

# Bridging the Divide: A Shared Interest in a Coherent National Tobacco Policy

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*If you meet a sectary, or a hostile partisan, never recognize the dividing lines; but meet on what common ground remains,—if only that the sun shines, and the rain rains for both; the area will widen very fast, and ere you know it the boundary mountains, on which the eye had fastened, have melted into air.*

— Ralph Waldo Emerson<sup>1</sup>

In its 2000 study on the polarized nature of the debate over core tobacco policy issues, the American Council on Science and Health observed:

A common feature of modern society is the convening of conferences and other forums where traditionally antipathetic parties come together to communicate in a genuine effort to understand one another and resolve lingering distrust and animosity. It is striking that the same cannot yet be said of the right and the left in the tobacco policy debate, where the opposing camps have engaged in little genuine dialogue.<sup>2</sup>

Three years later, the distrust and animosity persist. Important, yet reconcilable, differences on specific tobacco policy questions remain, but some in the industry and the public health community continue to focus on the differences rather than on how to resolve them. A proposal empowering the Food and Drug Administration (FDA) to regulate all aspects of the design, manufacture, and distribution of tobacco products, acknowledged by one of its critics as differing “in only about five percent” from a preferred proposal,<sup>3</sup> is nonetheless excoriated by some leading

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<sup>1</sup> RALPH WALDO EMERSON, *Prudence*, in *ESSAYS: FIRST SERIES* 207, 225 (Cambridge, Houghton Mifflin Co. 1883).

<sup>2</sup> CLIFFORD E. DOUGLAS ET AL., *AM. COUNCIL ON SCI. & HEALTH, BRIDGING THE IDEOLOGICAL DIVIDE: AN ANALYSIS OF VIEWS ON TOBACCO POLICY ACROSS THE POLITICAL SPECTRUM* 54-55 (2000).

<sup>3</sup> John Reid Blackwell, *Reinventing Tobacco*, *RICH.-TIMES DISPATCH*, Aug. 12, 2002, at D12.

tobacco control groups as “worse than having no legislation at all,”<sup>4</sup> “not requir[ing] any meaningful changes”<sup>5</sup> in behavior by the industry, and “not even represent[ing] a starting point for further negotiations.”<sup>6</sup> Some in the industry lambaste the same piece of legislation as placing “the future of tobacco farmers and their families at risk”<sup>7</sup> and imposing “a huge regulatory burden that would be difficult, if not impossible, for smaller manufacturers to sustain.”<sup>8</sup>

Something here does not compute. How can a single policy option be completely meaningless and, at the same time, threaten to drive an entire industry out of business? We seem to have reached a point where the hostility and rancor developed during nearly fifty years of the so-called “tobacco wars” have reached such a fevered pitch that, even where there are policy solutions with the potential to benefit all parties to the debate, the existence of the battle itself and the desire to sustain it have become ends in themselves. My company, for one, sees no benefit in continued fighting, and would like to find common ground that will both advance public health and permit our tobacco businesses to conduct their operations in a respectful, responsible—and, yes, profitable—way.

In this Commentary, I offer a view as to how the current impasse developed, and then explore the possibility of drawing back from the abyss. I first acknowledge the role that the tobacco industry has played in generating an unprecedented level of mistrust within the public health community. Then, I offer some observations about the strategy of demonizing tobacco companies. Finally, after an explanation of why I think the industry would benefit from meaningful, effective regulation of tobacco products by the FDA, I examine a specific policy question presented by the various legislative alternatives and suggest that a sensible, meaningful solution is possible.

### A COMBATIVE HISTORY

Clearly, our tobacco companies, together with the rest of the industry,

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<sup>4</sup> Press Release, Matthew L. Myers, Campaign for Tobacco-Free Kids, Rep. Davis' Sham FDA Bill Protects the Tobacco Industry, Not the Public Health (June 14, 2001), *available at* <http://www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=368>.

<sup>5</sup> *Id.*

<sup>6</sup> Press Release, Campaign for Tobacco-Free Kids, Public Health Groups Express United Opposition to Davis FDA Bill (June 25, 2001), *available at* <http://www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=372>.

<sup>7</sup> Press Release, Brown & Williamson Tobacco Corp., Brown & Williamson Says FDA Legislation Supported by Philip Morris Poses Threat to Farmers (Aug. 6, 2001), *available at* [http://www.bw.com/Index\\_sub2.cfm?ID=6](http://www.bw.com/Index_sub2.cfm?ID=6).

<sup>8</sup> *Id.*

played a major role in the development of the level of anger that is now directed against them—not just by many in the public health community, but by many in the general public as well. Put simply, ours was a culture of arrogance, bred by insularity and enabled by spectacular business success. Our tobacco companies evolved an approach towards important societal issues such that, if a given position was legally defensible, it was good enough for us. There was a bunker mentality, an “us-against-them” attitude, a belief that anyone who disagreed with us was an enemy out to destroy us.

This approach manifested itself in many ways and, over time, had a disastrous impact on our corporate reputation. Take, for example, our public positioning on key smoking and health issues. We focused on what was not known rather than listening as part of a meaningful dialogue. We argued over definitions rather than advancing solutions.

It seems clear, in retrospect, that had our companies simply deferred to the Surgeon General’s famous conclusion in 1964 that smoking causes lung cancer and not uttered a word of criticism against it, irrespective of the views of internal scientists, much of the rhetoric and ill-will directed at us today would be without foundation. Perhaps even more strikingly, had they accepted the Surgeon General’s revised definition of addiction in 1988 rather than argue about which definition had greater validity, that famous image of the seven CEOs raising their hands before a congressional committee would never have become ingrained in America’s collective consciousness. The reservoir of public anger that has built up against us would have been deprived of one of its primary wellsprings, and there could have been a foundation for problem solving instead of continued conflict.

Another example is the approach that was taken regarding cigarette marketing. Essentially, with certain exceptions, the approach was to advertise as aggressively as the law permitted because that was a fundamental business right. The industry did not have sufficient appreciation that, from society’s perspective, the unique dangers posed by cigarettes call for both rigorous regulation and significant voluntary restraints, regardless of the protection that the First Amendment guarantees commercial speech.

What resulted from this combative approach? In 1990, *Fortune* magazine ranked Philip Morris Companies as America’s second most admired corporation.<sup>9</sup> In 1997, we ranked 147th.<sup>10</sup> This dramatic plunge

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<sup>9</sup> Sarah Smith, *America’s Most Admired Corporations*, FORTUNE, Jan. 29, 1990, at 58.

<sup>10</sup> Edward A. Robinson, *America’s Most Admired Companies*, FORTUNE, Mar. 3, 1997, at 68.

not only made it easier for some to argue that we do not deserve a “place at the table” when important tobacco policy issues are discussed, but also paved the way for an overt strategy of industry demonization and vilification as a means of reducing tobacco consumption.

### “KEEPING THEM PARIAHS”

The vilification and demonization have taken many different forms, from caricatures of tobacco company executives as oily, laughing liars, to explicit comparisons to Hitler. An excerpt from a *Health MS* television spot illustrates the phenomenon:

“He killed 11,000 people a day.”

“That is impossible. . . .”

“He liked them young. Sold them poison loaded with an addictive drug. And when they got too old or died, he just went after more kids.”

“How did he get away with it for so long?”

“He ran a tobacco company.”

What started out as an “edgy” technique has now been embraced by some of the tobacco control movement’s leading lights. As articulated by one prominent advocate, “[i]f we can keep them perceived as pariahs in America, then we’ve got a much better chance of forcing them into reform.”<sup>11</sup> In the words of another:

[T]he company’s goal [in seeking FDA regulation] was to gain legitimacy. . . . [T]hey knew that regulation had the potential to make their products less controversial. We had helped make the tobacco companies pariahs, and I wanted to be sure that nothing I did would help put the stamp of government approval on tobacco now.<sup>12</sup>

In 1998, when the Senate rejected proposed national tobacco legislation in the form of the McCain Bill, former Surgeon General Dr. C. Everett Koop

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<sup>11</sup> Gordon Fairclough, *Philip Morris TV Ad Campaign Seeks To Repair Cigarette Maker’s Image*, Wall St. J., Oct. 13, 1999, at B16 (quoting William Novelli).

<sup>12</sup>DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 389 (2001).

famously demanded to know “[w]here’s the outrage?”<sup>13</sup> These vilification campaigns appear to be, at least in part, an attempt to generate some.

Nietzsche once wrote, “[W]hoever lives for the sake of combating an enemy has an interest in the enemy’s staying alive.”<sup>14</sup> Whether it is right for governments to sponsor campaigns attacking a legal, tax-paying industry comprised of thousands of its own citizens, or to teach our children—even as a means of discouraging them from smoking—to insult and despise their neighbors, is a subject that could consume an essay much longer than this one. So could the question of whether it even makes sense, from a public health perspective, to engage in a strategy that appears, at least to some, to be an attempt to drive existing tobacco companies into bankruptcy through litigation so that they can be replaced by new ones.<sup>15</sup> What is relevant here is the dilemma for the public health community concerning how to react when a company embraces one of that community’s primary policy goals. Which is more important, maintaining a tobacco company’s enemy status, or risking that status by putting in place the kind of regulation that could directly reduce the harm caused by smoking? Is it better to resolve the controversy or perpetuate it?

#### A TOBACCO COMPANY’S DESIRE FOR FDA REGULATION

When I first announced at a conference sponsored by the Center on Addiction and Substance Abuse, in February 2000, that we had decided to actively advocate the passage of legislation giving the FDA comprehensive authority to regulate tobacco products, there was, understandably, much skepticism. After all, we were still engaged in litigation over the FDA’s earlier attempt to regulate cigarettes as medical devices. Over time, however, our actions have convinced at least some that, whatever our motives, we are, in fact, serious about this. As one tobacco control lobbyist put it, “in the beginning I was cynical and thought this was a concerted ploy by the industry, but now I do think there is a real split.”<sup>16</sup> There are

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<sup>13</sup> MICHAEL PERTSCHUK, *SMOKE IN THEIR EYES: LESSONS IN MOVEMENT LEADERSHIP FROM THE TOBACCO WARS* 248 (2001).

<sup>14</sup> Friedrich Nietzsche, *Man Alone with Himself, Aphorism 531, The Enemy's Life*, in *HUMAN, ALL TOO HUMAN* 240 (Marion Faber & Stephen Lehmann trans., Univ. of Nebraska Press 1984) (1878).

<sup>15</sup> PERTSCHUK *supra* note 13, at 256 (“To be sure, the portfolio values of large investors, including worker pension plans, would be significantly diminished. But the current tobacco company executives would only continue, with full pay and corporate perks, to manage the enterprise under the bankruptcy courts’ mandate to *maximize* sales and profits for the benefit of creditors.”) (emphasis original).

<sup>16</sup> Samuel Lowenberg, *Smoke Screen: Why Is Philip Morris Supporting FDA Regulation of Cigarettes?*, SLATE, July 25, 2002, at <http://slate.msn.com/?id=2068476> (quoting Paul

several reasons for the evolution in our thinking.

First, all the major tobacco companies had accepted FDA regulation in the 1997 proposed settlement. As flawed as the final product may have been, we learned a great deal from the process. For example, as part of the negotiations, we painstakingly parsed every section of the FDA medical device statute and attempted to address the parts that simply did not make sense for tobacco products. Although there were many examples, the most obvious one was the need to find a regulatory standard to replace the concept of “safety and efficacy” required for medical products. This process demonstrated to us that, by putting the rhetoric and posturing aside, product regulation—if done thoughtfully and carefully—could address both public health concerns and our obligations to our shareholders.

Another key event for us was our decision in 1997 to change our policy approach to the issues of addiction and disease causation in smokers. We decided to adopt a policy of deferring to public health officials on these issues and to refrain from publicly debating them. In 2000, our tobacco companies updated this policy again, this time to make it clear that they agree with the consensus that cigarette smoking is addictive, and causes lung cancer and other fatal diseases. And once you begin actively communicating that you are selling a product that is both deadly and addictive, it is not much of a leap to come to the conclusion that there needs to be significant additional regulation. Tobacco control advocates who cite the irony that cigarettes are the only products consumers ingest that are not subject to a comprehensive regulatory regime are absolutely right.

We are also acutely aware of our poor credibility, and the fact that FDA oversight is an essential component of restoring America’s confidence in the business practices of the tobacco industry. The most painful example of this for me relates to the allegations—on national television—of nicotine “spiking.” The allegation was made; we denied it and commenced litigation over it; the network admitted that it had made a mistake and publicly apologized; and today, years later, many people still believe that we “spike” our cigarettes. In retrospect, it is obvious to me that, had the FDA been regulating tobacco products during this time, and had we been able to respond by saying, “we do not ‘spike’—and you should check with the FDA because it regulates our manufacturing processes,” the incident could have been convincingly put to rest in a way that did not fuel public anger and mistrust. So, the belief that one reason we seek FDA regulation

is to regain respectability is well founded. But hopefully everyone can agree that solving the problem is more important than having the issue.

Finally, our tobacco businesses have concluded that FDA regulation will assist them by establishing clear rules for the industry on issues like warning labels and manufacturing requirements that will be enforced uniformly on a nationwide basis. The FDA's administrative rulemaking process would pull together divergent points of view, and permit the agency to make decisions about issues such as "light" cigarettes that reflect both public health and industry perspectives. This is most important in the emerging area of potentially reduced-risk or reduced-exposure products, where it is clear that FDA oversight of comparative claims will be essential to both protecting consumers and guiding manufacturers.

#### PERFORMANCE STANDARDS—A KEY, RESOLVABLE DIFFERENCE

We are convinced that there is a basis to bridge remaining policy differences over FDA regulation. One difference is the scope of the FDA's power to impose mandatory design changes—called "performance standards"—to remove harmful components from tobacco products. It is an example where the disagreement, though real, ought to be amenable to a reasonable solution.

Philip Morris USA's position has evolved in the past three years. From an initial rejection of any authority that "reduces the product's palatability," it first evolved to a view that the FDA should be able to require the removal of any harmful added ingredients, but not properties inherent to tobacco. Now, Philip Morris USA has accepted a legislative proposal where any performance standard can be imposed if the FDA finds it to be "appropriate to protect public health,"<sup>17</sup> so long as the standard would not render cigarettes "unacceptable for adult consumption."<sup>18</sup> Tobacco control advocates support legislation containing the identical "protect public health" standard, but omitting the adult acceptability language.<sup>19</sup> Both versions contain the same language regarding "the reduction or elimination of other harmful constituents or harmful components of the product."<sup>20</sup>

Every regulated consumer product is governed by a statutory standard reflecting Congress's policy judgment as to the values governing the

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<sup>17</sup> See, e.g., The National Youth Smoking Reduction Act, S. 190, 107th Cong. § 907 (2001).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., The Youth Smoking Prevention and Public Health Protection Act, S. 2626, 107th Cong. § 907 (2002).

<sup>20</sup> *Id.*; S. 190.

rulemaking process. Just as medical devices need to be “safe and effective,”<sup>21</sup> a motor vehicle standard may only be imposed if it is “reasonable, practicable, and appropriate for the particular type of motor vehicle. . . .”<sup>22</sup> Similarly, the Consumer Products Safety Act requires a finding regarding “the probable effect of [safety standards] upon the utility, cost, or availability of . . . products.”<sup>23</sup> Our view is that the FDA should recognize tobacco products as legitimate for adults to use if they wish; that the agency should operate within some reasonable boundaries, making it clear its mission is not to phase tobacco products out entirely. To us, it seems entirely plausible that, under a pure “public health” standard, the FDA could conclude it is better for public health, overall, to ban tobacco products because that would result in millions of people quitting, and that having millions more seeking black market products, with all the attendant consequences, would be an acceptable tradeoff. Even if this conclusion is valid from a health perspective, it is not necessarily good public policy.

The opposition to any notion of “consumer acceptability” has been justified by concerns that the term’s vagueness will lead to “endless litigation,” and that “a reduction of tobacco consumption by 1% or less could be the basis for an industry claim that a new performance standard has left the product unacceptable to adults.”<sup>24</sup> There are responses to these concerns. It is unclear why consumer acceptability should be any more susceptible to court challenge than equally vague standards such as “the increased or decreased likelihood that existing users of tobacco products will stop using such products.”<sup>25</sup> And, under the well-known *Chevron*<sup>26</sup> doctrine, the FDA would be afforded substantial deference by the courts in determining what the language means. The point here is not to resolve the issue, or prove that we are “right” about it, but simply to suggest that workable language must exist that would both introduce some notion of reasonableness into the FDA’s performance standard calculus, and meet the public health objective of tough, meaningful authority that will lead to a reduction in youth smoking, real changes in tobacco products, and a significant reduction in the harm they cause.

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<sup>21</sup> 49 U.S.C. § 30111(b)(3) (2002).

<sup>22</sup> *Id.*

<sup>23</sup> 15 U.S.C. § 2058(f)(1)(C) (2002).

<sup>24</sup> Memorandum from Matthew L. Myers, President, Campaign for Tobacco-Free Kids, to Steven C. Parrish, Senior Vice President, Corporate Affairs, Altria Group, Inc. 7 (Sept. 19, 2002) (on file with author).

<sup>25</sup> S. 2626 § 907.

<sup>26</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).



## CONCLUSION

In his book about the 1997 proposed tobacco settlement, Michael Pertschuk observes:

It is never easy . . . for warriors to transform themselves into peacemakers, to shift from the comfort of combating a securely demonized enemy to the moral ambiguity involved in acknowledging an enemy as simultaneously a bargaining partner. . . . But the accumulating pressures on the industry in 1997—especially from its own investors—created an opportunity different in kind and dimension from anything that had come before. Yet . . . many others were [not] capable of stepping back and asking themselves whether a time had indeed come to suspend the fighting—not end it forever—and negotiate.<sup>27</sup>

Today, nearly six years later, there is still no FDA authority to regulate tobacco products. According to tobacco control advocates, each day of each of those years, thousands of kids have started to smoke, and hundreds of thousands of adults have died from smoking-related diseases. My company wants very much to resolve the impasse, and we are convinced that the remaining policy differences can be resolved through mutually respectful discussions that seek resolution rather than vilification. I hope very much that, together, we can bridge the divide and achieve our common goal.

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<sup>27</sup> PERTSCHUK, *supra* note 13, at 256.

