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TOBACCO'S WEAKEST LINK: WHY TOBACCO FARMERS ARE ESSENTIAL PLAYERS IN THE FIGHT AGAINST BIG TOBACCO

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INTRODUCTION

The current tobacco control policy in the United States focuses on reducing the demand for tobacco products through taxation, legislation, cessation, and education.¹ In order to be truly comprehensive, our tobacco control policy must also address the supply side of tobacco² by encouraging the reduction of tobacco

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1. According to the Centers for Disease Control and Prevention, a comprehensive tobacco control approach should apply "educational, clinical, regulatory, economic, and social strategies." CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS 7 (2007), available at http://www.cdc.gov/tobacco/tobacco_control_programs/stateandcommunity/best_practices/. The goals of a comprehensive tobacco control program include, *inter alia*, preventing initiation of smoking, promoting cessation of smoking, and implementing smoking bans through regulations and laws. *Id.* at 12. New York City has adopted a "Five-Point Tobacco Control Plan," which focuses on taxation, legal action, cessation, education, and evaluation. Bureau of Tobacco Control, N.Y. City Dep't of Health & Mental Hygiene, New York City's Five-Point Tobacco Control Plan, <http://www.nyc.gov/html/doh/html/smoke/tc9.shtml> (last visited Feb. 6, 2008).

2. Crystal H. Williamson, Comment, *Clearing the Smoke: Addressing the Tobacco Issue as an International Body*, 20 PENN ST. INT'L L. REV. 587, 615 (2002) (arguing that tobacco regulations should seek to reduce the consumer demand for tobacco and the supply of tobacco products); see also Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors, and Public Policy*, 26 AM. J. L. & MED. 187, 203 (2000) (asserting that a major goal of tobacco policy should be to reduce tobacco production and consumption). *But see* World Health Org., Interventions to Reduce Tobacco Consumption, <http://www.who.int/tobacco/research/economics/interventions/en/index.html> (last visited Feb. 29, 2008) (explaining that measures to reduce tobacco supply are less promising than measures to reduce demand for tobacco products).

production³ and establishing a powerful, new partnership between the public health community and tobacco farmers.

Tobacco farmers remain the forgotten branch of the tobacco industry. In the flurry surrounding one of the biggest public health epidemics of the twentieth century,⁴ tobacco farmers were largely cast aside while being exploited by the industry⁵ and neglected in negotiation.⁶ Nevertheless, farmers remain a critical part of the industry, and “taking aim at the tobacco companies will unquestionably have consequences for those farmers.”⁷ The inverse is true as well: taking aim at tobacco farmers may affect the tobacco industry, as cooperation between the public health community and the tobacco farmer community would result in a powerful collaboration that would bolster the fight against big tobacco.⁸ Rather than using farmers for target practice, tobacco control activists should consider tobacco farmers potential allies who can affect change from within the industry.

Part I of this comment will explain that tobacco farmers must be distinguished from the tobacco industry in order for tobacco control activists to reconcile working against the tobacco industry but with tobacco farmers. Part I.A will demonstrate how tobacco farmers can be distinguished from the industry as a whole, due to their primary role as agricultural workers, the tendency of farmers to become indebted as a result of the tobacco companies’ direct contracting system, and their lack of intent to deceive the public about the damaging health effects of tobacco products. Part I.B will identify action taken by the tobacco industry to weaken the power of tobacco farmers, including preventing farmers from participating in the negotiations leading up to the Master Settlement Agreement and effectively thwarting the enactment of the McCain Bill, which would have

3. Williamson, *supra* note 2, at 615.

4. The recognition of tobacco use as a health hazard is one of the ten great public health achievements of the United States in the twentieth century. Ctrs. for Disease Control & Prevention, *Ten Great Public Health Achievements – United States, 1900–1999*, 48 MORTALITY & MORBIDITY WKLY. REP. 241 (1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf>.

5. JUDITH MACKAY & MICHAEL ERIKSEN, WORLD HEALTH ORG., THE TOBACCO ATLAS 46 (2002), available at http://www.who.int/tobacco/statistics/tobacco_atlas/en (follow “The Tobacco Atlas” hyperlink) (“The tobacco industry exploits [farmers] by contributing to their debt burden, while using their economic plight to argue against efforts to control tobacco.”).

6. See *infra* Part I.B.1.

7. Jamey Pregon, Note, *Casualties of the War on Tobacco: Can Farmers Survive the Anti-Tobacco Onslaught?*, 3 DRAKE J. AGRIC. L. 465, 468 (1998). See also Clara Sue Ross, Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 331 (1987) (“An alteration in the present favored economic status of tobacco as a crop would have a negative impact on tobacco farmers.”).

8. If a reduction in tobacco supply is to have a meaningful impact, the effort to reduce supply must be pursued in other countries as well, because American tobacco companies are increasingly moving production and manufacturing facilities overseas. ERIC N. LINDBLOM, AM. HEART ASS’N, FALSE FRIENDS: THE U.S. TOBACCO COMPANIES’ BETRAYAL OF AMERICAN TOBACCO FARMERS I (1999), available at <http://tobaccofreekids.org/reports/falsefriends/campaign.pdf>.

provided market transition assistance for tobacco industry workers and their communities and given the Food and Drug Administration explicit authority to regulate tobacco products. Part I.B will also explain that tobacco farmers were eventually included in a national tobacco policy not through the efforts of the tobacco industry but through congressional action in the form of the Fair and Equitable Reform Act of 2004.

Part II will describe a program to phase out tobacco that is tailored to the needs of tobacco farmers. Part II.A will discuss alternative uses for tobacco, and part II.B will discuss the existence of alternative crops that may be able to replace tobacco as a stable cash crop. Part II.B will also dispel the myth that tobacco is the most profitable crop, demonstrate that many tobacco farmers are already selling other commodities, and show that, with the proper financial support, many tobacco farmers are willing to grow alternative crops. Part II.C will explain how excise taxes on cigarettes can be used to fund the phase-out program, which would subsidize research on alternative crops, crop diversification efforts, education, and job training. Finally, part II.C will demonstrate how excise taxes can be used to test the federal government's true objectives with respect to the tobacco industry.

I. TOBACCO FARMERS: THE ANTI-TOBACCO ACTIVISTS' UNLIKELY ALLIES

Some public health advocates are willing to destroy the livelihoods of tobacco farmers for the sake of the greater public health.⁹ To these activists, sacrificing an estimated 37,013 tobacco farms,¹⁰ in exchange for the lives of millions in the future,¹¹ is a simple equation with only one solution: throw tobacco farmers to the wolves. But allowing farmers to be exterminated by the anti-tobacco bulldozer ignores the potential for collaboration between two communities that traditionally have opposed each other: public health advocates and tobacco farmers.¹² To harness the potential that may come out of such an unlikely relationship, activists should approach farmers with a modified and less hostile version of the time-honored military technique of divide and conquer: divide and persuade. Activists must first divide tobacco farmers from the tobacco industry at large by

9. Pregon, *supra* note 7, at 493.

10. In 2002, there were 37,013 tobacco farms in the United States. TOM CAPEHART, U. S. DEP'T OF AGRIC., TRENDS IN U.S. TOBACCO FARMING 5 (2004), available at <http://www.ers.usda.gov/publications/tbs/nov04/tbs25702/tbs25702.pdf>.

11. Tobacco is "the world's leading agent of death If current trends continue, tobacco will kill 1000 million people prematurely during [the twenty-first] century." Thomas R. Frieden & Michael R. Bloomberg, *How to Prevent 100 Million Deaths from Tobacco*, 369 THE LANCET 1758, 1758 (2007).

12. David G. Altman et al., *Tobacco Farmers and Diversification: Opportunities and Barriers*, 5 TOBACCO CONTROL 192, 197 (1996) ("We believe that health professionals must learn to work more closely with tobacco farmers and farm organisations, emphasizing their joint interest in diversification."); MACKAY & ERIKSEN, *supra* note 5, at 46 ("[P]artnerships are developing between the farmers and the public health community.").

distinguishing farmers from the industry as a whole.¹³ Thereafter, activists must show tobacco farmers that the industry has not acted in their best interests, which will further weaken the farmers' trust in the industry and create space for an alliance between the public health and farmer communities.¹⁴

A. *Distinguishing Tobacco Farmers from the Tobacco Industry*

Before establishing a cooperative relationship with tobacco farmers, the public health community must first confront the seemingly irreconcilable contradiction of working against the industry but with the industry's farmers. To do so, tobacco control activists must distinguish the farmers from the tobacco industry at large, which is no easy task. Tobacco farmers are an indispensable part of the industry, as cigarette production "begins with the farmer and ends with the retailer, with manufacturers in the middle."¹⁵ Like the rest of the industry, tobacco farmers "profit from the sale of an addictive drug"¹⁶

Some scholars believe that tobacco farmers deserve support in part because "[f]arming as a way of life is central to the image of this country."¹⁷ Yet, with tobacco products endangering the health and lives of millions,¹⁸ the idea of supporting tobacco farmers in order to preserve a superficial vision of idyllic rural life is not sufficiently persuasive. Tobacco farmers should be protected from becoming "casualties of the war on tobacco"¹⁹ not because they preserve a romantic picture of American life, but because they operate on a distinctly different level than the rest of the tobacco industry.²⁰

1. *Viewing Tobacco Farmers as Agricultural Workers*

Despite the unique role of tobacco in American history and economy, "tobacco is an agricultural product, grown in much the same fashion as cotton and corn."²¹ Like other crops, tobacco is susceptible to unpredictable natural

13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. Pregon, *supra* note 7, at 468.

16. Donald W. Garner, *Tobacco Wars and the New Minority*, 2 J. HEALTH CARE L. & POL'Y 15, 27 (1998).

17. Paul A. LeBel & Richard C. Ausness, *Toward Justice in Tobacco Policymaking: A Critique of Hanson and Logue and an Alternative Approach to the Costs of Cigarettes*, 33 GA. L. REV. 693, 800 (1999).

18. Frieden & Bloomberg, *supra* note 11, at 1758.

19. Pregon, *supra* note 7, at 494.

20. See *id.* (arguing that tobacco farmers did not conspire with tobacco companies to knowingly promote products that caused serious health risks).

21. LaFrance, *supra* note 2, at 194.

occurrences.²² Rainfall, temperature, soil fertility, insects, and a variety of fungal, viral, and bacterial plant diseases can all affect crop production.²³ For many years, tobacco farmers received protection from natural disasters through a price support program and a quota system, which were established by the federal government “to protect farmers from ‘uncontrollable natural causes’ that affected their operations” and limit the supply of tobacco in the market.²⁴ Tobacco farmers are not unique in this respect, as farmers have grown many other crops, including cotton and sugar, under a government-imposed quota system.²⁵ As such, tobacco farmers can be viewed primarily as agricultural workers who face the same problems as other farmers.

2. *Growing Tobacco Involuntarily*

Many farmers may be forced into growing tobacco because they are trapped in a cycle of debt produced by the tobacco companies’ contracting system, which gives tobacco companies excessive control over the farmers’ financial success.²⁶ Under this contracting system, a tobacco company functions as a bank that gives a farmer credit in the form of seed, fertilizer, pesticide, and technical support at the beginning of the year.²⁷ In exchange for this tangible credit, the farmer agrees to

22. See Scott S. Partridge et al., *The Use of the Class Action Device in Agricultural Products Litigation*, 6 DRAKE J. AGRIC. L. 175, 188–93 (2001) (demonstrating that several environmental conditions affect the growth and production of crops).

23. *Id.* at 191–92.

24. Matthew Nis Leerberg, Note, *Takings and Statutory Entitlements: Does the Tobacco Buyout Take Quota Rights Without Just Compensation?*, 55 DUKE L.J. 865, 868 (2006) (“As part of the Agriculture Adjustment Act of 1938 (AAA), the federal government instituted a price support and marketing quota system.”). The Fair and Equitable Tobacco Reform Act of 2004 discontinued the price support program for tobacco. Pub. L. No. 108-357, 118 Stat. 1521 (codified as amended at 7 U.S.C. §§ 518–19a (2006)); JASPER WOMACH, CONG. RES. SERV., TOBACCO QUOTA BUYOUT at CRS-1 (2005), available at <http://www.nationalaglawcenter.org/assets/crs/RS22046.pdf>. See *infra* Part I.B.2.b.

25. ECON. RES. SERV., U.S. DEP’T OF AGRIC., HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS 1933–84, at 5 (1984), available at <http://www.ers.usda.gov/publications/aib485/aib485.pdf> (documenting the history of using crop quotas for sugar and cotton). For a history of the origins of the tobacco quota system, see Leerberg, *supra* note 24.

26. CAMPAIGN FOR TOBACCO FREE KIDS, GOLDEN LEAF BARREN HARVEST: THE COSTS OF TOBACCO FARMING 12–16 (2001), available at <http://www.tobaccofreekids.org/campaign/global/FCTCreport1.pdf>; WORLD HEALTH ORG., REPORT ON THE PUBLIC HEARING ON AGRICULTURAL DIVERSIFICATION AND ALTERNATIVE CROPS TO TOBACCO FOR THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 3 (2007), available at http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_ID3-en.pdf. Even tobacco farmers have acknowledged the “poverty cycle created by debt bondage contracts.” *Id.* Tobacco farmers feel “that the tobacco industry is attempting to enslave the farmers by eliminating the free market system that the auctions provided” CATHERINE SIEBEL ET AL., PRESS COVERAGE OF TOBACCO ISSUES 17 (2002), available at http://www.impactteen.org/states/general_PDFs/presentations/MSS2002_siebel.pdf.

27. CAMPAIGN FOR TOBACCO FREE KIDS, *supra* note 26, at 12.

sell his crop to that company.²⁸ At the end of the growing season, the company's leaf buyers determine the grade or quality of the farmer's tobacco leaf.²⁹ Because the price of tobacco leaf depends on the grade, the company is essentially able to set the price of the tobacco.³⁰ Often, the company's payment to the farmer is less than the value of the initial credit, creating a vicious cycle in which farmers fall into debt, continue growing tobacco in an attempt to repay their debt, and, as a result, become even further indebted.³¹ Additionally, almost all direct contracts with tobacco companies stipulate that farmers assume the production risk of growing tobacco, including "all loss and damage to the crop due to bad weather."³² This stipulation is less kind than the original price support system, which aimed to protect farmers from "uncontrollable natural causes" that wreaked havoc on their crops.³³ As a result of this exploitive contracting system, many farmers may be growing tobacco involuntarily, unable to break free of the cycle of debt.

The problem of tobacco farmer debt is most evident abroad. For example, it is estimated that thirty-five percent of tobacco growers in Brazil will finish the harvest in debt.³⁴ Although farmer indebtedness is particularly pronounced in developing countries, there is reason to believe that many American farmers are facing similar problems. Before 2001, "most tobacco was graded by government inspectors from the United States Department of Agriculture (USDA), under a voluntary agreement between farmers and buyers."³⁵ USDA grading was considered to be relatively fair because the USDA did not aim to profit from the system.³⁶ In 2001, the tobacco industry pressured farmers to switch to a contract system,³⁷ and by 2003 nearly all major cigarette companies were purchasing tobacco through direct contracts.³⁸ Without the protection of a federal crop insurance program, many American farmers may fall into the trap laid by the tobacco companies' contracting system and be forced to grow tobacco involuntarily.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. CAROLYN DIMITRI, U.S. DEP'T OF AGRIC., CONTRACTING IN TOBACCO? CONTRACTS REVISITED 4 (2003), available at <http://www.ers.usda.gov/publications/tbs/jun03/tbs25401/tbs254-01.pdf>.

33. Leerberg, *supra* note 24, at 868.

34. CAMPAIGN FOR TOBACCO FREE KIDS, *supra* note 26, at 16.

35. *Id.* at 14.

36. *Id.*

37. *Id.*

38. DIMITRI, *supra* note 32, at 2.

3. *A Difference of Intent*

Finally, when it comes to intent, “[a] useful distinction can be drawn among the agricultural, the manufacturing, and the distribution aspects of the tobacco industry.”³⁹ It is widely known that “tobacco companies have engaged in deceptive trade practices,” including targeting teenage smokers and “mask[ing] the health risks associated with their products.”⁴⁰ The industry’s intimate knowledge of the harms posed by cigarettes arguably puts “manufacturers of cigarettes . . . in a more ambiguous moral position than tobacco [farmers],”⁴¹ who may not have been aware of the industry’s ultimate objectives:

Tobacco companies, if they were conspiring to promote addiction to products they knew involved health risks, certainly did not include tobacco farmers in their plot. There were no memorandums sent to farmers telling them of the companies’ plans to manipulate nicotine levels in cigarettes to promote addiction. Such decisions, if they were indeed made by tobacco companies, were far removed from the fields where tobacco was grown. Tobacco farmers simply grew their crops, harvested them, and took them to the market to be sold.⁴²

Because tobacco farmers did not engage in the tobacco companies’ deceptive practices, farmers should not “suffer for the sins of the industry.”⁴³ Instead, the tobacco farmer community should be approached as a unique entity that operates on a distinctly different level than the industry at large.⁴⁴

B. Persuading Tobacco Farmers to Collaborate with the Public Health Community

The second step in building a cooperative relationship with tobacco farmers is to gain the farmers’ trust by showing them that the tobacco industry does not have their best interests in mind.⁴⁵ By showing farmers that the industry does not, in fact,

39. LeBel & Ausness, *supra* note 17, at 800.

40. Pregon, *supra* note 7, at 468; *accord* United States v. Philip Morris, 449 F. Supp. 2d 1, 852–53 (D.C. Cir. 2006) (finding that tobacco companies deliberately deceived consumers about the health risks of smoking in order to market their products).

41. LeBel & Ausness, *supra* note 17, at 800.

42. Pregon, *supra* note 7, at 494.

43. *Id.* at 493. “If the tobacco companies are at fault here, surely tobacco farmers should not share the blame.” *Id.* at 494.

44. *Id.* at 494 (arguing that tobacco farmers did not conspire with tobacco companies to knowingly promote products that caused serious health risks).

45. See LINDBLOM, *supra* note 8, at v, 1–3, available at <http://tobaccofreekids.org/reports/falsefriends/campaign.pdf> (noting that tobacco manufacturers’ trend to move production across seas and purchase foreign tobacco has increasingly caused family-owned tobacco farms to disappear). “[T]he bond between the tobacco industry and the tobacco farmer finally is beginning to break down . . .” MACKAY & ERIKSEN, *supra* note 5, at 46. “[T]he tobacco farmers are beginning to note situations where their interests diverge from those of the tobacco companies.” Allan

take farmers into consideration, tobacco control activists will be able to weaken the farmers' loyalty to the industry and persuade farmers to collaborate with the public health community. To demonstrate the industry's lack of concern for farmers, one need only look at the industry's recent actions: the industry's exclusion of farmers from the Master Settlement Agreement negotiations and its strong opposition to the McCain Bill.

1. *The De Facto Exclusion of Tobacco Farmers from the Master Settlement Agreement*

In the late 1990s, several states sued four major tobacco companies "to recover Medicaid funds spent treating smoking-related illnesses."⁴⁶ The states alleged, *inter alia*, that the tobacco companies lied about the harmful effects of smoking and unlawfully targeted children in their advertising.⁴⁷ The lawsuit concluded on November 23, 1998 with the signing of the Master Settlement Agreement (MSA),⁴⁸ "an accord . . . between the state Attorneys General of forty-six states, five U.S. territories, the District of Columbia and the four major tobacco and cigarette producers: Philip Morris Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Corp., and Brown & Williamson Tobacco Co."⁴⁹ In exchange for receiving immunity from further state liability,⁵⁰ the participating companies agreed, *inter alia*, to change the way tobacco products are marketed, to finance a \$1.5 billion anti-smoking campaign, and to open previously secret industry documents.⁵¹ The companies also agreed to make annual payments to the states in perpetuity,⁵² and it is estimated that the payments made during the first twenty-five years would have totaled over \$206 billion.⁵³

W. Vestal, "Real Partnerships" and Real Problems: Conforming Business Entity Law to Fiscal Realities and Popular Conceptions, 28 DEL. J. CORP. L. 877, 889 n.70 (2003). According to a survey conducted in 1994, only seven percent of tobacco growers believed that tobacco companies usually or always take growers' interests into account when making decisions. *In a Tobacco State of Mind*, LEXINGTON-HERALD LEADER (Lexington, Ky.), Sept. 11, 1994, at A10.

46. Rahul Rajkumar et al., *Is the Tobacco Settlement Constitutional?*, 34 J.L. MED. & ETHICS 748, 748 (2006).

47. *Id.*

48. C. STEPHEN REDHEAD, CONG. RES. SERV., RL30058: TOBACCO MASTER SETTLEMENT AGREEMENT (1998): OVERVIEW, IMPLEMENTATION BY STATES, AND CONGRESSIONAL ISSUES, at CRS-1 (1999), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30058.pdf>.

49. Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make It Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 615 (2005).

50. Nat'l Ass'n of Att'ys Gen., Master Settlement Agreement, § XII(a), at 90-91 (1998), available at <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf> [hereinafter Master Settlement Agreement] (follow "Master Settlement Agreement" hyperlink); accord Rajkumar et al., *supra* note 46, at 748.

51. Master Settlement Agreement, *supra* note 50, §§ III-IV, VI (a)-(c).

52. *Id.* § IX(c), at 45-46; accord Rajkumar, *supra* note 46, at 748.

53. Rajkumar, *supra* note 46, at 748.

The MSA does contain a provision referring to tobacco farmers:

[T]he Participating Manufacturers recognize the concern of the tobacco [farmer] community that it may be adversely affected by the potential reduction in tobacco consumption resulting from this settlement, reaffirm their commitment to work cooperatively to address concerns about the potential adverse economic impact on such community, and will, within 30 days after the MSA Execution Date, meet with the political leadership of States with [farmer] communities to address these economic concerns.⁵⁴

Despite this formal show of support, it has been suggested that the tobacco industry refused to include a funding provision for farmers in the MSA.⁵⁵ In fact, the MSA itself did not allocate any funds to be given specifically to tobacco farmers.⁵⁶ And although the tobacco manufacturers confirmed their desire to work with local governments at the negotiation table,⁵⁷ it has been suggested that the industry excluded tobacco growers from those very negotiations.⁵⁸ The farmers' collective interests were not "represented at the bargaining table, and their objectives were never factored into the original settlement."⁵⁹ Tobacco farmers were "excluded from the negotiations and were . . . the ultimate losers."⁶⁰

The industry did, however, take action on July 19, 1999.⁶¹ In accordance with the MSA provision regarding farmers, the tobacco companies voluntarily worked with tobacco-growing states to establish the National Tobacco Growers Settlement Trust Fund, also known as the "Phase II" settlement fund.⁶² The companies agreed to contribute \$5.15 billion on a market-share basis into the trust fund over the course of twelve years.⁶³ The MSA was predicted to have a negative impact on

54. Master Settlement Agreement, *supra* note 50, § I, at 1–2.

55. Colloquy, *Dr. Ron Davis*, 22 S. ILL. U. L.J. 485, 489 (1998).

56. Jasper Womach, CONG. RES. SERV., TOBACCO QUOTA BUYOUT PROPOSALS IN THE 108TH CONGRESS, at n.7 (2004), available at http://www.uky.edu/Ag/TobaccoEcon/publications/womach_rl31790.pdf.

57. Williamson, *supra* note 2, at 603.

58. David S. Samford, Note, *Cutting Deals in Smoke-Filled Free Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 865 (1999); Pregon, *supra* note 7, at 484. One factor contributing to the exclusion of farmers from negotiations was their disorganized nature. After decades of successfully fighting legislation and litigation, the tobacco industry was "actively organized and effective enough to participate in the tobacco negotiations." Samford, *supra*, at 861–62. Unlike the industry, tobacco farmer groups like the Burley Tobacco Growers Cooperation Association suffered from organizational problems and, thus, were not prepared to participate effectively in the settlement negotiations. *Id.* at 866–67.

59. Samford, *supra* note 58, at 865.

60. *Id.* at 883. Dr. Ron Davis, former Director of the Centers for Disease Control's Office on Smoking and Health, suggests that the tobacco growers were excluded from the settlement at the insistence of the tobacco industry. Colloquy, *supra* note 55, at 489.

61. *E.g.*, KY. REV. STAT. ANN. § 248.701 (West 2007).

62. REDHEAD, *supra* note 48, at CRS-5 to CRS-6, CRS-6 n.9.

63. *Id.* at CRS-6.

cigarette consumption, and the goal of the fund was to provide farmers with compensation for their expected decrease in earnings.⁶⁴

One wonders why it took the tobacco industry so long to offer farmers support in the form of the Phase II settlement fund. In light of the industry's otherwise consistent pattern of excluding the farmers, it is not difficult to believe that the Phase II payments were simply a political maneuver designed to improve the industry's image. The exclusion of farmers from the MSA negotiations undoubtedly weakened the farmers' already damaged relationship with the industry.⁶⁵

2. *The Inclusion of Tobacco Farmers in a National Tobacco Policy*

After being excluded from the MSA negotiations by the tobacco industry, tobacco farmers began to draw attention from Congress. There were various attempts to incorporate farmers into a national tobacco control policy, including the unsuccessful McCain Bill, and the Fair and Equitable Tobacco Reform Act, which was enacted in 2004.⁶⁶

a. *A Failed Legislative Effort: The McCain Bill*

In order to "remedy the initial omission of farmers" from the MSA, several Senators introduced proposals to reform the tobacco price support program.⁶⁷ On May 18, 1998, Senator John McCain introduced the National Tobacco Policy and Youth Smoking Reduction Act, commonly known as the "McCain Bill."⁶⁸ Most notably, the McCain Bill would have given the Food and Drug Administration explicit authority to regulate tobacco products.⁶⁹ The bill also included the Long-Term Economic Assistance for Farmers Act (LEAF Act), which would have

64. *Id.* at CRS-5.

65. "The alliance between the industry and other pro-tobacco groups, however, was not exactly built upon mutual trust." Samford, *supra* note 58, at 862. Over the past five years, tobacco farmers have become more aware of the "situations where their interests diverge from those of the tobacco companies." Vestal, *supra* note 45, at 889 n.70 (citation omitted).

66. *See infra* Part I.B.2.a-b.

67. Pregon, *supra* note 7, at 484. Senator Richard Lugar of Indiana proposed a bill, the Tobacco Transition Act, which would phase out the tobacco price support and quota programs. S.1313, 105th Cong. (1997). Senator Wendell Ford of Kentucky proposed a bill, The Long-Term Economic Assistance for Farmers Act, which would provide "market transition assistance for tobacco producers, tobacco industry workers, and their communities." S.1310, 105th Cong. (1997). For a comparison of several bills that proposed to reform the tobacco price support program, see JASPER WOMACH, CONG. RES. SERV., COMPENSATING FARMERS FOR THE TOBACCO SETTLEMENT at CRS-5 to CRS-6 (1998), http://assets.opencrs.com/rpts/98-133_19980706.pdf.

68. S.1415, 105th Cong. (1998); Garner, *supra* note 16, at 15.

69. S.1415 § 3.

provided market transition assistance for tobacco producers, tobacco industry workers, and their communities.⁷⁰

The LEAF Act allocated \$28.5 billion for economic development grants for communities dependent on tobacco, tobacco worker transition assistance, and educational grants for members of tobacco farm families.⁷¹ The Act arranged for the fund to be financed by tobacco manufacturers on a market share basis, with \$2.1 billion contributed annually between 1999 and 2008, and \$500 million contributed annually from 2009 to 2023.⁷² Unfortunately, at the last minute, the tobacco industry not only withdrew its support for the McCain Bill,⁷³ but launched a \$40 million advertising campaign directed against it.⁷⁴ On June 17, 1998, the McCain Bill was defeated in the Senate.⁷⁵

While the size and scope of the McCain Bill were problematic,⁷⁶ the tobacco industry's opposition to the bill was a significant, if not the determinative, factor in its demise. President Clinton, who had lobbied for the McCain Bill,⁷⁷ attributed the bill's defeat to the advertising campaign launched by the tobacco companies.⁷⁸ Additionally, a simple analysis of campaign contributions reveals the link between the mostly Republican Senators who voted against the McCain Bill and the tobacco industry.⁷⁹ The fifty-seven Senators who voted in support of the bill received only

70. *Id.* §§ 1001–41.

71. *Id.* “Perhaps the most stunning provision in the LEAF Act was funding for the college education of tobacco farmers and their (quite expansively defined) extended families.” Garner, *supra* note 16, at 15 n.33. For the text of the provision in the LEAF Act providing educational funding for members of a tobacco farm family, see S. 1415 §§ 1012(5), 1032.

72. S. REP. NO. 105-180, at 49–50 (1998), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr180.105.pdf. See also S.1415 § 1012.

73. Pregon, *supra* note 7, at 484.

74. *Id.* at 484 n.147 (“After rescinding support for the settlement, the five major tobacco companies embarked on a \$ 40 million advertising blitz in opposition to the McCain bill.”) (citing John F. Harris & Ceci Connolly, *Clinton Suffers Major Defeat on Tobacco*, WASH. POST, June 18, 1998, at A.19).

75. MARTHA A. DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS* 122, 129 (2d ed. 2005).

76. Even Senator John Kerry, an anti-tobacco advocate, admitted that the McCain Bill “got a little too big and too convoluted.” Major Garrett, *Congress Snuffs Out the Tobacco Bill*, U.S. NEWS & WORLD REP., June 29, 1998, at 32. The McCain Bill became unwieldy after losing its original focus and gaining opponents along the way. Samford, *supra* note 58, at 890.

77. Campaign for Tobacco-Free Kids, Special Reports Year in Review 1998 (1998), <http://tobaccofreekids.org/reports/yearsreview/1998inreview.shtml>.

78. David E. Rosenbaum, *The Tobacco Bill: The Overview; Senate Drops Tobacco Bill with '98 Revival Unlikely; Clinton Lashes Out at G.O.P.*, N.Y. TIMES, June 18, 1998, at A1.

79. TOBACCO-FREE KIDS ACTION FUND, CAMPAIGN FOR TOBACCO-FREE KIDS, CAMPAIGN CONTRIBUTIONS BY TOBACCO INTERESTS ANNUAL REPORT 1–2 (2006), available at <http://tobaccofreeaction.org/contributions/september2006/september2006.pdf>. In 1998, the Campaign for Tobacco-Free Kids, an organization devoted to preventing tobacco use by children, filed a complaint with the Federal Election Commission alleging that major United States tobacco companies violated federal election laws by making illegal corporate campaign contributions (in the form of political

\$4,810, on average, from the industry, while the forty-two Senators who voted against the McCain Bill received, on average, \$17,902 from the industry.⁸⁰

b. The Successful Legislative Effort: The Fair and Equitable Tobacco Reform Act of 2004 (FETRA or The Buyout)

In the late 1990s, demand for cigarettes continued to decline due to, in part, the MSA and state efforts to curb tobacco use.⁸¹ The tobacco farmer community acknowledged the mounting difficulties faced by tobacco farmers and chose to support Congress' next great proposal to reform the tobacco price program: the Fair and Equitable Tobacco Reform Act of 2004 (FETRA),⁸² otherwise known as "the buyout."⁸³ FETRA ended the tobacco quota system and the price support program, transitioned the farmers into a free-market system,⁸⁴ and established the Tobacco Transition Payment Program, which provided for a buyout of tobacco farmers' property interests.⁸⁵ FETRA also triggered an MSA clause that ended Phase II payments from the tobacco companies to farmers.⁸⁶ In the end, tobacco growers were finally incorporated into a national tobacco control policy not through the efforts of the tobacco industry, but through Congressional legislation.

advertisements) to Republican Senators. David E. Rosenbaum, *New Attack on Cigarette Makers*, N.Y. TIMES, June 29, 1998, at A12.

80. TOBACCO-FREE KIDS ACTION FUND, *supra* note 79, at 21.

81. H. FREDERICK GALE, JR. ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., TOBACCO AND THE ECONOMY: FARMS, JOBS, AND COMMUNITIES 7-8 (2000), available at <http://www.ers.usda.gov/publications/aer789/AER789.PDF>. In a report published in 2000, the U.S. Department of Agriculture Economic Research Service estimated that domestic demand for cigarettes would decline seventeen percent between 1998 and 2008. *Id.* at 11. In a 2002 report, the World Health Organization predicted that tobacco consumption in the U.S. would decline ten to nineteen percent between 1998 and 2008. MACKAY & ERIKSEN, *supra* note 5, at 88-89. For an example of how efforts to curb tobacco use at the state level contributed to decline in cigarette consumption, see Elizabeth Gilpin et al., *What Contributed to the Major Decline in Per Capita Cigarette Consumption During California's Comprehensive Tobacco Control Programme?*, 15 TOBACCO CONTROL 308, 312 (2006).

82. Pub. L. No. 108-357, 118 Stat. 1521 (codified as amended at 7 U.S.C. §§ 518-19a (2006)).

83. Farm Service Agency, United States Department of Agriculture, Tobacco Transition Payment Program, <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=toba&topic=landing> (last visited Feb. 12, 2008); Tobacco Transition Payment Program, 7 C.F.R. § 1463 (2005).

84. 7 U.S.C. § 518a. "[I]nternal divisions within the growers' community were compounded by the prospect of a federal tobacco allotment buy-out." Samford, *supra* note 58, at 867. While older farmers ready to retire supported the buyout, younger farmers were more concerned about the long-term effects of a one-time buyout. *Id.* at 889 n.285.

85. 7 U.S.C. § 518b.

86. *Id.* § 518a ("The Secretary shall offer to enter into a contract with each tobacco quota holder under which the tobacco quota holder shall be entitled to receive payments under this section in exchange for termination of tobacco marketing quotas and related price support . . ."); *accord* State v. Philip Morris USA Inc., 618 S.E.2d 219, 221-23 (N.C. 2005).

II. PHASING OUT TOBACCO FARMING

If tobacco farmers are willing to reduce production of tobacco, the public health community must uphold its end of the bargain. Calling for the discontinuation of tobacco production without providing farmers with assistance to transition out of growing tobacco would be irresponsible and impractical. Instead, the public health community must approach tobacco farmers with a well-developed phase-out program that is tailored to the needs of tobacco farmers. A comprehensive phase-out program would use an excise tax on cigarettes to fund research on alternative crops, subsidies for crop diversification, and education and training for farmers seeking to pursue off-farm careers.

A. *Alternative Uses for Tobacco*

Before committing to a complete elimination of tobacco, it is worthwhile to examine alternative uses for the crop.⁸⁷ Academic institutions like the Tobacco and Health Research Institute at the University of Kentucky in Lexington and North Carolina State University in Raleigh are paving the way in alternative use studies.⁸⁸ At the heart of alternative use research is the discovery that the genes of tobacco plants can be genetically engineered to express a variety of proteins, enzymes, and polymers.⁸⁹ Researchers at the University of Kentucky describe tobacco as a “super-rich petri dish” that can be used to “produce everything from antibiotics to sugars to industrial enzymes.”⁹⁰ Researchers are starting to use tobacco plants as “hosts for bioengineering processes,” which means that tobacco plants could soon be used to make vaccines, cancer treatments, and even blood substitutes.⁹¹ Tobacco plants could even be used to “clean up contaminated areas around weapons factories . . . just by being grown in the contaminated dirt.”⁹²

Although tobacco grown for biotechnology purposes does not demand as high a price as tobacco grown for cigarette manufacturing, tobacco grown for biotechnology purposes needs only about one month to grow, while tobacco grown

87. Brandy E. Fisher, *Turning Over a New Leaf*, 107 ENVTL. HEALTH PERSP. A 206, A 206 (1999), available at <http://www.ehponline.org/docs/1999/107-4/innovations.html> (“Anticipating a diminishing market for cigarettes and other such tobacco products in the future, researchers around the United States are studying alternative uses for tobacco plants. If the research comes to fruition, perhaps tobacco farmers may not have to change their occupation, just their customers.”).

88. *Id.* at A 207.

89. *Id.*

90. Jeff Worley, *UK's Tobacco and Health Institute Branching Out: Tobacco as a “Factory” to Grow New Products*, ODYSSEY (U. of Ky., Ky.), Spring 1998, at 3, 3, available at <http://www.research.uky.edu/odyssey/spring98/tobacco.html>.

91. CAMPAIGN FOR TOBACCO-FREE KIDS, POSSIBLE HEALTHY AND CONSTRUCTIVE USES FOR TOBACCO LEAF 1 (2000), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0107.pdf>.

92. *Id.*

for traditional purposes has a growing cycle of about four months.⁹³ Additionally, an acre of farmland can support only 6,000 tobacco plants grown for cigarette manufacturing, but the same acre can support up to 100,000 tobacco plants grown for biotechnology purposes.⁹⁴

B. *Alternative Crops*

For many years, scholars touted tobacco as the most profitable cash crop in existence. Recently, however, researchers have demonstrated that the labor-intensive nature of tobacco farming and the high cost of initial capital inputs reduce the profitability of tobacco.⁹⁵ Furthermore, Green Tobacco Sickness regularly impairs tobacco farmers, which affects the availability of labor.⁹⁶ And with the tobacco industry shifting manufacturing and production facilities overseas, tobacco is quickly losing its appeal as a stable cash crop.⁹⁷ As the value of tobacco declines, tobacco farmers can cushion their financial loss by diversifying their commodities and growing alternative crops.⁹⁸ One way to encourage farmers to reduce tobacco production is to fund alternative crop research and subsidize diversification efforts.⁹⁹

1. *Is Tobacco the Most Profitable Crop? The Pervasive Myth*

Before farmers can be persuaded to abandon tobacco in favor of alternative crops, tobacco control activists must dispel the myth perpetuated by the tobacco industry, legal scholars, politicians, and various organizations that there is no crop more profitable than tobacco. Tobacco has been praised as an economically appealing crop because of its high per-acre return and stable market.¹⁰⁰ In the past,

93. *Id.*

94. *Id.*

95. See *infra* notes 106–09 and accompanying text.

96. See *infra* notes 110–16 and accompanying text.

97. See *infra* notes 117–20 and accompanying text.

98. “[H]ealth professionals must learn to work more closely with tobacco farmers and farm organizations, emphasizing their joint interest in diversification.” Altman et al., *supra* note 12, at 197. The World Health Organization has identified alternative crop production as an important focus if tobacco farmers are to be convinced to leave tobacco. Article 17 of the Framework Convention on Tobacco Control is the “[p]rovision of support for economically viable alternative activities” and states: “Parties shall, in cooperation with each other and with competent international and regional intergovernmental organizations, promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers.” WORLD HEALTH ORG., FRAMEWORK CONVENTION ON TOBACCO CONTROL 16 (reprint 2005) (2003), available at http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf.

99. Altman et al., *supra* note 12, at 197 (emphasizing the need for collaboration between health professionals and tobacco farmers, particularly in the area of crop diversification).

100. Pregon, *supra* note 7, at 469–70; Ross, *supra* note 7, at 331; Lucien J. Dhooge, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT’L L.J. 355, 355 (1998); UNITED NATIONS CONFERENCE ON TRADE & DEV., ECONOMIC

both the United Nations Food and Agriculture Organization and the World Bank encouraged growing tobacco as a cash crop.¹⁰¹ At one time during his presidency, even President Clinton claimed that there was “no known crop with the same income per acre [as tobacco].”¹⁰² Predictably, the International Tobacco Growers’ Association claims that tobacco is the most profitable crop per unit of land out of tobacco, beans, maize, and dairy,¹⁰³ and, as of 2007, the industry still claims that tobacco is the best profitable crop.¹⁰⁴

In recent years, the MSA and state efforts to curb tobacco use have contributed to a decline in the value of American tobacco.¹⁰⁵ Making tobacco farming less appealing is the growing acknowledgment that the short-term gains of tobacco farming are likely to be outweighed by the long-term costs.¹⁰⁶ Although tobacco is a profitable crop, its economic appeal is reduced by the high cost of initial inputs such as fertilizers, pesticides, and equipment.¹⁰⁷ Additionally, tobacco farming is extremely labor intensive, and high labor costs further reduce the profitability of the crop.¹⁰⁸ Consequently, although tobacco yields higher income per acre, other crops may yield higher cost-benefit ratios when all the costs of tobacco farming are taken into account.¹⁰⁹

Tobacco farming also presents a unique hazard: Green Tobacco Sickness (GTS).¹¹⁰ GTS is an acute nicotine poisoning that occurs when farmers handle the leaves of mature tobacco plants by hand-harvesting, cutting, or loading the

ROLE OF TOBACCO PRODUCTION AND EXPORTS IN COUNTRIES DEPENDING ON TOBACCO AS A MAJOR SOURCE OF INCOME 16 (1995), available at <http://www.unctad.org/en/docs/pocomd63.en.pdf>.

101. ACTION ON SMOKING & HEALTH, FACTSHEET NO: 21: TOBACCO IN THE DEVELOPING WORLD (2001), available at <http://oldash.org.uk/html/factsheets/pdfs/fact21.pdf>.

102. CNN.com, Clinton Talks with Tobacco Farmers (April 9, 1998), available at <http://www.cnn.com/ALLPOLITICS/1998/04/09/clinton.tobacco/transcript.html>.

103. INT’L TOBACCO GROWERS ASS’N, TOBACCO IN THE DEVELOPING WORLD (2d ed. 1996), available at <http://www.forces.org/assorted/tob-dev.htm>.

104. WORLD HEALTH ORG., *supra* note 26, at 4 ¶ 23. “[T]he arguments of . . . the tobacco industry that tobacco is the best profitable crop are still not based on strong scientific research.” *Id.*

105. *See* sources cited *supra* note 81.

106. ACTION ON SMOKING & HEALTH, *supra* note 101. INT’L BANK FOR RECONSTRUCTION & DEV., WORLD BANK, WORLD DEVELOPMENT REPORT 1993: INVESTING IN HEALTH 89, 89 (1993), available at <http://www.dcp2.org/file/62/WorldDevelopmentReport1993.pdf>. According to the World Health Organization, “tobacco increases the poverty of individuals and families.” WORLD HEALTH ORG., TOBACCO AND POVERTY: A VICIOUS CIRCLE 4 (2004), available at http://www.who.int/tobacco/communications/events/wntd/2004/en/wntd2004_brochure_en.pdf.

107. CAMPAIGN FOR TOBACCO-FREE KIDS, *supra* note 26, at 19.

108. *Id.*

109. *Id.*; accord T-W Hu et al., *China at the Crossroads: The Economics of Tobacco and Health*, 15 TOBACCO CONTROL (Supp.) i37, i38–i39 (2006).

110. Jeffrey S. McBride et al., *Green Tobacco Sickness*, 7 TOBACCO CONTROL 294, 294 (1998); Robert McKnight & Henry Spiller, *Green Tobacco Sickness in Children and Adolescents*, 120 PUB. HEALTH REP. 602, 602 (2005), available at http://www.publichealthreports.org/userfiles/120_6/120602.pdf.

plants.¹¹¹ Symptoms of GTS may include headache and nausea followed by vomiting, diarrhea, fluctuations in blood pressure or heart rate, abdominal cramps, abnormal temperature, dizziness, muscle weakness, and insomnia.¹¹² The onset of GTS can occur anywhere from three to seventeen hours after exposure to nicotine, and the illness can last from one to three days.¹¹³ Although the symptoms of GTS are not long lasting, they can be debilitating.¹¹⁴ Unfortunately, data on the prevalence of the illness are still limited,¹¹⁵ and very little widespread action has been taken to reduce the risk of GTS.¹¹⁶

A final incentive to abandon growing tobacco in the United States is the industry's increasing reliance on developing countries for production and manufacturing.¹¹⁷ Tobacco companies are attracted to developing countries for a variety of reasons, including cheaper labor, easy access to natural resources,¹¹⁸ the relative lack of regulation, and the proximity to the source of tobacco, which is increasingly being grown overseas.¹¹⁹ Once the world's second largest tobacco producer, the United States now accounts for only seven percent of global tobacco production.¹²⁰ Growing tobacco is no longer as lucrative or attractive an enterprise as it once was.

2. *Alternative Crops to Tobacco*

Researchers throughout the world are seeking reliable alternatives to tobacco. Investigators at Virginia State University and Virginia Polytechnic Institute and State University conducted a study of over thirty potential alternative crops,

111. McBride et al., *supra* note 110, at 294–95; Ctrs. for Disease Control & Prevention, *Green Tobacco Sickness in Tobacco Harvesters — Kentucky, 1992*, 42 MORTALITY & MORBIDITY WKLY. REP. 237, 238 (1993), available at <http://www.cdc.gov/MMWR/PDF/wk/mm4213.pdf>.

112. McBride et al., *supra* note 110, at 294–95; University of Connecticut Health Center, *Identifying Green Tobacco Sickness in Farmworkers* (July 2002), <http://www.oehc.uchc.edu/news/new0702.htm> (last visited Feb. 12, 2008).

113. McBride et al., *supra* note 110, at 295.

114. *Id.* at 296.

115. T. A. Arcury et al., *Predictors of Incidence and Prevalence of Green Tobacco Sickness Among Latino Farmworkers in North Carolina, USA*, 55 J. EPIDEMIOLOGY & COMMUNITY HEALTH 818, 818 (2001).

116. McBride et al., *supra* note 110, at 297.

117. JASPER WOMACH, CONG. RES. SERV., U.S. TOBACCO PRODUCTION, CONSUMPTION, AND EXPORT TRENDS, at CRS-2 (2003) (explaining that domestic production of tobacco is steadily declining and is projected to decrease). See generally LINDBLOM, *supra* note 8.

118. CANADIAN COUNCIL FOR TOBACCO CONTROL, TOBACCO FARMING AND TOBACCO GROWERS 5 (2007), <http://www.cctc.ca/cctc/EN/mediaroom/backgrounderfarming>.

119. Ross Hammond, *Consolidation in the Tobacco Industry*, 7 TOBACCO CONTROL 426, 426 (1998).

120. CAMPAIGN FOR TOBACCO-FREE KIDS, *supra* note 26, at 6 (demonstrating that production of tobacco in the United States is falling at the same time as production in developing countries is rising).

including apricot, basil, cotton, onion, quinoa (a type of grain), and soybean.¹²¹ Crops varied in their success: while apricot and quinoa were not well adapted to the area, canola and the adzuki bean were identified as potential new cash crops.¹²² Another study at the University of Wisconsin focused on Echinacea, an herb sold in the herbal medicinal market as an immune system booster.¹²³ The study observed that tobacco equipment can be used to plant the herb, but that the herb may not be a dependable alternative crop due to its price volatility.¹²⁴ A 2006 study done in China concluded that tobacco does not produce the best economic return and that mulberry, rice, wheat, and vegetable oil each yielded a higher net profit than tobacco.¹²⁵ Another study, conducted in India, found that the “gross income from a hectare of tobacco is twenty-two percent higher than for an alternative crop like safflower”¹²⁶ However, after factoring in the production costs of growing tobacco, safflower farming was found to yield seventeen percent more profit.¹²⁷

Other organizations have made detailed descriptions of various alternative crops available on the Internet. The USDA National Agricultural Library provides a list of resources regarding alternative crops and enterprises for small farm diversification.¹²⁸ The website of the New Crop Opportunities Center of the University of Kentucky provides specific information about various crops, including the market outlook, economic considerations, labor requirements, pest management, and recommendations on harvest and storage.¹²⁹ Washington State University Island County Extension runs a similar website profiling many crops.¹³⁰ The Appropriate Technology Transfer for Rural Areas (ATTRA) or National Sustainable Agriculture Information Service, operating under a grant from the

121. H.L. Bhardwaj et al., *Alternative Crops Research in Virginia*, in PROGRESS IN NEW CROPS 87, 88 tbl.1 (Jules Janick ed., 1996) available at <http://www.hort.purdue.edu/newcrop/proceedings1996/v3-087.html>.

122. *Id.*

123. DON SCHUSTER & RICK KLEMME, CTR. FOR INTEGRATED AGRIC. SYS., UNIV. OF WIS.-MADISON, ECHINACEA AS A TOBACCO CROP ALTERNATIVE? 1-2, available at <http://www.cias.wisc.edu/pdf/echinace.pdf>.

124. *Id.* at 5.

125. T-W Hu et al., *supra* note 109, at i38-i39.

126. CAMPAIGN FOR TOBACCO-FREE KIDS, *supra* note 26, at 19.

127. *Id.*

128. U.S. Dep't of Agric., Alternative Farming Sys. Info. Ctr., List of Alternative Crops and Enterprises for Small Farm Diversification (July 18, 2006), <http://www.nal.usda.gov/afsic/pubs/altlist.shtml> (last visited Feb. 12, 2008).

129. Univ. of Ky., New Crop Opportunities Ctr., Crop Profiles, <http://www.uky.edu/Ag/NewCrops/intro.html> (last visited Feb. 12, 2008).

130. Wash. State Univ. Island County, Specialty Crops Information Sheets (Oct. 1998), <http://www.island.wsu.edu/CROPS/index.htm> (last visited Feb. 12, 2008).

USDA Rural Business-Cooperative Service,¹³¹ also provides a table of information about non-traditional crops.¹³²

The World Health Organization (WHO) has joined in the effort to find alternative crops through the Framework Convention on Tobacco Control (FCTC), an international treaty that aims to improve global public health by promoting global cooperation on tobacco control policies.¹³³ Article 17 of the FCTC is the “provision of support of economically viable alternative activities” and states: “Parties shall, in cooperation with each other and with competent international and regional intergovernmental organizations, promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers.”¹³⁴ In accordance with this provision, the WHO established a study group on alternative crops during the first session of the Conference of the Parties to the WHO FCTC held in Switzerland in 2006,¹³⁵ and the study group was charged with examining alternative crops and livelihoods, particularly in countries that are dependent on tobacco production.¹³⁶

In February of 2007, the WHO held a public hearing in Brazil on agricultural diversification and alternative crops.¹³⁷ At the hearing, tobacco farmer associations, tobacco control activists, governmental departments, research organizations, and academic bodies from around the world presented their views on diversification.¹³⁸ The issue of diversification was later addressed at the second session of the Conference of the Parties to the WHO FCTC in Thailand in 2007, where delegates from 145 parties gathered to consider provisions on exposure to tobacco smoke, the elimination of illicit trade, and the packaging and labeling of tobacco products.¹³⁹ A

131. Appropriate Tech. Transfer for Rural Areas, Nat'l Sustainable Agric. Info. Serv., Who We Are, <http://attra.ncat.org/who.html> (last visited Feb. 12, 2008).

132. PATRICIA SAUER & PRESTON SULLIVAN, APPROPRIATE TECH. TRANSFER FOR RURAL AREAS, ALTERNATIVE AGRONOMIC CROPS 3 (2000), available at <http://attra.ncat.org/attra-pub/PDF/altcrops.pdf>.

133. WORLD HEALTH ORG., *supra* note 98, at 1–3.

134. *Id.* at 16.

135. WORLD HEALTH ORG., MATTERS IDENTIFIED IN DECISIONS TAKEN BY THE CONFERENCE OF THE PARTIES THAT CALL FOR ACTION IN THE PERIOD BETWEEN ITS FIRST AND SECOND SESSIONS I (2007), available at http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_11-en.pdf.

136. World Health Org., Highlights of the First Tobacco Treaty Conference of the Parties (Feb. 17, 2006), <http://www.who.int/mediacentre/news/notes/2006/np03/en/index.html> (last visited Feb. 12, 2008).

137. WORLD HEALTH ORG., *supra* note 26, at 1.

138. *Id.* at 2.

139. World Health Org., WHO Framework Convention on Tobacco Control - Second Session of Conference of the Parties (2007), http://www.who.int/mediacentre/events/2007/fctc_bangkok/en/index.html (last visited Feb. 12, 2008); see also World Health Org., Conference of the Parties to the WHO Framework Convention on Tobacco Control, Second Session, Agenda, July 3, 2007), http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_1Rev1-en.pdf (demonstrating that a discussion on alternative crops was on the hearing agenda).

summary of the public hearing that took place in Brazil was presented at the second session of the conference, which indicated that tobacco farmers are concerned about finding stable alternative livelihoods and that more research is necessary in this area.¹⁴⁰

3. *Willingness of Farmers to Try Alternative Crops and Enterprises*

Several studies have demonstrated that tobacco farmers are interested in growing alternative crops or using other activities to supplement income from growing tobacco. As early as 1996, an American study demonstrated that there was substantial interest among tobacco farmers in alternative crops or ventures.¹⁴¹ Studies conducted in Kenya, India, and Bangladesh have produced similar findings.¹⁴²

Interestingly, American farmers have already been exploring alternative crops to supplement their income from tobacco farming. In 1996, the majority of tobacco farms were already diversified: eighty-two percent of farms growing flue-cured tobacco sold at least one other commodity, and forty-two percent of flue-cured tobacco farms sold four or more other commodities.¹⁴³ And in a 1998 study, ninety-five percent of tobacco farmers surveyed were growing or raising a commodity other than tobacco.¹⁴⁴ In the Suwannee Valley in northern Florida, farmers have been exploring alternative crops for the past ten to fifteen years, and their

140. WORLD HEALTH ORG., *supra* note 26, at 2–3.

141. Altman et al., *supra* note 12, at 195 (“Half of [interviewed farmers] had done something to learn about on-farm alternatives to tobacco, had an interest in trying other on-farm ventures to supplement tobacco income, and had found alternatives that were profitable.”).

142. In a case study in Kenya, “[a]ll of the interviewed tobacco farmers indicated a willingness to shift to alternative crops, with 90% stating they would shift immediately.” WORLD HEALTH ORG., *supra* note 135, at 9. A study conducted in India from 1996 to 2000 involved an action intervention in the village of Sidnal. Research for Int’l Tobacco Control, Economics of Shifting from Tobacco: A Micro-Level Study and Action Programme, <http://archive.idrc.ca/ritc/india.htm> (last visited Feb. 13, 2008). Tobacco farmers were provided seeds for an alternative crop, buffaloes for dairy farming, and financial assistance. *Id.* In the first year of the intervention, tobacco cultivation was reduced by half, and fifty-four percent of the farmers shifted to alternative crops or activities. *Id.* Tobacco farmers in Bangladesh also participated in a government program that encourages farmers to produce alternative crops; they assured the health minister of Bangladesh that if the government provides financial support, they would stop tobacco production. *Tobacco Farmers to Get Micro Credit to Produce Alternative Crop*, DAILY NEWS MONITORING SERVICE, Mar. 17, 2005, available at <http://www.bangladesh-web.com/view.php?hidDate=2005-0317&hidType=BAE&hidRecord=37774>.

143. GALE ET AL., *supra* note 81, at 19 tbl.8, 30.

144. David G. Altman et al., *Predictors of Crop Diversification: A Survey of Tobacco Farmers in North Carolina (USA)*, 7 TOBACCO CONTROL 376, 379 (1998). The study also found that sixty percent of the farmers surveyed reported that either the farmers themselves or a member of their family who lived on the farm had taken action to learn more about supplementing their tobacco income. *Id.* “Actions included such things as requesting written material about supplementing their tobacco income, attending a meeting about supplementation, and attending a farm demonstration of supplemental crops or methods.” *Id.* Additionally, twenty-six percent of the farmers surveyed had applied for loans, grants, or other money to support efforts to supplement their tobacco income. *Id.*

dependence on tobacco has declined.¹⁴⁵ With many farmers already interested in diversification, it may not be difficult to persuade them to explore alternatives to tobacco farming.

C. *A Phase-Out Program Tailored to the Needs of Tobacco Farmers*

Traditionally, agricultural workers receive assistance when new government policies affect their industries, and tobacco farmers should be no different.¹⁴⁶ If tobacco control activists seek the gradual termination of tobacco production, a program to phase out tobacco farming should include subsidies to support tobacco farmers through the transitional period.¹⁴⁷ A transitional subsidy can be funded through an excise tax on cigarettes, which can benefit both farmers and the public health. Finally, the public health community can use the government's willingness to levy excise taxes as a litmus test of the government's true objectives with regard to the tobacco industry.

1. *Funding Alternative Crop Research and Subsidizing Crop Diversification, Education, and Job Training*

To transition out of growing tobacco as seamlessly as possible, farmers need "an alternate means of income comparable to the income created by tobacco production."¹⁴⁸ But the search for a stable cash crop to replace tobacco is far from over,¹⁴⁹ as evidenced by ongoing research being conducted by academic institutions such as Virginia State University and Virginia Polytechnic Institute and State University, governmental bodies such as the USDA, and inter-governmental organizations such as the WHO.¹⁵⁰ Because existing research does not provide sufficient guidance on viable alternatives to tobacco, the federal government of the United States should assist in the search for suitable alternative crops by funding further research on crop diversification.¹⁵¹ Once stable alternative crops are identified, tobacco farmers should receive financial assistance as they replace tobacco with other crops.¹⁵²

145. Univ. of Fla., N. Fla. Research & Educ. Ctr., *Alternative Vegetable Crops*, <http://nfrec.ifas.ufl.edu/alternativecrops.htm> (last visited Feb. 13, 2008).

146. LeBel & Ausness, *supra* note 17, at 802.

147. *Id.* at 792 (explaining that subsidies can be used to encourage cooperation and alleviate the damage inflicted on the population suffering from harm).

148. Williamson, *supra* note 2, at 615.

149. "[T]he issues of growing, diversification and substitution cannot be resolved in a short period of time. Indeed, it will involve an extensive process of work, research and consultations with different stakeholders and experts in order to reach viable solutions on the issue of farming" WORLD HEALTH ORG., *supra* note 26, at 4.

150. *See supra* Part II.B.2.

151. WORLD HEALTH ORG., *supra* note 135, at 13–19.

152. The United States Department of Agriculture recognizes that farmers may need assistance with growing alternative or supplemental crops. GALE ET AL., *supra* note 81, at 30.

Additionally, we should not exclude the possibility that some tobacco farmers may want to stop farming altogether and pursue different careers.¹⁵³ Those who decide to pursue a new profession should receive subsidies¹⁵⁴ to help with “developing skills and education through community colleges, trade schools, GED course work, or other training programs.”¹⁵⁵ Providing funding for career transitions will further encourage farmers to leave tobacco in favor of a new enterprise.

2. *Funding the Transitional Subsidy with an Excise Tax on Cigarettes*

In the United States, an excise tax on cigarettes could be used to fund research on alternative crops and alternative livelihoods for tobacco farmers.¹⁵⁶ Excise tax revenues could also enable the USDA to help tobacco-growing states provide assistance to tobacco farmers in transitioning from growing tobacco to growing other crops or pursuing different occupations altogether.¹⁵⁷

Using an excise tax offers additional benefits. An excise tax on cigarettes could forge a stronger bond between farmers and public health advocates¹⁵⁸ by benefiting farmers¹⁵⁹ while reducing smoking rates.¹⁶⁰ An excise tax would advance the goals of both groups, thus aligning the interests of two traditionally conflicting groups.¹⁶¹ Additionally, one study has shown that a majority of Americans “believe[] that the government should help farmers make a living other than

153. *Id.* at 31. “While it is politically prudent to identify alternative livelihoods for tobacco farmers, one should not assume these would be in agriculture.” Derek Yach & Douglas Bettcher, *Globalisation of Tobacco Industry Influence and New Global Responses*, 9 *TOBACCO CONTROL* 206, 210 (2000).

154. LeBel & Ausness, *supra* note 17, at 802.

155. GALE ET AL., *supra* note 81, at 31.

156. Gregory D. Bassuk, Note, *Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation*, 85 *GEO. L.J.* 715, 745 (1997).

157. *Id.*

158. See Altman et al., *supra* note 12, at 196 (“Data from this study suggest that farmers and health professionals have reason to establish dialogue around diversification and using excise taxes to fund diversification.”).

159. *Id.* (“[T]he level of taxation will have a greater effect on the industry income than on farmer income.”); see also CAMPAIGN FOR TOBACCO-FREE KIDS, STATE CIGARETTE TAX INCREASES WILL NOT HURT U.S. TOBACCO FARMERS OR CIGARETTE FACTORY WORKERS 1 (2007), <http://tobaccofreekids.org/research/factsheets/pdf/0150.pdf> (arguing that tax increases on cigarettes will not hurt U.S. tobacco farmers because of the demand for tobacco abroad).

160. CAMPAIGN FOR TOBACCO-FREE KIDS, FEDERAL CIGARETTE EXCISE TAX INCREASES: ESTIMATED NEW REVENUES, COST SAVINGS, AND OTHER BENEFITS & EFFECTS 1 (2007), <http://www.tobaccofreekids.org/research/factsheets/pdf/0149.pdf>.

161. Altman et al., *supra* note 12, at 196–97 (demonstrating that tobacco farmers and public health groups both support an excise tax on cigarettes and can work together to allocate tax revenues to support diversification).

growing tobacco” and think that “taxpayers should help pay for such programs.”¹⁶² Finally, a diversification effort funded by excise taxes could “decrease public and policy-maker resistance to tobacco control.”¹⁶³ By offering support for an excise tax, tobacco farmers, tobacco control activists, and the public could present a united front against the industry.¹⁶⁴

3. *Using an Excise Tax as a Litmus Test of the Federal Government’s True Objectives*

An excise tax on cigarettes generates multiple benefits. It can be used to fund research on alternative crops and subsidize tobacco farmers as they transition out of growing tobacco while simultaneously decreasing tobacco consumption.¹⁶⁵ Only the tobacco industry seems to oppose excise taxes on cigarettes.¹⁶⁶ Thus, excise taxes become a litmus test of the federal government’s commitment to tobacco control.

If the federal government’s primary objective is to support the tobacco industry, then the government will reject an excise tax, even though such a tax can reduce tobacco consumption and help farmers transition out of growing tobacco. However, if the government does not aim to support the tobacco industry, then it may be willing to consider using an excise tax to assist farmers, despite the opposition of the tobacco industry. Identifying the government’s intentions with respect to the industry will be crucial for shaping future policies regarding tobacco farmers.

CONCLUSION

In recent years, tobacco control in the United States has been adversarial,¹⁶⁷ a warranted approach in light of the tobacco industry’s record of distortion and deception.¹⁶⁸ However, modern anti-tobacco activists need new weapons in their

162. David G. Altman et al., *Tobacco Farming and Public Health: Attitudes of the General Public*, 53 J. SOC. ISSUES 113, 121 (1997).

163. Altman et al., *supra* note 12, at 196.

164. Contrary to what the industry would have farmers believe, an excise tax on cigarettes is beneficial for farmers in their efforts to diversify. Altman et al., *supra* note 12, at 197. *See also* Vestal, *supra* note 45, at 889 n.70 (citation omitted) (noting that the Burley Tobacco Growers Cooperative Association recently supported an excise tax that was opposed by the Brown & Williamson Tobacco Corporation).

165. Bassuk, *supra* note 156.

166. *See sources cited supra* note 164.

167. DERTHICK, *supra* note 75, at 209. Pregon, *supra* note 7, at 467 (describing the tobacco control policy of the United States as an “all-out war against the tobacco industry”). W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 DUKE L.J. 1095, 1099 (1998) (explaining that the approach of the Food and Drug Administration towards tobacco control has been adversarial).

168. *United States v. Philip Morris*, 449 F. Supp. 2d 1, 852 (D.C. Cir. 2006) (finding that tobacco companies deliberately deceived consumers about the health risks of smoking to market their products).

arsenal, and it may come as a surprise that a powerful new tactic relies on cooperation with tobacco farmers rather than the more traditional strategy of attack.

Creating room for tobacco farmers in an anti-tobacco policy does not mean that tobacco control activists must temper their convictions to reduce or eliminate the use of tobacco products. It simply means that activists must be willing to understand the consequences to farmers of an anti-tobacco policy and consider avenues of tobacco control that reflect that understanding. Activists must acknowledge that it is possible to discontinue tobacco production without destroying the lives of farmers¹⁶⁹ by using an excise tax on cigarettes to fund alternative crop research and subsidize diversification, job training, and education.

By distinguishing farmers from the industry as a whole and persuading farmers that the industry does not have their best interests in mind, tobacco control advocates can create space for a powerful, new collaboration with farmers. Aligning the interests of the public health community and tobacco farmers will usher in a new era of cooperation, empower both groups, and further the public health goal of reducing tobacco consumption.

See also Yussuf Saloojee & Elif Dagli, *Tobacco Industry Tactics for Resisting Public Policy on Health*, 78 BULL. WORLD HEALTH ORG. 902, 902-03 (2000), available at [http://whqlibdoc.who.int/bulletin/2000/Number%207/78\(7\)902-910.pdf](http://whqlibdoc.who.int/bulletin/2000/Number%207/78(7)902-910.pdf) (discussing the tobacco companies' practice of concealing documents that implicate the companies' knowledge of the harm caused by cigarettes); Brian H. Barr, Note, *Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 FLA. ST. U. L. REV. 787, 826 (2001) ("The industry simply ignored the health and safety of its consumers and affirmatively lied to the users of its products about the negative health effects of smoking."); World Health Org., *Dismantling Tobacco Industry Myths* ("The tobacco industry has repeatedly misled and misinformed the public about the health risks and dangers of second-hand tobacco smoke and on the economic impact of smoking bans."), <http://www.who.int/tobacco/communications/events/wntd/2007/dismantling/en> (last visited Feb. 13, 2008).

169. Altman et al., *supra* note 12, at 197 ("Our goal should not be to save tobacco, but to save those whose livelihoods depend on tobacco.").

