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COMMENTS OF THE TOBACCO INSTITUTE ON
THE FTC STAFF REPORT ON THE CIGARETTE
ADVERTISING INVESTIGATION

T036950

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APPENDIX

The Tobacco Institute, Smoking and Health 1964 - 1979; The Continuing Controversy (1979)

This Appendix is not attached but is available upon request from The Tobacco Institute.

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INTRODUCTION

The FTC Staff Report on the Cigarette Advertising Investigation ("Report") culminates a five-year investigation ostensibly directed to the purpose and effect of cigarette advertising. Yet despite over 300 pages of text, with numerous footnotes and appendices, the Report does nothing more than confirm what has long been apparent: the FTC Staff does not approve of cigarette smoking and will find cigarette advertising objectionable as long as anyone continues to smoke.

The essence of the Report is the claim that, despite the Surgeon General's warning, which has appeared in its present form on every cigarette package since 1970 and in every cigarette advertisement since 1972, cigarette advertising is deceptive and misleading because it does not single out certain claimed health hazards that the FTC Staff attributes to smoking. Lack of such specificity renders the warning statement ineffective, the Staff claims. The Report utterly fails, however, to support this conclusion. The truth is that the smoking and health controversy is familiar to virtually everyone; the warning statement, mandated by Congress to inform the public about this issue, has fulfilled its intended function.

The Tobacco Institute submits these Comments on behalf of the major manufacturers of cigarettes¹ to point out the most

¹ The American Tobacco Company, A Division of American Brands, Inc.; Brown & Williamson Tobacco Corporation; Liggett & Myers Tobacco Company, Inc.; Lorillard, A Division of Loew's Theatres, Inc.; Philip Morris Incorporated; and R.J. Reynolds Tobacco Company.

important deficiencies of the Report. Supporting materials for each of the points summarized below are included in the tabbed sections of this submission. Not the merits of the Report but rather its length and distortions dictate the length of the tabbed sections. Although the Report purports to analyze public awareness of smoking and health issues, the Staff's primary concern is with public behavior. The Staff's position is that the warning statement is "ineffective" not because too few people are aware of the message conveyed but because despite the warning statement more people continue to smoke than the Staff deems desirable. That position represents an inappropriate regulatory attitude.

The warning statement that the Staff criticizes as ineffective is included in all cigarette advertising precisely because the FTC chose in 1972 to resolve its charges that cigarette advertising was deceptive by entering into negotiated Consent Orders that provide for the inclusion of the warning statement. In July 1981, two months after the Staff issued its Report, the Commission entered into an overall settlement of civil penalty actions that it brought against the major cigarette manufacturers for alleged violations of the 1972 Consent Orders. As part of the settlement, pursuant to which the cigarette manufacturers agreed to place the current warning statement for the first time on vending machines and elsewhere, the Commission agreed to entry of Consent Judgments which

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provide that the original Consent Orders respecting the warning statement "shall remain in full force and effect."

These Consent Judgments foreclose the Staff's recommendations for a change in the warning statement. The law precludes the Commission from unilaterally repudiating consent decrees. Moreover, public policy strongly favors the resolution of disputes by negotiated settlements such as that already entered into between the Commission and the companies. This policy would be frustrated if, within a few months of entering into Consent Judgments reaffirming the 1972 Consent Orders, the Commission repudiated the current warning statement and sought to impose a totally different set of requirements on the cigarette industry. In fact, the Commission confirmed the existing regulatory approach after the Staff had a full opportunity to challenge that approach. The industry is entitled to rely on the Commission's approval of the 1981 Consent Judgments.

SUMMARY

1. The Staff's Analysis of Public Awareness of the Alleged Health Hazards of Smoking (Chaps. III and IV(II)) Is Fundamentally Defective.

The central thesis of the Report is the Staff's insistence that the current warning statement in cigarette advertisements is "ineffective" because it does not adequately inform the public of claimed "new findings" and specific charges about the asserted relationship between cigarette

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smoking and health. The Staff's attempt to demonstrate this thesis by reviewing various consumer surveys and studies simply shows that some people do not see eye to eye with the Staff about the alleged hazards that the Staff attributes to cigarette smoking.

The Report treats the warning statement on cigarette packages and in cigarette advertising as though it were the only "sufficient" means to convey to the public assertions about the health hazards of cigarette smoking. In fact, there is constant reiteration in many different media and arenas of the anti-smoking view of the smoking and health controversy, and extended discussion of this view frequently appears in the print and electronic media and repeatedly is stimulated by a variety of groups, both governmental and private. But aside from this problem, the Report's conclusions about public awareness are flawed in at least two critical respects.

The Staff has ignored the fact that the present level of public awareness of the smoking and health controversy is extraordinarily high. Although the Staff admits that "most people are generally aware" of the claim that smoking is hazardous, Report at 3-5, that admission is, to say the least, an understatement. The fact is that more people are aware that "the Surgeon General has determined that cigarette smoking is dangerous to your health" than are aware of virtually any other public issue. This point is amply illustrated by the

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very studies cited and relied upon in the Report.¹ In the teeth of this evidence, the Staff asserts that significant numbers of people are "unaware." Report at 17. The Report's unstated premise that 100 percent of the public must agree with all of the contentions in the Surgeon General's reports -- contentions that the Staff has reduced to 57 pages of technical statistical claims -- is untenable.

Certainly the Surgeon General does not subscribe to any such premise. In the 1979 Report on Smoking and Health, for example, the Surgeon General emphasized the "notable changes" not only in public awareness but in public behavior, and expressed doubt that a higher level of awareness could have any effect on smoking behavior. 1979 Report at 17-8, 17-9, 19-9.

The Staff confuses the question of what the public believes about smoking and health with what the public is aware of about the subject. This confusion, whether deliberate or not, is the inevitable result of the Staff's premise that the claimed causal relationship between smoking and a variety of health problems has been demonstrated as indisputable fact. Anyone who does not believe the claims that the Staff characterizes as "facts" is deemed by the Staff to be unaware of these "facts." But people who respond with answers other than

¹ These studies and the Staff's misuse of the statistics they present are discussed in detail in Tab 1 to these Comments.

those approved by the Staff need not be "unaware" of the Staff's claims so much as simply not believe them. Indeed, the studies cited by the Staff demonstrate this to be the case.

The studies discussed in the Report examined beliefs. The Staff consistently misuses the findings of these studies to support its conclusions about awareness. One example should suffice:

"According to the Gallup Opinion Index, June, 1978, 19% of the population do not believe that smoking causes lung cancer Among all smokers, 28% did not believe smoking caused lung cancer while among heavier smokers, nearly one-third -- 31% -- did not believe or know about the link. . . . Projected nationwide, these data suggest that tens of millions of Americans, both smokers and non-smokers, do not know that cigarette smoking causes lung cancer." Report at 3-19. (Emphasis supplied, footnotes omitted).

According to the Staff, these assertions support the claim that "people remain unaware of the cancer risk." Report at 3-17. Manifestly, however, the fact that people do not believe the truth of a claim has nothing to do with whether they are aware of the claim, and the Staff's assumption that it does is a fundamental flaw in the Report. With this fundamental flaw exposed, the Report's basis that the public is "unaware" collapses. The Staff's inappropriate aim to achieve public conformity to official belief becomes unmistakable.

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2. The "Facts" That the Staff Claims Have Been Discovered About the Alleged Health Hazards of Smoking (Chap. I) Have Not Been Established as Facts.

The Staff's "summary" of the smoking and health controversy makes it clear that any evidence contrary to the Staff's views has been rejected. The Report simply parrots several one-sided reports of the Surgeon General and ignores many gaps in knowledge that exist about smoking and health. The Staff review makes no mention of fundamental concessions made by the Surgeon General in those reports.¹

The fact is that no data reviewed in the first Surgeon General's Report in 1964 and no data developed since that time establish that smoking causes any disease. The Staff's claim to the contrary is simply wrong. The Staff uncritically accepts statistical associations as proving cause and effect. The Staff does not mention the significant fact that no one has been able to produce squamous cell lung cancer in animals by inhalation of tobacco smoke. It does not consider the possibility that the decline in heart disease deaths in the

¹ The Surgeon General has admitted, for example, that: "Experiments on the effects of nicotine or carbon monoxide on experimental atherogenesis in animals have produced conflicting results and are inconclusive" (1979 Report at 4-19); "[T]here are no published studies that acceptably show in an animal model that the development of emphysema is induced by cigarette smoking" (1981 Report at 142); "One of the greatest limitations of much epidemiological and behavioral research on human smoking behavior is that the subjects are self-selected. Consequently, the research is inherently correlational rather than experimental. Correlational research can describe associations between variables, but it is often confounded by unmeasured variables." (1981 Report at 178).

United States confounds the claim that smoking is a principal cause of heart disease. It overlooks the effect that an increasingly stressful environment can have on the health of women. Indeed, it omits or ignores everything that runs counter to the long-standing official FTC position on smoking and health.¹

The selective nature of the Staff's "summary" on smoking and health is most apparent in the Report's attack on certain positions set forth in a 1979 review of the smoking and health controversy by The Tobacco Institute, which presented the conclusions and findings of a number of eminent scientists with whose views the Staff obviously disagrees.² A comparison of the 1979 Tobacco Institute review with the Staff "summary" readily demonstrates that (1) there are many controversial scientific questions about smoking and health; (2) the Report has not accurately summarized the scientific findings; and (3) there is much available evidence that was not considered by the Staff or, if considered, was rejected out of hand.

In short, it is the Staff's position -- and not scientific fact -- on which the Staff has chosen to base its

¹ See Tab 2 to these Comments for a further discussion of the Staff's treatment of smoking and health.

² A copy of The Tobacco Institute review, Smoking and Health 1964-1979; The Continuing Controversy (1979), is attached as an Appendix to these Comments.

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examination of public awareness of the smoking and health controversy. Many experts do not claim to know that smoking causes or contributes to the various conditions attributed to it in the Report. The Staff, therefore, cannot reasonably claim that the warning statement is "ineffective" because some of the public, like many experts, do not claim to know what causes or contributes to the various conditions that the Staff has associated with smoking.

3. The Staff's Discussion of Cigarette Advertising (Chap. II) Misstates the Purpose and Effect of Such Advertising.

The Report merely repeats longstanding Staff opposition to all cigarette advertising. Despite the fact that the Report culminates a five-year investigation ostensibly directed to the purpose and effect of cigarette advertising, the Staff has found absolutely nothing to say in 1981 about cigarette advertising that was not said in 1970 and before. Indeed, the Staff states that "there has been little change in the character of cigarette advertising" since 1964 (Report at 2-8), and then attacks recent advertising in terms identical to those used in virtually every annual FTC report issued since 1964.¹

Cigarette advertising is designed to sell a particular brand of cigarettes to smokers, not to convince nonsmokers to take up smoking. The Staff's brief and superficial discussion of

¹ See Tab 3 for additional discussion of the Staff's views on cigarette advertising.

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cigarette advertising proceeds on the unsupported and erroneous assumption that such advertising is designed to persuade nonsmokers to smoke. Even the 1979 Surgeon General's Report, so often otherwise cited by the Staff, does not support this assumption:

"As the cigarette industry has asserted, the major action of cigarette advertising now seems to be to shift brand preferences, to alter market shares for a particular brand." 1979 Report at 18-23.

The Staff's assumption is particularly surprising in light of the fact that the Commission itself has long recognized the brand-promotional purpose of cigarette advertising. In Congressional testimony in 1969, for example, then FTC Chairman Dixon acknowledged that cigarette advertising was "primarily" brand advertising. Hearings on Cigarette Labeling and Advertising Before the House Comm. on Commerce, 91st Cong., 1st Sess., pt. 2 at 495 (1969).

Cigarette advertising has been shaped by circumstances. Removal of cigarette advertising from the broadcast media resulted in its confinement to the print and outdoor media. At the same time, cigarettes were changing, and brands were proliferating in an unprecedented manner. The cigarette market is in the midst of experiencing, and adapting to, a major shift in consumer preference in favor of lower "tar" cigarettes, and every cigarette manufacturer, to remain competitive, must be represented in that expanding segment of the market. Low "tar" brands accounted for nearly 50 percent

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of all cigarette sales in 1980, compared to 2 percent just six years earlier. Today there are more than 180 different brands or brand styles competing for market shares. This is a market development that the FTC itself has long sought.

The intense inter-brand competition that this fundamental market change has created is probably unparalleled in any other industry. As a practical matter, therefore, cigarette manufacturers must aim their advertising at the realistic and limited objective of switching the brand preference of existing smokers.

Cigarette advertising has not been shown to cause nonsmokers to take up smoking. The Staff has cited no evidence that advertising is an important influence in causing people to start smoking. To the contrary, government sources estimate that there are 20 to 30 million fewer smokers in the country today than there would have been had the pre-1964 trend continued. See 1979 Surgeon General's Report, Preface at vii. A 1981 Gallup Poll survey reported that the percentage of the population that smokes is the lowest recorded in 37 years. There is no support in such facts for the Staff's theories about the purpose and effect of cigarette advertising.

4. The Staff's Legal Analysis (Chap. IV)
Is Incomplete and Incorrect.

In claiming that the FTC has the legal authority to take the steps against cigarette advertising recommended in the Report, the Staff disregards previous actions by Congress and the Commission itself that preclude imposition of the

"remedies" advocated in the Report, and misstates and misapplies the law applicable to deceptive and misleading advertising.¹

Congressional action and policy preclude the FTC from adopting any of the proposals contained in the Report. Since the original Surgeon General's Report was issued in 1964, Congress has taken a preemptive role in regulating the warning statement. In the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331, Congress mandated a warning statement to inform the public with respect to the alleged health consequences of smoking. When Congress determined that the original warning statement required by the 1965 Act should be changed, it amended the Act in 1970. The Act as amended thus represents a Congressional determination that the present warning statement is adequate to inform the public about the Surgeon General's views respecting the asserted relationship between smoking and health. The Act also represents a Congressional determination that there should not be conflicting approaches to regulation of advertising with respect to any such claimed relationship and that there should be a comprehensive uniform policy, legislatively formulated and articulated. Despite annual overtures by the FTC since 1970, Congress has shown no dissatisfaction with the present warning statement, either in packaging or in advertising. For the Commission unilaterally to seek any change in the warning

¹ See Tab 4 for a complete analysis of the Staff's discussion of the legal support for its proposals.

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statement -- whether through adjudication or rulemaking -- would violate the clear policy of Congress.¹

The Staff's proposals are contrary to and precluded by recent action taken by the Commission itself with respect to the warning statement. As noted earlier, in July of this year the Commission entered into Consent Judgments with the major cigarette manufacturers which embodied the continued use of the current warning statement in cigarette advertisements. Having just months ago expressly reaffirmed that warning statement, it would be legally impermissible (as well as contrary to sound policy and common sense) for the Commission to repudiate its agreement and impose new warning statements or other requirements on the cigarette manufacturers. The Supreme Court long ago established that a consent decree can be changed only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions." United States v. Swift & Co., 286 U.S. 106, 119 (1932) (emphasis supplied). All of the "new" information upon which the Staff's proposed "remedies" purportedly are based was long since known to the FTC at the time it chose to reaffirm the existing warning statement. It is thus clear that the Report could not provide even a minimally adequate basis for satisfying the Swift standard.

¹ The Commission itself recognizes this point. In the Federal Register notice requesting comment on the Report, the Commission conceded that "because of the nature of the issues posed by such a system, rotational warning proposals are particularly appropriate for Congressional consideration." 46 F.R. 30701 (June 10, 1981).

There is no legal support for the Staff's proposition that cigarette advertisements are deceptive within the meaning of Section 5 of the FTC Act. The Staff argument that cigarette advertising is deceptive within the meaning of Section 5 of the FTC Act is based on the premises that consumers are unaware of specifics of the alleged health hazards of smoking and that cigarette manufacturers have a legal duty to inform consumers about those allegations. As we demonstrate in these Comments, however, consumers clearly are aware of specifics of the smoking and health controversy. Moreover, deception under Section 5 arises only when an advertisement misleads consumers about the effects of the product advertised. Every cigarette advertisement carries the Congressionally mandated warning statement, unlike advertisements for other consumer products such as meat, eggs, alcoholic beverages, hair dryers, and cosmetics that also have been claimed by various government agencies to contribute to various health hazards. In view of this affirmative statement, there is no legal basis for compelling cigarette manufacturers to provide in advertising the FTC Staff's views on smoking and health.

The Staff also misstates the law when it implies that cigarette advertising is deceptive because consumers allegedly do not "spontaneously" and "consciously" recall the warning statement at the time they make purchase decisions. Report at 4-9. We are aware of no case, and the Report cites none, that holds an advertiser responsible for the failure of consumers to retain the message in an advertisement. The

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Consent Orders entered into in 1972 between the FTC and the six major cigarette companies require only disclosure of the warning statement in advertising; no provision of these Orders relates in any way to consumer recall. As already noted, moreover, even the Staff concedes that there is almost universal public awareness of the substance of the Congressionally mandated warning statement.

5. The Staff's Proposed "Remedies" (Chap. V) Are Ill-Considered and Inconsistent With the First Amendment.

The Report concludes by urging a variety of "remedies" for the "deception" identified by the Staff that are completely beyond the FTC's authority. In the course of reaching these conclusions, the Staff inaccurately describes past industry action with respect to advertising. The Staff also fails to demonstrate that its proposal to change the size, shape, and content of the warning statement would lead to any increase in the present extraordinarily high level of public awareness. Moreover, the Staff's proposed "remedies" would violate the First Amendment protection for commercial speech.¹

The Surgeon General's warning has appeared with exact uniformity in its present form and wording since 1970. It is, quite literally, an American institution, familiar to all. The deletion of the reference to the Surgeon General, as the Staff recommends, would alter the basic character of the warning statement, with unpredictable effect.

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¹ See Tab 5 for further discussion of the Staff's proposed remedies.

The Report reveals that the Staff has given no thought to the potential consequences of its proposal. Neither has the Staff made any effort to determine whether the warnings it is now proposing are likely to be more "effective" than the warning statement that the Staff now finds to be deficient. Accordingly, there is no reason to assume that the Staff's recommended "remedies" will serve any purpose.

To the contrary, it is apparent that the Staff's proposed "remedies" are merely another installment in its long-standing campaign to discourage, if not prohibit, people from smoking. Since 1964, the FTC periodically has attempted to impose restrictions on cigarette advertising and packaging. Congress has twice, in 1965 and 1970, moved to rein in the agency, preempting the FTC's claimed power in the matter of agency-proposed warnings.

Yet, today, the FTC Staff's basic measure of the "effectiveness" of the current warning statement and the "deceptiveness" of cigarette advertising remains whether people are prompted to stop smoking.

The abuse of regulatory power inherent in the Staff's objective of altering consumer behavior is a fruitless exercise as well. Professor William Wilkie, in his June 1980 report to the FTC on affirmative disclosure orders,¹ analyzed the range

¹ Wilkie, Affirmative Disclosure: A Survey and Evaluation of FTC Orders Issued From 1970-77 (1980). The Report omits any mention of this study.

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of potential objectives underlying the cigarette warning statement, from changing consumer awareness about smoking and health to changing actual smoking behavior, and concluded that examination of the objectives involving changes in personalized belief and behavior "suggests that it will be very difficult for any disclosure to achieve these sorts of effects in the real world." Wilkie at 58.

Similarly, the 1980 Chilton Study,¹ commissioned by the Staff and cited frequently in the Report, found unequivocally that "[f]actual knowledge about the health consequences of smoking" is not related either to current smoking behavior or intentions to smoke in the future. Chilton Study at 22-3. Other studies relied upon by the Staff confirm this conclusion.² Indeed, recent studies reveal that a substantial proportion of health professionals, who obviously are aware of the detailed information that the Staff wants to disseminate to the entire population, continues to smoke cigarettes.³

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¹ Chilton Research Services, A Survey of Adolescent and Adult Attitudes, Values, Behavior, Intentions and Knowledge Related to Cigarette Smoking (1980).

² The Burke Focus Group Study, for example, reports "almost complete agreement" among the participants that people who smoke do so despite, not in ignorance of, the warning statement. Burke Marketing Research, Exploratory Print Focus Groups, Analysis at 3-4 (1980).

³ Stellman, Women's Occupations, Smoking, and Cancer and Other Diseases, 31(1) CA-A Cancer Journal for Clinicians 29, 34 (1981) (reporting that almost one-third of women in the health professions smoke); Dicken, Sex Roles, Smoking and Smoking Cessation, 19(3) J. Health and Soc. Behav. 324, 330 (1978) (21 percent of male physicians and nurses and 39 percent of female physicians and nurses smoke).

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In short, given the fact that virtually everyone is aware that smoking is alleged to be hazardous to health, and given the fact that more detailed awareness about smoking and health has no demonstrable effect on smoking behavior, the Staff's effort to alter consumer behavior by the course of action proposed in the Report is not only improper but pointless.

The Staff's proposed "remedies" are inconsistent with the First Amendment. The Supreme Court has decisively rejected "the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech," holding that commercial speech may be regulated only if the regulation directly advances a substantial state interest and is no more extensive than is necessary to serve the state interest. E.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 562, 566 (1980). The Court stressed that any remedy affecting commercial speech "must be designed carefully to achieve the State's goal"; "may not be sustained if it provides only ineffective or remote support for the government's purpose"; and may not be "excessive." Id. at 564. The Staff's proposed remedies cannot meet this test.

CONCLUSION

The Report's recommendations and conclusions should be rejected by the Federal Trade Commission. Moreover, nothing in the Report warrants action by Congress or by any other agency of the federal government.

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I. PUBLIC AWARENESS OF THE SMOKING AND HEALTH CONTROVERSY

A. The Public Is Highly Aware of the Claims About the Asserted Health Hazards of Cigarette Smoking.

The Staff necessarily concedes that "most people are generally aware" of the claim that smoking is hazardous. Report at 3-5. That concession, however, minimizes and understates both how widespread and how specific that awareness is. The 1978 Roper Study for The Tobacco Institute, cited in the Report, concludes that "the belief that smoking is hazardous to health is now almost totally accepted by Americans." 1978 Roper Study at 47. Similarly, the 1978 Gallup Opinion Index cited in the Report indicates that 90 percent of the respondents believe that smoking is hazardous to health.¹

This widespread belief goes well beyond mere generalities. Nearly 2 out of 3 people believe that any amount of smoking is harmful, and half of the population believes that smoking makes a great deal of difference in life span. 1978 Roper Study Q16, 12. Almost 75 percent of the respondents in the 1980 Roper Study conducted for the FTC believe that smoking greatly increases the risk of heart attack. 1980 Roper Study Q30. An equivalent proportion of the population believes the

¹ Indeed, the original warning phrase, ". . . may be hazardous to your health," has passed into the language and is heard daily in one context or another. For example, a recent New York Times article began: "That stereo set blasting from the next apartment and all those other minor irritants in life may be hazardous to your health." New York Times, July 1, 1981 at A19.

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claim that "a 30 year old person reduces his life expectancy if he smokes at least one pack a day." One-third of these people say that the reduction in life is six or more years, some believing that it is over ten years. 1980 Roper Study Q30, 31.

A majority of the public believes the claim that "[a] 40 year old smoker has a greater chance of dying within the next year than a 40 year old non-smoker." 1980 Roper Study Q30. Well over 80 percent either "think" or "know" that smokers are "many more times as likely to develop lung cancer" as nonsmokers. Ibid. The 1980 Chilton Study conducted for the FTC found that more than 90 percent of the public believes that heart disease has been found to be associated with cigarette smoking. 1980 Chilton Study Q42(e). The Chilton Study also found that almost 90 percent of the respondents believe that smoking during pregnancy can have an effect on the smoker's baby, and almost three quarters believe that if a woman smokes and uses birth control pills, she increases her chance of having a heart attack. 1980 Chilton Study Q39, 53.

As discussed below (pp. 26-29), these high percentages represent people who believe the various claims about smoking and health; the percentage of the public aware of such claims is necessarily even higher, and outstrips public awareness of virtually any other issue. Consider, for example, the following responses to various national polls: (1) Only 24 percent of the population know what the First Amendment is or

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what it deals with; (2) one quarter of the public have never heard or read about the debate as to whether the Concorde should be permitted to land in the United States; (3) one third of the public do not know whether the federal budget is balanced; (4) 16 percent also do not know whether enough oil is produced in this country to meet present energy needs; and (5) 8 percent of the public are not even sure whether they have ever taken itemized deductions on their federal income tax returns.¹

These responses to major, widely discussed issues (or in the last case, to the respondent's own past actions) lead inevitably to the conclusion that if anything is better known to the public than the claim that smoking is hazardous to health, including the specific health hazards that the Staff has attributed to smoking, it has not been demonstrated.

B. Neither the Report Nor the Studies Upon Which It Relies Demonstrate That a Significant Portion of the Public Is Unaware of the Specifics and the Severity of the Health Hazards That the Staff Attributes to Smoking.

Although the statistics quoted in the Report itself demonstrate an extraordinarily high level of public awareness of virtually all facets of the smoking and health controversy,

¹ These responses are taken from, respectively: The Gallup Opinion Index No. 174 (January 1980) at 25; 5(5) Current Opinion (May 1977) at 52, quoting the Gallup Poll, March 25-28, 1977; The Gallup Poll, Public Opinion 1972-1977 (1978) at 1178; The Gallup Poll, Public Opinion 1979 (1980) at 168; 5(3) World Opinion Update (May/June 1981) at 81, quoting The Harris Survey, March 27-April 2, 1981.

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the Staff asserts repeatedly that significant numbers of people do not have the requisite information. That assertion is based on the Staff's misuse and misinterpretation of the information contained in the various surveys and studies cited by the Staff, and the Staff's confusion of public awareness with public belief.

1. The Staff Misinterprets and Misuses the Studies To Understate Awareness.

The figures in the Report that the Staff claims represent those who are "unaware" of various specifics of the smoking and health controversy are biased upward and are unreliable due to the Staff's faulty definition of those who are "unaware." The Staff lumps together as "unaware" those who "do not believe true statements, believe false statements, underestimate on a multiple choice question, or answer 'don't know' or 'uncertain.'" Report at 17. None of these five diverse responses indicates that the respondent is "unaware" of the answer deemed correct by the Staff.

The Staff assumes throughout its discussion of public awareness that if a number of people are not aware of a specific detail about the smoking and health issue (e.g., the claim that smoking during pregnancy increases the risk of stillbirth and miscarriage), those people are not sufficiently aware of the general proposition that encompasses that detail (e.g., the allegation that smoking during pregnancy increases the risk of adverse effects on the baby). This assumption is contrary to the actual results of the studies cited by the

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Staff, which uniformly demonstrate that people generally are aware of the health dangers that the Staff associates with smoking, even if they cannot respond with precise medical statistics. Moreover, the Staff's assumption that a person cannot be aware of a general fact unless he is aware of a specific application of that fact clearly is wrong as a matter of basic logic.

The Report also misuses the results of the detailed questions included in the studies. Respondents were asked numerous questions involving specific numbers, e.g., "Out of every hundred people who get lung cancer, how many die from it?". According to the Staff, anyone who answers with other than the "correct" number is unaware of the general fact to which the number relates. But as the Report itself admits, "[s]ome of this lack of knowledge, of course, is due to the use of a specific figure . . . in the question rather than real consumer misunderstanding." Report at 3-22. In fact, none of the questions requiring the selection of a specific number, ratio, or percentage can be considered an accurate indication of public awareness about a specific health problem.¹

¹ In the example given, from the Chilton Study, only 11.6 percent of teenagers and 10.8 percent of adults gave the Staff's correct answer, 95. Almost 75 percent of teenagers and adults, however, answered either 45, 75, or 95. Chilton Study Q24. Thus, the Report's conclusion that "many people do not appreciate the severity of lung cancer" (Report at 3-23) unfairly misrepresents the fact that the vast majority of people are aware that lung cancer is alleged to have a high mortality rate of at least 1 of every 2 of those suffering from the disease.

The Staff also grossly misinterprets the statistics by summarizing all responses other than the one deemed correct by the Staff, including "don't know" answers and reasonably close estimates, as representing people who are completely unaware of a particular statement. Such responses, however, are equally susceptible to the interpretation that the respondent is generally aware of a statement but is unsure of the precise number involved. In the previously described example, a person who believed that most people with lung cancer die from that disease, but was not sure whether the correct proportion is 90, 95, or 97 of 100, might fall into the "don't know" category and therefore would erroneously be considered by the Report as a person who is unaware of the severity of lung cancer.

In addition, some of the responses deemed "incorrect" by the Staff could simply have reflected lack of understanding of the question. Consider, for example, Question 16 from the Chilton Study:

"How many Americans living today will eventually die from diseases related to smoking cigarettes (READ LIST) (CIRCLE ONE ANSWER)

	54-
None	1
One out of two	2
One out of six	3
One out of ten, or	4
One out of 100	5
DO NOT READ Don't know	8
	"

Does this question -- read to the respondent by a stranger over the telephone -- relate to smokers or to "Americans" whether or not they have ever smoked? The Staff

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claims that heart disease is "related to smoking cigarettes," but millions of Americans who have never smoked "will eventually die" of heart disease. It is surprising, in light of the ambiguity of the question and the five alternative answers, that 35 percent of the respondents gave the "correct" answer to the above question.

Some of the questions that were asked are virtually impossible to understand in any context. The question from the Shor study cited in the Report (at 3-16), for example, is made almost incomprehensible by the use of medical jargon and awkward phrasing: "In industrialized nations, cigarette smoking is the greatest single cause of excess morbidity and mortality from lung and other cancers, from heart attacks, and also from emphysema in both men and women."

The Staff's misuse of the survey statistics in the above respects demonstrates that the Staff was more interested in providing support for a foregone conclusion than engaging in an objective survey of the level of public awareness of the smoking and health controversy. There is in fact disturbing evidence that the Staff was made aware of some of these problems prior to the issuance of its Report. In a letter to the Staff dated December 5, 1980, Burns W. Roper, Chairman of the Roper Organization, stated as follows with respect to the results of "[the Staff's] tack-on questions" to the 1980 Roper Study:

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"[I]t is our joint opinion that the results show a high general awareness of the dangers of smoking on health that the government, the Cancer Society and others have been promoting By that I mean that while many people give technically wrong numerical relationships, (e.g., '50 times more likely', '10 times as likely', '50% greater', '6 to 8 years less', etc.), most say there is a significantly greater chance of X, or a significant reduction in expected longevity, etc."

This letter was produced by the Commission in response to a Freedom of Information Act Request submitted on behalf of The Tobacco Institute. Although the request was granted only in part, the Roper letter and other materials raise serious questions about the fairness of the Staff's investigation and analysis of "public awareness."¹

2. The Staff Confuses Public Awareness With Public Belief.

The most serious misinterpretation, and one that undermines the entire Report, is the Staff's confusion between public awareness and belief. The studies relied upon by the Staff to demonstrate "awareness" did not examine that issue. The 1980 Roper Study, for example, consists in large part of asking people "how true you personally think" a particular statement is.² Respondents were permitted to answer only

¹ In a letter to the Roper Organization dated October 16, 1980, for example, the FTC's Assistant Director for Advertising Practices required that the "final wording and number of questions" in the Roper survey "will be mutually agreed upon."

² The questioner was to introduce these questions as follows: "Now I'm going to read you some statements about smoking and health, and for each one I'd like you to tell me your beliefs about how true the statement is." Roper Study Q30 (Emphasis in original).

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"know it's true," "think it's true," "don't know if it's true," "think it's not true," or "know it's not true." The Staff and the study concluded that those responding in the latter three categories are "unaware" of the information conveyed by the specific statements made. It is obvious, however, that a respondent could be aware of a claim (e.g., that smoking increases the risk of heart attack) yet disagree with it. A similar error is apparent in the Staff's interpretation of the Shor Study. As indicated in the Report (3-15 and 3-16), respondents in that study were asked to rate statements according to whether the respondents strongly believed, believed, were neutral or uncertain, disbelieved, or strongly disbelieved the statement. The Report took the results of this study, which on its face is directed only to the respondents' beliefs, and concluded that where respondents either disbelieved or were neutral about a statement, the respondents were unaware of the "fact" that the statement represented. The Chilton Study, too, contains numerous "true-false" questions that determine belief not awareness.

Similarly, the Staff makes much of the fact that while 90 percent of the population believe that smoking is harmful to health, "24% of heavy smokers do not know or believe it is hazardous." Report at 3-5. But the Staff conveniently ignores the fact that the asserted health hazards of smoking remain in controversy and that people need not choose to believe the Staff-approved version. The fact that smokers

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consistently respond less affirmatively than nonsmokers to statements about the health hazards of smoking confirms that belief, not awareness, is the factor being tested by the studies.

Had the studies been aimed at measuring awareness as opposed to belief, the questions could have been designed to elicit that information. In the Chilton Study, for instance, several questions were so designed. Respondents were asked whether particular diseases had "been found to be associated with cigarette smoking." Notably, responses to such questions indicated that the vast majority of people are familiar with the various health claims asserted in the Report. For example, over 81 percent of teenagers and 87 percent of adults agreed that cancer of the mouth has been "found to be associated with cigarette smoking." Chilton Study Q41(c). Over 82 percent of teenagers and 87 percent of adults agreed that chronic bronchitis has been "found to be associated" with smoking. Id. Q42(b). Similar high percentages responded to such questions concerning emphysema and heart disease. Id. Q42(c), (e).

When the questions reflecting awareness about the asserted health hazards of cigarette smoking are extracted from the overall studies, they establish precisely the opposite of what the Staff concludes. Virtually everyone is aware that the Surgeon General has concluded that smoking is hazardous to health in a variety of ways. The fact that people nonetheless choose to continue to smoke reflects nothing more than the

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right of every person in a free society to act regardless of his awareness of the alleged consequences of his actions. The Staff appears to have lost sight of this fundamental premise.

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II. THE SMOKING AND HEALTH CONTROVERSY

The Federal Register notice of June 10, 1981, asks two questions about the Report's discussion of "evidence linking smoking with many specific health consequences." The questions are: (1) "Has the staff accurately summarized the available medical evidence?" (2) "Is there additional evidence which should be considered?"

The Staff summary is so inaccurate and so prejudiced that it would be fruitless to provide "additional evidence" to be "considered." The Staff obviously has decided to impose scientific conclusions by fiat and to find a way to correct anyone who does not give an "acceptable" answer to such conclusions.

A. The Staff's Review of the Evidence on Smoking and Health Is Biased.

In many respects, the Report is similar to other government reports on smoking and health, in which the repetition of old claims is used to support the claim that "new evidence" has been discovered or that previously asserted conclusions are more credible. A typical example is the Staff's citation of the "fact" that 300,000 deaths annually are caused by smoking to support the contention that smoking now is known to be more hazardous to health than was thought in 1964. Report at 11. The "300,000 deaths" figure, however, is not fact but rather has been part of the folklore of the anti-smoking campaign since at least 1965. It was discredited when it was first published and it remains discredited today.

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When the 300,000 figure was mentioned during Congressional hearings in 1965, anti-tobacco witnesses could not agree on a source, and one even credited an advertising executive with originating the number. There was no scientifically adequate statistical basis for the figure.¹ Nevertheless, this number has been bandied about for seventeen years as a scare tactic, handy to pull out as "proof" that some further restriction of cigarette advertising is necessary. It is disappointing, but not surprising, that the Staff has cited this number as "fact" in the current Report. It is inexcusable, however, that the Staff then uses that figure as an example of the ineffectiveness of the warning statement on the basis that many people are "unaware" of this newly discovered "fact."

The information summarized in the Report does not establish a causal relationship between smoking and diseases statistically associated with smoking. It does not establish a causal relationship between smoking and lung cancer, heart disease or chronic obstructive lung disease. It does not establish a causal relationship between smoking and fetal injury. It does not prove interaction between smoking and birth control pills or occupational exposures. It does not prove that carbon monoxide as found in tobacco smoke is dangerous.

¹ Hearings on Cigarette Labeling and Advertising Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., pt. 1 at 103-48 (1965).

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In short, the Report is a totally inadequate review of the scientific controversies that surround the many questions of smoking and health.

B. The Staff's Discussion of Smoking's Alleged Connection With Specific Health Hazards Is Biased.

Relying upon the one-sided 1979 Surgeon General's Report, the Staff asserts that "[c]igarette smoking has been established as a major cause of cancer of the lung, larynx, oral cavity, esophagus, and bladder and is significantly associated with cancer of the pancreas and kidney" (Report at 1-11, emphasis supplied), and that "[m]edical experts agree that cigarette smoking is the major cause of lung cancer cases in both men and women" (Report at 3-18, emphasis supplied), but ignores studies and analyses which contradict those claims. For example, in 1977 a U.S. Public Health Service Report, in an otherwise anti-smoking presentation, stated that

"[a]lthough epidemiological [statistical] data has clearly established the existence of a correlation [association] between smoking and cancer, a clear-cut causal relationship between cigarette smoking and cancer has not been demonstrated."¹

Professor Philip Burch of England has reached the same conclusion with respect to lung cancer. He stated in 1978 that:

"many eminent persons, committees and commissions have unanimously concluded that lung cancer 'is almost entirely due to cigarette

¹ Van Lancker, Smoking and Disease, Research on Smoking Behavior, National Institute on Drug Abuse Research Monograph 17 (December 1977) at 263.

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smoking'. I once shared that view, but having now studied the evidence in more detail and from new angles I feel unable to reach a definitive conclusion, apart from rejecting the 'pure' causal theory. Accordingly I find myself forced back to Fisher's (1959) earlier verdict: 'the data so far do not warrant the conclusions based upon them'.¹

Among the many other examples of the Staff's bias on this issue² is its assertion that "[w]ith all other variables held constant, the more cigarettes they smoke, the more years they smoke or the younger they are when they start smoking, the more likely [smokers] are to develop lung cancer." Report at 1-60. The Staff ignores studies conducted in the United States and Britain which have shown that the age of incidence of lung cancer does not depend either upon the age at which smoking commenced, the duration of smoking,³ or even whether or not one smokes.⁴ According to one expert: "That both the age of starting to smoke, and the rate of smoking, should have no appreciable influence on the average age of onset of

¹ Burch, Smoking and Lung Cancer: The Problem of Inferring Cause, A141(4) J. R. Statist. Soc. 437-477 (1978).

² The numerous instances of Staff bias with respect to the question of smoking and cancer can be seen by comparing the discussion of smoking and cancer in the Report with the discussion of the same subject in the Appendix to these Comments.

³ Herrold, Survey of Histologic Types of Primary Lung Cancer in U.S. Veterans, 7 Pathol. Annu. 45-79 (1972); Passey, Some Problems of Lung Cancer, Lancet II: 107-112 (July 21, 1962).

⁴ Hearings on Cigarette Labeling and Advertising Before the House Comm. on Commerce, 91st Cong., 1st Sess., pt. 2 at 769-774 (1969).

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lung cancer greatly taxes, if it does not destroy, any causal hypothesis."¹

Other examples of the Staff's bias abound. Consider, for example, the following editorial about smoking and heart disease published in the American Heart Journal of September 1980, which stated:

"Accordingly, it is reasonable to believe there is no proof that stopping [smoking] reduces the risk of heart disease."²

And with respect to smoking and pregnancy, a recent editorial appearing in the Lancet, May 16, 1981, commented as follows on a number of variables identified in a study of low birth weight babies:

"At first sight many of the above factors raise hopes of preventive measures such as family planning, restriction of smoking and alcohol consumption, an appropriate diet, and exercise. But, supposing that women were prepared to modify their behaviour and that they had access to safe contraception and that tobacco promotions were banned and smoking and drinking during pregnancy discouraged -- could we promise a drop in preterm delivery? The answer must be in the negative. No amount of mathematical manipulation can show that such associations are directly causal rather than purely indicative of a certain type of person." (Emphasis supplied).³

¹ Burch, Smoking and Cancer, Lancet I: 1315-1316 (June 9, 1973).

² 100(3) Am. Heart J. 275-280 (Sept. 1980).

³ Precursors of Preterm Delivery, Lancet I: 1087-1088 (May 16, 1981).

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Yet the Report states unequivocally: "[S]moking has been identified as one of the three major causes of coronary heart disease. However, according to survey data, many people . . . did not know that smoking caused heart disease"; "Studies show that maternal smoking during pregnancy . . . leads to significantly smaller average birth weight. However, a large percentage of people . . . are not aware of the serious consequences of maternal smoking during pregnancy." Report at 3-27 and 3-34.

These statements are a parody of science and semantics. Eminent scientific authorities and the editorial writers of major medical journals such as those cited above cannot say that smoking causes lung cancer, heart disease, or light weight babies, yet the Staff concludes that cigarette advertising is deceptive because many lay persons are "unaware" of what the Staff simply asserts to be "facts" about the relationship between smoking and these conditions.

The Report's treatment of low-"tar" cigarettes provides a similar example. The smoking and health controversy has not been notable for producing FTC staff objectivity on the issue of "tar" and nicotine, and the current Report has carried on this tradition.

In 1959 the FTC informed cigarette manufacturers that it considered "all representations of low or reduced tar or nicotine, whether by filtration or otherwise, to be health claims" and forbidden by the Commission's Cigarette Advertising

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Guides.¹ During Congressional hearings in 1965, the Chairman of the FTC specifically warned that calling attention to "tar" and nicotine figures could result in "misleading" the public.² Less than a year later, in March 1966, the FTC announced a complete reversal of its position: cigarette manufacturers would be permitted to disclose "tar" and nicotine content in advertising. The reason given was that the information "may be material and desired by the consuming public."³

The Public Health Service held a meeting in June 1966 on "tar" and nicotine. The PHS stated in its report following that meeting that the "preponderance" of existing evidence "strongly suggests" that the lower the "tar" and nicotine content of cigarettes, the "less harmful" the effects.⁴ This position was adopted by the FTC and the industry was encouraged to reduce "tar" and nicotine content.

In November 1967 the FTC published the results of the first of its tests of "tar" and nicotine yields made in its cigarette testing laboratory. In 1970, the FTC proposed a

¹ Correspondence, Brain, Federal Trade Commission, to Bowman Gray, President, R. J. Reynolds Tobacco Company, December 17, 1959.

² Hearings on Cigarette Labeling and Advertising Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., pt. 1 at 419 (1965).

³ Federal Trade Commission, News Release, March 25, 1966.

⁴ Hearings on Reviewing Progress Made Toward the Development and Marketing of a Less Hazardous Cigarette Before the Consumer Subcomm. of the Senate Comm. on Commerce, 90th Cong., 1st Sess., at 7 (1968).

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rule requiring "tar" and nicotine listings in cigarette advertising. In response to this action, cigarette manufacturers agreed voluntarily to disclose the "tar" and nicotine content of cigarettes in all advertising. This plan was accepted by the Commission.

In 1972, then Senator Moss, no friend of smoking, said: "Several cigarette marketers as well as the Public Health Service have made significant efforts to promote low tar and nicotine content. That activity is to be commended since much of it has been done in a fairly responsible manner."¹

Nearly 50 percent of cigarettes sold today are in the "low tar" segment of the market (15 milligrams or less). For some time it has been acknowledged that the average "tar" and nicotine content of cigarettes has been reduced by over 50 percent since the 1950's. In fact, sales-weighted average "tar" content has dropped nearly two-thirds -- from 38.4 milligrams in 1956 to 13.2 in 1980.

Yet the Report, in its universal condemnation of tobacco, downplays the industry's reduction of "tar" and nicotine. This is in sharp contrast to the "strongly" suggestive evidence the FTC referred to when it encouraged the reduction of "tar" and nicotine content.

¹ Hearings on Public Health Cigarette Amendments of 1971, Before the Consumer Subcomm. of the Senate Comm. on Commerce, 92d Cong., 2d.Sess., at 2 (1972).

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C. The Staff's Discussion of the Tobacco Industry's Position With Respect to the Smoking and Health Controversy Is Biased.

The Staff's attack (at pp. 1-58 through 1-65) on the positions set forth in a 1979 review of the smoking and health controversy by The Tobacco Institute reveals the extent of the Staff's bias and the consequent flaws in the Report's review of the evidence concerning smoking and health.¹

Thus, for example, the Staff attempts to refute the position that epidemiological studies cannot establish causation, and in doing so reveals a basic misunderstanding of epidemiology and its legitimate uses. Consider a few scientific comments on the subject:

"[T]he elementary but highly seductive fallacy of identifying association with causation continues to plague many studies."²

* * * * *

"In medicine, much more than correlation is necessary to establish causation."³

* * * * *

"Epidemiological studies, even prospective ones like the Seven Countries Study, cannot prove cause-and-effect when the end-point, 'effect', is an outcome of a chronic noncommunicable condition. . . .epidemiological

¹ The Tobacco Institute review also demonstrates that the 1979 Surgeon General's Report (heavily relied upon by the Staff) itself failed adequately to report on the state of the scientific literature.

² Burch, Pathology, Inference, and Carcinogenesis, Pathol. Annu. Part II, 15:21-44 (1980).

³ Colton, Statistics in Medicine (1974).

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evidence can be cited only as being consistent, or inconsistent, with the hypothesis in question."¹

Distinguished scientists continue to adhere to the basic premise asserted by Fisher, Berkson and others that statistical comparison between smokers and nonsmokers cannot establish cause and effect.² People self-select whether they will smoke or not, how much they will smoke and whether they will quit. This remains as true today as it was a quarter-century ago.

The tobacco industry is not "attacking" epidemiology in pointing out these limitations. Rather, it is raising a legitimate criticism of the extrapolation and decision-making that can occur when such limitations are ignored.

The Staff -- anxious to make a point -- has ignored more than the warnings about the limitations of epidemiology. It also has disregarded the many shortcomings of epidemiological studies used against smoking. While the Report criticizes the tobacco industry for challenging "the design and methodology of the studies relied upon to show the health hazards of smoking" (Report at 1-63), this comment simply illustrates the Staff's unwillingness to acknowledge the questionable quality

¹ Keys, The Diet and All-Causes Death Rate in the Seven Countries Study, *Lancet* II: 58-61 (July 11, 1981).

² Fisher, *Smoking. The Cancer Controversy* (1959); Berkson, *Smoking and Cancer of the Lung*, 35 *Proceedings of the Staff Meetings of the Mayo Clinic* 367-85 (June 22, 1960); Burch, *The Biology of Cancer. A New Approach* (1976).

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of many population studies. It would be hard to believe, for example, that the Staff has never considered the work of Dr. Alvan Feinstein, Professor of Medicine and Epidemiology at Yale University. Dr. Feinstein has described repeatedly how detection bias (looking harder for lung cancer in smokers and therefore finding it more often) can distort statistical data about smoking and lung cancer.¹ The Staff similarly has omitted mention of Dr. Theodor Sterling, an expert in computerized health information, who has reviewed the data from two large epidemiological studies frequently cited as "proof" that smoking causes disease. In one such study, he found basic errors in classifying people according to their smoking habits.² In the other, he found that certain disease patterns in the study population (e.g., breast cancer, lung cancer, emphysema) were considerably higher than in the U. S. population it is supposed to represent.³ Government scientists have also criticized these studies: "While several significant studies had

¹ Feinstein, Cigarette Smoking and Lung Cancer: The Problems of "Detection Bias" in Epidemiologic Rates of Disease, 22(3) Clin. Res. 535A (April, 1974); Feinstein, Quoted in Smoking Link to Lung Cancer Termed Diagnostic Bias, Family Practice News (July 15, 1974); Feinstein, Cigarette Smoking and Lung Cancer: The Problems of "Detection Bias" in Epidemiologic Rates of Disease, 87 Trans. Assoc. Am. Physicians 180-185 (1974).

² Sterling, What Happens When Major Errors Are Discovered Long After an Important Report Has Been Published, Presentation Before the American Statistical Association Annual Meeting, Washington, D.C., August 16, 1979.

³ Sterling, A Critical Reassessment of the Evidence Bearing on Smoking as the Cause of Lung Cancer, 65(9) Am. J. Public Health 939-953 (1975).

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been conducted earlier, such as those by Hammond and Horn, they were for the most part not based on scientifically designed probability samples, and were therefore more subject to the criticism that the finding could not be generalized to the total population."¹

The Staff also argues that conclusions about causation can be made without understanding the biology of how a disease is caused. Report at 1-61 and 1-62. This attempt to downplay biologic mechanisms is predictable. The Staff wants to draw firm conclusions in the face of numerous questions that remain in the area of basic science. For example, while "no well-designed and well-conducted experiments have shown that cigarette smoke causes lung cancer in animals,"² the Report totally ignores the implications of such negative animal data.

The Staff's argument that biologic mechanisms are insignificant is also hard to take seriously in light of its discussion of heart disease. The Staff has taken a "causation made easy" approach to heart disease: it states that smoking is one of the three major risk factors for heart attack, and then concludes in the next sentence that smoking accounts for

¹ Wilson, Statement, National Commission for Smoking and Public Policy, Philadelphia, Pennsylvania, June 16, 1977.

² Feinstein, Comments in "Discussion" of presentation by Burch, Smoking and Lung Cancer: The Problem of Inferring Cause (With Discussion), A141(4) J. R. Statist. Soc. 437-477 (1978).

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one-third of all deaths from coronary heart disease. Report at 1-18. This conclusion completely ignores several well known facts that contradict the Staff's position: (1) the major studies on heart disease list far more than three risk factors, (2) risk factors are not necessarily causes, and (3) meaningful figures cannot be obtained by dividing the number of coronary heart disease deaths by the number of alleged risk factors.

Developments in research on atherosclerosis illustrate the importance of biological mechanisms. Certain animal research by Astrup and co-workers has been cited for the past fifteen years as "proof" that the mechanism by which smoking supposedly causes heart disease involved carbon monoxide ("CO").¹ In the 1970's, doubt was expressed about the Astrup findings because other researchers were unable to confirm them.² Finally, the Astrup group tried to reproduce their earlier results and found that "no significant morphological changes were present to discriminate between experimental and control animals."³ Perhaps more clearly than any other recent

¹ Astrup, Enhancing Influence of Carbon Monoxide on the Development of Atheromatosis in Cholesterol-Fed Rabbits, 7 J. Atherosclerosis Res. 343-354 (1967).

² Armitage, The Effects of Carbon Monoxide on the Development of Atherosclerosis in the White Carneau Pigeon, 23(2) Atherosclerosis 333-344 (1976); Theodore, Toxicological Evaluation of Carbon Monoxide in Humans and Other Mammalian Species, 13(5) J. Occup. Med. 242-255 (1971).

³ Hugod, Morphological Investigations on Histotoxicity of Gas Phase Constituents of Tobacco Smoke in the Rabbit, Abstracts of the Fourth World Conference on Smoking and Health, Stockholm, Sweden, June 18-21, 1979.

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experience, this turnabout highlights the necessity of scrutinizing easy answers and emphasizing biologic mechanisms.¹

The Staff also is unconvincing in its attempt to discredit the constitutional hypothesis that smokers are more prone to disease than nonsmokers because of certain underlying constitutional differences between the groups. Report at 1-62, 1-63. Many studies have found that smokers as a group differ from nonsmokers. Cigarette smokers may tend to be more active, more extroverted -- and more prone to Type A behavior -- than nonsmokers. When such genetic and lifestyle differences repeatedly occur, is it not reasonable to study the hypothesis that differences in disease patterns are related to factors other than smoking? The tobacco industry does not maintain that a constitutional/stress theory is the explanation. It does believe, however, that serious consideration must be given to alternative explanations -- consideration that cannot be accomplished in the presence of dogmatic or preordained conclusions.

¹ The FTC Staff is not alone in ignoring scientific developments and research that are inconsistent with its views. The 1981 Surgeon General's Report describes Astrup's initial work on atherogenesis without mentioning the later disavowal. 1981 Report of the Surgeon General at 118.

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III. THE NATURE AND PURPOSE OF CIGARETTE ADVERTISING

Since the Report is described as the result of a five-year investigation of cigarette advertising, it might be expected that the Staff would devote substantial and careful attention to that subject. This is not the case. The discussion in the Report of the nature and effect of cigarette advertising stands out as the briefest and most superficial. The Report clings single-mindedly to the unfounded notion that cigarette advertising is aimed at luring nonsmokers to take up smoking even though it is apparent that the objective of cigarette advertising is to sell a particular brand of cigarettes to smokers.

The fundamental weakness of this section of the Report is that it contains no evidence or even consideration of consumer perceptions of cigarette advertising, but rather is based entirely on the Staff's obviously biased perspective of such advertising. Thus, for example, the Report states, "[i]n contrast to the current warning, cigarette advertisements present information about smoking in a highly effective manner" (Report at 2-2), without offering any consumer surveys or other objective evidence to support that conclusion. The Staff has completely overlooked the fact that while cigarette advertisements present the consumer with numerous conflicting messages about the relative attractiveness of particular brands of cigarettes, every advertisement, regardless of brand, carries the same unambiguous warning statement. Given

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this basic contrast, the Staff's claim that cigarette advertising is more "effective" than the warning statement in conveying information to consumers is not only unsupported but unsupportable.

A. Cigarette Advertising Is Intended To Sell a Particular Brand of Cigarettes to Smokers.

The Staff has attempted to create the impression that the tobacco industry has used advertising to subvert the conclusions of the Surgeon General in an attempt to persuade people to smoke. Thus, the Report begins its discussion of cigarette advertising with the observations that "cigarette advertising continues to be pervasive in American society," and "is a dominant force in" print and outdoor advertising media. Report at 2-1 (emphasis supplied). One wonders how any form of communication that is completely excluded from television and radio can be considered pervasive in contemporary society.¹ And the phrase "dominant force" suggests that, unlike advertisers in any other consumer product industry, cigarette advertisers exert some mysterious or unseen influence. The facts are quite the opposite from these and similar insinuations that pepper the Report.

¹ Statistics compiled by the Commission under its line-of-business reporting program reveal that as of 1975 the cigarette industry ranked only 11th among all industries in terms of advertising expenditures as a percentage of sales, and was far outstripped by such industries as proprietary drugs, cereals, and pet foods. See Advertising Age 42 (October 19, 1981).

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Cigarette advertising has been shaped by circumstances. Removal of cigarette advertising from the broadcast media resulted in its confinement to the print and outdoor media. As discussed in the 1969 FTC Cigarette Report (at 7 and 10), radio and television accounted for more than three-fourths of all cigarette advertising expenditures in the years preceding the broadcast ban. Since 1971, annual advertising expenditures by the cigarette companies, adjusted for inflation, have averaged over \$100 million less than in the four years prior to the radio and television advertising ban.¹

At the same time, cigarettes were changing, and brands were proliferating in an unprecedented manner. The cigarette market is in the midst of experiencing, and adapting to, a major shift in smokers' preference in favor of lower "tar" cigarettes. Low "tar" brands accounted for nearly 50 percent of all cigarette sales in 1980, compared to 2 percent just six years earlier. Today there are more than 180 different brands or brand styles competing for market shares. This is a market development that the FTC itself has long sought:

"The Commission hopes that the proposal to disclose tar and nicotine content in cigarette advertising made by eight manufacturers . . . when implemented will lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette, and resultant competition among the cigarette companies to meet that interest." 1970 FTC Cigarette Report at 15.

¹ See 43 Journal of Marketing (January 1979) 1036999

In response to these shifting smokers' preferences, there have been frequent new brand introductions in recent years that require major advertising efforts in order to bring them to smokers' attention. This is a simple fact of marketing life that earlier FTC studies have examined in detail, and which the authors of the current Report conveniently have chosen to ignore. In 1979, for example, the Staff of the FTC Bureau of Economics reported:

"Being first in the market is not a substitute for advertising. On the contrary, where price competition is significantly absent, advertising becomes increasingly more important to new entry. In his study of cigarettes, Alemson notes:

'Advertising, through various media, is instrumental in informing the largest possible number of people . . . that the newly launched cigarette brand is exclusively designed to cater to their particular tastes. Market segmentation . . . would be inoperative without the appropriate use of advertising' [Alemson, 1970, p. 296].

By informing a large number of potential consumers, advertising may serve as a catalyst, popularizing the new brand and speeding its growth and acceptance. If the advertising makes an association between the popular tastes and the brand, consumers may bestow a long-term benefit to the brand by identifying the brand with the newly formed submarket."¹

The tremendous effect of brand proliferation on advertising expenditures is revealed in the Report itself,

¹ Whitten, Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Bureau of Economics Staff Report to the Federal Trade Commission 6-7 (June 1979).

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although the Staff did not recognize it because of its failure to engage in any meaningful analysis of the data. Thus, the Report states that the real growth in cigarette advertising between 1967 and 1979 was more than 50 percent. Report at 2-4. It then states that the percentage of cigarette advertising for the newer, low "tar" cigarettes increased from 5.5 percent of the total in 1967 to 66.9 percent in 1979 (id. at 2-7), which means that the newer brands account for more than the entire increase in cigarette advertising. The advertising for the older brands actually has declined in real terms by almost 50 percent.

Thus, it is evident that the objective of cigarette advertisers has been to switch the brand preferences of existing smokers. The Commission itself recognizes this fact. In a Congressional appearance in 1969, then FTC Chairman Dixon testified that cigarette advertising was "primarily" brand advertising. Hearings on Cigarette Labeling and Advertising Before the House Comm. on Commerce, 91st Cong., 1st Sess., pt. 2 at 495 (1969). Yet the superficial Staff study of "recent cigarette advertising" and the "overall advertising context" (Report at 2-1) does not even mention the brand-promotion purpose of cigarette advertising.

B. Cigarette Advertising Has Not Had the Effect of Increasing the Number of People Who Smoke.

Not only is cigarette advertising not designed to promote smoking, it has not had that effect. Government sources confirm this fact. The Public Health Service, for example, reports a sharp drop in smoking among young people: 1037001

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"Perhaps the most dramatic change in substance use now taking place among American young people is the sharp drop in regular cigarette smoking. (Daily use dropped 4% this year to 21%.) The rate of decline appeared to accelerate this year among both males and females. We are inclined to attribute this change to a long-term increase in young people's health concerns about smoking as well as to a sharp decrease in the perceived peer acceptance of smoking."¹

The National Institute found that the proportion of high-school seniors who say their peers would disapprove of their smoking has risen from 55 percent in 1975 to 74 percent in 1980, and the proportion of them who expressed personal disapproval of pack-a-day smoking has increased from 66 percent in 1977 to 71 percent in 1980. (Id. at 97.) The Surgeon General's 1979 Report (at 17-15, 17-16) says that "cigarette ads are perceived by teenagers as hypocritical and are listed as 'least-liked'"

In the real world in recent years there have been dramatic changes in market shares and ranking among the cigarette manufacturers and among brands, plus a spectacular multiplication of brands, without significant increase in total volume. It is demonstrable that almost the entire growth of the newer, low-"tar" cigarette brands has been at the expense of the older, "full-flavor" brands, some of which have all but disappeared from the market. These facts strongly confirm the view generally held by all but the FTC Staff that

¹ National Institute on Drug Abuse, Highlights From Student Drug Use in America 1975-1980, at 7.

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both the purpose and the effect of cigarette advertising is inter-brand competition.

C. Cigarette Advertisements Are Brand Promotional and Make No Explicit or Implicit Health Claims.

In criticizing the themes and images commonly used in cigarette advertising, the Staff fails to recognize that such images are simply common brand-identification tools. The content of cigarette advertising is not directed to nonsmokers, but rather is completely consistent with the goal of inter-brand competition. Cigarettes are advertised and sold exclusively on the basis of brand identification, with virtually no reference to the manufacturer's identity. Each advertisement extols the virtues of a particular brand; none promotes a particular company's stable of brands or the notion that smoking in general is desirable.

The inference drawn in the Report that ads portraying attractive young-adult models are implicitly making health claims is baseless. Cigarette advertisements are no different in this respect than advertisements for such consumer products as soft drinks, beer and cosmetics. The Staff finds implicit health claims only when the product advertised is cigarettes.

The Staff complains that cigarette advertising portrays smoking as compatible with a wide range of athletic and healthful activities. Report at 2-13. But many tennis players, surfboarders, professional athletes, manual laborers and others who engage in athletic or other physical and healthful activities are also smokers. In fact, studies reported by

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the Surgeon General show that smokers tend to be more extroverted, sociable and care-free than nonsmokers (1964 Report at 365-366; 1979 Report at 18-5 through 18-7), and some studies have shown that smokers tend to participate more often in sports and physical activity and to have larger body dimensions than nonsmokers. (1964 Report at 372-373, 385-386).

Clearly, there is no basis for the Staff's implications that the models and settings used in cigarette advertising are not fairly representative of consumers. Most persons in their twenties and thirties, whether smokers or not, look perfectly normal and healthy. The models used in cigarette advertising are not more attractive, healthy or successful looking than the models used in most advertising.¹

The Staff applies the same strained analysis to all cigarette advertising, no matter who the model or what the setting. Menthol cigarette advertisements often feature green colors, leafy glades, snow-capped mountains, waterfalls and other scenes evoking the image of cool, refreshing taste. Nothing could be more appropriate. Such images are universally used to represent the cool sensation of menthol or mint in advertisements for products ranging from candy to shaving

¹ Moreover, since 1965 the cigarette manufacturers have adhered voluntarily to a Cigarette Advertising Code that prohibits, among other things, the use of athletes, celebrities, or persons who appear to be less than twenty-five years of age in cigarette advertisements.

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cream, but the Staff somehow finds hidden health messages when the product is cigarettes.

The use of seasonal themes is also considered subversive, as evidenced by the Report's denunciation of a "Christmas advertisement for Marlboro" that allegedly portrayed the "reflective pleasure of tobacco" and unified "the desire for a perfect Christmas with the experience of smoking." Report at 2-2 and 2-3. The Staff failed to mention that Clement Moore employed the same "anxiety-relieving" technique in his subversive portrayal of a wreath of smoke encircling the head of a pipe-smoking Saint Nick as he paused by the fireplace.

The Report's criticism of the industry's vigorous competitive promotion of low "tar" and nicotine cigarettes is equally strained and more than a little disingenuous in its attempt to create the impression that it is the tobacco industry, rather than the government itself along with private health agencies, that has actively publicized and promoted the idea that low-"tar" cigarettes are "less hazardous to health." As stated earlier, when the FTC decided in 1959 that "all representations of low or reduced tar . . . will be construed as health claims," the industry voluntarily agreed to eliminate all references to "tar" from its advertising. It was the FTC itself that, a few years later, reversed its position and initiated a campaign that resulted in the industry's acceptance of the Commission's request that all cigarette advertising disclose "tar" and nicotine content. Now the industry is

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taken to task for advertising precisely what the FTC required it to advertise.

This indiscriminating and unrelenting criticism of any cigarette advertising theme is not new; the Report is merely the latest in a long and repetitious line of FTC annual reports on cigarette advertising that have found each and every "image" employed in any cigarette advertisement to be designed for some improper purpose through the technique of "associating cigarette smoking with individuals, groups or ideas worthy of emulation or likely to be emulated." 1969 FTC Cigarette Report at 14. Thus, the current Report complains about the use of images of active, outdoor types, as well as about sophisticated women in evening dresses, about images of lean, white cigarettes and slim, brown cigarettes. Report at 2-11, 2-12. Previous FTC reports have singled out for criticism images of a "serious, work-shirt clad woman," and other "depiction[s] of women in work situations" (1974 Report at 5-6); a "serious blue-jean clad man and the equally serious man in a business suit and tie" (*id.* at 5); "fashionably attired, contemporary women" and "a feminine image . . . which featured floral arrangements as a background" (1971 Report at 11); "a no-frills masculine individual" who resists "fads and gimmicks" (*ibid.*); "choosy men and women who 'won't settle for less'" (*ibid.*); a couple sitting in a stadium in the rain who don't "cop out" (*ibid.*); "individual men and women, as well as couples, relaxed during numerous 'L&M moments'" (*ibid.*); "men

of the sea" (1970 Report at 8); "stylish young female models in such glamorous settings as a castle, a sailboat, and a Mercedes roadster" (id. at 9); "an intense young couple who stared straight ahead, with a somewhat brooding look on their intelligent, stylish faces" (id. at 10); couples "depicted in gourmet food stores, unfinished furniture shops, and at home in their own flower garden, displaying their sophisticated good taste" (ibid.); an "enigmatic, sinister fellow in the wrap-around shades" (ibid.); the "nice" Lark people, "such work-a-day folk as barbers, tailors, housewives, photographers, secretaries, weekend golfers, and poker players" shown in settings that "are definitely middle class and usually not glamorous" (ibid.).

In sum, it is clear that literally any advertising theme or illustration that a cigarette manufacturer may choose to use will be criticized by the Staff no matter how great the strain on credibility. That is because the Staff opposes cigarette advertising of any sort. The 1970 FTC Report contained the penetrating observation that "all cigarette advertising observed to date presents the advertised brand in a favorable light," and then proceeded with the following criticism of that phenomenon, disclosing the Staff's view of how the cigarette companies ought to advertise their products:

"In addition to this general tendency of all cigarette advertising [by its mere existence] to allay fears about the danger to health, many specific advertisements and campaigns help relieve anxieties by the scenes they depict. When people are displayed,

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whatever their age, occupation or activities, they are happy, and apparently healthy people. The Marlboro cowboy is seen galloping through the rain or sitting around a campfire, not occupying a bed in an emphysema ward, or even a lonely bunkhouse. An "L&M moment" never takes place on the steps of a church immediately after a funeral, or anywhere near a hospital." Id. at 11.

This relentlessly hostile and punitive approach to commercial advertising, divorced from any semblance of objectivity or practicality, characterizes the present Report as well, and substantially undermines the Staff's discussion and conclusions about cigarette advertising.

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IV. THE REPORT'S RECOMMENDATIONS ARE CONTRARY TO LAW

A. The Commission Is Barred by Congressional Policy and by Its Own Previous Actions From Altering the Warning Statement.

1. The Staff's Proposal To Change the Warning Statement Is Contrary to Congressional Policy.

In 1970, after an extensive review of the entire smoking and health controversy, including the FTC's role, Congress passed the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 et seq., which amended the original Federal Cigarette Labeling and Advertising Act of 1965 (the "Act"). Congress sought by the Act "to establish a comprehensive Federal program to deal with cigarette labeling and advertising." 15 U.S.C. § 1331. The centerpiece of the "comprehensive Federal program" that Congress developed was the warning statement that it required on all cigarette packages. Congress prescribed the text of this warning with great specificity in Section 4 of the Act, 15 U.S.C. § 1333. The Act's legislative history demonstrates that this wording reflected thorough Congressional review of the scientific opinion respecting smoking and health, and full consideration of the proper means for bringing any claim concerning the possible relationship between smoking and health to the attention of the public. H.R. Rep. No. 289, 91st Cong., 1st Sess. 2-6 (1969); S. Rep. No. 566, 91st Cong., 1st Sess. 1-13 (1969); H.R. Rep. No. 897, 91st Cong., 2d Sess. 4-5 (1970). In reaching its conclusion as to the appropriate warning statement to be required

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on cigarette packages, Congress rejected the FTC's proposed warning. S. Rep. No. 566, 91st Cong., 1st Sess. 6 (1969).

While Section 7 of the Act (15 U.S.C. § 1336(a)) recognizes the continued jurisdiction of the FTC to regulate cigarette advertising in appropriate circumstances, it is clear that Congress expected the Commission to exercise that authority in a manner consistent with the basic regulatory approach embodied in the Act. In this connection, Section 2 of the Act states that efforts to inform the public about the alleged hazards of smoking should not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations . . .," indicating Congressional intent to impose a uniform and consistent national policy in this area. 15 U.S.C. § 1331. Moreover, under Section 8 of the Act, the Commission is required to submit an annual report to Congress on cigarette advertising which includes "such recommendations for legislation as it may deem appropriate." 15 U.S.C. § 1337(b). The obvious purpose of this provision is to ensure that Congress: (i) is fully apprised of the contents of cigarette advertising, (ii) has an ample opportunity to determine whether new substantive approaches are needed, and (iii) may exercise its authority to formulate a policy consistent with those needs.

The 1972 Consent Orders, which incorporate in cigarette advertising the precise warning statement that Congress had already required in cigarette labeling, are not inconsistent

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with the policy of uniformity embodied in the Act. It is an entirely different matter, however, for the FTC to seek on its own to devise a new warning statement that Congress has neither adopted nor approved. When Congress determined that the original warning statement required by the 1965 Act should be changed, it amended the Act in 1970. The Act as amended thus represents a Congressional determination that the present warning statement is adequate to inform consumers about the asserted relationship between smoking and health. The Act also represents a determination that there should not be conflicting approaches to the regulation of cigarettes and that there should be a comprehensive uniform policy, legislatively formulated and articulated. Since that time, Congress consistently has taken an active interest in all matters relating to cigarette advertising and cigarettes,¹ and despite annual overtures by the FTC to do so, has shown no dissatisfaction with the present warning statement, either in packaging or in advertising. Under these circumstances, for the Commission to seek to make any changes on its own -- whether through adjudication or rulemaking -- would violate this clear policy of Congress.

¹ For example, when in 1975, the United States District Court for the District of Columbia ruled that the Consumer Products Safety Commission had jurisdiction over cigarettes under the Federal Hazardous Substances Act, Congress amended that Act to make clear that the CPSC had no such jurisdiction. 15 U.S.C. § 1261(f)(2) (1976).

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The Commission itself has long recognized the primacy of Congressional authority in this area. In 1965, during Congressional hearings leading to the adoption of the Federal Cigarette Labeling and Advertising Act and the first warning statement, then FTC Chairman Dixon testified as follows:

"As in the bills that we [the FTC] are considering, that you are considering right here, the language as to the warning is in quotation. There is no choice here. You pass it, this is the way it is going to be. I have said to you that if you pass what is required on the label, I will assure you the Commission will adopt the same language for its enforcement of its advertising requirements."¹

Chairman Dixon repeated this position during Congressional hearings in 1969, stating that "[c]ertainly we have no issue with the wisdom of Congress in arriving at what is an adequate warning." Hearings on Cigarette Labeling and Advertising Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. ser. 91-25 at 172 (1969). This statement was echoed by then Commissioner MacIntyre, who testified that the selection of a warning statement

"is a matter of what should be the established public policy on these questions. The establishment of public policy is the peculiar prerogative of the Congress of the United States. The Federal Trade Commission, any other agency of Government, implements,

¹ Hearings on Cigarette Labeling and Advertising Before the House Comm. on Commerce, 89th Cong., 1st Sess., pt. 1 at 66 (1965) (emphasis supplied). See also Hearings on Cigarette Labeling and Advertising Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., pt. 1 at 451 (1965).

carries out that policy. It does not establish it. The formulation, the establishment of the policy, is for you." Id. at 176.

When the Commission entered into Consent Orders with the major cigarette manufacturers in 1972 that required inclusion of the Congressionally mandated warning statement in all cigarette advertisements, a Commission spokesman stated that the adoption of that warning statement was aimed at "consistency with Congressional policy." G. Thain, FTC Attorney, quoted in Wall Street Journal, July 2, 1971 at 4. Indeed, in the Federal Register notice requesting comment on the current Staff Report, the Commission admitted that "because of the nature of the issues posed by such a system, rotational warning proposals are particularly appropriate for Congressional consideration." 46 F.R. 30701 (June 10, 1981).

2. The Staff's Proposal To Change the Warning Statement Is Contrary to the 1981 Consent Judgments and 1972 Consent Orders Entered Into by the FTC.

The Staff's principal complaint against present cigarette advertising is that the warning statement prescribed by Congress does not contain the Staff's claims regarding alleged health hazards of smoking. Report at 4-20. But the warning statement is included in all cigarette advertising precisely because the FTC chose in 1972 to resolve its charges that cigarette advertising was deceptive by entering into negotiated Consent Orders that require the inclusion of the

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warning statement. Lorillard, et al., 80 F.T.C. 455 (1972).¹ Moreover, as the Report notes, in 1975 the FTC brought civil penalty actions against the major cigarette manufacturers for alleged violations of the 1972 Consent Orders. Report at 4-5 n.14. In July 1981, two months after the Staff issued its Report, the Commission entered into an overall settlement of those actions.² As part of that settlement, the Commission agreed to the entry of Consent Judgments that interpret and purportedly clarify the 1972 Consent Orders and provide that the original Orders respecting the warning statement "shall remain in full force and effect."³

Having just months ago expressly reaffirmed the warning statement embodied in the original Consent Orders, the FTC cannot unilaterally repudiate its agreement and impose new warning statements or other requirements on the manufacturers.

¹ The Staff has suggested that the Commission in 1972 concluded that cigarette advertising that lacked a warning statement was deceptive. This was not the case. No hearings were held on the Staff assertions of deception, no findings on the issue were made, and the Staff's questionable legal theory that advertising could be found deceptive for failure to disclose information of common public knowledge was never put to the test.

² The action against R.J. Reynolds Tobacco Company remains pending, but only as to whether penalties will be imposed.

³ The Consent Judgments also provide that, inter alia: the warning statement will for the first time appear on vending machines, certain additional point-of-sale promotional material, and certain additional non-point-of-sale material; the warning statement will appear in a single line across the bottom of billboards in considerably larger lettering; and the warning statement will be disclosed in the same foreign language as is used in any foreign language advertisement.

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Rather it must have adequate grounds to seek a modification of those orders. In view of the fact that the Commission was fully apprised of the Staff's conclusions and recommendations before it entered into the Consent Judgments, no such grounds can possibly exist.

In United States v. Swift & Co., 286 U.S. 106, 119 (1932), the Supreme Court established the standard for modifications of judicial consent decrees:

"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." (Emphasis supplied).

That test is equally applicable to requests for modification by the government, e.g., United States v. Radio Corp. of America, 46 F. Supp. 654, 656 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943), and to modifications of Commission orders. Phillips Petroleum Co., [1967-73 Transfer Binder] Trade Reg. Rep. ¶ 19,546 (1971). In United States v. Radio Corp. of America, supra, the government sought to vacate an antitrust consent decree for the reason that the Department of Justice felt the decree no longer was adequate to promote the public interest. The court denied the government's motion, holding:

"Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government, the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the

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issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees." 46 F. Supp. at 656.¹

The Report has not and clearly could not provide a basis for satisfying the Swift standard. All of the "new" information that the Staff claims to have acquired about the relationship between smoking and health and about consumer awareness of the Staff's claims was in its possession long before the civil penalty cases were settled. Indeed, the Staff could not even justify modification of its 1972 Consent Orders under this test.²

¹ See also, Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342, 346 (D.C. Cir. 1965). In that case the Commission had issued a complaint dealing with substantially the same matters covered by an earlier consent order. In overturning the complaint, the Court of Appeals held that the Commission "may not unilaterally obliterate a part of the consideration -- indeed an important part -- by which it secured appellant's assent to be bound by a cease and desist order." An important element of the consideration by which the tobacco companies' consent to the 1972 Orders was obtained was relief from the "time and resources which would have been expended in litigation." See Agreement Containing Consent Order To Cease and Desist at 2.

² Although Swift deals with judicial consent decrees rather than FTC orders, essentially the same standard for modification is embodied in Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), which states in pertinent part that the Commission may modify consent orders if "conditions of fact or of law have so changed as to require such action or if the public interest shall so require." There has been no change in conditions of fact or law since July 1981, and for the Commission to renege on its reaffirmance of the 1972 Consent Orders on the basis of a Staff Report issued two months before that reaffirmance would establish a precedent contrary to the public interest.

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B. Cigarette Advertising Is Not Deceptive
Within the Meaning of Section 5.

The premise of the Staff's theory of deception is that its conclusions about the smoking and health controversy are "facts." As we have demonstrated, that premise is erroneous. To the contrary, the health claims made by the government and rehashed in the Report reflect a controversy that need not be disclosed in advertising unless the advertiser makes a representation concerning one side of that controversy.

National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). The Staff does not and could not contend that cigarette advertising contains any such representations. Every cigarette advertisement carries an affirmative warning statement that sets forth the essence of the government position on the smoking and health controversy, unlike advertisements for other consumer products such as meat, eggs, alcoholic beverages, hair dryers, and cosmetics that also have been linked by various government agencies to various health hazards.

The Staff is thus reduced to the novel theory that cigarette advertising is deceptive if it does not affirmatively and successfully educate every member of the public about every detail of the massive compilation of statistics and observations set forth in the 1,158-page 1979 Surgeon General's Report -- or more to the point, if it omits information that in the Staff's view would induce consumers to stop smoking if they were aware of it. There is no legal basis for such a theory.

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An advertiser has no duty to "educate" the public or counter "erroneous" public beliefs about the effects of its product unless those beliefs have been fostered by the advertiser's representations. For example, in Alberty v. FTC, 182 F.2d 36 (D.C. Cir.), cert. denied, 340 U.S. 818 (1950), the Court of Appeals explained:

"We think that neither the purpose nor the terms of the [FTC Act] are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority." 182 F.2d at 39. (Emphasis supplied).

The FTC reached the same conclusion in ITT Continental Baking Co., 83 F.T.C. 865 (1973). That case involved advertisements that claimed that Hostess snack cakes offered "good nutrition" because they were enriched with vitamins and minerals. The Staff contended that the "good nutrition" claim was misleading because the advertisement failed to disclose that Hostess snack cakes contain large amounts of sugar. In rejecting the Staff argument, the Commission stated:

"[I]t would be unrealistic to impose upon the advertiser the heavy burden of nutritional education In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." Id. at 965. (Emphasis supplied).

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Thus, in the absence of affirmative claims that need to be remedied, the FTC cannot legally compel cigarette companies to disclose specific health information in their advertisements. Although the Staff may assert that consumers wish to receive such information,¹ the Commission has no power to obligate advertisers to provide all potentially interesting information regarding their products.

No case brought under Section 5 of which we are aware is contrary to this conclusion. All involve express health, safety, pricing and other claims that were found by the Commission to be likely to deceive a substantial portion of the buying public. For example, in American Medicinal Products, Inc., 32 F.T.C. 1376 (1941), aff'd, 136 F.2d 426 (9th Cir. 1943), the only case cited by the Staff in support of its contention that there is precedent for requiring specific health warnings (Report at 4-28, 4-29), the respondents had affirmatively represented that a thyroid extract product, Re-Duce-Oids, was a cure or remedy for obesity and constituted a safe, competent and effective treatment. In light of these specific representations, the FTC required that future advertisements contain a full list of hazards potentially resulting from use of Re-Duce-Oids, and the disclosure that Re-Duce-Oids should only be used under competent medical supervision.

¹ In fact, according to the 1978 Roper Study cited by the Report at 3-7, 70 percent of the respondents -- smokers and nonsmokers alike -- feel that they already ". . . know enough about this whole matter of smoking and health." 1978 Roper Study Q68.

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The facts of that and similar cases are clearly distinguishable from cigarette advertising. In American Medicinal Products, consumers were urged to buy a product claimed to be a cure or treatment for a specific health problem and represented as safe; these direct and affirmative health representations were found to justify disclosure of the health effects of use of the product. Cigarettes, however, are not advertised as health remedies, and no consumer buys cigarettes for the cure or treatment of a health problem. The warning statement contained in every cigarette advertisement insures that no consumer could be misled and assume that beneficial health effects are claimed for cigarettes.

The Report, in fact, does not seriously dispute this point, but instead contends that cigarette advertisements carrying the Congressionally mandated warning statement are deceptive because they do not set forth the Staff's claims. As these Comments have demonstrated, the Staff's premise that consumers are unaware of these claims clearly is invalid. In any event, however, an advertisement cannot be considered deceptive within the meaning of Section 5 if it fails to disclose information about which consumers merely are uninformed; deception may occur only when consumers are misinformed about the effects of the product advertised. That proposition is established by one of the very cases relied upon most heavily by the Staff, Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978).

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The Staff similarly misstates the law when it implies that cigarette advertising is deceptive because consumers allegedly do not "spontaneously" and "consciously" recall the warning statement at the time they make purchase decisions. Report at 4-9. The only relevant question under Section 5 is whether an advertisement is deceptive. See 1964 Cigarette Rule at 8351. Accord, Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944). Compare American Home Products Corp. v. Johnson & Johnson, 436 F.Supp. 785 (S.D.N.Y. 1977), aff'd, 577 F.2d 160, 165-166 (2d Cir. 1978). We are aware of no case, and the Report cites none, that holds an advertiser responsible for the failure of consumers to retain the message in an advertisement. Indeed, the 1972 Consent Orders, reaffirmed by the Commission in 1981, require only disclosure of the warning statement in advertising; no provision of these Orders relates in any way to consumer recall.

In sum, the Staff's contention that consumer ignorance of a fact necessitates the disclosure of that fact in advertising is wholly unsupported by law. The Surgeon General's warning, which sets forth the essence of the entire anti-smoking argument, precludes any finding that cigarette advertisements are deceptive within the meaning of Section 5.

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V. THE STAFF'S PROPOSED REMEDIES

A. The "Remedial Action" Proposed in the Report Is Unnecessary and Ill-Advised.

1. The Staff Has Not Shown That the Present Warning Statement Is Ineffective.

At the outset of the Report, the Staff presents three reasons in support of its belief that the current warning statement is ineffective and that "remedies" for that ineffectiveness are necessary:

- (1) "the current warning refers to the health hazard of smoking only in the most generalized way. The warning does not communicate information on significant, specific risks that have recently been identified."
- (2) "after nearly a decade the current warning has been overexposed and has simply worn out. . . . While cigarette ads present their message in a variety of frequently changing, attention getting formats using numerous image provoking, personalizable themes, the current abstract warning in the same rectangular shape has appeared unchanged in every cigarette ad"
- (3) "The failure of the warning to provide specific health information and the abstract nature of the current warning, which makes it difficult for consumers to relate the warning to themselves, contribute to its ineffectiveness."
Report at 20.

None of these statements is supported by the remainder of the Report.

First, the Staff has presented no evidence to demonstrate that specific information on the alleged risks of smoking would be more "effective" than the current general

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warning statement. The Burke Study conducted for the FTC to test the recall of different types of proposed warnings revealed that the highest levels of recall related to matters of which consumers already are generally aware, such as lung cancer, and that the format of the warning, not the content, was the most significant factor in consumer recall.¹ Similarly, that study found that a specific lung cancer warning was "no more effective than the non-cancer warnings in eliciting mentions of the relationship between smoking and cancer"

Ibid.

Second, the Staff errs in its simplistic contention that the present warning statement has become ineffective because of "wearout" and that new warnings are needed if they are to be noticed by the consuming public. The fact that an advertising message is no longer specifically mentioned on unaided recall by a consumer who has seen the message repeatedly does not mean that that consumer is unaware of the message; in fact, as has been shown, there is virtually universal awareness of the warning statement. And with respect to consumers who are entering the market for the first time, the current warning statement is as novel as any other.

Third, there is no theoretical or empirical basis for the assumption that the measure of effectiveness of the warning statement is consumers' ability "to relate the warning

¹ Burke Marketing Research, Cigarette Print Ad Portfolio Study for Federal Trade Commission, Analysis 8-9 (1980)

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to themselves." As has been pointed out earlier, the Staff's comparison of "frequently changing . . . personalized" cigarette advertisements with the "unchanged . . . abstract" warning statement is misleading. The former must achieve consumer recall of a particular brand among numerous other brands, all of which present competing and conflicting messages, while the latter appears consistently to the consumer in every advertisement and on every pack of cigarettes. And perhaps most important, cigarette advertisements limited to the print media are the only method by which cigarette manufacturers can convey information about their products to the public, while the Surgeon General's warning is only one of numerous means by which consumers are exposed in all media to the claim by government agencies and private anti-smoking groups that cigarette smoking is hazardous to health.

Yet, as has been seen, the warning statement has been remarkably effective in promoting public awareness of the smoking and health controversy.

2. The Staff Has Failed To Demonstrate That the Proposed Rotational Warning System Is Likely To Be More Effective Than the Current Warning Statement.

Aside from the fact that the Report presents no problem for which remedial action is appropriate, the Staff has made no effort to determine whether its favored proposal, a cumbersome system of rotational warnings, is likely to be more effective than the warning statement that the Staff now finds to be deficient. Indeed, the Staff's "evidence" of

the likely impact of rotational warnings is limited to "some preliminary research" on Sweden's rotational warning system.

The evidence the Staff has been able to marshal in support of rotational warnings is meager and inconclusive. The Staff admits as much when it concedes that, despite the "preliminary" research results to which it refers (and which are not specifically disclosed or otherwise discussed in the Report), "the Swedish [rotational] system's long-term impact cannot yet be measured. . . ." Report at 5-33. The Staff also apparently feels compelled to state that "there are a number of differences between the U.S. and Sweden that make it impossible to state that their experience with rotational warnings would be comparable to ours." Ibid.¹

Despite these concessions, the Staff concludes that Sweden's brief experience with rotational warnings "[n]evertheless . . . is instructive." Ibid. This remarkable conclusion, with its singular lack of basis, reveals at once the

¹ Indeed, the Staff's reliance on Sweden as a role model for regulatory action in this country is not without substantial irony. The Swedish Government has gone far beyond all other Western governments in the area of attempted behavior modification and in its intrusion into private sector activities at the expense of individual freedom and self-reliance, and there is a growing body of evidence confirming the high costs associated with the Swedish system. See, e.g., H. Zetterberg, *The Legitimacy Crisis of the Welfare State and the Change in Systems of the 80s* (Stockholm 1981); D. Schaeffer, *Boring the Attitude in Sweden*, Vision 43 (May 1976). The Staff's approval of the Swedish system of rotational warnings simply confirms the Staff's interest in altering consumer behavior rather than increasing consumer awareness -- a wholly inappropriate regulatory goal.

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extent to which the Staff is prepared to bend existing evidence to satisfy its preordained objectives as well as the true nature of those objectives -- not to inform the public but to force or convince smokers to stop smoking.

B. The Staff's Proposals Are Inconsistent With the First Amendment.

The Staff asserts that its rotational warning proposal is consistent with the First Amendment. Report at 5-42 to 5-46. However, the principle that the FTC may take any action "reasonably related" to the prevention of the practice alleged to be illegal, see Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946), has been superseded in advertising cases by the First Amendment's requirement that regulation of protected speech may go no further than necessary to advance a substantial governmental interest. See, e.g., Beneficial Corp. v. FTC, 542 F.2d 611, 620 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977) (striking down FTC ban on use of the phrase "Instant Tax Refund" as excessively broad, and noting that "a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception"); National Commission on Egg Nutrition v. FTC, supra, 570 F.2d at 164 (court of appeals rejected the FTC's required disclosure because it was broader than absolutely necessary to inform the public that a controversy existed among experts regarding the effect of eggs on health).

Since 1976, it has been clear that the First Amendment protects "commercial speech," i.e., speech which "does no

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more than propose a commercial transaction." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). The Supreme Court recently articulated the degree to which commercial speech may be regulated, consistent with the First Amendment, in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). The Court traced the prior commercial speech cases and noted that "we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." 447 U.S. at 562. The Court then determined that commercial speech may be regulated only if the regulation directly advances a substantial state interest and is no more extensive than is necessary to serve that state interest. Id. at 566. The Court stressed that the remedy "must be designed carefully to achieve the State's goal"; "may not be sustained if it provides only ineffective or remote support for the government's purpose"; and may not be "excessive." Id. at 564. The Staff's proposed rotational warning system clearly cannot survive this constitutional scrutiny.

C. The Report Mischaracterizes Industry Self-Regulation of Advertising Practices.

In the course of reaching its conclusion about the best potential "remedies," the Staff disparages past voluntary industry action. Report at 5-10 through 5-16. As with the rest of the Report, the discussion of industry action on advertising and the smoking and health issue is misguided. The Staff's position apparently is that the industry has been

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remiss because it has not fully agreed with the Staff's position on smoking and health.

Any objective review of past industry action with respect to advertising reveals that the position of the tobacco industry has been a responsible one.

Since the Surgeon General's initial Report on Smoking and Health was issued in 1964, the tobacco industry has taken a number of significant steps to modify its advertising and promotional practices, especially to avoid influence on teenagers. It has eliminated advertising in student publications and the distribution of cigarette samples on campuses or near schools. It has eliminated the use of testimonials by athletes and public figures in cigarette advertising, and has required that all models used in cigarette advertising be, and appear to be, 25 or older. It supported the ban on broadcast advertising of cigarettes.

When, in 1959, the FTC decided that "all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construed as health claims," the industry voluntarily agreed to eliminate all references to "tar" and nicotine from cigarette advertising. A few years later, when the Commission reversed its position, the industry acceded to its request that cigarette advertising disclose "tar" and nicotine content. In 1972 the members of the industry agreed to the Consent Orders requiring the warning statement in all cigarette advertising.

The industry to date has committed more than \$91 million, on a no-strings-attached basis, to fund independent scientific and medical research on smoking and health questions. While its views on smoking and health questions differ from those of the FTC Staff, it does not use cigarette advertisements to argue those views or to discredit the Surgeon General's conclusions.

The industry will continue to maintain a responsible advertising policy. It will not, however, submit to each annual flight of fancy by the FTC Staff.

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Voluntary Initiatives of the Cigarette Companies
in Self-Regulation of Advertising and Promotion

1954

Founded the Council for Tobacco Research to pursue independently, with all necessary funds, the many unanswered scientific and medical questions about smoking.

1963

Withdrew cigarette promotion to students, setting the policy that smoking is a custom of personal choice to be decided upon by more mature persons in light of all available information.

1965

Established a strict advertising code, the principles of which are still observed by all companies.

1967

Began a continuing program of technical assistance to the Federal Trade Commission on the Commission's "tar" and nicotine testing.

1968

Participated through cigarette company scientists, who continue to serve in individual capacities, in the Tobacco Working Group of the Lung Cancer Task Force of the National Cancer Institute, the smoking and health research program of the Public Health Service.

1969

Volunteered to withdraw from broadcast advertising, principally because its increasing competitive level coupled with steady growth of youth audiences made it an inappropriate medium.

1970

Volunteered to begin to include FTC "tar" and nicotine ratings in advertising.

1971

Voluntarily agreed to depict cigarette packages legibly showing the Congressional package warning in all newspaper, magazine, billboard and other advertising.

1972

Entered agreement with Federal Trade Commission on terms of display of package warning in print advertising.