



AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To express the sense of the Senate regarding legislation to impose an excise tax on tobacco lawyers's fees that exceed \$20,000 per hour in order to increase funding for equipment for the United States Armed Forces.

IN THE SENATE OF THE UNITED STATES—108th Cong., 2d Sess.

**S. 2400**

To a

**AMENDMENT No. 3191**

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as for  
other

By KYL - CORNYN

To: AMPT. NO. 3151

20  
Page(s)

GPO: 2002 83-247(Mac)

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. KYL (for himself and Mr. CORNYN) to the amendment (No. 3151) proposed by Mr. LAUTENBERG

Viz:

- 1 At the end of the amendment, insert the following:

*PENDING*

1 **SEC. 858. SENSE OF THE SENATE REGARDING EXCISE**  
2 **TAXES ON EXCESS FEE TRANSACTIONS OF**  
3 **CERTAIN ATTORNEYS.**

4 It is the sense of the Senate that Congress should,  
5 as soon as practicable, enact the following legislation:

6 **SEC. \_\_\_. EXCISE TAXES ON EXCESS FEE TRANSACTIONS**  
7 **OF CERTAIN ATTORNEYS.**

8 (a) IMPOSITION OF TAX.—

9 (1) IN GENERAL.—Subchapter D of chapter 42  
10 of the Internal Revenue Code of 1986 (relating to  
11 failure by certain charitable organizations to meet  
12 certain qualification requirements) is amended by  
13 adding at the end the following new section:

14 **“SEC. 4959. TAXES ON EXCESS FEE TRANSACTIONS.**

15 **“(a) INITIAL TAXES.—**

16 **“(1) IN GENERAL.—**There is hereby imposed on  
17 the collecting attorney in each excess fee transaction  
18 a tax equal to 5 percent of the excess fee.

19 **“(2) PAYMENT.—**The tax imposed by para-  
20 graph (1) shall be paid by any collecting attorney re-  
21 ferred to in subsection (f)(1) with respect to such  
22 transaction.

23 **“(b) ADDITIONAL TAX ON THE COLLECTING ATTOR-**  
24 **NEY.—**

25 **“(1) IN GENERAL.—**In any case in which a tax  
26 is imposed by subsection (a) on an excess fee trans-

1       action and the excess fee involved in such trans-  
2       action is not corrected within the taxable period,  
3       there is hereby imposed a tax equal to 200 percent  
4       of the excess fee involved.

5               “(2) PAYMENT.—The tax imposed by this para-  
6       graph shall be paid by any collecting attorney re-  
7       ferred to in subsection (f)(1) with respect to such  
8       transaction.

9               “(c) EXCESS FEE TRANSACTION; EXCESS FEE.—For  
10      purposes of this section—

11               “(1) EXCESS FEE TRANSACTION.—

12                       “(A) IN GENERAL.—The term ‘excess fee  
13       transaction’ means any transaction in which a  
14       fee is provided by an applicable plaintiff (in-  
15       cluding payments resulting from litigation on  
16       behalf of an applicable plaintiff determined on  
17       an hourly or percentage basis, whether such fee  
18       is paid from the applicable plaintiff’s recovery,  
19       pursuant to a separately negotiated agreement,  
20       or in any other manner), directly or indirectly,  
21       to or for the use of any collecting attorney with  
22       respect to such applicable plaintiff if the  
23       amount of the fee provided exceeds the value of  
24       the services received in exchange therefor or  
25       subsection (g)(1) applies.

1           “(B) DETERMINATION OF VALUE.—For  
2 purposes of subparagraph (A), in determining  
3 whether the amount of the fee provided exceeds  
4 the value of the services received in exchange  
5 therefor, the value of the services shall be the  
6 sum of—

7           “(i) the reasonable expenses incurred  
8 by the collecting attorney in the course of  
9 the representation of the applicable plain-  
10 tiff, and

11           “(ii) a reasonable fee based on—

12           “(I) the number of hours of non-  
13 duplicative, professional quality legal  
14 work provided by the collecting attor-  
15 ney of material value to the outcome  
16 of the representation of the applicable  
17 plaintiff, taking into account the fac-  
18 tors described in subparagraphs (B)  
19 and (D) of subsection (h)(2),

20           “(II) reasonable hourly rates for  
21 the individuals performing such work  
22 based on hourly rates charged by  
23 other attorneys for the rendition of  
24 comparable services, including rates  
25 charged by adversary defense counsel

1 in the representation, taking into ac-  
2 count the factors described in sub-  
3 paragraphs (A), (C), (E), and (G) of  
4 subsection (h)(2), and

5 “(III) to the extent such items  
6 are not taken into account in estab-  
7 lishing the reasonable hourly rates  
8 under subclause (II), an appropriate  
9 adjustment rate determined in accord-  
10 ance with subparagraph (C) to com-  
11 pensate the collecting attorney for pe-  
12 riods of substantial risk of non-pay-  
13 ment of fees and for skillful or inno-  
14 vative services which increase the  
15 amount of the applicable plaintiff’s re-  
16 covery.

17 “(iii) FEES IN CERTAIN SETTLE-  
18 MENTS.—For purposes of this subpara-  
19 graph, the value of services for any col-  
20 lecting attorney receiving fees under the  
21 Master Settlement Agreement shall be  
22 deemed to include a reasonable fee that is  
23 based on a reasonable hourly rate (includ-  
24 ing appropriate adjustment rates) of not  
25 less than \$20,000 per hour

1 “(C) ADJUSTMENT RATE.—

2 “(i) IN GENERAL.—For purposes of  
3 this paragraph, an appropriate adjustment  
4 rate is a percentage of the reasonable  
5 hourly rate under subparagraph (B)(ii)(II)  
6 which is added to the amount of such rate  
7 and which is not more than the sum of one  
8 risk percentage and one skill percentage  
9 described in clauses (ii) and (iii), respec-  
10 tively.

11 “(ii) RISK PERCENTAGE.—For pur-  
12 poses of this subparagraph, the term ‘risk  
13 percentage’ means a percentage rate that  
14 is proportional to the collecting attorney’s  
15 risk of nonrecovery of fees and which is—

16 “(I) in the case of a collecting at-  
17 torney who assumed a substantial risk  
18 of nonpayment of fees, not more than  
19 100 percent,

20 “(II) in the case of a collecting  
21 attorney who assumed a substantial  
22 risk of nonpayment of fees and de-  
23 voted more than 8,000 hours of legal  
24 work (as described in subparagraph  
25 (B)(ii)(I)) and more than 2 years to

1 the case before resolution of all  
2 claims, not more than 200 percent, or

3 “(III) in the case of a collecting  
4 attorney who assumed a substantial  
5 risk of nonpayment of fees and de-  
6 voted more than 15,000 hours of legal  
7 work (as described in subparagraph  
8 (B)(ii)(I)) and more than 4 years to  
9 the case before resolution of all  
10 claims, not more than 300 percent.

11 “(iii) SKILL PERCENTAGE.—For pur-  
12 poses of this subparagraph, the term ‘skill  
13 percentage’ means, in the case of a col-  
14 lecting attorney who has demonstrated ex-  
15 ceptionally skillful or innovative legal serv-  
16 ice which generated a recovery for the ap-  
17 plicable plaintiff substantially greater than  
18 the typical recovery in similar cases, a per-  
19 centage rate that is proportional to the in-  
20 crease in the applicable plaintiff’s recovery  
21 and that is not more than 100 percent.

22 “(iv) LIMITATION.—An appropriate  
23 adjustment rate shall not increase the col-  
24 lecting attorney’s fee above an amount that

1 is proportional to the applicable plaintiff's  
2 recovery.

3 “(D) COURT APPROVAL OF FEES.—Fee  
4 payments approved by any court shall be pre-  
5 sumed to not be in excess of the value of the  
6 services received in exchange therefor if the  
7 court approving the fee—

8 “(i) did not approve an adjustment  
9 rate greater than that determined to be  
10 appropriate under subparagraph (C) in a  
11 case where such fee included an adjust-  
12 ment rate, and

13 “(ii) obtained and relied upon a report  
14 of a legal auditing firm with respect to  
15 such fee in accordance with the procedures  
16 in paragraph (12).

17 “(2) EXCESS FEE.—The term ‘excess fee’  
18 means the excess referred to in paragraph (1)(A).

19 “(d) JOINT AND SEVERAL LIABILITY.—For purposes  
20 of this section, if more than 1 person is liable for any tax  
21 imposed by subsection (a), all such persons shall be jointly  
22 and severally liable for such tax.

23 “(e) APPLICABLE PLAINTIFF.—For purposes of this  
24 section the term ‘applicable plaintiff’ means any person

1 represented by a collecting attorney with respect to a claim  
2 described in subsection (f)(1).

3 “(f) OTHER DEFINITIONS AND RULES.—For pur-  
4 poses of this section—

5 “(1) COLLECTING ATTORNEY.—The term ‘col-  
6 lecting attorney’ means any person engaged in the  
7 practice of law who represents—

8 “(A) any governmental entity, including  
9 any State, municipality, or political subdivision  
10 of a State, or any person acting on such enti-  
11 ty’s behalf, including pursuant to Federal or  
12 State Qui Tam statutes, in a claim for  
13 recoupment of payments made or to be made by  
14 such entity to or on behalf of any natural per-  
15 son by reason, directly or indirectly, of a breach  
16 of duty that causes damage to such natural per-  
17 son,

18 “(B) any organization described in para-  
19 graph (3) or (4) of section 501(c) and exempt  
20 from tax under section 501(a), in a claim for  
21 damages based on a breach of duty, whether  
22 civil or criminal, causing damage to such orga-  
23 nization,

24 “(C) any natural person seeking to recover  
25 damages in a claim based on breaches of duty,

1           whether civil or criminal, causing damage to  
2           such natural person, or

3           “(D) any assignee or other holder of  
4           claims described in subparagraph (A), (B), or  
5           (C),

6           when 1 or more of such claims, whether or not  
7           joined in 1 action, involve the same or a coordinated  
8           group of plaintiff’s attorneys or similarly situated  
9           defendants, arise out of the same transaction or set  
10          of facts or involve substantially similar liability  
11          issues, and result in settlements or judgments aggregating at least \$100,000,000.

13          “(2) TAXABLE PERIOD.—The term ‘taxable period’ means, with respect to any excess fee transaction, the period beginning with the date on which the transaction occurs and ending 90 days after the earliest of—

18           “(A) the date of the mailing of a notice of deficiency under section 6212 with respect to the tax imposed by subsection (a), or

21           “(B) the date on which the tax imposed by subsection (a) is assessed.

23          “(3) MASTER SETTLEMENT AGREEMENT.—The term ‘Master Settlement Agreement’ means that certain Master Settlement Agreement of November 23,

1 1998, and other, concluded Settlement Agreements  
2 based on State health care expenditures pursuant to  
3 title XIX of the Social Security Act (42 U.S.C. 1396  
4 et seq.), including lawsuits involving the States of  
5 Florida, Minnesota, Mississippi, and Texas.

6 “(4) CORRECTION.—

7 “(A) GENERAL RULE.—Any excess fee  
8 transaction is corrected by undoing the excess  
9 fee to the extent possible and taking any addi-  
10 tional measures necessary to place the applica-  
11 ble plaintiff in a financial position not worse  
12 than that in which such plaintiff would be if the  
13 collecting attorney were dealing under the high-  
14 est fiduciary standards.

15 “(B) PAYMENT OF EXCESS FEES.—

16 “(i) IN GENERAL.—Except as pro-  
17 vided in clause (ii), a collecting attorney  
18 corrects an excess fee transaction by pay-  
19 ing any excess fees plus interest to the ap-  
20 plicable plaintiff.

21 “(ii) CERTAIN SETTLEMENTS.—In the  
22 case of excess fees arising from or related  
23 to the Master Settlement Agreement, the  
24 collecting attorney corrects an excess fee

1 transaction by paying any excess fees plus  
2 interest to the Secretary of the Treasury.

3 “(C) NO WAIVER OF FEE.—No collecting  
4 attorney may avoid imposition of any tax im-  
5 posed by this section by transferring any por-  
6 tion of the excess fee or refusing to accept any  
7 portion of the excess fee.

8 “(5) LIMITED REASONABLE CAUSE.—For pur-  
9 poses of section 4962(a), an excess fee transaction  
10 shall not be treated as an event which was due to  
11 reasonable cause if the amount of the fee provided  
12 would exceed the value of the services received in ex-  
13 change therefor determined with the maximum ad-  
14 justment rate allowed under subsection (e)(1)(C).

15 “(g) DISCLOSURE REQUIREMENTS.—

16 “(1) TREATMENT AS EXCESS FEE.—Any fee  
17 provided after the date of the enactment of this sub-  
18 section by an applicable plaintiff (including pay-  
19 ments resulting from litigation on behalf of an appli-  
20 cable plaintiff determined on an hourly or percent-  
21 age basis, whether such fee is paid from the applica-  
22 ble plaintiff’s recovery, pursuant to a separately ne-  
23 gotiated agreement, or in any other manner), di-  
24 rectly or indirectly, to or for the use of any col-  
25 lecting attorney with respect to such applicable

1 plaintiff shall be deemed to be an excess fee provided  
2 in an excess fee transaction unless the disclosure re-  
3 quirements described in paragraph (2) are met.

4 “(2) CONTENTS OF STATEMENT.—The disclo-  
5 sure requirements of this paragraph are met for any  
6 taxable year in which a collecting attorney receives  
7 any fees with respect to a claim described in sub-  
8 section (f)(1), if such collecting attorney—

9 “(A) includes in the return of tax for such  
10 taxable year a statement including the informa-  
11 tion described in subsection (c)(1) with respect  
12 to such claim, and

13 “(B) provides a statement including the in-  
14 formation described in subsection (c)(1) to the  
15 applicable plaintiff prior to the deadline (includ-  
16 ing extensions) for filing such return.

17 “(h) LEGAL AUDITING FIRM.—

18 “(1) IN GENERAL.—In any case before a Fed-  
19 eral district court or a State court in which the  
20 court approves fees paid to a collecting attorney, the  
21 court shall seek bids from legal auditing firms with  
22 a specialty in reviewing attorney billings and select  
23 1 such legal auditing firm to review the billing  
24 records submitted by the collecting attorney, under  
25 the same standards the firm would use if it were

1 hired by a private party to review legal bills sub-  
2 mitted to the party, for the reasonableness of such  
3 attorney's billing patterns and practices. The court  
4 shall require the collecting attorney to submit billing  
5 records, cost records, and any other information  
6 sought by such firm in its review.

7 “(2) REVIEW BY LEGAL AUDITING FIRM.—In  
8 reviewing the billing records and work performed by  
9 the collecting attorney, the legal auditing firm shall  
10 address all relevant matters, including—

11 “(A) the hourly rates of the collecting at-  
12 torney compared with the prevailing market  
13 rates for the services rendered by the collecting  
14 attorney,

15 “(B) the number of hours worked by the  
16 collecting attorney on the case compared with  
17 other cases that the collecting attorney worked  
18 on during the same period,

19 “(C) whether the collecting attorney per-  
20 formed tasks that could have been performed by  
21 attorneys with lower billing rates,

22 “(D) whether the collecting attorney used  
23 appropriate billing methodology, including keep-  
24 ing contemporaneous time records and using  
25 appropriate billing time increments,

1           “(E) whether particular tasks were staffed  
2           appropriately,

3           “(F) whether the costs and expenses sub-  
4           mitted by the collecting attorney were reason-  
5           able,

6           “(G) whether the collecting attorney exer-  
7           cised billing judgment, and

8           “(H) any other matters normally ad-  
9           dressed by the legal auditing firm when review-  
10          ing attorney billings for private clients.

11          “(3) FILING OF REPORT; RESPONSE; BURDEN  
12          OF PROOF.—The court shall set a date for the filing  
13          of the report of the legal auditing firm, and allow  
14          the collecting attorney or any applicable plaintiff to  
15          respond to the report within a reasonable time pe-  
16          riod. The report shall be presumed correct unless re-  
17          butted by the collecting attorney or any applicable  
18          plaintiff by clear and convincing evidence.

19          “(4) FEE FOR LEGAL AUDITING FIRM.—The fee  
20          for the report of the legal auditing firm shall be paid  
21          from the collecting attorney’s fee award, the applica-  
22          ble plaintiff’s recovery, or both in a manner deter-  
23          mined by the court.

24          “(i) REGULATIONS.—The Secretary shall prescribe  
25          such regulations as may be necessary or appropriate to

1 carry out this section, including regulations to prevent  
2 avoidance of the purposes of this section and regulations  
3 requiring recordkeeping and information reporting.”.

4 (2) CONFORMING AND CLERICAL AMEND-  
5 MENTS.—

6 (A) Subsections (a), (b), and (c) of section  
7 4963 of the Internal Revenue Code of 1986 are  
8 each amended by inserting “4959,” after  
9 “4958,”.

10 (B) Subsection (e) of section 6213 of such  
11 Code is amended by inserting “4959 (relating  
12 to excess fee transactions),” before “4971”.

13 (C) Paragraphs (2) and (3) of section  
14 7422(g) of such Code are each amended by in-  
15 serting “4959,” after “4958,”.

16 (D) The heading for subchapter D of chap-  
17 ter 42 of such Code is amended to read as fol-  
18 lows:

19 **“Subchapter D—Failure by Certain Chari-  
20 table Organizations and Persons to Meet  
21 Certain Qualification Requirements and  
22 Fiduciary Standards.”.**

23 (E) The table of subchapters for chapter  
24 42 of such Code is amended by striking the

1 item relating to subchapter D and inserting the  
2 following:

“SUBCHAPTER D. Failure by certain charitable organizations and  
persons to meet certain qualification requirements  
and fiduciary standards.”.

3 (F) The table of sections for subchapter D  
4 of chapter 42 of such Code is amended by add-  
5 ing at the end the following new item:

“Sec. 4959. Taxes on excess fee transactions.”.

6 (3) **EFFECTIVE DATE.**—The amendments made  
7 by this subsection shall apply to excess fees paid on  
8 or after the date of the enactment of this Act.

9 (b) **DECLARATORY JUDGMENTS RELATING TO EXCISE**  
10 **TAXES ON EXCISE FEE TRANSACTIONS OF CERTAIN AT-**  
11 **TORNEYS.**—

12 (1) **IN GENERAL.**—Subchapter B of chapter 76  
13 of the Internal Revenue Code of 1986 (relating to  
14 judicial proceedings) is amended by redesignating  
15 section 7437 as section 7438 and by inserting after  
16 section 7436 the following new section:

17 **“SEC. 7437. DECLARATORY JUDGMENTS RELATING TO TAX**  
18 **ON EXCESS FEE TRANSACTIONS.**

19 “(a) **IN GENERAL.**—In a case of actual controversy  
20 involving—

21 “(1) a determination by the Secretary or the  
22 collecting attorney with respect to the imposition of

1 the excise tax on excess fee transactions on such col-  
2 lecting attorney under section 4959, or

3 “(2) a failure by the Secretary or the collecting  
4 attorney to make such a determination,

5 upon the filing of an appropriate pleading by an applicable  
6 plaintiff, the Tax Court may make a declaration with re-  
7 spect to such determination or failure. Any such declara-  
8 tion shall have the force and effect of a decision of the  
9 Tax Court and shall be reviewable as such.

10 “(b) DEFERENTIAL REVIEW.—If a collecting attor-  
11 ney’s fee has been approved by a court in accordance with  
12 section 4959(c)(1)(D) or by the Secretary pursuant to sec-  
13 tion 4959, the Tax Court shall review the fee only for an  
14 abuse of discretion.

15 “(c) LEGAL AUDITING FIRM.—In any petition for a  
16 declaration referred to in subsection (a):

17 “(1) NO PREVIOUS REPORT.—If a report by a  
18 legal auditing firm that meets the requirements of  
19 section 4959(h) has not been previously produced  
20 and relied on by another court, the Tax Court shall  
21 hire such a legal auditing firm and rely on its report  
22 pursuant to the procedures in section 4959(h).

23 “(2) SECOND REPORT.—

24 “(A) IN GENERAL.—If a report by a legal  
25 auditing firm has been approved by a court in

1           accordance with section 4959, the Tax Court  
2           shall hire a second legal auditing firm upon the  
3           request of the petitioner.

4           “(B) FEE FOR REPORT.—The Tax Court  
5           may direct the petitioner to pay the fee for any  
6           report of a legal auditing firm provided pursu-  
7           ant to subparagraph (A).

8           “(d) TIME FOR BRINGING ACTION.—No proceeding  
9           may be initiated under this section by any person until  
10          90 days after such person first notifies the Secretary of  
11          the excess fee transaction with respect to which the pro-  
12          ceeding relates.

13          “(e) DEFINITIONS.—For purposes of this section,  
14          any term used in this section and also in section 4959  
15          shall have the meaning given such term by section 4959.”.

16          (2) CLERICAL AMENDMENT.—The table of sec-  
17          tions for subchapter B of chapter 76 of the Internal  
18          Revenue Code of 1986 is amended by striking the  
19          item relating to section 7437 and by inserting the  
20          following new items:

“Sec. 7437. Declaratory judgments relating to tax on excess fee transactions.  
“Sec. 7438. Cross references.”.

21          (3) EFFECTIVE DATE.—The amendments made  
22          by this subsection shall apply to actions filed on or  
23          after the date of the enactment of this Act.

1           (e) USE OF CERTAIN FEES.—Any fees collected by  
2 the Secretary of the Treasury pursuant to section  
3 4959(f)(4)(B)(ii) of the Internal Revenue Code of 1986  
4 (as added by subsection (a)), shall be made available to  
5 the Secretary of Defense, as provided by appropriation  
6 Acts, for making expenditures to address the readiness,  
7 force protection, and safety needs arising out of the ongo-  
8 ing global war on terrorism. Such expenditures shall in-  
9 clude additional—

10           (1) up-armored High Mobility Multipurpose  
11 Wheeled Vehicles;

12           (2) add-on ballistic protection for medium and  
13 heavy wheeled vehicles;

14           (3) Interceptor Body Armor, including add-on  
15 protection for the shoulder and side body areas;

16           (4) unmanned aerial vehicles;

17           (5) ammunition and selected items of high pri-  
18 ority (such as vehicles, night vision devices, sensors,  
19 and Javelin missiles); and

20           (6) replacement of equipment lost in combat.