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

Re: U.S. Smokeless Tobacco Company's
Request For Advisory Opinion

Dear Secretary Clark:

I am writing on behalf of U.S. Smokeless Tobacco Company ("USSTC") to respond to certain comments submitted to the Commission in connection with USSTC's February 5, 2002, request for an advisory opinion. The comments to which USSTC is responding are contained in two letters, the first dated March 1, 2002, submitted by the American Academy of Otolaryngology – Head and Neck Surgery, Inc., and the second dated March 8, 2002, submitted by the California Health and Human Services Agency's Department of Health Services. Those letters contain comments that are similar in nature and USSTC is therefore responding to both of them in this letter.

First, both letters argue that USSTC's request for an advisory opinion should be denied because the Surgeon General and others have concluded that smokeless tobacco poses a health risk and is not a safe alternative to cigarettes. They argue, therefore, that USSTC's proposed statements in advertising would constitute "unproven health claims."

Both organizations apparently misunderstand the substance of USSTC's submission. The exemplar statement proposed by USSTC expressly communicates the views of many researchers in the public health community. It includes the fact that these researchers do not assert that smokeless tobacco products are "safe." Rather, USSTC's exemplar statement makes clear that there is considerable agreement in the scientific community that the use of smokeless tobacco involves significantly less risk of adverse health effects than cigarette smoking. Any similar statements in advertising would include comparable qualifying language.

Second, the letter from the California Department of Health Services asserts that the cross-category comparative statements which USSTC proposes to include in its advertising would be directed to minors. This assertion is contradicted by both USSTC's February 5 submission and by its decision (unique among smokeless tobacco manufacturers) to agree to the

provisions of the Smokeless Tobacco Master Settlement Agreement which, among other things, funds programs to reduce usage by minors of tobacco products. Also, pursuant to that Agreement, USSTC is the only smokeless tobacco company which has adopted an array of advertising and marketing restrictions designed to achieve the same objective. Furthermore, the American Academy of Otolaryngology's claim that a "growing number of teenagers . . . are using smokeless tobacco" is incorrect. Government and academic studies confirm the fact that smokeless tobacco usage by minors is low and, since at least 1994, has been on a significant and sustained downward trend.

Third, both letters assert that it is inappropriate for the Federal Trade Commission to address USSTC's request because it does not have the requisite regulatory authority or scientific expertise. The commentators assert that only the Food and Drug Administration and other agencies of the Department of Health and Human Services should address the issues presented by USSTC's request. To the contrary, however, the FTC has clear statutory authority over this smokeless tobacco advertising issue, as Chairman Muris made clear before the Commerce, Trade and Consumer Protection Subcommittee of the House Energy and Commerce Committee on November 7, 2001. There, he stated that the Commission has the "authority now" to address reduced risk claims by tobacco manufacturers. Furthermore, as USSTC pointed out in its request, the Commission can and -- as it has in numerous other situations involving technical, scientific claims in advertising -- may well consult with appropriate DHHS agencies in formulating its response.

Fourth, the commentators assert (in the words of the California Department of Health Services) that USSTC's request for an advisory opinion is an attempt "to manipulate and deceive the public, and that to release such an advisory would undermine the health of the populace of our nation." On the contrary, the subject matter of the requested advisory opinion and its publication are of significant public interest. At stake are important issues of public health and the ready availability of accurate information about what many researchers are saying regarding comparative health risks. In effect, the commentators seek to deny to adult cigarette smokers truthful information about what are considered by many in the public health community to be significantly reduced risk alternatives to smoking.

Encouraging publication of such information advances consumer knowledge and, therefore, consumer sovereignty. An advisory opinion that addresses parameters for reduced risk statements in advertising will encourage the publication of accurate information about the comparative risks associated with use of the various forms of tobacco and will help adult consumers make more informed choices about the tobacco products they use. *See* Beales and Muris, *State and Federal Regulation of National Advertising*, (1993) at 9. Indeed, as the Supreme Court stated recently, the First Amendment protects truthful advertising relating to tobacco products: "[T]obacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525,

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564 (2001). The alternative would be the suppression of important and truthful public health information.¹

Lastly, USSTC is pleased that the American Academy of Otolaryngology “would welcome the opportunity to participate in any Commission workshop or other forum regarding smokeless tobacco advertising.” USSTC suggested in its submission that the Commission may wish to consider holding a workshop to address the appropriateness of conveying tobacco harm reduction information as part of smokeless tobacco advertising. Such a workshop would afford all of the participants in this public health debate an opportunity to present their views in a constructive and productive manner, and would facilitate public discussion of this important issue.

USSTC requests that these comments be placed on the public record relating to this matter.

Sincerely yours,

Daniel C. Schwartz

cc: Chairman Timothy J. Muris
Commissioner Sheila F. Anthony
Commissioner Mozelle W. Thompson
Commissioner Orson Swindle
Commissioner Thomas B. Leary

J. Howard Beales, III, Director, Bureau of Consumer Protection
Lydia B. Parnes, Deputy Director, Bureau of Consumer Protection
C. Lee Peeler, Deputy Director, Bureau of Consumer Protection
Mary K. Engle, Acting Associate Director, Division of Advertising Practices
Gerard Butters, Assistant Director, Bureau of Economics

¹ As the Supreme Court has held, “[t]here is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).