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By Fax (2511 3658) and By Post

4 February 2009

Mr Alfred Lee
Assistant Director (Waste Management Policy)
Environmental Protection Department
46/F, Revenue Tower
5 Gloucester Road
Wan Chai, Hong Kong

Dear Mr Lee,

Product Eco-responsibility (Plastic Shopping Bags) Regulation

I enclose herewith some questions on the legal and drafting aspects of the abovenamed regulation and would be pleased if you could me have your reply in bilingual form before 12 February 2009.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl

cc. Legal Adviser
CCS(1)1

Product Eco-responsibility (Plastic Shopping Bags) Regulation

Part 2 - Registration and deregistration of retailers

Section 3

Application for registration of prescribed retailers

1. Section 3(1) provides that a prescribed retailer or a person who proposes to be a prescribed retailer *may* apply for registration as a registered retailer in respect of a qualified retail outlet in writing and in the specified form. Section 3(2) provides that the applicant *may*, by giving the Director of Environmental Protection ("the Director") notice in writing, withdraw the application before it is determined. Section 3(3) provides that if a change in the information provided to the Director occurs before the determination of the application, the applicant must, as soon as reasonably practicable, give the Director notice in writing unless the application has been withdrawn. Section 3(4) provides that "[i]f a requirement under this section is not complied with, the application is to be treated as not properly made".

2. Would the Administration -

- (a) identify the particular requirement(s) under the various subsections in section 3 which has to be complied with, and
- (b) consider whether it is more appropriate to clearly set out each particular requirement(s) so that the applicant may avoid his application to be treated as not properly made by the Director.

Section 4

Determination of application for registration

3. Section 4 provides for the procedure for determining application for registration as registered retailers in that "[f]or the purposes of section 19(6) of the Ordinance, the Director must approve an application under section 3 unless it is rejected under subsection (2)" (section 4(1)).

4. Section 19(6) of the Product Eco-responsibility Ordinance (32 of 2008) ("the Ordinance") provides that "[t]he Director may approve or reject an application under subsection (2) or (5) in accordance with regulation". Section 19(2) of the Ordinance provides that a prescribed retailer may apply to be a registered retailer in respect of a qualified retail outlet. Section 19(5) provides that a registered retailer may apply for deregistration if any of the 4 conditions is met.

5. Please explain the reason for making cross reference to the whole of section 19(6) of the Ordinance in section 4(1) since section 4 seems to deal with only the question of determination of application for registration (but not deregistration).

Section 6

Application for deregistration of registered retailers or registered retail outlets

6. The drafting of section 6 is similar to section 3 except that it deals with application for deregistration of registered retailer or registered retail outlets. Would the Administration consider the questions in paragraph 2 above?

Section 7

Determination of application for deregistration

7. The effect of section 7 seems to be that the Director *must approve* an application for deregistration unless it is rejected by the Director and the Director *may reject* the application if the Director considers that, amongst other things, "none of the circumstances specified in section 19(5) of the Ordinance under which the application may be made exists" (section 7(2)(b)). The circumstances, which are all factual, provided in section 19(5) of the Ordinance, are -

- (a) the retailer ceases to carry on a retail business in that outlet;
- (b) that outlet is no longer a qualified retail outlet;
- (c) the retailer ceases to provide plastic shopping bags from that outlet; or
- (d) that retailer is no longer a prescribed retailer.

8. Please explain, from the legal point of view, who (the Director or the applicant) will bear the initial burden of proof of the above factual circumstance(s) provided in section 19(5) of the Ordinance before the Director considers whether to reject the application. In other words, is the applicant required first to prove to the satisfaction of the Director that above circumstance(s) exists when he makes the application, or does the Director have a duty to prove that none of the above circumstances exists before he may reject an application for deregistration?

Part 3 – Exemption of part of the area of registered retail outlets

Section 8

Application for exemption of part of the area of registered retail outlets or variation of exemption

9. Section 23(2) of the Ordinance gives the power to the Director to exempt part of the area of a registered retail outlet of a retailer in accordance with the regulation, whereas section 29 of the Ordinance provides for such a regulation making power. Section 8, however, provides that a registered retailer may apply to the Director for exemption of part of the area of a registered retail outlet, or for the *variation of an exemption*. Please advise that whether a power to grant an exemption provided in a principal legislation includes a power to grant a variation of an exemption previously given.

10. The drafting of section 8 is similar to section 3 except that it deals with applications for exemption of part of the area of a registered retail outlets or variation of an exemption. Would the Administration consider the questions in paragraph 2 above?

Section 9

Determination of application for exemption or variation of exemption

11. Similar to section 7 (please paragraphs 7 and 8 above), the effect of section 9 seems to be that the Director *must approve* an application for exemption or variation unless it is rejected by the Director. The Director *may reject* the application if the Director considers, amongst other things, that the retail outlet does not meet the criteria for exemption specified in section 9(3). The criteria for exemption, which are all factual, are -

- (a) the total floor area of the retail outlet in which only non-specified goods are displayed or offered for sale is more than 50% of the retail floor area of the retail outlet; and
- (b) each part of the area to be exempted is a cashier's counter that accepts payment for non-specified goods only.

12. Again, please explain that from the legal point of view, who (the Director or the applicant) will bear the initial burden of proof of the above factual criteria under section 9(3) before the Director considers whether to reject the application. In other words, is the applicant required first to prove to the satisfaction of the Director that above criteria are met when he makes the application, or does the Director have a duty to prove that none of the above circumstances exists before he may reject an application for exemption?

13. It seems that the effect of section 9(3) is that if exemption is granted by the Director, the exempted area will only be the cashier's counter but not other parts of the area where non-specified goods are displayed or offered for sale, even though such area is more than 50% of the retailer floor area of the retailer outlet. Please confirm if this understanding is correct.

14. Since different retailers may have different setups in their retail outlets, for example, a customer service or enquiries desk may also take payments from customers if needed, would the Administration consider provide a definition to "cashier's counter" (section 9(3)(b))?

15. Under section 9(5)(a), if an application is approved, the Director must, for the purposes of section 23 of the Ordinance, exempt the part of the area of the registered retail outlet, or vary the exemption, as indicated in the application subject to certain conditions. Are those conditions mandatory for the approval for exemption? If so, please explain why the word "must" is used to qualify the verb "exempt" instead of making reference to those conditions?

16. Section 9(5)(a) also provides that the exemption or variation of exemption is subject to, amongst other things, such other conditions as the Director may reasonably impose *from time to time*. Please explain the reason why a continuing power is given to the Director to, from time to time, impose other conditions which the applicant is not in a position to ascertain at the time of applying for exemption or variation of exemption.

Part 4 – Obligations of registered retailers

Section 12

Submission of quarterly returns

17. Please clarify (and explain with examples) how plastic shopping bags may be provided "indirectly" to customers, as provided in section 12(3)(b) and (d).

Part 5 – Miscellaneous

Section 16

Specified Forms

18. Section 29(1) of the Ordinance provides that the Secretary for the Environment ("the Secretary") may, after consultation with the Advisory Council on the Environment, make regulations with respect to the matters set out in section 29(1)(a) to (f). Please advise that whether the regulation making power in respect of

the matters provided in section 29(1) of the Ordinance may be delegated by the Secretary to other public officer, e.g. the Director.

19. Section 16 provides that the Director may specify forms to be used under the Regulation and such requirement has to be complied with in relation to the different procedures under the Regulation. These forms may require that -

- (a) it be completed in a specified way;
- (b) specified information or documents be included in or attached to it; and
- (c) it be submitted in a specified manner (section 16(2)).

20. Please clarify the legal status of the forms to be specified by the Director under section 16.

21. Will the Advisory Council on the Environment be consulted before the forms are specified by the Director? Will the Administration provide a draft of these specified forms for the reference of the subcommittee?

Practice guidelines

22. The meaning of prescribed retailers and whether a retail outlet is a qualified retail outlet are provided in Schedule 4 to the Ordinance. In paragraph 6 of the LegCo Brief, the Administration considers that the area occupied by a third party operator should not be regarded as the part of the retail outlet of a registered retailer only if -

- (a) the operator operates under a separate business registration at the location in question;
- (b) the operation occupies a clearly defined area;
- (c) the brand name of that third party is conspicuously displayed within that area;
- (d) the operation is managed by an employee of that third party; and
- (e) the third party operator provides its own plastic shopping bags that bear its own brand name or logo.

23. As the Administration will set out the above criteria in its own practice guidelines (para. 6 of LegCo Brief), please advise the Subcommittee on the legal status of such practice guidelines.

24. Will the Advisory Council on the Environment be consulted before the practice guidelines are issued?

25. What issues will be covered in these practice guidelines? Would the Administration provide a draft of these practice guidelines for the reference of the Subcommittee?