

TOM DAVIS, VIRGINIA,
CHAIRMAN

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
STEVEN C. LATOURETTE, OHIO
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE
JOHN SULLIVAN, OKLAHOMA
NATHAN DEAL, GEORGIA
CANDICE MILLER, MICHIGAN
TIM MURPHY, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
JOHN R. CARTER, TEXAS
WILLIAM J. JANKLOW, SOUTH DAKOTA
MARSHA BLACKBURN, TENNESSEE

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

April 17, 2003

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
Wm. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LINDA T. SANCHEZ, CALIFORNIA
C.A. DUTCH RUPPERSBERGER,
MARYLAND
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE
CHRIS BELL, TEXAS

BERNARD SANDERS, VERMONT,
INDEPENDENT

The Honorable W.J. "Billy" Tauzin
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable James C. Greenwood
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Tauzin and Greenwood:

I am writing to urge you to investigate what appears to be two years of document destruction by Philip Morris Incorporated, in violation of a federal court order. This document destruction was not disclosed until June 2002 and has the effect of denying the Department of Justice access to company documents in key areas of investigation, including the marketing and sale of tobacco products, the lobbying of government officials, and the health effects of smoking.

Philip Morris's document destruction appears to have been caused by a "print and retain" policy that recalls the infamous "document retention" policy of Arthur Andersen. The tobacco company not only had evidence that the policy would lead to document destruction, but it also delayed fixing the problem for years. In fact, internal company documents repeatedly recognized the inadequacy of the "print and retain" policy and urged the adoption of new measures.

During the Energy and Commerce Committee's investigation of Enron and Arthur Andersen last year, Chairman Tauzin said that document destruction:

[R]aises some broader questions about document-retention policies that we may have to address: For example, how do corporations implement these policies, particularly when

The Honorable W.J. "Billy" Tauzin
The Honorable James C. Greenwood
April 17, 2003
Page 2

investigations may be developing? Is this a wide-spread, though under-appreciated, problem? . . . This Committee takes document destruction very seriously.¹

These "broader questions" are directly implicated by Philip Morris's document destruction and should, I believe, be given the same serious scrutiny as Arthur Andersen's practices.

Background

The U.S. Department of Justice filed a lawsuit on September 22, 1999 against several tobacco corporations, including Philip Morris. The lawsuit alleges that Philip Morris engaged in deceptive practices, including concealing what it knew about the addictiveness and harms of smoking, in violation of federal racketeering law.

As part of this lawsuit, Judge Gladys Kessler issued a document preservation order on October 19, 1999, which required that "[e]ach party shall preserve all documents or other records containing information potentially relevant to the subject matter of this litigation."²

According to Philip Morris, the company considered the relevant subject matter to have a wide scope. In addition to documents on such topics as marketing, health effects, and lobbying of government officials, Philip Morris also indicated it would preserve materials on numerous other issues, including genetically engineered tobacco, communication practices between Philip Morris facilities, and fire safety.³

¹House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Destruction of Enron-Related Documents by Andersen Personnel*, 107th Cong., 9 (Jan. 24, 2002) (online at <http://energycommerce.house.gov/107/action/107-80.pdf>).

²Order #1: First Case Management Order for Initial Scheduling Conference, *United States v. Philip Morris Inc.*, No. 99-CV-2496, 4 (D.D.C. Oct. 19, 1999).

³Letter from Thomas J. Frederick, Esq., Winston & Strawn, to Renee Brooker and Andrew N. Goldfarb, Esqs., Tobacco Litigation Team, U.S. Department of Justice (July 17, 2002) (hereinafter "July 17 Letter"). Philip Morris considered the full list of topics to include:

- Research and development concerning tobacco or tobacco products
- Related health issues, including ETS [environmental tobacco smoke] and fire safety
- Chemical properties of tobacco, tobacco products or smoke
- Use of pesticides or genetic engineering in tobacco growth

The Honorable W.J. "Billy" Tauzin
The Honorable James C. Greenwood
April 17, 2003
Page 3

On June 19, 2002, however, a lawyer representing Philip Morris notified Judge Kessler that relevant documents had been destroyed: "It has come to the attention of Philip Morris that some e-mail of some employees has been inadvertently deleted without having been printed and retained, and the company believes it is likely that some of this e-mail was subject to the Document Preservation Order."⁴

According to Philip Morris, the problem was first noted in February 2002, two and a half years after the court order was issued.⁵ So far, the company has identified 11 individuals who deleted relevant records. Their positions include: Vice President in Research and Development; Vice President of Public and Community Relations; Director in Marketing, Information and Planning; Principal Scientist in Research and Development; and Analyst in Marketing, Information and Planning.⁶

-
- Tobacco formulas, recipes or filter composition
 - Tobacco processing and testing
 - Cigarette manufacturing processes and methodologies with respect to tobacco or tobacco products that are manufactured and sold in the United States
 - The marketing and sale of tobacco or tobacco products in the United States (including information about advertising, promotions and consumer preferences); marketing plans and strategies (anywhere) (discussing which markets or segments to target and ways of reaching them); and marketing materials (anywhere) that discuss health claims or relate to youth smoking
 - Government regulation of tobacco products, including lobbying efforts, in the United States
 - Record retention, storage and disposal policies or practices
 - Routing policies or practices for communications between Philip Morris facilities in the United States and laboratories located outside the United States
 - Any other specific topics of already existing disposal suspension notices.

⁴Letter from Thomas J. Frederick, Esq., Winston & Strawn, to the Honorable Gladys Kessler, U.S. District Court for the District of Columbia (June 19, 2002) (hereinafter "June 19 Letter").

⁵Deposition of Michael T. Wallmeyer (Dec. 19–20, 2002), in *United States v. Philip Morris Inc.*, No. 99-CV-2496, at 383–85.

⁶*Id.* at 384–95.

Philip Morris has identified computer backup tapes containing e-mails going back to October 2001, but the amount of material relevant to the Department of Justice lawsuit that could have been deleted by these 11 individuals between October 1999 and October 2001 is immense. Furthermore, it is likely that relevant records have been deleted by other employees as well.

Philip Morris's "Print and Retain" Policy

The document destruction does not appear to be an isolated event. To the contrary, it appears to be the calculated result of a flawed document-retention policy.

In 1994, Philip Morris made a systemwide backup of all the company's electronic records in existence at that time. According to Michael Wallmeyer, an information services specialist at Philip Morris deposed by the Justice Department in December 2002, this backup was created in connection with litigation pending against the company.⁷ With such a system, the company could relatively easily retrieve documents that had been inadvertently deleted and produce them for litigation.⁸ After 1994, however, the company did not permanently retain any backup files⁹ and instead relied upon a policy that virtually ensured documents would be destroyed.

This policy was called "print and retain." It put the responsibility of preserving important documents on the employees. Under this approach, employees were responsible for identifying documents that were subject to current court document preservation orders, printing these documents, and storing them for future reference.¹⁰ Philip Morris would automatically purge the e-mail accounts of employees on a regular basis.¹¹ Philip Morris did periodically create a temporary backup of all electronic records, but these backups were regularly recorded over.¹² Indeed, at least for the past few years, the backup tapes were kept for only three weeks before they were recycled.¹³ Any documents that were not printed and retained were thus lost once the

⁷*Id.* at 94–98.

⁸*See id.* at 100–04.

⁹*Id.* at 94–98, 168–71, 218.

¹⁰July 17 Letter, *supra* note 3.

¹¹June 19 Letter, *supra* note 4.

¹²Deposition of Michael T. Wallmeyer, *supra* note 5, at 175.

¹³*Id.* at 168–71.

backup tapes were recycled.¹⁴ The policy of recycling the tapes every three weeks was apparently established by Philip Morris's Chief Financial Officer.¹⁵ While costs might be suggested as the rationale, a Philip Morris insider has indicated that such a cost-cutting justification was not taken seriously in the organization.¹⁶ The regular recycling of the backup tapes precluded the company from retrieving much information that was deleted from computers after 1994.

For a company as involved with litigation as Philip Morris, a "print and retain" policy is simply inadequate to the task of document preservation. According to Philip Morris, the company regularly sent memos to employees on what to print and retain.¹⁷ For example, such a memo was sent in reference to the Department of Justice lawsuit.¹⁸ These memos created a maze of ever-changing topics for employees to monitor. In 1998, Philip Morris had 34 separate memos addressing multiple categories of documents to be printed and retained, many of which would have related to documents relevant to litigation.¹⁹ Mr. Wallmeyer stated in his deposition:

- Q So as far as you recall, there has not been a time since the mid-'90s when Philip Morris has not been a party to a litigation?
- A Right, to the best of my understanding.²⁰

¹⁴*See id.* at 383–84.

¹⁵*Id.* at 171.

¹⁶A Philip Morris employee wrote a letter to the judge in the lawsuit brought against the major tobacco companies by the Attorney General of Minnesota and Blue Cross/Blue Shield of Minnesota, stating: "During December 1995 or January 1996 I inadvertently deleted some of my computer files located on the main frame computer. Normally, we had been able to retrieve backup files going back several years. A few weeks later I called . . . the computer department about getting a backup. [The employee] told me that now we could only get backup data for the past month or two. I inquired why. He said computer tapes were being recycled in order to save money. I recall him chuckling about this." *Id.* at Exhibit 35.

¹⁷July 17 Letter, *supra* note 3; Deposition of Michael T. Wallmeyer, *supra* note 5, at 295–98.

¹⁸July 17 Letter, *supra* note 3.

¹⁹Deposition of Michael T. Wallmeyer, *supra* note 5, at Exhibit 27.

²⁰*Id.* at 34.

Philip Morris appears to have known that it was not meeting its legal requirements with its “print and retain” standard as early as 1996, well before the federal court issued its preservation order for the Department of Justice lawsuit. In 1996, a Philip Morris document — apparently a records management status report — indicated that an ongoing item of discussion was to “[f]inalize management systems for electronic media subject to court preservation orders.”²¹

The problem was not fixed by 1998, as a document addressing projects for that year stated that one of the company’s goals was to “[i]mplement interim solutions for electronic retention of electronic information subject to disposal suspension.”²²

Yet another year passed and no significant progress was made. Records from a meeting on December 14, 1999, two months after Judge Kessler’s document preservation order, indicate that one of the company’s objectives was to “create an electronic records management system that meets legal, regulatory, and business standards sooner rather than later. We would like to eliminate the need to ‘print and retain’ in most cases for economic and space reasons.” A “Future Direction” from this same meeting was “[m]aintaining primary and disposal-suspended records in electronic form.”²³

In November 2001, after two more years had gone by, Philip Morris changed the e-mail that alerted employees that their electronic records would be deleted shortly. Whereas the old e-mail contained no reference to document preservation, the new e-mail included a reminder of their “print and retain” responsibilities.²⁴ It was not until April 2002 that the company finally stopped its regular e-mail deletions.²⁵

Other more advanced methods were available to Philip Morris than its “print and retain” rule. Some systems allow employees to mark records that need to be preserved and then automatically save these records in a central electronic repository. Others perform key word searches on all electronic records and preserve documents that are identified as relevant to

²¹*Id.* at 269.

²²*Id.* at 274–75.

²³*Id.* at Exhibit 26.

²⁴*Id.* at Exhibit 33.

²⁵July 17 Letter, *supra* note 3.

The Honorable W.J. "Billy" Tauzin
The Honorable James C. Greenwood
April 17, 2003
Page 7

current court orders. Some organizations, such as the White House, preserve all of their electronic records through extensive backup systems.

In communications with the court, Philip Morris has tried to minimize the seriousness of the document destruction. Beginning with its letter in June 2002, Philip Morris indicated that "some" e-mail of "some" employees had been deleted and that it was likely that "some" of the e-mails would have been subject to the court's preservation order.²⁶ When discussing the e-mail destruction and the late production of other documents, Philip Morris stated:

[Philip Morris's Attorney]: So I accept the fact that, you know, we have to address the Philip Morris production issues here, but I want to make sure that we do not lose sight of the context, and that is ultimately there is no deficiencies substantively in discovery in this case that impact the overall proof. . . . The government has had ample discovery, and if it cannot prove its claims —

The Court: I do not think, by the way, that that is necessarily true at all in terms of the e-mail problem. I see that as an insoluble problem. You cannot recreate what has been destroyed.²⁷

Need for Congressional Investigation

These facts raise serious questions that should be examined by the Committee. Important unanswered questions include the following:

- **Approximately how many documents were destroyed and by whom?**

It took Philip Morris six months to inform the Department of Justice of the identity of any of the employees involved in what may be two years of document destruction in violation of a court order. According to the Department of Justice, two months after notifying the court and the Department that e-mails had been deleted, Philip Morris had yet to identify any of the affected employees, even though it was highly likely that some of them had been deposed for the lawsuit.²⁸ So far, Philip Morris has only identified 11 employees

²⁶June 19 Letter, *supra* note 4.

²⁷Transcript of Status Hearing, *United States v. Philip Morris Inc.*, No. 99-CV-2496, 39 (D.D.C. Jan. 17, 2003).

²⁸Letter from Stephen D. Brody and Michelle Gluck, Esqs., Tobacco Litigation Team, U.S. Department of Justice, to Thomas J. Frederick, Esq., Winston & Strawn (Aug. 13, 2002)

who failed to follow the "print and retain" policy. However, it is reasonable to assume that other employees may also have destroyed important documents.

Philip Morris also states that there have been no consequences for the 11 individuals who failed to follow company policy by letting important documents be deleted.²⁹ If the company is serious about complying with court orders, Philip Morris should also explain why this has been the case.

- **What is the status of efforts to recover lost information?**

Although Philip Morris has identified backup tapes of electronic data dating back to October 2001, two years went by during which employees failed to keep documents. As of January 2002, Philip Morris had still failed to inform the Department of Justice whether they were able to recover any data from 54 additional backup tapes that had been found.³⁰

- **Why were better systems not in place?**

The evidence presented above indicates that Philip Morris knew for years that the "print and retain" policy was inadequate to meet its legal obligations. The company has yet to discuss why, despite the existence of better alternatives, it continued to rely on its employees to save documents rather than doing the job itself.

- **What other litigation has been adversely affected?**

Given that the Philip Morris "print and retain" policy has been in effect since 1994, dozens of other lawsuits may have been affected. The company should disclose all of the litigation involved.

- **Why is Philip Morris not more forthcoming with the Department of Justice regarding the deleted documents?**

The Department of Justice has been continually frustrated with the response of Philip Morris to the deletion of important information. A letter in August 2002 to Philip Morris's lawyer from the Department stated:

(hereinafter "August 13 Letter").

²⁹Deposition of Michael T. Wallmeyer, *supra* note 5, at 396–97.

³⁰Transcript of Status Hearing, *supra* note 27, at 32. Philip Morris had mentioned these tapes as early as July 2002. See July 17 Letter, *supra* note 3.

The Honorable W.J. "Billy" Tauzin
The Honorable James C. Greenwood
April 17, 2003
Page 9

As a preliminary matter, we believe that the absence of certain basic information about the loss of this relevant information has been and continues to be an impediment to a full evaluation of this issue by the parties. Specifically, the fact that your recent correspondence omits information responsive to certain [of our] inquiries . . . makes it difficult for the United States to fully evaluate the impact of this matter.³¹

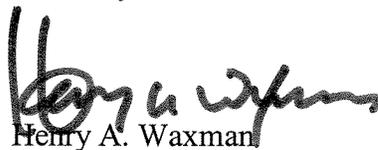
Philip Morris stated that it first became aware of the destruction of records in February 2002. However, a letter was not sent to the court describing the loss until June 19, 2002.³² The Department of Justice was not notified directly of this matter, and the court's notification came less than two weeks before the deadline for fact discovery. Furthermore, a number of the individuals said by Philip Morris to have deleted records had previously given their depositions without disclosing this loss of records. Philip Morris has not yet explained the reasons for these actions.³³

Conclusion

The Energy and Commerce Committee has taken the lead in Congress in investigating document destruction. On January 24, 2002, the Subcommittee on Oversight and Investigations held a hearing entitled: "Destruction of Enron-Related Documents by Andersen Personnel." At this hearing, Subcommittee Chairman Greenwood stated that Congress had a duty to bring "any wrongdoing into the bright light of public scrutiny so that those responsible suffer the consequences."³⁴

The same logic applies to document destruction by Philip Morris. For this reason, I urge a full investigation.

Sincerely,



Henry A. Waxman
Ranking Minority Member

³¹August 13 Letter, *supra* note 28.

³²June 19 Letter, *supra* note 4.

³³August 13 Letter, *supra* note 28.

³⁴House Committee on Energy and Commerce, *supra* note 1, at 1.