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Via Overnight Delivery

Benjamin I. Berman, Acting Secretary
Office of the Secretary
Federal Trade Commission, Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Cigarette and Smokeless Tobacco Reports

Dear Mr. Secretary:

The Office of the California Attorney General welcomes this opportunity to comment on the Federal Trade Commission's reports on cigarettes and smokeless tobacco products. This comment is submitted in response to the FTC's Request for Public Comments, published in the Federal Register on April 10, 2001.

Since 1967 the Federal Trade Commission has issued annual reports on cigarette sales, advertising and promotion, pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, et seq. Since 1986, the Federal Trade Commission has issued biennial reports on smokeless tobacco sales, advertising and promotion, pursuant to the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401, et seq. State and federal law enforcement agencies, public health agencies, tobacco control programs, tobacco manufacturers, the media, and individual consumers have all come to rely on these reports, as the reports are the only source of reliable, public information on the tobacco industry's sales and advertising activities in the United States.

Tobacco is one of the most heavily advertised products in the United States. According to Advertising Age, Philip Morris is the third largest advertiser in the United States.¹ In 2000, the most recent year for which data is available, tobacco products were among the most heavily

¹ Endicott, R., "45th Annual Report: 100 Leading National Advertisers," Advertising Age (Sept. 25, 2000). This includes advertising for all Philip Morris products, not just tobacco.

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advertised products in magazines.² Among all consumer product manufacturers, Philip Morris was the leading magazine advertiser in 2000, spending more than \$561 million on magazine ads alone.³

Tobacco manufacturers are also among the leading corporations in terms of corporate sponsorship of events. Philip Morris is the second largest corporate sponsor in the United States, spending between \$175 million and \$180 million in 2000.⁴ RJR is also among the 20 largest corporate sponsors, reportedly spending between \$40 million and \$45 million.⁵

Tobacco advertising can be measured not only in dollars, but also in the toll it takes on public health. Studies have suggested that tobacco advertising and promotion may increase tobacco consumption in numerous ways, including:

- encouraging children to experiment with and initiate the regular use of cigarettes;
- deterring current smokers from quitting;
- prompting former smokers to resume smoking;
- increasing smokers' daily cigarette consumption by serving as an external cue to smoke; and
- contributing to the perception that smoking is less hazardous, more prevalent, and more socially acceptable than it is.⁶

² Magazine Publishers of America, www.magazine.org/resources/fact_sheets/adv4_9_01.html.

³ Magazine Publishers of America, www.magazine.org/resources/fact_sheets/adv2_9_00.html.

⁴ "Top U.S. Sponsors: Companies Spending More Than \$15 Million." IEG Sponsorship Report (Dec. 18, 2000) at 1. Total expenditures represent only fees paid for sponsorship rights, and do not include additional expenditures for advertising and promotion connected with the sponsored events.

⁵ Id.

⁶ CDC, Reducing the Health Consequences of Smoking: 25 Years of Progress - A Report of the Surgeon General (US Department of Health and Human Services, Public Health Service, 1989); Warner, K., Selling Smoke: Cigarette Advertising and Public Health (American Public Health Association, 1986).

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Further, some researchers have suggested that the potential loss of tobacco advertising revenues may inhibit media coverage of issues relating to the health consequences of smoking.⁷

Tobacco sponsorship associates popular athletic and entertainment events with tobacco products. The distribution of free samples or coupons at sponsored events encourages the trial or purchase of the products.⁸ Further, sponsorship of televised events enables tobacco manufacturers to circumvent the broadcast ad ban, and cigarette sponsorship of televised sporting events has been shown to increase cigarette brand recognition among youth.⁹

Given the magnitude of tobacco advertising and promotion, and the adverse consequences it has on public health, it is imperative that the Federal Trade Commission continues to monitor and report on advertising and promotion by manufacturers of cigarettes and smokeless tobacco products.

The Master Settlement Agreement (“MSA”) and the Smokeless Tobacco Master Settlement Agreement (“STMSA”), executed in November 1998, required tobacco manufacturers to change their advertising and promotional practices. The agreements imposed significant restrictions on outdoor advertising, event sponsorship, product sampling, and the use of brand name merchandise. As a result, the industry is shifting its advertising and marketing efforts. For example, several studies found that cigarette advertising in magazines with high youth readership increased significantly following the execution of the MSA.¹⁰ Another study found a substantial

⁷ Warner, K., “Cigarette Advertising and Media Coverage of Smoking and Health,” New England Journal of Medicine (1985) 312:384-388.

⁸ Popper, E., “Advertising of Tobacco Products,” Hearings Before the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives, Ninety-ninth Congress, 2nd Session (July 18 and Aug. 1, 1986) 119-156.

⁹ Ledwith, F., “Does Tobacco Sports Sponsorship on Television Act as Advertising to Children?” Health Education Journal (1984) 43: 85-88.

¹⁰ Turner-Barker, D. and W. Hamilton, “Cigarette Advertising Expenditures Before and After Master Settlement Agreement: Preliminary Findings” Massachusetts Dept. of Public Health (May 15, 2000); Fairclough, G. “Are Cigarette Ads in Magazines Angling for Teens?” The Wall Street Journal (May 15, 2000); American Legacy Foundation, “Tobacco Brand Magazine Advertising to Teens” (May 15, 2000).

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increase in point-of-sale advertising and marketing efforts since the MSA's restrictions on outdoor advertising became effective.¹¹

In response to the MSA's and STMSA's restrictions, the tobacco industry devised new ways of promoting its products. The FTC's most recent report on cigarette advertising, issued in 2001, reflects the first phase of this shift in advertising resources. For example, the report indicated that total advertising expenditures rose 22 percent in 1999 to an all-time record high of \$8.24 billion. The cigarette industry reportedly spent significantly more money on promotional allowances and retail value added. Additionally, between 1998 and 1999, product sampling increased by 133 percent, newspaper advertising expenditures rose 73 percent, and direct mail expenditures rose 64 percent. At the same time, the FTC reported that spending on outdoor advertising was down 82 percent, and spending on transit advertising decreased 86 percent. Thus, the industry is dramatically changing its advertising, marketing and promotional efforts. While the FTC reports on cigarette and smokeless tobacco sales and advertising are always valuable, they are particularly critical now as the industry changes its traditional forms of advertising and promotion.

FTC'S QUESTIONS

In the Federal Register notice inviting public comment, the FTC posed a series of questions regarding the utility of the reports on cigarettes and smokeless tobacco products. Although some of them are addressed above, the following is a brief answer to the questions presented.

1. Who uses the cigarette and smokeless tobacco reports? For what purpose?

The FTC's published data regarding the advertising and promotional expenditures by cigarette and smokeless tobacco manufacturers is widely used and cited by federal and state agencies, public health groups, non-governmental organizations, researchers, the media, members of the tobacco industry, and the public. Like many other government and private entities, the Office of the California Attorney General relies on the reports for data regarding sales and advertising expenditures for tobacco products. More recently, the Attorney General's office has started relying on these reports in enforcing the terms of the MSA and STMSA. For example, the recent report of a dramatic decline in spending on outdoor and transit advertising confirms that the industry is complying with the restrictions on outdoor advertising.

¹¹ Wakefield, M., et al., "Changes at the Point of Purchase for Tobacco Following the 1999 Tobacco Billboard Advertising Ban," University of Illinois at Chicago Research Paper Series, No. 4 (July 2000).

Since the MSA was executed, the states have also started to rely on the Commission's reports to assist in calculating the actual payments that the tobacco manufacturers must make to the states. Under the MSA, the Participating Manufacturers' payments to the Settling States in a particular year may be subject to a downward adjustment (the "NPM Adjustment") if, among other conditions, the Participating Manufacturers experience a loss in market share in excess of two percentage points when compared to their 1997 market share, and an economic consulting firm chosen by the parties determines that the disadvantages the Participating Manufacturers experienced as a result of the MSA's provisions were a "significant factor" contributing to the market share loss. Among the "disadvantages" the Participating Manufacturers may point to are the MSA's advertising restrictions. Comparisons of the Participating Manufacturers' advertising, marketing, and promotional expenditures during the relevant years could therefore be highly relevant to the "significant factor" determination. Further, although the MSA provides a method for obtaining data on sales and shipments of tobacco products, the Commission's reports on sales are an important alternative source of information, which serves as a check on the data obtained under the procedures set forth in the MSA.

The historical data included in the reports are very useful to enforcement efforts. By tracing the industry's spending on any single type of advertising or promotion over time, it is easy to identify changes in advertising strategies. For example, the dramatic increase recently reported in spending on product sampling and direct mail suggests the types of promotions that may be gaining in importance to the industry, and which may warrant closer attention by law enforcement agencies concerned with tobacco marketing to youth.

The reports also provide an overview of the tobacco industry's sales data, as reported by the major manufacturers, as well as the USDA's consumption estimates. This has proven to be a useful tool in determining the success of nationwide efforts to curtail tobacco use.

2. What are the costs to the industries to provide the Commission with the data?

While only the manufacturers themselves can estimate their costs of providing the data used in the reports to the FTC, it is difficult to imagine that these costs would be significant. Certainly all manufacturers maintain detailed records regarding their advertising and promotional expenditures, as well as sales data, for their own internal use. Documents produced by tobacco manufacturers to the Office of the California Attorney General indicate that, in fact, the manufacturers' own records are considerably more extensive than the information that is provided to the FTC. For example, while the FTC directs manufacturers to provide data on overall magazine advertising expenses, the manufacturers also maintain records on their advertising costs per magazine, and per advertisement, for their own use. Since the companies are already compiling the data they provide to the FTC for their own internal purposes, the additional cost of assembling the data called for in the FTC's 6(b) annual reports and submitting it to the Commission is minimal.

The cost to the tobacco industry of providing this data to the Commission is insignificant in comparison to the industry's other regulatory compliance expenses, let alone its annual advertising expenditures, and are greatly outweighed by the public benefit derived from the dissemination of this data.

3. Should the Commission continue to collect and publish data regarding cigarette and smokeless tobacco sales, advertising, and promotion?

Given the extensive use of the data by federal and state agencies, public health groups, non-governmental organizations, researchers, the media and the public, and the minimal costs to industry members of providing this data, it is clear that the FTC should continue to collect and publish the information contained in these reports. As discussed above, the data contained in the published reports is used to monitor and quantify the industry's advertising and marketing practices, and to help track the industry's compliance with the MSA and the STMSA. Such information is vital to help protect the public's health and safety.

4. What data contained in the reports are useful and should be continued in any future reports? What data are of little or no use and could be omitted in future reports?

In the cigarette report, data on annual cigarette sales, per capita sales, and the USDA's consumption estimates are useful in tracking the rate of smoking in the United States, and the historical information dating back to the 1960's is useful in identifying trends in cigarette consumption. The information on the cigarette advertising and promotional expenditures is, as discussed above, important to the Attorney General's law enforcement efforts. While the most recent data is always the most useful, the historical data helps identify trends and shifts in the industry's advertising and marketing strategies.

In the interest of conserving resources, the Commission may wish to consider omitting some of the older data from future reports. For example, rather than continually republishing the data for every year since 1975, the historical data that is more than ten years old could be reduced to data reported at 5-year intervals. Thus, the data would be included for 1970, 1975, 1980, 1985, 1990, and then each subsequent year. The omitted data would still be readily available in the reports the Commission has published to date.

Given the significance of tar yield and filters of cigarettes to the health of smokers, the Commission should continue to publish the data on the domestic market share of cigarettes broken down by tar yield, cigarette length, and filter/non-filter. For the same reasons, the data on the percent of packs displaying tar and nicotine ratings should continue to be included in future reports.

In the smokeless tobacco report, the data on sales, advertising, and promotional expenditures is useful in tracking the rate of smokeless tobacco use in the United States and in

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identifying trends in smokeless tobacco consumption. As with the cigarette report, the information on the advertising and promotional expenditures is very helpful in the continued monitoring of the industry's compliance with the STMSA.¹²

As with the historical data in the cigarette report, some of the older data in the smokeless tobacco report could be omitted. Rather than publishing the advertising and promotional expenses for each year since 1985, the data could be reported for every five years through 1990, and then on an annual basis.

While the data regarding expenditures on "Sports and Sporting Events" is important, the Commission may wish to consider removing it from Charts 2D and 2E of the smokeless report. Currently, this category is included below the Total on the charts, to indicate that the category includes expenditures that are already included in other categories. However, this information may be less confusing if the data for "Sports and Sporting Events" were moved to either a separate chart, or to the textual portion of the report, as is currently done in the cigarette report.

Given the different forms of smokeless tobacco, such as loose leaf, dry snuff and moist snuff, the Commission should continue to publish the advertising and promotional expenditures for smokeless tobacco overall, as well as for the various forms of smokeless tobacco.

5. Is there information about cigarette and smokeless tobacco sales, advertising and promotion that has not been included in the reports, but that would be of use?

STATE SPECIFIC DATA

Currently, the FTC reports include information on tobacco sales and the industry's advertising and promotional expenditures on a nationwide basis. Many state agencies in California as well as other states have found a need for this information on a state-by-state basis, to better identify the tobacco industry's sales and marketing efforts in the particular state. Although the FTC does not currently require the tobacco manufacturers to submit this information on a state-by-state basis, it is almost certain that the manufacturers have this information readily available, and could easily provide it to the Commission. Other agencies of the federal government, including the USDA in its Tobacco Situation and Outlook Reports,

¹² In the most recent smokeless tobacco report, issued in 2001, the Commission refers to the settlement entered into by USTC as the Master Settlement Agreement ("MSA"). In fact, the MSA only applies to cigarette manufacturers. USTC entered into an agreement similar to the MSA, known as the Smokeless Tobacco Master Settlement Agreement ("STMSA").

already provide their tobacco-related data on a state-by-state basis.¹³ It would be very useful if the FTC required the tobacco manufacturers to report their sales data and advertising expenditures on a state-by-state basis, and included this information in the reports.

PRODUCT PLACEMENT APPROVALS

Since 1989, the FTC has required manufacturers to report the amount of money or other consideration paid to have a tobacco product or brand name appear in any motion picture or television show. Although all of the manufacturers have consistently indicated that they have not paid any money or consideration, tobacco brand names continue to appear in film and on television. In California, while the State has never paid to have any of its tobacco control advertisements appear in feature films or television programs, many of its tobacco control print ads and billboards have been used in such media. In almost every instance, film or television production staff contacted the Department of Health Services Tobacco Control Section to obtain permission and clearance to use the advertisements or billboards. Thus, it is almost certain that even if the manufacturers are not providing consideration for their product placements, they are approving these placements. Thus, the FTC and the public could get a better understanding of the scope of tobacco product placements if the FTC required the manufacturers to indicate the number of times the manufacturer granted approval for a product placement in film or television, and for each placement, indicate the name of the film or show, and the CARA rating (e.g., G, PG, PG-13, R, NC-17) for each film.

CIGARETTE ADVERTISING DATA

In the report on smokeless tobacco products, the FTC includes data on sales measured in pounds as well as in dollars. In the cigarettes report, however, the sales data is only reported in terms of the quantity of cigarettes. Although the FTC already requires cigarette manufacturers to report their sales in dollars to the FTC, the FTC does not publish this information in the cigarette report. It would be useful if the FTC could include the dollar value of all cigarette sales in future reports.

While both the smokeless report and the cigarette report break down the respective industry's advertising and promotional expenditures into a variety of categories—such as magazine, outdoor, direct mail, and public entertainment—only the smokeless report includes an explanation as to precisely what expenditures are included in each category. (See Smokeless

¹³ See also Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, State Tobacco Control Highlights 1997 (1998); CDC, "State-Specific Prevalence Among Adults of Current Cigarette Smoking and Smokeless Tobacco Use and Per Capita Tax-Paid Sales of Cigarettes - United States, 1997," Morbidity and Mortality Weekly Report (MMWR) 47(43): 922-926 (November 6, 1998).

Report, Appendix A.) Future cigarette reports would be more useful if the FTC included the definitions of the various categories used in reporting the cigarette data as well.

6. How frequently should the reports be issued?

Given the lag time inherent in the FTC's collection and compilation of the data, the information in the reports is already a few years old by the time it is published. By publishing the smokeless report every other year rather than annually, some of the data is even older before it becomes available. Thus, the FTC should consider publishing both reports on an annual basis.

7. What other information should the Commission consider in deciding whether to continue the reports? What formats would be useful?

After weighting the significant public benefit derived from the publication of the sales, advertising, and promotional data included in the tobacco reports against the relatively minor costs to the manufacturers and the Commission in publishing this data, it should be clear that the Commission should continue publishing these reports. Printed copies of the reports are useful for those without access to the Internet. Electronic versions of the reports, especially those placed on the FTC's web site, make the reports easily accessible to the public at a minimal cost to the Commission. Thus, the FTC should continue to publish the reports in print and electronic versions. Perhaps the Commission could create a list serve or other electronic mailing list to automatically distribute the cigarette reports, the smokeless tobacco reports, the tar and nicotine reports, and other tobacco related information by e-mail to all interested parties.

Thank you for the opportunity to comment on the Commission's cigarette and smokeless tobacco reports. I hope these comments assist the Commission in its review. If we can be of further assistance, please contact me at (916) 323-3770.

Sincerely,



DENNIS ECKHART
Senior Assistant Attorney General

For BILL LOCKYER
Attorney General