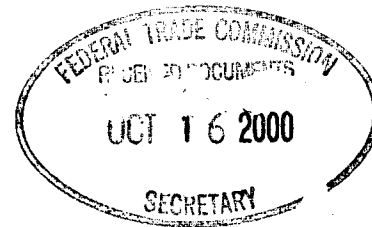


Smokeless Tobacco Council, Inc.

October 16, 2000



Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: 16 CFR Part 307 -- Comments of the Smokeless Tobacco Council

Dear Mr. Secretary, Chairman Pitofsky and Commissioners:

I am submitting comments on behalf of the Smokeless Tobacco Council, Inc. (the "STC"), the trade association representing five of the smaller domestic smokeless tobacco companies, in furtherance of the Commission's 10-year review of the 14-year Comprehensive Smokeless Tobacco and Health Act ("CSTHEA") of 1986. I am pleased to do so and commend the Commission on a long-standing, cooperative relationship over these many years.

Given that much of the debate establishing the CSTHEA and its labeling and advertising regulations focused on reducing illegal underage use of smokeless tobacco products, I will focus a majority of my remarks in this area and also will comment briefly on the challenging competitive marketplace for adult smokeless tobacco sales that exists today.

Government Reports Indicate Smokeless Tobacco Use By Minors Is Already Low and Continues to Decline

Numerous studies conducted at the behest of the federal government consistently indicate that illegal underage youth purchase and use of smokeless tobacco products has always been low and continues to decline even further. (*See Attachments*).

For example, the "*National Household Survey on Drug Abuse*," conducted by the Substance Abuse and Mental Health Services Administration ("SAMHSA"), has been conducted by the federal government since 1971. The 1996 study, published in August 1997, reports that smokeless tobacco use¹ by 12-17 year-old youth declined from 2.8% in 1994 to 1.9% in 1996. The 1997 report, published

¹ "Use" is defined as use at any time during the 30 days preceding the study.

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in August of 1998, reports that smokeless tobacco use by 12-17 year olds remained virtually unchanged at a low 2% in 1997. The most recent National Household Survey (August 31, 2000) demonstrated this continued decline and reported illegal smokeless tobacco use by 12-17 year olds at 2.1%. The Department of Health and Human Services (HHS) acknowledged this "significant decline" in its press release accompanying the release of this comprehensive survey.

The "*U.S. Department of Health and Human Services 24th Annual Monitoring the Future Study*," conducted by the University of Michigan's Institute for Social Research, released on December 18, 1998, reports a continued decline in tobacco use by minors. Specifically, it reports that among 12th graders, smokeless tobacco use² declined from 4.7% in 1986 to 3.2% in 1998. The same study also documents a decline in smokeless tobacco use by 10th graders, from 3.3% to 2.2%, and by 8th graders from 1.6% to 1.0% from 1991 to 1997. (The years 1986 and 1991 are the first years that data was available for 12th and 8th -10th grade students respectively.)

The "*Healthy People 2000 Midcourse Review and 1995 Revisions*," published by U.S. Department of Health and Human Services (HHS) in June 1995, reports smokeless tobacco use³ by 12-17 year-old males declined from 6.6% in 1988 to 3.9% in 1993.

The "*1997 Youth Risk Behavior Survey*," conducted by the CDC, and released August 14, 1998, reports a decline in the use⁴ of smokeless tobacco among high school students from 11.4% in 1995 to 9.3% in 1996. The survey reported declines in each of the four grades surveyed. This survey has consistently produced higher use numbers than other government surveys, perhaps because it includes individuals who are of legal age and defines "use" broadly. In any event, the survey confirms the trend documented by other government studies of low and decreasing use of smokeless tobacco products among minors.

Even though HHS attempted to move the goalposts in 1994 by altering its survey methodology, the trend of decreasing consumption continues. The agency has stated that one effect of the change in methodology is to increase its estimate of underage use of tobacco. For example, the reported use of smokeless tobacco by males age 12-17 in 1994 was 3.8% using the old methodology (a further decline from the 3.9% reported in 1993), but the new methodology resulted in a 1994 re-estimate of 5.1%. The 1995 estimate of smokeless tobacco use by males age

² "Use" is defined as daily use during the 30 days preceding the study.

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⁴ "Use" is defined as use at any time during the 30 days preceding the study.

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12-17 using the new methodology is 4.9%. Thus, both the old and the new survey methodologies report a low and consistent downward trend in the use of smokeless tobacco by underage males, and the reported usage is either below (using the old methodology) or approaching (using the new methodology) the HHS's "Healthy People 2000" goal of 4% by the year 2000.

Clearly, the current CSTHEA regime is working very effectively to reduce illegal underage sales of tobacco products. This success strongly suggests that no further changes are necessary in light of the very low illegal product purchase rates.

The STC Supports Retailer Education and Enforcement of Existing Laws to Continue the Decline in Underage Usage of Smokeless Tobacco Products -- Not Unnecessary New Regulations

As noted above, the HHS national goal for reducing illegal youth usage of smokeless tobacco use was 4.0% by the year 2000. The industry and this nation should be pleased that we met the goal years before the deadline. HHS has now established under "Healthy People 2010" a decade goal of reducing illegal youth usage of smokeless tobacco to 1.0% by 2010. We want to state unequivocally that we support this goal. It is our own goal that there should be no illegal purchase or use of tobacco products. "UNDER 18 - NO TOBACCO" is our position, policy and practice.

The STC's member companies comprise approximately 2% of the U.S. tobacco market. We will continue to work in the future with retailers, law enforcement agencies, and other interested groups to achieve the HHS goal. We have partnered with retailers, our wholesalers, our tobacco grower family, and other voices of reason to achieve this goal.

To demonstrate our commitment, the STC, and its member companies have led the effort to prevent illegal underage tobacco sales. We began in the 1980s working with educators, parents and civic groups in community-based partnerships to reinforce the "Adults Only" message for smokeless tobacco sales.

Partnering with the National Association of Convenience Stores in 1995, the STC pioneered a responsible tobacco retailing education program entitled "Under 18 - No Tobacco."

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With significant resources, we began retailer training to further state compliance with the "Synar Amendment" that required states to enforce age-of-purchase restrictions of tobacco sales. We ran this program for two years until approached by what is now called, the "Under 18-No Tobacco/We Card" Coalition to broaden the breadth and reach of our initiative. We continue as proud sponsors of the initiative today.

During our development of "Under 18 - No Tobacco" we found an ally in a western state Attorney General who shared our dual commitment to enforcing the law and responsible tobacco retailing. Partnering with the Attorney General, we were able to increase state compliance with age-of-purchase laws dramatically. This partnership was so effective that in June 2000, we shared the experiences of the state with other tobacco regulators, retailers and Attorneys General of three other states. These states are currently implementing aspects of our "Compliance thru Collaboration" plan in their individual states.

Further, the STC and its members have worked extensively with state legislatures to encourage the adoption of 18 as the minimum age of purchase of smokeless tobacco products since long before Congress enacted the "Synar Amendment" in 1992. In 1984, only 22 states had laws establishing 18 as the minimum purchase age of smokeless tobacco. Due in part to the STC's efforts, by 1992, 47 states had passed laws establishing 18 as minimum age for purchasing smokeless tobacco products. In many of these states - Colorado, Maryland, New York, Pennsylvania, Texas and Virginia - the STC submitted testimony in support of passage of these laws.

The STC and its member companies believe that its long-standing commitment to keep smokeless tobacco out of the hands of minors is working. Retailer education and law enforcement are the proven answer to keeping smokeless tobacco products out of the hands of minors, not new government regulations.

Based on the empirical evidence revealed by both federal and state government studies, the STC and its members strongly believe that existing regulations are effectively serving the CSTHEA. If, however, the Commission determines that any modifications to the existing rules are required, we urge the Commission to be mindful of the commercial speech protections provided by the First Amendment.

The Commission Must Avoid Promulgating Any Overly-Broad New Mandates that Run Afoul of the First Amendment

The right to be free from unreasonable government regulations that compel speech is well recognized as a vital part of the First Amendment. As the Supreme Court stated in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” Under the First Amendment, however, there is a narrow constitutional range in which the government can restrict or compel commercial speech in the name of consumer protection. The STC urges the Commission to be vigilant in ensuring that regulations continue to fall within this narrow range and thus properly preserve free speech rights protected by the Constitution.

In particular and in view of the fact that government studies demonstrate that illegal youth usage is low and decreasing, the STC strongly opposes the promulgation of any new regulations that would modify the specific wording, typeface, or placement of the statements required under the CSTHEA. Such overly broad regulations would not materially or directly advance the government’s interest, especially given the scope and availability of existing governmental tools and industry practices.

It is worth noting that courts have found that excessive size and typeface requirements for warnings on alcohol beverage ads violate the First Amendment. *See Memphis Publishing Co. v. Leech*, 539 F. Supp. 405 (W.D.Tn. 1982). In *Memphis Publishing*, for example, the court found that the requirement that the warning “be printed in a space at least 30% the size of the accompanying advertisement and in print no smaller than the largest type employed in the advertisement” was “more onerous than necessary to inform those sought to be informed.” *Id.* at 412. The court struck the regulation down as an unconstitutional burden on commercial free speech.

Similarly, excessive size, type, and placement requirements for smokeless tobacco warnings would unnecessarily infringe on a promoter’s commercial free speech rights. Allowing companies to continue to have some discretion in carrying out government-mandated policy will serve the government’s interest of informing consumers without placing overly burdensome requirements on promoters.

The Changing, Competitive Adult Smokeless Tobacco Marketplace

Over the 14-year history of the CSTHEA, the adult marketplace for smokeless tobacco products has become very competitive. Many traditional marketing and promotion practices are prohibited and/or restricted under the CSTHEA. Congress and many localities and states have further increased regulations, which have artificially impacted the competitive nature of the marketplace. Additionally, the competitors in the marketplace have changed.

The mission of the STC is to “maintain a competitive marketplace for adult smokeless tobacco products”. We vigorously defend the right of an adult American to choose to enjoy smokeless tobacco products. Recent attempts to restrict further the marketing and distribution of smokeless tobacco products by states and localities is seriously jeopardizing the competitive marketplace for adult sales.

One such initiative dubbed, “behind-the-counter,” attempts to restrict the placement of tobacco products in stores from direct access to non-self-serve access. Such attempts have interfered with adults’ legal right to choose and use tobacco products. Far more important for the Commission, these initiatives have tilted the competitive playing field in favor of market leading and more heavily advertised tobacco products.

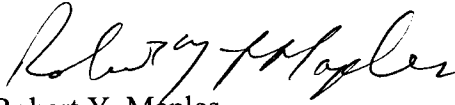
This shift in sales via regulation lessens the ability of smaller manufacturers to communicate with adult consumers about quality, price and other pertinent information about the product. With products forced “behind-the-counter,” lesser-known products become “out-of-sight, out-of-mind.” Unfortunately, the U.S. adult consumer loses when dominant companies become larger and deter competition.

Competitors in the trade often recognize the benefit of such a marketplace shift and often position themselves to capitalize on such opportunities. The STC wrote this year to Senator Christopher Bond (R-MO) and commended his Small Business Committee’s review of “slotting fees” and other manufacturer arrangements that, if not carefully monitored, can create “exclusionary” practices thereby thwarting free and open competition. We support Senator Bond’s review and the participation of the Commission in attempting to curtail retail practices that cross over into anti-competitive practices. As the Commission is considering existing smokeless tobacco regulations and any possible further changes, we encourage the Commission to assess the competitive consequences of such changes.

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As parties who are directly affected by these regulations, we appreciate your consideration of our views.

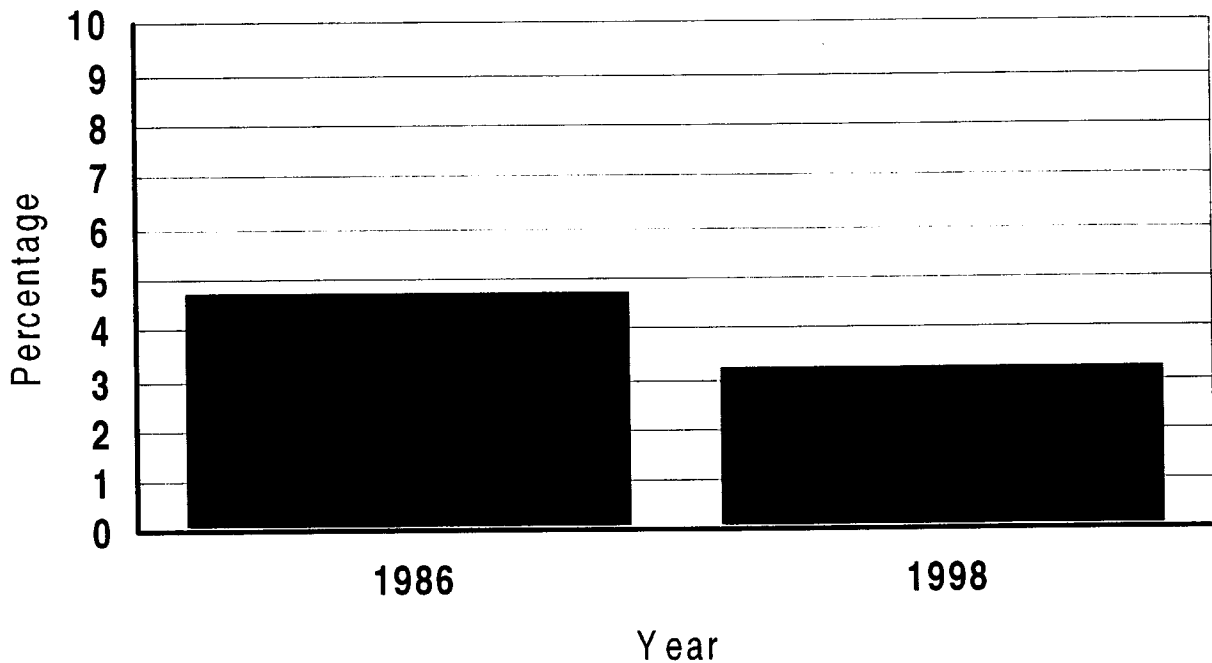
Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Robert Y. Maples".

Robert Y. Maples
President

/mvm
Attachments

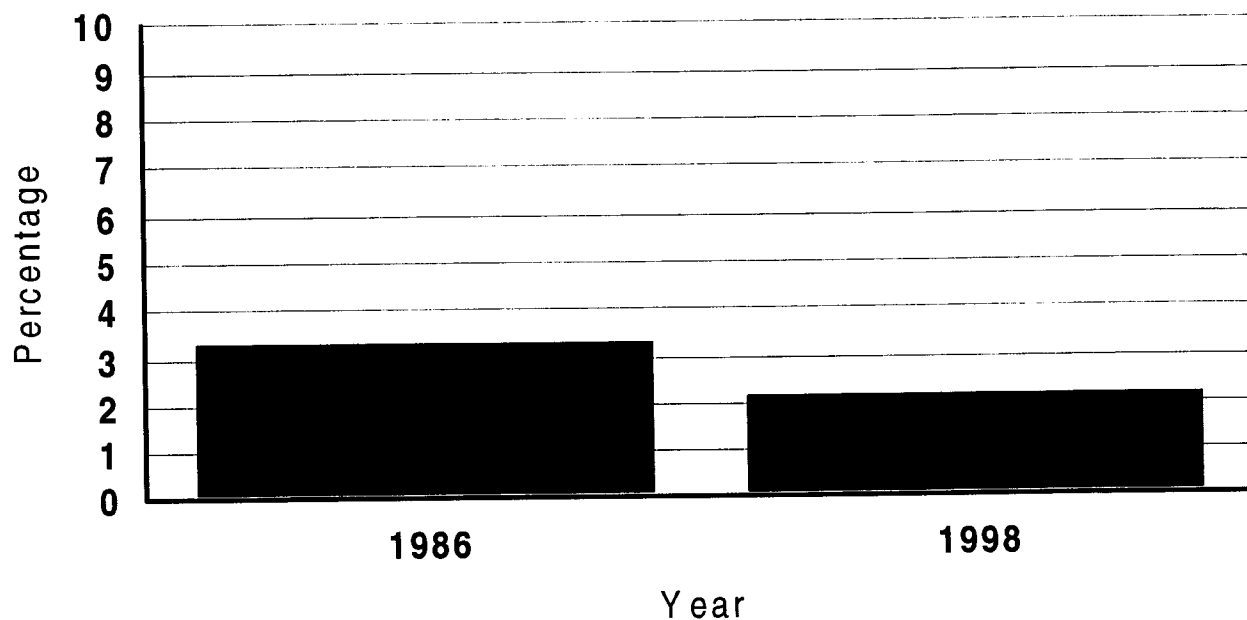
Smokeless Tobacco Use by 12th Graders



U.S. Department of Health and Human Services 24th Annual Monitoring the Future Study, conducted by the University of Michigan's Institute for Social Research, released on December 18, 1998, reports a continued decline in tobacco use by minors. Specifically, it reports that among 12th graders, smokeless tobacco use* declined from 4.7% in 1986 to 3.2% in 1998. The same study also documents a decline in smokeless tobacco use by 10th graders, from 3.3% to 2.2%, and by 8th graders from 1.6% to 1.0% from 1991 to 1997. The years 1986 and 1991 are the first years data was available for 12th and 8th -10th grade students respectively.

* use defined as daily use during the 30 days preceding the study

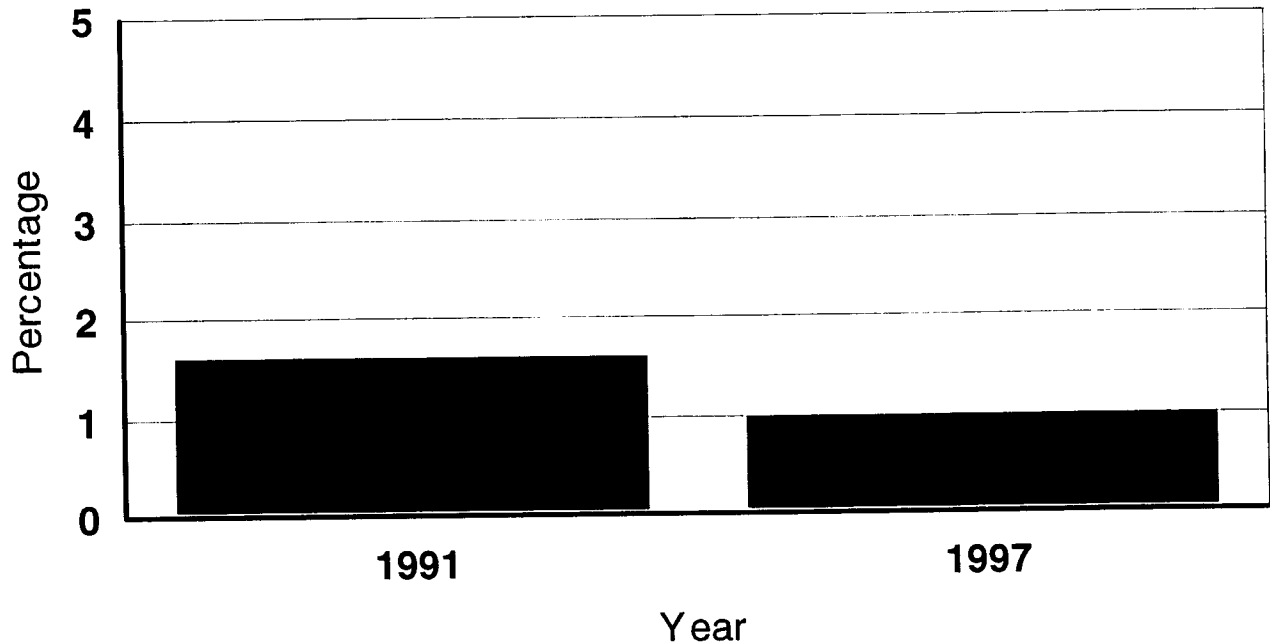
Smokeless Tobacco Use by 10th Graders



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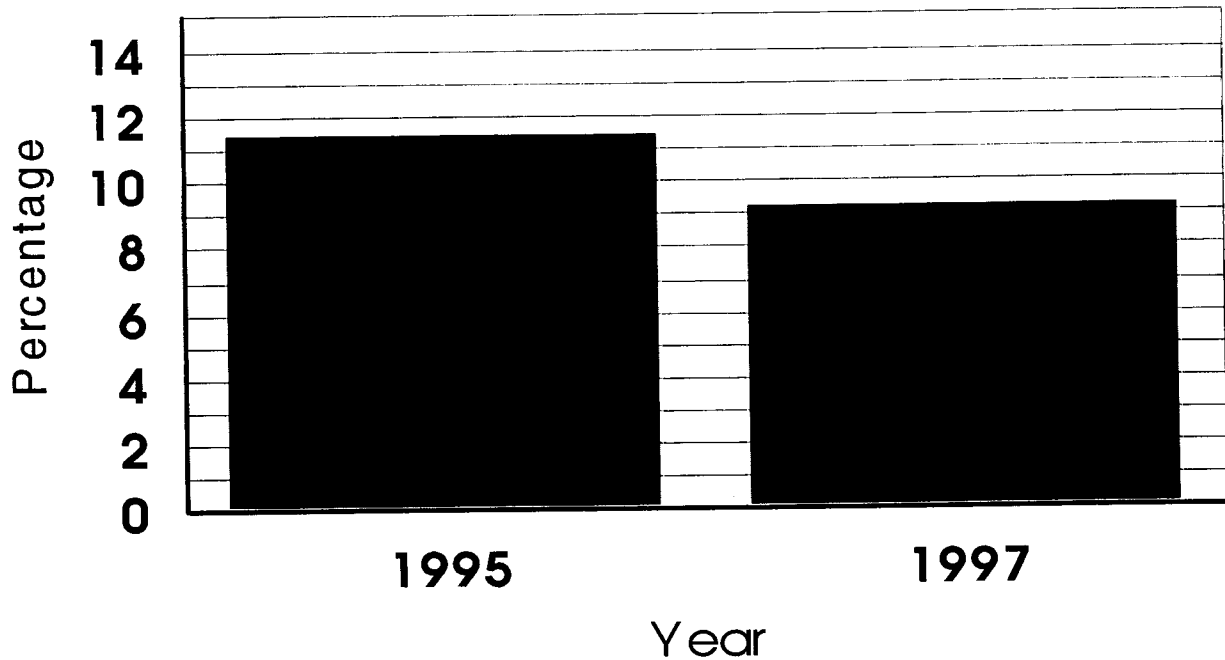
Smokeless Tobacco Use by 8th Graders



U.S. Department of Health and Human Services 24th Annual Monitoring the Future Study, conducted by the University of Michigan's Institute for Social Research, released on December 18, 1998, reports a continued decline in tobacco use by minors. Specifically, it reports that among 12th graders, smokeless tobacco use* declined from 4.7% in 1986 to 3.2% in 1998. The same study also documents a decline in smokeless tobacco use by 10th graders, from 3.3% to 2.2%, and by 8th graders from 1.6% to 1.0% from 1991 to 1997. The years 1986 and 1991 are the first years data was available for 12th and 8th -10th grade students respectively.

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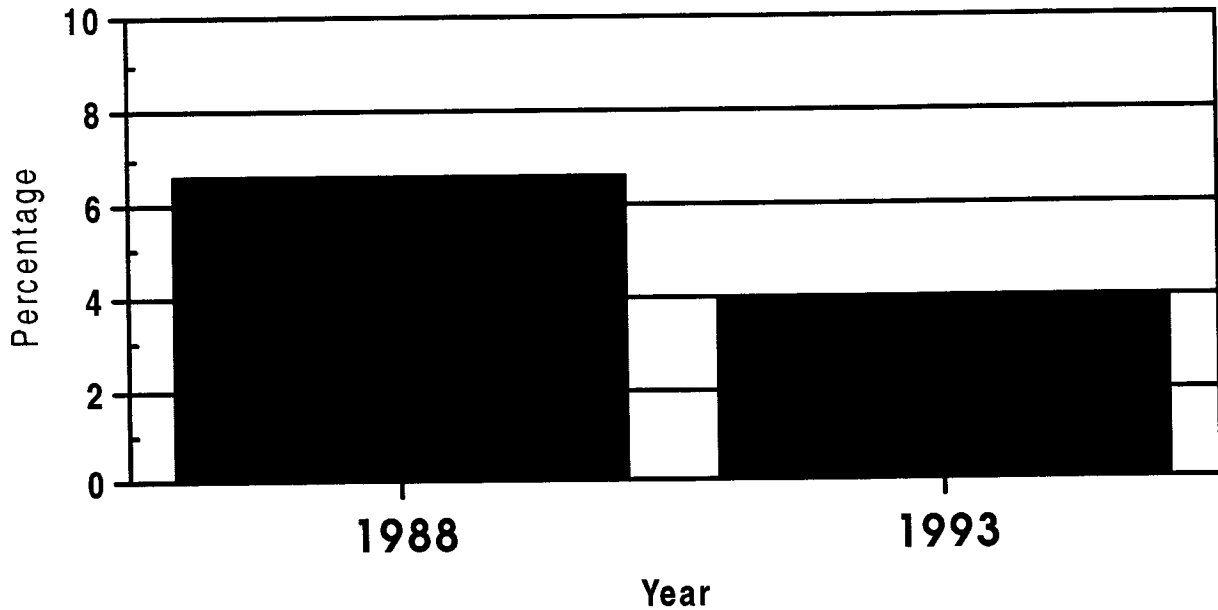
Smokeless Tobacco Used by High School Students



1997 Youth Risk Behavior Survey, conducted by the CDC, and released August 14, 1998, reports a decline in the use** of smokeless tobacco among high school students from 11.4% in 1995 to 9.3%. The survey reported declines in each of the four grades surveyed. This survey has consistently produced higher use numbers than other government surveys, perhaps because it includes individuals who are of legal age and defines use broadly. In any event, the survey confirms the trend documented by other government studies of low and decreasing use of smokeless tobacco products among minors.

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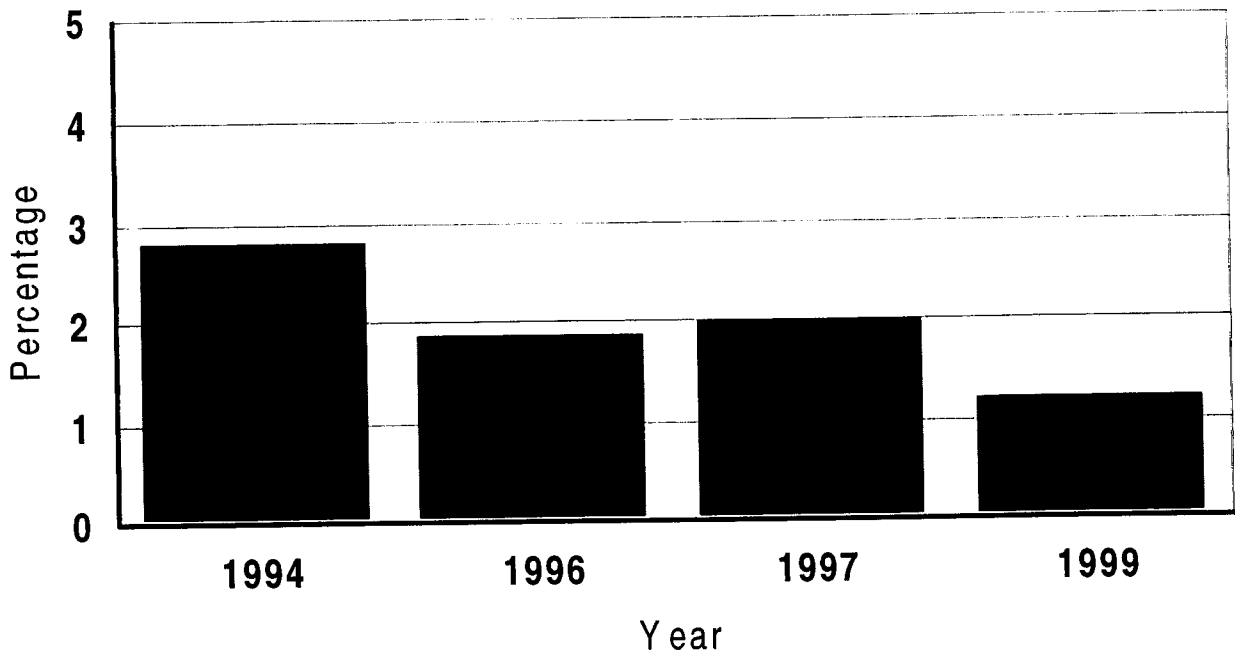
Smokeless Tobacco Use by 12-17 year-old Males



Healthy People 2000 Midcourse Review and 1995 Revisions, published by U.S. Department of Health and Human Services (HHS) in June 1995, reports smokeless tobacco use* by 12-17 year-old males declined from 6.6% in 1988 to 3.9% in 1993.

* use defined as daily use during the 30 days preceding the study

Smokeless Tobacco Use by 12-17 Year-old Youth



National Household Survey on Drug Abuse, conducted by the Substance Abuse and Mental Health Services Administration, has been conducted by the Federal Government since 1971. The 1996 study, published in August 1997, reports that smokeless tobacco use** by 12-17 year-old youth declined from 2.8% in 1994 to 1.9% in 1996. The 1997 report, published in August of 1998, reports that smokeless tobacco use by 12-17 year olds remained virtually unchanged at a low 2% in 1997. The 1999 study released in August of 2000, reports smokeless tobacco use by 12-17 year-olds at an all time low of 1.2%.

** use defined as use at any time during the 30 days preceding the study