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Report of the Bills Committee on Food Safety Bill

Purpose

This paper reports on the deliberations of the Bills Committee on the Food Safety Bill ("the Bill").

Background

2. The existing control of food safety is mainly provided in Part V of the Public Health and Municipal Services Ordinance (Cap. 132). Under section 52 of Cap. 132, no person shall sell to the prejudice of a purchaser any food which is not of the nature, or not of the substance or not of the quality of the food demanded by the purchaser. Section 54 of Cap. 132 further provides that no person shall sell any food which is unfit for human consumption.

3. Food incidents in the past years revealed inadequacies in Cap. 132 in the control of food safety. In this regard, the Chief Executive announced in his 2007-2008 Policy Address the Government's plan to introduce a Food Safety Bill to strengthen legislative control on food safety. The Bill will provide for food safety control measures including -

- (a) a registration scheme for food importers and food distributors;
- (b) a requirement for food traders to maintain proper transaction records to enhance food traceability;
- (c) power to make regulations for tightening import control on specific food types based on risk assessment; and

- (d) power for the authorities to make orders to prohibit the import and supply of problem food and order the recall of such food.

4. Given the immense public concern over food safety in the wake of the melamine incident in 2008, the Administration decided to expedite the legislative work in respect of paragraph 3(d) above. The Public Health and Municipal Services (Amendment) Ordinance 2009, which amended Cap. 132 by adding a new Part VA to empower the Director of Food and Environmental Hygiene ("DFEH") to make orders to prohibit the import and supply of problem food and order a food recall when DFEH has reasonable grounds to believe that public health is at risk, was passed by the Legislative Council ("LegCo") on 29 April 2009 and came into operation on 8 May 2009.

The Bill

5. The Bill seeks to -

- (a) establish a registration scheme for food importers and food distributors;
- (b) require the keeping of records by persons who acquire, capture, import or supply food to enhance food traceability;
- (c) empower the Secretary for Food and Health ("SFH") to make regulations for tightening import control on specific food types based on risk assessment; and
- (d) re-enact Part VA of Cap. 132.

6. The Food Safety Bill (except the penalty provisions) will commence on a day to be appointed by SFH by notice in the Gazette. To allow sufficient time for traders to adapt to the new requirements, the penalty provisions for failing to register and keep records will commence after a grace period of six months after the registration scheme starts.

7. Following the enactment of the Bill, the Administration will introduce two sets of regulations, namely (a) Imported Game, Meat, Poultry and Poultry Eggs Regulation and (b) Imported Aquatic Products Regulation, to cover food with a high potential health risk.

The Bills Committee

8. At the meeting of the House Committee held on 4 June 2010, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Fred LI Wah-ming, the Bills Committee has held 12 meetings. The membership list of the Bills Committee is at **Appendix I**. The Bills Committee has also invited views from the trade and other interested parties, a list of which is at **Appendix II**.

Deliberations of the Bills Committee

Definition of "food"

9. The definition of "food" in Clause 2 of the Bill is modelled on the definition of "food" in Cap. 132 and extended to include live aquatic products (except live shellfish which is already included in the current definition of "food" in Cap. 132) and edible ice (under Cap. 132, "food" does not include water, except aerated water, distilled water, water from natural springs and water placed in a sealed container for sale for human consumption). The Bill also introduces corresponding amendments to the definition of "food" in Cap. 132.

10. Members have expressed concern over the possible ambiguity of the regulation of some traditional Chinese herbs, such as "杞子" and "陳皮", which could serve as soup ingredients or snacks as well as medicine. The current definition of "food" in Cap. 132 and the Bill provides, among others, that food does not include "articles or substances used only as drugs" and the definition of "drugs" includes "any medicine, Chinese herbal medicine or proprietary Chinese medicine for internal or external use by man".

11. The Administration has advised that as reflected in SFH's reply to a question for the meeting of LegCo held on 4 February 2009, the Government's policy intention is that food products which cannot be classified as Chinese medicine under the Chinese Medicine Ordinance (Cap. 549) or western medicine under the Pharmacy and Poisons Ordinance (Cap. 138) are regulated under Cap. 132 as general food products. To clearly express such policy intention in the Bill, the Administration would amend the definition of "food" in Clause 2 of the Bill to indicate that food does not include "medicine as defined by section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138) or Chinese herbal medicine or proprietary Chinese medicine as defined by section 2(1) of the

Chinese Medicine Ordinance the Chinese Medicine Ordinance (Cap. 549)" in place of "articles or substances used only as drugs". The Administration would also propose the same amendment to the definition of "food" in Cap. 132 to achieve consistency through revising Clause 64(2) of the Bill.

12. With the proposed amendment to the definition of "food" mentioned in paragraph 11 above, the definition of "drug" in Clause 2 of the Bill is no longer required. The Administration will move a CSA to remove the definition of "drug" in the Bill. No consequential amendment to Cap. 132 is required, as there are other provisions in Cap. 132 concerning the regulation of drugs.

Definition of "drink"

13. To make the Chinese text of the definition of "drink" in Clause 2 of the Bill easier to comprehend, the Administration will move a CSA to replace “飲品”(drink)不包括不屬下列類別的水 - with “飲品”(drink)不包括水，但以下類別的水除外 -. The Administration will also move a CSA to amend Clause 64(1)(a) of the Bill to make the same amendment to the Chinese text of the definition of “drink” in Cap. 132 to achieve consistency.

Food not intended for human consumption (Clause 3)

14. Under Clause 3(2)(b) of the Bill, “any substance capable of being used in the composition or preparation of any food commonly used for human consumption that is found on any premises or in any vessel where that food is prepared is presumed, unless there is evidence to the contrary, to be intended for human consumption.”

15. Members have raised a concern that as a result of Clause 3(2)(b), certain food items may no longer be regarded as “food” because they are found in vehicles or on aircraft.

16. The Administration has pointed out that Clause 3(2)(a) of the Bill provides that “any food commonly used for human consumption is presumed, unless there is evidence to the contrary, to be intended for human consumption”. Under Clause 3(2)(a), whether the food is found in vehicles or on aircraft is irrelevant in determining whether it is food intended for human consumption. This catch-all presumption should ensure that food commonly used for human consumption will indeed be regarded as food under the Bill. The Administration has further pointed

out that Clause 3(2)(b) is modelled on section 67(1)(c) of Cap. 132. It does not deal with the food item per se but substances used in the composition or preparation of food. Clause 3(2)(b) presumes these substances to be intended for human consumption if they are found at places where the food is prepared. This presumption is required for certain food ingredients which can be for industrial usage as well, such as sodium carbonate (which can be used as acidity regulator/anti-caking agent/raising agent in food but also a cleansing agent) and gold leaf (a kind of permitted colouring matter in food). The presumption covers only premises and vessels but not vehicles and aircraft, as food business licences under the Food Business Regulation (Cap. 132X) are currently issued to premises (e.g. general restaurant licence, food factory licence) and vessels (i.e. marine restaurant licence) only. In light of this, the Administration does not see the need to expand the scope of Clause 3(2)(b) to cover vehicles and aircraft.

17. On whether the presumptions provided under Clause 3(2) of the Bill (against the defendants) would be contrary to the presumption of innocence guaranteed by Article 11(1) of the Hong Kong Bill of Rights ("BoR") and Article 87(2) of the Basic Law, the Administration has clarified that Clause 3(2) imposes an evidential burden on the defendant to point to or adduce evidence to raise a reasonable doubt as to whether the food or substance in question is intended for human consumption, while the prosecution continues to bear the persuasive burden throughout. The Administration considers that imposition of an evidential burden on the defendant would not be contrary to the presumption of innocence. For prosecuting those offences under the Bill, in practice, the prosecution would first have to prove that the subject matter is food commonly used for human consumption or a substance capable of being used in the composition or preparation of any food commonly used for human consumption. The defendant would then have to come up with evidence to raise an issue or engender a reasonable doubt that the food or substance in question is not intended for human consumption. If the defendant is able to provide any such evidence, the burden of proof remains with the prosecution. The Administration has pointed out that imposing an evidential burden on the defendant under the Bill is a lower threshold than the burden currently imposed on the defendant in Part V of Cap. 132 whereby a persuasive burden, i.e. "until the contrary is proved", is imposed on the defendant.

18. The Legal Adviser to the Bills Committee has advised that the Court of Final Appeal had held in two cases that imposing only an evidential burden on the defendant would be consistent with the presumption of

innocence guaranteed by the BoR and the Basic Law.

19. Clause 3(3) excludes live aquatic products kept in captivity for propagation or promotion of growth from the Bill. Members have raised query about the justification for the Clause because live aquatic products kept in captivity would be used for human consumption sooner or later.

20. The Administration has explained that Clause 3(3) is necessary because live aquatic products kept in captivity for propagation or promotion of growth, such as fish fry and oyster spat, are at the time not yet intended for human consumption and hence yet to enter the food chain. Under Clause 2 of the Bill, the definition of "supply" provides that "supply" in relation to food, means (a) to sell the food; (b) to offer, keep or exhibit the food for sale; (c) to exchange or dispose of the food for consideration; or (d) for commercial purposes, to give the food as a prize or to make a gift of the food. The Administration has also pointed out that without the exemption Clause of Clause 3(3), enforcement action may need to be taken under the Harmful Substances in Food Regulations (Cap.132AF) against producers of live aquatic products kept in captivity for propagation or promotion of growth, if certain veterinary drugs with specified maximum residue concentration in food are found to be contained in those live aquatic products not intended for human consumption for the time being. There would be a similar problem when enforcing the regulation related to metallic contamination in food.

21. Members note that the Administration will propose a CSA to Clause 67 of the Bill to add a new subsection to Section 67 of Cap. 132 to provide that, for the purposes of Cap. 132, live aquatic products are presumed not to be intended for human consumption while they are in captivity for the purposes of propagation or promotion of growth.

Registration scheme for food importers and distributors

22. Part 2 of the Bill establishes a registration scheme for food importers and distributors. Under the proposed scheme, any person who carries on a food importation or distribution business is required to register with DFEH by paper or electronic means. The information required to be provided in the form specified by DFEH will include the trader's particulars, contact details and the food type being imported or distributed. The two-tier food categorisation system, i.e. Main Food Category, such as cereal and grain products, and Food Classification, such as pasta/noodles, made with reference to the General Standard on Food Safety under the Codex Alimentarius and taking into account food types available locally, is

set out in Schedule 2 to the Bill.

23. Under the Bill, "food importer" means a person who carries on a business which brings or causes to be brought into Hong Kong any food by air, land or water (whether or not that is the principal activity of the business). The registration requirement does not apply if food is imported solely in the course of business of a transport operator. Likewise, it does not apply to bona fide travellers who import food in their personal baggage for non-commercial use. "Food distributor" means a person who carries on a business the principal activity of which is the supply of food in Hong Kong by wholesale. Hence, primary producers like fish farmers, vegetable farmers, etc. who distribute their products and produce would be required to register as food distributors. The same applies to food manufacturers who distribute their products. However, food traders, such as vegetable and fish farmers who sell their produce to ultimate consumers, say, in open-air bazaars, and food retailers whose principal business is not the distribution or supply of food to other retailers or catering establishments would not be required to register.

24. The registration cycle for food importers and distributors will be for a period of three years, subject to renewal. A registration fee will be charged on the basis of full-cost recovery. The fee level for registration and renewal of registration for a three-year term will be \$195 and \$180 respectively.

25. DFEH may refuse an application for registration/renewal or revoke registration if satisfied that the food importer/distributor has repeatedly contravened the relevant provisions in the Bill in the past 12 months.

26. DFEH's decisions in relation to the registration scheme will be subject to appeal. Any person who is aggrieved by DFEH's decision may, within 28 days after becoming aware of the decision, appeal to the Municipal Services Appeal Board ("MSAB") established under the MSAB Ordinance (Cap. 220). An appeal does not suspend DFEH's decision unless DFEH decides otherwise.

27. The maximum penalty for non-compliance with the registration requirement, without reasonable excuse, will be a fine at level 5 (\$50,000) and imprisonment for six months. This is in line with the penalty for selling food which is unfit for human consumption under section 54 of Cap. 132 or carrying on certain food businesses without a licence granted by DFEH under Cap. 132X.

28. On the question of what constituted a reasonable excuse under Clause 4(2) and other penalty provisions in the Bill, the Administration has advised that whether a person has a reasonable excuse depends on the facts of each individual case and is ultimately a decision for the court. "Reasonableness" is a well-established concept at common law. As the law could not provide for all possibilities, such as the circumstantial factors of individual cases, it is necessary in many cases to provide flexibility for the court to decide whether an excuse is reasonable from the angle of an average person, based on all the circumstances of each case. A plausible example of "reasonable excuse" for both Clauses 4(2) and 5(2) may be when a partner of a registered partnership dies suddenly. The remaining partners are not able to complete a new registration immediately.

Exemption from the registration requirement

29. Food importers or distributors who have already registered or have obtained a licence under other Ordinances will be exempted from the registration requirement as a trade facilitation measure, since the Government already possesses their information. For instance, mariculture operators licensed by the Agriculture, Fisheries and Conservation Department ("AFCD") and fishing vessel owners with licences for Class III vessels issued by the Marine Department will be exempted from registering with DFEH. A list of the exempted food importers and distributors and the relevant licensing authorities is in Schedule 1 to the Bill.

30. Hon WONG Yung-kan is of the view that similar to mariculture operators licensed by AFCD, local vegetable farmers who are food producers should also be exempted from the registration under the Bill. Mr WONG has pointed out that most local vegetable farmers are members of vegetable marketing co-operative societies ("VMCS"), which transport the farmers' vegetables to the Vegetable Marketing Organisation ("VMO") for wholesaling. As the Food and Environmental Hygiene Department ("FEHD") would be able to obtain information about local vegetable farmers who are VMCS members in case of food incidents, VMCS members should be exempted from registration.

31. The Administration has explained that the registration scheme for food importers and distributors is the key component of the food tracing mechanism which would facilitate DFEH in identifying and contacting the food traders speedily in case of food incidents. Local vegetable farmers who distribute their produce, whether on their own or through the VMO,

are regarded as food distributors and thus required to register with DFEH under the Bill.

32. The Administration has advised that, following a meeting with the Federation of Vegetable Marketing Co-operative Societies on 30 December 2010 to discuss the implications of the new registration scheme for food importers and distributors under the Bill for local vegetable farmers, representatives of the Food and Health Bureau ("FHB") and FEHD visited five VMCS on 14 January 2011 to understand their actual operation including their registers of vegetable farmers. The Administration could not agree to the proposed exemption for the following reasons -

- (a) although all of the five VMCS have maintained a register of members under Rule 10 of the Co-operative Societies Rules (Cap. 33A) which stipulates that every registered society shall keep a register to be called the "Register of Members" wherein information such as the name, address and occupation of each member; the date on which each member's name was entered in the register and the date on which any member ceased to be a member shall be entered, the inclusion of telephone numbers therein is not obligatory. Even those VMCS which have taken the initiative to compile members' directories are unable to record the telephone numbers of all their members. The registered addresses of some members are also incomplete and letters have to be forwarded to nearby farms or shops. As such, the FEHD cannot rely on the records to contact the vegetable farmers concerned speedily in case of food incidents;
- (b) while Clause 17 of the Bill requires registered food importers or distributors to inform FEHD in writing within 30 days after any changes of information provided, VMCS do not require their members to update their information;
- (c) VMCS have no mechanism in place to ascertain whether their members have indeed delivered all their vegetables to the VMCS for distribution. In this regard, exempting members of VMCS from registration may create a loophole in food tracing;
- (d) VMCS membership is not a legal requirement for local vegetable farmers and some of them have not joined any VMCS. This makes a great difference between them and the

persons listed in Schedule 1 of the Bill; and

- (e) FEHD has no statutory power to request VMCS to provide information about their members, as Clause 18 of the Bill only empowers DFEH to obtain information about persons licensed or registered under relevant Ordinances from the relevant licensing authorities and requires those licensing authorities to comply with DFEH's requests.

The Administration will enhance publicity of the Bill's requirements, render assistance to local vegetable farmers, and engage VMCS in helping and encouraging vegetable farmers to register.

33. Hon WONG Yung-kan considers that if the Administration is serious about safeguarding public health, it should introduce a licensing system to regulate oyster culture and fish pond culture. The Administration has undertaken to refer his views to SFH for consideration.

Requirement for food distributors to be registered

34. Under Clause 5(3)(c) of the Bill, a person would not be required to register as a food distributor in respect of that business if he has already been registered as a food importer in respect of the business. A registered food distributor, however, is required to register as a food importer under the Bill if he also carries on a food importation business, as it is important to have the full picture of all importers' information to enable better traceability of food in the event of a food incident given Hong Kong imports over 90% of its food. The Administration will step up publicity to make clear to food traders that food distributors must register as a food importer if they wish to also carry on a food importation business.

Exemptions by DFEH

35. Clause 6(1) of the Bill provides that DFEH may in writing exempt a person from the requirement to be registered under Part 2 of the Bill in respect of a business while Clause 6(4) provides that DFEH may, by notice publish in the Gazette, exempt a class of persons from the requirement to be registered under Part 2 of the Bill in respect of a class of businesses. The notice would be subsidiary legislation subject to negative vetting by LegCo. Members have asked about the criteria that DFEH would use in this regard.

36. The Administration has explained that the reason for Clause 6 is that DFEH may consider exempting a person or a class of persons from the requirement to be registered under Part 2 of the Bill when the situation warrants and that it would not cause any undue threat to public health. In making the decision, DFEH may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that DFEH considers appropriate, including but not limited to the following -

- (a) whether the exemption would cause any undue threat to public health;
- (b) past records of the applicant, for instance previous conviction records under the Bill or Cap. 132, previous revocation of registration as a food importer/distributor;
- (c) whether information about the food importer/distributor is readily available from other sources, for instance, in the case of exhibitors in a food exhibition, whether the detailed information about the exhibitors would be available from the organiser;
- (d) whether the food in question would be used for exhibition purposes (including free tasting) or sold for human consumption; and
- (e) the type and quantity of food that would be imported or distributed.

As an example, exhibitors in some major food exhibitions in Hong Kong may be exempted from registration as food importers. This is because organisers of these exhibitions generally possess detailed information about exhibitors, and exhibitors would only import small quantities of food over a short period of time for exhibition purposes. Many of them will only be importing food items on a one-off basis, without the intention of becoming a regular importer at that stage.

37. The Administration has assured members that DFEH will exercise caution and will not compromise public food safety in considering whether to grant an exemption. DFEH will also consider including the above factors in the guidelines to be issued in relation to the registration scheme.

38. On the question as to how the Administration could ensure that food sold at exhibitions is fit for human consumption, the Administration has

advised that although exhibitors in major food exhibitions may not be required to register as food importers or distributors, they would commit an offence under Cap. 132 if the food they supplied is not fit for human consumption. The Administration has assured members that DFEH would exercise caution and take into account the possible impact of an exemption on public health in considering whether to grant an exemption. Moreover, under Clauses 6(2) and 6(3) of the Bill, DFEH may impose conditions on the exemptions, for instance, stipulating that the food can only be used for exhibition purposes and not for sale, and withdraw the exemption should the conditions not be complied with. In addition, food importers and distributors exempted from registration are still required to keep import or wholesale supply records under Part 3 of the Bill.

Application for registration

39. Clause 7(2) of the Bill stipulates that for a partnership, a partner authorised by the partnership may apply for registration on behalf of the partnership and, if registration is granted, it is to be expressed to be granted to that person on behalf of the partnership. The Administration has advised that if there is any change to the partners in that partnership (which means the old partnership is dissolved), the new partnership would need to authorise a partner to apply for a new registration according to Clause 7(2) of the Bill.

40. Members consider that the drafting of Clause 7 of the Bill should be fine-tuned so that the policy intention of registration regarding partnership and limited company can be better reflected in the Bill.

41. The Administration has advised that the policy intention is that if a person has different businesses, the person needs to be registered in relation to each business separately. This has been reflected in Clause 7(1) of the Bill which provides that a person may apply to DFEH to be registered in respect of a business. Therefore, if a person is registered in relation to a business and the person buys another business, the person is required to be registered again in relation to the second business. However, if a limited company that is a registered food importer/food distributor is sold, the sale itself would not affect the limited company's registration in respect of its food importation/distribution business. The Administration, therefore, considers that the current drafting of Clause 7 is sufficiently clear to reflect its policy intention and does not see a need for fine-tuning. However, the Centre for Food Safety ("CFS") of FEHD will make clear the policy when issuing guidelines on the registration scheme, and will elaborate on how different business models should be registered

under Part 2 of the Bill and whether a new application is needed if there is a change to the business structure.

Determination of application for registration

42. Clause 8 of the Bill provides for DFEH to decide an application for registration and sets out the grounds for refusal. Registration may be refused if DFEH is satisfied that the applicant has repeatedly contravened the relevant provisions of the Bill in the previous 12 months or the applicant's former registration was revoked in the previous 12 months. DFEH must notify the applicant of the result of the application and give reasons if the application is refused.

43. Hon Audrey EU has raised a concern about a person using different companies to circumvent DFEH's power to refuse registration due to previous offences under the Bill. Ms EU has pointed out that Clause 8(2) of the Bill does not allow DFEH to refuse the registration of an applicant which is a body corporate on the ground that in the past 12 months, the owners or directors of that company have repeatedly contravened the Bill or their (or their other companies') registration has been revoked or cancelled.

44. The Administration has advised that, if the directors or owners are employees or agents of a company, their contraventions may be imputed to the company under Clause 52(1) or (2) of the Bill, depending on the circumstances of the case. Accordingly, DFEH may refuse registration of the company due to repeated contraventions of the Bill by its directors or owners on behalf of the company. The Administration has further advised that past contraventions of owners or directors not relating to the company are currently not a ground for refusal. The measure of checking the past records of the owners and directors of a company is only adopted in very rare cases when the integrity of the owners and directors of the company is crucial in the business of the company, for instance, section 71(2)(a) of the Banking Ordinance (Cap. 155) provides that the Monetary Authority shall refuse to give consent unless it is satisfied that the person concerned is a fit and proper person to be the chief executive or a director of the authorised institution concerned. Since the Government's policy intention of putting in place a registration scheme for food importers and distributors is mainly to assist DFEH in identifying and contacting a more defined group of food traders speedily in a food incident, the Administration does not consider that it is necessary to adopt such a measure.

Application for renewal of registration

45. Clause 11(1) of the Bill provides that only a registered food importer or registered food distributor may apply for renewal of registration. Clause 11(4) further provides that if an application for renewal of registration is made in accordance with Clause 11 but DFEH has not made a decision on the application before the day on which the registration is due to expire, the registration continues in effect until it is renewed or DFEH gives notice to the applicant of his decision to refuse the application.

46. Whilst noting that traders will need to submit applications for registration under Clause 7(1) of the Bill if they have missed the deadline for renewal of registration, members are sympathetic to those traders who have inadvertently missed the deadline for renewal as they cannot continue their business until their application is processed. Members have therefore asked if CFS could provide a performance pledge for processing an application under Clause 7(1). In addition to the performance pledge, some members also have suggested the creation of a provisional registration and the charging of a higher fee for provisional registration for applicants who have missed the deadline for renewal of registration so that they could continue their business whilst awaiting the outcome of their applications.

47. Having considered the procedures required, the Administration has advised that DFEH has undertaken to grant an application for registration within seven working days upon the receipt of all the required information. This performance pledge will only apply to those applications submitted after the full commencement of the Bill, i.e. after the expiry of the six-month grace period.

48. As to the creation of a provisional registration for applicants, the Administration does not see the need for such. In determining an application for registration, the Director needs to give due consideration to all relevant factors including the completeness of the information submitted as required by the Director for the purpose of considering the application and any record of previous contraventions of the Bill or revocation of the registration in the previous 12 months. Even if registration is only provisional in nature, DFEH would need to give similar consideration before granting such an application so that only appropriate food importers and food distributors are registered in order to ensure traceability of food. The pledge that DFEH could grant an application for registration under Clause 7(1) within seven working days upon the receipt of all the required information also serves to further undermine the need

for provisional registration. To minimise the chance of traders missing the deadline for renewal of registration, DFEH will issue reminder letters to traders. The current plan is to issue a reminder letter to registered food importers/distributors about four months before expiry of their registration. If the application for renewal of registration is not received, another reminder letter will be issued about one month before the expiry date.

Revocation of registration

49. Clause 14(2)(b) of the Bill empowers DFEH to revoke a person's registration in respect of a business (i.e. food importation business or food distribution business) if DFEH is satisfied that, in the case of a natural person, the person has died. Hon Tommy CHEUNG opines that automatic transfer of registration to an immediate family member or a successor of the deceased should be allowed under the Bill, as practised in the automatic transfer of liquor licence if the licensee has died.

50. The Administration has pointed out that if any family member of the deceased or related person wishes to continue operating the business previously registered under the name of the deceased, they must make a new application. Clause 14(5)(b) stipulates that revocation of registration takes effect on the expiry of 30 days after the day on which the decision to revoke the registration is made. This should allow adequate time for the family member or related person to make a new application and for the application to be processed. CFS would state in the guidelines for registration that in case of death of a natural person who held a valid registration prior to his death, if anyone wishes to continue operating the business registered under the name of the deceased, a new application for registration will have to be made.

Register of registered food importers and registered food distributors

51. Hon Fred LI has suggested that registered food importers and distributors should display their registration numbers in their invoices and receipts, so as to obviate the need for members of the public to check the register of registered food importers and registered food distributors to be set up by FEHD under Clause 15 of the Bill.

52. The Administration does not consider that it is necessary to impose a further requirement on registered food importers and distributors to display their registration numbers in their invoices and receipts. Clause 15(3) of the Bill stipulates that DFEH may consider keeping the register of registered food importers and registered food distributors in a form other

than a documentary form. It is the Administration's intention for DFEH to upload the register to the Internet, in addition to the paper register. Therefore, members of the public, including food traders, will have full access to the register to check the status of their trading partners.

Processing time of an application for registration during the six-month grace period

53. In view of the fact that some 8 600 food importers and distributors would need to register with DFEH under the Bill, members have requested the Administration to provide a performance pledge on the time for completing processing of applications for registration.

54. The Administration has advised that DFEH will grant approval-in-principle before the six-month grace period expires, provided that all the required information is submitted within the first four months of the grace period. For applications received within two months before the expiry of the grace period, the lead time for granting approval-in-principle will depend on the number of applications received.

Record-keeping requirement

55. The Bill will require any person who, in the course of business, imports, acquires or supplies by wholesale food in Hong Kong to keep transaction records of the business from which the food was obtained and the business to which it was supplied. DFEH will be empowered to inspect the records maintained by food traders.

56. There is no stipulated format for the records of each transaction to be maintained, but those records must cover -

- (a) the date of the transaction;
- (b) the name and contact details of the supplier;
- (c) the place from which the food was imported (for imported food only);
- (d) the name and contact details of the person to whom the food is supplied (i.e. the buyer); and
- (e) a description of the food, including the total quantity.

Fishermen who capture local aquatic products and supply them in Hong Kong will be required to maintain capture records covering the date or period of the capture, the common name of the capture, the total quantity and the area of the capture.

57. The capture or transaction records must be kept for a period of three months (for live aquatic products and food with a shelf-life of three months or less, e.g. fresh meat) or 24 months (for food with a shelf-life over three months, e.g. canned food). The record-keeping period for different food types will be provided for general reference in a Code of Practice to be issued by DFEH under the Bill.

58. The requirement to keep records of supplies of food will not apply to retail supplies to ultimate consumers as it would be impractical to do so and would impose a huge burden on the trade.

59. As there might be difficulties for food retailers to distinguish between business customers and ultimate consumers, the Bill provides a defence to a charge of failing to make a record by a food retailer if the food retailer concerned can show that it is his normal business to supply food by retail and it was reasonable to assume that the supply was not a wholesale supply.

60. The maximum penalty for non-compliance with the record-keeping requirement, without reasonable excuse, will be a fine at level 3 (\$10,000) and imprisonment for three months.

61. The Administration has consulted the trade on the draft code of practice on keeping records relating to food. The trade is generally supportive. Similar to the code of practice on section 78B orders under Cap. 132, the code of practice on keeping records relating to food will be published in the form of a general notice in the Gazette.

Record of local acquisition of food and acquisition of imported food

62. Clause 21 of the Bill requires a person who, in the course of business, acquires food in Hong Kong to record certain information about the acquisition. The record must be made within 72 hours after the time of the acquisition, which for the purposes of the Clause is the time the person takes possession or control of the food. Clause 22 of the Bill requires a person who, in the course of business, imports food to record certain information about the acquisition of the food. The record must be made at or before the time the food is imported. The requirement to make

records under Clause 22 does not apply to food transport operators, persons who import food for the purpose of exporting it if the food is air transshipment cargo or during the period between import and export, the food remains in the vessel, vehicle or aircraft in which it was imported and persons or classes of persons who are exempted by DFEH under Clause 29.

63. Members note that although food business operators would not be required to register with DFEH under Part 2 of the Bill, they would be required by Clause 22 of the Bill to keep and maintain records of the food they brought back to Hong Kong, such as spices, for use in food for supply/sale to their customers. Members have urged the Administration to make this requirement clear to the catering trade.

Record keeping by fishermen

64. The Bill requires fishermen who capture and supply local aquatic products by direct sale to ultimate consumers to keep capture records. According to Clause 23 of the Bill, capture records must contain the date or period of the capture, the common name of the local aquatic products, the total quantity and the area of the capture. However, if fishermen capturing such local aquatic products supply them by wholesale to other person(s), including selling to local seafood traders, fish collecting vessels or the Fish Marketing Organisation ("FMO"), they must keep food supply records, in addition to capture records, in accordance with Clause 24 of the Bill. This covers information including the date the food was supplied, the name and contact details of the person to whom the food was supplied, i.e. the buyer, and a description of the food and the total quantity. The capture or transaction records of live aquatic products must be kept for a period of three months.

65. For fishermen of fish collecting vessels who acquire catches from other fishermen within or outside Hong Kong waters and supply aquatic products by direct sale to ultimate consumers, they only have to keep records of local acquisition of food (i.e. within Hong Kong waters) or records of acquisition of imported food (i.e. outside Hong Kong waters). According to Clauses 21 and 22 of the Bill, records of local acquisition of food or records of acquisition of imported food must contain information including the date the food was acquired, the name and contact details of the person from whom the food was acquired, the place from where the food was imported (for imported food only) and a description of the food and the total quantity.

66. However, if fishermen of fish collecting vessels supply aquatic products to other person(s), including selling to local seafood traders, fish collecting vessels and FMO, then apart from maintaining records of local acquisition of food or records of acquisition of imported food, they must also keep supply records in accordance with Clause 24 of the Bill.

67. Having regard to the concern expressed by some fishermen about the record-keeping requirement under the Bill and their request for them to be exempted, members suggested that a pilot scheme should be carried out to evaluate the practicability of the proposed record-keeping requirements.

68. The Administration conducted a pilot scheme from 29 July 2010 to 10 September 2010 to assess whether the record-keeping requirements under the Bill are practicable. Major fishermen associations were invited to nominate their members to join the exercise. Twenty-two fishermen, each having their own mode of operation and selling their catches through different channels, participated in the scheme. Whilst there is no stipulated format for fishermen to keep capture records or records of wholesale supply of food, participating fishermen were provided with record templates for their use. Apart from the record templates, fishermen may also use the receipts/invoices issued by the FMO and seafood traders as records of wholesale transactions, as they generally contain all the information required to be recorded under the various requirements. By inserting the capture date or period and catch area on these receipts/invoices, fishermen could turn them into capture records. To facilitate record-keeping by those with difficulties in recording the catch area and in classifying their catches, the Administration has produced an annotated fishing map and a pictorial guide of aquatic products.

69. The Administration has advised that the pilot scheme demonstrates effectively that the record-keeping requirements for fishermen under the Bill are practicable and do not involve much extra work. With the assistance of CFS staff, most fishermen were able to make use of their existing transaction records, like invoices and receipts, to meet the new requirements. Some fishermen found the record templates, fishing map and pictorial guide of very practical use. In the months to come, the Administration has undertaken to continue to provide guidance to fishermen and assist them in getting prepared.

70. Hon Audrey EU is of the view that a specific duration should be specified for the "period of the capture" under Clause 23(1)(a) of the Bill. Hon WONG Yuk-man is also of the view that the Chinese term "期間" fails to fully reflect the meaning of "period of the capture" under Clause

23(1)(a) of the Bill.

71. The Administration has pointed out that as a fishing trip may take more than one day and having regard to the varied mode of operation among fishermen, the decision was therefore made to not specify in the Bill the exact date when the capture is made. The Administration has noted from the pilot scheme that fishermen generally have no difficulties in providing either the date or period of their capture.

72. With regard to Mr WONG's comment on the Chinese term "期間" (period) in "period of the capture" under Clause 23(1)(a) of the Bill, the Administration has pointed out that the same Chinese term "期間" is commonly adopted in other legislative provisions, for example, section 2(1) of the Construction Workers Registration (Fees) Regulation (Cap. 583B), section 2 of the Telecommunications (Method For Determining Spectrum Utilization Fees by Auction) Regulation (Cap. 106AC), and section 1A of the Betting Duty Ordinance (Cap. 108), etc. Hence, the Administration considers it appropriate to adopt "期間" as the Chinese rendition for "period".

Duration of keeping records

73. Clause 26 of the Bill sets out the required period for retention of records. Hon WONG Yung-kan questioned the necessity of requiring fish farmers and fishermen to keep transaction records of live fish for three months. Mr WONG considers it more appropriate to require traders to keep transaction records of live aquatic products for one month.

74. The Administration has pointed out that the proposed duration of record-keeping in Hong Kong is less stringent than that of other overseas jurisdictions. For example, in the European Union and Australia, the duration of record-keeping for highly perishable food items (e.g. "use-by" date of less than three months) is six months and 12 months respectively. To ensure that the proposed record keeping requirement is practicable, CFS has launched pilot exercises of record keeping in market stalls, fixed pitch hawker stalls, licensed/permitted food premises and other food shops selling different food categories in Central and Western, Wan Chai, Sham Shui Po, Yau Tsim Mong, Tuen Mun and Yuen Long. Whilst some traders were not familiar with the requirement initially, they had no problem complying gradually with more guidance. The trade generally accepted the proposed record-keeping requirements, including the retention period based on the shelf-life of the food products. For most of the traders interviewed, record-keeping was already an established practice

for tax filing purposes. In Hong Kong, every business is required to keep sufficient business records for seven years for such purposes.

Exemptions by DFEH

75. Clause 29 of the Bill empowers DFEH to exempt particular persons or classes of persons from the requirement to keep records. The Administration has advised that in deciding whether to grant an exemption, DFEH may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that DFEH considers appropriate, including but not limited to the following -

- (a) whether the exemption would cause any undue threat to public health;
- (b) whether the applicant has mechanisms in place to ensure that the food he supplies is fit for human consumption;
- (c) past records of the applicant (e.g. previous conviction records under the Bill or Cap. 132);
- (d) whether there is genuine and practical difficulty in keeping the required records under Part 3 of the Bill;
- (e) whether the food in question would be used for charitable purposes; and
- (f) the type and quantity of food in question.

Although the Administration does not consider it necessary to specify the criteria for DFEH to exercise this power of exemption so as to leave flexibility for DFEH to consider each case according to the circumstances, DFEH will exercise caution and take into account the possible impact of on public health in considering whether to grant an exemption. Consideration is being given to including the above factors in the Code of Practice to be issued in relation to the record keeping requirements.

76. The Administration has clarified that it would consider exempting some charitable food banks from the requirement to keep records if they have mechanisms in place to ensure that the food they supply is safe (for example, whether the staff from the organisation would check the labels for expiry dates or conditions of the food for deterioration). This is due to the difficulty of keeping records of food donated by the public as some

donors may wish to remain anonymous. Requiring donors to provide personal information may unnecessarily deter some in donating and hence disrupt the operation of these food banks. In many cases, the food donated is in pre-packaged form with manufacturing details provided, which poses less of a problem for source tracing should that be necessary. With the assistance of Hon CHEUNG Kwok-che, the Administration held a briefing session on 22 November 2010 for non-governmental organisations involved in operating food banks to explain to them the requirements of the Bill and the criteria to be considered by DFEH in granting an exemption from the requirement to keep records under the Bill.

77. Members note that the notice to be published by DFEH in the Gazette under Clause 29(4) to exempt a class of persons from the record-keeping requirement would be subsidiary legislation subject to negative vetting by LegCo.

Re-enactment of Part VA of Cap. 132

78. Part 4 of the Bill substantially re-enacts Part VA of Cap. 132 which was enacted by the Public Health and Municipal Services (Amendment) Ordinance 2009 to provide for the making and enforcement of food safety orders. A number of the provisions in Part VA of Cap. 132 have also been transferred to Part 5 of the Bill so that they will apply more generally.

79. Members note that the definition of "supply" under the Bill, which is different from the definition of "supply" in Cap. 132 in that the former does not include "to transmit, convey or deliver the food in pursuance of a sale or an exchange or disposal for consideration". However, Clause 30(1)(e) of the Bill provides that DFEH may make a food safety order to prohibit the carrying on of an activity in relation to any food, or permit the carrying on of any such activity in accordance with conditions specified in the order, for the period specified in the order.

80. Hon Audrey EU has sought clarification as to whether, say, a rug trader, who gives away food as a prize for commercial purposes would fall within the definition of "supply" under the Bill.

81. The Administration has explained that as the principal activity of the rug trader is not the supply of food by wholesale, he would not be required to register under Clause 5 of the Bill. However, DFEH could issue a food safety order under Clause 30(1)(b) of the Bill to prohibit the rug trader from giving away food intended for human consumption, regardless of the quantity, in the event of a food incident.

82. Members consider that the term "粗言穢語" in Clause 54(1) of the Bill should be amended to match better with the meaning of the term "abusive language" in the English text. On review, the Administration will move a CSA to Clause 54(1) by replacing "對其妨礙、抗拒，或對其使用粗言穢語" with "妨礙、抗拒或辱罵該人". The Administration will also move a CSA to add a new Clause to make the same amendment to section 139 of Cap. 132.

Grace period

83. Hon WONG Yung-kan has urged the Administration to delay enforcement of the penalty provisions for failing to comply with the record-keeping requirement against fishermen from six months to one year after the commencement of the Food Safety Bill, having regard to the large number of fishermen involved and the fact that some fishermen who operate outside Hong Kong waters are often away from Hong Kong for a stretch of up to six months. In the meantime, the Administration should use the coming annual fishing moratorium in the South China Sea from mid-May to August to provide training to fishermen to comply with the record-keeping requirements. Hon Tommy CHEUNG has also urged the Administration to consider extending the grace period to help fishermen as well as owners of small stalls comply with the requirements under the Bill.

84. The Administration has maintained the six-month grace period and advised that it will carry out publicity and education programmes so that food traders will be informed of the new measures under the Bill. The Administration will also tailor-make some programmes for target groups such as fishermen and owners of small stalls. For instance, FEHD and AFCD will co-operate to conduct briefing sessions on records keeping for fishermen during the next fishing moratorium in mid-2011. Besides, there is a plan to conduct briefing sessions for owners of small stalls during the six-month grace period.

Amendments to the Chinese renditions

85. Hon WONG Yuk-man has proposed some amendments to the Chinese text of the Bill. On review, the Administration will move CSAs to improve the Chinese text of the definition of "wholesale" in Clause 2, Clause 3(1) and (3) and Clause 30(2)(b).

Committee Stage amendments

86. The CSAs to be moved by the Administration and agreed by the Bills Committee are in **Appendix III**.

Resumption of Second Reading debate

87. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 30 March 2011.

Advice sought

88. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
9 March 2011

Bills Committee on Food Safety Bill

Membership list

Chairman Hon Fred LI Wah-ming, SBS, JP

Members Hon WONG Yung-kan, SBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Dr Hon Joseph LEE Kok-long, SBS, JP
Hon WONG Ting-kwong, BBS, JP
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, JP
Hon CHEUNG Kwok-che
Hon Alan LEONG Kah-kit, SC
Hon WONG Yuk-man

(Total : 13 Members)

Clerk Miss Mary SO

Legal Adviser Mr YICK Wing-kin

Date 14 October 2010

Bills Committee on Food Safety Bill

A. Organisations which have given oral representation to the Bills Committee

1. Aberdeen Fishermen Friendship Association
2. Aberdeen Fishery and Seafood Merchants Association
3. Association for Betterment of Licensed Hawkers
4. Consumer Council
5. Federation of Hong Kong Industries
6. Fung Kwai Tong Eggs Merchant Association
7. Hong Kong and Kowloon Merchants and Hawkers Association Limited
8. Hong Kong Chamber of Seafood Merchants Ltd.
9. Hong Kong Fishermen Consortium
10. Hong Kong Fishery Alliance
11. Hong Kong, Kowloon, New Territories and Overseas Fish Wholesalers Association
12. Hong Kong Medical Association
13. Hong Kong New Territories Fish Culture Association
14. Hong Kong Suppliers Association
15. Hong Kong Vegetable Union
16. Kowloon Fruit & Vegetable Merchants Association
17. The Hong Kong Food Council
18. The Rice Merchants' Association of Hong Kong Ltd.

19. 全港公共街市販商大聯盟

20. 香港漁民總社

B. Organisations which have provided written submissions only

1. Hong Kong Catering Industry Association

2. Hong Kong Fisherman and Aquatic Commerce Association

3. Hong Kong Retail Management Association

4. Institution of Dining Art

5. 港九水上漁民福利促進會

FOOD SAFETY BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Food
and Health

<u>Clause</u>	<u>Amendment Proposed</u>
2	By deleting the definition of "drug".
2	In the definition of "food", by deleting paragraph (h) and substituting - "(h) medicine as defined by section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138) or Chinese herbal medicine or proprietary Chinese medicine as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549);".
2	In the Chinese text, by deleting the definition of "批發" and substituting - ""批發"(wholesale)指向符合以下說明的人供應食物：該人取得該食物的目的，是在該人經營的業務的運作中，向第三者供應該食物，或是安排向第三者供應該食物；".

2 In the Chinese text, in the definition of “飲品”,
by deleting “不包括不屬下列類別的水” and substituting
“不包括水，但以下類別的水除外”.

2 In the Chinese text, in the definition of “職能”,
by deleting the semicolon and substituting a full
stop.

3 In the Chinese text, by deleting subclause (1)
and substituting -
“(1) 本條例就任何非擬供人食用的食物而言，並不
適用。”.

3 In the Chinese text, by deleting subclause (3)
and substituting -
“(3) 在不局限第(1)或(2)款的原則下，本條例就在
圈養狀態下繁殖或培育生長的活水產而言，並不適用。”.

30(2) In the Chinese text, by deleting paragraph (b)
and substituting -
“(b) 對公眾衛生所承受的危險的任何不良後果，予以緩
解，”.

- 54(1) In the Chinese text, by deleting “對其妨礙、抗拒，或對其使用粗言穢語” and substituting “妨礙、抗拒或辱罵該人”.
- 64(1)(a) By deleting “by repealing “不屬於” and substituting “不屬”” and substituting “by repealing “不包括不屬於下列類別的水” and substituting “不包括水，但以下類別的水除外””.
- 64(2) In the proposed definition of “food”, by deleting paragraph (h) and substituting -
- “(h) medicine as defined by section 2(1) of the Pharmacy and Poisons Ordinance (Cap. 138) or Chinese herbal medicine or proprietary Chinese medicine as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549);”.
- 67 By adding -
- “(3) Section 67 is amended by adding -
- “(4) The presumptions in subsection (1) do not apply to live aquatic products that are in captivity for the purposes of propagation or promotion of growth.”.”.

New

By adding -

**"69A. Section 139 amended (Obstruction
of officers in the exercise
of their duty)**

Section 139 is amended, in the Chinese text, by repealing "對其妨礙、抗拒，或對其使用粗言穢語" and substituting "妨礙、抗拒或辱罵該人".