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November 5, 2002

Donald S. Clark, Esq.
Secretary, Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Advisory Opinion Request of BHP Billiton Diamond, Inc.

Dear Mr. Clark

On behalf of BHP Billiton Diamonds Inc. ("BHP Billiton"), we respectfully submit this request pursuant to Rules 1.1 and 1.2 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1 & 1.2, for an advisory opinion under Section 5 of the Federal Trade Commission Act. Specifically, we request that the Federal Trade Commission or, in the alternative, the Commission Staff advise whether BHP Billiton may make marketing and/or advertising claims that diamonds that are mined in Canada but cut and polished in other countries (such as Belgium, India, Israel, etc.) are "Canadian diamonds" and "Made in Canada" for purposes of their sale in the United States.

As discussed in further detail below, we submit that this request is appropriate under the Commission's Rules of Practice because: (1) the proposed "Made in Canada" and "Canadian diamond" marketing and/or advertising claims involve a substantial or novel question of fact or law for which there is no clear Commission or court precedent; and (2) BHP Billiton's request and the Commission's advice, and the publication thereof, would be of significant public interest. Moreover, we submit that under the circumstances attendant to this request, a Commission opinion would not be unwarranted because: (1) BHP Billiton's proposed course of conduct is not hypothetical in nature; (2) it, or substantially similar conduct, is not under investigation nor is or has it been the subject of a current proceeding at the Commission or another governmental agency; and (3) an informed opinion can be rendered without extensive investigation or collateral inquiry. See 16 C.F.R. § 1.1(b)(1) & (2). Needless to say, should the Commission in its discretion determine that this request is more appropriately the subject of Commission Staff advice, or that Staff can provide such advice is a more expeditious manner, BHP Billiton would welcome such advice from Commission Staff in addition to or in lieu of the rendering of an advisory opinion by the Commission.

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As set forth below, we submit that the Commission should conclude that the proposed "Made in Canada" and "Canadian diamond" marketing and/or advertising claims are proper under Section 5 of the FTC Act on the basis of the following: (1) a related ruling rendered to BHP Billiton on or about October 3, 2002 by the Commissioner of Customs of the U.S. Customs Service that such diamonds are of Canadian origin for purposes of the North American Free Trade Agreement Marking Rules and, accordingly, should be marked "Made in Canada" when imported into the United States; (2) the conclusion under the Canada Competition Act, as set forth in the statement of "Enforcement Policy on the Marketing of Canadian Diamonds" by the Commissioner on Competition of Industry Canada, that diamonds that are mined in Canada but cut and polished elsewhere can be marketed as "Canadian diamonds" and "Made in Canada"; (3) despite the absence of any reliable authority promulgated by the Federal Trade Commission or other legal precedent, application of the analytic model adopted by the Commission in its "Made in USA" Statement would support the appropriateness of making a "Made in Canada" claim here; and (4) the public interest supporting consistency of interpretation for marketing and/or advertising claims for such diamonds with the noted regulatory schemes. We believe that these arguments are especially compelling in light of Chairman Muris's recent statements in support of convergence among consumer protection regulatory schemes, such as the United States's and Canada's, in order to enhance consumer welfare in cross-border markets. See T. Muris, "The Interface of Competition and Consumer Protection," FORDHAM LAW INSTITUTE 29TH ANNUAL CONFERENCE ON INTERNATIONAL LAW AND POLICY at pp. 16-18 (October 31, 2002).

Taken together, we submit that there is a sufficient shortage of reliable legal authorities to warrant the Commission's affirmatively ruling on this advisory opinion request, but that, at the same time, the limited relevant guidance that does exist would support the Commission's concluding that the "Made in Canada" and "Canadian diamond" claims are legally appropriate under FTC Act § 5.

FACTUAL BACKGROUND

BHP Billiton has mined diamonds in the Lac de Gras area of the Northwest Territories of Canada at the EKATI Diamond Mine™ since October 1998. The first diamond-bearing mineral deposits on the property were discovered in 1991. The opening of the mine in late 1998 followed a comprehensive mine approval and development process involving a multi-million dollar investment. The first sale of diamonds from the EKATI™ mine took place in January 1999.

Prior to the opening of the EKATI™ mine, almost all diamonds sold in Canada and the United States originated from mines in Africa, Australia, and Russia. Today, the EKATI™ mine produces approximately U.S.$500 million worth of rough diamonds a year, or about 6 percent of total world production, by value. With one additional mine in Canada owned by companies other than BHP Billiton scheduled to become operational in 2003, Canada's share of world production of rough diamonds is expected to increase to 12 percent.

Diamonds are pure carbon in a crystalline form. Natural diamonds originate far below the surface of the earth, at depths of 200 kilometers or more, where high temperatures and extreme pressures cause diamond crystallization. Volcanic eruptions brought diamonds to the earth's surface millions of years ago. Most natural diamonds are found in deposits of a rare variety of ultrabasic igneous rock called kimberlite. The majority of kimberlite deposits have no diamonds or so few as to be uneconomic to mine. Less than 100 kimberlite deposits in the world have been profitably exploited since kimberlite diamonds were first discovered almost 130 years ago.

The most substantial and costly operation in the production of a "finished" (i.e., cut and polished) diamond ready to be made into jewelry is the extraction of the rough diamond from a kimberlite deposit. BHP Billiton estimates that, excluding exploration, permitting, and mine development costs, which are substantial, approximately 85 percent of all costs involved in the production of a polished diamond relate to the mining and the on-site processing of the kimberlite ore necessary to extract rough diamonds. Thus, cutting and polishing the rough diamond to create a finished diamond accounts for approximately 15 percent of the total production costs.

Although cutting and polishing diamonds requires specialized skills, these skills are not unique to any one country. Expert cutting and polishing capability exists in many countries, including Belgium, India, Israel, Thailand, Russia, the Philippines, the United States, and, to a lesser degree, in Canada, where a small but growing industry exists. Moreover, although excellent visual acuity, manual dexterity, and proper computer programming can contribute to the shape and brilliance of a finished diamond, a diamond's inherent value is based on its weight, clarity, and color. These characteristics are innate in the rough diamond and cannot be fundamentally changed or altered through cutting and polishing.

BHP Billiton intends to ship rough diamonds extracted from the EKATI™ mine in the Northwest Territories, Canada, to diamond cutters in Belgium, Israel, India, Russia, Thailand, or some other third country. Diamond cutters in these countries will cut the rough diamonds and polish them into their finished form, and will maintain separate facilities, or an auditable tracking system to ensure that the stones from the EKATI™ mine are not mixed with any other sources. BHP Billiton will then export the finished (i.e., cut and polished) diamonds from their place of finishing to the United States. Either BHP Billiton, an affiliated company or joint venture, or an unaffiliated customer will act as the importer or record. BHP Billiton and/or their retail representatives propose to advertise and market the imported diamonds as "Made In Canada" and to represent the diamonds as "Canadian diamonds." In addition to or in lieu of such words, given the small size of the product, BHP Billiton alternatively proposes to mark the diamonds on their girdle with a lasered brand designating their Canadian origin, such as a stylized maple leaf.

II. RULING REQUEST UNDER NAFTA MARKING RULES

In response to BHP Billiton's Letter Request dated September 4, 2002, the Commissioner of Customs of the U.S. Customs Service by letter delivered October 10, 2002 ruled that diamonds mined in Canada but cut and polished in third countries must under applicable Customs Regulations be marked "Made in Canada" upon importation for sale in the United States. We have set forth for your further consideration BHP Billiton's Letter Request (at Annex A) and the Customs Service Ruling (at Annex B).

We submit that, absent compelling legal or public policy considerations to the contrary, the Commission should apply Section 5 of the FTC Act to the proposed conduct consistent with ruling of the Customs Service. Although we concede that the regulatory schemes are not identical such that the Customs Service ruling would be regarded as dispositive to the interpretation under Section 5 of the FTC Act, the fact that the Customs Service found Canada to be the "country of origin" for such diamonds for marking purposes should be highly relevant to the Commission's consideration of this issue. The Commission has in the past often examined such representations, such as "Made in USA" claims, in reliance upon country of origin considerations and analysis. Moreover, we understand that Commission Staff has followed an informal practice of consulting with the Customs Service on such issues in part due to the similarity and overlap of the regulatory schemes. In addition, we believe that the public interest strongly favors consistent regulatory treatment of the proposed conduct in order to avoid undue confusion to consumers when faced with country of origin markings on product packaging and inconsistent and/or conflicting advertising or marketing claims. These circumstances would also create a significant burden on wholesalers and retailers in managing and controlling product representations in the event that conflicting regulatory requirements were imposed.

III CANADA COMPETITION BUREAU "MADE IN CANADA" GUIDES

The "Made in Canada" and "Canadian diamond" claims at issue here, under precisely identical facts to those posed herein, are expressly permitted by Canadian regulatory authorities. The "Enforcement Policy on the Marketing of Canadian Diamonds" (hereinafter "Enforcement Policy") issued by the Commissioner of Competition of Industry Canada in November 2001 states that, for regulatory purposes in Canada, diamonds mined in Canada but cut and polished elsewhere would be regarded as having been "Made in Canada" such that advertising claims to that effect or representing such diamonds to be "Canadian diamonds" would not constitute false or misleading representations or deceptive marketing practices in contravention of the Competition Act. See Enforcement Policy at 2 (attached at Annex C). (The Enforcement Policy further refines the analysis set forth in Industry Canada's "Guide to 'Made in Canada' Labelling and Advertising" and the updated "Guide to 'Made in Canada' Claims," which the Competition Bureau noted "[were] mainly intended for manufactured goods, and not for natural resources such as mineral goods" such as diamonds. See id.) In its analysis of the issue in the Enforcement Policy, the Competition Bureau concluded that the cutting and/or polishing process does not result in a product that is fundamentally different from the rough-mined diamond, and

that the cutting and polishing costs associated with finishing the rough-mined diamond "would only represent a small percentage of total production costs." The Enforcement Policy concludes that "[i]n general the [Competition] Bureau would not take exception to the representation of a diamond as being a 'Canadian diamond' if it could be demonstrated that the diamond originated from a Canadian mine." In fact, BHP Billiton is able to conclusively establish that its diamonds originate from its Canadian mines.

The Competition Bureau's conclusion is particularly compelling here because of the similarity of the regulatory analysis of such a claim under the Competition Act to the consideration of such a claim under FTC Act § 5. More specifically, the general principles and regulatory requirements set forth in the Enforcement Policy and the related "Guide to 'Made in Canada' Claims" (attached at Annex D) parallel closely the legal precedent under FTC Act § 5 (e.g., claim interpretation, proximity of disclaimers made in a clear and conspicuous manner). Thus, although the Competition Bureau analysis is not dispositive to the consideration of this issue under FTC Act § 5, the similarity of the regulatory schemes should be viewed as creating a presumption, for purposes of the Commission's § 5 analysis here, in favor of the conclusion reached by the Competition Bureau on the lawfulness of the proposed conduct. It should also be noted that the Enforcement Policy resulted from a review by the Competition Bureau involving public and industry consultation, including the use of consumer perception surveys, regarding enforcement of the Competition Act to promotional claims alluding to Canada as the country of origin of polished diamonds. (For purposes of further factual examination of this issue, we have attached at Annex E the letter submission of BHP Billiton in connection with the Competition Bureau's issuance of the Enforcement Policy.)

In assessing the precise nature of the marketing and/or advertising claims at issue, special consideration should also be given to the apparent rejection by the Competition Bureau of the need to qualify the "Made in Canada" claim (by adding qualifying language such as "Mined in Canada") in the place of the broader, and more general, "Made in Canada" or "Canadian diamond" marketing and/or advertising claims in the case of such Canadian-mined diamonds. Specifically, although the Competition Bureau's "Guide to 'Made in Canada' Claims" (on which the Enforcement Policy is based) states that "[i]n circumstances where use of an unequivocal claim of 'Made in Canada" to promote a product may be misleading, it could be appropriate to use a qualified claim which more accurately reflects the limited production activity which took place in Canada," the Competition Bureau appears to have concluded that no such claim qualification is warranted in the case of Canadian-mined diamonds that are cut and/or polished in third countries.

IV. ABSENCE OF RELIABLE LEGAL AUTHORITY UNDER FTC ACT § 5

The absence of any reliable legal authority that considers, directly or indirectly, the proposed claims at issue here makes this advisory opinion request appropriate for Commission consideration. Based on our legal research on this issue, there does not appear to be any direct or indirect legal authority construing the lawfulness under FTC Act § 5 of a "Made in Canada" or

"Canadian diamond" advertising or marketing claim in the context of the facts set forth herein. In particular, we have examined the Commission's legal precedent and authorities under several regulatory schemes where the Commission has country-of-origin enforcement jurisdiction, such as the Textile Fiber Products Identification Act, the Wool Products Labeling Act, the Fur Products Labeling Act, and the American Automobile Labeling Act; in addition, we have examined the more general principles pertaining to the gemstone industry under the Commission's (recently amended) Jewelry Guides, which consider seemingly-analogous terms such as "Oriental pearl," "South Sea pearl," or "Mallorca pearl." Although there are a large number of decisions and other rulings examining misrepresentation of country-of-origin designations of products under these statutory schemes and authorities (including several cases examining advertising claims for products either manufactured in Canada or composed of ingredients produced in Canada, see, e.g., Manhattan Brewing Co. v. FTC, 1947-1947 Trade Cas. ¶ 57,439, and cases where the essential product ingredients came from one country and the processing of the product took place in another, see, e.g., Parfums Corday, Inc. v. FTC, 120 F.2d 808 (2d Cir. 1941), there is no reliable authority construing a fact pattern analogous to the instant one, particularly where the U.S. Customs Service has expressly ruled that the product must be marked as "Made in Canada" notwithstanding some amount of processing of the product into its consumer-recognizable form that has occurred outside of Canada.

The regulatory uncertainty facing a foreign producer like BHP Billiton as a result of the absence of reliable legal authority under FTC law on this issue is compounded by the fact that the FTC has adopted the enforcement position that, although the FTC shares jurisdiction with the U.S. Customs Service over country-of-origin claims and designations, the Commission has sole jurisdiction over "foreign-origin claims in advertising, which the U.S. Customs Service does not regulate." Federal Trade Commission, ENFORCEMENT POLICY ON U.S. ORIGIN CLAIMS at p. 2 (December 1997) (hereinafter, "Made in USA" Statement). This uncertainty is also heightened by the FTC's reservation of enforcement authority for claims going beyond those mandated by the U.S. Customs Service, such as claims that supplement a required foreign-origin marking, so as to represent where additional processing or finishing of a product occurred, and the Commission's admonition that the "Made in USA" Statement "is intended to address only those issues related to U.S. origin claims." Id. (emphasis added).

Notwithstanding the absence of reliable legal authority on this issue, we submit that a favorable ruling on our request would be generally consistent with the approach that the Commission has taken on related issues under the FTC's "Made in USA" Statement, although that authority expressly does not control the disposition of this issue. More specifically, we submit that on the basis of the analytical model adopted by the Commission in its "Made in USA" Statement, coupled with due deference given to relevant findings by the U.S. Customs Service and Industry Canada's Competition Bureau, the Commission should conclude that the "Made in Canada" and "Canadian diamond" claims are lawful under FTC Act § 5.

The FTC's "Made in USA" Statement identifies three critical determinations in assessing country-of-origin claims under the Commission's "all or virtually all" enforcement standard: (1)

site of final assembly or processing; (2) the proportion of total cost of manufacture that is attributable to each particular locale; (3) the relative remoteness of the foreign content in the manufacturing of the product. The Commission's discussion in the "Made in USA" Statement of each of these determinations strongly supports a "Made in Canada" representation here. (However, like Industry Canada's "Guide to 'Made in Canada" Claims," the FTC's "Made in USA" Statement appears to be directed more towards manufactured goods, rather than natural resources such as diamonds, so the precise application of the FTC's analytic model here may be difficult in some respects.)

First, in construing the "site of final assembly or processing" determination, the Commission has stated that "it is a prerequisite that the product have been last 'substantially transformed' in the United States [the claimed country-of-origin], as that term is used by the U.S. Customs Service--i.e. the product should not be required to be marked "made in (foreign country) under 19 U.S.C. § 1304." Id. at 4. In fact, in the case at hand, the U.S. Customs Service has expressly ruled that the finishing process (composed of cutting and polishing) of Canadian-mined diamonds in another country does not result in a "tariff shift" for NAFTA purposes so as to negate the mandated "Made in Canada" marking designation for these diamonds upon their importation into the United States. This is relevant because the "tariff shift" standard, which applies to "country of origin" determinations involving NAFTA countries (such as Canada here), subsumes the "substantial transformation" standard, which applies "country of origin" determinations involving non-NAFTA countries, as referenced by the Commission in the "Made in USA" Statement above. (See, e.g., "Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement", 61 Fed. Reg. 28932, at 28936 ("[I]t is the position of Customs that the principle of substantial transformation is reflected and codified not only in the § 102.20 rules but also in the entire hierarchy of § 102.11.")). Thus, the Customs Service ruling supports a finding that there is not a sufficient "substantial transformation" as a result of the cutting and polishing process to negate a "Made in Canada" claim here.

Second, in assessing the "portion of manufacturing costs" criteria, due regard must be given to Industry Canada Competition Bureau's specific finding in this regard. More specifically, the FTC's "Made in USA" Statement asserts:

> Assuming the product is put together or otherwise completed in the United States, the Commission will also examine the percentage of the total cost of manufacturing the product that is attributable to U.S. costs (i.e., U.S. parts and labor) and to foreign costs. Where the percentage of foreign content is very low, of course, it is more likely that the Commission will consider the product all or virtually all made in the United States. Nonetheless, there is not a fixed point for all products at which they suddenly become "all or virtually all" made in the United States. Rather, the Commission will conduct this inquiry on a

> case-by-case basis, ... Where, for example, a product has an extremely high amount of U.S. content, any potential deception resulting from an unqualified "Made in USA" claim is likely to be very limited, and therefore the costs of bringing an enforcement action challenging such a claim are likely to substantially outweigh any benefit that might accrue to consumers and competition.

Id. (footnotes deleted). As discussed above, Canada's Competition Bureau has concluded that the costs associated with the finishing (outside of Canada) of Canadian-mined diamonds "would only represent a small percentage of total production costs," see Enforcement Policy at 2. BHP Billiton estimates this "non-Canadian" activity comprises about 15 % of the production costs, with the remaining 85 % of all costs involved in the production of a polished diamond being attributable to the mining and on-suit processing of the kimberlite ore needed to extract the natural diamonds, see BHP Billiton Letter Submission to Industry Canada, Competition Bureau at p. 3. This, coupled with BHP Billiton's strong belief (based on advice received from Canadian jewelry retailers) that the ordinary consumer regards a diamond mined in Canada but cut and polished elsewhere to be a "Canadian diamond" (also set forth in BHP Billiton's Letter Submission to the Competition Bureau), supports a similar conclusion by the FTC here.

Third, in examining the "remoteness of foreign content" requirement, the Commission suggests that "un-remoteness" of the raw material of the finished product, as well as the significance of the raw material to the value of the finished product, are important considerations in the country-of-origin determination. The Commission's "Made in USA" Statement specifies:

> In this analysis, raw materials are neither automatically included nor automatically excluded in the evaluation of whether a product is all or virtually all made in the United States. Instead, whether a product whose other parts and processing are of U.S. origin would not be considered all or virtually all made in the United States because the product incorporated raw materials depends (as would be the case with any other input) on what percentage of the cost of the product the raw materials constitute and how far removed from the finished product the raw materials are. Thus, were the gold in a gold ring, or the clay used to make a ceramic tile, imported, an unqualified "Made in USA' claim for the ring or tile would likely be inappropriate. This is both because of the significant value the gold and the clay are likely to represent relative to the finished product and because the gold and the clay are only one step back from the finished articles and are integral components of those articles.

Id. at 5. Similarly, here, as BHP Billiton's Letter Submission asserts, the overwhelming portion of the value of the finished diamond is attributable to the Canadian-mined raw diamond, not the cutting and polishing process, and the raw diamond--as are the gold and clay in the Commission's examples above—is wholly "un-remote" to the finished diamond.

V. THE PUBLIC INTEREST SUPPORTS ISSUANCE OF THE REQUESTED ADVISORY OPINION

While we appreciate that the decision by the Commission to issue an advisory opinion (either from the Commission itself or the FTC Staff) is discretionary, we submit that doing so here is compelled not only by BHP Billiton's full satisfaction of the Commission's criteria set forth in the Commission's Rules of Practice, but also by significant public interest and policy considerations. Although this is an issue of significant importance to BHP Billiton, it is not unique to BHP Billiton, nor is the requested advisory opinion one of mere convenience to BHP Billiton's business activities. By far the most critical business objective for BHP Billiton's proposed "Made in Canada" claim is its branding strategy, by which BHP Billiton hopes to alter the commodity nature of the industry--beyond the well-recognized "four C's"--where consumers will attach added market significance to the product brand itself. See generally "Adding Brand Names to Nameless Stones," The New York Times at p. W1 (June 27, 2002) (attached at Annex F).

BHP Billiton believes that brand awareness offers significant value to consumers, and by doing so, will make the diamond industry in the United States, which represents approximately 40 % of world-wide diamond purchases, considerably more competitive than it is today. Branding, by facilitating new entry by BHP Billiton and other Canadian diamond manufacturers into the U.S. market, is also consistent with broader free trade policies underlying NAFTA and other free trade initiatives in the Western Hemisphere. And a favorable ruling by the Commission on BHP Billiton's "Made in Canada" claim would harmonize the FTC's enforcement approach not only with a sister federal regulatory agency, the U.S. Customs Service, but also with the FTC's cross-border law enforcement "cousin," Industry Canada's Competition Bureau which, at least on this issue, appears to employ a remarkably similar regulatory model in assessing such issues. By doing so, the Commission can avoid the inherent confusion in the marketplace which would otherwise result from the imposition of conflicting and inconsistent regulatory requirements, not only in the United States (as between FTC and U.S. Customs Service requirements), but also between U.S. and Canadian regulatory requirements (as between the FTC and Industry Canada's Competition Bureau). BHP Billiton submits that to do otherwise would seriously erode the principle of international regulatory convergence in consumer protection that appears to be an important law enforcement goal of the Commission, see generally Muris, supra at pp. 17 and 20-22, as well as the very foundation underlying the recently updated U.S.-Canada bilateral consumer protection agreement, see "Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws"

Absent a favorable ruling by the Commission, BHP Billiton will face significant regulatory uncertainty, which will have a significant impact on how it elects to market its diamond products in the United States. Because BHP Billiton will not be marketing directly to the consuming public, this regulatory uncertainty will pose significant legal and business risks for BHP Billiton in its dealings with the retail channel, through wholesalers and distributors, who will look to BHP Billiton to assure regulatory compliance for their marketing representations and activities. Accord, Muris at p. 21 (noting the burden imposed on merchants "in figuring out different, and potentially conflicting, marketing rules" arising from different jurisdictions). Absent clear guidance on this issue, BHP Billiton's retail channel will be compelled to scale back its competitive efforts generally, and the market implementation of BHP Billiton's branding strategy, more specifically.

Given the Commission's clear jurisdiction and its enforcement activity in this area, BHP Billiton has prudently sought advance direction from the Commission rather than risk, for either itself or its retail channel, the possibility of a significant enforcement action by the Commission in respect of BHP Billiton's proposed "Made in Canada" and "Canadian diamonds" claims and/or marks for its polished diamonds. An advisory opinion by the Commission would establish the ground rules for importers of polished diamonds and would also serve to eliminate public confusion and reduce the cost and time attendant on enforcement proceedings by the FTC.

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We would be pleased to address any further issues or inquiries relevant to this advisory opinion request as it is considered by the Commission.

Very truly yours,

Andrew G. Berg
Counsel to BHP Billiton Diamonds Inc.

AGB/kcj