

Board of Health Public Hearing – Point of Purchase Tobacco Warnings
September 8, 2011 – 5:30 PM
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August 29, 2011

TO: Philadelphia Board of Health

FROM: Steve Becker, Light'n Up

Good evening, my name is Steve Becker and I am the owner of Light'n Up, a tobacco store in Philadelphia.

I am here tonight to state my concerns and opposition to the ordinance that would require me to have health warning posters by each of my cash registers.

As a retailer, I abide by all of the laws and regulations for my store including licensing, compliance checks, and the new FDA tobacco regulations.

However, this proposal to put graphic signs at each of my registers simply goes too far.

The government should not have the right to require that I post signs in my store informing my customers to stop buying tobacco products, but that is what this proposed law essentially does.

As a properly licensed and taxpaying business owner, I have the right to sell legal tobacco products without the government mandating these kinds of signs.

I understand that New York City passed the same kind of law and that it was found to be illegal.

I think it is imperative that the Board of Health investigate the New York City experience and learn from the outcome of that case.

While I understand your health concerns with tobacco products, federal laws and the U.S. Constitution take precedence.

As a government health official, you may think that mandating these signs is the right thing to do.

However, I do not believe that requiring these signs is the legal thing to do and I should have a choice as a retail store owner to decide not to post these signs.

But that choice is not allowed under the terms of the ordinance and I ask you to not take any further action on this proposal.

Thank you.



Testimony for

Deborah P. Brown
President and CEO

American Lung Association of the Mid-Atlantic

Serving communities in Delaware, New Jersey, Pennsylvania and West Virginia

Contact information:

Telephone: 610-563-6992

Email: dbrown@lunginfo.org

Good evening. My name is Deborah Brown. I am the President and CEO for the American Lung Association of the Mid-Atlantic, which serves the communities of Pennsylvania, Delaware, New Jersey and West Virginia.

For over 100 years we have been fighting the diseases and environmental poisons like tobacco that damage our lungs. We at the Lung Association in Pennsylvania strongly support the proposed regulations to require all tobacco retailers to display a government warning sign containing a health warning about the dangers of tobacco use.

Can you believe the five largest cigarette manufacturers spent \$27.2 million a day on advertising and promotions? A day. That's \$9.94 billion a year.

72% of this budget accounted for price reductions paid to cigarette retailers to entice the consumer.

That was in 2008.

Today it is significantly more.

The tobacco industry is a cunning adversary (opponent). It does not play fair. It concentrates its marketing efforts around reducing the price of tobacco products to hook our nation's children to a deadly addiction.

When you combine the costs in terms of human life, sickness, debilitation and hard dollars and cents, the use of tobacco is clearly one of the biggest threats to Pennsylvanians. Residents of Philadelphia account for a large portion of these costs.

The City of Philadelphia has several challenges:

1. Nearly 25% of the adults here smoke. This is higher than the state average.
2. Philadelphia has one of the highest rates of regular youth smoking among large US cities. 11% of Philadelphia's youth in grades 9-12 smoked at some point in the last 30 days according to the 2009 YRBS.
3. Philadelphia has one of the highest rates of tobacco retailers among large US cities. 20% of these almost 4400 (4398) retailers sell to youth, even though they should not. This is unacceptable.

A 2002 study in the journal *Tobacco Control* examined tobacco industry documents related to cigarette tax increases, and found that the industry was well aware of the potent effect that increases in price have on reducing both youth and adult consumption of cigarettes. Pennsylvania's last excise tax increase on cigarettes was in 2009 and unfortunately, Pennsylvania chooses not to tax other tobacco products at all such as cigars, chewing tobacco, snus, etc. Studies show that a 10 % increase in the price of cigarettes reduces consumption by about 7% for youth and 4 % for adults.

Because so many of the tobacco retailers turn a blind eye when it comes to selling products to youth, Philadelphia is a dream city for the tobacco industry.

Lung disease is excruciating.

The tobacco industry knows this.

We have to do as much as we can to prevent tobacco use.

The American Lung Association in Pennsylvania is here to help save lives and supports the proposed regulations.

Thank you.

Testimony on
Point of Purchase Tobacco Warnings

Amy Hillier, MSW, PhD
Assistant Professor of City and Regional Planning
University of Pennsylvania School of Design

Presented to the Philadelphia Board of Health Hearing
September 8, 2011

I am pleased to speak in support of the proposed point of purchase tobacco warnings. My research in Philadelphia on outdoor advertising demonstrates that Philadelphia has an exceptional amount of outdoor advertising, particularly signage on corner stores, promoting tobacco sales, often in close proximity to where children spend their time. The point of purchase warnings would be a way to counter the existing tobacco signs and promote healthful decisions among our residents.

With colleagues from UCLA and the University of Texas, I helped lead a 5-city study of outdoor advertising in 2005 and with colleagues from Penn, Drexel, and The Food Trust, I currently lead a study focused on access to healthful food and physical activity in West and Southwest Philadelphia. Here are the key findings from our research:

- **Advertisements for cigarettes and tobacco products are pervasive in Philadelphia, particularly on the outside of corner stores.** We photographed the outside of more than 360 food stores in West and Southwest Philadelphia during the summer of 2010. Nearly one-half of the stores had at least one ad promoting cigarettes and many had more than one.

- **Regulations of outdoor advertising in Philadelphia are more permissive than in other cities.** Philadelphia has fewer billboards than Austin or Los Angeles but has far more small ads including those promoting sugary beverages and tobacco outside corner stores and convenience stores. Philadelphia's accessory sign regulations allow stores in the middle of the block to have six square feet of signage for every foot of frontage (84 square feet for the typical 14-foot wide property). Stores located on street corners are allowed to have even more. Furthermore, Philadelphia's zoning code does not regulate "incidental" signage (which includes

temporary ads for products sold on the premises) which results in store fronts being covered in ads for unhealthful products.

- **Unhealthful ads cluster around institutions that serve children in Philadelphia, particularly in predominantly African American neighborhoods.** On other words, places where children spend time have more ads than other areas. We defined “unhealthful” ads as those promoting sugary beverages, fast food restaurants, alcohol and tobacco. We mapped and analyzed the location of these ads relative to schools (public, private and charter), day cares, recreation centers, and libraries within six ZIP code areas in Philadelphia.¹
- **Low-income residents who receive federal food subsidies are disproportionately exposed to alcohol ads and sales.** More than 1500 corner stores in Philadelphia accept SNAP benefits (food stamps) and more than 400 accept WIC benefits. By virtue of redeeming their SNAP and WIC benefits at corner stores, they are exposed to ads promoting the sales and use of tobacco products. These stores also make up a sizeable proportion of the tobacco retail outlets in the city.

Philadelphia needs to enact and enforce more stringent regulations on outdoor advertising to reduce the barrage of unhealthful messages that assault children and adults who shop or pass by corner stores all across our city. That should happen as part of the development of a new zoning code for the city. In the meantime, the proposed point of sales warnings about the hazards of using tobacco products offer an important way to counter those ads with messages promoting healthful choices.

¹ Amy Hillier, Brian L. Cole, Tony E. Smith, Antronette K. Yancey, Jerome D. Williams, Sonya A. Grier, William J. McCarthy Clustering of Unhealthy Outdoor Advertisements Around Child-serving Institutions: A Comparison of Three Cities,” *Health and Place*, Vol.15, Issue 4, Dec. 2009 (pp. 935-945).

**Testimony of Andrew Kerstein
President, National Association of Tobacco Outlets, Inc.**

**Philadelphia Board of Health
September 8, 2011**

1. Members of the Board of Health, my name is Andrew Kerstein and I am the President of National Association of Tobacco Outlets, also known as NATO, which is a national tobacco retail trade association.
2. I am here today on behalf of NATO and the NATO retail members that operate stores Philadelphia.
3. NATO and its retail members oppose the health warning sign ordinance. Current federal law and constitutional protections would be violated if this ordinance was adopted.
4. There is a federal law called the Federal Cigarette Labeling and Advertising Act that specifically pre-empts a city or state from enacting the very kind of ordinance that is under consideration.
5. The law prohibits a city or state from adopting a requirement based on smoking and health with respect to the advertising or promotion of cigarettes.
6. In fact, this federal pre-emption was recently put to the test when the New York City Board of Health adopted a nearly identical health warning sign regulation in September of 2009.
7. Retailers, trade associations and manufacturers sued the New York City Board of Health and in December of 2010 a federal judge overturned the New York City graphic health warning sign and ruled that the signage requirement was a restriction on cigarette

promotion and pre-empted by the Federal Cigarette Labeling and Advertising Act.

8. This federal court ruling sets a precedent and would result in the Philadelphia ordinance being pre-empted by the federal advertising law.
9. Now some advocates of the sign ordinance may attempt to claim that a recent amendment to the Federal Cigarette Labeling and Advertising Act allows the Philadelphia Board of Health to proceed with the sign requirement.
10. Nothing could be further from the truth. While the amendment to the federal law allows a city to adopt what is known as “time, place and manner” restrictions on cigarette advertising, the amendment specifically prohibits cities from adopting “content” based restrictions.
11. However, the Philadelphia ordinance would also be prohibited under the amended federal law because it is a content-based proposal that dictates what information and graphic pictures are printed on the warning signs.
12. In addition to the specific pre-emption under the federal advertising law, the First Amendment to the U.S. Constitution protects free speech, including the right to speak freely and the right to not speak at all.
13. However, this ordinance would compel retailers to broadcast a government anti-tobacco product message by “speaking” to their customers through the words and graphic pictures on the warning signs when they would choose not to do so if they had a choice.
14. The U.S. Supreme Court had made clear that this kind of “compelled” government speech is unconstitutional.

15. Finally, it is NATO's position that taxpayer dollars are being misused and wasted when a local board of health considers an ordinance that federal law, federal court decisions and U.S. Constitutional protections would strike down.
16. Government officials have a fiduciary duty to citizens to spend taxpayer dollars prudently, but to consider and adopt an ordinance that clearly violates federal law and is unconstitutional on its face is a breach of that very duty.
17. Moreover, in these difficult and uncertain economic times, where cities and states all across the country are struggling to find ways to pay for essential services, spending taxpayer dollars on a non-essential regulation that will end up with the city being sued and the ordinance being ultimately overturned violates the fiduciary duty that governmental officials are sworn to uphold.
18. I urge you with the strongest possible conviction to not proceed with this proposed health warning ordinance.
19. Thank you for your time and I will answer any questions that you may have.

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*"Building healthier lives,
free of cardiovascular
diseases and stroke."*

Philadelphia Board of Health

Testimony: Proposed Regulations Regarding Tobacco and Cigarette Informational Signs

The American Heart Association is strongly supportive and appreciative of the City of Philadelphia's proposed regulations requiring retailers to post graphical and informational warning labels at the point of sales regarding the harms of cigarettes, cigars, and other tobacco products. The new warnings will help Philadelphians to understand that smoking and tobacco use are not just a bad habit, but an activity that significantly harms your health.

Big tobacco companies and some small retailers don't like these signs and labels because they are afraid they will work. We applaud your leadership in standing up for public health by adopting and implementing these warnings across this City because it is one of many great steps this Board is taking towards making Philadelphians healthier. This is a smart policy because Philadelphia's smokers drain the City's resources through utilization of more sick days, increased costs for care at City health centers, and many other problems, including litter. At the national level, tobacco companies are fighting new graphic warnings in the courts and using whatever means they have at their disposal. These warnings display, in pictures and in text, the damage that smoking causes to the body of the smoker. We have great confidence that these new warnings will help convince many Philadelphians to quit and many more never to start smoking at all.

Thank you for continuing your vigilance and your policy work to reduce smoking rates in this city. Tobacco remains the numbers one cause of preventable death in the US with obesity, poor nutrition, and a sedentary lifestyle coming close to closing the gap in the coming years. The American Heart Association supports you and all of your work stepping up enforcement on youth sales, eliminating trans fats, and asking Philadelphian's to consume less sugar sweetened beverages. Your policy leadership is commendable. We urge adoption of the proposed regulations before the Board regarding tobacco warnings.

Respectfully Submitted,



Jonathan M. Kirch
American Heart Association, Philadelphia and Delaware
JK

TESTIMONY OF
GERALD P. KUPRIS

PENNSYLVANIA DISTRIBUTORS ASSOCIATION, INC.
800 NORTH THIRD STREET, SUITE 505
HARRISBURG, PA 17102

BEFORE

PHILADELPHIA DEPARTMENT OF
PUBLIC HEALTH

1401 JFK Boulevard, Room 600
Philadelphia, PA 19102

SEPTEMBER 8, 2010

5:30 PM

Good evening. I am Gerald P. Kupris, President and CEO of the Pennsylvania Distributors Association, Inc. I want to thank you for the opportunity to present testimony

The Pennsylvania Distributors Association is a statewide trade association of businesses that distribute consumer products to retailers throughout this state. Our members distribute these products to the small retailer, grocery stores and large chains

These member companies are comprised of the small “mom & pop” organizations which are family owned, medium sized firms and large national companies. Members distribute such products as grocery items, health and beauty products, tobacco and confectionery products, snacks, automotive products and most items found in convenience stores and grocery stores. They have sales in this state estimated at more than \$7.5 billion.

The Association is celebrating its 65th year in existence. It has helped its members become more efficient in their businesses, comply with state and federal laws and regulations and has provided resources for its members to prepare themselves for the ever-changing business paradigms.

The Association has been in the forefront in supporting “Youth Access” limits which keep cigarettes out of the hands of youth with education programs such as “We Card,” and engaging in collaborative efforts with other business groups, retailers and consumers.

The Pennsylvania Distributors Association submits this testimony to express its concerns that the regulations proposed are problematic and are not the least invasive action in accomplishing a desirable end.

We express these concerns as follows:

1] The regulations appear to be pre-empted by Federal Law, 15 USC 1334, which prohibits states and localities from requiring the signage required in this proposed City Regulation. In fact, this was specifically decided in the U.S. District Court for the Southern District of New York this past December, 2010, 10 Civ. 4392, filed December 29, 2010.

[23-34 94TH ST. GROCERY CORP., KISSENA BLVD. CONVENIENCE STORE, INC., NEW YORK ASSOCIATION OF CONVENIENCE STORES, NEW YORK STATE ASSOCIATION OF SERVICE STATIONS AND REPAIR SHOPS, INC., LORILLARD TOBACCO COMPANY, PHILIP MORRIS USA INC., and R.J. REYNOLDS TOBACCO CO., INC.,

Plaintiffs,

NEW YORK CITY BOARD OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

DR. THOMAS FARLEY, in his official capacity as Commissioner of the New York City Department of Health and Mental Hygiene, and JONATHAN MINTZ, in his official capacity as Commissioner of the New York City Department of Consumer Affairs,

Defendants.

In that case, a copy attached, the Court held that the City had no authority to promulgate its regulations because of pre-emption. It should be noted that their regulations attempted to address all tobacco products, not just cigarettes.

2] The regulations amount to a form of commercial “taking,” a type of eminent domain, for which just compensation has not been made to the retailer. Besides selling products, the retailer’s next most valuable commodity is space, for which manufacturers will pay, in some cases called a “slotting allowance. The space around or near the cash register is the most valuable space the retailers has, whether or not he actually uses it to produce income.

This space, if rented to manufacturers for advertising, promotion or even product placement, would yield significant income to the retailer. When one multiplies the tobacco product retailers in this City, estimated at 4,500, by the amount of space the City is talking and correlates it into monies or potential monies lost, the City is depriving the retailer of millions of dollars each year, money which would ultimately go to bolstering the economic vitality of the City. If the theory of a “taking” is correct, the City would owe that money to the retailer. However, before a court would do this, it is likely that the regulation would be held invalid.

Further, if the Department of Public Health actually does what it intends to do in this regulation, what is to stop it from demanding 400 square inches in the future? How many inches are too much? How many inches are too little? How many inches are just right? And when and how will that decision be made? How was the original decision made? If the ends to be accomplished by the Regulation are not achieved, will the Regulation be changed to reflect new policies? Or, what is to stop it from extending a similar regulation to products it deems deleterious to the public health, such as sugared drinks, confectionery, butter, etc.

3] We are concerned regarding whether the Department of Health has the authority to enact this regulation, absent specific Councilmanic authority, due to the separation of powers doctrine.

To our knowledge, the regulation is not in response to any specific Ordinance directing the Department to execute the policies of the City Council. Rather, this document is so explicit and burdensome to the retailer that “upholding the general public health” is not sufficient authority for such a regulation which, in essence, is more properly called an enactment or ordinance.

Indeed, that regulation actually reads like a City Council proposed ordinance: witness the language of Section 1, B (1) “***The Department shall...***” [Emphasis added] Such mandatory language is generally delineated in a legislative action, or ordinance, and a Department’s proposed regulation is usually a repetition of the same language of the ordinance in response to

the policy established by the City Council. In this instance, there appears to be no explicit Legislative enactment providing the policy basis to the proposed ordinance.

4] The end to be accomplished by this regulation, the education of the tobacco-using public [we assume it to be], can be accomplished in a less invasive manner. Are there no alternative programs which could accomplish its end without burdening the retailer? Is it possible to develop programs which would address the concerns of the Department without burdening the retailer, or making the private business entity captive to the directive demands of the Department?

Actually, we are not quite sure what the rationale for the regulation is, or what end is intended to be accomplished, leading to the next concern:

5] We are concerned that it appears that the Department of Health never met with affected parties prior to proposing this regulation, an action which would have established a more practical and reasoned approach by involving the actual stakeholders. Stakeholders are properly invited to testify on the Regulation, but many issues could be avoided if these same stakeholders were part of the initial process. Hopefully, this public forum is the prelude to that process.

6] It appears that the regulation is written with the understanding that parts of it can be or will be held invalid, thus possibly resulting in an onerous signage requirement on other tobacco products only. However, even this result cannot obtain, as any signage purporting to affect other tobacco products will necessarily affect all tobacco products and be subject to the same argument expressed in item 1], above.

We have additional areas of concern:

The signage, 256 square inches, will result in a space of nearly two feet by one foot of space being rendered unavailable to the retailer, representing lost profits or opportunities for profit, or lost advertising, marketing or promotional space. [discussed above]

Since the signs are to be placed at the point of sale, a retail establishment having numerous cash registers would have additional space taken from the business. Compliance, with business economic efficiencies, would require changing the flow of cash register traffic.

The term “clearly visible from any face-to-face point of sale” is somewhat ambiguous. The place must be a “conspicuous” place. What is that? Who determines it? While no one suggests

that the decision would be capricious, it is possible that the different retail configurations would require different placements, and this would result in lack of uniformity. But to be totally uniform in application might result in additional burdens for certain retailers.

Section B [3] requires the retailer to request the signs. How is this accomplished? What is the timing on this? Who determines how many signs are required? What if the retailer makes a good faith response which turns out to be wrong in the eyes of the Health Department?

And as to the term: “clearly visible from any entrance to the premises.” It is assumed that it is visible to all passersby from the outside, whether tobacco user or not. What is the rationale, since the consumer in C [2] and C [4] is going to be inside the premises enjoying the tobacco product? Is the regulation trying to keep the consumer from entering? Is it alerting the would-be tobacco user of the nature of the use of the premises?

An important concern must be raised again: are there no other avenues of approach to the issue the Department of Health wishes to address? Cannot the end result be accomplished by other means less burdensome and invasive of the retailer’s private sales and marketing and promotional space?

Boiling this regulation down, it seems that the regulation attempts to achieve some possibly laudatory end by means which are not permitted, either by City Council authority or by Federal law, or by legal theories of private property.

For the foregoing reasons our Association presents our concerns to you. We are hopeful that more time and effort can go into this endeavor and include the actual parties to be affected, the retailers. Our members businesses are intimately tied to the Philadelphia retailer. As they succeed, so do we, and if this regulation negatively impact them, so will it impact us.

We look forward to the possibility of delineating the nature of the issue, working to fashion a plan which invites, but does not demand, the input of the retail and consumer community and fashioning a workable result which is equitable for all involved.

Thank you for the opportunity to make this presentation.

[Attachment: court case: Sent with the e-mail of this testimony]

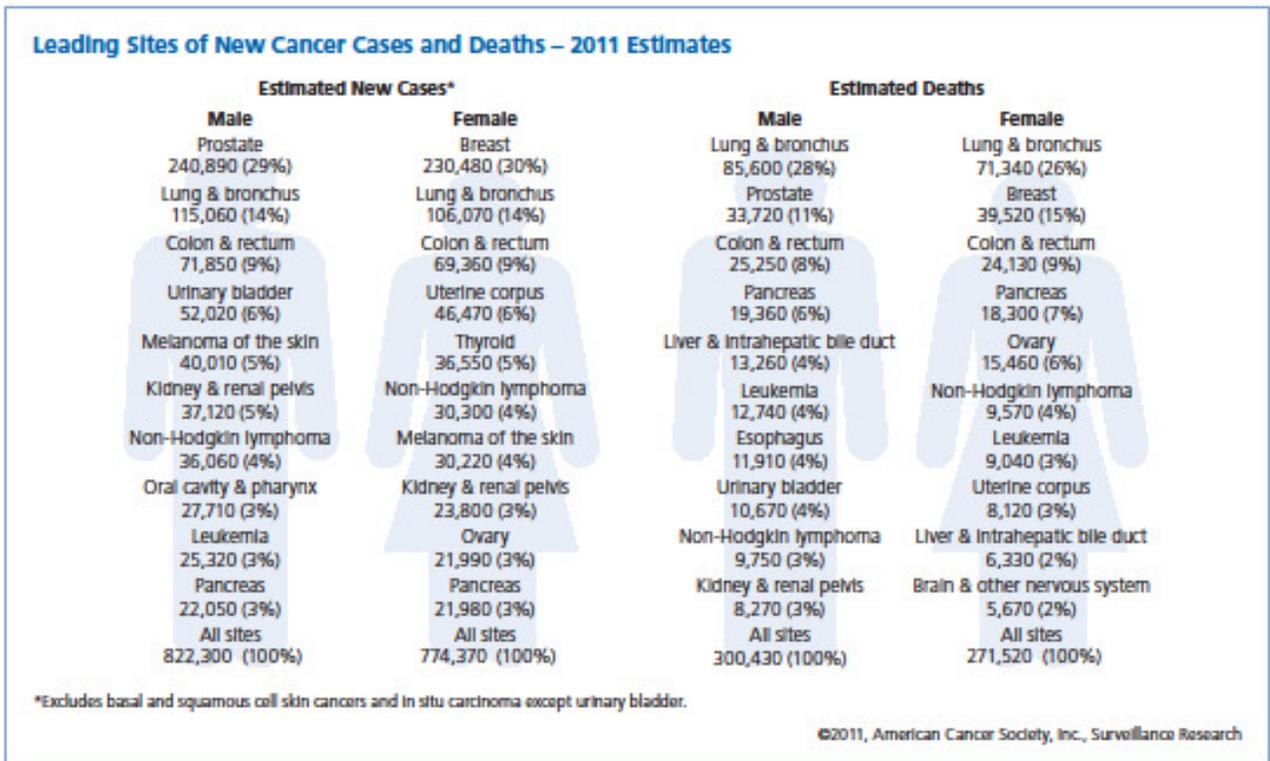
September 8, 2011
Philadelphia Board of Health Public Hearing
Point of Purchase Tobacco Warnings
Remarks by: Lynn M. Lucas-Fehm, MD, JD, President
The Philadelphia County Medical Society

Good afternoon Board President Dr. Schwarz and members of the Board of Health. On behalf of the concerned physicians of Philadelphia, thank you for this opportunity to speak to you regarding the marketing of tobacco products and the City's proposed anti-smoking signage campaign. I am Dr. Lynn Lucas Fehm, a Philadelphia resident and the current President of the Philadelphia County Medical Society. The Philadelphia County Medical Society is the professional membership organization representing over 4,500 Philadelphia physicians.

As a physician, one of the saddest and most frustrating experiences is the need for treatment of a disease that could have been prevented.

Lung cancer is a prime example.

Lung malignancy is the leading cause of cancer death among men and women. More people die of lung cancer than of colon, breast, and prostate cancers combined.



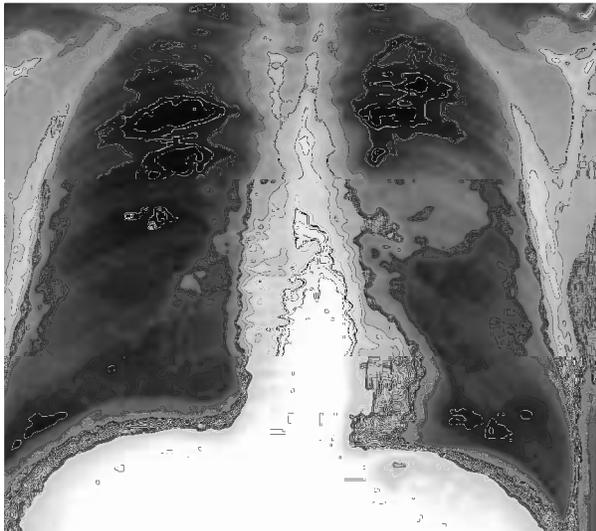
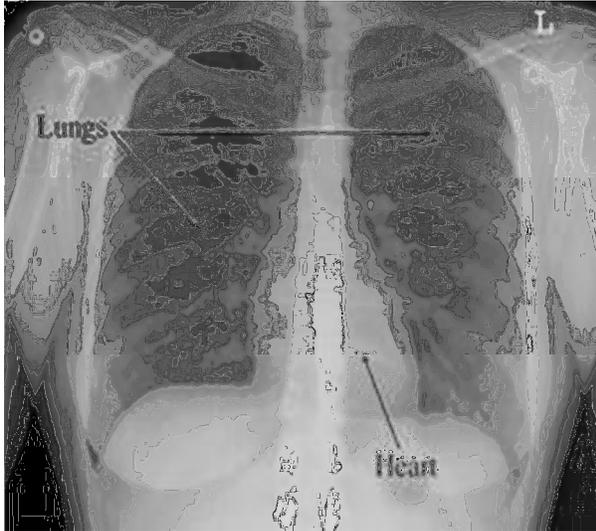
Approximately 87% of these lung cancer deaths result from smoking.

Smoking also causes cancers of the larynx, mouth, pharynx, esophagus, and bladder. Cigars, pipes, and other types of smokeless tobacco all cause malignancy as well.

Cancer is not the only medical consequence of smoking.

More than 12 million people in the United States suffer from chronic obstructive pulmonary disease (COPD), a name for long-term lung disease which includes both chronic bronchitis and emphysema. COPD is the fourth leading cause of death in America. Smoking is the main risk factor for COPD. More than 75% of COPD deaths are caused by smoking. Over time, COPD can make it hard to breathe, limit activity, and cause serious health problems. The late stage of chronic lung disease results in many patients becoming so short of breath that they feel like they are drowning.

I could continue on with the statistics about what are commonly referred to as cancer sticks but I think the saying a picture speaks a thousand words will convey what mathematical data cannot. Please note 2 chest x-rays – one normal and the other with a large cancer.



It does not take any special medical training to recognize that something is present on the second x-ray that is not on the first.

We should take every reasonable step to educate our community about the dangers of smoking so I no longer see chest x-rays like the one above.

The City's proposed anti-smoking signage campaign is so important right now because we know for a fact that tobacco advertisements and promotional campaigns appeal to young people by highlighting, stimulating and showing adventurous activities which also

convey the excitement and rewards associated with smoking. Adolescent exposure to such tobacco advertising and promotional campaigns has not diminished despite the Master Tobacco Settlement Agreement.

The Philadelphia County Medical Society strongly encourages and supports the Philadelphia Department of Public Health in its efforts to communicate and educate our youth and adult community regarding the adverse health effects resulting from tobacco use.

We strongly recommend that you pass the proposed regulation which would require all tobacco retailers to display a government warning sign containing a health warning about the dangers of tobacco use.

Knowledge is power and I support legislation that serves to assist our community in making informed healthy decisions.

Thank you. I am happy to take your questions.

Thank you,
Lynn Lucas-Fehm MD. JD,
President, Philadelphia County Medical Society

Testimony Presented to the Philadelphia Board of Health

September 8, 2011

Municipal Services Building Room 1450
1401 JFK Blvd. Philadelphia, PA 19102

Presented by: David L. McCorkle

President and Chief Executive Officer
Pennsylvania Food Merchants Association
Pennsylvania Convenience Store Council
P.O. Box 870
Camp Hill, Pennsylvania 17001-0870

Introduction

I am David McCorkle, President and CEO of the Pennsylvania Food Merchants Association (PFMA) and the Pennsylvania Convenience Store Council (PCSC). Thank you for allowing me to share our concerns about the draft regulations concerning tobacco sales signage with you. Our statewide organization has 1,000 corporate members who operate about 3,000 food stores in the Commonwealth. Members include a range of grocers from the smallest corner store to the largest supermarket and convenience store chains in Pennsylvania. Attached to my testimony is a profile of the retail industry in Philadelphia. More than 4,000 retail locations in the city employ around 46,000 Philadelphians. Supermarkets and convenience stores in Philadelphia employ over 11,000 city residents and pay \$228 million in salaries annually. The profit margin of the food industry remains low due to the competition for business and customer loyalty. As you know, despite the cooperative effort of business leaders, elected city, state and national officials there are still areas of the city where fresh, nutritious food is not as available as we would like.

Our members share the same concerns that each of you have about the importance of improving the health of every Philadelphian and we look forward to continuing our cooperative efforts to find creative and effective ways to change unhealthy habits through programs of public education and awareness.

Comments on the “Youth Tobacco Use, Access, and Illegal Sales Report” published on November 18, 2010 by the Philadelphia Board of Health.

Due to the leadership of the Philadelphia Health Department, the Board of Public Health and efforts of many others, Philadelphia tobacco use trends for youth are moving in the right direction. Retailers seek to eliminate sales to minors and employees in food stores selling tobacco products are trained to verify the age of anyone appearing to be 30 or younger. Self reported youth smoking has dropped significantly since 1997 peaks and enforcement of tobacco sales laws focuses on problem locations frequented by underage users. The retail food industry will continue to work with the Department to improve our record in the future.

Request for a delay in the consideration of regulations on informational signage in Philadelphia stores selling tobacco products.

I have attached to my testimony a letter to Dr. Schwarz. Specific concerns about the language of the proposed regulations will be described in the next section of this testimony. However, litigation in New York and the filing of a suit challenging the FDA’s authority to require graphic cigarette warnings on packaging lead us to conclude that the best policy course for Philadelphia is to focus on improving consumer education about tobacco use and await the ruling of the courts on pending cases. Let’s work cooperatively to avoid additional litigation on the topic of graphic signage that may or may not be effective in reducing tobacco usage.

Specific concerns about the published “Regulations Regarding Tobacco and cigarette Informational Signs”.

1. Signs depicting diseased humans at the point of sale or near the point of sale in a food store are likely to alienate consumers.
2. Some customers might shop less frequently if subjected to graphic signage depicting terminally ill humans. Retailers in Philadelphia are trying to make shopping a pleasant experience, not a distasteful experience.
3. The maximum sign size is much larger than any retail checkout location can accommodate. Any size large enough to make the point would be objectionable.
4. The regulation is not specific about where signage should be located after it is requested by the retailer. The cost of producing signs, distributing the materials, placing the signage and visiting stores would be added to the budget of the Health Department. Do we know what the cost will be?
5. The fine for violating the regulation could be \$500. This amount seems excessive.
6. An implementation date of July 1, 2012 is not possible.

Pennsylvania Food Merchants Association Pennsylvania Convenience Store Council

A statewide trade association representing supermarkets, convenience stores and associated businesses.

Resources

—Philadelphia Edition—

A look at the retail industry in Philadelphia

The more than 4,222 retail establishments operating in Philadelphia, employ more than 45,588 Philadelphians. The retail industry contributes to the overall economic health of the city. City residents depend on it to supply affordable goods and services to them every day.

Annual Sales in Philadelphia

Retail food and beverage stores sales are \$2.6 billion in Philadelphia. There are more than 1,016 retail food and beverage stores operating within the city.

Residents' Income Generated by Retail Firms

Philadelphia's retailers pay their employees \$1.2 billion in wages and salaries each year. Supermarket and convenience stores employ 11,281 city residents and pay nearly \$228 million in annual wages and salaries.

Community Support

Whether they are large or small, Philadelphia retailers support their local communities with monetary donations, merchandise and facilities. Their support helps community groups, schools, non-profit causes, youth programs and other organizations.

Other Food Industry Facts (source Food Marketing Institute)

Profit margins for supermarkets are less than 2 cents on each dollar of sales.

In fiscal year 2009, the industry's after tax net profit was 1.22 percent.

In 2009, consumers made an average of 2.1 trips to the supermarket per week - where they spent an average of \$29.25 per transaction.

Sources: Philadelphia County Profile - Center for Workforce Information & Analysis

~ November 2010 (www.paworkstats.state.pa.us/admin/gsipub/htmlarea/uploads/phila_cp.pdf)

2007 U.S. Census Bureau - Philadelphia County Statistics

(<http://factfinder.census.gov/> - via Data Sets by Geography)

Food Marketing Institute (www.fmi.org)

August 24, 2011

The Honorable Donald F. Schwarz MD
President, Philadelphia Board of Health
1401 JFK Boulevard Suite 600
Philadelphia, Pa. 19102

Dear Dr. Schwarz,

I am writing to request a delay in the review of draft regulations regarding the posting of tobacco and cigarette informational signs in Philadelphia retail stores. I will formally make the request at the Philadelphia Board of Public Health hearing on September 8, 2011. Signs up to 256 square inches (16" x 16") depicting a "pictorial image illustrating or explaining the adverse health effects of tobacco use" would be required near the point of sale in all Philadelphia businesses selling tobacco products.

Graphic cigarette warnings are controversial for many reasons. As you know, a New York City statute similar to the Philadelphia Department of Health draft regulation has been appealed to the 2nd Circuit Court of Appeals in New York. A hearing on the appeal is expected this November. In addition, a complaint was filed recently against the U.S. Food and Drug Administration seeking to void graphic labels on packages of tobacco products. The case is R.J. Reynolds Tobacco Co et al v. FDA U.S. Court, District of Columbia, no# 11-01482.

On behalf of Philadelphia retailers, I urge the members of the Board of Health to delay action on the proposed regulations until pending litigation provides guidance on this complicated public health issue. Attached you will find a letter from the Greater Philadelphia Chamber of Commerce and a profile of the retail food industry in Philadelphia.

Sincerely,

David L. McCorkle



President
Pennsylvania Food Merchants Association
Pennsylvania Convenience Store Council



August 17, 2011

Mr. David McCorkle
President & CEO
Pennsylvania Food Merchants Association
1029 Mumma Road
P.O. Box 870
Camp Hill, PA 17001-0870

Dear Mr. McCorkle:

In light of the upcoming hearing on September 8th, on behalf of the Greater Philadelphia Chamber of Commerce I am writing to share with you some of the concerns we have heard from our members, as well as other Chambers of Commerce, regarding the Philadelphia Department of Public Health's proposal to mandate tobacco warning signs for retailers at the point of sale.

The GPCC has been supportive of legislative efforts to create a smoke free environment in public places and did support the smoking ban ordinance passed in Philadelphia in 2006, better known as the "Clean Indoor Air Worker Protection Law". However, keep in mind that tobacco is a legal product which is highly taxed and regulated, particularly in Philadelphia. For instance, in June the City passed an ordinance requiring all tobacco retailers to pay \$50 for a permit to be displayed in the window. For businesses with 50 or more stores in the City this becomes very costly, and may be a deciding factor when expansion plans are considered which, or course, impacts jobs for local residents in the City.

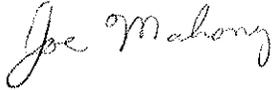
The proposed Philadelphia regulation to mandate all tobacco retailers to display signs which may be graphic in nature at their point of sale may further affect the retailers' bottom line. Not only will the signs (256 square inches) take up valuable counter space, but some consumers may be so offended by the signage that they may decide not to purchase food products. This loss is exacerbated by the fact that some businesses in Philadelphia have more than four cashiers where the signs would have to be posted.

Once again this places Philadelphia retailers at a competitive disadvantage with the surrounding counties.

I also wanted to share recent law suit information with you on this front. Four big cigarette makers sued the US Food and Drug Administration seeking to void as unconstitutional new graphic labels and advertising that warn consumers about the risks of smoking and induce them to quit. The lawsuit said the warnings required no later than September 22, 2012, would force cigarette makers to engage in anti-smoking advocacy on the government's behalf. They said this violates their free speech rights under the First Amendment.

On behalf of the GPCC I strongly suggest that this type of regulation should be left to the Federal Government and not local authorities and apply only to product labeling and not to point of sale signage. Should signage ultimately be required at the point of sale across the country the impact would be shared by all—not only Philadelphia retailers.

Sincerely,

A handwritten signature in cursive script that reads "Joe Mahoney".

Joseph W. Mahoney, Jr.
Executive Vice President

My name is Kevin Pasquay and I am a lobbyist representing Swedish Match. Our company manufactures cigars and other tobacco products.

The proposed regulation under consideration is not good. In 2012, by federal law, packages of cigarettes will have pictorial images which will graphically and visually depict the effects of smoking. That should suffice. The sign of approximately 256 square inches with the same type of gruesome graphic photos that will be placed on cigarette packs, is not needed. Cigarettes are placed behind counters at stores and cannot be sold to minors. This proposed sign, with accompanying pictures of people dead or dying, placed in a prominent part of a retail store display, where everyone can see it is overboard. Consequently, if a parent brings his kids to a retail outlet, they, too, will see this sign with its horrible depictions of people literally dying or near death. This representation is entirely misguided.

For the City of Philadelphia, this is yet one more illustration of promoting an anti-business climate, i.e., regulations, taxes, laws, etc., already have an adverse effect on retail shopping in Philadelphia. The fact that when you start a business in Philadelphia, you are hit immediately with a 6.5% business tax. The state sales tax in Philadelphia is 8% versus 6% in the suburbs or New Jersey. Businesses here are at a tremendous disadvantage out of the gate. The insurance costs are much higher including liability. I could go on and on but hopefully you will understand that all these costs, laws and regulations have made Philadelphia a place not to do business. While one could argue a social responsibility borne by businesses, this is not the time or place to do it. A 256 square inch sign places the retail owner already confronted with high taxes and laws in a precarious position while trying to make a buck but yet having to defend himself on a position by selling goods that is not his decision to make particularly in a convenience store industry where most of these products are bought and sold. Taken one step further, one could argue, that snacks, hoagies, cakes, donuts and soda could also face a similar fate. At what cost and when does government regulation stop? And do we rely on the old adage that this is Philadelphia business as usual? There is nothing unusual about it.

Thank you.

Hearing on regulation of point of sale tobacco warning signs

Written copy of oral testimony for 9/8/11

Robert Winn, MD

My name is Dr. Robert Winn and I am the medical director of Mazzoni Center, Philadelphia's Lesbian/Gay/Bisexual/Transgender Health Center, where we serve nearly 6000 community members. Tobacco use differentially affects our population and I am here to urge you to consider these facts in the design of a targeted tobacco reduction campaign.

In 2009, researchers at the American Lung Association conducted a review of 42 separate studies and state surveys measuring LGBT smoking prevalence (<http://www.lungusa.org/assets/documents/publications/lung-disease-data/lgbt-report.pdf>). They found:

Among Adults

- Gay men had between 1.1 and 2.4 times the odds of smoking compared to straight men
- Lesbians had between 1.2 and 2.0 times the odds of smoking compared to straight women
- Bisexually identified individuals had smoking rates higher than 30 percent on all state surveys that collect information on sexual identity. These results range up to 39.1%

Among Youth

- One study found 9.8% of gay/bisexual 16 year-old boys reported smoking at least weekly, compared to 4.3% of heterosexual 16 year-old boys¹
- The same study found that 38.7% of lesbian/bisexual 16 year-old girls reported smoking at least weekly, compared to 5.7% of heterosexual 16 year-old girls.

Data from the CDC's 2009 Youth Risk Behavior Surveillance System (<http://www.cdc.gov/mmwr/pdf/ss/ss60e0606.pdf>) found that gay, lesbian and bisexual students, and students who had same sex partners, had higher rates of:

- Ever having smoked a cigarette
- Smoking their first cigarette before the age of 13
- Having smoked cigarettes daily
- Currently smoking more than 10 cigarettes per day

Sadly there was also a lower prevalence of having tried to quit smoking in these students than in heterosexual/opposite-sex-partners-only students.

The American Lung Association Report identifies specific factors that appear to make LGBT individuals more likely to smoke.

- “homelessness, coming out at an early age, rejection by family and peers, lack of support, anxiety and homophobia”²
- “The youth also reported that smoking at school makes them look tough and can help prevent bullying”²

The report also details a history of LGBT-targeting by tobacco companies. A cited study included an analysis of 3,500 ads placed in gay and lesbian publications between January, 1990 and December, 2000.³

- 20% of ads were for tobacco products but occupied 39% of the total number of page equivalents
-

The American Lung Association Report recommends specifically that, “LGBT people should be treated as a priority population for tobacco control, similar to those racial and ethnic groups disproportionately affected by smoking.”

Mazzoni Center Data

Through the use of our new electronic health record, we have identified similar trends among our own patients.

Of clients identifying as LGBT, 34% are current smokers. Just over 10% are former smokers. Under 55% of clients have never smoked.

Among specific groups, the rate of smoking was 34% for transgender patients, 36% for non straight-identifying men, and 29% for non straight-identifying women.

In conclusion, I strongly urge you to consider the LGBT communities in the design of targeted campaigns for tobacco use reduction, particularly when considering printed warning signs that contain images. If LGBT consumers are able to identify with the image, they are more likely to pay attention to the warning.

Thank you.

¹ *Sexual Orientation and Tobacco Use in a Cohort Study of US Adolescent Girls and Boys*. Austin, S B, et al. 2004, Archives of Pediatrics & Adolescent Medicine, Vol. 158, pp. 317-322

² *Lesbian, gay, bisexual, and transgender youths: who smokes, and why?* Remafedi G. Suppl 1, 2007, *Nicotine Tobacco Research*, Vol. 9, pp. S65-S71.

³ *What makes a cigarette ad a cigarette ad? Commercial tobacco imagery in the lesbian, gay and bisexual press.* Smith E A, Offen N and Malone R E. 12, 2005, *Journal of Epidemiology & Community Health*, Vol. 59, pp. 1086-1091.



allenbrothers
WHOLESALE DISTRIBUTION

Jeff B. Allen
Allen Brothers Wholesale Distribution
120 W. Erie Ave.
Phila., Pa. 19140

September 8, 2011

Re: Proposed Tobacco Point of Sale Warnings legislation

To Members of the Philadelphia Board of Health, City Council and other City Leaders:

The City of Philadelphia is once again going after small business in the City of Philadelphia. As we all know, for many years it has been **unlawful to sell Tobacco products to a minor** and you must check ID at the point of purchase. These laws are strictly monitored and enforced in Retail establishments that carry tobacco products. Tobacco & cigarette products must be behind the counters and out of reach and harm's way of minors.

As we all know, A Federal law has already been passed that will change Cigarette packs to display Graphic Warnings, and these changes will soon appear on all Cigarette packs at the end of 2012.

Now the City of Philadelphia wants graphic and grotesque pictures to be displayed at Convenience stores, Mom & Pop stores and Drug store cash registers. One more reason to have consumers buy tobacco and **many other** products **outside of the City and not from Philadelphia business?** This will give shoppers a reason to turn around and leave the store, so there young child or ageing parent is not exposed to a disturbing image. These images should be a choice that a parent makes to share with their family, not a GOVERNMENT or legislative decision! What about the non smoker? Why should they be exposed to this?

Some of you know the Unified Business Owners Assoc. of Philadelphia (**UBOAP**). As Co- Chairman we have been fighting outrageous storm water fees for over a year now. Some of our members have seen increases as high as **500%**! All business water customers (PWD) have also just incurred an increase in their service charge on our PWD water bills, **unrelated to Storm water**. Local business is currently being told that there may be a proposal to increase the BPT!

Allen Brothers has been in the City of Philadelphia for 101 years, and employs 85 people with a good paying job, that includes health care, pension & 401 K plans. I am the 3rd generation and for the last 32 years I have either lived or maintained my business in the City, I can't tell you the frustration of trying to survive in "The **Business UNFRIENDLY**" City of Philadelphia. The current administration that runs this city has done NOTHING to help us survive and bring **new** good paying jobs to the city. With a 26 to 30 % unemployment rate, the black eye of flash mobs as well as the recent article that addressed Phila. as the leading City that has more starving families as well as one of the top 5 metropolitan cities for crime in and around the Train stations and Airports.



allenbrothers
WHOLESALE DISTRIBUTION

These are certainly top honors for a major metropolitan city.

Why are we focusing our energy on grotesque signage and unpleasant images in a retail store? Maybe we should address the weekly deaths and violence due to alcohol consumption and the gun violence on our streets? Maybe we should really work with the underprivileged children in the city and show them a better way, or help them to put food on the table. It's easier to legislate an issue and ignore the real problem at hand than roll up your sleeves and really do something about it. **Let's give the media something else to say negatively about Philadelphia.**

When are the Mayor and the current administration in Philadelphia going to wake up, and focus their energy on what is really wrong with our City?

Jeff B. Allen

President Allen Brothers

Co Chairman UBOAP

www.abdelivers.com | jallen@abwds.com

Direct: 215-739-5535

Office: 800-207-2553 ext. 111





August 26, 2011

Written Testimony of the National Association of Tobacco Outlets, Inc.

Philadelphia Board of Health
Department of Public Health
1401 JFK Boulevard, Room 600
Philadelphia, PA 19102

Dear Philadelphia Board of Health Members:

I am submitting this letter as written testimony to the proposed “Regulations Regarding Tobacco and Cigarette Informational Signs” on behalf of the National Association of Tobacco Outlets, Inc., a national retail tobacco trade association, and the association’s member stores located in Philadelphia.

The proposed ordinance would require each retailer that sells either cigarettes, other tobacco products, or both, to display an information sign up to 256 square inches in size near each point of sale that may include: (1) information about non-cigarette tobacco products or cigarettes and the adverse effects of tobacco use, (2) a pictorial image illustrating or explaining the effects of tobacco product use, and/or (3) information on how consumers may eliminate or reduce their use of tobacco products.

Federal Law Pre-empts Philadelphia Proposed Ordinance

The Federal Cigarette Labeling and Advertising Act (FCLAA) pre-empts this proposed ordinance. Specifically, Congress set forth a policy under this law that creates uniform health warnings about the adverse effects of cigarette smoking. This policy is found in Section 1331 of the FCLAA as follows:

Sec. 1331. It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by

diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Since the proposed Philadelphia ordinance would require informational signs that include health warnings, graphic pictures on the effects of tobacco use, and/or information for consumers to stop or reduce their use of tobacco products, these purposes have already been regulated on the federal level for decades by the FCLAA. For this reason alone, the proposed health warning signs are pre-empted by the federal law because they fall outside the comprehensive uniform health warnings mandated by Congress.

Federal Court Strikes Down Similar New York City Health Warning Sign Regulation

A recent U.S. Federal District Court ruling sets a precedent that the Philadelphia proposed sign ordinance is pre-empted by the FCLAA. Section 1334(b) of the FCLAA is the foundation of this recent federal court ruling and reads as follows:

- (b) State Regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

In September of 2009, the New York City Board of Health adopted regulations requiring graphic health warning informational signs to be displayed where cigarettes were sold both near cigarette displays and next to cash registers. In fact, the actual language in the New York City Board of Health regulation relating to the content of the health warning informational signs is virtually the same wording as contained in the Philadelphia ordinance. Several New York City retailers, state trade associations and tobacco manufacturers sued the New York City Board of Health seeking to overturn the health warning sign regulation.

In 23-24 94th St. Grocery Corp. v. New York City Board of Health, 757 F. Supp. 2d 407 (S.D.N.Y. 2010), the federal court judge ruled that mandating health informational signs which include graphic pictorial images is a form of promotion under the FCLAA. Specifically, the court found that the regulation's "requirements that anti-smoking signs be posted either where tobacco products are displayed or at the (adjoining) cash register in either case imposes conditions on plaintiff's promotion of tobacco products." That is, the mandate under the New York City regulation to post health warning signs is the kind of condition that is pre-empted by the FCLAA and this federal court ruling establishes a clear legal precedent that the proposed Philadelphia health warning sign requirement would be subject to the same pre-emption. (A copy of the U.S. Federal Court decision accompanies this testimony).

Amendment to FCLAA Does Not Allow Philadelphia's Proposed Health Warning Signs

Advocates of the proposed Philadelphia ordinance may attempt to claim that an amendment made to the FCLAA by the Family Smoking Prevention and Tobacco Control Act (FSPTCA) allows the adoption of a regulation requiring health warning signs. However, a close reading of the amendment language demonstrates that any such claim is misplaced and, in fact, the

language of the amendment strictly prohibits the kind of health warning signs contemplated by the proposed ordinance.

In June of 2009, and three months *before* the New York City Board of Health adopted its health warning sign requirement, the federal FSPTCA was signed into law by the president. This new federal law granted the U.S. Food and Drug Administration regulatory authority over certain tobacco products and added an exception to Section 1334(b) of the FCLAA that reads as follows:

- (c) Exception. Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, *but not content*, of the advertising or promotion of cigarettes [emphasis added].

The proposed Philadelphia ordinance violates this new exception to the FCLAA by requiring content-based signage in retail stores. That is, the ordinance mandates what the content of the sign must include, namely (1) information about non-cigarette tobacco products or cigarettes and the adverse effects of tobacco use, (2) a pictorial image illustrating or explaining the effects of tobacco product use, and/or (3) information on how consumers may eliminate or reduce their use of tobacco products. This kind of mandated content is exactly what the amendment to the FCLAA precludes a state or city from enacting.

It is also important to note that the New York City Board of Health warning sign regulation was adopted *after* the FSPTCA took effect, which demonstrates that this new exception to the FCLAA will not protect a similar regulation like the Philadelphia ordinance from being preempted by the federal law.

Health Warning Sign Violates First Amendment by Compelling Speech

The U.S. Supreme Court has ruled that the First Amendment to the U.S. Constitution not only protects free speech, but also protects against compelled speech. In Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court justices explained this duality of protection as including “both the right to speak freely and the right to refrain from speaking at all.” The Philadelphia ordinance dictates that retailers “speak” to their customers through the wording and graphic pictures that will be on the health warning signs and urge them to reduce their consumption of tobacco products or stop buying these legal products altogether. This is the kind of compelled speech that retailers would choose not to utter if they had a choice.

Based on all of these reasons, I urge the Philadelphia Board of Health to not enact the proposed health warning sign ordinance.

Sincerely,

Thomas A. Briant

NATO Executive Director and Legal Counsel

City of Philadelphia Board of Health's Proposed Regulations Regarding Tobacco and Cigarette Informational Signs

August 29, 2011

Testimony

by

William T. Godshall, MPH

Executive Director

Smokefree Pennsylvania

1926 Monongahela Avenue

Pittsburgh, PA 15218

412-351-5880

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smokefree@compuserve.com

Executive Summary

Upon careful analysis, I strongly encourage the Board of Health to **reject** the proposed Regulations Regarding Tobacco and Cigarette Informational Signs because the proposed Cigarette Informational Signs and the proposed Non-Cigarette Informational Signs that address other smoked tobacco products almost certainly violate the preemption clause of the Federal Cigarette Labeling and Advertising Act, and because smokers, smokeless tobacco consumers and the public already greatly overestimate the known health risks of smokeless tobacco products.

If the Board of Health desires to avoid a federal lawsuit while also informing tobacco consumers and the public about the known health risks of different tobacco products, I encourage the Board of Health to require the Department of Public Health to truthfully inform smokers (via educational materials and messages) that:

- Smokeless tobacco products are far less hazardous alternatives to cigarettes,
- Switching to smokeless tobacco products reduces smoker's health risks nearly as much as quitting all tobacco use, and
- Millions of smokers have already switched to far less hazardous smokeless tobacco products.

About Smokefree Pennsylvania

Since 1990, Smokefree Pennsylvania has advocated federal, state, local and organizational policies to reduce tobacco smoke pollution indoors, increase cigarette tax rates, reduce tobacco marketing to youth, preserve civil justice remedies for those injured by cigarette smoking, fund tobacco education and smoking cessation programs, inform smokers that smokefree tobacco/nicotine products are far less hazardous alternatives to cigarettes, and in 2007 I convinced US Senator Mike Enzi to amend the Family Smoking Prevention and Tobacco Control Act (FSPTCA) to require color graphic warnings on the front of all cigarette packages.

For conflict of interest disclosure, neither William Godshall nor Smokefree Pennsylvania have ever received any direct or indirect funding from any tobacco, drug or electronic cigarette company.

Federal Cigarette Labeling and Advertising Act Preempts Regulations Regarding Tobacco and Cigarette Informational Signs

Although the proposed Cigarette Informational Signs could further educate smokers and the public about the enormous and many different health risks attributable to cigarette smoking, Section 1334(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA) at http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001334----000-.html preempts (i.e. prohibits) state (and local) governments from requiring signs “based on smoking and health” “with respect to the advertising or promotion of any cigarettes”.

Last year, federal Judge Jed Rakoff struck down a similar New York City law http://www.nytimes.com/2010/12/30/nyregion/30smoking.html?_r=1&src=twrhp requiring cigarette retailers to display similar informational signs about the health risks of smoking. Although New York City is appealing Judge Rakoff’s ruling, the appeal is highly unlikely to succeed. Judge Rakoff’s 13 page decision is attached to the e-mail submitting this testimony.

Since the FCLAA almost certainly preempts state and local laws that require cigarette retailers to inform smokers and the public about the health risks of smoking cigarettes (or any other tobacco product), the Board of Health should reject its proposed Regulations Regarding Tobacco and Cigarette Informational Signs.

Smokeless Tobacco Products Pose Very Few Health Risks and are Exponentially Less Hazardous Alternatives to Cigarettes

While cigarettes and smokefree tobacco products are similarly addictive (i.e. creating daily dependence), published epidemiology research finds that daily cigarette smoking imposes about 100 times greater mortality risks than does daily use of smokefree tobacco products marketed in the U.S. and Sweden. On a continuum of tobacco mortality risk from 1 to 100 (whereby Nicotine Replacement Products are 1 and cigarettes are 100), smokefree tobacco products are below 2.

Nearly five years ago, I coauthored the most comprehensive evaluation of epidemiology research on smokeless tobacco products, which found that smokeless tobacco products used in the U.S. and Sweden are exponentially less hazardous than cigarette smoking, and recommended that smokers be provided with truthful information about the comparable health risks of different tobacco products and encouraged to switch to smokefree tobacco alternatives if they cannot or don’t want to quit using tobacco.

Tobacco harm reduction: an alternative cessation strategy for inveterate smokers, Brad Rodu and William T Godshall, Harm Reduction Journal 2006, 3:37doi:10.1186/1477-7517-3-37. <http://www.harmreductionjournal.com/content/3/1/37>

In 2007, the Royal College of Physicians published a report on the comparable health risks of smokeless tobacco products and cigarettes, that similarly concluded smokeless tobacco products are far less hazardous than cigarettes, and that smokers who cannot or won't quit tobacco use should be encouraged to switch to smokeless alternatives.

Harm reduction in nicotine addiction; Helping people who can't quit, Royal College of Physicians, 2007.
<http://www.rcplondon.ac.uk/pubs/contents/e226ee0c-ccef-4dba-b62f-86f046371dfb.pdf>
[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(07\)61482-2/fulltext#article_upsell](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(07)61482-2/fulltext#article_upsell)

A recently updated report by the American Council on Science and Health and Brad Rodu **The Scientific Foundation for Tobacco Harm Reduction, 2006-2011** at <http://www.harmreductionjournal.com/content/pdf/1477-7517-8-19.pdf> evaluating all published studies (during the past five years) on the health risks of smokeless tobacco products, confirming that they are far less hazardous than cigarettes, and that increasingly more smokers have quit smoking by switching to smokeless tobacco alternatives.

At the FDA's 2010 workshop entitled: **Risks and Benefits of Long-Term Use of Nicotine Replacement Therapy (NRT) Products; Public Workshop**, many presenters and commenters (including two FDA Tobacco Product Scientific Advisory Committee members) cited the strikingly similar health risk and benefit profiles between Swedish snus and Nicotine Replacement Therapy (NRT) gums and lozenges when recommending FDA approve longterm usage of NRT products (since epidemiology studies on NRT aren't available because the products have only been on the market for several decades)
<http://www.regulations.gov/#!documentDetail:D=FDA-2010-N-0449-0001;oldLink=false>.

Authors of a recently published meta analysis of North American and European epidemiological cohort and case-control studies relating any form of cancer to smokeless tobacco use (i.e. 62 US and 18 Scandinavian studies) reported the following results:

“Random-effects meta-analysis estimates for most sites showed little association. Smoking-adjusted estimates were only significant for oropharyngeal cancer (1.36, CI 1.04–1.77, $n = 19$) and prostate cancer (1.29, 1.07–1.55, $n = 4$). The oropharyngeal association disappeared for estimates published since 1990 (1.00, 0.83–1.20, $n = 14$), for Scandinavia (0.97, 0.68–1.37, $n = 7$), and for alcohol-adjusted estimates (1.07, 0.84–1.37, $n = 10$). Any effect of current US products or Scandinavian snuff seems very limited. The prostate cancer data are inadequate for a clear conclusion.”

“Smokeless tobacco-attributable deaths would be 1,102 (1.1%) if as many used smokeless tobacco as had smoked, and 2,081 (2.0%) if everyone used smokeless tobacco.”

Systematic review of the relation between smokeless tobacco and cancer in Europe and North America, Peter N Lee and Jan Hamling, *BMC Medicine* 2009, 7:36doi:10.1186/1741-7015-7-36
<http://www.biomedcentral.com/1741-7015/7/36>

Another recently published comprehensive meta analyses of 150 studies on various diseases found no association with snus use and cancer of the oropharynx (meta-analysis RR 0.97, 95% CI 0.68-1.37), oesophagus (1.10, 0.92-1.33), stomach (0.98, 0.82-1.17), pancreas (1.20, 0.66-2.20), lung (0.71, 0.66-0.76) or other sites, or with heart disease

(1.01, 0.91-1.12) or stroke (1.05, 0.95-1.15). The author concluded: “Using snus is clearly much safer than smoking. While smoking substantially increases the risk of cancer and cardiovascular diseases, any increase from snus use is undemonstrated, and if it exists is probably about 1% of that from smoking.”

Summary of the epidemiological evidence relating snus to health, Peter N Lee, Regul Toxicol Pharmacol 2011, Mar, 59(2):197-214 <http://www.ncbi.nlm.nih.gov/pubmed/21163315>

A previously published meta analysis of 11 studies found that snus use was associated with slightly elevated risk of fatal myocardial infarction and fatal stroke, but wasn't associated with all myocardial infarctions or strokes, casting doubt on its findings about fatal heart attacks and strokes.

Use of smokeless tobacco and risk of myocardial infarction and stroke: systematic review with meta-analysis, Paulo Boffetta, Kurt Straif, BMJ 2009; 339:b3060

<http://www.bmj.com/content/339/bmj.b3060.full>

A study found that Star's Ariva and Stonewall dissolvable tobacco products contained far lower levels of tobacco specific nitrosamines than various American moist snuff products and several Swedish snus products, and that nitrosamine levels in Star's Ariva and Stonewall were just slightly higher than nitrosamine levels in GlaxoSmithKline's Nicorette gum and Nicoderm CQ skin patch.

Tobacco-specific nitrosamines in new tobacco products, Irina Stepanov, Joni Jensen, Dorothy Hatsukami, Stephen S. Hecht, Nicotine and Tobacco Research Volume 8, Number 2 (April 2006) 309-313.

<http://www.starscientific.com/404/stepanov%20tsna%20in.pdf>

Another study evaluating plasma nicotine levels, heart rates, and reduction in cigarette cravings following use of Star's Ariva dissolvable tobacco product were very similar to those following use of GlaxoSmithKline's Commit dissolvable nicotine product.

Meanwhile, participants reported that Star's Ariva tasted better than GSK's Commit.

Evaluating the Acute Effects of Oral, Non-combustible Potential Reduced Exposure Products Marketed to Smokers, Caroline O Cobb, Michael F Weaver, Thomas Eissenberg, Tob Control

doi:10.1136/tc.2008.028993

http://static.mgnetwork.com/rtd/pdfs/20090712_toba.pdf

Millions of smokers have switched to smokefree tobacco products

Switching from cigarettes to smokefree tobacco products has been occurring in the U.S. and in Sweden for many decades, and isn't an unproven theory (as some harm reduction opponents claim).

The 1986 nationwide Adult Use of Tobacco Survey (AUTS), conducted by the CDC Office on Smoking and Health, found that 7% (i.e., 1.67 million) of male ex-smokers indicated they had used smokeless tobacco (ST) products to help them quit smoking cigarettes, and 6.4% (i.e., 1.63 million) of males who currently smoked indicated using ST to help them quit smoking. In comparison, just 1.7% of male ex-smokers (i.e., 404,600) and 2.4% of males who currently smoked (i.e., 609,000) indicated using organized programs to help them quit smoking cigarettes.

Smokeless Tobacco Use in the United States: The Adult Use of Tobacco Surveys, Novotny, Pierce, Fiore & Davis, NCI Monograph 8, 25-29, NIH, U.S. DHHS, 1989.

A 1984 Philip Morris market research survey of 489 adult male ST product users in Houston, Atlanta, and Florida (who were interviewed outside retail stores after purchasing ST) found that 37% of ST users stated they were former cigarette smokers (including 22% of those under age 35 and 50% of those 35 years or older). The survey also found that, in response to the question, “Did you start using smokeless/chewing tobacco as a replacement for cigarettes, that is, when you stopped smoking cigarettes, or not?” 20% of ST users said YES. These findings were consistent in the three different survey locations. Interestingly, 62% of respondents who used both ST and cigarettes reported that ST was “*more enjoyable*” than cigarettes.

Smokeless Tobacco Study – Atlanta/Florida, Philip Morris USA Marketing Research Department Report, Miller K, <http://tobaccodocuments.org/pm/2045600026-0045.html>

The 1991 NHIS found that 33.3% (i.e., 1.75 million) of U.S. adult ST users reported being former cigarette smokers, and the 1998 NHIS found that 31.1% of ST users reported being former cigarette smokers. The 1998 NHIS found that 5.8% of daily snuff users reported quitting smoking cigarettes within the past year, that daily snuff users were 3.2 times more likely to report being former cigarette smokers than were never snuff users who had smoked, and that daily snuff users were 4.2 times more likely to have quit smoking in the past year than were never snuff users who had smoked.

Use of Smokeless Tobacco Among Adults – United States, 1991, Morbidity and Mortality Weekly Report, Vol 42, No 14, 263-266, April 16, 1993, CDC, U.S. DHHS.

<http://www.cdc.gov/mmwr/preview/mmwrhtml/00020232.htm>

Tomar S, *Snuff Use and Smoking in US Men: Implications for Harm Reduction*, *American Journal of Preventive Medicine*, 2002, Vol. 23, No. 3, 143-149.

The 1987 NHIS found that, among 23-to-34 year old U.S. males, those who had smoked cigarettes and then subsequently used snuff were 2.1 times more likely to have quit smoking than were cigarette-only users.

Most smokeless tobacco use is not a causal gateway to cigarettes: using order of product use to evaluate causation in a national US sample, Kozłowski L, O’Connor, Edwards BQ, Flaherty BP, *Addiction*, 2003, Vol. 98, 1077-1085. <http://www.blackwell-synergy.com/links/doi/10.1046/j.1360-0443.2003.00460.x/abs>

A study of 51 female and 59 male ST users (in the Northwestern U.S.), in which 98% of females and 90% of males were either current or former cigarette smokers, found that 52% of females and 59% of males responded affirmatively when asked whether they used ST in place of cigarettes while quitting smoking.

A comparison of male and female smokeless tobacco use, Cohen-Smith D, Severson H, *Nicotine & Tobacco Research*, 1999, Vol. 1, 211-218.

Another study found that 72% of an estimated 359,000 U.S. smokers who switched to ST products on their last smoking cessation attempt successfully quit smoking.

Switching to smokefree tobacco as a smoking cessation method: evidence from the 2000 National Health Interview Survey, Brad Rodu and Carl V Phillips, *Harm Reduction Journal* 2008, 5:18doi:10.1186/1477-7517-5-18. <http://www.harmreductionjournal.com/content/pdf/1477-7517-5-18.pdf>

In Sweden, moist oral snuff is called snus. Unlike moist oral snuff commonly used in the U.S., snus is pasteurized, not fermented, and stored in refrigerators from the time of manufacture until sold at retail. Also in contrast to most ST products commonly sold in the U.S. (except for dissolvable ST products), snus is spitfree, contains fewer nitrosamines, and has not been found to be associated with mouth cancer.

Effect of smokeless tobacco (snus) on public health in Sweden, Foulds J, Ramstrom L, Burke M, Fagerstrom K, Tobacco Control, 2003, Vol 12, 349-359. <http://tc.bmjournals.com/cgi/content/full/12/4/349>

Smokeless tobacco use and increased cardiovascular mortality among Swedish construction workers.

Bolinder G, Alfredsson L, Englund A, et al., Am J Public Health 1994, Volume 84, 399-404.

Smoking tobacco, oral snuff and alcohol in the etiology of squamous cell carcinoma of the head and neck.

A population based case-referent study in Sweden. Lewin F, Norell SE, Johansson H, et al, 1998, Cancer, Vol. 82, 1367-1375.

Oral snuff, smoking habits and alcohol consumption in relation to oral cancer evaluated in a Swedish case-control study, Schildt E-B, Eriksson M, Hardell L, Magnusson A, 1998, International Journal of Cancer, Vol. 77, 341-346.

When a large national sample of Swedish ex-smokers was asked about how they succeeded in quitting, 50% stated that they had stopped without help, 33% said they used snuff, and 17% said they had used some form of NRT.

Smokeless Tobacco and Cardiovascular Disease, Asplund, K, Progress in Cardiovascular Diseases, Vol. 45, No 5, (March/April) 2003, 383-394.

Another survey of more than 6,700 Swedes found that more than 25% of male cigarette smokers indicated they had switched to snus. The survey also found that snus was more effective than NRT products as a smoking cessation aid.

Role of snus in initiation and cessation of tobacco smoking in Sweden, Ramström and Foulds Tob Control.2006; 15: 210-214. <http://tobaccocontrol.bmj.com/cgi/content/full/15/3/210>

Largely due to smokers switching to snus, the male cigarette smoking rate in Sweden dropped from 40% in 1976 to just 15% in 2002, while snus use among Swedish men increased from 10% to 23%. Due to this decline in smoking, male lung cancer rates in Sweden are the lowest in Europe, while Sweden's oral cancer rate has fallen during the last 20 years as snus use sharply increased.

Effect of smokeless tobacco (snus) on public health in Sweden, Foulds J, Ramstrom L, Burke M, Fagerstrom K, Tobacco Control, 2003, Vol 12, 349-359. <http://tc.bmjournals.com/cgi/content/full/12/4/349>

An international panel of seven experts, using the Delphi approach, estimated that an additional 10% of cigarette smokers would quit over five years if all smokefree tobacco products in the U.S. were required to be low-nitrosamine products and if those products were accompanied by a warning label that stated: "This product is addictive and may increase your risk of disease. This product is substantially less harmful than cigarettes, but abstaining from tobacco use altogether is the safest course of action."

The potential impact of a low-nitrosamine smokeless tobacco product on cigarette smoking in the United States: Estimates of a panel of experts, Levy D, Mumford E, Cummings KM, et al. Addictive Behaviors, Nov. 2005. <http://www.ascribe.org/cgi-in/behold.pl?ascribeid=20051114.171444&time=07%2042%20PST&year=2005&public=1>

Authors of a recent survey of Norwegian men who were either former or current smokers reported: "In a regression model in which education, number of previous attempts to quit smoking, perception of risk, and age were controlled for, the odds ratio

(OR) for reporting total abstinence at the time of the survey was significantly higher for those who had used varenicline (OR = 4.95, $p < .006$) and snus (OR = 2.68, $p < .001$) compared with those who had used nicotine chewing gum (reference OR = 1).” and “Compared with medicinal nicotine products, snus and varenicline increased the probability of quitting smoking completely”.

The use of snus for quitting smoking compared with medicinal products, Karl Erik Lund, Ann McNeill, Janne Scheffels, Nicotine Tob Res (2010) doi: 10.1093/ntr/ntq105
<http://ntr.oxfordjournals.org/content/early/2010/07/09/ntr.ntq105.full.pdf+html>

The Vast Majority of Smokers Inaccurately Believe that Smokeless Tobacco Products are as Hazardous as Cigarettes

While ST products are far less hazardous alternatives to cigarettes, a recent survey of more than 13,000 cigarette smokers in the US, Canada, UK and Australia found that only 13% correctly believed that ST products are less hazardous than cigarettes.

Smokers' beliefs about the relative safety of other tobacco products: Findings from the ITC Collaboration, Richard J. O'Connor; Ann McNeill; Ron Borland; David Hammond; Bill King; Christian Boudreau; K. Michael Cummings, Nicotine & Tobacco Research, Volume 9, Issue 10 October 2007, pages 1033-1042.
<http://www.informaworld.com/smpp/content~content=a783052257~db=all~order=page>

A 2000 survey of 36,012 young adults entering the U.S. Air Force found that 75% of males and 81% of females incorrectly believed that switching from cigarettes to ST products would not result in any risk reduction, while another 16% of males and 13% of females incorrectly believed that only a small risk reduction would occur. Only 2% of males and 1% of females correctly thought that a large risk reduction would occur by switching from cigarettes to ST.

Modified Tobacco Use and Lifestyle Change in Risk-Reducing Beliefs About Smoking, Haddock CK, Lando H, Klesges RC, et al, American Journal of Preventive Medicine, 2004 Vol. 27, No. 1, 35-41.

Another survey found that 89% of college freshmen incorrectly believe that ST is just as or more harmful than cigarettes.

Harm perception of nicotine products in college freshmen, Smith SY, Curbow B, Stillman FA, Nicotine Tob Res. 2007 Sep;9(9):977-82.
<http://www.informaworld.com/smpp/content~content=a781712955~db=all~tab=content~order=page>

A survey of more than 2,000 adult U.S. smokers found that only 10.7% correctly agreed that ST products are less hazardous than cigarettes, while 82.9% incorrectly disagreed.

Smoker Awareness of and Beliefs About Supposedly Less-Harmful Tobacco Products, O'Conner RJ, Hyland A, Giovino G, et al, American Journal of Preventive Medicine, 2005, Vol. 29, No. 2, 85-90.

In yet another survey, when asked if they believed that chewing tobacco is just as likely to cause cancer as smoking cigarettes, 82% of U.S. smokers incorrectly agreed.

Informing Consumers about the Relative Health Risks of Different Nicotine Delivery Products, presentation by K. Michael Cummings at the National Conference on Tobacco or Health, New Orleans, LA, November 2001.

The reason for this lack of knowledge is largely due to the 1986 Comprehensive Smokeless Tobacco Education Act, which required three rotating warnings on all smokeless tobacco products (i.e. This product is not a safe alternative to cigarettes. This product may cause mouth cancer. This product may cause gum disease and tooth loss.)

The FSPTCA now requires even large warnings on smokeless tobacco products and advertisements.

Authors of a study that evaluated 316 English language websites (none of which were tobacco companies) that contained health risk information about cigarettes and smokeless tobacco use concluded: “The risk from ST is widely conflated with the risk from cigarettes on websites that provide health advice and information. Almost every website had statements that played up the health risks from ST without caveat, making it difficult for consumers to recognize the huge contrast with cigarettes. The quantitative claims of health risks from ST were very often beyond a worst-case-scenario interpretation of the scientific literature. A large portion of websites directly stated or implied that the risks from ST and cigarettes are similar.”

You might as well smoke; the misleading and harmful public message about smokeless tobacco, Carl V Phillips, Constance Wang, Brian Guenzel, BMC Public Health 2005, 5:31doi:10.1186/1471-2458-5-31
<http://www.biomedcentral.com/1471-2458/5/31>

Smokers have a Human Right to be Truthfully Informed that Smokeless Tobacco Products are Far Less Hazardous Alternatives to Cigarettes

Just as sexually active individuals have a human right to be informed that condoms can reduce risks of pregnancy and STD transmission, and just as heroin addicts have a right to be informed that clean needles can reduce risks of HIV, hepatitis and other blood borne diseases, cigarette smokers have a human right to be truthfully informed that ST products are far less hazardous alternatives than cigarettes.

Harm reduction, public health, and human rights: Smokers have a right to be informed of significant harm reduction options, Kozlowski L, Nicotine & Tobacco Research, S55-S60, 2002.

http://ash.org.uk/html/regulation/pdfs/hr_kozlowski.pdf

First Tell The Truth, A Dialogue on Human Rights, Deception, and the Use of Smokeless Tobacco as a Substitute for Cigarettes, Kozlowski L, Tob Control, 12:34-36, 2003.

http://tc.bmjournals.com/cgi/search?andorexactfulltext=and&resourcetype=1&disp_type=&sortspec=relavance&author1=&fulltext=&volume=12&firstpage=34

Public Health Officials have an Ethical Duty to Truthfully Inform Smokers that Smokeless Tobacco Products are Far Less Hazardous Alternatives

Just as the US Public Health Service had an ethical duty to inform black syphilis sufferers in the notorious Tuskegee Study that there were effective treatments for syphilis, public health officials have an ethical duty to truthfully inform smokers that ST products are less hazardous alternatives to cigarettes.

No Evidence Smokeless Tobacco is a Gateway to Cigarette Smoking

Authors of a recently published analysis of NSDUH data concluded that: “Smokeless Tobacco (ST) use has played virtually no role in smoking initiation among White men and boys, the demographic groups among which ST use is most prevalent. There is evidence that, compared with cigarette initiators, ST initiators are significantly less likely to smoke.”

Evidence against a gateway from smokeless tobacco use to smoking, Brad Rodu and Philip Cole, Nicotine Tob Res (2010) 12 (5): 530-534. doi: 10.1093/ntr/ntq033
<http://ntr.oxfordjournals.org/content/12/5/530.short>

Using most of the same data, a 2009 SAMHSA report found that, among US residents who had used both cigarettes and smokeless tobacco products in their lifetime, 65.5% used cigarettes prior to smokeless tobacco use, and 31.8% used smokeless tobacco prior to cigarette usage.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies. (February 19, 2009). *The NSDUH Report: Smokeless Tobacco Use, Initiation, and Relationship to Cigarette Smoking: 2002 to 2007*. Rockville, MD.
<http://www.oas.samhsa.gov/2k9/smokelesstobacco/smokelesstobacco.htm>

The Overwhelming Majority of NRT Users Switch Back to Cigarettes

A meta-analysis found that an average of just 7% of those using over-the-counter NRT products remained cigarette free after six months, a 93% relapse rate.

A meta-analysis of the efficacy of over-the-counter nicotine replacement, Hughes JR, Shiffman S, Callas P, Zhang Z, Tobacco Control, 2003, Vol. 12, 21-27.
<http://tc.bmjournals.com/cgi/content/full/12/1/21?ijkey=5.ko5/Oz4yutl>

Another recent meta-analysis also found that 7% of NRT remain cigarette free after six months, and that just 2% remain cigarette free after 20 months (a 98% relapse rate).

Effectiveness and safety of nicotine replacement therapy assisted reduction to stop smoking: systematic review and meta-analysis, David Moore, Paul Aveyard, Martin Connock, Dechao Wang, Anne Fry-Smith, Pelham Barton, BMJ 2009;338:b1024
http://www.bmj.com/cgi/content/full/338/apr02_3/b1024

A meta analysis of seven placebo controlled randomised controlled trials involving different NRT products found that just 6.75% of those receiving NRT had quit smoking after six months. While this may have been twice the quit rate compared to placebo, it represents a 93.25% failure rate for smoking cessation, and clearly indicates that smokers need additional and alternative methods of reducing the health risk of cigarette smoking.

Effectiveness and safety of nicotine replacement therapy assisted reduction to stop smoking: systematic review and meta-analysis, David Moore, Paul Aveyard, Martin Connock, Dechao Wang, Ann Fry-Smith, Pelham Burton, BMJ 2009; 338:b1024
<http://www.sciencedirect.com/science/article/pii/S0306460311001572>

While supposedly double-blind clinical trials have found that NRT products double the chances of quitting when compared to using a placebo, skepticism has been raised about the accuracy and reliability of these studies, since it is likely that many participants who were assigned to placebos realized they were not getting nicotine.

The blind spot in the nicotine replacement therapy literature: Assessment of the double-blind in clinical trials, Mooney M, White T, Hatsukami D, Addictive Behaviors, 2004 Vol. 29, 673-684.

http://whyquit.com/studies/NRT_Blinking_Failures.pdf

Precession treatment with nicotine patch significantly increases abstinence rates relative to conventional treatment, Jed E. Rose, Joseph E. Herskovic, Frederique M. Behm and Eric C. Westman, Nicotine & Tobacco Research 2009 11(9):1067-1075; doi:10.1093/ntr/ntp103.

<http://ntr.oxfordjournals.org/cgi/content/abstract/ntp103>

Skin patches appear to be ineffective smoking cessation aids for those who fail to quit smoking during their first use of NRT, as two published studies on the use of NRT skin

patches to quit smoking after an initial failure with NRT found six-month smoking cessation rates of 0% and 1.4%, respectively.

Recycling with nicotine patches in smoking cessation. Tonnesen P, Norregaard J, Sawe U, Simonsen K, Addiction. 1993 Apr;88(4):533-9.

http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=8485431&query_hl=2

Double blind trial of repeated treatment with transdermal nicotine for relapsed smokers. Gourlay SG, Forbes Q, Marriner T, et al. British Medical Journal, 1995, Vol. 311, No 7001 363-366.

A survey of 500 U.S. smokers found only 16% agreed that NRT helps people quit smoking.

Attitudes toward nicotine replacement therapy in smokers and ex-smokers in the general public. Etter JF, Perneger TV, Clinical Pharmacol Therapy 2001 Volume 69, 175-83.

An estimated 36.6% of current nicotine gum users have consumed the product for longer than six months, indicating that long-term nicotine maintenance can occur with NRT gum, just as can occur with smokefree tobacco products.

Persistent use of nicotine replacement therapy: analysis of actual purchase patterns in a population based sample, Shiffman S, Hughes JR, Pillitteri JL, Burton SL, Tobacco Control, Vol. 12, 310-316, 2003.

<http://tc.bmjournals.com/cgi/content/full/12/3/310>

Summary

The City of Philadelphia Board of Health should **reject** its proposed Regulations Regarding Tobacco and Cigarette Informational Signs because the proposed Cigarette Informational Signs and the proposed Non-Cigarette Informational Signs that address other smoked tobacco products almost certainly violate the preemption clause of the Federal Cigarette Labeling and Advertising Act, and because smokers, smokeless tobacco consumers and the public already greatly overestimate the known health risks of smokeless tobacco products.

If the Board of Health desires to avoid a federal lawsuit while also informing tobacco consumers and the public about the known health risks of different tobacco products, I encourage the Board of Health to require the Department of Public Health to truthfully inform smokers (via educational materials and messages) that:

- Smokeless tobacco products are far less hazardous alternatives to cigarettes,
- Switching to smokeless tobacco products reduces smoker's health risks nearly as much as quitting all tobacco use, and
- Millions of smokers have already switched to far less hazardous smokeless tobacco products.



WRITTEN COMMENTS OF THE CAMPAIGN FOR TOBACCO-FREE KIDS AND THE AMERICAN LEGACY FOUNDATION

**SUPPORTING THE PHILADELPHIA BOARD OF HEALTH'S PROPOSED REGULATION TO
REQUIRE INFORMATIONAL SIGNS REGARDING THE HARMS OF CIGARETTE AND NON-
CIGARETTE TOBACCO USE AT ALL RETAIL OUTLETS THAT SELL TOBACCO PRODUCTS**

PUBLIC HEARING, SEPTEMBER 8, 2011

We are submitting these comments to express our support for the proposed regulations to require all tobacco retailers to post informational signs that will alert consumers to the health harms from tobacco use and give current tobacco users information on where to get cessation help.

Why Informational Warning Signs are Needed Now

Tobacco products, unlike any other consumer product, are harmful and deadly even when used precisely as intended. Unlike other legal consumables, tobacco products are also highly addictive, with the vast majority of all users beginning to consume tobacco products before reaching the minimum legal age. Further, the evidence consistently shows that most tobacco users find it difficult to quit. To make matters worse, the most common form of tobacco use, smoking, also causes substantial harm to innocent nonusers through exposure to secondhand smoke.

Indeed, our national policy reflects that more needs to be done to better and more effectively inform consumers about the harms of tobacco use. Repeated reports of the Surgeon General of the United States as well as the recently enacted Family Smoking Prevention and Tobacco Control Act conclude that more must be done to communicate to tobacco users and potential tobacco users and discourage tobacco use, particularly by youth. These goals are also reflected in the reports of the National Academy of Sciences' Institute of Medicine 2007 Report entitled, *Ending the Tobacco Problem: A Blueprint for the Nation*, and the 2008 Report of the President's Cancer Panel entitled, *Maximizing our Nation's Investment in Cancer: Three Crucial Actions for America's Health*.

There is no magic bullet to prevent and reduce the disease and death caused by tobacco use. Effectively addressing the problem requires a wide range of different strategies and tools, with each one working to complement and strengthen the beneficial impacts from the others. In addition to state efforts to combat tobacco use, such as a cigarette excise tax, Philadelphia has implemented some evidence-based measures, including a smoke-free law and tobacco prevention programs. However, more needs to be done to fully address the scope of the problem. As the Institute of Medicine, the President's Cancer Panel, the Surgeon General, and others have all said: new tobacco control measures are needed in addition to traditional tobacco control efforts¹ – and implementing the pending proposal would be a constructive addition.

The Importance of Warning Signs at the Point of Purchase

This proposal is particularly important because it reaches consumers at the point of purchase. There is substantial research about the power of information and cues on consumers at the

point of purchase. Those who sell tobacco products recognize the power of these visual cues and the impact of messages and visibility just as a consumer is about to make a purchase. At present, those cues, including carefully displayed attractive product packages, often at the point of check-out, can make tobacco products more visible, more attractive, and more alluring.² At the same time, the current health warnings are located on the side of cigarette packs and because most tobacco products are displayed front-facing, consumers often do not see these warnings until after making a purchase.

While this proposal is focused on insuring that the public is warned prior to a purchase decision and is not a counter to tobacco marketing, it should be noted that the tobacco industry recognizes the importance of seeking to influence consumers at the moment of purchase. The tobacco industry's marketing has an overwhelming presence in retail outlets, especially in the types of stores that youth often frequent – convenience stores. For example, in one survey, 80 percent of retail outlets had interior tobacco product advertising, 60 percent had exterior tobacco product advertising, and over 70 percent had tobacco product functional items, such as display racks, counter mats, entrance and exit signs, and change cups; and forty percent of retailers that also sell gas had tobacco product advertising in the driveway and parking lot area.³ An additional survey found that the average retail outlet had 25 pieces of in-store cigarette advertisements while another found more than 3,000 cigarette ads in just 184 stores.⁴ Further, a survey found that a large majority of convenience stores with and without gas featured at least one cigarette material near the counter area.⁵

More generally, point-of-purchase tobacco product displays and advertising at the point of purchase have been found to increase average retail tobacco product sales by as much as 12 to 28 percent.⁶ A 2008 study found that cigarette pack displays at retail outlets stimulate impulse purchases among smokers and that those trying to avoid smoking commonly experience urges to purchase cigarettes when confronted with these displays, suggesting that cigarette pack displays undermine intentions to quit among established smokers. That same study also found that 25 percent of the surveyed smokers had made an unplanned purchase of cigarettes as a result of seeing point-of-purchase tobacco product displays.⁷ Similarly, in a 2009 study based on interviews with persons having just bought cigarettes at retail outlets, nearly one in five people whose purchases were unplanned said that the cigarette pack display encouraged them to buy cigarettes.⁸

The informational warning signs required by the pending proposal will directly address the existing imbalance between the power of pro-tobacco-use cues at retail outlets and the lack of visible consumer information about tobacco use health harms or cessation assistance. The signs required by the pending proposal will reach, warn, remind, and educate consumers right at the key moment before final purchase decisions are made, which is exactly when those trying to quit or resist are particularly vulnerable to making impulse buys they will later regret.

Evidence for the Effectiveness of Informational Warning Signs

The need for this action is not decreased by the warning label requirements in the 2009 Family Smoking Prevention and Tobacco Control Act (FSPTCA). Because of their size and placement, the current warnings on cigarette packs are difficult to see, and the new warnings on cigarettes will not be implemented for another year. In that time, considering the number of times people visit retail stores that sell tobacco, Philadelphia's informational signs could reach many of the more than 70 percent of smokers who want to quit and the kids who are considering using tobacco.

A growing body of research on cigarette pack warning labels has established that warning signs that are large, prominent and colorful, include graphics, and are changed periodically to avoid becoming familiar and ignored work effectively among both youth and adults to reduce tobacco brand appeal, increase knowledge about tobacco use harms, reduce the amounts consumed, and increase both the intention to quit and the likelihood of quitting.⁹ Using images and pictures, and requiring warnings in different languages has been documented as beneficial in effectively communicating with consumers, including those who are not literate or who do not read English.¹⁰

The pending proposal is carefully designed to follow these research findings by directly requiring that the warning signs be placed in key locations where purchasers and potential purchasers of tobacco products are most likely to see them and be large enough to make sure they will be noticed and clearly seen. Equally important, based on the growing body of scientific evidence of what is most effective in communicating with consumers, the proposal authorizes the Health Department to employ colors, pictures and images, as well as text, and to change the warning signs' content and character as necessary to better promote the proposal's goals of educating consumers and preventing and reducing tobacco use and its harms.

In this regard, the informational warning signs required by the pending proposal would not only work effectively on their own to educate those who use or might use tobacco products, but would also serve as effective supplementary components of the ongoing public education efforts of the Department of Public Health regarding tobacco use and its harms, which are, in turn, complemented by the public education efforts of the state government, the American Legacy Foundation, and others.¹¹

Additional evidence of the effectiveness of providing key information and encouragement at the point-of-purchase comes from research showing that informational and promotional signage are effective at impacting consumer perception and choice. Recent studies have found that this type of information has led consumers to choose lower-fat snack options and healthier beverages from vending machines or has gotten shoppers to use stairs to get exercise rather than escalators.¹² Another study found that posters and messaging at elevators and in stairwells prompted employees in a five-story building to use the stairs more, with overweight workers more likely to make the switch.¹³ Recent studies found that simply providing calorie-content information at restaurants and cafeterias produced healthier food choices, and researchers suggest that larger and more consistent results can be obtained by going beyond just providing the calorie information and also offering related messaging.¹⁴

Further support for the pending proposal comes from additional research studies that have found that providing smokers with information about how to quit or about how they can get cessation assistance helps to increase both the number of quit attempts and the related success rates. Several studies, for example, have confirmed the expected finding that publicizing quitline phone numbers increases the number of tobacco users who call to get cessation assistance.¹⁵ More specifically, adding the national quitline phone number onto new graphic image cigarette warning labels in Australia doubled the number of calls by smokers to obtain quitting help during the year that the new packet warnings were introduced.¹⁶ Not surprisingly, smokers who call quitlines also have a much better chance of quitting successfully compared to those trying to quit with no assistance, and smokers receiving quitline assistance with cessation medications are more successful at quitting than those using cessation medications alone.¹⁷

The Need for Additional Information about Tobacco Use

Despite the impression that “everyone knows smoking is bad for you,” there are still important areas of consumer ignorance or misunderstandings that the informational signs required by the pending proposal could directly address. While the new FDA tobacco law has prohibited the use of misleading terms such as light, low or mild since June 22, 2010, new research shows that other kinds of words or colors, such as silver or gold, could mislead smokers into thinking a particular brand is safer or less risky, as can brands sold with pictures of filters.¹⁸ The informational signs required by the pending proposal could correct these and other misconceptions caused by ongoing and new tobacco industry marketing, as well.

There are many other examples of a lack of consumer knowledge or misunderstandings about tobacco products that impact tobacco use rates. For example, in a national survey, the vast majority of participants were not aware of the many dangerous chemicals in cigarettes and cigarette smoke.¹⁹ Most youth do not understand how powerfully addictive cigarettes are, with one survey finding that fewer than five percent of daily smokers in high school thinking that they will still be smoking at all in five years, but more than 60 percent of high school smokers are still regular daily smokers seven to nine years later.²⁰ There is a common false belief that cigar smoking is not very risky, much less deadly, at all; and many smokers, in particular, are confused about the relative risks of different types of tobacco and nicotine products.²¹ Similarly, many smokers grossly underestimate their own risks of harm and death from smoking, with one study even finding that substantial numbers inaccurately thinking that they can offset most of the risks and harms from smoking by exercising, taking vitamins, or simply having good genes.²² The informational signs required by the pending proposal could help to correct these kinds of misperceptions and inaccuracies that increase initiation of tobacco use and keep current users from doing more to try to quit or cut back.

All of the research and information described so far indicates that implementing the pending proposal will supplement and reinforce other ongoing tobacco prevention efforts by working directly to educate and warn consumers, thereby helping to prevent and reduce tobacco use and its harms throughout Philadelphia. At the same time, because it only requires the posting of one or a few signs, provided by the Department of Public Health, at each retail outlet that sells tobacco products, its implementation will not be unduly burdensome to retailers.*

This proposal will have the greatest positive impact in convenience stores. Reports from *Convenience Store News* note that convenience stores account for almost two-thirds of all cigarette sales nationwide and more than 85 percent of all other tobacco product sales.²³

The Legal Basis for the Regulation

Philadelphia's efforts to reduce tobacco use and more effectively warn its citizens about the health effects of cigarettes and smokeless tobacco products should not be deterred by the trial court decision in *23-34 94th St. Grocery Store Corp, et al. v. New York City Board of Health, et al.*²⁴ holding that the New York City signage legislation is preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA) for several reasons.

* The proposal requires an informational warning sign at each customer payment location or at the entrance for retailers that sell products for on-premise consumption. So, small retailers that display all their tobacco products behind a single register or payment counter, for example, would likely have only one such sign.

The proposal in Philadelphia is different in several significant ways. First, it requires signs to be posted where cigarettes and smokeless tobacco products are sold, not where they are advertised or displayed. Therefore, the Philadelphia proposal is not a requirement linked to the advertising or promotion of cigarettes as was the New York City law; it is a condition of the right to sell these products. Federal preemption applies only to restrictions that impact advertising and promotion, not sales and distribution. In addition, Philadelphia proposal applies to smokeless tobacco products as well as cigarettes. There is no federal preemption of state and local requirements related to the advertising of smokeless tobacco products.

Second, the trial court in New York City failed to take into account the recently enacted Family Smoking Prevention and Tobacco Control Act. This new law both explicitly states that states and local governments retain full authority over requirements linked to the sale and distribution of cigarettes and smokeless tobacco products and carves out an exception to federal preemption of states and local governments with regard to advertising and promotion. It allows states and local governments to enact laws that impact the time, place, and manner of cigarette advertising and promotion.²⁵ To the extent the Philadelphia proposal is deemed to be a requirement with respect to cigarette advertising and promotion of cigarettes, the Philadelphia proposal falls within the newly created exception.

Third, the trial court decision in the New York City case is inconsistent with prior law and, in our view, is incorrect factually and legally. Under no prior interpretation of the FCLAA would the New York City law have been interpreted to be a “requirement with respect to the advertising and promotion” of cigarettes. It imposed no restrictions on cigarette advertising and promotion and applied without regard to whether a retail outlet contained any advertising or promotion. In that critical respect, it differed entirely from the prior New York City law that was struck down in *Vango Media v. New York*,²⁶ that imposed a requirement that taxis that carried cigarette ads also carry anti-smoking ads.

Conclusion

Implementing the pending proposal will provide both current and potential tobacco users with information that will enable them to make more informed consumer decisions, it will offer helpful cessation assistance guidance to the large majority of smokers and other tobacco users who want to quit, and it will help to dampen unplanned impulse purchases at retail stores by those trying to quit or cutback. In addition, the new requirement will pose little or no financial or administrative burden on retailers, and will not occupy an undue amount of space.

In sum, this modest proposal will have a positive impact on consumer knowledge and perception and is consistent with the goals of the federal government, Pennsylvania, and Philadelphia. It is smart, focused public health policy. We urge you to adopt it.

Respectfully Submitted,



Matthew L. Myers
President
Campaign for Tobacco-Free Kids



Cheryl G. Heaton, Dr. P.H.
President and CEO
American Legacy Foundation

Endnotes

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**Statement in support of
Philadelphia Board of Health proposed regulations -
Tobacco product health warning**

Diane J. Phillips

Senior Director, State & Federal Government Relations

American Cancer Society

August 29, 2011

The American Cancer Society supports the regulations proposed by the Philadelphia Board of Health concerning the posting of health warnings by all tobacco retailers. Tobacco use in any form is addictive and seriously harmful to the health of its consumers, and it is entirely appropriate that this message be reinforced to young people and adults at retail sites.

Tobacco use is addictive and deadly

Lung cancer is the leading cause of cancer death in the United States today, and tobacco use is responsible for 87 percent of all lung cancer deaths. In Pennsylvania, over 7,800 people will die from lung cancer this year. During the five-year period of 2004-08, 4,869 people died from lung cancer in Philadelphia County (1).

Tobacco contains nicotine, a highly addictive substance. Industry documents indicate that tobacco companies have been adjusting nicotine levels in their products since the 1960s, realizing that the more addictive their product, the more likely a new user will continue its use, and the less likely current users will quit. More recently, one study showed that tobacco companies have been increasing nicotine levels in their products by an average of 1.6 percent a year between 1998 and 2005 across all brands of cigarettes (2). Another study found more than 100 additives in cigarettes that can enhance or maintain nicotine delivery, increase the addictiveness of cigarettes, and mask negative physical symptoms associated with smoking (3).

If we reduce tobacco use, we can reduce nicotine addiction and lung cancer deaths in our commonwealth.

Despite their risks, tobacco products are actively marketed

The tobacco industry spends billions on marketing to adults and children alike. It is especially influential on youth. Numerous studies have shown that children are more sensitive to tobacco advertising than adults, and exposure to tobacco advertising is related

to both intention to smoke and actual initiation (4). Awareness of tobacco product advertising, receptivity to tobacco product advertising and owning a promotional item increase the likelihood that a youth will become a tobacco user.

Tobacco companies have spent a substantial amount of their marketing expenditures on advertising, particularly in places youth frequent often, including convenience stores, placing ads in areas most visible to youth (such as right below the door handles, on ice cream coolers, and next to candy), and offering price discounts to make tobacco products more affordable. In 2006, tobacco companies spent over \$260 million on point-of-sale advertising in retail stores, a 30 percent increase from the previous year, and an additional \$9.4 billion on price discounts (5). As evidence of the success of tobacco companies' marketing efforts, the most popular cigarettes among youth are the most heavily advertised brands – Marlboro, Camel and Newport for cigarettes and Skoal and Copenhagen for smokeless tobacco (6).

Philadelphians are at risk

As noted in documents published by the city Department of Health, Philadelphia has:

- The highest rate of smoking among large US cities
- More cigarette retailers per capita than any other large city except Washington, DC
- One tobacco retailer for every 37 youth in the city

Clearly, Philadelphia's youth are at risk for tobacco addiction. The younger you are when you begin to use tobacco products, the more likely you are to be an adult tobacco user. And people who start tobacco use at younger ages are more likely to develop long-term nicotine addiction than those who start later in life.

Each day in the US, more than 3,500 people under the age of 18 try their first cigarette, and another 1,100 become regular, daily smokers. About one-third of these youth

will die prematurely from smoking-related diseases. With one tobacco retailer for every 37 youth, Philadelphia's kids are part of these grim numbers.

Cigarette smoking causes serious health problems among children and teens including:

- Coughing
- Shortness of breath
- More frequent headaches
- Respiratory illnesses
- Worse cold and flu symptoms
- Reduced physical fitness
- Poor lung growth and function
- Worse overall health
- Addiction to nicotine

As they get older, teens and adults who continue to smoke or use other tobacco products can expect problems like:

- Cancer, heart disease and stroke
- Gum disease and tooth loss
- Chronic lung diseases, like emphysema and bronchitis
- Hearing loss
- Vision problems, such as macular degeneration

Warning signs are an important health tool

From this information I am sure you can see that the health and well-being of Philadelphians are at stake. The tobacco industry is hard at work trying to make its products more alluring and even more addictive. We need the help of responsible merchants and city government to combat this problem, and the use of health warning signage is an important step in this process.

Tobacco producers and some retailers may push back and note that new federal regulations already require larger, more graphic labels on the products themselves by September 2012, thereby reducing the need for point of purchase signage. We strongly disagree. Tobacco use is addictive and destructive to health. We cannot over warn the public about its use. Signage at retail sites will educate and remind consumers of all ages

about the ill effects of tobacco use *before* a purchase is made. These signs are yet another tool by the city Department of Health to inform consumers and promote the avoidance or reduction of tobacco use.

With the goal of a healthier city in mind, we commend the Philadelphia Board of Health for proposing this action. We recommend that these regulations be enacted. Thank you for the opportunity to provide this statement.

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August 29, 2011

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**RE: LORILLARD SUBMISSION RE: PROPOSED PHILADELPHIA BOARD
OF HEALTH POINT OF SALE REGULATIONS**

The proposed Regulations Regarding Tobacco and Cigarette Informational Signs under consideration by the Philadelphia Board of Health (the "proposed Regulations") should not be enacted because, among other reasons, they are preempted by federal statute and they constitute unconstitutional compelled speech in violation of the First Amendment to the United States Constitution and the Free Speech Clause of the Pennsylvania Constitution. Furthermore, the proposed Regulations are similar to the requirements by the Food and Drug Administration that all cigarette packages and advertising display graphic warnings beginning September 22, 2012, and, therefore, impose an unnecessary burden on retailers for that additional reason.

The proposed Regulations are substantially the same as the New York City Board of Health ("NYC BOH") Resolution that recently were invalidated by the United States District Court for the Southern District of New York. Lorillard Tobacco Company brought that suit along with other tobacco companies, local retailers and trade associations. *See 23-34 94th St. Grocery Corp. v. New York City Board of Health, et al.*, 757 F. Supp. 2d 407 (S.D.N.Y. 2010), *appeal docketed*, No. 11-0091-cv (2d Cir.). In that case, the court held that the NYC BOH Resolution is preempted by the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*, and granted summary judgment declaring the Resolution null and void.

Like the NYC BOH Resolution, the proposed Regulations would be preempted by the Labeling Act and thus invalid. The Labeling Act establishes mandated cigarette health warnings and bars states and municipalities from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. § 1334(b). There can be no dispute that the proposed additional cigarette health warnings are a "requirement based on smoking and health." The proposed Regulations also are "with respect to the advertising or promotion of cigarettes." In the New York City case, the court held that the additional cigarette health warnings required by the NYC BOH, and similar to the signs required by the proposed Resolution, constitute promotion and therefore were preempted since the mandated signs were "with respect to the . . . promotion of cigarettes." The court also held that

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an independent and additional basis for preemption was that the NYC BOH Resolution was designed to counter the effect of point-of-sale promotional displays, and thus imposed conditions on and substantially impacted such promotion. The same logic requires the conclusion that the proposed Regulations here would be preempted.

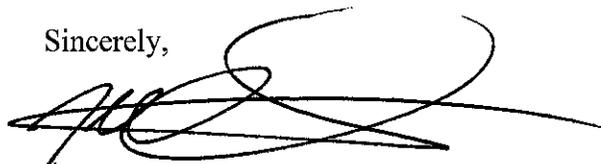
Moreover, while the New York district court did not need to reach the issue, the proposed Regulations are also “with respect to the . . . advertising of cigarettes,” and would be preempted by the Labeling Act. First, the proposed Regulations seek to alter the message presented to consumers by and the appearance of cigarette *advertising* in retail stores. Second, a primary purpose of the proposed Regulations is to counteract tobacco advertising. Third, the proposed Regulations would require graphic posters that are themselves indistinguishable from “advertising.” Ultimately, the proposed Regulations attack the core of the federal Labeling Act—mandating the posting of additional warnings next to and around the federal warnings required by the Labeling Act because the proponents of the Regulations have concluded that the federal warnings are not good enough.

The proposed Regulations also compel speech in violation of the First Amendment to the United States Constitution and the Free Speech Clause of the Pennsylvania Constitution. The Supreme Court has rejected time and again the notion that the government may compel or restrict speech in order to prevent adults from engaging in what it may consider to be disfavored—though perfectly legal—behavior.

In addition, the proposed Regulations are similar to FDA regulations that require all cigarette packaging and advertising to include color graphic warnings beginning September 22, 2012, which is less than three months after the effective date of the proposed Regulations. The FDA graphic warnings include graphic images that communicate the health risks of smoking, textual warning statements that communicate the adverse effects of cigarette use, and a cessation resource for consumers to call to aid their quitting. The proposed Regulations require the Department of Public Health to design and produce signs with the similar information for cigarettes. Beginning September 22, 2012, retailers selling cigarettes will effectively be displaying this same information on all cigarette packages and advertising located in their stores. The proposed Regulations, therefore, are an unnecessary burden on retailers.

If enacted, the proposed Regulations, like the NYC BOH Resolution, should be invalidated by the court as preempted by federal statute and as unconstitutional compelled speech. Further, the proposed Regulations are an unnecessary burden on retailers since the information the Department of Public Health is required to include on its informational signs for cigarettes is similar to the requirements of the recently promulgated FDA graphic warnings regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Shannon', with a large, sweeping flourish extending to the right.

Michael Shannon
Vice President, External Affairs