

CONFIDENTIAL
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[Letterhead of Tobacco Institute]

March 5, 1964

Secretary
Federal Trade Commission
Washington, D. C. 20580

Dear Sir:

This is to inform you of the desire of The Tobacco Institute, Inc., to present a statement of its views at the public hearings, to commence March 16, 1964, with respect to the establishment of Trade Regulation Rules for the advertising and labeling of cigarettes. The statement will be presented, in keeping with the invitation contained in the Commission Notice of January 18, 1964, but without conceding the jurisdiction of the Commission to issue Trade Regulation Rules as proposed.

The Institute is a voluntary association, incorporated under the Membership Corporations Law of the State of New York, of fifteen United States manufacturers of tobacco products, including all manufacturers of cigarettes for general public sale. The Institute has been authorized to present in its statement the views of its members.

The statement will be presented by H. Thomas Austern of Covington & Burling, Union Trust Building, Washington, D. C., counsel to the Institute. It is expected that Mr. Austern's presentation, a summary of which is attached, will require an hour for delivery and it is respectfully requested that such time be allotted.

Sincerely yours,

LG 2006832

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Summary of Statement to be Presented
By H. Thomas Austern
On Behalf of The Tobacco Institute, Inc.

The Tobacco Institute, and its members, are profoundly aware of the industry's responsibilities in the widely publicized area of tobacco and health. The industry has, for more than a decade, ~~made~~ ^{sponsored independent research} research grants totaling millions of dollars in the field of tobacco and health and, since the issuance of the Report of the Advisory Committee to the Surgeon General, has undertaken to support, by additional contributions of \$10 million, further independent research into these matters by the American Medical Association. This reflects the industry's conviction that massive further research is essential because to date no definitive answers to many basic questions are available. The industry is also now engaged in the development of guidelines for cigarette advertising responsive to the widespread publicity given the Report of the Advisory Committee and the wide public interest in the Report. The subjects being considered in the formulation of these new guidelines include those within the Commission's statutory jurisdiction for enforcement under Section 5 of the Federal Trade Commission Act, as well as other subjects coming within the area of lawful industry self-regulation.

With respect to the current proceedings looking to the establishment of Trade Regulation Rules, it will be emphasized that, both on legal and policy grounds, whatever regulation

may be deemed to be in the public interest should be developed and provided by the Congress and not in this Federal Trade Commission hearing on the proposed Rules. The Commission does not have the statutory power to issue the substantive regulations proposed. Moreover, from the outset, it has been intended that following the issuance of a report by the Advisory Committee to the Surgeon General, there was to be a full and deliberate examination by all interested parties and by all branches of the Federal Government in a Phase II study. A problem of the magnitude of that presented, affecting so many of our citizens and so many wide-ranging social and economic interests, should and can only be dealt with properly by the Congress.

The Commission hearing does not provide the appropriate forum or occasion for technical medical analysis and discussion of the Report of the Advisory Committee, or for the detailed technical presentation of those in the scientific community who assert that the criteria employed are not adequate and rest upon individual judgments which are not shared by other medical authorities.

Based on the intended effect of the proposed Trade Regulation Rules, which will be analyzed in the presentation, it is clear that the Commission is plainly attempting to legislate substantive rules. The Commission lacks statutory authority to legislate in this manner by issuing substantive rules and

regulations. Wholly apart from the basic lack of legal power to issue such regulations, under the Commission's Procedures and Rules of Practice which specify that it will take into consideration "all relevant matters of fact, law, policy and discretion", the Commission should recognize as a matter of policy that these questions should be considered by the Congress and not by any single administrative agency.

Without in any way conceding the jurisdiction of the Commission, the Institute's presentation will offer some general observations on the proposed rules. It will be shown that the asserted bases for the rules are found solely in a series of Commission "beliefs" set forth in the Commission's Notice of January 18, 1964, and that these asserted "beliefs" are not established in accordance with Section 5 of the Federal Trade Commission Act and the Administrative Procedure Act. These a priori beliefs of the Commission cannot be accepted as a predicate for attempted administrative action.

In addition, it will be shown that there is no need for the recitals required in the proposed Rule 1, particularly since the proposed rule disregards the extensive and continuing publicity given to questions of smoking and health.

As for Rules 2 and 3, the proposed text in many respects is either so ambiguous that it contributes nothing to the standard of Section 5(a) of the Federal Trade Commission Act or is so comprehensively rigid as to result in the

proscription of all cigarette advertising. The proposed Rule 3 could prevent any statement as to quantity of smoke ingredients simply by the inaction of the Commission. In addition, the point will be made that the Federal Trade Commission is not the appropriate agency to develop techniques for the scientific measurement of cigarette smoke ingredients.