

8. Tobacco Industry Challenge to ASSIST

Part 1

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8. Tobacco Industry Challenge to ASSIST

If successful in bringing about policies that would help create a tobacco-free norm, the American Stop Smoking Intervention Study (ASSIST) would have the dual effect of decreasing tobacco use and decreasing the adverse health effects resulting from tobacco use. The tobacco companies were aware of this potential, even before ASSIST started. Because of ASSIST's potential impact, the tobacco companies undertook efforts to counter the project. The two parts of this chapter present the tobacco industry's challenge to ASSIST, first from the perspective gleaned from industry documents that became available as a result of litigation and second from the perspective of ASSIST personnel who experienced the challenges first-hand.

The tobacco companies burdened the states with requests for documents through processes allowed by the federal Freedom of Information Act (FOIA), accused ASSIST staff and local coalition members of using funds for illegal lobbying, and brought lawsuits against ASSIST staff members. The results of the systematic research of industry documents, presented in part 1 of this chapter, identify eight industry strategies to oppose the activities of ASSIST. The search yielded 1,350 documents relevant to ASSIST. Of these, 166 contained information about the tobacco companies' strategies, which were coded by a standard research method. This chapter documents the strategies with quotations from many of the documents.

Part 2 of this chapter describes the legal and temporal contexts in which ASSIST staff members responded to the tobacco industry's requests and charges. The National Cancer Institute (NCI) made continuous efforts to educate the ASSIST staff about their responsibilities and limitations regarding advocacy and lobbying activities and their obligation to respond to FOIA requests for ASSIST materials. The accusations of illegal lobbying that the tobacco companies brought against ASSIST staff nevertheless caused confusion about which activities were legitimate, and the time burden of responding to FOIA requests diverted the staff members from tobacco control activities. As the industry's challenges repeated themselves and became more widespread, the ASSIST states became more effective at responding. The case studies in this chapter describe the responses of the state staff to the challenges and, in some cases, the unfortunate personal damage experienced by individual staff members.

Part 1. The Tobacco Industry's Response to ASSIST: An Analysis of Tobacco Industry Internal Documents

Methods for Researching the Tobacco Industry Documents

Lawsuits in the 1990s against the tobacco industry have resulted in the release of internal tobacco industry documents as part of the litigation and settlement agreements; these documents are now available to the public on the Internet. They provide an unprecedented look at tobacco industry motives, strategies, and operations—information that is not available from any other source. The documents describe an industry whose actions are directed at, among other things, promoting tobacco initiation and sustaining its use.¹

To understand the tobacco industry's reaction to ASSIST, the Legacy Tobacco Documents Library of the University of California–San Francisco (<http://legacy.library.ucsf.edu>), three tobacco industry document Web sites (www.pmdocs.com, www.tobaccoinstitute.com, www.rjrtdocs.com), and Tobacco Documents Online (<http://tobaccodocuments.org>) were searched between June 10, 2002, and April 28, 2003. The search was deliberately broad, the goal being to identify all documents that mention ASSIST. Exact duplicates were excluded. The search terms are listed in table 8.1.

The authors searched on the name of the program, “American Stop Smoking Intervention Study for Cancer Prevention.” This resulted in a number of documents that were official reports belonging to

Locations of Tobacco Industry Documents

For consistency and ease of retrieval, tobacco industry documents in this chapter have been referenced according to the Legacy Tobacco Documents Library Web site of the University of California–San Francisco. These documents became public in the late 1990s as a result of litigation against the tobacco industry. The tobacco industry Web sites are subject to changes and, because the Tobacco Master Settlement Agreement requires the Web sites to be maintained for only 10 years, these sites may not be available in the future. The Legacy Library is permanently archiving the tobacco industry documents from the Minnesota depository and elsewhere. Therefore, the documents cited in this chapter can be found by searching for them by Bates number (unique page number) on the Legacy Tobacco Documents Library Web site at <http://legacy.library.ucsf.edu>.

the ASSIST program itself, which did not provide the information needed to analyze the tobacco industry's strategies regarding ASSIST. The authors next searched on the term *ASSIST*, which resulted in over 21,000 hits. Many of these documents contained the verb “assist” in the title and had nothing to do with the ASSIST program. The number of these irrelevant documents was significantly reduced by combining the search term *assist* with relevant terms such as *smoking* or *NCI*. The search was then further narrowed to specific document types such as *memo*, *confidential*, or *letter* to identify the more interesting ones (docu-

Table 8.1. Search Terms Used with Tobacco Industry Document Sites

ALPHA
 American Stop Smoking Intervention Study for
 Cancer Prevention
 ASSIST
 attorney client work product
 Bennett, JT
 Bonilla
 budget
 Cancerscam
 Capitol Research Center
 Chilcote
 confidential
 cost effective
 DiLorenzo, TJ
 Earhart Cancerscam
 Earhart Foundation
 Fish, JH
 Hays and Wilson
 HHS
 Istook
 Klausner, R
 letter
 lobbying
 Mapes 1
 Massachusetts ASSIST Summary
 memo
 Minnesota Project ASSIST
 National Cancer Institute
 NCI
 New England Convenience
 North Carolina ASSIST Summary
 O’Keefe Project ASSIST
 Project ASSIST in Colorado
 Rhode Island ASSIST Summary
 Shalala
 Slavitt, J
 smoking
 Stuart Cloud
 Sunmark
 Tom Huff
 Washington
 Washington Legal Foundation
 West Virginia ASSIST Summary
 work product

ments from the tobacco industry, not reprints of ASSIST program reports, for example). Further search terms were developed on the basis of these documents. This is called “snowball searching by topic.”

Terms were combined in various ways and also limited to specific date ranges. Tobacco industry personnel often added prefixes “x” and “xx” to names to preserve confidentiality; therefore, the authors also searched most names, both as correctly spelled and with “x” and “xx” prefixed. Additional documents were obtained through snowball searches that identified related documents by examining adjacent Bates numbers (unique numerical identifiers assigned to documents during litigation).^{*} A document was included if it contained a discussion of the ASSIST program. In addition, where possible, government documents identified in the tobacco industry document collections were verified with copies from the original source.

LexisNexis (<http://web.lexisnexis.com/congcomp>) was searched for legislative history on the following terms between November 7, 2002, and January 22, 2003:

- House or Senate, 104, SMOKING
- Shalala, House Appropriations, 2/11/97
- Stop Smoking Intervention, House, Appropriations
- SMOKING, Shalala, House, Appropriations

^{*}For example, a search on 202607951* (with the asterisk substituted for the last number) resulted in three additional documents. But a search on 202401712* resulted in just one document, because all the other Bates numbers in the sequence 2024017121 through 2024017129 were either missing or were part of the one document.

The Tobacco Institute

The Tobacco Institute was the lobbying and trade organization for the American tobacco industry. Tobacco companies supported the Tobacco Institute financially in return for its lobbying, public relations, and other activities requiring industry-wide coordination. The Tobacco Institute was formed in 1958 and in 1998 was dissolved as a result of the Tobacco Master Settlement Agreement (MSA).

- Shalala, House, appropriations, smok*
- National Cancer Institute, smoking
- Smoking, House, Appropriations, 1996
- Smoking, House, Appropriations, 1995
- Federal Acquisition Streamlining Act

The Library of Congress Thomas Web site (<http://thomas.loc.gov>) was searched for congressional hearing transcripts, testimony, bills, and laws on the following terms between November 7, 2002, and January 29, 2003:

- Lobby, *limited to* Istook, Ernest J., Jr. (OK-5)
- Lobbying, 104

Supplemental searches were also performed to find commentary on the history of ASSIST by using the PubMed database and various Web sites, including those for the Cato Institute, George Mason University, *The National Review*, and ForceS.

The tobacco industry Web-site search focused on the Tobacco Institute, Philip

Morris USA, and R.J. Reynolds Tobacco Company because, in the searches conducted in the Legacy Library, these three entities were the primary and, in most cases, the only sources for documents relating to ASSIST. Among the companies, Philip Morris appeared to play a predominant role in efforts to counter ASSIST and, indeed, viewed itself as spearheading the effort: “This company is viewed as a leader. . . . If this company takes the initiative [regarding ASSIST], other members of the industry will follow. . . .”²(Bates no. 2048621158)

The documents that met the inclusion criteria were analyzed inductively using a “grounded theory” approach,^{3(p1)} although the authors were guided by their previous analyses of tobacco industry documents.^{1,4} Grounded theory entails “the discovery of theory from data systematically obtained from social research.”^{3(pp2-3)} “In discovering theory, one generates conceptual categories or their properties from evidence; then the evidence from which the category emerged is used to illustrate the concept.”^{3(p23)} For ASSIST, the first documents examined were preliminarily or “openly” coded according to draft conceptual categories.* As the document evidence accumulated, the conceptual categories were finalized, and documents subsequently found were coded according to the final categories (“selective coding”). The final categories, which are listed in the Table of Contents, are

*These initial categories were information gathering, legislative activities, bring complaint to the Department of Health and Human Services (DHHS) inspector general, harassment, diversion, infiltration, submit competing proposals, the Schools Channel, media/public relations, “scholarly works,” allies, local “astroturf” coalitions, litigation, and “redbaiting.”

- The Tobacco Industry’s Perception of ASSIST as a Major Threat
- Tobacco Industry Plans for Countering ASSIST
- Strategy 1: Gather Information on ASSIST and Monitor Its Activities at the State and Local Levels
- Strategy 2: Enlist Congressional Allies
- Strategy 3: Enlist Business and Consumer Allies
- Strategy 4: Discredit ASSIST—File Legal and Regulatory Actions
- Strategy 5: Infiltrate ASSIST
- Strategy 6: Divert Funds from the Community Environment Channel and Promote Alternative Programs
- Strategy 7: Discredit ASSIST through Public Relations Tactics
- Strategy 8: Promote Preemption Laws and Ballot Initiatives

According to Glaser and Strauss, Theory . . . must fit the situation being researched, and work when put into use. By “fit” we mean that the categories must be readily (not forcibly) applicable to and indicated by the data under study; by “work” we mean that they must be meaningfully relevant to and be able to explain the behavior under study.^{3(p3)}

Another researcher may interpret or code the initial data differently and develop a different theory from those codes; this is only a different interpretation and does not invalidate the original researcher’s concepts. The only valid criteria are that the original researchers’ categories “fit”

and “work.” On the basis of the evolving categories, words, phrases, sentences, or whole paragraphs were labeled for purposes of subsequent qualitative data analysis. By organizing the data according to these conceptual categories, the authors identified the recurring ideas, reactions, and expressions found throughout the documents that referred to ASSIST.

Approximately 1,350 tobacco industry documents were reviewed by the authors. A number of these documents were copies of ASSIST proposals, plans of action, meeting minutes, and other documents that had been obtained by the tobacco industry through the federal FOIA and similar state laws. For the results reported in this chapter, all tobacco industry documents that pertained to developing and implementing strategies to counter ASSIST were analyzed.* These 166 documents were categorized by type of strategy, how strategies were implemented, tobacco companies’ evaluations of their own efforts, and date.

Results of the Research

The Tobacco Industry’s Perception of ASSIST as a Major Threat

On Friday, October 4, 1991, Louis Sullivan, then secretary of DHHS, announced the launching of ASSIST at a press conference. After describing the program, he commented, “But we are fully aware of what we are up against. The tobacco industry will do its best to

*The initial search strategy resulted in over 21,000 documents mentioning ASSIST. Over 19,000 were eliminated because they contained the verb “assist” in their title or other index category but did not concern the ASSIST program; because they were redundant copies; because they were standard reports produced by ASSIST state programs that did not pertain to the tobacco industry’s interaction with ASSIST; or because they did not provide useful information for analysis.

undermine our efforts.”⁵(Bates no. TIMN0019104)

The tobacco industry did indeed consider ASSIST a major threat because of its scope, its emphasis on public and private policy change, and its fostering of local tobacco control coalitions and infrastructures.⁶⁻¹⁰ In a speech prepared for a meeting of the Tobacco Institute’s Executive Committee in June 1992, Susan Stuntz, senior vice president for public affairs at the Institute, outlined some of the threats:

In California, our biggest challenge has not been the anti-smoking advertising created with cigarette excise tax dollars.

Rather, it has been the creation of an anti-smoking infrastructure . . . right down to the local level. An infrastructure that for the first time has the resources to tap in to the anti-smoking network at the national level. . . .

The ASSIST program has the potential to replicate our California experience in 17 other states. . . .

It [ASSIST] will hit us in our most vulnerable areas . . . in the localities and in the private workplace.

It has the potential to peel away from the industry many of its historic allies.¹⁰(Bates no. TI13851814)

By the mid-1990s, the tobacco control movement presented a challenge to the industry nationwide. ASSIST and others were involved in a number of major tobacco control initiatives. These initiatives included state excise tax increases; efforts to bring nicotine under Food and Drug Administration regulation; the Synar Amendment, which required states receiving substance abuse block grants to have laws restricting pur-

chase of cigarettes to people aged 18 and over, and to conduct random unannounced inspections to ensure compliance; and lawsuits by state attorneys general to recover from the tobacco companies Medicaid costs for tobacco-related illnesses. A Philip Morris USA Five-Year Plan for 1992–96 described an “increasingly hostile socio-political environment.”¹¹(Bates no. 2024090296) Tobacco control advocates appeared to “hold the high ground and the momentum.”²(Bates

no. 2048621164) A Philip Morris executive’s draft of a briefing to the company’s marketing branch, dated December 1, 1993, described how ASSIST was contributing to the tobacco industry’s problems:

. . . the social battle over smoking has escalated into an all-out war.

Companies that market cigarettes are under constant attack at all levels of government as well as by an increasingly well organized and well financed anti-smoking movement that wants to tax, restrict, and regulate the industry out of business. . . .

Project ASSIST is a windfall to the anti-smoking movement. Before Project ASSIST, anti-smoking groups were constrained like other organizations to raise funds for overhead and salaries, and what was left over could be used to attempt to put us out of business. Today, with Project ASSIST funds, those groups automatically have their overhead/ salary nut [*sic*] paid for, and this means that they can use all of their own funds to ban all billboards from a town as has happened in Massachusetts, or ban sampling, couponing, or even in store point of purchase displays. . . .

The way our issues manager Josh Slavitt puts it, “for marketing issues,

you can look at the Synar law as a bullet and ASSIST as the howitzer to fire it. Synar is the way to inflict damage on us and ASSIST provides the shock troops and weaponry to inflict the damage. . . .”

The simple fact is we are at war, and we currently face the most critical challenges our industry has ever met.⁷(Bates no. 2024017124,7134–7135,7150)

The Biggest Threat: The Community Environment Channel

The tobacco industry was well aware that it would have the most trouble with ASSIST’s interventions in community environments because of the emphasis on local public and private policy change, and on use of local media.^{7,8,12,13} As stated in the “ASSIST Program Guidelines,” the objectives for the Community Environment Channel were the following:

By 1998, cues and messages supporting non-smoking will have increased, and pro-smoking cues and messages will have decreased.

By 1998, sites will substantially increase and strengthen public support of policies which (a) mandate clean indoor air; (b) restrict access to tobacco by minors; (c) increase economic incentives to discourage the use of tobacco products; and (d) restrict the advertising and promotion of tobacco.¹⁴(Community Group Channel, p5)

Philip Morris consultant Ted Trimpa of Hays, Hays & Wilson wrote, “The Community Environment Channel . . . has the strongest emphasis in ASSIST and focuses on goals and activities which are the most objectionable.”¹³(Bates no. TNWL0047245) Significantly, a document

by the Tobacco Institute, dated January 10, 1995, identified the population of smokers who would be most affected by the Community Environment Channel activities:

The Community Environment Channel is very important in influencing [low-educated] population [*sic*]. The most effective way of reaching low-educated populations will be through policy and media advocacy.¹⁵(Bates no. T113850331)

A Philip Morris executive briefing document from 1993 spelled out the local challenge as follows:

. . . the anti—finally having learned that it’s tough to win at the state level— . . . have gone local.

They are focusing their energies on town vending bans, stadium advertising bans, county bans on couponing, city bans on advertising on city property or public transportation, and so on. It is a Pac-Man approach, gobbling up our ability to market a small piece at a time until suddenly this patchwork of marketing regulations coalesces into a crazy quilt that is as effective as a national ban.⁷(Bates no. 202401746–7147)

Tobacco Institute executive Kurt Malmgren described the situation in a lengthy memo dated November 30, 1992, to Executive Director Samuel Chilcote:

The anti-tobacco forces have developed a more sophisticated and well-funded structure to address local government affairs. . . .

ASSIST guarantees that local matters will take increasing portions of our time and effort.

Clearly, there is a well-orchestrated effort among the anti-tobacco

leadership to strike where it perceives the tobacco industry to be most vulnerable: the local level. . . .

During the 1980's and until very recently . . . the clear priority for the industry was in the state capitals; local activities always took a back seat. . . .

Today . . . local efforts must be placed on a par with state efforts. . . .⁸(Bates no. 2023965875-5877)

Malmgren illustrates these comments with an example from California:

[In California] it became physically impossible to attend all the hearings held on certain days, let alone mount successful opposition campaigns. . . .

More troubling still, the industry did not have in place a mechanism to make it aware of the introduction of some local ordinances while opposition was still feasible.

Therefore the industry was, on occasion, forced to address local concerns at the ballot box, an extremely expensive undertaking.⁸(Bates no. 2023965878)

Malmgren concluded:

Industry leaders have recognized that state laws which preempt local anti-tobacco ordinances are the most effective means to counter local challenges. . . .

However state preemption is, at best, difficult to achieve. Thus our local plan is crucial.⁸(Bates no. 2023965880,5887)

Tobacco Industry Plans for Countering ASSIST

By Monday, October 7, 1991, following DHHS Secretary Sullivan's Friday announcement, several tobacco industry

executives appeared to be communicating about a broad range of strategies to "manage the situation."¹⁶ A memo from Cathey Yoe of the Tobacco Institute to other Institute executives outlined recommended actions:

- Public Affairs Division will obtain [ASSIST] technical proposals . . . under the Freedom of Information Act. . . .
- Federal Division will alert key Members of Congress to protest use of federal taxpayer dollars. . . .
- Federal Division will attempt to amend National Cancer Institute's [NCI's] next authorization or appropriation bill (a) to prohibit use of grant funds for influencing state or local legislation, ballot initiatives, or other regulatory activities, and (b) to require detailed auditing and reporting of grant expenditures. . . .
- State Activities' regional staff will identify local business and labor interests in 17 grant states who could gain representation in community-based ASSIST coalitions.
- State Activities' regional staff will explore possible [ASSIST] grant-sponsored local activities educating against youth smoking which could use industry's "It's the Law" and similar programs. . . .
- Such plans may include limiting state health department's [*sic*] authority to fund community coalitions which pursue adoption of legislation or regulations.¹⁷(Bates no. T113851417-1418)

The same Monday, R.J. Reynolds executives M. B. Oglesby Jr. and Roger Mozin-go wrote a memo stamped "Confidential" that described potential courses of action regarding ASSIST, including the following:

- Restrict or limit how the funds are used through the state appropriations process and contacts with executive branch officials. . . .
- Work with the tobacco-land Congressional delegation to eliminate ASSIST funds in future appropriations bills; alternatively, seek restrictions on how the funds can be used.
- In Colorado and Massachusetts, where California Proposition 99 type initiatives are expected to be on the 1992 . . . ballot, develop plans to make voters aware that ASSIST and other federal funds are already used in their states for these purposes, and additional state funding would be duplicative and unnecessary.^{16(Bates no. 511073913-3914)}

Two days later, on October 9, 1991, executive director Samuel Chilcote wrote a memo to the Tobacco Institute executive committee that the Institute had already taken action to coordinate with the state government relations departments of each member company to “counter potential state and local legislative action resulting from” ASSIST contracts to the 17 states.^{18(Bates no. T113851380)}

According to the memo, activities already under way included the following:

We have filed a Freedom of Information Act request and will review the documents we obtain for “public policy” activities which could spark state or local legislation on tobacco issues.

Members of Congress have been asked to protest to the Administration this use of federal taxpayer dollars in an era of mounting deficits.

In addition, we are pursuing the possibility of including in the

Department of Health and Human Services Appropriations Bill for Fiscal 1992 language that would prohibit use of NCI funds for influencing state or local legislation. . . .

At the state level, plans are under development to ensure that the use of ASSIST funds is limited to appropriate activities and not targeted to anti-smoking lobbying campaigns.^{18(Bates no. T113851380)}

Chilcote also wrote that the Tobacco Institute would hold a series of 50 state planning sessions with state government affairs experts from tobacco companies. The goal of the planning sessions was to discuss a range of strategies that included the following:

- Work with state administrative and legislative leaders to ensure that those applying for grants meet stringent state guidelines for the use of ASSIST funds and face regular and rigorous state auditing processes.
- Work to limit state health departments’ authority to fund community coalitions which pursue adoption of legislation or regulation; and limit state funding of anti-tobacco programs by amounts received under the federal ASSIST program. . . .
- Massachusetts, New Jersey, North Carolina, Virginia, West Virginia, and Wisconsin are among the many ASSIST states which continue to face severe budget shortfalls. Explore the feasibility of introducing legislation or specific regulatory language to redirect current state anti-tobacco education monies to other programs. . . .
- Identify appropriate local business and other groups in the 17 states to apprise them of the ASSIST grant program so that they might be better

positioned to join a community-based ASSIST coalition and apply for grants. . . .

- Focus special attention on the industry’s youth programs in the 17 ASSIST states. . . .
- Focus legislative efforts on passage of anti-discrimination and/or indoor air quality laws to counter encouragement of smoking bans. . . .
- Expand current monitoring of the activity of anti-tobacco groups in the states to ensure that misuses of ASSIST funds are made known in a timely fashion to state leaders and the public.
- Promote expanded education of existing independent scholarly works that call into question the motives and operating techniques of certain voluntary health organizations.¹⁸(Bates no. T113851380–1381)

By July 1992, tobacco industry strategies had begun to be implemented, but a document found in the office of Josh Slavitt* (who appears to have been the primary strategist regarding ASSIST at Philip Morris) expressed impatience with the tobacco industry’s efforts:

FACT: . . . 6) ASSIST implementation phase commences this fall—coalitions have been developed and the program has faced no major threat.

CONCLUSION: . . . 6) The company/industry has taken no action since the program’s inception—the longer the program goes, the more difficult it is to stop.²(Bates no. 2048621155)

The document also mentioned the costs involved in an effective counter-ASSIST program, “As this is a time intensive project that requires immediate action,

low financial commitment will not achieve the objective.”²(Bates no. 2048621158)

Then, after a lengthy section detailing “Strengths, Weaknesses, Opportunities, and Threats” for both the tobacco industry and ASSIST, the document concluded by arguing that an effective action plan to counter ASSIST will have long-term benefits for the tobacco industry overall—regardless of the expense involved:

Use first year of ASSIST program implementation as a means for launching an investigation to discredit NCI, HHS and opponents. . . . Having all Anti organizations involved could substantially damage the movement if ASSIST is brought down. . . . Use overall investigation to develop a public relations program designed to erode credibility of opponents over the long term. . . . If any lasting impact is to occur from an investigation of ASSIST, it must be broader in scope and have a longer political and public lifespan.²(Bates no. 2048621166,1169,1174)

The documents describing the tobacco industry’s early response to ASSIST suggest that the industry was prepared to launch a coordinated effort to oppose ASSIST, even if it was costly. The following sections describe the eight strategies identified from the documents, which the tobacco industry used to implement its plans.

The Strategies

Numerous strategy papers, memos, and briefings on comprehensive plans to counter ASSIST appear to have been developed and discussed throughout the

*The document did not list an author but was stamped as having been retrieved from Slavitt’s office.

first 4 years of the project by tobacco industry executives, and by public relations firms, legal firms, and others with whom they contracted.^{2,7,8,12,13,16–26} This section describes the major strategies recommended in these documents as well as in other, briefer communications,^{23,27,28} how they were implemented, and how the tobacco companies evaluated the results of their efforts. Most of these strategies were implemented simultaneously, although gathering information on ASSIST appears to have been a priority at the beginning. Below are listed the 8 strategies and 10 major messages about ASSIST intended to be conveyed by those strategies.

Tobacco Industry Strategies to Counter ASSIST

1. Gather information on ASSIST and monitor its activities at the state and local levels
2. Enlist congressional allies
3. Enlist business and consumer allies
4. Discredit ASSIST—File legal and regulatory actions
5. Infiltrate ASSIST
6. Divert funds from the Community Environment Channel and promote alternative programs
7. Discredit ASSIST through public relations tactics
8. Promote preemption laws and ballot initiatives

Tobacco Industry Messages Regarding ASSIST

- Misuse of taxpayer dollars
- “Illegal lobbying,” “tax grabs,” conflict of interest/“cronism,” commingling of funds, use of front groups

- Government waste
- Duplication of existing programs, unnecessary, diversion from legitimate uses (e.g., breast cancer, prenatal care), not effective
- Greedy health professionals, volunteer charities, academics
- Discrimination
- Unfair tax burden on poor
- Workplace discrimination
- Freedom of choice and “commercial free speech”
- Conspiracy of the Left (“an instrument of the left designed to destroy a legal [tobacco] industry”)¹³(Bates no. T113850215–0253)

Strategy 1: Gather Information on ASSIST and Monitor Its Activities at the State and Local Levels

Freedom of Information Act Requests. The federal FOIA was passed in 1966 to ensure that all citizens have access to records and other information generated and stored by tax-supported federal agencies. The purpose of this law is to maximize accountability for the actions of government agencies. The records can be requested from agencies through an established process, and the agencies have an obligation to provide the copies requested.

Tobacco industry strategists appeared to agree that a crucial first step was to gather extensive information about the ASSIST programs, primarily through “aggressive open records efforts,”²⁴(Bates no. T113850208) using the FOIA and similar state legislation, but also using materials gathered by private investigators and infiltrators.^{2,12,13,16–18,24,25} The latter tactics are similar to those used over the years

by the tobacco industry to learn about a variety of public health groups.²⁹ A Philip Morris document categorized as having been found in Josh Slavitt's office described the need for more knowledge:

Fact: Internal knowledge of workings of Anti's is sporadic.

Conclusion: Need more information about how opponents operate to fight them proactively. . . .

Who/what/where/why/how is available and more information is coming in—knowing where/how the Anti's will strike is a plus. . . .

Although their frontal assault continues, their flank may be vulnerable (over-extended and over-confident).^{2(Bates no. 2048621156)}

The strategists recommended obtaining such documents as proposals, "letters, correspondence, memoranda, notes, plans, proposed plans and agendas. . . . drafts, working drafts, . . . handwritten notes, typewritten notes . . . position papers. . . . Newsletters, handouts, brochures, signs . . . transcripts. . . ."^{30(Bates no. TIMN0044291)} "ownership, tax status, etc., of vendors, consultants, companies receiving ASSIST funds . . . research competitive bidding process on ASSIST awarded contracts . . . review committee sign-up sheets."^{25(Bates no. TNWL0020835)}

By June 1992, the Tobacco Institute had obtained from NCI, through FOIA requests, "the contracting documents for the national program, as well as for the 17 state programs. [Our staff] have completed their review of these documents and have begun to identify possible opportunities to raise concerns . . . about the manner in which some of these funds

are being spent."^{31(Bates no. 2023608217)} Numerous documents show that the tobacco industry, its allies, and paid consultants were extremely active throughout the life of the ASSIST project in gathering information by a variety of means, primarily through FOIA.^{25,32–42} The documents also include copies of responses from the NCI contract officer for ASSIST^{43,44} and state health department officials⁴⁵ promising or enclosing the requested documents.^{13,15,30,46–59}

Thomas Briant, a lawyer from Minneapolis who reported to the Tobacco Institute during the ASSIST era, pointed out in a document that the FOIA requests not only provided valuable information but also had a "chilling" effect on ASSIST activities:

[FOIA requests in Minnesota] have been beneficial for several reasons. First, and most important, the documents furnished by the Department of Health set forth in great detail the local activities to be engaged in by the ASSIST grantees. That is, the documents are like a road map because they indicate what cities are being targeted for ordinances, when the ASSIST groups will attempt to pass the ordinance and what kind of restrictions will be proposed to the city council of the targeted locality. The information contained in these documents is invaluable and allows retailers to prepare a response to take a proactive approach when deemed appropriate.

Second, based on the ASSIST group proposals approved by the Dept. of Health, the activities of the ASSIST groups are tracked by surveying the targeted cities via telephone to learn what actions are being taken. This

provides additional advance notice of activities and allows more time in which to prepare the necessary response.

Third, the survey results show a reduction in the number of cities actually being contacted by the ASSIST groups even though the grants require [them] . . . to attempt to pass a local ordinance in the targeted cities. . . . one reason for the reduction may be the chilling effect the document requests have had and the greater sensitivity of the Dept. not to allow ASSIST funds to be used for lobbying activities.

Fourth, the retail associations submitted another grant proposal about three weeks ago for the 1996–1998 ASSIST years. The ASSIST documents obtained through the FOIA requests are helpful in drafting the retail ASSIST grant proposal.⁶⁰(Bates no. T114200702)

Documents indicate that the Tobacco Institute also saw the value of obtaining proposals submitted by states that were not awarded ASSIST contracts. As Karen Fernicola Suhr of the Institute wrote in 1992,

Though these states have not received ASSIST funds, they'll probably be using their proposals as blueprints for at least limited anti-smoking activities anyway, having gone through the trouble of developing them. So, a review of these proposals at some point would probably be useful.⁶¹(Bates no. 2021253352)

Thus, not only did these states not receive ASSIST contracts, they exposed their plans to the tobacco industry.

Reasons for Monitoring ASSIST Activities. In the tobacco industry documents, the most frequently mentioned purpose of information gathering was to find evi-

dence of “lobbying,” the label used by the tobacco industry to describe ASSIST policy initiatives in the Community Environment Channel. In a prepared speech to be delivered to the Executive Committee on June 11, 1992, Susan Stuntz stated, “We think that catching the ASSIST coalitions in lobbying activities offers our best shot at working through Congress, or in the states to redirect the anti-smokers’ activity.”¹⁰(Bates no. T113851818) A Philip Morris document characterized as having been found in Slavitt’s office and dated June 1992 pointed out that “Fact: . . . HHS Secretary Shalala has gone on record against using HHS funds for lobbying activities. Conclusion: . . . The precedent is being established (GAO, Shalala statements) to force government agencies to live up to their statutory obligations and their rhetoric regarding lobbying.”²(Bates no. 2048621155)

The definitions and restrictions for lobbying with public funds vary widely among the states and the federal government. These restrictions on lobbying do not preclude public health officials from doing policy work but rather direct how they can do it.⁶² People affiliated with the tobacco industry used as broad a definition of “lobbying” as possible, in order to include most ASSIST policy advocacy activities under that rubric.^{27,38,63} Field reports from the 17 ASSIST states described ASSIST policy advocacy activities; industry public statements also misconstrued those activities in a way that implied that staff members of publicly funded health departments were themselves lobbying.^{15,49,52–59,64–68}

Throughout ASSIST, no federal funds could be used to lobby Congress. Begin-

ning in fiscal year 1997 (i.e., starting October 1, 1996), lobbying state legislatures with federal funds was also prohibited.⁶⁹ Beginning with the ASSIST contract extension (October 1, 1998), the prohibition against using federal dollars to lobby was extended to local legislative bodies as well. However, non-governmental entities using unrestricted funds were always allowed to lobby, subject to restrictions, at every level.

Although these varied and confusing restrictions on lobbying were introduced over a period of time, the restrictions had a “chilling effect” on ASSIST coalition members as early as 1995.^{39,62} The complex and changing rules were not always completely understood by local activists. The result was often a decrease in advocacy activities because the activists were confused and unsure about the nature of their activities.^{45,70} Some tobacco industry affiliates occasionally became confused about how they should be defining the term “lobbying,”^{39(Bates no. TI14304071)} as shown in the following memo from tobacco industry advocate Sara Mahler to several Philip Morris executives:

Some of these [documents I am sending] may indicate illegal lobbying. . . . I don’t have a clear idea of how to find the line that separates “education” from “lobbying.” . . . Best wishes from “the grassroots.”^{71(Bates no. 2046641500)}

Tobacco industry affiliates at the state level continually provided to tobacco companies’ headquarters and to the Tobacco Institute detailed information on ASSIST coalition advocacy of local and state tobacco control legislation, or “lobbying.”^{15(Bates no. TI13850329)} A 1995

memo from the Tobacco Institute’s Bob McAdam in Washington State appears to show that these continual requests did indeed have an effect on ASSIST’s ability to advocate for policies:

Our probing for documents has clearly caused some internal concern within the coalition. They have spent some considerable time and discussion on developing a “crisis management plan” to address the public disclosure request that we have initiated. . . .

They now say they will not have any direct contact with members of the legislature while the legislature is in session. . . .

At the same time, they continue to talk about influencing local ordinances.^{39(Bates no. TI14304071)}

A second purpose of information gathering was to “expos[e] the wasteful and inefficient use of ASSIST funds.”^{13(Bates no. TI13850214)} A Tobacco Institute report on the Missouri ASSIST project provided examples:

Most ASSIST projects appear to be 1) duplicating existing programs 2) unnecessary due to already-widespread awareness about possible negative health effects of smoking 3) opposed by many Missouri residents, legislators, teachers, etc. who object to the program on financial and/or philosophical grounds. . . .

ASSIST programs are forced on unwilling participants. . . .

Teachers and principals have become resistant to calls for additions to already overcrowded curricula. . . .

. . . state legislators ranked funding for tobacco control programs *last* in comparison to other cancer control legislative and budget items. . . .

Low-educated populations. . . cherish their independence, as reflected in their rural lifestyle and purchase of trucks, motorcycles, and all-terrain vehicles.¹⁵(Bates no. T113850334-0336)

A third, and equally important, purpose of information gathering was to “gain more extensive intelligence concerning current and planned ASSIST activities in order to develop potential counter-activities.”¹³(Bates no. T113850214) Ted Trimpa wrote a thorough report for Tobacco Institute consultants Hays, Hays & Wilson in 1994 on Colorado ASSIST.³⁰ The report described various crucial internal ASSIST documents he had obtained (with substantial portions redacted) as well as material that could be used to allege that ASSIST was using the Coalition for a Tobacco-Free Colorado as a “shelter for documents and activities that Colorado ASSIST Project personnel believe to be beyond the purview of the taxpaying public.”³⁰(Bates no. TIMN0044290)

FOIA requests were detailed and exhaustive.⁷² An example was described in a memo from Trimpa, dated July 22, 1994, in which he announced that he had requested

All letters, correspondence, memoranda, notes, plans, proposed plans, and agendas that are on Coalition for a Tobacco Free Colorado stationary [*sic*] date 1991 to the present . . .

The Colorado ASSIST media plan, . . . including all documentation, drafts, working drafts, proposed drafts, memoranda, handwritten notes, typewritten notes, computer-produced

notes, position papers, plans, proposed plans, and letters that were used, are being used, or those anticipated to be used in the creation . . . of the State Media Communication Plan . . .

All notes, news releases, newsletters, handouts, brochures, signs, advertisements, transcripts, letters, speeches, memoranda, overhead display sheets, and statistics used in Arnold Levinson’s* presentations on tobacco taxes . . .

All handwritten and typewritten notes, memoranda, letters, brochures, and correspondence used or distributed by Arnold Levinson* in providing technical assistance, . . .

assisting the “Project Director in designing implementation of annual channel activities . . . of the Community Environment Committee . . .”³⁰(Bates no. TIMN0044291-4292)

The Tobacco Industry’s Evaluation of Its Efforts. In January 1995, Tobacco Institute executive Bob McAdam presented an evaluation of progress in gathering ASSIST documents:

The first phase of research on the current usage of ASSIST funds is virtually complete. . . we have learned . . . how the[y] intend to spend the funds. . . .

Only in Colorado have we gone beyond phase I research to learn how the money is actually being used at the local level. We must expand this level of research to other ASSIST states.¹²(Bates no. T113850204)

McAdam had commissioned a report from Trimpa, of the Colorado consulting firm of Hays, Hays & Wilson, titled “Analysis and Recommendations Con-

*At the time, Arnold Levinson was the executive director of the Fair Share for Health Committee.

cerning Selected State ASSIST Projects” and dated January 26, 1995.¹³ Trimpa was to “look at all of the material that we currently had on file from the various states to determine where our search would be most fruitful.”²⁴(Bates no. T113850208)

The report’s detailed analysis of ASSIST in seven states (Minnesota, Washington, Michigan, Wisconsin, Massachusetts, Virginia, and West Virginia) included sections on “Interesting Facts and Possible Political Opportunities,” such as the following concerning Washington:

Dr. Robert Jaffe, the leader of the TFWC [Tobacco Free Washington Coalition] . . . is a principal Investigator with the Robert Wood Johnson Foundation. Which may mean:

a. Jaffe is probably involved with the Washington DOC (Doctors Ought to Care) group, which is the recipient of RWJF Smokeless States money (almost \$200K). Washington DOC is an ASSIST contractor;

b. Given Jaffe’s multiple roles and the self-proclaimed aggressive legislative agenda . . . , there may be some exploitable self-dealing/misuse of funds opportunities;

c. Jaffe is probably an “ends justify the means” type of person which in turn may provide exploitable political opportunities.¹³(Bates no. T113850235–0236)

In his cover letter to the Trimpa report, McAdam provided names of lawyers who might pursue open records requests in each state, with additional comments such as the following:

Minnesota

A sizeable amount of work has already been done by Tom Briant, who also represents the wholesalers. . . .

Briant has demonstrated an ability to use the open records laws in an expedited fashion. We can expect to reach pay dirt level in a relatively short amount of time.

Washington

I am more concerned about Washington than almost any other state in that we have clear indications that they plan to launch a tax initiative against the industry. If we are able to identify the use of ASSIST funds for this purpose early on, we could both derail the initiative and limit the abuse of ASSIST.

I have identified a law firm that can handle the pursuit. Brad Keller has represented RJR in a successful Joe Camel lawsuit and represented the restaurant association in the Puyallup smoking ban case. They appear to have an aggressive attitude and have extensive experience in going up against government entities.²⁴(Bates no. T113850209–0210)

Tobacco Institute executive Patrick Donoho appears to have sent the Trimpa report and McAdam cover memo on to executive director Samuel Chilcote on February 2, 1995, with the following note:

I highly recommend that we pursue ASSIST research, as outlined in the attached memo. The research has a projected budget of \$135,000. I recommend that we use the excess funds from the Colorado Initiative, which amount to \$374,000.

With your approval, we will move forward immediately.⁷³(Bates no. T113850207)

By 1996, the Tobacco Institute had prepared comprehensive analyses of ASSIST in most ASSIST states,^{15,30,46–50} including detailed reports on alleged

lobbying activities by all 17 ASSIST states. The latter reports were combined into a single 95-page document that demonstrated the comprehensiveness and consistency of analysis the Tobacco Institute was able to accomplish. The report included precise examples of alleged lobbying as well as examples from ASSIST contracts and planning documents in each state that might be interpreted as intent to lobby, all useful for any legal or political action the tobacco industry and its allies might want to initiate.⁶⁴

Hays, Hays & Wilson prepared lengthier analyses of selected ASSIST states for the Tobacco Institute. The 59-page analysis of Washington ASSIST, for example, had a 35-page section describing the program, and sections on the responsibilities and background of key individuals in ASSIST, the Tobacco Institute's legislative agenda, and "legal and political opportunities."⁶⁶(Bates no. TNWL0046638) The report listed a number of "ASSIST Activities Possibly in Violation of Federal and/or State Law"⁶⁶(Bates no. TNWL0046699) but cautioned, "given the loopholes under federal law, such as for 'educational activities,' maintaining a federal claim may be difficult."⁶⁶(Bates no. TNWL0046698) The solution was to exploit politically those activities which "lack[ed] specific evidence to maintain a federal or state law claim."⁶⁶(Bates no. TNWL0046700) These "Potential Political Opportunities" included items such as the following:

There are indications that tax dollars . . . are being used to build and further the grassroots lobbying and coalition-building efforts of the allegedly "independent" Tobacco Free Washington Coalition.⁶⁶(Bates no. TNWL0046700)

TFW/Washington ASSIST appears to be fraught with self-dealing. Many of the contractors who have received . . . ASSIST funds also sit on the task forces which recommended their hiring.⁶⁶(Bates no. TNWL0046700)

R.J. Reynolds⁵¹⁻⁵⁶ and Philip Morris⁵⁷⁻⁵⁹ also prepared state-based analyses. A set of e-mail correspondence within Philip Morris in October 1995 indicated the tremendous workload tobacco industry affiliates had in keeping track of the multidimensional ASSIST program and the pressure they were under in implementing the demands of their "Counter ASSIST Plan." Some of the documents, quoted in part, suggest that the tobacco industry thought that its progress in monitoring ASSIST was slow.

From Lance Pressl to Tina Walls and others (October 4, 1995): "[We need to] discuss how to establish a system where the Tom Briant's and Joe C's of the world can send the material for analysis."⁷⁴(Bates no. 2047077445)

Response from Walls to Pressl and Scott Fisher, later on October 4, 1995: ". . . quite frankly, the issues group has been overwhelmed by other assignments and under staffed."⁷⁴(Bates no. 2047077445)

From Pressl to Josh Slavitt, October 5, 1995: "What do we need to do to get this jump-started?"⁷⁴(Bates no. 2047077445)

Slavitt to Pressl later on October 5, 1995:

I'm not sure what you mean by jump starting? . . . We are now going down to a lower level in each state to determine what local groups are receiving from the state agencies—this is a time consuming process fraught with delays

and snags as the states attempt to avoid answering these kinds of questions. We've also suggested repeatedly that all ASSIST states be FOIA'd. I've prepared questions which Scott has used to encourage state legislators to inquire specifically where funds have gone . . . and what audits and controls have been put in place to conform with federal requirements (specifically the federal Single Audit Act, which requires states to audit any program receiving federal funds that makes expenditures of \$25K or higher to local groups). ASSIST expires in 1997—What else CAN we do to jump start this?⁷⁴(Bates no. 2047077445)

Nevertheless, tobacco industry monitoring of ASSIST is impressive in its scope, detail, and depth of analysis. The documents reflect a well-coordinated effort, with consistency in strategies and messages.^{2,24,64}

Strategy 2: Enlist Congressional Allies

Tobacco industry strategists saw a number of ways in which their allies in Congress, state houses, and state legislatures could help with the efforts to undermine ASSIST, including holding hearings on ASSIST and promoting legislation that would limit ASSIST's effectiveness in some way.^{12,25} Tobacco industry staff members were available to draft testimony for congressional hearings, text for questioning ASSIST leadership and staff, and even letters for legislators to sign.^{67,75–79} The importance tobacco industry executives attached to the role of their political allies is reflected in the memo Tobacco Institute director Chilcote sent out 3 days after ASSIST

was launched in 1991, announcing that Tobacco Institute staff members had already contacted “appropriate congressional offices concerning this announcement, and [had] raised concerns about the manner in which these funds are being spent.”⁸⁰ According to one Philip Morris strategist,

- If framed right, it's a “good government” story for reform-minded politicians.
- Fiscal watchdogs are interested in taking on this issue.
- The Republicans need an issue with the Democratic controlled Congress and White House—abuse of public funds is viewed as a haymaker. . . .
- ASSIST has a “mother-pie” veneer—whoever takes it on will have to be prepared for criticism.²(Bates no. 2048621167)

At the same time, tobacco industry analysts understood the need both to protect their political allies and to keep them in line:

We should have our legislative political allies make certain that these [ASSIST] funds cannot be used . . . to educate the community as to the anti-tobacco beliefs of a particular public official or the pro-tobacco beliefs of a particular official. . . .

. . . we should continue to support our allies, particularly in the state legislatures and in other high political posts at every level to help them resist the pressure that may come as a result of these programs.⁸¹(Bates no. T113850725–0726)

On August 10, 1992, U.S. Senators Malcolm Wallop, Orrin Hatch, and Mitch McConnell sent to DHHS Secre-

tary Sullivan a letter about ASSIST that began as follows:

We have recently received information which indicates that federal funds made available through the National Cancer Institute will be used to fund lobbying activities at the state and local level. Given the disturbing precedent that this would establish and the numerous legal and policy problems which could arise when the federal government finances one side of a debate, we ask that you take necessary steps to stop this practice immediately.⁸²(Bates no. 2024103356)

After this initial paragraph, the letter contains a number of sentences that are remarkably similar to an R.J. Reynolds document, undated but with a fax date of March 24, 1992 (4.5 months earlier).⁶⁷ Selected parts of the texts are placed side by side for comparison on the next page.

Hearings on annual appropriations for DHHS also provided opportunities for industry advocates to press their cases against ASSIST. On February 24, 1994, Cathey Yoe of the Tobacco Institute wrote to colleagues regarding the upcoming House appropriations hearings in which Secretary Donna Shalala would testify: “Since ASSIST is a priority for Burleigh Leonard at RJR, perhaps we should coordinate with him on using the appropriations hearings to point out abuses of ASSIST funding. I have taken a first stab at a draft question for Shalala. . . .”⁷⁵(Bates no. T113850617)

Yoe attached two draft versions of questions to be asked of Secretary Shalala. Excerpts are given below:

Secretary Shalala, . . .

when this program first got under way, my colleague Mrs. Bentley expressed concern that ASSIST funds would be used for lobbying state and local officials. . . . You assured the Committee that federal ASSIST funds would not be used for lobbying. . . .

Surely you are aware that in nearly every state receiving ASSIST money, the stated goals include passage of legislation. ASSIST funds are being used to train “volunteer advocates” or “volunteer activists” in the art of lobbying. . . .

I don’t think any of us quarrel with getting greater participation of citizens in the legislative process at all levels. But when the Federal government hands those citizens an agenda and a T-shirt, aren’t those taxpayer dollars being used in lobbying? . . . Calling it “policy advocacy” or “engaging” state legislators doesn’t make it anything other than lobbying. . . .

how are you ensuring that those federal funds do not get used in “targeting legislatures” with lobbying efforts?⁷⁶(Bates no. T113850618)

Two years later, R.J. Reynolds staff drafted questions to ask Secretary Shalala regarding ASSIST at the 1996 hearings of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education. A document dated March 26, 1996, by John Fish of R.J. Reynolds to Eric Fox, staff assistant to Congressman Henry Bonilla, who apparently was not familiar with ASSIST at the time, contained the following questions:

Attached are a few questions for Secretary Shalala—if Mr. Bonilla has the opportunity to ask them. They deal with a program called ASSIST. . . .

**Portions of RJR Nabisco Memorandum
Faxed March 24, 1992**

“The model program does include a disclaimer on lobbying, but then includes in each of the grants awarded to the states a form entitled, ‘Disclosure of Lobbying Activities.’ . . .

“The Department of Health and Human Services will spend \$115 million over seven years on the ASSIST program. An additional \$25 to \$30 million will be provided by the American Cancer Society. Moreover, the Department also will spend approximately \$20 million for national coordination and evaluation. . . .

“The Massachusetts ASSIST program will use part of its federal funds to finance a conference involving legislative and advocacy leaders to draft legislation which would be submitted simultaneously to all of the New England state legislatures. . . .

“Some of the grantees were a bit skittish about being too directly involved in lobbying. For example, the Minnesota ASSIST program indicated that it would consider retaining the state’s existing tobacco control lobby as a subcontractor. . . .

“Once the federal government begins to finance one side of a public policy debate, there can be no debate. There will only be the federal government’s position.”

Source: RJR Nabisco. Using Federal Funds to Lobby State and Local Leaders. March 24, 1992. <http://legacy.library.ucsf.edu/tid/zuu24e00> (accessed June 24, 2002). Bates no. 2026079534–9535.

**Portions of
Wallop/Hatch/McConnell Letter
August 10, 1992**

“Your department will spend approximately \$115 million over seven years on the program, and the American Cancer Society will provide an additional \$25 to \$30 million. Your department will also spend roughly \$20 million for national coordination and evaluation. . . .

“The model program does include a disclaimer on lobbying, but then includes in each of the grants awarded to the states a form entitled, ‘Disclosure of Lobbying Activities.’ . . .

“The Massachusetts ASSIST program will use part of its federal funds to finance a conference involving legislative and advocacy leaders to draft legislation which would be submitted simultaneously to all of the New England state legislatures. . . .

“Some of the grantees were a bit skittish about being too directly involved in lobbying. For example, the Minnesota ASSIST program indicated that it would consider retaining the state’s existing tobacco control lobby as a subcontractor. . . .

“. . . once the federal government begins to finance one side of a public policy debate, there will no longer be a debate. There will only be the federal government’s position.”

Source: Hatch, O., M. McConnell, and M. Wallop. Letter to Health and Human Services Secretary Louis Sullivan. U.S. Senate. August 10, 1992.

One concern with asking Shalala about this contradiction [regarding lobbying] is it gives her the ability to get on her soapbox about tobacco. . . .

One word of warning, Shalala has already indicated that the whole FDA

and tobacco issue is going to be a campaign issue—and a winner for the Democrats. I say this to warn you that any questions asked need to be very focused so that the door isn’t opened to her. . . .⁷⁷(Bates no. 522629314–9315)

In 1993, my colleague, Helen Bentley, raised with you her concern about ASSIST funds being used to lobby at the state and local levels. Your response left no room for uncertainty—no funds would be used to lobby. . . . Is it still your policy that federal funds shall not be used for lobbying at the state and local levels? . . . I have a copy of a [communication] from a contracting officer at NCI to ASSIST project directors which contradicts your previous statement. My question for you is who sets policy for HHS—you or the Project Officers? What actions are you going to take to make sure that federal funds are not used to lobby state and local officials?⁷⁷(Bates no. 522629316)

No evidence is available that Congressman Bonilla used this text to question Secretary Shalala at the 1996 appropriations hearings. A Tobacco Institute memo dated a month later mentions that “transcripts of Secretary Shalala’s testimony before the House Appropriations Subcommittee on Labor, HHS, and Education will be unavailable for some time, due to a technical glitch with the transcribing service.”⁸³(Bates no. 518239758) However, a committee report dated July 8, 1996, from the Committee on Appropriations to accompany the appropriations bill (H.R. 3755) for, among others, DHHS, included the following passage:

The Committee is concerned that the National Cancer Institute may not be adequately overseeing the so-called ASSIST Program (the American Stop Smoking Intervention Study Program). Questions have been raised about some of the expenditures in this program. The Committee strongly urges the

Inspector General to conduct an audit of the contractors in the program to determine if the funds are being properly spent and that the program is meeting its goals.⁸⁴(p124)

Transcripts are available for the next year’s hearings on the DHHS appropriations, dated February 11, 1997, at which Secretary Shalala testified.⁸⁵ The transcripts provide the full text of Secretary Shalala’s response to questioning by Congressman Bonilla as well as by Congressman Ernest Istook. The questions from the two congressmen are not available; the transcript lists them as “inaudible.” Secretary Shalala’s responses suggest that they are questioning her intensively:

Rep. Bonilla: (Off mike, inaudible.)

Secretary Shalala: I think we’ve provided extensive information to you about the activities of the ASIS (?) [sic] contracts. We have informed all of our contractors and all of our grantees that they are not to engage in lobbying activities, which is prohibited under the Federal Acquisition and Streamlining Act.

We have made it very clear that violations of the act will not be tolerated by the Department. If allegations of violations of the act are serious enough, we will turn them over to the Inspector General. The Inspector General is conducting an investigation.

We have thus far found no lobbying violations in the course of our internal inquiry and, as you indicated, no one on this committee, and I don’t know anyone in this country, that’s in favor of smoking by children.

It’s a major public health problem, but we intend to obey the law and to make sure our contractors obey the law, and

thus far we have not found any violations, but we have made it very clear to the contractors that they are not to violate the law.^{85(pp11)}

A few moments later, Congressman Istook again raised the subject of lobbying:

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: Let me repeat again. We have taken the position that once the law was passed, any contract after the law was passed cannot use federal money for lobbying. . . .

We also are taking the position that if there is a renewal of any existing contract, it ought to be covered by the law that was passed so that we would catch, as there are any extensions or renewals contract [*sic*], any new people coming up.

As to whether before the law was passed, which is October 1st, 1995, whether we have actually gone back to see whether anyone continues to lobby because they have a contract that's before that, I'm not sure I know the answer to that question.

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: I think that we must not have understood the question at the time. We've been consistent in our interpretation of the law, and that is, any contract that was awarded after October 1st and any extension of a contract after October 1st, is covered by that law, but apparently we have not gone back to look whether—and we have sent notifications to everyone who is on our contracts, or they've signed an affidavit saying that they understand what the rules are, but apparently we have not gone back to see whether, even though it's a legal activity under our interpretation of the law.

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: Well, first of all, a year ago was 1996, and a year ago was a year after the—I mean, some time after the law had been passed.

Our responsibility is to enforce the laws once they're passed, and what I've indicated to you is as of October 1st, 1995, any contracts or any renewals of contracts by our lawyers' interpretation are covered by this law, and we will enforce that.

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: Mr. Istook, I'm interpreting the law as passed by the Congress. The law, as passed by Congress, my understanding of that law is it was not retroactive. Now, if there is a different interpretation of that law, and if—

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: I probably couldn't under the law. I'd have to ask my counsel.

Rep. Istook: (Off mike, inaudible).

Secretary Shalala: You know, all I can do is obey the law, as the law is passed. I can't talk to a contract that was a contract in the previous Administration about a new law that was passed that doesn't apply to them. So I can do my best and enforce the new law, and that's what you should hold me accountable for.^{85(pp13-14)}

Congressman Istook had offered an amendment to a 1995 Lobby Reform Bill⁸⁶ and another to the March 1996 Balanced Budget Down Payment Act,⁸⁷ requiring all organizations receiving federal grants to provide an annual report of expenses for lobbying activities. Organizations and businesses receiving govern-

ment contracts or tax exemptions were not required to report lobbying expenses.⁸⁶ The 1996 version of the Lobby Reform Bill passed. In arguing for this legislation, Congressman Istook had made the following points:

It is time to end taxpayer-funded political advocacy! . . .

The term “lobbying” is too narrow to be useful for this purpose. The broader term “political advocacy” should be used. . . .

No federal funds should be used for political advocacy.

No grant funds should be used to provide support to other organizations who, in turn, conduct political advocacy. . . .

Any Federal grantee should be subject to an audit. . . .^{88(pp1-2)}

One tobacco industry document indicated that Congressman Istook worked with the tobacco industry to prevent the use of federal funds for political advocacy. A *Weekly Bullet Report* prepared by Philip Morris (PM) lobbyists in Washington, DC, dated February 21, 1997 (10 days after the above hearing), included the following passage:

Labor, HHS [Appropriations Subcommittee]: PM consultants do not think we can chop funding for anti-tobacco programs, given the obvious sensitivity of the issue and the vote count on the Sen. subcomm. We can at least work w/ Northup’s office on HHS failure to promptly implement SAMHSA/ Synar vs. how quickly FDA put together its rule, and Istook and Bonilla’s office on use of ASSIST funds for lobbying.^{89(Bates no. 2078293672)}

In conclusion, the tobacco companies’ documents indicate that corporate executives understood how important it was to cultivate political allies and take advantage of some allies’ previously defined political positions. The tobacco industry appears to have provided these allies with information and drafted language about ASSIST for their legislative efforts.

Strategy 3: Enlist Business and Consumer Allies

While the tobacco companies worked closely with their political allies and had extensive sales force networks and other internal resources to address the ASSIST situation as well, they also recognized the need to recruit and use outside organizations linked to the tobacco industry economically or philosophically for their efforts to counter ASSIST.^{2,7,8,10,18-20,90,91} These potential allies included tobacco vendors, restaurateurs, grocers, convenience stores, and hoteliers; organizations and business groups concerned with “taxpayer abuse” and “government excess”; conservative and libertarian think tanks; and consumer groups (smokers). Josh Slavitt at Philip Morris described several ways in which tobacco industry allies could contribute to “opportunities to disrupt ASSIST funding.”^{19(Bates no. 2023916866)}

A more thorough investigation should be launched . . . particularly in terms of the NCI/ACS relationship and the use of federal funds for state and local lobbying purposes. . . . Various tax and fiscally responsible organizations could get involved.

Washington Legal Foundation/other groups could at the same time launch concurrent injunctive challenges in ASSIST states to stop dispersal of funds while the Congressional investigation is going on, as well as to determine whether the program violates Federal or state ethics/lobbying laws. . . .

Local anti-tax groups could also weigh in because the program will affect budgets by adding state DoH jobs with many ASSIST states looking to reduce major deficits.¹⁹(Bates no. 2023916866-6867)

Tobacco industry ally activity appears to have begun early in the ASSIST project. By June 1992, Slavitt reported, “. . . fiscal watchdog groups are examining spending at HHS to point out wasteful spending in a number of areas, in order to put the department on the defensive. . . . Derek has also contacted Citizens Against Government Waste (the former Grace Commission), which has agreed to include ASSIST in their “PIG Book.”²⁰(Bates no. 2078755122)

Kurt Malmgren of the Tobacco Institute developed a lengthy strategy paper in November 1992 on how to recruit and work with allies at the local level. The following strategies were included:

- A. Develop effective monitoring systems to ensure that the industry learns of the introduction of unfair local anti-tobacco proposals in a timely fashion. . . .

Nothing . . . works more effectively than a system in which city and county clerks are contacted on a

regular basis to determine if anti-tobacco activity is scheduled. . . . Unlike Massachusetts, where convenience store allies and member company sales representatives fill the role, in Minnesota, the wholesalers have implemented a similar program which has proved effective.

- B. Employ effective local advocates. . . .

Identifying and deploying the local person who can “make the sale” before local government entities . . . accounts for an extremely large portion of the reason the industry achieves its goals. This is the single most important non-managerial element of the program.

- C. [Build strong local coalitions.] The constant claim on the local front is that “It’s only the out-of-state tobacco industry that opposes this ordinance.” . . .

[In California], coalition coordinators . . . develop support from individual restaurateurs, retailers, hoteliers, local labor leaders and others. The coordinators get in the door, educate the potential allies, form official local groups if necessary, . . . encourage their attendance at the hearings, motivate them to testify . . . and even encourage them to write letters to lawmakers and the press. [Coordinators should be local too], . . . on the ground every day working these potential allies. . . .²¹(Bates no. 2023965881-5883)

In an early 1995 report to the Tobacco Institute, the public relations firm The Madison Group recommended aggres-

¹⁹The *Congressional PIG Book* is an annual summary of alleged waste and “Pork in Government” expenditures. Citizens Against Government Waste (www.cagw.org) was formed as a nonprofit to continue the activities of President Reagan’s Grace Commission.

sively mobilizing local coalitions. They suggested

identifying third party allies who share a concern with taxpayer abuse and government excess. . . .

- Cultivate the coalition that will carry the attack against Assist [*sic*]. . . .
- Organize coalition indignation and uprising against Assist [*sic*]. . . .
- Extend the issue and general indignation for as long as possible.^{90(Bates no. TNWL0047343)}

Allies were also used to send FOIA requests, using sample letters provided by the tobacco companies;^{21,41} request hearings or file complaints regarding “illegal lobbying” and other allegations;^{41,92} file lawsuits;³⁵ write letters to politicians at various levels issuing complaints or demanding investigations;⁹³ and publish articles criticizing ASSIST in their newsletters.⁹⁴ In some cases, allies required “financial assistance to enable the organization to improve its capabilities in dealing with tobacco issues. . . .”^{95(Bates no. 2023965833)}

This was the case with the American Wholesale Marketers Association, which received contributions from the Tobacco Institute in 1993,⁹⁵ and the Minnesota Candy & Tobacco Association, which received \$20,000 from the Tobacco Institute in 1991.⁹⁶

The Tobacco Industry’s Self-evaluation of Their Efforts to Recruit Allies. It is difficult to assess overall how successful the tobacco industry was in enlisting and using these various allies. At the beginning of ASSIST, the Tobacco Institute’s Susan Stuntz, in a speech to the executive committee, had listed in detail some of the diverse coalition members ASSIST states had successfully recruited, includ-

ing major employers, the Urban League and NAACP, state newspaper publishers associations, Blue Cross, Prudential, and state AFL-CIOs. Many of these had also been heavily recruited by the tobacco industry. Stuntz pointed out that

those coalitions that involve major employers in the state, state or local chambers of commerce, or unions and other employee organizations are of major concern. . . .

In one state, it appears that outdoor advertising agencies are working quietly with the ASSIST coalition to develop anti-smoking messages.^{10(Bates no. TI13851814)}

Malmgren of the Tobacco Institute reported in November 1992 that the industry had been successful in recruiting and collaborating with a retail association in the northeast:

. . . the industry established a formal, solid working relationship with the New England Convenience Store Association to develop better coordination of their resources. . . .

For monitoring purposes, we fund our allies in the convenience store group to regularly report on ordinance introductions and assist in campaigns to stop unreasonable measures. . . .

As a result [primarily of this alliance], the industry is prepared to deliver direct mail, run phone bank operations and otherwise attack local proposals with our local business allies in a generally coordinated and productive fashion.

The team is beginning to export the Massachusetts efforts to other states in New England to prepare for the increase in local activity expected from ASSIST funding in Maine and Rhode

Island, as well as Massachusetts.⁸(Bates no. 2023965879)

In contrast, in a memo dated November 29, 1995, Josh Slavitt of Philip Morris expressed some frustration with the lack of a strong key ally in New Jersey:

... as an ASSIST state, NJ is beginning to catch fire on the local level where communities are attacking our sales and marketing practices. It is difficult to implement our traditional methods of heading off legislative/regulatory marketing restrictions at the local level in New Jersey due to the lack of a strong retail trade association in the state.⁹⁷(Bates no. 2045887287)

A Philip Morris planning document of July 1992 also had expressed doubts about the tobacco industry's ability to recruit smokers in their efforts against ASSIST:

Fact: 1) Consumers are diminishing resource and have doubts—doubts reduce effectiveness. 2) Efforts to enlist consumers in fighting the Anti's directly have been generally unsuccessful. . . .

Conclusion: 1) Fewer consumers will affect the pool of available activists who can/will articulate their own defense. . . .²(Bates no. 2048621157)

Minnesota lawyer Thomas Briant echoed this concern in a handwritten note, dated August 16, 1994, that accompanied a letter to a Philip Morris executive and complained, "The political environment in MN is going further south with 'stings' at retail all over the place and now the state suing PM! Any NY help available to fight back? Our people are getting overwhelmed."⁹⁸(Bates no. 2044135472) Thus, individuals affiliated with the tobacco in-

dustry expressed frustration with their inability to recruit useful allies.

Strategy 4: Discredit ASSIST—File Legal and Regulatory Actions

In the tobacco companies' documents, the authors found discussions of a number of tactics to discredit ASSIST and those involved with ASSIST. These tactics included injunctions, lawsuits, complaints to the DHHS inspector general, audits, changes in federal regulations, and complaints before ethical practices boards. A 1993 Philip Morris document titled "Synar ASSIST Task Force" identified the single overarching objective for these activities as eroding the credibility of those involved with ASSIST:

ASSIST

Objective

... Launch investigation of ASSIST program in Congress and in state legislatures. . . .

Use overall investigation to develop a public relations program designed to erode credibility of opponents over the long term.²⁶(Bates no. 2023961348)

Injunctions and Legal Actions. Tobacco company executives planned to use their legislative allies to carry out various legal actions. These included Slavitt's idea for filing injunctions against the distribution of ASSIST funds:

In order to determine whether a member of Congress has grounds to file an injunction, Legal should review the original RFP from HHS and the state proposals to determine the potential for litigation. . . .

Senator McConnell has previously filed a letter to HHS criticizing

ASSIST. However, based upon the legal analysis, there may be an opportunity for other Members of Congress to file an injunction against distributing these funds.

Identifying the appropriate MoC [member of Congress] must be pursued aggressively by the Washington Relations Office—in the best case, the member should be from a non-tobacco state.²⁰(Bates no. 2078755122)

A lengthy Tobacco Institute document reported on the success of one legal action in Colorado:

On February 13, 1995, a Colorado administrative law judge (“ALJ”) found that the Colorado Department of Public Health and Environment (“DPH”) violated state election law by using public funds and resources, apparently including money provided through the ASSIST program, to further a pending tobacco tax initiative.⁴⁰(Bates no. TI30519007)

Federal Acquisition Regulations. In March 1993, the ASSIST Coordinating Center provided a training workshop for state ASSIST staff regarding policy advocacy limitations on lobbying under current law, and the Center prepared a “white paper” titled “Restrictions on Lobbying and Public Policy Advocacy by Government Contractors: The ASSIST Contract.”⁹⁹(Bates no. TNWL0046714) Among its conclusions, the paper found that, under current law,

state public health agencies . . . may not use federal Government contract funds to lobby Congress. . . . [However, no current law] precludes lobbying the executive or administrative branch of government, at any level. . . . State public health agencies are likewise free to lobby the legislative branch at the

state or local level, and to attempt to influence initiatives or referenda.⁹⁹(Bates no. TNWL0046721–6722)

The Tobacco Institute obtained a draft copy of the ASSIST paper on lobbying. From the tobacco industry’s viewpoint, a serious weakness in existing laws was that lobbying restrictions on federal funds did not apply to local legislation and ordinances, so the Tobacco Institute strongly advocated for amending the Federal Acquisition Streamlining Act (FASA). As described in a Tobacco Institute document dated December 15, 1994,

. . . this fall we were able to attach an amendment to the Federal Acquisition Streamlining Act (“Act”) legislation . . . which—for the first time—would prohibit federal funds from being used to lobby a local legislative body. . . .

The Act will result in a revision of the Federal Acquisition Regulations (“FAR”), which govern all federal contracts, including the ASSIST program. . . . the new lobbying prohibition will not be enforceable until final regulations are promulgated, probably some time in the fall of 1995.²³(Bates no. TI13850309–0310)

The amended FASA stated that “Costs incurred to influence (directly or indirectly) legislative action on any manner pending before Congress, a State legislature, or a legislative body of a political subdivision of a State” were not allowed in federal contracts.¹⁰⁰(§§1587–68)

The new law took effect on October 1, 1995, and it applied only to government contracts based on solicitations issued after that date. Because the original ASSIST contracts had been awarded prior to that date, they were not governed

by FASA—as the Tobacco Institute discovered when it attempted to use the new regulations to restrict ASSIST activities. Nevertheless, tobacco companies used this amendment as a basis for requesting official government audits of ASSIST contract activities.

HHS Inspector General Audits. The December 15, 1994, Tobacco Institute document cited above also pointed out that, even with the FASA amendment, certain clauses in the Federal Acquisition Regulations (FAR) would make it difficult to challenge ASSIST:

... complaints involving the ASSIST program may not fit under the Federal Acquisition Regulations framework for several reasons. . . .

the regulations envision an interested party to be . . . a company that may have submitted a contract bid and lost. . . .

Second, . . . the probable remedy is very mild. . . . the contractor . . . would be expected simply to reimburse the government for the cost of its lobbying efforts.²³(Bates no. T113850310-0311)

The author of the document mentions the role played by two U.S. Senators in attempting to fit the legislation to the tobacco industry's needs, then introduces a new strategy involving not only congressional allies but also allies at the state and local levels:

As you know, Senators Hatch and Ford were unsuccessful in their attempt to amend the Act to make sure that individual ASSIST grantees could be sued by any interested party under the Federal Acquisition Regulations.

Consequently, the best way to use the new lobbying prohibition may be to bring a complaint to the Inspector Gen-

eral of the Department of Health and Human Services. . . . [This] has three distinct advantages over the FAR. First the Inspector General has a great deal of discretion over the scope of his investigations and has a wide spectrum of remedies from which to choose if he determines that federal funds are being used to lobby. . . . Consequently, even if the complaints would not be actionable under the FAR on procedural grounds, the complaints coupled with political pressure from the Hill eventually might be more effective than a FAR complaint to the GAO [General Accounting Office] or the GSBICA [General Services Administration Board of Contracts Appeals].

Second, unlike the FAR framework, there are no procedural technicalities that hinder outside third parties from bringing complaints before the Inspector General. In fact, by sending the complaints to the Inspector General, we could coordinate a grassroots effort that would send dozens of complaints to the Inspector General's office, forcing the Inspector General to address the problem.

Finally, if the Inspector General dismisses the complaints, or if he chooses to engage in a less than vigorous investigation, his actions will be of interest to the appropriate congressional oversight committees. And, given recent political changes, the Department of Health and Human Services may be more sensitive to Congressional pressure.

Procedurally, filing a complaint with the Inspector General is very straightforward. . . . The letter should . . . request that the Inspector General investigate and audit ASSIST to determine whether such violations are indeed occurring.²³(Bates no. T113850311-0313)

The author finishes by suggesting that the complainant “request that the Inspector General recommend that the ASSIST program be eliminated and that the federal government be reimbursed for federal funds that were illegally spent.”²³(Bates no. T113850313)

In 1996, the House Appropriations Subcommittee on Labor, Health and Human Services, and Education requested that the inspector general of the DHHS perform an audit of ASSIST.¹⁰¹ A year later, R.J. Reynolds’s John Fish again wrote Congressman Henry Bonilla’s office, this time with a set of questions for the inspector general, including the following:

Does your office conduct periodical [sic] reviews of all contracts to ensure that the money is used in appropriate ways? . . .

You are currently conducting an audit of the ASSIST program. Can you tell me when your audit will be completed?⁷⁸(Bates no. 522524229)

In June 1997, the deputy inspector general for audit services at DHHS wrote the following to Congressman Bonilla, with a copy to Congressman Istook:

This is to provide you the status of our review, made at your request, of the . . . (ASSIST) program. . . . Your staff expressed particular concern about (1) whether ASSIST funds were used for lobbying activities, (2) whether the program was effective, and (3) the relationship of ASSIST to other initiatives to reduce smoking. The Committee on Appropriations also requested the Office of Inspector General (OIG) to conduct an audit of the program. . . .

To determine whether the activities were reimbursable under the provisions of Federal cost principles and laws which prohibit use of Federal funds for lobbying elected officials, we:

- interviewed NCI ASSIST officials and officials of one ASSIST contractor [NJ], . . .
- reviewed progress reports, . . . [and]
- engaged the Office of Counsel to the Inspector General (OCIG). . . .

Our review of the list of eight reported activities and progress reports submitted by ASSIST contractors disclosed (1) one instance where nonreimbursable lobbying activities occurred, and (2) six instances had not violated applicable Federal lobbying laws. We are continuing to review one instance to ensure that no Federal funds were used for lobbying activities.¹⁰²(Bates no. 522524692–4693)

The single case found involved a journal advertisement in New Jersey regarding banning of smoking in casinos. The advertisement’s cost was \$1,470.¹⁰² NCI auditors followed up with an audit of the New Jersey contract and found that the \$1,470 expense was appropriate. The deputy inspector general also “concur[red] with the observation of NCI ASSIST officials that more analysis is needed in order to determine the effectiveness of the ASSIST program.”¹⁰²(Bates no. 522524696)

State Audits. Demands for audits were also used at the state level.^{21,25,28,93} In Michigan, Philip Morris’s Scott Fisher wrote a memo (April 25, 1994) to executives at the Tobacco Institute, Philip Morris, and R.J. Reynolds detailing how the tobacco industry could use a local politician to force an audit of the state ASSIST program:

Michigan's Co-Speaker of the House has taken a keen interest in uncovering more information regarding the state's seven-year involvement in the ASSIST program. Attached you will find a copy of a letter Speaker Hertel sent to . . . Director of the Michigan Department of Public Health . . . seeking detailed information on the ASSIST program. . . . Please note . . . [three counties] have received over \$25,000 each year. . . . The Single Audit Act of 1984 requires any sub-recipient which received over \$25,000 in federal grant monies to be audited. No such audit of these agencies has been done by [Fiscal Year] FY '91, '92, or '93.²¹(Bates no. 2041190064)

Fisher then made several recommendations, among them,

1. What specific follow-up questions should the Speaker send back to the Director of the [Department of Public Health]? . . .
5. Can a letter be sent by Speaker Hertel to federal officials such as Michigan's Congressional representatives or HHS and/or its auditor regarding the lack of enforcement of the Single Audit Act of 1984 which could jeopardize future funding for Michigan's ASSIST?²¹(Bates no. 2041190065)

On October 18, 1995—less than 2 weeks after the new legislation took effect—a tobacco ally, the Minnesota Grocers Association,^{28,103} wrote a letter to Governor Arne Carlson and the state auditor, with copies to the Minnesota congressional delegation. Portions of the letter follow:

Information has been brought to the attention of the Minnesota Grocers Association which indicates that

taxpayer dollars dispensed under the direction of the Minnesota Department of Health's ASSIST Project have been used unlawfully and improperly to fund lobbying activities. . . . Using the more than 500 pages of documents provided to us, . . . we are asking the Governor's Office and the State Auditor to launch an immediate investigation. . . .⁹³(Bates no. 513967722)

Four months later, the Minnesota Grocers Association received a letter from the Minnesota ASSIST project director pointing out that, according to the NCI,

the Federal Acquisition Streamlining Act of 1994 only affects contracts awarded on or after October 1, 1995. Since the ASSIST contracts were awarded in September of 1991, the new cost principles do not apply to Minnesota's ASSIST contract. Further, the Office of General Counsel, Department of Health and Human Services, has advised NCI that in its opinion the ASSIST subcontractors are also not covered by the changes of October 1, 1995 because ASSIST contractors are not expected to pass on the new cost principles to their subcontractors.¹⁰⁴(Bates no. 2046957021)

A similar effort to use the new FASA regulations in New York also failed, as shown by an undated Tobacco Institute document from around 1996, which includes a letter from New York's ASSIST program manager to his coalition project directors and contacts, with the following announcement:

I am happy to tell you that a final interpretation of the regulations by the Department of Health and Human Services has determined that contracts awarded prior to October 1, 1995, are not subject to the FASA, and, there-

fore, these regulations do not apply to contractors or subcontractors participating in the ASSIST program. . . .

This news should encourage all coalitions to redouble their policy advocacy efforts. All coalitions may use contract funds to appropriately advocate for tobacco control at the local level, and most may do so at the state level. Local legislation, regulation, and voluntary policies are the cornerstone of our effort to eradicate tobacco-caused disease. Your vigorous advocacy for tobacco control is the key to our success.^{105(Bates no. T116270186)}

In Washington State, tobacco industry operatives drafted letters for state Representative Tom Huff. Representative Huff appears to have been recruited to request an audit of ASSIST, as described in a memo (March 15, 1996) from Bill Fritz of Public Affairs Associates, a public relations firm working with the Tobacco Institute:

Here is the State Auditor’s reply to Rep. Tom Huff’s request for an audit of the ASSIST program.

The audit appears to have been “a once over lightly” effort that either avoided some questions poised [*sic*] by Rep. Huff or provided inadequate answers. . . .

we should draft another letter for Rep. Huff’s signature pointing out and reasking the questions that were not answered. . . .^{79(Bates no. TNWL0046478)}

In Maine, an attorney from the law firm Doyle & Nelson met with and then wrote to Maine’s attorney general on April 23, 1997, regarding “possible failure to follow the law and inappropriate conduct” by ASSIST. The attorney re-

quested that the attorney general “launch an immediate investigation in conjunction with the State Auditor’s Office.”¹⁰⁶

(Bates no. 518270712) The attorney cited “lobbying activities” and “lack of bidding procedures,” but he was most indignant that the local program had sent to the ASSIST Coordinating Center a list of Maine tobacco lobbyist lawyers and selected clients and then encouraged health care clients to switch to other lawyers:

Carol Allen clearly was told that she lost the Maine Teachers Association . . . because of her representation of tobacco clients; I personally was told that there were attempts to remove me as head of the United Way campaign . . . because of my representation of tobacco clients; My partner Craig Nelson, who serves on one of the affiliated boards of the Kennebec Health System, was told by several persons that he should resign, and there was some pressure to do that until I intervened. (I spoke with the President of the Maine Lung Association . . . who heads up this years [*sic*] anti-smoking effort and told him that if his organization or any unknown members of that organization persisted that we would sue them both collectively and individually.) . . . I am absolutely outraged that state tax dollars can be used to attempt to deprive attorneys engaged in private practice of their clients.^{106(Bates no. 518270715)}

Investigation by Ethical Practices Board. In addition to demanding an audit, as mentioned earlier in this chapter, the Minnesota Grocers Association, a tobacco industry ally, sent a letter on October 18, 1995, to the State Ethical Practices Board requesting that “the Governor’s Office and the State Auditor . . . conduct a

formal investigation of the Minnesota . . . ASSIST Project . . . [regarding] lobbying activities. . . the vast majority of these groups that have engaged in lobbying activities have not registered with the Ethical Practices Board as lobbyists and have failed to file lobbyist reports.”¹⁰⁷(Bates no. 513967726)

On February 4, 1996, lawyer Thomas Briant, writing on Minnesota Wholesale Marketers Association letterhead, wrote to Tobacco Institute, Philip Morris, R.J. Reynolds, and U.S. Tobacco executives that the Ethical Practices Board had dismissed 15 of the 16 complaints brought by the Minnesota Grocers Association because the amount of money and time spent lobbying had not exceeded the threshold.²⁸ Undeterred, Briant went on to say that he would be “sending a letter to the Minnesota Department of Health informing them which ASSIST grantees intended to engage in local and/or state lobbying activities and request that the Department of Health take all necessary to steps to prevent such lobbying.”²⁸(Bates no. 517759156)

The above examples demonstrate the industry’s perseverance in bringing federal and state complaints against ASSIST; adverse rulings did not deter the tobacco industry from repeated attempts to stop ASSIST’s policy advocacy efforts. In Washington, public relations consultant Fritz described “our objective” in a memo to the Tobacco Institute as follows:

turning the public spotlight on the improper and illegal use of public funds for anti-tobacco lobbying, producing a “chilling effect” on the zeal and cavalier manner in which the anti-tobacco activists conduct their programs, leading to the diminishment and eventual curtailment of some of

these programs funded with public money.¹⁰⁸(Bates no. TNWL0020096)

Strategy 5: Infiltrate ASSIST

The tobacco companies’ documents reveal that they planned to infiltrate ASSIST as they have infiltrated other public health groups, such as Stop Teenage Addiction to Tobacco (STAT) and Infant Formula Action Coalition (IN-FACT).²⁹ Proposed strategies included joining and reporting on ASSIST coalitions as well as applying for ASSIST grants and contracts.¹⁰⁹ One of the Tobacco Institute’s initial action plans, in October 1991, included the following: “State Activities’ regional staff will identify local business and labor interests in 17 grant states who could gain representation in community-based ASSIST coalitions.”¹⁷(Bates no. 518143180)

The tobacco industry took advantage of the openness with which ASSIST coalitions welcomed new members. Briant, a Minneapolis attorney who, as noted above, worked for both the Tobacco Institute and the Minnesota Wholesale Marketers Association, included the following recommendation in his analysis of the Minnesota ASSIST proposal:

As indicated in the Best and Final Offer Proposal, . . . “any organization desiring to join [the ASSIST Coalition] will be welcomed.” Given this open membership, I would recommend that business groups which would be effected [*sic*] by the ASSIST study as a result of reduced smoking rates become members of the Minnesota ASSIST Coalition.⁹¹(Bates no. TT14021167)

The Minnesota Wholesale Marketers Association then applied for funding from

the ASSIST program. In a letter dated February 4, 1996, however, Briant reported that the Minnesota Grocers Association had applied for but had not been awarded a grant from ASSIST.²⁸ The tobacco industry, through its “retail association” allies, tried again in May with another grant proposal for 1996–98.⁶⁰

Research documented a single example of outright infiltration by a tobacco industry operative; this instance occurred in Colorado in 1992. An individual, apparently working for the Denver public relations firm Karsh & Hagan, reported on attending a meeting of an ASSIST coalition in Fort Collins:

I arrived after the meeting commenced and, despite my effort to remain invisible, ended up seated at the head of the table. I signed in as a student and hoped that my baggy clothes and backpack would make this credible. . . .

One attendee said that tobacco companies often worked through . . . rights groups to make their efforts seem “local.” This person believed that informational breakfasts were already being conducted along these lines in Denver. She suggested sending a spy to these events, as well as to a smoker’s rights group that meets at Gabby’s . . . restaurant in Ft. Collins.

At this point, I felt extremely conspicuous and decided it would be a good time to leave. I waited until the group moved on to a more benign topic so as not to seem abrupt, looked conspicuously at my watch and left. Would advise future “plants” to arrive late and leave early, avoiding the awkward small talk with other attendees that might create suspicion.¹¹⁰(Bates no. 2023667420,7422)

Strategy 6: Divert Funds from the Community Environment Channel and Promote Alternative Programs

The sixth strategy identified in the review of the tobacco industry’s documents was to diminish the effectiveness of ASSIST by diverting funding from the strongest part of ASSIST to alternative programs that would either weaken ASSIST’s effectiveness or strengthen the tobacco industry’s image. Specifically, the tobacco industry wanted to move resources away from the Community Environment Channel, which had “the strongest emphasis in ASSIST . . . and focuses on goals and activities which are the most objectionable.”¹³(Bates no. T113850215)

Within 3 days of the announcement of ASSIST, Tobacco Institute executives were discussing how to involve their political allies in ways to divert ASSIST funding from activities to mobilize the community around tobacco control:

We should have our legislative political allies make certain that these [ASSIST] funds cannot be used for any anti-tobacco strategy which is political in nature. . . .

We could also work to assure that the money is so widely disbursed that its impact is lessened. . . .⁸¹(Bates no. T113850725)

One way to lessen the impact could be to restrict ASSIST funding to specific populations:

Restrict or limit how the funds are used through the state appropriations process and contacts with executive branch officials.

Make reasonable grants for programs directed at pregnant women and youth a priority; secondary priorities to be

developed, but may include smoking cessation programs for people who have decided to quit.¹⁶(Bates no. 511073913)

Tobacco Institute executive Bob McAdam recommended that the tobacco industry attempt to “restrict ASSIST funding to school-based anti-tobacco education [*sic*].”¹²(Bates no. T113850205) Consultant Ted Trimpa agreed, recommending that the Institute “provide a basis to advocate shifting all ASSIST funds to the Schools Channel. . . .”¹³(Bates no. T113850215)

Nevertheless, he warned that this strategy might inadvertently fund activities in the Community Environment Channel:

The Community Environment Channel . . . has a number of youth access objectives which may overlap with the Schools Channel. By shifting funds to Schools, the Community Environment Channel activities may be inadvertently supported/funded.¹³(Bates no. T113850215)

One reason that the tobacco industry might have preferred the schools channel to the Community Environment Channel is because school interventions alone are not as effective as those combined with community-based or comprehensive programs.^{111–114} In addition, as Slavitt, of Phillip Morris, pointed out, “The tobacco industry could also offer our own youth initiatives . . . and suggest that further Federal or state funding is not needed for youth anti-smoking campaigns.”¹⁹(Bates no. 2023916867) (Phillip Morris had its own youth initiative, titled “It’s the Law,” which emphasized smoking as an adult pastime.) In other words, the tobacco industry could argue for a shift in funding to the Schools Channel followed by an argument to eliminate school programs.

While one Philip Morris executive wrote that “the industry’s ‘Youth Initia-

tives’ have ground to a halt” in the summer of 1992,²⁰(Bates no. 2048621164) by 1993, the company had distributed a total of 1.9 million “It’s the Law” kits nationally.¹¹⁵ (Bates no. 2023916805) A report prepared for Philip Morris’s Task Force on Smoking by Minors announced that the company had a database of more than 50,000 subscribers to “It’s the Law,” with a budget of \$1,199,000.¹¹⁶

The tobacco industry strategists also suggested diverting funding entirely from ASSIST to nontobacco programs. One of Philip Morris’s strategies involved taking advantage of the needs of groups not normally considered allies of the tobacco industry:

Use of Health Advocacy Groups:

At both the state and Federal levels a number of Health Advocacy groups could attack Sullivan for failing to address major health care issues—AIDS, pre-natal, teen pregnancy, affordable health care, child immunization—instead of wasting more Federal dollars on anti-smoking programs.¹⁹(Bates no. 2023916867)

In a later memo (June 1992), ACT-UP and expanded low-income health services were added as “other health constituencies” which “can criticize waste in state [Department of Health] DoH’s.”²⁰(Bates no. 2078755123) The Corporate Affairs section of the Philip Morris 1992–96 marketing plan listed as a long-term goal: “Work with grass roots organizations to divert state health department funds, equivalent to the amount of ASSIST funding, to support other health programs (pre-natal care, half-way houses, etc.).”^{11,117}(Bates no. 2046454338)

Strategy 7: Discredit ASSIST through Public Relations Tactics

Proposed tobacco industry public relations tactics identified in this research were coded into four categories: identify and assist tobacco-friendly investigative reporters;^{12,20,25,90} work with local grassroots coalitions;⁹⁰ sponsor “scholarly works” that criticize voluntary health organizations, particularly ASSIST partner the American Cancer Society,^{18,118} and publicize the tobacco industry’s youth programs (for example, Philip Morris’s “It’s the Law”).^{17,18}

The Tobacco Institute and tobacco companies planned to make the most of FOIA requests by organizing media coverage regarding the information gathered. In 1995, the Tobacco Institute commissioned The Madison Group, a public relations firm, to develop a public relations/public affairs plan for FOIA requests. The proposed plan outlined a number of activities including the following:

Prepare for FOIA request, identify spokesperson and provide adequate media training. . . .

Counter efforts by project Assist [*sic*] to stir up animosity in the media and among elected officials . . .

Identify investigative reporter(s) likely to independently pursue Assist [*sic*] abuse . . .

If an interested reporter has been identified, brief and provide with information that will support the reporter. . . .

Provide targeted contact on the results to key office holders.^{90(Bates no. TNWL0047342-7343)}

The Madison Group proposed a budget of \$40,000 for these and other activities. This analysis did not uncover documentation about whether the activities were funded.

A number of documents reveal the tobacco industry’s activities of writing press releases,¹¹⁸ providing information to friendly reporters,^{40,119} and developing messages about ASSIST,¹²⁰ which they often shared with each other to prevent duplicating efforts. For example, a Tobacco Institute publication about ASSIST, titled, “Federal Tax Funding to ‘ASSIST’ State Tobacco Control Lobbying,” appeared 19 times in the Philip Morris, Lorillard, and Tobacco Institute document collections.¹²¹ (See page 323 of this chapter for additional messages that were to be conveyed in public relations materials about ASSIST.)

The Tobacco Institute appears to have been consulted on a comprehensive media plan to publicize a complaint filed with the Washington Public Disclosure Commission in 1995 against ASSIST and alleging “taxpayer-funded lobbying.”^{92(Bates no. TI14303912)} The complaint was brought by Stuart Cloud, proprietor of a small chain of Seattle-area tobacco shops. Public relations consultant Bob Kahn stayed in touch with the Tobacco Institute while developing a press release,⁹² writing a backgrounder,⁶⁸ arranging for interviews with Cloud and his attorney,⁶⁸ and sending information to reporters.¹²² On October 13, 1995, Kahn sent a list of questions and answers to the Tobacco Institute’s Bob McAdam to review¹²⁰ in preparation for the upcoming press conference regarding Cloud’s

filing. The purpose was to “be sure that I’m positioning this properly. My intent is to suggest abuse without actually claiming it. I assume that’s the best we can do at this point.”¹²⁰(Bates no. T114303899)

Kahn’s comments included a recommendation that the attorney general investigate ASSIST. McAdam wrote back with additions that included a number of the main messages the tobacco industry wanted to convey to the press:

[Handwritten note] Using taxpayer money to lobby is not right. . . .

We hope there will be a healthy public debate. . . .

If they confined the use of ASSIST funds to education, no one would quarrel. However they have pursued an overtly political agenda. . . .¹²³(Bates no. T114303898)

Many of the grants went to advocacy groups that are part of the Democratic party coalition (e.g., Planned Parenthood, Gay and Lesbian groups). . . . Audits . . . have never been performed. . . . There is no accountability in this program. . . .¹²⁴(Bates no. T114303897)

The tobacco industry also publicized its criticism of ASSIST on the Smokers’ Rights ForceS Web site, www.forces.org. At least fifty-one different articles attacking ASSIST appeared on the Web site during the lifetime of ASSIST.^{125,126}

A major public relations tool for the counter-ASSIST effort was the 1998 book, *CancerScam: The Diversion of Federal Cancer Funds to Politics*, by James T. Bennett and Thomas J. DiLorenzo, established critics of tobacco control researchers and private health charities.^{127–136} *CancerScam*, a 170-page

criticism of the American Cancer Society, presents the ASSIST project as a prime example of “blatantly illegal tax-funded politics”¹²⁷(p13) involving “front groups, illegal lobbying, and other improper uses of federal funds.”¹²⁷(p13) Although no documents were found that showed Drs. Bennett and DiLorenzo had been recruited to write the book, a review of documents found three copies of early drafts—one was apparently of the entire book, and the others were of different sections—on the Philip Morris Web site, www.pmdocs.com. The drafts came from the office of Lance Pressl, who was director of government affairs at Philip Morris, and all were dated 1994 by Philip Morris—4 years before the book was published.^{118,137,138}

The tobacco companies’ documents also provide evidence that Philip Morris surreptitiously gave Bennett materials on ASSIST coalition member organizations. An e-mail, dated May 27, 1993, to John Ostronic from Slavitt of Philip Morris (PM) concerning the Coalition for a Smoke-Free Colorado, states the following:

I talked with Lindsay Steyer at Russell, Karsh & Hagan [a Denver public relations firm]. . . . She will collect all of the state agencies, universities, and organizations involved in anti-tobacco activities in CO and forward them to you. . . .

Please also forward a copy to Jim Bennett, be careful to ensure that nothing on Lindsay’s materials references her firm, or contains any other references to PM—if there is a cover note, shred it. Please remember not to use a PM return address, or any

thing [*sic*] which indicates that the info emanated [*sic*] from us—PM postal stamp, etc.¹³⁹(Bates no. 2073248267A)

The information was forwarded in a letter to Dr. Bennett at his office at George Mason University.¹⁴⁰ Philip Morris then began working on public relations for the book. A handwritten memo faxed on August 13, 1993, and found in Philip Morris executive Victor Han’s office, reads:

I got all the 411 on Jim Bennett. We need first to get this guy media-trained. We then need to identify key markets across the US to publicize his book and information. . . . Why not cultivate the very talented Grace Martin (formerly of Burson Marsteller, a public relations firm/D.C. and now newly-married, living in Roanoke, Va and unemployed) to do the publicity for Bennett. . . . She could . . . be very effective for us, without having any ties to us!¹⁴¹(Bates no. 2046527199–7200)

A proposed 1994 Philip Morris budget for communications, found in the company’s documents, listed \$50,000 for “Assist [*sic*] Book Publicity.”¹⁴² Philip Morris was also a “benefactor” for George Mason University in 1994–95, donating in the \$10,000 to \$99,999 category.¹⁴³

Strategy 8: Promote Preemption Laws and Ballot Initiatives

The tobacco industry appears to have launched several legislative efforts in response to ASSIST, and it worked hard to undermine initiatives sponsored by ASSIST coalitions. A document describing Philip Morris’s 1992–96 Marketing Plan announced as one of its long-term

goals a “Rollback Program” to do as follows: “Particularly in localities, introduce legislation to reinstate sales practices, such as free-standing displays, that have been banned or restricted” and “Pass state preemption.”¹¹⁷(Bates no. 2046454338)

Philip Morris executive Tina Walls, in a draft speech dated July 8, 1994, noted the importance of preempting local initiatives with weaker state laws as a key strategy for dealing with the tobacco control advocates’ “PAC-man” approach:

Our goal, simply stated, is to see some form of accommodation/pre-emption legislation passed in all 50 states. . . .

. . . the anti-smoking movement has become more sophisticated in its efforts to enact bans and restrictions on smoking. . . .

they can be in more places than we can and, thanks to Project ASSIST in 17 states, Proposition 99 in California, and Question 1 in Massachusetts, the “antis” now have the deep pockets necessary to intensify their local efforts.

The solution to “PAC-man” is statewide pre-emption. . . .

we’re dead serious about achieving pre-emption in all 50 states.¹⁴⁴(Bates no. 2041183752–3753,3756)

Tobacco industry efforts to promote statewide preemption are illustrated by a letter, dated December 13, 1994, from Geoffrey C. Bible, President and Chief Executive Officer of Philip Morris, addressed to then Governor-Elect George Pataki of New York. Bible wrote this letter to follow up on a visit with the governor-elect the previous evening. In it,

Bible described what he perceived to be the negative implications of the Vallone Bill, which would restrict tobacco use in workplaces; restaurants, bars, and hotels; recreational areas; public buildings; and transit facilities in New York City. Bible asserted that Philip Morris would support an amendment to the Vallone Bill that would reduce the permitted smoking area from 50% to 25%, and he also raised the option of statewide preemption. The following excerpt from that letter highlights Philip Morris's view on preemption:

I trust that this will only be the beginning of what I know can be a mutually beneficial dialogue. . . .

Another option to consider, and one on which we would be pleased to work with you, is statewide pre-emption, something that 17 other states have on their books with regard to smoking restrictions. Reasonable statewide pre-emption would provide a uniform standard for all localities throughout New York. One county would not be placed in competition with another for business and tourism, and New York would not be forced to compete with more hospitable climates in surrounding states such as New Jersey and Connecticut.¹⁴⁵(Bates no. 2046988148-8149)

Bible closed the letter by listing his views on the many ways that Philip Morris has contributed to the economies of New York State and New York City. (See case study 8.5).

During the early 1990s, the number of local tobacco control initiatives across the country increased dramatically, in part because of ASSIST. By the end of

1995, 1,006 communities had adopted local tobacco control measures. However, at the same time, 29 states had enacted laws that preempted local tobacco control ordinances. Twenty-six state preemption bills were introduced in 19 states during the 1996 legislative session alone; 17 states defeated these laws, and 2 states passed them.¹⁴⁶ Attempts to repeal preemptive tobacco control laws were initiated in six states.¹⁴⁶ As of late 1998, Maine, an ASSIST state, was the only state that had succeeded in repealing a youth-access preemptive tobacco control law.¹⁴⁷ In 2002, Delaware was the first state to repeal preemption of local clean indoor air regulations.¹⁴⁸

The considerable costs of the many local battles generated by ASSIST activities were an issue of concern, as shown by this 1995 memo from McAdam of the Tobacco Institute:

. . . many of the activities and organizations of the ASSIST coalitions in the states have used the funds to influence state and local legislators. . . .

[This] clearly raises the level of activities the industry must respond to. In Minnesota, for example, ASSIST documents . . . indicate there will be at least 90 local ordinance battles during 1995. Several groups receiving ASSIST money are part of the statewide coalition attempting to pass a large tobacco tax increase in the legislature. Documents in other states indicate a variety of local and state battles that the industry will be compelled to address. These battles will significantly add to the projected costs of our operation.¹²(Bates no. T113850203)

Discussion

During the 1990s, the U.S. tobacco industry had tremendous resources with which to counter tobacco control efforts in the nation. This analysis of the internal documents of the Tobacco Institute, Philip Morris USA, and R.J. Reynolds Tobacco Company shows that the industry moved quickly and relentlessly against ASSIST. The tobacco companies appear to have used their resources in a coordinated way to aggressively monitor, audit, and attempt to infiltrate ASSIST coalitions; pursue legal actions; preempt local tobacco control initiatives; generate negative publicity about ASSIST; and use their political and other allies to confront ASSIST at every level of government. These tactics were not new to the tobacco industry.¹ Furthermore, the documents strongly suggest that the tobacco industry attempted to hide its efforts by, for example, working through third parties such as public relations firms and legislators in nontobacco states, providing information but not disclosing that the Tobacco Institute or a tobacco company was the source, and secretly infiltrating public health groups.

This analysis of tobacco industry documents has several limitations related to using internal tobacco industry documents as a data source. Because of the enormous volume of tobacco industry documents available, and the variable indexing of these documents, there is no way to determine if all key documents related to the tobacco industry and ASSIST were retrieved. Furthermore, time and financial resources presented a limitation because the documents are spread across depositories worldwide and are on multiple Web sites. The purpose of this research was to document and highlight the tobacco industry's plans related to ASSIST and their implementation, not to establish causality between the industry's efforts and the outcomes of ASSIST. This analysis suggests that tobacco control advocates should expect a vigorous, sophisticated, and well-coordinated response from the tobacco industry to any efforts to implement major policy change at the local, state, and national levels. The tobacco industry's response to ASSIST also shows that mobilizing local coalitions—the “grass roots”—in a policy-focused approach presents the greatest challenge for the tobacco industry in its efforts to keep Americans smoking.

Part 2. ASSIST's Response to the Tobacco Companies: Facing the Opposition

Part 1 of this chapter analyzes tobacco industry documents to reveal and categorize the strategies that the tobacco industry planned to counter the effects and the very existence of ASSIST. Part 2 presents the experiences of ASSIST staff members as they encountered those strategies over the life of the ASSIST project. The case studies, which depict both the programmatic and the personal effects of tobacco industry activities, are preceded by an explanation of the legal and temporal contexts in which these events occurred. In particular, as government employees, ASSIST staff members had an obligation to respond to FOIA requests and to spend funds in compliance with state and federal regulations. Therefore, background information is presented about FOIA and about what constituted legitimate lobbying and advocacy practices by ASSIST personnel and coalition members.

When ASSIST staff members were experiencing the tobacco industry's charges of misuse of funds and illegal lobbying, they did not know that the tobacco industry was very determined to disrupt the project. The tobacco industry documents were only beginning to become available near the end of the ASSIST project. The case studies presented in this chapter describe events that occurred from 1993 through 1997.

Although ASSIST staff members anticipated that the industry would oppose their efforts, they did not anticipate the types of strategies or the amount of time

that would be required to respond. Complying with the multiple FOIA requests reduced the time that ASSIST staff members could spend on their tobacco control work. When the tactics took the form of accusations of wrongdoing—of illegal lobbying—some advocates were intimidated, and some coalitions struggled to keep their partners involved. When the tobacco industry leveled accusations against ASSIST at the state level, program intervention activities sometimes slowed down or became less effective. Not all advocates in the movement were intimidated, however, and some became stronger and more committed in the face of attacks.

Understanding the Obligation to Respond to FOIA Requests

As explained in part 1, strategy 1, of this chapter, the federal FOIA was passed in 1966 to ensure that all citizens have access to records and other information generated and stored by tax-supported federal agencies.¹⁴⁹

Eventually, through conversations with one another, ASSIST project managers and directors realized that many of them were receiving FOIA requests for documents. The FOIA requests made the material in the ASSIST files accessible to the tobacco industry and its allies. When served with FOIA requests, the public health staffs at the state and local levels interrupted their activities to comply with the relevant laws and to provide

the requested documents. These documents included ASSIST plans for future activities that the departments of health and coalition partners would have preferred not to release at that time.

To assist the states with understanding the extent of these requests and to respond to them, the ASSIST Coordinating Center contracted with a consultant to assess the experience of the ASSIST programs receiving FOIA requests. The consultant conducted telephone conversations during February 1996 with most ASSIST project directors and other individuals who were knowledgeable about FOIA activity. These conversations revealed that all 17 states had received at least 1 written request from Fiscal Planning Services Inc. (a private firm in Bethesda, Maryland, that was contracted by Philip Morris to coordinate this^{20,150}) for a listing of all recipients and awards made in fiscal year 1995.¹⁵¹ Additional FOIA requests varied in number and scope. They included (1) what appeared to be requests from interested individuals following the instructions in *ASA News*, a publication of the American Smokers Alliance;¹⁵² (2) follow-up requests from Fiscal Planning Services for more detailed information; (3) formal requests filed by trade associations in which tobacco companies were overt or covert participants (Walter ‘Snip’ Young, e-mail message to E. Bruce, April 5, 2004);¹⁵³ and (4) requests filed by law firms that typically did not (and did not have to) reveal the client whose interests they were representing.

An obvious pattern of using information from previous FOIAs to construct the next FOIA was discerned in the in-

formation derived from the telephone interviews—building on information from previous FOIAs. Some ASSIST states, such as Massachusetts, received very burdensome FOIA requests that required increasingly greater specificity and detail from local health departments and ASSIST subcontractors. These continuing requests seemed, in a well-coordinated way, to build on information obtained through prior FOIA requests. The internal tobacco industry documents quoted in part 1, strategy 1, of this chapter subsequently provided a clear picture of the extent of the tobacco industry’s FOIA strategy. Described also is the extensive public relations/public affairs plans to use information extracted from ASSIST documents to erode public and legislative support for the program. Typically, the tobacco companies, their trade associations, and other allies garnered voluminous documents from which they culled small parts that they later used as part of their legal and ethical challenges in Colorado, Washington State, Minnesota,^{154–157} and Maine.¹⁵⁸

The tobacco industry’s use of FOIA did have a disruptive effect on the operation of ASSIST. In some cases, fulfilling FOIA requests disturbed communication and cooperation among coalition members who felt that their confidences had been betrayed. Responding to the requests diverted resources and staff from tobacco control work and was burdensome. Washington State staff members reported spending hundreds of hours to respond with extensive information about coalition members statewide. Massachusetts hired an attorney half-time to coordinate and oversee re-

sponses to the almost constant flow of FOIA requests. Many ASSIST staffs, however, related that they had received little legal assistance in complying with the requests. Over time, the ASSIST states learned to share information about their FOIA experiences, to coordinate responses to the tobacco industry's use of FOIA, and to reduce the disruption of their programs.

Understanding the Regulations on Lobbying

Policy advocacy is distinct from lobbying, and that distinction became an important legal issue during ASSIST. *Lobbying* refers to promoting or fighting a bill that is actually under consideration by a legislative body. *Policy advocacy* refers to expressing support for a position on an issue or on a policy before it is under consideration for passage into law. Policy advocacy is a legitimate activity for federal and state government agencies and their employees and has never been prohibited. However, some ASSIST staff and coalition members tended to overinterpret restrictions on lobbying and believed that they could not do advocacy work. When ASSIST interventions began in the early 1990s, federal money could not be used to lobby at the federal level, but could be used to lobby state governments and local policy-making bodies in regard to policies. The laws and regulations changed during the course of the 8-year ASSIST project. Beginning with federal fiscal year 1997, the law that appropriated money for DHHS broadened the ban on using federal funds for lobbying and pro-

hibited the lobbying of state legislatures.¹⁵⁹

FASA also was enacted during the course of ASSIST.¹⁶⁰ The final rules implementing FASA were published on August 16, 1995, and the law became effective on October 1, 1995. Under FASA, “Costs incurred to influence (directly or indirectly) legislative action on any manner pending before Congress, a State legislature, or a legislative body of a political subdivision of a State”¹⁶⁰ were deemed unallowable under federal contracts. By its own terms, FASA applied only to government contracts based on solicitations issued after October 1, 1995. Because the original ASSIST contracts preceded that date, they were not affected by it. FASA’s total prohibition against using federal money to lobby at any level of government did apply to the 1-year extension contracts issued to ASSIST states beginning October 1, 1998, because these were considered new contracts.

From the beginning and throughout ASSIST, the principal planners at NCI, the American Cancer Society (ACS), the ASSIST Coordinating Center, and state departments of health were highly sensitive to the myriad restrictions on how federal contract money could be spent. They were especially careful, because these numerous restrictions were occasionally contradictory, and often confusing, and they changed during the ASSIST era. The Internal Revenue Code (IRC) definition of lobbying is complex and in itself could be confusing. The IRC definition of lobbying excludes many kinds of activities (e.g., advocating for regulations and administrative

Example of Instructions to the States Regarding Lobbying

“In the absence of an explicit definition, government specialists in cost principles urge reliance on the ‘customary’ definition of lobbying. . . . The best articulation of the customary definition of lobbying would be exactly what is contained in the Internal Revenue Code [IRC]. Therefore, for purposes of ASSIST, the IRC definition should guide contractors in determining what would be allowable costs under the contract.

“Specific examples of likely activities that can and cannot be reimbursed under FAR and OMB Circular A–122 may help to clarify these rules. Under this regulatory scheme, for-profit and 501(c)(3) awardees may not use federal contract money to:

- participate in electoral activities;
- work for or against passage of referenda or initiatives;
- lobby Congress to introduce or to pass legislation;
- lobby state legislators to introduce or to pass legislation;
- conduct grassroots lobbying on state or federal legislation;
- lobby members of the executive branch to urge the signing or vetoing of legislation;
- advocate that state or local officials should lobby Congress or state legislatures;
- conduct legislative liaison activities in ‘knowing preparation for,’ i.e., in support of unallowable activities.

“It is equally clear that, until FASA applies to the ASSIST contract (i.e., beginning October 1, 1998), for-profit and 501(c)(3) contractors may use federal contract money to:

- lobby legislative or policy-making bodies at the local level;
- lobby the executive branch (except to sign or veto a bill);
- lobby regulatory agencies at all levels (e.g., OSHA, EPA, FDA, state health departments, etc.);
- advocate the enactment or enforcement of ‘private’ or voluntary policies, e.g., workplace smoking policies, bans on smoking in restaurants, etc.;
- advocate the enforcement of existing laws, e.g., those that control tobacco sales to minors;
- conduct educational activities that help people understand issues and supporting evidence . . . ;
- conduct public education campaigns to affect the opinions of the general public . . . ;
- respond to documented requests by providing technical and factual presentations on topics directly related to your contract performance.”

Source: ASSIST Contracting Officer. 1997. Restrictions on lobbying and public policy advocacy by government contractors: The ASSIST contract. July 18. Internal document, ASSIST Coordinating Center, Rockville, MD (pp. 11–12).

actions, enforcement activities, and public education activities).¹⁶¹ In addition, activities that would constitute lobbying under some circumstances would not under others. For example, if the chair of a congressional committee asks an individual or organization to testify about an issue, nothing done in preparation for

or delivery of that testimony constitutes lobbying.

Throughout the life of ASSIST, much effort was invested in tracking, analyzing, and explaining to ASSIST contractors and subcontractors the laws and regulations that applied to their federal contract money and the different rules

that applied to state governmental and nongovernmental partners. Assistance was provided through written guidelines,¹⁶² numerous training events,¹⁶³ individual consultations, and other forms of technical assistance.¹⁶⁴ For example, a 1993 “White Paper,” which covered the limitations on lobbying, was updated and circulated by NCI to all ASSIST project directors and managers in 1997.^{99,164}

Because the effectiveness of tobacco control efforts depends on various types of organizations fulfilling different roles, it was important that ASSIST coalitions include nongovernmental partners. Non-profit organizations (including ACS)—sometimes known as 501(c)(3) groups or public charities—are legally allowed to lobby up to certain limits.¹⁶⁵ In fact, the 1976 Tax Reform Act specifically encourages nonprofit organizations to participate in public policy making. Although the ASSIST partners could and did use unrestricted nonfederal funds to lobby, the tobacco industry repeatedly made accusations of illegal lobbying, as described in the experiences of five states later in this chapter.

Case Studies

The tobacco companies continuously challenged ASSIST activities and staff. Case studies 8.1–8.5 describe the reactions of tobacco control advocates in Colorado, Washington State, Minnesota, Maine, and New York to the opposition their programs encountered. In Colorado, the tobacco industry filed five legal actions; although only minor infractions were upheld, the legal actions seriously

impaired tobacco control initiatives in the state and had grave and serious repercussions for the Colorado ASSIST codirector. Similar complaints of illegal lobbying were filed against ASSIST in Washington State. Although minor infractions had occurred in reporting spending, the ruling indicated that they had *not* improperly used public funds for lobbying. In Minnesota, the tobacco industry’s strategy significantly deterred the implementation of local tobacco control ordinances but was unsuccessful in defeating comprehensive youth access legislation. Maine, on the other hand, having learned of the strategies used in other states, was ready when the tobacco industry brought charges there and attempted to discredit ASSIST publicly. In New York, when Philip Morris tried to implement a preemption strategy, tobacco control advocates turned the tables on the company, made charges of illegal lobbying, and won. The accusations that the tobacco industry had made against health advocates were actually used against the industry.

Onward after the Opposition

The ASSIST project was based on solid research, which had clearly indicated that public and private policy advocacy—in local, state, and federal legislatures, businesses, schools, and local communities—is an effective way to reduce smoking initiation and prevalence. This policy focus was a major problem for the tobacco industry. The documents demonstrate that tobacco industry executives were under a great deal of pressure in dealing with ASSIST’s local, commu-

Case Study 8.1 Full-Scale Challenge in Colorado

In relation to the tobacco industry's full-scale challenge to ASSIST in Colorado, industry opposition in the other states seems piecemeal. In Colorado, the tobacco industry took a comprehensive approach through five legal actions: a lawsuit in Colorado's district court, three complaints to the Colorado secretary of state, and a lawsuit in Federal District Court. These legal actions were a principal strategy of the tobacco industry to defeat a state-wide grassroots question for the November 1994 ballot that would raise the tax on cigarettes from 20¢ to 70¢. Through legal actions, the tobacco industry built a case in the popular press that ASSIST had violated Colorado's Campaign Reform Act by spending state dollars to support a political campaign issue.

Supporting the Tax Initiative

Two principal entities worked on the public health side of the tobacco tax initiative: the Coalition for a Tobacco-Free Colorado (CTFC), a nonprofit 501(c)(3) public health organization with experience in policy advocacy activities, and the Fair Share for Health Committee, a tax-exempt 501(c)(4) political organization, which, by law, was permitted to lobby. CTFC had helped position Colorado to be competitive in the ASSIST application process.

An All-Too-Personal Experience

With my forehead in my palms and elbows perched on the edge of a long, dark mahogany conference table, I heard my attorney say, "Don't worry, everything will be all right. I'll be back in a few minutes. I have an urgent call to take." Then, alone in the empty and unfamiliar room in a high-rent office building, I suddenly felt lonely and besieged. I gazed out the window over the 16th Street pedestrian mall in downtown Denver and became frightened, thinking, . . . If the attorney general's office doesn't represent me, where will I get \$50,000 for my legal defense? . . . Mortgage my house? . . . Borrow from family? Had my careful research into the legal parameters for state employee participation in setting public policy been faulty? Is this my reward for trying to prevent tobacco-caused death and disability? What will my family think? Are my children hearing negative comments about me at school? Will the media ever let up? . . . The door swung open and my attorney exclaimed, "Let's make that call now to the attorney general." In this call, my attorney implied that he might bring a suit against the state if the attorney general did not represent me.

Replacing the phone receiver in its console, I said to my lawyer, "Thanks for your help. I don't think I would have convinced them to represent me without your help." They believed that I had willfully broken the law and therefore they would not have been obligated to represent me.

"But I'm still worried about the outcome of these lawsuits. What will it mean for me? . . . my career in public health? . . ." I asked with great pause.

In a commanding tone, my attorney said, "Don't worry, just tell the truth, and the truth will set you free."

Never before had such a trivial statement meant so much. I felt immense relief. Finally, there was someone in my corner, someone with credibility who believed I had not broken the law.

—Walter 'Snip' Young

Case Study 8.1 (continued)

Walter ‘Snip’ Young, the director of the Colorado Department of Health Division of Prevention Programs, was a long-time active member of CTFC and was the Colorado ASSIST project director. He was appointed to chair an ad hoc committee formed to plan a February 1993 community meeting where a proposed increase in the tobacco tax would be discussed.

Through his research of Colorado statutes and consultation with an attorney knowledgeable in these matters, Young was aware that Colorado law permitted state employee involvement in matters of policy that could lead to voter initiatives, as long as he was not involved in his official capacity after the matter was before the electorate. In this case, that date was December 15, 1993. After the ballot petition language was filed, government employees could participate in voter-initiated actions only on their own time, as citizen advocates.

This understanding of the law and his compliance with it provided Young with a false sense of security. He did not anticipate that his strict adherence to the law would not protect him from litigation and criticism in the press.

Tobacco Industry Groups

The tobacco industry used many law firms and various organizations and individuals to oppose the tax initiative.^{a,b} The Colorado Executive Committee—the political action committee formed to oppose the proposed tobacco tax increase—was organized by Colorado lobbyists at Hays, Hays & Wilson^c for the Tobacco Institute and other tobacco industry interests. The Colorado Executive Committee spent \$5.5 million, mostly for television and radio air time, on the political and public relations campaigns to defeat the tax initiative. The Colorado Executive Committee also formed a 501(c)(4) tax-exempt political organization called Citizens Against Tax Abuse and Government Waste. This organization’s name was attached to political ads run by the tobacco industry during the campaign. Groups supported by the tobacco industry (such as the American Constitutional Law Foundation, Smoker Friendly Stores, and a few individual owners of smoke shops and discount cigarette stores) filed the lawsuits described in the following paragraphs. Most of the open-records research that went into building the cases for the American Constitutional Law Foundation was conducted by an attorney employed by Hays, Hays & Wilson. According to a 1996 Tobacco Institute budget document, disclosed during the Minnesota tobacco consumer fraud lawsuit, the American Constitutional Law Foundation was paid \$60,000 in 1995 after the defeat of the Colorado tobacco tax initiative.^c

After acquiring more than 6,000 pages of documents from the Colorado Department of Health, the tobacco industry groups filed a second open-records request, which produced about 5,000 pages of documents that were never claimed. This action

reflected a tactical strategy used by the tobacco industry affiliates to divert Colorado Department of Health resources and ASSIST staff and volunteers from matters related to tobacco control.

Legal and Regulatory Actions

Action #1. The first lawsuit was triggered by a series of requests for documents that were filed under Colorado's public records law by a local lobbying firm known to represent the Tobacco Institute.^c Although the request in February 1994 came from a Colorado state representative on the Legislative Audit Committee, staff suspected that the letter was written by tobacco industry attorneys, because it sought specific documents by names generally known only to those close to the program and the tobacco industry (e.g., ASSIST annual action plan, comprehensive tobacco use reduction plan). The letter signaled the start of a year-long legal and public relations struggle for Colorado ASSIST.

At the time, files and records for CTFC were stored in the ASSIST office of the Colorado Department of Health and had been kept in these offices for many years before the start of ASSIST because the Colorado Department of Health provided administrative and clerical assistance to CTFC. When the open-records request for CTFC files was received, Young told the president of the coalition about the request, and CTFC removed the files the next day. The Tobacco Institute's local attorneys then filed a lawsuit in Colorado's district court to obtain the CTFC records. According to Young, the state attorney general did not vigorously defend this suit, because it was determined that since the Colorado Department of Health employees had access to these records, they were deemed public records under Colorado statute.

Tobacco Institute attorneys were interested primarily in obtaining a copy of the recently completed application for funds submitted to The Robert Wood Johnson Foundation's (RWJF's) SmokeLess States Project. This application proposed to run a prevention and public education campaign about tobacco use during the fall of 1994. The tobacco industry prevailed in district court, and CTFC records (including the RJWF application for funds) that had been on site at the Colorado Department of Health were turned over to tobacco industry attorneys.

On July 12, 1994, a Washington, D.C., law firm sent a letter to the RWJF staff member managing the SmokeLess States competition, complaining that the planned timing of the CTFC public education campaign was "no coincidence." It stated that "this [public education campaign] obviously could have adverse tax consequences for the foundation" and that "our clients and we would strenuously object to any use of the private foundation funds to support . . . a lobbying effort."^d The tobacco industry was trying to intimidate the RWJF Board into not funding the Colorado application, claiming that it was an illegal contribution to the tax initiative campaign.

Case Study 8.1 (continued)

A few days later, a letter from a Colorado attorney was sent to the major media outlets and advertising firms in Colorado “warning” them that they might not recover money that they might spend to purchase television, radio, and newspaper ads under contract with CTFC or RWJF. The letter stated, “We will pursue this matter vigorously and, if necessary, file complaints against the Robert Wood Johnson Foundation and CTFC with the Internal Revenue Service as well as seek injunctive relief in Federal Court.”^e

Action #2. The second legal action was a complaint filed with the Colorado Secretary of State by the Citizens Against Tax Abuse and Government Waste. In a promotional campaign, a Denver radio station gave away baseball tickets to smokers who would toss their cigarettes into a coffin that was set up at a bus station where American Cancer Society volunteers were seeking signatures to qualify the excise tax initiative for the November state ballot. The complaint charged that the activity constituted “bribery.” The radio station publicized the complaint, which was then dropped.

Action #3. The third legal action, a complaint by the American Constitutional Law Foundation, charged that the Colorado Department of Health and Young himself had violated Colorado’s Campaign Reform Act by helping to plan the state initiative to raise tobacco taxes. The secretary of state ultimately exonerated the Colorado Department of Health and Young of any illegal activity and rejected the complaint, except for three minor violations:

1. Mentioning the tax initiative in an ASSIST newsletter
2. Preparing a presentation (which was never delivered) about the Colorado tax initiative for an international lung cancer conference in Colorado Springs
3. Contributing to the Fair Share for Health Committee (FSHC) through its annual dues to CTFC^f

Action #4. The American Constitutional Law Foundation also filed a complaint against the Fair Share for Health Committee. The complaint alleged that the Fair Share for Health Committee had failed to disclose in-kind contributions (totaling less than \$100) to the campaign made by the Colorado Department of Health. The secretary of state subsequently determined that three items should have been reported that were not, and the Fair Share for Health Committee amended its campaign contribution reports to reflect the items.

Action #5. In an apparently frivolous lawsuit brought in Federal District Court, the American Constitutional Law Foundation charged the Boulder County Health Department, the Colorado Department of Health, and specific staff members with violating the First, Fifth, Ninth, Tenth, and Fourteenth Amendments and Article IV, Section 4, of the U.S. Constitution by using public funds to support a voter-initiated

action. The court dismissed this lawsuit in 1995 for lack of evidence. It was appealed and dismissed again later the same year.

A Lost Opportunity

Ultimate exoneration from these various charges was a hollow victory. These public health groups and individuals all operated within the confines of the laws that chartered and governed them (with the exception of the minor violations mentioned in Action #3), yet the tobacco industry was successful in spinning the public health involvement as illegal. By casting the collaborative activities of these entities as an improper and perhaps illegal entanglement of the government and private sector, the tobacco industry diverted attention away from the public health message and toward the message of big government acting improperly or illegally.

Specifically, Young's involvement in the early planning stages for the tax initiative, although prior to placement of the ballot question before the electorate and, therefore, within the confines of the law, was eventually characterized in the popular press as "improper," if not illegal. Tobacco industry attorneys provided to the local press excerpts that they had drawn from their open-records requests—with the tobacco industry's spin on the information and supporting documentation. Simply by raising questions about the propriety of ASSIST actions, the tobacco industry put the Colorado Department of Health, ASSIST, and Young on trial in the court of public opinion.

Eventually, the Colorado attorney general agreed to represent Young and the other state employees who were named personally as defendants (after Young's attorney threatened her office with a lawsuit), but the social and psychological stresses imposed on these people were severe.

The costs to Colorado's tobacco control effort were also large. A poll conducted in spring 1993 had documented that 72% of Colorado voters supported the proposed 50¢ per pack increase in Colorado's cigarette tax. Nevertheless, the tax initiative campaign, hampered by insufficient funding and mired in the legal challenges, was overwhelmed by the tobacco industry, which spent more than \$5 million to oppose the referendum. In November of that year, the initiative (Amendment 1/CO Tobacco Tax Initiative) was defeated at the polls by a margin of 20% (60% against, 40% for).⁸

Insights

Being named as a defendant in a legal action is traumatic; however, such experience offers valuable insights that might benefit other state tobacco control programs and their community partners.

First, a state health agency tobacco control program should establish a working relationship with the state attorney general's office. In this way, trust and understanding

Case Study 8.1 (continued)

between attorney and client will be established prior to any tobacco industry legal actions. It is particularly important that this be done now that state attorneys general are responsible for monitoring compliance with the Master Settlement Agreement. State tobacco control program staff should be aware of violations of the Master Settlement Agreement, learn of complaints filed by others, and/or bring their own complaints to the attorney general's office.

Second, each state tobacco control program should develop a strategic communication plan that guides responses of the health agency and nongovernmental agencies to tobacco industry challenges (see chapter 3). Each should monitor the actions of the tobacco industry, examine potentially vulnerable areas of the state program, and anticipate the tobacco industry's opposition to public health advocacy actions.

Third, engaging state and local public health leaders in planning tobacco control efforts has never been more important. High-level state government officials tend to be more involved now because of the need for executive management of Master Settlement Agreement funds, yet this involvement could be more broadly based and involve communities. Involvement of high-level leadership and management will help to deflect assaults on government agencies and criticism of policy actions.

—Walter 'Snip' Young, former Colorado ASSIST Project Director and Director of the Division of Prevention Programs of the Colorado Department of Health (CDH) and currently Scientist, The Cooper Institute, Golden, Colorado

^aFlora, M. E. Letter to Betsy Zakely. June 9, 1994. Kelley, T. B. Letter to Julie Merrick. June 22, 1994. Hays, F. L. III. Letter to select Colorado advertising firms. July 15, 1994. Perlman, B. A. Letter to Joyce Herr. September 30, 1994. O'Toole, N. D. Letter to Joyce Herr. December 1, 1994. In the author's possession.

^bU.S. District Court for the District of Colorado. Civil Action 94-2239. September 29, 1994.

^cAdams, W. A. 1995. Memorandum re: 1996 Tobacco Institute budget. October 27. The Tobacco Institute. <http://legacy.library.ucsf.edu/tid/rju28d00> (accessed May 18, 2004). Bates no. 2041212088–2216.

^dTemko, S. L. 1994. Letter to Edward H. Robbins, proposal manager, The Robert Wood Johnson Foundation, July 12. Internal document, Covington & Burling, Washington, DC.

^eHayes, F. L. III. 1994. Letter to select Colorado advertising firms. July 15, 1994.

^fHopf, N. A. Before the Secretary of State, State of Colorado. Case no. OS 94-02. Initial decision, American Constitutional Law Foundation and Lonnie Hayes v. Colorado Department of Public Health and Environment and Pueblo CI, 25. <http://legacy.library.ucsf.edu/tid/ygo60d00> (accessed May 18, 2004). Bates no. 522525513–5541.

^gSchrader, A. "Smoke tax goes down in flames. Tobacco lobby fends off Amend. 1" *The Denver Post*. November 9, 1994.

Case Study 8.2

Work Disruptions in Washington State

The ASSIST project in Washington State began to receive requests under FOIA in September 1994; over time, the requests grew in size, scope, and specificity. Soon the Washington Department of Health had supplied to tobacco lawyers more than 5,000 pages of records; supplying these records consumed 360 person-hours of state employees' time.^a Subsequently, attorneys purporting to represent an individual tobacco-nist filed a 425-page complaint with the State Public Disclosure Commission against ASSIST, the Washington Department of Health, the Washington State Division of ACS, and the Tobacco-Free Washington Coalition. The complaint charged, among other things, violations of state law by using public funds improperly for lobbying. These charges were almost identical to those made against Colorado ASSIST (described in case study 8.1). It was discovered and eventually reported in the news media (1) that the attorney who filed the complaint against Colorado ASSIST also helped prepare the complaint against Washington State ASSIST^b and (2) that the Tobacco Institute, not the individual tobacco-nist, had paid the legal fees involved.^{c-e}

Tobacco Institute Strategy for Investigating and Impeding the Washington State ASSIST Project

“We would recommend that you hire a private investigator to pursue the following:

1. Research ownership, tax status, etc., of vendors, consultants, companies receiving ASSIST funds.
2. Compile aggregate totals of all expenditures made by state employees and reimbursed expenses received.
3. Total all entertainment, catering, hotel, travel expenses.
4. Determine connection, if any, between temporary services provided and campaign consultants.
5. Cross match Prop. 43 expenditures, contributions, etc. with TFW and ASSIST accounts.
6. Research actual expense vouchers presented by ASSIST employees.
7. Research competitive bidding process on ASSIST awarded contracts to determine any violations of state law.
8. Review committee sign-up sheets for names that match with ASSIST payments in order to determine if any of the witnesses received payment for appearing before the Legislature.

Potential Actions:

1. State Auditor Review: The State Auditor could audit the ASSIST program upon a request of a legislator.
2. Media: We could turn information over to an investigative reporter or to a tax ‘watch dog’ group for public distribution.
3. Legislative: We could request a standing committee of the Legislature to hold hearings & investigate.
4. Legal Action: Depending on what we find . . . ?”

Source: Fritz, B., T. K. Bentler, J. Daniels, and S. Halsan. 1995. ASSIST information. Memorandum to B. McAdam of the Tobacco Institute, May 23, 1995. <http://legacy.library.ucsf.edu/tid/txt07d00> (accessed May 18, 2004). Bates no. TNWL0020835.

Case Study 8.2 (continued)

The Washington State Public Disclosure Commission issued its final order in this case in December 1999. In the final order, the department of health conceded that it had inadvertently failed to disclose the funding of four programs that it was required to report. The department paid a \$2,500 penalty and implemented a training program about compliance with Washington State’s lobbying laws.^f Substantial tobacco industry resources were spent, with minimal identification of program misconduct.

—Anne Marie O’Keefe,
former Policy and Media Advocacy
Manager, ASSIST Coordinating Center

^aLevin, M. 1996. Legal weapon. *Los Angeles Times*. April 21. (Kim Dalthorp, a former Washington Department of Health tobacco control official and ASSIST Co-Project Manager, is quoted in this article.)

^bMurakami, K. 1995. Tobacco Institute backs complaint against state anti-smoking program. *Seattle Times*. November 10.

^cPaulson, T. 1995. Cough up documents, agency told. *Seattle Post-Intelligencer*. October 24.

^dPaulson, T. 1995. Smokers’ rights advocate files complaint against state. *Seattle Post-Intelligencer*. November 10.

^eMapes, L. V. 1995. Smokers’ rights advocate says foes aren’t fighting fair. *The Spokesman-Review.com*. November 10.

^fWashington Public Disclosure Commission. 1999. *Enforcement Action v. Washington State Department of Health* (PDC case no. 97-192). Final order, December 21, 1999. Olympia: Washington Public Disclosure Commission.

Case Study 8.3

In Minnesota: Multiple Strategies, Multiple Defeats—Ultimate Victory

In June 1991, Minnesota was awarded an ASSIST contract of \$6.3 million over a 7-year period. (It was later extended for 1 year as all the state contracts were.) Within months, the tobacco industry began a coordinated effort of multiple tactics to interfere with the plans and interventions of ASSIST local coalitions. The extent of the industry’s tactics and the degree to which they were coordinated were not apparent to ASSIST staff and volunteers. Only after the tobacco industry documents became public, as a result of the lawsuit *State of Minnesota and Blue Cross/Blue Shield of Minnesota v. Philip Morris, Inc., et al.*, did they understand what they had been working against. Tobacco industry tactics to counter ASSIST in Minnesota included threats of lawsuits, FOIA requests, confrontational face-to-face meetings with health department staff, and even an application for an ASSIST grant. The industry filed complaints against ASSIST grantees with elected officials and filed a formal complaint with the state Ethical Practices Board. Tobacco lobbyists attended at least one ASSIST quarterly meeting. As illustrated and documented in this case study, the

industry's strategy in Minnesota resulted in repeated defeats of comprehensive youth access legislation and delays in implementing local tobacco control ordinances. The industry's tactics intimidated the tobacco control practitioners.

FOIA Requests

The tobacco industry used FOIA requests to learn the plans that ASSIST had for tobacco prevention and control interventions. Between September 7, 1993, and February 8, 1996, tobacco-related interests filed 11 FOIA requests with the Minnesota Department of Health (MDH). Through a FOIA request, the Minnesota ASSIST comprehensive tobacco control plan became available to the industry.

Minnesota attorney Tom Briant was retained as a consultant by individual tobacco companies and the Tobacco Institute to coordinate the Minnesota Local Response Project, the purpose of which is clear from the following memorandum from Thomas A. Briant to Minnesota Sales Representatives/Sales Managers/Sales Directors of Philip Morris, July 20, 1994:

The Project involves coordinating the response of the tobacco retailers to local ordinances and state legislation that seeks to regulate tobacco products. . . . A significant part of the Project is the development of a communications network between you and myself. I need your assistance to inform me of any proposed local ordinances or other local restrictions on tobacco products or the sale of tobacco products.^a

As an example of his involvement, Briant noted, in a letter to tobacco retailers in Litchfield before a City Council meeting on a proposed ordinance, "I represent the Minnesota Coalition of Responsible Retailers. The Coalition is comprised of five state trade associations that have an interest in the retail issues."^b

Threats of Lawsuits

On September 23, 1993, Briant filed a FOIA request for materials related to the ASSIST contract, but his activities were not limited to opposing ASSIST initiatives. For example, in December 1993 and January 1994, he spoke against an ordinance that would restrict point-of-sale advertising in the Minnesota city of Brooklyn Center. He attended the public hearing on the ordinance and wrote a letter to the city council suggesting that the city would face litigation with the tobacco industry if the ordinance were to become law.

Lawsuits

In May 1994, Preston, a town of 1,500 residents in southern Minnesota, passed an ordinance restricting point-of-sale advertising. In December, Jim Larkin, a founding partner at one of Minnesota's largest law firms that was representing the owner of a Preston convenience store, filed a lawsuit against the city. Larkin claimed not to know who was paying his fees to represent Binh Chiglo,^c but Peggy Carter of R.J.

Case Study 8.3 (continued)

Reynolds was quoted in a newspaper article as saying that R.J. Reynolds is “helping with some of her [Ms. Chiglo’s] legal fees.”^d While the Preston case was pending, the Stillwater city council tabled a proposal to ban in-store advertising of tobacco products; the ban was proposed by the ASSIST coalition, Tobacco-Free Future.^e Briant, representing the Minnesota Coalition of Responsible Retailers, then wrote letters to Stillwater tobacco retailers, urging them to oppose the proposal.^f The court overturned the ordinance, ruling that the Preston ordinance was preempted by federal law. Preston did not appeal, and Stillwater did not go ahead with its ordinance.

The FOIA requests for the Preston case had other reverberations. On June 30, 1995, Larkin wrote a letter to the MDH ASSIST project director stating that in the discovery process for the Preston case they had learned of activities by ASSIST that they believed violated the Federal Acquisition Streamlining Act:

See for example, the attached materials from your records of the application of Brian Bates for ASSIST funds. No applications for ASSIST funds should be approved which contemplate the use of ASSIST funds to lobby state or local legislative bodies. I believe that this would include use of such funds to defend these ordinances. In discovery in the above case, the City of Preston admitted that its ordinance was prompted by direct solicitation from Mr. Bates’ organization.^g

The letter concludes,

Thus I believe it is clear that the department should not approve any ASSIST subcontracts or subgrants that contemplate use of federal funds for such purposes.^g

As a result of the letter, even though ASSIST staff believed they were acting properly and legally, they began devoting increasing amounts of their time to documentation due to concerns about potential lawsuits.

Formal Complaints

Another large FOIA request was submitted to MDH in August 1995; four pages detailed documents beginning with the first quarterly reports of ASSIST. These documents became the basis for a complaint filed by the Minnesota Grocers Association, Inc. The complaint, “RE: Unlawful Use of Federal Taxpayer Dollars by Minnesota Department of Health and Violations of State Lobbyist Registration and Reporting Laws” was filed with Minnesota Governor Arne Carlson and State Auditor Judy Dutcher, with a copy sent to the Ethical Practices Board. Two months later, the Minnesota Grocers Association filed ethical practices complaints against 17 ASSIST subcontractors. The complaint received newspaper and television coverage. The outcome of the filing was described by Briant in a confidential memo to five persons at the Tobacco Institute, two at Philip Morris, one at RJR, and one at U.S. Tobacco:

The entire Minnesota ASSIST Project has been placed on indefinite hold until the outcome of the pending investigation by the Minnesota Department of Health and the Ethical Practices Board. This includes 1995–1996 ASSIST grants which have been

approved, but the contracts between the Department of Health and the ASSIST groups have not been executed nor have the 1995–1996 ASSIST funds been disbursed. These revelations come directly from Barbara Nerness, the Assistant Commissioner of the Minnesota Department of Health, in a telephone conversation I had with her earlier today.^h

The memo continued,

Barbara [Nerness] also stated that if the Department’s investigation demonstrates that the ASSIST groups did indeed use federal funds for lobbying, then the Department of Health will take all necessary corrective action. She also stated that the Department will not protect anti-smoking zealot groups (her words) if they used federal funds for lobbying purposes.^h

In a September 1995 activity report to Philip Morris, Media Services Incorporated reported having “launched a major effort to interest local editors and reporters in an investigative story on the anti-tobacco lobby illegally using federal ASSIST monies to lobby local and state officials contrary to federal rules and regulations.”ⁱ

In February 1996, however, the Ethical Practices Board dismissed the Minnesota Grocers Association complaint against 15 of 16 ASSIST groups and found only that the Minnesota Coalition for a Smoke-Free Society 2000 did not disclose \$40.00 spent for producing and distributing an action alert that urged others to communicate with legislators about a retail tobacco licensing bill.

Countering Legislation

The First Youth Access Bill. In 1995, a bill was introduced in the Minnesota state legislature that would have required mandatory licensing of retail cigarette sales and would have supported compliance checks and fines for selling to minors. The tobacco industry opposed the bill and instead promoted bills to limit the licensing authority of local governments and to preempt local ordinances in favor of the industry. The industry-backed bills called for (1) a statewide mandatory training standard for retail clerks engaged in retail sales of tobacco and (2) a system for compliance checks.^j

On February 25, 1996, 2 days before the Minnesota House of Representatives vote on the industry-promoted bill, the Association for Nonsmokers–Minnesota staff found an envelope under their office door. The document in the envelope appeared to be a status report that Briant had sent to individuals at the Tobacco Institute, Minnesota Wholesale Marketers Association, Licensed Beverage Association, Minnesota Retail Merchants, Minnesota Petroleum Marketers, RJR Grassroots Consulting, Philip Morris, Lorillard, U.S. Tobacco, Brown and Williamson Tobacco Company, R.J. Reynolds, and the Smokeless Tobacco Council. The document showed the deep reach of the tobacco industry into local communities, with monitoring and reporting to the highest level of the tobacco industry activities of towns as small as 2,000 residents. State representative Matt Entenza read the memo on the floor of the House

Case Study 8.3 (continued)

of Representatives, effectively taking the mask off the Coalition for Responsible Retailers, which had argued that they were merely a group of local retailers, with no connection to the tobacco industry. “After rather lengthy and heated debate” the House voted to delete preemption from the bill and the bill was pulled.^k

The Second Youth Access Bill. A renewed effort was made to pass a comprehensive youth access law when the legislature reconvened in 1997. Both sides were fully mobilized. Preemption was the issue. The health campaign fighting preemption included the Smoke-Free Coalition, ASSIST coalitions, the Children’s Defense Fund, health maintenance organizations, medical associations, voluntary health organizations, and the state’s attorney general. The League of Minnesota Cities weighed in heavily against preemption. On the other side were the tobacco industry and their retail allies.

At a critical point in the legislative battle, a member of the health coalition thought that compromise could be worked out with the retailers, but the other members disagreed. One person overheard a tobacco lobbyist say, “Don’t worry about the coalition; when they start to go down, they eat their own.” Subsequently, “Don’t eat our own” became a rallying cry for the coalition, and the coalition members pulled together and won passage of one of the strongest youth access bills in the country—with no preemption.

Tobacco Industry Tactics

To achieve “desired results of putting the antis on the defensive regarding ASSIST funding”^l the tobacco industry called editorial board meetings and wrote guest editorials. In addition, the tobacco industry sponsored media fly-arounds (airplane tours from town to town to meet with media representatives) and phone banking (contacts with a list of supporters to request that they call their legislators to oppose the bill). The media fly-arounds were planned and managed for Philip Morris by Media Services Incorporated.^m The telephone bank operation was proposed by Briant on letterhead of the Minnesota Coalition of Responsible Retailers.^{n,o} In the end, the tobacco industry succeeded in intimidating tobacco control practitioners and delayed tobacco control interventions, but ASSIST continued to function, and the coalitions passed and implemented numerous local and state initiatives while developing a formidable grassroots network in response.

—*Jeanne Weigum, Association for Nonsmokers–Minnesota*

^kBriant, T. A. Confidential memorandum to Minnesota sales representatives, sales managers, and sales directors of Philip Morris. July 20, 1994, 1. <http://legacy.library.ucsf.edu/tid/rin38c00> (accessed May 25, 2004). Bates no. 2061902465.

^lBriant, T. A. Letter to Litchfield tobacco retailers. February 16, 1995. <http://legacy.library.ucsf.edu/tid/rbj61d00> (accessed May 25, 2004). Bates no. 51512003-2005.

^mFranklin, R. 1994. Preston, Minn., sued for banning tobacco ads where products sold. *Minneapolis Star Tribune*. December 13.

- ^dDougherty, M. 1994. Cigarette ad ordinance pits tiny Preston against tobacco giant. *Rochester (MN) Post Bulletin*. December 13.
- ^eBroede, J. 1995. Town #2 may ban in-store tobacco ads. *St. Paul (MN) Pioneer Press*. June 12.
- ^fBriant, T. A. Letter to the Stillwater Tobacco Retailer, January 12, 1996. <http://legacy.library.ucsf.edu/tid/rms13c00> (accessed May 25, 2004). Bates no. 94040084.
- ^gLarkin, J. P. Letter to Richard Welch. June 30, 1995. <http://legacy.library.ucsf.edu/tid/kze30d00> (accessed November 9, 2004). Bates no. 518239682–9684.
- ^hBriant, T. A. 1995. Update on Minnesota Project ASSIST investigation. Confidential memorandum to five persons at the Tobacco Institute, two at Philip Morris, one at R.J. Reynolds, and one at U.S. Tobacco. Minnesota Wholesale Marketers Association. November 21. <http://legacy.library.ucsf.edu/tid/qyx83e00> (accessed May 25, 2004). Bates no. 2047077566–7567.
- ⁱMedia Services Inc. 1995. Activity report to Philip Morris. September. <http://tobaccodocuments.org/pm/2044420610.html> (accessed April 28, 2005). Bates no. 2044420610.
- ^jLenzi, J. 1996. MN-3A game plan. Memorandum to T. Walls, D. Crawford. January 10. <http://legacy.library.ucsf.edu/tid/ugt28d00> (accessed May 25, 2004). Bates no. 2062985025–5027. Note: Master document ID range 2062985024–5027 contains T. Walls document.
- ^kLenzi, J. Memorandum to T. Walls re: Minnesota retailer bill. February 29, 1996. <http://legacy.library.ucsf.edu/tid/clo52d00> (accessed May 25, 2004). Bates no. 2047216418A-6419. Note: 6418A also contains memo from Walls to Lenzi.
- ^lASSIST conference call agenda. February 29, 1996. <http://legacy.library.ucsf.edu/tid/bgu28d00> (accessed May 25, 2004). Bates no. 2047062557.
- ^mMedia Services Inc. 1995. Plan for media fly-arounds. June 25. <http://legacy.library.ucsf.edu/tid/thu28d00> (accessed May 25, 2004). Bates no. 20478700052.
- ⁿBriant, T. A. 1996. Telephone bank operation proposal. February 2. <http://legacy.library.ucsf.edu/tid/pzt28d00> (accessed May 25, 2004). Bates no. 2062976202.
- ^oBriant, T. A. 1996. Telephone bank operation proposal. February 5. <http://legacy.library.ucsf.edu/tid/rzt28d00> (accessed May 25, 2004). Bates no. 2062976204–6205.

Case Study 8.4 On Alert in Maine

By the time the tobacco industry brought its strategy of FOIA requests and legal accusations to Maine, ASSIST personnel had discerned the pattern in other states and were prepared. The Maine Department of Human Services (DHS) received a FOIA request, dated November 21, 1996, for all ASSIST documents. The request, filed by an Augusta attorney who stated that he was acting on his own initiative, reflected almost verbatim requests made in other ASSIST states. In responding to the request, the department's staff invited local television stations to film the staff members hunting through boxes and filing cabinets of documents. This coverage exposed the tobacco industry's tactics as burdensome harassment and presented opportunities for media advocates to frame tobacco use as the chief preventable cause of death in Maine. Rather than presuming her staff had done something wrong, Dr. Dora Mills, director of Maine's Bureau of Public Health, went on the offensive, declaring, "The public has a right to know this is happening and it will tie up our staff for quite a few

Case Study 8.4 (continued)

days.”^a A newspaper headline asked, “The smoking gun? Some Mainers think cigarette makers’ request for hundreds of documents is an attempt to stall legislation.”^a An editorial announced, “Tobacco industry bungles use of right-to-know law.”^b

The documents obtained from the FOIA requests later appeared in a notebook labeled “Survey of DHS ASSIST Files,” distributed by a Maine tobacco lobbyist to every member of the legislative committee then considering an increase in the cigarette excise tax. The notebook organized its accusations into five sections, the last of which included the familiar false charge of illegal lobbying. The “survey” included details such as copies of travel and expense account vouchers for ASSIST staff seeking reimbursement for attending meetings. The notebook featured a graph labeled “Maine Adult Smoking (Age 18+) and Cumulative ASSIST Dollars Spent to 9/30/96,” cited as compiled from Maine DHS ASSIST files. The graph plotted Maine’s annual smoking prevalence from a high of 27.8% in 1986 to 25% in 1995 against the steep upward curve of cumulative annual ASSIST spending—making tobacco control look like a bad investment.

An April 23, 1997, letter from another Maine lawyer to Maine’s attorney general advised him that a review of the ASSIST files revealed illegal activities. Among other demands, the letter said that the attorney general “should launch an immediate investigation in conjunction with the State Auditor’s Office to determine the responsibility of state officials who knew of, condoned or encouraged illegal lobbying practices and determine what steps the State of Maine should take to put an immediate end to these activities.”^c

Tobacco control leaders in Maine immediately responded to the charges in the survey notebook and in the letter to the attorney general. With speed and accuracy resulting from its nationwide information sharing and readiness, the national ASSIST program staff prepared and distributed its own notebook, titled “Tobacco Industry Campaign of Harassment Against State Public Health Agencies: Latest Target—Maine.” The notebook exposed the false allegations and distortions and the similarities between the FOIA requests and charges made in Maine and those made in other ASSIST states. It also accurately described the goals and activities of ASSIST.

On May 22, 1997, the assistant attorney general for health responded to all charges made in the letter, corrected the misstatements of law and fact, pointed out the “lack of any evidence that any state laws have been violated,” and concluded that “a closer look at federal law reveals that these allegations do not violate any specific provisions of federal law and certainly do not warrant investigation by the Attorney General’s Office.”^d

—Anne Marie O’Keefe, former Policy and Media Advocacy Manager, ASSIST Coordinating Center

^aThe smoking gun? Some Mainers think cigarette makers' request of hundreds of documents is attempt to stall legislation. 1996. *Lewiston (ME) Sun Journal*. December 17.

^bTobacco industry bungles uses of right-to-know law. 1996. *Kennebec (ME) Journal*. December 17.

^cDoyle, J. R. Letter to Andrew Ketterer, Esq., Maine attorney general. April 23, 1997. <http://legacy.library.ucsf.edu/tid/pce30d00> (accessed October 1, 2004). Bates no. 518270712–0716.

^dLeighton, C. C. (assistant attorney general; director, health and instructional services unit). Letter to Jon R. Doyle. May 22, 1997.

Case Study 8.5

New York State Defeats Tobacco Industry's Attempt to Impose Preemption

In 1994, the New York City Council, led by Speaker Peter Vallone, enacted smoking restrictions that were far more comprehensive than existing state law. The new legislation prohibited smoking in the indoor dining areas of restaurants with more than 35 seats. Smoking was still permitted in smaller restaurants, bar areas of restaurants, and stand-alone bars and taverns.^a Internal industry documents show that the tobacco companies battled the proposed restrictions fiercely, spending hundreds of thousands of dollars and deploying a team of corporate and contracted lobbyists in a vain effort to defeat the measure.^b At the time, the New York tobacco control coalition did not know the extent of specific tobacco industry funding and other resources expended to obstruct the coalition's efforts.

Shortly after the bill was passed by the New York City Council in November 1994, George Pataki was elected governor of New York. On December 13, Philip Morris chief executive officer Geoffrey Bible sent a letter to governor-elect Pataki.^c Bible wrote, "It was a pleasure visiting with you last night."^c His letter laid out the company's objections to the "Vallone Bill" and argued that the bill should be weakened to protect the "City's economy from sudden economic fallout" that would result from the regulations on smoking in restaurants and other public places. In fact, no such "fallout" occurred; rather, New York City's hospitality industry enjoyed an unprecedented boom in the following years.^d On December 15, 1994, a check from Philip Morris in the amount of \$25,000 was deposited to the governor's then-undisclosed inaugural account.^e (See part 1 of this chapter, strategy 8.)

On December 19, 1994, Philip Morris corporate lobbyist Sharon Portnoy distributed the "NY SWOT and preemption plan" to advocacy and communication staff within the company and scheduled a meeting to discuss it.^f A Lorillard memo (dated February 27, 1995) reported that the tobacco companies had developed a "New" New York City Plan. The memo said, "The United Restaurant and Tavern Associa-

Case Study 8.5 (continued)

tion of New York State was a tremendous ally during the legislative battle [in New York City]. They have agreed to spearhead continuing efforts. . . .”^g

On April 25, Scott Wexler, executive director of the New York Tavern & Restaurant Association (the group operated under several names), sent a nine-page proposal to the Tobacco Institute’s New York lobbyist requesting between \$307,400 and \$419,900 to “seek enactment of state legislation that establishes uniform standards for the regulation of smoking which preempts any local action in this area.”^h The Tobacco Institute’s 1996 budget shows that in 1995 its special projects account center allocated \$279,700 to a “New York State Preemption Plan.”ⁱ

On May 11, 1994, New York State senate majority leader Joseph Bruno met with chief executive officer Geoffrey Bible, Sharon Portnoy, and Ellen Merlo at Philip Morris’s Manhattan headquarters. Merlo followed up with a letter that said, “We all took great comfort in the message that you had to deliver.”^j On June 12, the state senate rules committee, controlled by State Senator Bruno, introduced legislation preempting all local laws and regulations “concerning the sale, distribution, use or display of tobacco products.”^k

Alerted to the preemptive legislation by the ASSIST program director, New York’s commissioner of health, Dr. Barbara DeBuono, criticized the legislation to a newspaper reporter, even though State Senator Bruno was quoted in newspapers as saying that the governor’s office had asked him to introduce the measure—something the governor’s office denied. The storm of controversy created by the commissioner and health advocates ensured that no action was taken on the bill. A second attempt to pass preemptive legislation in 1996 failed when the state assembly refused to consider the legislation.

In 1998, advocates gained access to the Tobacco Institute’s 1996 budget and filed a complaint with the New York Temporary Commission on Lobbying alleging that the Tobacco Institute’s spending on the “Preemption Plan” had not been appropriately reported as legally required. After an investigation by the commission, the Tobacco Institute acknowledged that it had failed to report \$443,072 spent in 1995 on lobbying and that those funds had been transferred to the New York State Tavern & Restaurant Association to lobby the state government on its behalf. The Association similarly admitted that it had failed to report the expenditures.^l In July 1999, after reviewing materials in the online Philip Morris archive, the *New York Times* reported that between 1995 and 1997, Philip Morris lobbyist Sharon Portnoy had spent tens of thousands of dollars on entertainment, as well as on gifts for state legislators and executive staff—expenditures that she failed to report to the Lobby Commission as required by law.^m

After a second investigation by that commission, Philip Morris amended its reports to reflect the spending and paid a \$75,000 fine. Portnoy was fined \$15,000 and was banned from lobbying in New York State for 3 years.

The Philip Morris preemption plan was dead.

—Russell Sciandra, former New York ASSIST Department of Health Project Manager and current Director, Center for a Tobacco-Free New York

^aSmoke-Free Air Act. Local Law 5 of 1995. Int. No. 232-A. New York City code §§17-501–17-514. www.nycosh.org/NYC_Smoke-Free_Air_Act.htm.

^bPhilip Morris. 1994. A chronology of the tobacco lobby's efforts to repeal smoking laws. <http://legacy.library.ucsf.edu/tid/oey97d00> (accessed October 1, 2004). Bates no. 2073535531–5535.

^cBible, G. 1994. [Letter to Governor-elect George Pataki]. Philip Morris. December 13. <http://legacy.library.ucsf.edu/tid/wjg45d00> (accessed October 1, 2004). Bates no. 2046988148–8149.

^dHyland, A., K. M. Cummings, and E. Nauenberg. 1999. Analysis of taxable sales receipts: Was New York City's smoke-free air act bad for restaurant business? *Journal of Public Health Management Practice* 5 (1): 14–21.

^eGovernor-elect Pataki's Inaugural Fund, 12/15/94.

^fPortnoy, S. 1994. New York SWOT and preemption plan. December 19. <http://legacy.library.ucsf.edu/tid/coo52d00> (accessed October 1, 2004). Bates no. 2044716234–6240.

^gLorillard memo on "New" New York City plan. February, 1995. <http://legacy.library.ucsf.edu/tid/kcl00e00> (accessed October 1, 2004). Bates no. 93766255–6261.

^hNew York Tavern and Restaurant Association. 1995. Hospitality coalition proposal to establish a statewide standard for the regulation of smoking. April 26. <http://legacy.library.ucsf.edu/tid/wnn00e00> (accessed October 1, 2004). Bates no. 92104063–4071.

ⁱThe Tobacco Institute. 1996. The Tobacco Institute 1996 proposed budget. Revised October 26, 1995. <http://legacy.library.ucsf.edu/tid/bfr90d00> (accessed October 1, 2004). Bates no. 518257876–7999.

^jMerlo, E. 1995. [Letter to New York State Senate Majority Leader Joseph Bruno]. May 16. <http://legacy.library.ucsf.edu/tid/ivm38d00> (accessed October 1, 2004). Bates no. 2044313530.

^kTobacco Industry Relief Act, New York State bill 5414, 104th Cong., 2nd session. 1995.

^lLevy, C. J. 1998. Lobby admits to higher spending in smoking-law fight. *New York Times*, December 12.

^mLevy, C. J. 1999. Tobacco giant spends heavily around Albany. *New York Times*, July 27.

nity-based approach to policy advocacy and other activities.¹⁰ From the number of planning memoranda, meeting minutes, e-mails, contacts with legislators and other allies, and other communications available in the tobacco industry documents, it is clear that the industry invested an enormous amount of time,

money, thought, and energy into undermining ASSIST.

There is no question that the continual FOIA requests, lawsuits, complaints, and negative publicity brought against ASSIST had a dampening effect on the program. A lawyer affiliated with the tobacco industry, Thomas Briant, saw this

very clearly in Minnesota when he spoke of the reduction in the number of cities actually being contacted by ASSIST groups to pass local ordinances, and the “chilling effect” the document requests had had in that state.¹⁶⁶ As public health staff became better versed in FOIA and other requirements, the requests became less disruptive and local public health associations and state agencies maintained their resolve to initiate policy actions to prevent and control tobacco use.

At the end of ASSIST, the tobacco control movement was at the threshold of a new opportunity—an opportunity for all agencies, organizations, and individuals supporting tobacco control to unite nationally around common goals. Chapter 9 describes how ASSIST leaders worked with other stakeholders in the tobacco control movement to plan and act strategically to bring about a national tobacco prevention and control program.

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