Prepared Statement of

the Federal Trade Commission

Before the

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

November 13, 2007

Chairman Inouye, Vice Chairman Stevens, Senator Lautenberg, and Members of the Committee, I am William E. Kovacic, a Commissioner at the Federal Trade Commission ("FTC" or "Commission").[1] The Commission is pleased to have this opportunity to provide testimony at today's hearing. Today, I would like to discuss the FTC's responsibilities and activities in the area of tobacco advertising generally, and then turn more specifically to a discussion of cigarette testing and the promotion of cigarettes based on machine-measured tar and nicotine yields. The testimony discusses concerns the FTC has with the test method, and renews the Commission's previous recommendation that Congress consider giving authority over cigarette testing to one of the federal government's science-based public health agencies.

As the nation's consumer protection agency, the FTC has a broad mandate, with diverse responsibilities such as the prosecution and prevention of fraud in the marketing of health care products, deceptive financial practices in the subprime mortgage and credit repair industries, identity theft, and technology risks to consumers such as spam and spyware. The FTC also has responsibility over the marketing and promotion of tobacco products, including cigarettes, smokeless tobacco, cigars, and new tobacco products. One of the most challenging issues concerning cigarette advertising and promotion is the topic of today's hearing: the advertising and promotion of cigarettes based on their tar and nicotine yields as measured by the test methodology commonly referred to in the United States as "the FTC Method," although, as discussed below, the FTC stopped testing according to this method in 1987.[2]

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[1] The written statement presents the views of the Federal Trade Commission. My oral testimony and responses to questions reflect my views, and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] *See infra* n.15.

Cigarette testing under this test methodology began 40 years ago, in 1967, when the Commission approved use of the FTC Method for measuring the tar and nicotine yields of cigarettes.[3] From the outset, cigarette testing under the FTC Method was intended to produce uniform, standardized data about the tar and nicotine yields of mainstream cigarette smoke, *not* to replicate actual human smoking. Because no known test could accurately replicate human smoking, the FTC believed that the most important objective was to ensure that cigarette companies presented tar and nicotine information to the public based on a standardized method. In 1967, most public health officials believed that reducing the amount of "tar" in a cigarette could reduce a smoker's risk of lung cancer; therefore, it was thought that giving consumers uniform and standardized information about the tar and nicotine yields of cigarettes would help smokers make informed decisions about the cigarettes they smoked.[4] In the intervening 40 years, cigarettes have changed markedly and scientific understanding of smoking behavior has improved. These changes have important implications for cigarette measurement.

The Commission's Responsibilities Over Tobacco Advertising and Promotion

The Commission's core responsibility over the advertising and promotion of cigarettes and other tobacco products arises from its law enforcement authority under Section 5 of the FTC

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[3] When the Commission approved the test methodology, it was called the Cambridge Filter Method. The Cambridge Filter Method is now commonly referred in the United States as "the FTC Method."

[4] When the test method was adopted, the public health community believed that "[t]he preponderance of scientific information strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect." U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette* 1 (1981) (quoting a 1966 Public Health Service statement).

Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[5] The FTC's law enforcement activities involving cigarette advertising and promotion date back to the 1930s.[6] In 1962, the FTC's request for technical assistance from the U.S. Public Health Service was among the factors that led the then-Surgeon General to establish an advisory panel to undertake a comprehensive analysis of the data on smoking and health. The work of the advisory panel, in turn, led to the now-historic 1964 Report of the Surgeon General finding that cigarette smoking presented significant health risks. In that same year, the Commission issued a regulation requiring tobacco companies to include health warnings in cigarette advertisements and on packages.[7] The FTC's regulation was superseded in 1965, before it went into effect, by the Federal Cigarette Labeling and Advertising Act ("Cigarette Act"),[8] which required health warnings on cigarette packages.

The Commission also has used its Section 5 authority to prosecute a variety of unfair and deceptive cigarette advertising practices – including claims about tar and nicotine ratings for cigarettes. For example, in the early 1980s, the FTC filed a federal district court lawsuit challenging claims made by Brown & Williamson Tobacco Corporation that its Barclay

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[5] 15 U.S.C. § 45(a).

[6] *See, e.g., Julep Tobacco Co.*, 27 F.T.C. 1637 (1938) (stipulation prohibiting claims that Julep cigarettes helped counteract irritations due to heavy smoking and never made the throat dry or parched).

[7] *See* Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8354 (1964).

[8] 15 U.S.C. § 1331 *et seq*. Although the Commission administers the Cigarette Act, the Department of Justice enforces it.

cigarettes had only 1 mg. of tar. The FTC had previously revoked the "1 mg. tar" rating after concluding that the FTC Method did not accurately measure Barclay's tar, nicotine, and carbon monoxide due to the cigarette's unique channel ventilation system. The Court agreed with the FTC, and found that the "1 mg. tar" claim was deceptive.[9] Likewise, in 1995, the Commission approved a consent agreement with American Tobacco Company, settling charges over advertisements that allegedly misused the tar and nicotine ratings by representing that smokers would get less tar by smoking 10 packs of Carlton brand cigarettes (which were rated at 1 mg. tar per cigarette) than by smoking a single pack of certain other brands of cigarettes (which were rated at 10 mg. of tar).[10]

In addition to law enforcement actions, the Commission administers the Cigarette Act and administers and enforces the Comprehensive Smokeless Tobacco Health Education Act ("Smokeless Tobacco Act").[11] The Cigarette Act instructs the FTC to take certain steps to implement the mandated Surgeon General's health warnings. The Smokeless Tobacco Act directs the FTC to promulgate regulations governing the health warnings on packaging and

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[9] *FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd. in part, remanded in part*, 778 F.2d 35 (D.C. Cir. 1985).

[10] *The American Tobacco Co.*, 119 F.T.C. 3 (1995). In another example of a Commission action involving unfair and deceptive cigarette advertising practices, in 1997, the Commission issued a complaint against the R.J. Reynolds Tobacco Co. alleging that the company's Joe Camel advertising campaign caused or was likely to cause many young people to begin or continue to smoke, thereby exposing them to significant health risks. *R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999). The Commission's complaint was issued on May 28, 1997. On January 26, 1999, the Commission dismissed the complaint without prejudice because the relief sought had been achieved through, *inter alia*, the master settlement between the major tobacco companies and the attorneys general for 46 states.

[11] 15 U.S.C. § 4401 *et seq*.

advertising for smokeless tobacco products. The Commission's regulations specify the format, placement, and rotation of the warnings, and require companies to submit plans setting forth their rotation schedules to the FTC for approval.[12] In addition, the FTC enforces the ban in the Smokeless Tobacco Act on broadcasting smokeless tobacco advertisements on radio and television.

The Commission also publishes periodic reports on the advertising and promotion activities in the cigarette and smokeless tobacco industries.[13] Those reports provide information on sales and on various categories of advertising and marketing expenditures. The Commission issued its first report for cigarettes in 1967, and on the smokeless tobacco industry in 1987. The Commission also published periodic reports showing the tar, nicotine, and carbon monoxide yields of various cigarette brands from 1967 through 2000.[14] In light of concerns over the test method used to measure these yields, which are discussed later in this Statement, these reports have not been published since 2000 (reporting on 1998 data). But the FTC continues to collect this information, and it is available to researchers on the FTC's web site.

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[12] 16 C.F.R. Part 307.

[13] In addition, the Commission issued a report on the advertising and promotion activities in the cigar industry in 1999. *Federal Trade Commission Report to Congress, Report on Cigar Sales, Advertising, and Promotion* (1999).

[14] Until 1981, the Reports only provided information about the tar and nicotine yields. In 1981, the test methodology was changed to include testing for carbon monoxide yields, and the Commission subsequently began reporting those yields in addition to tar and nicotine.

Finally, testing for the tar, nicotine, and carbon monoxide yields of cigarettes is conducted by the cigarette industry under the test methodology approved by the FTC in 1967.[15] Cigarette companies have promoted their cigarettes based on ratings generated by this test methodology, and have adopted descriptors, such as "light" and "low," to characterize cigarettes that have tar ratings of 15 mg. or less.[16]

The "FTC Test Method" and Its Limitations

Cigarette ratings for tar, nicotine, and carbon monoxide are determined by machine testing conducted in accordance with the Cambridge Filter test method, commonly known in the U.S. as "the FTC Method."[17] The FTC Method determines the relative yield of individual cigarettes by "smoking" them in a standardized fashion, according to a pre-determined protocol, on a machine. The machine is calibrated to take one puff of 2-second duration and 35 ml volume

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[15] In 1967, the Commission opened its own testing laboratory to analyze the tar and nicotine yields of cigarettes. In 1981, the Commission laboratory began to analyze the carbon monoxide yields as well. The Commission operated this laboratory until April 1987, when it decided to close it because, *inter alia*, significant expenditures were needed to update and continue the laboratory, and the same information was available from the industry. *See* Prepared Statement of the Federal Trade Commission on Cigarette Tar and Nicotine Testing Before the Subcommittee on Transportation, Tourism, and Hazardous Materials, United States House of Representatives (May 7, 1987). Since the FTC laboratory closed, the Tobacco Industry Testing Laboratory conducts the testing and provides the data to the individual cigarette companies; the Commission obtains the data from the cigarette companies pursuant to compulsory process.

[16] These terms are not defined by the FTC or any other government agency. The industry, however, has generally adopted them. The term "low" tar generally refers to cigarettes currently rated as 15 mg. tar or less and "ultra low" to those rated 6 mg. or less. The industry uses the term "full flavor" to describe cigarettes with tar ratings above 15 mg. The terms "light" and "ultra-light" are used interchangeably with "low" tar and "ultra low" tar, respectively.

[17] Europe and many other countries have adopted a similar machine-based test method established by the International Organization for Standardization. In those countries, the test method is referred to as the "ISO Method."

every minute. Cigarettes are smoked to a specified length, and the ratings are then calculated. In 1967, when it began, the intent of the tar and nicotine testing program was to provide smokers seeking to switch to lower tar cigarettes information based on a single, standardized measurement with which to choose among then-existing brands.

Over the past 40 years that the current system has been in place, there have been dramatic decreases in the machine-measured tar and nicotine yields of cigarettes. In 1968, for example, only 2% of all cigarettes had machine-measured yields of 15 mg. or less. Today, over 83.5% of all cigarettes sold have machine-measured yields of 15 mg. or less.

Despite these dramatic decreases in machine-measured yields, the Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of the amount of tar and nicotine they actually will get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of tar and nicotine exposure. This appears to be primarily due to compensation – or the tendency of smokers of lower rated cigarettes to take bigger, deeper, or more frequent puffs, or otherwise alter their smoking behavior in order to obtain the dosage of nicotine they need. Such variations in the way people smoke can have significant effects on the amount of tar, nicotine, and carbon monoxide they get from any particular cigarette. Smokers may incorrectly believe, for example, that they will get three times as much tar from a 15 mg. tar cigarette as from a 5 mg. tar cigarette. In fact, if compensation is sufficiently great, it is possible for smokers to get as much tar and nicotine from relatively low rated cigarettes as from higher rated cigarettes. Although the limitations in the test methodology were recognized when the testing program began in 1967, they became a substantially greater concern by the 1990s as a result of changes in modern

cigarette design and a better understanding of the nature and effects of compensatory smoking behavior.

In light of these concerns, in 1994, the Commission, along with Congressman Henry Waxman, asked the National Cancer Institute ("NCI") to convene a consensus conference to address cigarette testing issues. That conference took place in December 1994, and the NCI issued its Report of the conference in October 1996.[18] The NCI Report recommended, among other things, that the cigarette testing system measure and publish information on the range of tar, nicotine, and carbon monoxide that most smokers should expect from the cigarettes they smoke. Accordingly, in September 1997, the Commission requested public comments on proposed revisions to the test method that would add a second tier of testing – using more rigorous smoking conditions – to better approximate a range of tar and nicotine yields and make it more apparent to consumers that the amount of tar and nicotine they get from any specific cigarette depends on how they smoke it.

Around this same time, some public health officials expressed concerns that recently released studies raised serious questions about the basic assumption then underlying cigarette testing: that cigarettes with lower machine-measured tar and nicotine ratings are less harmful than ones with higher ratings. For example, in 1997, the NCI issued a Report noting that the apparent mortality risk among current smokers had risen in the last forty to fifty years, even though machine-measured tar and nicotine yields had fallen dramatically during the same

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[18] *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee*, National Institutes of Health, National Cancer Institute (1996).

period.[19] In attempting to understand this phenomenon, the authors of the NCI Report suggested that the increased mortality risk might be due to increases in current smokers' lifetime exposure to cigarette smoke, or that the reduced tar levels of modern cigarettes might have less benefits than previously believed. In addition to the NCI Report, a number of other studies reported that changes in smoking behavior and cigarette design appeared to have resulted in an increase in a specific type of cancer that occurs deeper in the lung than the type of lung cancer that was previously associated with smoking.[20]

Citing these studies, public health agencies asked the Commission to postpone its proposed modifications to the test method until a broader review of unresolved scientific issues surrounding the system could be addressed. The Commission responded to these comments, in 1998, by formally requesting that the Department of Health and Human Services ("HHS") conduct a review of the FTC's cigarette test method.[21] In particular, the Commission asked HHS to provide recommendations as to whether the testing system should be continued, and if it should be continued, what specific changes should be made in order to correct the limitations previously identified by the NCI, an agency within HHS, and other public health officials.

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[19] *Smoking and Tobacco Control Monograph 8: Changes in Cigarette-Related Disease Risk and Their Implications for Prevention and Control*, National Institutes of Health, National Cancer Institute (1997).

[20] *See* Thun MJ, et al., "Cigarette Smoking and Changes in the Histopathology of Lung Cancer," 89 *J. of the Nat'l Cancer Inst.* 1580 (1997); Ernster VI, "The Epidemiology of Lung Cancer in Women," 4 *Annals of Epidemiology* 102 (1994); Levi FS et al., "Lung Carcinoma Trends by Histologic Type in Vaud and Neuchatel, Switzerland, 1974-1994," 79 *Cancer* 906 (1997).

[21] Letter from Donald S. Clark, Secretary, *Federal Trade Commission* to the Honorable Donna E. Shalala, Secretary, *Department of Health and Human Services* (Nov. 19, 1998).

In November 2001, the NCI published a Report presenting the results of a review of the epidemiological and other scientific evidence on the public health effects of low tar cigarettes.[22] As noted in Dr. Backinger's testimony prepared for today's hearing, this NCI Report concluded that "there is no convincing evidence that changes in cigarette design . . . have resulted in an important decrease in the disease burden caused by cigarette use."[23] The NCI Report also concluded that "[v]ariations in the tar and nicotine delivery that result from the known compensatory alterations in smoking behaviors make the current U.S. cigarette tar and nicotine yields as measured by the FTC method not useful to the smoker either for understanding how much tar and nicotine he or she is likely to inhale from smoking a given cigarette or for comparing the tar and nicotine intake that is likely to result from smoking different brands of cigarettes."[24]

The Commission understands that this Report represented, at least in part, the first step in the HHS response to the FTC's 1998 request for assistance. When it announced the release of this Report, the NCI noted the FTC's previous request, and indicated that it would work with its sister science-based agencies at HHS to determine what changes needed to be made to the testing

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[22] *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, National Institutes of Health, National Cancer Institute (2001).

[23] Statement of Cathy Backinger, M.D., "Research Findings Concerning So-Called Low-Tar or 'Light' Cigarettes," Testimony Before the Committee on Science, Commerce, and Transportation, United States Senate (Nov. 13, 2007). *See also Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, National Institutes of Health, National Cancer Institute, at 146.

[24] *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, National Institutes of Health, National Cancer Institute, at 34.

method.[25]

The FTC understands that representatives from agencies within HHS are continuing to explore these issues. In addition, the Commission understands that an expert panel has been assembled by the World Health Organization to address tobacco testing issues and to make recommendations concerning such testing.

The Commission believes that it is vital that there be an effective mechanism for implementing any recommended changes to the test method once the evaluations are completed. Although the Commission brings a strong, market-based expertise to its scrutiny of consumer protection matters, it does not have the specialized scientific expertise needed to design and evaluate scientific test methodologies. Indeed, when evaluating medical or other scientific issues, the Commission often relies on other government agencies and outside experts with more knowledge in the relevant areas. Therefore, in its July 1999 "Report to Congress for 1997, Pursuant to the Cigarette Labeling and Advertising Act," the Commission recommended that Congress consider giving authority over cigarette testing to one of the federal government's science-based public health agencies. The Commission renewed that recommendation in 2003 in testimony before Congress,[26] and the Commission reiterates that recommendation again today.

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[25] National Cancer Institute, "Low-Tar Cigarette: Evidence Does Not Indicate a Benefit to Public Health," *News from the NCI* (Nov. 27, 2001).

[26] Prepared Statement of the Federal Trade Commission Before the Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, United States House of Representatives (June 3, 2003); Prepared Statement of the Federal Trade Commission Before the Committee on Government Reform, United States House of Representatives (June 3, 2003).

In conclusion, the FTC thanks the Committee for the opportunity to present testimony on this important topic.