

REPUBLIC OF SOUTH AFRICA

TOBACCO PRODUCTS CONTROL AMENDMENT BILL

*(As amended by the Select Committee on Social Services (National Council of Provinces))
(The English text is the official text of the Bill)*

(MINISTER OF HEALTH)

[B 7D—2008]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Tobacco Products Control Act, 1993, so as to define certain expressions and to amend certain definitions; to provide anew for the advertising, sponsorship, promotion, distribution and information required in respect of the packaging and labelling of tobacco products; to make the standards that apply to manufacturers of tobacco products applicable to importers of tobacco products; to prohibit the sale of tobacco products to and by persons under the age of 18 years; to extend the provisions in respect of free distribution of tobacco products; to provide anew for tobacco sales by means of vending machines; to extend the Minister’s power to make regulations; and to adjust the provisions in respect of offences and penalties; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 83 of 1993, as amended by section 2 of Act 12 of 1999 and section 1 of Act 23 of 2007

1. Section 1 of the Tobacco Products Control Act, 1993 (hereinafter referred to as the principal Act), is hereby amended by the—

- (a) substitution for the definition of “advertisement” of the following definition:
 - “**advertisement**” in relation to any tobacco product—
 - (a) means any commercial communication or action brought to the attention of any member of the public in any manner with the aim, effect or likely effect of—
 - (i) promoting the sale or use of any tobacco product, tobacco product brand element or tobacco manufacturer’s name in relation to a tobacco product; or
 - (ii) being regarded as a recommendation of a tobacco product;
 - (b) includes product placement; and
 - (c) excludes commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and share holders and any communications required by law;
- and “advertise has a corresponding meaning.”.

- (b) insertion after the definition of “**advertisement**” of the following definition:
 “**‘brand element’** includes the brand name, trade mark, trade name, distinguishing guise, logo, graphic arrangement, design, slogan, symbol, motto, selling message, print, type-face, recognisable colour or pattern of colours, or any other symbol of product identification, that is likely to be taken as or confused with any brand of tobacco product designed to promote tobacco use;”;
- (c) insertion after the definition of “**‘employed’** or **‘employment’**” of the following definition:
 “**‘importer’** means any person who brings, or attempts to bring, a tobacco product into the Republic for the purposes of selling that product, and **‘import’** has a corresponding meaning;”;
- (d) substitution for the definition of “**organised activity**” of the following definition:
‘organised activity’—
- (a) means any activity or event—
- (i) which any member of the public attends or in which he or she participates **[in]**;
- (ii) which is organised for the purposes of entertainment, sport or recreation or for educational or cultural purposes; and
- (iii) where a tobacco product, or brand name, trade mark, logo or company name in relation to a tobacco product, is used in the name of or portrayal of the activity or event to promote tobacco use; but
- (b) excludes any **[private activity or]** event arranged by a manufacturer, importer, distributor or retailer of a tobacco product where only its shareholders or its employees or their spouses or partners attend;”;
- (e) substitution for the definition of “package” of the following definition:
‘package’ means **[any packing, carton, wrapping or any other]** the container, receptacle or wrapper in which tobacco products are **[generally]** sold, **[by]** supplied or distributed at wholesale or at retail;”;
- (f) insertion after the definition of “private dwelling” of the following definitions:
‘product placement’ means the depiction of, or reference to, a tobacco product or brand element in a broadcast programme, film, video recording, telecast or other electronic medium for which the producer, or any other person associated with the broadcast programme, film, video recording, telecast or other electronic medium, receives payment in cash or otherwise;
- ‘promotion’** is the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for the purposes of selling the tobacco product or encouraging tobacco use, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film, television production, radio production or the internet, and **‘promote’** has a corresponding meaning.”.

Substitution of section 3 of Act 83 of 1993, as substituted by section 4 of Act 12 of 1999

2. The following section is hereby substituted for section 3 of the principal Act:

“Advertising, sponsorship, promotion, distribution, display and [required] information required in respect of [packages] packaging and labelling of tobacco products

3. (1) (a) No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.

(b) A commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and share holders, must contain no other information except for factual information about the tobacco product, its characteristics, its availability or price, pictures of the tobacco products, the component parts and their packaging. 5

(2) No manufacturer, importer, distributor or retailer of tobacco products shall—

- (a) organise or promote any organised activity that is to take place in whole or in part in the Republic;
- (b) make any financial contribution to any organised activity that is to take place, or is taking place, or has taken place in whole or in part in the Republic; 10
- (c) make any financial contribution to any person in respect of—
 - (i) the organisation or promotion of any organised activity in the Republic by that person; 15
 - (ii) the participation, by that person, in any organised activity that is to take place, or is taking place in whole or in part, in the Republic.

(3) **[A retailer of tobacco products may post in accordance with the regulations passed in relation to this Act, signs at the point of sale that indicate the availability of tobacco products and their price]”** A manufacturer or importer of a tobacco product may make a charitable financial contribution or sponsorship, provided that such contribution or sponsorship is not for the purpose of advertisement; 20

[(4) No person shall sell or import for subsequent sale any prescribed tobacco product, unless— 25

- (a) **such product is in a package;**
- (b) **the package in which the tobacco product is sold bears the prescribed warning concerning the health hazards incidental to the smoking of tobacco products; and** 30
- (c) **the quantities of the constituents present in the tobacco product concerned are stated on the package.]**

(5) Notwithstanding the provisions of **[section 3] subsections (1), (2) and (3), the Minister may, by regulations, provide for** prescribe exemptions for unintended consequences or the phasing out of existing sponsorship or contractual obligations. 35

(6) No person shall package or label a tobacco product in any way that is false, misleading, deceptive or likely to create any erroneous, deceptive or misleading impression about its characteristics, properties, health effects, toxicity, composition, merit, safety, hazards or emissions, including any term, descriptor, trade mark, figurative or other sign that directly or indirectly creates the impression that a particular tobacco product is less harmful than another tobacco product. 40

(7) No person shall manufacture for sale in the Republic, import for subsequent sale or sell a tobacco product— 45

- (a) unless the tobacco product is packaged in the prescribed manner; and
- (b) in a package or containing a label that contains false or misleading information or that is calculated to deceive the user of such product.

(8) A wholesaler shall display a tobacco product at his or her place of business in the prescribed manner. 50

(9) A retailer shall display—

- (a) a notice in the prescribed manner in his or her place of business that contains the prescribed information regarding any tobacco product available at his or her place of business; and
- (b) a tobacco product at his or her place of business in the prescribed manner and in such a way that no person shall be able to handle the tobacco product before paying for it. 55

(10) No person shall sell or offer to sell tobacco products at retail, unless the prescribed notices are displayed.

(11) This section must not be construed as limiting, amending, repealing or otherwise altering any legal obligation or liability in terms of any other law to warn consumers of the risks of using a tobacco product which a manufacturer, importer or retailer is bound by.”. 60

Amendment of section 3A of Act 83 of 1993, as inserted by section 5 of Act 12 of 1999 and amended by section 3 of Act 23 of 2007

3. Section 3A of the principal Act is hereby amended by the—
- (a) substitution for the heading of the following heading: 5
“Standards for manufacturing, importing and export of tobacco products”; and
- (b) substitution for subsections (1) and (2) of the following subsections, respectively: 10
- “(1) No person shall manufacture or import a tobacco product unless it complies with such standards as may be prescribed. 10
- (2) Every manufacturer and importer of a tobacco product shall provide such information about the product and its emissions to the Minister and the public as may be prescribed, in the prescribed manner and within the prescribed time.”. 10

Substitution of section 4 of Act 83 of 1993, as amended by section 6 of Act 12 of 1999 15

4. The following section is hereby substituted for section 4 of the principal Act:

“[Prohibition of sale of] Prohibitions in respect of tobacco products [to persons under age of 16 years]

4. (1) No person shall sell or supply any tobacco product to any person under the age of [16] 18 years[, **whether for his personal use or not**]. 20
- (2) The owner or person in charge of any business shall ensure that no person under the age of 18 years in his or her employ or under his or her control, as the case may be, shall sell or offer to sell any tobacco product on the business premises. 20
- (3) No person may sell or supply any confectionary or toy that resembles or is intended to represent any tobacco product. 25
- (4) No person shall sell or offer to sell tobacco products in—
- (a) any health establishment contemplated in section 1 of the National Health Act, 2003 (Act No. 61 of 2003), including any pharmacy; and 30
- (b) any place where a person under the age of 18 years receives education or training. 30
- (5) (a) No person shall sell, offer to sell, supply, distribute or buy any tobacco product through the postal services, the internet or any other electronic media. 35
- (b) The prohibition contained in paragraph (a) does not apply to any commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and share holders. 35
- (6) Subject to section 252A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Director-General may authorise in writing any person or class of persons to monitor compliance with this section in the prescribed manner.”. 40

Substitution of section 4A of Act 83 of 1993, as inserted by section 7 of Act 12 of 1999

5. The following section is hereby substituted for section 4A of the principal Act:

“Free distribution and reward prohibited 45

- 4A.** (1) No manufacturer, distributor, importer or retailer of a tobacco product, or any person or agent acting on behalf of a manufacturer, distributor, importer or retailer, shall for free, or at a reduced price, other than a normal trade discount— 50
- (a) distribute any tobacco product; or 50
- (b) supply any tobacco product to any person for subsequent distribution.

(2) No person shall offer any gift, cash rebate or right to participate in or attend any contest, lottery or game, or any sporting, cultural, social or recreational event, to any person in consideration of the purchase of a tobacco product, or the furnishing of evidence of such a purchase, or the confirmation of use of a tobacco product.”.

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Substitution of section 5 of Act 83 of 1993, as amended by section 7 of Act 12 of 1999

6. The following section is hereby substituted for section 5 of the principal Act:

“Restrictions on use of [~~vending-machines~~] vending machines

5. (1) [The sale of tobacco products from vending machines shall be restricted to places in which purchases from such machines are inaccessible to persons under the age of sixteen years] No person shall place a vending machine containing tobacco products in any indoor or outdoor location, other than in the specified public place which has been declared by the Minister under section 2(1)(b).

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(1A) A person who offers a tobacco product for sale by way of a vending machine shall—

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- (a) not use such vending machine for the sale of anything other than a tobacco product; and
- (b) display a notice in the prescribed manner on the vending machine that contains the prescribed information regarding any tobacco product available for sale in that vending machine.

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(2) It shall be the responsibility of any person during such time as he or she is responsible for or has control of the premises in which any vending machine is kept to ensure that no person under the age of **[~~sixteen~~] 18** years makes use of any such machine.

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(3) The Director-General may in writing direct the owner of the **[~~vending-machine~~] vending machine** in question or the person in control thereof—

- (a) to take such precautionary measures as are specified in the **[~~direction~~] directive** to prevent the **[~~vending-machine~~] vending machine** being used by persons under the age of **[~~16~~] 18** years; or
- (b) to remove the **[~~vending-machine~~] vending machine** from the premises within the period specified in the **[~~direction~~] directive**.”.

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Amendment of section 6 of Act 83 of 1993, as amended by section 9 of Act 157 of 1993 and section 4 of Act 23 of 2007

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7. Section 6 of the principal Act is hereby amended by—

- (a) the substitution in subsection (1) for paragraph (b) of the following paragraphs:

“(b) the signs in respect of tobacco products and the information that must be displayed at points of sale and on vending machines, including—

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- (i) health warnings that must appear on the signs;
- (ii) size and format of the signs;
- (iii) location of the signs; and
- (iv) the legal age at which tobacco products may be purchased.

(bA) information that must be displayed on a package containing a tobacco product and on an enclosed leaflet, picture or pictogram, including—

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- (i) information about the product and its emissions;
- (ii) health hazards and health effects arising from the use of the product or from its emissions;
- (iii) other health-related messages such as advice on how to stop smoking,
- (iv) information that may not appear on packages; and
- (v) the descriptors, package design characteristics, graphics or terms considered to be false, misleading, deceptive or likely to create any erroneous impression;”;

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- (b) the substitution in subsection (1)(f) for the words preceding subparagraph (i) of the following words:
 “subject to Chapter 2 of the Constitution of the Republic of South Africa, 1996, any information that a manufacturer or importer of a tobacco product must submit to the Minister and to the public, including information in respect of—”;
- (c) the substitution in subsection (1)(f) for subparagraph (ii) of the following subparagraph:
 “(ii) the quantity of a tobacco product manufactured or imported, as the case may be;”;
- (d) the deletion of subsection (2).

Amendment of section 7 of Act 83 of 1993, as substituted by section 5 of Act 23 of 2007

8. Section 7 of the principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections, respectively:

(2) Any person who contravenes or fails to comply with section 2(5), 3(8), (9)(a) or (b) or (10), 4(1), (2), (3), (4)(a) or (b) or (5) or 5, or contravenes or fails to comply with any regulation made in terms of this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000.

(3) Any person who contravenes or fails to comply with [the provisions of] section 3(1), (2), (3), (6), (7)(a) or (b), 3A₂ or 4A shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 000.”.

Transitional arrangement

9. Any notice or regulation issued by the Minister prior to the coming into operation of this Act remains in force until amended, repealed or replaced by a notice or regulation made by the Minister in terms of the principal Act.

Short title and commencement

10. This Act is called the Tobacco Products Control Amendment Act, 2008, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE TOBACCO PRODUCTS CONTROL AMENDMENT BILL, 2008

1. PURPOSE OF BILL

The Bill seeks to amend the Tobacco Products Control Act, 1993 (Act No. 83 of 1993) (“the Act”), to bring it in line with the World Health Organisation Framework Convention on Tobacco Control (to which South Africa is a signatory) by prohibiting the sale of tobacco products to children under the age of 18 years.

The Bill also intends to close loopholes that exist in the current legislation.

2. OBJECTS OF BILL

2.1 The Bill seeks to amend the definitions of “advertisement” and “package”. The Bill also seeks to introduce definitions for “brand element”, “importer”, “product placement” and “promotion”.

2.2 The Bill seeks further to—

- (a) provide anew for advertising, sponsorship, promotion, distribution and information required in respect of packaging and labelling of tobacco products;
- (b) make the standards that apply to manufacturers of tobacco products applicable to importers of tobacco products;
- (c) prohibit the sale of tobacco products to and by persons under the age of 18 years;
- (d) extend the provisions regarding free distribution of tobacco products;
- (e) extend the provisions regarding the sale of tobacco products by means of vending machines;
- (f) amend the regulations section to empower the Minister to prescribe the information to be displayed on a package containing tobacco products; notices and signs that must be displayed at points of sale; display of tobacco products at points of sale; and quantities or number of units that must be contained in a package of tobacco products;
- (g) increase the fine for contravening the provisions of the Act so as to deter people who are trying to circumvent, or are not complying with, the provisions of the Act.

2.3 The Bill contains transitional provisions necessary for its application.

3. CONSULTATION

The Department of Health consulted—

- British American Tobacco;
- the Department of Agriculture and Land Affairs;
- the Department of Finance;
- the Department of Justice and Constitutional Development;
- the Department of Provincial and Local Government;
- the Department of Trade and Industry;
- the Director of Public Prosecutions;
- the South African Police Service; and
- the tobacco industry.

4. FINANCIAL IMPLICATIONS

It is envisaged that there will be positive financial implications for the State in that additional revenue will be generated as a result of the prohibition of duty-free and tax-free sales of tobacco products.

5. PARLIAMENTARY PROCEDURE

5.1 This Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution, namely “Trade”.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the House of Traditional Leaders in terms of sections 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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