



May 29, 2002

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The Honorable Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Secretary Clark:

I am writing to voice my support for the request, submitted by U.S. Smokeless Tobacco Company on February 5, for an advisory opinion on whether smokeless tobacco producers may communicate through advertising that smokeless tobacco products are considered to be a reduced risk alternative to cigarette smoking. Please submit my comments to the public record.

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I am the president of The Heartland Institute, an independent nonprofit research organization based in Chicago, Illinois. For the past 18 years, I have been conducting my own research and writing and editing and publishing the work of nearly 100 others, on a wide range of public policy issues, including tobacco litigation, regulation, and taxation. Heartland's work is supported by some 1,300 individuals, foundations, and corporations. Philip Morris is a modest supporter of The Heartland Institute; it was not consulted during the writing of this letter and probably would disagree with parts of it.

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I am also one of the approximately 45 million smokers in the U.S. who will be directly affected by the Federal Trade Commission's decision in this case. Yesterday I attended a debate on this very subject, sponsored by Northwestern University's Law School and featuring, among others, Matthew Meyers of the Campaign for Tobacco-Free Kids. I came to the debate eager to hear both sides, but came away offended and sometimes confused by Mr. Meyers' statements. This letter will refer several times to Mr. Meyers' comments made at that debate. They are similar to positions taken in his letter to you dated February 25, in which he urged the FTC to reject UST's request.

Customers have a right to know the choices they face

During the past 23 years I have smoked cigarettes, pipes, and (currently) cigars. I have never been informed of the comparative risk between these three

19 South LaSalle
Suite 903
Chicago, Illinois 60603
phone: 312.377.4000
fax: 312.377.5000
e-mail: think@heartland.org
web: www.heartland.org

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choices or the likely health consequences of switching to smokeless tobacco. I do not know if low-tar cigarettes are “safer” than regular or unfiltered cigarettes. I don’t know how much risk I am facing by smoking one cigar every evening rather than switching to chewing tobacco, or perhaps smoking two filtered cigarettes.

How are smokers, the people with the most at stake in the decisions to use tobacco products and the frequency of such use, to make informed choices? None of the ads for the above mentioned products make comparative health claims, nor does such information appear on their packaging. A search for “chewing tobacco” on the Web site of the Centers for Disease Control links to a feature¹ that asks, “Is smokeless tobacco safer than smoking?” In large letters it answers: “No Way!” Yet there is virtual consensus in the medical community that smokeless tobacco is less threatening to health than smoking (a point addressed below).

An hour on the CDC Web site reveals no information about the health benefits, if any, of switching to low-tar cigarettes. Tobacco companies (are required to) report the level of tar in their cigarettes, but smokers have no idea if low-tar cigarettes are actually safer than high-tar brands, or for that matter, a pipe or cigars. According to at least one expert, after adjusting for changes in smoker habits, low-tar cigarettes “are about 20 percent safer in terms of the lung cancer risks, but there is no comparable evidence indicating an effect for heart disease.”²

I do not know a single fellow smoker who, if asked, could tell me that smoking light cigarettes reduces his chance of lung cancer by about 20 percent. Similarly, in my 23 years of smoking, I have been told just once that smoking *less* has genuine health benefits.³ Why isn’t that part of the public health message on smoking?

As a smoker, I want to know about the risks of the products I may wish to buy. I am not too stupid to understand comparative health claims, and the spread of light cigarettes demonstrates that my fellow smokers are not too apathetic to change their conduct in response to information. Research by Nobel Laureate economist Gary Becker and others⁴ that people with strong habits and addictions tend to react rationally to information and incentives. Yet, the assumption underlying efforts to prohibit comparative-risk advertising is that we smokers are too stupid,

¹ <http://www.cdc.gov/tobacco/sgr/sgr4kids/smokless.htm>

² W. Kip Viscusi, *Smoke Filled Rooms: A Postmortem on the Tobacco Deal* (Chicago, IL: University of Chicago Press, 2002), p. 67.

³ That one person was a cardiologist in Rockford, Illinois, who said smoking fewer than 7 cigarettes a day was probably harmless . . . an observation so astounding to me that I have repeated it to many fellow smokers over the years, prompting more than a few to attempt to reduce (but not quit entirely) their smoking.

⁴ Gary S. Becker’s “theory of rational addiction” was originally set forth in three working papers by the Center for the Study of the Economy and the State at the University of Chicago: “A Theory of Rational Addiction” (with Kevin M. Murphy, Working Paper #41, 1986); “Rational Addiction and the Effect of Price on Consumption” (with Michael Grossman and Kevin M. Murphy, Working Paper #68, 1991), and “Habits, Addictions, and Traditions” (Working Paper #71, 1991).

apathetic, or addicted to use information that potentially could prolong our lives and spare our loved ones from emotional suffering and financial hardship.

Mr. Meyers suggests that adult smokers must be denied access to this information in order to avoid attracting children to tobacco products. The logic used by anti-tobacco activists in the debate over whether tobacco companies direct their advertising to children is dubious.⁵ But more to the point, Mr. Meyers has no right to deprive smokers of information about the choices they are making. In his personal reflections on morality and justice he is free to put the interests of children ahead of adult smokers if he likes; he has no right to use the power of the state to impose that choice on others.

Prohibiting comparative health claims from appearing in tobacco advertising deprives 25 percent of the adult population of information they genuinely want and would put to good use. This is an injustice at least, and probably an act of aggression done under the cloak of "public interest advocacy." Either way, it is a violation of my rights and the rights of some 45 million other Americans.

Producers have a right to communicate to consumers

The U.S. Supreme Court has held that producers have the conditional right to convey truthful information about their products to consumers.⁶ The First Amendment says "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." I have never been able to find in these words an exception for commercial speech, though some courts have and many regulations currently assume such an exception.

While courts and regulators have been less than consistent in upholding a First Amendment right to commercial speech, it is a bedrock issue for civil and economic libertarians. As Robert B. Ekelund, Jr. and David S. Saurman write:

The crucial point is that advertising is an expression of opinion in addition to being factually informative. For personal and individual freedom to exist in a society,

⁵ Anti-smoking activists often argue that since Joe Camel was a cartoon, R.J. Reynolds was targeting kids. But as I pointed out in an essay that first appeared in 1996, cartoons are used by the producers of many consumer products that can only be purchased and used by adults, including life insurance, household cleaners, automobile rustproofing, and tires. The argument is a non sequitur. See Joseph Bast, "Joe Camel Is Innocent!" *The Heartlander*, August 1996, pp. 1, 3. Available at www.heartland.org/perspectives/tobacco.htm.

⁶ The Supreme Court has ruled that commercial speech can be regulated or prohibited if it does not accurately inform the public about lawful activity, if the state can assert a substantial interest to be achieved by restrictions on commercial speech, if such restrictions "directly advance" the governmental interest, and if the governmental interest could not be served as well by lesser restrictions on commercial speech. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), *Central Hudson Gas & Electric Corp. v. Public Service Communication* (1980), *Shapero v. Kentucky Bar Association* (1988), etc.

government cannot regulate or suppress the free exchange of opinion between free people, be it news, literature, editorial commentary, or advertising. Individual freedom is eroded once governmental regulation and control of the market for ideas is imposed.⁷

Carving out from the First Amendment an exception for commercial speech assumes false distinctions between ideas and goods, and thoughts and actions. Can freedom of speech genuinely be protected if speech referring to goods or services we wish to make available to others is somehow considered “nonspeech”? What ideas and thoughts do we have that *do not* relate in some way to what we are willing to do for others, and under what terms? As historian Richard Pipes wrote recently, “what a man is, what he does, and what he owns are of a piece, so that the assault on his belongings is an assault also on his individuality and his right to life.”⁸ “Advertising,” write Ekelund and Saurman, “seems to be the lone exception to the rule of no government interference in the ideas market, an exception steeped in illogical and contradictory argument.”⁹

Tobacco companies are discouraged or prohibited by the courts, FDA, and the surgeon general from making comparative health claims in their advertising. Matthew Meyers, during the debate yesterday, said tobacco companies should be allowed to make such claims only if they submit to regulation of their products by the Food and Drug Administration (FDA). But Mr. Meyers knows the FDA does not have such authority currently, and without new rules treating tobacco as a unique product, giving the FDA authority over tobacco would require that it ban the sale of cigarettes entirely.

Mr. Meyers claimed in his letter of February 25, and said repeatedly during the debate, that UST wants “a government stamp of approval” on its product without submitting to additional regulation, and that consumers would be denied “the same government protections that consumers get for every other product.” This is not, he said, a First Amendment issue.

In fact this case *is* about free speech. UST is seeking regulatory certainty, not privilege. The language it proposes doesn’t claim government approval of its statement. UST’s application to the FTC for permission to run certain ads easily falls within the FTC’s traditional purview. Given the hostility toward all tobacco products and advertising shown by the FDA and statutes restricting FDA’s authority over tobacco products, it is reasonable that UST would take its case to the FTC, the government agency that has shown a more modern understanding of the role of advertising in a market economy.

⁷ Robert B. Ekelund, Jr. and David S. Saurman, *Advertising and the Market Process* (San Francisco, CA: Pacific Research Institute, 1988), p. 181.

⁸ Richard Pipes, *Property and Freedom* (New York, NY: Random House, 1999), p. 210.

⁹ Ekelund and Saurman, *supra* note 7, p. 180.

Contrary to Mr. Meyers' assertion, producers of other products do not submit to close government regulation in exchange for "permission" to advertise their products. They have a *right* to communicate with their customers, subject to reasonable regulation and liability for fraud or misrepresentation. UST is seeking assurance by regulators that its plan to exercise its legal right to advertise does not run afoul of current legal restrictions.

Of course if tobacco companies make health claims in their advertisements, those claims must be accurate. Common law already provides penalties for fraud, and there appears to be no shortage of lawyers willing to file suits against tobacco companies alleging fraud. There may be a case on efficiency grounds for government to regulate advertising claims, rather than rely on the tort system: In fact, this is a major part of the theoretical justification for the FTC's existence. But it is surely putting the horse on the saddle to allow government to severely limit or even ban advertising in the name of improving its accuracy.

To say advertising must be accurate is not the same as requiring that ads give full disclosure of the content of the product or all its potential health impacts. To attract consumers' attention, ads must be brief and memorable. Full disclosure would make some ads encyclopedic, making them too expensive to run or, if they were run, likely to be ignored by consumers. As J. Howard Beales and Timothy Muris wrote:

Regulatory requirements that give advertisers the choice between nearly complete information or no information will often leave consumers with no information. And if advertising cannot inform consumers of product differences, consumers have less incentive to improve products in ways that consumers would desire.¹⁰

During yesterday's debate, Matthew Meyers displayed colorful ads for "Rooster" chewing tobacco, one of UST's products, and said it was obvious such ads are not aimed solely at persuading current smokers to switch to smokeless tobacco for the sake of their health.¹¹ Adding a small statement about the comparative health benefits of chewing versus smoking, he said, would not wash away the ads' apparent sin of being attention-getting.

So long as UST is discouraged from making health claims, we can expect it to continue to run colorful ads with limited text aimed at creating the image of a "cool" or "hip" product, and such ads will appeal to people of all age groups. The ads Mr. Meyers displayed, in other words, are the product of the very policies he defends.

In point of fact, UST has the right to advertise its products today without making any

¹⁰ J. Howard Beales and Timothy J. Muris, *State and Federal Regulation of National Advertising* (Washington, DC: American Enterprise Institute, 1993), p. 33.

¹¹ Apparently the Rooster ads are what Mr. Myers had in mind when, in his February 25 letter, he refers to "the continued use of themes and images that experts agree appeal to young people"

comparative health claims. While Mr. Meyers may wish the company would run black and white text-only ads, that is not the law today nor ought such a restriction even be under consideration. Chewing tobacco is a legal product that poses only a slight health risk to its users and no threat to nonusers. Its producers have a right to advertise their products aggressively and truthfully.

Advertising is integral to a free and efficient market

Robust advertising is integral to ensuring that markets are competitive, since advertising is the only way producers can communicate with consumers about new products and the benefits of current products. Restrictions on advertising protect some firms (typically the market leaders) and handicap competitors and potential new entrants to the market, leading to higher prices and less product innovation.

This theory of advertising is almost unchallenged among economists.¹² It has also long been the view of the FTC. As Beales and Muris wrote:

Past and present FTC officials have long been unanimous in their belief that truthful advertising is an important competitive weapon that should be encouraged. Robert Pitofsky, observing the changes that occurred in FTC enforcement during the 1970s, wrote that “the major recent programs designed . . . [to regulate advertising] are based on a revised and more sensible view of the function of advertising in the market and should result in higher levels of consumer welfare.” And former chairman and commissioner Michael Pertschuk wrote, “Overregulation of advertising can chill aggressive competition and impose fruitless burdens on a shaky economy.”¹³

The chilling effect of overregulation of advertising can plainly be seen in the tobacco industry. Restrictions on advertising tar and nicotine claims, adopted by the FTC in 1960, dramatically slowed a promising downward trend in tar content, the result of what had been lively competition among and rapid innovation by cigarette companies.¹⁴ Only when the ban was lifted in 1968 did innovation resume and tar content continue its previous rate of decline.

David Sweanor, senior legal counsel for the Smoking and Health Action Foundation located in Ottawa, Ontario,¹⁵ observes that excessive regulation and restrictions on advertising have created a “nicotine maintenance monopoly” whereby “individuals who need nicotine on a

¹² See Robert B. Ekelund, Jr. and David S. Saurman, *supra* note 7.

¹³ Beales and Muris, *supra* note 10, p. 13.

¹⁴ The story is told by an FTC Bureau of Economics Report: John Calfee, *Cigarette Advertising, Health Information and Regulation Before 1970* (December 1985).

¹⁵ Sweanor was also present at the debate at Northwestern University on May 29, 2002.

maintenance basis have little choice other than to use tobacco products.”¹⁶ Characteristic of highly regulated markets, the tobacco industry has trended toward concentration, with Philip Morris, for example, having 50 percent of the tobacco market in the U.S.

Sweanor, who is strongly anti-tobacco, is dead-on in his analysis of the negative impact of heavy-handed regulation of tobacco substitutes and advertising restrictions. Regulation is the most common cause of concentration and monopoly in the U.S.,¹⁷ and it has severely distorted the marketplace for tobacco products. “The safest products (NRT [nicotine replacement therapy] preparations) are subject to stringent regulation and are relatively difficult to obtain, and the most toxic products (cigarettes) are virtually unrestricted and widely available.”¹⁸

Sweanor’s analysis helps expose the fallacy of Matthew Meyers’ insistence that producers must allow their products to be regulated before getting “permission” to advertise. FDA regulation of smokeless tobacco would not help its producers compete more effectively against cigarette companies. Rather, it would have just the opposite effect: Smokeless tobacco would become like every other form of nicotine delivery other than tobacco: tightly regulated as a drug delivery device, perhaps available only by prescription, and at a price sufficiently high to discourage smokers from switching.

Allowing advertising ought to be the default presumption in every debate over regulatory policy because it has been so convincingly demonstrated that advertising benefits consumers. Experience in the tobacco industry, both past and present, makes the case all the more compelling.

The public health benefits would be considerable

Allowing smokeless tobacco producers to make comparative health claims in their advertisements would amount to recognition that our zero tolerance, “quit or die” approach hasn’t worked. In its place would be a “risk reduction strategy” that aims for the more modest goal of less risk. Would the public health benefits of this second-best strategy be worth giving up the hope of achieving the complete elimination of tobacco?

The math seems undebatable. Smokers die, on average, 6 to 7 years before nonsmokers, while smokeless tobacco users lose 15 days, or 0.04 years of life expectancy.¹⁹ If just 10 percent

¹⁶ David Sweanor, “Policy Options to Reduce Tobacco-Caused Mortality,” *Journal of Addictive Diseases*, Vol. 18 (3), 1999, p. 4.

¹⁷ Yale Brozen, *Is Government the Source of Monopoly? And Other Essays* (Washington, DC: Cato Institute, 1980).

¹⁸ Sweanor, *supra* note 16, p. 3.

¹⁹ B. Rodu and P. Cole, “Tobacco-related mortality,” [letter to the editor] *Nature*, Vol. 370 (1994), p. 184.

of the 45 million smokers in the U.S. today switched to smokeless tobacco, the result would be an almost incredible 26.8 million life-years saved. The UST letter of February 5 lists some 50 publications in the scientific literature relevant to this point, so I will not belabor it.

Similar risk reduction strategies have worked in other fields with little or no controversy. Deaths due to automobile accidents are a national tragedy almost on par with the death toll attributable to smoking, yet as a nation we do not pursue a "walk or die" strategy of attempting to scare people into staying home or walking instead of driving a car. We have made cars safer by adding seatbelts and airbags, stressing driving responsibly, and allowing auto manufacturers to advertise the government safety ratings of their vehicles. Similar strategies are working in our fights with alcohol and sexually transmitted diseases.

Consumers of tobacco products historically have responded positively to comparative health claims. Consider, for example, the popularity of filtered cigarettes in the U.S., which rose from zero to over 90 percent of the total cigarette market since their introduction in 1950, and the decline by about three-fifths in per-capita cigarette consumption adjusted for the tar content of cigarettes.²⁰ As W. Kip Viscusi writes:

The data on changes in tar levels, filter cigarette usage, and per capita cigarette consumption all provide a consistent pattern in which there has been increased attention to the health-related properties of cigarettes. Consumers have ultimately responded by smoking fewer cigarettes, but more importantly, they have attempted to change the kind of cigarettes they smoke, focusing on filter cigarettes and low-tar cigarettes.²¹

Matthew Meyers apparently disputes the health benefits of declining tar levels in cigarettes, and believes the "tar wars" of the late 1950s and early 1960s illustrate the power of advertising to mislead rather than to educate consumers. But Viscusi, whose past work on risk management shows him to be predisposed to take seriously offsetting behavioral responses,²² takes into account such responses as deeper inhaling and smoking more cigarettes and still finds a 20 percent risk reduction from falling tar levels.

It is difficult not to speculate that Matthew Meyers' intense opposition to the tobacco industry blinds him to the fact that switching from smoking to smokeless tobacco would save many lives. Promoting individual welfare, not imposing one person's or one group's values on others, is the only legitimate justification for regulation of tobacco. Mr. Meyers seems to have lost sight of this simple but important truth.

²⁰ Viscusi, *supra* note 2, p. 197.

²¹ Viscusi, *supra* note 2, p. 200.

²² W. Kip Viscusi, *Regulating Consumer Product Safety* (Washington, DC: American Enterprise Institute, 1984).

Conclusion

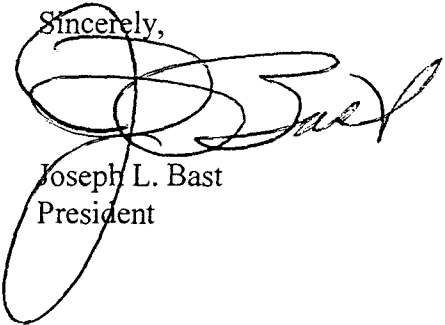
UST asks the FTC to consult with other government agencies, including the FDA, with consumer advocacy groups, and with other scientists and experts before ruling on its request. It is clear from its February 25 letter that the anti-smoking lobby opposes even allowing such deliberations to proceed. Its position in this debate resembles a crusade, not a reasonable position based on science, law, or common sense.

Smokers need information about the risks they face when deciding what tobacco products to use and how frequently to use them. They have proven they have the capacity to understand such information when it is made available and to act responsibly on the basis of such information. The producers of tobacco products have the right to provide that information, subject to reasonable regulation and tort liability for false or misleading claims. These facts combine to make a powerful case for approving UST's petition.

Not everyone recognizes the rights of consumers or producers to exchange information, so this letter has also contains two pragmatic or utilitarian justifications for approving the UST request. Allowing comparative health claims in tobacco advertising would encourage competition and innovation, as it does in every other industry. The tobacco industry desperately needs an injection of these forces to protect and benefit consumers who wish to continue to ingest nicotine but want to avoid the adverse health effects of smoking. The health benefits if even a small portion of current smokers switched to chewing tobacco would be enormous: 26.8 million life-years saved if just 10 percent of current smokers switched.

As a policy analyst, I find the case in support of UST's petition compelling. As a long-time smoker, I am personally moved to ask the Commission to grant this petition. By blocking smokers' access to potentially life-saving information, public health advocates such as Matthew Meyers are failing to do their job. Not only are their assumptions wrong (and insulting to smokers), but they offer no alternative strategy that promises to do as much, for as many, as allowing comparative health claims in tobacco advertising.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Bast", written over the typed name and title.

Joseph L. Bast
President