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Secretary for Health, Welfare and Food  
Health, Welfare and Food Bureau  
(Attn: Mrs Ingrid YEUNG, DS(H)2)  
19/F, Murray Building  
Garden Road  
Hong Kong

By Fax (2840 0467) and By Post

26 September 2006

Dear Mrs YEUNG

**Smoking (Public Health) (Amendment) Bill 2005 (“the Bill”)**

I refer to the CSAs proposed by the Administration on Schedule 5A and have the following comments:

1. Section 5(a) provides that:

“For the purposes of sections 2(a)(ii) and 3(a)(ii), the following are the requirements specified in relation to an unregistered trade mark or trade name used on the packet or retail container of any tobacco products sold by a specified person –

- (a) that trade mark or trade name was in use by the specified person in good faith in the course of retail sale of tobacco products in Hong Kong immediately before the appointed day, and such use has been continuing since the appointed day;”.

Please clarify the meaning of the following underlined words:

- (a) the trade mark or trade name was “in use... in good faith”.

- (b) the trade mark or trade name was “in use... in the course of retail sale of tobacco products in Hong Kong”. As the Trade Marks Ordinance (Cap. 559) (“the Ordinance”) does not define “the use of a trade mark or a trade name by an owner”, please clarify the policy intent and provide for a definition of the term in the CSAs.
- (c) “such use has been continuing since the appointed day”. Depending on your definition of use, is the mark or name be required to be used every day after the appointed day?

2. Section 5(e) and section 6(d) provide for another requirement for exemption:

“trade mark or trade name has not previously been refused registration under section 11 of the Trade Marks Ordinance (Cap. 559) for being likely to deceive the public”.

Please clarify:

- (a) whether a trade name is required to be registered under the Ordinance?
- (b) how about a trade mark which has been refused registration but under appeal?

3. I was informed that the “grandfathering” exemption to be granted under Schedule 5A is a “conditional exemption” i.e. the exemption is subject to the “requirements” provided under sections 5(c), (d) and (e) and sections 6(b), (c) and (d). Thus, under certain circumstances some of the trade marks and trade names exempted under the grandfathering arrangement will no longer be exempted after the bill is passed, notwithstanding that the prescribed notation is added to the tobacco packaging (“the revoked marks”).

As the revoked marks and the other exempted marks are “like products” when the Bill is passed, please confirm the subsequent revocation of the grandfathering exemption does not amount to-

- (a) “HKC’s non-compliance with WTO TRIPS”, in particular, violation of the principles that “Most-Favoured-Nation Treatment” and “National Treatment” should be given to all like products.
- (b) breach of the legal rights, in particular the property rights under the Basic Law, of the owners of the marks.

(c) the risk of litigation involved under (a) and (b)?

It is appreciated that your reply in both Chinese and English could reach us by close of play, 26 September 2006.

Yours sincerely

(Monna LAI)  
Assistant Legal Adviser

c.c. DoJ (Attn: Miss Shandy LIU, SGC)  
IPD (Attn: Mr Peter Cheung, DDIP)