SECTION	CONCERN	PROPOSED AMENDMENT
1 "brand element"	<u>Brand name</u> 1. To ensure certainty, it is recommended that a definition of "*brand name*" is introduced. <u>Trade mark</u> 2. The reference to "*trademark*" as part of the definition should be to "*trade mark*" as this is the terminology used in the Trade Marks Act, 194 of 1993 ("the Trade Marks Act"). <u>Trade name</u> 3. "*Trade name*" is not defined and it is assumed that: a) a "*trade name*" is different to and not intended to be a reference to a "*brand name*" or a "*trade mark*"; and b) that is intended to refer to the manufacturer or the entity that takes responsibility for a relevant product in South Africa. 4. If these assumptions are correct, the definition proposed should be included in order to ensure certainty. If the assumptions are incorrect, then guidance should be provided by the Minister as to what the Department of Health's ("the DOH") intention is, so that an appropriate amendment can be provided. <u>Distinguishing guise</u> 5. The term "*distinguishing guises*" emanates from Canadian trade mark law. A "*distinguishing guise*" was defined as a "*shaping of wares or their containers*" or "*a mode of wrapping and packaging*" and the Canadian Trade-Marks Act, 1985	**'brand element'** includes the brand name, **trade mark**, trade name, ~~distinguishing guise,~~ **get-up** ~~logo, graphic arrangement, design, slogan, symbol, motto, selling message, print, typeface, recognisable colour or pattern or combination of colours or any other symbol of product identification of a relevant product or a related product,~~ or **any** ~~such~~ feature, that is likely to be taken as or confused with any relevant product or related product brand element; **'brand name' in relation to the relevant products and related products, means the name given by the manufacturer to a product for the purpose of distinguishing that manufacturer's products from the same or similar products sold by other manufacturers. A brand name includes, but is not limited to, a trade mark;** **'trade name' means the person or entity that takes responsibility for the relevant product or related product and whose name is declared on the label in accordance with clause 4 of *SANS* 289;** **"get-up" means pack design and includes any** logo, **pack architecture,** graphic **element(s)** ~~arrangement~~, design, slogan, symbol, motto, selling message, print, typeface, recognisable

	set out requirements for the registration of such distinguishing guises as trade marks. A "*distinguishing guise*", therefore, refers to a type of mark in respect of which registration may be sought. It should be noted that the reference to a "*distinguishing guise*" is no longer a part of the Canadian Trade-Marks Act, 1985, having been repealed in 2014. 6. The Trade Marks Act does not refer to or define a "*distinguishing guise*" and, in the circumstances, the importation of the terminology into this Bill is vague and arbitrary. To the extent that shapes, containers and get-up are capable of registration under the Trade Marks Act, such marks would be covered by the reference to the term "trade mark". "*Distinguishing guise*" should, therefore, be deleted from the definition of "*brand element*". <u>Get-up</u> 7. In addition, it is recommended that the term "*get-up*" is included as part of the definition of "*brand element*" as this term is used and commonly understood in the legal fraternity in South Africa and abroad to refer to a product's pack design, pack architecture and its "*look and feel*". <u>Symbol</u> 8. It would be useful to know if the reference to "*symbol*" emanates from clause 8 of Section II *General Principles* of the *Advertising Code of Practice of the Advertising Regulatory Board of South Africa*.	colour or pattern or combination of colours or any other symbol of product identification of a relevant product or a related product,
"promote"	9. It is unclear why the Minister has elected to remove the definition of "*advertisement*" from the Bill and revise the definition of "*promotion*", as it currently appears in the Tobacco Products Control Act, 83 of 1993 ("the Tobacco Act"). Under the Tobacco Act, "*advertisement*" and "*promotion*" are defined separately. Under the Bill, the Minister has sought to merge the two concepts	~~**'promote'** means any form of communication, advertisement, recommendation or action with the aim, effect or likely effect of increasing awareness, creating interests, generating sales and creating brand loyalty of a relevant~~

	under one definition, and while a promotion may also be advertising, this is not true in every instance. 10. Moreover, the term "*advertisement*" is used in South Africa's national legislation that seeks to regulate, *inter alia*, the advertising of foodstuffs, cosmetics, disinfectants; liquor products; and medicines and related substances. Consequently, in the advertising law industry, "*advertisement*" is, in effect, the umbrella under which various advertising activities fall, including promotion and sponsorship. This framework is also reflected in the Advertising Regulatory Board's definition of "*advertisement*". 11. This understanding of "*advertisement*" is not unique to South Africa, and this is, typically, how these concepts are understood globally. Since the definition of "*promote*" does not align with local legal definitions and practice, it may result in confusion in practice. It is recommended that the definitions of "*advertisement*", "*promotion*" and "*product placement*" in the Tobacco Act are retained, with minor amendments.	~~product or a related product or the use of such product, directly or indirectly, but excludes—~~ ~~*(a)* any commercial communication between a manufacturer or importer of such product and the trade partners, business partners, employees and shareholders of the manufacturer or importer; and~~ ~~*(b)* any communication required by law;~~ **'advertisement'**, in relation to any ~~tobacco~~ **relevant** product **or related product**- *(a)* means any commercial communication or action **that is** brought to the attention of any member of the public**,** in any manner**,** with the aim, effect or likely effect of- (i) promoting the sale or use of any ~~tobacco~~ **relevant** product **or related product;** ~~tobacco product any brand element or tobacco manufacturer's name in relation to a tobacco product~~; or (ii) being regarded as a recommendation of a ~~tobacco~~ **relevant product or related** product; and *(b)* includes product placement; and *(c)* excludes commercial communication between a ~~tobacco~~ manufacture or importer and its trade partners, business partners, employees and share holders and any communications required by law, and **'advertise'** has a corresponding meaning; **'product placement'** means the depiction of, or reference to a ~~the~~ **relevant** product **or a**

		related product or brand element in a broadcast programme, film, video recording, telecast, social media, game or other communication for which the producer, or any other person associated with the broadcast programme, film, video recording, telecast, social media**, game** or other electronic medium, receives payment in cash or otherwise; **'promotion'** ~~is~~ **means** the practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for the purposes of selling the ~~tobacco~~ **relevant product of related** product or encouraging ~~tobacco~~ use **of such products**, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film;
3(1)	12. Section 3(1) of the Bill seeks to regulate the advertising, promotion and sponsorship of the relevant products and related products both in South Africa and "*cross-border*". The provision is, in the absence of what is meant by "*cross-border*", impermissibly vague and *ultra vires*. Based on the construction and interpretation of section 3(1), advertising, sponsorship and promotion of a relevant product in another country is prohibited. Is it the Minister's intention then to stop such activities from occurring on foreign soil? This cannot be the intention as Chapter 4 of the Constitution does not empower Parliament to make legislation that would regulate advertising, promotion and sponsorship	3(1) All domestic ~~and cross-border~~ advertising, promotion and sponsorship of a relevant product or a related product are prohibited.

	activities for territories outside of South Africa. Quite simply, the Constitution does not purport to have such extraterritorial effect. 13. Alternatively, is it the intention of the Minister to stop the transshipment of the relevant products or related products in closed and sealed containers through South Africa in circumstances where the relevant products: a) are not labelled in accordance with the regulations that are to be published in terms of the Bill and are instead labelled in accordance with the law of the country in which such goods will ultimately be sold; and/or b) are not manufactured locally and are manufactured elsewhere, for example, in Lesotho (a landlocked country that would require transit through South Africa to be exported to the relevant market); and c) are not intended for sale in South Africa? 14. If this is the intention, does this then alter the position under the Counterfeit Goods Act and Customs' powers to stop containers containing alleged counterfeit goods that are neither manufactured in South Africa, nor intended to be sold in South Africa but which goods are transported through South Africa for sale elsewhere? Currently, Customs is not empowered to stop such transhipments in terms of the Counterfeit Goods Act as the infringement of the statutory right does not occur in South Africa (since the goods are not sold in South Africa). If it is not Parliament's intention to interfere with the transhipment of counterfeit goods through South Africa, it does call into question why the Minister seeks to distinguish between and treat differently the transhipment of the relevant products and related products, the sale of which in South Africa is not unlawful *per se*, from transhipment of counterfeit goods, the sale of which in South Africa is unlawful, bearing in mind that, in both instances, it is not a South African right that is affected by the transshipment of those goods.	

	15. Further to this, and, on the basis of section 3(1) of the Bill, will a South African sporting team (including but not limited to a national sports' team, a university sports team, a local football club) be banned from participating in a sporting event hosted in another country where the sponsorship of the sporting event by a manufacturer of a relevant product, where such sponsorship is not prohibited? Will either the Minister or the Department of Sports and Recreation prohibit any South African sports teams from participating in sporting events hosted by manufacturers in other countries in the future? 16. Finally, and, because no definition of "*cross-border*" is provided, it is unclear if the purpose of this provision is limited to prohibiting the advertising, promotion and sponsorship of a relevant product in a duty-free zone at the airport, or the "*no-man's land*" between the South African Border Post and the Border Post of a neighbouring country. 17. It is, in view of the foregoing, unclear what mischief the Minister seeks to prevent insofar as "*cross-border advertising, promotion and sponsorship*" is concerned. The provision is, as it relates to "*cross-border advertising, promotion and sponsorship*" is impermissibly vague and *ultra vires* Chapter 4 of the Constitution and the reference to "*cross-border*" should be deleted. If this provision will be retained in its current form, the Minister should provide clearer guidance on what mischief he is seeking to avoid so that a suitable amendment can be proposed.	
3(3), read with 3(4)(e) and the definition of "*commercial communication*"	18. These provisions are vague, unduly restrictive, irrational and result in an arbitrary deprivation of: a) a trade mark holders' property rights in violation of section 25(1) of the Constitution; and b) a manufacturer's right to freedom of commercial expression in violation of section 16(1) of the Constitution.	Both section 3(3) and the definition of "*commercial communication*" should be deleted, alternatively, guidance should be provided as to the mischief that the Minister is seeking to avoid so that an appropriate amendment may be provided.

	19. Based on the definition of "*commercial communication*" and the restrictions imposed in section 3(3), commercial communication shall be restricted to factual or scientific information about a relevant product or a related product only. In terms of its construction, section 3(3) is capable of being interpreted as prohibiting the use of any brand element as part of instruments of communication, including but not limited to e-mail signatures, corporate or official letterheads and business cards, that are exchanged in the ordinary course of trade. 20. Since "*commercial communication*" is defined as "*a communication made in pursuit of … indirect furthering of a business or financial interest*", section 3(3) is also capable of being interpreted as interfering with, for example, how (i.e. on corporate or official letterheads) a manufacturer communicates, for example, to its employees regarding bonuses, salary increases and promotions (all of which, arguably, incentivise employees, thereby indirectly furthering a business interest). That cannot be the intention. 21. It is not clear why this prohibition has been adopted. It is in a sense both over- and under-inclusive. It appears that the purpose of the prohibition is to stop manufacturers from advertising any brand element, in any manner, in conducting their day-to-day business. Prohibiting the use of brand elements would, in many instances, not achieve the Act's purpose and is, therefore, not necessary. While the persons affected by commercial communication (as defined) may also be consumers, the sale of the relevant products and related products is not unlawful in South Africa and, therefore, a manufacturer's business and commercial communications are not, at face value, unlawful. It is submitted respectfully that this prohibition requires substantial revision. 22. For the reasons set out below, section 3(3) read with the definition of "*commercial communication*" arbitrarily infringes section 16(1) and 25(1) of the Constitution. These infringements are not rational or justifiable in terms of section 36 of the Constitution. In the circumstances, section 3(3) read with	

	section 3(4)(e) and the definition of "*commercial communication*", are *ultra vires* the Constitution. 23. The Socio-Economic Impact Assessment ("the Assessment") does not provide any substantiation, scientific or otherwise, demonstrating that there is a link between the use of any brand element as part of commercial communication, as defined, and a consumer's decision to start or to continue smoking. 24. There is, therefore, no rational reason for prohibiting, for example, the use of any brand element as part of commercial communication: quite simply, there is no scientific evidence demonstrating that a consumer will make healthier or even different choices if these elements form part of commercial communication. 25. It is also unclear not only who will be responsible for enforcing this provision but also how the monitoring of this provision will occur . How will the Department of Health's inspectors monitor compliance with this provision and, will receiving a formal response from the manufacturer, on its corporate letterhead , amount to a contravention of this provision?	
3(4)(a)	26. It has been recommended above to include the definition of "*product placement*" under section 1, as this does assist in interpreting legislation and it also improves the readability of section 3(4)(a). 27. Section 3(4)(a) is, in any event, vague as it is unclear if this provision will have retrospective effect.	3(4) The advertising, promotion and sponsorship of a relevant product or a related product includes— *(a)* product placement ~~by means of the depiction of, or reference to, the product component or brand element in a broadcast programme, film, video recording, telecast, social media, game or other communication for which the producer or any other person associated with such broadcast programme, film, video recording, telecast, social media or~~

		~~other communication, receives payment or other consideration~~
3(4)(b), 3(4)(c)	28. To improve the readability of sections 3(4)(b) and 3(4)(c), the definitions of "*brand stretching*" and "*brand sharing*" should be removed from these sections and included in section 1. 29. Sections 3(4)(b) and 3(4)(c) are, in any event, vague as it is unclear if these provisions will apply in respect of brand elements that are currently in the market in relation to: a) non-relevant products and/or unrelated products that are already in the trade; b) pending trade mark applications filed in classes other than class 34 of the Nice Classification; and/or c) trade mark registrations registered in classes other than class 34 of the Nice Classification. 30. In the absence of a causal link between brand stretching and brand sharing and a consumer's decision to start or to continue smoking, the retrospective effect of sections 3(4)(b) and 3(4)(c) will result in an arbitrary deprivation of property. 31. The list of goods falling in class 34 of the Nice Classification, 12th Edition is attached, marked **"C4"**. The list includes goods that would be classified as "*smokers' articles*" and it would be useful to have clarity on whether or not "*smokers' articles*" constitute related products.	The advertising, promotion and sponsorship of a relevant product or a related product includes— … *(b)* brand stretching,~~ which occurs when a brand element of a relevant product, a related product, a service or company is connected with a non-relevant product or a non-related product, service or company in such a way that the products, services or company are likely to be associated~~; *(c)* brand sharing;~~, which occurs when a brand element of a non-relevant product, a non-related product, a service or a company is connected with a relevant product, a related product, a service or a compan4 in such a way that the products, services or company are likely to be associated;~~ **Introduce the definition of 'brand stretching' and 'brand sharing' under section 1:** **'brand stretching' means using any brand element of a relevant product or related product in relation to new non-relevant products or non-related products or any services;** **'brand sharing' means using any brand element of a non-relevant products or**

		unrelated products or any services in relation to a relevant product or related product;
4(2)	32. This provision is unduly restrictive, irrational and arbitrary. It amounts to an arbitrary deprivation of trade mark holders' property rights in violation of section 25(1) of the Constitution. Similarly, get-ups will also be affected and the reputation and goodwill vesting in a get-up may be lost if brand owners are forced to abandon their get-ups. This too, amounts to a violation of property rights. 33. In light of the emerging research demonstrating that plain packaging legislation undermines the public health and other governmental objectives (such as curbing the illicit trade in tobacco products), the depravation entailed in section 4(2) may be arbitrary. Of particular concern is that it does not appear that either the Minister of the DOH have considered the recent studies (details of which are provided in the Cover Letter). 34. The Minister prescribing and restricting the artistic elements of a get-up in circumstances where the packaging clearly reflects the mandatory labelling requirements is, with respect, untenable. 35. For further comments regarding this issue, the reader is directed to heading 4 of the Cover Letter. 36. Section 4(2) should be deleted.	This section should be deleted, and the status *quo* should be maintained.