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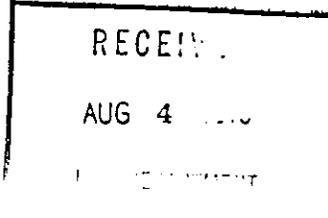
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August 2, 1975



CONFIDENTIAL

TO THE COMMITTEE COUNSEL:

Supplementing last night's communication with which we enclosed a xerox copy of the Commission letter which you will presumably receive on Monday, August 4 or Tuesday, August 5, I am enclosing my notes of a conversation which I had on July 30 with Mr. Eric Rubin, who had left a call for me on Thursday, July 24.

Though inconsistent in some particulars with what Mr. Boyle stated yesterday afternoon, this memorandum warrants your reading.

Copies of the Commission letter to each respondent company were received by us shortly after 4 o'clock yesterday and after telephonic consultation the clear consensus was that no responsive publicity over the weekend would be desirable.

In anticipation of the meeting of the Committee, now rescheduled for August 4th and 5th at the Tobacco Institute, I have concluded that it might be useful to tender to the Committee a number of questions which might be considered before that meeting.

LG 2012546

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1. It can hardly be challenged that the Commission letters to the companies, which vary in minor particulars among them, are hardly specific. In one or two instances under the third charged disclosure of the health warning in positions in violation of the Order, the letter to a particular company refers in general terms to named advertisements, and in one instance does identify a particular advertisement by periodical and date. The remainder of the letters are patently unspecific. In addition, the theory of the Staff as to how penalties are to be asserted is not clear. It may be that they are thinking about each advertisement as a separate violation, or that they will assert that the same ad published in several newspapers constitutes multiple violations, or even that the readership of each newspaper is the basis for calculating penalties.

2. Mr. Rubin's comments on July 28th can be interpreted to mean that if the companies very promptly came in to talk, and were willing to put up possibly substantial sums, the sending of the complaints to the Department of Justice might be delayed (see page 3, first full paragraph). This is not consistent with what Boyle stated was in the Commission Minutes directing that these complaints be forwarded "immediately." This raises the question whether the respondents want to move forward on this vague and possibly inconsistent suggestion that discussions be opened even on the directed penalty actions. Absent real specificity, it is dubious whether this could be successfully accomplished by any respondent other than to agree to put on the table some substantial sum. (It is reasonable speculation that even the complaints will be lacking in complete specificity as to particular advertisements, where and when they were published, or the precise asserted violation).

3. The respondents are plainly invited to come in to discuss the Staff theories on billboards and typography, upon which the Commission's "determination of violation" presumably was based. As to billboards, the Commission apparently accepted Boyle's theory that "clear and conspicuous" overrides the specifics of Section D. We have already gotten suggestions from the billboard people that in any discussions of billboards they desire to be in the act.

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As to typography, one may suspect that Mr. Boyle's explanation was so confused that the Commission agreed to send this back for discussion.

As to "shrinkage", I remain utterly baffled as to whether that point is to be embraced within the complaints, and also as to what Mr. Rubin (Memorandum, page 4) means when he suggests that we should not waste time on shrinkage.

4. In short, the Commission seems to have come to a divided judgment. They have directed penalty actions on some points however vaguely set forth. Depending upon further disclosure of how many items or point of sale items are charged, it is difficult to determine what penalty actions they will seek on those points. As to vending machines, they are not going back of July 1972 but apparently take the position that on all contracts for vending machine panels, the panel is one advertisement and whether the individual package displays were framed or not, the companies individually or jointly were required to have those panels include a warning statement measured by the overall dimensions of the entire panel. (Whether or not Mr. Boyle's theories about "control" are operative we simply do not know.) In all likelihood, it would be a difficult job to straighten all of this out in any discussions about penalty actions even if the respondents were willing to open those discussions by offering substantial sums.

5. As to declaratory judgments being instituted on the two areas left open, there are a number of sub-questions which need careful exploration:

a. Does the Commission "determination" of existing violation in this area afford any respondent standing to sue for a declaratory judgment? Our preliminary determination is that it does, that the violation is not specified, and that the companies are left in an impossible position.

b. If those declaratory judgments were promptly instituted would they be an announcement to the Commission that we were not in agreement on the areas left open and would it lead the Commission to add these two to the penalty actions?

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It is not unlikely that if declaratory judgments were instituted, the Commission would promptly move to dismiss pointing out that they were prepared to amend their penalty actions and that all issues of interpretation of the Order could be decided in one lawsuit. There is considerable question whether the declaratory judgments being considered would survive that motion.

c. What will be the status of continuing to advertise in the media and without changed formats as to which the penalty actions are instituted? It must be assumed that in any independent presentation of the issues the particular advertisements must be specified as to date of dissemination. Assuming that the penalty actions are not successfully defended, does this leave it open to the Commission to assert that advertisements run or vending machines left unchanged between the date penalty actions are started and the date they are decided can be penalized? So far as we have presently determined, this issue has never been adjudicated.

6. As a collateral question, we now have a basis for urging that Mr. Boyle disqualify himself from further participation because of his remarks at the 3rd World Conference on Smoking and Health, on June 2-5, 1975. If there is any disposition to negotiate further with the FTC Compliance Staff, this issue might be raised with the Commission promptly. If there are to be no negotiations, it might be just as well to defer doing anything about Mr. Boyle's public statements.

The manner in which the Commission has handled its response to the respondents' Statement of Position is likewise colorable to say the least. Should there be any remonstrances on that point or should it also be held for possible use in litigation?

7. It is our understanding that with the institution of penalty actions, with varying charges against the several respondents, each company will defend its own complaint through its own counsel. We will, of course, be available to make the detailed history of the investigation and the various advertisements and POS items submitted for each company available to its counsel. A possibly salient question is whether the various respondents will achieve a common point of view on some of these open questions. Similarly, in the defense of the penalty actions, the question of common interpretations of the Order (as expressed in the materials furnished to the Commission in the respondents' Statement of Position) may arise and warrants consideration.

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No useful purpose will be accomplished by rehearsing, however vigorously, the course of the Commission action in this area, including the leak on July 23 and the resulting publicity, and the confusion embodied in the Commission letters. My only residual feeling is that an opportunity to give each Commissioner a ten-minute quiz on their understanding of these issues or of the Order would indeed be revealing.

Very truly yours,

A handwritten signature in cursive script, appearing to read "H. T. Austern".

Enclosure

LG 2012550