Legal Update

The Retrospective Issue

The year 2014 opened with the release of the 50th anniversary Surgeon General’s Report on smoking and health, and renewed focus on the devastating and seemingly unending health impact of tobacco products. This comprehensive report, subtitled “50 Years of Progress,” noted many of the historic milestones in tobacco control that have led to the decline in smoking among U.S. adults over the last half century. These milestones include laws requiring warning labels on cigarette packages, removing...

Memorable Moments

We asked several attorneys at the Consortium’s affiliated legal resource centers to share a few memorable moments in tobacco control law and policy that stand out in their minds. Their thoughtful and clever contributions offer insights on the challenges faced by the tobacco control community over the last few decades, as well as its many impressive accomplishments.

“I had been working on tobacco regulation issues for about ten years when the County Council for Prince George’s County, Maryland, asked for my assistance on a bill that would impose a minimum pack size on cigars. If passed, the law would be the first of its kind in the U.S. While anxiously waiting for the bill to be called, I was chatting with my good friend, Ron Salisbury, also known as Captain Tobacco. Ron was the enforcement agent for the County on the youth...
Memorable Moments

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sales, product placement and single cigarette laws. A young man was standing near Ron and me and joined our conversation about in-laws (I’ll leave it at that). Eventually we introduced ourselves. When I told the young man who I was and started to say why I was there, he cut me off and said he knew quite well why I was there and he was stunned to have bumped into the infamous Kathleen Hoke Dachille. I looked at him quizzically until he told me that he was with Philip Morris and that my name had come up in a few company meetings. He joked that, perhaps, tobacco company executives preferred their in-laws over me! We got quite the laugh out of that but I was secretly flattered to have been enough trouble to have registered on the radar screen at the largest cigarette manufacturer in the country.

“And for the Paul Harvey ‘rest of the story’.... The bill passed but was ultimately struck down by the Maryland Court of Appeals as preempted by state law. But local cigar packaging laws have been passed in municipalities across the country and we expect that to continue. So while the Prince George’s County bill may have died, it lives on in the movement toward better regulation of cigars.”

“At ChangeLab Solutions, we are proud to be a part of the California tobacco control movement, which has advanced innovation in tobacco control law and policy. During the past several decades, we have seen cutting-edge policy interventions take root in our cities and counties, and have watched them spread throughout the state. Across California, at least 57 local California jurisdictions cigarette ads on TV and radio, and prohibiting smoking in public areas and work sites, as well as landmark litigation against the tobacco industry.

Today, thanks to many of these laws, lawsuits, and other evidence-based policy measures, 20 percent of U.S. adults smoke, compared to the roughly 50 percent of U.S. men and 40 percent of U.S. women who smoked in 1964. We still have a long way to go, and the battle is far from over, with new tobacco products continuing to challenge us, but if “the epidemic of smoking-caused disease in the twentieth century ranks among the greatest public health catastrophes of the century,” then “the decline of smoking consequent to tobacco control is surely one of public health’s greatest successes.”

The Retrospective Issue

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This Legal Update looks back at tobacco control accomplishments since 1964, the year the first Surgeon General’s Report on Smoking and Health was released. We feature reflections on memorable moments in tobacco control law and policy from Consortium attorneys in several legal resource centers, review a few major legal challenges over the last decade, and salute a committed public health champion who has played a pivotal role in U.S. tobacco control legislation — Congressman Henry Waxman. We also include information about new tobacco product challenges and regulatory opportunities.
have closed loopholes in the California Smoke Free Workplaces Act to make their workplaces smokefree; 141 localities have adopted tobacco retailer licensing laws; and 91 jurisdictions have laws restricting the sale or use of electronic smoking devices. The collective impact of this local movement is enormous. In the last three decades, California smoking rates have plummeted from 25.9 percent in 1984 to 12.7 percent in 2012.

“Although we are immensely proud of the policy successes we’ve been a part of in tobacco control, one of our greatest accomplishments has been sharing the lessons we’ve learned and applying tobacco control strategies to influence other public health initiatives. For example, the tobacco control movement has found that tobacco use declines when prices increase, when not smoking becomes the norm, and when the tobacco retail environment is regulated. The healthy eating and active living movement is taking these strategies and adapting them to fight the obesity epidemic in America. They are exploring how tax strategies can be used to reduce the impact of sugary drinks, how community design can be improved so that physical activity becomes the norm, and how tobacco retailer licensing can be retooled to fit a healthy food retail initiative. In this way, the impact of our work has been extended to create healthier communities for everyone.”

“Reflecting back on the process of enactment of Minnesota’s smoke-free workplace law, several memories stand out. First and foremost is the extraordinary dedication and skill of local advocates who went to the mat time and time again to shore up local support and help enact strong local ordinances. Those ordinances increased the mounting pressure on state legislators to move with due haste to amend the Minnesota Clean Indoor Air Act. Between 2000 and 2007, at least six counties and ten cities adopted ordinances that paved the way for the enactment of the Freedom to Breathe Act of 2007. When the state’s largest city, Minneapolis, voted to adopt a smoke-free workplace ordinance in 2005, the sense of victory in the corridors of City Hall was palpable — it telegraphed that enactment of a statewide law was no longer a matter of if but when — and signaled that the time was drawing near. Also memorable was the impressive cohesiveness of our state’s tobacco control coalition, which brought together public health advocates, labor unions, and many others to fight with a unified voice for a strong statewide law that would preserve the ability of local governments to enact stronger prohibitions.

“During the throes of the 2007 legislative session, when the bill language was debated, advocates slogged (tirelessly!) through 15 committees, 4 floor sessions, and 109 amendments, doggedly advocating for the best possible language. Seven years later, Minnesotans stand firm in their support for smoke-free workplaces — a 2014 poll conducted by Blue Cross and Blue Shield of Minnesota found that 87 percent of Minnesotans support the law, an increase from 77 percent in 2008.”
Enforcing MSA section III prohibitions
On marketing and promotion under
certain conditions.
These include restrictions on targeting youth,
Resulting in limits on appealing to kids’
sweet tooth.
Magazine ads had been indiscriminate.¹
So common that placement wasn’t
questioned yet.
Campaigns featured cartoons and bright
pink “bling,”²
Along with giveaways of beats³ to which youth
especially like to sing.
We have seen new products emerge,
And then observed use snooze,⁴ not surge.
These products didn’t stick — they didn’t strip
or orbit⁵ the field;
Instead, cigarettes’ dominance remained sealed.
With deliveries of online sales largely sacked
(Due to state compacts and federal PACT Act),
There are fewer cheap products accessible for use
And in turn fewer youth these products reach
and seduce.

1 In 2006 R.J. Reynolds and 41 states entered a settlement agreement
restricting the naming and marketing of flavored cigarette brand styles.
Specifically,
• Existing Camel, Kool, and Salem flavored brand styles banned;
• Any future flavored cigarettes subject to restrictions;
  - Name may not be candy, a fruit or an alcoholic beverage, and may
  not include any of a number of specified terms that evoke imagery of
  candy, fruit or alcoholic beverages;
• Marketing of such cigarettes must also avoid such references and
  imagery
Investigation and settlement efforts were led by the New York and Illinois
Attorney General Offices.
2 Tobacco companies were marketing in magazines with high rates of youth
readership. R.J. Reynolds is subject to limitations imposed by the California
judgment, as well as a settlement agreement reached in late 2004. Philip
Morris USA, Brown & Williamson, Lorillard had previously agreed to limits.
US Smokeless Tobacco Company announced new limits immediately after
the California decision. Companies also agreed to use of selective binding
for classroom and school library editions of major newsmagazines.
3 As part of promotional campaign for then-new R.J. Reynolds brand
style “Camel No. 9.”
4 R. J. Reynolds music centered promotional campaign for its “Kool”
brand cigarettes; R. J. Reynolds music centered promotional campaign,
“The Farm,” for its “Camel” brand cigarettes.
5 Alluding to snus — all brands.
6 Alluding to R.J. Reynolds “sticks, strips and orbs” and dissolvable
products by other manufacturers.
Over the last eleven years, the Tobacco Control Legal Consortium has filed and joined almost forty “friend of the court” (amicus curiae) briefs in tobacco-related cases of national significance. We have filed these briefs at state appellate courts, as well as the U.S. Courts of Appeals, U.S. District Courts, and the U.S. Supreme Court. Dozens of national and local public health partners have signed on to these briefs. Here is a brief snapshot of a few key amicus briefs we’ve filed over the years and the outcome of these cases.


**ISSUES:** Whether several major tobacco companies violated the Racketeer Influenced and Corrupt Organizations Act by engaging in a conspiracy to defraud the public about the health risks of smoking and to market tobacco products to children (2005). Whether the court’s ordered remedies were unconstitutional. (2007)

**SIGNIFICANCE:** In 1999, the United States Department of Justice (DOJ) sued several major tobacco companies for fraudulent and unlawful conduct and reimbursement of tobacco-related medical expenses. The District Court dismissed the DOJ’s claim for reimbursement, but allowed the DOJ to bring its claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), on the ground that the tobacco companies had engaged in a decades-long conspiracy to mislead the public about the health risks of smoking. The court granted health group organizations permission to intervene in the lawsuit so they could be heard on the issue of what remedies the court should order.

In 2005, the Consortium filed an amicus brief, joined by eighteen medical and public health organizations, recommending proposed remedies relating to document disclosure, prohibited practices, and corrective communications. On August 17, 2006, Judge Gladys Kessler of the U.S. District Court for the District of Columbia, issued a landmark 1,683 page opinion holding the tobacco companies liable for violating RICO by fraudulently covering up the health risks associated with smoking and for marketing their products to children.

The tobacco companies appealed. In 2007, the Consortium filed a second amicus brief, addressing the tobacco industry’s claim that the First Amendment insulated it from the District Court’s findings of fraud and imposed remedies. The Consortium’s brief argued that because the industry’s commercial speech was false, misleading, and deceptive, it was not constitutionally protected. Our brief was written by Professor David Vladeck, Georgetown University Law Center, and joined by six medical, public health and consumer organizations. In 2009, the U.S. Court of Appeals for the D.C. Circuit upheld Judge Kessler’s finding of liability and almost all of the imposed remedies, pointing out that the First Amendment did not protect the tobacco industry from liability that rested on deliberate deceits perpetrated with knowledge of their falsity.

**OUTCOME:** The decision in U.S. v. Philip Morris (often referred to as the “DOJ case”) was a seminal event in the history of tobacco control and resulted in findings about the tobacco companies and their practices that policymakers, health advocates and the public can use today to advance tobacco control and counter tobacco industry opposition. For more information about this case, read the Consortium’s compilation of select quotes from the opinion, *The Verdict is In: Findings from United States v. Philip Morris* and a brief overview of the case and resulting remedies, *Everything You Ever Wanted to Know about U.S. v. Philip Morris but Were Afraid to Ask*, and visit our [website](#) for other related resources.

**Altria Group, Inc. et al. v. Good et al. (2008)**

**ISSUE:** Whether tobacco companies can be sued under state law for deceptive advertising of “light” cigarettes or whether federal law prohibits such lawsuits.

**SIGNIFICANCE:** This important case focused on whether consumers could sue the tobacco industry for any form of fraudulent misrepresentation and deceptive marketing, or whether federal law preempted state lawsuits and allowed manufacturers to escape legal accountability. In 2008, the Consortium filed an amicus brief at the U.S. Supreme Court, supporting the plaintiff Stephanie Good and arguing

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Podcast: “The Minnesota Lawsuit: The Gift that Keeps on Giving”

Doug Blanke, Director of the Tobacco Control Legal Consortium and former Assistant Attorney General of the State of Minnesota, played a key role in the historic Minnesota litigation that resulted in the release of thirty-five million pages of secret tobacco industry documents, showing how tobacco companies targeted children in their marketing, hid data on the dangers of smoking, and misled the American public about their products. 

» Listen to the podcast.

The Way Things Were / CDC

A keystone accomplishment of the tobacco control movement over the past 50 years has been the significant decline in the social acceptability of smoking. This U.S. Centers for Disease Control and Prevention video explores the importance of social norm change as a primary strategy for improving public health by reducing smoking rates.

» Watch the video.

» Find a ready-to-use slide presentation for informing general audiences of key findings from the report, The Health Consequences of Smoking — 50 Years of Progress: Key Findings.

Changing Social Norms of Smoking

Madeleine Solomon of Emory University and the Tobacco Technical Assistance Consortium, examines the social and policy changes that have affected tobacco use by reducing acceptability of smoking.

» Watch the video.


 Archived recording and slides of a Consortium-sponsored webinar featuring Brian King, Senior Scientific Advisor for Epidemiology, Office of Smoking and Health, U.S. Centers for Disease Control and Prevention; Sharon Eubanks, J.D. (prosecuting attorney in the 1999 U.S. Department of Justice case against the tobacco industry); Michael Tynan, Policy Officer, Oregon Health Authority, Public Health Division; and Maggie Mahoney, Deputy Director, Tobacco Control Legal Consortium.

» Access the webinar recording and slides.

Tobacco in the Courts

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that based on legal precedent, there was no merit to the tobacco company’s radical claim that the Federal Cigarette Labeling and Advertising Act shields cigarette companies from being held liable for fraud under state law. Our brief was written by Professor David Vladeck, Georgetown University Law Center.

OUTCOME: In 2008, the U.S. Supreme Court held that state law fraud claims relating to cigarette packaging and marketing are not preempted by federal law. (Writing for the majority, Justice John Stevens cites the Consortium’s amicus brief three times.) This significant ruling allowed other “light” cigarette fraud cases to be brought without risk of being preempted by federal law.

Roark & Hardee v. City of Austin (2008)

ISSUE: Whether implementation language in a local smoke-free ordinance was unconstitutionally vague.

SIGNIFICANCE: Several bars challenged Austin, Texas’s smoke-free ordinance, claiming that the language requiring operators of public places to take “necessary steps” to prevent smoking on their premises, was unconstitutionally vague. In 2007, the Consortium filed an amicus brief supporting the City of Austin, arguing that the ordinance provided adequate notice of the actions it required operators of public places to take. Our brief, written by Cliff Douglas, University of Michigan Tobacco Research Network, was joined by five other national public health organizations.

OUTCOME: In 2008, the U.S. Court of Appeals for the Fifth Circuit upheld Austin’s smoke-free ordinance, pointing out that “from this evidence, we find it apparent that, most of the time, the only ‘steps’ taken were in trying to find
Tobacco in the Courts

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Philip Morris USA v. City and County of San Francisco (2009)

ISSUE: Whether a city and county ordinance prohibiting the sale of tobacco products in stand-alone pharmacies violated the First Amendment.

SIGNIFICANCE: In 2008, San Francisco passed a first-in-the-nation ordinance prohibiting tobacco sales in the city’s nearly 60 drug stores, including large pharmacy chains, but not yet (at that time) in supermarkets and big-box retailers with pharmacies. Philip Morris argued that the ordinance violated its freedom of speech by limiting its ability to communicate with customers. In 2009, the Consortium filed an amicus brief in support of the City and County of San Francisco, arguing that the ordinance was well within San Francisco’s police power and was not a restriction on freedom of speech guaranteed by the First Amendment. The brief was joined by nineteen parties, including national medical, public health and pharmaceutical organizations, as well as California health organizations.

OUTCOME: In 2009, the Ninth U.S. Circuit Court of Appeals unanimously upheld the city’s ordinance. San Francisco’s ordinance was the first of many similar policies across the U.S. that prohibited the sale of tobacco products in pharmacies.


ISSUE: What standard of First Amendment review applies when the government requires companies to disclose factual information for the public interest?

SIGNIFICANCE: This case was brought by the meat industry to challenge a federal regulation requiring county-of-origin labeling on meat products offered for sale in the U.S. It focuses on whether mandatory disclosures of information — which play a key role in federal, state, and local regulations protecting public health and safety, as well as in the consumer protection arena — can be required to arm consumers with information or whether the government must show that the disclosures are necessary to prevent consumer deception. At risk are important regulations such as tobacco product graphic warning label requirements, nutritional labeling, and other disclosures of factual information for public health/consumer protection educational purposes. Our amicus brief, written by Public Good Law Center, was joined by fifteen public health, environmental and consumer protection organizations, and filed in the D.C. Circuit in March 2014.

OUTCOME: The case is currently under review by the Court of Appeals for the D.C. Circuit sitting en banc.
Q “With all the success of the tobacco control movement over the past fifty years, what do you see as one of the key issues in tobacco control today?”

While this Update is rightfully focused on the history and many incredible successes of the tobacco control movement over the past five decades, we can’t lose sight of the challenges that lie ahead. Currently, no issue is in the news or on the minds of tobacco control advocates more than electronic cigarettes. Introduced only a decade ago, e-cigarettes have quickly morphed from a niche market to a multi-billion dollar global industry that is continuing to grow and diversify at a pace no one could have imagined a few years ago.

You probably know that over the past couple of years, major tobacco companies have become key players in the e-cigarette market. As a result, we’re now seeing e-cigarette advertising strategies that mirror the cigarette marketing of days gone by: iconic images of freedom and rugged individualism, celebrity sex symbols and overall coolness, combined with products that come in whimsical flavors that appeal to kids. All of this masks the very real dangers of nicotine addiction and other potential health effects. It’s déjà vu all over again, but this time, absent any meaningful oversight.

Since 2010, when the U.S. Court of Appeals issued its opinion in Sottera, Inc. v. Food & Drug Administration, which held that the FDA had the authority to regulate e-cigarettes as tobacco products under the Tobacco Control Act, we have been waiting for some federal action on this issue. During this time, kids in many states have been able to legally purchase and use e-cigarettes to inhale cotton candy and bubble gum-flavored nicotine, while advertisements for the products have become increasingly ubiquitous on television, radio and billboards. Also, since no manufacturing standards are in place for e-cigarettes and no ingredient disclosure is required, we don’t really know what type of chemicals users are inhaling.

Finally, after more than three years, the U.S. Food and Drug Administration issued its proposed deeming regulation in April 2014, which would provide additional rules for a number of products, including e-cigarettes. If enacted as proposed, which is no guarantee, the regulation would eventually address some existing gaps by prohibiting the sale of e-cigarettes with nicotine to minors, for example, and by requiring the disclosure of e-cigarette ingredients. The regulation would not, however, address some other key issues such as prohibiting the sale of flavored e-cigarette products or restricting the marketing of e-cigarettes. Also, keep in mind that, even in the best case, the new regulation is unlikely to take effect for several years. Therefore, while it’s certainly a step in the right direction, it’s important to remember that it is just a first step.
As a result of the regulatory wasteland over the past few years, many state and local governments took the initiative to introduce bills to regulate e-cigarettes. Many of these laws focus on the most pressing issues, such as youth access, without attempting to provide more comprehensive regulation. Unfortunately, many other jurisdictions decided to wait until the FDA took action before implementing any regulations. The proposed deeming regulation provides some insight into the FDA’s focus and, perhaps more importantly, identifies areas that are unlikely to be regulated at the federal level in the near future. In addition, the time lag between proposal and implementation of a regulation illustrates how important it is for state and local governments to take proactive steps to comprehensively regulate e-cigarettes in a way that best meets their own jurisdiction’s public health needs and goals.

At the Tobacco Control Legal Consortium, we’ve reviewed and provided legal technical assistance for a wide variety of proposed e-cigarette laws in more than thirty-five states and U.S. territories. We’ve also drafted several publications and sponsored webinars on the regulation of e-cigarettes, all of which are available on our website. We’re constantly updating these resources to keep up with this ever-changing industry. Please stop by our website at www.publichealthlawcenter.org for the latest information on the regulatory landscape of e-cigarettes and similar devices.

Remember, the first fifty years is only the beginning.

**Ask A Lawyer**
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Remember, the first fifty years is only the beginning.

**U.S. Tobacco Control from a Global Perspective**

Action on Smoking and Health (ASH) has just released *A Half Century of Avoidable Death: A Global Perspective on Tobacco Control in America*, which reflects on the progress made in tobacco control over the last half century and challenges that remain — but through a global lens. The publication points out the extent to which the United States has been leapfrogged by many other countries in fighting the tobacco epidemic, and reminds us of the value of looking to the global community for new ways to address tobacco.

» Read *A Half Century of Avoidable Death: A Global Perspective on Tobacco Control in America*. 

“...we’re now seeing e-cigarette advertising strategies [with] iconic images of freedom and rugged individualism, celebrity sex symbols and overall coolness, combined with products that come in whimsical flavors that appeal to kids.... it’s déjà vu all over again, but this time, absent any meaningful oversight.” — Mark Meaney
Profiles in Public Health Law

This Legal Update feature showcases individuals and organizations with distinguished records of accomplishments in public health law and policy. In this issue, we salute a remarkable leader in tobacco control — Congressman Henry Waxman.

Henry Waxman: Saluting an Incomparable Tobacco Control Leader

Over the past fifty years of tobacco control legislation, the impact of one lawmaker in particular stands out. Today we’re delighted to salute the many legislative accomplishments in public health of a Congressional legend, Henry Arnold Waxman, the U.S. representative for California’s 33rd congressional district since 1975.

Rep. Waxman, who plans to retire at the end of session this year, has played critical roles in passing a raft of landmark laws that advance consumer rights, public health and the environment. For example, he was the driving force behind legislation that made infant formula safer and more nutritious (1980), brought low-priced generic drugs to market (1984), cleaned the air (1990), provided services and medical care to people with AIDS (1990), ensured food safety and pesticide regulation (1996), provided coverage to the children of working families (1997), reformed and modernized the Post Service (2006), guaranteed access to affordable health coverage to millions of Americans (2010) and, of course, gave the U.S. Food and Drug Administration authority to regulate the manufacture, distribution, and marketing of tobacco products (2009).

Born in 1939, Waxman graduated from UCLA law school in 1964. After serving three terms in the California Assembly, he was elected to represent California’s 33rd congressional district in the 1974 Watergate class, and has been re-elected 17 times.

During his remarkable 40-year tenure in Congress, Waxman has established himself as a tenacious advocate and reformer, known for his coalition-building, investigative skills, passion for policy, and prolific record of legislative achievements. From 2007 to 2009, he served as Chairman of the House Committee on Oversight and Government Reform and from 2009 to 2011, he was Chairman of the House Committee on Energy and Commerce. He is now the ranking member of the Energy and Commerce Committee.

As Cliff Douglas points out in our accompanying story, Waxman’s work in transforming the U.S. tobacco landscape goes back decades and was instrumental in the passage of the Family Smoking Prevention and Tobacco Control Act. His legacy of historic legislative measures is almost unimaginable in today’s politicized Congress. When news of Waxman’s pending retirement hit the media, he was hailed as “Liberalism’s Legislative Genius,” “One of the Most Important Congressmen Ever,” and “Elliot Ness, Mother Teresa, and Green Giant Rolled into One.” President Obama called the congressman “One of the most accomplished legislators of his or any era.” It’s easy to see why. The consumer protection and tobacco control measures Waxman spearheaded have saved countless lives over the years. On behalf of the entire nation — thank you, Congressman Waxman.
HENRY WAXMAN AND THE PHILIP MORRIS 2,000:
Fighting the Good Fight with the People’s Tobacco Control Champion

BY CLIFF DOUGLAS

This commemorative edition of the Legal Update salutes Congressman Henry Waxman for decades of service as a public health champion in the U.S. Congress. No one is more deserving of such recognition, particularly when it comes to Mr. Waxman’s role in the fight against the tobacco epidemic and the industry responsible for it.

From his ten groundbreaking hearings in the House Subcommittee on Health and the Environment in 1994 — including the iconic session at which the leaders of the nation’s biggest tobacco companies raised their right hands and swore under oath that nicotine was not addictive and smoking had not been proved to cause cancer — to countless other efforts to combat the industry’s targeting of kids and addiction of millions, Henry Waxman’s courage and persistence have been unrivaled.

While Congressman Waxman has been widely lauded for his extraordinary public service, I am pleased to share a lesser known story about his ingenuity and commitment, which stems from one of our collaborations during the heady days of the mid-1990s, which helped launch many of the important changes we have since experienced in the tobacco control world, from enactment of legislation granting the Food and Drug Administration regulatory authority over tobacco, to disclosures of industry misconduct, the Department of Justice’s historic racketeering lawsuit against the major tobacco companies, and what has finally become mainstream consideration of reducing nicotine to non-addictive levels.

This story took shape when, in the summer of 1995, through my work with whistleblowers and

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government investigators, I obtained 2,000 pages of Philip Morris nicotine research documents which had been turned over by the company to a federal court in Texas under a seal of confidentiality but then leaked to a local tobacco control organization. Having flown them back from Houston to Washington, DC (carefully protecting them on my lap and under the seat in front of me for 1,200 miles), I delivered copies to Congressman Waxman to enhance his ongoing oversight and legislative efforts. What followed helped accelerate our efforts to persuade the FDA to pursue regulation of tobacco products for the first time, inspired the introduction of new federal tobacco control legislation, fueled the Department of Justice’s investigations into industry misconduct, and spurred a wave of new litigation by injured and addicted cigarette smokers against the industry.

The individual who made this key turning point possible was Henry Waxman, who was always willing to be aggressive in the public interest and was never willing to settle for business as usual.

Our first strategic step was to deliver these documents to New York Times’ reporters Phil Hilts and Glenn Collins. Why? Because the documents uncovered decades of Philip Morris’s nicotine pharmacology research program in the U.S. and in hidden labs in Germany. The Times subsequently used these papers to publish a front-page exposé on June 8, 1995. Additional reporting on public and political reactions to the disclosures followed. These stories served to raise public awareness and alert many stakeholders to the existence of the secret documents. We also made sure that the White House and the Department of Justice received copies.

But that was only the start, and Congressman Waxman provided the kicker.

With the support of veteran staffers Phil Schiliro and Phil Barnett, he carefully organized this collection of Philip Morris documents for presentation purposes, and then, on July 24, 1995, walked to the floor of the House of Representatives and, with some drama, read them into the Congressional Record. This single act, which I elaborate on below, had a powerful impact. The resulting coverage in the New York Times, the Washington Post, the Associated Press and numerous other media reported that these previously secret documents showed clearly that Philip Morris had long been focused on fine-tuning the drug delivery of its cigarettes to addict consumers, and had even targeted children with attention deficit disorder in its nicotine and market research. Given the various advocacy options that were available, why did Congressman Waxman take the unique step of carrying two bankers’ boxes of tobacco company documents to the floor of the House to present them in this detailed fashion, when he could simply have relied on the media’s initial coverage and perhaps issued another press release?

First, Congressman Waxman had previously been subpoenaed by the Brown and Williamson tobacco company in connection with the disclosure of other secret documents (the ones famously leaked by Merrill Williams). While that subpoena was ultimately quashed by the court, it served as a sobering reminder that the major tobacco companies would do everything possible to intimidate federal lawmakers and stifle official efforts to hold them accountable. So this time, with guidance from House counsel, Congressman Waxman decided to release these documents on the House floor, where the U.S. Constitution’s Speech and Debate Clause affords protection to members of Congress to speak freely without risk of outside legal attack.
The Deeming Regulation would impose certain requirements on manufacturers and retailers, including prohibiting sales to youth, but would not prohibit youth-appealing flavors.

Consortium’s Resource Materials about the FDA’s Deeming Regulation

On April 24, 2014, the U.S. Food and Drug Administration finally announced its intent to regulate additional tobacco products, including e-cigarettes, cigars, “little cigars,” dissolvable tobacco products, and hookah. The agency’s proposed Deeming Regulation would impose certain requirements on manufacturers and retailers, including prohibiting sales to youth, but would not prohibit youth-appealing flavors. You can submit comments on this new docket, including scientific data, local survey data, and evidence of the public health impact of these tobacco products. In drafting your comments, you might want to consider these talking points. All comments on the proposed regulation must be submitted by July 9, 2014. For more information on the proposed regulation, check out the Consortium’s resources:

- **The Deeming Regulation: The FDA’s Questions for the Public Health Community** Compilation of specific questions the U.S. Food and Drug Administration is asking and information it is seeking from the public related to the agency’s proposed Deeming Regulation, expanding federal regulation of tobacco products.
- **The FDA Takes Small Steps to Expand Tobacco Regulation** Information on the FDA’s proposed Deeming Regulation including what products will be covered and what types of regulation will and will not apply to each product.
- **A Deeming Regulation: Expanding FDA Regulation of Tobacco Products** Short video clip that explains generally what happens once the U.S. Food and Drug Administration “deems” a product to be subject to the Tobacco Control Act.
- **Why Should I Care About a Deeming Regulation?** Short video clip that explains why, under federal law, the U.S. Food and Drug Administration must “deem” certain products to be subject to the Tobacco Control Act before it can exert its regulatory authority over them.
- **A Deeming Regulation: What is Possible Under the Law** Frequently asked questions about what a deeming regulation is, generally speaking, and what will happen once the U.S. Food and Drug Administration issues a proposed regulation expanding its authority over tobacco products.

If you have any questions or need more information, visit our [FDA Tobacco Action Center](#) or contact the Consortium’s FDA tobacco regulation attorneys, [Joelle Lester](#) and [Desmond Jenson](#).
Meet Our Newest Consortium Attorney — Maureen O’Brien

Maureen O’Brien, J.D.

On February 26, 2014, Maureen O’Brien joined the Tobacco Control Legal Consortium’s team of legal professionals providing legal technical assistance to public health professionals and organizations, legal professionals, and advocates throughout the United States. Before joining the Public Health Law Center, Maureen was an Assistant City Attorney for the City of Madison, Wisconsin, where she drafted ordinances and provided legal advice to the Common Council, prosecuted civil violations of the city code, and provided advice and legal representation to the local Public Housing Authority and City Planning Department. Maureen holds a B.A. from Boston University, magna cum laude, and a J.D. from the University of Wisconsin Law School. Although many of you may have already met Maureen via email or phone, we wanted to take this opportunity to introduce her to the tobacco control community at large. Welcome, Maureen!

Henry Waxman: Fighting the Good Fight

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Second, and most critically, by publishing these internal corporate documents verbatim in the Congressional Record, Congressman Waxman made them available for the FDA to officially rely on when it issued its landmark tobacco regulations in August 1996. That historic jurisdictional determination by the FDA — which detailed tobacco company knowledge of nicotine addiction and its manipulation of the drug — included dozens of citations to Congressman Waxman’s Congressional Record document submissions. Without the option of citing to the Congressional Record, FDA Commissioner David Kessler had been advised by FDA counsel that the agency should not use the Philip Morris documents because they had been leaked after earlier having been placed under a seal of confidentiality by a federal court.

And so, in yet one more extraordinary way, Henry Waxman contributed to public understanding and federal efforts to, for the first time, regulate tobacco products for health and safety, while holding tobacco companies accountable for addicting millions and targeting the most vulnerable children. The story of the “Philip Morris 2,000” and Henry Waxman’s successful efforts to make them public in the most strategic manner, serves as one more example, little known before now, of the unique contributions of this special public servant.

Cliff Douglas is the Director of the University of Michigan Tobacco Research Network, a lecturer at the University of Michigan’s School of Public Health, and a Consulting Advisor on Tobacco Control Policy at the Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services.
Upcoming Events

Clearing the Air: An Institute for Policy Advocacy — IX
Sept. 28 – Oct. 1, 2014, South Lake Tahoe, CA

Clearing the Air: An Institute for Policy Advocacy — IX is a three-day skills-building and strategy planning Institute designed to enhance awareness of the dangers of secondhand smoke, share recent science and economic data and first-hand experiences, and expand the capacity of smoke-free advocates, researchers, and other public health professionals nationwide. The meeting is hosted by the Americans for Nonsmokers’ Rights Foundation and sponsored in part by the American Heart Association, Campaign for Tobacco-Free Kids, American Cancer Society Cancer Action Network, Legacy, and California’s Tobacco-Related Disease Research Program.

» Read more about Clearing the Air: An Institute for Policy Advocacy — IX.

American Public Health Association Annual Meeting and Exposition
Nov. 15—19, 2014, New Orleans, LA

The American Public Health Association’s (APHA) 142nd Annual Meeting and Exposition will draw more than 13,000 public health professionals from around the globe to network, discuss and share the latest in public health research and policy. The theme of the meeting is “Healthography: How Where You Live Affects Your Health and Well-being.”

» Read more about APHA’s Annual Meeting and Exposition.

Job Openings

Job Opportunities in Federal Tobacco Regulation

» Check out the U.S. Food and Drug Administration’s Center for Tobacco Products website for opportunities in federal tobacco regulation.

Staff Attorney Position at Network for Public Health Law

The Network is seeking a staff attorney to join its Northern Region office, the Public Health Law Center, in St. Paul, Minnesota. This position provides technical assistance on specific issues of public health law, conducts training, develops legal resources and educational materials, and facilitates opportunities for networking and peer assistance. The attorney will work broadly in public health law, and be expected to develop expertise in specific topics.

» Read more about the staff attorney position and how to apply.