

HB

466

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
(907) 465-4712
465-4968/4986
(SESSION)

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

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

MEMORANDUM

TO: Senator Dick Eliason
Chair, Senate Labor & Commerce

FROM: Representative Max Gruenberg *MFG*

DATE: May 6, 1990

RE: Scheduling CSHB 466 (Judiciary), "An Act relating to tobacco"

I would very much appreciate it if you would waive HB 466, the anti-tobacco sample bill, or schedule the bill for a hearing in the Senate Labor & Commerce Committee as soon as possible.

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.

If you have any questions about the bill, please contact me or my staff attorney, Mark Handley, at 4968.

Thank you.

TOBACCO-FREE AMERICA

Legislative Clearinghouse
1726 M Street, N.W., Suite 902
Washington, D.C. 20036
(202) 452-1184

Angela T. Mickel
Director

John H. Madigan
American Cancer Society

Scott D. Ballin
American Heart Association

Fran Du Melle
American Lung Association

TOBACCO SAMPLING: THERE IS NO FREE LUNCH

APRIL 1990

A Public Policy Project Sponsored by



THE DISTRIBUTION OF TOBACCO PRODUCT SAMPLES:
THERE IS NO FREE LUNCH

OVERVIEW

Cigarette smoking is the number one preventable cause of death and disease in the United States. Scientific studies have proved that there is no known safe human use of tobacco products. Clearly, the way to substantially improve the overall health of this country is to drastically reduce or totally eliminate tobacco consumption. Yet, each year nearly 400,000 Americans die from cigarettes and tobacco-induced disease. To what may this alarming statistic be attributed? A simple answer would be "advertising and promotion."

Cigarettes are this nation's most heavily advertised consumer product. In 1987, the tobacco industry spent approximately \$2.6 billion on advertising and promotion, which includes the free distribution of product samples, to attract new smokers, retain current smokers, and to increase consumption. Advertising experts have testified that advertising and promotional practices used by the tobacco industry are specifically designed to attract and influence the behavior of the most vulnerable group in society: youth.

According to the National Institute on Drug Abuse 60 percent of all new smokers are 14 years of age or younger; 90 percent of all smokers start by age 19; and, very few people begin to smoke after the age of 21. Coupled with the fact that the younger one starts to smoke, the more likely one will:

- remain a smoker;
- smoke more heavily; and,
- die prematurely.

These statistics should not be ignored.

Through the association of tobacco use with youthful vigor, independence, social and athletic success, and with individuals and activities most likely to be admired by young people, tobacco advertising and promotion influences the attitudes of teenagers and their perceptions about cigarette smoking and the use of other tobacco products. Although the tobacco industry denies any purposeful attempt to recruit young users, increased distribution of tobacco product samples at industry-sponsored sports events and rock concerts attended by large numbers of teenagers make such claims untenable.

SAMPLING PRACTICE BECOMES WIDESPREAD

Since the early Seventies, the practice of distributing samples of tobacco products in public places or at public events, commonly referred to as "sampling," has become a vital marketing tool for tobacco manufacturers. The widespread use of sampling was prompted when the federal ban on cigarette advertising through the television and radio mediums, which would serve to greatly reduce the advertising capacity of the tobacco industry, took effect in 1970. Consequently, the tobacco industry was forced to find other ways to promote the sale of its products. In contrast to advertising, which communicates and identifies a product, promotional activities lead directly to consumer action, such as trying or buying the product. Thus, it was only natural for the tobacco industry to step up its promotional activities, and distributing samples of its products became a viable alternative.

Cigarette sampling is not new to our society. During World War II, packages of cigarettes became a staple ingredient in field rations sent to the men fighting in Europe. Soldiers quickly began associating cigarettes with such positive images as relaxation, safety, and home. Unfortunately, they continued smoking cigarettes after they returned to the States.

Today, cigarette manufacturers in the United States spend more money on promotional activities than they do on media advertising. For example, promotional expenditures grew from under 10 percent of their total advertising and promotional expenditures in 1963, to over one-half of total expenditures in 1983, to 66 percent in 1987. Of those totals, sampling expenditures increased from almost \$13 million in 1963 to over \$125 million in 1983. Although that figure decreased to over \$55 million in 1987, it is still way above the 1963 total.

Moreover, tobacco companies do not limit their sampling practices to cigarettes alone. With the increasing prevalence of smokeless tobacco use, especially among children, and the federal law banning the advertising of smokeless tobacco on both television and radio in 1986, sampling of smokeless tobacco products has been exercised on a greater scale.

OBJECTIONS TO SAMPLING RAISED

This explosion of the tobacco industry's use of non-media methods of promotion has alarmed consumer groups, health organizations, such as the American Cancer Society, the American Heart Association, and the American Lung Association, and private citizens. Consequently, the American Cancer Society, the American Heart Association, and the American Lung Association, through a joint venture -- Tobacco-Free America -- support the total elimination of tobacco product sampling. Rather than limit the distribution of tobacco products to those above the legal age, they believe it is more effective to ban the practice

entirely.

Several objections to the sampling of cigarette and smokeless tobacco products are:

- A. Tobacco product giveaways inevitably fall into the hands of minors. The tobacco industry has developed its own "Code of Cigarette Sampling Practices," which details certain standards that are to be observed in order to avoid distributing cigarette samples to under-age children. (Appendix A) According to the code, a distributor is required to ask a person's age and whether or not they are a smoker. Reports of random spot-checking of sampling distribution points have proved that no such restrictions are being observed. Moreover, the tobacco industry claims that its promotional activities are designed to induce existing smokers to switch brands, and not to attract new smokers. Yet, if they were not trying to enlist new smokers, their markets would disappear after one generation. Obviously, this is not the case. The tobacco industry sees children as future customers and acts accordingly.

In addition, minors can easily obtain samples discarded by adults. Although most states, including the District of Columbia, prohibit the sale and furnishing of tobacco products to minors, laws prohibiting the distribution of tobacco product samples to minors would do nothing to limit a child's access to discarded samples. Sampling provides another source for children to obtain tobacco products. The danger of samples getting into the hands of minors is demonstrated in studies that show that each year approximately one million adolescents who smoke even a few cigarettes become regular users.

- B. Persons who are trying to curtail their use of tobacco or who have already "kicked the habit" are confronted with the temptation to try these products. Usually, people will try anything that is free. Even a nonsmoker may attempt to smoke a cigarette, if there is no "risk" (loss of money) associated with smoking that cigarette.

Consequently, the size of the sample plays an important role. Most samples are packaged in smaller quantities in order to keep the cost of the promotion lower. However, tobacco companies are using larger samples (a full pack or even a carton) to increase the period of time in which the product may be sampled. A longer time-span gives consumers the opportunity to modify their preferences and to permanently adopt the use of the product. It also allows for the addictive substances contained in tobacco, primarily nicotine, to take effect. In the long run, it is to the tobacco companies' economic advantage to distribute larger samples when the result is increased sales of their product.

- C. A substantial portion of the public interprets sampling as an official endorsement of the products' use, even a dangerous and addictive substance like tobacco. Public confusion regarding a local government's position on tobacco use may encourage minors to risk trying it. In addition, already-addicted adults are provided with the rationale for not curtailing the use of the substance.
- D. The distribution of tobacco products on sidewalks and street corners and at entrances to sporting and cultural events creates congestion of pedestrian traffic and litter. Traffic tie-ups and littered sidewalks are a nuisance to pedestrians and to taxpayers who must bear the burden of the clean-up costs.

LEGISLATIVE ACTION

Whereas, in the past, significant legislative and regulatory limits were placed on tobacco advertising, attention has now shifted to restricting the promotional activities of tobacco manufacturers. Local governments have taken the lead in curbing the tobacco industry's sampling practices. Since 1979, 16 cities across the country have banned the distribution of cigarette samples. (Appendix B)

With regard to state legislation, the focus has been on limiting the accessibility of tobacco products solely to minors. Forty-four states and the District of Columbia restrict the sale of tobacco products to minors. Six states--Kentucky, Louisiana, Missouri, Montana, New Mexico, and Wyoming--have not yet acted to prohibit the sales of tobacco products to young persons. (Appendix C)

While many limit access of tobacco products to minors by prohibiting sales or furnishing, only 12 states have taken action to restrict the distribution of samples. Minnesota and Utah totally ban the distribution of cigarettes, smokeless tobacco products, cigars, pipe tobacco, or other tobacco products suitable for smoking. Kansas prohibits the distribution of sample cigarettes. Nebraska prohibits the distribution of sample smokeless tobacco products. Georgia, Indiana, Louisiana, Maine, New Hampshire, Oregon, Rhode Island, and Wisconsin ban the distribution of tobacco product samples to minors only. (Appendix B)

PREEMPTION ISSUE ADDRESSED

The question of whether the previous federal laws that banned radio and television advertising of cigarettes and smokeless tobacco products took away the authority of states to outlaw such sampling may be an obstacle that is preventing states from tackling this issue full-force. There are actually three laws that are referred to in the discussion of the preemption

issue for cigarettes: the Federal Cigarette Labeling and Advertising Act (1965), the Public Health Cigarette Smoking Act (1969), and the Little Cigar Act (1973). In short, the federal preemption pertains only to state regulations based on "smoking and health." It is limited entirely to state requirements or prohibitions in the advertising of cigarettes, and does not apply to:

- a) purely intrastate commerce;
- b) proper exercise by states of police and other powers in the interest of public health and safety; and,
- c) topics other than smoking or health.

Thus, states still retain the authority to restrict cigarette sampling when the legislative intent is to facilitate enforcement of existing laws that prohibit the sale and furnishing of tobacco products to minors and to control commercial activity on the public right-of-way.

With regard to smokeless tobacco, the Smokeless Tobacco Education Act (1986) clearly does not prohibit states from outlawing smokeless tobacco sampling in public areas. Under the Smokeless Tobacco Education Act, states were also given the authority to regulate how smokeless tobacco is advertised.

While representatives of the tobacco industry argue that any ban on the distribution of cigarette and other tobacco product samples, or "sampling," by state or local governments is preempted by federal law, a careful reading of the applicable laws and legal principles leads to the conclusion that the enactment of such a ban is permissible and is not preempted by federal law. (Appendix D)

CONCLUSION

Although the tobacco industry argues otherwise, states indeed have the legal authority to ban sampling. It has become a question of whether states have the political desire to regulate the tobacco industry in this manner. Enactment of such legislation would lead to more effective enforcement of already existing laws designed to prevent minors' access to a deadly product. It would also shield the public from the insidious practices of the tobacco industry. Given that the costs associated with tobacco use in the United States are estimated at nearly \$65 billion annually, including health care expenditures and loss productivity, the tobacco industry's promotional strategies of giving away samples lends credence to the old economic adage that "there is no such thing as a free lunch."

REFERENCES

- American Cancer Society, "Briefing Book: 100th Congress, 1st Session--1987," Public Affairs, Public Issues, 1987.
- American Lung Association, "Countering Tobacco Tactics, Briefing Paper #1, Cigarette Sampling (The Distribution of Free Cigarette Samples)," October 1985.
- Daynard, R.A., "Draft Report: Case Study of Successful Community Efforts to Ban Cigarette Sampling," A Report to the Office of Smoking and Health for presentation to the Interagency Committee on Smoking and Health, May 15, 1986.
- Garner, D.W., "Tobacco Sampling, Public Policy, and the Law," A paper presented to the Interagency Committee on Smoking and Health, June 4, 1986.
- Kirkwood, J.L., Comments before the Interagency Committee on Smoking and Health, June 4, 1986.
- Minnesota Statutes 1986, section 325F.77, subdivision 3 and amended subdivision 4 (1987).
- Popper, E.T., "Sampling and Couponing Promotional Activity in the Domestic Cigarette Market," A Report to the Office of Smoking and Health for presentation to the Interagency Committee on Smoking and Health, May 15, 1986.
- Tobacco-Free America, Legislative Clearinghouse, State Legislated Actions on Tobacco Issues, October 1989.
- U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Institute on Drug Abuse, Drug Use Among American High School Students, College Students, and Other Young Adults, 1987.
- U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health, Smoking and Health: A National Status Report. A Report to Congress, 1990.



The Tobacco Institute
Suite 800
1875 I Street, N.W.
Washington, D.C. 20006
(202) 457-4800

STATEMENT OF PURPOSE

Cigarette sampling is a form of cigarette advertising conducted through the free distribution of sample packages of cigarettes directly to adult smokers. The purpose of this Code is to ensure that certain standards are observed in connection with cigarette sampling, particularly avoiding the distribution of cigarettes to minors and the disruption of pedestrian or vehicular traffic, and to provide a means whereby compliance with those standards can be monitored and enforced.

Code of Cigarette Sampling Practices

ARTICLE I

DEFINITIONS

1. "Sampling" means giving or distributing without charge packages of cigarettes in a public place for commercial advertising purposes ("cigarette samples"), but does not include isolated offerings of complimentary packages or the distribution of such packages to wholesale or retail customers or to company shareholders or employees in the normal course of business.
2. "Public place" includes any street, sidewalk, park, plaza, public mall, and the public areas of shopping centers and office buildings.

ARTICLE II

RESTRICTIONS ON CIGARETTE SAMPLING

1. Persons who engage in sampling shall refuse to give a sample to any person whom they know to be under 21 years of age or who, without reasonable identification to the contrary, appears to be less than 21 years of age.
2. Sampling shall not be conducted in any public place within two blocks of any centers of youth activities, such as playgrounds, schools, college campuses, or fraternity or sorority houses.
3. The mails shall not be used to distribute unsolicited cigarette samples.
4. Persons who engage in sampling shall not urge any adult 21 years of age or over to accept a sample if the adult declines or refuses to accept such sample.
5. No cigarette samples shall be distributed by a sampler in a public place to any person in a vehicle.
6. Persons distributing cigarette samples shall secure their stocks of samples in safe locations to avoid inadvertent distribution of samples contrary to the provisions of this Article.
7. Persons distributing cigarette samples shall avoid blocking or otherwise significantly impairing the flow of pedestrian traffic.
8. In the event that circumstances arise at a particular location that make it unlikely that sampling can be conducted in a manner consistent with the provisions of this Article, sampling shall be stopped at that location until such circumstances abate.
9. Persons distributing samples shall promptly dispose of empty sample boxes and shall take reasonable steps to ensure that no litter remains in the immediate area of sampling as a result of sampling activities.

ARTICLE III

COMPLIANCE AND ENFORCEMENT PROVISIONS

1. Each cigarette manufacturer that subscribes to this Code shall impose by contract on all independent contractors who conduct cigarette sampling on the manufacturer's behalf a set of sampling standards no less stringent than those contained in this Code. In addition, each cigarette manufacturer shall require such sampling contractors to inform all personnel employed by the contractor who engage in sampling activities of the provisions of this Code, both orally and in writing.
2. Persons who engage in sampling shall be monitored on a periodic basis by supervisory personnel of the cigarette manufacturer and/or independent contractor for whom the sampling activities are being conducted to ensure compliance with the provisions of this Code.
3. Each cigarette manufacturer that subscribes to this Code shall take all reasonable steps to ensure that any person who engages in sampling and knowingly violates any of the provisions of Article II of this Code shall be discharged from employment as a cigarette sampler.

APPENDIX B

RESTRICTIONS ON DISTRIBUTION OF TOBACCO PRODUCT SAMPLES

STATES WITH LAWS RESTRICTING (13):

MINNESOTA (1986, 1987) -- TOTAL BAN
UTAH (1983, 1986, 1989) -- TOTAL BAN

GEORGIA (1987) -- MINORS ONLY
ILLINOIS (1988) -- MINORS ONLY
INDIANA (1987) -- MINORS ONLY
KANSAS (1984) -- BAN APPLIES TO CIGARETTES AND
MINORS ONLY
LOUISIANA (1988) -- MINORS ONLY
MAINE (1983) -- MINORS ONLY
NEW HAMPSHIRE (1987) -- MINORS ONLY
OREGON (1989) -- MINORS ONLY
RHODE ISLAND (1988) -- MINORS ONLY
WISCONSIN (1989) -- MINORS ONLY

NEBRASKA (1989) -- SMOKELESS TOBACCO PRODUCTS ONLY

CITIES WITH ORDINANCES PROHIBITING (16)

ALBERT LEA, MN (1986)
AMHERST, MA (1987)
ATLANTA, GA (1986)
AUSTIN, TX (1988)
BOSTON, MA (1984)
BOWIE, MD (1986)
CAMBRIDGE, MA (1982)
CINCINNATI, OH (1988)
LEOMINSTER (1990)
MINNEAPOLIS, MN (1979)
NEW BEDFORD, MA (1989)
NEW ORLEANS, LA (1988) -- MINORS ONLY
NEWTON, MA (1982)
ST. PAUL, MN (1979)
SOMERVILLE, MA (1983)
WEYMOUTH, MA (1989)
WORCESTER, MA (1984)

APRIL

APPENDIX C

STATE AGE RESTRICTIONS
FOR SALES OF TOBACCO PRODUCTS

STATE	MINIMUM AGE FOR:		STATE	MINIMUM AGE FOR:	
	CIGARETTES	SMOKELESS		CIGARETTES	SMOKELESS
AL	19	19	MO	--	--
AK	19	19	MT	--	--
AZ	18	18	NE	18	18
AR	18	18	NV	18	18
CA	18	18	NH	18	18
CO	18	18	NJ	18	18
CT	18	18	NM	--	--
DE	17	17	NY	18	18
DC	16	16	NC	17	17
FL	18	18	ND	18	18
GA	17	17	OH	18	18
HI	18	18	OK	18	18
ID	18	18	OR	18	18
IL	18	18	PA	16	16
IN	18	18	RI	18	18
IA	18	18	SC	18	18
KS	18	18	SD	18*	18
KY	--	--	TN	18	18
LA	--	--	TX	18**	18**
ME	18*	18*	UT	19	19
MD	18*	18	VT	17	17
MA	18	18	VA	16	16
MI	18	18	WA	18	18
MN	18	18	WV	18	18
MS	18	18	WI	18*	18*
			WY	--	--

-- No statewide age limit

* Effective July 1, 1989

** Effective September 1, 1989

SOURCES:

State departments of health, 1989.

"Tobacco-Free America State Component Survey," data received from state offices of the American Cancer Society, American Heart Association, and the American Lung Association, September 1988.

APRIL

APPENDIX D

ARE STATE AND LOCAL GOVERNMENTS PREEMPTED
FROM BANNING THE FREE DISTRIBUTION OR
SAMPLING OF TOBACCO PRODUCTS?

1. What are the federal laws that must be examined to determine whether a state or local government may lawfully ban the free distribution or sampling of tobacco products?

There are only two federal laws that address these issues. They are the Federal Cigarette Labeling and Advertising Act, as amended by the Comprehensive Smoking Education Act of 1984, 15 U.S.C. Sections 1331-1340, and the Comprehensive Smokeless Tobacco Education Act of 1986, 15 U.S.C. Sections 4401-4406.

The text of the relevant provisions of these acts is as follows:

The Federal Cigarette Labeling and Advertising Act: 15 U.S.C. Section 1334

- (a) No statement relating to smoking and health, other than the statement required by Section 1331 of the Title, shall be required on any cigarette package.
- (b) 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 the packages of which are labeled in conformity with the provisions of this Chapter.

The Comprehensive Smokeless Tobacco Education Act: 15 U.S.C. Section 4406

- (b) No statement relating to the use of smokeless tobacco products and health, other than the statement required by Section 4402 of this Title, shall be required by any state or local statute or regulation to be included on any package or in any advertisement (unless the advertisement is an outdoor billboard advertisement) of a smokeless tobacco product.

2. Why doesn't the Federal Cigarette Labeling and Advertising Act prohibit a state or local government from banning the free distribution of cigarette products?

There are three sound reasons why the Federal statute does not preempt state or local action in this area. They are:

- A. A ban on free sampling is a restriction on the distribution, not the promotion of cigarettes. While the Federal Cigarette Labeling and Advertising Act preempts efforts to restrict "the promotion" of cigarettes, it does not preempt state or local efforts to limit or restrict the "distribution" of cigarettes.

A state or local government remains free to restrict when and where and to whom cigarettes may be sold. A ban on the free sampling or free distribution of cigarettes is a restriction on the "distribution" of cigarettes, not on the "promotion" of cigarettes. This conclusion is confirmed by Section 1332 of the Act, which defines the terms "sale or distribution" as including "sampling or other distribution not for sale." Thus, just as a state or local government remains free to restrict the sale of cigarettes to minors or to prohibit the sale of cigarettes in schools or other facilities populated largely by minors, a state or local government remains free to limit the "distribution" of cigarettes by banning their free distribution and sampling.

- B. A ban on free sampling is consistent with the goals and purposes of the Federal Act. The preemption provision in the Federal Cigarette Labeling and Advertising Act must be examined in the context of the declared Congressional policy and purpose of the Act. The preemption provision was enacted to insure that state and local governments did not take actions which were inconsistent with the purposes of the Act.

15 U.S.C. Section 1331 states that Congress had two goals in the enactment of the Federal Cigarette Labeling and Advertising Act. First, Congress wished to inform the public about the hazards of cigarettes. Second, Congress did not want to unnecessarily impede the cigarette manufacturer's ability to sell cigarettes "by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. Section 1331(2).

A ban on the free sampling and free distribution of cigarette products is not inconsistent with the policy and purposes of the Federal Cigarette Labeling and Advertising Act, nor does it set up conflicting and confusing requirements that will otherwise impede the ability of cigarette manufacturers to market their products. The preemption provision was enacted to prohibit state and local restrictions on advertising and promotion that would make it difficult or impossible for a manufacturer to conduct a national advertising and promotional campaign. A ban on the free distribution of cigarette products within a particular jurisdiction does not conflict with this goal.

C. A ban on free sampling may be enacted for reasons other than smoking and health. Even if the federal statute is considered to preempt an effort to ban the free sampling of cigarettes when such a prohibition is "based on smoking and health" considerations, a state and local government is free to enact such a ban if it does so to avoid congestion on its streets, to control or reduce litter, to protect pedestrians from annoyance and invasion of their privacy, or to avoid facilitating the availability of cigarettes and other tobacco products to minors. The preemption provision is limited to laws enacted based on "smoking and health" considerations only.

3. Does the Federal Cigarette Labeling and Advertising Act provision that says "No Requirement or Prohibition Based on Smoking or Health Shall be Imposed Under State Law with Respect to the Advertising and Promotion" of cigarettes preempt a state or local government from banning the free distribution of cigarettes?

Probably not. The tobacco industry argues that a ban on the free distribution of cigarettes amounts to a prohibition on its promotional efforts and, therefore, is preempted by the federal statute. No court has explicitly addressed this issue yet. Nonetheless, there are sound reasons for concluding that the Federal Cigarette Labeling and Advertising Act does not preempt a state or local government from banning the free distribution, or sampling, of cigarettes.

4. Does the Comprehensive Smokeless Tobacco Health Education Act of 1986 preempt state or local governments from banning the free distribution, or sampling, of smokeless tobacco products?

No. The preemption provision in the Smokeless Tobacco Act is careful and narrowly limited. It only prevents a state or local government from enacting a statute that requires a different warning label required by the federal statute. State and local governments remain free otherwise to limit or restrict the advertisement of these products and to limit or prohibit any promotional efforts for smokeless tobacco products that take place within their jurisdiction.

Compiled by the Coalition on Smoking or Health, a public policy project supported by the American Cancer Society, the American Heart Association, and the American Lung Association, Washington, D.C.