

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION ON  
ADVERTISING, MARKETING AND ANTITRUST ISSUES IN THE GLOBAL  
TOBACCO SETTLEMENT

PRESENTED BY

ROBERT PITOFSKY, CHAIRMAN

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION  
UNITED STATES SENATE

MARCH 3, 1998

Mr. Chairman and members of the Committee, I am here at the request of the Committee to present the testimony of the Federal Trade Commission ("FTC" or "Commission") on two subjects related to the global tobacco settlement. First, I will address proposed restrictions on the advertising, marketing and sale of tobacco products, as well as areas for FTC involvement. Second, I will discuss our concerns about any antitrust exemption in the context of a proposed settlement.

#### FTC Jurisdiction and Historical Overview

The FTC has a long history of reviewing many aspects of the tobacco industry and its advertising and marketing practices. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>(2)</sup>

cigarettesmoking, the failure of the cigarette manufacturers to warn consumers of :  
danger violated Section 5 of the FTC Act. As a result, the Commission decided to  
tobacco companies to inform the public about the dangers of smoking. This trade  
regulation rule, which would have required warnings in cigarette advertising and on  
tobacco packages, eventually was superseded in 1965 by passage of the Federal Cigarette  
Labeling and Advertising Act ("Cigarette Act"), which required warnings on tobacco  
packages.

## Competition

The FTC also addresses tobacco issues as part of its competition mission and has many years of experience examining the competitive structure of the tobacco industry. The Commission has, for example, investigated the competitive practices of cigarette firms

education, to reduce underage tobacco use.

acts or practices or the dissemination of false advertisement<sup>(22)</sup>. As a provision expressly preserving FTC's authority ensures that the Commission will be able to continue to bring the kinds of cases it has always brought in the tobacco area. It also enables the FTC to address unfair or deceptive acts and practices in the advertising or marketing of tobacco products that might not otherwise be covered by the settlement, or for which the FTC Act provides better or more flexible enforcement tools. For example, the FTC recently received a petition complaining about the advertising of "no additive" cigarettes and suggesting that such ads make a deceptive health claim. Although FDA under the settlement legislation would likely also have authority over such a claim, it might h

The state attorneys general have played a critical role in bringing forth a comprehensive tobacco settlement. Should that settlement be enacted, the state attorneys general will, and should, continue to play an important role in enforcing its terms. Based on our experience, we strongly support the dual federal-state enforcement scheme contemplated by the proposed settlement. Coordinated federal-state enforcement of the proposed restrictions on tobacco advertising and marketing seems particularly appropriate as many of the proposed restrictions have specific, local applications.

### Antitrust Exemption

Let me now turn to the industry's request for an antitrust exemption for activities relating to the settlement. Any proposal for antitrust immunity is a serious matter and should be treated as such. (b)(7)(C)

law, . . . jointly confer, coordinate or act in concert, for this limited purpose.<sup>(31)</sup>

At the time of the Commission's October 29<sup>th</sup> testimony, it appeared that the tobacco product manufacturers wanted the proposed immunity provision to protect them in three hypothetical situations. First, manufacturers suggested that they might need to discuss and agree on issues relating to the ~~through~~ of Annual Payment amounts. Second, manufacturers contended that they might need to agree to implement privately the proposed marketing and advertising restrictions in the event that statutory provisions are invalidated on First Amendment grounds. Third, manufacturers stated that they might find it necessary to join forces to deal with retailers that undermine efforts to reduce underage smoking.

Mr. Koplow's October 29 testimony addressed the first and third issues but did not discuss any possible need for private implementation of marketing and advertising restrictions in the event of a successful First Amendment challenge to statutory restrictions. Rather, Mr. Koplow stated that an antitrust exemption was needed because "[t]he industry is agreeing, pursuant to a ~~protecal~~ contract with the federal government and the states -- not to engage in various forms of advertising, marketing, and promotion . . . .<sup>(32)</sup> In addition to ~~the~~ issue and the issues relating to the ~~through~~ of Annual Payment costs and joint dealings with uncooperative retailers, Mr. Koplow's testimony also discussed a need for an exemption for 1(i)-2(ng)103(o)-10(r)37s aoplowk1aymeed testimonyc(r)kn3pt1ad(m)-2(ok)aid3ted tensu(he)4( i)-2 3( a)4(n )-10(e)4(x)-18co0dh m1(u)o0dhr

transmit sales information to that third party. Such an approach would obviate the need for any agreement among the manufacturers.

## (2) Collaboration on Marketing and Advertising Restrictions

Some have also argued that certain marketing or advertising restrictions might have to be implemented by agreement among the manufacturers in the event that statutory provisions containing such restrictions are invalidated on First Amendment grounds. The Commission's October 29 testimony stated that the call for antitrust immunity was premature since we could not predict the likelihood and outcome of any First Amendment challenge. In addition, we noted that it would be necessary to more closely examine whether the embodiment of the marketing and advertising restrictions in state and possibly federal consent decrees, as Mr. Koplow has suggested, in a protocol with the states or the federal government -- might in fact obviate the need for an antitrust exemption. The Commission continues to believe that the industry has not demonstrated a need for an antitrust exemption on these grounds.

## (3) Joint Action to Address Problems with Uncooperative Retailers

Another reason advanced for antitrust immunity is that the manufacturers might need to join forces to deal with retailers that undermine the manufacturers' efforts to reduce underage smoking by not complying with restrictions on access to tobacco products by underage consumers. As I testified on October 29, although retailer compliance with access restrictions is a valid concern, it does not appear that manufacturers would have to engage in potentially anticompetitive conduct, such as a group boycott, to address the problem of an uncooperative retailer.

First, the proposed legislation, as contemplated by the settlement, would contain incentives for the manufacturers to respond individually to non-complying retailers. The strong penalties for not meeting target reduction in underage smoking could be abated to some extent under the proposed legislation if a manufacturer acted in good faith and took all reasonable steps to achieve the required reduction. (34) A unilateral decision to reduce or stop dealing with a non-complying retailer should be evidence of good faith, and if a manufacturer would have an incentive to take such action. Therefore, no antitrust immunity would be required to achieve this result.

The industry's broad-based proposed immunity provision seeks to address purely hypothetical situations and presents a significant risk of price increases (and industry profits) higher than those contemplated by the settlement. Moreover, this provision is inconsistent with most instances where antitrust exemptions have been used. In the rare cases where Congress has conferred a statutory grant of immunity for joint action of competitors, the provisions have more typically ex



labeling.

9. 15 U.S.C. §§401 *et seq.*

10. Although the Commission administers the Cigarette Act, the Department of Justice enforces it.

11. 16C.F.R. §307. Unlike the Cigarette Act, the Smokeless Tobacco Act gives the Commission authority to enforce the health warning requirement.

12. The *R. J. Reynolds* matter is currently pending before the agency in litigation before an administrative law judge. Accordingly, the Commission cannot discuss the merits of these allegations. Any decisions in this matter

distribute any such product to any individual under the age of 18." 42 U.S.C. ~~§ 260~~(1).

18. *See, e.g.,* Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*,

32. Testimony of Meyer G. Koplowsky, *supra* note 30, at 2.