

Complaint

IN THE MATTER OF

SWISHER INTERNATIONAL, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3964; File No. 0023199
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Swisher's cigar advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White, and BE.*

For the Respondents: *Andrew L. Zausner and Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Swisher International, Inc., a corporation ("respondent@), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Swisher International, Inc., is a Delaware corporation with its principal office or place of business at 459 East 16th Street, Jacksonville, FL 32206-3063.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including cigars.

Complaint

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. In its advertising, labeling, and sale of cigars, respondent has failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs. These facts would be material to consumers in their purchase and use of the product. Respondent's failure to disclose these facts has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Therefore, the failure to disclose these facts was, and is, an unfair or deceptive practice.

5. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this eighteenth day of August, 2000, has issued this complaint against respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

IT IS HEREBY AGREED by and between, by its duly authorized officers, and counsel for the Federal Trade Commission that:

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

Decision and Order

1. Respondent, Swisher International, Inc., is a Delaware corporation with its office or principal place of business located at 459 East 16th Street, Jacksonville, Florida 32206-3063.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "respondent" shall mean Swisher International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. ' 44.
3. "Cigar" shall mean any roll of tobacco wrapped in leaf tobacco or wrapped in any other substance containing tobacco, other than a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.
4. "Little cigar" shall mean any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C.1331, et seq.) and as to which one thousand units weigh not more than three pounds.
5. APremium cigar@ shall mean a hand-rolled cigar that is wrapped in a natural tobacco leaf wrapper.
6. "Commission" shall mean the Federal Trade Commission.

Decision and Order

7. "Brand" shall mean cigars that bear a common identifying name or mark, regardless of whether the cigars are differentiated by type of product, size, shape, packaging, or other characteristic, and, in the case of generic or private label cigars, means all cigars produced or imported by respondent or its affiliates.
8. "Package" shall mean any pack, box, carton, tube, can, jar, container or wrapping in which any cigar is offered for sale, sold or otherwise distributed to consumers, but for purposes of this order, package does not include: (a) any shipping container or wrapping used solely for transporting cigars in bulk or quantity to respondent or packagers, processors, wholesalers or retailers unless the container or wrapping is intended for use as a retail display or (b) any wrapping or container that bears no written, printed or graphic matter. Any package that is also used as a point-of-sale display item shall also constitute "advertising" for purposes of this order.
9. "Label" shall mean any written, printed or graphic matter affixed to or appearing on any package containing a cigar, with the exception of any revenue stamp affixed to a cigar or any cigar band with a total surface area less than three (3) square inches.
10. "Utilitarian item" shall mean any item, other than cigars, that is sold or given or caused to be sold or given by respondent to consumers for their personal use, and that display cigar advertising such as a brand name, logo or selling message. Such items include, but are not limited to, matchbooks, lighters, clothing or sporting goods. The term "logo" includes any brand specific characteristics of a cigar, including but not limited to any recognizable pattern of colors or symbols associated with a particular brand.
11. Unless otherwise exempted by specific provision of this order, "advertisement" (including the terms "advertise" and

Decision and Order

"advertising") shall include any oral, written, printed, pictorial or graphic representation made by or on behalf of respondent, the purpose or effect of which is to promote the sale or use of any cigar manufactured or distributed by respondent, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, utilitarian item, sponsorship material, package insert, film, slide, or point of purchase display (including any cigar package that can be used as an open package display or any functional item such as a clock or change mat that includes advertising), any advertising on television, radio, or the Internet, and any other electronic advertisement.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall not fail to disclose clearly and conspicuously and in the manner set forth in this order one of the following statements on all cigar labels and, unless otherwise exempt from disclosure by this order, in all cigar advertisements:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

Decision and Order

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Provided, however, that the warning statement requirements shall not apply to company and divisional names, when used as such; to signs on factories, plants, warehouses or other facilities related to the manufacture or storage of cigars; to corporate or financial reports; to communications to security holders and others who customarily receive copies of these communications; or to promotional materials that are distributed to wholesalers, dealers or merchants but not to consumers, and are not for public display or consumer exposure. In addition, these warning statement requirements do not apply to shelf-talkers and similar product locators with a display area of twelve (12) square inches or less.

II.

IT IS FURTHER ORDERED that for purposes of this order, "clear and conspicuous" disclosure of any warning statement required by this order means that the warning statement shall be set out as follows:

- A. The warning statement shall be capitalized and punctuated as indicated in Part I of this order, with the words "**SURGEON GENERAL WARNING**" printed in uppercase letters in bold print and the remaining words printed with the initial letter of each word in uppercase print and the remaining letters in lowercase print;
- B. The warning statement shall be printed in black against a solid white background. In addition, the warning statement shall appear in two to four lines that are parallel to each other as well to the base of the cigar package or advertisement; and
- C. The language of the warning statement shall appear:

Decision and Order

- (1) For any cigar label, the warning statement shall be set out in the English language. If the label of a cigar contains a required warning in a language other than English, the required warning shall also appear in English.
- (2) For any cigar advertisement, the warning statement shall be set out in the English language, except as follows:
 - (a) In the case of any cigar advertising in a newspaper, magazine, periodical, or other publication that is not in English, the warning statement shall appear in the predominant language of the publication in which the advertisement appears; and
 - (b) In the case of any other cigar advertising, the warning statement shall appear in the language of the target audience (ordinarily the language principally used in the advertisement).

III.

IT IS FURTHER ORDERED that in the case of any cigar label required by the order to bear a warning statement, the following requirements shall apply:

- A. The warning statement shall be in a clear and conspicuous place on the principal display panel of the label. The principal display panel is the part of a label that is likely to be displayed, presented, shown, or examined under normal viewing conditions. In the case of a rectangular or square cigar package, the principal display panel shall mean the front or top panel of the package, whichever is larger. *Provided, however,* that in the case of a rectangular or square package containing ten or more premium cigars, the warning shall appear on the front or top panel of the package, whichever is the principal display panel. In the case of a cylindrical cigar package, a clear and conspicuous place shall mean along the length of the cylinder and perpendicular to the top and bottom of the cylinder.

Decision and Order

Provided, however, that in the case of any cigar package, the warning statement shall not be deemed to be in a clear and conspicuous place if it:

- (1) appears or is affixed on the bottom of the package;
 - (2) is printed or affixed on the tear line;
 - (3) is printed or affixed on cellophane or any plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); or
 - (4) is printed or affixed in any other location that will be obliterated when the package is opened.
- B. The warning statement shall appear in a clear and conspicuous and legible type and be separated in every direction from other written or graphic matter on the label by the equivalent of at least twice the height of the "W" in the word "WARNING" in that warning statement.
- C. On a rectangular or square cigar package, the warning statement shall appear in the type style Univers 57 Condensed in the following type size in relation to total surface area of the largest panel of the package:
- (1) Surface area of less than 5 square inches
Type size: 9 point
 - (2) Surface area of 5 to less than 10 square inches
Type size: 10 point
 - (3) Surface area of 10 to less than 15 square inches
Type size: 11 point
 - (4) Surface area of 15 to less than 25 square inches
Type size: 12 point

Decision and Order

- (5) Surface area of 25 to less than 40 square inches
Type size: 14 point
 - (6) Surface area of 40 or more square inches
Type size: 16 point
- D. On a cylindrical cigar package, the warning statement shall appear in Univers 57 Condensed type style in the following type size in relation to the lengthwise surface area of the cylinder:
- (1) Surface area of less than 5 square inches
Type size: 8 point
 - (2) Surface area of 5 to less than 15 square inches
Type size: 9 point
 - (3) Surface area of 15 to less than 25 square inches
Type size: 10 point
 - (4) Surface area of 25 to less than 30 square inches
Type size: 12 point
 - (5) Surface area of 30 to less than 40 square inches
Type size: 14 point
 - (6) Surface area of 40 or more square inches
Type size: 16 point
- E. The warning statements required by this order may be affixed to the cigar label by sticker, provided that: the sticker is placed directly on the surface of the package, and not on any cellophane or other plastic film overwrap (with the exception of any package whose label appears only on cellophane or plastic film overwrap); the sticker is permanent (non-removable) and durable; and the warning statement complies with all other requirements of Parts I, II, III and VIII herein.

Decision and Order

- F. Each cigar label shall meet the requirements of this order upon being prepared for distribution in commerce for retail sale, but before it is distributed to be offered for retail sale. In the case of any cigar that is imported, the warning statements may be affixed in the country of origin or after importation into the United States, but shall be affixed before the cigar is removed from bond for sale or distribution. This section does not apply to any cigar that is manufactured, packaged or imported in the United States for export from the United States, if the cigar is not in fact distributed in commerce for use in the United States.

IV.

IT IS FURTHER ORDERED that in the case of any advertisement required by this order to bear a warning statement, except advertisements covered by Part V of this order, the following requirements shall apply:

- A. The warning statement shall appear in a ruled rectangular box with the enclosing rule printed in black, and shall be centered both horizontally and vertically within the rectangular box and separated from any edge of the rule by at least one-half the height of the "W" in the word "WARNING" in the warning statement;
- B. The warning statement shall be in a clear and conspicuous place. For purposes of this part, a "clear and conspicuous place" shall mean a location within the advertisement that is separated from any other written or textual matter or any graphic designs, elements or geometric forms by a distance from the outside rule at least twice the height of the "W" in the word "WARNING" in that warning statement. In addition, the disclosure shall not be positioned in the margin of a print advertisement. *Provided further*, the warning statement shall not be included as an integral part of a specific design or illustration in the advertisement, such as a picture of the

Decision and Order

package, unless at least 80 percent of the area of the advertisement is taken up by a picture of the package.

- C. The size of the warning statement shall be clear and conspicuous and shall be in Univers 57 Condensed type style, with the following outside dimensions and type size in relation to the advertising display area of the advertisement:
- (1) Total area of less than 15 square inches
Border: 2C" by :"
Rule width: 1 point
Type size: 9 point
 - (2) Total area of 15 to less than 65 square inches
Border: 3C" by :"
Rule width: 2 point
Type size: 11 point
 - (3) Total area of 65 to less than 110 square inches
Border: 32" by f"
Rule width: 2 point
Type size: 13 point
 - (4) Total area of 110 to less than 180 square inches
Border: 4C" by 1"
Rule width: 2 point
Type size: 15 point
 - (5) Total area of 180 to less than 360 square inches
Border: 4d" inches by 1C"
Rule width: 2 point
Type size: 16 point
 - (6) Total area of 360 to less than 470 square inches
Border: 5" by 13"
Rule width: 22 point
Type size: 18 point

Decision and Order

- (7) Total area of 470 to less than 720 square inches
Border: 83" by 1 : "
Rule width: 3 point
Type size: 30 point
- (8) Total area of 5 to less than 10 square feet
Border: 11" by 32"
Rule width: 6 point
Type size: 43 point
- (9) Total area of 10 to less than 20 square feet
Border: 1' 4" by 32"
Rule width: 8 point
Type size: 58 point
- (10) Total area of 20 to less than 40 square feet
Border: 2' 8" by 1'
Rule width: 3"
Type size: 12" (Cap Height)
- (11) Total area of 40 to less than 80 square feet
Border: 3' 4" by 1' 2"
Rule width: d"
Type size: 23" (Cap Height)
- (12) Total area of 80 to less than 160 square feet
Border: 5' 8" by 2' 4"
Rule width: : "
Letter height: 32" (Cap Height)
- (13) Total area of 160 to less than 350 square feet
Border: 19' 4" by 7' 4"
Rule width: 1 : "
Letter height: 11" (Cap Height)
- (14) Total area of 350 to 1200 square feet
Border: 20' by 7' 8"

Decision and Order

Rule width: 23"

Letter height:12" (Cap Height)

Decision and Order

- (15) Total area of 1200 square feet or more
 - Border: 27' 4" by 9' 4"
 - Rule width: 3"
 - Letter height: 1' 4" (Cap Height)

D. In determining the outside dimensions, type size and placement of the warning statement in any advertisement in a newspaper, magazine or other periodical that appears on more than one page:

- (1) A double full page or multiple full page advertisement shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement;
- (2) An advertisement that occupies one full page and part of another page shall not be required to have more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the full page on which the advertisement appears; and
- (3) An advertisement that occupies parts of two or more pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement.

E. In determining the outside dimensions, type size and placement of the warning statement on any point-of sale advertisement with curved, irregular or multiple surfaces:

Decision and Order

- (1) In the case of point-of-sale items that are designed to contain products ("merchandisers") such as counter and floor displays, package dispensers, racks and gondolas:
 - (a) Where the merchandiser itself contains no cigar advertising, the merchandiser shall not require a warning statement;
 - (b) Where the merchandiser contains cigar advertising, the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of all of the surfaces containing such advertising;
 - (c) On merchandisers displaying advertising on more than one side, the warning statement shall be placed on the largest side of the item that is visible to the public from its normal viewing position.
 - (d) For merchandiser formats designed and in use as of May 1, 2000 where the height or width of the display panel on which the warning statement must appear is less than the height or width of the border of the warning statement required by Part IV.C of this order, respondent may submit for approval, and the Commission shall approve upon a showing of practical necessity, a warning statement that has an alternative outside border provided that the warning statement has the same rule width, type size and total area as required by Part IV.C.
- (2) In the case of functional items such as clocks, change mats, change trays and welcome signs, the outside dimensions and type size of the warning statement shall be determined by the surface area of that side of the item which contains advertising, unless the advertising is clearly separated from the remainder of the area of that side by clear border lines of a contrasting color and one-quarter inch in width, in which event the size of the

Decision and Order

warning statement shall be determined by the surface area within the border area containing the advertising.

- F. In the case of a cigar package that also can function as a point-of-sale display, such item shall also comply with the advertising provisions of this order. In determining the outside dimensions, type size and placement of the advertising warning statement on such item:
- (1) in the case of a package that itself contains two or more packages of cigars, the item shall comply with the requirements of Part IV.E.1 of this order; and
 - (2) in the case of a package that contains two or more individual cigars, and can function as an open package display:
 - (a) the warning statement shall be placed on the principal display panel of the interior of the package and shall be positioned so that it is visible to the public from any normal viewing position; and
 - (b) the outside dimensions, type size and style of the warning statement shall be determined by the area of the panel on which the statement is placed.
- G. For any catalogue, leaflet, brochure or other non-point-of-sale promotional advertisement that has more than one page:
- (1) An advertisement that occupies up to four pages shall not be required to contain more than one warning, but the outside dimensions and type size of the warning statement shall be determined by the aggregate advertising display area of the entire advertisement and the warning shall appear on the page that contains the greater (or greatest) part of the advertisement; and

Decision and Order

- (2) An advertisement that occupies more than four pages shall be required to contain multiple warnings on alternating pages, with the outside dimensions and type size of the warning statement determined by the twice the advertising display area of the page containing the warning.

V.

IT IS FURTHER ORDERED that in a television, radio, Internet or other electronic advertisement, or any other audio or video advertisement, including but not limited to videotapes, cassettes, discs, films, filmstrips, audiotapes or other types of sound recordings, "clear and conspicuous" disclosure shall mean as follows:

- A. If the advertisement has a visual component, the warning statement shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box format, as specified in Parts IV.A and IV.B above, and its size, duration on the screen and location shall be sufficient for an ordinary consumer to read and comprehend it;
- B. If the advertisement has an audio component, the warning statement shall be announced orally and shall be delivered in a volume, cadence, and location sufficient for an ordinary consumer to hear and comprehend it;

Provided, however, in the case of an audio advertisement in a retail store or other place where cigars are offered for sale, no warning shall be required, 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.

- C. If the advertisement has both a visual and an audio component, the warning statement shall be superimposed on the screen in a rectangular box format and announced orally in compliance with the requirements set out in Sub-parts A and B of this Part V of the order. In addition to the foregoing, in advertising in an interactive electronic medium such as the

Decision and Order

Internet or online services, the disclosure shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials or other similar means.

- D. Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., it shall be unlawful for respondent to disseminate any advertisement for little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

VI.

IT IS FURTHER ORDERED that in the case of advertisements for cigars on utilitarian items:

- A. The warning statements required by this order shall be in a clear and conspicuous and legible type and shall appear within the rectangular box format specified in Part IV;
- B. The warning statement required by this order must be in a clear and conspicuous location on the object. A clear and conspicuous location on the object is one that is proximate to and on the same surface as the cigar advertising, and is visible when the brand name, logo or selling message is visible.
- C. The outside dimensions and type style and size of the warning statement shall conform to the requirements set forth in Part IV.C of this order. For purposes of determining the outside dimensions and type size of the warning statement, the advertising display area for an advertisement on a utilitarian item shall be the visible area on which the advertising appears. For example, the advertising display area for a shirt bearing a brand name, logo or selling message on the front or back is the entire front or back of the shirt, excluding any sleeves.

Decision and Order

For a shirt bearing a brand name, logo or selling message on the sleeve, the advertising display area is the sleeve.

- D. If the cigar advertising appears in more than one location on the utilitarian item, the warning either:
- (1) Shall appear proximate to each area with the advertising;
or
 - (2) Shall appear only once on the item, however, in such case, the advertising display area shall be the aggregate of all the surface areas on which any advertising appears.
- E. The warning statement required by this order must be printed, embossed, embroidered or otherwise affixed to the utilitarian item with a permanence and durability that is comparable to the permanence and durability of the brand name, logo, or selling message. *Provided, however,* that if a product brand name or logo is embroidered on a hat, and a legible warning cannot be embroidered in the proper size due to technological limitations, the warning may be affixed to the hat by another method, so long as its permanence and durability is comparable to that of the brand name, logo or selling message.
- F. For fabric baseball style hats, the warning statement shall appear in the Number 3 size as set forth in Part IV.C of this order.
- G. For those utilitarian items under eight (8) square inches that are viewed predominantly by the user, the warning statement shall be:
- (1) Printed on the package of the item, if the item is disseminated in a package to the consumer. The total surface area of the package shall comprise the advertising display area for purposes of determining the outside dimensions and type size of the warning statement; or

Decision and Order

- (2) Placed in the form of a sticker or decal directly onto the item in the Number 1 warning size as set forth in Part IV.C of this order. The item shall be packaged in such a way to ensure that the sticker cannot be removed before it is received by the consumer.

VII.

IT IS FURTHER ORDERED that all cooperative advertisements paid for, directly or indirectly, in whole or in part, by respondent must bear the required warning. *Provided, however,* in the case of a print advertisement with a display area of four (4) square inches or less, disseminated by a retailer, no warning is required so long as the advertisement contains only the brand name or other product identifier and a price. In addition, no warning is required in the case of certain in-store audio announcements as described in Part V.B of this order.

VIII.

IT IS FURTHER ORDERED that with regard to the rotation, display, and distribution of warning statements on cigar packages, respondent shall:

- A. Display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible on the labels of each brand of the product and distribute the packages randomly in all parts of the United States in which the cigars are marketed.

Provided, however, that for purposes of this order, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a cigar would prevent the five warning statements on the

Decision and Order

package from being distributed evenly in all parts of the United States where the product is marketed.

- B. No later than ninety (90) days after the effective date of this order, respondent shall submit to the Commission or its designated representative for approval a plan that provides for the display of the five warning statements on packages of cigars as required by this order, and comply with the plan as approved. This plan shall be sufficiently detailed to enable the Commission to determine whether the warning statements appear on the package in a manner consistent with the requirements of this order. The equal display requirements may be satisfied by one of the following three methods:
- (1) A plan may satisfy the requirements by providing for the engraving or preparation of cylinders, plates, or equivalent production materials in a manner that results in the simultaneous printing of the five required warnings in as near an equal number of times as possible under the circumstances;
 - (2) A plan may satisfy the requirements by providing for the preparation of separate cylinders, plates, and equivalent production materials and requiring that they be changed at fixed intervals in a manner that results in the display of the five required warnings in as near an equal number of times as possible under the circumstances during a one-year period; or
 - (3) A plan may satisfy the requirements by providing that stickers bearing the five required warnings be printed in equal numbers and affixed randomly to packages of the product.

Provided, however, nothing in this part of the order requires the use of more than one warning statement on the label of any brand during any given part of the 12-month period except for a cigar package that also functions as a cigar display (which

Decision and Order

must also comply with the advertising requirements of this order).

- C. A plan for the rotation, display, and distribution of warning statements on cigar packages shall include representative samples of labels with each of the five warning statements required by this order. This provision does not require submission of a label with each of the required warning statements for every brand marketed by respondent, and shall be deemed to be satisfied by submission of labels for different types of cigars, and a range of cigar package sizes for each type of product.

IX.

IT IS FURTHER ORDERED that with regard to the rotation, display, and dissemination of warning statements in cigar advertising:

- A. Except as specified in sub-part B. herein, respondent shall rotate each of the five warning statements required by this order every three (3) months in an alternating sequence in the advertisement for each brand of cigar. *Provided, however,* that any rotational system may take into account practical constraints on the production and distribution of advertising.
- B. On merchandisers, utilitarian items, and cigar packages that can function as open package displays, respondent shall display each of the five warning statements required by this order randomly in each twelve (12) month period in as equal a number of times as possible, and distribute such merchandisers, utilitarian items, and cigar packages randomly in all parts of the United States in which they are disseminated.

Decision and Order

Provided, however, that for purposes of this sub-part, the phrase "as equal a number of times as possible" shall permit deviations of four (4) percent or less in a 12-month period.

Provided further, that the term "random distribution" shall mean that nothing in the production or distribution process of a merchandiser or cigar package than can be used as an open package display would prevent the five warning statements on such display items from being distributed evenly in all parts of the United States where they are disseminated.

- C. No later than ninety (90) days after the effective date of this order, respondent shall submit a plan to the Commission or its designated representative for approval that ensures that:
- (1) On all types of cigar advertising, except those specified in sub-part B herein, the five warning statements are rotated every three months in alternating sequence, and that respondents comply with the plan as approved. This rotational warning requirement may be satisfied by requiring either that all brands display the same warning during each three-month period or that each brand display a different warning during a given three-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each three-month period during the first fifteen (15) month period for each brand. The plan also shall describe the method that will be used to ensure proper rotation in different advertising media in sufficient detail to ensure compliance with the order. For advertising in newspapers, magazines, or other periodicals, the method of rotation shall be set either according to the cover date or the closing date of the publication. For posters and placards, the method of rotation shall be set according to either the scheduled or actual appearance of the advertising. The method of rotation for point-of-sale and non-point-of-sale promotional materials such as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items shall be set according to either the date the materials or objects are ordered or the date on which the

Decision and Order

objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

- (2) On merchandisers, utilitarian items, and cigar packages that can function as open package displays, each of the five warning statements required by this order is displayed randomly in each twelve (12) month period in as equal a number of times as possible.
- D. A plan for the rotation, display, and dissemination of warning statements in cigar advertising shall include a representative sample of each of the five warning statements required by this order. This provision does not require the submission of all advertising for each brand marketed by respondent and shall be deemed to be satisfied by submission of actual examples of different types of advertising materials or acetates or other facsimiles indicating the warning statements as they would appear in advertisements of varying sizes.

X.

IT IS FURTHER ORDERED that the Commission 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. The Commission shall consider a state or local requirement for the display of different warnings concerning cigar smoking and health to be in conflict with the requirements of this order, but only to the extent that any such provision requires that the state or local warning appear on any package or advertisement required to display the Federal warnings set forth herein.

XI.

Decision and Order

IT IS FURTHER ORDERED that respondent shall be deemed to be in compliance with this order if it has taken reasonable steps to:

- A. Provide, by written contract or other clear and prominent instructions, for the rotation of the label statements required by this order;
- B. Give clear and prominent instruction and, to the extent possible, furnish materials (such as film negatives, acetates or other facsimiles) for the production of cigar packages and advertising that contain the required warning statements; and
- C. Prevent and correct mistakes, errors or omissions that have come to its attention.

Provided, however, that in the event of the distribution of labels or the publication of advertisements that do not conform to this order, the burden of establishing that reasonable steps have been taken to comply with this order (including fulfilling the conditions described in this Part of the order) shall rest solely with respondent.

XII.

IT IS FURTHER ORDERED that the cigar labeling and advertising requirements of Parts III through VI of this order shall become effective one hundred eighty (180) days after issuance of the order. *Provided, however,* that:

- A. The cigar labeling requirements of Part III of this order shall not apply to cigars distributed in commerce for retail sale prior to one hundred eighty (180) days from the date of issuance of the order.
- B. The cigar advertising requirements of Parts IV through VII of this order shall take into account practical constraints on respondent with respect to the production and distribution of

Decision and Order

advertising submitted for publication prior to one hundred eighty (180) days from the date of issuance of the order.

Decision and Order

XIII.

IT IS FURTHER ORDERED that in the event the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4401, et seq., or the regulations implemented thereunder, 16 C.F.R. 307, et seq., are amended or modified to change the size or format of the warning requirements for the labeling or advertising of cigarettes or smokeless tobacco, respectively, such action shall constitute sufficient changed conditions to reopen this order to determine whether the size or the format of the warning statements contained herein should be altered or modified to conform to the same or similar size or format.

XIV.

IT IS FURTHER ORDERED that respondent and its successors and assigns, for five (5) years after the last date of dissemination of any cigar label or advertisement covered by this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including, but not limited, to a sample copy of each advertisement and label disseminated during such time.

XV.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

XVI.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by the Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XVII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, at such times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Analysis to Aid Public Comment

Analysis of Proposed Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, agreements containing consent orders from the following cigar manufacturers, importers or marketers:

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

The proposed consent orders have been placed on the public record for thirty (30) days for the receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the agreements' proposed orders.

Background

In July 1999, the Federal Trade Commission provided a Report to Congress, entitled Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 ("Commission Report"). The Commission Report recommended that, given the significant increase in cigar smoking prevalence in recent years and the serious health risks posed by cigar smoking,¹ cigars should be regulated in a manner consistent with the current regulation of cigarettes and smokeless tobacco. See Federal

1 See U.S. Department of Health and Human Services, National Cancer Institute, Smoking and Tobacco Control Monograph No. 9 Cigars: Health Effects and Trends (1998), NIH publication no. 98-4302 (ACigar Monograph@).

Analysis to Aid Public Comment

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.; Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 et seq. The Commission Report recommended that Congress either enact legislation to require federal health warnings on cigar labeling and advertising or direct the Commission to use its existing authority, under Section 5 of the Federal Trade Commission Act, to require cigar health warnings.

In November 1999, in the Joint Explanatory Note of the Conferees to H.R. 3421 Appropriations Bill, the Congressional Appropriations Committees responded to the Commission Report by directing the FTC to report back to the Committees on Commission plans to establish “uniform Federal health warning label[s].”²

After consideration of the National Cancer Institute’s findings in its Cigar Monograph on the serious health risks of regular cigar use, and the failure of cigar advertising and labeling to disclose these health risks, the Commission negotiated consent agreements with the seven largest cigar companies to implement health warnings on cigar labeling and advertising nationwide.³

The Proposed Complaints and Orders

The proposed complaints each allege that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. Part I of the proposed orders requires the respondents to make a clear and conspicuous disclosure of the following warning statements on cigar labels and in advertising:

² 145 Cong. Rec. H12230-02 (daily ed. Nov. 17, 1999).

³ Like all FTC consent orders, these orders are for settlement purposes only and do not constitute an admission by the cigar manufacturers of any law violation.

Analysis to Aid Public Comment

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Part II of the proposed orders sets out specific format requirements for the warnings, which are designed to ensure that the warnings are visible and readable. Part II also requires that the warning statements on labeling and advertising be printed in black print on a solid white background, and be capitalized and punctuated as set forth in Part I.

Part III specifies the location and size requirements for the disclosure of the health warnings on cigar *labels*. The orders require that the warning be displayed on the principal display panel of the package. For the majority of cigar boxes, the orders define the principal display panel to be the larger of the top or front panel of the package, thus ensuring that the warning is in the most noticeable location. The orders make an exception for boxes of premium (hand-rolled) cigars, providing that the warning can appear on the top or front of the box, depending upon which panel is more likely to be seen by consumers.

Part IV sets forth the specific format and size requirements for the disclosure of the health warnings on cigar *advertising*. The orders provide that the warning shall be in black print on a white

Analysis to Aid Public Comment

background and be centered in a black ruled rectangular box. Part IV specifies how to calculate the size of the warning and where to place the warning in various types of advertising, including periodicals, merchandisers, functional items, catalogues and cigar packages that also function as point-of-sale displays.

Part V specifies how to make the required disclosures in audio and video advertisements, including radio, television, the Internet, tapes and films. The orders require that in interactive media, such as the Internet, the warnings must be displayed in an unavoidable manner on every Web page.

Part VI of the proposed orders addresses requirements for the disclosure of the warnings on utilitarian items. Utilitarian items are treated like other advertising, and the warning statements must appear in a rectangular box format, in a size based upon the item's total advertising display area.

Part VII provides that cooperative advertisements paid for in whole or in part by a respondent must include the warnings, with the exception of very small print advertisements containing only brand name and price information.

Part VIII sets forth the specific requirements for the rotation, display and distribution of the warning statements on cigar packages. For each cigar brand, respondents must display each of the five required warning statements randomly in as equal a number of times as possible, and must distribute the packages randomly in all parts of the U.S.A. in which they are marketed.

Part IX provides that, on most types of advertising, the five warning statements shall be rotated in an alternating sequence every three months. Part IX provides for equal simultaneous display of the warning statements on merchandisers, cigar boxes that can function as open package displays and utilitarian items. Parts VIII and IX of the proposed orders also require the companies to submit to the Commission for approval plans for the

Analysis to Aid Public Comment

display of the warnings on cigar packages and advertisements, and to comply with the plans as approved.

Part X of the proposed orders states that the Commission will consider state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warning to be in conflict with the orders.

Part XI provides a safe harbor in the event the companies have taken reasonable steps to assure compliance; in the event of labels or advertisements that do not comply with the order, the proposed respondents will bear the burden of establishing that reasonable steps were taken to comply with the order. This same safe harbor provision is included in the Commission's smokeless tobacco regulations.

Part XII of the proposed orders states that the warning requirements shall become effective one hundred and eighty (180) days after issuance of the order.

Part XIII provides that in the event the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act or the Commission's Smokeless Tobacco Regulations are amended or modified to change the size or format of the warnings for cigarettes or smokeless tobacco, the cigar orders may be reopened to determine whether the size or format of the warnings for cigars should be modified to conform to such changes.

Parts XIV through XVI of the proposed orders contain standard recordkeeping, reporting and compliance requirements.

The proposed orders do not contain a sunset provision due to the importance of the health warnings required therein.

Analysis to Aid Public Comment

Objectives of the Proposed Orders

The Commission's intent in obtaining the proposed consent orders is to provide a uniform national system of health warnings on cigar labeling and advertising. National health warnings that are clear and conspicuous benefit consumers. Here, the cigar warnings will prevent future deception and unfairness by providing important information with which consumers nationwide can make more informed choices.⁴

Each of the five warnings conveys a simple and specific message about health risks associated with cigar use. The orders' requirements for display of the warnings on packaging and advertising will provide sufficient repetition of each warning statement to contribute to long-term recall of each message, while decreasing the likelihood that any one message will become so familiar and overexposed that its effectiveness will "wear out." Together, the five warnings provide a comprehensive warning scheme that provides necessary and important information to consumers nationwide.

Because the proposed respondents' cigar packaging and advertising is disseminated in the national marketplace, a comprehensive national system of simple and direct warnings will provide the greatest benefits to consumers. Moreover, multiple, and potentially inconsistent, warnings on individual packages or advertisements could neutralize or negate those benefits. Such multiple warnings may be confusing to consumers and undercut the saliency of the warnings required by these consent orders. Further, they are likely to have the unintended effect of making it more difficult for consumers to process the warning messages required here. And, while diminished effectiveness could result when *one* state mandates additional warnings on packages or

4 Uniform national health warnings likewise benefit national competition. Multiple different warnings can raise costs and regulatory burdens for national marketers such as the proposed respondents.

Analysis to Aid Public Comment

advertisements bearing the Commission warnings, the problem will be exacerbated if more than one state imposes requirements applicable to a single package or advertisement.

In light of the important benefits from a national warning system, Part X of the Commission's orders preempts state or local requirements for different health warnings on any cigar labeling or advertising that is required to display the FTC warnings. At the same time, the Commission recognizes the critically important role that states play in consumer protection and tobacco control. The provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by the proposed orders (such as shelf talkers under a certain size), or state or local restrictions on advertising placement or youth access to tobacco products are not affected. It is the Commission's intent that this provision apply only to state requirements for different health warnings by companies who have entered into the FTC consent orders, and only to packages and advertising required to contain the federally-mandated warnings.

The purpose of the analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way the terms therein.

Complaint

IN THE MATTER OF

CONSOLIDATED CIGAR CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3966; File No. 0023200
Complaint, August 18, 2000--Decision, August 18, 2000

This consent order addresses Consolidated Cigar's advertising. The complaint alleges that the failure to disclose that regular cigar smoking can cause serious adverse health effects is both unfair and deceptive in violation of Section 5 of the FTC Act. The consent order requires the respondents to make a clear and conspicuous disclosure using specified warning statements on cigar labels and in advertising.

Participants

For the Commission: *Mamie Kresses, Rosemary Rosso, Michael Ostheimer, Anne V. Maher, C. Lee Peeler, Marc Winerman, Christian S. White, and BE.*

For the Respondents: *Andrew L. Zausner and Peter J. Kadzik, Dickstein Shapiro Morin & Oshinsky.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Consolidated Cigar Corporation, a corporation ("respondent@), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Consolidated Cigar Corporation is a Delaware corporation with its principal office or place of business at 5900 North Andrews Avenue, Ft. Lauderdale, Florida 33309.