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July 25, 2000

Via Federal Express

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

In the Matter of Swisher International, Inc. (No. 002-3199); Consolidated Cigar Corp. (No. 002-3200); Havtampa, Inc. (No. 002-3204); General Cigar Holdings, Inc. (No. 002-3202); John Middleton, Inc. (No. 002-3205); Lane Limited (No. 002-3203); and Swedish Match North America, Inc. (No. 002-3201)

Dear Secretary:

Enclosed please find comments and recommendations submitted by the Tobacco Resource Center, Inc. (TCRC) at Northeastern University School of Law regarding the cigar warning provisions set forth in the proposed Consent Orders being considered by the Federal Trade Commission in the above-named matters.

The Tobacco Control Resource Center, Inc. has been researching legal policy issues concerning cigar regulation since 1999 with support under a grant from the Robert Wood Johnson Foundation's Substance Abuse Policy Research Program. Most recently a TCRC article analyzing cigar warning proposals was accepted for publication by the John Marshall Law School (Patricia A. Davidson, "Cigar Warnings: Proceed With Caution," 33 (3) *John Marshall Law Review* (forthcoming Spring 2000)).

TCRC would be pleased to respond to any questions the Commission or its staff may have regarding the enclosed submission. Please contact Patricia A. Davidson, Staff Attorney, by telephone at (617)373-2733 or via e-mail at pdavidso@lynx.neu.edu.

Thank you for the opportunity to comment on this important national proposal.

Sincerely,

Patricia A. Davidson
Staff Attorney

Enclosure

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The Tobacco Control Resource Center (TCRC) at Northeastern University School of Law appreciates this opportunity to comment on the Consent Orders being considered by the Federal Trade Commission (FTC or Commission) in the above named-matters. We commend the Commission for exercising its authority under Section 5 to investigate unfair and deceptive practices in the cigar industry.

The captioned Consent Orders would establish national warning requirements for certain cigar packaging and advertising for the first time in the United States. At this critical juncture in the development of national policy it is vitally important to develop a comprehensive and effective consumer warning system for cigars.

Cigar smoking causes oral, esophageal, laryngeal and lung cancers.¹ Regular cigar smoking also increases the risk of coronary heart disease, cardiovascular disease and chronic obstructive pulmonary disease.²

¹ See *Smoking and Tobacco Control, Monograph 9, CIGAR: HEALTH EFFECTS AND TRENDS*, (National Institutes of Health; National Cancer Institute (1998) at 19 [hereinafter *Cigar Trends*].

² See e.g., Jean A. Shapiro et al, "Cigar Smoking in Men and Risk of Death From Tobacco-Related Cancers," 92 JOURNAL OF THE NATIONAL CANCER INSTITUTE 333, 335 (Feb. 16, 2000); Eric Jacobs et al., "Cigar Smoking and Death From Coronary Heart Disease in a Prospective Study of U.S. Men," 159 ARCHIVES OF INTERNAL MED. 2413 (Nov. 8, 1999); Carlos Irabarren et al., "Effect of

The glamorization and advertisement of cigars during the 1990's fueled a concurrent, sharp increase in the cigar sales throughout the United States.³ This troubling consumption trend, which reversed a 30 year decline in cigar smoking, has enticed many new cigar smokers, including younger men, women and adolescents.⁴

Recommendation: Applying lessons learned from the U.S. experience with cigarette and smokeless tobacco warnings and emulating the bolder tobacco warnings recently adopted by other nations (e.g., Canada; Australia) will assist the Commission to achieve its goal of informing the public about the specific health risks of cigar smoking. To that end TCRC submits the following comments and suggestions to modify the cigar warning requirements contained in the Consent Orders.

1. Increase the Size of the Warnings on Cigar Packaging and in Cigar Advertising

Parts II and IV of the proposed Consent Orders set forth a series of detailed requirements for the size of warnings to be placed on cigar packages and advertisements. Health warnings will occupy only 8-15% of the surface area of certain cigar packaging and advertisements under the proposed Consent Orders. Warnings of this size are not likely to satisfy the Commission's stated goal of requiring "clear and conspicuous" health warnings on cigar packages and advertising.

Research shows that larger warnings on tobacco products are most effective.⁵ A study of the Australian warnings, which cover 25% of tobacco packaging, concluded an increase in the size of warnings may be the most effective change. Another study of the Australian warnings suggests that larger warnings may decrease the attractiveness of tobacco packaging to adolescents.⁶ In that study three times as many (75%) of the teenagers tested said they would "least like to be seen" carrying a pack with warnings occupying 25% of the packaging. As those (25%) who said they would least like to be seen with a pack featuring a warning covering only 15% of the surface.⁷

Cigar Smoking on the Risk of Cardiovascular Disease, Chronic Obstructive Pulmonary Disease, and Cancer in Men" 340 NEW ENGLAND JOURNAL OF MEDICINE 773 (June 10, 1999).

³ 1993-1998 were peak consumption years, with sales of large premium cigars beginning to flatten in 1998. See *Cigar Trends* at 1-2. See also FEDERAL TRADE COMMISSION REPORT TO CONGRESS, CIGAR SALES AND ADVERTISING AND PROMOTIONAL EXPENDITURES FOR CALENDAR YEARS 1996 AND 1997, p. 9, n. 15 (July 1999) [hereinafter "*FTC Cigar Report*"].

⁴ *Cigar Trends*, at 21-53.

⁵ See e.g., Ron Borland, David Hill, "Initial Impact of the New Australian Tobacco Health Warnings on Knowledge and Beliefs," 6 TOBACCO CONTROL 317-325 (1997).

⁶ Ron Borland & David Hill, "The Path to Australia's Tobacco Health Warnings," 92 (9) ADDICTION 1151-1157, at 1153-1154 (1997).

⁷ *Id.* at 1154

Recommendation: TCRC recommends that the Commission modify the proposed Consent Orders by increasing the size of the required warnings. For example, the Commission could follow the Massachusetts model, which called for cigar packaging warnings to occupy at least 25% of the front or top of cigar packages⁸ and 20% of the advertising area.⁹

2. Require All Cigar Advertising to Carry Health Warnings

The proposed Consent Orders carve out a number of exceptions for cigar advertising. First and foremost, cigar advertising is only subject to the warning requirements if it is paid for, at least in part, by one of the respondents.¹⁰ This is a potentially wide loophole that for example, appears to permit Internet advertisers and retailers (other than the named respondents) to advertise cigars on-line without health warnings.

A recent study published in the *American Journal of Public Health* concluded that on-line cigar advertising is both pervasive and particularly attractive to adolescents.¹¹ The Commission's expressed intent to require health warnings on Internet and other forms of electronic cigar advertising is thus both laudable and appropriate.¹² However, this important objective could be thwarted if warning requirements are limited to Internet cigar advertising paid for by the seven respondents.

Indeed the FTC recognized that cigar advertising data reported in its 1999 Cigar Report (based on expenditures by the five leading U.S. cigar manufacturers) probably underestimated spending on Internet cigar advertising.

"Internet advertising rose almost 180% from 1996 to 1997, from over \$78,000 to over 218,000. Moreover, it is likely that the cigar industry's presence on the Internet is substantially greater than what is reflected in their actual advertising

⁸ 940 C.M.R. 22.04.

⁹ 940 C.M.R. 22.05. A federal appeals court recently invalidated the Massachusetts regulations establishing health warnings on cigar packaging and advertising requirements on narrow Commerce Clause grounds. *Lorillard Tobacco Co. v. Reilly*, 2000 WL 950526 (1st Cir. Mass.) July 17, 2000 at 22-25. But the court clearly stated that the state could revise the warning regulations. *Id.* Furthermore, the decision to strike the regulations was not based on the proposed size of the warnings.

¹⁰ Consent Order, Part VII

¹¹ See Ruth E. Malone & Lisa A. Bero, "Cigars, Youth and the Internet Link," 90 AMERICAN JOURNAL OF PUBLIC HEALTH 674 (May 2000).

¹² See definition 11 of the Consent Order expressly including the Internet, radio, television "and any other electronic advertisement" in its definition of "advertisement". See also Part V, describing the cigar warning display requirements for Internet, radio, television and other electronic advertisements.

expenditures because there may not be costs associated with certain types of indirect promotion."¹³

Other exceptions to the warning in advertising requirements should also be eliminated. For example, the Commission offers no explanation for its proposed exemption for "shelf-talkers" and similar product locators (a foot or less in length) from the requirements that cigar advertisements carry "clear and conspicuous" health warnings.¹⁴

It appears that cigar retailers enjoy several unexplained exemptions from the advertising requirements, through loopholes that may also benefit the respondent manufacturers in the form of increased sales. For example, warnings are not required for audio advertisements "in a retail store or other place where cigars are offered for sale, . . . even if respondent provides an incentive for disseminating the advertisement, so long as the announcement includes only the brand name or product identifier, the price and the product's location in the store."¹⁵ The Consent Orders also feature a special exception for print cigar advertisements disseminated by retailers with display areas of less than four (4) square inches if the ad contains only a brand name, other product identifier and price.¹⁶

Recommendation: Exceptions for on-line cigar advertisers and retailers and point-of sale cigar advertising must be eliminated if the FTC Consent Orders are intended to establish an effective, uniform, national system for warning the public about the health risks of cigar smoking.

3. Effective Warning Messages Must be Periodically Tested and Updated

The proposed Consent Orders do not contain any mechanism for evaluating the effectiveness of the new cigar health warnings before or after they begin appearing on covered packaging and advertising. Indeed to date the FTC has not released any data showing that either the test of the messages or any of the formatting requirements (e.g., size, placement, black and white lettering, rotation plan) are demonstrably effective. Using standard market research techniques to test the cigar warnings could ensure that the messages are actually being heard and understood.¹⁷

¹³ See *FTC Cigar Report* at 4 (emphasis added).

¹⁴ See Consent Order, Part I.

¹⁵ See Consent Order, Part V. B.

¹⁶ See Consent Order, Part VII

¹⁷ See Paul M. Fisher et al., "An Evaluation of Health Warnings in Cigarette Advertisements Using Standard Market Research Methods: What Does it Mean to Warn?" 2 *TOBACCO CONTROL* 279-285 (1993).

The governments of Canada and Australia, which have both recently adopted dramatic new warnings for tobacco products tested their warnings prior to implementation.¹⁸ And post implementation studies conducted for the 1995 Australian warnings show that at least initially consumer awareness of the health risk of smoking increased.¹⁹

Even if the FTC concludes that there is an urgent need to implement the proposed Consent Orders without empirically testing the warnings there is no valid reason to omit a mechanism for post-implementation review and revision. Indeed the FTC has long known that the novelty and effectiveness of tobacco warnings decreases over time and in the past has required periodic review and reports on their effectiveness.²⁰

The proposed Consent Orders create a very narrow opportunity to revise the new cigar warnings by providing that the Consent Orders may be re-opened “to determine whether the size or the format of the warning statements contained herein should be altered or modified” to conform to statutory or regulatory changes in the size or format of the warnings for cigarettes or smokeless tobacco.²¹

This limited review trigger is not adequate to avoid institutionalizing the new cigar warnings, which have not been tested for efficacy. First, few changes have been made to the federal cigarette warning law since it first adopted in 1965.²² And no changes have been made to the smokeless tobacco warning law since it was adopted in 1986.²³

¹⁸ See e.g., “Focus Group Report on Warning Labels for Cigars, Pipes, and Chewing Tobacco,” PN4234, HC-003-155-9728, Prepared for Health Canada – Office of Tobacco Control, Prepared by: Environics Research Group Limited (March 1998); Ron Borland & David Hill, “The Path to Australia’s Tobacco Health Warnings,” 92 (9) ADDICTION 1151, 1157 (1997) describing the 1992 efficacy studies conducted by The Center for Behavioral Research in Cancer. For an excellent summary of the literature regarding the efficacy of tobacco warnings and recommendations for improving U.S. tobacco warnings see “How US Tobacco Product Warning Labels Can Be Improved,” Submitted as Comments to the Federal Trade Commission on the Proposed Amendments to the Smokeless Tobacco Trade Regulation Rule (16 CFR Part 307), by the Massachusetts Department of Public Health, July 2000.

¹⁹ See Ron Borland, “Tobacco Health Warnings and Smoking –Related Cognitions and Behaviors,” 92 (119) ADDICTION 1427–1435 (1997).

²⁰ Federal Trade Commission, Staff Report on the Cigarette Advertising Investigation, Federal Trade Commission, Washington D.C., May 1981. The first federal cigarette warning law built in an expiration date for review and possible revision of the packaging warnings. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, sec. 2, 79 Stat. 282 (codified as amended 15 U.S.C. secs. 1331-40).

²¹ See Consent Order, Part XII (emphasis added).

²² See Pub. L. 89-92. Sec. 4, July 27, 1965, 79 Stat. 283. The major changes occurred in 1970 and 1984. See Pub.L. 91-222, sec. 2, Apr. 1, 1970, 84 Stat. 88; Pub.L. 98-474, sec. 4(a), Oct. 12, 1984, 98 Stat. 2201.

²³ See Pub. L. Pub.L. 99-252, sec. 3, Feb. 27, 1986, 100 Stat. 30.

Second, limiting future modifications to size and format – and requiring that any changes substantially conform to warnings for cigarettes and smokeless tobacco products – provides no incentive and little opportunity for cigar specific warnings to develop and improve over time. For example, the text of cigar health messages would never be changed under Part XIII of the Consent Orders. This is particularly problematic considering the current lack of data on the health effects of occasional cigar smoking.

Moreover, while TCRC lauds the FTC’s attempt to create the first national warning focusing on the risk of environmental tobacco smoke (“ETS”) we view this new and important warning as especially likely to benefit from testing, review and revision over time. We are also concerned that an ineffective ETS warning - coupled with the prospect of regulatory and liability preemption (see discussion below) - could be a set-back instead of a gain for public health.

Recommendation: Scientific review of the effectiveness of the proposed cigar warnings and requirements to periodically test and revise them in the future should be included in the proposed Consent Orders.

4. Narrow Regulatory Preemption

Part X of the proposed Consent Orders purports to preempt conflicting state or local cigar warning requirements. While TCRC appreciates the Commission’s desire to establish a uniform, national warning system we question whether preemption is necessary. Considering the small, relatively inconspicuous size of the proposed warnings, it is difficult to imagine, for example, why a state law requiring cigar manufacturers and advertisers to carry the same messages mandated by the Consent Orders in a larger size (e.g., covering 25% of the packaging and 20% of the advertising area) would be viewed as a conflict by the FTC.

Furthermore, even assuming that preemption of conflicting state or local cigar warning requirements on packaging or advertising covered by the FTC Consent Orders is acceptable, it is not entirely clear that the language of the Consent Order is so limited. The phrase “concerning . . . smoking and health”²⁴ is reminiscent of the broad preemption language of the Federal Cigarette Labeling and Advertising Act (“FCLAA”)²⁵ which has sparked considerable litigation about the scope of state and local authority to regulate cigarette advertising.²⁶

²⁴ See Consent Order, Part X.

²⁵ 15 U.S.C. sec. 1334(b).

²⁶ See e.g., Lorillard Tobacco Company v. Reilly, 2000 WL 960526 (1st Cir. Mass.) (July 17, 2000) (holding that regulations promulgated by the Massachusetts Attorney General restricting outdoor tobacco advertising are not preempted by FCLAA). Cf. Lindsey v. Tacoma-Pierce County Health Dep’t, 195 F.3d 1065 (9th Cir. 1999) *rehearing denied* (March 13, 2000) (holding that similar restrictions on outdoor tobacco advertising adopted by a local board of health are preempted by FCLAA).

Recommendation: Clarifying language should be added to the text of Part X of the Consent Orders expressly stating that state and local authority to adopt and enforce laws restricting the sale, advertising, promotion, use and distribution of cigars is not preempted or affected in any way by the Consent Orders.

5. Disavow Liability Preemption – No Immunity for the Cigar Industry

The Consent Orders are silent on the question of whether the proposed FTC warnings could be relied upon by the cigar industry as protection from lawsuits. This omission must be addressed or the industry could argue that it is immune from litigation on failure to warn related theories.²⁷ Surely the FTC does not intend to confer this type of broad, sweeping immunity.

Recommendation: TCRC recommends that the “no liability” protection language which appears in the federal law establishing national warnings for smokeless tobacco products²⁸ be inserted in the Consent Orders. For example, the Consent Orders could disavow any intent to confer immunity by stating: “Nothing in this Consent Order shall relieve any person from liability at common law or under State statutory law to any other person.”

²⁷ See e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992).

²⁸ See 15 U.S.C. sec. 4406 (c). This disclaimer was added to the federal smokeless warning law under similar circumstances: the smokeless industry was prepared to accept national warnings in order to avoid complying with multiple state requirements. See Richard Kluger, *ASHES TO ASHES, AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORIS*, pp. 561-565 (1996) (describing the development of the smokeless tobacco warnings).