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Paper for the House Committee

**Report of Subcommittee on
Import and Export (General) (Amendment) Regulation 2013**

Purpose

This paper reports on the deliberations of the Subcommittee on Import and Export (General) (Amendment) Regulation 2013 ("the Subcommittee").

Background

2. In January 2013, there was a run on certain brands of powdered formula in Hong Kong. According to the Administration, the supply of powdered formula in the local market has been closely monitored. The supply chain failure in relation to powdered formula was closely related to parallel trading activities, and the serious shortage of certain brands of powdered formula at the retail level was due to the huge demand of parallel traders.

3. On 1 February 2013, the Administration announced a series of measures to combat parallel trading activities. In the Administration's view, the problem of parallel traders diverting large quantities of powdered formula away from the supply chain in Hong Kong is likely to re-emerge in the short to medium term. The Administration considers it necessary to regulate the export of powdered formula from Hong Kong so as to combat the problem. On 22 February 2013, the Administration published in the Gazette the Import and Export (General) (Amendment) Regulation 2013 ("the Amendment Regulation") to amend the Import and Export (General) Regulations (Cap. 60 sub. leg. A) ("the IE Regulations") to prohibit the export of powdered formula to all places outside Hong Kong, except with a licence issued by the Director-General of Trade and Industry ("DGTI").

The Amendment Regulation

4. The Amendment Regulation seeks to amend the IE Regulations to prohibit the unlicensed export of powdered formula to all places outside Hong Kong. Section 3 adds a definition of "powdered formula" and section 5 adds powdered formula to Part 1 of the Schedule of articles prohibited from export. Section 4 adds provisions for the exemption arrangements for personal use.

5. The Amendment Regulation came into operation on 1 March 2013.

The Subcommittee

6. At the House Committee meeting on 1 March 2013, Members agreed to form a subcommittee to study the Amendment Regulation. The membership list of the Subcommittee is in **Appendix I**.

7. Under the chairmanship of Mr WONG Ting-kwong, the Subcommittee has held eight meetings with the Administration, including one meeting to receive views from deputations. A list of organisations and individuals which/who have made submissions to the Subcommittee is in **Appendix II**.

8. The scrutiny period of the Amendment Regulation has been extended from 27 March 2013 to 17 April 2013 by a resolution of the Council passed on 20 March 2013, in order to allow more time for the Subcommittee to study the Amendment Regulation.

Deliberations of the Subcommittee

Need for the Amendment Regulation

9. Most members have expressed support for the Government's decision to introduce the legislative proposal in order to combat the problem of parallel trading activities and to ensure a sufficient and steady supply of powdered formula in Hong Kong. Some members, however, have cautioned that the implementation of the Amendment Regulation has created tension between Hong Kong and the Mainland residents. They consider that the huge demand of powdered formula from the Mainland parents is mainly due to food safety concern in the Mainland. Some other members including Members belonging to the Liberal Party, Mr Abraham SHEK and Mr Paul TSE, do not consider it necessary to impose export restriction on powdered formula. They stress that

parallel trading activities per se should not be an offence. Dr LEUNG Ka-lau has also pointed out that as the composition of different brands of powdered formula is very similar, one brand can be substituted with another in most cases. Hence, the shortage of certain brands of powdered formula should not pose much problem.

10. The Administration points out that they have been promoting the merits of breastfeeding in order to encourage its adoption by parents. Where breastfeeding is not feasible, powdered formula is the only processed foodstuff which wholly fulfils the nutritional requirements of infants during the first months of life until the introduction of complementary feeding¹. For young children above six months of age, some parents still rely heavily on powdered formula as the diet for their children under the age of 36 months. To protect the health of infants and young children under the age of 36 months, it is necessary to ensure that powdered formula is safe for consumption and has sufficient and steady supply.

11. The Administration has pointed out that Hong Kong relies on the importation of powdered formula for infants and young children under 36 months to meet all local demands. The total amount of import of products concerned was largely steady at the level of 15 million kilograms per annum from 2006 to 2008. Since then, demand has shot up, with the amount of import reaching 44 million kilograms in 2012, representing a 193% increase. During the same period, the amount of re-export was about two million kilograms per annum, while the growth in the number of births in Hong Kong was only about 16%. On the basis of these figures, the Administration believes that, over the past years, a large amount of powdered formula has been consistently diverted through parallel trading activities to satisfy the demand of Mainland parents.

12. The Administration has advised that in January 2013, there were indications of a serious shortage of certain brands of powdered formula at the retail level. These brands constituted a market share of over 60% in Hong Kong. Despite the assurance of major suppliers of powdered formula that they had enhanced their services, had sufficient stock in hand, and had put in place stringent measures to combat the malpractices of some retailers, many local parents still complained that individual brands of powdered formula were still out of stock at the retail level that calls to hotlines of certain suppliers were unanswered and that response of certain suppliers was relatively slow. It was also observed that the shortage of powdered formula had become more and more acute. Furthermore, the shortage of powdered formula caused by parallel traders had spread from areas in the New Territories, including Sheung Shui, Fanling and

¹ Complementary feeding is normally introduced at six months of age.

Tai Po, to urban areas. The community at large was extremely concerned about the situation. In the Administration's view, the huge demand of parallel traders had led to a supply chain failure in the market of powdered formula, resulting in the serious shortage of powdered formula available for purchase by local parents at the retail level.

13. Deputations representing the suppliers of formula products have strong reservations about the Amendment Regulation. They have pointed out that there is no critical shortage of powdered formula. The so-called supply chain failure in the market of powdered formula is limited to the shortage of certain brands of powdered formula at certain retail outlets. They consider the export restriction unnecessarily stringent. Mr Tommy CHEUNG, Mr Vincent FANG and Mr CHUNG Kwok-pan share the views of these deputations. To assess objectively the extent of shortage of powdered formula in the local market, these members have requested the Administration to provide statistics on the local consumption of infants and young children of powdered formula, import quantity of individual brands and the shortage of each type of these formula products at the retail level.

14. On the local consumption of powdered formula, the Administration has advised that the Census and Statistics Department does not keep statistics on the demand of infants and young children for, or the import quantity of each type of formula products. Neither does the Administration collect statistics on the import and re-export quantities of each brand of powdered formula. Major suppliers of powdered formula have recently been asked to provide the information on the monthly import quantity of powdered formula. Replies from only a few suppliers have been received so far and the majority of these suppliers have expressed reservations about sharing the information for reasons of internal confidentiality. At members' repeated request, the Administration has advised on the basis of a very rough estimation that the consumption of powdered formula by all locally-born infants and young children was about eight million kilograms in 2012, of which the amounts consumed by infants and young children of zero to six months, six to 12 months and 12 to 36 months were about 1.6 million 1.5 million and 4.9 million kilograms respectively.

15. The Administration maintains that it is an indisputable fact that there is a shortage of powdered formula recently in Hong Kong. The Administration has pointed out that apart from maintaining frequent contact with major suppliers of powdered formula who also observed an acute shortage at the retail level, the Administration had deployed staff to inspect pharmacies and major chain retailers to obtain information on the shortage problem in the market. Certain suppliers advised that calls to their hotlines had multiplied. Between 1 February and 8

February 2013, the special hotline service set up by the Administration received 5 808 calls and referred 3 190 purchase orders for powdered formula, to suppliers of the seven major brands, reflecting the concern of local parents about the problem. The Administration stresses that the restriction on the export of powdered formula under the Amendment Regulation is only a measure taken as a last resort. It is not targetted at travellers from the Mainland or other places, but simply to ensure the sufficient and steady supply of powdered formula for infants and young children of local parents.

16. Some members including Mr Vincent FANG and Mrs Regina IP have suggested that consideration should be given to requiring the suppliers of formula products to reserve a prescribed level of formula products for local sale. According to the Administration, it has examined the option of listing powdered formula as a reserved commodity under the Reserved Commodities (Control of Imports, Exports and Reserve Stocks) Regulations (Cap. 296 sub. leg. A), but existing control scheme under the Regulations imposes control not only on export but also on import as well as the level of stock to be maintained by stockholders of the concerned goods. The main problem faced by the Administration is that the imported powdered formula has been diverted away from Hong Kong in large quantities through parallel trading activities, causing a short supply of certain brands of powdered formula for local consumption. As it is not necessary at this stage to control import and the stock level, the proposed amendments to the IE Regulations are more appropriate to achieve the policy objective.

17. There is also a view that consideration should be given to imposing an export tax on powdered formula so as to combat the problem of parallel trading activities. The Administration has advised against the proposal as its implementation could impact on the smooth passenger flow and Customs operation at control points. The Administration has also advised that it has made reference to the practice adopted in Macau and other measures, such as setting up venues for the direct sale of powdered formula for local parents. However, these measures are considered not viable in Hong Kong.

Conformity with the Basic Law and the World Trade Organization requirements

18. Article 115 of the Basic Law ("BL115") provides that the Hong Kong Special Administrative Region ("HKSAR") shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital. Some members have queried whether the Amendment Regulation is consistent with BL115.

19. The Administration has explained that no definition of "policy of free trade" and "free movement of goods" has been provided for under the Basic Law. In view of the broad wording of BL115 which only seeks to provide a general policy guideline, the Administration considers that the Amendment Regulation would not engage BL115. Furthermore, BL115 does not prohibit regulation of import and export of goods in specified situations, provided that the policy of free trade as a whole is implemented in HKSAR. Various restrictions on the import and export of goods have been practised in Hong Kong under the Import and Export Ordinance (Cap. 60) ("the IE Ordinance") and IE Regulations since the 1980s.

20. The Subcommittee has also examined the issue of whether the Amendment Regulation can satisfy the proportionality test. The Administration has advised that there is yet to be any local case law on BL115. Nonetheless, it takes the view that the Amendment Regulation is consistent with BL115 because the court will likely find that BL115 is not engaged and even if BL115 is engaged, it would satisfy the proportionality test (assuming that such test is applicable) for the following reasons -

- (a) the alleged interference with the "policy of free trade" and/or "free movement of goods" is prescribed by law, namely, the IE Ordinance and IE Regulations;
- (b) the courts will likely consider that the following are legitimate aims:
 - (i) a guaranteed supply of powdered formula for parents of children below the age of three; and
 - (ii) the protection of the health of these children in Hong Kong;
- (c) it is arguable that there is a rational connection between the Amendment Regulation and the above legitimate aims; and
- (d) it is also reasonably arguable that a reasonable relationship of proportionality exists between the Amendment Regulation and the legitimate aims, as only some forms of trading are regulated under the Amendment Regulation.

21. Mr Paul TSE is not satisfied with the Administration's explanation, considering that the Administration has adopted an inconsistent approach in interpreting different Chapters of the Basic Law.

22. Noting that some suppliers of powdered formula expressed strong opposition to the legislative proposal on the grounds that it is inconsistent with

the free market operations, members have enquired whether the Amendment Regulation is in compliance with the World Trade Organisation ("WTO") requirements.

23. The Administration has explained that according to WTO General Agreement on Tariffs and Trade, Members shall not institute or maintain any prohibitions or restrictions, other than duties, taxes or other charges, on the export of any products. However, export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member is expressly allowed as an exception. Should other WTO Members challenge that the measure amounts to an export restriction forbidden by WTO, the Government may invoke the exception provision. The Administration has assured the Subcommittee that it will review the operation of the measure from time to time and will ensure on-going compliance with the WTO requirements in its review.

24. Some members including Members belonging to the Liberal Party and Mr Abraham SHEK have expressed dissatisfaction with the Administration's explanation. They hold the view that the Amendment Regulation is inconsistent with the free trade operations and has undermined the longstanding position of Hong Kong as a free port. They have further pointed out that the WTO exception provision should only be invoked to relieve a serious shortage of foodstuffs or other essential products temporarily. Given that there is no critical shortage of powdered formula and the export restrictions under the Amendment Regulation are not temporary in nature, they have enquired whether the Administration has notified WTO of the export restrictions. Mr Paul TSE has expressed the view that it is inappropriate to impose restrictions on powdered formula under the export licensing system as other articles currently listed in Schedule 2 to the IE Regulations are pharmaceutical products, hazardous chemicals, etc to which export restrictions are applied largely for the purpose of compliance with international convention and environment protection.

25. The Administration has reiterated that the Amendment Regulation is in conformity with the WTO requirements. It will notify WTO, upon the expiry of the scrutiny period of the Amendment Regulation, in accordance with the established notification system. Mr Tommy CHEUNG has requested the Administration to keep Members posted of the WTO's view, if any.

26. Mr James TO has asked about the power of DGTI to impose conditions on the issuance of an export licence for powdered formula. The Administration has explained that under section 3(1) of the IE Ordinance, DGTI may issue any licence and may attach thereto such conditions as he may see fit to impose. As

Hong Kong does not produce powdered formula, all demand for powdered formula are met by importers. All Hong Kong food importers, including importers of "infant/follow-up/growing-up formula (for babies up to 36 months)", must register with the Director of Food and Environment Hygiene in accordance with the Food Safety Ordinance (Cap. 612). To safeguard legitimate trading activities, the Trade and Industry Department in general issues export licences only to relevant importers who have registered under Cap. 612 or exempted from the registration requirement under section 4(3)(a) of Cap. 612. Besides powdered formula, there are other articles subject to the control of the IE Regulations as stipulated in Schedule 2 to the IE Regulations. According to the Administration, some 930 export licences for powdered formula have been issued within two clear working days as pledged since the commencement of the Amendment Regulation on 1 March 2013 and up to 5 April 2013, involving 1.5 million kilograms powdered formula, to facilitate lawful trading activities.

Penalties under the Amendment Regulation

27. The Subcommittee notes that section 6D(1) of the IE Ordinance provides that no person shall export any article specified in the second column of Schedule 2 to the IE Regulations to the country or place specified opposite thereto in the third column of that Schedule except under and in accordance with an export licence issued under section 3 of the IE Ordinance. The Administration has advised that there is a need to apply the restrictions under the Amendment Regulation to all places outside Hong Kong in order to include the Mainland, Macau and Taiwan. Any person who contravenes section 6D(1) of the IE Ordinance in respect of any articles specified in the second column of Part 1 of that Schedule shall be guilty of an offence and shall be liable on conviction to a fine of \$500,000 and to imprisonment for two years. The Subcommittee also notes that section 6D(3) of the IE Ordinance is a strict liability offence, unless an exemption applies. However, it is not an absolute offence, it is open to the person concerned to raise a common law defence.

28. Some members consider that the level of penalty for breach of the Amendment Regulation is too heavy. Some members have expressed strong queries about the need to detain persons arrested for breach of the Amendment Regulation. Some members also take the view that the level of penalty is not proportionate to the seriousness of the offence in question. They have sought information on the penalties imposed by the court on persons in breach of the restrictions on articles other than powdered formula listed in Schedule 2 to the IE Regulations.

29. The Administration has explained that the penalty level under the IE Ordinance is applicable to different offences, including smuggling activities for which heavier sentences have to be imposed. The Administration has advised that since the commencement of the Amendment Regulation on 1 March and up to 31 March 2013, 499 persons were arrested by the Customs and Excise Department ("C&ED") under the IE Ordinance and IE Regulations, involving 291 Hong Kong residents and 204 visitors from the Mainland. Between 1 and 22 March 2013, 20 cases involving five Hong Kong residents and 12 visitors from the Mainland have been dealt with by the court and were fined from \$500 to \$5,000. The Administration has explained that there is no provision on the detention or bail of suspected persons under the Amendment Regulation. Generally speaking, police bail would be granted to persons arrested by C&ED. Nonetheless, C&ED officers may, on individual merits (including the likelihood of the arrestee to abscond or whether he/she can provide a reasonable amount of bail money), consider whether or not to detain the arrestee for handing over to the Police to bring him/her before a magistrate at the earliest possible time. Between 1 and 6 March 2013, 137 persons were arrested by C&ED under the Amendment Regulation. Among these offenders, seven were refused bail due to their likelihood to abscond or failure to provide a reasonable amount of bail money. They were brought before a magistrate by the Police on the next day.

30. Members in general call on the Administration to step up publicity on the implementation of the Amendment Regulation at the boundary control points. According to the Administration, both prior to and after commencement of the Amendment Regulation, it has launched a series of publicity activities, including broadcasts and displaying posters on the implementation at boundary control points, as well as distributing leaflets to cross boundary passengers and powdered formula retail outlets in the North District.

31. There is a suggestion that the Administration should consider allowing persons departing Hong Kong and found carrying small quantity of powdered formula in excess of 1.8 kilograms to dispose of the excess quantity at the boundary control points before immigration clearance. The Administration has advised that it has identified suitable locations at nine boundary control points for the provision of receptacles for persons leaving Hong Kong to dispose of their excessive powdered formula before immigration clearance. Members urge the Administration to expedite the arrangements.

32. Mr Dennis KWOK has expressed the concern of the Civic Party that the Amendment Regulation has already come into operation before the expiry of the scrutiny period of the subsidiary legislation. They consider that the Administration should give an account of the urgent need for adopting such an

arrangement given that any person breaching the Amendment Regulation shall be guilty of an offence and will be liable on conviction to a fine and imprisonment term.

33. The Administration has explained that in the light of the acute shortage of powdered formula throughout the territory and the fact that powdered formula is the sole or major source of food for infants and young children aged below 36 months, there is an urgent need for the Administration to introduce immediate steps to address the problem. With the gazettal of the Amendment Regulation on 22 February 2013, it has provided the legal basis for the Trade and Industry Department to start processing applications for export licence for powdered formula on the same day and have the first batch of licences issued on 1 March 2013, i.e. the commencement date of the Amendment Regulation

Implementation of the Amendment Regulation

Definition of powdered formula

34. The Amendment Regulation adds a definition of powdered formula to mean "a substance in powder form that is or appears to be for consumption by a person aged under 36 months and is or appears to be milk or milk-like substance in powder form to satisfy wholly or partly the nutritional requirement of a person aged under 36 months". According to the Administration, some parents prefer to feed their infants and young children under 36 months by soya-based formula, which is derived from soya beans and not animal milk, due to various reasons, such as allergy to milk-based products and intolerance following a diarrhoea episode. Hence the Administration considers it necessary to include "milk-like substance" in the definition of powdered formula. Furthermore, a key feature of powdered formula is that they will satisfy wholly or partly the nutritional requirements of infants and young children. By including the concept of "nutritional requirement" in the definition of powdered formula, it will reflect the policy intent clearly.

35. The Administration has further pointed out that it has included "appears to be" as an element in the definition of powdered formula to facilitate effective law enforcement as officers of C&ED can judge from the outlook of a can as to whether it falls within the definition of powdered formula. Cans containing powdered formula will in general be clearly labelled that they are for consumption by a certain age group, for example, zero to six months, and would state that they satisfy the nutritional requirement of that particular age group. In determining whether a certain product falls within the definition of powdered formula, officers of C&ED will take into account all relevant factors of

circumstances. For example, the information on the label of the can, whether the can is sealed or unsealed as well as the appearance and the state of the powdered substance. In addition, the Administration has compiled a list of powdered formula available at the retail level in Hong Kong through information collected from all local suppliers of powdered formula and the Centre for Food Safety for the reference of officers of C&ED when they take enforcement actions.

36. Members note with concern that there were 12 cases in which people leaving Hong Kong carrying rice-based milk cereal in excess of 1.8 kilograms had been intercepted for breaching the Amendment Regulation. Members have sought clarification as to whether rice-based milk cereal for consumption by a child, that satisfied partly the nutritional requirement of a child, is within the meaning of powdered formula. Concern has also been raised as to whether other kinds of milk powder for the aged or for all ages that are able to satisfy partly the nutritional requirement of a person aged under 36 months are within the scope of regulation.

37. The Administration has advised that if a powdered formula product bears information on its label showing that the product satisfies partly the nutritional requirement of a person aged below 36 months, and would be in liquid form after blending/mixing with water, the product will be within the scope of regulation. With regard to rice-based milk cereal, although the product contains the ingredient of milk and is packaged in cans similar to those of powdered formula products of the same brand, it is intended to facilitate diet transition of infants and young children into solid food and would be in paste form after blending/mixing with water, the product is not covered by the Amendment Regulation.

38. Some members consider that the drafting of the definition of powdered formula is too broad for implementation. Some members and some suppliers of powdered formula products have suggested that as the recent shortage of powdered formula is limited to certain brands only, the Administration should consider restricting the application of the Amendment Regulation to prescribed brands of powdered formula products of which there have been serious shortage. The Administration, however, considers the suggestion not viable on the ground that the demand on powdered formula by parallel traders may switch from one brand to another.

39. Mr James TO and Dr Helena WONG have suggested to amend the definition of powdered formula along the line of setting out the brands and product names of powdered formula that are within the scope of regulation so as to facilitate easy identification of products. In the Administration's view, the definition of powdered formula provided for under the Amendment Regulation

reflects the scope of regulation in respect of powdered formula fully and effectively. The proposal of including a list of powdered formula available at the retail level in Hong Kong to the Schedule to the IE Regulations is not desirable as this will give rise to making frequent legislative amendments with new products entering the market. Mr Dennis KWOK has suggested the Administration to consider deleting the references to "appears to be" and "satisfy wholly or partly the nutritional requirement of a person aged under 36 months" in the definition of powdered formula and substitute it with "(a) is manufactured, sold, supplied or offered for sale predominately for the nutritional consumption by a person aged under 36 months; and (b) has the physical appearance of milk or milk-like substance in powder form."

The Administration's proposed amendment to the definition of powdered formula

40. To address members' concerns, the Administration has proposed to revise the definition of powdered formula to mean "any substance in powder form that, having regard to any product descriptions and users instructions (if applicable) and any other relevant circumstances, is intended for or claimed to be for consumption, as milk powder or soya-based formula powder, in liquid form by persons of any age under 36 months (notwithstanding it is also claimed to be suitable for consumption by persons of any age over 36 months) to satisfy their nutritional requirement".

41. While most members in general welcome the proposed amendment put forward by the Administration, some members remain concerned whether the proposed revised definition can adequately reflect the legislative intent. They have sought clarification on the meaning and effect of "any other relevant circumstances". Some members including Mr Alan LEONG, Mr Paul TSE, Mr Dennis KOWK and Ir Dr LO Wai-kyok have questioned the rationale and need to include "any other relevant circumstances" in the definition of powdered formula.

42. The Administration has explained that it has included "any other relevant circumstances" as an element in the definition in order to provide sufficient flexibility for law enforcement. In determining whether a milk powder product satisfies the definition of powdered formula, the enforcement officers will take into consideration a basket of factors, including the product descriptions, users instructions, and other relevant circumstances of individual cases, such as whether the product is properly packed in a sealed can, whether the original product descriptions/user instructions have been obliterated, or further product information obtained from the suppliers. Mr Dennis KWOK remains of the view that the Administration should improve the clarity of definition of powdered

formula having regard to the fact that any person breaching the Amendment Regulation shall be guilty of an offence.

43. Some members have also expressed concern whether the proposed amendment will have the effect of expanding the scope of regulation to cover almost all kinds of milk powder products which are claimed to be suitable for any age group. To improve the clarity and reflect clearly the policy intent, Mr Dennis KWOK and Ir Dr LO Wai-kiwok have suggested to add "primarily" before "intended for or claimed to be for consumption," to the proposed revised definition. Mr KWOK has also suggested that the Administration should consider further amending the definition to the effect that the Amendment Regulation will covers only powdered formula products specifically claimed to be suitable for persons aged under 36 months.

44. The Administration has stressed that the proposed amendment to the definition of powdered formula fully reflects the policy intent of ensuring sufficient and steady supply of powdered formula for infants and children aged under 36 months of local parents. The Administration also pointed out that the Amendment Regulation is not applicable to milk powder products without a target age group. The Administration, moreover, considers it not viable to amend the definition to only cover powdered formula intended for infants and young children under the age of 36 months, as a person may circumvent the regulation by claiming that the powdered formula product is suitable for persons aged under 37 months, if the Amendment Regulation only covers powdered formula products specifically for consumption by persons of 0-36 months only. Furthermore, such definition will result in some 80 powdered formula products falling outside the scope of the regulation, as these products only claim to be suitable for infants and young children above particular age group, without specifying the upper age limit.

45. Dr LEUNG Ka-lau has reiterated that as the nutrients and composition of different types and brands of powdered formula products which are claimed to be suitable for consumption by persons of any age over 12 months are almost the same, consideration should be given to narrowing the applicability to powdered formula products for infants and children aged up to 12 months. The Administration has advised that the meaning of powdered formula for the purpose of the Amendment Regulation is whether the substance is in powder form, and is intended for or claimed to be for consumption as milk powder or soya-based formula powder in liquid form, by persons of any age under 36 months. The nutrients and composition of the powdered formula products are not the focus of the definition. The Administration has further pointed out that there is no international standard on the classification of powdered formula

products according to the intended age groups. Although there are different types of powdered formula products specifying for particular age groups, the classification is usually a commercial decision. The Administration has stressed that in the light of an acute shortage of powdered formula products for infants and young children under 36 months, it has no intention to narrow the scope of application of the Amendment Regulation.

46. To put beyond doubt the legislative intent, the Administration has proposed to further amend the definition of powdered formula by adding "if applicable" to the phrase in the bracket and to read as "(notwithstanding it is also claimed, if applicable, to be suitable for consumption by persons of any age over 36 months)". The Administration has advised that the Secretary for Food and Health will give notice to amend the definition of powdered formula at the Council meeting of 17 April 2013, and the proposed amendment will take effect on the gazettal date of the resolution.

Exemption for personal use

47. The Subcommittee notes that having regard to the need of those leaving Hong Kong for powdered formula for personal use, it is provided under the Amendment Regulation that no more than a total net weight of 1.8 kilograms of powdered formula (equivalent to two cans of powdered formula) may be carried by each person aged 16 or above. Some members have enquired about the rationale for setting the weight restriction for powdered formula at 1.8 kilograms.

48. The Administration has explained that for an infant under six months who has to rely on powdered formula as the sole source of food, the allowance of 1.8 kilograms of powdered formula would normally be sufficient for a two-week period. The 1.8 kilograms exemption arrangements are applicable to all people leaving Hong Kong to places elsewhere by different modes of transport.

49. Some members have cautioned that as the exemption is only applicable to a person on his/her first departure from Hong Kong within a 24-hour period, the Administration should be mindful of the inconvenience caused in some cases. Mr Alan LEONG and Ir Dr LO Wai-kwok have called on the Administration to revise the exemption arrangement for personal use from first departure from Hong Kong within a 24-hour period to within the same day. The Administration considers that the proposal will cause more parallel trading activities at the land boundary control point which operates 24 hours a day by taking advantage of the exemption before and after midnight. The Administration has also advised that another exemption is provided to allow a person (aged 16 or above) leaving Hong Kong, who left Hong Kong one or more times in the last 24 hours, to carry

powdered formula, provided that person travels with an infant or young child aged under 36 months; the powdered formula is in an unsealed container; and the quantity does not exceed a reasonable quantity for consumption by the infant or child during the travelling time from the Hong Kong point of exit to the next point of entry in a place outside Hong Kong. The exemption arrangement has struck a reasonable balance between addressing individual needs of bona fide travellers and combating parallel trading activities of diverting powdered formula away from Hong Kong.

Enforcement

50. Concerns have been raised about the staffing and resources implications arising from the enforcement of the Amendment Regulation. The Administration has informed the Subcommittee that to cater for the enforcement work, C&ED has worked out deployment plans and adopted multiple-pronged strategies before the Amendment Regulation coming into effect. On enforcement side, C&ED has stepped up export control at all boundary control points and adopted risk-based approach on passenger and cargo inspection. At the same time, C&ED has enhanced intelligence collection, continued to keep close contact with the Mainland customs authorities and conduct joint operations if necessary. For manpower arrangement, C&ED has deployed around 200 officers, including retired C&ED officers employed under non-civil service contracts, to strengthen customs clearance on outbound passengers and vehicles. In addition, a task force comprising over 70 officers has been established to handle and investigate cases effected under the Amendment Regulation. For inspection equipment, C&ED has installed 14 X-ray checkers, baggage examination counter, digital scales, together with other inspection tools at the departure halls of the nine boundary control points to facilitate and expedite baggage inspection by customs officers.

51. Members have asked about the guidelines and support provided for the C&ED frontline officers. According to the Administration, C&ED officers are provided with a list of powdered formula available at the retail level in Hong Kong, which sets out details including the brands, types, nature, weight and intended age groups of the products, for their reference when taking enforcement actions. Further, the Food and Health Bureau has set up a 24-hour hotline to provide factual information to facilitate the work of law enforcement officers upon their request. The Administration has, however, declined members' request for the provision of the list to the Subcommittee on the ground that it is inappropriate to make public the list which is for law enforcement purpose.

Review of the implementation of the Amendment Regulation

52. While most members are supportive of the legislative proposal, they are of the view that the arrangements should not be made permanent and call on the Administration to set a timeline to review the effectiveness and necessity to continue with the export control and exemption arrangements. Deputations representing the suppliers of powdered formula have also made a similar request for reviewing the long-term need for the Amendment Regulation. Members have also asked about the circumstances under which the Administration would consider it appropriate to discontinue the implementation of the Amendment Regulation. Some members have asked whether the Administration will consider including a sunset provision in the Amendment Regulation.

53. The Administration has pointed out to the Subcommittee that since the Amendment Regulation has just commenced operation on 1 March 2013, inclusion of a sunset provision at this stage is premature and will convey a wrong message. The import figures of powdered formula in the past showed a rising demand for powdered formula due to parallel trading activities. If a date is fixed for the repeal of the Amendment Regulation without regard to the actual situation, the Administration will have difficulty to ensure that upon the repeal, there will not be a revival of parallel trading activities causing serious impact on the supply of powdered formula at the retail level.

54. The Administration is of the view that strengthening the supply chain in relation to powdered formula in Hong Kong is the most important means to prevent a recurrence of the problem of serious shortage of powdered formula and allay the stress and anxieties of parents. The Administration would keep in view the effectiveness of the relevant measures and the market situation. Members have enquired about the specific factors to be taken into account by the Administration in its review of the effectiveness of the relevant measures.

55. The Administration has explained that since the supply chain failure in relation to powdered formula has a major bearing on the serious shortage of powdered formula recently, a crucial consideration in its review is whether suppliers of powdered formula have effectively strengthened their supply chain to ensure a sufficient and steady supply of powdered formula for infants and young children in Hong Kong. In this regard, the Administration will urge local suppliers of powdered formula to -

- (a) increase the efficiency of stock replenishment from places outside of Hong Kong by reducing the time required;

- (b) enhance the capacity for distribution and delivery of goods to improve the supply chain management at the retail and wholesale levels and replenish the stock at retail outlets expeditiously;
- (c) commit additional resources to boost the number of hotlines for taking purchase orders and establish a mechanism for promptly increasing the number of hotlines and staffing level under exceptional circumstances to handle the purchase orders; and
- (d) examine and set up services for advance order of powdered formula at retail outlets of different regions throughout the territory.

56. Most members take the view that while it may not be feasible for the Administration to anticipate when the restrictions under the Amendment Regulation can be lifted, the Administration should conduct periodic review of the need for the Amendment Regulation after its implementation. Ir Dr LO Wai-kwok has expressed the strong request of Members belonging to the Business and Professionals Alliance for Hong Kong that the Administration should conduct a review of the need for the Amendment Regulation six months after its coming into force. In order to ensure that the Administration would speed up its work in putting the supply chain into proper track and conducting timely review, Ms Cyd HO has indicated that she will consider proposing to include a sunset provision in the Amendment Regulation.

57. The Administration has stressed that it will closely monitor as to whether suppliers of powdered formula have effectively strengthened their supply chain to cater for the needs of infants and young children in Hong Kong, especially when there is an anticipated surge in demand for formula products from Mainland visitors during the periods of Golden Weeks and Chinese New Year. In this regard, the Administration has undertaken to review the implementation of the Amendment Regulation in about one year's time and to report the implementation of the Amendment Regulation to the relevant Panel at regular intervals.

Recommendation

58. Subject to the amendment to be made by the Administration in **Appendix III**, the Subcommittee raises no objection to the Amendment Regulation.

Advice Sought

59. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
10 April 2013

**Subcommittee on
Import and Export (General) (Amendment) Regulation 2013**

Membership list

Chairman Hon WONG Ting-kwong, SBS, JP

Members Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon CHAN Hak-kan, JP
Dr Hon LEUNG Ka-lau
Hon Mrs Regina IP LAU Suk-yea, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Alan LEONG Kah-kit, SC
Hon Michael TIEN Puk-sun, BBS, JP
Hon Steven HO Chun-yin
Hon Gary FAN Kwok-wai
Hon CHAN Chi-chuen
Hon LEUNG Che-cheung, BBS, MH, JP
Hon Alice MAK Mei-kuen, JP
Hon Dennis KWOK (since 8 March 2013)
Hon SIN Chung-kai, SBS, JP
Dr Hon Helena WONG Pik-wan
Hon TANG Ka-piu
Dr Hon CHIANG Lai-wan, JP
Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Hon CHUNG Kwok-pan
Hon Christopher CHUNG Shu-kun, BBS, MH, JP

(Total : 26 members)

Clerk Miss Betty MA

Legal Adviser Mr Arthur CHEUNG / Ms Wendy KAN

Date 8 March 2013

**Subcommittee on
Import and Export (General) (Amendment) Regulation 2013**

- A. Organizations which have given oral representation to the Subcommittee
1. Eugene Group
 2. Hong Kong General Chamber of Pharmacy Limited
 3. Hong Kong Infant and Young Child Nutrition Association
 4. Hong Kong Suppliers Association Limited
 5. Snow Brand Hong Kong Company Limited
 6. Uneeds Company Limited
 7. Wyeth Nutrition
- B. Organizations/individuals which/who have provided written submission only
1. 「還我奶粉 追擊奶粉奸商水貨客」Facebook組群
 2. a member of public
 3. Abbott Laboratories Limited
 4. Anita
 5. Consumer Council
 6. Danone Baby Nutrition (HK) Limited
 7. Friesland Campina (Hong Kong) Limited
 8. Hong Kong Retail Management Association
 9. Long Rise Group Limited
 10. Miss TONG

11. Mr CHIK Wing-sang
12. Mr Edward MAN
13. Mrs CHAN
14. Ms FUNG Ying-suet
15. Ms Jenny LAW
16. Ms TSANG Wing-yan
17. Ms Venus YEUNG
18. Nestle Hong Kong Limited
19. New People's Party
20. Shatin Women's Association
21. Tung Wah Group of Hospitals - Food For All Food Assistance Service
22. 上水小市民
23. 心急爸爸
24. 希希媽媽

**Amendment to be proposed by the Administration
to the definition of powdered formula**

Proposed new definition

powdered formula (配方粉) means any substance in powder form that, having regard to any product descriptions and users instructions (if applicable) and any other relevant circumstances, is intended for or claimed to be for consumption, as milk powder or soya-based formula powder, in liquid form by persons of any age under 36 months (notwithstanding it is also claimed, if applicable, to be suitable for consumption by persons of any age over 36 months) to satisfy their nutritional requirement;