U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JAN 14 1993

Stuart M. Pape, Esquire
Patton, Boggs & Blow
2550 M Street, N.W.
Washington, D.C. 20037

Dear Mr. Pape:

This letter responds to your request for a statement by the Department of Justice, pursuant to the Business Review Procedure, 28 C.F.R. § 50.6, of its enforcement intentions with respect to a proposed research joint venture to develop uniform analytical methods for measuring the nicotine and moisture content of various smokeless tobacco products.[1/] We understand that the venture was formed in response to the enactment of the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4403, which requires producers of smokeless tobacco products to file reports as to the nicotine content of their products, and to a request by the Department of Health and Human Services ("HHS") that the companies develop uniform testing methods to report the nicotine and moisture content of their products.[2/]

At present, the only available uniform methods of analysis are those of the Association of Official Analytical Chemists ("AOAC") which you have indicated are antiquated, time consuming and costly, and which cannot be used to test all types of smokeless tobacco products. Consequently, companies have either adhered to the outdated AOAC methods or developed

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1/ Smokeless tobacco products are types of chewing tobacco and snuff, such as loose leaf, plug, twist, and moist or dry snuff.

2/ The Act does not require manufacturers to report on moisture content. HHS, however, has requested this additional information because over time, products lose moisture through the normal drying of tobacco, affecting the measurement of the nicotine content.

their own, more sophisticated tests for nicotine and moisture content. The result has been a lack of uniformity in testing methodology.

To accommodate HHS' request to develop a uniform method of analysis, the joint venture plans on forming a working group, consisting of one or more technical experts from each participating company. The working group will evaluate the methods of testing currently employed by each of the companies and reach a consensus on the best methods for the various smokeless tobacco products, based upon factors such as convenience, costs and efficiency. It is possible new methods of analysis will need to be developed. Once a consensus is reached, the selected methods will be subject to testing, before recommending the selected methods to HHS. Participating companies will bear their own costs of supplying the experts and allocate the costs of the technical work performed in accordance with their size.

Once the joint venture reaches agreement as to the uniform testing methods, it is anticipated that HHS will independently evaluate the methods selected, and barring appreciable problems, seek to require use of these testing methods on an industry-wide basis.

It is our understanding that participation in the joint venture is open to any company that manufactures, packages, or imports smokeless tobacco products into the United States.[3/] To ensure that companies not currently scheduled as participants learn of this opportunity, the joint venture plans to invite participation by advertising the venture in industry trade publications, and by sending letters of invitation to each company that manufactures, packages, or imports smokeless tobacco products in the United States. Further, the joint venture has agreed that appropriate, nonburdensome, cost-sharing arrangements will be offered to the new invitees.

After careful consideration of the information you have provided in your original letter and in response to subsequent requests by the Division, the Department has concluded that is has no present intention of challenging implementation of the proposal on antitrust grounds. The Department would be concerned if the proposal had the purpose or effect of

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3/ At the present time, the participants include the leading smokeless tobacco producers in the United States: Tobacco Company, the Pinkerton Tobacco Company, National Tobacco Company, Conwood Company, R.C. Owen, Helme Tobacco Company, and House of Windsor.

increasing the likelihood that the venture's members could successfully coordinate their interactions, such as by express or tacit collusion, regarding prices or output of smokeless tobacco products. The information to be exchanged among the venture participants, however, will be solely of a technical nature and will be limited to the costs and accuracy of testing methods and equipment. Because the participants will not share or exchange information relating to marketing, product prices, sales, product development, product costs, or other similar information, we have concluded that the joint venture cannot be used to facilitate collusion in the production and distribution of smokeless tobacco products. The Department also considered whether the venture would disadvantage smaller competitors by imposing large research costs on them. We have concluded that appropriate procedures, discussed above, have been adopted to prevent smaller rivals from being unfairly excluded from the operations of the proposed joint venture. In sum, implementation of the venture is unlikely to be anticompetitive and will facilitate a new, standardized means of testing the content of smokeless tobacco not currently available.

This letter expresses the Department's current enforcement intention only. In accordance with our normal practices, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if actual operation of any aspect of the venture proves anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of the letter unless you have requested, or request, that any of the material be withheld pursuant to paragraph 10(c) of the Business Review Procedure.

Sincerely,

J Mark Gidley

J. Mark Gidley
Acting Assistant Attorney General

Enclosure