U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUN 2 1993

Suzanne E. Harley, Esq.
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Suite 2100
Charlotte, NC 28282-8283

Re: Nickel Users Purchasing Association, Inc.

Dear Ms. Harley:

This letter responds to your request of July 13, 1992, as supplemented by your letters of September 1, 1992, and April 27, 1993, for a statement by the Department of Justice, pursuant to the Business Review Procedure, 28 C.F.R. § 50.6, of its current enforcement intentions regarding the formation and proposed activities of the Nickel Users Purchasing Association, Inc. ("NUPA"). NUPA, a for-profit corporation, proposes to negotiate, contract, and arrange for the purchase of primary nickel 1/ both from existing and new sources of supply on behalf of its members, as well as to arrange for reselling, warehousing, storing, insuring and shipping the nickel it purchases. 2/ NUPA would also provide a forum for gathering

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1/ There are two types of primary nickel: Class I nickel, which is commercially pure, unwrought nickel used in super alloys and metals for customers in the resistance heating, automotive specialty, aerospace and nuclear industries; and Class II nickel which includes less pure metallic forms, oxides, and ferro nickel, and is used mainly for the stainless steel industry.

2/ NUPA currently has only three members, all of which purchase Class I nickel, but membership is open to all of the approximately 180 U.S. firms which purchase Class I and Class II nickel. The prospective members produce a variety of end products using a large number of different alloys.

and disseminating general information related to the nickel market.

You have represented that the principal reason for the formation of NUPA is to enable members to negotiate volume discounts for nickel prices to ensure a steady supply of nickel at a relatively stable price. The availability of such discounts should enable NUPA's members to offer lower and more consistent prices on end products. You assert that these benefits are not attainable under current conditions, where pricing patterns have been volatile, due at least in part to the lack of certainty as to demand volume, and speculation in the nickel market which has often inflated prices out of proportion to actual demand. We understand that NUPA, therefore, will enter into longer-term contracts with brokerage houses in order to reduce the volatility of prices in the nickel market, will enter into hedging contracts, and will be able to aggregate purchases.

We understand further that an independent NUPA administrator will negotiate with nickel producers and provide services for daily operations. The administrator will not be an employee of any member and will report to the board of directors, which must approve all contracts. 3/ The negotiations conducted by the independent administrator will be confidential, and NUPA bylaws prohibit any NUPA member from negotiating on behalf of NUPA.

NUPA will keep company-specific or competitively sensitive information confidential, such as the volume of nickel purchased by individual members, contract terms, and all discussions between NUPA and its individual members. In discussions and meetings in which members participate, only publicly available information will be exchanged, legal counsel will be present, and minutes will be maintained. NUPA will not have any part in the purchasing, pricing or marketing of any of its members' products.

In addition, NUPA members will not be obligated to purchase nickel through the association; they will remain free to

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3/ A three-member board of directors elected by the general membership will manage NUPA; the bylaws provide that as many as seven members may serve on the board. While the board members will be representatives of NUPA members, they will not be exposed to confidential information from other members. For example, the contract review function will involve aggregate quantities and prices, not individual ones.

purchase their nickel supply directly from producers. Nor will NUPA require members to purchase any specific quantity. NUPA may, however, request members to make a purchase commitment in order to facilitate brokerage contract negotiations by the independent administrator. Contract commitments between NUPA and nickel producers will be cumulative for all members as a whole.

After careful consideration of the information you have provided, the Department of Justice has concluded that it has no present intention to challenge the proposed activities of NUPA on antitrust grounds. While collective price negotiation is potentially anticompetitive if it results in the exercise of market power by buyers ("monopsony power") over nickel prices in any relevant market, annual United States consumption of nickel represents only approximately 15 percent of what is in actuality a world market in primary nickel. Thus, it is unlikely that it would be profitable for NUPA's members, regardless of which domestic purchasers join NUPA in the future, to restrict usage of nickel in an effort to drive down world nickel prices. Therefore, the Department has concluded that NUPA's proposed conduct would not likely create monopsony power.

The Department also considered whether NUPA's proposal could have the purpose or effect of 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 their products. NUPA has adopted certain procedures designed to safeguard against such anticompetitive efforts, including the use of an independent administrator, the confidential treatment of information, and the fact that NUPA's members will not be obligated to arrange their purchases through NUPA. Although the cost of nickel can represent anywhere from 10% to 70% of the price of finished products, you have represented that the industry average is approximately 25%. Given the number of products and producers, as well as the adoption by NUPA of the procedural safeguards discussed above, the risk that the venture will substantially increase the likelihood of coordinated interaction seems low.

There also appears to be a procompetitive justification for this proposal. Collective price negotiation has the potential to create efficiencies that could result in lower prices for nickel and thus for nickel-based products manufactured by the members.

For the foregoing reasons, the Department has no present intention to challenge the formation or activities of NUPA. In accordance with our normal practice, 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 proposed activities proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions 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 thirty days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the business review procedure.

Sincerely,

John W. Clark
Acting Assistant Attorney General
Antitrust Division