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## Consumer News

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## FTC Chomps Down on Cigar Industry

Cigar sales are up 53% since 1993. In the last five years, cigar manufacturers have sold 5.2 billion cigars, or \$4.4 billion dollars worth of cigars. Concerned about the increased sales of cigars and their popularity among teenagers, the Federal Trade Commission ("FTC") issued an order in February requiring the five largest cigar makers to disclose their advertising and promotions budget. This action brings cigar industry regulations, virtually nonexistent until now, more in line with the regulations imposed on cigarette and smokeless tobacco manufacturers.

Under these new regulations, cigar manufacturers had until April 9, 1998 to provide the FTC with data on the total number of cigars the manufacturers have sold, the dollar value of those sales, and how much they have spent on advertising and marketing. Cigarette and smokeless tobacco companies currently submit this data to the FTC.

In particular, the FTC is interested in whether cigar companies are paying for placement of their products in movies to target young people. Cigar sales have increased over the past four years as celebrities have glamorized cigar smoking on and off the "big screen." The FTC was alarmed by a 1996 survey that the Centers for Disease Control and Prevention released which suggested that a significant number of teenagers are smoking cigars. The survey of more than 16,000 teenagers indicated that 27%, or six million, U.S. teenagers (14-19 years old) have smoked

at least one cigar and almost 4% of boys and 1.2% of girls have smoked 50 cigars or more.

The FTC will issue its own study this year that will report the health effects of cigar smoking. Current data on cigar smoking suggests smoking cigars causes dangers as great as, or greater than, those posed by cigarette smoking. According to the American Lung Association, cigar smokers are four to ten times more likely to die of cancer of the mouth, larynx, and esophagus than nonsmokers. Cigar smokers also are 34% more likely to get lung cancer than nonsmokers. The FTC and the International Committee for Cigar Smoke studies report that a premium cigar contains 44 mg of tar, 97 mg of carbon monoxide, and 13.3 mg of nicotine, while a filtered cigarette contains, 16 mg of tar, 14 mg of carbon monoxide and 1.1 mg of nicotine. The National Cancer Institute also is expected to study the health effects of cigar smoking and report its findings this year. The FTC will have plenty of ammunition from these studies should it decide to impose more stringent regulations on the cigar industry.

The cigar industry has not resisted the FTC's request for disclosures. Timothy Mann, president of cigar maker, Swisher International, said he is not worried about the FTC's order because it "won't affect our business at all." Industry analysts and lobbyists contend that the cigar industry already has imposed on itself some of the regulations that the government has placed on cigarettes. For instance, the vast

majority (90%) of U.S. cigars carry health-risk warning labels required under California law.

However, the industry has disputed claims that its marketing efforts target teenagers by placing its products in movies. "The majority of the cigar makers . . . don't pay for movie placements," said Norman Sharp, president of the Cigar Association of America. In fact, the industry does very little advertising and promotion. The cigar industry spends about \$15 million a year on advertising and promotion — compared with the \$500 million that the cigarette industry spent on advertising last year.

The FTC, however, is more concerned with the effect of the cigar industry's promotion and

advertising than the dollar amounts. After the FTC reviews the industry's sales and advertising figures, it may impose some regulations, but not so severe that they cripple the industry. Possible FTC regulations could include a requirement that cigar advertisements contain a health warning from the U.S. Surgeon General and a requirement that manufacturers disclose the ingredients in cigars to federal health agencies. Given the current health and legal concerns associated with cigarettes, the FTC likely will keep a close watch on the marketing activities of cigar makers.

**CLR**

## Environmental Safety Group Issues Pesticide Warning

The Environmental Working Group ("EWG") released a report in January of this year, warning of unsafe levels of insecticides in children's and infants' food. EWG, a nonprofit environmental research group based in Washington, D.C., claimed that an estimated one million children under five years old eat food that contains unsafe doses of one or more agricultural pesticides, known as organophosphates, that create high levels of toxins in fruits, vegetables, and baby food. EWG has asked the Environmental Protection Agency ("EPA") to ban several of these pesticides. In response, the pesticide industry has criticized the EWG report as alarmist and lacking peer review.

Organophosphates are used on 20% of the farmland in this country and in a substantial number of household insecticides. Among the pesticides that EWG claimed were dangerous

are pirimiphos methyl, methyl parathion, chlorpyrifos, dimethoate, and azinphos methyl. According to the EWG report, the foods most likely to contain unsafe levels of these pesticides are apples, popcorn, peaches, nectarines, and pears.

Officials from trade groups and manufacturers criticized the report. They claimed that EWG's report contradicted scientifically-based studies of these pesticides which indicated that the pesticides harbored little or no risk and that the EPA had conducted extensive safety tests on the pesticides. They also argued that Food and Drug Administration and United States Department of Agriculture data suggested no such danger to infants and children from pesticide residue. "As with all reports by EWG to date, the latest is without scientific, political or public merit," said Jay Vroom, president of the American Crop

Protection Association, which represents agricultural pesticide manufacturers. "It was not peer-reviewed by reputable independent third-party scientists or scientific organizations," Vroom said. Not only did the trade groups and pesticide manufacturers claim that the report was inaccurate, but they argued that it was intended to frighten parents. According to Rhona Applebaum of the National Food Processors Association, EWG "used a shameless technique" to involve consumers in their political agenda to ban all pesticides.

Anticipating criticism from the pesticide industry and possible legal action under state food disparagement laws, EWG president, Ken Cook, stated "we have chosen to exercise our First Amendment right to highlight concerns about food safety." The group supported its conclusions by modeling its research on the methodology used in a 1993 study by the National Research Council ("NRC"), an

affiliate of the well-respected National Academy of Sciences. The NRC study, which also focused on the effect of pesticides on infants and children, concluded that federal pesticide regulation did not adequately protect infants and children. Finally, noted University of Pittsburgh professor of pediatrics and psychology, Dr. Herbert L. Needleman, further substantiated EWG's claims by explaining that "[t]hese chemicals[, organophosphates,] do affect the brain and nervous system, and developing nervous systems are more vulnerable."

The EPA has acknowledged that EWG's report is useful. The agency will conduct its own study to assess children's and infants' exposure to and tolerance for certain organophosphates. The EPA's assessment of the combined effect of the pesticides could result in a ban of these chemicals by the agency.

**CLR**

## Telemarketing Tactics Curtailed

Anyone who has received a pesky telemarketing call during dinner or their favorite television program can appreciate the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1997) ("Act"). The Act, however, has gone virtually unnoticed by consumers although it was enacted seven years ago. Although the Act does not prohibit all telemarketing calls, it does ban the most obnoxious and fraudulent types of calls.

The Act limits telemarketing in a variety of ways. First, it prohibits artificial voice or prerecorded calls, unless the call is for a noncommercial purpose. Under this rule, if the call is for a commercial purpose, then it may

not include unsolicited advertising. Second, the Act restricts the time frame in which "live" solicitors can make their calls to between 8:00 a.m. and 9:00 p.m. Third, the Act requires that telemarketers keep a "do-not-call" list of consumers who do not wish to be called at any time. If a consumer requests that his or her name be placed on the do-not-call list, telemarketers are restricted from calling that consumer for ten years. Fourth, the Act requires solicitors to identify themselves when they call and prohibits telemarketers from sending unsolicited advertising to facsimile machines. Finally, the Act prohibits telemarketers from employing auto-dial,

artificial-voice, and prerecorded calls to any guest or patient room in hospitals or retirement homes and to any emergency service's telephone line.

Consumer groups are using the Act and other tactics to limit telemarketers. The American Association of Retired Persons ("AARP") has begun a campaign to inform its members about certain criminal telemarketing calls. The AARP is distributing one of its public service announcements ("PSA") — *Plan in Advance for the Criminal Call* — around the country in television, radio, and print media. In addition, the AARP has enlisted the aid of federal and state legislators to get the message out to its members and the general public. Furthermore, the AARP supports expanded state and federal legislation to protect consumers. Four states recently have passed

anti-fraud telemarketing legislation and fifteen others are considering similar legislation.

Additionally, law enforcement agencies have increased their efforts to enforce laws that protect consumers from telemarketing fraud. "The nation's law enforcement community is aggressively working to identify and prosecute these criminals, but our greatest wish would be to stop the crime before it happens," said Timothy Healy, Special Supervisory Agent with the Federal Bureau of Investigations. In the meantime, the AARP and other consumer groups continue to educate the public on how to avoid annoying telemarketers and how to protect against becoming victimized by fraudulent telemarketing schemes.

**CLR**

## Plain English, Please

The Securities and Exchange Commission ("SEC") has adopted a new rule which requires that companies offering securities and mutual funds use "plain English" in their offering documents and prospectuses. By "plain English," the SEC means that these companies must: (1) use the active voice; (2) use short sentences and "everyday" words; (3) structure complex information in "bullet" lists, when possible; (4) avoid legal jargon or technical terms; and (5) avoid double negatives. The new rule takes effect on October 1, 1998.

Though the SEC will not function as the "grammar police," it will monitor documents for clarity, and it has urged companies to use plain English throughout their documents. The SEC released a publication entitled, *A Plain English Handbook: How to Create Clear SEC Disclosure Documents*, which is available in draft form on the Web at <http://www.sec.gov/consumer/plaine.htm> or by calling the SEC at (800) SEC-0330.

**CLR**

## Former GM Engineer Allowed to Testify Despite Non-Disclosure Agreement

In a major victory for consumer advocates, the Supreme Court ruled in January 1998 that a former General Motors Corporation ("GM") engineer could testify against GM, despite having entered into a non-disclosure agreement. In *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998), the Court held that a non-disclosure clause in a settlement agreement that was entered into in one state did not preclude a party to the agreement from testifying in another state.

In 1992, Ronald Elwell, the former GM engineer who testified in *Baker*, brought an unrelated wrongful discharge action against GM in Michigan state court. Elwell settled his claim by entering into an agreement in which, in return for an undisclosed amount of money, he promised not to testify in lawsuits against GM that involved engine fires. The court consented to the settlement agreement by issuing a consent judgment which disposed of the case.

In *Baker*, a woman died after her 1985 Chevy Blazer collided head-on with another car and caught fire. The plaintiff contended that the Blazer's electric fuel injector, which allegedly pumped fuel to the engine after the collision, fueled the fire. Elwell was a key witness in the case because of his extensive knowledge of company practices given his 30-year employment with GM. His knowledge included a crucial 1973 value analysis that reportedly studied the likely cost to GM of each life lost in an accident caused by, or involving, fuel-fed engine fires.

GM argued that the trial court should have prohibited Elwell from testifying given the effect of the "Full Faith and Credit" clause of the Constitution on the Michigan court's consent judgment. The Full Faith and Credit clause requires courts in one state to honor the judgments of courts in another state. The *Baker* plaintiff, represented by Professor Laurence Tribe of Harvard Law School, successfully countered that the Full Faith and Credit clause should not be used to prevent a litigant in a different jurisdiction from examining witnesses or utilizing other effective discovery tools. The Court agreed.

Writing for the majority, Justice Ruth Bader Ginsburg explained that Michigan's consent judgment "cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other states, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell-GM dispute."

Consumer advocacy groups call the Court's ruling a landmark decision. Jeffrey White of the Association of Trial Lawyers of America said the decision resolved key issues that otherwise "would have allowed corporations like GM to buy the silence of its experts who have the best evidence." The group filed an *amicus* brief (a brief by a non-party, or "friend of the court," in favor of one of the parties' positions) opposing the ability of parties to conceal important health

and safety information from the public through settlement agreements.

The implications of this decision reach far beyond the parties in *Baker*. In particular, the Court's decision dealt a setback to the corporate strategy of silencing prospective whistle-blowers in product liability suits by

using non-disclosure agreements when settling employee litigation. Justice Ginsburg's opinion protects consumers by enabling plaintiffs to prove-up their claims against manufacturers of faulty products.

**CLR**

## New Rules for Banks Selling Investment Products

Congress is considering legislation (H.R. 10, 105th Cong. (1998)), that would allow banks to expand their operations within the investment and insurance products business. As the debate continues regarding how and when banks will begin selling investment and insurance products, such as mutual funds and annuities, federal banking and securities regulators are developing new rules to manage banking sales and marketing practices.

Comptroller Eugene A. Ludwig, of the Office of the Comptroller of the Currency ("OCC"), one of many federal regulatory agencies responsible for overseeing banking activities, recommends that his fellow regulators convert voluntary guidelines regarding uninsured investment products to mandatory rules. "Our bottom line is to make sure our products are sold responsibly," said Julie L. Williams, who will assume Mr. Ludwig's position as Comptroller of the Currency when his term ends in April 1998. "We don't want consumers subjected to unacceptable risks, and we don't want banks putting their reputations at risk because of improper relationships with customers," she said.

Bank regulators for the federal government,

including the Federal Deposit Insurance Corporation ("FDIC"), Securities Exchange Commission ("SEC"), and the OCC want to ensure that bank customers are well served and properly informed while minimizing the regulatory burden placed on banks. To meet these goals, federal bank regulators want to convert voluntary guidelines governing banks' offerings of limited investment and insurance products into mandatory rules, before Congress imposes tougher regulations on banking operations.

For example, although federal bank regulators currently have voluntary guidelines for uninsured investment products, they want to add "teeth" to them by requiring banks to separate their investment and insurance sales operations from their deposit activities. Once separated, banks would disclose to consumers that certain investment products are not federally insured and could decrease in value at any time. This disclosure is important because bank customers are accustomed to having their deposits insured by the FDIC. Additionally, like most other investments, the investment and insurance products that the banks plan to sell will not be protected against devaluation. Federal regulators want banks to disclose these

attendant risks in promotional and sales materials given to consumers.

Consumer advocacy groups support the idea of new mandatory rules. They contend that many banks fail to inform consumers that certain investment products are not insured or may not be right for a consumer's portfolio. Mary Griffin, insurance counsel for Consumers Union, praised Mr. Ludwig's proposals to strengthen banking rules. In a letter to Mr. Ludwig, Ms. Griffin stated, "[s]tudy after study reveals that many financial institutions are failing to inform consumers [of investment product features]." Other consumer groups, including the Consumer Federation of America and the U.S. Public Interest Research Group endorsed Ms. Griffin's letter.

While they have consumer support, federal bank regulators are adopting rules that satisfy consumers by requiring increased disclosure by banks, which also will result in uniform and less burdensome regulations. Mr. Ludwig and other federal bank regulators hope that such preemptive action will avert more restrictive legislation from Congress. "We already are subject to a lot of redundant examinations,"

said Alan R. Leach, president of Deposit Guaranty Investments, Inc., a unit of Deposit Guaranty National Bank in Jackson, Mississippi.

Instead of coordinating among the inspectors to reduce the number of redundant examinations, Ed Hipp, CEO of the securities unit of Centura Banks, Inc. in Rocky Mount, North Carolina, has suggested that these regulators be replaced by a single regulatory agency — the NASD — as the primary supervisor for bank mutual fund operations. "Bankers already consider the NASD as the dominant voice on mutual funds, and the [OCC and SEC] agencies need to realize they must present the industry with a common message," he said.

None of Mr. Ludwig's proposed changes are expected to take effect before his term ends in April. In the meantime, federal bank regulators continue to draft mandatory rules that provide adequate consumer protections and disclosure requirements while satisfying bankers' requests for uniform regulations.

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