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Paper for the House Committee

**Report of the Subcommittee on Prevention of Bribery Ordinance
(Amendment of Schedules 1 and 2) Order 2012**

Purpose

This paper reports on the deliberations of the Subcommittee on Prevention of Bribery Ordinance (Amendment of Schedules 1 and 2) Order 2012.

Background

2. The Prevention of Bribery Ordinance (POBO) (Cap. 201) and its subsidiary legislation provide a legislative framework for bribery prevention. Public bodies, which under section 2(1) include

“any board, commission, committee, or other body specified in Schedule 1”,

are subject to more stringent control than private organizations. Under sections 4 and 5 of POBO, members and employees of a public body are prohibited from soliciting or accepting any advantage relating to their work in the public body concerned. Furthermore, persons doing business with a public body are subject to sections 4, 5, and 8 of POBO, which make bribery and corrupt dealings in connection with public bodies and public servants under various circumstances an offence.

3. For a public body which is included in Schedule 1 and not in Schedule 2 to POBO, and is not a club, association or an education institution, all its members and employees will become public servants for the purposes of POBO and are subject to sections 4 and 5 of POBO.

4. However, some public bodies have members who have no management responsibility for running the public body in question. For these public bodies, only their employees, office holders (other than honorary ones) and members vested with responsibility for the conduct of the affairs of the public body are subject to sections 4 and 5 of POBO. These public bodies are set out in both Schedules 1 and 2 to POBO.

5. According to the Administration, in considering whether an organization should be designated as a public body under POBO, the following criteria are relevant –

- (a) whether the organization receives substantial public funds;
- (b) whether the organization has a monopoly or partial monopoly of a public service; and
- (c) whether the organization is placed in a position of special trust by the Government.

Prevention of Bribery Ordinance (Amendment of Schedules 1 and 2)
Order 2012 (the Order) (L.N. 38)

6. The Order was made by the Chief Executive-in-Council under section 35 of POBO to amend Schedules 1 and 2 to POBO and to rectify a clerical error in Schedule 1. The Order adds –

- (a) the four bodies below to Schedule 1 –
 - (i) Hong Kong Internet Registration Corporation Limited (HKIRC);
 - (ii) Hong Kong Domain Name Registration Company Limited (HKDNR);
 - (iii) Hong Kong Applied Science and Technology Research Institute Company Limited (ASTRI); and
 - (iv) Hong Kong Cyberport Management Company Limited (HKCMCL),

so as to designate these four organizations as public bodies under POBO; and

- (b) HKIRC to Schedule 2 of POBO to exclude its members who have no responsibility for the management of company affairs from the definition of public servants.

7. The Administration considers that all the four organizations perform important public missions and fulfill one or more of the above criteria (paragraph 5), and should be listed in Schedule 1 to POBO.

8. Except for HKIRC, all employees and members of the four bodies will become public servants for the purpose of POBO. For HKIRC, which is also added to Schedule 2 to POBO, only the employees, office holders (other than honorary ones) and members who are vested with responsibility in conducting the affairs of HKIRC are public servants for the purpose of POBO.

9. According to the Administration, HKDNR, being HKIRC's subsidiary, is run by the Board of Directors and the staff of HKIRC. It has no members who do not have management responsibility. As such, the Administration considers that there is no need to include HKDNR in Schedule 2.

10. The Order will come into operation on 11 May 2012.

11. The Order was gazetted on 16 March 2012 and tabled at the Legislative Council on 21 March 2012. The scrutiny period of the Order has been extended from 18 April 2012 to 9 May 2012 by resolution of the Council passed on 18 April 2012.

The Subcommittee

12. At the meeting of the House Committee on 23 March 2012, Members formed a Subcommittee to examine the Order. Under the chairmanship of Hon CHAN Kam-lam, the Subcommittee held three meetings with the Administration, including two meetings with a representative of the Independent Commission Against Corruption (ICAC) as well and one meeting with the HKIRC Chairman. The membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

Inclusion of HKIRC in Schedule 2

13. The Subcommittee has asked about the rationale of including HKIRC in Schedule 2 to POBO, which will make its Directors and employees, but not its ordinary members, public servants. It is noted that as at 4 April 2012, the ordinary members of HKIRC comprised 365 Internet-related service providers and 2 566 Internet users who had opted to be HKIRC members.

14. The Administration has explained that the ordinary members of HKIRC are “.hk” and “.香港” domain name holders maintaining a valid registration with HKIRC. They have no responsibility for the management of HKIRC, the administration and allocation of domain names, or dispute resolution. As members, they have a right to attend the Annual General Meeting held every year to consider the accounts, balance sheets and the reports of the Directors and auditors, as well as to elect Directors and appoint and fix the remuneration of the auditors. They can also move resolutions in accordance with the Memorandum and Articles of Association for consideration and decision at Extraordinary General Meeting (EGM), which can only be passed by a majority of members present. The Administration has advised that given their indirect and limited role in HKIRC’s affairs, the ordinary members of HKIRC should not be made public servants under POBO. This arrangement also applies to the eight public bodies in Schedule 2 to POBO, a list of which is in **Appendix II**. In effect, the eight Directors on the HKIRC Board and 25 staff members of HKIRC as well as its wholly owned subsidiary, HKDNR, who are responsible for the management and operation of HKIRC, will become public servants after designation of HKIRC and HKDNR as public bodies.

15. Hon James TO has expressed concern about the inclusion of HKIRC in Schedule 2 and its implications. He has expressed the view that although HKIRC’s ordinary members have no management responsibilities, they can elect half of the number of Directors of the HKIRC. If HKIRC's ordinary members are not public servants, offering advantage to them in the election of Directors would not be subject to the POBO provisions applicable to public servants. He has asked the Administration to consider a hypothetical situation that if certain HKIRC’s ordinary members were offered advantage by a member to elect a particular Director(s) who did not receive any advantage but would and in fact adopted certain policies that would be favourable to the giver of advantage concerning the registration of .hk domain names. Further, the policies in question may not prove to be against the public interest. Mr TO considers that the above situation can only be tackled by making HKIRC’s ordinary members public servants under POBO. He

has also pointed out that since HKIRC's members can move resolutions at EGM, which can override decisions of the Board of Directors, HKIRC's members can in fact exert influence on HKIRC's business.

16. In response to Mr James TO's concern, the Administration has consulted the HKIRC Board again. The Administration has advised that the HKIRC Board maintains its view that its ordinary members should not be made public servants under POBO because they have no management responsibility. Moreover, given that some 70% of HKIRC's 2 931 ordinary members are companies, but not individuals, it is impracticable to make them public servants under POBO. The Administration is supportive of the HKIRC Board's view and has further pointed out that the HKIRC Board comprises four Directors appointed by the Government and another four elected by HKIRC's members. Among the elected Directors, two are elected by members of the Supply Class (i.e. Internet-related service providers maintaining “.hk” and “.香港” domain names who opt to be members) and two by members of the Demand Class (i.e. other “.hk” and “.香港” domain name holders who opt to be members). The quorum of a Board meeting shall not be less than half of the Directors, including at least one appointed Director. Issues arising at Board meetings are decided by a majority of votes, which are open for public information through HKIRC's website. The Administration considers that under such a transparent governance mechanism with checks and balances, it would be highly unlikely for any individual Director to be able to exert undue influence on HKIRC's business.

17. The Administration has also advised that under the Memorandum of Understanding between the Government and HKIRC, HKIRC has the obligation to conduct its activities in an open and transparent manner. Besides, according to a legally-binding Designation Agreement between the Government and HKIRC, the Government may terminate HKIRC's status as the designated administrator of “.hk” and “.香港” if there is conviction by a court of law of a director or officer of HKIRC of any serious dishonesty or other serious offences.

18. Mr James TO considers that the Administration's explanation fails to address his concerns and has indicated that he would consider moving an amendment to put HKIRC under Schedule 1 only. In this connection, he has requested the Administration to provide a paper on the Administration's legal advice that a company cannot be made a public servant under POBO, and on the legislation that can be invoked to tackle

the hypothetical situation as stated in paragraph 15 above. Mr TO would further decide whether he would move the said amendment in the light of the information to be provided by the Administration.

Outsourcing

19. Hon James TO has expressed concern whether the above four organizations designated as public bodies have contracted out any core operations and, if so, whether the outsourced contractors concerned should also be subject to a level of probity. The Administration has confirmed that currently, the four organizations only contract out non-core operations, such as security and cleansing services. They have no plan to contract out core operations (such as leasing and incubation programmes) which require screening, evaluation and selection.

20. To address members' concern, the Administration and ICAC representatives have suggested that upon designation as public bodies, the four organizations will be advised to include a probity clause in their outsourcing contracts notifying their counter-parties that they are public bodies under POBO and requiring, by way of contract, their service contractors to observe stipulated probity guidelines.

21. Hon James TO and Hon LAU Kong-wah have requested ICAC to explore further anti-corruption measures to tighten the control of a contractor engaged to provide services which are non-core but of a relatively sensitive nature¹, or which require substantial public funds for the service delivery, thus rendering the outsourced contractor to fulfill the criterion in paragraph 5(a) above. To address members' concerns, ICAC has undertaken that its Corruption Prevention Department (CPD) would offer corruption prevention advice and make recommendations to government departments/public bodies concerned to tighten control on the service providers/contractors as necessary. The control measures on outsourced service providers/contractors recommended by ICAC are in **Appendix III** for Members' reference. At the suggestion of Hon LAU Kong-wah, ICAC has agreed to remind all public bodies concerned that they should ensure that their contractors' staff members are also well aware that they are subject to section 9 of POBO and are prohibited from offering, soliciting or accepting advantage in relation to the outsourced contracts.

¹ Examples given by members include the outsourcing of telecommunications services by Government departments and inspection of sites, which may involve the handling of sensitive information.

Retrospective effect

22. The Subcommittee has expressed concern that as the amendments carry no retrospective effect, impropriety committed prior to the designation of the four organisations as public bodies could not be pursued under POBO. The Administration has advised that some anti-corruption provisions in POBO target persons employed in both the public and private sectors. In particular, section 2 defines an agent to include "a public servant and any person employed by or acting for another." Further, section 9 makes it an offence for any agent who, without lawful authority or reasonable excuse, solicit or accept an advantage as an inducement to or reward for or otherwise on account of the agent's, e.g., doing or forbearing to do any act in relation to his principal's affairs or business. In the light of the above, the Administration opines that any act which would have been illegal should the amendment have retrospective effect can, despite the lack of such effect, be catered by section 9.

23. At the request of the Subcommittee, the Administration has provided a summary of the differences between non-public bodies and public bodies with reference to each of the relevant provisions of POBO and the ICAC Ordinance (Cap.204). The summary is in **Appendix IV** for Members' reference.

Mechanism to designate organizations as public bodies

24. Hon Audrey EU has asked why the Government decided only in February 2012 that the Order be made, whereas the recommendation of designating HKIRC and HKDNR as public bodies was made by CPD of ICAC to the Government in 2007. The Administration has advised that in 2007, CPD suggested to the Government that HKIRC and HKDNR should be designated as public bodies under POBO, given that the ".hk" domain name was an important public resource and HKIRC was designated by the Government as the sole service provider. The Commerce and Economic Development Bureau (CEDB) consulted HKIRC in October 2009 on the proposal to designate it and HKDNR as public bodies after its re-organisation from 2007 to 2009. In May 2010, HKIRC confirmed its agreement to be included in both Schedules 1 and 2. In the course of considering the need to designate HKIRC and HKDNR as public bodies, CEDB took the opportunity to review whether the same arrangement should be made for other organizations which were also under the purview of CEDB. After review, CEDB considered that ASTRI and HKCMCL also fulfilled one or more of the criteria in

paragraph 5 and should be designated as public bodies under POBO.

25. Hon Audrey EU has enquired about the existing institutional structure to conduct regular reviews on whether any organization should be designated as a public body under POBO. The Administration has advised that bureaux and departments are required to consult ICAC on the need to designate a new organisation² as a public body when it is established. For existing organizations that have not been designated as public bodies, the responsible bureaux/departments will take into account the criteria in paragraph 5 and decide whether any such organisation should be designated as such.

26. Hon Audrey EU has pointed out that as seen from the summary in Appendix IV, an organization is not subject to the relevant provisions of POBO, unless the organization is designated as a public body under POBO. She has also expressed concern that only 115 organizations (or 119 including the four organizations covered by the Order) have been designated as public bodies under POBO, which is a rather small number compared with the number of statutory bodies in Hong Kong. Ms EU considers it desirable to put in place a mechanism whereby each policy bureau is required to regularly review the organizations under its purview on the basis of the established criteria to identify any organization that should be designated as a public body under POBO. She has further suggested that consideration should be given to assigning a leading policy bureau to coordinate the conduct of such reviews by individual bureaux.

27. The Administration has advised that in view of members' concern, it would consider issuing a reminder to bureaux and departments on the need to review whether the existing organizations under their purview should be designated as public bodies. The Subcommittee has agreed to refer members' views and the Administration's suggestion to the relevant Panel for follow-up.

Amendments

28. Hon James TO has indicated that he would consider moving an amendment to the effect that HKIRC's ordinary members would be made public servants under POBO (paragraphs 13 to 18 refer). The

² According to the Administration, recent examples of new organisations being designated as public bodies upon establishment include the Financial Reporting Council, the West Kowloon Cultural District Authority and the Digital Broadcasting Corporation Hong Kong Limited.

Subcommittee and the Administration have not proposed amendments to the Order.

Advice sought

29. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
2 May 2012

**Subcommittee on Prevention of Bribery Ordinance
(Amendment of Schedules 1 and 2) Order 2012**

Membership list

Chairman Hon CHAN Kam-lam, SBS, JP

Members Hon James TO Kun-sun
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Samson TAM Wai-ho, JP

(Total : 5 Members)

Clerk Ms Joanne MAK

Legal Adviser Miss Evelyn LEE

**Public Bodies in
Schedule 2 of the Prevention of Bribery Ordinance (Cap. 201)**

1. The Stock Exchange of Hong Kong Limited
2. Hong Kong Futures Exchange Limited
3. Hong Kong Securities Clearing Company Limited
4. The SEHK Options Clearing House Limited
5. HKFE Clearing Corporation Limited
6. Hong Kong Exchanges and Clearing Limited
7. A company recognized as an investor compensation company under section 79(1) of the Securities and Futures Ordinance (Cap 571) *
8. Financial Reporting Council

Note:

- * The Investor Compensation Company Limited has been recognised as an investor compensation company.

**Subcommittee on Prevention of Bribery Ordinance
(Amendment of Schedules 1 and 2) Order 2012**

ICAC's Response to Issue Raised by Members

Purpose

At the second meeting of the Sub-committee held on 13 April 2012, Members enquired on the corruption prevention measures to tighten the control of contractors engaged by public bodies to provide services which are non-core but of a relatively sensitive nature or which requires substantial public funds for the service delivery. This paper sets out ICAC's response.

Control on Outsourced Contractors/Service Providers

2. From corruption prevention angle, sensitive duties, such as law enforcement or those involving sensitive information, should be avoided from outsourcing. Only supporting functions may be outsourced if required.
3. Where there is a need to outsource, ICAC recommends that control on the service provider/contractor could be tightened by one or more than one of the following means, as appropriate:
 - a. Make the service provider/contractor a public body where the circumstance warrants and permits.
 - b. Include probity requirement as one of the listing conditions or contract requirements to commit the service provider/contractor to ethical practice.
 - c. Include in the contract requirements that the Corruption Prevention Department (CPD) of ICAC may conduct review on the systems and procedures of the service provider/contractor in relation to the delivery of the outsourced duties.
 - d. Step up supervisory control by the government department involved

such as conducting random checks and requiring regular reporting etc.

4. With probity provisions imposed on the outsourced service provider/contractor, their agents, employees and sub-contractors will be prohibited from offering, soliciting or accepting advantage in relation to the contracts. Breaches of such provisions will result in infringement of Section 9 of the Prevention of Bribery Ordinance for which a criminal sanction can be imposed. Connivance by the service provider/contractor would also attract regulatory action under the list management regime or contractual action under the outsourced contracts.

5. CPD of ICAC would offer corruption prevention advice and make recommendations to government departments and public bodies concerned to tighten control on the service providers/contractors as necessary.

**Corruption Prevention Department
Independent Commission Against Corruption
April 2012**

**Subcommittee on Prevention of Bribery Ordinance
(Amendment of Schedules 1 and 2) Order 2012**

**Administration's Response to Issues Arising from
the Sub-committee Meeting on 30 March 2012**

Purpose

At the Sub-committee meeting on 30 March 2012, Members requested a summary in table form of the differences between non-public bodies and public bodies with reference to each of the relevant sections of the Prevention of Bribery Ordinance (Cap. 201). Members may wish to note that sections 12 and 13 of the Independent Commission Against Corruption Ordinance (Cap. 204) are also relevant. The requisite information is set out below:

Anti-corruption provisions	Non-public bodies	Public bodies
Prevention of Bribery Ordinance (Cap. 201)		
Section 4(1) and (2) Bribery	Not applicable	Applicable to public servants and any persons offering advantage to them
Section 5(1) and (2) Bribery for giving assistance, etc. in regard to contracts	Not applicable	Applicable to public servants and any persons offering advantage to them
Section 6 Bribery for procuring withdrawal of tenders	Not applicable	Applicable to anyone dealing with tenders of public bodies
Section 7 Bribery in relation to auctions	Not applicable	Applicable to anyone dealing with auctions of public bodies
Section 8 (2) Bribery of public servants by persons having dealings with public bodies	Not applicable	Applicable to anyone having dealings with public bodies
Section 9 Corrupt transactions with agents	Applicable to both non-public bodies and public bodies	
Independent Commission Against Corruption Ordinance (Cap. 204)		
Section 12(d) and (f) Duties of the Commissioner	Not applicable	The Commissioner has a statutory duty to examine the practices of public bodies to facilitate the discovery of corrupt practices, and make recommendations for corruption prevention purposes.
Section 13(2)(b) Powers of the Commissioner	Not applicable	To discharge the duties in section 12(d) or (f), the Commissioner and authorized officers are empowered to gain access to, relevant records, books and other documents of a public body.