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Health, Welfare and Food Bureau
Government Secretariat, Government of the Hong Kong Special Administrative Region
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Ms Doris Chan
Clerk to Bills Committee
Legislative Council
8 Jackson Road
Central
Hong Kong
(Fax: 2509 9055)

Dear Ms Chan,

Smoking (Public Health) (Amendment) Bill 2005

I refer to your letter dated 30 August 2006 referring to us a letter from Dr Hon KWOK Ka-ki enquiring about a recent judgment handed down in a case heard in the United States District Court of Columbia in relation to the use of descriptors on cigarette packets. Please find below our response for your onward transmission to Members of the Bills Committee -

As far as we understand it, the relevant U.S. court ruling will not go into force unless and until the appeal process is completed. Normally, the filing of an appeal creates the possibility of a stay of the judgment. It is expected that the defendants will request that in this instance.

Also, the decision of the federal court on this occasion applies only to the defendants named in the case. Any tobacco company not a party to that case is not subject to the decision or to the limitation on the use of the terms "light," "low-tar," etc.

It seems to us that the U.S. court case was decided by the U.S. federal court on the basis of those facts pertaining to those defendant tobacco companies in the U.S. pursuant to the "Racketeer Influenced and Corrupt Organizations Act" ("RICO"). In the judgment, there was no reference made to or ruling on the issues of property right or intellectual property which are the subject of our concerns in proposing an amendment to Clause 11 of our Smoking (Public Health) (Amendment) Bill 2005.

In view of the above and given the different legal systems, different domestic laws, tobacco control measures being adopted and related legislation, we consider that each case should be considered on its own and that direct application of a particular U.S. Court ruling on our legislative proposal would not be appropriate.

We would like to reiterate our position that in the context of Hong Kong, a legislative approach is more desirable than taking litigation actions on a case-by-case basis because –

- it provides certainty and clarity in law (unlike in the US case, the court is limited to deciding only the particular case presented to them in litigation and the case is subject to appeal);
- it is most effective and save resources (the US court case was a complex case started 7 years ago and involved the exchange of millions of documents, the entry of more than 1,000 orders and a trial that lasted approximately 9 months with 84 witnesses testifying in open court);
- the notation approach plus the health warnings as we presently propose are effective measures to inform consumers of the risks of smoking and to warn them of any potential misleading effects that the proscribed words may have. This is also in compliance with our obligation under the Framework Convention on Tobacco Control in safeguarding public health; and
- we have to take into account the unique circumstances in Hong Kong, compliance with the Basic Law and fulfilment of our obligations under international intellectual property conventions.

Yours sincerely,



(Miss Christine Au)

for Secretary for Health, Welfare and Food