CTAlettOmbudMPFAJan13
James Middleton to: bc_01_11, panel_hs 11/01/2013 11:38

1 attachment

CTAlettOmbudMPFAJan13.pdf

Dear Legco Bills Committee and Panel on Health Services members

Please find our self-explanatory letter to the Ombudsman herewith.

Kind regards,

James Middleton

Chairman

www.cleartheair.org.hk

ClearTheAir 爭氣行動

The Office of the Ombudsman
30/F, China Merchants Tower, Shun Tak Centre, 168-200 Connaught Road
Central, Hong Kong
PO Box No. 3300, Hong Kong
Tel 2629 0555
Fax 2882 8149
complaints@ombudsman.hk

11th January 2013

Dear Sir,
Clear the Air is a local NGO and registered Hong Kong Government charity.

> http://www.ombudsman.hk/t_en/about_us.shtml
> **Vision** To ensure that Hong Kong is served by a fair and efficient public administration which is committed to accountability, openness and quality of service
> **Mission** Through independent, objective and impartial investigation, to redress grievances and address issues arising from maladministration in the public sector

I wish to bring to your attention the contents of the self-explanatory accompanying attachments to this letter.
Hong Kong is (sub China) a ratified signatory to the WHO FCTC Treaty, an international binding legal instrument.
http://www.who.int/fctc/about/en/index.html
http://www.who.int/fctc/signatories_parties/en/index.html
http://whqlibdoc.who.int/publications/2003/9241591013.pdf
http://whqlibdoc.who.int/publications/2003/9789245591016_chi.pdf

Countries which have ratified the Treaty are obliged to fully comply with its requirements.

Under Article 5.3 of the Treaty:
http://www.who.int/fctc/protocol/guidelines/adopted/article_5_3/en/index.html

Governments (including China, the SAR Hong Kong and SAR Macau) are bound to follow the Treaty Guidelines:
http://www.who.int/fctc/guidelines/article_5_3.pdf
which states amongst other salient items:

> ***"(4) Avoid conflicts of interest for government officials and employees.***
> 22. The involvement of organizations or individuals with commercial or vested interests in the tobacco industry in public health policies with respect to tobacco control is most likely to have a negative effect. Clear rules regarding conflicts of interest for government officials and employees working in tobacco control are important means for protecting such policies from interference by the tobacco industry."

> **Recommendations**
> "4.1 Parties should mandate a policy on the disclosure and management of conflicts of interest that applies to all persons involved in setting and implementing public health policies with respect to tobacco control, including government officials, employees ,**consultants and contractors."**

"4.7 Government institutions and their bodies should not have any financial interest in the tobacco industry, unless they are responsible for managing a Party's ownership interest in a State-owned tobacco industry."

Our complaint to the Ombudsman is that the MPFA being a statutory body in Hong Kong funded by Hong Kong Government is obliged to comply with the requirements of the FCTC Treaty which binds Hong Kong. The MPFA refuses to control its Trustees which it is obliged by way of fiduciary responsibilities to do so. The MPFA is claiming neither the MPFA nor Government have the power to control the MPFA Trustees' unethical investments in tobacco products but this is a falsehood as shown below:

The Chief Executive of HKSAR may also give directions with respect to the exercise by MPFA of its functions.
Powers of the Chief Executive and the Financial Secretary of HKSAR under the Mandatory Provident Fund Schemes Ordinance ("MPFSO") (Chapter 485, Laws of Hong Kong)

"To amend schedules/make regulations/give advice on making of guidelines"
http://www.mpfa.org.hk/eng/mpfa/corporate_governance/public_accountability/powers_of_ce_fs/index.jsp

'Financial Secretary': **"The MPFA may, after consultation with FS, make guidelines specifying which investment practices must not be engaged in by trustees** (section 28)"

This power directly contradicts the statement from Nancy Wong / MPFA below:

From: NancyWong@mpfa.org.hk [mailto:NancyWong@mpfa.org.hk]
Sent: 16 March, 2012 18:40
To: James Middleton
Subject: RE: Investments by MPFA

Dear Mr Middleton,

As explained in my previous emails to you, I have to reiterate that the MPF funds under the MPF System are privately owned. They are **not** public monies owned by the HKSAR Government. The MPFA implements the MPF System in accordance with the MPF Schemes Ordinance and we are not in a position to go beyond the provisions in the Ordinance.

Regards,
Nancy Wong
Manager
Corporate Affairs Department
Mandatory Provident Fund Schemes Authority
Phone:(852) 2918 0102
Fax: (852) 2259 8806

From: NancyWong@mpfa.org.hk [mailto:NancyWong@mpfa.org.hk]
Sent: 14 March, 2012 14:22
To: James Middleton
Cc: Frederick_WS_YU/FSB/HKSARG%GCN-NOTES@mpfa.org.hk
Subject: Re: MPFA Trustees - investments in tobacco stocks must be divested to comply with the International ratified FCTC Treaty

Dear Mr Middleton,

Thank you for your email of 8 February 2012 and 10 March 2012 expressing your views about MPFA's compliance with FCTC guidelines in its investments. Our Managing Director Mrs Diana Chan has instructed me to reply on her behalf.

The MPFA does have investments managed by external fund managers and we will ensure that such investments comply with the Guidelines for Implementation of Article 5.3 of the FCTC. In this connection, please be informed that we are making arrangements to divest from tobacco-related investments and will refrain from making such investments.

Thank you for your kind attention.

Regards,
Nancy Wong
Manager
Corporate Affairs Department
Mandatory Provident Fund Schemes Authority
Phone:(852) 2918 0102
Fax: (852) 2259 8806
Email: nancywong@mpfa.org.hk

----- Forwarded by Stephanie Law/ENF/MPFA on 13-03-2012 AM 09:55 -----

"James Middleton" < > 10-03-2012 PM 05:55
To <mpfa@mpfa.org.hk>, <panel_hs@legco.gov.hk>
Subject Government of Canada Legislation

Hong Kong Mandatory Provident Fund Authority
attention:
Mrs Diana Chan Tong Chee-ching, JP
Mr Darren Mark McShane
mpfa@mpfa.org.hk

Clear the Air says:

the cost of treatment for tobacco related diseases in Hong Kong in 1998 was calculated as HKD 5.3 billion per year (University of HK Dept of Community Medicine report). Now in 2012 that cost will be far higher.
Clear the Air queries why this seemingly tycoon friendly Hong Kong Administration has failed to emulate USA and now Canada to sue the tobacco companies for the substantial costs of medical treatment of tobacco related diseases.

Meanwhile the Canadian Province of Alberta has divested from tobacco stocks' investments with others expected to follow.
The Governments of Norway and New Zealand have already divested from tobacco investments.
The Hong Kong Monetary Authority is in the process of like divestment also, having realised it is unethical, contrary to the FCTC Treaty binding Hong Kong SAR and a poor long term investment which can only profit from the death and suffering of its citizens.

We trust the Hong Kong Mandatory Provident Fund Authority will likewise follow suit.
89% of Hong Kong people do not smoke and would not tolerate third parties investing their contributions in tobacco stocks whilst these lurid despicable companies will always continue to addict Hong Kong youth in the search for profits and replacement smokers.

James Middleton
Chairman
www.cleartheair.org.hk

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http://www.mpfa.org.hk/eng/mpfa/csr/index.jsp

Corporate Social Responsibility

With "Community Perspective" as one of its core values, **MPFA is dedicated and committed to its corporate social responsibility.**

Clear the Air comments that 89% of the public in Hong Kong does not smoke or use tobacco. It is reprehensible that the MPFA allows its Trustees to freely make and hold unethical tobacco investments in their Schemes contrary to the FCTC Treaty requirements, contrary to their fiduciary duties as a Statutory Hong Kong Body and contrary to their corporate social responsibility and Duty of Care to the public of Hong Kong.

MPFA's Legal Status.

The MPFA is a **statutory body** established on 17 September 1998 under section 6 of the Mandatory Provident Fund Schemes Ordinance ("MPFSO") (Chapter 485, Laws of Hong Kong). Its mission is to ensure the provision of retirement protection for Hong Kong's workforce through an effective and efficient system of prudential regulation and **supervision of privately managed provident fund schemes.**

Its role is to **regulate and supervise** the operations of mandatory provident fund ("MPF") schemes and occupational retirement ("ORSO") schemes.

The MPFA's functions as laid down in section 6E(1) of MPFSO include:

to be responsible for ensuring compliance with MPFSO;

to register provident fund schemes as registered schemes;

to approve qualified persons to be approved trustees of registered schemes;

to regulate the affairs and activities of approved trustees and to ensure as far as reasonably practicable that those trustees administer the registered schemes for which they are responsible in a prudent manner;

to promote and encourage the development of the retirement scheme industry in Hong Kong, **including the adoption of a high standard of conduct and sound prudent business practices by trustees and other service providers**; and

to exercise such other functions as are conferred or imposed on MPFA by or under MPFSO or any other Ordinance.

The MPFA also acts as Registrar of Occupational Retirement Schemes as provided under section 5(1) of the Occupational Retirement Schemes Ordinance (Chapter 426, Laws of Hong Kong).

Hong Kong's legal system is based on British Law. Accordingly we provide herewith an online link to legal advice on fiduciary duty of Trustees from Freshfields Bruckhaus Derringer International Law firm.

http://ash.org.uk/files/documents/ASH_831.pdf

" The responsible investment approach

Trustees may also decide that excluding a particular investment would have a positive impact on the fund's long-term performance. It is now widely accepted that environmental, social and governance (ESG) issues can affect company performance. In a landmark 2005 report, the law firm Freshfields Bruckhaus Derringer concluded that considering these factors is well within the scope of investors' fiduciary duties: indeed, "***it may be a breach of fiduciary duties to fail to take account of ESG considerations that are relevant and to give them appropriate weight.***" 13

On this basis, there are various reasons why trustees might conclude that tobacco is a risky long-term investment and these reasons are explored below (see Argument #3). Indeed, the London Borough of Newham currently excludes tobacco on this basis, saying in its Statement of Investment Principles:

"*Fund managers are instructed not to invest segregated elements of their portfolio in companies that generate over half of their income from tobacco products, due to the risk that tobacco companies may face large liabilities from outstanding court actions.*"

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Where does this leave fiduciary duty?
All of this suggests that the law does not oblige pension funds to dismiss the ethical concerns of their members out of hand. Rather, the appropriate response is to analyse whether those concerns could be accommodated without compromising the performance of the fund. Moreover, non-financial issues which could affect the performance of the fund should be considered by funds as part of their normal investment analysis.

Argument #2: "It is not our policy to interfere with our fund managers' discretion"
Response:
It is common practice for pension funds to delegate day-to-day investment decision-making to external fund managers.
However, this does not prevent them from instructing their fund managers in particular matters (as in the Newham example above). **Indeed, the law is quite clear that, although trustees may delegate their investment functions, they cannot delegate their fiduciary responsibilities.**

Final responsibility for investment decision-making rests with the trustees themselves. The judge in Martin v City of Edinburgh (see Box B above) **stressed that trustees must "*apply their minds separately and specifically to the question whether [the decision at hand] would be in the best interests of the beneficiaries.*"** Moreover, in order to fulfill their fiduciary duties, **the law requires trustees to monitor their fund managers on an ongoing basis**. 15

In other words, as FairPensions' recent report concluded, **"It is a vital principle of fiduciary obligation that fiduciaries cannot outsource their obligation to think."**

The legal opinion above shown in the online ASH UK web-link is also appropriate to and binding on the MPFA which likewise, cannot delegate its fiduciary responsibilities to its Trustees.

The Governments of Norway and New Zealand have divested from all tobacco holdings, as has the Province of Alberta Canada and the State of New South Wales Australia. Tobacco Plain Packaging legislation has commenced in Australia, whilst New Zealand, UK, France, India and other countries have intimated they will follow suit; UK has already conducted a public consultation on Plain packaging. Thus an unstoppable domino is underway.

Moreover it makes no sense to allow MPFA Trustees to profit from unethical tobacco investments when Hong Kong society has to pay the medical bills, nowadays in excess of HK$ 6 billion per year for the treatment of tobacco related diseases. http://tobaccocontrol.bmj.com/content/15/2/125.abstract

The major international players in the tobacco industry are convicted racketeers under the USA RICO legislation (see Kessler judgment attached) whilst worldwide civil litigation grows by the day against them. Again it makes little sense to invest provident fund money with tobacco companies which they can then use against Governments to fight for their prolonged survival at the cost of human lives.

Tobacco use kills one in every two of its users when used as directed by its manufacturers.

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http://www.smh.com.au/nsw/health-groups-breathe-easy-after-tobacco-ban-20121126-2a3n9.html

Health groups breathe easy after tobacco ban

November 27, 2012

"Take billions away from an industry and you take away their power and influence to expand" ... chief executive of Action on Smoking and Health Australia Anne Jones believes this is the government's first step in the right direction. *Photo: Supplied* **TOBACCO investment by the government and public sector will be banned in NSW,** in a move applauded by health groups. The withdrawal of up to $224 million could be the single biggest blow to tobacco investment ever seen in Australia, but will need the support of the independent State Super to be fully implemented. The chief executive of action on smoking and health Australia, Anne Jones, said the NSW decision could lead to other governments and super funds taking similar action. "It's possible that billions of dollars are invested in tobacco companies by Australian Governments and individuals through their super funds," she said. "Take billions away from an industry and you take away their power and influence to expand". The health director of the Heart Foundation, Julie Anne Mitchell, said smoking was still the No.1 cause of early death in NSW. "Actions like this help us in our daily fight against tobacco companies," she said.

The NSW branch of the Australian Medical Association also welcomed the move. The chief executive of State Super, John Livanas, said the organisation's $158m investment in tobacco was only a fraction of its $35 billion portfolio. He said State Super was an independent trustee corporation that would make its own decision after receiving a formal request from government. "The moment we receive that note I will initiate the review process straight away," he said.

The Greens MP John Kaye, who has campaigned against government tobacco investment, said if State Super did not agree the Greens would put forward legislation in February to force it to. "If Jillian Skinner and Mike Baird are serious about their commitment and getting the state out of tobacco they will support our legislation," he said. **The NSW Treasurer, Mike Baird, said the government would immediately begin the process of removing tobacco investments from the portfolio of the NSW Treasury Corporation and other public sector agencies.**

"The O'Farrell Government is leading the way in tobacco control measures and it's **entirely appropriate for us to divest the State of all tobacco investments and to ban them going forward,"** he said. This month *Fairfax Media* revealed the treasury corporation had nearly A$29m **indirectly invested by fund managers in tobacco companies**, a figure since revised to $27m due to fluctuations in the market. Mr Baird said WorkCover also had about $39m invested. The Federal Government's Future Fund, currently invests about $210m in tobacco companies and is reviewing its policies
Read more:
http://www.smh.com.au/nsw/health-groups-breathe-easy-after-tobacco-ban-20121126-2a3n9.html#ixzz2DbyNZ5Z1

http://www.theaustralian.com.au/news/breaking-news/nsw-govt-bans-all-tobacco-investments/story-fn3dxiwe-1226524368571

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http://vitals.nbcnews.com/_news/2012/11/27/15490985-judge-orders-tobacco-firms-to-say-they-lied-about-smoking-dangers?lite

Judge orders tobacco firms to say they lied about smoking dangers

By Frederic J. Frommer, Associated Press

WASHINGTON -- A federal judge on Tuesday ordered tobacco companies to publish corrective statements that say they lied about the dangers of smoking and that disclose smoking's health effects, including the death on average of 1,200 people a day.

U.S. District Judge Gladys Kessler previously had said she wanted the industry to pay for corrective Statements in various types of advertisements. But Tuesday's ruling is the first time she's laid out what the statements will say.

Each corrective ad is to be prefaced by a statement that a federal court has concluded that the defendant tobacco companies "deliberately deceived the American public about the health effects of smoking."

Among the required statements are that smoking kills more people than murder, AIDS, suicide, drugs, car crashes and alcohol combined, and that "secondhand smoke kills over 3,000 Americans a year."
The corrective statements are part of a case the government brought in 1999 under the Racketeer Influenced and Corrupt Organizations. Kessler ruled in that case in 2006 that the nation's largest cigarette makers concealed the dangers of smoking for decades, and said she wanted the industry to pay for "corrective statements" in various types of ads, both broadcast and print.
The Justice Department proposed corrective statements, which Kessler used as the basis for some of the ones she ordered Tuesday.
Tobacco companies had urged Kessler to reject the government's proposed industry-financed corrective statements; the companies called them "forced public confessions." They also said the statements were designed to "shame and humiliate" them. They had argued for statements that include the health effects and addictive qualities of smoking.
Kessler wrote that all of the corrective statements are based on specific findings of fact made by the court.
"This court made a number of explicit findings that the tobacco companies perpetuated fraud and deceived the public regarding the addictiveness of cigarettes and nicotine," she said.

A spokesman for Altria Group Inc., owner of the nation's biggest tobacco company, Philip Morris USA, said the company was studying the court's decision and did not provide any further comment.

A spokesman for Reynolds American Inc., parent company of No. 2 cigarette maker, R.J. Reynolds Tobacco Co., said the company was reviewing the ruling and considering its next steps.
The statements Kessler chose included five categories: adverse health effects of smoking; addictiveness of smoking and nicotine; lack of significant health benefit from smoking cigarettes marked as "low tar, " "light," etc.; manipulation of cigarette design and composition to ensure optimum nicotine delivery; and adverse health effects of exposure to secondhand smoke.

Among the statements within those categories:

- "Smoking kills, on average, 1,200 Americans. Every day."
- "Defendant tobacco companies intentionally designed cigarettes to make them more addictive."
- "When you smoke, the nicotine actually changes the brain — that's why quitting is so hard."
- "All cigarettes cause cancer, lung disease, heart attacks and premature death — lights, low tar, ultra lights and naturals. There is no safe cigarette."
- "Secondhand smoke causes lung cancer and coronary heart disease in adults who do not smoke." "Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, severe asthma and reduced lung function."
- "There is no safe level of exposure to secondhand smoke."

Justice Department spokesman Charles Miller said the department was pleased with the order.

Matt Myers, president of the Campaign for Tobacco-Free Kids, called it an important ruling.

"The most critical part of the ruling is that it requires the tobacco companies to state clearly that the court found that they deceived the American public and that they are telling the truth now only because the court is ordering them to do so," Myers said in an interview. "This isn't the last word, but this is a vitally important step because this should resolve exactly what the tobacco companies are required to say."

In July, a federal appeals court rejected efforts by the tobacco companies to overrule Kessler's ruling requiring corrective statements. The companies had argued that a 2009 law that gave the Food and Drug Administration authority over the industry eliminated "any reasonable likelihood" that they would commit future RICO violations.

In her ruling Tuesday, Kessler ordered the tobacco companies and Justice Department to meet beginning next month to address how to implement the corrective statements, including whether they will be put in inserts with cigarette packs and on websites, TV and newspaper ads. Those discussions are to conclude by March.

Yours faithfully,

James Middleton

Chairman
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