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110TH CONGRESS *2d Session*	SENATE	REPORT 110–512

TRUTH IN CIGARETTE LABELING ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2685

SEPTEMBER 26 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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TRUTH IN CIGARETTE LABELING ACT

SEPTEMBER 26 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

Mr. INOUYE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2685]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2685) to prohibit cigarette manufacturers from making claims or representations based on data derived from the cigarette testing method established by the Federal Trade Commission, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

S. 2685 would prohibit cigarette manufacturers from using the modified Cambridge Filter method, adopted by the Federal Trade Commission (FTC or Commission) and also known as the FTC method, as the basis for making representations or claims about the nicotine and tar content of their products.

BACKGROUND AND NEEDS

Development of the FTC Method. Before a standardized procedure for testing cigarette yields existed, cigarette manufacturers started advertising their products' tar and nicotine content. In 1955, the FTC responded to these practices by publishing cigarette advertising guides that banned claims that a specific cigarette brand had low tar or nicotine—or had lower tar or nicotine than another brand—if no scientific evidence validated the claim. Contradicting the FTC's instruction, manufacturers continued to advertise tar numbers, producing a host of inconsistent product assertions that failed to equip consumers with an ability to accurately assess different cigarette tar deliveries. In 1960, after talks with the Commission, industry agreed to halt tar and nicotine advertising.

In 1964, the U.S. Department of Health and Human Services issued the first Surgeon General's report on the health risks of smoking. The report concluded that cigarette smoking was a cause of lung cancer in men. Two years later, the Public Health Service announced that most scientific evidence suggested that lower levels of tar and nicotine would produce a less harmful effect on consumers. In 1966, the FTC initiated two actions to encourage manufacturers to disclose comparative tar and nicotine yield information to consumers. First, the Commission lifted the ban on nicotine and tar advertising but made future industry factual statements conditional: Statements would be required to support tests conducted in keeping with the Cambridge Filter method, and they could not include assertions of reduced health hazards. Second, the Commission authorized the creation of a laboratory designed to analyze cigarette smoke and sought public comment on suggested changes to the Cambridge Filter method. Analysts often refer to the modified Cambridge Filter method adopted by the Commission as the "FTC method."

The FTC method was designed to obtain uniform and standardized data about tar and nicotine yields of cigarette smoke. It was not designed to replicate human smoking. According to the 1967 FTC publication, "Cigarette Testing and the Federal Trade Commission: A Historical Overview," the purpose of the cigarette testing was "not to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method." Changes in cigarette technology have created ways to lower a cigarette's tar and nicotine ratings when tested by the FTC method. These have included: (1) Adding filters that trapped some tobacco smoke particles before they reached the machine; (2) wrapping the tobacco plug in paper with a quick burning rate; and (3) inserting ventilation holes around the filter's circumference, creating an "aeration" effect in which air is absorbed into the filter generating a diluted mixture of air and smoke which produces lower tar and nicotine ratings.

According to the FTC, disclosures of tar and nicotine ratings in advertising by manufacturers are voluntary. No formal legal requirement obligates companies to disclose the tar and nicotine ratings in their advertisements. The disclosure of the ratings in advertisements is the result of a voluntary agreement in 1971 among five of the then-largest companies and three smaller companies. Due to the voluntary agreement, the Commission suspended indefinitely a rulemaking proceeding that would have required such disclosures.

FTC Critique of the Method. On several occasions, the Commission has questioned the applicability of its standardized cigarette testing method and has invited public comment on proposed revisions to its test. A lack of consensus among the commenters, however, in addition to related unresolved scientific issues, have kept the Commission from altering the testing protocol. Chairman Kovacic in his testimony before the Commerce Committee in November 2007 noted, "Despite these dramatic decreases in machine-measured yields, the Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of the

amount of tar and nicotine they actually will get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of tar and nicotine exposure. This appears to be primarily due to compensation—or the tendency of smokers of lower rated cigarettes to take bigger, deeper, or more frequent puffs, or otherwise alter their smoking behavior in order to obtain the dosage of nicotine they need. Such variations in the way people smoke can have significant effects on the amount of tar, nicotine, and carbon monoxide they get from any particular cigarette."

Smokers' Perceptions: Effects of Marketing Practices. Despite scientific evidence revealing that "light" cigarettes have neither lowered the disease risk of smokers nor created a public health benefit, many smokers assume that light or ultra light cigarettes present less of a health risk than the risk associated with other cigarettes. Many smokers also misapprehend "light" and "ultra light" cigarettes as exposing them to lower nicotine and tar levels. For example, a July 1998 survey in the American Journal of Preventive Medicine indicated that many smokers choose light or ultra light cigarettes in order to reduce smoking risks. Almost three-fourths of the ultra light smokers said they smoked ultra light cigarettes to reduce their intake of tar and nicotine. Thirty nine percent of light smokers and fifty eight percent of ultra light smokers said they smoke the lighter brands in order to reduce risks without having to quit smoking entirely. A 1986 study by the Centers for Disease Control and Prevention (CDC) found that smokers of light/ultra light cigarettes had a lower likelihood of quitting than smokers of regular cigarettes. The study also found that smokers who had never changed to low tar or nicotine brands had a higher likelihood of quitting than smokers who had changed to lower tar brands.

Health Advocacy Community's Critique of Marketing Practices. Health experts and consumer safety advocates have criticized the use of the words "light" and "low tar" as inaccurate. The Campaign for Tobacco-Free Kids points to a distinction between food advertising and cigarette advertising: "Foods with descriptors such as 'light' or 'low in fat' are required by the Food and Drug Administration (FDA) to provide an actual benefit to consumers—a specified reduction in calorie content or fat grams. With the absence of FDA regulation over tobacco products, there is no equivalent protection for consumers of cigarettes branded as 'light' or 'low tar.'" The National Cancer Institute (NCI) has affirmed that the FTC's testing method does not provide smokers with meaningful information regarding the amount of tar and nicotine smokers will realistically intake from a cigarette.

In addition, the NCI has concluded that light cigarettes provide no benefit to smokers' health: "According to the NCI monograph *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, people who switch to light cigarettes from regular cigarettes are likely to inhale the same amount of hazardous chemicals, and they remain at high risk for developing smoking-related cancers and other diseases." Finally, according to the NCI, no evidence exists showing that switching to light or ultra-light cigarettes aids smokers in quitting.

SUMMARY OF PROVISIONS

S. 2685 would mandate that a cigarette manufacturer cannot make any claims or representations based on data derived from a cigarette testing method established by the FTC. A violation of the prohibition would be treated as a violation of a rule defining an unfair or deceptive act or practice, which would allow the Commission to assess civil penalties of up to $11,000 per day per violation.

LEGISLATIVE HISTORY

On March 3, 2008, Senator Lautenberg introduced S. 2685, the Truth in Cigarette Labeling Act, which was referred to the Committee on Commerce, Science and Transportation. Senators Snowe and Clinton cosponsored the measure. The Commerce Committee held a hearing titled the "Accuracy of the FTC Tar and Nicotine Cigarette Rating System" on November 13, 2007. At the hearing, the Committee explored the FTC testing method for determining cigarettes' tar and nicotine ratings, tobacco companies' marketing of light cigarettes to Americans, and the public health implications of changes in cigarette design. FTC Chairman William Kovacic, the NCI, the CDC and other stakeholders testified at the hearing.

On May 15, 2008, the Committee met in open executive session to consider S. 2685, as introduced. The measure was accepted by voice vote. Without objection, the Committee ordered the bill to be reported favorably without amendment.

Staff assigned to this bill are David Strickland, Democratic Senior Counsel, Jana Fong-Swamidoss, Democratic Counsel, and Rebecca Hooks, Republican Professional Staff member.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

JUNE 25, 2008.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2685, the Truth in Cigarette Labeling Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2685—Truth in Cigarette Labeling Act of 2008

S. 2685 would prohibit cigarette manufacturers from making certain claims based on data derived from a cigarette testing method developed by the Federal Trade Commission (FTC). The bill would authorize the FTC to enforce this new prohibition.

The cigarette testing method developed by the FTC is used by manufacturers to determine the relative levels of tar, nicotine, and

carbon monoxide produced by a cigarette. Based on the results of those tests, cigarette manufacturers make claims about a product that it is "low tar" or "light," for example. S. 2685 would prohibit this practice.

Based on information from the FTC, CBO estimates that implementing the provisions of S. 2685 would not significantly increase spending subject to appropriation. Under current law, the FTC enforces certain laws governing both warnings printed on cigarette labels and advertising claims made by cigarette manufacturers, including claims about tar and nicotine ratings. The new prohibition created by S. 2685 would not add a significant new burden to the FTC's enforcement efforts.

Enacting S. 2685 could increase federal revenues from civil monetary penalties on cigarette manufacturers for violations of the new prohibition; CBO estimates that the effect would not be significant. Enacting the bill would not affect direct spending.

The bill would impose a private-sector and intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) on manufacturers of cigarettes and certain other tobacco products, including certain Indian tribes, by prohibiting them from making any claims or representations based on the level of tar and nicotine as measured by the FTC test method. Based on information from tobacco companies and tribal manufacturers of cigarettes, CBO expects that the aggregate costs of complying with the mandate would not exceed the annual thresholds established in UMRA ($136 million in 2008 for private-sector mandates and $68 million in 2008 for intergovernmental mandates, adjusted annually for inflation).

The CBO staff contacts for this estimate are Susan Willie (for federal costs), Elizabeth Cove (for the state and local impact), and MarDestinee Perez (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

Number of persons covered

The prohibition on basing advertisements of cigarettes on the FTC method would affect every cigarette consumer who relied upon those statements when purchasing their cigarettes.

Economic impact

S. 2685 could impact sales of light cigarettes in that the marketing of the product would have to change to reflect the prohibition of the usage of the FTC method.

Privacy

S. 2685 would not impact the privacy of individuals.

Paperwork

It is not expected that the legislation would increase the paperwork requirements of the FTC.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 would provide that the legislation may be cited as the "Truth in Cigarette Labeling Act of 2008."

Section 2. Prohibition on claims regarding tar or nicotine yield levels of cigarettes

Subsection (a) of section 2 would set forth a number of Congressional findings related to the marketing of cigarettes using the FTC method for testing tar and nicotine intake.

Subsection (b) of section 2 would define the terms "cigarette" and "roll-your-own-tobacco". Cigarette would be given the same definition as in section 3(1) of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1332(1)) but also would include tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette or as roll-your-own tobacco. Roll-your-own-tobacco would be defined as any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

Subsection (c) of section 2 would prohibit cigarette manufacturers from making claims or any other representations based on data derived from a cigarette testing method established by the FTC and in effect on the day before the date of enactment of this Act. The subsection also would establish that a violation of this prohibition be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act, and that the FTC shall enforce section 2 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of section 2.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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