BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, DC

IN THE MATTER OF:	)
PROPOSAL TO RESCIND FTC GUIDANCE CONCERNING THE CURRENT CIGARETTE TEST METHOD	)
Cigarette Test Method [P944509]	)

COMMENTS OF LIGGETT GROUP LLC

Liggett Group LLC ("Liggett") submits these comments in response to the Federal Trade Commission ("FTC") *Proposal to Rescind FTC Guidance Concerning the Current Cigarette Test Method*, published July 14, 2008 at 73 Fed. Reg. 40,350 (the "Proposal"). Under the Proposal, the FTC would rescind its 1966 guidance that for more than 40 years has governed the testing and disclosure of cigarette tar and nicotine yields. The FTC proposes to abandon the longstanding uniform standard in favor of no standard – without considering possible changes to improve the existing standard, without proposing an alternative testing standard, without addressing the potential impact on consumers, and without any proposed transitional mechanisms.

Liggett believes the existing standard should be maintained until an improved or new uniform testing regime is developed. In addition, prior to abandoning the established standard, the FTC should consider the potential impact of disclosures and the possibility of adding qualifying language.

A Uniform Standard Is Needed

The FTC position since 1966 has been that factual statements of the tar and nicotine content of mainstream cigarette smoke, if supported by adequate testing in accordance with the Cambridge Filter Method, do not violate laws administered by the FTC. *See* Proposal, 73 Fed. Reg. at 40,351. The FTC and others, including companies within the cigarette industry, have nevertheless recognized and acknowledged that the Cambridge Filter Method is a standard test method, not a perfect test method, and that it does not and cannot replicate the many different ways people actually smoke.

That the Cambridge Filter Method is subject to legitimate criticism does not, however, require the conclusion embodied in the Proposal – that there should be no standard test method. The absence of a standard test method will result in a regulatory "free-for-all" where for some products there might be no information provided to consumers and for other products the information would result from non-uniform test methods that might well vary from company to company. Accordingly, in the absence of regulatory guidance, consumers would be subject to an array of statements and claims from different manufacturers that, while factually true and substantiated, are nonetheless derived from and use different standards and measurements, thus causing substantial confusion among consumers.

Consumers, however, already understand that standard test methods are not always intended to yield, and do not yield, precisely accurate predictions of actual everyday experience. Vehicle gas mileage testing in accordance with the Environmental Protection Agency ("EPA") test method is a good example. People understand that the EPA test results are an estimate, that the tests do not guarantee that a particular vehicle will achieve a particular mileage, and that "real-world" gas mileage depends on driving style and many other factors. In fact, when the

EPA recently revised its fuel economy standards, it modified its website to indicate that fuel economy estimates are specifically designed to allow consumers to comparison shop and that actual results will vary based upon a number of factors, such as weather, road conditions, and driving and maintenance habits.[1] Despite known limitations, the EPA standard test method provides valuable information to consumers. Likewise, smokers and others interested in cigarette tar and nicotine yields understand that the Cambridge Filter Method does not guarantee specific tar and nicotine yields and that actual yields will vary depending on smoking behavior and other factors.

Tar and nicotine yields disclosed in an environment without a uniform industry-wide standard will undoubtedly cause more consumer confusion than any possible confusion caused by the current standard. It was just this sort of unacceptable non-standardized environment that led the FTC to issue its guidance in the first place. A key reason supporting issuance of the guidance in 1966 – avoiding the conflicting and often incomprehensible patchwork of claims made in the absence of a uniform standard – is still valid today. In addition, the European Union and other jurisdictions continue to recognize the value of a uniform standard and rely on the ISO Method, a method very close to the Cambridge Filter Method.

The FTC and others have long recognized the value of uniform, even if imperfect, testing standards with respect to many different products.[2] The FTC should maintain its longstanding guidance pending consideration by appropriate federal authorities of alternative standard test methods to replace or supplement the Cambridge Filter Method. The FTC's original policy considerations and goals underlying the uniform standard for measurement of tar and nicotine

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[1] *See* www.epa.gov/fueleconomy/index.htm (accessed September 11, 2008).

[2] *See e.g.* 16 C.F.R. Part 460 (FTC regulations governing labeling and advertising of home insulation and mandatory test methods).

remain valid notwithstanding the known limitations of the Cambridge Filter Method, at least pending consideration of alternative test methods and potential qualifying language.

Potential Duplication Should Be Avoided

The prospect of Congressional action on this issue in the context of the pending legislation to grant the Food and Drug Administration ("FDA") regulatory authority over tobacco products is another reason for the FTC not to make a change at this time. Abolishing a regulatory structure that has been in place for decades in favor of an environment lacking a uniform testing standard, quite possibly to be followed with a new regulatory structure, would needlessly subject consumers and industry to two major regulatory regime changes in succession – potentially resulting in substantially different tar and nicotine testing and disclosure. Consumers and industry would first need to adjust to the withdrawal of the existing guidance and whatever new guidance the FTC issues. Thereafter, all those affected would potentially need to make another major transition to adapt to the FDA's new tar and nicotine regulation. In the meantime, consumers would be subject to variable and changing statements, presumably based on different test methods, resulting in significant consumer confusion.

Because the pending legislation grants FDA the authority to set the method for testing and disclosing tar and nicotine yields, the FDA could adopt a regulation at odds with the Proposal, or even elect to reinstate the Cambridge Filter Method. The costs to Liggett and others in the industry of complying with one major change in the regulatory structure would be substantial. Liggett would then need to incur similar costs again if the FDA were to issue tar and nicotine yield regulations different from that contemplated in the Proposal. This potential doubling of costs would be particularly wasteful if the FDA elected to readopt the Cambridge Filter Method. In short, two major changes in succession will only add to consumer confusion,

impose undue and duplicative costs on the industry, and potentially impair the FDA's ability to implement a regulatory scheme if the FDA legislation becomes law.

Other Consequences Need To Be Addressed

The Proposal also fails to address several consequences that would result if the guidance is rescinded. Despite the significant effects on the industry of abolishing a standard testing and disclosure method for cigarette tar and nicotine, the Proposal does not set an effective date for withdrawal of the existing guidance or provide for a transition period to adapt to a new regulatory structure. If the Proposal is adopted, it will at a minimum require changes to all consumer-directed cigarette advertising and marketing materials, and could lead to changes to product packaging. Liggett and others in the industry should be afforded a reasonable transition period to make the changes that will be necessary if the Proposal is adopted. Liggett submits that the transition period should be not less than one year.

The Proposal also gives no insight into the FTC's position on whether, and if so how, cigarette manufacturers may communicate with consumers and trade customers regarding the abolition of the uniform standard for tar and nicotine testing and disclosure, and the related consequences resulting from that change. The Proposal should also be modified to make clear that point-of-sale and other advertising and marketing materials that have already been distributed to customers are exempt from any changes that might be necessary or deemed appropriate as a result of implementing the Proposal.

Possible Interim Steps

Interim steps could be taken to address certain issues raised in the Proposal. These include revising the current tar and nicotine disclosure statement language from "FTC Method" to "Cambridge Filter Method." This change would alleviate the concern that referring to the test

as the "FTC Method" implies FTC approval, ownership, or endorsement of the Cambridge Filter Method. Also, the FTC could consider adding qualifying language such as statements indicating that the amount of tar and nicotine a smoker receives depends on individual smoking habits.

Conclusion

The public interest is served by having a uniform standard for the testing and disclosure of cigarette tar and nicotine. Although subject to legitimate criticism, the current standard based on the Cambridge Filter Method should not be abandoned in favor of no standard. Ongoing research efforts deserve consideration and evaluation as possible replacements for or improvements to the Cambridge Filter Method. A transition period of at least a year should be provided for any change that is implemented.

Respectfully submitted,

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Dated: September 12, 2008

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