

Confidential

MEMORANDUM FOR FILE

September 3, 1963

Liggett & Myers Tobacco Co.  
SURGEON GENERAL'S COMMITTEE

On Wednesday, August 21, 1963, I attended a protracted conference at Davis Polk of lawyers concerned with the defense of cancer litigation in the tobacco industry. Actually those present consisted of the Ad Hoc Legal Committee on Tobacco Institute problems. Those present were:

Mr. Temko of the Covington firm, Washington, D. C.

Messrs. Ramm  
Chandler  
Coleman  
Jacob for R. J. Reynolds Tobacco Co.

Miss Janet Brown for American Tobacco Co.

Messrs. Hewitt  
Hardy  
Ehrensfield for Philip Morris Inc.

Messrs. Russell  
Wald for P. Lorillard Co.

Mr. Yeaman for Brown & Williamson Tobacco Co.

Mr. McCormick from England

FPH for Liggett & Myers Tobacco Co.

The discussion was designed to cover possible Government action following the report of the Surgeon General.

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It was rumored by some that subcommittee reports were due by the end of September and that the Surgeon General's Committee would then seek agreement with respect to the compilation of the material to be included within the report. Estimates of the date when the report might be completed ranged from November 1963 to March 1964.

All agreed that the appointment of Dr. Guthrie to succeed Dr. Hamill in overseeing the Surgeon General's investigation was an unfortunate event. It is believed that Dr. Guthrie is not truly uncommitted on the subject under investigation.

It was also announced that Dr. Kotin, the scientific adviser of T.I.R.C., would soon succeed Dr. Shimkin as associate director of the National Cancer Institute.

Although there is some belief that Senator Neuberger may well not wait for Phase II in order to push anti-smoking legislation in Congress, the following were considered as possibilities for further action following publication of the Surgeon General's report:

1. Federal Trade Commission

a. It is deemed unlikely that a complaint would be filed against one company to try a test case although there is a possibility that the FTC might publish its intention to

to issue a complaint against all the companies which would allow a period of time to negotiate a consent or decide upon formal litigation.

b. There is also the possibility that the FTC might institute proceedings under the Trade Regulation Rules Proceedings which could be challenged in Court before the rule became final.

c. There is also the possibility that the FTC might review the Guides which some time ago led to a code dealing with advertising.

d. It is also considered possible that the FTC might take affirmative action to compel the insertion of a warning on packages or in advertising.

Although all the foregoing are possibilities it is believed that the FTC wants to have a mandate from Congress or higher Government office before it would proceed along any of the above lines.

## 2. Congressional Hearings

It was agreed that Congressional Hearings are likely on the Surgeon General's report and possibly, in addition, with respect to bills introduced dealing with labeling, etc. With elections forthcoming, however, the likelihood of these being imminent was doubted.

3. Food and Drug Administration

There is a possibility that the FDA might proceed under the Hazardous Substance Labeling Act of 1961. The Act appears to be broad enough to cover cigarettes although there is the understanding that FDA does not believe that cigarettes come within it.

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It was generally agreed that the Ad Hoc Committee should step up its investigation of emphysema, heart disease, bronchitis, the pharmacology of smoking, all of which may be expected to become of increasing interest, whether in the field of Congressional Hearings, litigation, F.T.C. proceedings, etc.

Miss Brown, Messrs. Cooke, Hardy, Holtzman, Jacob, Russell and Haas were given this responsibility.

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It was unanimously agreed that those in attendance would recommend to their respective principals that if there was to be a statement after the Surgeon General's report was made public, it should be an industry statement rather than separate statements by one or more companies. This would obviate the possibility that a statement by one company might

be inconsistent with that made by another. The same method of procedure was recommended as well in the event of F.T.C. or Congressional action.

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There was a brief discussion as to whether the companies should voluntarily consider inserting a warning on package labeling. The consensus of opinion was that the industry could best shelter itself in litigation after such a warning were imposed on them by legislation or otherwise, and that a voluntary warning might encourage litigation (because it could be alleged that this was a recognition of risk), and that it might in any event encourage anti-smoking legislation.

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Discussion then turned to a draft (Version 3) of a possible ad to be run by the Tobacco Institute entitled Unanswered Questions in the Anti-Smoking Attacks containing 25 numbered questions which were obviously designed to show that much remains unknown about the smoking/lung cancer issue. While there was no unanimity, the following was raised:

1. A number of the questions appear to be irrelevant to the issue and only two of them dealt with heart disease. It was thought that if such an ad were to be run it might well be confined to the lung cancer issue.

2. It might be better to withhold such an ad until after the Surgeon General's report is published since the report may not treat a number of the items and the counter statement of the industry might be stronger if published after the event.

3. A number of the questions would be better stated if made in the form of a direct statement rather than a question. It may well be expected that the American Cancer Society, etc. would join in publishing a counter statement listing each of the questions of the Tobacco Institute with the answers following them. While it is recognized that this might only focus on the fact that the issue is not resolved, all present have had sufficient experience with statements of the opposition to know that they were not reasonable ones at all times.

There was no attempt to edit each of the questions but, if desired, certain of the Committee could work with the authors in an effort to do so.

The undersigned made the suggestion that there should be some reference in the box entitled What the Industry Is Doing indicating that individual tobacco companies have spent large sums investigating the issue in their own laboratories above and beyond the expenditures by T.I.R.C. Apparently there is some resistance to this by reason of the fact that some of the companies have not conducted such research.

F. P. H.

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