



Florida House of Representatives

December 27, 1995

GREG GAY
REPRESENTATIVE, DISTRICT 74

Docket Nos. 95N-0253 and 95N-0253J
Dockets Management Branch (HFA-305)
Food and Drug Administration
Rockville, MD 20857

To Whom It May Concern:

I would like to take this opportunity to express my opposition to the FDA's proposed regulations restricting sale, distribution, advertising and promotion of cigarettes and smokeless tobacco products, 60 Fed. Reg. 41,314 (1995). In an obvious attempt to allow government to control even more of our private lives, the FDA has launched a campaign to federalize the issue of youth access to tobacco products. This issue has been and should remain under state sovereign authority. The proposed regulations are an affront, and they should be withdrawn.

Before I explain my specific objections, I want to make it clear I do not acknowledge the FDA's authority to regulate tobacco products. The FDA and its predecessor have regulated the drug market for nearly 80 years and during that span have never claimed authority over tobacco products as traditionally marketed. It is my belief, the FDA is being influenced, if not being controlled, by anti-tobacco supporters bent on destroying the entire tobacco industry and revoking the right of adults to smoke. But federal law does not change its meaning simply because the winds of extremism have swept through the FDA.

In our federal system of government, youth access to tobacco products should be and always has been regulated by the states. Indeed, the ADAMHA Reorganization Act of 1992 required the states to regulate in this area! Florida law makes it a crime to sell tobacco products to a person under 18 years of age. FL Stat. 569.007. I am proud of the fact Florida has developed a clear, coherent policy to confront the problem of youth access.

The FDA would claim, no doubt, Florida has not done an adequate job of enforcing its youth access laws. I disagree. Unlike the FDA, which lives in the dream world of the federal budget, Florida legislators have had to make tough decisions about how to spend precious taxpayer dollars. Whether we spend more money on the youth access problem is a decision that should be made not by FDA bureaucrats, but by people like me--state legislators directly answerable to the citizens who receive the benefits and foot the bill.

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The key to the youth access problem is preventing retail clerks from selling tobacco to minors. Does the FDA have a serious proposal? No. The FDA wants to step behind the sales counter and make it a federal offense to fail to check a purchaser's identification (§897.12(a)). In other words, the FDA proposes to draft tobacco manufacturers as spies who impose the law without worrying about private property rights or the presumption of innocence. I think it is appalling a federal agency would conscript an industry into becoming the enforcers. In Florida, the police enforce the law.

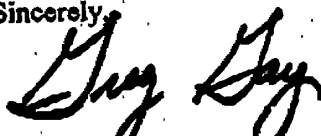
Even if the tobacco companies do enforce some of the proposed regulations, they cannot enforce the I.D. checking and the federal ban on sales to minors. When all is said and done, the proposed regulations avoid the crucial question: how can we persuade clerks to obey existing law and stop selling tobacco to minors? I am convinced the FDA has no answer, and the states are better positioned to find the answer.

To make up for the lack of enforcement provisions, the proposed regulations would make each person who "furthers the marketing of cigarettes or smokeless tobacco products" liable as a "distributor" (§897.3 (c)) for ensuring any cigarettes and smokeless tobacco products he/she "distributes" comply with all of the FDA's regulations (§897.10). This apparently means a trucking company might be convicted of federal offense if a cigarette pack in one of its trucks contains fewer than 20 cigarettes (§897.16(b)). A person could, therefore, be punished for an offense actually committed by someone else, someone over whom the person had no control. This is clearly a denial of due process under the U.S. Constitution. Amazingly, the FDA offers no justification for shifting liability from the allegedly guilty to the clearly innocent. 60 FED.REG. At 41,323. The reason is the policy is unjustifiable. The FDA's true motivation is obvious. It wants to treat the entire tobacco business as a conspiracy subject to an antediluvian theory of collective guilt.

The FDA proposes to require itself to come back in seven years with additional restrictions on advertising, promotion and sale of tobacco products if the number of underage smokers does not decrease by 50% (§897.44). In my view, when regulations fail to work, the answer is definitely not more than regulation but less.

For the reasons I have discussed, the proposed regulations are completely unacceptable. They are nothing more than a classic power play by a federal agency in an area traditionally regulated by the states. They violated the constitutional guarantees of due process. They would turn tobacco companies into spies and "enforcers". They ultimately would have no effect on youth smoking, and they would use this absence of effect to justify further regulation. The regulations should be withdrawn. The issue of youth access to tobacco products should be left to the states.

Sincerely,



Greg Gay, House District 74

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