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July 25, 2000

BY FACSIMILE

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attention: Ms. Anne Maher, Assistant Director

**Re: Consent Order with Cigar Manufacturers
FTC File Nos. 0023199-00023205**

To the Federal Trade Commission:

This letter is written on behalf of our client, Davidoff of Geneva (CT), Inc. ("Davidoff") and in response to the proposed Order contained in the Agreement Containing Consent Orders (herein, the "Order") which the Federal Trade Commission (the "FTC") proposes to enter into with (each individually) Swisher International, Inc., Consolidated Cigar Corporation, Havana Tampa, Inc., General Cigar Holdings, Inc., John Middleton, Inc., Lane Limited, Inc. and Swedish Match North America, Inc. This letter is being submitted pursuant to the FTC's public comment period with respect to the Order, ending on July 26, 2000.

Davidoff supports the concept of uniform federal guidelines for warnings regarding the health risks associated with cigar use, and would seriously consider voluntary compliance with such guidelines. However, Davidoff objects to certain provisions of the proposed Order, which are prohibitive in cost and do not take into account certain practical considerations inherent in the industry. We respectfully request your consideration of the following comments.

1. Paragraph 8 of the definitions section of the proposed Order sets forth the definition of "package," which, in subparagraph (b), excludes "any wrapping or container that bears no written, printed or graphic matter." It is customary in the industry to enclose individual cigars in a clear, cellophane wrapping. However, Davidoff's customers have frequently requested that it add the Uniform Product Code and the price

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to the wrapping surrounding individual cigars. According to the proposed definition of "package" in the proposed Order, Davidoff's compliance with such a request would require the addition to the wrapping of the warning statement, even if such wrapper contained no other text or graphic material other than the price and/or Uniform Product Code. *Accordingly, we believe that, consistent with the intent of the proposed Order, subparagraph (b) of the definition of "package" should be revised as follows: "any wrapping or container that bears no written, printed or graphic matter other than the Uniform Product Code and/or the price."*

2. We believe that the proposed definition of "utilitarian item" set forth in Paragraph 10 of the definitions section of the Order is too broad and could be construed to impose the labeling requirement of the Order on non-cigar related utilitarian items which bear a logo which is also used in connection with the manufacture and sale of cigars.

A manufacturer of cigars may use certain logos for a broad range of products, some of which are cigars or cigar-related and others of which are completely unrelated to cigars or cigar smoking. A significant portion of Davidoff's business involves fragrances, jewelry, leather goods and fashion accessories. For example, the Davidoff logo appears on the container of a fragrance that, in addition to being the largest selling fragrance in Europe, has significant sales in the United States. In this case, the use of the Davidoff logo is in no way related to the sale or promotion of cigars or cigar-related products. Yet the proposed definition of "utilitarian item" is capable of being interpreted to require warning labels on containers of the fragrance due to the use of the Davidoff logo. Requiring a company, because of the presence of one of its logos, to place a warning statement on utilitarian items which have no connection with cigars or cigar smoking would place that company at a competitive disadvantage, thoroughly confuse consumers and does not further the purposes of the proposed Order.

The definition of "utilitarian item" should be revised to explicitly state that a cigar manufacturer's brand name or logo used on a utilitarian item is not in itself sufficient to subject the item to the labeling requirements of the proposed Order. With respect to a cigar manufacturer's brand name or logo used on a utilitarian item, the proposed Order should require a warning label on utilitarian items only when the purpose of the cigar manufacturer's brand name or logo is clearly intended to promote or sell cigars or cigar related products.

3. Paragraph II.B of the proposed Order requires that the warning statement be printed in black against a white background. However, 15 U.S.C. 1333 ("Section 1333"), with regard to warning labels on packages of cigarettes and in advertising for cigarettes, requires only that each label be "in conspicuous and legible type in contrast by

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typography, layout, or color with all other printed material" on the package or in the advertisement (15 U.S.C. 1333(b)(1) and (2)).

The standard set forth in Section 1333 applied to cigar manufacturers would be sufficient to promote the purposes of the Order while avoiding unnecessary overregulation. Warning statements in accordance with Section 1333 would maintain the "clear and conspicuous" standard for warning labels set forth in Paragraph II of the Order. It is not necessary to require that warning statements be printed in black against a white background to comply with the spirit of the Order. Further, there is no reason to regulate beyond what is necessary to realize the intent of the Order. Cigar manufacturers should be given the limited discretion set forth in Section 1333 with regard to the color, font and background of the warning statements. *Accordingly, we believe that Paragraph II.B should be revised according to the criteria for the layout of warning statements on packages and in advertisements set forth in 15 U.S.C. 1333(b)(1) and (2).*

4. We believe that the FTC exceeded its jurisdiction and failed to recognize practical considerations inherent in the global economy in Paragraph V.C of the proposed Order. The jurisdiction of the FTC, as an administrative agency of the United States government, is limited to the United States and its territories, a fact the FTC explicitly acknowledges in Paragraph X of the proposed Order, which states that the FTC "intends that this order provide for a uniform, federally mandated system of health warnings on cigar packages and advertisements nationwide. Entry of the order will uniformly provide consumers in all states and territories of the United States with clear, conspicuous and understandable disclosures of the health risks of cigar smoking."

In addition to acknowledging the limits of its jurisdiction, the FTC recognizes practical considerations inherent in a global economy in Paragraph III.F of the Order, which states, "This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States" Although the FTC has the authority to require that the Order be applicable to all cigars manufactured within the United States, regardless of whether they are ultimately distributed outside the United States, it has chosen to exclude those cigars manufactured inside and exported outside its jurisdictional boundaries. The rationale behind this exception to the applicability of the Order can only be based on the recognition of the FTC's jurisdictional limitations and the impracticalities of requiring cigar manufacturers to send cigar-related products with warning statements into unregulated marketplaces.

However, the FTC fails to recognize its jurisdictional limitations and the practical considerations inherent in the global Internet economy. Paragraph V.C of the proposed Order states that "in advertising in an interactive electronic medium such as the Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page ..." Given the global reach

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of an Internet web site, that is, the fact that web sites may be accessed by individuals anywhere in the world and created by companies in foreign countries and accessed in the United States, it is impractical for the FTC to require that all Internet advertising be subjected to the Order.

In such a case, advertising campaigns geared towards European or Asian consumers appearing on a web site would be required to contain the warning statements set forth in the Order because American consumers could also access the web site. In addition, U.S. cigar manufacturers could be considered liable for the acts of their foreign affiliates or licensees which create web sites geared toward consumers in their home countries and which the U.S. cigar manufacturers may not control.

The provision contained in the proposed Order quoted above with respect to the inclusion of warning statements on Internet web pages lacks the jurisdictional and practical considerations contemplated by the FTC in exempting from the Order cigars manufactured inside but exported outside the U.S. and, therefore, ignores the realities of the global Internet economy. *The provision should be revised and made applicable only to advertising campaigns on the Internet geared toward American audiences or web sites originated within the United States by U.S. cigar manufacturers.*

5. Paragraphs VIII.A and IX.B of the proposed Order permit a deviation in the rotation of the five warning statements on packaging and in advertisements of four percent (4%) or less in a 12-month period. However, we believe this provision is unnecessary as the remaining portions of Paragraphs VIII and IX provide sufficient guidelines to ensure that the warning statements are systematically rotated.

Both paragraphs require that the warning statements be displayed "in as equal number of times as possible" in each 12-month period, that warning statements in advertisements be rotated every three months in an alternating sequence, and that cigar manufacturers submit a plan to the FTC which demonstrates compliance with these provisions of the Order. In addition, in the event of any questions regarding a cigar manufacturer's compliance with the rotation of label statements required by the Order, Paragraph XI (among other things) places the burden of demonstrating compliance upon the cigar manufacturer.

These provisions provide ample guidance and incentive to ensure that warning statements are properly rotated by cigar manufacturers. Instituting the computerized systems required to monitor the rotation of the warning statements within a margin of error of four percent, however, would be cost prohibitive to cigar manufacturers, especially for smaller companies such as Davidoff. In addition, cigarette manufacturers are not subjected to such a stringent measurement of deviation with

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respect to cigarette warning statements. *The four percent (4%) deviation measurement is unnecessary, cost prohibitive and unfair, and should be removed from the Order.*

6. As mentioned above, Paragraph IX.B of the proposed Order permits a deviation of four percent (4%) or less in the rotation of the five warning statements in advertisements in a 12-month period. In the event that the FTC disagrees with our view set forth above that this rule should be removed from the Order completely, it should be deemed inapplicable with respect to cigar manufacturers that advertise infrequently.

For example, most of Davidoff's advertisements are displayed less than 25 times per year. If an advertisement were displayed 25 times in a 12-month period, Paragraph IX.B as currently written would allow a total deviation in the rotation of the warning statements of one advertisement (4% of 25) per such 12-month period. Such a slim margin of error is too difficult for any business to be reasonably expected to adhere to. It is not uncommon for larger cigar manufacturers to display their advertisements for their brands of cigars thousands of times per year. Even taking a conservative estimate of 1,000 displays in a 12-month period, Paragraph IX.B would permit a deviation of 40 advertisements (4% of 1000) per such 12-month period, a more achievable standard to adhere to.

Advertising campaigns that display advertisements infrequently, perhaps less than 500 times per year, should be declared exempt from the four percent (4%) deviation standard of Paragraph IX.B. The paragraph should be revised accordingly. The remaining provisions of Paragraph IX, which set the standards for the rotation of the warning statements in advertisements, are sufficient to ensure proper rotations.

7. Paragraph XII of the proposed Order provides that the cigar labeling and advertisement requirements of the Order shall become effective 180 days after issuance of the Order. Paragraph XII.A modifies the foregoing by creating a grace period for cigars distributed prior to such date by providing that the cigar labeling requirements of the Order shall not apply to cigars distributed in commerce for retail sale prior to 180 days from the date of issuance of the Order.

However, in determining the length of time of the grace period, the FTC does not take into consideration the common industry practice of storing a one-year or more supply of cigars in warehouses while such cigars age. For example, Davidoff has inventory constituting several years' worth of packaged cigars currently stored in warehouses, both in the United States and abroad, for such purpose. It would be cost-prohibitive and impractical to add warning labels to the thousands of cigars already packaged in storage that are ready for shipment. *Accordingly, the Order should take into account standard industry practice and increase the grace period provided for in Paragraph XII.B to a minimum of one year.*

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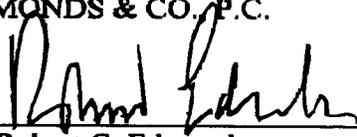
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8. Paragraph XIV of the proposed Order requires cigar manufacturers to maintain a sample copy of all advertisements covered by the Order for five (5) years from the last date of dissemination of each advertisement. However, many advertisements, such as billboards and retail displays, are large or cumbersome, and storage of such advertisements for any amount of time, especially a significant amount of time such as five years, would be costly and awkward. *Storage of photographs of any such advertisements should be sufficient to comport with the spirit of the Order and the Order should be revised accordingly.*

We would appreciate serious consideration by the Federal Trade Commission of the above comments prior to issuance of the Order and appropriate revisions thereto. Any questions on our comments may be directed to Robert C. Edmonds or Scott F. Brown at this firm.

Very truly yours,

EDMONDS & CO. P.C.

By: 

Robert C. Edmonds

cc: Ms. Eva Kaufman, Davidoff of Geneva (CI), Inc.
Scott F. Brown, Esq.