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**Bills Committee on Electoral Legislation
(Miscellaneous Amendments) Bill 2012**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper gives an account of the discussions of relevant committees of the Legislative Council ("LegCo") relating to review of the regulatory regime of election advertisements ("EAs").

Background

2. The current regulatory regime on EAs is laid down in the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") and the relevant regulations made under the Electoral Affairs Commission Ordinance (Cap. 541) ("EAC regulations"). As defined in section 2 of ECICO, EA covers notices, public announcement or any other form of publication (including printed advertisements and those distributed by electronic transmission) published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election.

3. Under section 34(4) of ECICO, a person must, not later than seven days after publishing a printed EA, furnish two copies of the advertisement to the appropriate Returning Officer ("RO"). Strictly speaking, all notices, announcements or publications displayed or distributed by candidates on the Internet would fall within the definition of EA and are, therefore, subject to the prior declaration/submission requirement. Under respective regulations on electoral procedure previously made by Electoral Affairs Commission ("EAC") under the EAC Ordinance, before display, distribution or otherwise use of any EA, a candidate must submit a declaration and two copies each of the declared EAs to RO. To satisfy the statutory declaration requirement, a candidate was required to print out the electronic EA and submit two hardcopies of it to RO before displaying, distributing or otherwise using it on the Internet.

4. In May 2011, EAC made nine Amendment Regulations under the EAC Ordinance which sought to refine electoral procedures, voter registration and

other practical arrangements to prepare for the District Council ("DC"), Election Committee ("EC") subsector, Chief Executive ("CE") and Legislative Council ("LegCo") elections scheduled for 2011 and 2012. The relevant Amendment Regulations on electoral procedure has introduced the following improvement -

- (a) for electronic EAs, candidates can make the required declaration and submission to RO either electronically or in hard copy; and
- (b) where it is not practicable to submit the electronic EAs to RO before they are displayed, distributed or used (such as messages displayed or sent interactively and spontaneously through social networking platforms on the Internet like Facebook and Twitter, candidates can deposit with RO a declaration and the electronic EAs by the end of the first working day following the day on which the advertisements are sent or displayed.

5. Sections 27(1) and (2) of ECICO make it an offence if a candidate or a person publishes an EA which includes the name, logo or pictorial representation of another person or an organization in such a way as to imply, or to be likely to cause electors to believe that a certain candidate has the support from such person or organization, unless the candidate or the person concerned has obtained prior written consent of support from such person or organization. Failure to meet the requirement will constitute a false claim of support. The EAC regulations also stipulate that the candidate must deposit the consent in writing with RO.

Relevant discussions held by relevant committees

6. When the Panel on Constitutional Affairs ("the CA Panel") discussed issues relating to the review of electoral arrangements for the four elections to be held in 2011 and 2012 at its meeting on 17 January and 18 March 2011, some members considered it very inconvenient for candidates to submit to the Registration and Electoral Office ("REO") hard copies of EAs, authorization letters, ERs ("election returns"), etc. in order to comply with the prevailing statutory declaration requirement under the respective electoral procedures regulations made by EAC. They requested the Administration to facilitate candidates by accepting election materials transmitted electronically and develop an information technology ("IT") system to cater for the electronic transmission of all types of election materials. The Administration advised that EAC would amend the respective regulations to address members' concern.

7. In May 2011, EAC made five Amendment Regulations under the EAC Ordinance to align or improve electoral procedures which, among others, sought to relax the electoral procedures set out under the respective EAC regulations to achieve the following improvement -

- (a) candidates would be allowed to submit electronic EAs and the required declaration to ROs electronically, in the manner and format as specified by EAC; and
- (b) where it was not practicable to submit the electronic EAs to RO before they were displayed, distributed or otherwise used (such as messages displayed or sent interactively and spontaneously through social networking or communication websites on the Internet like Twitter, Facebook, blogs etc.), candidates were allowed to make ex post facto declaration. Candidates were only required to deposit with the RO a declaration and the declared electronic EAs by the end of the first working day following the day on which the advertisements were sent or displayed.

8. During the deliberations of the Subcommittee which was formed to study the relevant Amendment Regulations, members expressed disappointment that the Administration had proposed to allow the candidates of DC, EC subsector, CE and LegCo elections to submit, in the manner and format specified by EAC, a declaration and a copy of only electronic EAs, but not printed EAs, to ROs by electronic means. They considered it very inconvenient and time-consuming for candidates to submit hard copies of printed EAs, authorization letters, election returns, etc. to ROs. Members were of the view that the Administration should facilitate candidates by accepting printed election materials transmitted electronically. They called on the Administration to develop an IT system to cater for the electronic transmission of all types of election materials as soon as possible.

9. The Administration explained that it was the long-term objective to allow submission of all EAs by electronic means and REO had actively pursued the use of electronic means for the submission of election materials. However, it was considered that a cautious approach must be adopted in order to ensure that all elections were conducted in an open, fair and transparent manner. As the number of candidates for the coming DC, EC subsector and LegCo elections would increase substantially, it was advisable to allow candidates, as a first step, to submit electronic EAs by electronic means. For EAs of large sizes such as posters and exhibits, candidates could also send the photos of these EAs to ROs by email. REO would capitalize on the experience in the 2011 DC and EC Subsector elections and explore the feasibility of accepting more types of election materials by electronic means.

10. Members reiterated their concern about the difficulties encountered by candidates in fulfilling the existing statutory declaration requirement to submit to ROs copies of electronic EAs distributed, sent or used on social networking or communication websites on the Internet. Members pointed out that messages posted on these websites could change quite rapidly and frequently within a short period of time. Furthermore, as some websites were not hosted by candidates themselves, messages could be removed or deleted by the relevant website administrators without prior notification to candidates who posted the messages. As such, there were practical difficulties for candidates to capture every electronic EA posted on these websites for submission to ROs.

11. Some members also expressed concern over the practical problems in keeping full and complete records of electronic EAs for submission in certain circumstances, owing to the nature of exchanges conducted on the social networking and communication websites. They raised the issue of practicability of treating such electronic EAs in the same way as physical-form EAs under the current statutory declaration requirement. In view of the advance in IT and the prevalence of these websites, these members queried the feasibility of applying the current statutory control regime under ECICO to electronic EAs transmitted through these means. Some other members, however, took the view that it was necessary to regulate the dissemination of EAs on Internet.

12. The Administration advised that to address members' concern, it was necessary to review whether electronic EAs should be treated in a manner different from physical-form EAs and, if so, whether amendments should be made to the relevant provisions of ECICO and EAC Regulations. The Administration had undertaken to study the issue separately and revert to the CA Panel in due course.

13. When the Administration briefed the CA Panel at its meeting on 20 June 2011 on the practical arrangement for the 2011 DC election, some members reiterated their view that dissemination of EAs via social networking or communication websites was getting more popular and messages posted on these websites could change quite rapidly and frequently within a short period of time. It would be impractical to require candidates to deposit with REO every electronic EA posted on these websites by the end of the first working day following the day on which the EAs were displayed on the Internet.

14. At the meeting of the CA Panel on 21 November 2011, the Administration briefed members on the proposed amendments to further relax the regulation on EAs. Members in general welcomed the proposals to relax the regulation on EAs so as to facilitate candidates to conduct electioneering

activities. However, some members expressed concern about the practical difficulties for a candidate to comply with the proposed requirement to maintain his election website for a 12-month period after publication of the election results and also considered the proposed penalty for failing to meet the requirement too severe. The Administration undertook to consider the suggestion of providing a central portal to be maintained by REO for submission of electronic EAs by candidates.

15. Members noted that the Administration proposed to amend the existing requirements so that (a) a candidate or a person was not required to obtain prior written consent from those who provided support in the EAs published by him if such support was provided by the supporters themselves out of their own volition; and (b) if a candidate or a person published or continued to publish the EAs with the support mentioned in (a) above without any modification of the contents or description of the support, the candidate or the person was not required to obtain prior written consent from those who provided support in such EAs. Otherwise, the candidate or the person had to follow the existing requirement to obtain prior written consent before publishing such EAs. Some members expressed concern that as it might not be possible to ascertain the real identity of a person who had indicated support, there would be practical difficulties for the candidate to obtain prior written consent from persons indicating support to a candidate on social networking and communication websites on the Internet given the spontaneous support received.

16. When responding to a member's enquiry on how to define whether the support was "*provided by the supporters themselves out of their own volition*", the Administration explained that there would be no need for a candidate to obtain prior written consent from those parties if the "Like" sign or supportive comments were posted by these supporters on the candidate's webpage. This, however, did not cover circumstances in which the sign of support was not provided directly by their supporters themselves. The Administration undertook to consider how to make explicit such policy intent in the proposed legislative amendment.

17. In response to the suggestion of members of the CA Panel, the Administration published its Consultation Paper on Review of Regulation on EAs on 6 December 2011 for public consultation until 31 December 2011. The latest proposal put forward in the Consultation Paper in respect of the operating and keeping of an election website for public inspection of EAs was as follows -

- (a) a candidate can post his EAs onto an election website maintained by him or a central portal maintained by REO for public inspection instead of making declaration and submission of EAs to RO; and

- (b) a candidate is allowed to post EAs onto his election website or the central portal within one working day after the publication of EAs instead of having to make declaration and submission of EAs to RO before publishing EAs.

Relevant documents

18. A list of the relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
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Appendix

Relevant documents on Bills Committee on Electoral Legislation (Miscellaneous Amendments) Bill 2012

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	16.2.2004 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	17.12.2007 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Legislative Council	13.7.2011	<u>Report of the Panel on Constitutional Affairs</u>
CA Panel	17.1.2011 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	18.3.2011 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Subcommittee on Nine Amendment Regulations made under the Electoral Affairs Commission Ordinance	2.6.2011	<u>Agenda</u> <u>Minutes</u>
	8.6.2011	<u>Agenda</u> <u>Minutes</u>
	14.6.2011	<u>Agenda</u> <u>Minutes</u>
	17.6.2011	<u>Agenda</u> <u>Minutes</u>
CA Panel	20.6.2011 (Item III)	<u>Agenda</u> <u>Minutes</u>
	21.11.2011 (Item IV)	<u>Agenda</u>
CA Panel	--	<u>Consultation Paper on Review of Regulation on Election Advertisements issued by Constitutional and Mainland Affairs Bureau</u>