

(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.

§ 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 re-

ferral 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