

Testimony before the Energy and Commerce Subcommittee on Health

United States House of Representatives

Submitted by

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Regarding H.R. 1108

The Family Smoking Prevention and Tobacco Control Act

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My name is Henry Armour and I am President and CEO of the National Association of Convenience Stores (“NACS”). Founded in 1961, NACS is a non-profit trade association representing more than 2,200 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. The convenience store industry in the United States, with over 145,000 stores across the country, posted \$569.4 billion in total sales in 2006. More than 70 percent of NACS members are small family businesses owning and operating 10 stores or less.

I appreciate this opportunity to share the convenience store industry’s views regarding H.R. 1108, the Family Smoking Prevention and Tobacco Control Act. Tobacco sales are a highly important component of NACS members’ businesses. Convenience stores sell more than

60 percent of the cigarettes sold in the United States in more than 20 million transactions per day. Such sales, on average, constituted nearly thirty four percent of the in-store sales at NACS members' retail locations in 2006. Tobacco is a legal product that is important to the economic viability of the convenience store industry. I have firsthand experience with the everyday realities of operating a business and selling tobacco products. Before coming to NACS, I owned and operated a chain of more than 50 retail outlets in the states of Washington, Oregon, and California.

I want to make clear that NACS takes no position with respect to the manufacturing provisions in H.R. 1108 – that is not our issue. Our industry simply wants to sell legal products responsibly under regulatory regimes that are fair. And we do have quite a bit of experience with the retail sale of tobacco products. In our view, H.R. 1108 should take a different approach to the regulation of retail tobacco sales. My testimony will explain why we believe a system of state regulation with federal goals – like the current system – is the right one and why the approach taken in H.R. 1108 should be changed to reflect the lessons we have learned.

The Current System for Regulating Tobacco Retailing is Working

Underage Sales Are Falling. H.R. 1108's overall approach to retail sales has not changed much from previous legislative proposals that Congress has considered and failed to enact for the past decade. While the overall approach has been largely stagnant, however, the facts on the ground have changed dramatically.

The Department of Health and Human Services recently released the latest numbers regarding state efforts to enforce laws against tobacco sales to minors. Since the mid-1990s, states have faced the possibility of losing some of their substance abuse and mental health

services grant funds if they have not reduced the rate of violations of these laws to below 20 percent. This federal standard, known as the Synar Amendment, has produced consistently improving results.

During the past ten years, the violation rates nationwide have fallen every single year. In fact, the percentage of retail violations found nationally fell from 40.1% in 1997 to 10.9% in 2006. Virtually every state has shown consistent improvement. And in 2006, for the first time, every single state in the nation reduced its rate of sales to minors below the threshold set by the Congress. I have included a copy of this latest report as exhibit A to my testimony. There does not appear to be any other way to read this report than to conclude that our current system of regulating retail sales of tobacco is making progress. In light of these clear findings, Congress should not impose costly regulations that are unnecessary and counterproductive. Instead, Congress should continue its successful policy of working with states to ensure that they diligently regulate tobacco sales.

Retailers Are Taking Action to Reduce Underage Sales. Part of the reason for the success of the Synar Amendment is the effort put forward by retailers. Convenience store operators and other retailers have dedicated considerable resources and money trying to prevent tobacco sales to minors by investing in employee training, signage, company-operated stings, incentives for employees, and enforcement of company policies. Some retailers have even installed electronic age verification (EAV) devices to help eliminate these sales.

In order to assist in the elimination of tobacco sales to minors, retailers, wholesalers and manufacturers have formed the Coalition for Responsible Tobacco Retailing. This Coalition developed the “*We Card*” training program, which provides education and training to help retailers prevent underage tobacco sales. The program includes development and dissemination

of retailer best practices to tobacco retailers across the country. The “*We Card*” training materials include signage, training videos, training guides, posters, interactive on-line training, and daily reminder calendars. To date, over one million “*We Card*” kits have been distributed to retailers nationwide. “*We Card*” offers hundreds of classroom training sessions that train almost 10,000 retailers annually. Indeed, since its inception, “*We Card*” has held over 2,070 classroom training sessions in all 50 states in the U.S. and U.S. territories. In the past decade, over 100,000 owners, managers and frontline employees have been trained by “*We Card*.”

In addition to NACS, “*We Card*” has been endorsed by the National Grocers Association, the National Retail Federation and the National Association of Police Organizations. Forty-four state coalitions have been assembled to support state level training and education and 236 regional, state and local trade associations support the “*We Card*” initiative. Several governors, mayors, state attorneys general, and tobacco control boards throughout the United States have also endorsed this program.

Many retailers have strengthened their efforts to reduce the sales of tobacco products to minors by incorporating “*We Card*” into a multi-pronged approach to combat this problem. In addition to the training and signage included in the “*We Card*” program, many companies have set stringent company policies. Retailers across the United States understand that solely training employees and setting a “NO ID-NO SALE” policy is not enough to eliminate these sales. Without enforcement of their policy, the inclusion of incentives and/or use of additional tools retailers would not be able to be successful. For example, many companies conduct mystery shopper programs. Through these programs, companies hire teenagers to conduct company operated stings in order to obtain an accurate account of their compliance rate, and continually remind their employees of the company's tobacco retailing policy. These mystery shopper

programs are becoming more prevalent throughout the industry. Additionally, many retailers have instituted incentive programs for their employees. Many employers are providing incentives, either through bonuses or other benefits, for those employees who pass a company operated sting. Some retailers also have adopted zero tolerance policies. For those companies, if an employee is caught even once selling to a minor that person is terminated on the spot. Retailers are also looking at other, non-traditional, avenues to assist in this effort. Many companies are purchasing EAV devices to help eliminate calculation errors. An EAV will electronically read birth date information stored on state driver's licenses to determine whether a consumer can purchase an age-restricted product, thus removing an element of human error.

Independent studies have shown that retail education and training as well as asking for proper identification can help prevent underage tobacco sales. A University of Idaho study conducted for the Idaho Department of Health compared retailers using the “*We Card*” program to retailers using other materials or no materials at all. The study found:

- The violation rate among retailers using “*We Card*” materials was 7.22%, while the rate for other retailers was 16.96%.
- Retailers displaying “*We Card*” materials were 12.9 times more likely to ask for identification than not to ask for identification, while other retailers were 4.9 times more likely to ask for identification than not to ask for identification.

Shortcomings of the Retail Provisions of H.R. 1108

Not only does NACS differ with the overall approach to tobacco retailing taken by H.R. 1108, some of the specific provisions and omissions in the bill are less effective than they should be and/or are unfair.

Retailers Should be Encouraged to Sell Responsibly. The first thing to note is that in most areas of regulation we do not hold people liable for things over which they do not have control. Penalizing activity that we have no ability to control loses does not deter illegal conduct – it is simply punitive. That is important to note when legislating on this subject. When I ran a chain of convenience stores, I had compliance plans in place to try to ensure that we followed the laws with respect to selling age-restricted products like tobacco. For example, we conducted comprehensive training for all employees to ensure that they were trained on their responsibilities for checking ID cards and we had a zero tolerance policy if they failed to follow the rules, including immediate termination if tobacco was sold to a minor. We also conducted sting operations on our own stores to try to detect problems and correct them. But I could not guarantee that an employee would never make a mistake or intentionally violate my company policies. Unfortunately, H.R. 1108 puts at risk a retailer's license to sell tobacco even if that retailer has an excellent compliance program but has one or two bad employees who unintentionally (or intentionally) sell to minors. I believe that is the wrong approach. While there may be fines imposed for any violation, losing the ability to sell tobacco often means that a convenience store goes out of business. That is just an economic reality given the very thin margins in the industry and the number of adults who frequent convenience stores in order to buy tobacco. Closing the store is too harsh a sanction if a business owner has done everything in his or her power to prevent a violation. And such a harsh sanction against companies with quality compliance programs may have the unintended consequence of stores being sold to individuals with no such training programs. In addition, having a provision requiring an adequate compliance program as a condition to avoid the loss of a license to sell tobacco can be a powerful incentive for retailers to do the right thing. In our view it would help us make real

progress on this issue if retailers had this incentive for implementing strong compliance programs.

The States, not FDA, Should Have Primary Enforcement Responsibility. Another problem with this legislation is that it makes the Food and Drug Administration responsible for duplicating the regulation of retailers when states are already doing a good job in this area. We now have a decade of experience with the Synar Amendment in place and retailer noncompliance rates have gone down every single year. As I said earlier, the national weighted average noncompliance rate in 1997 was 40.1 percent and last year that number fell to 10.9 percent. While our goal is to completely eliminate tobacco sales to minors, the current system is a real success story and is certainly making progress toward achieving our goal.

Rather than creating a new federal bureaucracy for retail sales, Congress should be looking at ways to improve upon the successes we have gained through the Synar Amendment's incentive to states. We are willing to work with the Committee in setting standards that state regulations must meet, making Synar's requirements tougher, or otherwise, but it is difficult to see why adding an already overtaxed FDA on top of the current system of state regulation will improve the system. We all know that the FDA has its hands full just trying to keep our food supply safe and adding the responsibility to regulate 300,000 retail establishments that are not currently under its jurisdiction will undoubtedly put even greater strains on the agency.

Innovative legislative activity relating to the retailing of tobacco is occurring in the States. Pennsylvania, Texas, Idaho, Colorado, Michigan, Florida, Ohio and others have laws that offer an affirmative defense for retailers who take necessary compliance measures to avoid underage sales. These laws incentivize retailers to take appropriate measures to ensure their businesses comply with the law and the approach has been quite successful. H.R. 1108 would

remove some of these incentives and make retailers subject to a loss of their license to sell tobacco even if they do everything right. That change threatens to undo some of the progress made by these states.

Pennsylvania, Missouri and Iowa have enacted laws that place the shared responsibility upon retailers, minors and clerks. In Missouri, the law allows for the assessment of a fine upon clerks as well as retailers. The person making the underage sale is then subject to a fine of \$25 for the first offense, \$100 for the second offense and \$250 for subsequent offenses. In Pennsylvania, minors purchasing or attempting to purchase tobacco products are required to participate in tobacco education programs, lose their driving privileges, or be fined. In fact, many states have passed laws creating penalties for minors who purchase or possess tobacco and have been successful in curtailing underage smoking.

Vermont law provides that people under age eighteen who possess tobacco will be fined \$25 and, if the fine is not paid within 60 days, will lose their driver's license for up to 90 days or their initial eligibility for a driver's license will be delayed by up to one year. If a person under age 18 misrepresents his or her age to buy tobacco, then that individual will be subject to a \$50 fine or ten hours of community service or both. Vermont's approach is working. Vermont's 2005 Youth Risk Behavior Survey showed that smoking rates among eighth graders in the state have steadily fallen from 26% in 1997 to 22% in 1999 to 13% in 2001 to 8% in 2005. For all Vermont students surveyed (including students in grades eight through twelve), smoking rates fell from 36% in 1997 to 31% in 1999 to 22% in 2001 to 16% in 2005. In all, Vermont experienced a drop of more than 50% in youth smoking over a four-year period. In fact, the Campaign for Tobacco-Free Kids called Vermont's results "among the most impressive in the

nation.” The Centers for Disease Control and Prevention (CDC) has noted that the number of states and localities imposing such penalties is increasing.

H.R. 1108 fails to include any penalties for minors who attempt to purchase tobacco. That means they have absolutely no deterrent and the same 17-year old can attempt to buy cigarettes at a store over and over again and get tobacco from older friends, family members, the Internet or elsewhere without threat of sanction. This is a major flaw in the legislation. We have penalties when minors possess age-restricted products like alcohol because we understand that taking action on both the supply and the demand side of the equation is more comprehensive and produces better results.

Some states have used incentives based on new technology to try to get better results. New York and Connecticut, for example, have passed state legislation giving retailers an affirmative defense if they purchase and use EAV (electronic age verification) devices solely for the purpose of age verification on sales of age-restricted products.

All of these state activities have affected where minors get tobacco products. According to the most recent Youth Risk Behavior Surveillance study conducted by the CDC, the percentage of students who said they purchased their cigarettes from a store or gas station fell from 38.7% in 1995 to 15.2% in 2005. Minors now report that friends and family members are more frequent sources of tobacco products than convenience stores. This demonstrates that we need to adjust our thinking to address all of the ways that minors get tobacco. It also shows that States, localities, and private efforts are having an effect and should be given the opportunity to make further improvements.

The Retail Provisions of H.R. 1108 Can and Should be Improved

If the Committee moves forward with H.R. 1108, it must address some of the most difficult – and growing – problems in tobacco retailing.

Internet and Native American Sales. The improving compliance rates I noted earlier do not cover sales made through the Internet or on Native American lands. We do not know how often these retailers check IDs to make sure their customers are old enough to purchase tobacco. What we do know is that what you typically see when you attempt to purchase tobacco on the Internet is woefully inadequate. In many cases, when a customer clicks on a pack of cigarettes on a website to try to purchase tobacco, a box appears. The wording can vary slightly but often says that by clicking “OK” the purchaser verifies that he or she is 18 years old. As if this “honor system” approach were not inadequate enough, many of these sites only have one box – the one that says “OK.” A minor could not respond that he was underage even if he wanted to do so. H.R. 1108, however, revives 10-year old FDA regulations that exempt Internet and mail order purchases from the requirement for checking IDs. This makes no sense. Internet cigarette sales are now about 14 percent of the national market. That is big business. IDs can be checked at the point of delivery – and often are when alcohol is shipped – so there is no reason to exempt these sales from regulation.

Any legislation also should address tobacco sales on Native American reservations. Without explicit provisions making clear that the law should be enforced on reservations, the history on these issues shows that such sales will be ignored. Yet, Native American tobacco retailers have increased their share of the retail tobacco market over the past several years and there is no reason why they should not abide by the same rules, and deal with similarly effective

enforcement mechanisms, as their off-reservation competitors. This can be done without violating tribal sovereignty and is essential if Congress's goal is to have a fair and comprehensive bill. A cigarette purchased over the Internet or on an Indian reservation is no less harmful to the youths of America and should be regulated in the same manner as all other cigarette sales.

Sales of Smoking Cessation Products. A number of other problems exist in this legislation, including placing responsibility in the wrong place for labels and setting unrealistic penalties, but there is one issue in particular that I would like to call to your attention. Several years ago, FDA entered into a consent decree preventing convenience stores from selling over-the-counter a popular smoking cessation product, Nicorette gum. This was done when the product first became available over-the-counter so there was no evidence of any kind that there were issues with sales of these products in convenience stores. Indeed, products like Nicorette are sold over the counter today at drug stores from a shelf right above cartons of cigarettes. Why drug stores can offer these products and the local convenience store cannot baffles me. If Congress is serious about wanting people to stop smoking, it should enable people to get products that help them quit in convenient settings and in those places where they would purchase cigarettes. Prohibiting such sales is counter-productive.

Conclusions

As noted, the current system of state regulation to try to meet federal goals is making measurable progress. This approach should be preserved. If the Committee is going to legislate with respect to retail sales, then it should work with the current system – not against it. Four elements are critical.

First, the legislation should preserve the role of states as the regulators of retail tobacco sales but could set additional federal goals that states must meet. Such legislation could range from compliance targets like those set in the Synar Amendment to detailed model legislation that states must adopt and enforce. NACS has advocated for this type of approach in the past and experience has shown that it is the right way to address retail sales. The bottom line is that states have the experience and resources to regulate retail sales – the FDA does not. States have a record of a decade of solid progress in reducing tobacco sales to minors – the FDA does not. States have the enforcement and judicial personnel to enforce the law and provide due process to retailers – FDA does not. In fact, just a cursory glance at the newspapers demonstrates that the FDA is an agency that is already stretched incredibly thin. It is being asked to address more issues – including new questions about the safety of imported food and drugs – without enough resources. Adding the responsibility of policing more than 300,000 retailers of tobacco products across the nation is a prescription for disaster for the FDA and will not improve efforts to curb youth smoking. Instead, it may make things significantly worse. State regulation to meet federal standards is an approach that works in this area. Let's do what works.

Second, any new legislation should explicitly address tobacco sales over the internet and on Indian reservations and require all tobacco retailers to obey the same rules.

Third, Congress should adopt appropriate incentives for companies to implement effective compliance programs by protecting them from losing their license to sell tobacco products.

Finally, Congress should lift the ban on the sale of smoking cessation products in convenience stores.

I thank you for your time and for the opportunity to share NACS' views with you. I welcome any questions you may have.