

Food products advertising in China

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1.- General principles

Regulation of advertising is mainly aimed at both protecting the consumer's faith and fair competition between operators. *PRC Advertising Law*, of 1994, of course provides the main framework; however, *PRC Consumer Protection Law* of 1993 (amended on 25 October 2013) and *PRC Anti-Unfair Competition Law* of 1993 also contain relevant provisions. Advertisements shall not (ii) violate national security, (iii) offend public morality, (iv) discriminate by ethnicity, religion or sex, (v) threatening environment¹.

PRC national symbols (flag, emblem, anthem), or referral to state organs or their officers, cannot be included in advertisements².

Of course, advertisement shall be true and cannot contain any false or misleading information³, in particular about quality⁴, composition, performance, use, producer, shelf life, origin, etc⁵. Basically, any content shall be objective and able to be supported by evidence.

Advertisements shall be recognizable and cannot be in the format of news report⁶.

Any data, statistics, survey, quotations used in advertisements shall be true and accurate, and the sources shall always be indicated⁷. Claims of patents shall be true and include all references (patent type and number) to the patent, and are only allowed for patents already granted – i.e. mere applications still pending cannot be used⁸.

Although comparative advertising is not clearly and generally forbidden, advertisements cannot belittle or denigrate competitors⁹.

2.- Superlative expressions

Superlative expressions such as “national level” (国家级) “highest grade” (最高级) or “the best” (最佳) are expressly forbidden¹⁰, as well as referrals to “*the newest science*” (最新科学), “*the most advanced process*” (最先进加工工艺), “*the most recent technology*” (最新技术)¹¹.

In practice, authorities expand the list of forbidden superlatives by evaluating on a time-by-time basis whether advertisements convey messages conflicting with the law. As authorities in charge of consumer protection and advertising compliance (Administration of Industry and Commerce) act on local level (province, city), interpretation and practice can differ in different locations.

The following have been deemed equivalent to the superlative expressions forbidden under article 7 of the Advertising law¹²:

- any mention of market share¹³ such as “*best-sold in the Country*” (全国销量第一), “*biggest market share*” (市场占有率第一), “*leader brand on the market*” (市场主导品牌) or “*consumers' first choice*” (消费者首选品牌);
- express endorsements such as “*brand/product recommended by..*” (推荐产品/品牌); “*identified by..*” (认定); “*recognized by..*” (×认可); “*shown by..*” (展示); “*collected by..*” (荟萃); “*appointed by..*” (指定);
- superlatives such as “*famous Chinese brand/product*” (中国公认名/品牌), “*first brand*” (第一品牌) or “*ultimate*” (极品).

3.- Specific regulation for food products advertisement

Advertising for food products is also subject to specific regulations¹⁴ – mainly, the *PRC Food Safety Law* of 2009, as well as various other regulations – in addition to these general principles.

Food advertisement shall not be false or even just exaggerated¹⁵.

(1) Advertising Law, art. 7.

(2) Advertising Law, art. 7.

(3) Advertising Law, art. 4; Consumer Protection Law, art. 8.

(4) This provision matches the obligation of all advertisers to guarantee that their products have the same quality as shown in the advertisement (Consumer Protection Law, art. 23).

(5) Anti-Unfair Competition Law, art. 9.

(6) Advertising Law, art. 13.

(7) Advertising Law, art. 10.

(8) Advertising Law, art. 11. For example, in May 2013 a food company was punished by AIC in Hebei province for claiming a patent while the approval was still pending.

(9) Advertising Law, art. 12.

(10) Advertising Law, art. 7.

(11) Food Advertising Implementing Regulations, art. 6.

(12) Those have been deemed as equivalent to “*the best*” by several decision of AIC at provincial level.

(13) Referrals to market share are forbidden as they are based on unofficial market research, statistics, recommendations.

(14) Mainly the Food Advertising Implementing Regulations of 1996 amended in 1998 and the Administrative Regulation for advertising of alcoholic products of 1996.

(15) Food Safety Law, art. 54.

3.1.- Endorsements

Advertising cannot include – under any form – recommendations by food safety regulatory agencies or institutions undertaking food inspection and testing, food industry associations, or customer associations¹⁶.

Food advertising cannot exploit the title or the image (e.g., by showing a person wearing doctor's white coat) of doctors and medical organizations; moreover, any statements by experts and consumers – as long as their title or image is stressed – are not allowed.

Implicit endorsement from other entities or individuals (e.g. celebrities) is allowed, although endorsers can also be held liable¹⁷ in case those advertisements are declared fake or misleading. In a recent case currently pending, basketball celebrity Yao Ming appears to have been sued by a consumer in Beijing claiming to have being induced by Yao Ming's endorsement to purchase some fish-oil pills – which purportedly turned out to be less effective than shown in advertisement.

3.2.- Avoid confusion with drugs/health food

Food products advertisement shall comply with public health regulations, avoid medical jargon as well as any confusion with pharmaceutical products¹⁸; claims (explicit or implicit) of disease prevention or treatment functions are strictly forbidden¹⁹. Ordinary food (i.e. non-health food) can boast nutritional claims (e.g.: *no lactose; low sodium; rich in dietary fiber; fat reduced compared with...; Carbohydrate is the major source of energy for human*) but only in strict compliance with the relevant regulation²⁰.

3.3.- Specific food products

Some regulations are specific to particular food products. For instance:

- baby food advertising cannot show breastfeeding women or infants, nor imply that these products can replace/substitute breast milk²¹;
- alcoholic beverages advertisements²² shall not (i) show the act of drinking, minors, potential dangerous actions (such as driving cars, boats or planes), (iv) convey implicitly or explicitly the message that those drinks help to release stress, anx-

ety or increase physical strength, (v) associate personal, business or sport success to their consumption, (vi) declare any prize, positive appraisals/evaluations or awards obtained. Moreover, alcoholic beverages' advertisements can be published on media (television, radio, newspaper) within specific limits (TV: no more than twice a day between 19-21h and no more than 10 times during normal times; Radio: no more than twice per hour; Newspapers/magazines: no more than twice per issue, and never on first page/cover).

Control on food products advertising has also an impact on import procedures: if specific features - such as awards, certificates, production location, geographical indications, special ingredients – are stressed on the label, it is necessary to provide the authority in charge of label inspection (AQSIQ) with certified supporting evidence²³. In case of import dairy products (such as milk, cheese, yoghurt, baby formula) labeled with mention of awards, certifications or prizes, the supporting certificates shall be legalized through diplomatic channels²⁴.

4.- Health food, novel food, food for special dietary use

Health food advertising is subject to a specific regulation²⁵ and procedure, as applicants (i.e. health food companies) need to have all advertising content pre-approved by the local office of the CFDA. Application documents include the certificates and approval for the production or import of the health food, as well as the standards, labels and packaging. The approval lasts for one year.

Functions claims are allowed only²⁶ – on a very strict basis – for those products which have been successfully registered as “Health Food” (保健食品) with the CFDA. It is an extremely long and costly procedure, as it involves – depending on the specific claim – tests on animals or humans. Even for approved health food, only the specific claims are allowed (same exact wording as provided by the regulations and approved by CFDA).

It is strictly forbidden for health food any reference or mention to therapeutic claims/effect. However, according to an official release by CFDA on 7 June 2013, around 90% of health food advertisements on television and newspaper appears to have breached this provision.

⁽¹⁶⁾ Food Safety Law, art. 54.

⁽¹⁷⁾ Art. 55 of the Food Safety Law and art.25 Measures for the Supervision and Administration of Food Safety in the Circulation Links provide grounds for liability of endorsers in case of false advertisement.

⁽¹⁸⁾ Advertising Law, art. 19.

⁽¹⁹⁾ Food Safety Law, art. 54.

⁽²⁰⁾ General Standard for Nutritional Labeling of Pre-Packaged Food, GB 28050-2011.

⁽²¹⁾ Food Advertising Implementing Regulations, art. 8.

⁽²²⁾ Administrative Regulation for advertising of alcoholic products of 1996. It shall be noted that other administrative decisions or regulations have provisions for specific alcohol products (e.g. wine), which may add or waive some of these general provisions.

⁽²³⁾ Label Inspection Rules for Import and Export Prepackaged Food, art. 6.

⁽²⁴⁾ Administrative Measure on Inspection, Quarantine and Supervision of Imports and Exports of Dairy products, art. 11.

⁽²⁵⁾ Mainly, Implementing regulations for examination of health food advertising of 2005.

⁽²⁶⁾ General Standard for Health Food GB 16740-1997.

Health food advertising shall avoid using the following²⁷:

- expressions such as “*science or research discovers that ..*”, “*experiments or data prove that..*” and similar, as long as they cannot be confirmed/verifies;
- claims that the health food product is a traditional method/recipe;
- referral to “*safety*”, “*no toxic side effects*”, “*no addictive*” etc;
- claims that the health food products is necessary for a normal life.

It is explicitly forbidden comparative advertising between health food and other health foods or drugs²⁸.

Health products advertising shall always display the notice “*this product cannot replace drugs*”; on TV advertising, this notice shall appear for the whole duration of the advertising²⁹. Advertising of health food, novel food and special dietary use food shall display the approval registration number³⁰ for that specific product.

5.- Mislabeling

As advertising shall not deceive consumers and shall not provide false or misleading information, mistakes or inaccuracies on the label lead – in several cases – can expose to legal liabilities.

Sometimes it can be the wrong translation into Chinese of a food ingredient – such as the famous case of almonds, which have been translated (and labelled) into Chinese as 杏仁 (apricot kernel) until a consumer objected that the correct translation should have been “扁桃仁” or “巴旦木”.

Other times it can be a fake/wrong indication of product's or ingredient's origin³¹, as well as promotion campaigns (with prizes or vouchers) omitting to indicate the exact ratio of “winning” products³² are also considered as commercial fraud to the consumers. Claims – and mainly negative claims for additives – can be very risky, as PRC law does not set minimum threshold under which the additive can be labelled as “0”. While many companies have an aggressive approach in this regards, others have internal policies that basically ban this kind of claims.

Labels can undergo the scrutiny by PRC authorities even if they are in foreign languages – as long as they are able to mislead potentially Chinese consumers: it is the case for instance of organic food, which can be labelled as “ORGANIC”, “BIO” or equivalent (in Latin alphabet) only if it

complies with PRC standards for organic (“有机”) food and has obtained the relevant PRC certificates in this regard (which are different from European and American ones).

6.- Sanctions

Violation of regulations on advertising can trigger several sanctions, depending on the specific case.

Advertising Law³³ punishes several misconducts of advertisers as well as advertising agencies/operators – with fines up to five times the amount of the advertising expense.

Food Safety Law – and its famous article 96 – allows consumers to claim from either the producer or the seller (i.e. the retailer) punitive damages up to ten times the price paid in case of in case of purchase of food product not complying with food safety standards³⁴. Mis-representation (through advertising or other means) of the quality of own goods or service is also punished by Anti-Unfair Competition Law with fines up to 200,000 RMB³⁵.

The Consumer Protection Law also provides grounds for punishment in some cases – e.g. for non-compliant promotions through prizes/awards, which can be considered as fraud to the customer³⁶.

Finally, the (soon-to-be approved) revision of Food Safety Law³⁷ provides that advertising operators – as well as publishers, designers, producers – involved in false food advertising shall bear joint liabilities together with the advertisers (food producers/traders).

ABSTRACT

Food products' advertising is subject to a regulation comprised both of general principles and of specific provisions for food products. PRC Advertising law sets fundamental principles whereby advertising cannot be misleading or provide false information about products. Superlatives expressions implying absolute degree primacy are also forbidden, as well as referral to market shares. Advertising for health food need to be expressly pre-approved by CFDA, and any referral or confusion with drugs or therapeutic properties is strictly forbidden. Claims are allowed only in strict compliance with the provisions of the law (e.g., GB standards on nutritional label as well as food additives). Sanctions can be very harsh and costly for food companies as well as retailers.

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⁽²⁷⁾ Implementing regulations for examination of health food advertising, art. 8.

⁽²⁸⁾ Food Advertising Implementing Regulations, art. 12.

⁽²⁹⁾ Implementing regulations for examination of health food advertising, art. 11.

⁽³⁰⁾ Those kinds of food products need prior approval/registration with CFDA.

⁽³¹⁾ For instance, in a case in 2013 in Shandong province, an ice-cream franchisor was found guilty of fake advertising as he claimed to sell ice-cream made with 100% Italian products (while actually all ingredients were produced locally).

⁽³²⁾ Authorities require a specific ratio per each specific SKU (cannot provide an average ratio of two or more SKUs).

⁽³³⁾ Advertising Law, artt. 37; 39; 40.

⁽³⁴⁾ With the *Judicial Interpretation on Issues concerning the Application of Laws relating to Food and Drug Disputes* of 9 December 2013, the Supreme Court has confirmed that such amount is due to the consumer even if the consumer purchases the goods being aware of their non-compliance.

⁽³⁵⁾ Anti-Unfair Competition Law, art. 24.

⁽³⁶⁾ Art. 55 of the revised Consumer Protection Law provides penalties up to 300% the paid price (and in any case not less than 500 RMB) in case of fraud to customers.

⁽³⁷⁾ Draft of revised Food Safety Law, art. 76, currently under public-comments phase until 31 July, 2014.