Tobacco Advertising and Promotion (Scotland) Bill (SP Bill 40) as introduced in the Scottish Parliament on 5 November 2001

TOBACCO ADVERTISING AND PROMOTION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. The following documents are published to accompany the Tobacco Advertising and Promotion (Scotland) Bill introduced in the Scottish Parliament on 5 November 2001:

   - Explanatory Notes;
   - a Financial Memorandum;
   - the Presiding Officer’s Statement on Legislative Competence.

The Financial Memorandum and Presiding Officer statement are required under Rule 9.3 of the Parliament’s Standing Orders.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by Nicola Sturgeon, who is the member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE BILL

4. The Bill bans advertising and promotion (including sponsorship) of tobacco products, with certain limited exceptions. If passed it will come into force at the end of the period of six months beginning with the date of Royal Assent, or on an earlier date or dates to be appointed by the Scottish Ministers.

5. The Bill defines “tobacco advertisement” as an advertisement whose purpose or whose effect is to promote a tobacco product. The term “advertisement” is not defined and bears its natural meaning. The Bill covers direct advertising (for example, posters, billboards and press advertising) and other forms of promotion such as direct marketing. The Bill also covers media other than paper e.g. electronic communication and video. It does not cover television and radio, which are already subject to regulation under the Broadcasting Acts (reserved to the UK Parliament under Schedule 5 to the Scotland Act 1998).

COMMENTARY ON SECTIONS

Section 1 – Prohibition of tobacco advertising

6. Subsection (1) of this section makes it an offence to publish a tobacco advertisement in Scotland. Subsection (2) creates a separate offence relating to the design, printing or distribution of such an advertisement. Both offences are subject to the available defences in sections 4 and 5.

7. The Bill does not make incidental commentary on smoking or tobacco products an offence. It does not prevent the public at large or journalists from commenting on tobacco products or prohibit the representation of smoking and tobacco products by those engaged in creative or artistic activities.

8. Subsections (1) and (2) include the phrase “in the course of a business” to make it clear that what is prohibited is the promotion of tobacco products as part of a commercial enterprise designed to persuade others to use tobacco products.
9. Subsection (3) makes it clear that the offence of distributing may be committed by anyone involved in the transmission of a tobacco advertisement by electronic means, subject to the defences in sections 4 and 5.

10. Subsection (4) exempts persons who do not carry on business in Scotland from the offence of publishing or causing to be published where they do so via the internet, given that access to a website cannot be controlled by its originator.

Section 2 – Advertising: newspapers, periodicals etc.

11. This section makes it clear that in the case of press advertising, anyone in the chain from commissioning to selling an offending publication could be guilty of an offence, subject to the defences in section 4.

Section 3: Advertising: exclusions

12. This section sets out the exceptions to the advertising ban set out in sections 1 and 2.

13. Subsection (1)(a) deals with communications between those engaged in the sale of tobacco products. Purely commercial communications will not be prohibited on condition that they do not reach the wider public.

14. Subsection (1)(b) allows information on tobacco products to be sent to individuals who specifically and personally request that information. A request for information on one occasion cannot be considered as a request for further information in the future.

15. Subsection (1)(c) excludes from the Bill adverts that are contained in publications that are printed and published outside Scotland and which are not printed or published mainly or specially for distribution in Scotland. The practical effect of this section will be to prohibit tobacco advertising in Scottish publications and in Scottish editions of UK or foreign publications (regardless of where they are printed and published). However, the Bill will not prohibit advertising in UK or foreign publications that, although sold or distributed here, are not printed or published here and are not printed and published specially or mainly for distribution in Scotland.

16. Subsection (2) enables the Scottish Ministers to exempt by regulations limited advertising in places where tobacco products are offered for sale. Such regulations could allow advertising, for example, around a shop till area but ban it in, for example, shop window displays. Regulations under this subsection are subject to annulment by resolution of the Parliament (under section 14(4)).

Section 4 – Advertising: defences

17. This section sets out possible defences for anyone charged with an offence under sections 1 or 2.
18. Subsection (2) provides a defence in relation to an advertisement whose effect is to promote a tobacco product where it could not reasonably be foreseen by the defendant that it would have that effect. In most cases it would be expected that this would only function as a defence once, as the effect would be known thereafter.

19. Subsection (4) provides a specific defence for distributors who did not know and had no reason to suspect that what they distributed infringed the ban. It applies equally to transmission by electronic means.

20. Subsection (5) provides a defence for distributors involved in the electronic transmission of a tobacco advertisement who do not carry on business in the UK or were unable to prevent the distribution of the tobacco advertisement.

21. Subsection (7) provides a defence for a seller of a publication where he or she did not know and had no reason to suspect that the publication contained a tobacco advertisement. This is to protect a seller such as a newsagent from having to look through all the publications he or she might sell to ensure that no such advertisement appeared. Again, once the seller’s attention is drawn to the advertisement he or she would need to remove the publication from sale.

Section 5 – Specialist tobacconists

22. Subsection (1) allows specialist tobacconists to advertise non-cigarette and non-hand rolling tobacco within and outside their shops.

23. Subsection (2) sets out a definition of specialist tobacconists. These are retailers who specialise in non-cigarette and hand-rolling tobacco products where the sale of these goods account for the principal part of the specialist’s income.

24. Subsection (3) sets out the basis for calculating whether a shop qualifies as a specialist tobacconist for the purposes of subsection (2).

25. Subsection (4) sets out the definition of “shop”. Some specialist tobacconists operate from shops within shops, for example in a department store. Such shops within shops may comprise a self-contained cigar room and a counter area which is not physically marked off from the remainder of the store; where this happens advertising for cigars and other specialised products may only take place within or immediately outside the self-contained area. The display elsewhere of all tobacco products will be subject to section 7 and the regulations pursuant to it. This does not prevent there being signposting for customers elsewhere in the store to indicate where the specialist tobacconist is located, so long as that signposting is not branded.

Section 6 – Developments in technology

26. This section gives the Scottish Ministers power to make an order amending the provisions of the Bill concerning publication or distribution of tobacco advertisements via electronic means
in light of technological amendments if this should prove necessary. Any such order would require affirmative resolution by the Parliament (under section 14(3)).

Section 7 – Displays

27. This section makes point of sale advertising an offence if it does not comply with regulations made by the Scottish Ministers. Any such regulations would require affirmative resolution by the Parliament (under section 14(3)).

Section 8 – Prohibition of sponsorship

28. Subsection (1) prohibits anything done pursuant to a sponsorship agreement if the purpose or effect of the agreement is to promote a tobacco product. It applies to both the sponsor and the recipient.

29. Subsection (2) defines a sponsorship agreement to include any form of promotion whereby an event receives help in monetary or other form from an individual or organisation in return for advertising and promoting tobacco products.

30. Subsection (3) sets out a defence where the defendant did not know and had no reason to suspect that the purpose of the agreement was to promote a tobacco product or if he or she could not reasonably foresee that that would be its effect.

Section 9 – Enforcement

31. This section sets out that the authority charged with enforcing the ban on tobacco advertising will be the local weights and measures authority, part of the local authority.

32. Subsection (3) gives the Scottish Ministers power to direct that any of the enforcement functions be taken over by them in any particular case or class of cases.

Section 10 – Powers of entry, etc.

33. This section sets out the powers of entry that enforcement officers may exercise. Such powers are standard powers for enforcement officers (and are similar, for example, to provisions in the Food Standards Act 1999).

Section 11 – Obstruction, etc. of officers

34. This section makes obstructing an officer of an enforcement body, or making false statements to an officer, an offence.
Section 12 – Penalties

35. This section sets out the penalties for offences under the Bill. “Summary conviction” means that prosecutions under the Bill will be dealt with by the sheriff or district court, without a jury. “Conviction on indictment” means that prosecution is dealt with in the sheriff or High Court, with a jury. A fine at “level 3 on the standard scale” is currently £1,000 and “the statutory maximum” is currently £5,000.

Section 13 – Offences by bodies corporate and Scottish partnerships

36. This section provides that officers of companies as well as the companies themselves are liable to be prosecuted as appropriate.

Section 14 – Regulations and orders

37. This section sets out further details on regulation and order-making powers. Subsection (3) provides that orders concerning advertising by electronic means (section 6), and regulations on requirements for displays (section 7), will be subject to affirmative resolution, which means that they will have to be debated and approved by the Scottish Parliament.

Section 15 – Transitional provisions: sponsorship

38. This section gives the Scottish Ministers powers to make regulations to specify when the ban on sponsorship is to take effect. This may not be later than 1 October 2006. This reflects the final deadline in the European Directive for the ending of tobacco sponsorship. Regulations under this section are subject to annulment by the Parliament (under section 14(4)).

FINANCIAL MEMORANDUM

INTRODUCTION

39. The Bill bans the advertising and promotion (including sponsorship) of tobacco products, with certain limited exceptions. The principal costs flowing from the Bill will be those associated with enforcement. Other costs will be incurred by the tobacco and advertising industries, as well as by sports that currently benefit from tobacco sponsorship. There will be a cost to the UK Exchequer as a result of an anticipated decrease in tobacco consumption.

COSTS ON THE SCOTTISH EXECUTIVE

40. Costs on the Scottish Executive will be limited to those associated with the making of regulations and orders and those associated with any consultation process adopted before making
regulations. Costs associated with the making of regulations and orders should be absorbed within existing budgets. Costs of consultation likewise may be absorbed within existing budgets. Additional costs may be incurred if the Executive was to choose to discharge the duties of an enforcement authority under section 9(3).

COSTS ON LOCAL AUTHORITIES

41. The principal costs will be those associated with enforcement. Local authorities will require to train trading standards officers in relation to enforcement and undertake information campaigns to raise awareness of the ban. It is expected that these costs will be met from existing budgets.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

42. The UK Government has estimated that a ban on tobacco advertising, promotion and sponsorship would lead to an overall reduction in tobacco consumption of around 2.5%. If this estimate proves accurate, it can be expected that the turnover of the tobacco industry in Scotland will eventually fall by around £30 million per annum. However, the amounts that the industry currently invests in advertising, promotion and sponsorship – estimated at £10 million in Scotland – would be saved. Accordingly, the profitability of tobacco companies would fall by around £20 million per annum.

43. The UK Government further estimates that the UK advertising industry would lose around £50 million per annum, or £5 million per annum in Scotland, although it is expected that much of this could be recouped from other clients.

44. Sports would lose existing sponsorship revenue but it is expected that this would be recovered from other sources.

45. The UK Government has assumed that it will lose around £30 million per annum in lost tax revenue as a result of an advertising ban in Scotland, although some of this may be recouped if consumers spend their money on other taxable goods. Given that tobacco tax revenue, like revenue from the oil industry, currently is not included in calculations affecting the Barnett Formula, this reduced revenue should not result in a corresponding reduction in the Scottish Executive’s annual budget.

---

1 This estimate is taken from the Draft Regulatory Impact Assessment published with the Draft Tobacco (Prohibition of Advertising and Promotion) Regulations 1999, and reproduced in the Explanatory Notes published to accompany the Tobacco Advertising and Promotion Bill introduced in the House of Commons in December 2000. It is based on the “Smee Report”, Effect of Tobacco Advertising on Tobacco Consumption (Department of Health, 1992) which estimated that the likely, eventual net effect on consumption would be between 0 and 5%.
SAVINGS

46. Based on the assumption of a 2.5% decline in tobacco consumption, it is expected that the Bill will, in due course, save around 300 lives per annum in Scotland. As a result, NHS Scotland would save around £5 million per annum.

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

47. On 2 November 2001, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Tobacco Advertising and Promotion (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
TOBACCO ADVERTISING AND PROMOTION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

© Copyright The Scottish Parliamentary Corporate Body 2001

EDINBURGH: THE STATIONERY OFFICE

Printed in the United Kingdom by The Stationery Office Limited

£2.10

Applications for reproduction should be made in writing to the Copyright Unit, Her Majesty’s Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ. Fax 01603 723000.

Produced and published in Scotland on behalf of the Scottish Parliament by
The Stationery Office Ltd.

Her Majesty’s Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliament publications.