowhere mentioned in Section 1926 itself.

### Performance criteria – § 96.130(f)(1)

Under the proposed rules, it is not enough for a state to make a good-faith effort to enforce its minimum age law, as Section 1926(b) requires. To be found in compliance with proposed rules, the state additionally must be able to demonstrate retailer compliance with its state's minimum age law at levels specified by HHS, through a program of inspections that must be approved by HHS. The state's inspection program, at a minimum, must show compliance levels of 50 percent in the first year, 60 percent in the second year, 70 percent in the third year and 80 percent in the fourth and subsequent years. § 96.130(f)(1). Except in "extraordinary circumstances," the state risks loss of federal block grant funds if it fails to achieve these specified compliance levels. § 96.130(f)(2). The

requirement that compliance be measured is reflected in the protocol for inspections set forth in § 96.130(c)(1).

## DISCUSSION

### I. FUNDING CONDITIONS IMPOSED ON THE STATES' EXERCISE OF THEIR SOVEREIGN POWERS MUST BE SET FORTH UNAMBIGUOUSLY AND SPECIFICALLY IN THE PERTINENT STATUTORY LANGUAGE.

Section 1926 represents an effort by Congress, through the imposition of funding conditions, to regulate the states' exercise of their sovereign power to enact and enforce state laws to further federal objectives.[1/] But the Constitution imposes strict limits on "the circumstances under which Congress may [thus] use the States as implements of regulation." New York v. United States, 112 S. Ct. 2408, 2420 (1992).

In particular, when the federal spending power is used to regulate the states' exercise of their sovereign powers, it is axiomatic that the conditions imposed must be stated clearly and unambiguously in the pertinent federal statute. See, e.g., New York v. United States, 112 S. Ct. at 2407 (Low-Level Radioactive Waste Policy Amendments Act); South Dakota v. Dole, 483 U.S. 203, 207 (1987) (statute conditioning highway project funds on adoption of minimum drinking age statute).

This requirement of unambiguous statutory direction is designed to "assure * * * that the legislature has in fact faced, and intended to bring into issue," the weighty concerns of federalism that must be overcome to warrant federal intrusions into the sovereign realm of the states. Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991). As the Supreme Court explained in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981):

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if the State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States

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1/ Other instances in which Congress has threatened to withhold federal funding to induce the states to enact and enforce laws include, for example, 23 U.S.C. 154 (maximum speed limits); 23 U.S.C. 158 (minimum drinking age); 23 U.S.C. 159 (revocation or suspension of drivers' licenses of individuals convicted of drug offenses).

to exercise their choice knowingly, cognizant of the consequences of their participation." Id. at 17 (emphasis added).[2/]

Fair notice is crucial because the states can protect their interests as sovereigns only through informed participation in the legislative process. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985). To protect their interests, states must know in advance precisely what funding conditions proposed legislation would impose.

Accordingly, when a federal agency implements a statute that seeks to regulate, through funding conditions, the states' exercise of their historic police powers, the agency may not impose additional conditions in the name of effectuating the statutory purpose. See Gregory, 111 S. Ct. at 2403. That, however, is precisely what the proposed ADAMHA rules would do.

## II. THE PROPOSED RULES IMPERMISSIBLY IMPOSE FUNDING CONDITIONS NOT SET FORTH IN SECTION 1926 AND CONTRAVENE CONGRESSIONAL INTENT AS EMBODIED IN SECTION 1926.

### A. The Proposed Rules Impose Conditions Beyond Those Set Forth in the Statute.

#### 1. Additional laws

By its terms, Section 1926 requires a state to have in effect one law and one law only – "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." Section 1926 does not require a state to adopt any additional laws, such as those specified in § 96.130(c)(2). As discussed below, Congress rejected a proposal that states be required to adopt such additional laws.

HHS suggests that it "does not propose specifying the provisions of the States' laws." 45 Fed. Reg. at 45,156. It insists that it is not "specifying particular enforcement measures that States must take," and it affirms its belief that "governors and States should have

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[2/] As the Supreme Court commented in upholding a conditional exercise of the spending power in New York v. United States, "the conditions imposed [by the statute] are unambiguous * * *; the Act informs the States exactly what they must do and by when." 112 S. Ct. at 2407. See also Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) ("Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, or if it intends to impose a condition on the grant of federal moneys") (citations omitted); Grove City College v. Bell, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept").

maximum flexibility to devise their own solutions." Id. at 45,161. It also suggests that "States remain free to devise any enforcement approaches that they find cost-effective." Id. at 45,160.

These assurances ring hollow. Sec. 96.130(c)(2) expressly provides that states "shall have in place" laws of the type described in the rule, and HHS's own commentary makes clear that a state that does not adopt some or all of the additional laws specified in § 96.130(c)(2) risks being found in noncompliance with Section 1926(b)(1). See id. at 45,156.[3/]

2. **Performance criteria**

Section 1926 requires a state to enforce its minimum age law "in a manner that can reasonably be expected" to reduce the availability of tobacco products to individuals under the age of 18. But it does not require a state to demonstrate levels of retailer compliance with the law, as specified in § 96.130(f)(1). By contrast, when Congress conditioned highway funding on the states' adoption of a 55 m.p.h. speed limit, it expressly required the states to demonstrate a 50 percent compliance rate. 23 U.S.C. 154(f). The implementing regulations duly incorporate that condition. 23 C.F.R. Part 659.

As noted earlier, Section 1926 merely conditions future block grants on compliance with four conditions: (1) passage of a minimum age law, (2) enforcement of that law, (3) use of annual random unannounced inspections, and (4) submission of a report to the Secretary. Congress envisioned good-faith enforcement by the states in any manner they believe will succeed. That is the import of the "reasonable expectation" language of Section 1926(b)(1). The statute does not add the additional requirement of attaining a particular, uniform degree of success established by a federal agency.

If Congress had intended to condition receipt of federal funds on the achievement of a minimum success rate, it would have said so in Section 1926 itself. Instead, Section 1926 requires only that a state describe in its report to the Secretary the success the state has achieved in reducing the availability of tobacco products to individuals under the age of 18. Section 1926(b)(2)(B)(ii). To be sure, a state's consistent inability to demonstrate

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[3/] HHS pointedly appended to its Notice of Proposed Rulemaking a "model law" that the agency implies would satisfy § 96.130(c)(2). 58 Fed. Reg. at 45,156, 45,159. The message is clear: A state can help ensure that it will be found in compliance with Section 1926, and thus avoid a funding cutoff, if it adopts the model law. Similarly, if a state wishes to make retailers assume the cost of enforcing the laws required by HHS, as HHS suggests (see id. at 45,160), adopting revenue-generating licensing systems is practically unavoidable. HHS also "suggests" that the states sharply increase cigarette excise taxes to reduce sales to minors and increase state revenues. HHS offers that a state "may choose" to impose "taxes so high as to discourage most youth purchases." See id. at 45,162.

success in this regard could be taken to indicate that the state's enforcement efforts cannot "reasonably be expected" to be produce the desired results. In that event, HHS might encourage the state to enhance those efforts in the future. The reporting requirement of Section 1926(b)(2)(B)(ii) suggests that this is what Congress intended: A state makes a good-faith effort to enforce its minimum age law, the results of its enforcement efforts are reviewed by HHS and a determination then is made as to whether the state should be encouraged to strengthen its efforts.

In short, Section 1926 does not prescribe a performance standard. HHS's attempt to redefine the conditions for federal funds to impose one is impermissible. As discussed below, Congress rejected language that arguably might have supported a performance standard.

**B. <u>The Proposed Rules Are Inconsistent with Congressional Intent.</u>**

Congress considered and rejected proposals to require additional laws of the very type that the proposed rules would require, as well as language that arguably might have supported a performance standard.

On November 1, 1991, Rep. Henry Waxman introduced H.R. 3698, the Community Mental Health and Substance Abuse Services Improvement Act of 1991. The legislation was to serve as the mark-up vehicle for the ADAMHA reauthorization in the House. As introduced, H.R. 3698 added a new section 1925 to the Public Health Service Act denying Section 1921 grants to any state without a law prohibiting the sale or distribution of tobacco products to persons under the age of 18, and requiring a state to promise to enforce its law in a manner that could reasonably be expected to reduce "significantly" the availability of such products to individuals under the age of 18. H.R. 3698, 102d Cong., 1st Sess., p. 36 (1991).

While not objecting to a national minimum sales age, the tobacco industry strongly opposed Rep. Waxman's proposed language on the ground that it was "so broad that the Secretary [of HHS] could set up any kind of guidelines he chose for enforcement and insist on compliance under threat of loss of funds." Comments on Tobacco Provisions in ADAMHA Bill.

During the consideration of H.R. 3698, the Subcommittee on Health and the Environment adopted an amendment offered by Rep. Thomas Bliley that retained the requirement of an 18-year-old minimum-age law but contained no language with respect to enforcement. Rep. Waxman thereafter circulated substitute language for consideration by the Energy and Commerce Committee that, among other things, would have required states to adopt laws –

- prohibiting the possession or purchase of tobacco products by persons under the age of 18,

- requiring retailers to display signs providing notice of the minimum sales age and to demand proof of age from prospective purchasers,

- imposing location and supervision restrictions on the sale of tobacco products through vending machines, and

- authorizing enforcement of these laws by local law enforcement authorities.

Ultimately, agreement was reached on compromise language. This compromise, adopted by the Energy and Commerce Committee and ultimately approved by Congress, is Section 1926. See 138 Cong. Rec. H1640 (daily ed. March 24, 1992) (remarks of Rep. Bliley) (describing Section 1926 as a "compromise").

As is evident from this history, Congress rejected proposed language that would have required states to adopt laws in addition to a minimum age law – i.e., Rep. Waxman's counterproposal to the language offered by Rep. Bliley. Congress also rejected proposed language that arguably might have supported a performance standard – i.e., Rep. Waxman's original proposal requiring the states to enforce their minimum age laws in a manner that could reasonably be expected to reduce "significantly" the availability of such products to individuals under the age of 18.[4/]

HHS suggests that requiring the states to adopt additional laws and satisfy a prescribed performance standard merely implements the requirement of Section 1926(b)(1) that the states enforce their minimum age laws in a manner that can reasonably be expected to reduce the availability to tobacco products to persons under 18. See 58 Fed. Reg. at 45,156. Such requirements, however, not only go far beyond the statutory language but would negate the compromise approved by Congress. Those requirements would render that compromise meaningless by implementing the law as though Rep. Waxman's language had been enacted.[5/]

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[4/] HHS nevertheless encourages the states to provide the Department with data showing "significant" progress toward reducing use of tobacco products by individuals under the age of 18. 45 Fed. Reg. at 45,157. Indeed, HHS "expects every state to attempt to achieve zero failure rates" – i.e., 100 percent compliance. Ibid.

[5/] Rep. Synar, Rep. Waxman and six other members of the Energy and Commerce Committee asserted in a separate statement placed in the committee report that Section 1926 "requires that states * * * demonstrat[e] to the Secretary * * * that the availability of tobacco products to adolescents is reduced." See Supplemental Views of Rep. Synar, *et al.*, H. Rep. No. 464, 102d Cong., 2d Sess. 179 (1992). This interpretation of Section 1926 was not endorsed by a majority of the Committee, by its Chairman, Rep. Dingell, or by Rep. Bliley, a key party to the compromise that Section 1926 represents. It cannot negate the

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## III. THE PROPOSED RULES VIOLATE FEDERALISM AND ARE ILL-ADVISED.

The proposed rules would place HHS in the untenable and unacceptable position of legislating for the states. The requirement that states adopt additional laws as specified in § 130.96(c)(2) implies review of those laws by HHS to determine their adequacy for purposes of the rule. States would be required to satisfy the agency that their laws in this area are sufficient to serve the purposes of the federal statute.

Indeed, in the legislative battles that § 130.96(c)(2) is bound to precipitate, it seems likely that HHS would be asked for its views, prior to enactment, on which of several competing bills in the state legislature would best ensure compliance with the federal statute. Such intervention by a federal agency in a state's lawmaking processes would be a gross usurpation of state sovereignty.

The proposed rules similarly would place HHS in the position of micro-managing state law enforcement programs. The rules contain detailed requirements for state inspection programs, and review of those programs by HHS to ensure compliance with these requirements obviously is contemplated. HHS inevitably would have to manage implementation of those programs as well.[6/]

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[5/](...continued)
plain language of the statute or the history of that language as described in the text above. Significantly, neither Rep. Waxman nor Rep. Synar suggested in their floor remarks that Section 1926 contemplated a performance standard or laws in addition to a minimum sales-age law. See 138 Cong. Rec. H1640 (daily ed. March 24, 1992) (Rep. Waxman); id. at H1643 (Rep. Synar).

[6/] The rules prescribe detailed requirements for state inspection programs:

> "The State shall conduct annual, random and targeted, unannounced inspections of both over-the-counter and vending machine outlets. The random inspections shall cover a range of outlets (not pre-selected on the basis of prior violations) to measure overall levels of compliance as well as to identify violations. Random, unannounced inspections shall be conducted annually and shall be conducted in such a way as to ensure a scientifically sound estimate of the success of enforcement actions being taken throughout the State. Thus, the State shall give due consideration to the methodological design of the inspection effort and the adequacy of the sample design. The sample shall reflect the distribution of the population of those under 18 throughout the State and the distribution of outlets throughout the State. The sample shall further reflect that, because of location (e.g.,
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> (continued...)

Moreover, because § 130.96(f)(1) would link funding to achievement of specified compliance rates, the proposed rules could operate to discourage states from uncovering violations. To ensure that the states are enforcing their tobacco sales restrictions, HHS itself might well have to manage the law-enforcement programs of the 50 states, the District of Columbia and the territories. This detailed management of state law-enforcement programs seems particularly ironic and ill-timed in view of Vice President Gore's National Performance Review, which calls for greater flexibility for the states in the administration of federal programs.

HHS estimates that enforcement of Section 1926 under the terms of the proposed rules could entail annual costs of up to $150 million nationally. 58 Fed. Reg. at 45,159. A portion of these costs (over $50 million) would be administration and enforcement costs to the states. 58 Fed. Reg. 45,159.[7/] The proposed rules would thus drain funds from vital state and local programs and impose substantial new fiscal burdens on the states at a time when unfunded federal mandates already are overwhelming state and local governments.

HHS suggests that the states might avoid these new costs by shifting them to retailers through license fees. Id. at 45,160. It is far from clear that this would be politically feasible in many states, especially because retailers already would face up to $100 million in other costs under the proposed rules. Id. at 45,159.[8/] In any event, retailers are not required to assume state law-enforcement costs generally; licensing fees account for only a small fraction of the cost of alcoholic beverage law enforcement. Retailers should not be required to assume the costs of enforcing tobacco sales laws mandated by Congress or HHS.

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[6/] (...continued)

> near schools) or other factors, some outlets are more likely to be used by minors. States are to ensure that the inspections occur at times when minors are likely to purchase tobacco products. Targeted inspections shall focus on outlets which have a history of prior violations." Sec. 96.130(c)(1).

[7/] HHS estimates that even if a state were to achieve economies by piggybacking its tobacco licensing system on an existing alcoholic beverage licensing and enforcement system, the state would have to hire a staff of "one or two dozen" employees and a budget of approximately $1 million would be required, or $50 million nationally. HHS further contemplates 200-400 "sting" operations in each state to test compliance, with each sting requiring 10 person hours of time, at a total annual cost of $1-$2 million annually.

[8/] This figure reflects the cost of training staff, posting signs, checking for compliance, relocating vending machines, etc. Ibid.

## CONCLUSION

For the reasons stated above, HHS should not promulgate § 96.130(c)(2) (mandating additional laws) or § 96.130(f)(1) (setting a performance standard), and it should modify § 96.130(c)(1) to eliminate the compliance measurement function of the mandatory inspection programs. It should eliminate from its comments on the final regulations "suggestions" that states adopt additional laws or take other steps to ensure a finding by the agency of compliance with Section 1926.

TI Tapes Review Database Records

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|---|---|
| TIBOX | = 1111 |
| CBBOX | = 123 |
| TAPENO | = 1 |
| SEGMENTNO | = 1 |
| TOTALSEG | = 2 |
| REVIEWER | : SMB |
| REVIEWDATE | = 19991101 |
| FORMAT | : ACAS |
| TAPETITLE | : Training |
| SEGMENTTITLE | : Example Sheet |
| SEGMENTDATE | = 19871001 |
| ESTIMDATE | = E |
| TRANSCRIPT | : Yes |
| STATION | : WKRP |
| NETWORK | : NBC |
| CITYLOCA | : Cincinati |
| STATELOCA | : OH |
| SEGLENGTH | : 3 min |
| TISPEAKERS | : Walker Merryman, TI spokesman |
| OTHERINDUSPA | : Thomas Sandefur, CEO of Brown & Williamson |
| OTHERNOTABLE | : Surgeon General C. Everett Koop |
| CONTENTDESC | : News segment on a conference on smoking addiction and cessation programs. A clip is show of Thomas Sandefur, the CEO of Brown & Williamson, saying, "I believe that nicotine is not addictive." There is a short interview with Walker Merryman in which he says that nicotine is habituating but is not proven the be physically addictive. A clip of Surgeon General C. Everett Koop at the conference is shown talking about how we need to implement more smoking cessation programs to put an end to the number one preventable cause of death in America. Koop mentions that second-hand smoke as well as actual smoking is claiming lives. |
| COMMENTS | : Report is non-biased, neutral. |
| NOTES | : Bad visual quality. or audio |
| ISSUES | : 1, 5<br>ETS Issues: 2(F), 3, 9 (refer 2 green sheet) |
| CONF_INTERN | : (If this were a confidential tape you would put a Y here) |
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VIA OVERNIGHT DELIVERY

MEMORANDUM

September 27, 1993

TO: Regional Vice Presidents

FROM: Pat Donoho PD
Ron Morris RM

SUBJECT: ADAMHA Proposed Regulation Comments and Draft Legislation

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It is your assignment to identify individuals on the state and local level to target for submitting comments on the proposed draft ADAMHA regulations. In an effort to assist you in soliciting comments on the proposed regulations, enclosed are the following documents:

1. Talking points aimed at isolating the points of most importance to each affected constituency;

2. Sample letters sent by state representatives to HHS commenting on the draft regulations.

When you have confirmed individuals to submit comments, please let Margaret or Diana know and they can assist in having letters drafted. In addition to these attachments, please feel free to use the background pieces on ADAMHA which were included in your packets in Tucson.

In addition to securing comments on the regulations, it is imperative that each state be on the offensive in drafting legislation to comply with the ADAMHA regulations. Enclosed are a number of documents to assist your efforts:

1. A list of current licensing laws by state;

2. A concept paper, outlining the various provisions you may want to incorporate in a bill;

3. Two conceptual bills (one with licensing - one without). These bills should be used with the various concepts in #2 above, which you may want to incorporate in your individual state bills. These are guidelines and by no means expected to be used as written. You will need to work with your lobbyists, member company representatives, and allies in crafting each individual state bill, and;

4. A C&B paper outlining state ADAMHA legislation.

There will be a conference call on Tuesday, September 28, at 10:30 a.m. E.S.T. to discuss this memo and details of these projects. We look forward to discussing these projects with you in further detail.

/da
Enclosures

cc: Kurt Malmgren

## ADAMHA TALKING POINTS

## GOVERNORS/ STATE LAWMAKERS

**Overall message**

- States should be allowed to enforce their laws prohibiting tobacco sales to youth in the manner they best believe will accomplish the desired results, as Congress intended. Congress intended the states to have genuine flexibility, not the Hobson's choice presented by the proposed rules.

  – In the past few years, states have stepped up their activities in this area. These new programs should be given a chance without an overlay of new requirements.

  – Critically needed funds for substance abuse prevention and treatment should not be held hostage to the federal agency's antismoking agenda. The victims will be the intended beneficiaries of ADAMHA.

**Affront to Federalism**

- Only Congress may use the federal spending power to regulate the states' exercise of their historic police powers – federal agencies may not. Funding conditions may not be imposed by federal agency fiat.

- The imposition by a federal agency of funding conditions not specified by Congress in the pertinent statute is an affront to federalism and would set a dangerous precedent.

- The conditions imposed by HHS go to the core of state sovereignty – the making and enforcing of laws. They would put HHS in the position of legislating for the states and overseeing their law-enforcement efforts.

  – States would have to satisfy HHS that they have enacted "adequate" laws relating to tobacco and youth and are enforcing those laws in an "adequate" manner.

  – To minimize the risk of a funding cut-off, moreover, states would be compelled to seek HHS approval of their laws and law-enforcement programs in advance!

- The detailed management of state law-enforcement programs implied by the HHS' proposed rules seems particularly ironic and ill-timed in view of Vice President Gore's National Performance Review, which calls for greater flexibility for the

states in the administration of federal programs as well as limits on unfunded mandates.

**Fiscal and Economic Burden**

- The conditions proposed by HHS represent yet another unfunded federal mandate that HHS estimates will impose an $50 million in costs on state and local governments, draining funds from vital programs.
  - It seems likely that the actual costs of establishing and operating new smoking-control bureaucracies would exceed the $50 million estimate.
  - This would come on top of $15 billion in unfunded federal mandates that the National Conference of State Legislators estimates the states currently must bear!
- HHS is wrong to assume that the states can make their retailers absorb these costs through licensing fees. At a minimum, this will ignite a political firestorm in many states.
  - The HHS proposed rules would impose an estimated $100 million in compliance costs on retailers, not counting costs imposed on the states.
  - Alcoholic beverage law-enforcement costs are largely funded through general revenues, not license fees.
  - Retailers already are burdened with regulation.
- The proposed rules will further harm the economies of the states, not only by burdening the retail sector in each state with an estimated $100 million in additional costs, but also by increasing pressures for tax increases to pay for law-enforcement costs.
- The compliance-rate requirements, which draw conclusions about state-wide compliance from results involving small samples, are grossly unfair. Projections from these samples could cost the states millions of dollars in substance abuse prevention and treatment funds.
  - No matter how "scientific" the samples approved by HHS may be, projections of statewide compliance rates from the samples are inherently unreliable. Individual retail outlets simply cannot be viewed as "representative" of a state's retail outlets in general.

– If compliance-rates requirements are to be utilized, the first year should establish a baseline and subsequent years should require a steady but more gradual improvement.

## ADAMHA TALKING POINTS

### ATTORNEYS GENERAL/ LAW ENFORCEMENT AUTHORITIES

- We are capable of enforcing our laws prohibiting the sale or distribution of tobacco products to minors without interference from or superintendence by a federal agency in Washington, D.C.

- Under the regime apparently contemplated by the proposed rules, important law-enforcement responsibilities would be transferred from the Attorney General and vested in state health departments or new licensing authorities.

  - The proposed rules will create intense pressure to put state health departments or other bureaucracies in the law-enforcement business. At a minimum, this will create overlapping authority and confusion.

  - The proposed rules also strongly encourage the state to delegate law-enforcement power to local governments and "private entities" – further splintering state law-enforcement authority and encouraging vigilantism.

- The proposed rules would require the states to adopt – and enforce – new laws, conduct an elaborate program of retail outlet inspections, and ensure that the tough compliance rates are achieved. This will require the state to divert resources from critical law-enforcement activities – e.g., safe streets and safe schools – at a time of unprecedented budget stress.

## ADAMHA TALKING POINTS

### STATE AGENCIES

- The proposed rules will put critically needed substance abuse prevention and treatment funds at risk to achieve compliance with a program not mandated by Congress. Critically needed substance abuse prevention and treatment funds should not be held hostage to the federal agency's antismoking agenda.

- Since the statute and proposed rules prohibit use of ADAMHA funds to pay the costs of the antismoking program imposed by HHS, funds will have to be diverted from existing state substance abuse programs to pay those costs.

  - It is no comfort that the rules do not say this is where the funds must come from. As long as the rules impose the costs, our programs are at risk.

- Congress did not mean to make a state's substance abuse prevention and treatment funds depend on its ability to satisfy an elaborate HHS program for reducing tobacco sales to individuals under the age of 18.

- When it passed Section 1926, Congress meant to promote conscientious enforcement of state laws to enforce their laws prohibiting the sale and distribution of tobacco products to individuals under the age of 18.

  - Congress envisioned good-faith enforcement by the states in any manner they believe will succeed. This is the import of the "reasonable expectation" language of Section 1926(b)(1).

  - The statute does not impose the additional requirement of enforcing additional laws or attaining a particular, uniform degree of success established by a federal agency.

# ADAMHA TALKING POINTS

## RETAILERS

### Overall message

- The proposed rules would subject retailers to costly and onerous state licensing schemes and endless harassment by antismoking groups.

- The requirements imposed by the proposed rules are unnecessary. Existing state laws are adequate and industry programs promoting compliance with those laws are sufficient.

- At a minimum, the retail community should be given the opportunity to demonstrate its compliance with these laws before HHS induces the states to take more drastic action.

### Cost

- HHS estimates that the proposed rules will require retailers to bear $100 million in compliance costs, and HHS further suggests that retailers be forced to absorb an additional $50 million in law-enforcement costs as well through new licensing systems – so retail outlets bear costs of $150 million annually. See 58 Fed. Reg. at 45,160.

- Retailers already are subject to a welter of costly and burdensome regulatory and licensing requirements. It is unfair to require them to assume yet further burdens.

### Harassment

- The proposed rules should be revised to eliminate any suggestion that "private entities" be enlisted to conduct sting operations or otherwise enforce laws relating to tobacco and youth.

  - It is inappropriate for HHS to promote such interest-group vigilantism. The rules should strictly limit any use of private individuals to test compliance with a state's laws. Private entities should not be in the business of enlisting underage youth to violate the law!

- The proposed rules should be revised to eliminate any suggestion that "local governments" be enlisted to conduct sting operations or otherwise enforce laws relating to tobacco and youth.

  - Retailers are entitled to uniform statewide enforcement of state laws. They should not be subjected to a welter of local programs. In some communities, antismoking agendas will produce oppressive activity.

**Unfair**

- The statute requires random, unannounced inspections to ensure compliance with state laws prohibiting the sale or distribution of tobacco products to persons under the age of 18. Yet the proposed rules would require the states to conduct targeted inspections of retailers with "a history of prior violations."

  - This goes beyond what the statute requires and sets retailers up for harassment even when they have taken every reasonable step to ensure compliance with the law.

- The proposed rules strongly suggest that states adopt laws to license retailers of tobacco products, so that the threat of license suspension or revocation can be used to promote compliance with the minimum sales age law. License suspension or revocation would punish retailers who have taken all reasonable measures to ensure compliance with the law for the misbehavior of their employees.

- HHS outrageously suggests that states adopt a so-called "informational" strategy of "publishing in local newspapers the names of stores caught selling illegally to minors" so as to "signal[ ] consumers who would wish to steer their patronage to stores which do not violate the law." 58 Fed. Reg. at 45,160. Because this approach would punish retailers who have taken all reasonable measures to ensure compliance with the law for the misbehavior of their employees, it too would be unfair.

## ADAMHA TALKING POINTS

### VENDORS

- Most vending machines are located in places not frequented by minors, and vending machines account for only a small fraction of illegal sales to minors. In places frequented by minors, access can be prevented by requiring supervision of the machines or the use of locking devices.

- The proposed rules would require the states to adopt laws restricting vending machine locations. This is altogether inappropriate. Section 1926 does not even mention vending machines, much less require location restrictions. As stated above, moreover, location restrictions are unnecessary.

- In its comments on the proposed rules, HHS strongly encourages states to ban tobacco vending machines by stressing "the difficulty of enforcement options short of bans." 58 Fed. Reg. at 45,161. Indeed, HHS predicts "significant drops in vending-machine sales of tobacco products because of the actions that will have to be taken to prevent sales to minors from these devices." Id. at 45,160.

  - As stated, there are many means short of bans – including supervision or locking devices – that effectively can prevent youth access.

  - The suggestion in HHS's comments that cigarette vending machines should be banned should be eliminated when the final regulations are published.

- The focus on whether minors are prohibited from being in a place where vending machines are located misses the point; the question is whether as a practical matter minors frequent a location. HHS should not encourage states to ban vending machines in particular locations simply because youths theoretically could use them (see 58 Fed. Reg. at 45,161), when as a practical matter youths do not frequent those places.

- The vending machine industry is prepared to work with state and local lawmakers to address the issue of youth access. Additional laws at this time are unnecessary. Certainly there is no justification for the drastic approaches urged by HHS.

H. WILLIAM DEWEESE
THE SPEAKER

THE STATE CAPITOL
HARRISBURG PENNSYLVANIA 17120-0018

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

May 17, 1993

Honorable Donna E. Shalala
Secretary
Department of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Shalala:

I understand that the Department of Health and Human Services is developing regulations intended to satisfy the requirements of the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act of 1992. Section 1926(b)(1) of the Act requires that an involved State enforce anti-sale-to-minor laws in a manner "that can reasonably be expected to reduce" the availability of tobacco products to those under age 18. The Act also requires the use of random, unannounced inspections.

I am told the regulations under discussion would specify the number, type and location of inspections and that targeted inspections would be required. Apparently the draft regulations also would create standards which establish a maximum permissible percentage of illegal sales.

It is difficult for me to reconcile regulatory proposals which impose such particularity with statutory language requiring enforcement "that can reasonably be expected to reduce the availability" of these products. Please take those steps necessary to assure the regulations do not impose a level of regimentation beyond the statute's dictate.

I understand the task of developing responsible compliance standards is demanding. I am sure, however, the Department can protect state and local governments from regulatory mandates which reach beyond the statute's requirements.

Thank you for your attention to these concerns.

Very Truly Yours,

H. WILLIAM DEWEESE

C.: Hon. Leon Pannetta
Director
Office of Management & Budget
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SPEAKER PRO TEM
Chairman:
Appropriations Committee
Vice Chairman:
Joint Budget Committee

May 11, 1993

Ms. Donna E. Shalala, Secretary
Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Ms. Shalala:

As Speaker Pro Tem of the State of Colorado, a state receiving a substance abuse block grant, I am very concerned about the regulations that HHS intends to propose concerning the restriction on tobacco sales to individuals under the age of 18, which has been imposed on block grant recipients under the ADAMHA Reorganization Act of 1992.

My concern emanates from the lack of flexibility provided to states under the draft regulations. The ADAMHA Act reflects that Congress, in order to best achieve its desired policy goals, provided the states with the maximum discretion possible to reduce the availability of tobacco products to minors. Yet, the draft regulations include a number of very specific and burdensome prescriptions and requirements that a state must follow in order to receive 100 percent of its block grant funding.

While I wholly support the policy goals of the ADAMHA Act, it is my strong view that such goals will be subverted if a state is not granted the flexibility to enforce the tobacco restrictions to tailor its enforcement to its particular needs and capabilities. Moreover, the prescriptions and requirements contained in the draft regulations impose costs on the states that we can ill afford. I urge you to consider the states' perspective in finalizing your proposed regulations.

Thank you for your attention to this matter.

Sincerely,

Tony Grampsas
State Representative

TG/bjs