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Panel on Financial Affairs

Meeting on 6 January 2014

**Background brief on retention of two supernumerary directorate posts in
Financial Services Branch of the Financial Services and
the Treasury Bureau**

Purpose

This paper provides background information on the staffing proposal of retaining a supernumerary Administrative Officer Staff Grade B ("AOSGB") (D3) post and a supernumerary Administrative Officer Staff Grade C ("AOSGC") (D2) post in Financial Services Branch ("FSB") of the Financial Services and the Treasury Bureau ("FSTB") for dealing with legislative exercises on corporate insolvency, auditor regulatory reform, and "abscondee" regime under the Bankruptcy Ordinance (Cap. 6) ("BO"), as well as other matters. It also summarizes the major concerns and views expressed by Members during discussions on the staffing proposal and other related issues in 2011, 2012 and 2013.

Background

Modernization of corporate insolvency law

2. The Administration launched a comprehensive rewrite of the Companies Ordinance (Cap. 32) ("CO") in mid-2006. Due to the extensive nature of the CO rewrite exercise, a phased approach was taken by tackling the provisions affecting the operation of live companies in Hong Kong through introduction of the Companies Bill in January 2011. The Companies Ordinance 2012 ("the new CO") was enacted by the Legislative Council ("LegCo") in July 2012. When the new CO comes into operation, the

provisions concerning the operation of live companies in the existing CO will be repealed and the remaining provisions, mainly the winding-up and insolvency provisions will be re-titled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance. In November 2011, the Administration rolled out a legislative exercise to modernize Hong Kong's corporate insolvency law. The underlying objectives of the exercise are threefold, namely:

- (a) streamlining and rationalizing 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.

3. In January 2012, the Administration formed an Advisory Group chaired by the Official Receiver ("OR") and comprising representatives from the business sectors, relevant professions, private insolvency practitioners, the academic sector as well as members of the Standing Committee on Company Law Reform to provide technical inputs and expert advice to the Government on the legislative proposals to be included in the corporate insolvency law improvement exercise. The Advisory Group completed its work in October 2012. The Administration published a consultation document on "Improvement of Corporate Insolvency Law Legislative Proposals" on 16 April 2013 for a three-month consultation up to 15 July 2013. Subject to the outcome of the consultation, the Administration plans to introduce an amendment bill into LegCo in 2014-2015.

Review of the abscondee regime under the Bankruptcy Ordinance (Cap. 6)

4. Section 30A(3) of BO provides that a bankrupt would be automatically discharged from bankruptcy after the running of a relevant period from the date of the bankruptcy order. Under section 30A(10)(b), if a bankrupt has left Hong Kong after the date of the bankruptcy order without notifying the trustee of his itinerary and his contact information (section 30A(10)(b)(i)); or fails to return to Hong Kong at such time as specified by the trustee (section 30A(10)(b)(ii)), the relevant period will automatically be suspended from running until the bankrupt returns to Hong Kong and notifies the trustee of his return. Bankrupts who left Hong Kong and could not be contacted are known as "abscondee".

5. According to the Administration, section 30A(10)(b)(i) was ruled by the Court of Final Appeal in an earlier court case as unconstitutional on grounds that the provision is unreasonably restrictive of the right to travel guaranteed under the Basic Law. In view of the ruling, the Administration intends to take forward a review of the abscondee regime.

Retention of the supernumerary post of AOSGB in 2012

6. The supernumerary AOSGB post was created in March 2006 for 60 months to take forward the CO rewrite exercise. In April 2011, the post was retained for 16 months up to 31 July 2012¹. On 7 November 2011, the Administration consulted FA Panel on the staffing proposal to further extend the supernumerary AOSGB post for 24 months up to 31 July 2014 and its plan to modernize Hong Kong's corporate insolvency law. The staffing proposal was endorsed at the Establishment Subcommittee ("ESC") meeting on 18 January 2012 and approved by the Finance Committee ("FC") on 13 April 2012. The main responsibilities of the AOSGB post are –

- (a) To oversee the corporate insolvency law modernization exercise;
- (b) To oversee the preparation of subsidiary legislation to be made under the Companies Bill;
- (c) To oversee the trust law reform and to lead the Administration's team to assist the Legislative Council in scrutinizing the proposed amendments to the Trustee Ordinance (Cap. 29) and the Perpetuities and Accumulations Ordinance (Cap. 257);
- (d) To oversee policy issues concerning insolvency administration and housekeeping matters concerning the Official Receiver's Office, including reviewing the bankruptcy abscondee regime;
- (e) To oversee policy issues and housekeeping matters concerning the Companies Registry; and
- (f) To oversee regulation of the accountancy sector, including reviewing the existing regime on auditor oversight.

¹ The relevant staffing proposals are set out in EC(2005-06)9 and EC(2010-11)1 respectively.

Retention of the supernumerary post of AOSGC in 2013

7. The supernumerary AOSGC post was created in October 2006 for 48 months to underpin AOSGB post in taking forward the CO rewrite exercise. In October 2010, the post was retained for 33 months up to 30 June 2013¹. On 7 January 2013, the Administration consulted FA Panel on the staffing proposal to further retain the supernumerary AOSGC post for 12 months up to 30 June 2014. The staffing proposal was endorsed at ESC meeting on 20 February 2013 and approved by FC on 15 March 2013. The main responsibilities of the AOSGC post are –

- (a) To provide policy input on matters relating to the implementation of the new CO and its subsidiary legislation;
- (b) To provide policy support on the preparation of the subsidiary legislation to be made under the new CO and throughout the vetting of the same by LegCo, and to make preparation for implementation;
- (c) To provide policy input on the reform of our trust law and policy support throughout the vetting of the Trust Law (Amendment) Bill 2013 by LegCo, and make preparation for implementation of the reform proposals;
- (d) To take forward a policy review on the abscondee regime under BO and formulate detailed proposals on the way forward; and
- (e) To be responsible for housekeeping matters of the Companies Registry.

Major views and concerns expressed by Members at meetings of the Panel on Financial Affairs and the Establishment Subcommittee

8. The major views and concerns expressed by Members on the staffing proposals to retain the supernumerary AOSGB and AOSGC posts and related issues at meetings of FA Panel and ESC held in 2011, 2012 and 2013 are summarized in the ensuing paragraphs. FA Panel was updated on the progress of the legislative exercise to improve corporate insolvency law at the meeting on 3 May 2013. The major views and concerns expressed by members on related issues are also summarized below.

Workload of the supernumerary AOSGC post

9. At the FA Panel meeting and ESC meeting in January and February 2013, some Members expressed concern that as the holder of the AOSGC post had to undertake a wide range of duties, the proposed extension period of 12 months might not be adequate to complete all required tasks. Members further opined that the Administration should step up efforts to complete the review of the abscondee regime under BO within the target timeframe.

10. The Administration advised that the proposed extension period for the supernumerary post was drawn up in a prudent manner having regard to the estimated timeframe for implementing the new CO in the first quarter of 2014 and completion of the legislative exercise for the trust law reform by mid 2014. On the review of the abscondee regime, the Administration responded that it had started preparatory work for the review and would endeavour to reach a milestone by mid-2014 by developing policy options to facilitate subsequent public discussion and engagement with stakeholders. The Administration stressed that it would review the future need for the supernumerary post taking into account progress of the tasks, and would seek further extension of the post through established mechanism when necessary.

Timeframe of the modernization of corporate insolvency law

11. At FA Panel meeting on 7 November 2011, members called on the Administration to expedite the progress to modernize the corporate insolvency law and introduce the legislative proposals into LegCo as soon as possible.

12. The Administration responded that while it had conducted preliminary study on streamlining and rationalizing the company winding-up procedures, discussions with the stakeholders/experts and public consultation on the legislative proposals would still need to be undertaken before finalizing the proposals. The Government also considered it appropriate to take forward the legislative proposals on modernizing the company winding-up procedures and the new statutory corporate rescue procedure simultaneously as some of the proposals for the two sets of procedures were inter-related. Given the complexity of the issues involved and the large number of parties to be consulted, the Administration aimed to substantially complete the modernization exercise within the 2012-2016 LegCo term.

The necessity of a new corporate rescue procedure

13. At FA Panel meetings on 7 November 2011 and 3 May 2013, some members opined that in view of the impact of the global financial crisis and the

relevant developments in overseas jurisdictions, the Administration should introduce legislative proposals for a new statutory corporate rescue procedure into LegCo as soon as possible. Nonetheless, some members had reservation on the procedure and pointed out that the business community had yet to reach a consensus on the matter. These members also expressed concern that only the large corporations would benefit from the proposed corporate rescue regime since the small and medium-sized enterprises ("SMEs") would not be able to afford the high professional fees. Furthermore, there was concern about including insolvent trading provisions in the proposed corporate rescue procedure which would place unfair responsibilities on the directors of corporations. They pointed out that a director would face a dilemma when a limited company became insolvent. If the director declared that his company was insolvent, banks would be reluctant to provide credit facility for the company. These members urged the Administration to consider the proposal on corporate rescue procedure carefully.

14. The Administration responded that it had launched a public consultation on the conceptual framework and some key issues of a corporate rescue procedure in 2009 and also briefed FA Panel on the feedback and conclusions of the public consultation in July 2010. Relevant parties, including SMEs, had been consulted. The Administration remarked that, while sizable corporations were more likely to benefit from the rescue procedures, the legislative provisions would provide more protection to the employees and suppliers in case a corporate became insolvent. As for the liabilities of directors, the Administration could explore the possibility of providing appropriate safe harbours in the proposed legislation to protect the interests of directors. The Administration supplemented that it had been working further on the detailed proposals of a corporate rescue procedure and would engage stakeholders on the proposals in 2013-2014.

Fees for insolvency cases

15. At FA Panel meeting on 7 November 2011, a member expressed concern about the high level of fees charged by OR in individual insolvency cases which might dent into the dividends available for distribution to creditors, and urged that there should be provisions to regulate the amount of fees charged by OR. The Administration advised that the Government had from time to time reviewed the fee scale for insolvency cases. A person who felt aggrieved regarding the fee charged by OR for a bankruptcy case could seek redress from the court. The subsidiary legislation relating to the scale of fees to be charged for insolvency cases would also be reviewed during the exercise to improve the corporate insolvency law.

Latest development

16. The supernumerary and AOSGB and AOSGC post created in FSB of FSTB will lapse by end of July 2014 and end of June 2014 respectively. The Administration will brief FA Panel at the coming meeting on 6 January 2014 on the proposal to retain the two supernumerary directorate posts.

Relevant papers

17. A list of relevant papers is given in the **Appendix I**.

Council Business Division 1
Legislative Council Secretariat
2 January 2014

List of relevant papers

Date	Event	Paper/Minutes of meeting
7 November 2011	The Panel on Financial Affairs ("FA Panel") was briefed on the staffing proposal to retain the supernumerary post Administrative Officer Staff Grade B in the Financial Services Branch of the Financial Services and the Treasury Bureau	Administration's paper (LC Paper No. CB(1)237/11-12(05)) Minutes (LC Paper No. CB(1)614/11-12)
18 January 2012	Meeting of the Establishment Subcommittee	Administration's paper (LC Paper No. EC(2011-12)16) Minutes (LC Paper No. ESC34/11-12)
13 April 2012	Meeting of the Finance Committee	Minutes (LC Paper No. FC175/11-12)
7 January 2013	FA Panel was briefed on the staffing proposal to retain the supernumerary post Administrative Officer Staff Grade C in the Financial Services Branch of the Financial Services and the Treasury Bureau	Administration's paper (LC Paper No. CB(1)358/12-13(06)) Minutes (LC Paper No. CB(1)782/12-13)
20 February 2013	Meeting of the Establishment Subcommittee	Administration's paper (LC Paper No. EC(2012-13)22) Minutes (LC Paper No. ESC30/12-13)
15 March 2013	Meeting of the Finance Committee	Minutes (LC Paper No. FC180/12-13)

Date	Event	Paper/Minutes of meeting
3 May 2013	FA Panel was briefed on the public consultation on improvement of corporate insolvency law	<u>Administration's paper</u> (LC Paper No. CB(1)876/12-13(01)) <u>Minutes</u> (LC Paper No. CB(1)1789/12-13)