

COMMENTS ON
“POSSIBLE AMENDMENTS TO THE NOMENCLATURE TO CREATE A NEW
HEADING FOR NICOTINE PRODUCTS AND NOVEL TOBACCO PRODUCTS
(PROPOSAL BY AUSTRALIA)”

BACKGROUND AND SUMMARY

- Australia’s Department of Immigration and Border Protection (Australia) has submitted a proposal to the Harmonized System Review Sub-Committee (RSC) of the World Customs Organization (WCO). Australia proposes amendments to Chapter 24 of the Harmonized Commodity Description and Coding System (HS System), which currently consists of headings and sub-headings for the classification of “Tobacco and manufactured tobacco substitutes.”
- Australia proposes to amend Chapter 24 of the HS to create a new heading for *inter alia* chemicals that are tobacco-free, such as liquid solutions, with or without nicotine, for use with electronic nicotine delivery systems (ENDS).
- Chemical solutions for use with ENDS – i.e. so-called e-liquids – are chemical mixtures that generally contain nicotine¹, propylene glycol, glycerin water, and soluble flavorings. As such, they are, and have consistently been, classified under Chapter 38 of the HS (Miscellaneous chemical products). This has been confirmed by classification opinions issued by the WCO and adopted by the Contracting Parties to the HS Convention, including the EU and the United States.
- Yet, Australia proposes to amend Chapter 24 of the HS to create a new heading for, *inter alia*, tobacco-free e-liquids.
- **For the reasons explained in greater detail below, CECCM (Confederation of European Community Cigarette Manufacturers)² do not support the creation of new headings under Chapter 24 of the HS for the classification of tobacco-free chemicals, such as e-liquids.**

CHAPTER 24 OF THE HS SHOULD NOT BE AMENDED TO INCLUDE CHEMICALS

- **E-liquids should continue to be classified under Chapter 38 of the HS nomenclature.** For customs classification, *two* criteria must be considered. First, the essential physical characteristics of the product. Second, in some cases, their intended use. The composition and intended use of e-liquids render them significantly different to products currently classified in Chapter 24 of the HS (“Tobacco and manufactured tobacco substitutes”). In particular, e-liquids do not contain tobacco and there is no combustion involved in their use. Since e-liquids are chemical solutions that do not contain tobacco, they must continue to be classified in HS Chapter 38 (“Miscellaneous chemical products”).
- **The above approach is consistent with the practice of officials responsible for tariff classification issues.** At its 48th Session in September 2011, the Harmonized System Committee (HSC) of the WCO adopted a classification opinion in which it decided that, due to their composition and use, cartridges for electronic cigarettes, “whether or not containing nicotine, could not be regarded as tobacco substitutes.”

¹ It should be noted that not all e-liquids contain nicotine. Some e-liquids on the market are nicotine-free. In any event, Australia proposes to classify both types of liquids under Chapter 24 of the HS.

² CECCM represents the common views of major European-based cigarette manufacturers such as British American Tobacco (BAT), Imperial Brands, and Japan Tobacco International (JTI)

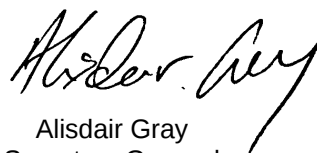
- In addition, in November 2016, the EU's Customs Code Committee agreed, with no dissenting voices, that cartridges and refills for so-called Electronic Nicotine Delivery Systems (ENDS) should be classified in Chapter 38 of the HS, and the devices for their use should be classified in Chapter 85 of the HS.
- In the United States, the Committee for Statistical Annotation of Tariff Schedules—comprising representatives from USITC, U.S. Customs and Border Protection (CBP), and the U.S. Census Bureau (Census) – established six new statistical reporting numbers for e-cigarette devices, parts, and liquid in the Harmonized Tariff Schedule of the United States. These reporting numbers took effect in 2016. The reporting numbers for e-cigarette devices and parts are placed under Chapter 85, while the reporting numbers for liquids are placed under Chapter 38.
- The inclusion of chemical solutions under the same Chapter of the HS system as tobacco-containing products would lead to an obvious lack of physical commonality among these diverse products. Yet it is a well-established principle that classification under the HS nomenclature must clearly reflect the physical properties of a product.

THE OBJECTIVES OF THE HS NOMENCLATURE CAN BE MET IN FULL IF E-LIQUIDS CONTINUE TO BE CLASSIFIED UNDER HS CHAPTER 38

- The three main objectives of the HS are to: (i) facilitate international trade; (ii) facilitate the collection, comparison and analysis of international trade statistics; and (iii) promote the standardization of trade documentation and the transmission of data. Shifting the classification of e-liquids from Chapter 38 of the HS to Chapter 24 of the HS would not improve the ability of customs authorities to achieve any of these objectives.
- According to Australia, its proposal is motivated by a desire to “enable data collection on the trade” of nicotine products for human consumption. However, if Contracting Parties to the HS Convention are interested in improving the collection of statistics on the international trade of e-liquids, they can consider amending Chapter 38 of the HS system to create a new six-digit subheading specifically for e-liquids. Alternatively, **individual countries can already achieve this objective nationally and in full by creating new 8 or 10 digit subheadings in their national nomenclatures under existing HS code 3824.99.** We note in this regard that the United States, for example, has specific 10 digit sub-headings for “e-cigarette liquid that contains 5 percent or more by weight of nicotine” (3824.90.2840) or “less than 5 percent by weight of nicotine” (3824.90.9280). Other WCO members could certainly adopt a similar approach.

CONCLUSION

- **For the above reasons, CECCM (Confederation of European Community Cigarette Manufacturers) representing the common views of major European-based cigarette manufacturers such as British American Tobacco (BAT), Imperial Brands, and Japan Tobacco International (JTI) as well as 13 national Manufacturers' Associations, do not support the creation of new headings under Chapter 24 of the HS for the classification of tobacco-free chemicals, such as e-liquids.**



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