

17 March 1986

MEMORANDUM

To: Fred Panzer

From: Duffin *AUD*

Re: Candy Wholesaler piece on ad restriction proposals

Katherine Becker passed along this article on the AMA and Bradley/Stark proposals. It's one of the best I've seen.

You'll note the Congress on Racial Equality is listed among the "unlikely bedfellows" brought into the tobacco industry's camp.

This fact was probably relayed by us, based on Walker's receiving a call in early December from Cyril Boynes, personal assistant to CORE president Roy Innis.

No one's been in touch with CORE since to my knowledge. Susan tells me we've had no coalition dealings with them. But I'll bet they'd be as interested to sign up on your Bradkley/Stark slate -- through ACLU? -- as Boynes assured Walker they were on the AMA measure.

attachment

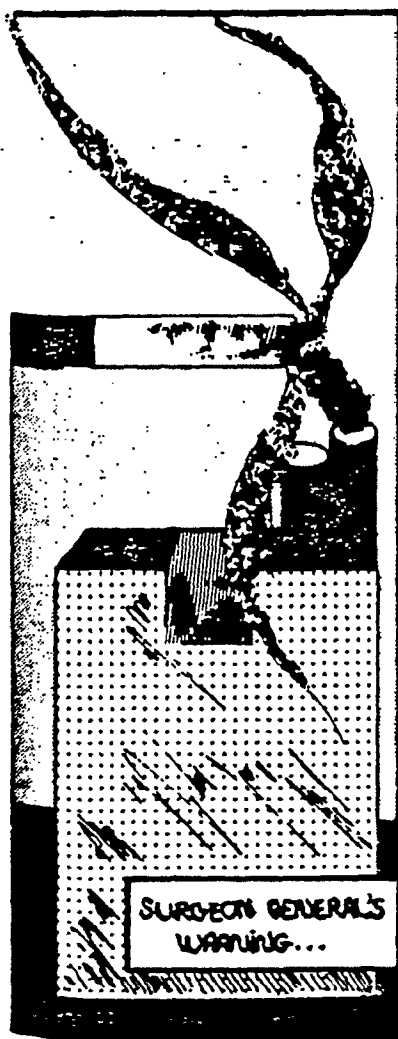
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The tobacco advertising debate heats up once again



"If the AMA wanted to figure out a way to offend 55 million adult Americans, the constitution, CORE, the ACLU, and the industries which bring us the daily, weekly and monthly news, they couldn't have done a better job. I think the AMA ought to concern itself with better doctoring instead of worse lawyering."—J. Robert Ave, president and chief executive officer, Lorillard

"Why doesn't the tobacco industry just voluntarily go to Congress and offer to stop advertising?"—Kirk Johnson, general counsel, American Medical Association

"There have been perennial efforts to attack cigarettes on the same grounds since 1980-81. This is nothing new."—Scott Stapf, assistant to the president, Tobacco Institute.

"As long as it's not deceptive and the market's legal, it's vital to our system that it be allowed. Anything else undermines the free market system."—Geoff Sands, staff executive, American Association of Advertising Agencies.

"There is no such thing as a safe cigarette."—Jerry Paulson, legislative assistant for Congressman Pete Stark (D-CA)

In late December, at its annual meeting in Washington, DC, the American Medical Association once again brought cigarette advertising to the front pages of the nation's newspapers by passing a resolution calling for an outright

ban on all tobacco advertising. Reiterating its longstanding assertion that cigarettes represent the number one controllable health hazard in the United States today, and that cigarette advertising affects both consumer attitudes and

coverage of cigarette issues in the print media, the AMA pushed full steam ahead into a First Amendment controversy of mammoth proportion.

The resolution raises the ugly face of censorship over the AMA's head as it questions the right of the media to choose its own sources of revenue and cover issues in whatever manner seems appropriate. Although supported by traditional anti-smoking groups, it has brought into the tobacco industry's camp such unlikely bedfellows as the American Civil Liberties Union, Congress for Racial Equality, the American Association of Advertising Agencies and scores of publishing organizations throughout the United States.

Constitutional Question

"We've seen very little support for the AMA proposal," reports Scott Stapf of the Tobacco Institute. "Obviously, you don't have to break your back to defend the First Amendment."

Kirk Johnson, general counsel for the AMA, sees First Amendment concerns as a not-necessarily insurmountable challenge in the eventual passage of a draft ad ban bill now in the works. "We're never going to avoid the constitutionality question. The First Amendment is such a precious thing, it's not an open and shut case; but it's not an outrageous proposal either," he says emphasizing that commercial speech does not have quite the same protection as other forms of self-expression.

A 1980 Supreme Court case, *Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York*, created a three-part test for commercial free speech. In order to implement an



advertising ban on tobacco products, proponents would have to prove: (1) The government has a substantial interest to protect through the restraint; (2) The particular type of restraint will meet the goal Congress is trying to reach; and (3) There is no less-restrictive measure which would be as effective.

On point one Johnson cites public health as the government's "substantial public interest." He says the AMA's "secure from that standpoint," admitting that points two and three are a bit more nebulous. AMA contends that advertising has a direct relationship on smoking, and its restriction will cause a decrease in consumption. Both the tobacco and advertising industries, however, insist that advertising affects brand choice, but cannot create new users. Advertising restrictions will not decrease usage, they say, and could increase it.

AMA and the tobacco and advertising industries say they have studies to prove their perspectives. Presumably the evidence will come out in the halls of Congress or the courtroom floor.

And is an advertising ban the only measure which will effectively achieve the desired result?

That's another question which will be facing serious debate.

Congressional Action

What the AMA's approach has done, is prompt two bills in Congress designed to help achieve anti-smokers' ends. At the same time, it has opened the door to considerable public exposure for the tobacco industry's side of the story.

In early January, Senator Bill Bradley (D-NJ) and Fortney "Pete" Stark (D-CA) submitted to their respective committees S.1950 and H.R. 3950—both intended to circumvent the First Amendment question by approaching the issue from a tax standpoint. S.1950 would eliminate the business tax deduction for tobacco product advertising. H.R. 3950 would take that one step further by removing deductibility of tobacco industry promotional activity as well.

In addition to print media advertising, the latter would eliminate tax breaks for in-store merchandising programs, point-of-purchase materials, couponing, free goods, placement allowances, etc. It would end the tobacco industry's tax deductible support of cultural events and sports activities such as R. J. Reynolds' country western concerts, the Virginia Slims Tennis Tournament, Brown & Williamson's former Kool Jazz Festival, American Tobacco's rodeos, and Philip Morris' sponsorship of the visual and performing arts.

"In our judgement this is a mischievous and devious method of trying to achieve indirectly what the AMA is trying to do directly," says J. Robert Ave, president and CEO of Lorillard. "To our knowledge no other legal consumer product's marketing expenditures are not fully deductible as a busi-

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business expense. We feel this would be patently inequitable and unfair, and would set a terrible precedent in the freedom of commerce that legitimate business enjoys in this country."

Ideally, says Jerry Paulson, legislative assistant for Representative Pete Stark, eliminating the advertising and promotion tax deduction would eliminate cigarette advertising altogether. If not, presumably the cigarette companies would be forced to raise cigarette prices in order to offset the increased costs of advertising and promotion, he adds, noting that "to the extent that cigarettes are price sensitive, utilization would go down."

Advertising's Effect?

In countries such as Italy, Belgium, Finland and Norway, where total advertising bans on cigarettes have been tried, cigarette smoking in fact did not go down, reports Geoff Sands of the American Association of Advertising Agencies. To a certain extent, he says, "people actually became heavier smokers, because they smoked more brands with heavier nicotine." Without advertising as a vehicle to increase market

share, manufacturers had no reason to produce low-tar cigarettes; and those that did were unable to make their products visible to potential users.

"If that were the case," counters a staff member in Senator Bill Bradley's office, "I would think the tobacco companies would be happy to see a ban on advertising. Look at all the money they'd save."

Some would say he may not be that off base, comments one former tobacco company executive. To a certain extent cigarette advertising today cultivates percentages of market share points. It does not create new smokers, and despite massive brand extensions and new offerings, for the most part once a consumer chooses a brand she or he sticks with it. Advertising or not, a lot of new cigarette product offerings fail to break the barriers of consumer brand loyalty. That being the case, he says, "if all the tobacco companies could stop advertising at the same time, they'd probably love it."

Another tobacco industry spokesperson calls that perspective hogwash. Although some studies support the notion that cigarette advertising does not create new smokers, and industry advertising for years has concentrated on building sales by market share switches, "we wouldn't have the budgets for advertising and promotional activity that we do if it wasn't working."

In a mature market like the cigarette industry, adds Geoff Sands, advertising encourages brand awareness, brand loyalty and brand moves. Although the percentages of market share which change are minute "in an industry like the tobacco industry, a piece of a percentage point can mean a lot."

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TV vs Print Argument

The issues today are much different than those which the industry faced nearly twenty years ago, when it voluntarily offered to discontinue all advertising on the electronic media. The concern then was the power of advertising on the restricted and regulated mediums of television and radio. Of particular worry was television advertising's influence on teenagers, and that the image cigarette companies were presenting would encourage teens to start smoking.

"The tobacco industry passed, in 1964, a formal industry code prohibiting advertising to youngsters," says Scott Stapf. Although the tobacco companies agreed to take themselves off the airwaves in 1968, antitrust regulations prohibited them from acting in concert. Congressional legislation was passed in 1970, and the last televised cigarette advertising was seen by viewers on the New Year's Day bowl games in 1971.

But unlike radio and television, the print and promotional media are not limited by the number of airwaves open. There is room within them for all voices to be

heard as loudly and as clearly as they wish to present themselves. And, reminds David Fischel, vice president for public information at R. J. Reynolds, the industry's print advertising has for years focused directly on adult tobacco and cigarette users—placing ads only in adult-oriented publications and concentrating totally on a mature emphasis. RJR, for example, has a standing policy of not using any models under the age of 25 in any of its ads.

"Advertising's role is choice of product," says Fischel. "Nobody yet has come up with an ad that got anyone to do what they hadn't planned to do in the first place. The guy who can come up with that is going to be a very rich man."

If the argument for a ban on advertising or further regulation is that more advertising means more smokers, adds Stapf, the proposal weakens further. "Teenage smoking has fallen off over 35 percent in the last ten years, according to an annual poll of high school seniors by the University of Michigan."

"If that's accurate, that's great," comments Kirk Johnson, "but that doesn't mean this isn't still a huge problem area."

Opening Avenues for Debate

In a sense, Stapf says, the focus of the AMA's recent effort and the bills now proposed in Congress represent something of a boon for the tobacco industry. They have opened doors through which the industry can present its views, and remphasize its opposition to teenage smoking, across a broad spectrum of public forums.

Although the Bradley and Stark proposals in the House and Senate focus on the tax issue specifically because of First-Amendment

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concerns about an advertising ban, their bills could represent another constitutional threat. "The Fourteenth Amendment guarantees equal protection under the law," continues Stapf. Since both bills, as well as the bill proposal upcoming from AMA, would single out the tobacco industry and leave other industries facing other health questions without such regulation, he suggests, the possibility of constitutionality comes into play. Kirk Johnson stresses that the focus of AMA's call for an outright advertising ban is "solely on the tobacco industry because of its unique negative effect."

A spokesperson in Senator Bradley's office suggests that the 100-year old federal excise tax on cigarettes would have been challenged by now had such programs jeopardized Fourteenth Amendment principles. Obviously, industry people disagree.

In addition, says David Fischel, "the tobacco industry is one of the most regulated consumer product industries in the country. For 15 to 20 years now we have been marketing our products with strict adherence to Federal regulations. We don't think either (the AMA ban or the Bradley/Stark proposals) are justified."

"Tobacco is already one of the most regulated commodities," agrees Robert Ave. "We do not advertise on any broadcast me-

dia; we have federally mandated rotating warning labels on all our packaging and in all our advertising; and the tobacco industry accounts for 13.6 percent of all federal excise taxes collected by our government."

The Current Tax Bite

Cigarette smokers in the United States currently pay in excess of \$4 billion dollars in federal excise taxes. When state and local taxes are added in, say industry officials, approximately one-third of the price of the item goes into governmental coffers. That, they insist, is grossly out of proportion to other consumer goods.

Assuming industry advertising and promotional expenditures (totalling some \$2.6 billion in 1983 according to the FTC) lost their tax-deductibility, initial Congressional guestimates put the additional federal revenues at somewhere between \$500 million and \$1 billion.

David Fischel says he has his doubts Congress will get up much of a head of steam about the Bradley/Stark bills, and as of late January, AMA had not come up with its own proposal. Senator Bradley, having proposed the tax code changes, reportedly would prefer just to tack a 32 cent excise tax on cigarettes and stop sidestepping what he sees as the real issue—hitting tobacco consumers in the pocketbook hard enough to get them to stop smoking.

Industry representatives like Scott Stapf, however, believe proposals like Bradley's and Stark's and resolutions like the AMA's put the tobacco industry "on the high ground. . . . We are left in the public arena, discussing why it won't work, how it's impractical, and why it won't stop cigarette smoking." □