



March 27, 2017

The Honorable Jeff Sessions  
Attorney General of the United States  
U.S. Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-2001

Dear Attorney General Sessions:

We write to urge that, in all of its tobacco-related litigation, the Department of Justice (“DOJ” or “the Department”) take transparent steps to avoid the serious breaches of ethical standards that would arise if attorneys who have previously represented tobacco product manufacturers or other tobacco-related businesses in private practice were to switch sides and represent the United States government. As explained below, we have immediate concerns about Noel Francisco, the current nominee for Solicitor General, as well as Chad Readler, currently Acting Assistant Attorney General of the Civil Division, but the issue is broader than these two individuals.

The Department of Justice has a laudable history of endeavoring to hold itself to the highest ethical standards, recognizing that each of its employees “has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain.”<sup>1</sup> The Department, to this end, requires that its employees abide by the principles of ethical standards applicable to federal employees,<sup>2</sup> including the obligation to “act impartially and not give preferential treatment to any private organization or individual,”<sup>3</sup> and the requirement that employees “endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in [the applicable federal law].”<sup>4</sup>

Consistent with these ethical principles, senior government attorneys have routinely recused themselves or been recused based on their prior work in private practice. During the George W. Bush administration, for example, Treasury Department General Counsel David Aufhauser recused himself from a case involving R.J. Reynolds Tobacco Company (“R.J. Reynolds”) reportedly because the law firm at which he had previously been a partner “has worked for [R.J. Reynolds] and other tobacco companies.”<sup>5</sup> Solicitor General Theodore Olsen and Principal Deputy Solicitor

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<sup>1</sup> *Do It Right*, U.S. Dep’t of Justice, <https://www.justice.gov/jmd/do-it-right> (last visited Mar. 9, 2017).

<sup>2</sup> *See id.*

<sup>3</sup> 5 C.F.R. § 2635.101(b)(8).

<sup>4</sup> *Id.* § 2635.101(b)(14).

<sup>5</sup> Myron Levin, *High Court Refuses Cigarette Suit*, L.A. Times (Nov. 5, 2002), <http://articles.latimes.com/2002/nov/05/business/fi-smoke5>; *see also* Brief for the United States as Amicus Curiae at 18 n.\*\*, *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, No. 01-1317 (U.S. Oct. 2002) (“The General Counsel is recused in this case.”).

General Paul Clement also did not participate in that same case, reportedly because they or their former law firms had worked on the matter.<sup>6</sup> During the Obama administration, Solicitor General Don Verrilli and Principal Deputy Solicitor General Ian Gershengorn recused themselves from a case concerning copyright protections for broadcast television programs apparently because, when they were in private practice, they had worked on a different case that raised a similar issue.<sup>7</sup> Associate Attorney General Thomas Perrelli similarly recused himself from several cases relating to terrorist detainees, reportedly because his former law firm “worked on behalf of detainees while he served on the firm’s management committee and on its appellate and Supreme Court practice groups.”<sup>8</sup>

If attorneys at the Department of Justice have worked in law firms that represented tobacco product manufacturers, they should not participate on behalf of the United States in matters in which such companies, including their former clients, are adverse to the government. The major companies in this industry often join in litigation against the federal government because they typically have the same or very similar interests. Lawyers who have worked in firms that have represented tobacco product companies in litigation against the United States should therefore be recused from any tobacco-related litigation while they serve at the Department. Failure to adopt such a recusal policy would risk eroding the Department’s longstanding commitment to federal ethics standards.

Such ethical issues would arise if Noel Francisco, current nominee for Solicitor General, were to participate in tobacco-related litigation at the Department. Mr. Francisco, a former partner at Jones Day, has long represented R.J. Reynolds in tobacco litigation. For example, he represented R.J. Reynolds in the continuing litigation over a district court order forcing R.J. Reynolds and other defendants in a landmark RICO lawsuit brought by the United States to make corrective statements disclosing the previously hidden truth about cigarettes as a remedy for their decades-long conspiracy to defraud the American people.<sup>9</sup> Mr. Francisco also argued two of the most important cases involving constitutional challenges to the federal regulation of the tobacco industry in recent years. He represented R.J. Reynolds in *Discount Tobacco City & Lottery, Inc. v. United States*,<sup>10</sup> a case that challenged a host of provisions in the Family Smoking Prevention and Tobacco Control Act of 2009 (“Tobacco Control Act”) on constitutional grounds, and argued that case before the U.S. Court of Appeals for the Sixth Circuit. He also represented R.J. Reynolds in its challenge to the

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<sup>6</sup> See Levin, *supra* note 5. The Campaign for Tobacco Free-Kids urged the recusal of General Olsen in this case as “necessary to avoid any perceived or actual conflict of interest in the Administration’s approach to this case.” *Bush Administration Should Support Canada’s Right to Sue R.J. Reynolds in Smuggling Case Now Before U.S. Supreme Court*, Campaign for Tobacco-Free Kids (May 13, 2002), [http://www.tobaccofreekids.org/press\\_releases/post/id\\_0492](http://www.tobaccofreekids.org/press_releases/post/id_0492).

<sup>7</sup> See Jonathan Handel, *Aereo Backstory: One Supreme Court Case, Three Recusals, One ‘Unrecusal,’ Much Uncertainty*, *The Hollywood Reporter* (Apr. 22, 2014), <http://www.hollywoodreporter.com/thr-esq/aereo-backstory-one-supreme-court-698094>; see also Brief for the United States as Amicus Curiae Supporting Petitioners at 34, *Am. Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (“The Solicitor General and the Principal Deputy Solicitor General are recused in this case.”).

<sup>8</sup> See Stephen Clark, *GOP Seeks More Answers on Justice Officials Who Defended Terror Suspects*, *Fox News* (Feb. 24, 2010), <http://www.foxnews.com/politics/2010/02/24/gop-seeks-answers-justice-officials-defended-terror-suspects.print.html>.

<sup>9</sup> See *United States v. Philip Morris USA Inc.*, 786 F.3d 1014 (D.C. Cir. 2015) (listing Mr. Francisco as appearing on the briefs for appellants). Mr. Francisco is listed as the lead attorney for R.J. Reynolds in the two most recent briefs filed by the RICO defendants in their latest appeal to the D.C. Circuit concerning the corrective statements remedy. See Appellants’ Opening Brief, *United States v. Phillip Morris USA, Inc.*, Nos. 16-5101 & 16-5127 (D.C. Cir. Sept. 9, 2016); Appellants’ Reply Brief, *United States v. Philip Morris USA Inc.*, Nos. 16-5101 & 16-5127 (D.C. Cir. Dec. 22, 2016).

<sup>10</sup> 674 F.3d 509 (6th Cir. 2012).

constitutionality of requiring graphic warning labels on cigarette packs and advertising, as promulgated by the FDA pursuant to the Tobacco Control Act, and he argued that case in both the district court and the court of appeals.<sup>11</sup> Given his prominent role in representing the tobacco industry in litigation, Mr. Francisco should not be permitted to participate in the government's defense of laws he attacked in private practice or laws that his former client attacks in the future.

We are also concerned that a serious ethical lapse has already occurred. Chad Readler, who currently serves as Acting Assistant Attorney General of the Civil Division, regularly represented R.J. Reynolds when he was a partner at Jones Day.<sup>12</sup> During that time, R.J. Reynolds submitted comments to the Food and Drug Administration ("FDA") opposing, on First Amendment and other grounds, parts of an FDA rule that deemed additional categories of tobacco products subject to FDA's statutory authority.<sup>13</sup> After the rule was finalized, several lawsuits were filed challenging it. In one case, *Cyclops Vapor 2, LLC v. U.S. Food & Drug Admin.*, No. 2:16-cv-556 (M.D. Ala.), the plaintiffs contend that parts of the deeming rule violate the First Amendment. Despite the fact that his former client, R.J. Reynolds, in its comments on the deeming rule, made the same First Amendment arguments as to the type of tobacco product manufactured by the plaintiff in *Cyclops Vapor*, Mr. Readler has been listed as counsel representing the United States in that case.

Mr. Readler's participation in *Cyclops Vapor* or related litigation is not appropriate and, if continued, would give the appearance of a conflict of interest and risk the reputation of the Department of Justice for strict adherence to well recognized ethical standards. Before Mr. Readler joined DOJ, the Department defended the FDA rule, filing a brief in a similar case vigorously defending the legality of the rule and its critical importance to public health.<sup>14</sup> With Mr. Readler now on the *Cyclops Vapor* case, the United States has filed a motion requesting an extension "to more fully consider the issues raised."<sup>15</sup> Given Jones Day's representation of Reynolds in tobacco litigation, including on First Amendment issues, Mr. Readler should not be involved in the consideration of the government's position in litigation concerning this critical aspect of tobacco regulation.

Our concerns extend beyond Mr. Readler and Mr. Francisco. Jones Day has for many years been one of the principal firms representing R.J. Reynolds in numerous litigated matters, many of them involving litigation against the federal government. R.J. Reynolds has been one of Jones Day's largest clients.<sup>16</sup> We believe that existing ethical standards would be compromised if any former

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<sup>11</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

<sup>12</sup> See, e.g., Chad A. Readler, The Federalist Society, <http://www.fed-soc.org/experts/detail/chad-a-readler> (last visited Mar. 9, 2017) ("In product liability matters, Chad represents clients including R.J. Reynolds . . . and has represented R.J. Reynolds in commercial speech litigation."); Chad A. Readler, FindLaw (Jan. 7, 2014), [http://pview.findlaw.com/view/2209863\\_1](http://pview.findlaw.com/view/2209863_1) (listing three cases in which Mr. Readler represented R.J. Reynolds Tobacco Company); Brian Meyer, *R.J. Reynolds Challenging City's Effort to Restrict Posting of Tobacco Ads*, Buff. News (Sept. 3, 2005), <http://buffalonews.com/2005/09/03/r-j-reynolds-challenging-citys-effort-to-restrict-posting-of-tobacco-ads/> (quoting Mr. Readler in advocacy for R.J. Reynolds Tobacco Company, which was then threatening to sue the city of Buffalo for its efforts to "wipe out tobacco ads around schools, playgrounds and day care centers").

<sup>13</sup> See Comment by James E. Swauger, VP – Regulatory Oversight, RAI Services Company (Aug. 8, 2014), available at <https://www.regulations.gov/document?D=FDA-2014-N-0189-76048>.

<sup>14</sup> See Memorandum in Opposition to Plaintiffs' Motions for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, *Nicopure Labs, LLC v. FDA*, No. 16-878 (D.D.C. Aug. 16, 2016).

<sup>15</sup> Defendants' Consent Motion to Extend Deadlines, *Cyclops Vapor 2, LLC v. U.S. Food & Drug Admin.*, No. 2:16-cv-556 (M.D. Ala. Mar. 1, 2017). The Campaign for Tobacco-Free Kids has been granted leave to file an amicus brief on behalf of the government in this case.

<sup>16</sup> See Roy Strom, *A Quiet Law Firm with a Famous Client*, The American Lawyer (Mar. 1, 2017) (describing Jones Day's representation of R.J. Reynolds as "[o]ne of its longest-lasting relationships").

partner of Jones Day, which has worked tirelessly on behalf of the tobacco industry, participates in the Justice Department's defense of tobacco regulations or other actions by FDA affecting the industry. This recusal policy should apply not only to lawyers in DOJ, but also to lawyers in the White House Counsel's Office and attorneys who work at federal agencies. It also should apply to lawyers from other law firms that have participated in litigation on behalf of tobacco-industry clients.

We ask that the Department of Justice uphold its longstanding commitment to the principles of federal ethics laws and ensure that attorneys who have worked in law firms that represented the tobacco industry state publicly that they will not participate in tobacco-related litigation as an employee of the United States. Such recusals are essential to ensure the appearance of impartiality and to give the public the greatest possible confidence that decisions about the federal government's litigation positions are taken solely based on the facts and the law to advance the public health and the public interest.

Sincerely,



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President  
American Cancer Society Cancer Action  
Network



Matthew L. Myers  
President  
Campaign for Tobacco Free Kids



Nancy A. Brown  
Chief Executive Officer  
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Robin Koval  
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cc: Cynthia K. Shaw  
Director, Departmental Ethics Office

Walter Shaub, Jr.  
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