

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

HEAD 148 – GOVERNMENT SECRETARIAT: FINANCIAL SERVICES AND THE TREASURY BUREAU (FINANCIAL SERVICES BRANCH)

Subhead 003 Recoverable salaries and allowances (General)

Members are invited to recommend to Finance Committee the retention of the following supernumerary post in the Financial Services Branch of the Financial Services and the Treasury Bureau for a period of 24 months from 1 August 2012 to 31 July 2014 –

1 Administrative Officer Staff Grade B
(D3) (\$147,150 - \$160,600)

PROBLEM

The existing supernumerary post of an Administrative Officer Staff Grade B (AOSGB) (D3) in the Financial Services Branch (FSB) of the Financial Services and the Treasury Bureau (FSTB), designated as Deputy Secretary (Financial Services) 3 (DS(FS)3), will lapse on 1 August 2012. We need to retain the post to provide high-level policy steer for (a) the completion of the first phase of the Companies Ordinance (Cap. 32) (CO) Rewrite exercise, in particular enactment of the relevant subsidiary legislation; (b) a new exercise to modernise Hong Kong's corporate insolvency law; and (c) undertaking other major policy initiatives including the reform of the Trustee Ordinance (Cap. 29) (TO) and the Perpetuities and Accumulations Ordinance (Cap. 257) (PAO).

/PROPOSAL

PROPOSAL

2. We propose to retain one supernumerary post of AOSGB (D3) in the FSB for 24 months from 1 August 2012 to 31 July 2014 to provide high-level policy steer for the exercise to complete the first phase CO Rewrite, modernise Hong Kong's corporate insolvency law and take forward other major policy initiatives.

JUSTIFICATION

CO Rewrite exercise

3. We launched a rewrite of the CO in mid-2006. This is important for enhancing Hong Kong's status as a major international business and financial centre. The Companies Bill (CB), which represents the outcome of the first phase of the Rewrite exercise concerning over 910 000 live companies in Hong Kong, was introduced into the Legislative Council (LegCo) on 26 January 2011. It is now being scrutinised by a Bills Committee in LegCo and is targeted for enactment in mid-2012. After the CB is enacted as the new CO, more than ten pieces of subsidiary legislation will have to be made before it can come into operation. We estimate that the new CO may commence operation in around 2014.

Modernisation of corporate insolvency law

4. Upon the commencement of the new CO, the remaining provisions of the existing CO will be retitled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance (C(WUMP)O), which will mainly comprise provisions on (a) company winding-up and insolvency; and (b) prospectuses¹. For the provisions on company winding-up and insolvency, we plan to roll out a new exercise to modernise Hong Kong's corporate insolvency law. The underlying objectives of the exercise are threefold, namely –

- (a) streamlining and rationalising the company winding-up procedures with regard to international experience to facilitate efficient administration of winding-up and increase protection of creditors;
- (b) providing for a new statutory corporate rescue procedure for companies in short-term financial difficulty to turn around or restructure; and
- (c) enhancing regulation of the winding-up regime and insolvency practitioners.

/(a)

¹ The provisions on prospectuses in the C(WUMP)O will be dealt with in a separate review by the Securities and Futures Commission and will likely be moved to the Securities and Futures Ordinance (Cap. 571).

(a) Streamlining and rationalising the company winding-up procedures

5. The company winding-up and insolvency-related provisions in the existing CO are broadly based on the provisions contained in the Companies Act 1929 and Companies Act 1948 of the United Kingdom (UK). While many amendments have been made to these provisions in Hong Kong over the years with focus on particular issues, other jurisdictions have embarked upon exercises to reform their corporate insolvency laws². To consolidate Hong Kong's position as a major international business and financial centre, we consider it beneficial to conduct a holistic review of the company winding-up and insolvency-related provisions in the existing CO to streamline and rationalise the procedures so that our corporate insolvency regime can keep up with latest developments and meet social and economic needs.

(b) Providing for a new statutory corporate rescue procedure

6. At present, Hong Kong companies facing financial difficulty may try to come to an arrangement with their creditors by means of non-statutory voluntary workouts or restructuring arrangements under section 166 of the CO. However, neither of those methods provides for a moratorium that can bind creditors while an arrangement proposal is being formulated, thereby lacking certainty. A statutory corporate rescue procedure will provide for a moratorium on creditors' legal action while an independent professional third party, namely the provisional supervisor, can take effective control of the company during the provisional supervision period and formulate a voluntary arrangement proposal for creditors within a specified timeframe. We launched a three-month public consultation on the legislative proposals to introduce a statutory corporate rescue procedure in October 2009. We briefed the LegCo Panel on Financial Affairs on the proposals in December 2009 and the public consultation conclusions in July 2010. Since the issue of the consultation conclusions in July 2010³, we have been working on detailed proposals of the statutory corporate rescue procedure. However, in view of other competing priorities and resource constraints, it is not possible for the Bill on the corporate rescue procedure to be introduced into the LegCo within its current term. We will therefore consider how best to take forward the proposals on the statutory corporate rescue procedure in the modernisation of corporate insolvency law.

/(c)

² For example, in the UK, as a result of the recommendations in the Report of the Review Committee on Insolvency Law and Practice (commonly referred to as the "Cork Report") issued in 1982, the Insolvency Act 1985 made substantial changes to insolvency provisions of the Companies Act 1985. The Insolvency Act 1985 was subsequently replaced by the Insolvency Act 1986, which was a consolidating enactment that repealed and re-enacted the Insolvency Act 1985 and the insolvency provisions of the Companies Act 1985. In Australia, the Law Reform Commission published a Report on its General Insolvency Inquiry in 1988 (commonly referred to as the "Harmer Report") which had led to substantial corporate insolvency law changes in 1993.

³ Available at http://www.fstb.gov.hk/fsb/ppr/consult/doc/review_crplp_conclusions_e.pdf.

(c) Enhancing regulation of the winding-up regime and insolvency practitioners

7. Over the years, the Official Receiver's Office (ORO) has been gradually moving away from its previous role as the liquidator of last resort in court winding-up cases to being a regulator of insolvency practitioners. Since 2000, ORO began outsourcing court winding-up cases to insolvency practitioners. There is a need to review the existing provisions concerning the regulation of the winding-up regime to improve transparency for creditors, ensure appointment of competent insolvency practitioners, better insulate companies from delinquent officers and insolvency practitioners as well as to ensure that proper control can be exercised over the work of insolvency practitioners when they administer the winding-up process.

8. We aim to substantially complete the corporate insolvency law modernisation exercise within the 2012-16 LegCo term. Given the timetable, we will implement the deliverables of the modernisation exercise through amendments to the C(WUMP)O. Depending on the progress of review, we plan to launch a public consultation in late-2012 to consult the public on the major legislative proposals, and finalise them thereafter with a view to introducing the Bill into LegCo by the second quarter of 2014.

Review of the TO and PAO

9. The TO has not been substantially reviewed since its enactment in 1934. Some of its provisions, especially those concerning trustees' powers, are outdated. The PAO contains complex and outdated rules regarding perpetuities and accumulations of income. Since early 2008, we have been reviewing the trust law regime in Hong Kong, mainly to amend and modernise the TO and PAO to provide a better legal framework for the operation of trusts in Hong Kong.

10. Modernising our trust law will strengthen the competitiveness and attractiveness of our trust services industry and allow us to leverage the reform in trust law in other comparable jurisdictions (such as the UK and Singapore) in recent years. It will encourage more local and overseas settlors to choose Hong Kong law as the governing law for their trusts and to administer their trusts in Hong Kong. A modern and user-friendly TO will benefit the settlors, trustees and beneficiaries by providing more clarity and certainty in law. It will also provide trustees with modern powers that are necessary for the efficient management of trusts.

11. We launched a three-month public consultation on proposals to modernise TO and PAO in June 2009 and briefed the LegCo Panel on Financial Affairs on the consultation conclusions in March 2010. We plan to consult the relevant stakeholders on the draft Trust Law (Miscellaneous Amendments) Bill before introducing the Bill into the LegCo in 2012-13.

The need to retain the supernumerary AOSGB post

12. The corporate insolvency law modernisation exercise will be a major undertaking involving extensive legal and policy research into the existing provisions of the CO as well as developments in insolvency law taking place in other major common law jurisdictions. Besides, it is important to involve relevant stakeholders at an early stage to ensure that the new regime is attuned to modern needs. After finalising the legislative proposals, there is also a need to prepare drafting instructions with a view to finalising the Bill. We envisage that all these work require a significant amount of manpower resources.

13. In the initial planning stage, we propose to absorb most of the workload arising from the preparatory work as far as practicable within the FSB of the FSTB, the ORO and the Department of Justice. However, to spearhead the exercise and to provide high-level policy steer and management of this large-scale project, we propose to extend, for a period of 24 months from 1 August 2012 to 31 July 2014, a supernumerary AOSGB post in FSB (i.e. DS(FS)3), which is due to lapse by 1 August 2012.

14. DS(FS)3 is currently the head of the Companies Bill Team formed in mid-2006 dedicated for the CB. He is also leading other major policy initiatives, including the review of the TO and the PAO, the review of the bankruptcy abscondee regime as well as the review of the auditor oversight regime. In addition, he is also responsible for overseeing policy issues concerning the accountancy sector and insolvency administration. With the expected enactment of the CB in mid-2012, DS(FS)3's work with regard to the CB will start to wind down. However, he will still be responsible for overseeing the making of the necessary subsidiary legislation to the CB which is integral and crucial to the smooth operation of the new CO after its commencement in around 2014. At the same time, the current proposal of rolling out a corporate insolvency law modernisation exercise will call for high-level policy steer. We therefore need to retain the post for a further period of 24 months till 31 July 2014. The proposed job description of the post during the 24 months is set out at Enclosure 1.

Encl. 1

15. After the initial planning stage, we envisage that substantial additional legal and policy support for the modernisation exercise would be required when public consultation on the modernisation proposals is scheduled to start in late-2012. We will keep the manpower resources requirements under review, and seek additional resources, if needed, through the established mechanism in due course.

Non-directorate support

16. DS(FS)3 will continue to be supported by two AOSGC (D2) staff (namely, Principal Assistant Secretary (FS)4 and Principal Assistant Secretary (FS)6) who are in turn underpinned by four non-directorate officers, namely, three Senior Administrative Officers and one Administrative Officer.

Alternatives considered

17. At present, there are two other Deputy Secretaries (Financial Services) in FSB, i.e. Deputy Secretary (Financial Services) 1 (DS(FS)1) and Deputy Secretary (Financial Services) 2 (DS(FS)2). DS(FS)1 is mainly responsible for policy matters and legislation relating to the securities and futures sector, the banking sector and financial market development. Within these policy areas, there are a number of key initiatives which are being pursued and will require active follow-up within the next few years. These include the further development of off-shore Renminbi business, the listing platform and asset management industry in Hong Kong; promotion of the further and sustainable development of the local bond market including the Islamic bond market; implementation of relevant regulatory reforms to enhance investor protection and market quality, and other enhancement measures on financial stability promulgated by international forums including G20 and the Basel Committee on Banking Supervision; and formulation of legislative proposals for facilitating market development including the implementation of a scripless securities market in Hong Kong.

18. DS(FS)2 is mainly responsible for policy matters and legislation relating to the insurance sector, Mandatory Provident Fund (MPF) schemes and other retirement schemes, anti-money laundering and counter terrorist financing in respect of the financial sectors, and housekeeping matters of Census and Statistics Department. There are a number of key initiatives currently underway, notably the proposed establishment of an independent Insurance Authority and a policyholders' protection fund, legislation for enhancing the regulation of MPF intermediaries, implementation of the proposed increase of the maximum level of relevant income for MPF contributions and the Employee Choice Arrangement for MPF schemes, the on-going review of the operation of the MPF system, implementation of the new anti-money laundering legislation for financial institutions, and preparation for seeking agreement of the Financial Action Task Force to remove Hong Kong from its regular follow-up process in mid-2012.

19. The workload arising from these initiatives will already fully occupy the two DS(FS)s over the next few years. In view of this, it would be unrealistic for them to take on the proposed portfolio of DS(FS)3. The organisation chart of FSB is at Enclosure 2.

FINANCIAL IMPLICATIONS

20. The proposed retention of the supernumerary post of DS(FS)3 will bring about an additional notional annual salary cost at mid-point of \$1,870,200. The full annual average staff cost of the proposal, including salaries and staff on-cost, is \$2,611,000. Since DS(FS)3 is expected to spend part of his time in overseeing the preparation of subsidiary legislation to be made under the CB for the period from 1 August 2012 to 30 June 2013, 25% of the staff cost during the said period (i.e. about \$0.6 million) will be met by the Companies Registry Trading Fund. The rest of the cost will be absorbed by the FSB internally.

ESTABLISHMENT CHANGE

21. The establishment changes in FSB for the last two years are as follows –

Establishment (Note)	Number of posts			
	Existing (as at 1 December 2011)	As at 1 April 2011	As at 1 April 2010	As at 1 April 2009
A	12 + (4)*	12 + (3)	12 + (3)	12 + (3)
B	65	63	57	53
C	87	89	91	89
Total	164 + (4)	164 + (3)	160 + (3)	154 + (3)

Note –

A - ranks in the Directorate Pay Scale or equivalent

B - non-directorate ranks, the maximum pay point of which is above Master Pay Scale (MPS) Point 33 or equivalent

C - non-directorate ranks, the maximum pay point of which is at or below MPS Point 33 or equivalent

() number of supernumerary directorate post

* as at 1 December 2011, there was no unfilled directorate post in FSB

PUBLIC CONSULTATION

22. The LegCo Panel on Financial Affairs was consulted on 7 November 2011. Members generally supported the proposal to extend the supernumerary AOSGB post for 24 months from 1 August 2012 to 31 July 2014. Some Members also urged the Administration to expedite the relevant processes of the corporate insolvency law modernisation exercise.

23. We also consulted the Standing Committee on Company Law Reform and other stakeholders on our plan to launch the corporate insolvency law modernisation exercise, and obtained general consensus on its early implementation.

CIVIL SERVICE BUREAU COMMENTS

24. The Civil Service Bureau supports the proposed retention of the supernumerary AOSGB post. The grading and ranking of the proposed post is considered appropriate having regard to the level and scope of responsibilities required.

ADVICE OF THE STANDING COMMITTEE ON DIRECTORATE SALARIES AND CONDITIONS OF SERVICE

25. As the post is proposed on a supernumerary basis, its retention, if approved, will be reported to the Standing Committee on Directorate Salaries and Conditions of Service in accordance with the agreed procedures.

**Proposed Job Description
Deputy Secretary (Financial Services)3**

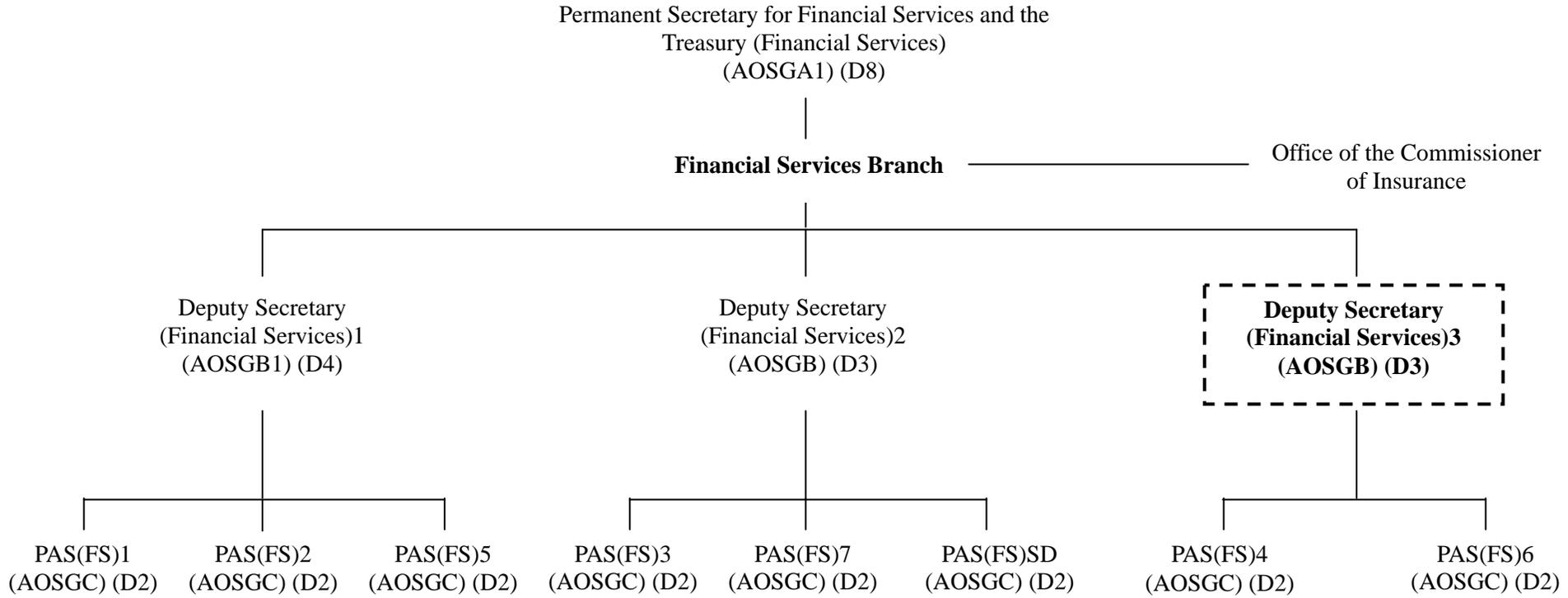
Rank : Administrative Officer Staff Grade B (D3)

Responsible to : Permanent Secretary for Financial Services and the Treasury (Financial Services) (PSFS)

Main Duties and Responsibilities –

1. To oversee the corporate insolvency law modernisation exercise.
2. To oversee the preparation of subsidiary legislation to be made under the Companies Bill.
3. To oversee the trust law reform, and to lead the Administration's team to assist the Legislative Council in scrutinising the proposed amendments to the Trustee Ordinance (Cap. 29) and the Perpetuities and Accumulations Ordinance (Cap. 257).
4. To oversee policy issues concerning insolvency administration and housekeeping matters concerning the Official Receiver's Office, including reviewing the bankruptcy abscondee regime.
5. To oversee policy issues and housekeeping matters concerning the Companies Registry.
6. To oversee regulation of the accountancy sector, including reviewing the existing regime on auditor oversight.
7. To undertake any other tasks as assigned by PSFS.

Organisation Chart of Financial Services and the Treasury Bureau (Financial Services Branch)



Legend :

- Supernumerary AOSGB post to be retained
- AOSGA1 Administrative Officer Staff Grade A1
- AOSGB1 Administrative Officer Staff Grade B1
- AOSGB Administrative Officer Staff Grade B
- AOSGC Administrative Officer Staff Grade C
- PAS(FS) Principal Assistant Secretary for Financial Services and the Treasury (Financial Services)
- SD Special Duties