



March 26, 2007

Alcohol and Tobacco Tax and Trade Bureau  
Regulations and Rulings Division  
(Attn: Notice No. 65)  
P.O. Box 14412  
Washington, D.C. 20044-4412  
Attention: Mr. Frank Foote

**Re: Notice No. 65/Tax Classification of Cigars and Cigarettes**

Dear Mr. Foote:

This comment is submitted by John Middleton, Inc. ("JMI") to supplement its comments of January 18, 2007 ("JMI's Initial Comments") related to the *Notice of Proposed Rulemaking: 27 CFR Parts 40, 41, 44, and 45, Tax Classification of Cigars and Cigarettes (2006R-276P); Proposed Rule Total Reducing Sugars Analytical Method; Notice, 71 Fed.Reg. 62506, 62524 (October 25, 2006)* (the "Proposed Rule" or "Proposed Rulemaking").

TTB states in its Proposed Rule summary that the proposed changes to the regulations are intended to address TTB's concerns over the adequacy of the current regulatory standard for distinguishing between cigars and cigarettes. Specifically it states "*These clarifications are intended to reduce possible revenue losses through the misclassification of cigarettes as little cigars.*" 71 Fed. Reg. 62506. The effect of the Proposed Rule is far more sweeping. If adopted, the Proposed Rule would result in the unprecedented reclassification of virtually an entire segment of the large cigar market—JMI's pipe tobacco filled large cigars ("PTCs")—as cigarettes, even though JMI's PTCs have always been recognized by consumers as large cigars.

This result would require JMI's PTCs to be taxed as large cigarettes and subject them to the requirements of the Master Settlement Agreement ("MSA"). This result would be contrary to ATF's and TTB's forty year history of prior classification rulings issued to JMI and JMI's Consent Decree with the Federal Trade Commission ("FTC").

This reclassification of JMI's PTCs as large cigarettes is overbroad, arbitrary and unprecedented. It will result in conflicting interpretations of the same statutory language by different federal agencies, is beyond the requests of the petitions seeking the Proposed Rulemaking and, most importantly, is beyond TTB's authority under the controlling statute.<sup>1</sup> Adoption of the Proposed Rule without modification will result in irreparable harm to JMI as TTB will unilaterally, without request by any of the petitioners, eliminate JMI's PTCs from the U.S. cigar market.<sup>2</sup> JMI's PTCs will become large cigarettes, a class of products which has not existed in the U.S. market since 1995 according to TTB.<sup>3</sup>

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<sup>1</sup> See, National Distributing Company v. United States Treasury Department, 200 U.S. App. D.C. 133; 626 F.2d 997; 1980 U.S. App. LEXIS 18444; 1982-83 Trade Cas. (CCH) P65, 171; 58 A.L.R. Fed. 764 (December 3, 1979).

<sup>2</sup> For forty years, JMI has reasonably relied in good faith on the policy and tax classification rulings of ATF and TTB that JMI's PTCs are cigars and not cigarettes. JMI has made enormous investments in production facilities, the introduction of new PTCs, packaging, labeling, marketing and promotion in reliance on the characterization of its PTCs as cigars. The Proposed Rule's reclassification of all JMI PTCs as cigarettes would cause serious economic harm to JMI as a result of that detrimental reliance. That serious economic harm would include, without limitation, the additional costs resulting from possible MSA escrow assessments, the loss in sales resulting from the confusion to the consumer caused by the change in classification from a cigar to a cigarette, and the inability to compete in the cigarette marketplace which is dominated by mammoth companies whose financial, technical and marketing resources dwarf those of JMI. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988) (Scalia, J. concurring) (a rule is arbitrary or capricious, on grounds of unreasonable "secondary retroactivity," if it is amended "in a manner that makes worthless substantial past investment incurred in reliance upon [a] prior rule"); *Indep. Petroleum Ass'n of Am. v. DeWitt*, 279 F.3d 1036, 1039 (D.C. Cir. 2002) (stating that a secondarily retroactive regulation may be arbitrary or capricious).

<sup>3</sup> Large cigarettes (weighing more than 3 pounds per thousand) have not been manufactured or removed or, to the best of JMI's knowledge, sold in the United States for at least twelve years. See, TTB Tax Paid on Removals of Cigarettes and Little Cigars. See also: "The Straight Dope: How come you never see a Class B cigarette?" at [http://www.straightdope.com/a4\\_148.html](http://www.straightdope.com/a4_148.html).

**SUMMARY OF JOHN MIDDLETON, INC.'S ("JMI") COMMENTS ON THE PROPOSED RULE, PROPOSED RECOMMENDATIONS AND CONCLUSION**

**I. The Rule As Proposed Will Arbitrarily Reclassify All JMI Pipe Tobacco Filled Large Cigars As Large Cigarettes**

For forty years, JMI has manufactured its large cigars filled with pipe tobacco. JMI is the largest producer of pipe tobacco filled large cigars ("PTCs") in the U.S., accounting for 96% of all sales in this category and approximately 23% of the domestic large cigar market. JMI does not now produce, nor has it ever produced, cigarettes, small cigars, or any cigars that contain filler other than pipe tobacco. However, the Proposed Rule will result in the arbitrary reclassification of all JMI's PTCs as large cigarettes.

**II. JMI's Pipe Tobacco Filled Large Cigars Cannot Be Classified As Cigarettes**

The Proposed Rule is contrary to the statutory language of 26 U.S.C. §5702(a) and (b) and completely disregards the Congressional intent of limiting the definition of a cigarette when the wrapper consists of a substance containing tobacco. The statute requires that a roll of tobacco, wrapped in a substance containing tobacco, can only be classified as a cigarette if the product is likely to be offered to, or purchased by, a consumer as a cigarette. TTB may not reclassify cigar products, wrapped in a substance containing tobacco, as cigarettes without evidence that such products are likely to be offered to, or purchased by, consumers as cigarettes. Absent such proof in the Proposed Rulemaking record, and JMI's ability to rebut it, JMI's PTCs may not lawfully be reclassified as cigarettes.

Consumers do not perceive, nor have they ever perceived, JMI's PTCs as cigarettes because there are many objective differences between the two products. These include differences in size, shape, appearance, filler, wrapper, packaging, feel, taste, aroma and manufacturing processes. JMI's PTCs do not resemble cigarettes. Since the introduction of JMI's first PTC in 1967, ATF and TTB have consistently ruled that JMI's PTCs are cigars. FTC has never required that JMI include the statutorily mandated health warnings specific to cigarettes on its PTC packages. Moreover, based on JMI's 2000 Consent Order, FTC has concluded that JMI's PTCs are offered and marketed to consumers as cigars, not cigarettes. As mandated by that Order, JMI's PTCs include health warnings specific to cigars on all its PTCs packages and advertising.

### **III. Proposed Recommendations**

JMI recommends the following modifications to the Proposed Rule. These modifications adhere to the statutory requirements and achieve TTB's stated purpose of its Proposed Rulemaking to establish objective standards that allow it to distinguish between little cigars and cigarettes.

#### **A. DELETE BURLEY AND UNFERMENTED TOBACCOS AS PRIMARY CONSTITUENTS OF CIGARETTE FILLER**

The inclusion of burley tobacco and unfermented tobaccos as primary constituents of cigarette fillers is arbitrary and capricious. TTB has never before classified burley tobacco or unfermented tobaccos as cigarette-type tobaccos. Conversely, it has clearly identified flue-cured and oriental tobaccos as traditional cigarette fillers in ATF Ruling 73-22 ("Ruling 73-22"). Burley-type air-cured tobacco has been a primary constituent of pipe tobacco for hundreds of

years, greatly predating its use in cigarette fillers. By including “unfermented tobaccos” in its definition of cigarette tobacco, TTB has confused a discrete, optional step in the manufacturing process, fermentation, with types of tobacco. Fermentation is to tobacco manufacturing what pickling is to food canning. Given that every type of tobacco in the world, including traditional cigar tobacco, is unfermented when it is grown, harvested and cured, the Proposed Rule literally identifies and, thus, defines every type of tobacco as a cigarette-type tobacco. The inclusion of burley and unfermented tobaccos as a primary constituent for cigarette filler is unprecedented, unsupportable and must be deleted from §40.12(b)(3)(iii).

**B. MODIFY THE PROPOSED TOTAL REDUCING SUGARS STANDARD AND  
CREATE A STANDARD FOR NON-REDUCING SUGARS**

It is impossible to use any measurement of total reducing sugars as a ‘bright-line’ standard for differentiating between all cigars and cigarettes because it does not distinguish between JMI’s PTCs and cigarettes. Specifically, the proposed total reducing sugars standard is fundamentally flawed as TTB did not test JMI’s PTCs. If a sugars standard is to be included in the Final Rule, the whole approach to establishing a sugars standard must be revisited. Necessary modifications include: (i) the standard must be combined with the definition of the primary constituents of cigarette filler and apply only if the primary constituents of that filler, per Ruling 73-22, are flue-cured or Oriental tobaccos; (ii) a total reducing sugars standard must be set at 6.0% to reflect the minimum total reducing sugars found in cigarettes; (iii) a supplemental non-reducing sugars test<sup>4</sup> must be included with the non-reducing sugars standard set at 4.0% to reflect the maximum non-reducing sugars found in cigarettes, consistent with an independent

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<sup>4</sup> A non-reducing sugars test can be run simultaneously with a total reducing sugars test on the same equipment, so no additional time or effort is required and only nominal incremental expense is incurred.

laboratory's test results; and (iv) the total reducing sugars standard must be eliminated from the definition of a cigar as a matter of law.

Taken together, these modifications would provide an objective standard that would classify as cigarettes those products containing, as primary constituents, flue-cured and Oriental tobaccos which have total reducing sugars equal to or greater than 6.0% and non-reducing sugars equal to or less than 4.0%. TTB must modify §§40.12(a)(1)(ii), (b)(2) and (b)(3)(iii) to reflect the foregoing.

**C. REQUIRE CONSIDERATION OF ALL APPEARANCE FACTORS, INCLUDING THE WRAPPER, COLLECTIVELY WHEN CLASSIFYING A CIGARETTE**

TTB should modify §40.12(b)(3) so that when a roll of tobacco is wrapped in a substance containing tobacco, its overall appearance factors, including its wrapper, must be considered collectively when classifying the product as a cigarette. Appearance factors include, but are not limited to, the size, shape, integrated filter, and wrapper of a cigarette. Use of the term "typical" to describe a cigarette's size and shape is insufficient. The actual size and shape of a "typical" cigarette are known and should be specified in the Final Rule. TTB's failure to recognize appearance as including a combination, rather than any one distinct individual factor, is arbitrary and capricious and contrary to the statute. Furthermore, if the product is wrapped in a substance containing at least two-thirds tobacco content, TTB should conclude that its appearance is so cigar-like that the product should not be classified as a cigarette.

#### **IV. Conclusion**

Failure of TTB to adopt the recommendations proposed by JMI will result in irreparable harm to JMI as all JMI PTCs will be reclassified as large cigarettes, a class of products which has not existed in the United States since 1995 according to TTB<sup>5</sup>. Once this occurs, JMI's PTCs become the "typical" large cigarette which, under the Proposed Rule, subsequently results in the wholesale reclassification as large cigarettes all other large cigars with a size and shape similar to JMI's PTCs. In total, JMI estimates that the end result would be to reclassify as large cigarettes 35% of the existing large cigars sold domestically.

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<sup>5</sup> Large cigarettes (weighing more than 3 pounds per thousand) have not been manufactured or removed or, to the best of JMI's knowledge, sold in the United States for at least twelve years. See TTB Tax Paid on Removals of Cigarettes and Little Cigars. See also: "The Straight Dope: How come you never see a Class B cigarette?" at [http://www.straightdope.com/a4\\_148.html](http://www.straightdope.com/a4_148.html).

**JMI'S COMMENTS AND RECOMMENDATIONS  
RELATED TO THE PROPOSED RULE**

**I. JMI's Pipe Tobacco Filled Large Cigars Are Cigars And Not Cigarettes.**

JMI is a manufacturer of pipe tobacco and large cigars filled with its pipe tobacco. JMI is the largest producer of PTCs in the U.S., accounting for 96% of all sales in this category and approximately 23% of the domestic large cigar market. JMI does not now produce, nor has it ever produced, cigarettes, small cigars, or any cigars that contain filler other than pipe tobacco. However, the rule as proposed will result in the arbitrary reclassification of all JMI PTCs as large cigarettes.

**A. OBJECTIVE CRITERIA DIFFERENTIATING JMI'S PIPE TOBACCO FILLED LARGE CIGARS FROM CIGARETTES**

- JMI's PTCs have a different appearance, including a different size and shape, than cigarettes.
- JMI's PTCs are wrapped in reconstituted wrapper which is two-thirds tobacco content, has the tobacco taste, aroma and color characteristics of natural leaf wrapper and does not have the appearance or taste of cigarette paper. Cigarettes are typically wrapped in white paper that contains no tobacco.
- JMI's PTCs are individually wrapped and banded as are most large cigars. To JMI's knowledge, no cigarettes are individually wrapped or banded.
- JMI's PTCs are not sold in 20-packs like cigarettes, and all JMI PTC packages are a different size and shape than cigarette packages. All JMI PTCs are packed in consumer packaging traditionally used for mass market cigars.
- JMI's PTCs are clearly labeled as "cigars" on their packages and are marketed and sold as cigars, not as cigarettes.
- JMI's PTCs look, feel and taste differently than cigarettes.
- JMI's PTCs have a different room aroma than cigarettes.



- JMI's PTCs burn at a temperature about half that of cigarettes, resulting in a cooler, slower burning product.
- The predominant tobacco type used in the filler of JMI's PTCs is different than that used in cigarettes, which gives JMI's PTCs their distinctively different smoking characteristics. The tobacco blend of JMI's pipe tobacco filler is 95% burley tobacco, and the tobacco blend of cigarette filler is approximately 65% flue-cured tobacco<sup>6</sup>.
- The nature and amount of casing sauce added to pipe tobacco is very different than that added to cigarette tobacco. A significant amount of non-reducing sugar (e.g., sucrose) based casing sauce is added to JMI's pipe tobacco, while very little reducing sugar (e.g., fructose and glucose) based casing sauce is added to cigarette tobacco.
- In JMI's finished pipe tobacco filler, casing sauce is approximately 35% of the total weight, while tobacco comprises approximately 65%. In stark contrast, in finished cigarette filler, casing sauce is only about 6% of the total weight, while tobacco comprises approximately 94%. As a result, there is almost six (6) times more casing sauce in JMI's pipe tobacco than there is in cigarette tobacco.
- During the manufacturing process, a significant amount of cigarette tobacco is puffed, or expanded (much like Rice Krispies), to substantially increase its filling power, but nothing similar is done to the pipe tobacco filler used in JMI's PTCs.
- It is impossible to make JMI's PTCs on any cigarette machine. JMI's PTCs are manufactured on proprietary machines that run at less than 10% of the speed of a modern high-speed cigarette machine that produces up to 20,000 cigarettes per minute. JMI's pipe tobacco filler will not run through any cigarette machine because its rough and large cut as well as the large amount of casing sauce cause the filler to jam the machines. Furthermore, the reconstituted wrapper used on JMI's PTCs is too weak and will break at the speed at which any cigarette machine runs.<sup>7</sup>

As a result of these differences in size, shape, appearance, filler, wrapper, packaging, taste, aroma and manufacturing processes, JMI's PTCs are not cigarettes and are not confusingly similar to cigarettes. All of TTB's rule changes, which result in JMI's PTCs being reclassified as cigarettes, avoid the critical statutory issue of whether consumers perceive JMI's PTCs as

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<sup>6</sup> The flue-cured tobacco content consists of leaf, stem and reconstituted tobacco sheet.

<sup>7</sup> See Comment of Sluis Cigar Machinery dated March 2, 2007 (See Exhibit "A" attached).

cigarettes. Consumers do not perceive, and have never perceived, them as cigarettes.<sup>8</sup> TTB has offered no evidence to the contrary. Absent such proof in the Proposed Rulemaking record, and JMI's ability to rebut it, JMI's PTCs may not lawfully be reclassified as cigarettes.

**B. JMI'S PIPE TOBACCO FILLED LARGE CIGARS ARE NOT OFFERED TO, OR PURCHASED BY, CONSUMERS AS CIGARETTES**

26 U.S.C. §5702(a) defines a cigar as "any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (b)(2))." 26 U.S.C. §5702(b)(2) provides that a cigarette means "any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1)." This is the statutory standard by which TTB is required to evaluate JMI's PTCs. TTB must first determine that JMI's PTCs are likely to be offered to, or purchased by, consumers as a cigarette. Since JMI's PTCs have never met this standard, they have always been classified as cigars.

TTB's Proposed Rule would reclassify all JMI PTCs as cigarettes. Since all JMI PTCs weigh more than 3 pounds per 1,000, JMI's PTCs would be classified as large cigarettes under 26 U.S.C. §5701(b)(2). However, according to TTB, no large cigarettes have been manufactured domestically since 1995.<sup>9</sup> As there are no large cigarettes in the market place, it is impossible

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<sup>8</sup> See Comment of Smoker Friendly Stores, dated March 7, 2007 (See Exhibit "B" attached). See Comment of House of Oxford, dated March 6, 2007 (See Exhibit "C" attached). See Comment of Mountain Service Distributors, dated March 24, 2007 available on TTB's website.

<sup>9</sup> Large cigarettes (weighing more than 3 pounds per thousand) have not been manufactured or removed or, to the best of JMI's knowledge, sold in the United States for at least twelve years. See TTB Tax Paid on Removals of Cigarettes and Little Cigars. See also: "The Straight Dope: How come you never see a Class B cigarette?" at [http://www.straightdope.com/a4\\_148.html](http://www.straightdope.com/a4_148.html).

for consumers to perceive JMI's PTCs as large cigarettes, and consequently, TTB cannot conclude that consumers purchase JMI's PTCs as large cigarettes. Therefore, under the clear statutory language, which TTB has no authority to change, JMI's PTCs cannot be classified as cigarettes under any new rules promulgated by TTB.

**C. THE FEDERAL TRADE COMMISSION HAS CONCLUDED THAT JMI'S PIPE TOBACCO FILLED LARGE CIGARS ARE CIGARS AND NOT CIGARETTES.**

Since the introduction of JMI's first PTC in 1967, ATF and TTB have consistently ruled that JMI's PTCs are cigars. Equally significant, FTC considers JMI's PTCs to be cigars and not cigarettes within the meaning of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), adopted in 1965. FTC has never required JMI to include the statutorily mandated health warnings specific to cigarettes on JMI's PTC packages. Moreover, no third party has ever sought to have the cigarette-specific warnings placed on any JMI PTC packaging. Since 1996, JMI has received numerous communications from FTC in connection with FTC's collection of information from JMI on cigars and has referred to JMI as one of the "major domestic marketers of cigars."<sup>10</sup> In light of this history, it is inconceivable that anyone can argue that JMI's PTCs are, or ever have been, likely to be offered to, or purchased by, consumers as cigarettes.

In 2000, JMI, along with the six other largest cigar manufacturers, entered into consent agreements with FTC to place uniform, federally mandated health warnings, specific to cigars, on their cigar packages and cigar advertisements. See In the Matter of John Middleton, Inc., Docket No. C-3968 (the "Order"). For purposes of the Order, a cigar was defined in all substantive respects identically to the definition of a cigar in 26 U.S.C. Section §5702(a).

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<sup>10</sup> September 10, 1997 letter from FTC to JMI.

(“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.”) A cigarette is defined in FCLAA identically to the definition of cigarette in 26 U.S.C. §5702(b). Pursuant to the Order with FTC, JMI is required to place health warnings which specifically refer to cigars on all its cigar packages. The FTC cigar warning labels are clear and compelling evidence that FTC has concluded, under its statutory authority, that JMI’s PTCs are cigars and not cigarettes. The inclusion of cigar-specific warning labels, which are different than cigarette-specific warning labels, on its packages makes it impossible for JMI’s PTCs to be offered to, or purchased by, consumers as cigarettes.

TTB’s adoption of the Proposed Rule will result in inconsistent interpretations of the same statutory language by different governmental agencies and will put JMI in the untenable position of either complying with the interpretations of TTB or those of FTC.<sup>11</sup>

Based on the above, JMI’s PTCs are not offered to or purchased by consumers as cigarettes. Consequently, as a matter of law, they are cigars and must be recognized as such in the Final Rule.

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<sup>11</sup> Section 1334(a) of FCLAA provides that no statement relating to smoking and health other than the federally mandated cigarette health warnings can be required on any cigarette package. Cigarette warning labels would directly conflict with FTC mandated cigar health warning labels JMI currently places on all PTC packages and advertisements.

**II. TTB's Proposal To Define The Primary Constituents of Cigarette Filler Is Arbitrary, Capricious And Overbroad And Must Be Modified.**

**A. THE FINAL RULE MUST DELETE BURLEY AND UNFERMENTED TOBACCOS FROM SECTION 40.12(B)(3)(III)**

In JMI's Initial Comments to TTB, JMI set out a number of fundamental flaws with respect to proposed §40.12. One of the flaws is that burley and unfermented tobaccos are defined as primary constituents of cigarette filler, and such presence is determinative that a roll of tobacco, wrapped in a substance containing tobacco, is a cigarette.

TTB has never before specified burley tobacco or unfermented tobaccos as "cigarette" type tobaccos. In Ruling 73-22, TTB noted that the "... inclusion of flue-cured or aromatic (oriental) tobaccos--which traditionally have been the primary constituents of cigarette filler--can contribute significantly to making a product cigarette-like." Despite TTB's stated intention to incorporate the substance of Ruling 73-22 in the regulations (71 Fed. Reg. 62517), the Proposed Rule contradicts Ruling 73-22 not only by stipulating that burley and unfermented tobaccos are cigarette tobaccos, but also concluding that the inclusion of either as a primary constituent automatically makes the product a cigarette. TTB provides no basis for this conclusion (and JMI knows of none), which represents a significant variation from past practice.

Section 40.12(b)(3)(iii) is so broad that any type of tobacco, wrapped in a substance containing tobacco, could be a cigarette. That result occurs because TTB has confused a discrete, optional step in the manufacturing process – fermentation – with types of tobacco. There are six major types of tobacco grown in the world: flue-cured, burley, dark air-cured, sun air-cured, dark fire-cured, and Oriental. Each of these six broad tobacco types has individual tobacco sub-types which, collectively, number in the hundreds. No tobacco, including traditional

cigar tobacco, is fermented at the time it is harvested and cured. Moreover, every tobacco type grown in the world can be fermented, including flue-cured and Oriental (the two traditional cigarette tobaccos identified in Ruling 73-22). In essence, fermentation to tobacco manufacturing is the same as pickling is to food canning. Under the Proposed Rule, a roll of traditional cigar tobacco left unfermented, and wrapped in a substance containing tobacco, would be a cigarette, not a cigar. By including “unfermented tobaccos” in its definition of cigarette tobacco, TTB literally defines every type of tobacco grown in the world as cigarette tobacco. In contrast to its identification of only two types of cigarette tobacco in Ruling 73-22, TTB now includes hundreds of types of tobacco as cigarette tobacco, including traditional cigar tobacco. This astounding expansion of the definition of cigarette tobacco is arbitrary and capricious. Accordingly, unfermented tobaccos must be deleted from this section of the Proposed Rule.

Burley was known to be a minor constituent of cigarette filler when Ruling 73-22 was issued, yet it was not mentioned in the Ruling, much less considered, as a type of tobacco primarily associated with cigarette fillers. Further, with respect to the types of tobacco a product can possess in its filler, Ruling 73-22 clearly guides those manufacturers intending to make cigars by stating that for a product to be a cigar, the filler must be substantially of tobaccos unlike those in ordinary cigarettes. While “substantially” is not quantified, the clear meaning has to be more than 50%. What is most important to note is that Ruling 73-22 does not specify that only fermented tobaccos are permitted to be used in cigars, but rather explicitly states that a filler of substantially any tobacco type unlike those used in ordinary cigarettes, which it limits to flue-cured and aromatic (Oriental) tobaccos, is acceptable for use in cigars as long as no flavors are added to make the product possess the taste and aroma generally attributed to cigarettes. As

burley tobacco is not included in Ruling 73-22 as a cigarette-type tobacco, it is permissible for use as a primary constituent of cigar filler.

However, TTB's Proposed Rule runs directly counter to this past guidance. Ruling 73-22 does not ban the use of flue-cured and Oriental tobacco types in cigar filler, but provides only that the inclusion of these tobacco types can contribute significantly to a product being cigarette-like. Ruling 73-22 requires that a final determination of a product's cigarette status must include an examination of other factors, such as having a typical cigarette size and shape, having a typical cigarette-type filter, and using a typical cigarette-type package. Under the Proposed Rule, however, TTB has established a bright-line such that the presence of flue-cured and Oriental tobaccos as primary constituents in a product's filler cause the product to be classified as a cigarette.

TTB fails to recognize that the same types of tobacco are routinely used, in varying amounts, to manufacture distinctly different tobacco products. While flue-cured tobacco is used as the primary constituent in cigarette filler, it is also used as a minor constituent in pipe tobacco, pipe tobacco filled cigars, certain traditional cigars, and smokeless products. Similarly, burley tobacco is a primary constituent of pipe tobacco (up to 100% in some brands) even though it is used as a minor constituent in cigarette filler. In fact, the use of burley-type air-cured tobacco in pipe tobacco products predates its use in cigarette filler by hundreds of years.

In drafting §40.12(b)(3)(iii), TTB did not consider the existence of pipe tobacco or JMI's PTCs. If it had, TTB would not have included burley or unfermented tobaccos as tobacco types whose primary presence in the filler of a roll of tobacco, wrapped in a substance containing

tobacco, makes a product a cigarette. By failing to do so, TTB has arbitrarily and capriciously expanded the statutory definition of cigarette tobacco filler and simultaneously limited the statutory definition of cigar filler.

TTB states that the Proposed Rule attempts to “provide clearer and more objective product classification criteria.”<sup>12</sup> It continues, “We propose to incorporate the substance of ATF Ruling 73-22....” in the Proposed Rule. 71 Fed. Reg. 62517. Therefore, in creating a new, objective criterion for cigarette filler under the Proposed Rule, TTB must do so in a manner consistent with Ruling 73-22. Consequently, TTB must modify §40.12(b)(3)(iii) to limit the types of tobacco identified as primary cigarette filler to “flue-cured or aromatic (Oriental) tobaccos--which traditionally have been the primary constituents of cigarette filler...”. (See Ruling 73-22).

Given the broad nature of the Proposed Rule, this “objective” standard, standing alone, will lead to the reclassification of JMI’s PTCs as cigarettes without any consideration of whether or not JMI’s PTCs are likely to be offered to, or purchased by, consumers as cigarettes. As previously noted, TTB has offered no evidence in the record on this critical, indeed indisputable statutory requirement.

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<sup>12</sup> Despite TTB’s professed attempts to promulgate objective standards, many parts of the Proposed Rule are far from objective. See, for example, §40.12(b)(3)(ii), “It has a *typical* cigarette size and shape,” and §40.12(b)(3)(iii) “It ... has a filler material *yielding the smoking characteristics* of any of these tobacco.” {emphasis added}



**B. THE FINAL RULE MUST MODIFY THE PROPOSED TOTAL REDUCING SUGARS STANDARD**

**1. TTB Failed To Appropriately Sample The Cigar Market**

Another criteria in the Proposed Rule is the creation of the new “objective” total reducing sugars standard which is intended to create a “bright-line” when classifying cigars and cigarettes. However, the standard as proposed is fundamentally flawed, because TTB did not test any JMI PTCs in the empirical study used to develop this proposed ‘objective’ standard.<sup>13</sup> TTB confirmed this fact in its letter of March 5, 2007 in response to a JMI Freedom of Information Act request.

The failure to test JMI’s PTCs in developing the Proposed Rule is particularly troubling given:

- (i) that JMI is one of the largest domestic cigar manufacturers,
- (ii) the number of cigar tax class rulings ATF and TTB have issued related to JMI’s PTCs over the last forty years,
- (iii) the level of cigar taxes JMI pays annually, and
- (iv) the information JMI reports to TTB on a monthly basis.

Furthermore, TTB’s failure to test JMI’s PTCs as part of its empirical study runs counter to TTB’s assertion that the cigar products tested in the study were obtained from those

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<sup>13</sup> Basing a rule on inaccurate statistics, in addition to being arbitrary and capricious, violates agency guidelines issued pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, which requires each federal agency to “issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency.” Pub. L. No.106-554 (codified at 44 U.S.C. §3516 Note). Department of Treasury guidelines require that, in the context of scientific or statistical information, the agency must use “sound statistical and research methods” in order to meet the “objectivity” requirement. Sub. Div. Treas., IT Man., Chap. 14 Info. Quality. At 14.4.2. TTB’s failure to select a sufficiently representative cross-section of tobacco products is contrary to sound statistical methods and thus the result of this study cannot be relied upon in this rulemaking.

manufacturers with “the most significant domestic presence.” With approximately 23% of the market, clearly JMI’s PTCs represent a significant presence in the domestic cigar industry.

If TTB had tested JMI’s PTCs, the data would have shown that JMI’s PTCs have, in almost all cases, total reducing sugar levels greater than any cigarette tested in its study. In order to confirm this fact, JMI retained Arista Laboratories (“Arista”), an independent laboratory located in Richmond, Virginia, to test its PTCs. Arista utilized the TTB test procedures to determine the total reducing sugars levels present in JMI’s PTCs. The results of Arista’s tests indicate that the total reducing sugars in JMI’s PTCs range from 10% to 23% (See Exhibit “D” attached). Thus, the use of a total reducing sugars standard of 3.0% as a sole ‘bright-line’ criteria to differentiate between cigars (less than 3.0% total reducing sugars) and cigarettes (total reducing sugars of 3.0% or greater) is unsupportable and invalid. Simply stated, the ‘bright-line’ proposed by TTB does not exist.

If TTB adopts its proposed ‘bright line’ standard, it will reclassify every single JMI PTC as a cigarette based on the high levels of total reducing sugars in JMI’s pipe tobacco cigar filler. Not only will they be reclassified as cigarettes, but they will be large cigarettes under the tax code.<sup>14</sup> The end result of the Proposed Rule, if enacted without modification, will be to arbitrarily and capriciously eliminate JMI’s PTCs from the U.S. cigar market.

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<sup>14</sup> Large cigarettes (weighing more than 3 pounds per thousand) have not been manufactured or removed or, to the best of JMI’s knowledge, sold in the United States for at least twelve years. See TTB Tax Paid on Removals of Cigarettes and Little Cigars. See also: “The Straight Dope: How come you never see a Class B cigarette?” at [http://www.straightdope.com/a4\\_148.html](http://www.straightdope.com/a4_148.html).

**2. TTB Incorrectly Assumed That Only Cigarette Manufacturers Add Sugars During The Manufacturing Process**

TTB is aware that sugars are added during the manufacturing process of tobacco products as noted in the discussion in the Proposed Rulemaking (“...sugar is often added directly to cigarette filler tobaccos to ‘balance’ smoke flavor”). 71 Fed. Reg. 62509. However, TTB erroneously assumed that only cigarette manufacturers add sugar to their filler blends during the manufacturing process. This invalid assumption, coupled with the lack of a proper sampling of the cigar category as part of the empirical study, led directly to the fundamentally flawed Proposed Rule.

Based upon the discussion in the Proposed Rulemaking, TTB intended that the proposed total reducing sugars standard be an infallible indicator of the types of tobacco contained within a filler and, therefore, whether a product is a cigar or a cigarette. However, the analytical test to establish the total reducing sugar percentage of a product is designed by TTB to be performed on the finished product sold at retail to the consumer. By performing the analysis on products sold at retail, TTB’s test fails to distinguish the sugars naturally present in the types of tobacco used in the filler from the sugars which are added during the manufacturing process. TTB acknowledges this shortcoming in its testing procedures by stating in the Proposed Rule that its test for “...total reducing sugars encompasses *all* monosaccharides [reducing sugars] and disaccharides [non-reducing sugars].” 71 Fed. Reg. 62509.

The presence or absence of total reducing sugars in any amount in a tobacco product sold at retail is not necessarily indicative of the filler having cigarette-like characteristics, because it fails to clearly distinguish between pipe tobacco filler and cigarette filler. As such, it fails to be

an objective 'bright-line' criterion to differentiate between JMI's PTCs and cigarettes. TTB had to be fully aware of the fact that pipe tobacco adds sugar during the manufacturing process based on ATF Procedure 90-2 ("Procedure 90-2"). Procedure 90-2 was issued by ATF to "...effectively assist in differentiating between smoking tobacco that has been traditionally considered as 'pipe tobacco' and smoking tobacco considered to be 'roll-your-own tobacco'." A product would be classified, under Procedure 90-2, as either pipe tobacco or roll-your-own cigarette tobacco based upon the measurement of "...different casing materials added to smoking tobacco, with pipe tobacco having heavier casing or saucing additives than roll-your-own tobacco." Primary among the casing or saucing additives is sugar, with pipe tobacco having a much heavier application of sugars during the manufacturing process than roll-your-own tobacco used in making cigarettes. Significantly, ATF concluded in Procedure 90-2 that "...this procedure properly recognizes and applies the definition of pipe tobacco..."

The enormous difference between casing sauces added during the manufacturing processes of pipe tobacco and cigarette tobacco is readily noted by comparing the percentages of casing sauce and tobacco for each product. In finished pipe tobacco filler, including JMI's PTCs, casing sauce is approximately 35% of the total weight, while tobacco comprises approximately 65%. In stark contrast, in finished cigarette filler, casing sauce is only about 6% of the total weight, while tobacco comprises approximately 94%. As a result, there is almost six (6) times more casing sauce in JMI's pipe tobacco than there is in cigarette tobacco.

**3. JMI Pipe Tobacco Filler Is Not Cigarette Tobacco Filler**

Pipe tobacco, the filler used in all JMI PTCs, is statutorily different than cigarette tobacco, a difference clearly understood by Congress when adopting the statutory definitions for these classes of tobacco products.

The term pipe tobacco is defined in 26 U.S.C §5702(n) as:

...any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco *to be smoked in a pipe*. {emphasis added}.

Roll-your-own cigarette tobacco is defined in 26 U.S.C. §5702(o) as:

...any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco *for making cigarettes*. {emphasis added}.

Furthermore, Internal Revenue Service (“IRS”) regulations reflect that these two classes of tobacco products are distinct by requiring different labeling for pipe tobacco than for roll-your-own cigarette tobacco. Beginning in 1989, when an excise tax was imposed on pipe tobacco, but not on roll-your-own cigarette tobacco, JMI paid the pipe tobacco excise tax on all JMI products (excluding its PTCs) since they were classified as pipe tobacco rather than roll-your-own cigarette tobacco. This is clear and compelling evidence that the IRS has concluded that JMI’s pipe tobacco is, in fact, not roll-your-own cigarette tobacco.

This distinction was further confirmed in the 1998 MSA between the several states and the cigarette companies. Section II(m) of the MSA defines a cigarette and states that:

*The term “Cigarette” includes “roll-your-own”* (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). Except as provided in subsections II(z) and II(mm), 0.0325 ounces of “roll-your-own” tobacco shall constitute one individual “Cigarette.” {emphasis added}.

Under the MSA, no state has required JMI to establish qualified escrow accounts for its pipe tobacco, thus recognizing that JMI’s pipe tobacco is not roll-your-own cigarette tobacco. As the Attorney General for the State of Ohio said in a letter dated June 13, 2002: “We are in agreement that John Middleton Incorporated is not required to make escrow payments on your current products under Ohio law, and we trust you will notify us if you do begin manufacturing cigarettes or roll-your-own tobacco.” {emphasis added}. See, Letter from the State of Tennessee Office of the Attorney General to JMI (May 15, 2001) (See Exhibit “E” attached); Letter from Office of Attorney General of the State of Ohio to JMI (June 13, 2002) (See Exhibit “F” attached); and Letter from Office of Attorney General of the State of South Dakota (November 2, 2000). (See Exhibit “G” attached.)

Under the Proposed Rule, TTB ignores the statutory distinction between pipe tobacco and roll-your-own cigarette tobacco by classifying as a cigarette any product, wrapped in a substance containing tobacco, with filler that has a 3.0% or greater total reducing sugars measurement. Thus, the Proposed Rule concludes that a roll of JMI’s pipe tobacco, wrapped in a substance containing tobacco, has cigarette-like characteristics solely because of its total reducing sugars content. This is unsupportable given the statutory distinction between pipe tobacco and roll-your-own cigarette tobacco. TTB reached this erroneous conclusion because it failed to consider that the process of manufacturing pipe tobacco requires the addition of large amounts of sugars

to the tobacco blend. As clearly set forth in Procedure 90-2, it is the much heavier application of casing sauces, resulting in significantly higher sugar content, which makes the filler of a JMI PTC pipe tobacco, not cigarette tobacco.

Historically, TTB has adhered to the statutory distinction between pipe tobacco and roll-your-own cigarette tobacco by consistently recognizing that pipe tobacco filler, in a large cigar, is not cigarette tobacco filler. Therefore, in the case of JMI's PTCs, ATF and TTB have repeatedly ruled that rolls of JMI pipe tobacco, wrapped in a substance containing tobacco, are cigars. These classification rulings include:

<b>Date of Response</b>	<b>Product</b>	<b>Approved by ATF AND TTB As:</b>
February 27, 1967	Middleton's Cherry Blend	Cigars
June 27, 1968	Middleton's Cherry Blend	Cigars
December 27, 1979	Black & Mild	Cigars
September 4/ September 13, 1991	Prince Albert's Traditional Blend Prince Albert's Soft Vanilla Prince Albert's Refreshing Mint	Cigars
October 27, 2004	GreyStone Smooth Vanilla <sup>15</sup>	Cigars

In fact, in the September 4, 1991 letter from ATF to JMI, the concept that the product might be a cigarette was never raised. ATF stated:

...While the filler tobaccos of these products are unique in that they are not typical of other filler tobaccos used in standard cigars currently on the market, we have **determined that these products are cigars**. **This determination is based on our overall analysis and our understanding of the marketing of the products.** {emphasis added}.

Additionally, in its October 27, 2004 letter to JMI, TTB stated: "We found that the wrapper, filler tobacco, and physical appearance of the sample[s] were consistent with that of a cigar."

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<sup>15</sup> GreyStone Smooth Vanilla was the original name for the cigar sent to TTB for confirmation of tax status. This name was later changed to Black & Mild FT. The actual cigar was not changed.

These rulings are all consistent with the statutory definition of a cigar with regard to a roll of tobacco, wrapped in a substance containing tobacco, as each ruling fully contemplated the likelihood of JMI's PTC being offered to, or purchased by, a consumer as a cigarette and concluded such was not the case.

The foregoing shows that IRS, ATF, TTB and the MSA signatory states have long recognized that JMI's pipe tobacco offered to the consumer for use in a pipe is not suitable for use as filler in roll-your-own cigarettes and vice versa. Simply stated, JMI's pipe tobacco is not cigarette tobacco, and cigarette tobacco is not JMI's pipe tobacco. The fillers used in JMI's PTCs are the same pipe tobacco blends as JMI sells in its pouches of pipe tobacco. Consequently, it is contrary to the statutory construction to conclude, as the Proposed Rule does, that the same tobacco product classified as pipe tobacco rather than cigarette (roll-your-own) tobacco when it is packed in a pouch arbitrarily becomes cigarette tobacco when it is wrapped in a substance containing tobacco.

TTB must modify its Final Rule to insure that JMI's pipe tobacco filler, when wrapped in a substance containing tobacco, is not classified as a cigarette by eliminating burley and unfermented tobaccos from §40.12(b)(3)(iii) and by adopting JMI's modifications to the proposed total reducing sugars standard, as set forth below.



**C. JMI'S MODIFICATIONS TO THE PROPOSED TOTAL REDUCING SUGARS STANDARD**

**1. A Total Reducing Sugars Standard Cannot Be A Sole Criterion To Classify A Product As A Cigarette**

The proposal to establish a total reducing sugars standard as an independent criterion for determining if a product is a cigarette is not supported by the statute. The statutory language requires TTB to consider the types of tobacco used in a roll of tobacco, when wrapped in a substance containing tobacco, as a possible indicator of a product's likelihood to be offered to, or purchased by, a consumer as a cigarette. It is impossible to use any measurement of total reducing sugars as a 'bright-line' standard for differentiating between cigars and cigarettes. Thus, the use of a measurement of total reducing sugars contained in the filler of a finished product as the sole criterion for classifying a product as a cigarette does not accomplish this statutory requirement and impermissibly changes the statutory definitions of cigars and cigarettes.

Given the above, the sugars standard should be modified as set forth below so that it accurately distinguishes between cigars and cigarettes based on the consumer's perception of those two products in the market place. Unless modified as recommended, JMI reserves its right to challenge any Final Rule that includes standards for sugars that are part of the means of defining cigars and cigarettes. If appropriate modification is not possible, the total reducing sugars standard should be abandoned.

***a. TTB Should Combine The Proposed Total Reducing Sugars Standard With The Type Of Tobacco In The Filler Criterion***

The statute focuses on the tobacco types used in the filler as a possible reason for a product's likelihood to be offered to, or purchased by, a consumer as a cigarette. As indicated above, this statutory requirement cannot be solely defined by the total reducing sugars content of the filler. Therefore, any objective standard for sugars in a product must be directly related to the filler content of the product. If a sugar standard is to be included in the Final Rule, it must be combined with or made a part of §40.12(b)(3)(iii) which relates to filler content. By combining these two standards into one integrated standard (and eliminating burley and unfermented tobaccos as primary constituents of cigarette filler), TTB will meet the intent of the statute and insure that JMI's pipe tobacco filler, wrapped in a substance containing tobacco, is not unlawfully reclassified as a cigarette.

***b. TTB Should Raise The Total Reducing Sugars Standard To 6.0%***

As of the date of the issuance of the Proposed Rule, TTB had tested 47 out of 140 cigarette products which it had collected. TTB notes that the lowest total reducing sugars level for those cigarettes analyzed was 7.47% and also notes "it is not expected that more data will significantly alter the overall results of the study." 71 Fed. Reg. 62510. To test this assertion, JMI had Arista test the total reducing sugars levels of 139 cigarette products, while JMI tested the total reducing sugars levels of 22 large cigar products manufactured by its competitors.

Based on Arista's preliminary test results<sup>16</sup> and JMI's internal testing, JMI concludes that the most appropriate level for the total reducing sugars standard is 6.0%. JMI found only one competitor's cigar product with a total reducing sugars level above 6.0% (though there were four products above 4.0% and another two above 3.0%), and Arista found only one cigarette product below 6.0%. With the exception of these two outliers, all cigarette products and competitors' cigar products tested satisfy this 6.0% standard.

Therefore, JMI recommends that if the total reducing sugars standard is in the Final Rule, the standard should be set at 6.0%.

***c. If TTB Adopts A Sugar Test, It Must Test For Both Total Reducing Sugars And Non-Reducing Sugars***

JMI's pipe tobacco and, therefore, JMI's PTCs, have high levels of sugars in their fillers. As noted earlier, JMI's pipe tobacco filler is overwhelmingly made from burley tobacco, which is naturally low in sugar content after the curing process. In addition, JMI's pipe tobacco filler is heavily cased with sauces during the manufacturing process, a primary ingredient of which is sucrose, a non-reducing sugar. In contrast, the flue-cured and Oriental tobacco blends that primarily comprise cigarette filler are naturally high in reducing sugars after the curing process and require only very minor additions of reducing sugars during cigarette manufacturing to maintain their product taste and smoking characteristics. This difference between non-reducing sugars and reducing sugars is significant<sup>17</sup> and easily quantified by a complete sugar analysis. Under such an analysis, JMI's PTCs would show measurably higher levels of non-reducing

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<sup>16</sup> As of the date of this comment, Arista's final report was not available. Upon TTB's request, JMI will provide that report to TTB when it is available.

<sup>17</sup> All sugars are either reducing sugars or non-reducing sugars.

sugars than cigarettes. Therefore, a complete, objective sugars standard should include a test for non-reducing sugars to differentiate JMI's PTCs, with their pipe tobacco filler, from cigarette filler.

If TTB decides to retain any total reducing sugars standard, it is absolutely imperative that TTB modify the Proposed Rule to create a supplemental non-reducing sugars standard to account for non-reducing sugars added during the manufacturing process of JMI's pipe tobacco filler. A non-reducing sugars test can be run simultaneously with a total reducing sugars test on the same equipment, so no additional time or effort is required and only nominal incremental expense is incurred. That test would only be necessary to determine whether a product is a cigarette if it exceeds the 6.0% total reducing sugars level.

In order to establish the validity of this supplemental standard, JMI had Arista test the non-reducing sugars levels in 139 cigarette products. Arista's results indicate that the level of non-reducing sugars in all those products is less than or equal to 4.0% (See Exhibit "H" attached). Therefore, consistent with Arista's test results, the non-reducing sugars standard should be set at 4.0%. Consequently, a complete sugars analysis would provide an objective standard that would accurately classify as cigarettes those products containing, as primary constituents, flue-cured and Oriental tobaccos which have total reducing sugars equal to or greater than 6.0% and non-reducing sugars equal to or less than 4.0%.

**2. TTB Does Not Have The Statutory Authority To Impose A Total Reducing Sugars Standard In The Definition Of A Cigar**

The statute does not limit in any manner the type or qualities of tobacco used in the filler of a cigar. Thus, TTB does not have the authority to regulate the type of filler used in a cigar.

For example, under the statute, a roll of cigarette tobacco wrapped in leaf tobacco is a cigar. Yet with regard to a roll of tobacco, wrapped in a substance containing tobacco, the Proposed Rule seeks to modify the statutory definition of cigar by limiting the percentage of total reducing sugars permissible in the filler of that product to be classifiable as a cigar. JMI agrees with TTB's statement in the discussion of the Proposed Rule that the "...statutory definitions of 'cigar' and 'cigarette' are controlling and are not susceptible to modification by regulation." As the definition of a cigar is not open to regulatory interpretation or clarification, TTB does not have the authority to require that a cigar must possess any level of total reducing sugars in its filler.

Simply stated, the addition of a total reducing sugars standard in §40.12(a)(1)(ii) is beyond the scope of the statute defining cigars and should be removed from the Final Rule.

### **III. Amend Section 40.12(b)(3) To Require Consideration Of All Appearance Factors, Including The Wrapper, In Combination When Classifying A Cigarette**

#### **A. WRAPPER DEFINES THE PRODUCT**

Congress has given TTB a clear and simple roadmap for establishing criteria for distinguishing cigars from cigarettes. The statute and its legislative history lead to a requirement that TTB look first to the wrapper in distinguishing the products.

In order to bring greater clarity to the distinction between the definition of a cigar and cigarette, and to address concerns about misclassification of products wrapped in reconstituted tobacco, Congress passed the "Excise Tax Reduction Act of 1965." The definition of a cigar was retained from the 1954 Internal Revenue Code ("IRC"), but revised to include "any roll of tobacco wrapped in leaf tobacco *or in any substance containing tobacco (other than any roll of*

*tobacco which is a cigarette within the meaning of subsection (b)(2)).*” {emphasis added} 26 U.S.C. §5702(a) (1965). The legislative history underscores the fact that Congress intended to continue to define a cigar by the substance of its wrapper.<sup>18</sup> More specifically, a product had to be wrapped in tobacco or a substance containing tobacco to be classified as a cigar.

However, Congress simultaneously amended the definition of a cigarette. While the original 1954 statute defined a cigarette simply as “*any roll of tobacco, wrapped in paper or any substance other than tobacco,*”<sup>19</sup> Congress added a second paragraph to the 1965 statute:

(2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1). 26 U.S.C. §5702(b)(2) (1965).

In this manner, paragraph (2) was drafted to classify as a cigarette only a product, wrapped in any substance containing tobacco, that is likely to be offered to, or purchased by, a consumer as a cigarette described in 26 U.S.C. §5702(b)(1) (e.g., a cigarette that is wrapped in paper or a substance not containing tobacco). This narrow definition is consistent with the legislative goal that products using reconstituted tobacco wrapper not be classified as cigarettes if they were not regarded by consumers as products “that closely resemble cigarettes” and the wrapper was not suitable “for use in high-speed cigarette manufacturing machinery”. S. REP. NO. 89-324 at 53 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 1670, 1744.

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<sup>18</sup> “Before 1959, cigars produced in the United States were traditionally made with a wrapper of natural tobacco leaf. However, using ground or pulverized tobacco as the basic constituency, industry researchers had by the late 1950s produced several forms of reconstituted tobacco sheet.” ATF Procedure 73-5 at 1.

<sup>19</sup> 26 U.S.C. §5702 (d) (1954) {emphasis added}; See Also, P.L. 85-859, Sec. 202(a), amending Code Sec. 5702.

Prior to the 1965 revision, ATF accepted the use of reconstituted tobacco, which possessed “essential characteristics of natural tobacco leaf,” as wrapper for cigars – provided further that the filler used was not traditional to cigarettes. In ATF Ruling 73-22 and ATF Procedure 73-5, ATF recognized that “the terms ‘substance containing tobacco’ as used in 26 U.S.C. §5702 and ‘reconstituted tobacco’ were used synonymously.” Based upon this recognition, ATF found that for wrapper material to be considered a ‘substance containing tobacco’ as used in 26 U.S.C. §5702(a), the finished wrapper material must:

- (1) be approximately two-thirds or more tobacco which did not in the reconstitution process lose its tobacco character (e.g., taste, aroma, identifiable chemical components), and
- (2) be of a color consistent with that of the natural leaf tobaccos traditionally used as a wrapper for American cigars. ATF Ruling 73-22.

Therefore, under ATF’s interpretation, any wrapper containing “two-thirds or more tobacco” content with the proper leaf color would qualify as a cigar wrapper material because it is sufficiently tobacco-like in appearance that consumers will not confuse it with typical cigarette wrappers.

As such, the appearance criteria within the cigarette statutory definition for a roll of tobacco, wrapped in a substance containing tobacco, as being likely to be offered to, or purchased by, a consumer as a cigarette must include an examination of the wrapper for its tobacco-like characteristics. When these wrapper characteristics are so much like those of leaf tobacco, as established in Ruling 73-22, it becomes unlikely that a consumer will regard such a wrapped product as a cigarette. The more tobacco content in the wrapper, the more the wrapper resembles leaf tobacco and, therefore, the more cigar-like it is. Conversely, the less tobacco

content in the wrapper, the more the wrapper resembles a non-tobacco substance and, therefore, the more cigarette-like it is.

Consequently, the quantity of tobacco content in the wrapper is the key “appearance” factor of the product. If the product is wrapped in a substance containing at least two-thirds tobacco content, TTB should conclude that its appearance is so cigar-like that the product should not be classified as a cigarette because the product does not meet the statutory requirement of being likely to be offered to, or purchased by, a consumer as a cigarette.<sup>20</sup>

**B. AN INDIVIDUAL APPEARANCE FACTOR CANNOT BE A SOLE CRITERION FOR CLASSIFYING A CIGARETTE**

The statute also clearly requires that when a roll of tobacco is wrapped in a substance containing tobacco, the product’s overall appearance must be evaluated. Section 40.12(b)(3)(ii) of the Proposed Rule conflicts with the statute and Ruling 73-22 by providing that a single characteristic of a tobacco product’s appearance can unilaterally classify it as a cigarette, regardless of whether, overall, it is likely to be offered to, or purchased by, a consumer as a cigarette. The statute anticipates that an assessment be made of a product’s overall appearance (its size, shape, integrated filter, wrapper, package marking and labeling). Consequently, this section violates the intent of the statute.

For purposes of evaluating its potential to be classified as a cigarette, appearance cannot be reduced to mean only size and shape, or only possessing a cellulosic acetate or other cigarette-type filter. Such a simplistic approach to a complex issue, involving multiple appearance factors

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<sup>20</sup> In the Proposed Rule, TTB defined “substance containing tobacco” as requiring at least two-thirds tobacco content. This definition is contrary to legislative history and 26 U.S.C. §5702, and is beyond TTB’s statutory authority.



that are inextricably entwined, leads to an arbitrary and capricious result. A mule does not become a pony just because they share a similar size and shape or because both animals have tails. The use of an integrated filter, in and of itself, cannot conclusively establish when a product is likely to be offered to, or purchased by, a consumer as a cigarette. Otherwise, this creates a de facto ban on the use of integrated filters on cigar products wrapped in a substance containing tobacco. In fact, JMI makes a PTC which incorporates an integrated filter that does not have the size and shape or other appearance factors of a cigarette. The concept of reclassifying a cigar product as a cigarette solely on the basis of the use of an integrated filter is an overreach of the term ‘appearance’ and beyond TTB’s statutory authority.

Furthermore, TTB’s reliance on the words “typical” cigarette size and shape and “traditional” cigarette-type package in §40.12(b)(3)(ii) fails to provide clear objective standards. This failure creates an open-ended opportunity for the cigarette industry, not TTB, to define a cigarette by virtue of the cigarette manufacturers’ unlimited ability to change the size, shape or other appearance factors of their products at any time. Thus, TTB is abdicating its authority to the very entities that it is required to regulate.

Given that there are no large cigarettes presently sold in the U.S., we can only assume that when TTB proposes to classify as a cigarette any product which “... has a typical cigarette size and shape,...”, it is referring to those cigarettes currently being sold. Consistent with TTB’s desire to establish objective standards, TTB should explicitly define a “typical” cigarette size and shape as being between 85mm and 100mm in length, not exceeding 20.25mm ring gauge and cylindrical in shape, as these are the typical dimensions of cigarettes currently being sold.

Otherwise, there is nothing to prevent a cigarette manufacturer from changing the size, shape or other appearance factors of a cigarette to whatever it wants and, in so doing, cause existing cigars of a similar size or shape or containing other similar appearance factors to be immediately reclassified as cigarettes. The Proposed Rule's language must not grant control of the definition of a cigar to cigarette manufacturers through the latter's ability to control the "typical" appearance of cigarettes. The word "typical" is simply too broad and too open-ended.

In fact, if TTB does not adopt the core focus of JMI's comments firmly establishing its PTCs as cigars, TTB will unilaterally establish a new definition of a "typical" (large) cigarette size and shape...it will be the JMI Pipe Tobacco Filled Large Cigar! Further, this reclassification of JMI's PTCs as large cigarettes would cause the subsequent wholesale reclassification as large cigarettes of all other large cigars with a size and shape similar to JMI's PTCs. In total, JMI estimates that the end result would be to reclassify as large cigarettes 35% of the existing large cigars sold domestically. It is not the stated intent of the petitioners, TTB or the Proposed Rule to force the massive reclassification of large cigars to large cigarettes.

These issues are easily solved by simply modifying the criteria in §40.12(b)(3) to require a combination of appearance factors in order for a product to be classified as a cigarette.

## **CIGAR ASSOCIATION OF AMERICA COMMENTS**

By reference, JMI herein incorporates the comments submitted to TTB by the Cigar Association of America, dated March 26, 2007, to the extent not inconsistent herewith.<sup>21</sup>

### **EFFECTIVE DATE**

JMI requests that the Final Rule become effective at least one year after issuance. JMI will require substantial time to determine the viability of its PTCs should they be reclassified from cigars to cigarettes, to make any changes to its PTCs that may be required in order to comply with the Final Rule, to comply with any new labeling and packaging requirements and to obtain sufficient information from its suppliers to file any certification required by §40.13.

If TTB implements a supplemental sugars standard or modifies the total reducing sugars standard, JMI requests that this standard be published for comment prior to its incorporation into the Final Rule.

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<sup>21</sup> JMI understands that TTB provided CAA with a partial response to CAA's FOIA request only one business day prior to the close of the Proposed Rulemaking comment period. JMI has not had an opportunity to review those responses and therefore reserves the right to submit at a later date additional comments related to TTB's responses to CAA's FOIA request.

## PROPOSED REGULATORY LANGUAGE

### A. 27 CFR Part 40, Section 40.11

The Proposed Rule would add the following definitions in 27 CFR §40.11:

~~*Substance containing tobacco.* Reconstituted tobacco sheet or any other material, other than leaf tobacco, at least two thirds by weight of which consists of tobacco leaf or other fibrous material from the plant *Nicotiana tabacum* or the plant *Nicotiana rustica*.~~

~~*Substance not containing tobacco.* Paper or any other material of which less than two thirds by weight consists of tobacco leaf or other fibrous material from the plant *Nicotiana tabacum* or the plant *Nicotiana rustica*.~~

### B. 27 CFR §§40.12; 41.12; 44.12

New Sections 40.12, 41.12, and 44.12 would be added, entitled “Classification of cigars and cigarettes,” to determine whether a tobacco product is a cigar or cigarette. Section 40.12 contains the primary definitions and states as follows:

(a) *Classification of cigars.*

(1) *General.* A tobacco product is classified as a cigar if:

(i) It consists of a roll of tobacco wrapped in leaf tobacco;  
or

(ii) It consists of a roll of tobacco ~~that contains no more than 3.0 percent by weight of total reducing sugars and that is wrapped in a substance containing tobacco, and it is not classifiable as a cigarette under paragraph (a)(2)(b)(2) of this section.~~

~~(2) *Cigarette classification precedence.* A tobacco product consisting of a roll of tobacco wrapped in a substance containing tobacco is classified as a cigarette rather than as a cigar if it is described in paragraph (b)(2) or (b)(3) of this section.~~

(b) *Classification of cigarettes.* A tobacco product is classified as a cigarette if:

(1) It consists of a roll of tobacco wrapped in paper or in any substance not containing tobacco;

or

~~(2) It consists of a roll of tobacco that contains more than 3.0 percent by weight of total reducing sugars and that is wrapped in a substance containing tobacco; or~~

(3)(2) It consists of a roll of tobacco wrapped in a substance containing tobacco; and—

(i) It is put up in a package that bears a product designation or tax classification specified in §40.215;

(ii) It has a ~~typical cigarette~~ cylindrical size and shape, between 85mm and 100mm in length and not exceeding 20.25mm ring gauge, has a wrapper whose tobacco content is less than two-thirds by weight, has a cellulose acetate or other cigarette-type integrated filter, ~~or~~ and is put up in a traditional cigarette-type package that does not bear all of the notice requirements for cigars specified in §40.214; or

(iii) It has a filler primarily consisting of flue-cured or, ~~burley,~~ oriental, ~~or unfermented~~ tobaccos, *contains more than 6.0 percent by weight of total reducing sugars and not more than 4.0 percent by weight of non-reducing sugars and can be used as roll-your-own tobacco filler* or has a filler material yielding the smoking characteristics of any of those tobaccos.

Alcohol and Tobacco Tax and Trade Bureau  
March 26, 2007

**CONCLUSION**

We respectfully request that TTB modify its Proposed Rule to reflect the points raised by JMI above and to adopt the recommendations of JMI set forth herein in the Final Rule.

  
Orrin W. Ridington, Jr.  
President/COO

**List of Exhibits:**

Exhibit "A" -- Sluis Cigar Machinery Comment, dated March 2, 2007

Exhibit "B" -- Smoker Friendly Stores Comment, dated March 7, 2007

Exhibit "C" -- House of Oxford Comment, dated March 6, 2007

Exhibit "D" -- Arista Laboratories Test Report – JMI's PTCs, dated  
March 22, 2007

Exhibit "E" -- Tennessee Attorney General letter, dated May 15, 2001

Exhibit "F" -- Ohio Attorney General letter, dated June 13, 2002

Exhibit "G"-- South Dakota Attorney General letter, dated November 2, 2000

Exhibit "H" -- Arista Laboratories Test Report – Cigarette Non-Reducing Sugars,  
dated March 22, 2007

NOTIE: Exhibits can be viewed in the TTB Information Resource Center by appointment (202-927-2400).