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Secretary for Health, Welfare and Food
(Attention: Mr Jeff LEUNG,
Principal Assistant Secretary (H)1)
Health, Welfare and Food Bureau
19/F., Murray Building
Garden Road
Central
Hong Kong

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BY FAX

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Dear Mr Leung,

Undesirable Medical Advertisements (Amendment) (No. 2) Bill 2004

I am scrutinising the legal and drafting aspects of the Bill with a view to advising Members and would like to seek your clarification on the following -

Clause 2

2. The scope of the Undesirable Medical Advertisements Ordinance (Cap. 231) ("the Ordinance") has been widened to include not only advertisements relating to medical matters but health matters. Is there any need to amend the short title as well so as to reflect the object of the Ordinance?

Clause 4

3. The proposed definition of "orally consumed product" would exclude "product which is customarily consumed only as food or drink". What are the criteria for a product to be classified as "customarily consumed food or drink"? A person may take some health food daily and would regard such health food as his customarily consumed food. Is there any authority in Hong Kong to objectively approve or classify a product as "customarily consumed food or drink"?

4. Currently, there are advertisements of some conventional food with claims that they can have additional health benefits such as that oats may have cholesterol-lowering effect and sweeteners are suitable for diabetic patients. Will these claims be permissible? If yes, does it mean that so long as a product is regarded as

"customarily consumed food or drink", it can make any claim, with or without being substantiated? Further, if a product is not to be regarded as "customarily consumed food or drink", is it the legislative intent that it cannot make any specified claim even if the claim is true?

Clause 5

5. The proposed definition of "orally consumed product" has not excluded medicines, the sale of which has been pre-approved by the Hong Kong relevant authority. Under section 3 of the Ordinance, advertisements relating to certain diseases are to be prohibited "except with the authority of the Director of Health or the authority of an officer of Her Majesty's forces for dissemination only amongst members of Her Majesty's forces" (section 3(1) and (2) of the Ordinance).

6. To take the example of medicine treating diabetes, it can make such a claim if it has been approved by the relevant authority. But since it is also regarded as an "orally consumed product", it cannot claim that it is suitable for diabetic patients and the Director has no authority to approve such claim under the proposed section 3B and Schedule 4. Is this the legislative intent?

7. Incidentally, it is noted that expressions like "Her Majesty's forces" still appear in section 3. Will the Administration take this opportunity to adapt this Ordinance?

8. Under the new section 3B, no person shall publish an advertisement for an orally consumed product with certain claims. Is it the legislative intent to target those persons like publishers of newspaper or broadcasters? Will any defence be available to these persons similar to persons charged with advertising for sale of any food or drug injurious to health under section 50(4) of the Public Health and Municipal Services Ordinance (Cap. 132)? It shall be a defence for the person so charged to prove that, being a person whose business it is to publish, or arrange for the publication of advertisements, he received the advertisement for publication in the ordinary course of business (section 50(6) of Cap. 132).

9. Further, is it the legislative intent to target those persons such as wholesalers, retailers, importers, exporters, leaflet distributors, exhibition organizers etc? If so, is there any defence available to them such as that they do not know or could not with reasonable diligence ascertain the claim? (Under section 61(3) of Cap. 132, if a person is charged with publishing an advertisement of food or drugs with false or misleading labels, it shall be a defence for the defendant to prove that he did not know and could not with reasonable diligence to ascertain that the advertisement was of such a character or that he is a person whose business is to publish advertisements, and he received the advertisement in the ordinary course of business.)

10. On the definition of "any similar claim", could you please illustrate with examples as to what "claim" would not constitute as "any similar claim" under the proposed Schedule 4?

Clause 8

11. In this Clause, enforcement provisions will be added. Had the Administration encountered any difficulties in enforcing this Ordinance because of the lack of the enforcement provisions? How many persons were prosecuted under the Ordinance within the last five years?

12. Under the new section 8(4)(d), if orally consumed products are seized and if any person considers himself aggrieved by the seizure and removal, can he complain to the court for restoration or compensation? (Under section 59(5) of Cap. 132, if any food or drug is seized because it is unfit for consumption, the person aggrieved may apply to court for restoration or compensation within 72 hours of seizure and removal.)

13. Two minor drafting points are noted for your consideration -

(a) In the new section 8(2)(b), the expression "in or on the premises" is used while "in the premises" is used in other provisions.

(b) In the Chinese version, should "名稱" be added after "姓名"?

New schedule 4

14. Under items 4, 5 and 6, some claims are allowed if disclaimers stating that this is not a registered pharmaceutical product or a registered proprietary Chinese medicine are included. Will all existing proprietary Chinese medicines be registered by the time this Bill, if enacted, is to come into operation?

15. It is appreciated if you could reply in both Chinese and English at your earliest convenience, before the date of first meeting, i.e. 2 November 2004, if possible.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

c.c. Department of Justice (Attn: Miss Frances HUI, SGC and
Ms Grace LEUNG, GC)

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