



THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Submission on the Hong Kong Code of Marketing and Quality of Formula Milk and Related Products, and Food Products for Infants & Young Children

January 3, 2013

The American Chamber of Commerce in Hong Kong (the “Chamber”) appreciates the HKSAR Government’s effort in regulating formula products and foods for infants and young children and promoting, protecting and supporting breastfeeding in Hong Kong.

We understand that the Panel on Food Safety and Environmental Hygiene and Panel on Health Services (“Panels”) of the Legislative Council have met on November 20, 2012 to discuss the introduction of a code for the marketing of breastmilk substitutes.

The Department of Health (“DH”) has also recently launched a public consultation on the draft Hong Kong Code of Marketing and Quality of Formula Milk and Related Products, and Food Products for Infants & Young Children (“Hong Kong Code”), which aims to provide voluntary guidelines on existing marketing behavior, and labelling and quality of infant formula and related products.

This submission aims to address the relevant issues concerning the Hong Kong Code.

1. The regulation of labelling and quality should be legislated

The Chamber appreciates the Government's efforts to address the nutrition labelling gap for formula and food intended to be consumed by children under the age of 36 months. However, if the Hong Kong Code were to be implemented in the form of voluntary guidelines only, it would not be able to address the legislative gap that the Hong Kong Code was intended to eradicate. Those companies whose products of questionable quality made it necessary to implement the Hong Kong Code are likely to be the ones that would choose not to comply with the Hong Kong Code and there will not be any impact on them for such non-compliance. In other words, problems such as low iodine as exemplified in the Legislative Brief (LC Paper No. CB(2)192/12-13(03)) are likely to continue despite the implementation of the Hong Kong Code. Consumers will also be confused by the different marketing behavior of product manufacturers and distributors and susceptible to being misguided by non-compliant marketing practice.

In addition, this would lead to unfairness and inequity in the market as there is no level playing field between compliant manufacturers and distributors and non-compliant ones given the voluntary nature of the Hong Kong Code.

To ensure full compliance and a level playing field for industry participants, as well as to provide confidence and certainty to consumers, the Chamber therefore urges the Panels to consider incorporating the Hong Kong Code into the legislation to give it an effective enforcement mechanism.

2. The regulation of labelling and quality should be addressed separately from the guidelines for marketing practices.

Taking reference to other developed countries, it is noted that the issues of “marketing practices” and “labelling and quality” are separately regulated. There is no country in the world that incorporates the two aspects into a single code.

Given that the Hong Kong Code is voluntary and DH has also launched another public consultation on the Legislative Proposals Relating to Formula Products and Foods Intended for Infants and Young Children under the Age of 36 Months (“Proposal”), we believe that the regulation of labeling and composition of formula products and food items for infants and children under 36 months should be taken out from the Hong Kong Code and addressed separately under the Proposal. This would avoid duplication and pass a positive message to manufacturers and distributors on the importance of labeling and quality of such products.

The separation of the two initiatives ensures that each will receive its deserved attention and undergo appropriate development processes that balance the legitimate interests of all key relevant stakeholders.

3. Any regulation of marketing of infant formula should follow the WHO Code of Marketing of Breastmilk Substitutes and global best practices, and should be adopted as legislation

The WHO Code of Marketing of Breastmilk Substitutes encourages exclusive breastfeeding for infants during their first 6 months after birth after which infants should be given appropriate complementary foods and introduced to a vast array of other foods¹.

Considering the practices in developed countries with similar social and economic conditions to Hong Kong, the large proportion of working mothers, the freedom to access information and the WHO Code of Marketing of Breastmilk Substitutes, the Chamber believes that any code or legislation to regulate the marketing of infant formula, food products and related products should be well-balanced. On the one hand, it is crucial to stop any misleading or false claims made by manufacturers and distributors; on the other hand, any biased or over-regulation of such activities will be contrary to the long-standing value of Hong Kong as an open and free market economy.

The Chamber therefore recommends that any marketing practice of infant formula and food products should be regulated through legislation after thorough consultation with all stakeholders. In addition, in order not to jeopardize the fundamental right of consumers to information and choices and to allow parents to make informed decisions, any ban on marketing and promotional practices should only be up to 6 months and thereafter, such activities should be allowed under controlled conditions.

4. Product suppliers’ right to use their company names, logos and trademarks should be respected.

It is noted that the Hong Kong Code (a) prohibits companies from inserting the brand name, logo or trade mark of formula milk and formula milk related products or the company name of the manufacturer or distributor on any information or educational materials produced or distributed by parties other than the

¹ World Health Organization (1981). *International code of marketing of breast-milk substitutes*. Geneva.

manufacturers or distributors²; and (b) requires companies to insert only ONCE its company logo OR a trademark of the products on the container of formula milk or the label affixed thereto³. If this is to be implemented, this would be in contravention of the international intellectual property conventions to which Hong Kong is a party, contrary to free trade and a gross discrimination against companies in the trade.

Under Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the use of a trademark in the course of trade shall not be unjustifiably encumbered by, for example, special requirements or use in a special form. The use of trademarks is also protected by the Paris Convention for the Protection of Industrial Property⁴. Intellectual property (including trademarks), is a property protected under the Basic Law of Hong Kong. Article 6 of the Basic Law requires the Hong Kong Government to protect the right of private ownership of property and Article 105 extends this protection to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property, in accordance with the law. Regulations that would disadvantage a particular trademark holder, including preventing the continuation of trademarks' use in their intended format must be supported and justified by overwhelming evidence. Otherwise, it could be viewed as a "regulatory taking"⁵ of intellectual property rights, particularly in the absence of any evidence proving that such regulation advances any compelling objective or the speech in question is deceptive, misleading or otherwise undeserving of protection. As the current proposed provision does not appear to meet a well-defined and significant public interest, it may open up the Government to specific compensatory liabilities under law.

As an important business asset and commercial distinction, a company's brand name or trademark helps consumers to differentiate different products of the same category and reflects the company's proprietary investment in quality and research, both of which are important to preserving consumer expectations associated with a particular brand. Impeding its use without fair compensation will be in contravention of the international conventions and treaties regarding the protection of intellectual property rights.

5. More public education on breastfeeding should be provided.

The Legislative Brief pointed out the difficulties encountered by mothers wanting to have exclusive breast feeding due to the unfavorable social attitudes towards breastfeeding in public places and lack of baby care facilities. Legislating against the marketing behavior of manufactures and distributors of infant formula and related products is only one of the many options available to deal with the low rate of breastfeeding. More important is for the Government to provide more public education on breastfeeding to raise public awareness and to make it more socially acceptable.

The multi-media e-learning education kit available for medical practitioners is very informative and useful. One suggestion is to develop a similar education kit for expectant and/or breastfeeding mothers, and their family members. Such material should be made readily available for display, use and dissemination in public and private hospitals.

² Article 4.4.1(d). *Hong Kong Code of Marketing and Quality of Formula Milk and Related Products, and Food Products for Infants & Young Children* released on October 26, 2012.

³ Article 8.2.1(a). *Hong Kong Code of Marketing and Quality of Formula Milk and Related Products, and Food Products for Infants & Young Children* released on October 26, 2012.

⁴ World Intellectual Property Organization (1883). *Paris convention for the Protection of Industrial Property*. Paris.

⁵ 5th Amendment of the United States Constitution.

Efforts should also be made in the workplace to foster a better environment for mothers going back to work to continue breastfeeding. There should also be mandatory requirements for restaurants and shopping malls to have baby care facilities.

In summary, the Chamber supports the Government's efforts to promote breastfeeding but any such efforts should ensure a balance between the interests of all stakeholders, including the trade and consumers. The Chamber looks forward to work with the Government to formulate a suitable legislation that will truly protect the mutual benefits of all parties based on scientific evidence and thorough consideration and consultation.

AmCham is the largest international chamber in Hong Kong, and represents a broad and diverse membership. It has more than 1,800 members, covers over 40 nationalities, and includes large multinationals as well as small- and medium-sized enterprises. AmCham is one of the most dynamic and influential international business organizations in the Asia-Pacific region. The Chamber's mission is to enhance Hong Kong's stature as an international business center fostering commerce among the Mainland China, Hong Kong, and the United States.