

**HB**

**466**

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_  
 Title: "An Act relating to tobacco."  
 Sponsor: Representative Gruenberg  
 Requestor: House Judiciary

Agency Affected: Department of Law  
 BRU: Legal Services  
 Components: Operations

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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**FUNDING: (Thousands of Dollars)**

GENERAL FUND	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS					
OTHER					
<b>TOTAL</b>					

**POSITIONS:**

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS : (Attach a separate page if necessary)**

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director  
 Division: Administrative Services  
 Approved by Commissioner: Richard I. Pegues / FOR  
Douglas B. Bailly Attorney General  
 Agency: Department of Law

Phone: 465-3672  
 Date: March 2, 1990  
 Date: March 2, 1990

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 466

This bill amends AS 11.76 by adding a new section that provides that a person may not provide tobacco to another person without charge or for a nominal fee, for the purpose of promoting retail sales. The bill does allow a person to provide small samples of tobacco without charge or for a nominal fee to a person 19 years of age or older for the purpose of promoting retail sales, if the samples are provided in a retail store that sells primarily tobacco, or at trade shows or conventions from which the general public is excluded, or in conjunction with a separate sale of tobacco by a retailer, manufacturer, or distributor.

There has apparently been some discussion, on the part of tobacco industry representatives, that state jurisdiction of tobacco promotions is preempted by 15 U.S.C. 1334(b), which places responsibility for regulating tobacco advertising at the federal level. It is the Department of Law's view, however, that the distribution of free samples falls under 15 U.S.C. 1332(6), which places the responsibility for the regulation of the distribution of tobacco, whether for sale or not, at the state level. If the bill is approved and is then subsequently challenged in court, the department will handle a challenge using its existing staff. Consequently, fiscal note costs are not required.

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 2, 1990

The Hon. Max Gruenberg  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Re: HB 466 -- (prohibition on the  
free distribution or sampling  
of tobacco products)

Dear Representative Gruenberg:

You have asked us if the state is preempted by federal law from enacting a prohibition on the free distribution or sampling of tobacco products. There is a prohibition against providing free tobacco in HB 466.

Because of the short period of time in which our response has been requested, we have not done an extensive analysis of this issue. However, our initial review leads us to believe that while it may be a close question, there is a legitimate argument that the state is not preempted by federal law from enacting a prohibition against the free distribution or sampling of tobacco products.

Under the supremacy clause of the United States Constitution, Article VI, cl. 2, Congress can pass laws that will completely govern an area, thus preempting any state action in that area. However, in determining whether state action is preempted in any particular area we must analyze whether there is an actual conflict between state and federal legislation and whether there was an intent behind the federal legislation to preclude state action. See Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1962).

House Bill 466 states (with certain exceptions for tobacco stores and trade conventions), "A person may not provide tobacco to another person without charge or for a nominal fee, for the purpose of promoting retail sales." HB 466, p. 1, lines 23-25. Federal statute provides that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes [when the packages are properly labelled." 15 U.S.C.A. 1334(b) (1970).

STEVE COWPER, GOVERNOR

REPLY TO:

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ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 276-3550  
FAX: (907) 276-3697

1st NATIONAL CENTER  
100 CUSHMAN ST. SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 452-1568  
FAX: (907) 456-1317

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
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The key question is whether or not giving away tobacco is "advertising or promotion." While giving away tobacco could be considered part of a promotional scheme, it is not "advertising" in the traditional sense. Furthermore, under 15 U.S.C.A. 1332(6) (1970), Congress defined the term "sale or distribution" as "including sampling or any other distribution not for sale." If Congress had meant to preempt state action in this area it arguably would have used the same terms ("sale or distribution") in 15 U.S.C.A. 1334(b) and would have clearly stated that states cannot interfere with the sale or distribution of tobacco. By not doing so, even though Congress has obviously taken action in this field, states do not appear to be explicitly forbidden from enacting legislation limiting the distribution of tobacco.

This analysis is further supported by the rule of statutory construction that states:

Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

2A C. Sands, Sutherland Statutory Construction 51.05, at 315 (4th ed. 1973) (footnotes omitted), cited in State v. Green, 586 P.2d 595, 602 (Alaska 1978).

House Bill 466 and federal law can be read in harmony with one another. Promotion is a general term, and does not necessarily cover the distribution of an item. Furthermore, even if the two laws did conflict, prohibiting the distribution of tobacco could be found to simply specify in a "more detailed manner" something that is not allowed under the general ambit of "promotion."

Finally, Congress's statement of intent in 15 U.S.C.A. 1331 does not specifically preclude states from limiting distribution of tobacco. Rather, it precludes the states from enacting "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Id. At least three other states have enacted statutes similar to the one proposed by HB 466. As we have noted,

The Hon. Max Gruenberg  
Alaska State Legislature

March 2, 1990  
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although it may be a close issue, we believe the better view is that states are not automatically preempted from enacting a restriction on the free distribution of tobacco.

Sincerely yours,

DOUGLAS B. BAILY  
ATTORNEY GENERAL

By: *Elizabeth J. Kerttula*  
Elizabeth J. Kerttula  
Assistant Attorney General

EJK:jf

# State of Alaska

## Committees

CO-CHAIR, HOUSE JUDICIARY  
VICE-CHAIR, HOUSE LABOR AND COMMERCE  
HOUSE HEALTH, EDUCATION  
AND SOCIAL SERVICES



P.O. BOX V  
JUNEAU, ALASKA 99811  
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465-4968/4986  
(SESSION)  
914 CLAY COURT  
ANCHORAGE, ALASKA 99503  
(907) 276-6844

Representative Max F. Gruenberg, Jr.  
District 11  
Spenard, Upper Midtown Anchorage

April 30, 1990

## MEMORANDUM

TO: Members of the Senate Judiciary Committee  
FROM: Representative Max Gruenberg *Max*  
RE: CSHB 466 (Judiciary), "An Act  
relating to tobacco"

I would very much appreciate your support of HB 466, the anti-tobacco sample bill.

Under the present law it is legal to give adults unsolicited free samples of cigarettes and other tobacco products.

HB 466 prohibits giving away tobacco products in order to promote retail sales except in limited circumstances, such as in tobacco shops or conventions.

Deaths and serious illnesses from tobacco use are some of society's most serious substance abuse problems. This bill discourages tobacco use by prohibiting this type of aggressive marketing.

HB 466 passed the House by a vote of 29 - 4.

Thank you.

POSITION PAPER  
CS HB 466

"An Act relating to tobacco."

BACKGROUND

This bill would prevent tobacco sampling, restrict the availability of tobacco samples, and place limits on methods of distributing tobacco. It defines, as a violation, the distribution of tobacco to any person without charge or at nominal cost for the purpose of promoting retail tobacco sales, with some exceptions involving sales of tobacco to adults, or at promotional conventions and trade shows not open to the public.

ANALYSIS

The following statistical and research data was obtained from two principle sources: a 1989 report of the Surgeon General to Congress, "Reducing the Health Consequences of Smoking, 25 Years of Progress" (SGR), and a report dated February 20, 1990 to Congress by the Center for Disease Control's Office on Smoking and Health, "Smoking and Health, A National Status Report, 2nd Edition" (OSH).

Limiting access to tobacco is an important public health measure for the following reasons:

1. Tobacco use has clearly been shown to cause, or increase the risk of, some of the leading causes of mortality in the United States, including cancer, heart disease and stroke. In fact, smoking causes more premature deaths than cocaine, heroine, alcohol, fire, automobile accidents, homicide, and suicide combined (OSH).
2. Smoking is an especially serious health problem in Alaska, which has the highest rate of both smoking and lung cancer mortality in the country. The OSH report states, based on 1985 data, that while the national smoking prevalence rate is 26.5%, in Alaska the rate for persons over 20 is 43.4% for males, and 28.9% for females. A recent survey of Alaska adolescents' health-related behavior suggests that smoking prevalence in this group may be much higher, particularly in rural areas. The OSH report states

that the direct and indirect costs of smoking-related adverse health effects to Alaska residents is \$82.3 million annually, and that the smoking-attributable years of potential life lost for Alaskans is 4,762 years.

3. Availability and price effect tobacco use, especially with young people. Virtually all adult smokers began using tobacco before age 20. Research indicates that if persons do not begin smoking by age 20 they rarely do so later. Those who begin smoking early in life have more trouble quitting, smoke more heavily, and have a higher risk of developing smoking related disease. Delaying the onset of smoking behavior, by prohibiting sampling, will likely have the effect of reducing both the incidence of new smokers and the prevalence of smoking and the associated adverse health effects.
4. The Surgeon General's report states that retailers are the primary source of tobacco used by minors. Vending machines and free samples are both cited as sources of tobacco for the youngest children, possibly due to refusal by retailers to sell to them directly because of statutory restrictions. Therefore, this bill may be particularly effective in preventing tobacco use by this group, which is arguably the least able to make informed judgements about using tobacco and is at the greatest risk for adverse health effects if they begin using tobacco.

The right of states to restrict tobacco use has a long legal history in the United States, dating to a Supreme Court decision in 1900. In general, the federal government has not restricted the distribution of tobacco, leaving this to the states (SGR). Twelve (12) states and at least 12 municipalities have laws restricting the distribution of samples of tobacco products.

Free sampling of tobacco products is an inappropriately aggressive marketing tactic because tobacco is an extremely harmful and addictive drug.

The likely effect of this bill would be to discourage tobacco use. In particular, it would tend to prevent people

from beginning to smoke, or limit the amount they smoke, by limiting their access to free tobacco samples.

POSITION

The Department of Health and Social Services strongly supports this bill.

Recommended by: *Sally Mead*  
Sally Mead, Coordinator  
Office of Prevention

Date: 3/16/90

Approved by: *Myra M. Munson*  
Myra M. Munson, Commissioner  
Department of Health and  
Social Services

Date: 3/19/90

*Tanana Chiefs Conference, Inc.*

122 First Avenue  
Fairbanks, Alaska 99701-4897  
(907) 452-8251  
Fax (907) 451-8936

March 29, 1990

Representative Ben Grussendorf  
Chairman, Rules Committee  
Alaska State Legislature  
P.O. Box V (MS 3100)  
Juneau AK 99811

Dear Chairman Grussendorf:

Tanana Chiefs Conference, Inc. (TCC) supports HB 466, a bill prohibiting distribution of free tobacco samples.

We are all aware of the health effects of tobacco consumption. There exists a need to restrict free distribution of these products especially to young people. The tobacco industry depends on young people as the new generation of addicts. Studies show 18% to 21% of all high school students are smokers. Teenagers spend over one billion dollars a year on tobacco. It is much more difficult to start smoking as an adult than it is to start as a young teenager.

The tobacco industry aims much of their marketing techniques at the teenager population - it is their guarantee that a steady stream of customers are insured. A large amount of the marketing monies are used to give away free samples. These samples are given away at sporting and music events, events that are often frequented by young people. Distribution of free samples makes it much easier for our youth and others to pick up that cigarette for the first time and smoke.

Tanana Chiefs wants to make it difficult to learn to smoke by supporting legislation that prohibits this activity, that prohibits smoking in educational and health facilities, that increases taxes on tobacco products, and to penalize those entrepreneurs who sell tobacco products to our youth.

COPY

Your Committee is the last Committee to review this bill in the House. Your earliest consideration to scheduling this bill would be much appreciated. Thank you.

Sincerely,

TANANA CHIEFS CONFERENCE, INC.

*Michael Graf*

Michael Graf, Director  
Community Health Services

LAC/de

cc: House Rules Committee Members

## But do their daughters smoke?

WASHINGTON — While you read this column, three Americans will die of smoking-related illnesses. Not surprising, considering that in 1986 the Surgeon General reported, among other horrific things, benzene concentrations in cigarettes up to 2,000 times greater than the amounts that caused Perrier water to be pulled from markets worldwide. What is surprising, and will flabbergast future generations, is that public policy is so flaccid regarding the nation's foremost cause of preventable death.

Policy may become more muscular in the aftermath of an anomalous controversy, one concerning a major corporation's attempts to market in a normal way a legal, indeed subsidized, product. The product is addictive (80 percent of adults using it want to quit; two-thirds have tried and failed), sickening and often lethal when used as it is intended to be used.

Today's subject is cigarettes and the task, not exactly chivalric, is one of protecting "virile females."

According to a company marketing memo, virile females are 18 to 20, have no education beyond high school, work in entry-level service or factory jobs, wear jeans and knit tops, watch "Roseanne," enjoy such events as motorcycle races, tractor pulls, monster truck competitions. Virile females are the market segment targeted by the new brand "Dakota," which may be promoted by Dakota-sponsored "Nights of the Living Hunks" and male strip shows.

Reynolds recently retreated from a plan to test-market a brand, "Uptown," targeted at blacks in inner cities, a group that already smokes much more than whites. (Billboards — advertisements that cannot be turned off or otherwise avoided



*George F. Will is a Pulitzer prize-winning columnist for the Washington Post.*

— hawking cigarettes are concentrated most heavily in inner cities.)

Tobacco companies bring a chilly clarity to the task of coping with a shrinking market. They use sophisticated marketing like a sniper's rifle, drawing beads on the most vulnerable, manipulable Americans. The rate of smoking is two-and-a-half times as high among Americans who have not finished high school as among college graduates.

America pays \$52 billion annually — \$221 per American — in health insurance costs and lost productivity because of tobacco, which every year kills more Americans than World War II did. The toll from tobacco is far higher than from cocaine, crack and heroin, combined. One thousand deaths a day, one every 90 seconds. If an industrial accident killed everyone in the Augusta, Ga., metropolitan area, the nation would be horrified. That is the scale of the annual tobacco disaster.

Last week, Sen. Edward Kennedy chaired a spirited hearing that considered, among other good ideas, Sen. Bill Bradley's proposal to deny tax deductions for tobacco advertising — \$2.5 billion of it annually. The companies, spending \$8.9 million a day on advertising and promotions,

cheekily claim it is all aimed at winning market shares, and none of it is aimed at children.

But about half of all smokers start by the time they are 15; few start after 21. Only 10 percent of smokers switch brands in a year. Death and intelligence cost the cigarette companies 6,000 customers a day. That many new smokers must be found daily to keep the companies running in place.

Cigarette advertising plays upon teenagers' desire for autonomy and anxiety about social acceptance and sexual allure. If just 3 percent of cigarette sales are to underage children, that market segment spends \$1 billion, giving the companies \$150 million in profits.

New smokers are disproportionately women and minorities. Forty years ago, just 3 percent of women with cancer had lung cancer. Now 20 percent do.

You say cigarette advertising is off television? Look again. Cigarette signs are in most of the key television camera sight lines in sports arenas and stadiums. On NBC's 83-minute telecast of the 1989 Marlboro Grand Prix, there were 4,997 images of Marlboro signs, 519 of Marlboro billboards and 249 of the Marlboro car. The brand name was visible 46 of the 83 minutes — 49 percent of the telecast.

Targeted marketing, a common tactic, is now considered disgusting when the targeted group is picked because it is badly educated and informed, and hence manipulable, and the product being marketed is injurious. But senior executives who set the tobacco companies' marketing strategies do not have daughters who fit the "virile female" profile.

One wonders: Do the executives' daughters smoke? If so, are the executives pleased? If so, are they not strange parents?

# AMERICAN LUNG ASSOCIATION of ALASKA

*Dedicated to the prevention and control of lung disease*

DATE: FEBRUARY 27, 1990

TO: MEMBERS OF THE HOUSE JUDICIARY COMMITTEE  
ALASKA STATE LEGISLATURE

FROM: WALTER L. HAYS, EXECUTIVE DIRECTOR   
AMERICAN LUNG ASSOCIATION OF ALASKA

RE: HB 466

I am writing in support of HB 466 currently under review by your committee.

There is an increasing awareness in our society about the health hazards of tobacco use. The National report by former Surgeon General Koop that categorically defines tobacco as an addictive substance, the recent federal bill that bans smoking on 99% of all domestic airlines flights and the recent statements by Health and Welfare Secretary Sullivan regarding the target marketing of tobacco products to specific populations are all indications of the growing public awareness of the issues related to smoking and health.

The prohibition of the distribution of most tobacco samples would be a positive step forward for Alaska. Currently, Minnesota and Utah have enacted such laws. Similar legislation has been introduced in New York and Washington. In 1989, Nebraska banned the distribution of smokeless tobacco products.

Additionally, sixteen (16) major metropolitan areas have laws restricting the distribution of tobacco product samples. These cities include: Austin, Texas; Cambridge, Mass; Cincinnati, Ohio; Atlanta, Georgia; Amherst, Mass; and St. Paul, Minn.

The simple documented fact is that access does impact consumption. We have current report of rural Alaskan communities where 60-70% of older teens are regular smokers.

This act will be a positive step forward for all Alaskans in the regulation of an addictive and potential harmful product and the promotion of better community health.

Gruenberg

Local Address: P.O. Box 1285, Kotzebue, Alaska 99752

# AMERICAN LUNG ASSOCIATION of ALASKA

27 February 1990

*Dedicated to the prevention and control of lung disease*

Representative Max F. Gruenberg, Jr., Co-Chair  
House Judiciary Committee  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Dear Representative Gruenberg:

We have a serious drug problem in Kotzebue that your committee can help us fix. As you may know, tobacco products kill more Americans than all the other recreational drugs combined—nearly 400,000 people die a year from tobacco-related illnesses.

Most Alaskans addicted to nicotine get hooked at an early age, and that is how you can help with your support of HB 141, which would license the sale of tobacco products.

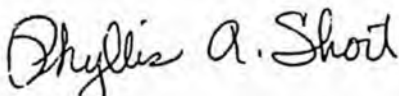
We have a problem in Kotzebue with one store in particular that routinely sells tobacco products to children. While most local store owners are responsible people who do not sell tobacco to children, this one store may be helping to addict a whole new generation of children to nicotine. If that store needed a license to sell tobacco products, the police would have a license to revoke if it broke the law.

We also support HB 466, which deals with the distribution of tobacco products, as well as SB 222 (and its counterpoint in the House), which would further restrict smoking in public places.

Attitudes have changed dramatically about tobacco use in our society in the past few years. Alaska has always been on the forefront of this movement, and your support of this legislation would demonstrate your commitment to the anti-drug campaign in America. Thank you.

Sincerely yours,

  
John Creed, Kotzebue Facilitator  
American Lung Association of Alaska

  
Phyllis Short, Board Member, Kotzebue  
American Lung Association of Alaska

cc: Walter Hays  
Senator Al Adams  
Representative Eileen MacLean