

21 USC CHAPTER 9, SUBCHAPTER IX: TOBACCO PRODUCTS**From Title 21—FOOD AND DRUGS****CHAPTER 9—FEDERAL FOOD, DRUG, AND COSMETIC ACT****SUBCHAPTER IX—TOBACCO PRODUCTS****PRIOR PROVISIONS**

A prior subchapter IX of this chapter, consisting of sections 391 to 399a of this title, was redesignated subchapter X by Pub. L. 111–31, *div. A, title I, §101(b)(1), June 22, 2009*, 123 Stat. 1784.

§387. Definitions

In this subchapter:

(1) Additive

The term "additive" means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristic of any tobacco product (including any substances intended for use as a flavoring or coloring or in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding), except that such term does not include tobacco or a pesticide chemical residue in or on raw tobacco or a pesticide chemical.

(2) Brand

The term "brand" means a variety of tobacco product distinguished by the tobacco used, tar content, nicotine content, flavoring used, size, filtration, packaging, logo, registered trademark, brand name, identifiable pattern of colors, or any combination of such attributes.

(3) Cigarette

The term "cigarette"—

(A) means a product that—

(i) is a tobacco product; and

(ii) meets the definition of the term "cigarette" in section 1332(1) of title 15; and

(B) includes tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette or as roll-your-own tobacco.

(4) Cigarette tobacco

The term "cigarette tobacco" means any product that consists of loose tobacco that is intended for use by consumers in a cigarette. Unless otherwise stated, the requirements applicable to cigarettes under this subchapter shall also apply to cigarette tobacco.

(5) Commerce

The term "commerce" has the meaning given that term by section 1332(2) of title 15.

(6) Counterfeit tobacco product

The term "counterfeit tobacco product" means a tobacco product (or the container or labeling of such a product) that, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a tobacco product listed in a registration under section 387e(i)(1) of this title.

(7) Distributor

The term "distributor" as regards a tobacco product means any person who furthers the distribution of a tobacco product, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption. Common carriers are not

considered distributors for purposes of this subchapter.

(8) Illicit trade

The term "illicit trade" means any practice or conduct prohibited by law which relates to production, shipment, receipt, possession, distribution, sale, or purchase of tobacco products including any practice or conduct intended to facilitate such activity.

(9) Indian country

The term "Indian country" has the meaning given such term in section 1151 of title 18.

(10) Indian tribe

The term "Indian tribe" has the meaning given such term in section 450b(e) of title 25.

(11) Little cigar

The term "little cigar" means a product that—

- (A) is a tobacco product; and
- (B) meets the definition of the term "little cigar" in section 1332(7) of title 15.

(12) Nicotine

The term "nicotine" means the chemical substance named 3-(1-Methyl-2-pyrrolidiny) pyridine or C[10]H[14]N[2], including any salt or complex of nicotine.

(13) Package

The term "package" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane), in which a tobacco product is offered for sale, sold, or otherwise distributed to consumers.

(14) Retailer

The term "retailer" means any person, government, or entity who sells tobacco products to individuals for personal consumption, or who operates a facility where self-service displays of tobacco products are permitted.

(15) Roll-your-own tobacco

The term "roll-your-own tobacco" means any tobacco product which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

(16) Small tobacco product manufacturer

The term "small tobacco product manufacturer" means a tobacco product manufacturer that employs fewer than 350 employees. For purposes of determining the number of employees of a manufacturer under the preceding sentence, the employees of a manufacturer are deemed to include the employees of each entity that controls, is controlled by, or is under common control with such manufacturer.

(17) Smoke constituent

The term "smoke constituent" means any chemical or chemical compound in mainstream or sidestream tobacco smoke that either transfers from any component of the cigarette to the smoke or that is formed by the combustion or heating of tobacco, additives, or other component of the tobacco product.

(18) Smokeless tobacco

The term "smokeless tobacco" means any tobacco product that consists of cut, ground, powdered, or leaf tobacco and that is intended to be placed in the oral or nasal cavity.

(19) State; Territory

The terms "State" and "Territory" shall have the meanings given to such terms in section 321 of this title.

(20) Tobacco product manufacturer

The term "tobacco product manufacturer" means any person, including any repacker or relabeler, who—

- (A) manufactures, fabricates, assembles, processes, or labels a tobacco product; or
- (B) imports a finished tobacco product for sale or distribution in the United States.

(21) Tobacco warehouse

(A) Subject to subparagraphs (B) and (C), the term "tobacco warehouse" includes any person—

- (i) who—
 - (I) removes foreign material from tobacco leaf through nothing other than a mechanical process;
 - (II) humidifies tobacco leaf with nothing other than potable water in the form of steam or mist; or
 - (III) de-stems, dries, and packs tobacco leaf for storage and shipment;

(ii) who performs no other actions with respect to tobacco leaf; and
 (iii) who provides to any manufacturer to whom the person sells tobacco all information related to the person's actions described in clause (i) that is necessary for compliance with this chapter.

(B) The term "tobacco warehouse" excludes any person who—

- (i) reconstitutes tobacco leaf;
- (ii) is a manufacturer, distributor, or retailer of a tobacco product; or
- (iii) applies any chemical, additive, or substance to the tobacco leaf other than potable water in the form of steam or mist.

(C) The definition of the term "tobacco warehouse" in subparagraph (A) shall not apply to the extent to which the Secretary determines, through rulemaking, that regulation under this subchapter of the actions described in such subparagraph is appropriate for the protection of the public health.

(22) United States

The term "United States" means the 50 States of the United States of America and the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Atoll, the Northern Mariana Islands, and any other trust territory or possession of the United States.

(June 25, 1938, ch. 675, §900, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1784.)

SEVERABILITY

Pub. L. 111–31, div. A, §5, June 22, 2009, 123 Stat. 1782, provided that: "If any provision of this division [see Short Title of 2009 Amendment note set out under section 301 of this title], of the amendments made by this division, or of the regulations promulgated under this division (or under such amendments), or the application of any such provision to any person or circumstance is held to be invalid, the remainder of this division, such amendments and such regulations, and the application of such provisions to any other person or circumstance shall not be affected and shall continue to be enforced to the fullest extent possible."

CONSTRUCTION

Pub. L. 111–31, div. A, §4, June 22, 2009, 123 Stat. 1782, provided that:

"(a) **INTENDED EFFECT.**—Nothing in this division [see Short Title of 2009 Amendment note set out under section 301 of this title] (or an amendment made by this division) shall be construed to—

"(1) establish a precedent with regard to any other industry, situation, circumstance, or legal action; or

"(2) affect any action pending in Federal, State, or tribal court, or any agreement, consent decree, or contract of any kind.

"(b) **AGRICULTURAL ACTIVITIES.**—The provisions of this division (or an amendment made by this division) which authorize the Secretary to take certain actions with regard to tobacco and tobacco products shall not be construed to affect any authority of the Secretary of Agriculture under existing law regarding the growing, cultivation, or curing of raw tobacco.

"(c) **REVENUE ACTIVITIES.**—The provisions of this division (or an amendment made by this division) which authorize the Secretary to take certain actions with regard to tobacco products shall not be construed to affect any authority of the Secretary of the Treasury under chapter 52 of the Internal Revenue Code of 1986 [26 U.S.C. 5701 et seq.]."

FINDINGS

Pub. L. 111–31, div. A, §2, June 22, 2009, 123 Stat. 1776, provided that: "The Congress finds the following:

"(1) The use of tobacco products by the Nation's children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults.

"(2) A consensus exists within the scientific and medical communities that tobacco products are inherently dangerous and cause cancer, heart disease, and other serious adverse health effects.

"(3) Nicotine is an addictive drug.

"(4) Virtually all new users of tobacco products are under the minimum legal age to purchase such products.

"(5) Tobacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents.

"(6) Because past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, comprehensive restrictions on the sale, promotion, and distribution of such products are needed.

"(7) Federal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products.

"(8) Federal and State public health officials, the public health community, and the public at large recognize that the tobacco industry should be subject to ongoing oversight.

"(9) Under article I, section 8 of the Constitution, the Congress is vested with the responsibility for regulating interstate commerce and commerce with Indian tribes.

"(10) The sale, distribution, marketing, advertising, and use of tobacco products are activities in and substantially affecting interstate commerce because they are sold, marketed, advertised, and distributed in interstate commerce on a nationwide basis, and have a substantial effect on the Nation's economy.

"(11) The sale, distribution, marketing, advertising, and use of such products substantially affect interstate commerce through the health care and other costs attributable to the use of tobacco products.

"(12) It is in the public interest for Congress to enact legislation that provides the Food and Drug Administration with the authority to regulate tobacco products and the advertising and promotion of such products. The benefits to the American people from enacting such legislation would be significant in human and economic terms.

"(13) Tobacco use is the foremost preventable cause of premature death in America. It causes over 400,000 deaths in the United States each year, and approximately 8,600,000 Americans have chronic illnesses related to smoking.

"(14) Reducing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today's children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately \$75,000,000,000 in savings attributable to reduced health care costs.

"(15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth. Past efforts to oversee these activities have not been successful in adequately preventing such increased use.

"(16) In 2005, the cigarette manufacturers spent more than \$13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use.

"(17) Tobacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.

"(18) Tobacco product advertising is regularly seen by persons under the age of 18, and persons under the age of 18 are regularly exposed to tobacco product promotional efforts.

"(19) Through advertisements during and sponsorship of sporting events, tobacco has become strongly associated with sports and has become portrayed as an integral part of sports and the healthy lifestyle associated with rigorous sporting activity.

"(20) Children are exposed to substantial and unavoidable tobacco advertising that leads to favorable beliefs about tobacco use, plays a role in leading young people to overestimate the prevalence of tobacco use, and increases the number of young people who begin to use tobacco.

"(21) The use of tobacco products in motion pictures and other mass media glamorizes its use for young people and encourages them to use tobacco products.

"(22) Tobacco advertising expands the size of the tobacco market by increasing consumption of tobacco products including tobacco use by young people.

"(23) Children are more influenced by tobacco marketing than adults: more than 80 percent

of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.

"(24) Tobacco company documents indicate that young people are an important and often crucial segment of the tobacco market. Children, who tend to be more price sensitive than adults, are influenced by advertising and promotion practices that result in drastically reduced cigarette prices.

"(25) Comprehensive advertising restrictions will have a positive effect on the smoking rates of young people.

"(26) Restrictions on advertising are necessary to prevent unrestricted tobacco advertising from undermining legislation prohibiting access to young people and providing for education about tobacco use.

"(27) International experience shows that advertising regulations that are stringent and comprehensive have a greater impact on overall tobacco use and young people's use than weaker or less comprehensive ones.

"(28) Text only requirements, although not as stringent as a ban, will help reduce underage use of tobacco products while preserving the informational function of advertising.

"(29) It is in the public interest for Congress to adopt legislation to address the public health crisis created by actions of the tobacco industry.

"(30) The final regulations promulgated by the Secretary of Health and Human Services in the August 28, 1996, issue of the Federal Register (61 Fed. Reg. 44615–44618) for inclusion as part 897 of title 21, Code of Federal Regulations, are consistent with the first amendment to the United States Constitution and with the standards set forth in the amendments made by this subtitle [probably means this division, see Short Title of 2009 Amendment note set out under section 301 of this title] for the regulation of tobacco products by the Food and Drug Administration, and the restriction on the sale and distribution of, including access to and the advertising and promotion of, tobacco products contained in such regulations are substantially related to accomplishing the public health goals of this division.

"(31) The regulations described in paragraph (30) will directly and materially advance the Federal Government's substantial interest in reducing the number of children and adolescents who use cigarettes and smokeless tobacco and in preventing the life-threatening health consequences associated with tobacco use. An overwhelming majority of Americans who use tobacco products begin using such products while they are minors and become addicted to the nicotine in those products before reaching the age of 18. Tobacco advertising and promotion play a crucial role in the decision of these minors to begin using tobacco products. Less restrictive and less comprehensive approaches have not [been] and will not be effective in reducing the problems addressed by such regulations. The reasonable restrictions on the advertising and promotion of tobacco products contained in such regulations will lead to a significant decrease in the number of minors using and becoming addicted to those products.

"(32) The regulations described in paragraph (30) impose no more extensive restrictions on communication by tobacco manufacturers and sellers than are necessary to reduce the number of children and adolescents who use cigarettes and smokeless tobacco and to prevent the life-threatening health consequences associated with tobacco use. Such regulations are narrowly tailored to restrict those advertising and promotional practices which are most likely to be seen or heard by youth and most likely to entice them into tobacco use, while affording tobacco manufacturers and sellers ample opportunity to convey information about their products to adult consumers.

"(33) Tobacco dependence is a chronic disease, one that typically requires repeated interventions to achieve long-term or permanent abstinence.

"(34) Because the only known safe alternative to smoking is cessation, interventions should target all smokers to help them quit completely.

"(35) Tobacco products have been used to facilitate and finance criminal activities both domestically and internationally. Illicit trade of tobacco products has been linked to organized crime and terrorist groups.

"(36) It is essential that the Food and Drug Administration review products sold or distributed for use to reduce risks or exposures associated with tobacco products and that it be empowered to review any advertising and labeling for such products. It is also essential that manufacturers, prior to marketing such products, be required to demonstrate that such products

will meet a series of rigorous criteria, and will benefit the health of the population as a whole, taking into account both users of tobacco products and persons who do not currently use tobacco products.

"(37) Unless tobacco products that purport to reduce the risks to the public of tobacco use actually reduce such risks, those products can cause substantial harm to the public health to the extent that the individuals, who would otherwise not consume tobacco products or would consume such products less, use tobacco products purporting to reduce risk. Those who use products sold or distributed as modified risk products that do not in fact reduce risk, rather than quitting or reducing their use of tobacco products, have a substantially increased likelihood of suffering disability and premature death. The costs to society of the widespread use of products sold or distributed as modified risk products that do not in fact reduce risk or that increase risk include thousands of unnecessary deaths and injuries and huge costs to our health care system.

"(38) As the National Cancer Institute has found, many smokers mistakenly believe that 'low tar' and 'light' cigarettes cause fewer health problems than other cigarettes. As the National Cancer Institute has also found, mistaken beliefs about the health consequences of smoking 'low tar' and 'light' cigarettes can reduce the motivation to quit smoking entirely and thereby lead to disease and death.

"(39) Recent studies have demonstrated that there has been no reduction in risk on a population-wide basis from 'low tar' and 'light' cigarettes, and such products may actually increase the risk of tobacco use.

"(40) The dangers of products sold or distributed as modified risk tobacco products that do not in fact reduce risk are so high that there is a compelling governmental interest in ensuring that statements about modified risk tobacco products are complete, accurate, and relate to the overall disease risk of the product.

"(41) As the Federal Trade Commission has found, consumers have misinterpreted advertisements in which one product is claimed to be less harmful than a comparable product, even in the presence of disclosures and advisories intended to provide clarification.

"(42) Permitting manufacturers to make unsubstantiated statements concerning modified risk tobacco products, whether express or implied, even if accompanied by disclaimers would be detrimental to the public health.

"(43) The only way to effectively protect the public health from the dangers of unsubstantiated modified risk tobacco products is to empower the Food and Drug Administration to require that products that tobacco manufacturers sold or distributed for risk reduction be reviewed in advance of marketing, and to require that the evidence relied on to support claims be fully verified.

"(44) The Food and Drug Administration is a regulatory agency with the scientific expertise to identify harmful substances in products to which consumers are exposed, to design standards to limit exposure to those substances, to evaluate scientific studies supporting claims about the safety of products, and to evaluate the impact of labels, labeling, and advertising on consumer behavior in order to reduce the risk of harm and promote understanding of the impact of the product on health. In connection with its mandate to promote health and reduce the risk of harm, the Food and Drug Administration routinely makes decisions about whether and how products may be marketed in the United States.

"(45) The Federal Trade Commission was created to protect consumers from unfair or deceptive acts or practices, and to regulate unfair methods of competition. Its focus is on those marketplace practices that deceive or mislead consumers, and those that give some competitors an unfair advantage. Its mission is to regulate activities in the marketplace. Neither the Federal Trade Commission nor any other Federal agency except the Food and Drug Administration possesses the scientific expertise needed to implement effectively all provisions of the Family Smoking Prevention and Tobacco Control Act [div. A of Pub. L. 111–31, see Short Title of 2009 Amendment note set out under section 301 of this title].

"(46) If manufacturers state or imply in communications directed to consumers through the media or through a label, labeling, or advertising, that a tobacco product is approved or inspected by the Food and Drug Administration or complies with Food and Drug Administration standards, consumers are likely to be confused and misled. Depending upon the particular language used and its context, such a statement could result in consumers being misled into

believing that the product is endorsed by the Food and Drug Administration for use or in consumers being misled about the harmfulness of the product because of such regulation, inspection, approval, or compliance.

"(47) In August 2006 a United States district court judge found that the major United States cigarette companies continue to target and market to youth. *USA v. Philip Morris, USA, Inc., et al.* (Civil Action No. 99–2496 (GK), August 17, 2006).

"(48) In August 2006 a United States district court judge found that the major United States cigarette companies dramatically increased their advertising and promotional spending in ways that encourage youth to start smoking subsequent to the signing of the Master Settlement Agreement in 1998. *USA v. Philip Morris, USA, Inc., et al.* (Civil Action No. 99–2496 (GK), August 17, 2006).

"(49) In August 2006 a United States district court judge found that the major United States cigarette companies have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction while also concealing much of their nicotine-related research. *USA v. Philip Morris, USA, Inc., et al.* (Civil Action No. 99–2496 (GK), August 17, 2006)."

PURPOSE

Pub. L. 111–31, *div. A, §3, June 22, 2009*, 123 Stat. 1781, provided that: "The purposes of this division [see Short Title of 2009 Amendment note set out under section 301 of this title] are—

"(1) to provide authority to the Food and Drug Administration to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), by recognizing it as the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products as provided for in this division;

"(2) to ensure that the Food and Drug Administration has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco;

"(3) to authorize the Food and Drug Administration to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products;

"(4) to provide new and flexible enforcement authority to ensure that there is effective oversight of the tobacco industry's efforts to develop, introduce, and promote less harmful tobacco products;

"(5) to vest the Food and Drug Administration with the authority to regulate the levels of tar, nicotine, and other harmful components of tobacco products;

"(6) in order to ensure that consumers are better informed, to require tobacco product manufacturers to disclose research which has not previously been made available, as well as research generated in the future, relating to the health and dependency effects or safety of tobacco products;

"(7) to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers;

"(8) to impose appropriate regulatory controls on the tobacco industry;

"(9) to promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases; and

"(10) to strengthen legislation against illicit trade in tobacco products."

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

Pub. L. 111–31, *div. A, §6, June 22, 2009*, 123 Stat. 1783, provided that:

"(a) **DELAYED COMMENCEMENT OF DATES FOR SECRETARIAL ACTION.**—

"(1) **IN GENERAL.**—Except as provided in subsection (c), with respect to any time periods specified in this division [see Short Title of 2009 Amendment note set out under section 301 of this title] (or in an amendment made by this division) that begin on the date of enactment of this Act [June 22, 2009], within which the Secretary of Health and Human Services is required to carry out and complete specified activities, the calculation of such time periods shall commence on the date described in subsection (b).

"(2) **LIMITATION.**—Subsection (a) shall only apply with respect to obligations of the Secretary of Health and Human Services that must be completed within a specified time period and shall not

apply to the obligations of any other person or to any other provision of this division (including the amendments made by this division) that do not create such obligations of the Secretary and are not contingent on actions by the Secretary.

"(b) **DATE DESCRIBED.**—The date described in this subsection is the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary of Health and Human Services has collected fees under section 919 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387s] (as added by section 101).

"(c) **EXCEPTION.**—Subsection (a) shall not apply to any time period (or date) contained—

"(1) in section 102 [21 U.S.C. 387a–1], except that the reference to '180 days' in subsection (a)(1) of such section shall be deemed to be '270 days'; and

"(2) in sections 201 through 204 [amending sections 1333, 1334, and 4402 of Title 15, Commerce and Trade, and enacting provisions set out as notes under sections 1333 and 4402 of Title 15] (or the amendments made by any such sections).

"(d) **ADJUSTMENT.**—The Secretary of Health and Human Services may extend or reduce the duration of one or more time periods to which subsection (a) applies if the Secretary determines appropriate [sic], except that no such period shall be extended for more than 90 days."

§387a. FDA authority over tobacco products

(a) In general

Tobacco products, including modified risk tobacco products for which an order has been issued in accordance with section 387k of this title, shall be regulated by the Secretary under this subchapter and shall not be subject to the provisions of subchapter V.

(b) Applicability

This subchapter shall apply to all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco and to any other tobacco products that the Secretary by regulation deems to be subject to this subchapter.

(c) Scope

(1) In general

Nothing in this subchapter, or any policy issued or regulation promulgated thereunder, or in sections 101(a), 102, or 103 of title I, title II, or title III of the Family Smoking Prevention and Tobacco Control Act, shall be construed to affect, expand, or limit the Secretary's authority over (including the authority to determine whether products may be regulated), or the regulation of, products under this chapter that are not tobacco products under subchapter V or any other subchapter.

(2) Limitation of authority

(A) In general

The provisions of this subchapter shall not apply to tobacco leaf that is not in the possession of a manufacturer of tobacco products, or to the producers of tobacco leaf, including tobacco growers, tobacco warehouses, and tobacco grower cooperatives, nor shall any employee of the Food and Drug Administration have any authority to enter onto a farm owned by a producer of tobacco leaf without the written consent of such producer.

(B) Exception

Notwithstanding subparagraph (A), if a producer of tobacco leaf is also a tobacco product manufacturer or controlled by a tobacco product manufacturer, the producer shall be subject to this subchapter in the producer's capacity as a manufacturer. The exception in this subparagraph shall not apply to a producer of tobacco leaf who grows tobacco under a contract with a tobacco product manufacturer and who is not otherwise engaged in the manufacturing process.

(C) Rule of construction

Nothing in this subchapter shall be construed to grant the Secretary authority to promulgate regulations on any matter that involves the production of tobacco leaf or a producer thereof, other than activities by a manufacturer affecting production.

(d) Rulemaking procedures

Each rulemaking under this subchapter shall be in accordance with chapter 5 of title 5. This subsection shall

not be construed to affect the rulemaking provisions of section 102(a) of the Family Smoking Prevention and Tobacco Control Act [21 U.S.C. 387a–1(a)].

(e) Center for tobacco products

Not later than 90 days after June 22, 2009, the Secretary shall establish within the Food and Drug Administration the Center for Tobacco Products, which shall report to the Commissioner of Food and Drugs in the same manner as the other agency centers within the Food and Drug Administration. The Center shall be responsible for the implementation of this subchapter and related matters assigned by the Commissioner.

(f) Office to assist small tobacco product manufacturers

The Secretary shall establish within the Food and Drug Administration an identifiable office to provide technical and other nonfinancial assistance to small tobacco product manufacturers to assist them in complying with the requirements of this chapter.

(g) Consultation prior to rulemaking

Prior to promulgating rules under this subchapter, the Secretary shall endeavor to consult with other Federal agencies as appropriate.

(June 25, 1938, ch. 675, §901, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1786.)

REFERENCES IN TEXT

The Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (c)(1), is div. A of Pub. L. 111–31, [June 22, 2009](#), 123 Stat. 1776. Section 101(a) of title I of the Act amended section 321 of this title. Section 102 of title I of the Act enacted section 387a–1 of this title. Section 103 of title I of the Act amended sections 331, 333, 334, 355, 360m, 372 to 374, 375, 379a, 381, 393, 399, and 679 of this title and enacted provisions set out as notes under sections 331, 333, and 387c of this title. Title II of the Act amended sections 1333, 1334, 4402, and 4406 of Title 15, Commerce and Trade, and enacted provisions set out as notes under sections 1333 and 4402 of Title 15. Title III of the Act enacted section 387t of this title. For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

PRIOR PROVISIONS

A prior section 901 of act June 25, 1938, was renumbered section 1001 and is classified to section 391 of this title.

§387a–1. Final rule

(a) Cigarettes and smokeless tobacco

(1) In general

On the first day of publication of the Federal Register that is 180 days or more after June 22, 2009, the Secretary of Health and Human Services shall publish in the Federal Register a final rule regarding cigarettes and smokeless tobacco, which—

(A) is deemed to be issued under chapter 9 ¹ of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387 et seq.], as added by section 101 of this division; and

(B) shall be deemed to be in compliance with all applicable provisions of chapter 5 of title 5 and all other provisions of law relating to rulemaking procedures.

(2) Contents of rule

Except as provided in this subsection, the final rule published under paragraph (1),² shall be identical in its provisions to part 897 of the regulations promulgated by the Secretary of Health and Human Services in the August 28, 1996, issue of the Federal Register (61 Fed. Reg. 44615–44618). Such rule shall—

(A) provide for the designation of jurisdictional authority that is in accordance with this subsection in accordance with this division and the amendments made by this division;

(B) strike Subpart C—Labels and section 897.32(c);

(C) strike paragraphs (a), (b), and (i) of section 897.3 and insert definitions of the terms "cigarette", "cigarette tobacco", and "smokeless tobacco" as defined in section 900 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387];

(D) insert "or roll-your-own paper" in section 897.34(a) after "other than cigarettes or smokeless

tobacco";

(E) include such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly* (533 U.S. 525 (2001));

(F) become effective on the date that is 1 year after June 22, 2009; and

(G) amend paragraph (d) of section 897.16 to read as follows:

"(d)(1) Except as provided in subparagraph (2), no manufacturer, distributor, or retailer may distribute or cause to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products (as such term is defined in section 201 of the Federal Food, Drug, and Cosmetic Act).

"(2)(A) Subparagraph (1) does not prohibit a manufacturer, distributor, or retailer from distributing or causing to be distributed free samples of smokeless tobacco in a qualified adult-only facility.

"(B) This subparagraph does not affect the authority of a State or local government to prohibit or otherwise restrict the distribution of free samples of smokeless tobacco.

"(C) For purposes of this paragraph, the term 'qualified adult-only facility' means a facility or restricted area that—

"(i) requires each person present to provide to a law enforcement officer (whether on or off duty) or to a security guard licensed by a governmental entity government-issued identification showing a photograph and at least the minimum age established by applicable law for the purchase of smokeless tobacco;

"(ii) does not sell, serve, or distribute alcohol;

"(iii) is not located adjacent to or immediately across from (in any direction) a space that is used primarily for youth-oriented marketing, promotional, or other activities;

"(iv) is a temporary structure constructed, designated, and operated as a distinct enclosed area for the purpose of distributing free samples of smokeless tobacco in accordance with this subparagraph;

"(v) is enclosed by a barrier that—

"(I) is constructed of, or covered with, an opaque material (except for entrances and exits);

"(II) extends from no more than 12 inches above the ground or floor (which area at the bottom of the barrier must be covered with material that restricts visibility but may allow airflow) to at least 8 feet above the ground or floor (or to the ceiling); and

"(III) prevents persons outside the qualified adult-only facility from seeing into the qualified adult-only facility, unless they make unreasonable efforts to do so; and

"(vi) does not display on its exterior—

"(I) any tobacco product advertising;

"(II) a brand name other than in conjunction with words for an area or enclosure to identify an adult-only facility; or

"(III) any combination of words that would imply to a reasonable observer that the manufacturer, distributor, or retailer has a sponsorship that would violate section 897.34(c).

"(D) Distribution of samples of smokeless tobacco under this subparagraph permitted to be taken out of the qualified adult-only facility shall be limited to 1 package per adult consumer containing no more than 0.53 ounces (15 grams) of smokeless tobacco. If such package of smokeless tobacco contains individual portions of smokeless tobacco, the individual portions of smokeless tobacco shall not exceed 8 individual portions and the collective weight of such individual portions shall not exceed 0.53 ounces (15 grams). Any manufacturer, distributor, or retailer who distributes or causes to be distributed free samples also shall take reasonable steps to ensure that the above amounts are limited to one such package per adult consumer per day.

"(3) Notwithstanding subparagraph (2), no manufacturer, distributor, or retailer may distribute or cause to be distributed any free samples of smokeless tobacco—

"(A) to a sports team or entertainment group; or

"(B) at any football, basketball, baseball, soccer, or hockey event or any other sporting or entertainment event determined by the Secretary to be covered by this subparagraph.

"(4) The Secretary shall implement a program to ensure compliance with this paragraph and submit a report to the Congress on such compliance not later than 18 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act.

"(5) Nothing in this paragraph shall be construed to authorize any person to distribute or cause to be distributed any sample of a tobacco product to any individual who has not attained the minimum age established by applicable law for the purchase of such product."

(3) Amendments to rule

Prior to making amendments to the rule published under paragraph (1), the Secretary shall promulgate a proposed rule in accordance with chapter 5 of title 5.

(4) Rule of construction

Except as provided in paragraph (3), nothing in this section shall be construed to limit the authority of the Secretary to amend, in accordance with chapter 5 of title 5, the regulation promulgated pursuant to this section, including the provisions of such regulation relating to distribution of free samples.

(5) Enforcement of retail sale provisions

The Secretary of Health and Human Services shall ensure that the provisions of this division, the amendments made by this division, and the implementing regulations (including such provisions, amendments, and regulations relating to the retail sale of tobacco products) are enforced with respect to the United States and Indian tribes.

(6) Qualified adult-only facility

A qualified adult-only facility (as such term is defined in section 897.16(d) of the final rule published under paragraph (1)) that is also a retailer and that commits a violation as a retailer shall not be subject to the limitations in section 103(q) ³ and shall be subject to penalties applicable to a qualified adult-only facility.

(7) Congressional review provisions

Section 801 of title 5 shall not apply to the final rule published under paragraph (1).

(b) Limitation on advisory opinions

As of June 22, 2009, the following documents issued by the Food and Drug Administration shall not constitute advisory opinions under section 10.85(d)(1) of title 21, Code of Federal Regulations, except as they apply to tobacco products, and shall not be cited by the Secretary of Health and Human Services or the Food and Drug Administration as binding precedent:

(1) The preamble to the proposed rule in the document titled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents" (60 Fed. Reg. 41314–41372 (August 11, 1995)).

(2) The document titled "Nicotine in Cigarettes and Smokeless Tobacco Products is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act" (60 Fed. Reg. 41453–41787 (August 11, 1995)).

(3) The preamble to the final rule in the document titled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" (61 Fed. Reg. 44396–44615 (August 28, 1996)).

(4) The document titled "Nicotine in Cigarettes and Smokeless Tobacco is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act; Jurisdictional Determination" (61 Fed. Reg. 44619–45318 (August 28, 1996)).

(Pub. L. 111–31, div. A, title I, §102, June 22, 2009, 123 Stat. 1830.)

REFERENCES IN TEXT

The Federal Food, Drug, and Cosmetic Act, referred to in subsec. (a)(1)(A), is act June 25, 1938, ch. 675, 52 Stat. 1040, which is classified generally to chapter 9 (§301 et seq.) of this title. Chapter 9 [IX] of the Act is classified generally to this subchapter. For complete classification of this Act to the Code, see section 301 of this title and Tables.

This division, referred to in subsec. (a)(2)(A), (5), is div. A of Pub. L. 111–31, June 22, 2009, 123 Stat. 1776, known as the Family Smoking Prevention and Tobacco Control Act. For complete classification of division A to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

The date of enactment of the Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (a)(2)(G), is the date of enactment of Pub. L. 111–31, which was approved June 22, 2009.

Section 103(q), referred to in subsec. (a)(6), is section 103(q) of Pub. L. 111–31, which enacted provisions set out as notes under sections 333 and 387c of this title.

CODIFICATION

Section was enacted as part of the Family Smoking Prevention and Tobacco Control Act and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

For provision deeming reference to "180 days" in subsec. (a)(1) to be "270 days", see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

¹ So in original. Probably should be "chapter IX".

² So in original. The comma probably should not appear.

³ So in original. See References in Text note below.

§387b. Adulterated tobacco products

A tobacco product shall be deemed to be adulterated if—

- (1) it consists in whole or in part of any filthy, putrid, or decomposed substance, or is otherwise contaminated by any added poisonous or added deleterious substance that may render the product injurious to health;
- (2) it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health;
- (3) its package is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;
- (4) the manufacturer or importer of the tobacco product fails to pay a user fee assessed to such manufacturer or importer pursuant to section 387s of this title by the date specified in section 387s of this title or by the 30th day after final agency action on a resolution of any dispute as to the amount of such fee;
- (5) it is, or purports to be or is represented as, a tobacco product which is subject to a tobacco product standard established under section 387g of this title unless such tobacco product is in all respects in conformity with such standard;
- (6)(A) it is required by section 387j(a) of this title to have premarket review and does not have an order in effect under section 387j(c)(1)(A)(i) of this title; or
(B) it is in violation of an order under section 387j(c)(1)(A) of this title;
- (7) the methods used in, or the facilities or controls used for, its manufacture, packing, or storage are not in conformity with applicable requirements under section 387f(e)(1) of this title or an applicable condition prescribed by an order under section 387f(e)(2) of this title; or
- (8) it is in violation of section 387k of this title.

(June 25, 1938, ch. 675, §902, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1787.)

PRIOR PROVISIONS

A prior section 902 of act June 25, 1938, was renumbered section 1002. Subsec. (a) of section 1002 is set out as a note under section 301 of this title. Subsecs. (b) and (c) of section 1002 are classified to section 392 of this title. Subsec. (d) of section 1002 is set out as a note under section 392 of this title.

§387c. Misbranded tobacco products

(a) In general

A tobacco product shall be deemed to be misbranded—

- (1) if its labeling is false or misleading in any particular;
- (2) if in package form unless it bears a label containing—
 - (A) the name and place of business of the tobacco product manufacturer, packer, or distributor;
 - (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count;
 - (C) an accurate statement of the percentage of the tobacco used in the product that is domestically grown tobacco and the percentage that is foreign grown tobacco; and
 - (D) the statement required under section 387t(a) of this title,

except that under subparagraph (B) reasonable variations shall be permitted, and exemptions as to small

packages shall be established, by regulations prescribed by the Secretary;

(3) if any word, statement, or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, or designs in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(4) if it has an established name, unless its label bears, to the exclusion of any other nonproprietary name, its established name prominently printed in type as required by the Secretary by regulation;

(5) if the Secretary has issued regulations requiring that its labeling bear adequate directions for use, or adequate warnings against use by children, that are necessary for the protection of users unless its labeling conforms in all respects to such regulations;

(6) if it was manufactured, prepared, propagated, compounded, or processed in an establishment not duly registered under section 387e(b), 387e(c), 387e(d), or 387e(h) of this title, if it was not included in a list required by section 387e(i) of this title, if a notice or other information respecting it was not provided as required by such section or section 387e(j) of this title, or if it does not bear such symbols from the uniform system for identification of tobacco products prescribed under section 387e(e) of this title as the Secretary by regulation requires;

(7) if, in the case of any tobacco product distributed or offered for sale in any State—

(A) its advertising is false or misleading in any particular; or

(B) it is sold or distributed in violation of regulations prescribed under section 387f(d) of this title;

(8) unless, in the case of any tobacco product distributed or offered for sale in any State, the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that tobacco product—

(A) a true statement of the tobacco product's established name as described in paragraph (4), printed prominently; and

(B) a brief statement of—

(i) the uses of the tobacco product and relevant warnings, precautions, side effects, and contraindications; and

(ii) in the case of specific tobacco products made subject to a finding by the Secretary after notice and opportunity for comment that such action is appropriate to protect the public health, a full description of the components of such tobacco product or the formula showing quantitatively each ingredient of such tobacco product to the extent required in regulations which shall be issued by the Secretary after an opportunity for a hearing;

(9) if it is a tobacco product subject to a tobacco product standard established under section 387g of this title, unless it bears such labeling as may be prescribed in such tobacco product standard; or

(10) if there was a failure or refusal—

(A) to comply with any requirement prescribed under section 387d or 387h of this title; or

(B) to furnish any material or information required under section 387i of this title.

(b) Prior approval of label statements

The Secretary may, by regulation, require prior approval of statements made on the label of a tobacco product to ensure that such statements do not violate the misbranding provisions of subsection (a) and that such statements comply with other provisions of the Family Smoking Prevention and Tobacco Control Act (including the amendments made by such Act). No regulation issued under this subsection may require prior approval by the Secretary of the content of any advertisement, except for modified risk tobacco products as provided in section 387k of this title. No advertisement of a tobacco product published after June 22, 2009, shall, with respect to the language of label statements as prescribed under section 1333 of title 15 and section 4402 of title 15 or the regulations issued under such sections, be subject to the provisions of sections 52 through 55 of title 15.

(June 25, 1938, ch. 675, §903, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1788.)

REFERENCES IN TEXT

The Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (b), is div. A of Pub. L. 111–31, [June 22, 2009](#), 123 Stat. 1776. For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

PRIOR PROVISIONS

A prior section 903 of act June 25, 1938, was renumbered section 1003 and is classified to

section 393 of this title.

Another prior section 903 of act June 25, 1938, was renumbered section 1004 and is classified to section 394 of this title.

EFFECTIVE DATE

Pub. L. 111–31, div. A, title I, §103(q)(5), (6), June 22, 2009, 123 Stat. 1840, provided that:

"(5) PACKAGE LABEL REQUIREMENTS.—The package label requirements of paragraphs (3) and (4) of section 903(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387c(a)] (as amended by this division) shall take effect on the date that is 12 months after the date of enactment of this Act [June 22, 2009]. The package label requirements of paragraph (2) of such section 903(a) for cigarettes shall take effect on the date that is 15 months after the issuance of the regulations required by section 4(d) of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1333[(d)]), as amended by section 201 of this division. The package label requirements of paragraph (2) of such section 903(a) for tobacco products other than cigarettes shall take effect on the date that is 12 months after the date of enactment of this Act. The effective date shall be with respect to the date of manufacture, provided that, in any case, beginning 30 days after such effective date, a manufacturer shall not introduce into the domestic commerce of the United States any product, irrespective of the date of manufacture, that is not in conformance with section 903(a)(2), (3), and (4) and section 920(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387t(a)].

"(6) ADVERTISING REQUIREMENTS.—The advertising requirements of section 903(a)(8) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 387c(a)(8)] (as amended by this division) shall take effect on the date that is 12 months after the date of enactment of this Act [June 22, 2009]."

§387d. Submission of health information to the Secretary

(a) Requirement

Each tobacco product manufacturer or importer, or agents thereof, shall submit to the Secretary the following information:

(1) Not later than 6 months after June 22, 2009, a listing of all ingredients, including tobacco, substances, compounds, and additives that are, as of such date, added by the manufacturer to the tobacco, paper, filter, or other part of each tobacco product by brand and by quantity in each brand and subbrand.

(2) A description of the content, delivery, and form of nicotine in each tobacco product measured in milligrams of nicotine in accordance with regulations promulgated by the Secretary in accordance with section 1333(e) of title 15.

(3) Beginning 3 years after June 22, 2009, a listing of all constituents, including smoke constituents as applicable, identified by the Secretary as harmful or potentially harmful to health in each tobacco product, and as applicable in the smoke of each tobacco product, by brand and by quantity in each brand and subbrand. Effective beginning 3 years after June 22, 2009, the manufacturer, importer, or agent shall comply with regulations promulgated under section 387o of this title in reporting information under this paragraph, where applicable.

(4) Beginning 6 months after June 22, 2009, all documents developed after June 22, 2009 that relate to health, toxicological, behavioral, or physiologic effects of current or future tobacco products, their constituents (including smoke constituents), ingredients, components, and additives.

(b) Data submission

At the request of the Secretary, each tobacco product manufacturer or importer of tobacco products, or agents thereof, shall submit the following:

(1) Any or all documents (including underlying scientific information) relating to research activities, and research findings, conducted, supported, or possessed by the manufacturer (or agents thereof) on the health, toxicological, behavioral, or physiologic effects of tobacco products and their constituents (including smoke constituents), ingredients, components, and additives.

(2) Any or all documents (including underlying scientific information) relating to research activities, and research findings, conducted, supported, or possessed by the manufacturer (or agents thereof) that relate to the issue of whether a reduction in risk to health from tobacco products can occur upon the employment of technology available or known to the manufacturer.

(3) Any or all documents (including underlying scientific or financial information) relating to marketing research involving the use of tobacco products or marketing practices and the effectiveness of such practices used by tobacco manufacturers and distributors.

An importer of a tobacco product not manufactured in the United States shall supply the information required of a tobacco product manufacturer under this subsection.

(c) Time for submission

(1) In general

At least 90 days prior to the delivery for introduction into interstate commerce of a tobacco product not on the market on June 22, 2009, the manufacturer of such product shall provide the information required under subsection (a).

(2) Disclosure of additive

If at any time a tobacco product manufacturer adds to its tobacco products a new tobacco additive or increases the quantity of an existing tobacco additive, the manufacturer shall, except as provided in paragraph (3), at least 90 days prior to such action so advise the Secretary in writing.

(3) Disclosure of other actions

If at any time a tobacco product manufacturer eliminates or decreases an existing additive, or adds or increases an additive that has by regulation been designated by the Secretary as an additive that is not a human or animal carcinogen, or otherwise harmful to health under intended conditions of use, the manufacturer shall within 60 days of such action so advise the Secretary in writing.

(d) Data list

(1) In general

Not later than 3 years after June 22, 2009, and annually thereafter, the Secretary shall publish in a format that is understandable and not misleading to a lay person, and place on public display (in a manner determined by the Secretary) the list established under subsection (e).

(2) Consumer research

The Secretary shall conduct periodic consumer research to ensure that the list published under paragraph (1) is not misleading to lay persons. Not later than 5 years after June 22, 2009, the Secretary shall submit to the appropriate committees of Congress a report on the results of such research, together with recommendations on whether such publication should be continued or modified.

(e) Data collection

Not later than 24 months after June 22, 2009, the Secretary shall establish, and periodically revise as appropriate, a list of harmful and potentially harmful constituents, including smoke constituents, to health in each tobacco product by brand and by quantity in each brand and subbrand. The Secretary shall publish a public notice requesting the submission by interested persons of scientific and other information concerning the harmful and potentially harmful constituents in tobacco products and tobacco smoke.

(June 25, 1938, ch. 675, §904, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1790.)

PRIOR PROVISIONS

A prior section 904 of act June 25, 1938, was renumbered section 1004 and is classified to section 394 of this title.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387e. Annual registration

(a) Definitions

In this section:

(1) Manufacture, preparation, compounding, or processing

The term "manufacture, preparation, compounding, or processing" shall include repackaging or otherwise changing the container, wrapper, or labeling of any tobacco product package in furtherance of the distribution of the tobacco product from the original place of manufacture to the person who makes final delivery or sale to the ultimate consumer or user.

(2) Name

The term "name" shall include in the case of a partnership the name of each partner and, in the case of a corporation, the name of each corporate officer and director, and the State of incorporation.

(b) Registration by owners and operators

On or before December 31 of each year, every person who owns or operates any establishment in any State engaged in the manufacture, preparation, compounding, or processing of a tobacco product or tobacco products shall register with the Secretary the name, places of business, and all such establishments of that person. If enactment of the Family Smoking Prevention and Tobacco Control Act occurs in the second half of the calendar year, the Secretary shall designate a date no later than 6 months into the subsequent calendar year by which registration pursuant to this subsection shall occur.

(c) Registration by new owners and operators

Every person upon first engaging in the manufacture, preparation, compounding, or processing of a tobacco product or tobacco products in any establishment owned or operated in any State by that person shall immediately register with the Secretary that person's name, place of business, and such establishment.

(d) Registration of added establishments

Every person required to register under subsection (b) or (c) shall immediately register with the Secretary any additional establishment which that person owns or operates in any State and in which that person begins the manufacture, preparation, compounding, or processing of a tobacco product or tobacco products.

(e) Uniform product identification system

The Secretary may by regulation prescribe a uniform system for the identification of tobacco products and may require that persons who are required to list such tobacco products under subsection (i) shall list such tobacco products in accordance with such system.

(f) Public access to registration information

The Secretary shall make available for inspection, to any person so requesting, any registration filed under this section.

(g) Biennial inspection of registered establishments

Every establishment registered with the Secretary under this section shall be subject to inspection under section 374 of this title or subsection (h), and every such establishment engaged in the manufacture, compounding, or processing of a tobacco product or tobacco products shall be so inspected by 1 or more officers or employees duly designated by the Secretary at least once in the 2-year period beginning with the date of registration of such establishment under this section and at least once in every successive 2-year period thereafter.

(h) Registration by foreign establishments

Any establishment within any foreign country engaged in the manufacture, preparation, compounding, or processing of a tobacco product or tobacco products, shall register under this section under regulations promulgated by the Secretary. Such regulations shall require such establishment to provide the information required by subsection (i) and shall include provisions for registration of any such establishment upon condition that adequate and effective means are available, by arrangement with the government of such foreign country or otherwise, to enable the Secretary to determine from time to time whether tobacco products manufactured, prepared, compounded, or processed in such establishment, if imported or offered for import into the United States, shall be refused admission on any of the grounds set forth in section 381(a) of this title.

(i) Registration information

(1) Product list

Every person who registers with the Secretary under subsection (b), (c), (d), or (h) shall, at the time of registration under any such subsection, file with the Secretary a list of all tobacco products which are being manufactured, prepared, compounded, or processed by that person for commercial distribution and which have not been included in any list of tobacco products filed by that person with the Secretary under this paragraph or paragraph (2) before such time of registration. Such list shall be prepared in such form and

manner as the Secretary may prescribe and shall be accompanied by—

(A) in the case of a tobacco product contained in the applicable list with respect to which a tobacco product standard has been established under section 387g of this title or which is subject to section 387j of this title, a reference to the authority for the marketing of such tobacco product and a copy of all labeling for such tobacco product;

(B) in the case of any other tobacco product contained in an applicable list, a copy of all consumer information and other labeling for such tobacco product, a representative sampling of advertisements for such tobacco product, and, upon request made by the Secretary for good cause, a copy of all advertisements for a particular tobacco product; and

(C) if the registrant filing a list has determined that a tobacco product contained in such list is not subject to a tobacco product standard established under section 387g of this title, a brief statement of the basis upon which the registrant made such determination if the Secretary requests such a statement with respect to that particular tobacco product.

(2) Consultation with respect to forms

The Secretary shall consult with the Secretary of the Treasury in developing the forms to be used for registration under this section to minimize the burden on those persons required to register with both the Secretary and the Tax and Trade Bureau of the Department of the Treasury.

(3) Biannual report of any change in product list

Each person who registers with the Secretary under this section shall report to the Secretary once during the month of June of each year and once during the month of December of each year the following:

(A) A list of each tobacco product introduced by the registrant for commercial distribution which has not been included in any list previously filed by that person with the Secretary under this subparagraph or paragraph (1). A list under this subparagraph shall list a tobacco product by its established name and shall be accompanied by the other information required by paragraph (1).

(B) If since the date the registrant last made a report under this paragraph that person has discontinued the manufacture, preparation, compounding, or processing for commercial distribution of a tobacco product included in a list filed under subparagraph (A) or paragraph (1), notice of such discontinuance, the date of such discontinuance, and the identity of its established name.

(C) If since the date the registrant reported under subparagraph (B) a notice of discontinuance that person has resumed the manufacture, preparation, compounding, or processing for commercial distribution of the tobacco product with respect to which such notice of discontinuance was reported, notice of such resumption, the date of such resumption, the identity of such tobacco product by established name, and other information required by paragraph (1), unless the registrant has previously reported such resumption to the Secretary under this subparagraph.

(D) Any material change in any information previously submitted under this paragraph or paragraph (1).

(j) Report preceding introduction of certain substantially equivalent products into interstate commerce

(1) In general

Each person who is required to register under this section and who proposes to begin the introduction or delivery for introduction into interstate commerce for commercial distribution of a tobacco product intended for human use that was not commercially marketed (other than for test marketing) in the United States as of February 15, 2007, shall, at least 90 days prior to making such introduction or delivery, report to the Secretary (in such form and manner as the Secretary shall prescribe)—

(A) the basis for such person's determination that—

(i) the tobacco product is substantially equivalent, within the meaning of section 387j of this title, to a tobacco product commercially marketed (other than for test marketing) in the United States as of February 15, 2007, or to a tobacco product that the Secretary has previously determined, pursuant to subsection (a)(3) of section 387j of this title, is substantially equivalent and that is in compliance with the requirements of this chapter; or

(ii) the tobacco product is modified within the meaning of paragraph (3), the modifications are to a product that is commercially marketed and in compliance with the requirements of this chapter, and all of the modifications are covered by exemptions granted by the Secretary pursuant to paragraph (3); and

(B) action taken by such person to comply with the requirements under section 387g of this title that are applicable to the tobacco product.

(2) Application to certain post-February 15, 2007, products

A report under this subsection for a tobacco product that was first introduced or delivered for introduction into interstate commerce for commercial distribution in the United States after February 15, 2007, and prior to the date that is 21 months after June 22, 2009, shall be submitted to the Secretary not later than 21

months after June 22, 2009.

(3) Exemptions

(A) In general

The Secretary may exempt from the requirements of this subsection relating to the demonstration that a tobacco product is substantially equivalent within the meaning of section 387j of this title, tobacco products that are modified by adding or deleting a tobacco additive, or increasing or decreasing the quantity of an existing tobacco additive, if the Secretary determines that—

- (i) such modification would be a minor modification of a tobacco product that can be sold under this chapter;
- (ii) a report under this subsection is not necessary to ensure that permitting the tobacco product to be marketed would be appropriate for protection of the public health; and
- (iii) an exemption is otherwise appropriate.

(B) Regulations

Not later than 15 months after June 22, 2009, the Secretary shall issue regulations to implement this paragraph.

(June 25, 1938, ch. 675, §905, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1792.)

REFERENCES IN TEXT

The Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (b), is div. A of Pub. L. 111–31, June 22, 2009, 123 Stat. 1776. For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

PRIOR PROVISIONS

A prior section 905 of act June 25, 1938, was renumbered section 1005 and is classified to section 395 of this title.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387f. General provisions respecting control of tobacco products

(a) In general

Any requirement established by or under section 387b, 387c, 387e, or 387i of this title applicable to a tobacco product shall apply to such tobacco product until the applicability of the requirement to the tobacco product has been changed by action taken under section 387g of this title, section 387j of this title, section 387k of this title, or subsection (d) of this section, and any requirement established by or under section 387b, 387c, 387e, or 387i of this title which is inconsistent with a requirement imposed on such tobacco product under section 387g of this title, section 387j of this title, section 387k of this title, or subsection (d) of this section shall not apply to such tobacco product.

(b) Information on public access and comment

Each notice of proposed rulemaking or other notification under section 387g, 387h, 387i, 387j, or 387k of this title or under this section, any other notice which is published in the Federal Register with respect to any other action taken under any such section and which states the reasons for such action, and each publication of findings required to be made in connection with rulemaking under any such section shall set forth—

- (1) the manner in which interested persons may examine data and other information on which the notice or findings is ¹ based; and
- (2) the period within which interested persons may present their comments on the notice or findings

(including the need therefore) orally or in writing, which period shall be at least 60 days but may not exceed 90 days unless the time is extended by the Secretary by a notice published in the Federal Register stating good cause therefore.

(c) Limited confidentiality of information

Any information reported to or otherwise obtained by the Secretary or the Secretary's representative under section 387c, 387d, 387g, 387h, 387i, 387j, 387k, or 374 of this title, or under subsection (e) or (f) of this section, which is exempt from disclosure under subsection (a) of section 552 of title 5 by reason of subsection (b)(4) of that section shall be considered confidential and shall not be disclosed, except that the information may be disclosed to other officers or employees concerned with carrying out this subchapter, or when relevant in any proceeding under this subchapter.

(d) Restrictions

(1) In general

The Secretary may by regulation require restrictions on the sale and distribution of a tobacco product, including restrictions on the access to, and the advertising and promotion of, the tobacco product, if the Secretary determines that such regulation would be appropriate for the protection of the public health. The Secretary may by regulation impose restrictions on the advertising and promotion of a tobacco product consistent with and to full extent permitted by the first amendment to the Constitution. The finding as to whether such regulation would be appropriate for the protection of the public health shall be determined with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account—

- (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and
- (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products.

No such regulation may require that the sale or distribution of a tobacco product be limited to the written or oral authorization of a practitioner licensed by law to prescribe medical products.

(2) Label statements

The label of a tobacco product shall bear such appropriate statements of the restrictions required by a regulation under subsection (a) as the Secretary may in such regulation prescribe.

(3) Limitations

(A) In general

No restrictions under paragraph (1) may—

- (i) prohibit the sale of any tobacco product in face-to-face transactions by a specific category of retail outlets; or
- (ii) establish a minimum age of sale of tobacco products to any person older than 18 years of age.

(B) Matchbooks

For purposes of any regulations issued by the Secretary, matchbooks of conventional size containing not more than 20 paper matches, and which are customarily given away for free with the purchase of tobacco products, shall be considered as adult-written publications which shall be permitted to contain advertising. Notwithstanding the preceding sentence, if the Secretary finds that such treatment of matchbooks is not appropriate for the protection of the public health, the Secretary may determine by regulation that matchbooks shall not be considered adult-written publications.

(4) Remote sales

(A) In general

The Secretary shall—

- (i) within 18 months after June 22, 2009, promulgate regulations regarding the sale and distribution of tobacco products that occur through means other than a direct, face-to-face exchange between a retailer and a consumer in order to prevent the sale and distribution of tobacco products to individuals who have not attained the minimum age established by applicable law for the purchase of such products, including requirements for age verification; and
- (ii) within 2 years after June 22, 2009, issue regulations to address the promotion and marketing of tobacco products that are sold or distributed through means other than a direct, face-to-face exchange between a retailer and a consumer in order to protect individuals who have not attained the minimum age established by applicable law for the purchase of such products.

(B) Relation to other authority

Nothing in this paragraph limits the authority of the Secretary to take additional actions under the other paragraphs of this subsection.

(e) Good manufacturing practice requirements**(1) Methods, facilities, and controls to conform****(A) In general**

In applying manufacturing restrictions to tobacco, the Secretary shall, in accordance with subparagraph (B), prescribe regulations (which may differ based on the type of tobacco product involved) requiring that the methods used in, and the facilities and controls used for, the manufacture, preproduction design validation (including a process to assess the performance of a tobacco product), packing, and storage of a tobacco product conform to current good manufacturing practice, or hazard analysis and critical control point methodology, as prescribed in such regulations to assure that the public health is protected and that the tobacco product is in compliance with this subchapter. Such regulations may provide for the testing of raw tobacco for pesticide chemical residues regardless of whether a tolerance for such chemical residues has been established.

(B) Requirements

The Secretary shall—

(i) before promulgating any regulation under subparagraph (A), afford the Tobacco Products Scientific Advisory Committee an opportunity to submit recommendations with respect to the regulation proposed to be promulgated;

(ii) before promulgating any regulation under subparagraph (A), afford opportunity for an oral hearing;

(iii) provide the Tobacco Products Scientific Advisory Committee a reasonable time to make its recommendation with respect to proposed regulations under subparagraph (A);

(iv) in establishing the effective date of a regulation promulgated under this subsection, take into account the differences in the manner in which the different types of tobacco products have historically been produced, the financial resources of the different tobacco product manufacturers, and the state of their existing manufacturing facilities, and shall provide for a reasonable period of time for such manufacturers to conform to good manufacturing practices; and

(v) not require any small tobacco product manufacturer to comply with a regulation under subparagraph (A) for at least 4 years following the effective date established by the Secretary for such regulation.

(2) Exemptions; variances**(A) Petition**

Any person subject to any requirement prescribed under paragraph (1) may petition the Secretary for a permanent or temporary exemption or variance from such requirement. Such a petition shall be submitted to the Secretary in such form and manner as the Secretary shall prescribe and shall—

(i) in the case of a petition for an exemption from a requirement, set forth the basis for the petitioner's determination that compliance with the requirement is not required to assure that the tobacco product will be in compliance with this subchapter;

(ii) in the case of a petition for a variance from a requirement, set forth the methods proposed to be used in, and the facilities and controls proposed to be used for, the manufacture, packing, and storage of the tobacco product in lieu of the methods, facilities, and controls prescribed by the requirement; and

(iii) contain such other information as the Secretary shall prescribe.

(B) Referral to the Tobacco Products Scientific Advisory Committee

The Secretary may refer to the Tobacco Products Scientific Advisory Committee any petition submitted under subparagraph (A). The Tobacco Products Scientific Advisory Committee shall report its recommendations to the Secretary with respect to a petition referred to it within 60 days after the date of the petition's referral. Within 60 days after—

(i) the date the petition was submitted to the Secretary under subparagraph (A); or

(ii) the day after the petition was referred to the Tobacco Products Scientific Advisory Committee,

whichever occurs later, the Secretary shall by order either deny the petition or approve it.

(C) Approval

The Secretary may approve—

(i) a petition for an exemption for a tobacco product from a requirement if the Secretary determines that compliance with such requirement is not required to assure that the tobacco product will be in

compliance with this subchapter; and

(ii) a petition for a variance for a tobacco product from a requirement if the Secretary determines that the methods to be used in, and the facilities and controls to be used for, the manufacture, packing, and storage of the tobacco product in lieu of the methods, facilities, and controls prescribed by the requirement are sufficient to assure that the tobacco product will be in compliance with this subchapter.

(D) Conditions

An order of the Secretary approving a petition for a variance shall prescribe such conditions respecting the methods used in, and the facilities and controls used for, the manufacture, packing, and storage of the tobacco product to be granted the variance under the petition as may be necessary to assure that the tobacco product will be in compliance with this subchapter.

(E) Hearing

After the issuance of an order under subparagraph (B) respecting a petition, the petitioner shall have an opportunity for an informal hearing on such order.

(3) Compliance

Compliance with requirements under this subsection shall not be required before the end of the 3-year period following June 22, 2009.

(f) Research and development

The Secretary may enter into contracts for research, testing, and demonstrations respecting tobacco products and may obtain tobacco products for research, testing, and demonstration purposes.

(June 25, 1938, ch. 675, §906, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1795.)

PRIOR PROVISIONS

A prior section 906 of act June 25, 1938, was renumbered section 1006 and is classified to section 396 of this title.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

¹ So in original. Probably should be "are".

§387f–1. Enforcement action plan for advertising and promotion restrictions

(a) Action plan

(1) Development

Not later than 6 months after June 22, 2009, the Secretary of Health and Human Services (in this section referred to as the "Secretary") shall develop and publish an action plan to enforce restrictions adopted pursuant to section 387f of this title, as added by section 101(b) of this division, or pursuant to section 387a–1(a) of this title, on promotion and advertising of menthol and other cigarettes to youth.

(2) Consultation

The action plan required by paragraph (1) shall be developed in consultation with public health organizations and other stakeholders with demonstrated expertise and experience in serving minority communities.

(3) Priority

The action plan required by paragraph (1) shall include provisions designed to ensure enforcement of the restrictions described in paragraph (1) in minority communities.

(b) State and local activities**(1) Information on authority**

Not later than 3 months after June 22, 2009, the Secretary shall inform State, local, and tribal governments of the authority provided to such entities under section 1334(c) of title 15, as added by section 203 of this division, or preserved by such entities under section 387p of this title, as added by section 101(b) of this division.

(2) Community assistance

At the request of communities seeking assistance to prevent underage tobacco use, the Secretary shall provide such assistance, including assistance with strategies to address the prevention of underage tobacco use in communities with a disproportionate use of menthol cigarettes by minors.

(Pub. L. 111–31, div. A, title I, §105, June 22, 2009, 123 Stat. 1841.)

CODIFICATION

Section was enacted as part of the Family Smoking Prevention and Tobacco Control Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387g. Tobacco product standards**(a) In general****(1) Special rules****(A) Special rule for cigarettes**

Beginning 3 months after June 22, 2009, a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. Nothing in this subparagraph shall be construed to limit the Secretary's authority to take action under this section or other sections of this chapter applicable to menthol or any artificial or natural flavor, herb, or spice not specified in this subparagraph.

(B) Additional special rule

Beginning 2 years after June 22, 2009, a tobacco product manufacturer shall not use tobacco, including foreign grown tobacco, that contains a pesticide chemical residue that is at a level greater than is specified by any tolerance applicable under Federal law to domestically grown tobacco.

(2) Revision of tobacco product standards

The Secretary may revise the tobacco product standards in paragraph (1) in accordance with subsection (c).

(3) Tobacco product standards**(A) In general**

The Secretary may adopt tobacco product standards in addition to those in paragraph (1) if the Secretary finds that a tobacco product standard is appropriate for the protection of the public health.

(B) Determinations**(i) Considerations**

In making a finding described in subparagraph (A), the Secretary shall consider scientific evidence concerning—

- (I) the risks and benefits to the population as a whole, including users and nonusers of tobacco products, of the proposed standard;
- (II) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and
- (III) the increased or decreased likelihood that those who do not use tobacco products will start using such products.

(ii) Additional considerations

In the event that the Secretary makes a determination, set forth in a proposed tobacco product standard in a proposed rule, that it is appropriate for the protection of public health to require the reduction or elimination of an additive, constituent (including a smoke constituent), or other component of a tobacco product because the Secretary has found that the additive, constituent, or other component is or may be harmful, any party objecting to the proposed standard on the ground that the proposed standard will not reduce or eliminate the risk of illness or injury may provide for the Secretary's consideration scientific evidence that demonstrates that the proposed standard will not reduce or eliminate the risk of illness or injury.

(4) Content of tobacco product standards

A tobacco product standard established under this section for a tobacco product—

(A) shall include provisions that are appropriate for the protection of the public health, including provisions, where appropriate—

- (i) for nicotine yields of the product;
- (ii) for the reduction or elimination of other constituents, including smoke constituents, or harmful components of the product; or
- (iii) relating to any other requirement under subparagraph (B);

(B) shall, where appropriate for the protection of the public health, include—

- (i) provisions respecting the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product;
- (ii) provisions for the testing (on a sample basis or, if necessary, on an individual basis) of the tobacco product;
- (iii) provisions for the measurement of the tobacco product characteristics of the tobacco product;
- (iv) provisions requiring that the results of each or of certain of the tests of the tobacco product required to be made under clause (ii) show that the tobacco product is in conformity with the portions of the standard for which the test or tests were required; and
- (v) a provision requiring that the sale and distribution of the tobacco product be restricted but only to the extent that the sale and distribution of a tobacco product may be restricted under a regulation under section 387f(d) of this title;

(C) shall, where appropriate, require the use and prescribe the form and content of labeling for the proper use of the tobacco product; and

(D) shall require tobacco products containing foreign-grown tobacco to meet the same standards applicable to tobacco products containing domestically grown tobacco.

(5) Periodic reevaluation of tobacco product standards

The Secretary shall provide for periodic evaluation of tobacco product standards established under this section to determine whether such standards should be changed to reflect new medical, scientific, or other technological data. The Secretary may provide for testing under paragraph (4)(B) by any person.

(6) Involvement of other agencies; informed persons

In carrying out duties under this section, the Secretary shall endeavor to—

- (A) use personnel, facilities, and other technical support available in other Federal agencies;
- (B) consult with other Federal agencies concerned with standard setting and other nationally or internationally recognized standard-setting entities; and
- (C) invite appropriate participation, through joint or other conferences, workshops, or other means, by informed persons representative of scientific, professional, industry, agricultural, or consumer organizations who in the Secretary's judgment can make a significant contribution.

(b) Considerations by Secretary

(1) Technical achievability

The Secretary shall consider information submitted in connection with a proposed standard regarding the technical achievability of compliance with such standard.

(2) Other considerations

The Secretary shall consider all other information submitted in connection with a proposed standard, including information concerning the countervailing effects of the tobacco product standard on the health of adolescent tobacco users, adult tobacco users, or nontobacco users, such as the creation of a significant demand for contraband or other tobacco products that do not meet the requirements of this subchapter and the significance of such demand.

(c) Proposed standards

(1) In general

The Secretary shall publish in the Federal Register a notice of proposed rulemaking for the establishment, amendment, or revocation of any tobacco product standard.

(2) Requirements of notice

A notice of proposed rulemaking for the establishment or amendment of a tobacco product standard for a tobacco product shall—

- (A) set forth a finding with supporting justification that the tobacco product standard is appropriate for the protection of the public health;
- (B) invite interested persons to submit a draft or proposed tobacco product standard for consideration by the Secretary;
- (C) invite interested persons to submit comments on structuring the standard so that it does not advantage foreign-grown tobacco over domestically grown tobacco; and
- (D) invite the Secretary of Agriculture to provide any information or analysis which the Secretary of Agriculture believes is relevant to the proposed tobacco product standard.

(3) Finding

A notice of proposed rulemaking for the revocation of a tobacco product standard shall set forth a finding with supporting justification that the tobacco product standard is no longer appropriate for the protection of the public health.

(4) Comment

The Secretary shall provide for a comment period of not less than 60 days.

(d) Promulgation

(1) In general

After the expiration of the period for comment on a notice of proposed rulemaking published under subsection (c) respecting a tobacco product standard and after consideration of comments submitted under subsections (b) and (c) and any report from the Tobacco Products Scientific Advisory Committee, the Secretary shall—

- (A) if the Secretary determines that the standard would be appropriate for the protection of the public health, promulgate a regulation establishing a tobacco product standard and publish in the Federal Register findings on the matters referred to in subsection (c); or
- (B) publish a notice terminating the proceeding for the development of the standard together with the reasons for such termination.

(2) Effective date

A regulation establishing a tobacco product standard shall set forth the date or dates upon which the standard shall take effect, but no such regulation may take effect before 1 year after the date of its publication unless the Secretary determines that an earlier effective date is necessary for the protection of the public health. Such date or dates shall be established so as to minimize, consistent with the public health, economic loss to, and disruption or dislocation of, domestic and international trade. In establishing such effective date or dates, the Secretary shall consider information submitted in connection with a proposed product standard by interested parties, including manufacturers and tobacco growers, regarding the technical achievability of compliance with the standard, and including information concerning the existence of patents that make it impossible to comply in the timeframe envisioned in the proposed standard. If the Secretary determines, based on the Secretary's evaluation of submitted comments, that a product standard can be met only by manufacturers requiring substantial changes to the methods of farming the domestically grown tobacco used by the manufacturer, the effective date of that product standard shall be not less than 2 years after the date of publication of the final regulation establishing the standard.

(3) Limitation on power granted to the Food and Drug Administration

Because of the importance of a decision of the Secretary to issue a regulation—

(A) banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own tobacco products; or

(B) requiring the reduction of nicotine yields of a tobacco product to zero,

the Secretary is prohibited from taking such actions under this chapter.

(4) Amendment; revocation

(A) Authority

The Secretary, upon the Secretary's own initiative or upon petition of an interested person, may by a regulation, promulgated in accordance with the requirements of subsection (c) and paragraph (2), amend or revoke a tobacco product standard.

(B) Effective date

The Secretary may declare a proposed amendment of a tobacco product standard to be effective on and after its publication in the Federal Register and until the effective date of any final action taken on such amendment if the Secretary determines that making it so effective is in the public interest.

(5) Referral to Advisory Committee

(A) In general

The Secretary may refer a proposed regulation for the establishment, amendment, or revocation of a tobacco product standard to the Tobacco Products Scientific Advisory Committee for a report and recommendation with respect to any matter involved in the proposed regulation which requires the exercise of scientific judgment.

(B) Initiation of referral

The Secretary may make a referral under this paragraph—

(i) on the Secretary's own initiative; or

(ii) upon the request of an interested person that—

(I) demonstrates good cause for the referral; and

(II) is made before the expiration of the period for submission of comments on the proposed regulation.

(C) Provision of data

If a proposed regulation is referred under this paragraph to the Tobacco Products Scientific Advisory Committee, the Secretary shall provide the Advisory Committee with the data and information on which such proposed regulation is based.

(D) Report and recommendation

The Tobacco Products Scientific Advisory Committee shall, within 60 days after the referral of a proposed regulation under this paragraph and after independent study of the data and information furnished to it by the Secretary and other data and information before it, submit to the Secretary a report and recommendation respecting such regulation, together with all underlying data and information and a statement of the reason or basis for the recommendation.

(E) Public availability

The Secretary shall make a copy of each report and recommendation under subparagraph (D) publicly available.

(e) Menthol cigarettes

(1) Referral; considerations

Immediately upon the establishment of the Tobacco Products Scientific Advisory Committee under section 387q(a) of this title, the Secretary shall refer to the Committee for report and recommendation, under section 387q(c)(4) of this title, the issue of the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities. In its review, the Tobacco Products Scientific Advisory Committee shall address the considerations listed in subsections (a)(3)(B)(i) and (b).

(2) Report and recommendation

Not later than 1 year after its establishment, the Tobacco Product Scientific Advisory Committee shall submit to the Secretary the report and recommendations required pursuant to paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to limit the Secretary's authority to take action under this section or other sections of this chapter applicable to menthol.

(f) Dissolvable tobacco products

(1) Referral; considerations

The Secretary shall refer to the Tobacco Products Scientific Advisory Committee for report and recommendation, under section 387q(c)(4) of this title, the issue of the nature and impact of the use of dissolvable tobacco products on the public health, including such use among children. In its review, the Tobacco Products Scientific Advisory Committee shall address the considerations listed in subsection (a)(3)(B)(i).

(2) Report and recommendation

Not later than 2 years after its establishment, the Tobacco Product Scientific Advisory Committee shall submit to the Secretary the report and recommendations required pursuant to paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to limit the Secretary's authority to take action under this section or other sections of this chapter at any time applicable to any dissolvable tobacco product.

(June 25, 1938, ch. 675, §907, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1799.)

PRIOR PROVISIONS

A prior section 907 of act June 25, 1938, was renumbered section 1007 and is classified to section 397 of this title.

§387h. Notification and other remedies

(a) Notification

If the Secretary determines that—

- (1) a tobacco product which is introduced or delivered for introduction into interstate commerce for commercial distribution presents an unreasonable risk of substantial harm to the public health; and
- (2) notification under this subsection is necessary to eliminate the unreasonable risk of such harm and no more practicable means is available under the provisions of this subchapter (other than this section) to eliminate such risk,

the Secretary may issue such order as may be necessary to assure that adequate notification is provided in an appropriate form, by the persons and means best suited under the circumstances involved, to all persons who should properly receive such notification in order to eliminate such risk. The Secretary may order notification by any appropriate means, including public service announcements. Before issuing an order under this subsection, the Secretary shall consult with the persons who are to give notice under the order.

(b) No exemption from other liability

Compliance with an order issued under this section shall not relieve any person from liability under Federal or State law. In awarding damages for economic loss in an action brought for the enforcement of any such liability, the value to the plaintiff in such action of any remedy provided under such order shall be taken into account.

(c) Recall authority

(1) In general

If the Secretary finds that there is a reasonable probability that a tobacco product contains a manufacturing or other defect not ordinarily contained in tobacco products on the market that would cause serious, adverse health consequences or death, the Secretary shall issue an order requiring the appropriate person (including the manufacturers, importers, distributors, or retailers of the tobacco product) to immediately cease distribution of such tobacco product. The order shall provide the person subject to the order with an opportunity for an informal hearing, to be held not later than 10 days after the date of the issuance of the order, on the actions required by the order and on whether the order should be amended to require a recall of such tobacco product. If, after providing an opportunity for such a hearing, the Secretary determines that inadequate grounds exist to support the actions required by the order, the Secretary shall vacate the order.

(2) Amendment of order to require recall**(A) In general**

If, after providing an opportunity for an informal hearing under paragraph (1), the Secretary determines that the order should be amended to include a recall of the tobacco product with respect to which the order was issued, the Secretary shall, except as provided in subparagraph (B), amend the order to require a recall. The Secretary shall specify a timetable in which the tobacco product recall will occur and shall require periodic reports to the Secretary describing the progress of the recall.

(B) Notice

An amended order under subparagraph (A)—

- (i) shall not include recall of a tobacco product from individuals; and
- (ii) shall provide for notice to persons subject to the risks associated with the use of such tobacco product.

In providing the notice required by clause (ii), the Secretary may use the assistance of retailers and other persons who distributed such tobacco product. If a significant number of such persons cannot be identified, the Secretary shall notify such persons under section 375(b) of this title.

(3) Remedy not exclusive

The remedy provided by this subsection shall be in addition to remedies provided by subsection (a). (June 25, 1938, ch. 675, §908, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1804.)

PRIOR PROVISIONS

A prior section 908 of act June 25, 1938, was renumbered section 1008 and is classified to section 398 of this title.

§387i. Records and reports on tobacco products**(a) In general**

Every person who is a tobacco product manufacturer or importer of a tobacco product shall establish and maintain such records, make such reports, and provide such information, as the Secretary may by regulation reasonably require to assure that such tobacco product is not adulterated or misbranded and to otherwise protect public health. Regulations prescribed under the preceding sentence—

- (1) may require a tobacco product manufacturer or importer to report to the Secretary whenever the manufacturer or importer receives or otherwise becomes aware of information that reasonably suggests that one of its marketed tobacco products may have caused or contributed to a serious unexpected adverse experience associated with the use of the product or any significant increase in the frequency of a serious, expected adverse product experience;
- (2) shall require reporting of other significant adverse tobacco product experiences as determined by the Secretary to be necessary to be reported;
- (3) shall not impose requirements unduly burdensome to a tobacco product manufacturer or importer, taking into account the cost of complying with such requirements and the need for the protection of the public health and the implementation of this subchapter;
- (4) when prescribing the procedure for making requests for reports or information, shall require that each request made under such regulations for submission of a report or information to the Secretary state the reason or purpose for such request and identify to the fullest extent practicable such report or information;
- (5) when requiring submission of a report or information to the Secretary, shall state the reason or purpose for the submission of such report or information and identify to the fullest extent practicable such report or information; and
- (6) may not require that the identity of any patient or user be disclosed in records, reports, or information required under this subsection unless required for the medical welfare of an individual, to determine risks to public health of a tobacco product, or to verify a record, report, or information submitted under this subchapter.

In prescribing regulations under this subsection, the Secretary shall have due regard for the professional ethics of the medical profession and the interests of patients. The prohibitions of paragraph (6) continue to apply to records, reports, and information concerning any individual who has been a patient, irrespective of

whether or when he ceases to be a patient.

(b) Reports of removals and corrections

(1) In general

Except as provided in paragraph (2), the Secretary shall by regulation require a tobacco product manufacturer or importer of a tobacco product to report promptly to the Secretary any corrective action taken or removal from the market of a tobacco product undertaken by such manufacturer or importer if the removal or correction was undertaken—

(A) to reduce a risk to health posed by the tobacco product; or

(B) to remedy a violation of this subchapter caused by the tobacco product which may present a risk to health.

A tobacco product manufacturer or importer of a tobacco product who undertakes a corrective action or removal from the market of a tobacco product which is not required to be reported under this subsection shall keep a record of such correction or removal.

(2) Exception

No report of the corrective action or removal of a tobacco product may be required under paragraph (1) if a report of the corrective action or removal is required and has been submitted under subsection (a).

(June 25, 1938, ch. 675, §909, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1805.)

PRIOR PROVISIONS

A prior section 909 of act June 25, 1938, was renumbered section 1009 and is classified to section 399 of this title.

§387j. Application for review of certain tobacco products

(a) In general

(1) New tobacco product defined

For purposes of this section the term "new tobacco product" means—

(A) any tobacco product (including those products in test markets) that was not commercially marketed in the United States as of February 15, 2007; or

(B) any modification (including a change in design, any component, any part, or any constituent, including a smoke constituent, or in the content, delivery or form of nicotine, or any other additive or ingredient) of a tobacco product where the modified product was commercially marketed in the United States after February 15, 2007.

(2) Premarket review required

(A) New products

An order under subsection (c)(1)(A)(i) for a new tobacco product is required unless—

(i) the manufacturer has submitted a report under section 387e(j) of this title; and the Secretary has issued an order that the tobacco product—

(I) is substantially equivalent to a tobacco product commercially marketed (other than for test marketing) in the United States as of February 15, 2007; and

(II) is in compliance with the requirements of this chapter; or

(ii) the tobacco product is exempt from the requirements of section 387e(j) of this title pursuant to a regulation issued under section 387e(j)(3) of this title.

(B) Application to certain post-February 15, 2007, products

Subparagraph (A) shall not apply to a tobacco product—

(i) that was first introduced or delivered for introduction into interstate commerce for commercial distribution in the United States after February 15, 2007, and prior to the date that is 21 months after June 22, 2009; and

(ii) for which a report was submitted under section 387e(j) of this title within such 21-month period,

except that subparagraph (A) shall apply to the tobacco product if the Secretary issues an order that the

tobacco product is not substantially equivalent.

(3) Substantially equivalent defined

(A) In general

In this section and section 387e(j) of this title, the term "substantially equivalent" or "substantial equivalence" means, with respect to the tobacco product being compared to the predicate tobacco product, that the Secretary by order has found that the tobacco product—

- (i) has the same characteristics as the predicate tobacco product; or
- (ii) has different characteristics and the information submitted contains information, including clinical data if deemed necessary by the Secretary, that demonstrates that it is not appropriate to regulate the product under this section because the product does not raise different questions of public health.

(B) Characteristics

In subparagraph (A), the term "characteristics" means the materials, ingredients, design, composition, heating source, or other features of a tobacco product.

(C) Limitation

A tobacco product may not be found to be substantially equivalent to a predicate tobacco product that has been removed from the market at the initiative of the Secretary or that has been determined by a judicial order to be misbranded or adulterated.

(4) Health information

(A) Summary

As part of a submission under section 387e(j) of this title respecting a tobacco product, the person required to file a premarket notification under such section shall provide an adequate summary of any health information related to the tobacco product or state that such information will be made available upon request by any person.

(B) Required information

Any summary under subparagraph (A) respecting a tobacco product shall contain detailed information regarding data concerning adverse health effects and shall be made available to the public by the Secretary within 30 days of the issuance of a determination that such tobacco product is substantially equivalent to another tobacco product.

(b) Application

(1) Contents

An application under this section shall contain—

- (A) full reports of all information, published or known to, or which should reasonably be known to, the applicant, concerning investigations which have been made to show the health risks of such tobacco product and whether such tobacco product presents less risk than other tobacco products;
- (B) a full statement of the components, ingredients, additives, and properties, and of the principle or principles of operation, of such tobacco product;
- (C) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and, when relevant, packing and installation of, such tobacco product;
- (D) an identifying reference to any tobacco product standard under section 387g of this title which would be applicable to any aspect of such tobacco product, and either adequate information to show that such aspect of such tobacco product fully meets such tobacco product standard or adequate information to justify any deviation from such standard;
- (E) such samples of such tobacco product and of components thereof as the Secretary may reasonably require;
- (F) specimens of the labeling proposed to be used for such tobacco product; and
- (G) such other information relevant to the subject matter of the application as the Secretary may require.

(2) Referral to Tobacco Products Scientific Advisory Committee

Upon receipt of an application meeting the requirements set forth in paragraph (1), the Secretary—

- (A) may, on the Secretary's own initiative; or
- (B) may, upon the request of an applicant,

refer such application to the Tobacco Products Scientific Advisory Committee for reference and for submission (within such period as the Secretary may establish) of a report and recommendation respecting the application, together with all underlying data and the reasons or basis for the recommendation.

(c) Action on application**(1) Deadline****(A) In general**

As promptly as possible, but in no event later than 180 days after the receipt of an application under subsection (b), the Secretary, after considering the report and recommendation submitted under subsection (b)(2), shall—

(i) issue an order that the new product may be introduced or delivered for introduction into interstate commerce if the Secretary finds that none of the grounds specified in paragraph (2) of this subsection applies; or

(ii) issue an order that the new product may not be introduced or delivered for introduction into interstate commerce if the Secretary finds (and sets forth the basis for such finding as part of or accompanying such denial) that 1 or more grounds for denial specified in paragraph (2) of this subsection apply.

(B) Restrictions on sale and distribution

An order under subparagraph (A)(i) may require that the sale and distribution of the tobacco product be restricted but only to the extent that the sale and distribution of a tobacco product may be restricted under a regulation under section 387f(d) of this title.

(2) Denial of application

The Secretary shall deny an application submitted under subsection (b) if, upon the basis of the information submitted to the Secretary as part of the application and any other information before the Secretary with respect to such tobacco product, the Secretary finds that—

(A) there is a lack of a showing that permitting such tobacco product to be marketed would be appropriate for the protection of the public health;

(B) the methods used in, or the facilities or controls used for, the manufacture, processing, or packing of such tobacco product do not conform to the requirements of section 387f(e) of this title;

(C) based on a fair evaluation of all material facts, the proposed labeling is false or misleading in any particular; or

(D) such tobacco product is not shown to conform in all respects to a tobacco product standard in effect under section 387g of this title, and there is a lack of adequate information to justify the deviation from such standard.

(3) Denial information

Any denial of an application shall, insofar as the Secretary determines to be practicable, be accompanied by a statement informing the applicant of the measures required to remove such application from deniable form (which measures may include further research by the applicant in accordance with 1 or more protocols prescribed by the Secretary).

(4) Basis for finding

For purposes of this section, the finding as to whether the marketing of a tobacco product for which an application has been submitted is appropriate for the protection of the public health shall be determined with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account—

(A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and

(B) the increased or decreased likelihood that those who do not use tobacco products will start using such products.

(5) Basis for action**(A) Investigations**

For purposes of paragraph (2)(A), whether permitting a tobacco product to be marketed would be appropriate for the protection of the public health shall, when appropriate, be determined on the basis of well-controlled investigations, which may include 1 or more clinical investigations by experts qualified by training and experience to evaluate the tobacco product.

(B) Other evidence

If the Secretary determines that there exists valid scientific evidence (other than evidence derived from investigations described in subparagraph (A)) which is sufficient to evaluate the tobacco product, the Secretary may authorize that the determination for purposes of paragraph (2)(A) be made on the basis of such evidence.

(d) Withdrawal and temporary suspension**(1) In general**

The Secretary shall, upon obtaining, where appropriate, advice on scientific matters from the Tobacco Products Scientific Advisory Committee, and after due notice and opportunity for informal hearing for a tobacco product for which an order was issued under subsection (c)(1)(A)(i), issue an order withdrawing the order if the Secretary finds—

- (A) that the continued marketing of such tobacco product no longer is appropriate for the protection of the public health;
- (B) that the application contained or was accompanied by an untrue statement of a material fact;
- (C) that the applicant—
 - (i) has failed to establish a system for maintaining records, or has repeatedly or deliberately failed to maintain records or to make reports, required by an applicable regulation under section 387i of this title;
 - (ii) has refused to permit access to, or copying or verification of, such records as required by section 374 of this title; or
 - (iii) has not complied with the requirements of section 387e of this title;

(D) on the basis of new information before the Secretary with respect to such tobacco product, evaluated together with the evidence before the Secretary when the application was reviewed, that the methods used in, or the facilities and controls used for, the manufacture, processing, packing, or installation of such tobacco product do not conform with the requirements of section 387f(e) of this title and were not brought into conformity with such requirements within a reasonable time after receipt of written notice from the Secretary of nonconformity;

(E) on the basis of new information before the Secretary, evaluated together with the evidence before the Secretary when the application was reviewed, that the labeling of such tobacco product, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the Secretary of such fact; or

(F) on the basis of new information before the Secretary, evaluated together with the evidence before the Secretary when such order was issued, that such tobacco product is not shown to conform in all respects to a tobacco product standard which is in effect under section 387g of this title, compliance with which was a condition to the issuance of an order relating to the application, and that there is a lack of adequate information to justify the deviation from such standard.

(2) Appeal

The holder of an application subject to an order issued under paragraph (1) withdrawing an order issued pursuant to subsection (c)(1)(A)(i) may, by petition filed on or before the 30th day after the date upon which such holder receives notice of such withdrawal, obtain review thereof in accordance with section 387l of this title.

(3) Temporary suspension

If, after providing an opportunity for an informal hearing, the Secretary determines there is reasonable probability that the continuation of distribution of a tobacco product under an order would cause serious, adverse health consequences or death, that is greater than ordinarily caused by tobacco products on the market, the Secretary shall by order temporarily suspend the authority of the manufacturer to market the product. If the Secretary issues such an order, the Secretary shall proceed expeditiously under paragraph (1) to withdraw such application.

(e) Service of order

An order issued by the Secretary under this section shall be served—

- (1) in person by any officer or employee of the department designated by the Secretary; or
- (2) by mailing the order by registered mail or certified mail addressed to the applicant at the applicant's last known address in the records of the Secretary.

(f) Records**(1) Additional information**

In the case of any tobacco product for which an order issued pursuant to subsection (c)(1)(A)(i) for an application filed under subsection (b) is in effect, the applicant shall establish and maintain such records, and make such reports to the Secretary, as the Secretary may by regulation, or by order with respect to such application, prescribe on the basis of a finding that such records and reports are necessary in order to enable the Secretary to determine, or facilitate a determination of, whether there is or may be grounds for withdrawing or temporarily suspending such order.

(2) Access to records

Each person required under this section to maintain records, and each person in charge of custody thereof, shall, upon request of an officer or employee designated by the Secretary, permit such officer or employee at all reasonable times to have access to and copy and verify such records.

(g) Investigational tobacco product exemption for investigational use

The Secretary may exempt tobacco products intended for investigational use from the provisions of this subchapter under such conditions as the Secretary may by regulation prescribe.

(June 25, 1938, ch. 675, §910, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1807.)

PRIOR PROVISIONS

A prior section 910 of act June 25, 1938, was renumbered section 1010 and is classified to section 399a of this title.

§387k. Modified risk tobacco products**(a) In general**

No person may introduce or deliver for introduction into interstate commerce any modified risk tobacco product unless an order issued pursuant to subsection (g) is effective with respect to such product.

(b) Definitions

In this section:

(1) Modified risk tobacco product

The term "modified risk tobacco product" means any tobacco product that is sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products.

(2) Sold or distributed**(A) In general**

With respect to a tobacco product, the term "sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products" means a tobacco product—

- (i) the label, labeling, or advertising of which represents explicitly or implicitly that—
 - (I) the tobacco product presents a lower risk of tobacco-related disease or is less harmful than one or more other commercially marketed tobacco products;
 - (II) the tobacco product or its smoke contains a reduced level of a substance or presents a reduced exposure to a substance; or
 - (III) the tobacco product or its smoke does not contain or is free of a substance;

- (ii) the label, labeling, or advertising of which uses the descriptors "light", "mild", or "low" or similar descriptors; or

- (iii) the tobacco product manufacturer of which has taken any action directed to consumers through the media or otherwise, other than by means of the tobacco product's label, labeling, or advertising, after June 22, 2009, respecting the product that would be reasonably expected to result in consumers believing that the tobacco product or its smoke may present a lower risk of disease or is less harmful than one or more commercially marketed tobacco products, or presents a reduced exposure to, or does not contain or is free of, a substance or substances.

(B) Limitation

No tobacco product shall be considered to be "sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products", except as described in subparagraph (A).

(C) Smokeless tobacco product

No smokeless tobacco product shall be considered to be "sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products" solely because its label, labeling, or advertising uses the following phrases to describe such product and its use: "smokeless tobacco", "smokeless tobacco product", "not consumed by smoking", "does not produce smoke", "smokefree", "smoke-free", "without smoke", "no smoke", or "not smoke".

(3) Effective date

The provisions of paragraph (2)(A)(ii) shall take effect 12 months after June 22, 2009, for those products whose label, labeling, or advertising contains the terms described in such paragraph on June 22, 2009. The effective date shall be with respect to the date of manufacture, provided that, in any case, beginning 30 days after such effective date, a manufacturer shall not introduce into the domestic commerce of the United States any product, irrespective of the date of manufacture, that is not in conformance with paragraph (2)(A)(ii).

(c) Tobacco dependence products

A product that is intended to be used for the treatment of tobacco dependence, including smoking cessation, is not a modified risk tobacco product under this section if it has been approved as a drug or device by the Food and Drug Administration and is subject to the requirements of subchapter V.

(d) Filing

Any person may file with the Secretary an application for a modified risk tobacco product. Such application shall include—

- (1) a description of the proposed product and any proposed advertising and labeling;
- (2) the conditions for using the product;
- (3) the formulation of the product;
- (4) sample product labels and labeling;
- (5) all documents (including underlying scientific information) relating to research findings conducted, supported, or possessed by the tobacco product manufacturer relating to the effect of the product on tobacco-related diseases and health-related conditions, including information both favorable and unfavorable to the ability of the product to reduce risk or exposure and relating to human health;
- (6) data and information on how consumers actually use the tobacco product; and
- (7) such other information as the Secretary may require.

(e) Public availability

The Secretary shall make the application described in subsection (d) publicly available (except matters in the application which are trade secrets or otherwise confidential, commercial information) and shall request comments by interested persons on the information contained in the application and on the label, labeling, and advertising accompanying such application.

(f) Advisory Committee**(1) In general**

The Secretary shall refer to the Tobacco Products Scientific Advisory Committee any application submitted under this section.

(2) Recommendations

Not later than 60 days after the date an application is referred to the Tobacco Products Scientific Advisory Committee under paragraph (1), the Advisory Committee shall report its recommendations on the application to the Secretary.

(g) Marketing**(1) Modified risk products**

Except as provided in paragraph (2), the Secretary shall, with respect to an application submitted under this section, issue an order that a modified risk product may be commercially marketed only if the Secretary determines that the applicant has demonstrated that such product, as it is actually used by consumers, will—

- (A) significantly reduce harm and the risk of tobacco-related disease to individual tobacco users; and
- (B) benefit the health of the population as a whole taking into account both users of tobacco products and persons who do not currently use tobacco products.

(2) Special rule for certain products**(A) In general**

The Secretary may issue an order that a tobacco product may be introduced or delivered for introduction into interstate commerce, pursuant to an application under this section, with respect to a tobacco product that may not be commercially marketed under paragraph (1) if the Secretary makes the findings required under this paragraph and determines that the applicant has demonstrated that—

- (i) such order would be appropriate to promote the public health;
- (ii) any aspect of the label, labeling, and advertising for such product that would cause the tobacco product to be a modified risk tobacco product under subsection (b) is limited to an explicit or implicit representation that such tobacco product or its smoke does not contain or is free of a substance or contains a reduced level of a substance, or presents a reduced exposure to a substance in tobacco

smoke;

(iii) scientific evidence is not available and, using the best available scientific methods, cannot be made available without conducting long-term epidemiological studies for an application to meet the standards set forth in paragraph (1); and

(iv) the scientific evidence that is available without conducting long-term epidemiological studies demonstrates that a measurable and substantial reduction in morbidity or mortality among individual tobacco users is reasonably likely in subsequent studies.

(B) Additional findings required

To issue an order under subparagraph (A) the Secretary must also find that the applicant has demonstrated that—

(i) the magnitude of the overall reductions in exposure to the substance or substances which are the subject of the application is substantial, such substance or substances are harmful, and the product as actually used exposes consumers to the specified reduced level of the substance or substances;

(ii) the product as actually used by consumers will not expose them to higher levels of other harmful substances compared to the similar types of tobacco products then on the market unless such increases are minimal and the reasonably likely overall impact of use of the product remains a substantial and measurable reduction in overall morbidity and mortality among individual tobacco users;

(iii) testing of actual consumer perception shows that, as the applicant proposes to label and market the product, consumers will not be misled into believing that the product—

(I) is or has been demonstrated to be less harmful; or

(II) presents or has been demonstrated to present less of a risk of disease than 1 or more other commercially marketed tobacco products; and

(iv) issuance of an order with respect to the application is expected to benefit the health of the population as a whole taking into account both users of tobacco products and persons who do not currently use tobacco products.

(C) Conditions of marketing

(i) In general

Applications subject to an order under this paragraph shall be limited to a term of not more than 5 years, but may be renewed upon a finding by the Secretary that the requirements of this paragraph continue to be satisfied based on the filing of a new application.

(ii) Agreements by applicant

An order under this paragraph shall be conditioned on the applicant's agreement to conduct postmarket surveillance and studies and to submit to the Secretary the results of such surveillance and studies to determine the impact of the order on consumer perception, behavior, and health and to enable the Secretary to review the accuracy of the determinations upon which the order was based in accordance with a protocol approved by the Secretary.

(iii) Annual submission

The results of such postmarket surveillance and studies described in clause (ii) shall be submitted annually.

(3) Basis

The determinations under paragraphs (1) and (2) shall be based on—

(A) the scientific evidence submitted by the applicant; and

(B) scientific evidence and other information that is made available to the Secretary.

(4) Benefit to health of individuals and of population as a whole

In making the determinations under paragraphs (1) and (2), the Secretary shall take into account—

(A) the relative health risks to individuals of the tobacco product that is the subject of the application;

(B) the increased or decreased likelihood that existing users of tobacco products who would otherwise stop using such products will switch to the tobacco product that is the subject of the application;

(C) the increased or decreased likelihood that persons who do not use tobacco products will start using the tobacco product that is the subject of the application;

(D) the risks and benefits to persons from the use of the tobacco product that is the subject of the application as compared to the use of products for smoking cessation approved under subchapter V to treat nicotine dependence; and

(E) comments, data, and information submitted by interested persons.

(h) Additional conditions for marketing

(1) Modified risk products

The Secretary shall require for the marketing of a product under this section that any advertising or labeling concerning modified risk products enable the public to comprehend the information concerning modified risk and to understand the relative significance of such information in the context of total health and in relation to all of the diseases and health-related conditions associated with the use of tobacco products.

(2) Comparative claims**(A) In general**

The Secretary may require for the marketing of a product under this subsection that a claim comparing a tobacco product to 1 or more other commercially marketed tobacco products shall compare the tobacco product to a commercially marketed tobacco product that is representative of that type of tobacco product on the market (for example the average value of the top 3 brands of an established regular tobacco product).

(B) Quantitative comparisons

The Secretary may also require, for purposes of subparagraph (A), that the percent (or fraction) of change and identity of the reference tobacco product and a quantitative comparison of the amount of the substance claimed to be reduced shall be stated in immediate proximity to the most prominent claim.

(3) Label disclosure**(A) In general**

The Secretary may require the disclosure on the label of other substances in the tobacco product, or substances that may be produced by the consumption of that tobacco product, that may affect a disease or health-related condition or may increase the risk of other diseases or health-related conditions associated with the use of tobacco products.

(B) Conditions of use

If the conditions of use of the tobacco product may affect the risk of the product to human health, the Secretary may require the labeling of conditions of use.

(4) Time

An order issued under subsection (g)(1) shall be effective for a specified period of time.

(5) Advertising

The Secretary may require, with respect to a product for which an applicant obtained an order under subsection (g)(1), that the product comply with requirements relating to advertising and promotion of the tobacco product.

(i) Postmarket surveillance and studies**(1) In general**

The Secretary shall require, with respect to a product for which an applicant obtained an order under subsection (g)(1), that the applicant conduct postmarket surveillance and studies for such a tobacco product to determine the impact of the order issuance on consumer perception, behavior, and health, to enable the Secretary to review the accuracy of the determinations upon which the order was based, and to provide information that the Secretary determines is otherwise necessary regarding the use or health risks involving the tobacco product. The results of postmarket surveillance and studies shall be submitted to the Secretary on an annual basis.

(2) Surveillance protocol

Each applicant required to conduct a surveillance of a tobacco product under paragraph (1) shall, within 30 days after receiving notice that the applicant is required to conduct such surveillance, submit, for the approval of the Secretary, a protocol for the required surveillance. The Secretary, within 60 days of the receipt of such protocol, shall determine if the principal investigator proposed to be used in the surveillance has sufficient qualifications and experience to conduct such surveillance and if such protocol will result in collection of the data or other information designated by the Secretary as necessary to protect the public health.

(j) Withdrawal of authorization

The Secretary, after an opportunity for an informal hearing, shall withdraw an order under subsection (g) if the Secretary determines that—

(1) the applicant, based on new information, can no longer make the demonstrations required under subsection (g), or the Secretary can no longer make the determinations required under subsection (g);

(2) the application failed to include material information or included any untrue statement of material fact;
 (3) any explicit or implicit representation that the product reduces risk or exposure is no longer valid,
 including if—

(A) a tobacco product standard is established pursuant to section 387g of this title;

(B) an action is taken that affects the risks presented by other commercially marketed tobacco products that were compared to the product that is the subject of the application; or

(C) any postmarket surveillance or studies reveal that the order is no longer consistent with the protection of the public health;

(4) the applicant failed to conduct or submit the postmarket surveillance and studies required under subsection (g)(2)(C)(ii) or subsection (i); or

(5) the applicant failed to meet a condition imposed under subsection (h).

(k) Subchapter IV or V

A product for which the Secretary has issued an order pursuant to subsection (g) shall not be subject to subchapter IV or V.

(l) Implementing regulations or guidance

(1) Scientific evidence

Not later than 2 years after June 22, 2009, the Secretary shall issue regulations or guidance (or any combination thereof) on the scientific evidence required for assessment and ongoing review of modified risk tobacco products. Such regulations or guidance shall—

(A) to the extent that adequate scientific evidence exists, establish minimum standards for scientific studies needed prior to issuing an order under subsection (g) to show that a substantial reduction in morbidity or mortality among individual tobacco users occurs for products described in subsection (g)(1) or is reasonably likely for products described in subsection (g)(2);

(B) include validated biomarkers, intermediate clinical endpoints, and other feasible outcome measures, as appropriate;

(C) establish minimum standards for postmarket studies, that shall include regular and long-term assessments of health outcomes and mortality, intermediate clinical endpoints, consumer perception of harm reduction, and the impact on quitting behavior and new use of tobacco products, as appropriate;

(D) establish minimum standards for required postmarket surveillance, including ongoing assessments of consumer perception;

(E) require that data from the required studies and surveillance be made available to the Secretary prior to the decision on renewal of a modified risk tobacco product; and

(F) establish a reasonable timetable for the Secretary to review an application under this section.

(2) Consultation

The regulations or guidance issued under paragraph (1) shall be developed in consultation with the Institute of Medicine, and with the input of other appropriate scientific and medical experts, on the design and conduct of such studies and surveillance.

(3) Revision

The regulations or guidance under paragraph (1) shall be revised on a regular basis as new scientific information becomes available.

(4) New tobacco products

Not later than 2 years after June 22, 2009, the Secretary shall issue a regulation or guidance that permits the filing of a single application for any tobacco product that is a new tobacco product under section 387j of this title and which the applicant seeks to commercially market under this section.

(m) Distributors

Except as provided in this section, no distributor may take any action, after June 22, 2009, with respect to a tobacco product that would reasonably be expected to result in consumers believing that the tobacco product or its smoke may present a lower risk of disease or is less harmful than one or more commercially marketed tobacco products, or presents a reduced exposure to, or does not contain or is free of, a substance or substances.

(June 25, 1938, ch. 675, §911, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1812.)

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that

begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387i. Judicial review

(a) Right to review

(1) In general

Not later than 30 days after—

- (A) the promulgation of a regulation under section 387g of this title establishing, amending, or revoking a tobacco product standard; or
- (B) a denial of an application under section 387j(c) of this title,

any person adversely affected by such regulation or denial may file a petition for judicial review of such regulation or denial with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has their principal place of business.

(2) Requirements

(A) Copy of petition

A copy of the petition filed under paragraph (1) shall be transmitted by the clerk of the court involved to the Secretary.

(B) Record of proceedings

On receipt of a petition under subparagraph (A), the Secretary shall file in the court in which such petition was filed—

- (i) the record of the proceedings on which the regulation or order was based; and
- (ii) a statement of the reasons for the issuance of such a regulation or order.

(C) Definition of record

In this section, the term "record" means—

- (i) all notices and other matter published in the Federal Register with respect to the regulation or order reviewed;
- (ii) all information submitted to the Secretary with respect to such regulation or order;
- (iii) proceedings of any panel or advisory committee with respect to such regulation or order;
- (iv) any hearing held with respect to such regulation or order; and
- (v) any other information identified by the Secretary, in the administrative proceeding held with respect to such regulation or order, as being relevant to such regulation or order.

(b) Standard of review

Upon the filing of the petition under subsection (a) for judicial review of a regulation or order, the court shall have jurisdiction to review the regulation or order in accordance with chapter 7 of title 5 and to grant appropriate relief, including interim relief, as provided for in such chapter. A regulation or denial described in subsection (a) shall be reviewed in accordance with section 706(2)(A) of title 5.

(c) Finality of judgment

The judgment of the court affirming or setting aside, in whole or in part, any regulation or order shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28.

(d) Other remedies

The remedies provided for in this section shall be in addition to, and not in lieu of, any other remedies provided by law.

(e) Regulations and orders must recite basis in record

To facilitate judicial review, a regulation or order issued under section 387f, 387g, 387h, 387i, 387j, or 387p of this title shall contain a statement of the reasons for the issuance of such regulation or order in the record of

the proceedings held in connection with its issuance.

(June 25, 1938, ch. 675, §912, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1819.)

§387m. Equal treatment of retail outlets

The Secretary shall issue regulations to require that retail establishments for which the predominant business is the sale of tobacco products comply with any advertising restrictions applicable to retail establishments accessible to individuals under the age of 18.

(June 25, 1938, ch. 675, §913, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1820.)

§387n. Jurisdiction of and coordination with the Federal Trade Commission

(a) Jurisdiction

(1) In general

Except where expressly provided in this subchapter, nothing in this subchapter shall be construed as limiting or diminishing the authority of the Federal Trade Commission to enforce the laws under its jurisdiction with respect to the advertising, sale, or distribution of tobacco products.

(2) Enforcement

Any advertising that violates this subchapter or a provision of the regulations referred to in section 387a–1 of this title, is an unfair or deceptive act or practice under section 45(a) of title 15 and shall be considered a violation of a rule promulgated under section 57a of title 15.

(b) Coordination

With respect to the requirements of section 4 of the Federal Cigarette Labeling and Advertising Act [15 U.S.C. 1333] and section 3 of the Comprehensive Smokeless Tobacco Health Education Act of 1986 [15 U.S.C. 4402]—

(1) the Chairman of the Federal Trade Commission shall coordinate with the Secretary concerning the enforcement of such Act as such enforcement relates to unfair or deceptive acts or practices in the advertising of cigarettes or smokeless tobacco; and

(2) the Secretary shall consult with the Chairman of such Commission in revising the label statements and requirements under such sections.

(June 25, 1938, ch. 675, §914, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1820.)

REFERENCES IN TEXT

The Federal Cigarette Labeling and Advertising Act, referred to in subsec. (b), is Pub. L. 89–92, [July 27, 1965](#), 79 Stat. 282, which is classified generally to chapter 36 (§1331 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 15 and Tables.

The Comprehensive Smokeless Tobacco Health Education Act of 1986, referred to in subsec. (b), is Pub. L. 99–252, [Feb. 27, 1986](#), 100 Stat. 30, which is classified principally to chapter 70 (§4401 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 4401 of Title 15 and Tables.

§387o. Regulation requirement

(a) Testing, reporting, and disclosure

Not later than 36 months after June 22, 2009, the Secretary shall promulgate regulations under this chapter that meet the requirements of subsection (b).

(b) Contents of rules

The regulations promulgated under subsection (a)—

(1) shall require testing and reporting of tobacco product constituents, ingredients, and additives, including

smoke constituents, by brand and subbrand that the Secretary determines should be tested to protect the public health, provided that, for purposes of the testing requirements of this paragraph, tobacco products manufactured and sold by a single tobacco product manufacturer that are identical in all respects except the labels, packaging design, logo, trade dress, trademark, brand name, or any combination thereof, shall be considered as a single brand; and

(2) may require that tobacco product manufacturers, packagers, or importers make disclosures relating to the results of the testing of tar and nicotine through labels or advertising or other appropriate means, and make disclosures regarding the results of the testing of other constituents, including smoke constituents, ingredients, or additives, that the Secretary determines should be disclosed to the public to protect the public health and will not mislead consumers about the risk of tobacco-related disease.

(c) Authority

The Secretary shall have the authority under this subchapter to conduct or to require the testing, reporting, or disclosure of tobacco product constituents, including smoke constituents.

(d) Small tobacco product manufacturers

(1) First compliance date

The initial regulations promulgated under subsection (a) shall not impose requirements on small tobacco product manufacturers before the later of—

(A) the end of the 2-year period following the final promulgation of such regulations; and

(B) the initial date set by the Secretary for compliance with such regulations by manufacturers that are not small tobacco product manufacturers.

(2) Testing and reporting initial compliance period

(A) 4-year period

The initial regulations promulgated under subsection (a) shall give each small tobacco product manufacturer a 4-year period over which to conduct testing and reporting for all of its tobacco products. Subject to paragraph (1), the end of the first year of such 4-year period shall coincide with the initial date of compliance under this section set by the Secretary with respect to manufacturers that are not small tobacco product manufacturers or the end of the 2-year period following the final promulgation of such regulations, as described in paragraph (1)(A). A small tobacco product manufacturer shall be required—

(i) to conduct such testing and reporting for 25 percent of its tobacco products during each year of such 4-year period; and

(ii) to conduct such testing and reporting for its largest-selling tobacco products (as determined by the Secretary) before its other tobacco products, or in such other order of priority as determined by the Secretary.

(B) Case-by-case delay

Notwithstanding subparagraph (A), the Secretary may, on a case-by-case basis, delay the date by which an individual small tobacco product manufacturer must conduct testing and reporting for its tobacco products under this section based upon a showing of undue hardship to such manufacturer.

Notwithstanding the preceding sentence, the Secretary shall not extend the deadline for a small tobacco product manufacturer to conduct testing and reporting for all of its tobacco products beyond a total of 5 years after the initial date of compliance under this section set by the Secretary with respect to manufacturers that are not small tobacco product manufacturers.

(3) Subsequent and additional testing and reporting

The regulations promulgated under subsection (a) shall provide that, with respect to any subsequent or additional testing and reporting of tobacco products required under this section, such testing and reporting by a small tobacco product manufacturer shall be conducted in accordance with the timeframes described in paragraph (2)(A), except that, in the case of a new product, or if there has been a modification described in section 387j(a)(1)(B) of this title of any product of a small tobacco product manufacturer since the last testing and reporting required under this section, the Secretary shall require that any subsequent or additional testing and reporting be conducted in accordance with the same timeframe applicable to manufacturers that are not small tobacco product manufacturers.

(4) Joint laboratory testing services

The Secretary shall allow any 2 or more small tobacco product manufacturers to join together to purchase laboratory testing services required by this section on a group basis in order to ensure that such manufacturers receive access to, and fair pricing of, such testing services.

(e) Extensions for limited laboratory capacity

(1) In general

The regulations promulgated under subsection (a) shall provide that a small tobacco product manufacturer shall not be considered to be in violation of this section before the deadline applicable under paragraphs (3) and (4), if—

- (A) the tobacco products of such manufacturer are in compliance with all other requirements of this subchapter; and
- (B) the conditions described in paragraph (2) are met.

(2) Conditions

Notwithstanding the requirements of this section, the Secretary may delay the date by which a small tobacco product manufacturer must be in compliance with the testing and reporting required by this section until such time as the testing is reported if, not later than 90 days before the deadline for reporting in accordance with this section, a small tobacco product manufacturer provides evidence to the Secretary demonstrating that—

- (A) the manufacturer has submitted the required products for testing to a laboratory and has done so sufficiently in advance of the deadline to create a reasonable expectation of completion by the deadline;
- (B) the products currently are awaiting testing by the laboratory; and
- (C) neither that laboratory nor any other laboratory is able to complete testing by the deadline at customary, nonexpedited testing fees.

(3) Extension

The Secretary, taking into account the laboratory testing capacity that is available to tobacco product manufacturers, shall review and verify the evidence submitted by a small tobacco product manufacturer in accordance with paragraph (2). If the Secretary finds that the conditions described in such paragraph are met, the Secretary shall notify the small tobacco product manufacturer that the manufacturer shall not be considered to be in violation of the testing and reporting requirements of this section until the testing is reported or until 1 year after the reporting deadline has passed, whichever occurs sooner. If, however, the Secretary has not made a finding before the reporting deadline, the manufacturer shall not be considered to be in violation of such requirements until the Secretary finds that the conditions described in paragraph (2) have not been met, or until 1 year after the reporting deadline, whichever occurs sooner.

(4) Additional extension

In addition to the time that may be provided under paragraph (3), the Secretary may provide further extensions of time, in increments of no more than 1 year, for required testing and reporting to occur if the Secretary determines, based on evidence properly and timely submitted by a small tobacco product manufacturer in accordance with paragraph (2), that a lack of available laboratory capacity prevents the manufacturer from completing the required testing during the period described in paragraph (3).

(f) Rule of construction

Nothing in subsection (d) or (e) shall be construed to authorize the extension of any deadline, or to otherwise affect any timeframe, under any provision of this chapter or the Family Smoking Prevention and Tobacco Control Act other than this section.

(June 25, 1938, ch. 675, §915, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1820.)

REFERENCES IN TEXT

The Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (f), is div. A of Pub. L. 111–31, June 22, 2009, 123 Stat. 1776. For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387p. Preservation of State and local authority

(a) In general

(1) Preservation

Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.

(2) Preemption of certain State and local requirements

(A) In general

No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

(B) Exception

Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. Information disclosed to a State under subparagraph (A) that is exempt from disclosure under section 552(b)(4) of title 5 shall be treated as a trade secret and confidential information by the State.

(b) Rule of construction regarding product liability

No provision of this subchapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State.

(June 25, 1938, ch. 675, §916, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1823.)

§387q. Tobacco Products Scientific Advisory Committee

(a) Establishment

Not later than 6 months after June 22, 2009, the Secretary shall establish a 12-member advisory committee, to be known as the Tobacco Products Scientific Advisory Committee (in this section referred to as the "Advisory Committee").

(b) Membership

(1) In general

(A) Members

The Secretary shall appoint as members of the Tobacco Products Scientific Advisory Committee individuals who are technically qualified by training and experience in medicine, medical ethics, science, or technology involving the manufacture, evaluation, or use of tobacco products, who are of appropriately diversified professional backgrounds. The committee shall be composed of—

(i) 7 individuals who are physicians, dentists, scientists, or health care professionals practicing in the area of oncology, pulmonology, cardiology, toxicology, pharmacology, addiction, or any other relevant specialty;

(ii) 1 individual who is an officer or employee of a State or local government or of the Federal Government;

(iii) 1 individual as a representative of the general public;

(iv) 1 individual as a representative of the interests of the tobacco manufacturing industry;

(v) 1 individual as a representative of the interests of the small business tobacco manufacturing industry, which position may be filled on a rotating, sequential basis by representatives of different small business tobacco manufacturers based on areas of expertise relevant to the topics being considered by

the Advisory Committee; and
 (vi) 1 individual as a representative of the interests of the tobacco growers.

(B) Nonvoting members

The members of the committee appointed under clauses (iv), (v), and (vi) of subparagraph (A) shall serve as consultants to those described in clauses (i) through (iii) of subparagraph (A) and shall be nonvoting representatives.

(C) Conflicts of interest

No members of the committee, other than members appointed pursuant to clauses (iv), (v), and (vi) of subparagraph (A) shall, during the member's tenure on the committee or for the 18-month period prior to becoming such a member, receive any salary, grants, or other payments or support from any business that manufactures, distributes, markets, or sells cigarettes or other tobacco products.

(2) Limitation

The Secretary may not appoint to the Advisory Committee any individual who is in the regular full-time employ of the Food and Drug Administration or any agency responsible for the enforcement of this chapter. The Secretary may appoint Federal officials as ex officio members.

(3) Chairperson

The Secretary shall designate 1 of the members appointed under clauses (i), (ii), and (iii) of paragraph (1) (A) to serve as chairperson.

(c) Duties

The Tobacco Products Scientific Advisory Committee shall provide advice, information, and recommendations to the Secretary—

- (1) as provided in this subchapter;
- (2) on the effects of the alteration of the nicotine yields from tobacco products;
- (3) on whether there is a threshold level below which nicotine yields do not produce dependence on the tobacco product involved; and
- (4) on its review of other safety, dependence, or health issues relating to tobacco products as requested by the Secretary.

(d) Compensation; support; FACA

(1) Compensation and travel

Members of the Advisory Committee who are not officers or employees of the United States, while attending conferences or meetings of the committee or otherwise engaged in its business, shall be entitled to receive compensation at rates to be fixed by the Secretary, which may not exceed the daily equivalent of the rate in effect under the Senior Executive Schedule under section 5382 of title 5, for each day (including travel time) they are so engaged; and while so serving away from their homes or regular places of business each member may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 for persons in the Government service employed intermittently.

(2) Administrative support

The Secretary shall furnish the Advisory Committee clerical and other assistance.

(3) Nonapplication of FACA

Section 14 of the Federal Advisory Committee Act does not apply to the Advisory Committee.

(e) Proceedings of advisory panels and committees

The Advisory Committee shall make and maintain a transcript of any proceeding of the panel or committee. Each such panel and committee shall delete from any transcript made under this subsection information which is exempt from disclosure under section 552(b) of title 5.

(June 25, 1938, ch. 675, §917, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1824.)

REFERENCES IN TEXT

Section 14 of the Federal Advisory Committee Act, referred to in subsec. (d)(3), is section 14 of Pub. L. 92–463, which is set out in the Appendix to Title 5, Government Organization and Employees.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387r. Drug products used to treat tobacco dependence

(a) In general

The Secretary shall—

(1) at the request of the applicant, consider designating products for smoking cessation, including nicotine replacement products as fast track research and approval products within the meaning of section 356 of this title;

(2) consider approving the extended use of nicotine replacement products (such as nicotine patches, nicotine gum, and nicotine lozenges) for the treatment of tobacco dependence; and

(3) review and consider the evidence for additional indications for nicotine replacement products, such as for craving relief or relapse prevention.

(b) Report on innovative products

(1) In general

Not later than 3 years after June 22, 2009, the Secretary, after consultation with recognized scientific, medical, and public health experts (including both Federal agencies and nongovernmental entities, the Institute of Medicine of the National Academy of Sciences, and the Society for Research on Nicotine and Tobacco), shall submit to the Congress a report that examines how best to regulate, promote, and encourage the development of innovative products and treatments (including nicotine-based and non-nicotine-based products and treatments) to better achieve, in a manner that best protects and promotes the public health—

(A) total abstinence from tobacco use;

(B) reductions in consumption of tobacco; and

(C) reductions in the harm associated with continued tobacco use.

(2) Recommendations

The report under paragraph (1) shall include the recommendations of the Secretary on how the Food and Drug Administration should coordinate and facilitate the exchange of information on such innovative products and treatments among relevant offices and centers within the Administration and within the National Institutes of Health, the Centers for Disease Control and Prevention, and other relevant agencies.

(June 25, 1938, ch. 675, §918, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1825.)

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in an amendment by div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

§387s. User fees

(a) Establishment of quarterly fee

Beginning on June 22, 2009, the Secretary shall in accordance with this section assess user fees on, and collect such fees from, each manufacturer and importer of tobacco products subject to this subchapter. The

fees shall be assessed and collected with respect to each quarter of each fiscal year, and the total amount assessed and collected for a fiscal year shall be the amount specified in subsection (b)(1) for such year, subject to subsection (c).

(b) Assessment of user fee

(1) Amount of assessment

The total amount of user fees authorized to be assessed and collected under subsection (a) for a fiscal year is the following, as applicable to the fiscal year involved:

- (A) For fiscal year 2009, \$85,000,000 (subject to subsection (e)).
- (B) For fiscal year 2010, \$235,000,000.
- (C) For fiscal year 2011, \$450,000,000.
- (D) For fiscal year 2012, \$477,000,000.
- (E) For fiscal year 2013, \$505,000,000.
- (F) For fiscal year 2014, \$534,000,000.
- (G) For fiscal year 2015, \$566,000,000.
- (H) For fiscal year 2016, \$599,000,000.
- (I) For fiscal year 2017, \$635,000,000.
- (J) For fiscal year 2018, \$672,000,000.
- (K) For fiscal year 2019 and each subsequent fiscal year, \$712,000,000.

(2) Allocations of assessment by class of tobacco products

(A) In general

The total user fees assessed and collected under subsection (a) each fiscal year with respect to each class of tobacco products shall be an amount that is equal to the applicable percentage of each class for the fiscal year multiplied by the amount specified in paragraph (1) for the fiscal year.

(B) Applicable percentage

(i) In general

For purposes of subparagraph (A), the applicable percentage for a fiscal year for each of the following classes of tobacco products shall be determined in accordance with clause (ii):

- (I) Cigarettes.
- (II) Cigars, including small cigars and cigars other than small cigars.
- (III) Snuff.
- (IV) Chewing tobacco.
- (V) Pipe tobacco.
- (VI) Roll-your-own tobacco.

(ii) Allocations

The applicable percentage of each class of tobacco product described in clause (i) for a fiscal year shall be the percentage determined under section 518d(c) of title 7 for each such class of product for such fiscal year.

(iii) Requirement of regulations

Notwithstanding clause (ii), no user fees shall be assessed on a class of tobacco products unless such class of tobacco products is listed in section 387a(b) of this title or is deemed by the Secretary in a regulation under section 387a(b) of this title to be subject to this subchapter.

(iv) Reallocations

In the case of a class of tobacco products that is not listed in section 387a(b) of this title or deemed by the Secretary in a regulation under section 387a(b) of this title to be subject to this subchapter, the amount of user fees that would otherwise be assessed to such class of tobacco products shall be reallocated to the classes of tobacco products that are subject to this subchapter in the same manner and based on the same relative percentages otherwise determined under clause (ii).

(3) Determination of user fee by company

(A) In general

The total user fee to be paid by each manufacturer or importer of a particular class of tobacco products shall be determined for each quarter by multiplying—

- (i) such manufacturer's or importer's percentage share as determined under paragraph (4); by
- (ii) the portion of the user fee amount for the current quarter to be assessed on all manufacturers and importers of such class of tobacco products as determined under paragraph (2).

(B) No fee in excess of percentage share

No manufacturer or importer of tobacco products shall be required to pay a user fee in excess of the percentage share of such manufacturer or importer.

(4) Allocation of assessment within each class of tobacco product

The percentage share of each manufacturer or importer of a particular class of tobacco products of the total user fee to be paid by all manufacturers or importers of that class of tobacco products shall be the percentage determined for purposes of allocations under subsections (e) through (h) of section 518d of title 7.

(5) Allocation for cigars

Notwithstanding paragraph (4), if a user fee assessment is imposed on cigars, the percentage share of each manufacturer or importer of cigars shall be based on the excise taxes paid by such manufacturer or importer during the prior fiscal year.

(6) Timing of assessment

The Secretary shall notify each manufacturer and importer of tobacco products subject to this section of the amount of the quarterly assessment imposed on such manufacturer or importer under this subsection for each quarter of each fiscal year. Such notifications shall occur not later than 30 days prior to the end of the quarter for which such assessment is made, and payments of all assessments shall be made by the last day of the quarter involved.

(7) Memorandum of understanding**(A) In general**

The Secretary shall request the appropriate Federal agency to enter into a memorandum of understanding that provides for the regular and timely transfer from the head of such agency to the Secretary of the information described in paragraphs (2)(B)(ii) and (4) and all necessary information regarding all tobacco product manufacturers and importers required to pay user fees. The Secretary shall maintain all disclosure restrictions established by the head of such agency regarding the information provided under the memorandum of understanding.

(B) Assurances

Beginning not later than fiscal year 2015, and for each subsequent fiscal year, the Secretary shall ensure that the Food and Drug Administration is able to determine the applicable percentages described in paragraph (2) and the percentage shares described in paragraph (4). The Secretary may carry out this subparagraph by entering into a contract with the head of the Federal agency referred to in subparagraph (A) to continue to provide the necessary information.

(c) Crediting and availability of fees**(1) In general**

Fees authorized under subsection (a) shall be collected and available for obligation only to the extent and in the amount provided in advance in appropriations Acts, subject to paragraph (2)(D). Such fees are authorized to remain available until expended. Such sums as may be necessary may be transferred from the Food and Drug Administration salaries and expenses appropriation account without fiscal year limitation to such appropriation account for salaries and expenses with such fiscal year limitation.

(2) Availability**(A) In general**

Fees appropriated under paragraph (3) are available only for the purpose of paying the costs of the activities of the Food and Drug Administration related to the regulation of tobacco products under this subchapter and the Family Smoking Prevention and Tobacco Control Act (referred to in this subsection as "tobacco regulation activities"), except that such fees may be used for the reimbursement specified in subparagraph (C).

(B) Prohibition against use of other funds**(i) In general**

Except as provided in clause (ii), fees collected under subsection (a) are the only funds authorized to be made available for tobacco regulation activities.

(ii) Startup costs

Clause (i) does not apply until October 1, 2009. Until such date, any amounts available to the Food and Drug Administration (excluding user fees) shall be available and allocated as needed to pay the

costs of tobacco regulation activities.

(C) Reimbursement of start-up amounts

(i) In general

Any amounts allocated for the start-up period pursuant to subparagraph (B)(ii) shall be reimbursed through any appropriated fees collected under subsection (a), in such manner as the Secretary determines appropriate to ensure that such allocation results in no net change in the total amount of funds otherwise available, for the period from October 1, 2008, through September 30, 2010, for Food and Drug Administration programs and activities (other than tobacco regulation activities) for such period.

(ii) Treatment of reimbursed amounts

Amounts reimbursed under clause (i) shall be available for the programs and activities for which funds allocated for the start-up period were available, prior to such allocation, until September 30, 2010, notwithstanding any otherwise applicable limits on amounts for such programs or activities for a fiscal year.

(D) Fee collected during start-up period

Notwithstanding the first sentence of paragraph (1), fees under subsection (a) may be collected through September 30, 2009 under subparagraph (B)(ii) and shall be available for obligation and remain available until expended. Such offsetting collections shall be credited to the salaries and expenses account of the Food and Drug Administration.

(E) Obligation of start-up costs in anticipation of available fee collections

Notwithstanding any other provision of law, following the enactment of an appropriation for fees under this section for fiscal year 2010, or any portion thereof, obligations for costs of tobacco regulation activities during the start-up period may be incurred in anticipation of the receipt of offsetting fee collections through procedures specified in section 1534 of title 31.

(3) Authorization of appropriations

For fiscal year 2009 and each subsequent fiscal year, there is authorized to be appropriated for fees under this section an amount equal to the amount specified in subsection (b)(1) for the fiscal year.

(d) Collection of unpaid fees

In any case where the Secretary does not receive payment of a fee assessed under subsection (a) within 30 days after it is due, such fee shall be treated as a claim of the United States Government subject to subchapter II of chapter 37 of title 31.

(e) Applicability to fiscal year 2009

If the date of enactment of the Family Smoking Prevention and Tobacco Control Act occurs during fiscal year 2009, the following applies, subject to subsection (c):

(1) The Secretary shall determine the fees that would apply for a single quarter of such fiscal year according to the application of subsection (b) to the amount specified in paragraph (1)(A) of such subsection (referred to in this subsection as the "quarterly fee amounts").

(2) For the quarter in which such date of enactment occurs, the amount of fees assessed shall be a pro rata amount, determined according to the number of days remaining in the quarter (including such date of enactment) and according to the daily equivalent of the quarterly fee amounts. Fees assessed under the preceding sentence shall not be collected until the next quarter.

(3) For the quarter following the quarter to which paragraph (2) applies, the full quarterly fee amounts shall be assessed and collected, in addition to collection of the pro rata fees assessed under paragraph (2).

(June 25, 1938, ch. 675, §919, as added Pub. L. 111–31, div. A, title I, §101(b)(3), June 22, 2009, 123 Stat. 1826.)

REFERENCES IN TEXT

The Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (c)(2)(A), is div. A of Pub. L. 111–31, [June 22, 2009](#), 123 Stat. 1776. For complete classification of this Act to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title.

The date of enactment of the Family Smoking Prevention and Tobacco Control Act and such date of enactment, referred to in subsec. (e), is the date of enactment of Pub. L. 111–31, which was approved June 22, 2009.

§387t. Labeling, recordkeeping, records inspection

(a) Origin labeling

(1) Requirement

Beginning 1 year after June 22, 2009, the label, packaging, and shipping containers of tobacco products other than cigarettes for introduction or delivery for introduction into interstate commerce in the United States shall bear the statement "sale only allowed in the United States". Beginning 15 months after the issuance of the regulations required by section 1333(d) of title 15, as amended by section 201 of Family ¹ Smoking Prevention and Tobacco Control Act, the label, packaging, and shipping containers of cigarettes for introduction or delivery for introduction into interstate commerce in the United States shall bear the statement "Sale only allowed in the United States".

(2) Effective date

The effective date specified in paragraph (1) shall be with respect to the date of manufacture, provided that, in any case, beginning 30 days after such effective date, a manufacturer shall not introduce into the domestic commerce of the United States any product, irrespective of the date of manufacture, that is not in conformance with such paragraph.

(b) Regulations concerning recordkeeping for tracking and tracing

(1) In general

The Secretary shall promulgate regulations regarding the establishment and maintenance of records by any person who manufactures, processes, transports, distributes, receives, packages, holds, exports, or imports tobacco products.

(2) Inspection

In promulgating the regulations described in paragraph (1), the Secretary shall consider which records are needed for inspection to monitor the movement of tobacco products from the point of manufacture through distribution to retail outlets to assist in investigating potential illicit trade, smuggling, or counterfeiting of tobacco products.

(3) Codes

The Secretary may require codes on the labels of tobacco products or other designs or devices for the purpose of tracking or tracing the tobacco product through the distribution system.

(4) Size of business

The Secretary shall take into account the size of a business in promulgating regulations under this section.

(5) Recordkeeping by retailers

The Secretary shall not require any retailer to maintain records relating to individual purchasers of tobacco products for personal consumption.

(c) Records inspection

If the Secretary has a reasonable belief that a tobacco product is part of an illicit trade or smuggling or is a counterfeit product, each person who manufactures, processes, transports, distributes, receives, holds, packages, exports, or imports tobacco products shall, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times and within reasonable limits and in a reasonable manner, upon the presentation of appropriate credentials and a written notice to such person, to have access to and copy all records (including financial records) relating to such article that are needed to assist the Secretary in investigating potential illicit trade, smuggling, or counterfeiting of tobacco products. The Secretary shall not authorize an officer or employee of the government of any of the several States to exercise authority under the preceding sentence on Indian country without the express written consent of the Indian tribe involved.

(d) Knowledge of illegal transaction

(1) Notification

If the manufacturer or distributor of a tobacco product has knowledge which reasonably supports the conclusion that a tobacco product manufactured or distributed by such manufacturer or distributor that has left the control of such person may be or has been—

- (A) imported, exported, distributed, or offered for sale in interstate commerce by a person without paying duties or taxes required by law; or
- (B) imported, exported, distributed, or diverted for possible illicit marketing,

the manufacturer or distributor shall promptly notify the Attorney General and the Secretary of the Treasury of such knowledge.

(2) Knowledge defined

For purposes of this subsection, the term "knowledge" as applied to a manufacturer or distributor means—

(A) the actual knowledge that the manufacturer or distributor had; or

(B) the knowledge which a reasonable person would have had under like circumstances or which would have been obtained upon the exercise of due care.

(e) Consultation

In carrying out this section, the Secretary shall consult with the Attorney General of the United States and the Secretary of the Treasury, as appropriate.

(June 25, 1938, ch. 675, §920, as added Pub. L. 111–31, div. A, title III, §301, June 22, 2009, 123 Stat. 1850.)

REFERENCES IN TEXT

Section 201 of the Family Smoking Prevention and Tobacco Control Act, referred to in subsec. (a)(1), is section 201 of div. A of Pub. L. 111–31.

¹ So in original. Probably should be "the Family".

§387u. Studies of progress and effectiveness

(a) FDA report

Not later than 3 years after June 22, 2009, and not less than every 2 years thereafter, the Secretary of Health and Human Services shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives, a report concerning—

(1) the progress of the Food and Drug Administration in implementing this division, including major accomplishments, objective measurements of progress, and the identification of any areas that have not been fully implemented;

(2) impediments identified by the Food and Drug Administration to progress in implementing this division and to meeting statutory timeframes;

(3) data on the number of new product applications received under section 387j of this title and modified risk product applications received under section 387k of this title, and the number of applications acted on under each category; and

(4) data on the number of full time equivalents engaged in implementing this division.

(b) GAO report

Not later than 5 years after June 22, 2009, the Comptroller General of the United States shall conduct a study of, and submit to the Committees described in subsection (a) a report concerning—

(1) the adequacy of the authority and resources provided to the Secretary of Health and Human Services for this division to carry out its goals and purposes; and

(2) any recommendations for strengthening that authority to more effectively protect the public health with respect to the manufacture, marketing, and distribution of tobacco products.

(c) Public availability

The Secretary of Health and Human Services and the Comptroller General of the United States, respectively, shall make the reports required under subsection ¹(a) and (b) available to the public, including by posting such reports on the respective Internet websites of the Food and Drug Administration and the Government Accountability Office.

(Pub. L. 111–31, div. A, title I, §106, June 22, 2009, 123 Stat. 1841.)

REFERENCES IN TEXT

This division, referred to in subsecs. (a)(1), (2), (4) and (b)(1), is div. A of Pub. L. 111–31, June 22, 2009, 123 Stat. 1776, known as Family Smoking Prevention and Tobacco Control Act. For complete classification of division A to the Code, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables.

CODIFICATION

Section was enacted as part of the Family Smoking Prevention and Tobacco Control Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

MODIFICATION OF DEADLINES FOR SECRETARIAL ACTION

With respect to any time periods specified in div. A of Pub. L. 111–31 that begin on June 22, 2009, within which the Secretary of Health and Human Services is required to carry out and complete specified activities, with certain limitations, the calculation of such time periods shall commence on the first day of the first fiscal quarter following the initial 2 consecutive fiscal quarters of fiscal year 2010 for which the Secretary has collected fees under section 387s of this title, and the Secretary may extend or reduce the duration of one or more such time periods, except that no such period shall be extended for more than 90 days, see section 6 of Pub. L. 111–31, set out as a note under section 387 of this title.

¹So in original. Probably should be plural.