Dissenting Views to Accompany H.R. 5535,
the "Prevention of Civil RICO Abuse Act of 2006"

We strongly dissent from H.R. 5535. This bill, which exempts foreign governments from using the civil RICO statute to pursue claims against United States corporations, is a special interest giveaway to the tobacco industry. Although not explicit in its intention, the bill appears to benefit most of the tobacco industry, as several companies have been sued by foreign governments in recent years, including Canada, Columbia and the European Union. The bill is opposed by the Campaign for Tobacco-Free Kids, the American Heart Association, and the American Lung Association.

We also object to the process under which the Committee considered this bill. The Committee marked this bill up without the benefit of a single hearing and with minimal notice of the markup.

The following is a brief description of the bill and a more detailed itemization of our concerns with it.

Description of the Legislation

The RICO statute, found at 18 U.S.C. §§1961-1968, outlaws the investment of ill-gotten gains in another business, the acquisition of an interest in a business through certain illegal acts, and the conduct of the affairs of a business through such acts. The civil provisions, found at 18 U.S.C. § 1964, allow civil claims to be brought by any person injured in their business or property by reason of a RICO violation. Section 1964(a) provides for equitable relief, while section 1964(c) provides for treble damages.

The underlying bill amends section 1964(c) of RICO by stating that a foreign governmental entity may not sue under this subsection. Chairman Sensenbrenner offered a substitute amendment, which passed by a voice vote, that exempts foreign corporations from section 1964 in its entirety, not just from 1964(c) (the treble damage provision). Thus, the amendment exempts foreign governments from pursuing any civil RICO lawsuits, whether it be for treble damages or for equitable relief.[1]

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[1]The definition of who is a "person" under section 1961(3) – and thus who is eligible to sue civilly under section 1964 – has been interpreted by the courts to include foreign governmental entities. In the earliest case, a 1988 decision, the Ninth Circuit stated that the Philippines was a "person" eligible to sue the Marcoses under section 1964 for RICO violations predicated on mail fraud, wire fraud, and transport of stolen property. *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988). In 2001, two separate federal district courts in New York reached the same conclusion in tobacco lawsuits. *See Attorney Gen'l of Canada v. RJ Reynolds*, 103 F. Supp. 2d 134, 146-50 (N.D.N.Y. 2000) and *European Community v. RJR Nabisco, Inc.,* 150 F. Supp. 2d 456, 486-92.

The decisions have drawn on the antitrust laws that were a model for RICO in certain

Background

Without the benefit of a hearing or markup, the purpose of this legislation is unclear. However, it's effect is unmistakable: it benefits the tobacco industry, which has been the subject of several lawsuits by foreign governments. In recent years, foreign governments have begun seeking civil RICO damages against tobacco companies in U.S. courts. Most of these tobacco cases have been thrown out of court on the basis of the "revenue rule," an eighteenth century doctrine that allows courts to decline entertaining suits or enforcing foreign tax judgments or foreign revenue laws.[2]

Recently, however, the Columbian government has filed suit in the Eastern District of New York asserting damages for "commercial" losses instead of tax revenue. If the case can proceed because of the lack of a "revenue rule" defense, there could be a new avenue for foreign governments to pursue claims in the U.S. against U.S. companies. The tobacco companies, as a result, are not completely safe from these suits by foreign corporations.

Arguments Against the Legislation

H.R. 5535 should be opposed for several reasons. It will prevent cigarette companies

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respects, and relied upon a Supreme Court decision, *Pfizer v. Gov't of India*, 434 U.S. 308 (1978), which held that a FGE can sue for treble damages under the antitrust laws.

Notably, and contrary to the point made by the Majority, the EU court addressed the reference to "private persons" in the legislative history of civil RICO and *rejected* the contention that this reference represented Congress's sole intent. The court noted that the statute was passed without the word "private," and that there was insufficient evidence that limitation to private persons was Congress's exclusive purpose.

Finally, in a 2005 decision about mail fraud and the revenue rule, the Supreme Court stated that "We express no view on . . .. whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under [RICO] for a scheme to defraud it of taxes." *Pasquantino v. United States*, 544 U.S. 349, 355 n.1 (2005).

[2]An illustration of how the revenue rule has operated to bar lawsuits by foreign governments is *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.* 268 F.3d 103 (2d Cir. 2001). In response to the Canadian government's decision to double the tobacco tax, R.J. Reynolds engaged in elaborate schemes that involved exporting Canadian cigarettes and tobacco under false declarations, manufacturing the tobacco into Canadian cigarettes in Puerto Rico and then smuggling the cigarettes through free-trade zones or Indian reservations back into Canada. Canada brought an action in a United States court under the U.S. civil RICO statutes, 18 U.S.C. § 1962, seeking damages from R.J. Reynolds based on lost tax revenues and additional law enforcement costs. The Second Circuit affirmed the dismissal of the suit for failure to state a claim, as a suit based on the avoidance of foreign taxes was precluded under the revenue rule. *See* 268 F.3d at 105-06.

from being held accountable for knowingly smuggling cigarettes and evading taxes, when there is substantial evidence linking tobacco smuggling and the funding of terrorist activities and organizations. It will also hinder foreign governments' abilities to collect taxes and conduct marketing campaigns against teen and youth smoking, as well as their ability to pursue companies in the United States that cause harm to their citizens.

Moreover, this legislation threatens to destroy the notion of reciprocity and comity among the U.S. and foreign governments. The U.S. government can sue in foreign countries when foreign companies cause harm to the United States, so there is no justification for refusing foreign countries this option when the harm is caused by a U.S. company. If other countries were to follow suit and enact parallel legislation, it would cut off the right of the U.S. government to use those countries' judicial systems to go after terrorist and criminal organizations that are harming or threatening to harm the United States or its citizens.

It is noteworthy that this legislation has not received the benefit of a hearing or virtually any debate. It is therefore difficult to understand exactly what this bill would do and what it is designed to prevent. Rather than hurrying to enact this peculiar and very dangerous provision, we should hold hearings and invite experts on criminal and terrorist organizations – including the Secretary of Defense and the Secretary of Homeland Security – to testify on the impact this legislation might have on our national security.

I. This legislation prevents cigarette companies from being held accountable for knowingly smuggling cigarettes.

Whatever the intent of this bill, it appears to be for the sole purpose of exempting tobacco companies from the increasing number of lawsuits brought by foreign governments for smuggling contraband cigarettes. It should be opposed because it undermines the broader goal of punishing tobacco companies that engage in illegal and harmful conduct.

According to a report by the Campaign for Tobacco Free Kids and internal tobacco company documents, major cigarette companies (British American Tobacco, Philip Morris, and R.J. Reynolds Tobacco) have gone well beyond knowingly selling cigarettes that they know will end up in the hands of tobacco smugglers; they have also carefully monitored and overseen the smuggling of brands into various countries. These documents show that the major cigarette companies have sent high-level executives to meetings with middleman companies directly involved in smuggling operations to discuss the details of smuggling operations, including destinations, brands, routes, quantities, and prices. These same companies knowingly supplied cigarette smuggling operations used by illegal drug traffickers for money laundering purposes. Les Thompson, the former president of R.J. Reynolds, pled guilty to involvement in illegal cigarette smuggling.

Representative Meehan offered an amendment that would exclude tobacco companies from this legislation, preserving the ability of foreign governments to sue tobacco companies in the United States under the civil RICO statute. The amendment was defeated by a vote of 8-17.

Foreign governments attempting to crack down on such operations will be precluded from bringing lawsuits in the U.S. if this bill is enacted. The "revenue rule" has already resulted in a boon for big tobacco companies, and this bill will only serve to further broaden their immunity from liability.

II. There is substantial evidence linking tobacco smuggling and the funding of terrorist organizations.

Several studies have found a connection between cigarette smuggling and terrorism. In fact, the Justice Department recently pursued 19 men on charges of participating in a global smuggling network dealing in contraband cigarettes and pharmaceuticals that allegedly generates funding for Hezbollah. Illegal cigarette trafficking now rivals drug trafficking as the method of choice to fill terrorists' bank accounts. In addition, in 2002, *The Wall Street Journal* reported that American brands were being smuggled into Iraq from Turkey and other countries, with the knowledge and cooperation of R.J. Reynolds. *The Wall Street Journal* reported that one beneficiary of this illegal smuggling was Saddam Hussein's eldest son, Uday, who collected $10 million a year on average in "taxes" from legal and illegal sales of imported cigarettes in Iraq to support the Hussein regime. Chairman Sensenbrenner, the chief sponsor of this bill, has acknowledged as much: "It is obvious that the terrorists are using cigarette smuggling in order to help finance their activities."[3]

Representative Schiff offered an amendment that would exempt from the legislation any entity whose conduct consists of providing funding or other support or assistance to terrorist organizations. While this amendment passed on a voice vote, it by no means alleviates or solves the real problem of cigarette smuggling to finance terrorist operations. Even with this language added to the bill, the burden of proving that an organization can be sued because it falls under this exception will be heavy. It takes authorities many years to match up the funds from cigarette smuggling to the terrorist activities. In the case of a lawsuit by a foreign government, the burden of proving that the organization being sued has ties to terrorist activities will be placed on the foreign government, and it may not be able to do so in time to survive a motion to dismiss or motion for summary judgment. Without the inclusion of Representative Meehan's amendment exempting tobacco companies, the issue of cigarette smuggling still remains the largest part of the problem.

We need to create and use all possible tools to prevent and reduce cigarette smuggling. If this bill succeeds, it would remove another tool to combat terrorism. RICO lawsuits brought against U.S. companies in U.S. courts could assist the United States in uncovering terrorist organizations and activities and bringing those criminals and terrorists to justice.

III. This legislation undermines foreign governments' abilities to protect their citizens and to discourage teen and youth smoking.

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[3]Statement of Chairman Sensenbrenner, debate over Coble Amendment to Patriot Act, July 21, 2005.

Finally, this legislation should be opposed because it offers complete immunity to companies that harm individuals when foreign governments pursue the lawsuits, and thus undermines foreign governments' efforts to collect taxes and discourage youth and teen smoking through marketing campaigns. Cigarette trafficking is done to evade taxes, which makes cigarettes less expensive. As a result, people smoke more, become more addicted, and suffer more from tobacco-related illnesses.

Conclusion

H.R. 5535 is nothing more than special interest legislation, benefitting tobacco companies, many of which have already been sued by foreign governments in recent years. It will prevent cigarette companies from being held accountable for knowingly smuggling cigarettes and evading taxes, and will immunize these companies from liability for funding terrorist activities and organizations.

This bill would also undermine foreign governments' efforts to protect their citizens through conducting marketing campaigns against smoking for youths and teens and pursuing those companies in U.S. courts. In 1998, the tobacco companies in the United States entered into an agreement with the Justice Department that prohibited advertising to children and other egregious marketing tactics. As a result, the number of teens who smoke has declined by 36 percent. Now that have begun the process of stemming the tide of smoking in the United States, we should not adopt policies that help to increase it in the rest of the world.

Finally, this legislation removes a major tool the U.S. government and foreign governments have for uncovering terrorist activities and organizations and bringing them to justice.

Description of Amendments Offered by Democratic Members

1. Amendment Offered by Rep. Schiff

Description of Amendment: This amendment provides an exception for any entity whose conduct consists of providing funding or other support or assistance to terrorist organizations.

The amendment was accepted by a voice vote.

2. Amendment Offered by Rep. Meehan

Description of Amendment: This amendment provides an exception for tobacco companies located in the United States.

The amendment was defeated by a vote of 8 to 17. Ayes: Representatives Green, Conyers, Lofgren, Meehan, Sanchez, Van Hollen, Wasserman Schultz, Sensenbrenner. Nays: Representatives Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Cannon, Inglis, Hostettler, Keller, Issa, Flake, Forbes, Feeney, Franks, Gohmert, Scott.

John Conyers, Jr.
Sheila Jackson Lee
Martin T. Meehan
Chris Van Hollen
Debbie Wasserman Schultz