



The Office of the Ombudsman

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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.**”

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“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](mailto: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" <dynamco@netvigator.com> 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



<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."



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.



<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.

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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

www.cleartheair.org.hk

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HONG KONG MONETARY AUTHORITY
香港金融管理局

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2 February 2012

Mr James Middleton
Chairman
Clean the Air NGO and Charity
8/F Eastwood Centre
5 A Kung Ngam village Road
Shaukeiwan
Hong Kong

Dear Mr Middleton,

**Framework Convention on Tobacco Control
of the World Health Organisation**

Thank you for your letter dated 16 December 2011 to Mr Norman Chan, the Chief Executive of the Hong Kong Monetary Authority (HKMA), and your subsequent e-mails in January 2012 to the general public enquiry email account of the HKMA.

We hope you will understand that owing to market sensitivities of the details of the investment of the Exchange Fund, we do not normally comment on the investment operations of the Exchange Fund.

But we can assure you that the investment of the Exchange Fund will comply with guidelines issued under international conventions that Hong Kong is party to. This includes the adoption of the Guidelines for Implementation of Article 5.3 of the Framework Convention on Tobacco Control (FCTC) by the World Health Organisation (WHO) as referred in your letter.

For the investment portfolio managed internally by the HKMA investment team, there is no investment that will infringe the FCTC guidelines. However, we also make use of external fund managers to manage the equity investments of the Exchange Fund. Since some of the mandates awarded are passive mandates requiring the managers to track common stock indices, which may imply that by design the portfolio may include investing in a large number of index constituent stocks across a variety of industries, including the tobacco industry. In the light of the relevant guidelines under the FCTC, we have already requested all our external managers to examine their stock holdings for the account of the Exchange Fund, and make necessary arrangements to divest from the stock holding of tobacco industry as soon as practicable if any such holding is identified. This exercise is now in good progress.

Thank you for your kind attention.

Yours sincerely,

(Francis Chu)

Executive Director (Reserves Management)



**Legco Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No. 2) Bill 2011**

bc_01_11@legco.gov.hk

13th February 2012

Dear Members of the Bills Committee,

Please find herewith self explanatory information regarding the HKMA's instruction to its contractors to divest from all tobacco stock portfolio holding.

Since the MPF intermediaries are about to be subjected to a statutory control regime please ensure that the prevention of unethical tobacco stock portfolio holding is included in the intermediaries regulation and also forbid other unethical investing such as those made in weapons' manufacturers and the like.

<http://www.legco.gov.hk/yr11-12/english/bc/bc01/general/bc01.htm>

"Proposed statutory regime to control intermediaries.

JUSTIFICATIONS

***Setting up a statutory Mandatory Provident Fund ("MPF")
intermediaries regulatory regime***

*(a) The need to replace the existing administrative regulatory arrangements
with a statutory regime*

*21. At present, MPFA implements an administrative regulatory regime for MPF
intermediaries through its "Code of Conduct for MPF Intermediaries". Under this
administrative regime, MPFA is the standard setter and registration authority whereas
HKMA, IA and SFC are, in accordance with the Memorandum of Understanding signed
between them and MPFA, responsible as far as practicable for the day-to-day supervision of
MPF intermediaries who are also their own regulatees under the Banking Ordinance (Cap.
155), Insurance Companies Ordinance (Cap. 41) and SFO respectively."*

EMAIL TO MPFA and FSTB February 8th 2012

From: James Middleton [mailto:dynamco@netvigator.com]

Sent: Wednesday, February 08, 2012 16:34

To: 'fredericky@fstb.gov.hk'; 'mpfa@mpfa.org.hk'; 'NancyWong@mpfa.org.hk'; 'AliceSCTang@mpfa.org.hk'

Subject: MPFA Trustees - investments in tobacco stocks must be divested to comply with the International ratified FCTC Treaty

Dear Mr Yu

Please see the self explanatory reply from the Hong Kong Monetary Authority.
The FCTC Treaty applies to ALL departments of the Hong Kong Government which has a
fiduciary duty to comply across the board and to instruct, as the HKMA has done,
the MPFA and its contractors to comply and divest accordingly.

Kind regards,

James Middleton

Chairman

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WHO Treaty Framework Convention on Tobacco Control Article 5.3

FCTC Article 5.3

http://www.who.int/fctc/guidelines/article_5_3.pdf

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

4.10 Parties should not allow any official or employee of government or of any semi/quasi-governmental body to accept payments, gifts or services, monetary or in kind from the tobacco industry.

4.11 Taking into account national law and constitutional principles, Parties should have effective measures to prohibit contributions from the tobacco industry or any entity working to further its interests to political parties, candidates or campaigns, or to require full disclosure of such contributions.

Yours sincerely,

James Middleton

Chairman
Clear the Air NGO

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Approved MPF Trustees

Name of Trustee (In English)	Name of Trustee (In Chinese)
Ageas Trustees (HK) Limited	富通信託(香港)有限公司
American International Assurance Company (Trustee) Limited	美國友邦 (信託) 有限公司
AXA China Region Trustees Limited	安盛信託有限公司
AXA Financial Services Trustees Limited	安盛理財策劃信託有限公司
Bank Consortium Trust Company Limited	銀聯信託有限公司
Bank of Communications Trustee Limited	交通銀行信託有限公司
Bank of East Asia (Trustees) Limited	東亞銀行 (信託) 有限公司
BOCI-Prudential Trustee Limited	中銀國際英國保誠信託有限公司
China Life Trustees Limited	中國人壽信託有限公司
Cititrust Limited	
HSBC Institutional Trust Services (Asia) Limited	匯豐機構信託服務(亞洲)有限公司
HSBC Provident Fund Trustee (Hong Kong) Limited	
ING Pension Trust Limited	
Manulife Provident Funds Trust Company Limited	宏利公積金信託有限公司
MassMutual Trustees Limited	美國萬通信託有限公司
Principal Trust Company (Asia) Limited	信安信託 (亞洲) 有限公司
RBC Dexia Trust Services Hong Kong Limited	加皇達亞信託香港有限公司
Royal Bank of Canada Trust Company (Asia) Limited	加拿大皇家銀行信託 (亞洲) 有限公司
Sun Life Trustee Company Limited	永明信託有限公司

10th December 2011

Dear Sir,

Mandatory Provident Fund – Trustee investments in tobacco stocks

We hereby request all the approved trustees of the MPFA scheme to provide us with a copy of their financial reports published by the said trustees in respect of the MPF scheme, which contain the details of investments held by the constituent funds offered by the scheme.

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Specifically we are seeking information on your investments in tobacco related stocks. It seems obvious from information received that certain Hong Kong MPF Trustees have unethical investments in tobacco stocks which is contrary to the FCTC Treaty Article 5.3 Guidelines subsection 4.7. Perhaps you were not aware that-

The said international instrument treaty binds Hong Kong Government and thereby all its subcontractors and bodies.

The University of Hong Kong 1998 study shows that the cost to the Hong Kong taxpayer to treat the ravages of tobacco and lost productivity are HK\$ 5.3 billion per year (at 1998 treatment costs) and that when the loss of life is taken into consideration the cost to Hong Kong society is HK\$ 73 billion per year. Let us know if you want a copy of the study.

It makes little sense for MPF trustees to invest in a lethal product that kills 50% of its users when used according to the manufacturers' instructions and then have the Hong Kong Government fund the cost of treating the tragic results.

Furthermore the Tobacco Plain Packaging domino that will spread around the world has already commenced in Australia so tobacco stocks will no longer be the grim reapers' best investments

http://www.who.int/fctc/guidelines/article_5_3.pdf

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.

We provide herewith self explanatory information whereby divestment in Tobacco stocks is the best course of action :

<http://www.fool.com/investing/dividends-income/2011/06/27/time-to-quit-big-tobacco-dividends.aspx>

Time to Quit Big Tobacco Dividends

By [Chris Baines](#) | [More Articles](#) June 27, 2011 |

Riding the U.S. tobacco gravy train has been one of the most reliable ways for an investor to get rich over the past century. Wharton's Jeremy Siegel reports that **Altria** (NYSE: [MO](#)) , formerly Philip Morris, was the best performing stock in the S&P 500 from 1957 to 2003. I believe him: They've been some of my best buys [on CAPS](#). But all good things -- or bad depending on your perspective -- must eventually draw to a close. Such is the case with U.S. tobacco stocks today. I think we are at a crossroads and it's finally time to call 'em quits.

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Quit your tobacco dividend addiction

U.S. tobacco stocks have historically appealed to investors because of their dividend yields of 5% or more coupled with reliable dividend increases. But now there is reason to think those dividends are -- or soon will be -- under pressure, and simply aren't worth the risk anymore.

For the first time in the last decade, Altria's free cash flow could not cover its dividend payments last year. America's largest domestic tobacco company paid out \$2.96 billion in dividends while only generating \$2.6 billion in free cash flow. The gap was made up by the issuance of equity and debt.

Now, I'm sure an observant reader will point out that 2010's result was an aberration due to a one-time \$945 million Internal Revenue Service payment and that Altria's continuing profitability cannot be judged by it.

I totally get that (and good for you for knowing that), but even if we add back the IRS payment, the free cash flow yield is a paltry 6.3%. That provides a dangerously thin margin to be supporting a 5.7% dividend yield. **Reynolds American** (NYSE: [RAI](#)) is in a similar pickle, supporting its own dividend yield of 5.7% with a free cash flow yield of 3.6%. **Lorillard** (NYSE: [LO](#)) has more headroom.

There are better alternatives

Besides, a 5.7% yield (what Altria and Reynolds both offer, and Lorillard 4.7%) simply doesn't cut it anymore. I can get that from safer telcos like **Verizon**

Communications (NYSE: [VZ](#)) or **AT&T** (NYSE: [T](#)), which sell their own form of addictive product. And unlike big tobacco, those two companies have ample free cash flow yields (a whopping 16.6% for Verizon and 8.1% for AT&T) to cover their dividend yields of 5.4% and 5.7%, respectively, while funding future growth.

Another alternative is junk bonds. Don't laugh. Altria, Reynolds, and Lorillard are practically junk bonds themselves, since they have a risky future, pay out most of their expected return, and have, dare I say, a finite lifetime. Junk bond ETFs like the **SDPR Barclays Capital High Yield** (NYSE: [JNK](#)) offer yields of around 8%. And they're more diversified to boot.

Last but not least, what about **Coca-Cola** (NYSE: [KO](#)) or **PepsiCo** (NYSE: [PEP](#))? They're trading at nearly identical free cash flow ratios as the tobacco companies (4.9% and 4.8%, respectively), which I've argued matters more than dividend yields. Why would I buy a moribund Altria or Reynolds when I can buy a Coke or Pepsi at a similar valuation? Plus you still get a roughly equal payout when you factor in share buybacks.

A picture is worth a thousand words

But there is another reason to stay away from U.S. tobacco dividends. Starting in fall 2012, tobacco companies will have to start putting horrific pictures on every cigarette carton. While I personally doubt this will have an effect on pre-existing smokers, I do think this will discourage a great many kids from taking it up. And without new customers, big tobacco and their big dividends eventually bite the dust.

The Campaign for Tobacco-Free Kids -- an interest group that lobbies against tobacco companies -- has put together an informative factsheet detailing the effectiveness of pictorial labeling requirements in the 35 countries that already have them.

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More than 90% of Canadian youths report that pictorial labels make smoking seem less attractive. When a second set of pictorial labels was introduced in Thailand in 2006, 53% of smokers said it made them think "a lot" about the health risks, and 44% of smokers said they were "a lot" more likely to quit over the next month. When Brazil introduced new picture warnings, 67% of smokers said it made them want to quit. When pictorial labels were introduced in Australia, the number of smokers who called the quit line doubled.

Just Say NO

Like their products, big tobacco's stocks are just too expensive and just too dangerous. These companies pay out most everything in a dividend, retaining almost nothing for growth, and 4.7% to 5.7% just isn't a high enough return given the risk. **There are better (and ethical) alternatives for your money**

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http://www.smoke-free.ca/eng_home/2011/news_press_20_October_2011.htm

Press Release

Ottawa - October 20, 2011

Alberta moves away from tobacco investments

Health group calls for other governments to protect health and protect pension investments by adopting investment policies against tobacco stocks.

PSC welcomes today the news that the Alberta government had directed the Alberta Investment Management Corporation (AIMCo) to sell-off its direct ownership of tobacco companies.

"Government investments in tobacco companies are wrong-headed on many fronts," explained Cynthia Callard, PSC's executive director. "The initial share offerings provide tobacco companies with the resources to expand their markets and harm new communities. Continued shareholdings push tobacco companies to generate profits through sustained or increased sales."

PSC has long called for all government investment boards, and especially the Canada Pension Plan Investment Board, to stop investing in tobacco companies. This position is supported by the Framework Convention on Tobacco Control, to which Canada is party. The FCTC directs governments to protect public health from tobacco industry interference and recommends that no state agency be involved in tobacco company ownership outside of state monopolies.

"The Alberta government deserves praise for being the first Canadian government to acknowledge, however tacitly, **that part-ownership of profit-seeking tobacco companies is inconsistent with its responsibility to protect health,**" said Callard.

A PSC review of institutional ownership of tobacco stocks last year found that Canadians owned more than \$2 billion in tobacco industry shares of the

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4 largest companies, and received more than \$90 million in dividend payments from the profits of tobacco sales, including at least \$36 million from sales in developing countries. **About 25% of these shareholdings were direct ownership by investment firms under government control.**

"Many countries do not put pension funds in any form of stock market investment. Those that do should follow the example of Norway, New Zealand and Alberta and ensure that pension investments do not worsen the global tobacco epidemic."

For information:

Cynthia Callard, Executive Director, 613 233 4878

Canadian institutional ownership of the "big four" tobacco companies Share-holdings by government-managed pension and private institutional investors, January 2011

* Public Pensions & Tobacco Public pension investments in and revenues from global tobacco sales, 2010

B.C. Government investments in tobacco. British Columbia Investment Corporation investments in and revenues from global tobacco sales, 2010

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http://en.wikipedia.org/wiki/The_Government_Pension_Fund_of_Norway

The Ethical Council NORWAY

Part of the investment policy debate is related to the discovery of several cases of investment by The Petroleum Fund in highly controversial companies, involved in businesses such as arms production and tobacco. The Petroleum Fund's Advisory Council on Ethics was established 19 November 2004 by royal decree. Accordingly, the Ministry of Finance issued a new regulation on the management of the Government Petroleum Fund which also includes ethical guidelines.

On 19 January 2010 the Ministry of Finance announced that 17 tobacco companies had been excluded from the fund.[9] The total divestment from these companies was USD 2bn (NOK 14.2bn), making it the largest divestment caused by ethical recommendations in the history of the fund.[10]

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<http://www.nzsuperfund.co.nz/news.asp?pageID=2145831983&RefID=2141735292> NEW ZEALAND

GNZS to Divest Tobacco Stocks (23 October)

Posted On: Tuesday, 23 October 2007

Auckland (23 October 2007) - The Guardians of New Zealand Superannuation today announced their intention to divest tobacco stocks from the New Zealand Superannuation Fund. As at 30 June 2007, the Fund held \$37.6 million invested in tobacco stocks on its segregated portfolio, equivalent to 0.29% of total assets.

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The divestment decision was made following an assessment of the tobacco sector against the Guardians' responsible investment framework. The Guardians apply a set of guidelines that enable the assessment of the Fund's investments for environmental, social, and governance issues against relevant international conventions, New Zealand law, and Crown actions.

If an issue is identified as breaching the Guardians' responsible investment standards, the Guardians then assess the most appropriate response for the Fund. The Guardians' preference is to engage with a company or industry sector as a responsible shareholder, and in concert with other likeminded investors. If engagement is assessed to be ineffective, then exclusion or divestment will be considered.

The Guardians' Chief Executive Officer, Mr Adrian Orr said "In assessing the issue of tobacco manufacture, the Board concluded that the Fund's investment in this sector was inconsistent with our responsible investment standards. This decision was based on product safety issues and New Zealand's commitment to specific international conventions.

While our preferred approach to responsible investment issues is to engage with the company or sector, in the case of tobacco manufacture we determined that this would be in conflict to the long-term goals of a shareholder, and inconsistent with New Zealand commitments to international conventions, in particular the objectives of the World Health Organisation Framework Convention on Tobacco Control. As a result, the Board resolved to divest from the sector.

The decision to divest from tobacco stocks should not be seen as a precedent for future decisions or actions. The Guardians have a transparent framework for responsible investment assessment. Recent international experience in this area highlights that engagement with companies, in concert with other investors, is often the most effective means by which to improve company policies, products and practices, within the sphere of shareholder influence.

The Guardians continue to assess other industry issues," concluded Mr Orr.

Yours faithfully,

James Middleton

Chairman

Clear the Air NGO and Charity

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Addressee list:

Name of Trustee (In English)	Ageas Trustees (HK) Limited
Name of Trustee (In Chinese)	富通信託(香港)有限公司
Principal Business Add.	28/F Wing On Centre 111 Connaught Road Central Hong Kong 香港干諾道中 111 號 永安中心 28 樓
Principal Business Ph. No.	25918888 *
Principal Business Fax No.	28385303
Name of Trustee (In English)	American International Assurance Company (Trustee) Limited
Name of Trustee (In Chinese)	美國友邦 (信託) 有限公司
Principal Business Add.	5/F Cornwall House, Taikoo Place 979 King's Road Quarry Bay, Hong Kong 香港鰂魚涌英皇道九七九號 太古坊康和大廈五樓
Principal Business Ph. No.	28321800 *
Principal Business Fax No.	25724695
Name of Trustee (In English)	AXA China Region Trustees Limited
Name of Trustee (In Chinese)	安盛信託有限公司
Principal Business Add.	20th Floor, AXA Centre 151 Gloucester Road Wanchai, Hong Kong 香港灣仔告士打道 151 號 安盛中心 20 樓
Principal Business Ph. No.	28022812 *
Principal Business Fax No.	31832168
Name of Trustee (In English)	AXA Financial Services Trustees Limited
Name of Trustee (In Chinese)	安盛理財策劃信託有限公司
Principal Business Add.	20th Floor, AXA Centre 151 Gloucester Road Wanchai, Hong Kong 香港灣仔告士打道 151 號 安盛中心 20 樓

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Principal Business Ph. No.	28022812 *
Principal Business Fax No.	25119559
Name of Trustee (In English)	Bank Consortium Trust Company Limited
Name of Trustee (In Chinese)	銀聯信託有限公司
Principal Business Add.	18/F, Cosco Tower 183 Queen's Road Central Hong Kong 香港中環皇后大道中 183 號 中遠大廈 18 樓
Principal Business Ph. No.	22989800 *
Principal Business Fax No.	25200909

Name of Trustee (In English)	Bank of Communications Trustee Limited
Name of Trustee (In Chinese)	交通銀行信託有限公司
Principal Business Add.	1/F, Far East Consortium Building 121 Des Voeux Road Central Hong Kong 香港中環德輔道中一百二十一號 遠東發展大廈一樓
Principal Business Ph. No.	28544998 *
Principal Business Fax No.	28540880

Name of Trustee (In English)	Bank of East Asia (Trustees) Limited
Name of Trustee (In Chinese)	東亞銀行 (信託) 有限公司
Principal Business Add.	32/F, BEA Tower, Millennium City 5 418 Kwun Tong Road, Kwun Tong Kowloon, Hong Kong 香港九龍觀塘道 418 號 創紀之城五期東亞銀行中心 32 樓
Principal Business Ph. No.	36080688 *
Principal Business Fax No.	36086008

Name of Trustee (In English)	BOCI-Prudential Trustee Limited
Name of Trustee (In Chinese)	中銀國際英國保誠信託有限公司
Principal Business Add.	12/F & 25/F, Citicorp Centre 18 Whitfield Road Causeway Bay, Hong Kong 香港銅鑼灣威非路道 18 號 萬國寶通中心 12 及 25 字樓
Principal Business Ph. No.	22901000 *
Principal Business Fax No.	21519888

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Name of Trustee (In English)	China Life Trustees Limited
Name of Trustee (In Chinese)	中國人壽信託有限公司
Principal Business Add.	Room 2002, 20/F. CLI Building, 313 Hennessy Road,, Wan Chai,, Hong Kong. 香港 灣仔軒尼詩道三百一十三號中國人壽大廈二十樓二 零零二室
Principal Business Ph. No.	2545 8111 *
Principal Business Fax No.	2544 4395

Name of Trustee (In English)	Cititrust Limited
Name of Trustee (In Chinese)	
Principal Business Add.	55/F, One Island East 18 Westlands Road, Island East Hong Kong 香港港島東華蘭路十八號 港島東中心五十五樓
Principal Business Ph. No.	28688888 *
Principal Business Fax No.	23237499

Name of Trustee (In English)	HSBC Institutional Trust Services (Asia) Limited
Name of Trustee (In Chinese)	匯豐機構信託服務(亞洲)有限公司
Principal Business Add.	17/F, Tower 2&3, HSBC Centre, 1 Sham Mong Road Kowloon, Hong Kong 香港九龍深旺道 1 號 匯豐中心第 2 及 3 座 17 樓
Principal Business Ph. No.	36637000 *
Principal Business Fax No.	34092608

Name of Trustee (In English)	HSBC Provident Fund Trustee (Hong Kong) Limited
Name of Trustee (In Chinese)	
Principal Business Add.	6/F, Tower 1, HSBC Centre, 1 Sham Mong Road Kowloon, Hong Kong 香港九龍深旺道 1 號 匯豐中心 1 座 6 樓
Principal Business Ph. No.	36637000 *
Principal Business Fax No.	28105259

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Name of Trustee (In English)	ING Pension Trust Limited
Name of Trustee (In Chinese)	
Principal Business Add.	8/F, ING Tower 308 Des Voeux Road Central Hong Kong 香港中環德輔道中三零八號 安泰金融中心八樓
Principal Business Ph. No.	28515222 *
Principal Business Fax No.	28515293

Name of Trustee (In English)	Manulife Provident Funds Trust Company Limited
Name of Trustee (In Chinese)	宏利公積金信託有限公司
Principal Business Add.	22/F., Manulife Financial Centre 223-231 Wai Yip Street, Kwun Tong Kowloon, Hong Kong 香港九龍觀塘偉業街 223-231 號 宏利金融中心 22 樓
Principal Business Ph. No.	25105600 *
Principal Business Fax No.	21043504

Name of Trustee (In English)	MassMutual Trustees Limited
Name of Trustee (In Chinese)	美國萬通信託有限公司
Principal Business Add.	4/F, MassMutual Tower 38 Gloucester Road Wanchai, Hong Kong 香港灣仔告士打道 38 號 美國萬通大廈 4 樓
Principal Business Ph. No.	29199115 *
Principal Business Fax No.	29199233

Name of Trustee (In English)	Principal Trust Company (Asia) Limited
Name of Trustee (In Chinese)	信安信託 (亞洲) 有限公司
Principal Business Add.	11/F, Island Place Tower, 510 King's Road,, North Point,, Hong Kong. 香港 北角英皇道 510 號港運大廈 11 樓
Principal Business Ph. No.	2827 1628 *
Principal Business Fax No.	2827 1618

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Name of Trustee (In English)	RBC Dexia Trust Services Hong Kong Limited
Name of Trustee (In Chinese)	加皇達亞信託香港有限公司
Principal Business Add.	Floor 51, Central Plaza 18 Harbour Road Wanchai, Hong Kong 香港灣仔港灣道 18 號 中環廣場 51 樓
Principal Business Ph. No.	29785656 *
Principal Business Fax No.	28450390

Name of Trustee (In English)	Royal Bank of Canada Trust Company (Asia) Limited
Name of Trustee (In Chinese)	加拿大皇家銀行信託 (亞洲) 有限公司
Principal Business Add.	1702A Cheung Kong Center 2 Queen's Road Central Hong Kong 香港中環皇后大道中 2 號 長江集團中心 17 樓 1702A 室
Principal Business Ph. No.	28483107 *
Principal Business Fax No.	25212968

Name of Trustee (In English)	Sun Life Trustee Company Limited
Name of Trustee (In Chinese)	永明信託有限公司
Principal Business Add.	12/F, China Resources Building 26 Harbour Road Wanchai, Hong Kong 香港灣仔港灣道 26 號 華潤大廈 12 樓
Principal Business Ph. No.	28614000 *
Principal Business Fax No.	28656837

Dear Ms Wong,

27 May 2012

I refer to your emails below whereby you seek to put the MPFA Trustees at arms-length 'i.e. they are doing their own thing' and thereby attempt to abrogate the fiduciary responsibility of the MPFA. I attach herewith a self-explanatory report based on British Law of which many extracts are of relevance to your stance. Salient amongst these are:

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 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

New ham example - 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."

Accordingly you must seek legal advice on your current stance which prima facie denies you have fiduciary responsibility for the MPFA investment portfolios.

James Middleton

Chairman

www.cleartheair.org.hk

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

▼"James Middleton" ---15-03-2012 PM 07:45:40---Dear Ms Wong are you trying to say that you will not execute your fiduciary duty and

From: "James Middleton" <dynamco@netvigator.com>
To: <NancyWong@mpfa.org.hk>
Cc: "'Dr J Mackay'" <jmackay@pacific.net.hk>, <raymond_ho@dh.gov.hk>
Date: 15-03-2012 PM 07:45
Subject: RE: Investments by MPFA

Dear Ms Wong
are you trying to say that you will not execute your fiduciary duty and instruct the MPF Trustees to divest ?
regards
James

From: NancyWong@mpfa.org.hk [<mailto:NancyWong@mpfa.org.hk>]
Sent: 01 December, 2011 16:58
To: James Middleton
Cc: Frederick_WS_YU/FSB/HKSARG%GCN-NOTES@mpfa.org.hk

Subject: Re: Further Enquiry dd 7.11.2011 from Clean the Air on Tobacco Stocks (Our ref: E11110070)

Dear Mr Middleton,

Your email of 28 November 2011 on the captioned matter refers. I am sorry that you are not satisfied with my email of 28 November 2011. I would like to explain our position a little clearer here.

The MPF System is a privately-managed system. The MPF legislation requires employers and employees to contribute money to employees' accounts under MPF schemes that are administered by the approved trustees from the private sector. The assets under MPF schemes belong to scheme members rather than the Hong Kong Government.

In the current MPF legislation, there is no investment requirement which restricts investments in tobacco stocks by MPF funds. The MPFA does not request the information specifically in relation to investments in tobacco stocks from the approved trustees. Should you wish to obtain information on the investments of MPF schemes, you may contact the approved trustees of the MPF schemes. According to the MPF legislation, a member of an MPF scheme may request the approved trustee of the scheme for a copy of the financial report published by the trustee in respect of the scheme, which contains the details of investments held by the constituent funds offered by the scheme.

For your easy reference, please refer to the link below listing all the approved trustees of MPF schemes.

http://www.mpfa.org.hk/english/reg_use/reg_use_amt/reg_use_amt.asp

The contact information of each approved trustee is available by further clicking the name of the approved trustee.

I hope the above is useful to you.

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: 15 March, 2012 18:10
To: James Middleton
Cc: [Frederick WS YU/FSB/HKSARG%GCN-NOTES@mpfa.org.hk](mailto:Frederick_WS_YU/FSB/HKSARG%GCN-NOTES@mpfa.org.hk)
Subject: Investments by MPFA

Dear Mr Middleton,

I write to explain further on my email to you yesterday on the above subject.

The MPFA holds a capital grant by the Government which is invested and managed by external fund managers. We will ensure that investments of this grant comply with the Guidelines for Implementation of Article 5.3 of the FCTC and we are making arrangements to divest from tobacco-related investments.

The capital grant mentioned above, however, is separate and different from the MPF funds in the MPF System which are privately operated and managed and for which investment requirements are set out in legislation, as explained in my earlier email dated 1 December 2011 to you (appended at the bottom of this email).

I hope the above sufficiently clarifies my email of yesterday.

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 Nancy Wong/CSER/MPFA on 15-03-2012 PM 03:10 -----

From: Nancy Wong/CSER/MPFA
To: "James Middleton" <dynamco@netvigator.com>
Cc: Frederick WS YU/FSB/HKSARG@GCN-NOTES
Date: 14-03-2012 PM 02:22

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
"
<dynamco@netvigator.com>
To<mpfa@mpfa.org.hk>,
<panel_hs@legco.gov.hk>

cc

10-03- Subject Government of
2012 PM Canada Legislation
05:55

**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

(See attached file: Copyright.pdf)

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

"James
Middleton"
<dynamco@netvigator.com>
To: <mpfa@mpfa.org.hk>
cc
Subject: HKMADivestTobaccoStocks.pdf

10-03-
2012
PM
05:57

**Hong Kong Mandatory Provident Fund Authority
attention:**

Mrs Diana Chan Tong Chee-ching, JP

Mr Darren Mark McShane

mpfa@mpfa.org.hk

(See attached file: HKMADivestTobaccoStocks.pdf)

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

"James
Middleton"
To: <mpfa@mpfa.org>

<dynamco@netvigator.com>
cc

10-03-2012 PM 05:59 Subject CTA letter
Bills Committee
MPFA
Divestment

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

From: James Middleton [<mailto:dynamco@netvigator.com>]
Sent: 23 February, 2012 08:40
To: 'office@annawu.hk'
Subject: CTA letter Bills Committee MPFA Divestment

Details of WU HUNG YUK, ANNA

Name (English)	WU HUNG YUK, ANNA
Name (Chinese)	胡紅玉
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From: James Middleton [<mailto:dynamco@netvigator.com>]
Sent: Saturday, February 18, 2012 21:05
To: 'NancyWong@mpfa.org.hk'
Subject: FW: CTA letter Bills Comm MPF

Cc MPFA

From: James Middleton [<mailto:dynamco@netvigator.com>]
Sent: Saturday, February 18, 2012 20:49
To: 'hytchiu@legco.gov.hk'
Cc: 'bc_01_11@legco.gov.hk'
Subject: CTAletterBillsCommMPF

Legco Bills Committee
MPFA Intermediaries

Dear Sir,

I hereby replace my previous submission to the Bills Committee with this more relevant updated version.

Kind Regards
James Middleton
Chairman
www.cleartheair.org.hk

(See attached file: CTAletterBillsCommMPF.pdf)

----- Forwarded by Frederick WS YU/FSB/HKSARG on 08/02/2012 16:38 -----

To<frederickyu@fstb.gov.hk>
<mpfa@mpfa.org.hk>
<NancyWong@mpfa.org.hk>
<AliceSCTang@mpfa.org.hk>

cc

SubjectMPFA Trustees - investments in tobacco stocks must be divested to comply with the International ratified FCTC Treaty

Dear Mr Yu

Please see the self explanatory reply from the Hong Kong Monetary Authority. The FCTC Treaty applies to ALL departments of the Hong Kong Government which has a fiduciary duty to comply across the board and to instruct, as the HKMA has done, the MPFA and its contractors to comply and divest accordingly.

Kind regards,

James Middleton

Chairman

www.cleartheair.org.hk

(See attached file: CTAMPFATrustees.pdf)(See attached file: HKMAreply.pdf)

----- Forwarded by Nancy Wong/CSER/MPFA on 15-03-2012 PM 03:11 -----

From: Nancy Wong on 01-12-2011 PM 04:57

To: "James Middleton" <dynamco@netvigator.com>

cc: Frederick WS YU/FSB/HKSARG@GCN-NOTES

Fax to:

Subject: Re: Further Enquiry dd 7.11.2011 from Clean the Air on Tobacco Stocks (Our ref: E11110070)

Dear Mr Middleton,

Your email of 28 November 2011 on the captioned matter refers. I am sorry that you are not satisfied with my email of 28 November 2011. I would like to explain our position a little clearer here.

The MPF System is a privately-managed system. The MPF legislation requires employers and employees to contribute money to employees' accounts under MPF schemes that are administered by the approved trustees

from the private sector. The assets under MPF schemes belong to scheme members rather than the Hong Kong Government.

In the current MPF legislation, there is no investment requirement which restricts investments in tobacco stocks by MPF funds. The MPFA does not request the information specifically in relation to investments in tobacco stocks from the approved trustees. Should you wish to obtain information on the investments of MPF schemes, you may contact the approved trustees of the MPF schemes. According to the MPF legislation, a member of an MPF scheme may request the approved trustee of the scheme for a copy of the financial report published by the trustee in respect of the scheme, which contains the details of investments held by the constituent funds offered by the scheme.

For your easy reference, please refer to the link below listing all the approved trustees of MPF schemes.

http://www.mpfa.org.hk/english/reg_use/reg_use_amt/reg_use_amt.asp

The contact information of each approved trustee is available by further clicking the name of the approved trustee.

I hope the above is useful to you.

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

Mandatory Provident Fund Schemes Authority (Head Office)
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January 2012

Local authority pension funds and investments in the tobacco industry



Purpose of this briefing

This briefing is a position statement by Action on Smoking and Health and FairPensions which aims to inform stakeholders in local authority pensions, including councillors, pension fund members, local taxpayers and pension fund trustees.

Local authority pension funds in the UK have attracted public criticism for holding investments in the tobacco industry. There are three common responses to this criticism, each of which will be examined in this briefing:

1. Local authority pension funds have a legal duty to maximise financial return and cannot give consideration to ethical issues.
2. Pension fund trustees do not interfere with the day to day decisions of external investment fund managers.
3. Tobacco is a low risk, high return investment.

This briefing challenges the claim that local authorities are in effect 'duty bound' to invest in tobacco and:

1. clarifies the law regarding the legal duties of pension fund trustees and explains the options for trustees wishing to properly consider ethical concerns around investments in the tobacco industry;
2. counters common misconceptions about the fiduciary duties around investments; and
3. provides information on the financial risks facing the tobacco industry which raises doubts about its long-term investment viability.

Argument #1: 'We have a fiduciary duty to maximise return'

Trustees' legal obligations to pension fund members are known as fiduciary duties. Pension funds often justify tobacco investments by claiming that their fiduciary duty requires them to maximise returns and ignore ethical considerations. However, this conventional interpretation of the law is somewhat simplistic.

Response

Although local authority pension funds are governed by different laws to other types of pensions (see Box C), members of their pensions committees have similar fiduciary duties to pension fund trustees. The phrase 'duty to maximise return' does not appear in any UK statute or case law. Pension fund trustees have a fiduciary duty to invest "in the best interests of members and beneficiaries."¹ This is based on the common law duty of loyalty, which exists to ensure that trustees avoid conflicts of interest and do not abuse their position to further their own ends.² Trustees also have a duty to invest prudently.³

In the 1984 case of *Cowan v Scargill* (see Box A), the judge ruled that, in a pensions context, “*the best interests of the beneficiaries are normally their best financial interests.*”⁴ This is often quoted as evidence that pension fund trustees are prohibited from considering ethical issues. However, the judgement explicitly denies this interpretation, going on to say: “*I am not asserting that the benefit of the beneficiaries which a trustee must make his paramount concern inevitably and solely means their financial benefit.*”⁵

Box A: *Cowan v Scargill* 1984

This case concerned the mineworkers' pension scheme. The five trustees appointed by the National Union of Mineworkers (NUM), led by Arthur Scargill, refused to approve an investment plan for the trust unless it excluded *all* overseas investments and all investments in industries directly competing with coal (e.g. oil and gas). The court upheld the employer-nominated trustees' contention that this was a breach of fiduciary duty, as:

- The trustees were motivated by their personal views and by a desire to pursue union policy, and were not putting the beneficiaries first (a breach of the duty of loyalty)
- Many of the beneficiaries, such as widows and dependants, would not be directly affected by the health of the mining industry, but would suffer any negative impacts from the likely sacrifice of return (a breach of the duty of impartiality)
- In any case, the social benefits of the policy were too speculative and remote: the pension fund's assets were not large enough to have any material impact on the prosperity of the mining industry or the national economy.

It is worth bearing in mind that, contrary to popular belief, the policy was not rejected on the grounds that it is unlawful for trustees to consider non-financial issues (see above). Rather, it was rejected on grounds specific to the facts of the case, including the trustees' decision-making process.

Indeed, it has been noted that the policy at issue bore little resemblance to a modern responsible or ethical investment policy. A landmark 2005 report by law firm Freshfields Bruckhaus Derringer concluded that “*No court today would treat Cowan v Scargill as good authority for a binding rule that trustees must seek the maximum rate of return possible with every individual investment and ignore other considerations.*”¹

¹ UNEP-FI, 2005, 'A legal framework for the integration of environmental, social and governance issues into institutional investment'

Similarly, in the case of *Martin v City of Edinburgh District Council* (see Box B), the judge said, “*I cannot conceive that trustees have an unqualified duty... simply to invest trust funds in the most profitable investment available.*”⁶

Indeed, local authority pension schemes (in line with other occupational pension schemes) are required to say in their Statement of Investment Principles “*the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments*”.⁷ This provision was intended as a ‘light-touch’ intervention to clarify that it is indeed legitimate for pension funds to take ethical issues into account.⁸

Case law does indicate that it would be difficult for trustees to justify an ethical restriction which significantly damaged financial returns, largely because of their duty to act impartially: it would not be fair if the ethical preferences of one group of beneficiaries hurt the retirement

prospects of another group who did not share their views.⁹ However, this is not the same as a bar on considering ethical issues. In particular, it leaves open two scenarios in which trustees might be able to exclude certain investments: firstly, if it would make no material difference to investment returns (the ‘**ethical tie-break**’), and secondly, if they have reason to believe it would actually enhance performance over the long run (the ‘**responsible investment approach**’).

Box B: Martin v City of Edinburgh 1995

In the case of *Martin v City of Edinburgh District Council*, a Conservative councillor sued his Labour colleagues for implementing a policy of disinvestment from apartheid-era South Africa. The judge ruled that the councillors had failed in their fiduciary duty because they had not undergone due process and taken proper advice. But he stressed that had they done so, the policy could have been legitimate: indeed, the fund's performance actually improved after the policy was implemented.

Moreover, the judge explicitly rejected the plaintiff's claim that *Cowan v Scargill* required trustees “*merely to rubber-stamp the professional advice of financial advisors.*” On the contrary, he said:

“I cannot conceive that trustees have an unqualified duty... simply to invest trust funds in the most profitable investment available. To accept that without qualification would, in my view, involve substituting the discretion of financial advisers for the discretion of trustees.”

The ethical tie-break

In *Cowan v Scargill*, the union trustees were insisting on a blanket exclusion of all overseas investments, and of any industries in competition with coal. In a subsequent paper the judge speculated that a more nuanced policy – for example, of excluding certain investments ‘all other things being equal’ – might have been permissible.¹⁰ More broadly, he suggested that an investment policy which accommodated the ethical concerns of some members without compromising the financial interests of others would be in the best interests of the beneficiaries as a whole. In other words, ethical criteria could be used to choose between two investment options that are equally attractive financially. This ‘tie-break’ principle has been restated several times in UK and US law and guidance.¹¹

Of course, trustees cannot be expected to predict actual investment performance. For this reason, the test of whether two options were ‘equivalent’ is not outcome but process: did the trustees take appropriate advice, and, based on the information available at the time, was their decision reasonable? It is very possible to imagine that a decision to exclude tobacco could pass this test. Indeed, many funds with much broader ethical exclusions (for example, the Norwegian State Pension Fund which excludes investments in tobacco producers among other things¹²) have consistently matched or outperformed the market.

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.”¹⁴

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 “*app[ly] their minds separately and specifically to the question whether [the decision at hand] would be in the best interests of the beneficiaries.*”¹⁵ Moreover, in order to fulfil their fiduciary duties, the law requires trustees to monitor their fund managers on an ongoing basis.¹⁶ In other words, as FairPensions’ recent report concluded, “*It is a vital principle of fiduciary obligation that fiduciaries cannot outsource their obligation to think.*”¹⁷

Box C: Local authority pensions – a special case?

Local authority pension funds are governed by different *statutory* rules to other occupational pension schemes.¹ There is no statutory requirement for assets to be invested in the best interests of beneficiaries, and schemes must take account of the interests of local taxpayers.² In our view this does not amount to a significant difference in the underlying legal principles governing scheme investment. Common law fiduciary duties – to which the above analysis refers – still apply. However, given their duty to taxpayers, it is arguably also relevant for local authority pension schemes to consider the cost to the taxpayer both of measures to prevent smoking and of dealing with the public health impacts of smoking when evaluating their tobacco investments.

1 The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 (SI 2009/3093)

2 The Myners Principles, <http://www.thepensionsregulator.gov.uk/docs/igg-myners-principles-update.pdf>

Argument #3: The tobacco industry is a low risk, high profit investment

Response:

Tobacco shares have traditionally been a low-risk, high profit investment. However, there are a number of factors indicating that investments may be a risk in the medium and long term and there is a strong business case for reviewing investments in the short term.

There is a risk that some tobacco investments may currently be overvalued. In November 2011 Goldman Sachs downgraded Imperial Tobacco to “sell” from “neutral”, having previously downgraded the stock from “buy” to “neutral” in September 2011^{18,19} and an article by ‘Smart Investor’ on City Wire in August 2011 suggested that British American Tobacco shares may be overvalued.²⁰

Is the tobacco industry in terminal decline?

Analyst Adam Spielman has argued that tobacco could virtually disappear in 30 to 50 years. In the Financial Times, Spielman argues that “*The percentage of smokers is declining across the developed world ... If these trends continue, then by 2050 many important tobacco markets will have gone to zero smoking.*”²¹

The UK, European and American markets

Sales in the UK and Europe have been in long-term decline and are predicted to decline further. In the UK adult smoking rates have fallen from 27% in 2000 to 21% in 2009²² and since 1990 there has been a decline in smoking rates in almost all EU states.²³

The European Commission is currently revising the Tobacco Products Directive, which is likely to include proposals to make pictorial warnings mandatory and larger (80% of the pack) and to introduce plain packaging of tobacco products.²⁴ The UK government has set out its ambition to reduce adult smoking prevalence in England from 21% to 18% by 2015,²⁵ resulting in 210,000 fewer smokers every year. The Welsh Government plans to reduce adult smoking rates from 23% to 16% by 2020.²⁶

The American market is also in long term decline, with cigarette sales falling steadily from 640 billion in 1981 to 380 billion in 2006.²⁷

Imperial Tobacco is still highly dependent on its EU and American markets with 55% of net revenue coming from the declining EU market,²⁸ having sought to diminish dependence on the UK and expand sales through acquisitions in America and Europe, acquiring brands including Fortuna, Gauloises and Gitanes in 2008. However, the risk of this dependency on the European and American markets was demonstrated in 2010 when net revenue in the Americas decreased by 9 per cent to £780 million and adjusted operating profit declined by 15 per cent to £244 million following substantial increases in federal excise tax.²⁹

Developing world markets

Tobacco companies have sought to manage the risk posed by declining EU volumes through investing in new, profitable markets, such as investments in Africa and China. However, excluding China where the transnational tobacco companies have little market share, global tobacco consumption is already declining^{30,31,32} and with increased regulation these markets can no longer be relied on to provide the growth tobacco companies need to balance declining EU sales.

Regulatory Risk

Framework Convention on Tobacco Control

The World Health Organization's Framework Convention on Tobacco Control (FCTC)³³ aims to restrict smoking prevalence in the very countries where the industry has achieved its growth in recent years. More than 170 countries are now party to the FCTC. The FCTC covers price and tax measures to reduce the demand for tobacco products (Article 6), non-price measures to reduce demand (Article 7) product regulation (Article 9) packaging and labelling (Article 11), reducing advertising promotion and sponsorship (Article 13) and measures to reduce supply (Articles 15-17).

Countries across the globe are introducing measures to meet their FCTC requirements, including widespread legislation for smokefree workplaces and advertising bans. For example China, which accounts for over 40% of the total global tobacco market, introduced a range of measures to tackle tobacco in May 2011, including a ban on smoking in all public places.³⁴

In Russia, the world's fifth biggest market, health warnings were introduced in 2010 and the national parliament is mandated to pass legislation to bring Russia into full alignment with the FCTC, which will mean smokefree indoor public places and public transport and a complete ban on all advertising, promotion and sponsorship by 2015.³⁵

Uruguay has introduced a range of measures, including an increase in tobacco tax, graphic health warnings taking up 80% of the packet and a ban on all tobacco advertising.³⁶

Tax increases

Several countries have introduced substantial increases in tobacco taxation. During 2010 Spain introduced a 28% increase in tobacco duty as part of a package to tackle the budget deficit,³⁷ Japan introduced a 33% increase³⁸ and in Australia tax was increased by 25%.³⁹ The Indonesian government announced a 15% increase in tobacco excise from January 2012.⁴⁰

These abrupt, high level tax increases are likely to have a greater impact on tobacco industry profits. There is a significant risk that similar tobacco tax increases will become increasingly attractive to governments seeking to tackle budget deficits.

Plain packaging

Australia is set to become the first country in the world to require tobacco products to be sold in plain, standardised packaging with promotional features removed, from 1 December 2012.⁴¹

In the UK, the Government has committed to consult on options to reduce the promotional impact of tobacco packaging, including the introduction of plain packaging.⁴² In addition to Australia and the UK, other countries are also examining the option of introducing plain packaging, including Turkey, New Zealand and Canada. According to the Financial Times: *"If the Australian proposals are implemented, similar laws will emerge elsewhere, with damaging effects on profits."*⁴³



Front cover of the tobacco industry journal warning of the business risk from plain packaging (2008)

In 2008 the industry journal Tobacco Journal International reported on proposals to require plain packaging for tobacco products, stating: “*standardisation of cigarette packaging [would] drive down pricing and put an end to the appeal of premium cigarettes which carry higher profit margins*”. Although the article concluded the 2008 proposal had little chance of success at that time, the author observed “*how much industry regulation has come to pass, namely once it has been put on the table it never really goes away until one country becomes bold enough to implement it and then others soon follow suit.*”⁴⁴

A report produced for Philip Morris by Jorge Padilla⁴⁵ argues that plain packaging will lead to substantial price reductions, by removing the brand loyalty that enables tobacco companies to charge premium prices. The report also argues that plain packaging will make market entry by new suppliers of super-low price “no-name” products easier. Although Padilla’s claims have been challenged by a leading economist,⁴⁶ shareholders should be aware of the risk implied by the industry’s own analysis.

Analyst Adam Spielman has also highlighted the risk to the industry’s profitability posed by reduced brand equity likely to result from plain packaging. “*The industry is so profitable only because consumers are willing to pay a premium of £1.50 for certain brands.*”⁴⁷ “*If the proposal is carried out, it would reduce the brand equity of cigarettes massively... Anything that weakens this will dramatically reduce profitability.*”⁴⁸

Litigation – from Nunavut to Nigeria

In 1998, 46 US states settled their Medicaid lawsuits against the tobacco industry for recovery of tobacco-related health care costs and were awarded \$206 billion in compensation. The deal, known as the Master Settlement Agreement, was in addition to \$36.8 billion awarded to the states of Mississippi, Florida, Texas, and Minnesota.⁴⁹

The industry now faces a new threat from other governments around the world that are suing tobacco companies for the cost of providing healthcare. In recent years Argentina, Israel, Italy, Turkey, France, Poland India, Nigeria, Canadian provinces and Sri Lanka have all brought suits against tobacco companies relating to the healthcare costs arising from smoking. The EU took action in the US courts against tobacco manufacturers for colluding in tobacco smuggling under the Racketeering Influenced Corrupt Organisations Act.⁵⁰ In 2011, the Australian government announced that it was considering legal action to seek compensation from tobacco companies for the health care costs of smoking.⁵¹

Tobacco industry profits have suffered from over £250 billion paid out in litigation costs and if recent law suits are successful this is likely to open the door to encourage similar cases elsewhere.

The damage to the tobacco industry from litigation is not limited to the cost of settlements alone. “*There is also a risk that, regardless of the outcome of the litigation, negative publicity from the litigation and other factors might make smoking less acceptable to the public, enhance public restrictions on smoking, induce many similar lawsuits against JT and its subsidiaries, forcing them to deal with and bear the costs of such lawsuits, and so on.*” Japan Tobacco Inc., 2007⁵²

Box D: Tobacco – an industry with a disappearing future

- 170 countries are parties to the Framework Convention on Tobacco Control, and committed to introduce price and tax measures to reduce the demand for tobacco products
- UK government plans to cut the number of smokers by 210,000 every year
- Plain packaging “*will dramatically reduce profitability.*”

The questions that stakeholders should be asking

- Has the pension fund asked its fund managers for their view on the long-term financial viability of tobacco, in light of declining markets and regulatory or litigation risks?
- Has the pension fund asked its fund managers to undertake an analysis of the long-term impact of excluding tobacco from their portfolio, taking into account any measures that could be taken to compensate for the exclusion (for example, increasing weightings of other defensive stocks)?
- If not, will pension fund trustees:
 - commission these analyses;
 - make the results available to members; and
 - review their tobacco holdings, taking into account these findings as well as the ethical concerns of members?
- Will the pension fund develop and publish a statement of policy in relation to investments in tobacco companies?

References

- 1 The Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378), Regulation 4(2).
- 2 Bristol and West Building Society v Mothew [1996] 4 All ER 698
- 3 Re Whiteley [1886] LR 33 Ch D 347
- 4 Cowan v Scargil [1984] All ER 750; [1985] Ch 270. Page 760.
- 5 Cowan v Scargill, Ibid, Page 761
- 6 Martin v City of Edinburgh District Council [1988] SLT 329, [1988] SCLR 90
- 7 The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 (SI 2009/3093), Regulation 12(2)
- 8 See for example Stephen Timms, 10 Nov 2009, Speech for National Ethical Investment Week.
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From: Dr J Mackay [mailto:jmackay@pacific.net.hk]
Sent: 24 May, 2012 09:52
To: mpfa@mpfa.org.hk
Cc: annahywu@netvigator.com; aw@annawu.hk; Chan Sophia; Griffiths Sian; Ho, Raymond; Lai Vienna; Lam, TH; Lau, Lisa; Middleton, Jim; Tso, Homer
Subject: MPFA Responsible Investment

24 May 2012

Attn: Mrs Diana Chan Tong Chee-ching, JP
Deputy Chairman and Managing Director

Dear Mrs Chan,

Re: Tobacco industry investment by MPFA

I have been in communication with Anna Wu on the above topic, and also made a representation to the Legislative Council Bills Committee in March 2012 on behalf of a number of health organisations (attached).

The reply via Legco stated: “The Mandatory Provident Fund Schemes Ordinance (Cap. 485) does not have any sections restricting unethical investment in industries like munitions, blood diamonds, tobacco, etc. The Administration may review this issue. MPFA will take into account the views expressed, among others, in its future review of investment regulations.”

The current MPFA “Investment Restrictions” has not yet addressed the ethical aspects of investment. While munitions, blood diamonds and others may be unworthy investments, to my knowledge tobacco is the only substance where Hong Kong has obligations under an international UN convention, as outlined in my letter.

UN Principles for Responsible Investment (UN PRI)

Hong Kong: The task is made easier for the MPFA by the Signatories to the Principles for Responsible Investment at

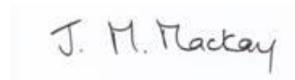
<http://www.unpri.org/signatories/index.php?country=Hong Kong>
which lists several Hong Kong companies.

Ban Ki-moon, UN Secretary-General, has unequivocally stated “The combined support of the UN Global Compact, the UNEP Finance Initiative and committed leaders from the investment community has helped to make the Principles a unique initiative that holds great

promise for financial markets and for achieving a wide range of United Nations objectives. I applaud the leadership of the institutions that have committed themselves to this undertaking, and **urge other investors around the world to join this historic effort.**" (see attached)

I would be happy to discuss this with you further,

Yours sincerely,



Dr Judith Mackay, SBS, OBE, JP, FRCP(Edin), FRCP(Lon)

Director, Asian Consultancy on Tobacco Control

Senior Advisor, World Lung Foundation, Senior Policy Advisor, World Health Organization

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worldlungfoundation.org



Presentation to the Legislative Council of the Hong Kong Special Administrative Region, Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011. Item (a) setting up a statutory MPF intermediaries regulatory regime

Dr Judith Mackay, SBS, OBE, JP, FRCP (Edin), FRCP (UK)

Date: 6 March 2012

Dear Chair and Members of the Bills Committee,

I am a medical doctor, who has worked in Hong Kong since 1967, firstly in university and public hospital practice, followed by public health. I am here today representing World Lung Foundation and the Asian Consultancy on Tobacco Control. I am also a Senior Policy Advisor for World Health Organization and an Honorary Consultant to the HK Department of Health.

I have also been mandated to make this presentation on behalf of:

- School of Nursing, The University of Hong Kong
- The Jockey Club School of Public Health and Primary Care, Faculty of Medicine, The Chinese University of Hong Kong
- Department of Community Medicine, School of Public Health, The University of Hong Kong
- Hong Kong Council on Smoking and Health
- Clear the Air, Hong Kong
- Dr Homer Tso, Honorary Consultant, Department of Health

Hong Kong Anti-smoking Policy: Since the 1970s the Hong Kong government has adopted an anti-smoking policy, which has been successful in many ways regarding tobacco control legislation and tobacco taxation policy. Our lowered smoking prevalence rates are now among the best in the world, but it is equally important to maintain vigilance, especially with regard to youth smoking.

FCTC and Hong Kong: China ratified the WHO Framework Convention on Tobacco Control (FCTC) in 2005 (after the establishment of the MPF system), and specifically stated that Hong Kong and Macau were included in this UN treaty.

Article 5.3 of the FCTC states: “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.” This applies to all sectors of government. Thus, any government that ratifies the convention has an obligation to divest of commercial links to the tobacco industry.

The Guidelines for Implementation are available at:

http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf

GUIDING PRINCIPLES for the implementation of Article 5.3 state:

Item 7.2 (page 11) states: “**Parties that do not have a State-owned tobacco industry should not invest in the tobacco industry and related ventures.**”

HK Monetary Authority: The Hong Kong Monetary Authority has recently laudably but properly pledged to do just that. In a letter dated 2 February addressed to Clear the Air, the HKMA wrote:

“We can assure you that the investment of the Exchange Fund will comply with guidelines issues under international conventions which Hong Kong is party to. This includes the adoption of the Guidelines for Implementation of Article 5.3 of the Framework Convention on Tobacco Control (FCTC) by the World Health Organisation (WHO).

“For the investment portfolio managed internally by the HKMA investment team, there is no investment that will infringe the FCTC guidelines... In the light of the relevant guidelines under the FCTC, we have already requested all our external managers to examine their stock holdings for the account of the Exchange Fund, and make necessary arrangements to divest from the stock holding of the tobacco industry as soon as practicable if any such holding is identified. This exercise is now in good progress.”

Our present submission is that it would seem appropriate for the MPF to announce likewise (in fact, would be difficult for the MPF to announce a contrary policy).

Zero cost: It will cost the MPF nothing, has virtually no administrative costs other than vigilance, and is easy to implement. There is already a document of Investment Restrictions, so this item could be added to that.

Following global trends, and exemplar in Asia: Other administrations, such as Norway and New Zealand, have already taken such steps, and many others ranging from Australia to Scotland are in active discussion on divestment.

This is important not only for Hong Kong, but also to set an exemplar for Asia.

Unethical investments: We note that there is not yet any clause in the MPF about investment in industries such as munitions, blood diamonds, tobacco, etc, so this may be an appropriate moment to discuss this larger framework, although to my knowledge, the tobacco is the only item covered under international obligation on the Hong Kong government.

Mr Chairman and Members, thank you

Message from the UN Secretary-General

Until recently, the role of financial markets in sustainable development was little understood and widely discounted. The Principles for Responsible Investment have helped to change this impression.



Launched in April 2006, the Principles are in essence a set of global best-practices for responsible investment. Rising numbers of institutional investors – from all regions of the world, representing more than eight trillion dollars in the first year alone – are embracing them, marking a major advance in mainstream financial markets. The Principles have quickly become the global benchmark for responsible investing.

By incorporating environmental, social and governance criteria into their investment decision-making and ownership practices, the signatories to the Principles are directly influencing companies to improve performance in these areas. This, in turn, is contributing to our efforts to promote good corporate citizenship and to build a more stable, sustainable and inclusive global economy.

The Principles complement the UN Global Compact, which asks companies to embed in their strategies and operations a set of universal principles in the areas of human rights, labour standards, the environment and anticorruption. The Principles are also a natural extension of the work of the UN Environment Programme Finance Initiative, which has helped sensitize capital markets to the importance of environmental and social issues.

The combined support of the UN Global Compact, the UNEP Finance Initiative and committed leaders from the investment community has helped to make the Principles a unique initiative that holds great promise for financial markets and for achieving a wide range of United Nations objectives. I applaud the leadership of the institutions that have committed themselves to this undertaking, and **urge other investors around the world to join this historic effort.**

Ban Ki-moon
UN Secretary-General

<http://www.unpri.org/signatories/>

Accessed 24 May 2012

<http://www.unpri.org/signatories/index.php?country=Hong Kong>

Signatories to the Principles for Responsible Investment

There are three main categories of signatory:

	Number of signatories
Asset owners	
Investment managers	9
Professional service partners	3
Total	12

Find signatories by individual country:

Asset owner signatories

Institution	Link	Country
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Investment manager signatories

NB. Linking to PRI services of signatories in no way indicates endorsement of these services by the UN or any other signatories.

Institution	Link	Country
ADM Capital		Hong Kong
AMCG Partners		Hong Kong
ARCH Capital Management Co. Ltd.		Hong Kong
Earth Investment Partners		Hong Kong
Environmental Investment Services Asia (EISAL)		Hong Kong

Institution	Link	Country
Leon CVM Capital Management		Hong Kong
NewQuest Capital Partners		Hong Kong
Orchid Asia Hong Kong Management Company Limited		Hong Kong
Squadron Capital		Hong Kong

Professional service partners

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Institution	Link	Country
Avantage Ventures		Hong Kong
Pacific Risk Advisors Ltd (PRA)		Hong Kong
SustainAsia Ltd		Hong Kong

**James Middleton: Chairman www.cleartheair.org.hk
<http://www.unpri.org/>**

‘time to turn up the heat on uncontrolled MPFA Trustees who are investing our money in tobacco stocks, blood diamonds and munitions, land mine manufacturers, environmental polluters, child labour factories and other unethical investments.’

29 March 2012

To: Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 ("Bills Committee")

As a follow-up to the written and oral submission to the Bills Committee, I would be grateful if you would inform me as to what action has either been planned or implemented.

Particularly bearing in mind that Hong Kong is party to an international Convention on this very matter. China ratified the WHO Framework Convention on Tobacco Control (FCTC) in 2005, and specifically stated that Hong Kong and Macau were included in this UN treaty.

Article 5.3 of the FCTC states: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law." This applies to all sectors of government. Thus, any government that ratifies the convention has an obligation to divest of commercial links to the tobacco industry.

The Guidelines for Implementation are available at:

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GUIDING PRINCIPLES for the implementation of Article 5.3 state:

Item 7.2 (page 11) states: **"Parties that do not have a State-owned tobacco industry should not invest in the tobacco industry and related ventures."**

I, and the other organizations listed, look forward to hearing from you.

Sincerely,



Dr Judith Mackay, SBS, OBE, JP, FRCP (Edin), FRCP (Lon)
Senior Policy Advisor to World Health Organization
Consultant to the HK Department of Health
Policy Advisor to World Lung Foundation
(writing in the capacity of Director of the Asian Consultancy on Tobacco Control, Hong Kong)

**Submission to The Legislative Council of the Hong Kong Special Administrative Region
Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011**

**For discussion on 6 March 2012 under Item (a) setting up a statutory MPF
intermediaries regulatory regime**

Date: 23 February 2012

Dear Chair and Members of the Bills Committee,

Hong Kong Anti-smoking Policy: Since the 1970s the Hong Kong government has adopted an anti-smoking policy, which has been successful in many ways regarding tobacco control legislation and tobacco taxation policy.

FCTC and Hong Kong: China ratified the WHO Framework Convention on Tobacco Control (FCTC) in 2005, and specifically stated that Hong Kong and Macau were included in this UN treaty.

Article 5.3 of the FCTC states: “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.” This applies to all sectors of government. Thus, any government that ratifies the convention has an obligation to divest of commercial links to the tobacco industry.

HK Monetary Authority: The Hong Kong Monetary Authority has recently laudably but properly pledged to do just that, and it would seem appropriate for the MPF to announce likewise (in fact, would be difficult for the MPF to announce a contrary policy).

Zero cost: It will cost the MPF nothing, has virtually no administrative costs other than vigilance, and is easy to implement.

Following global trend, and exemplar in Asia: This is important not only for Hong Kong, but also to set an exemplar for Asia, at a time when many governments are taking similar action under their obligations under Article 5.3.

Unethical investments: We note that there is not yet any clause in the MPF about investment in industries such as munitions, blood diamonds, tobacco, etc, so this may be an appropriate moment to discuss this larger framework, although to my knowledge, the tobacco is the only one covered under international obligation on the Hong Kong government.

Signed, in alphabetical order of name, on the following pages. A representative of this group would be available to make an oral presentation on 6th March.



SCHOOL OF NURSING
LI KA SHING FACULTY OF MEDICINE
THE UNIVERSITY OF HONG KONG

Professor Sophia Chan
PhD, MPH, MEd, RN, RSCN, FFPH, FAAN
Professor and Director of Research
School of Nursing, The University of Hong Kong

香港中文大學
CUHK

賽馬會公共衛生及基層醫療學院
The Jockey Club School of Public Health and Primary Care

Professor Sian Griffiths, OBE, JP
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The Chinese University of Hong Kong



SCHOOL OF PUBLIC HEALTH
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Professor TH Lam, MD,
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Dr Judith Mackay, SBS, OBE, JP, FRCP (Edin), FRCP (Lon)

Senior Policy Advisor to World Health Organization

Consultant to the HK Department of Health

Policy Advisor to World Lung Foundation

(writing in the capacity of Director of the Asian Consultancy on Tobacco Control, Hong Kong)

Homer Tso

Dr. Homer W. K. Tso, SBS, BBS, JP, DDS

Honorary Consultant, Department of Health, HKSAR



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Mr Chairman and Members, thank you

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	99-2496 (GK)
	:	
PHILIP MORRIS USA, INC.,	:	
<u>et al.</u>	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Back in 2006, the Court issued its Final Judgment and Remedial Order #1015 [Dkt. No. 5733], mandating that Defendants publish corrective statements on each of five topics on which the Court found they had made false and deceptive statements. These topics are: "(a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any significant health benefit from smoking 'low tar,' 'light,' 'ultra light,' 'mild,' and 'natural,' cigarettes; (d) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (e) the adverse health effects of exposure to secondhand smoke." United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 938-39 (D.D.C. 2006) ("Original Opinion"). Upon consideration of the briefs, the oral argument, and the entire record herein, the Court herein finalizes the text of the corrective messages to be published. See infra Section II.A-E.

I. Background

On September 22, 1999, the United States filed this civil suit against Defendants pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. After nearly five years of discovery, motions, and other pretrial proceedings, trial began in September 2004. The bench trial lasted nine months and on August 17, 2006, this Court issued a lengthy opinion finding that all Defendants "(1) have conspired together to violate the substantive provisions of RICO, pursuant to 18 U.S.C. § 1962(d), and (2) have in fact violated those provisions of the statute, pursuant to 18 U.S.C. § 1962(c)." Original Opinion, 449 F. Supp. 2d at 26. In particular, the Court concluded that Defendants "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." Id. at 852.

A. Factual Findings

The Court made detailed Findings of Fact on each of the various topics on which Defendants made their false, deceptive, and misleading public statements. Id. at 146-839. First, the Court found that "each and every one of these Defendants repeatedly, consistently, vigorously - and falsely - denied the existence of any adverse health effects from smoking," despite "the massive documentation in their internal corporate files from their own

scientists, executives, and public relations people" that confirmed that there was little evidence supporting their claims. Id. at 208. Specifically, Defendants "knew there was a consensus in the scientific community that smoking caused lung cancer and other diseases" by at least January 1964. Id. at 180. Despite this internal knowledge, the Defendants embarked on a "campaign of proactive and reactive responses to scientific evidence that was designed to mislead the public about the health consequences of smoking." Id. at 187-88.

Second, the Court found that Defendants "have publicly denied and distorted the truth as to the addictive nature of their products for several decades." Id. at 209. Defendants "knew and internally acknowledged that nicotine is an addictive drug," id. at 218, but "publicly made false and misleading denials of the addictiveness of smoking, as well as nicotine's role in causing that addiction." Id. at 271. The Court found that this conduct was continuing, observing that "no Defendant accepts the Surgeon General's definition of addiction, no Defendant admits that nicotine is the drug delivered by cigarettes that creates and sustains addiction, and no Defendant acknowledges that the reason quitting smoking is so difficult, and not simply a function of individual will power, is because of its addictive nature." Id. at 286.

Third, the Court found that "Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction." Id. at 309. Specifically, most cigarettes are "manufactured using reconstituted tobacco material, additives, burn accelerants, ash conditioners, and buffering substances, all of which affect nicotine levels and delivery." Id. "Other cigarette design features used by Defendants to control nicotine delivery include filter design, paper selection and perforation, ventilation holes, leaf blending, and use of additives (such as ammonia) to control the PH of cigarette smoke." Id. However, the Defendants "denied, repeatedly and publicly, that they manipulate nicotine content and delivery in cigarettes in order to create and sustain addiction." Id. at 374.

Fourth, the Court found that, for several decades, Defendants marketed and promoted "low tar brands" as less harmful than conventional cigarettes. Id. at 430. Defendants knew that "smokers of low tar cigarettes modify their smoking behavior, or 'compensate,' for the reduced nicotine yields by taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes." Id. at 431. Based on their sophisticated understanding of compensation, Defendants understood that low tar/light cigarettes offered no clear health benefits. Id.

at 456-75. However, they "concealed that knowledge and disseminated false and misleading statements to downplay its existence and prevalence." Id. at 500. Defendants "continue to make[] false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting." Id. at 507-08.

Fifth, the Court found that "Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicating passive smoke as a health hazard."¹ Id. at 693. Research funded by Defendants provided evidence confirming that "nonsmokers['] exposure to cigarette smoke was a health hazard." Id. at 709. However, Defendants made "numerous public statements denying the linkage" between secondhand smoke and disease in nonsmokers. Id. at 788. The Court found that the Defendants' conduct was continuing, noting that "currently no Defendant publicly admits that passive exposure to cigarette smoke causes disease or other adverse health effects." Id. at 693.

B. Remedies

Based on these findings, as well as many others, the Court imposed a number of injunctive measures in order to prevent and restrain future violations of RICO. Id. at 937-45; see also id. at 908-09 (recognizing that 18 U.S.C. § 1964(a) limits remedies to

¹ Secondhand smoke, "also called passive smoke or environmental tobacco smoke ('ETS'), is a mixture of mostly sidestream smoke given off by the smoldering cigarette and some mainstream smoke exhaled by smokers." Id. at 693.

those which "prevent and restrain violations of section 1962"). The Court concluded that there was a reasonable likelihood that Defendants would continue to violate RICO in the future. Id. at 908-19. The Court also found that the "evidence in this case clearly establishes that Defendants," with the exception of several parties who have since been dismissed, "have not ceased engaging in unlawful activity." Id. at 910. Further, "[e]ven after the Complaint in this action was filed in September 1999, Defendants continued to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day." Id.

One of the injunctive measures ordered Defendants to make corrective statements on each of the five topics on which they had historically made (and were currently making) false and deceptive statements. Id. at 925-26. These statements were necessary to prevent and restrain "Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful corrective communications." Id. at 927. The statements are to be published in newspapers and disseminated "through television, advertisements, onsets, in retail displays, and on their corporate websites." Id. at 928; see also id. at 938-41. The Court stated that it would receive proposals from the parties "for the exact wording of such corrective statements, with any supporting materials deemed necessary." Id. at 939.

C. Post-Trial Rulings of the Court of Appeals

On May 22, 2009, the Court of Appeals affirmed this Court's judgment of liability and affirmed major provisions in its Remedial Order.² United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1150 (D.C. Cir. 2009) ("Affirmance Opinion"). The Court of Appeals specifically affirmed many of the individual Findings of Fact discussed above, including that Defendants made false and misleading statements: (1) denying the addictive properties of nicotine; (2) suggesting that "light" and "low tar" cigarettes were less harmful than regular cigarettes; and (3) denying the health hazards of secondhand smoke. 566 F.3d at 1124-26, 1126-27, 1127-28. In addition, the Court upheld the finding that there was a reasonable likelihood that Defendants would commit future RICO violations and concluded that corrective statements were appropriate "to counteract these anticipated violations." Id. at 1131-34, 1144. Defendants petitioned for a writ of certiorari, which was denied. 130 S. Ct. 3501 (2010).

Since then, the Court of Appeals has issued two additional opinions upholding this Court's post-remedial decisions.³ First, the Court of Appeals affirmed this Court's broad remedial powers

² The Court of Appeals remanded the case with directions to address four discrete matters not at issue in this opinion.

³ Those decisions by this Court can be found at 778 F. Supp. 2d 8 (D.D.C. 2011) (disaggregated marketing data decision) and 787 F. Supp. 2d 68 (D.D.C. 2011) (denying motion for vacatur).

when it declined to overturn its clarification of its disaggregated marketing disclosure remedy. United States v. Philip Morris USA Inc., 686 F.3d 839 (D.C. Cir. 2012). Second, the Court of Appeals upheld this Court's determination that the passage of the Family Smoking Prevention and Tobacco Control Act ("TCA" or "Act"), Pub. L. No. 111-31, 123 Stat. 1776 (2009), did not eliminate the reasonable likelihood that Defendants would commit future RICO violations. United States v. Philip Morris USA Inc., 686 F.3d 832, 837 (D.C. Cir. 2012). In affirming this Court's decision not to assume that the Defendants would comply with the TCA, the Court of Appeals noted that the Act did not establish penalties as broad as those available under RICO, and observed that, "[i]f the defendants were not deterred by the possibility of RICO liability, the district court reasonably found the defendants were not likely to be deterred by the Tobacco Control Act either." Id. at 836-37.⁴

Thereafter, this Court ordered briefing from the parties on whether it should defer consideration of the issue of corrective statements pending the resolution of various challenges to the regulations promulgated by the Food and Drug Administration under the TCA. Order, Nov. 17, 2011 [Dkt. No. 5950]. After considering

⁴ This finding is corroborated by the continuing legal challenges being brought by tobacco companies, including many of the Defendants, against various provisions of the Tobacco Control Act. See, e.g., Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012) (refusing to grant facial challenge under the First Amendment to FDA's authority to require graphic warning labels), pet. for cert. filed, Oct. 26, 2012.

the submissions of the parties, this Court decided not to defer a decision pending a final resolution of R.J. Reynolds Tobacco Co. v. Food & Drug Administration, 823 F. Supp. 2d 36 (D.D.C. 2011), then pending on appeal. However, mindful of the expedited manner in which the Court of Appeals was handling that case and mindful of the possibility that a ruling in that case might have a substantial impact on its corrective statements ruling in this case, this Court took no action until the Court of Appeals ruled on Aug. 24, 2012 in R.J. Reynolds Tobacco Co. v. Food & Drug Administration, 696 F.3d. 1205 (D.C. Cir. 2012) ("Reynolds").

II. Corrective Statements

Each party submitted proposed corrective statements. After carefully evaluating the submissions, the Court concludes that the following Corrective Statements will most effectively prevent and restrain future violations of RICO. Appendix A directs the reader to the citations in the Original Opinion supporting each of these Statements.

A. Adverse Health Effects of Smoking

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects

of smoking, and has ordered those companies to make this statement.

Here is the truth:⁵

- Smoking kills, on average, 1200 Americans. Every day.
- More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes, and alcohol, **combined**.
- Smoking causes heart disease, emphysema, acute myeloid leukemia, and cancer of the mouth, esophagus, larynx, lung, stomach, kidney, bladder, and pancreas.
- Smoking also causes reduced fertility, low birth weight in newborns, and cancer of the cervix and uterus.

B. Addictiveness of Smoking and Nicotine

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the addictiveness of smoking and nicotine, and has ordered those companies to make this statement. Here is the truth:

- Smoking is highly addictive. Nicotine is the addictive drug in tobacco.
- Cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction.
- It's not easy to quit.
- When you smoke, the nicotine actually changes the brain - that's why quitting is so hard.

⁵ Each Statement begins with similar language declaring that a court has ruled the Defendants deceived the public about a particular topic and has ordered them to make corrective statements. These introductory sentences will be referred to as the "preamble."

C. Lack of Significant Health Benefit from Smoking "Low Tar," "Light," "Ultra Light," "Mild," and "Natural" Cigarettes

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public by falsely selling and advertising low tar and light cigarettes as less harmful than regular cigarettes, and has ordered those companies to make this statement. Here is the truth:

- Many smokers switch to low tar and light cigarettes rather than quitting because they think low tar and light cigarettes are less harmful. They are **not**.
- "Low tar" and filtered cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.
- **All** cigarettes cause cancer, lung disease, heart attacks, and premature death - lights, low tar, ultra lights, and naturals. There is no safe cigarette.

D. Manipulation of Cigarette Design and Composition to Ensure Optimum Nicotine Delivery

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about designing cigarettes to enhance the delivery of nicotine, and has ordered those companies to make this statement. Here is the truth:

- Defendant tobacco companies intentionally designed cigarettes to make them more addictive.
- Cigarette companies control the impact and delivery of nicotine in many ways, including designing filters and selecting cigarette paper to maximize the ingestion of nicotine, adding ammonia to make the cigarette taste less harsh, and controlling the physical and chemical make-up of the tobacco blend.

- When you smoke, the nicotine actually changes the brain - that's why quitting is so hard.

E. Adverse Health Effects of Exposure to Secondhand Smoke

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of secondhand smoke, and has ordered those companies to make this statement. Here is the truth:

- Secondhand smoke kills over 3,000 Americans each year.
- 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.

III. The Court Has Broad Discretion to Formulate Corrective Statements

The parties are in agreement that this Court has broad discretion to determine the content of the Corrective Statements in order to most effectively prevent and restrain future RICO violations. See Hr'g. Tr., Oct. 15, 2012. The Court can, but is not obligated to, receive additional evidence. See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993), modified by 831 F. Supp. 177, 182-84 (S.D.N.Y. 1993) (evaluating whether to admit additional evidence in remedial phase of RICO litigation and determining not to admit it after

deeming it irrelevant on the questions of fact at issue). The parties have submitted twenty-five briefs related to the content of these Corrective Statements, and the Court heard oral argument on October 15, 2012.

Naturally, this Court's equitable power is limited by the terms of the underlying statute, as well as the Constitution. See United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1197 (D.C. Cir. 2005). While RICO provides a district court with jurisdiction to issue orders that "prevent and restrain" RICO violations, our Court of Appeals made it clear that this language limits a court's equitable discretion to "forward looking remedies that are aimed at future violations." 396 F.3d at 1198.

In its Affirmance Opinion, the Court of Appeals upheld this Court's determination that corrective statements, targeted at "reveal[ing] the previously hidden truth" about cigarettes and "correct[ing] Defendants' campaign of deceptive marketing," will prevent and restrain future RICO violations. Id.; see also Reynolds, 696 F.3d at 1216 & n.10 (observing that this case requires statements in order "to correct any false or misleading claims made by cigarette manufacturers in the past"). Thus, the corrective statements remedy has been upheld as within the scope of this Court's discretion, presuming that the Statements are targeted at correcting the fraud perpetuated by the Defendants.

IV. First Amendment Analysis

As already noted, even though the Court has a significant amount of equitable discretion under RICO, its discretion is also cabined by the provisions of the Constitution. The Defendants argue that certain portions of the Statements violate the First Amendment because they exceed the scope of permissible governmental restrictions on commercial speech. After reviewing the Supreme Court's development of the commercial speech doctrine and in light of recent cases decided by the Supreme Court and our Court of Appeals, this Court concludes that the Statements pass constitutional muster.

A. Historical Development of "Commercial Speech" Protection

The First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (quoting Ashcroft v. A.C.L.U., 535 U.S. 564, 573 (2002)). Content-based restrictions on protected speech are entitled to "strict scrutiny" when reviewed by courts. Id. at 2738. This heightened scrutiny invalidates a government restriction on speech "unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." Id. (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)). However, certain types of speech, such as obscenity, incitement, and fighting words, have been deemed unworthy of such heightened

scrutiny, and are considered "unprotected speech." See Brown, 131 S. Ct. at 2733 (discussing categories of unprotected speech). Thus, when the government restricts speech, the court must evaluate what kind of speech it is and what level of protection is due that type of speech.

Over the years, the Supreme Court has sought to identify how much and what level of protection the First Amendment provides for so-called "commercial speech," defined as "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980). Initially, the Court indicated that "purely commercial advertising" might be entirely unprotected. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (observing that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising"). However, a quarter of a century later, the Court decided that commercial speech was not outside the realm of constitutional protection, observing that "speech does not lose its First Amendment protection because money is spent to project it." Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). While the Court did not specify what level of protection commercial speech was entitled to, it did conclude that "whatever may be the proper bounds" of permissible government restrictions, they were "plainly exceeded" in that case. Id. at 771.

A few years later, the Court set forth a general framework for evaluating whether a particular government restriction on commercial speech was constitutional. See Central Hudson, 447 U.S. at 566. The Court established a four-step test:

For commercial speech to come [under the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. This standard, which is often referred to as an “intermediate” level of scrutiny, is less demanding than the strict scrutiny standard applied to traditionally protected speech. See Brown, 131 S. Ct. at 2733 (defining strict scrutiny); see also Reynolds, 696 F.3d at 1212 (describing Central Hudson test as “not quite as demanding” as strict scrutiny).

In 1985, the Supreme Court then established an even lower level of scrutiny for government restrictions aimed at commercial speech that is false or misleading. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Court analyzed the constitutionality of various Ohio state disciplinary rules, including a rule requiring an attorney to affirmatively disclose that clients may be responsible for legal costs regardless of the outcome of their case. Id. at 629-30.

The Court began by observing that an advertiser has only a "minimal" constitutional interest in not providing any particular "purely factual and uncontroversial" information. Id. at 651. Thus, given that the interests of the advertiser are less pressing, warnings or disclaimers "might be appropriately required" to avoid "consumer confusion or deception." Id. (citing In re R.M.J., 455 U.S. 191, 201 (1982)).

The Court then concluded that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651. It specified in a footnote that such disclosure requirements were not subject to a "least restrictive means" analysis. Id. at 651 n.14. However, the Court also noted that "unjustified or unduly burdensome" disclosure requirements might offend the First Amendment if they "chill[ed] protected commercial speech." Id. at 651.

B. Choosing the Appropriate Standard of Review

1. Recent Cases Discussing Which Commercial Speech Standard Applies

a. Affirmance Opinion

Courts have long struggled on a case-by-case basis with whether Central Hudson or Zauderer applies to particular governmental restrictions on commercial speech. In the Affirmance Opinion, the Court of Appeals directly addressed the question of

what level of First Amendment scrutiny should be applied to the corrective statements in this case. 566 F.3d at 1142-45.

The Court began by acknowledging that several standards exist for evaluating commercial speech restrictions under the First Amendment. Id. at 1142. It went on to observe that, whatever standard was applicable, the "fit" required between the means and the end was the same: such restrictions must be "narrowly tailored to achieve a substantial government goal." Id. at 1143 (citing Bd. of Trustees v. Fox, 492 U.S. 469, 480 (1989)).⁶

The Court of Appeals rejected the Defendants' argument that the corrective statements should not be considered "commercial speech," id. at 1143, and then analyzed whether the corrective statements remedy was appropriately tailored to the government's interest as required by the various commercial speech standards. Id.

The Court of Appeals began by discussing this Court's Factual Findings, observing that Defendants had "violated RICO by making false and fraudulent statements to consumers about their products," and were "reasonably likely to commit similar violations in the future." Id. It also emphasized this Court's determination that a corrective statements remedy was "necessary to counteract these

⁶ It is clear that strict scrutiny does not apply in this case, although Defendants have preserved the issue for appellate review. See Hr'g. Tr., Oct. 15, 2012; see also Defs.' Supplemental Br. Regarding the Gov't's Proposed Corrective Statements, 6 n.2 [Dkt. No. 5985] (raising strict scrutiny argument).

anticipated violations.” Id. The Court of Appeals concluded, based on this Court’s Findings, that the corrective statements remedy was narrowly tailored to achieve the substantial governmental interest of “preventing Defendants from committing future RICO violations.” Id. at 1144.

The Court of Appeals then directed this Court to develop statements that would satisfy the Zauderer requirements. Id. It cautioned that this Court “must confine the statements to purely factual and uncontroversial information, geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers’ existing misperceptions.” Id. at 1144-45 (citations and internal quotations omitted). This statement echoes the key requirements of Zauderer, which, as discussed above, apply to the review of mandatory disclosures of purely factual and uncontroversial information directed towards preventing consumer deception. Zauderer, 471 U.S. at 651.

In sum, the Court of Appeals’ discussion of the corrective statements remedy in the Affirmance Opinion established two important guidelines. First, the Court has established that, regardless of which commercial-speech standard applies, the test regarding the “fit” is the same and is satisfied in this case. Second, the Court of Appeals directed this Court to develop

statements that would satisfy the requirements of Zauderer, thereby indicating that the Zauderer test was the appropriate standard of review.

b. Cases Decided Since the Affirmance Opinion

Several cases decided by the Supreme Court and our Court of Appeals since the issuance of the Affirmance Opinion in 2009 underscore the appropriateness of applying Zauderer to these Corrective Statements.

First, in 2010, the Supreme Court considered whether Central Hudson or Zauderer review applied to federal regulations that required a law firm to identify itself as a "debt relief agency." Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010). Emphasizing the fact that the disclosure requirements were directed at misleading commercial speech, id. at 1339, the Court concluded that Zauderer review was appropriate and then re-affirmed the Zauderer analysis:

Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Id. at 1339-40 (citing Zauderer, 471 U.S. at 651).

Second, our Court of Appeals recently applied Zauderer to a final rule issued by the Department of Transportation ("DOT") requiring that the most prominent figure on airline print

advertisements and websites be the final price, including taxes, in order to avoid consumer confusion. Spirit Airlines, Inc. v. Dep't of Transp., 687 F.3d 403, 408 (D.C. Cir. 2012). The Court noted that, as in Milavetz, the regulation required a disclosure of accurate information targeted at correcting misleading or confusing commercial speech. Id. at 412-13 (describing rule in Zauderer as requiring a "clarifying" disclosure). The Court also held that the DOT rule was reasonably related to the goal of "prevent[ing] consumer confusion" about the total price consumers would have to pay. Id. at 414.

In addition, the Court of Appeals analyzed the DOT rule under Central Hudson, and summarized the Central Hudson analysis as follows:

First, is the asserted government interest substantial? . . . The second and third inquiries are related: whether the regulation directly advances the governmental interest asserted, and whether the fit between the government's ends and the means chosen to accomplish those ends is not necessarily perfect, but reasonable.

687 F.3d at 415 (citing Pearson v. Shalala, 164 F.3d 650, 656 (D.C. Cir. 1999) (internal quotation and citation omitted)). Remarking that the analysis was "easy," the Court first declared that there was no question that the government's interest in "ensuring the accuracy of commercial information in the marketplace is substantial." Id. (citing Edenfield v. Fane, 507 U.S. 761, 769 (1993)). It then observed that the interest was "clearly and

directly advanced" by a rule requiring the total price to be the most prominent price in a particular advertisement. Id. Finally, the Court of Appeals concluded that the rule was "reasonably tailored." Id. (noting that the rule focused primarily on the manner of disclosure and did not impose any burden on speech other than requiring disclosure of the final price).

Third, our Court of Appeals again examined the issue of which level of First Amendment scrutiny applies to restrictions on commercial speech in Reynolds. As noted above, tobacco companies challenged a Final Rule issued by the Food and Drug Administration that used its authority under the TCA to promulgate graphic warning labels depicting the negative health consequences of smoking to be placed on cigarette packages. Reynolds, 696 F.3d at 1209.

In Reynolds, the Court rejected application of the Zauderer test. It concluded that Zauderer review is limited to government restrictions targeted at "misleading or incomplete commercial messages." Id. at 1213 (citing Glickman v. Wileman Bros. v. Elliott, Inc., 521 U.S. 457, 491 (1997) (Souter, J., dissenting)). Because the FDA's "interest" was in discouraging consumers from buying cigarette products, not preventing consumer deception, the Court held that Zauderer did not apply. See id. at 1215-16.

Significantly, the Court of Appeals specifically distinguished Reynolds from this litigation. It noted that this case did involve "remedial measure[s] designed to counteract specific deceptive

claims made by the Companies.” Id. at 1216 n.10 (observing that “[s]uch matters are the subject of a pending – and entirely separate – line of litigation against the Companies,” citing this case).

The Court then discussed how, even if Zauderer applied, the warnings would fail that test because the graphic images were not “purely factual and uncontroversial.” Id. at 1216 (citing Zauderer, 471 U.S. at 651); see also id. (describing the disclosures in Zauderer and Milavetz as “clear statements that were both indisputably accurate and not subject to misinterpretation by consumers”).

The Court relied on two crucial concessions made by the FDA in determining that the images were not “purely factual.” First, the FDA conceded that the graphic images were “not meant to be interpreted literally,” which raised concerns that the images “could be misinterpreted by consumers.” Id. Second, the FDA “tacitly admit[ted]” the images were intended to evoke an emotional response and/or shock the reader into retaining information. Id. at 1216. Because of these admissions, the Court concluded:

These inflammatory images . . . cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting. . . . While none of these images are patently false, they certainly do not impart purely factual, accurate, or uncontroversial information to consumers.

Consequently, the images fall outside the ambit of Zauderer.

Id. at 1216-17.

The Court of Appeals then found that the appropriate level of scrutiny to apply to the graphic images was the Central Hudson test. Id. at 1217 (citing its Affirmance Opinion, 566 F.3d at 1142-43). The Court reiterated its finding that the intended purpose of the FDA rule was "to encourage current smokers to quit and dissuade other consumers from ever buying cigarettes." Id. at 1218. Assuming without deciding that such a government interest was substantial, the Court concluded that the FDA had offered no evidence to show that the graphic warnings directly advanced that interest. Id. at 1218-21. For those reasons, the FDA rule did not survive Central Hudson scrutiny and was struck down.

These recent cases clarify two basic principles regarding First Amendment scrutiny of commercial speech. First, Zauderer only applies to government restrictions on commercial speech that require purely factual and noncontroversial disclosures in order to prevent and correct consumer deception. If a restriction qualifies for Zauderer review, it then need only be "reasonably related" to the state's interest, as long as it is not otherwise unjustified or unduly burdensome. Second, assuming Zauderer does not apply, the restriction is to be reviewed under Central Hudson and will survive First Amendment scrutiny if it directly advances a substantial

government interest, and the fit between the government's interest and the means chosen to advance that interest is reasonable.

2. Zauderer Is the Applicable Standard for Review of the Corrective Statements

A government restriction on speech is reviewed under Zauderer if: (1) the government restriction requires a disclosure rather than a ban on speech; (2) the required disclosures are purely factual and uncontroversial; and (3) the disclosures are aimed at false and misleading commercial speech and preventing such speech from deceiving consumers. Since no party is arguing that the Corrective Statements are bans on speech rather than "disclosures," the Court will turn to the remaining two requirements.

a. The Statements Are Purely Factual and Uncontroversial

i. "Purely Factual"

Every sentence of the Corrective Statements is based in specific Findings of Fact made by this Court in the Original Opinion. See Appendix A. Moreover, each Statement is "clear" and "accurate." Reynolds, 696 F.3d at 1216 (describing the statements found factual in Zauderer and Milavetz). Defendants disagree.

Defendants' first argument alleges that the preamble language that introduces the various Statements is not "purely factual." However, Defendants fail to raise any substantive argument against the content of the preamble, which does nothing more than state that a federal court ruled that Defendant tobacco companies

deceived the public about the topic of the particular Statement and ordered them to issue an accurate Statement.

For example, the preamble in Corrective Statement B states, "A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the addictiveness of smoking and nicotine, and has ordered those companies to make this statement." 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. See, e.g., Original Opinion, 449 F. Supp. 2d at 209 ("Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades."); id. at 271 ("Defendants have publicly made false and misleading denials of the addictiveness of smoking[.]"); id. at 307 ("For approximately forty years, Defendants publicly, vehemently, and repeatedly denied the addictiveness of smoking and nicotine's central role in smoking."); id. at 856 ("Defendants have made and continue to make false and fraudulent statements about the addictiveness of nicotine and smoking."). These findings were upheld on appeal. Affirmance Opinion, 566 F.3d at 1127-28 (upholding the district court's conclusion that Defendants engaged in "a campaign of statements intended to mislead the public into believing that giving up smoking is not markedly more difficult than giving up everyday habits").

It is also factually true that the Court is ordering the Corrective Statements to be made on this topic so as to prevent further dissemination of untruthful information by Defendants. Original Opinion, 449 F. Supp. 2d at 928 (ordering Defendants to make corrective statement about addiction). Similar findings of fraud were made as to each of the other topics addressed, and the Court similarly ordered the Defendants to make statements on those topics. See Appendix A. Thus, there is simply no support for Defendants' argument that the language of the preamble text is not "factual."

Recognizing this flaw in their argument, Defendants' attack on the preamble language does not suggest that the actual content is inaccurate, but instead argues that the language evokes an "emotional response" and "embarrassment" and thus is not factual under Reynolds.⁷ Defendants' attempts to analogize this case to Reynolds ignore the enormous and analytically significant differences between the two. The required disclosures in the two cases contain vastly different content, were issued under different statutes, and serve different government interests.

The warnings at issue in Reynolds contained graphic images such as a man smoking through a tracheotomy hole, a woman crying,

⁷ In this context, as in the Supreme Court's many cases attempting to define obscenity, whether a Statement evokes an "emotional response" or "embarrassment" will often be in the eye of the beholder. See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting difficulty of defining "hard-core pornography," but observing "I know it when I see it").

and a man wearing a shirt with the words "I QUIT" on it. Reynolds, 696 F.3d at 1216. The FDA conceded that these images were "not meant to be interpreted literally." Id. In contrast, the Corrective Statements contain no pictures and merely disclose facts. Thus, there is no danger that the Statements do "not convey any warning information" nor is there any fear that they are "not meant to be interpreted literally," as the Court of Appeals concluded about the graphic images. Id. at 1216-17 (emphasis in original). Thus, Defendants make no substantive argument for why the Statements should be found not to be factual under Reynolds.

Defendants then raise a number of challenges against the phrasing of particular facts in various Statements. First, Defendants argue that the assertion in Corrective Statement A regarding how many Americans die each day from smoking-related illnesses is not factual "because the calculation is based on a rough estimate of the number of Americans who die each year from smoking-related illnesses, not each day." Defs.' Resp. to the Gov't's Proposed Corrective Statements, 18 [Dkt. No. 5881]. The Original Opinion explicitly phrased the statistic in terms of days. Original Opinion at 854-55 ("Cigarette smoking and exposure to secondhand smoke kills . . . more than 1,200 [Americans] every single day."). To the extent the Defendants' argument is that the text of the statement does not properly indicate that the number is a "rough estimate," the final version of Corrective Statement A

reads, "Smoking kills, on average, 1,200 Americans. Every day." Thus, the text has been amended to address Defendants' concerns.

Second, Defendants argue that the portion of Corrective Statement D which asserts that Defendants "manipulated cigarettes to make them more addictive" is "misleading" because "it suggests that Defendants spike cigarettes with additional nicotine." Defs.' Resp. to the Gov't's Proposed Corrective Statements, 18 [Dkt. No. 5881]; see also Defs.' Reply to Pub. Health Intervenors' Resp. to U.S. Submission of Proposed Corrective Statements & Expert Report, 3-4 [Dkt. No. 5889]. It does no such thing.

The language does not state or imply that Defendants "spiked" or added nicotine to their cigarettes. Instead, the Statement summarizes the Factual Findings concluding that Defendants manipulated nicotine delivery in a number of ways. This Court found that:

Defendants have used a variety of physical and chemical design parameters to manipulate the nicotine delivery of their commercial products. . . . Defendants' goal to ensure that their products deliver sufficient nicotine to create and sustain addiction influences their selection and combination of design parameters. No single design parameter is responsible, on its own, for the level of nicotine delivered by a particular cigarette. Rather, Defendants combine design parameters to ensure that any particular cigarette delivers a sufficient level of nicotine.

Original Opinion, 449 F. Supp. 2d at 337-38 (emphasis added); see also id. at 858-59 ("Defendants have studied extensively how every

characteristic of every component of cigarettes - including the tobacco blend, the paper, the filter, additives, and the manufacturing process - affects nicotine delivery. They have utilized that understanding in designing their cigarettes.") (emphasis added). Thus, the language asserting that Defendants manipulated cigarettes is amply supported by the record and is factually accurate.

Third, Defendants argue that Corrective Statement D errs when it states that cigarette companies "add[] ammonia to make the cigarette taste less harsh," because the assertion is "subject to the misinterpretation that all of Defendants' cigarettes are presently made with ammonia as an added ingredient, which is not correct." Defs.' Supplemental Br. Regarding the Gov't's Proposed Corrective Statements, 5 [Dkt. No. 5985]. However, the text clearly specifies that adding ammonia is only one of "many ways" in which cigarette companies control the impact and delivery of nicotine. See Corrective Statement D ("Cigarette companies control the impact and delivery of nicotine in many ways, including . . . adding ammonia to make the cigarette taste less harsh"). The language of Statement D in no way suggests that all Defendants add ammonia to all of their cigarettes.

Fourth and finally, Defendants challenge the assertion in Corrective Statements B and D that quitting is difficult because nicotine actually changes the brain. They suggest that the language

inaccurately suggests that "smokers cannot quit smoking because of changes to the brain caused by smoking." Defs.' Resp. to the Gov't's Proposed Corrective Statements, 13 n.3 [Dkt. No. 5881]. Again, the Corrective Statement cannot reasonably be read in this way. The challenged language states, "When you smoke, the nicotine actually changes the brain - that's why quitting is so hard." The Factual Findings of this Court, affirmed by the Court of Appeals, support this assertion. See Original Opinion, 449 F. Supp. 2d at 210 ("[B]ecause the smoker's brain has adapted to the constant presence of nicotine, it becomes dependent on nicotine to function normally. When a smoker doesn't have nicotine, the brain functions abnormally and most people, approximately 80%, experience withdrawal symptoms."); see also id. ("Over time, the brain becomes tolerant to the effects of nicotine and needs even greater amounts of it to produce the same effects on hormones as it once did before the development of tolerance."). Identifying that quitting smoking is difficult, a fact Defendants do not dispute, is not the same as asserting that quitting smoking is impossible.

In conclusion, it is significant that Defendants do not point to any evidence that the assertions they challenge are not true. Rather, they argue that certain portions of the Statements will be misconstrued by consumers. As discussed above, their arguments are not based on reasonable readings of the language. Thus, since the Corrective Statements are grounded in the affirmed Findings of Fact

of this Court, convey accurate information, and do not attempt to "shock" the reader or elicit embarrassment, they are "factual" under Zauderer.

ii. "Uncontroversial"

The Corrective Statements also satisfy Zauderer's requirement that they be uncontroversial. "Controversy" is defined as "a cause, occasion or instance of disagreement or contention," or "a difference marked especially by the expression of opposing views." Webster's Third New International Dictionary 497 (1993). However, in the context of litigation, controversy must mean more than "the fact that some people may be highly agitated and be willing to go to court over the matter." Fund for Animals v. Frizzell, 530 F.2d 982, 988 (D.C. Cir. 1975). By the same token, it must also mean more than that Defendants simply disagree with a particular proposition that has been decided against them.

Our Court of Appeals discussed the contours of a "controversial" government restriction on commercial speech in Reynolds. The FDA, as noted earlier, conceded that the graphic images were intended to "symbolize the textual warning statements." Reynolds, 696 F.3d at 1216. The Court found this to be problematic because the images did not clearly convey the particular text, but rather were "subject to misinterpretation" and required "significant extrapolation on the part of consumers." Id.

The text of the Corrective Statements, in comparison, consists

of simple declarative sentences and basic, uncomplicated language. There are no images at issue and the language used does not raise similar concerns about misinterpretation. Nor is there any need for the consumer to "extrapolate" from the text. In short, the Statements are, as noted earlier, entirely distinguishable from the images in Reynolds.

Defendants raise two specific arguments to support their claim that the Statements are "controversial." First, Defendants again attack the preamble, reiterating their argument that it is controversial under Reynolds because it intends to evoke an emotional response. Defs.' Supplemental Br. Regarding the Gov't's Proposed Corrective Statements, 4 [Dkt. No. 5985] (citing Reynolds, 696 F.3d at 1217); see also Defs.' Reply to Pub. Health Intervenors' Resp. to U.S. Submission of Proposed Corrective Statements & Expert Report, 3 [Dkt. No. 5889] (calling the preamble "unprecedented, self-denigrating language which would compel Defendants to make public admissions of past wrongdoing").

Putting aside Defendants' hyperbole, their argument ignores the fact that the government regularly requires wrongdoers to make similar disclosures in a number of different contexts. The language of the preamble is hardly "unprecedented," and the variety of contexts in which such language has been approved undermines Defendants' position that the preamble is "controversial."

For example, the Federal Trade Commission ("FTC") has required

corporations to issue corrective messages for decades. Recently, the FTC ordered a seller of supposed "cancer remedies" to send a letter, on its own letterhead, signed by the seller itself, to individuals who had purchased its product. In re Daniel Chapter One, No. 9329, 2010 WL 387917, at *2 (F.T.C. Jan. 25, 2010). The letter included the statement, "the Federal Trade Commission ('FTC') has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future." Id. at *4. The letter went on to specify that "[c]ompetent and reliable scientific evidence" did not support the company's claims that their products were "effective when used for prevention, treatment or cure of cancer." Id.

The company argued that requiring it to send the letter was compelled speech, barred by the First Amendment. See Br. of Pet'rs at *61, Daniel Chapter One v. F.T.C., 405 F. App'x 505 (D.C. Cir. 2010) (No. 10-1064), 2010 WL 5644693 (citations omitted). Our Court of Appeals firmly rejected this claim:

Deceptive commercial speech is entitled to no protection under the First Amendment and, even if it were, that would not preclude the Commission's order, which is carefully tailored to protect DCO's clientele from deception.

Daniel Chapter One, 405 F. App'x at 506 (citations omitted), cert.

denied, 131 S. Ct. 2917 (2011).⁸ The Corrective Statements are similarly “carefully tailored to protect” consumers from deception. They alert the consumer to the fact that they have been misinformed, and then provide the accurate information.

The National Labor Relations Board (“NLRB” or “Board”) has also required companies that have violated federal labor law to post at their facilities a notice that it refers to as an “Appendix.” See, e.g., Parkwood Dev. Ctr., Inc., 347 N.L.R.B. 974, 977-78 (2006), pet. for rev. denied, 521 F.3d 404 (D.C. Cir. 2008); Guardsmark, LLC & Serv. Employees Int’l Union, Local 24/7, 344 N.L.R.B. 809, 812, 814 (2005), pet. for rev. denied in relevant part, 475 F.3d 369, 380-81 (D.C. Cir. 2007). The Appendix begins:

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR
RELATIONS BOARD
An Agency of the United States Government
The National Labor Relations Board has found
that we violated Federal labor law and has
ordered us to post and obey this notice.

Parkwood, 347 N.L.R.B. at 978; Guardsmark, 344 N.L.R.B. at 814. The Appendix then goes on to detail what rights the workers have and specifies what the company can and cannot do under federal law. Parkwood, 347 N.L.R.B. at 978; Guardsmark, 344 N.L.R.B. at 814. The Appendix is signed by the company itself. Parkwood, 347 N.L.R.B. at

⁸ Similar FTC orders have been upheld. See, e.g., In re Brake Guard Prods., Inc., 125 F.T.C. 138 (1998) (requiring letter saying that FTC had determined that certain statements are “FALSE and MISLEADING”), aff’d sub nom. Jones v. F.T.C., 194 F.3d 1317 (9th Cir. 1999) (unpublished table opinion).

978; Guardsmark, 344 N.L.R.B. at 814. Again, these cases demonstrate that there is nothing novel about requiring those who have violated the law to identify their wrongdoing and correct their conduct.

In addition, a number of other statutory and regulatory provisions establish that manufacturers can be compelled to disclose adverse determinations about themselves and their products. For example, under the National Traffic and Motor Vehicle Safety Act, the National Highway Transit Safety Administration ("NHTSA") can determine that there is a safety defect or noncompliance with an applicable safety standard and order the manufacturer to issue a notice alerting "owners, purchasers, and dealers" to that defect or noncompliance. 48 U.S.C. § 30118(b)(2)(A). If there is litigation and the government prevails, NHTSA can order the manufacturer to provide a notice alerting consumers that a defect exists, and that NHTSA's "decision has been upheld in a proceeding in the Federal Courts." 49 C.F.R. §§ 577.5, 577.6(c)(I). Thus, mandatory disclosures alerting the consumer to wrongdoing and giving accurate information about that wrongdoing have been upheld. They are neither unprecedented nor controversial.

Defendants' second argument is that the Factual Findings of this Court are inherently "controversial" because no other court has made similar findings. In fact, Defendants go so far as to

argue that other courts have actually made findings that directly contradict the Findings of this Court. See Defs.' Resp. to the Gov't's Proposed Corrective Statements, 10 [Dkt. No. 5881]; Defs.' Reply in Support of Resp. to the Gov't's Proposed Corrective Statements, 8-9 [Dkt. No. 5893].

The simplest response is that this Court's Findings are the law of this case - differing findings in another case do not create a legal "controversy." Regardless, none of the cases cited by Defendants support their argument. See U.S.' Surreply in Support of the U.S.' Submission of Proposed Corrective Statements & Expert Report, App'x 1 (addressing each case cited by Defendants and identifying why those cases do not contain findings that contradict the findings in this case); see also Grisham v. Philip Morris, Inc., 670 F. Supp. 2d 1014, 1035 (C.D. Cal. 2009) ("[N]o previous case appears to include an ultimate finding of fact absolving tobacco companies of liability on the basis that they did not engage in fraudulent activities. Rather, the verdicts in favor of the tobacco companies are based on issues such as standing, absence of harm, or plaintiffs' non-reliance on the fraud."). Thus, the Defendants point to nothing that directly and substantively contradicts the Findings of this Court.

Because the Statements are grounded in Factual Findings that have been upheld on appeal and are not inflammatory or likely to be

misunderstood, they are both factual and uncontroversial under Zauderer and its progeny.

b. The Government Interest Is to Correct and Prevent Consumer Deception

The next requirement for a government restriction on speech to receive First Amendment review under Zauderer is that the factual and uncontroversial disclosures must be aimed at correcting misleading speech and preventing deception of consumers. Milavetz, 130 S. Ct. at 1339-40. There can be no question that this is the purpose of the Corrective Statements. In the words of the Court of Appeals, the Statements intend to "reveal the previously hidden truth" about the products and "correct Defendants' campaign of deceptive marketing" in an attempt to prevent and restrain future RICO violations. Affirmance Opinion, 566 F.3d at 1140; see also Reynolds, 696 F.3d at 1216 & n.10 (observing that this case's remedial justification is "to correct any false or misleading claims made by cigarette manufacturers in the past").

Defendants suggest that the government's proposed statements were inappropriately motivated by a desire to motivate smokers to quit. Defs.' Reply in Support of Resp. to the Gov't's Proposed Corrective Statements, 13 [Dkt. No. 5893]. The Statements say nothing about the choices of individual smokers to quit or continue smoking. Unlike in Reynolds, where the FDA chose images with the express purpose of "encourag[ing] current smokers to quit and dissuad[ing] other consumers from ever buying cigarettes," 696 F.3d

at 1218, this Court has never suggested or indicated that its Corrective Statements seek to encourage smokers to quit. In fact, it has specifically acknowledged that such a goal would be inappropriate and not authorized by the RICO statute.⁹

Thus, the Defendants offer no substantive argument that the Statements are not "geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions," as directed by the Court of Appeals. Affirmance Opinion, 566 F.3d at 1144-45 (citation omitted).

In conclusion, the Corrective Statements should be reviewed under Zauderer because they are purely factual and uncontroversial disclosures aimed at preventing commercial speech from deceiving consumers.

C. The Corrective Statements Satisfy the Zauderer Requirements

Once a court has concluded that the Zauderer standard of review is appropriate, the challenged disclosures survive constitutional scrutiny under Zauderer if they are (1) reasonably

⁹ This Court rejected the government's request that a national smoking cessation program be included in the Remedial Order. Original Opinion, 449 F. Supp. 2d at 933. At that time, the Court observed that, while adoption of a cessation program would "unquestionably serve the public interest," it was not a permissible remedy under section 1964(a) because "it is not specifically aimed at preventing and restraining future RICO violations." Id.

related to the government interest in preventing consumer deception and (2) not otherwise unjust or unduly burdensome. The Court will address these issues separately.

1. The Statements Are Reasonably Related to Correcting and Preventing Consumer Deception

To satisfy Zauderer, the Statements must be "reasonably related" to the government's interest in correcting Defendants' false and misleading speech in order to prevent future consumer deception.¹⁰

As already discussed, the FTC regularly uses corrective statements as a tool to correct a public campaign of misinformation. In Warner-Lambert Company v. F.T.C., 562 F.2d 749 (D.C. Cir. 1977), the FTC ordered the manufacturer to inform consumers that, "[c]ontrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." 562 F.2d at 763. Our Court of Appeals ruled that the First Amendment presented "no obstacle to government regulation of false or misleading advertising." Id. at 758 (discussing Virginia Bd. of Pharm., 425 U.S. at 772). After examining the specific wording and the details of publication, the Court approved the corrective statement as "well calculated to assure that the disclosure will

¹⁰ This does not require a "least restrictive means" analysis. See Full Value Advisors, LLC v. S.E.C., 633 F.3d 1101, 1109 (D.C. Cir.) (noting that Zauderer rejected idea that disclosure requirements are subject to "least restrictive means" analysis), cert. denied, 131 S. Ct. 3003 (2011).

reach the public." Warner-Lambert, 562 F.2d at 763.

Though the Court of Appeals affirmed the corrective statement generally, it deleted the "contrary to prior advertising" language as unnecessary. Id. It observed that, although this case was not such an "egregious case of deliberate deception" as to justify the inclusion of such a preamble, it was possible that such a statement might be appropriate in another situation. Id.

While Warner-Lambert was decided well before the development of the commercial speech doctrine, our Court of Appeals reaffirmed its principal holding as to the value of corrective statements in Novartis Corporation v. F.T.C., 223 F.3d 783 (D.C. Cir. 2000). In that case, the FTC found that Novartis's advertisements for Doan back pain remedies were "deceptive." 223 F.3d at 785. The administrative law judge who originally ruled on the complaint decided that corrective advertising was unjustified and too "drastic." Id. at 786. The Commission, however, concluded that it was warranted "because the Doan's advertisements had created or reinforced consumer misbelief in Doan's superior efficacy and the misbelief was likely to continue." Id. Therefore, it ordered Novartis to include a disclaimer stating, "Although Doan's is an

effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain." Id.

The Court of Appeals affirmed the Commission's finding that the advertising was "deceptive," id. at 786-87, and held that the expert testimony proffered by the FTC provided "substantial evidence" in support of the Commission's decision. Id. at 788. Significantly, the Court of Appeals also concluded that there was "no First Amendment impediment to the remedy" under Central Hudson.¹¹ Id. at 788-89. The Court observed that the remedy chosen by the FTC advanced the government's interest in the "avoidance of misleading and deceptive advertising." Id. at 789. It then noted that, because the order was appropriate and justified under the Commission's regulatory standard, the remedy was no greater than necessary to serve the interest involved, and was thus not overly broad. Id. (citing Warner-Lambert, 562 F.2d at 758).

In addition to the fact that corrective statements have historically been used to target and redress consumer deception, our Court of Appeals has already ruled in this case that "the publication of corrective statements addressing Defendants' false assertions is adequately tailored to preventing Defendants from deceiving consumers." Affirmance Opinion, 566 F.3d at 1144. The Court of Appeals explained that "[r]equiring Defendants to reveal

¹¹ Interestingly, Novartis reviews the statements under Central Hudson, without any mention or discussion of Zauderer.

the previously hidden truth about their products will prevent and restrain them from disseminating false and misleading statements, thereby violating RICO, in the future." Id. at 1140; see also id. ("Defendants will be impaired in making false and misleading assurances about, for instance, smoking-related diseases or the addictiveness of nicotine . . . if they must at the same time communicate the opposite, truthful message about these matters to consumers.") Defendants offer no argument that challenges this conclusion.

Defendants' only concrete argument is that the preamble to the Corrective Statements is not "reasonably related" to the government's interest, because, under Warner-Lambert and Novartis, the Corrective Statements must be focused on facts regarding the product, not the speaker's past conduct. Defs.' Resp. to the Gov't's Proposed Corrective Statements, 7 [Dkt. No. 5881].

Defendants' argument is not persuasive for two reasons. First, as discussed above, while Warner-Lambert and Novartis did not see the need for a preamble focused on a speaker's past conduct, the FTC and our Court of Appeals have upheld determinations that alerting people to the deceptive nature of a business practice is warranted and tailored to "protect" consumers from further deception. See, e.g., Daniel Chapter One, 405 F. App'x at 506; see also supra Sec. IV.B.2.a.ii (discussing compelled disclosures under other statutes).

Second, the deception at issue in Warner-Lambert and Novartis is very different from the deceptive campaign waged for close to fifty years by Defendants.¹² In those cases, companies presented one specific claim, namely, that their product provided a benefit that it did not, in fact, provide. To address that single untruth, the corrective statements merely had to state that the claim was not true. Warner-Lambert, 562 F.2d at 763 (“Listerine will not help prevent colds or sore throats or lessen their severity.”); Novartis, 223 F.3d at 786 (“Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain.”). There was no finding of bad faith or intentional deception in either of those cases. See Warner-Lambert, 562 F.2d at 763 (“While we do not decide whether petitioner proffered its cold claims in good faith or bad, the record compiled could support a finding of good faith.”); Novartis, 223 F.3d at 786 (noting that Novartis did not dispute that the implied claim was “likely to deceive,” but not mentioning fraud, intentional deception, or bad faith).

The scope of the consumer fraud at issue here is much greater. The Defendants not only proffered scientific claims they knew were false, such as when they explicitly denied the adverse health

¹² As the Original Opinion discussed at length, even though a scientific consensus existed by 1964 that smoking caused disease, 449 F. Supp. 2d at 174-179, Defendants falsely denied and distorted that information for many years thereafter. Id. at 187-204.

effects of smoking and secondhand smoke, Original Opinion, 449 F. Supp. 2d at 187-204, 788-800, but also, for example, concealed and repressed research data showing that nicotine is addictive, id. at 289-307, marketed to young people to recruit "replacement smokers" in order to ensure their economic future, id. at 561-691, manipulated cigarette designs to ensure that cigarettes delivered doses of nicotine adequate to create and sustain addiction, id. at 338-74, conspired to undermine and discredit the scientific consensus that secondhand smoke causes disease, id. at 723-88, suppressed and concealed scientific research, id. at 801-14, and destroyed relevant documents to support their public and litigation positions, id. at 814-31. The length of time this went on and the scope of the manipulation of information that was given to consumers went far beyond a single advertising campaign making a single claim that a health benefit existed when it did not.

The Court of Appeals directed this Court to look to the entirety of the Defendants' deceptive scheme in crafting its remedy. See Affirmance Opinion, 566 F.3d at 1144-45 (citation omitted) (noting that the interest at issue is "thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions."); see also Warner-Lambert, 562 F.2d at 769 (determining that "advertising which fails to rebut the prior

claims . . . [would] inevitably build[] upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly"). Thus, in light of the record, this Court concludes that the massive scope of Defendants' campaign of deception and fraud differentiates this case from cases requiring simpler corrective statements such as Warner-Lambert and Novartis.

Given the lengthy record detailing Defendants' deceptions over the last several decades, and the finding, affirmed twice by the Court of Appeals, that Defendants are likely to commit future RICO violations, the preamble language provides important and necessary context for the consumer to understand the accurate information that follows.

Since the preamble is reasonably related to correcting and preventing future consumer deception, and the Defendants offer no substantive argument to suggest that the substance of the Statements is not also reasonably related to that interest, the Court concludes that the Statements in their entirety satisfy the "reasonably related" prong of Zauderer review.

2. The Corrective Statements Are Not Unjustified or Unduly Burdensome

The final step in the Zauderer analysis is determining whether the Corrective Statements are unjustified or unduly burdensome. Defendants argue that the Statements are "unduly burdensome" because they "impose far greater burdens on Defendants' speech than necessary to further the Government's anti-fraud interest." Defs.'

Supplemental Br. Regarding the Gov't's Proposed Corrective Statements, 9 n.3 (citing Zauderer, 471 U.S. at 651).

Defendants fail to point to any "burden" or "chill" that the Statements would actually have on their speech. There is no reason to believe that issuing these Corrective Statements would place any burden on Defendants' speech other than the desired one, namely preventing Defendants from denying the accuracy of them. See Spirit Airlines, 687 F.3d at 415 (considering, while conducting more stringent Central Hudson review, that DOT rule did not impose any burden on speech other than requiring disclosure of final price). Nor do Defendants acknowledge that the Court of Appeals has already concluded, presuming the Statements are "'purely factual and uncontroversial information' geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions," that such Statements do not impermissibly chill Defendants' protected speech. Affirmance Opinion, 566 F.3d at 1144-45 (quoting Zauderer, 471 U.S. at 651). In sum, the Court finds no basis for deeming the Statements to be unduly burdensome.

Based on the foregoing review, the Court concludes that the Corrective Statements satisfy the Zauderer requirements.

D. Even if the Zauderer Requirements Are Not Satisfied, the Corrective Statements Satisfy the Requirements of Central Hudson

Even if the Corrective Statements do not satisfy Zauderer,

they meet the Central Hudson requirements and thus survive First Amendment scrutiny. Our Court of Appeals has indicated that it is correct to evaluate a government restriction on commercial speech under Central Hudson if it does not survive Zauderer review. See Reynolds, 696 F.3d at 1217 (holding that when FDA rule did not "fall within the narrow enclave carved out by Zauderer," Central Hudson review was appropriate); see also Spirit Airlines, 687 F.3d at 415 (determining that Zauderer applied and was satisfied, but also ruling that the DOT rule survived Central Hudson scrutiny).

Three questions must be answered under Central Hudson: (1) whether the asserted government interest is substantial; (2) whether the regulation directly advances the government interest asserted; and (3) whether the fit between the government's interest and the means chosen is "not necessarily perfect, but reasonable." Id. (citation omitted).

The answer to the first question is easy. Defendants do not deny that the government's interest in preventing and restraining future consumer deception is substantial.

As to the second question regarding whether the Statements directly advance the governmental interest asserted, the burden is on the government to show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Florida Bar v. Went for It, Inc., 515 U.S. 618, 626 (1995) (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995)).

There has been some discussion as to what quantum of evidence is necessary to support the government's assertion that corrective statements are necessary and will be effective. Florida Bar, 515 U.S. at 626. However, in 2001 the Supreme Court clarified that:

We do not . . . require that empirical data come . . . accompanied by a surfeit of background information. . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (citations and internal quotation marks omitted).

In this case, "simple common sense," as well as deference to the guidance proffered by the Court of Appeals, supports this Court's conclusion that "reveal[ing] the previously hidden truth" about the products and "correct[ing] Defendants' campaign of deceptive marketing" will prevent and restrain future RICO violations. Affirmance Opinion, 566 F.3d at 1140.

As to the third question, Defendants argue that the statements they originally proposed advance the same government interest with less encroachment on their First Amendment rights. Defendants appear to be arguing that the "fit" between the government's interest and the Statements is not "reasonable." Spirit Airlines, 687 F.3d at 415 (citation omitted).

This argument fails for several reasons. First, there is no “least restrictive means” test under Central Hudson. Fox, 492 U.S. at 477 (“Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue for the first time, and conclude that the reason of the matter requires something short of a least-restrictive-means standard.”). Rather, the test is whether there is “a reasonable fit between the [government]’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.” Lorillard Tobacco, 533 U.S. at 556 (citing Florida Bar, 515 U.S. at 632 (citations and internal quotation marks omitted)).

Our Court of Appeals has already concluded that the Corrective Statements meet this standard, observing that the remedy is narrowly tailored to achieve the substantial government interest in “preventing Defendants from committing future RICO violations.” Id. at 1144; see also Novartis, 223 F.3d at 789 (citing Warner-Lambert, 562 F.2d at 758) (holding that corrective statements were no greater than necessary to serve the interest involved). In its Affirmance Opinion, the Court made clear that “[a]llthough the standard for assessing burdens on commercial speech has varied . . ., the Supreme Court’s bottom line is clear: the government must affirmatively demonstrate its means are ‘narrowly tailored’ to achieve a substantial government goal.” Affirmance Opinion, 566 F.3d at 1143 (citations omitted).

Moreover, there are significant differences between Defendants' proposed submissions and the Statements fashioned by the Court. These differences are material for predicting how effective the Statements will be at preventing and restraining Defendants from violating RICO in the future. For example, the Original Opinion found that an "overwhelming accumulation of data demonstrates that [secondhand smoke] causes disease," 449 F. Supp. 2d at 703, and that such a consensus has existed since at least 1986. Id. at 800. The Opinion also found that Defendants recognized these dangers as early as 1961, based on studies done by public health officials and their own internal research. Id. at 708-09. Despite publicly promising to fund independent research on the issue, Defendants "took steps to undermine independent research, to fund research designed and controlled to generate industry-favorable results, and to suppress adverse research results." Id. at 722-23; see also id. at 724-88 (describing various consultants and organizations created and funded by Defendants and publicized as "independent" that in reality controlled and manipulated scientific information about secondhand smoke).

Based on these Findings of Fact, this Court and the Court of Appeals concluded that there was a reasonable likelihood that Defendants would continue to engage in false and deceptive advertising practices in the future. Original Opinion, 449 F. Supp. 2d at 910; Affirmance Opinion, 566 F. 3d at 1131-34.

The corrective statements submitted by the Defendants would be less effective at preventing and restraining such future violations because they would allow Defendants, once the two-year publication period expires,¹³ to falsely deny that secondhand smoke causes disease. Defendants' proposed statements depict this well-established fact as if it were a mere opinion held by public health officials, rather than representing a consensus held by the scientific community at large.¹⁴

By ensuring that consumers know that Defendants have misled the public in the past on the issue of secondhand smoke in addition to putting forth the fact that a scientific consensus on this subject exists, Defendants will be less likely to attempt to argue in the future that such a consensus does not exist. Thus, Defendants' proposed statements do not advance the interest in

¹³ The corrective statements are to be published in various forms, but the longest-running public statements will be the cigarette onserts and the point-of-sale displays, which will continue for two years. 449 F. Supp. 2d at 939-40. The statements will be placed on Defendants' websites "for the duration of this Final Judgment and Remedial Order," however, which may be longer. Id. at 939.

¹⁴ All of the statements on secondhand smoke submitted by the Defendants phrased the fact as merely a "conclusion" held by either the Surgeon General or "public health officials." See Philip Morris USA's Proposed Corrective Statements As Compelled by the Final J. & Remedial Order, 5 [Dkt. No. 5776] ("Public health officials have concluded that secondhand smoke from cigarettes causes disease"); Certain Joint Defs.' Submission of Proposed Corrective Statements Pursuant to Order #1015, 6-7 [Dkt. No. 5780] ("The Surgeon General has concluded: Exposure to environmental tobacco smoke has been proven to cause"); Lorillard Tobacco Company's Proposed Corrective Statements Required by Order #1015, 4 [Dkt. No. 5781] ("The Surgeon General has concluded: The evidence is sufficient to infer a causal relationship between exposure to secondhand smoke and [various diseases].").

preventing future consumer deception to the same extent as the final Corrective Statements. Beyond that, Defendants offer no concrete reasons to support their argument that the "fit" between the chosen Corrective Statements and the government's interest is not "reasonable."¹⁵

Thus, since the Corrective Statements satisfy the requirements of both Central Hudson and Zauderer, they do not violate the First Amendment.

V. Due Process

One last argument needs to be briefly addressed. Defendants argue that the preamble is "confessional" and has "an exclusively punitive purpose." It then argues that such a punitive measure cannot be imposed in the absence of the procedural protections available to defendants in criminal cases. Defs.' Resp. to the Gov't's Proposed Corrective Statements, 25-26 [Dkt. No. 5881].

First, the Court does not construe the preamble as confessional. Its purpose is not punitive, but corrective. Second, court have, in various cases and under various statutes, upheld decisions ordering defendants to admit wrongdoing and publish

¹⁵ Defendants' only other support for the proposition that its statements would be effective is the government's expert report. See Defs.' Supplemental Br. Regarding the Gov't's Proposed Corrective Statements, 8-9 [Dkt. No. 5985]; Defs.' Supplemental Reply Br. Regarding the Gov't's Proposed Corrective Statements, 7 [Dkt. No. 5989]. Although the Court has not relied on the report, it can't help but note that the Defendants' reliance on the report contradicts its vigorous attempts to convince the Court that it is "fundamentally flawed" and "unreliable." Defs.' Resp. to the Gov't's Proposed Corrective Statements, 3 [Dkt. No. 5881].

corrections, though those defendants were not provided with the procedural protections of the criminal justice system. See supra IV.B.2.a.ii. Third, this argument attempts to relitigate an issue raised by Defendants at an earlier stage that was resolved against them. See United States v. Philip Morris, Inc., 273 F. Supp. 2d 3 (D.D.C. 2002) (rejecting Defendants' arguments for a jury trial).

VI. Conclusion

This Court's authority to order corrective statements as a remedy for past deception was affirmed by the Court of Appeals. This Court has heeded its mandate to fashion Corrective Statements that are purely factual and uncontroversial and are directed at preventing and restraining the Defendants from deceiving the American public in the future.

Now that the text for the Corrective Statements has been finalized, the Court intends to address the details of implementation. Originally, Defendants were ordered to publish the Statements on their corporate websites, publish them as full-page advertisements in major newspapers, run them on major television networks, and attach inserts containing the Statements to their cigarette packaging. Original Opinion, 449 F. Supp. 2d at 939-41.¹⁶

¹⁶ Defendants were also ordered to include the statements on Countertop Displays and Header Displays provided as part of their Retail Merchandising Programs. Id. at 939-40. This part of the remedial order was vacated and remanded "for the district court to evaluate and 'make due provisions for the rights of innocent persons,' either by abandoning this part of the remedial order or by crafting a new version reflecting the rights of third parties." Affirmance Opinion, 566 F.3d at 1142 (continued...)

These media were chosen in order to "structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." Id. at 928. Over six years have passed since the Court issued that ruling. During that interval, the types of media in which Defendants convey commercial messages of this nature have changed dramatically. See Appendix B (listing various implementation considerations).

Because of the complexity of these issues, the Court has concluded that the most efficient way to address them is to have the parties meet and confer with the Special Master to see if agreement can be reached. If not, the Court will order a Report and Recommendation from the Special Master.

Even though the holiday season is upon us, the Court wants discussions to begin in December and expects them to conclude by March 1, 2013, unless the Special Master believes that additional time would prove useful.

November 27, 2012

/s/
Gladys Kessler
United States District Judge

Copies via ECF to all counsel of record

¹⁶(...continued)
(citing 18 U.S.C. § 1964(a)). This issue has been fully briefed, and will be resolved in the near future.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	99-2496 (GK)
	:	
PHILIP MORRIS USA, Inc.,	:	
<u>et al.</u>	:	
	:	
Defendants.	:	

ORDER #34-Remand

Back in 2006, the Court issued its Final Judgment and Remedial Order #1015 [Dkt. No. 5733], mandating that Defendants publish corrective statements on each of five topics on which the Court found they had made false and deceptive statements. These topics are: "(a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any significant health benefit from smoking 'low tar,' 'light,' 'ultra light,' 'mild,' and 'natural,' cigarettes; (d) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (e) the adverse health effects of exposure to secondhand smoke." United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 938-39 (D.D.C. 2006) ("Original Opinion"). Upon consideration of the briefs, the oral argument, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the text of the corrective statements shall be as follows:

A. Adverse Health Effects of Smoking

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement.

Here is the truth:

- Smoking kills, on average, 1200 Americans. Every day.
- More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes, and alcohol, **combined**.
- Smoking causes heart disease, emphysema, acute myeloid leukemia, and cancer of the mouth, esophagus, larynx, lung, stomach, kidney, bladder, and pancreas.
- Smoking also causes reduced fertility, low birth weight in newborns, and cancer of the cervix and uterus.

B. Addictiveness of Smoking and Nicotine

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the addictiveness of smoking and nicotine, and has ordered those companies to make this statement. Here is the truth:

- Smoking is highly addictive. Nicotine is the addictive drug in tobacco.
- Cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction.
- It's not easy to quit.
- When you smoke, the nicotine actually changes the brain - that's why quitting is so hard.

C. Lack of Significant Health Benefit From Smoking "Low Tar," "Light," "Ultra Light," "Mild," and "Natural" Cigarettes

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public by falsely selling and advertising low tar and light cigarettes as less harmful than regular cigarettes, and has ordered those companies to make this statement. Here is the truth:

- Many smokers switch to low tar and light cigarettes rather than quitting because they think low tar and light cigarettes are less harmful. They are **not**.
- "Low tar" and filtered cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.
- **All** cigarettes cause cancer, lung disease, heart attacks, and premature death - lights, low tar, ultra lights, and naturals. There is no safe cigarette.

D. Manipulation of Cigarette Design and Composition to Ensure Optimum Nicotine Delivery

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about designing cigarettes to enhance the delivery of nicotine, and has ordered those companies to make this statement. Here is the truth:

- Defendant tobacco companies intentionally designed cigarettes to make them more addictive.
- Cigarette companies control the impact and delivery of nicotine in many ways, including designing filters and selecting cigarette paper to maximize the ingestion of nicotine, adding ammonia to make the cigarette taste less harsh, and controlling the physical and chemical make-up of the tobacco blend.
- When you smoke, the nicotine actually changes the brain - that's why quitting is so hard.

E. Adverse Health Effects of Exposure to Secondhand Smoke

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of secondhand smoke, and has ordered those companies to make this statement. Here is the truth:

- Secondhand smoke kills over 3,000 Americans each year.
- 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.

; and it is further

ORDERED that the parties are to engage in discussions with the Special Master, to begin in December 2012 and conclude by March 1, 2013, regarding implementation of the corrective statements. In particular, the parties are to address the issues raised in Appendix B to the Memorandum Opinion.

November 27, 2012

/s/
Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF