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AIDS HELPLINE: 0800-0123-22 Prevention is the cure

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GOVERNMENT NOTICE

DEPARTMENT OF HEALTH**No. 1513****17 October 2003****TOBACCO PRODUCTS CONTROL AMENDMENT BILL, 2004**

The Minister of Health intends to table the Tobacco Products Control Amendment Bill, 2004 in Parliament next year.

Interested persons are invited to submit any substantiated comments or representations on the Tobacco Products Control Amendment Bill, 2004 to the Director-General of Health: Private Bag X828, Pretoria, 0001 (for the attention of the Director: Health Promotion), within one month of the date of this notice.

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 insert definitions of 'brand element', 'composition', 'distribute', 'emission', 'manufacturer', 'promotion', 'public conveyance' and 'vending machine'; to amend definitions of 'advertisement', 'package', 'public place' and 'tobacco product'; to provide for the enforcement of national regulations; to prohibit and restrict sales to and by minors; to restrict tobacco sales from vending machines; to prohibit the tax-free and duty-free sale of tobacco products; to provide measures to prevent illicit trade in tobacco products; to increase the penalties; and to provide for matters incidental thereto.

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

Amendment of the Preamble

1. The Preamble of the Tobacco Products Control Act, 1993 (hereinafter referred to as the "principal Act"), is hereby amended by the substitution for the Preamble of the following:

"Preamble

ACKNOWLEDGING that tobacco use-

is extremely injurious to the health of both smokers or non-smokers and warrants, in the public interest, a restrictive legislation;

is a widely accepted practice among adults, which makes it inappropriate to ban completely;

REALISING that the association of smoking with social success, business advertisement and sporting prowess through the use of advertising and promotion may have the particularly harmful effect of encouraging children and young people to take up smoking;

CONSIDERING that the extent of the effects of smoking on health calls for strong action to deter people from taking up smoking, to protect people, especially young people from the harmful effects of tobacco products and to encourage existing smokers to give up smoking; and

RESOLVING to align the health system with the democratic values of the Constitution and the international Framework Convention of Tobacco Control and to enhance and protect the fundamental rights of citizens by discouraging the use, promotion and advertising of tobacco products in order to reduce the incidence of tobacco-related illness and death;".

Amendment of section 1 of Act 83 of 1993

2. 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 means any drawn, still or moving picture, sign, symbol, brand element, other visual image or message or audible message aimed at the public and designed to promote or publicise a tobacco product or has the effect of promoting or publicising a tobacco product or to promote smoking behaviour [and includes the use in any advertisement or promotion aimed at the public of a tobacco product manufacturer's company name where the name or any part of the name is used as or is included in a tobacco product trade mark,] and includes product stacking and product displays of any kind or size, and 'advertise' has a corresponding meaning;";

(b) insertion after the definition of "advertisement" of the following definitions:

" 'brand element' includes the brand name, trade-mark, trade-name, distinguishing guise, logo, graphic arrangement, design, slogan, symbol, motto, selling message, recognizable colour or pattern of colours, or any other indicia of product identification identical or similar to, or identifiable with those used for any brand tobacco product;";

" 'composition' refers to the content, arrangement or combination of substances included in the processing and manufacture of tobacco products;";

“ ‘**emission**’ means any substance or combination of substances that is produced as a result of a tobacco product being lit;”;

- (c) insertion after the definition of “employed” or “employment” of the following definitions:

“ ‘**manufacturer**’ includes any entity that is associated with the manufacturer, including an entity that controls or is controlled by the manufacturer or that is controlled by the same entity that controls the manufacturer;”;

- (d) substitution for the definition of “package” of the following definition:

“ ‘**package**’ means the container, receptacle or wrapper in which tobacco products are sold, supplied or distributed;”;

- (e) insertion after the definition of “private dwelling” of the following definitions:

“ ‘**promotion**’ is the practice of fostering awareness of and positive attitudes towards a tobacco product, brand or manufacturer for the purpose of selling the tobacco product or encouraging tobacco use, through various means including direct advertisement, discounts, incentives, rebates, free distribution, entertainments, organised activities, questionnaires or surveys, promotion 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;”;

“ ‘**public conveyance**’ includes any commercial or chartered aircraft, ship, boat, train, bus, mini-bus or taxi;”;

- (f) substitution for the definition of “public place” of the following definition:

“ ‘**public place**’ means any indoor, [or] enclosed or semi-enclosed area which is open to the public or any part of the public, and includes a workplace and a public conveyance as well as the area within five metres of any doorways or entrances to the public place, workplace or public conveyance;”;

- (g) the insertion after the definition of “public place” of the following definition:

“ ‘**sell**’ in relation to this Act means to sell, offer to sell, expose for sale, distribute, give, supply, exchange, convey, consign, deliver, furnish, or transfer possession for commercial purposes, or offer to do so, whether for a fee or other consideration or as a sample, gift, prize, bonus or otherwise without charge, and ‘sale’ has a corresponding meaning;”;

(h) substitution for the definition of "tobacco product" of the following definitions:

"'tobacco product' means any product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves, and including cigarette papers, tubes and filters;";

(i) insertion after the definition of "trade mark" of the following definition:

"'vending machine' means any means of distribution of tobacco products that is not monitored in the prescribed manner by a human being."

Amendment of section 2 of Act 83 of 1993

3. Section 2 of the principal Act is hereby amended by-

(a) by the substitution for subsection (2) of the following subsection:

"(2) The Minister may by notice in the Gazette prohibit or restrict smoking in specified outdoor public spaces where persons are likely to congregate within close proximity to one another or where smoking may pose a fire or other hazard.";

(b) the substitution for subsection (3) of the following subsection:

"(3) A municipality shall have the power, duty and obligation to enforce this Act and the regulations made in terms thereof in its area of jurisdiction.";

(c) the substitution for subsection (4) of the following subsection:

"(4) An employer, owner, lessee or person in control of a public place or specified outdoor space shall, in accordance with regulations made in terms of this Act, post signs informing employees and the public of the prohibitions on smoking.";

(d) the substitution for subsection (5) of the following subsection:

"(5) The Minister may make regulations-

(a) prescribing the location, content, size and format of any signs required in terms of this Act; and

(b) generally as needed to carry out this section.";

(e) the substitution for subsection (6) of the following subsection:

“(6) All public places, workplaces and public conveyances and any outdoor spaces designated non-smoking areas in terms of this Act shall post signs, in accordance with the regulations.”;

(f) the substitution for subsection (7) of the following subsection:

“(7) Children under the age of 18 years shall not be permitted in a permissible smoking area.”.

Amendment of section 3 of Act 83 of 1993

4. Section 3 of the principal Act is hereby amended by-

(a) the substitution for the heading of section 3 of the following heading:

“Advertising, sponsorship, promotion and distribution of tobacco products and [required] information that is required in respect of [packages] the packaging and labelling of tobacco products.”.

(b) the substitution for subsection (1) of the following subsection:

“(1) No person shall advertise or promote or cause to advertise or promote by any other person, a tobacco product or a tobacco product-related brand element through direct or indirect means, including through sponsorship of any organization, event, service, physical establishment, programme, project, bursary, scholarship or any other vehicle of any kind.”;

(c) the insertion after subsection (2) (c) of the following subsection:

“(d) make any financial contribution to any person in respect of any organization, event, service, physical establishment, programme, project, bursary, scholarship or any other vehicle of any kind.”;

(d) the substitution for subsection (3) and subsection (4) of the following subsections:

“(3) No person shall sell or offer to sell tobacco products except in a package containing the quantities or number of units prescribed by regulation.

(4) Notwithstanding any regulation made under this Act, no person shall sell or offer to sell tobacco products in the following places:

(a) health institutions, including hospitals, pharmacies and clinics;

(b) any educational or training institutions, including primary and secondary schools, and educational institutions where more than 50% of the learners are under the age of 18 years;";

(e) the insertion after **subsection (5)** of the following subsections:

"(6) No person shall sell or offer to sell a tobacco product unless it is hidden from view of the general public at the point of sale, except where the sole purpose of the retailer is to sell tobacco products.

(7) Notwithstanding subsection (6), retailers may post, in accordance with regulations passed in terms of this Act, a notice indicating that tobacco products are available for sale, the specific brands available for sale, and their respective prices, provided that brand elements other than the brand names are not displayed.

(8) No person shall sell or offer to sell a tobacco product by means of a display that permits a person to handle the tobacco product before paying for it.

(9) No person shall sell or offer to sell tobacco products at retail unless signs bearing prescribed health warnings and other prescribed information are posted at the point of sale in accordance with regulations passed in terms of this Act.

(10) No person shall sell, offer to sell, supply or distribute to the public or any member of the public tobacco products through direct offers, the postal services or the Internet.

(11) No person shall, at any place or premises in which tobacco or tobacco-related products are sold at retail, display any sign concerning the legal age at which tobacco products may be purchased unless the sign is consistent with the regulations made in terms of this Act.

(12) No person shall manufacture, distribute, or import a tobacco product unless the package containing it displays, in the prescribed form and manner, including through an enclosed leaflet if prescribed, the information required by the regulations about the product and its emissions, about the health hazards and health effects arising from the use of the product or from its emissions, other health related messages such as, inter alia, advice on how to quit smoking, and markings designed to facilitate efforts to identify illegally manufactured or distributed tobacco products or products on which tax has not

been paid and the messages may be in the form of pictures or pictograms.

(13) 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, trademark, figurative or other sign that directly or indirectly creates that impression that a particular tobacco product is less harmful than another tobacco product, and this includes, inter alia, terms such as "low tar", "light", "ultra-light", or mild.

(14) Any requirements arising from the above-mentioned clauses do not relieve a manufacturer or retailer of further legal obligations or other liabilities in terms of any other law to warn consumers of the risks of using tobacco products.

(15) The Minister may make regulations in terms of the objects of the Act for purposes of achieving the objects of this Act:

- (a) regarding the content and format of information described in subsection 12 of this Act that must appear on packages and in leaflets;
- (b) regarding information that may not appear on packages or in leaflets;
- (c) prescribing quantities of tobacco to be sold in a single package;
- (d) prescribing places where tobacco products may not be sold;
- (e) prescribing notices and signage at points of sale; and
- (f) generally as needed to carry out this section of this Act."

Amendment of section 3A of Act 83 of 1993

5. Section 3A of the principal Act is hereby amended by the substitution for section 3A of the following section:

"3A Product Regulation

(1) No person shall manufacture, sell, or import a tobacco product except in compliance with this Act and regulations made in terms of this

Act.”

(2) Every manufacturer and importer of a tobacco product shall provide the Minister, in the prescribed manner and within the prescribed time, prescribed information about the product and its emissions as required by the regulations.

(3) The Minister may make regulations:

- (a) establishing standards for the manufacture of tobacco products, including
 - (i) prescribing the amount of substances that may be contained in the product or its emissions;
 - (ii) prescribing substances that may not or may not be added to tobacco products; and
 - (iii) prescribing product design standards to meet the health and safety objectives of the Act.
- (b) prescribing test methods, including methods to assess conformity with the standards;
- (c) prescribing information that manufacturers and importers must provide to the Minister or the public about tobacco products and their emission, including sales data on product promotion and information on product composition, ingredients, hazardous properties and brand elements;
- (d) generally as needed to carry out this section of this Act.”.

Amendment of section 4 of Act 83 of 1993

6. Section 4 of the principal Act is hereby amended by-

(a) the substitution for the heading of section 4 of the following heading:

“4 Prohibition of sale of tobacco products to and by persons under the age of [16] 18 years.”.

(b) the substitution for subsection (1) of the following subsection:

“(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].”

(c) The insertion after subsection (1) of the following subsections:

“(2) No person under the age of 18 years shall sell or offer to sell tobacco products.”

“(3) It shall not be a defence to subsection (1) that the person appeared to be 18 years old or older.”

Amendment of section 5 of Act 83 of 1993

7. Section 5 of the principal Act is hereby amended by-

(a) the substitution for the heading of section (5) of the following heading:

“ **Restriction on [use of vending machines] specific forms of the sale of tobacco products**”

(b) the substitution for subsection (1) of the following subsection:

“(1) The sale of tobacco products [from] through vending machines shall be restricted [to places in which purchases from such machines are inaccessible to persons under the age of sixteen years] and the Minister may make regulations regarding the sale of tobacco products through vending machines”.

(c) the substitution for subsection (2) of the following subsection:

“(2) The sale of tax- and duty- free tobacco products shall be prohibited within a period of three months after the coming into operation of this Act .”.

(d) the deletion of subsection (3)

Amendment of section 6 of Act 83 of 1993

8. Section 6 of the principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

“(1) In addition to the regulations specified in this Act, the Minister may make regulations regarding any matter required or permitted to be prescribed in terms of a provision of this Act, or any regulations that may reasonably be

prescribed in order to achieve the objects of this Act.”.

- (b) the deletion of subsection (2).
- (c) the substitution for subsection (3) of the following subsection:

“(3) The Minister shall, not less than **[three months]** ~~one month~~ before issuing any regulations under this Act, cause a draft of the regulation to be published in the *Gazette*, together with a notice declaring his or her intention to issue such regulation and inviting interested persons to furnish him or her with any comments thereon or representations in connection therewith within a specified period.”.

Amendment of section 7 of Act 83 of 1993

9. Section 7 of the principal Act is hereby amended by-

- (a) the substitution for subsection (1) of the following subsection:

“(1) Any person who contravenes ~~section 2(1)~~ or fails to comply with any notice issued in terms section 2(1) shall be guilty of an offence and liable on conviction to a fine not exceeding **[R200]** ~~R20 000~~ or to such penalties as may be determined for the first offence, and in the case of a any subsequent offences to a fine of not less than R20 000 and not more than R 100 000 or such penalties as may be determined;”.

- (b) the substitution for subsection (2) of the following subsection:

“(2) Any person who contravenes or fails to comply with any provisions of sections 4(1) or 5(1) or fails to comply with any notice issued in terms section 4(1) shall be guilty of an offence and liable on conviction to a fine not exceeding **[R10 000]** ~~R50 000~~ or such **[imprisonment]** penalties as may be determined for the first offence, and in the case of a any subsequent offences to a fine of not less than R50 000 and not more than R 150 000 or such penalties as may be determined;”.

- (c) the substitution for subsection (3) of the following subsection:

“(3) Any person who contravenes or fails to comply with the provisions of section 3, 3A or 4A or any notice issued in terms of section 3, 3A or 4A shall be guilty of an offence and liable on conviction to a fine not exceeding **[R200 000]** ~~R500 000~~ or to such **[imprisonment]** penalties as may be determined for the first offence, and in the case of a any subsequent offences to a fine of not less than R500 000 and not more than R 900 000 or such penalties as may be determined.”.

(d) the insertion after subsection (3) of the following subsections:

“(4) Any person who contravenes or fails to comply with any provisions of sections 5(2) shall be guilty of an offence and liable on conviction to a fine not exceeding R250 000 or such penalties as may be determined for the first offence, and in the case of a any subsequent offences to a fine of not less than R250 000 and not more than R 700 000 or such penalties as may be determined.

(5) Any person found guilty of smoking in a place where smoking is prohibited shall be liable to a fine of not less than R300 and not more than R 500 for the first offence, and of not less than R500 and not more than R1 000 for subsequent offences.”.

10. Transitional arrangements

(1) Any notice or regulation issued by the Minister prior to the coming into operation of this Act shall remain in force until amended, repealed or replaced by a notice or regulation made by the Minister in terms of this Act.

11. Short title and commencement

(1) This Act shall be called the Tobacco Products Control Amendment Act, 2003, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

(2) Different dates may be fixed in respect of different provisions of this Act.

MEMORANDUM ON THE OBJECTS OF THE TOBACCO PRODUCTS CONTROL AMENDMENT BILL, 2003

1. The Bill seeks to amend the Tobacco Products Control Amendment Act, 1993 in order to bring local legislation in line with the international Framework Convention of Tobacco Control to which the Republic of South Africa was a cosignatory. It further intends to close loopholes that exist in the present tobacco legislation that were exploited by the tobacco industry and which made prosecution on contraventions of the Act very difficult.

2. CLAUSE-BY-CLAUSE ANALYSIS OF THE BILL

2.1 Clause 1 amends the preamble to also insert the international Framework Convention of Tobacco Control.

2.2 Clause 2 seeks to amend some of the definitions in the present tobacco legislation as well as to insert some new definitions to extend the application of Tobacco Products Control Act and to close down on any loopholes that exist in the present tobacco legislation.

2.3 Clause 3 seeks to provide for the Minister to restrict or prohibit smoking in certain outdoor places such as schools, hospitals and other health institutions and further seeks to mandate municipalities to enforce the Tobacco Products Control Act and the regulations issued in terms thereof.

2.4 Clause 4 seeks to restrict the sale of tobacco products as well as the display thereof and further seeks to empower the Minister to regulate the format of information on the packaging which could include pictorial information and package inserts and quantities in which tobacco products may be sold as well as where these products should be kept by a retailer.

2.5 Clause 5 seeks for a manufacturer, importer and retailer to supply to the Minister with information relating to the tobacco product and further provides for the Minister to issue regulations relating to the type of information as well as the format in which such information shall be submitted to the Minister.

2.6 Clause 6 seeks to increase the restriction on the sale of a tobacco product to Children under the age of 16 years to under the age of 18 years to bring the legislation in line with the Constitution as well as the international Framework Convention of Tobacco Control.

2.7 Clause 7 seeks to restrict the sale of tobacco products through vending machines and seeks to prohibit the sale of tax- and duty-free tobacco products.

2.8 Clause 8 seeks to amend the section on regulations and provides for the Minister to give notice of her intentions to make regulations by publication of a notice in the *Gazette* not less than one month in advance in order to give interested parties an opportunity to make comments.

2.9 Clause 9 seeks to increase the fine for contravening the provisions of the Act and the regulations published in terms thereof to the extent that it will be a deterrent for persons who are trying to circumvent the provisions or are not complying with the provisions of the Act and the regulations.

2.10 Clause 10 deals with the transitional arrangements prior to the coming into operation of the Bill.

2.11 Clause 11 contains the short title of the Bill and provides for the commencement of date of the Bill.

3. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill provides for certain functions to be executed by municipalities. However, there will be additional personnel requirements as the functions imposed by the Bill will be executed by personnel already employed by municipalities i.e. environmental health inspectors and metro police officers. However, there could be an additional load on the present personnel involved in the execution of criminal justice as offenders contravening the tobacco legislation will have to be prosecuted and tried through the criminal justice system.

4. FINANCIAL IMPLICATIONS FOR THE STATE

There will be no negative financial implications for the State. The positive financial implications that the Bill will have for the State is that additional revenue will be generated through the prohibition of duty- and tax-free sales of tobacco products as well as the fines imposed for any contravention of the tobacco legislation.

5. IMPLICATIONS FOR THE PROVINCES

There will be no implications as a result of the Bill forthcoming to any of the provinces.

6. IMPLICATIONS FOR LOCAL AUTHORITIES

The Bill will have an impact on municipalities in that it seeks a municipality to implement and enforce the provisions of the tobacco legislation. To this extent the functions and duties of officers such as health inspectors and port health officials already in the employ of a municipality will be extended to include the enforcement of the tobacco legislation.

7. CONSULTATIONS

The Department of Health consulted apart from such stakeholders such as the tobacco industry and British American Tobacco, also consulted with the South African Police Service, Department of Trade and Industry, Department of Agriculture and Land Affairs, Department of Finance, Department of Provincial and Local Government, Department of Justice and the Director of Public Prosecutions.

The Director of Public Prosecutions has expressed the opinion that the degree of some of the fines might be excessive but it has been decided to revisit this issue once the comment of the public has also been received.

The Department of Local and Provincial Government has further indicated that as municipalities do have the capacity in enforcing the provisions envisaged by the Bill.

The Department of Trade and Industry has questioned the prohibition on the duty- and tax-free sale of tobacco products, but the Department of Health is of the opinion that there are no financial or legal considerations which justify the duty- and tax-free sale of tobacco products.

8. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Health are of the opinion that the Bill must be dealt with in accordance with Parliamentary procedure established by section 76(1) or (2) of the Constitution, since it falls within the functional areas listed in Schedule 4 to the Constitution, namely "Health Services" and Municipal health services".

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