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Secretary for Health, Welfare and Food
Health, Welfare and Food Bureau
(Attn: Mrs Ingrid YEUNG, DS(H)2)
19/F, Murray Building
Garden Road, Hong Kong

By Fax (2840 0467) and By Post

28 September 2006

Dear Mrs YEUNG

Smoking (Public Health) (Amendment) Bill 2005 (“the Bill”)

I refer to the CSAs on clause 11 of the Bill tabled today and have the following comments:

1. The Administration advised the Bills Committee that the offence under the proposed sections 10(3)(a) and 10(3)(b) were alternative offence. Section 10(3)(a) provides that:

“Any manufacturer of tobacco products or his agent, or any wholesale distributor of tobacco products, who sells, offers for sale or possesses for the purpose of sale any tobacco product to which section 8 or 9 applies commits an offence if any packaging of the product (including any packet, retail container, wrapping, and any label attached to or printed on the packaging or the product) bears any term, descriptor, trademark, figurative or any other sign that is likely to create an erroneous impression that the product is less harmful to health than other tobacco products the packaging of which does not bear such term, descriptor, trademark, figurative or sign;”

Please clarify whether the act which actually “**creates** an erroneous impression that the product is less harmful to health than other tobacco products the packaging of which does not bear such term, descriptor, trademark, figurative or sign” is an offence which falls within the scope of the provision.

2. Article 11 1(a) of the Framework Convention on Tobacco Control (“FCTC”) provides that:

“1. Each Party shall, within a period of three years after

entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

- (a) tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products.”.

As the elements of the offence under the proposed section 10(3)(a) is “likely to create an erroneous impression” that “the product is less harmful to health” “than other tobacco products the packaging of which does not bear such term, descriptor, trademark, figurative or sign,” it appears that the scope is more restrictive than Article 11 1(a). Please confirm that the restriction of the erroneous impression to less harmful to health than other tobacco products the packaging of which does not bear such term, descriptor, trademark, figurative or sign complies with the requirements under the FCTC. Please clarify the policy intent that when adducing evidence of the offence, reference can only be drawn from other tobacco products the packaging of which does not bear such term, descriptor, trademark, figurative or sign. Does it mean that there will be no offence if the packaging of all tobacco products bears such term, descriptor, trademark, figurative or sign?

It is appreciated that your reply in both Chinese and English could reach us by close of play, 28 September 2006.

Yours sincerely

(Monna LAI)
Assistant Legal Adviser

c.c. DoJ (Attn: Miss Shandy LIU, SGC)
IPD (Attn: Mr Peter Cheung, DDIP)