

CB(1) 509/06-07(02)

By Fax and Mail

13 December 2006

Legislative Council Secretariat
Legal Service Division
8 Jackson Road
(Attn: Mr. Stephen LAM)
Central
(Fax: 2877 5029)

Dear Mr. Lam,

Air Pollution Control (Volatile Organic Compounds) Regulation

I write in reply to the questions you raised in your letter of 29 November on the Air Pollution Control (Volatile Organic Compounds) Regulation (hereunder the “Regulation”).

Section 2

Definition of “goods in transit”

We have by and large followed similar definition in a number of ordinances currently in force, e.g. the Import and Export Ordinance (Cap. 60). Since Hong Kong is only connected to the Mainland on land, practically it is unlikely that goods will be brought into Hong Kong from the Mainland via vehicle for the purpose of taking it back to the Mainland.

Definition of “manufacture” and “manufacturer”

The activity of adding colourants to the tint base of paint is included in the definition of “manufacture”.

There are 20 strong small-scale paint mixers in Hong Kong whose business is solely to add colourants to the tint base of paints for over-the-counter sale. They are in effect retailers and it is not appropriate to impose on them the requirements for manufacturers as set out in Sections 4-7. Hence, we deliberately exclude them from the definition of “manufacturer”.

Definition of “packaging”

A piece of plain paper wrapping a container that contains a regulated product would be considered as "packaging" under this Regulation.

Definition of “transshipment”

In the definition, we have mentioned “vehicle” which, according to the Concise Oxford Dictionary, means “any conveyance for transporting people, goods, etc., esp. on land”. It is thus not necessary to add “train”.

Section 3

“Import” is already defined in the Interpretation and General Clauses Ordinance (Cap. 1) as “to bring or cause to be brought into Hong Kong by air, land or water.”

Section 4 to 7

The Administration has consulted the trades on this Regulation. Since different industries are in different stages of readiness and face entirely different operating environment, we cannot have a “one-size-fit-all” policy for all sectors. There are more requirements on regulated paints partly because their prescribed VOC limits are enforced much later than other products, having regard to both commercial and technical feasibilities.

Section 6(1)

Material Safety Data Sheet is a common trade document and is widely understood by trade practitioners.

Sections 9(2), 12(3) and 15(2)

With the advance of science and technology, testing methods will evolve over time. Alternative methods may come into place and older methods may no longer be available in the market. Other jurisdictions may also make new methods that are technically equivalent to ours. The Administration must have the necessary power and flexibility to ensure the timely adoption of the state-of-the-art technology in the field and avoid creating technical barriers to trade. Schedule 1 of the Air Pollution Control (Dry-cleaning Machines) (Vapour Recovery) Regulation (Cap. 311T) contains a similar provision.

Since these new alternative methods have not yet come into being, we cannot give any concrete examples.

Section 16(4)

There are countless possibilities of a certification that is inadequate in meeting the requirements in Section 16(1)-(2). This has to be determined on a case-by-case basis and it is impossible to give an exhaustive list of criteria.

Section 19(1) & (2)

The Prosecution has the legal/persuasive burden of proof since the Prosecution has to prove that the defendant is the person who manufactures or imports the regulated product and that the product contains volatile organic compounds over the statutory limit. Section 19(1) & (2) adopts the formulae "in the absence of evidence to the contrary" and is intended to impose an "evidential burden" on the defendant. Such a shift of evidential burden is not objectionable on the ground of presumption of innocence under Article 11(1) of the Hong Kong Bill of Rights. The Court of Appeal in its decision in *HKSAR v Hung Chan Wa* (CACC 411/2003, 23 June 2005) made the following remarks about the reverse of evidential burden:-

"The evidential burden requires that there is adduced sufficient evidence to raise an issue for the determination of the tribunal of fact. What is required to discharge the evidential burden has been the subject of different formulae. The imposition of an evidential burden is not inconsistent with the presumption of innocence. See *R v DPP ex parte Kebilene*[2002] 2 AC 326, 379. That is because such a burden does not create the risk of a conviction in the face of a reasonable doubt as to an essential element of the crime. (para 62(4)(b) of the judgment)."

The decision of the Court of Appeal on the constitutionality of the reverse of evidential burden was subsequently upheld by the Court of Final Appeal in *HKSAR v Hung Chan Wa* (Final Appeal No. 1 of 2006 (Criminal), 31 August 2006).

Section 20

It is not necessary to define the term "in transit" here. Section 20 is not applicable to lithographic heatset web printing machine under Section 16. The latter concerns the continual operation of emission control devices, which practically will not happen to a machine in transit.

Section 21

An example of exemptions would be products used for medical emergencies. In granting the exemptions, we may suitably specify the duration, location, quantities and conditions under which the products may be sold or used.

This Section does not apply to lithographic heatset web printing machine because we do not conceive of any practicable circumstances under which the emission control process should be exempted, or that there cannot be other environment-friendly alternatives for the purposes performed by such printing machine.

Section 22

For the purpose of the policy, we only need to require for records relating to regulated products. It is not applicable to the emission control process in printing.

Schedule 1, PART 1 & Schedule 3, PART 2

The Administration has made reference to the state-of-the-art international standards on VOC control for different industry sectors. The definitions of VOCs will differ because of the unique technical characteristics of specific products or industrial processes.

Chinese text

We prefer to keep our original version since the word “他” is ambiguous. It may refer to “任何人” or “另一人” in the first sentence of Section 18(4).

Yours sincerely,

(SHIU Lik-king)
for Director of Environmental Protection

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Internal
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