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FAIR GAME

GRETCHEN MORGENSON

Slamming The Window On Investors

A company's new rule squeezes a money manager's campaign for change.

IT'S BECOMING a full-time job cataloging the contortions some companies go through to avoid addressing their shareholders' concerns.

Today's example comes from JDS Uniphase, a maker of communications and optical equipment and one of the quintessential highfliers during the turn-of-the-millennium Internet bubble. But its stock is up only about 3 percent so far this year, versus about 15 percent for the Nasdaq composite index.

JDS Uniphase, like most companies, counts many institutional shareholders among its owners. Among them is Sandell Asset Management, a money manager based in New York with \$1.5 billion in assets; it owns just under 2 percent of JDS Uniphase's shares. Sandell has voiced concerns about JDS Uniphase's stock price, which has also underperformed the Standard & Poor's 500-stock index this year.

JDS Uniphase hasn't done enough to maximize the value of its various businesses, in Sandell's view, and last summer, its officials had discussions with the company about how to unlock value, perhaps by selling one of its units, a maker of optical components and commercial lasers. It thought a sale of the unit would create more value

The clock quickly runs out on a JDS Uniphase shareholder.

for shareholders than a spinoff. But JDS Uniphase decided to spin off the business.

Frustrated, Sandell submitted a shareholder proposal on Sept. 12, 2014, to be voted upon at this year's annual meeting. The proposal asked that the company's board evaluate "further strategic alternatives" beyond the spinoff to increase shareholder value.

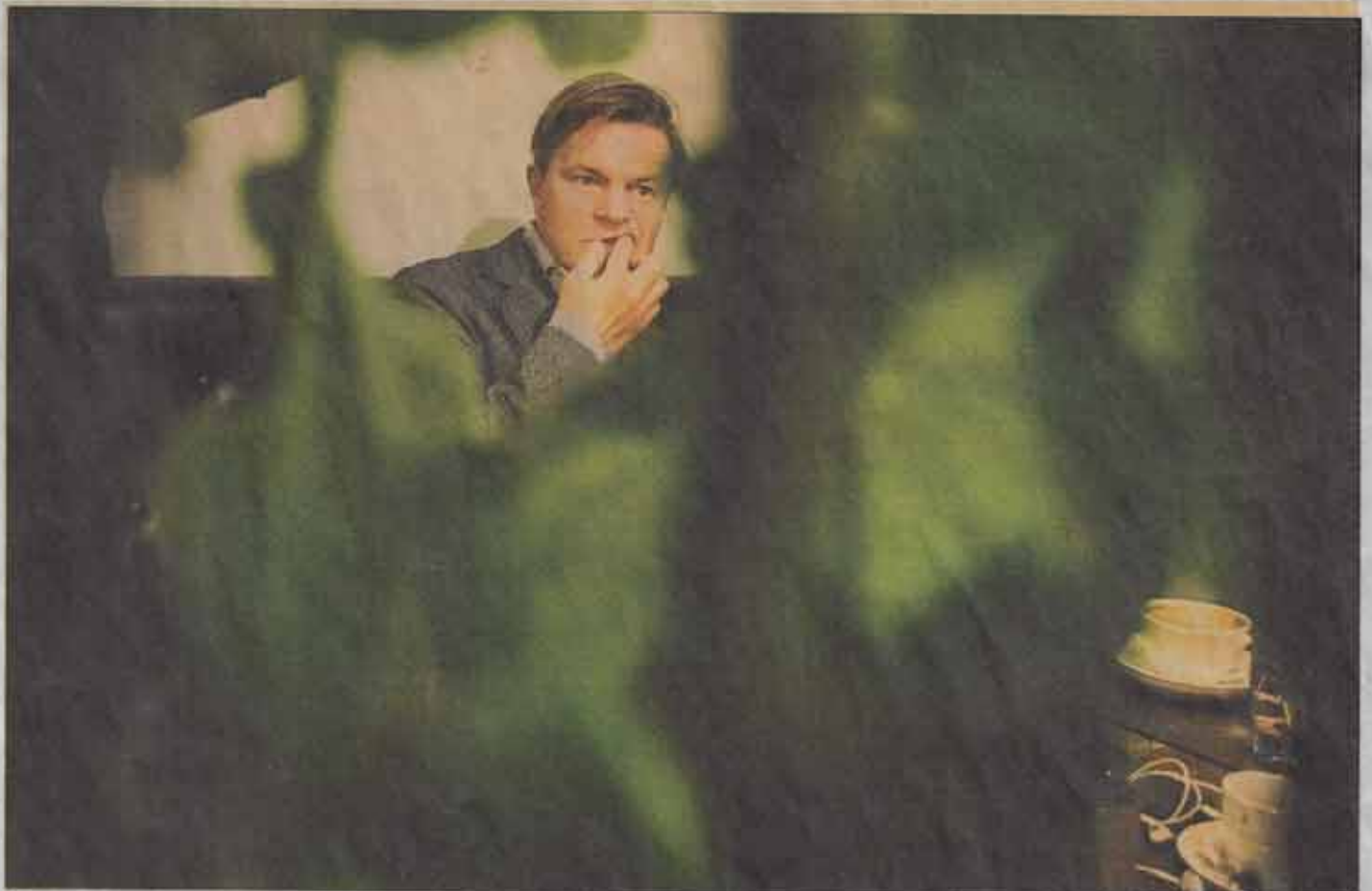
When Sandell submitted its proposal, the date of the JDS Uniphase meeting was unclear. Historically, the company's shareholders have met in November or December.

But on May 21, not long before Sandell began raising its concerns to the company, the JDS Uniphase board altered its bylaws affecting shareholders who want to put forward proposals for a vote at annual meetings. The company changed its rules to require that shareholders submit their proposals at least 60 days in advance of the meeting. Previously, shareholders could put forward proposals or director nominees as late as 30 days before a meeting.

That change, the company said, was made on the advice of the board's governance committee, headed by Martin A. Kaplan. Mr. Kaplan, 77, was an executive vice president of Pacific Telesis, the former telecommunications company, and has been a director at JDS Uniphase since 1997.

JDS Uniphase's bylaw change didn't receive much attention when it was made in May. But in early October, its impact be-

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PHOTOGRAPH BY MAGDOLNA LAJKA FOR THE NEW YORK TIMES



A Lesser Warning? Maybe

A Swedish tobacco company wants the F.D.A. to change course, by declaring its smokeless product less harmful than cigarettes.

By MATT RICHTER and DAVID JOLLY

On a recent morning at a Starbucks in Richmond, Va., Patrik Hildingsson ordered a latte and, between sips, tucked a pouch of tobacco into his upper lip.

Mr. Hildingsson, 46, lean and sandy-haired and wearing a slim-fitting Tiger of Sweden suit, doesn't fit the image that many people associate with smokeless tobacco users — the cowboy or baseball player, say, with dark juice oozing from his mouth. The pouch in Mr. Hildingsson's lip contained snus (pronounced "snoose"), a

discreet cousin of chewing tobacco that doesn't require spitting.

He is vice president for communications and public affairs at Swedish Match, a company that sells snus. As tobacco companies go, it is a pipsqueak. Snus, its main product, is banned in the European Union and is relatively obscure outside exempted Sweden, its home country. And as a smoking substitute, snus has fewer users in the United States than a much newer product, electronic cigarettes. This makes it all the more peculiar that Swedish Match is in a position to do something that no company

THE NEW SMOKE

The Harm-Reduction Debate

has done before: spur a reshaping of American tobacco policy and regulation, and the conventional wisdom around it.

The company is doing this by asking American regulators to say that its snus is less harmful than cigarettes.

While Swedish Match concedes that snus carries health risks — and some see those risks as unacceptable — Mr. Hildingsson, who is Swedish, prefers to think of it as a useful stimulant. He thinks it should be considered a "daily pleasure"

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Seen through tobacco plants, Patrik Hildingsson, top, sampled a pouch of snus, a discreet cousin of chewing tobacco. He is an executive at Swedish Match, which wants the United States government to declare snus to be less harmful than cigarettes. Snus is popular in Sweden; Margareta Bloom Sandback, above left, took a snus break in Stockholm.

A Lesser Tobacco Warning? Maybe

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that, unlike smoking or using chewing tobacco, passes societal muster. In asking the United States government to bless its snus as less toxic, the company is raising a broader question: Should warning labels on tobacco products — from chew to e-cigarettes — take into account varying degrees of harm?

It's a move that many in public health have long resisted. The traditional view has been black-and-white: All tobacco products are harmful and addictive. Period. To say that some products are less dangerous, the thinking goes, risks encouraging nicotine addiction, eventually leading to the undeniably lethal habit of cigarette smoking.

Some public health scholars argue that while snus is addictive and harmful and Swedish Match self-interested, the company is still raising a reasonable question about harm reduction. Under this harm-reduction doctrine, which acknowledges that people do things that are bad for them and tries to limit the damage, snus could be seen as a less dangerous way to consume nicotine. Of course, harm-reduction strategies can also work in the other direction. Offering clean needles to heroin addicts, while preventing the spread of H.I.V., potentially encourages drug use.

The harm-reduction question for tobacco has taken center stage recently because of the surge in popularity of e-cigarettes, which deliver a nicotine-laden vapor rather than the soup of known carcinogens produced by a burning cigarette. E-cigarettes are relatively new, though, and there is little long-term health data on their use. So there is a greater chance that the harm-reduction policy question will be addressed in the near term not by these new electronic nicotine systems but by the smokeless tobacco made in Sweden by Swedish Match.

"Snus is the Swedish e-cigarette," said Karl Olov Fagerstrom, an expert in nicotine addiction who has been a consultant to Swedish Match. Sweden, he said, "could actually stamp out tobacco smoking faster and easier than anyone else because we have snus."

Swedish Match has filed a 122,000-page petition with the Food and Drug Administration to alter warning labels on the snus it sells in the United States. The warning now says that the product can lead to mouth cancer and is not a safe alternative to cigarettes. The company's proposed warning is this: "No tobacco product is safe, but this product presents substantially lower risks to health than cigarettes."

To back up this claim, Swedish Match tells a story it calls the "Swedish Experience": Since the 1970s, the use of snus in Sweden has grown steadily, but rates of smoking have plummeted — and, more important, so have rates of tobacco-related diseases, including lung and oral cancer.

Swedes have done a remarkable job of reducing smoking through bans and hard-hitting public health messages; Swedish Match argues that snus contributed significantly to the decline.

Since 2000, when Congress passed a law allowing the F.D.A. to consider such "modified risk" warnings, a few requests have come before the agency. The Swedish Match application is the first to receive full consideration.

Should the application be approved, it would be a watershed moment. "Imagine a tobacco company being able to advertise saying, 'We were reviewed by the F.D.A., and the F.D.A. has confirmed this product is significantly less harmful than cigarettes,'" said Scott J. Leischow, a behavioral scientist and professor at the Mayo Clinic. "It would be unprecedented."

Such a new warning would be applicable only to the Swedish Match product, but it could pave the way for e-cigarette and American smokeless tobacco makers to present harm-reduction research in the future. For now, American chew is generally seen as more harmful than Swedish snus.

Many tobacco scholars and policy makers argue that replacing a harmful tobacco product with another harmful tobacco product is wrongheaded policy. But a growing number of heavy hitters in public health, while stopping far short of endorsing Swedish Match's view, say the time has come for a new conversation about the regulation of nicotine. Mitchell Zeller, who heads the Center for Tobacco Products — the F.D.A. agency that will rule on the Swedish Match application — has said that what kills smokers is combustion, not nicotine. Mr. Zeller has suggested endorsing strategies that permit the cleanest, least harmful methods of nicotine delivery.



PHOTOGRAPH BY MAGNET LAVALOR FOR THE NEW YORK TIMES

"We need to have an open mind," he said, speaking broadly about nicotine policy.

Hundreds of millions of people use nicotine, Mr. Hildingsson noted, most of them smokers, and public policy should reflect the reality of their addiction.

"We do strange things," he said. "We marry each other, we have religion, we have sex without reproduction, we enjoy theater and culture. We enjoy a drink now and then, and we enjoy our nicotine. It's what makes us human."

His vision, however, as outlined in a recent internal Swedish Match memo, goes well beyond snus as a smoking-cessation tool. It describes a future that would deeply disturb many in public health — one in which "a pinch of snus" — an addictive product with cancer-causing agents — "is regarded much like a cup of coffee."

Return of the Snussers

The Swedish Experience refers to Sweden's efforts to curb smoking, which exploded in popularity there, as in the rest of the world, around World War I.

Before that, Swedes had been avid users of snus. But smoking, which lets nicotine quickly enter the bloodstream through the sensitive lining of the lungs, gave a more satisfying nicotine hit, and snus was abandoned in favor of the intensely marketed, newly fashionable cigarette.

Then, by the second half of the 20th century, as the risks of smoking became clear, Sweden took a particularly active role in discouraging smoking, banning all tobacco advertising, restricting sales to youths and hammering the message that smoking was deadly and uncool. And there was that history of snus. Its popularity grew again, not by government fiat but by "neighbor talking to neighbor, family members sharing experiences," according to a report presented to the F.D.A. in 2012 by a scientist from Swedish Match.

Mr. Hildingsson joined Swedish Match, the remains of a former government monopoly called Swedish Tobacco, in 1997. It was a time of major change for the company, which decided not long after to stake its business on snus and to drop its cigarette brands, though it continued to distribute cigarettes on behalf of foreign companies. There were plenty of skeptics, including Mr. Hildingsson's mother. He recalled her once saying at dinner: "Do you see anyone using snus? I don't see anyone."

Today, about 19 percent of adult Swedish men use snus daily, up from 16.8 percent in 1985; snus use by women has risen to 3 percent from less than 1 percent. By 2011, the percentage of men who were daily smokers had dropped to 12.7 percent from 35.1 percent in 1980 (some also use snus); among women, it dropped to 14.7 from 27.9. That compares with a current European Union average of 32 percent for men and 24 percent for women. (In the United States, it's about 18 percent over all; 20.5 for men and 15.8 for women.) One Swedish



Oskar Gammesson, at top, is work in the Svenska Snus store in Stockholm, where men gathered at a "snus bar," above. Below, Dorothy Hatsukami of the University of Minnesota is conducting studies on the health effects of snus.

"The most important thing is to stop smoking. But I don't think another product from the tobacco industry will solve the problem. It will just create new users."

MARGARETHA HAGLUND, FORMER HEAD OF TOBACCO CONTROL FOR THE SWEDISH PUBLIC HEALTH AGENCY

convert is Charlotta Davies, 48, a hotel manager in Stockholm, who was a long-time smoker until she had her first child in 1994. She quit cigarettes but still craved nicotine. In 2002, she tried snus.

"It was a little embarrassing. It wasn't so feminine," she said, pulling a white pouch from a circular container and tucking it underneath her lip. Now, although she resents the addiction, it starts her day. "It's really stupid, but it's better than smoking," she added. "Our generation, we were smokers, but now we're more snussers. It's not socially acceptable to smoke anymore, but it's acceptable to snus."

Tax policy has helped encourage snus use, at least relative to cigarettes. A pack of 19 Marlboro cigarettes costs 56 kronor, or about \$7.50, of which 75 percent is tax, while a 24-pouch tin of General, Swedish Match's most popular snus brand, costs \$7.15, about 55 percent of it tax.

But Swedish health authorities haven't endorsed snus. Gabriel Wikstrom, the Swedish health minister, said he believed that snus "has something to do with" the country's remarkable record on tobacco-related disease — but that he thought the best policy was for no one to use tobacco products of any kind. (In Sweden, 10 percent of deaths are attributable to tobacco, versus 23 percent in the United States, according to the World Health Organization.)

To some experts, Sweden's experience is an excellent example of harm reduction. Overall tobacco use in Sweden is similar to that of other countries in Europe, but more of it is snus. It "is a huge success story that hasn't received enough attention," said David B. Abrams, executive director of tobacco research at the American Legacy Foundation, a research and education group focused on reducing cigarette use and related diseases. It shows that "other forms of nicotine" that aren't as lethal as cigarettes "can be used to reduce death and disease."

"The evidence we have from Sweden is the most solid we have in the world," Dr. Abrams said.

Others have a different interpretation. Snus appeals mostly to men, but smoking rates have fallen for women too, though less so. It suggests to some health experts that smoking rates can fall even without use of snus. And in the United States, smoking rates have fallen by roughly half for women and men since the mid-1970s, thanks to education campaigns, tobacco ad restrictions, indoor smoking bans and other efforts — but not snus.

Margaretha Haglund, former head of tobacco control for the Swedish public health agency, and now an anti-tobacco activist, said snus was "not a magic bullet for smoking cessation," noting that large numbers of Swedish men have quit smoking without using snus and that others use snus but also smoke, which keeps disease risk high. "The most important thing is to stop smoking," she said. "But I don't think another product from the tobacco industry

will solve the problem. It will just create new users."

Norwegians have recently taken up the snus habit, too. Karl Lund, research director at the Norwegian Institute for Alcohol and Drug Research, said that surging use of snus has led smoking rates for those ages 16 to 74 to fall to 15 percent in 2013, from 37 percent in 1985.

This happened in the face of concern from European Union authorities, who banned all oral tobacco, including snus, in 1992, citing concerns that it would be used "above all by young people." Sweden, which joined the European Union three years later, received an exemption. (Norway is not a member.)

While the ban remains, the European Union agreed in 2001 to remove the warning in Sweden that snus causes oral cancer. The current European Union-approved warning there says snus "can damage your health and is addictive."

Mr. Lund, who was once skeptical of snus and harm reduction, is now a believer. "Without a doubt, this is beneficial for public health," he said. But, he added: "It's the experience we've had in Scandinavia. That, of course, is very hard for tobacco-control people to acknowledge."

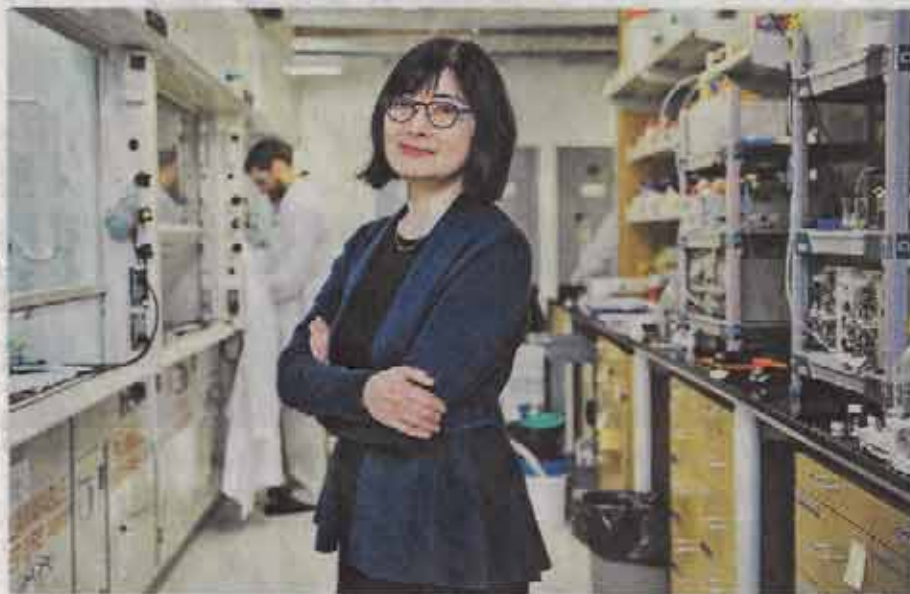
Danger of Dual Use

Congress has set a high bar for Swedish Match, or any others, to get the F.D.A.'s blessing for a gentler warning on a tobacco product. The company must prove two things: that the products are not as harmful to individual users as the current warnings state and that, if the warnings change, it will lead to a health benefit for the population as a whole.

The first requirement is simpler to address. And the evidence, though it can be hard to untangle, offers Swedish Match hope. A number of studies show that Swedish snus increases only modestly the risk of mouth cancer, which is fairly rare to begin with; snus users also face a greater risk of pancreatic cancer.

The relatively low risks — at least when compared to smoking — from Swedish snus appear to reflect a manufacturing process that limits levels of nitrosamines, important cancer-causing chemicals. American smokeless tobacco products, including loose chewing tobacco and pouches of snus, aren't made the same way and generally contain more toxins, said Dorothy Hatsukami, a psychologist and expert in tobacco science at the University of Minnesota.

"The epidemiology doesn't seem to suggest in Sweden or Norway that there is increased risk of oral cancer," Dr. Hatsukami said. But she is quick to add that Swedish snus is not harmless; it is addictive and may have other cancer and cardiovascular risks. And she offers another caveat: The risks for snus are low only if users don't also smoke cigarettes, which confer a large-



PHOTOGRAPH BY THE NEW YORK TIMES

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PHOTOGRAPHS BY MAGNUS LAURA FOR THE NEW YORK TIMES

Less Risky but Not Harmless

THE WARNING LABEL on cans of Swedish snus sold in the United States says that "this product can cause mouth cancer" and cautions that it "is not a safe alternative to cigarettes."

Swedish Match, the company that sells snus, has petitioned the Food and Drug Administration to soften its warning label. How accurate is the current warning? How dangerous is Swedish snus?

The short answer is that snus appears to increase the risk of mouth cancer and some other cancers, but modestly in comparison with the array of lethal risks posed by smoking. Many studies have been done on the question, but as in many fields that involve complex questions and human subjects, the research is imperfect. For instance, some research concluding virtually no oral cancer risk from snus was funded by Swedish Match itself.

Other research showing increased cancer risk is decades old and involves patient populations using oral tobacco products with far more cancer-causing toxins than current products. And still other research doesn't adjust for the cancer-causing impact of cigarette smoking, which is often done in tandem with using snus.

In light of the difficulty of weighing the evidence in a highly politicized field, The New York Times asked Kristin L. Sainani, an epidemiologist at Stanford who is not involved in tobacco research, to examine the state of the science.

"The weight of the evidence suggests a small increase" in the risk of oral cancer with snus, Dr. Sainani said. In Sweden, users of Swedish snus see virtually no increase in the rates of lip and oral cancer. "From a public health point of view, if snus keeps you from smoking, its benefits far outweigh its risks," she said, adding, "clearly, the small increases in risks in isolated cancers with snus use pale in comparison to the huge increases in risk with cigarette smoking."

But she also said that "it is inconsistent with the evidence" to suggest that there is "absolutely no harm to an individual" from snus. In fact, she said, Swedish snus users face a doubling of risk of pancreatic cancer, though that is a relatively rare illness. In the United States, the lifetime risk of contracting pancreatic cancer is 1.5 percent, while the baseline risk of contracting oral or throat cancer is 1.1 percent, ac-

ording to the National Cancer Institute.

One independent overview of the snus research, published in 2008 in The Lancet Oncology, a journal, summarized findings of three previous studies — two from Sweden and one from Norway — and also found little to no increased risk of oral cancer. The Lancet summary did find that use of snus contributed to a slightly elevated risk of pancreatic and esophageal cancer.

According to the World Health Organization, the Swedish manufacturing process is "known to lessen somewhat toxicant levels." Swedish snus makers rely on air curing of the tobacco leaves, rather than the fire or smoke curing practiced in the United States. This and other differences in processing appear to limit growth of microbes that produce carcinogens.

In a 2008 report, scientists working for the European Union concluded that while all smokeless tobacco products caused oral lesions and carried health risks, the products on the whole were substantially less hazardous than cigarettes and carried "probably also at least 50 percent" less risk of oral cancer than smoking.

STILL, WHEN THE European Union moved last year to update its tobacco laws, there was little interest outside Sweden, where snus has remained legal, in ending a ban on it. That was because member states had no appetite for introducing a new tobacco product.

Deborah M. Winn, who conducted research showing the cancer hazards of smokeless tobacco several decades ago and is now deputy director of the division of cancer control at the National Cancer Institute, said she considered Swedish snus to be "a form of smokeless tobacco," which, in general, she said, is generally "linked to mouth cancer."

She said studies done in the 1990s showed that users of Swedish snus in the 1970s faced a twofold increase in the risk of oral cancer. How much to rely on those studies now is unclear, she said, given that the company has reduced the cancer-causing nitrosamines in snus.

"Swedish snus in the past has given you cancer, and at the current low levels, I don't know," she said. "There could be some risk there."

That risk is what the F.D.A. is continuing to assess. **MATT RICHTEL AND DAVID JOLLY**

The New Smoke

Articles in this series examine the multibillion-dollar market for e-cigarettes and the consequences for public health. Previous articles in the series are at nytimes.com/businessday

On a Stockholm street, above, a classic sign of a snus user. About 3 percent of Swedish women are now using snus, compared with less than 1 percent in 1988. Below, Martin and Charlotta Davies at home: "Our generation, we were smokers, but now we're more snussers," Ms. Davies said.



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er risk for oral cancer along with a 15 to 30 percent greater chance of lung cancer.

Showing health benefits for the population is trickier. Swedish Match submitted company-funded studies to the F.D.A. suggesting that Americans would adopt snus if the warning label said that using it was less harmful than smoking.

But Dr. Hatsukami doubted that American smokers would switch to snus, no matter what the warning said.

"Snus is a harm-reduction product on an individual basis," she said. "But what we need to think about is what will be the overall effect." She added, "Sweden found that people switched to snus and didn't see it as a gateway to cigarette smoking, but that's in a Swedish environment."

Dr. Hatsukami has a particularly keen view of the American environment. She is conducting several studies on the health effects of snus and users' reaction to it. To do so, she needs research subjects — but merely recruiting volunteers has been a struggle. "There was a 'yuck' factor," she said. "We almost had to market the product to them to get them to engage."

One volunteer, Susan Rothman, said her image of smokeless tobacco was "disgusting, aesthetically, especially for women" and would mean "brownish little drool down the lip." She joined the study for two reasons: She learned that snus wasn't like chew you had to spit, and she wanted to quit smoking. "I'm spending a lot of money to kill myself," she said.

On a recent afternoon, in Dr. Hatsukami's research clinic at the University of Minnesota, Ms. Rothman allowed that snus had grown on her. But although the little packets satisfy Ms. Rothman's nicotine craving, they don't give her the powerful feeling of "nicotine hitting the nerves in my head" that she gets from cigarettes. So she has been unable to give up the first morning cigarette, and she acknowledges smoking several others during the day.

This kind of dual use is exactly what concerns public health officials about harm-reduction strategies. A paper by researchers at the University of California, San Francisco, published in the journal Tobacco Control in 2010, laid out the quandary. "Smokeless tobacco causes less pulmonary disease than cigarettes, so if a smoker immediately and permanently switched to low nitrosamine smokeless tobacco, their risk would be reduced," the paper said. But "snus promotion may encourage uptake among non-tobacco users, lead to smoking, or lead smokers who would have quit to become dual users."

In other words, the paper argued, snus use could lead to greater population harm, not greater health.

Gerry Roerty, the general counsel for Swedish Match in the United States, said the company would face a kind of Catch-22 if, as a requirement for reducing the warning's severity, it had to prove that people would quit cigarettes and switch to snus. "We say, 'What if we tell you that this product is 98 percent safer than a cigarette?'" he said. "Most consumers would say, 'You tell me in a health warning that this causes mouth cancer, and it causes my teeth to fall out. Say whatever you want to me, but unless the government changes its

warning, I'm not buying it.'"

Dr. Hatsukami agreed that consumers need more accurate information. She hoped that the F.D.A., which might make a decision about snus as early as next summer, would allow some change to the warnings, but not necessarily the one Swedish Match wants. For instance, she thinks the label should also warn consumers that risks substantially increase when snus is used with cigarettes. "It's not a good thing for people to be misled into thinking smokeless tobacco is as bad as cigarettes," she said. "People have the right to make informed decisions and, as a result, have to have the right information."

Cigars, Cigarettes and Snus

On a recent afternoon in Richmond, Mr. Roerty sat in his 15th-floor office in the United States headquarters of Swedish Match. He looked out at the James River, where in the 19th century boats loaded with tobacco leaves floated through the heart of the South. Mr. Hildingsson sat in a chair opposite. In the corner was a humidifier packed with cigars made by a company in which Swedish Match has a minority interest.

Given that the company says its mission is to create less harmful tobacco products, Mr. Hildingsson conceded that it was a "fair question" whether it was hypocritical to sell cigars and also distribute cigarettes for other companies in Sweden.

Mr. Roerty's opinion is that cigars are different from cigarettes because they "are not inhaled" — and besides, he said, the cigar business is needed to subsidize the snus effort, "which is currently losing tens of millions of dollars in the U.S." He added: "We use them at political fund-raisers. Members of Congress and the senators smoke cigars, the same ones who say they hate tobacco."

The American snus retail business is puny — perhaps \$200 million for the overall category, versus \$90 billion for cigarettes. Swedish Match had total sales of snus and snuff of about \$700 million in 2013, with more than two-thirds in Scandinavia and most of the rest in the United States.

Invoking these sorts of business realities — putting profits first while saying they have the public interest in mind — might make these executives sound little different from those at tobacco companies whose products they say they want to make obsolete.

But Mr. Abrams, from the Legacy Foundation, says Swedish Match is a different kind of tobacco company, one that stopped making cigarettes and works to limit nitrosamines. "They actually decided to stop selling a lethal product so they wouldn't have a conflict," he said. "That's really something to be said."

Still, Mr. Hildingsson sees a world arrayed against the idea that nicotine addiction should be accommodated.

"The most preventable disease we have in the world is tobacco, perhaps besides sugar," he said, "and imagine that you had the answer and there are so many people who, for political reasons, are proactively working against it."

"We're coming to a point where regulators and politicians need to adjust," he added. "Nicotine will never go away."