

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1385/03-04

Ref : CB2/SS/4/03

**Paper for the House Committee meeting on 20 February 2004**

**Second report of the Subcommittee on subsidiary legislation  
relating to 2004 Legislative Council elections**

**Purpose**

This paper reports on the deliberation of the Subcommittee on Electoral Affairs Commission (Financial Assistance for Legislative Council Elections) (Application and Payment Procedure) Regulation.

**Background**

2. The Legislative Council (Amendment) Ordinance 2003 was enacted on 3 July 2003. The new Part VIA of the Legislative Council Ordinance (LCO) (Cap. 542) provides for a Financial Assistance Scheme (the Scheme) for candidates and lists of candidates standing in Legislative Council (LegCo) elections in respect of election expenses. The aim of the Scheme is to encourage more public-spirited candidates to participate in LegCo elections. This will be conducive to the development of political parties and political groups in Hong Kong.

3. Under the Scheme, candidates or lists of candidates who get elected or who have received 5% of valid votes or more will be given financial assistance to offset part of their election expenses as follows -

- (a) in respect of candidates in a contested geographical or functional constituency, the amount payable is the lowest of -
  - (i) the amount obtained by multiplying the total number of valid votes cast for the candidate or list of candidates by the specified rate (now \$10 per vote); or
  - (ii) 50% of the declared election expenses of the candidate or list of candidates; or

- (iii) if the declared election expenses of the candidate or list of candidates exceed the corresponding declared election donations, the difference in amount between those expenses and donations.
  - (b) in respect of uncontested geographical or functional constituencies, the amount payable is the lowest of -
    - (i) the amount obtained by multiplying 50% of the number of registered electors for the constituency by the specified rate; or
    - (ii) 50% of the declared election expenses of the candidate or list of candidates; or
    - (iii) if the declared election expenses of the candidate or list of candidates exceed the corresponding declared election donations, the difference in amount between those expenses and donations.
4. If the declared election donations of a candidate or list of candidates equal or exceed the declared election expenses of the candidate or list of candidates, financial assistance is not payable. LCO also stipulates broad procedural and documentary requirements for making a claim, and general conditions for payment to be made.

### **The Regulation**

5. The new Part VIA of LCO empowers the Electoral Affairs Commission to make regulations to provide for the procedures for handling claims for financial assistance and effecting payment by the Chief Electoral Officer (CEO). The Electoral Affairs Commission (Financial Assistance for Legislative Council Elections) (Application and Payment Procedure) Regulation (the Regulation) sets out the detailed implementation procedures for the Scheme.

6. The Regulation contains provisions for -
- (a) making claims and their presentation;
  - (b) verification of claims;
  - (c) withdrawal of claims;
  - (d) payment of claims after verification; and
  - (e) recovery of payment.

## **The Subcommittee**

7. Under the chairmanship of Hon HUI Cheung-ching, the Subcommittee has held three meetings with the Administration to discuss the Regulation.

## **Deliberation of the Subcommittee**

8. While the Subcommittee supports the Regulation in principle, members have expressed concerns and sought clarifications about the various aspects of the Scheme. The deliberation of the Subcommittee is detailed below.

### Requirement for the election return to be audited

9. Section 3 requires that a claim for financial assistance must be made by a candidate or a list of candidates on a specified form. It must be signed by an eligible candidate or all candidates on an eligible list. The claim form must be accompanied by an election return (with the accounts of declared election expenses and the declared election donations) defined under section 2(1) of the Elections (Corrupt and Illegal Conduct) Ordinance (ECICO) (Cap. 554), and an auditor's report which confirms that an auditor has audited the accounts of the declared election expenses and the declared election donations, and states whether the election return complies with the requirements under section 37(1) and (2)(b) of ECICO in all material respects. Candidates who do not claim financial assistance are not required to have their accounts of declared election expenses and declared election donations audited.

### *Standard adopted by auditor*

10. On the standard to be adopted by an auditor in auditing the election return, the Subcommittee has noted that the Administration has consulted the Hong Kong Society of Accountants (HKSA). Taking into account the advice by HKSA, the auditor will be required to audit the accounts of the declared election expenses and the declared election donations in accordance with the Standard on Assurance Engagements 200, High Level Assurance Engagements (SAE 200), issued and as amended by the Council of HKSA from time to time. A set of guidance notes will be prepared by the Registration and Electoral Office (REO) with assistance by HKSA for auditors who are engaged by candidates to perform the auditing task. These notes will be issued by HKSA to its members prior to the 2004 LegCo elections. The Administration has also advised that organizations in receipt of funding support from the Innovation and Technology Fund are also required to submit accounts to the Commissioner for Innovation and Technology, in accordance with SAE 200.

### *Auditing fee*

11. Some members have expressed concern whether the requirement for an auditor's report will impose additional financial burden on candidates, and whether the auditing fee would be out of proportion to the financial assistance they receive under the Scheme.

12. In response to the request of the Subcommittee, the Administration has contacted HKSA regarding an estimate of the likely auditing fee. HKSA has advised the Administration that a small-to-medium-sized accounting firm may charge a fee of \$20,000 to \$30,000 for auditing an election return of a list of candidates which has incurred election expenses of \$2.5 million. As to auditing an election return of a functional constituency candidate, the fee may range from \$10,000 to \$20,000. Separately, the Administration has also informally sounded out three small-sized accounting firms. Their preliminary rough estimate is that the auditing fee for an election return filed in connection with a geographical constituency election may be in the region of \$10,000 or less. The Administration has advised that the exact fee charged will depend on the complexity of individual election returns, the pricing policy of individual accounting firms, and negotiation between the parties concerned.

13. Some members have asked whether the auditing fee could be regarded as election expenses and covered by election donations, and whether an elected candidate who accepts an advantage to meet the auditing fee would contravene section 4 of the Prevention of Bribery Ordinance (POBO) (Cap. 201).

14. The Administration has explained that "election expenses" is defined under section 2 of ECICO to mean -

"in relation to a candidate or group of candidates at an election, means expenses incurred or to be incurred, before, during or after the election period, by or on behalf of the candidate or group of for the purpose of -

- (a) promoting the election of the candidate or group; or
- (b) prejudicing the election of another candidate or group, and includes the value of election donations consisting of goods and services used for that purpose."

As the auditing fee is not incurred for the purpose of promoting candidature or prejudicing another candidate, it would not be regarded as an election expense. An elected candidate could accept money from others to meet the auditing fee incurred and would not be required to report the acceptance of such money in his election return. Section 4 of POBO does not prohibit the acceptance of such an advantage per se, but if an elected candidate decides to accept such an advantage he should ensure that the acceptance is not in breach of the relevant provisions in section 4.

15. Hon Emily LAU has pointed out that the auditing fee is an expense incidental to the election and should be regarded as an election expense. As ECICO was enacted a few years ago, she has requested the Administration to review the definition of "election expenses" to take account of the introduction of the Scheme.

*Auditor's report*

16. Hon Emily LAU considers that the requirement for an auditor's report should apply to all candidates irrespective of whether they make claims under the Scheme.

17. Hon CHEUNG Man-kwong considers that the Administration has applied double standard in treating candidates making claims for financial assistance and those do not. As the existing arrangement for candidates to file their election returns without the need for the accounts of declared election expenses and declared election donations to be audited has worked well, he has suggested that the same arrangement should be adopted for the Scheme. In his view, any irregularities detected by REO on election returns submitted by candidates could be reported to the appropriate authorities for investigation or prosecution.

18. Hon Howard YOUNG has pointed out that many candidates of functional constituencies could only claim a very small amount of financial assistance based on the computation formula, and will not bother to make any claims under the Scheme in view of the relatively high auditing fee. While he agrees that candidates should be subject to the auditing requirement when public money is involved, he considers that the aim of the Scheme will be defeated if candidates are discouraged from claiming financial assistance because of the high fee of the auditor's report. He has suggested that the auditor's report should only be required for a claim above a certain amount of financial assistance.

19. The Administration has explained that under the existing arrangement stipulated in section 37 of ECICO, all candidates are required to file their election returns together with the accounts of declared election expenses and declared election donations. However, the requirement for a claim made under the Scheme to be accompanied by an election return, with the accounts of the declared election expenses and the declared election donations audited by an auditor, is stipulated in section 60I(1)(b) of LCO. The Regulation merely sets out the detailed implementation procedures for the Scheme. Hence, any changes to the auditing requirement, if implemented, would require amendments to the relevant principal legislation, which is outside the scope of the Regulation. The Administration has further explained that auditing of election returns is required under the Scheme because the Scheme involves the payment of public money to candidates based on their declared election expenses and donations.

### *Self incrimination*

20. The legal adviser to the Subcommittee has requested the Administration to clarify whether the inclusion by a candidate in his claim of an auditor's opinion that the relevant election return fails to comply with section 37(1) or (2)(b) of ECICO in any material respects would amount to an act of self-incrimination.

21. The Administration has advised that its legal advice is that the question should not arise. This is because -

- (a) the opinion is made by the auditor, not the candidate;
- (b) it is not mandatory for the candidate to submit an auditing report. He would only be required to do so if he chooses to make a claim under the Regulation;
- (c) under ECICO, there is already a requirement for the candidate to submit and verify his election return; and
- (d) non-compliance with section 37(1) and (2)(b) of ECICO would not necessarily amount to an offence. Under section 40 of the Ordinance, a candidate may apply to the court for granting of relief in certain circumstances, so as to take the opportunity to make necessary rectification after submission of the election return.

22. The Subcommittee has noted that the auditor's opinion, which should only be given from the auditing perspective, has to be understood as such. It should not be regarded as an opinion given from any other perspective (for example, the legal perspective).

### Loans and interest

#### *Loans with or without interest*

23. Members have sought clarification from the Administration on whether a loan obtained by a candidate from different parties (e.g. a political organization, a financial institution, a family member or a friend) to finance his campaigning activities would be regarded as an election expense or an election donation under various scenarios.

24. The Administration has responded that if a candidate obtains a loan with interest, the amount of interest incurred should be declared as part of the election expenses. Whether a loan is obtained from a financial institution, a family member, or a friend is irrelevant, as the law makes no distinction between different sources of a loan.

25. As regards whether the interest waived on a loan should be declared as a donation, the Administration has advised that as stipulated in the Guidelines on Election-related Activities in respect of the District Councils Elections, donations in kind include goods and services obtained free of charge or at a discount. Unless the discount is generally available to all customers, the difference between the market/regular price and the price charged is a donation and must be declared and included as such and correspondingly as an election expense in the election return. The same principle applies to loans obtained at no interest or at an interest rate lower than usual.

26. On a loan obtained by a candidate from a political organization, if the candidate is elected and required to repay the loan with interest, the amount of interest incurred should be declared as an election expense. If the loan is interest-free, the amount of interest waived should be declared as a donation and correspondingly as an election expense. On the other hand, if the candidate is not elected and therefore no repayment needs to be made, the amount of "loan" should be declared as a donation.

27. If a loan is provided by a political organization on the condition that the candidate, if elected, would not be required to make any repayment but would be required to enter into other financial arrangements, the Administration has advised that the amount of "loan" should be declared as a donation as no repayment is necessary.

28. Some members have suggested that the Administration should consider promulgating guidelines to clarify the status of "conditional loans" and "conditional donations". The Administration has explained that it is not possible to anticipate each and every type of "conditional loans" and "conditional donations", and therefore it is not possible to promulgate any guideline in this respect. It is a matter which will be for the court to rule on. When a case comes before it, the court will determine the status of a "conditional loan" or "conditional donation" by considering its facts and merits, including the actual terms agreed between the parties concerned.

#### *Calculation of interest*

29. As the waived interest of an interest-free loan should be declared as a donation and correspondingly as an election expense, members have requested the Administration to advise how the waived interest should be calculated for the purpose of compiling the election return. The Administration's advice is that a reasonable amount should be assessed by reference to the market interest rate.

30. A member considers that an interest-free loan obtained by a candidate from a family member should be regarded as a form of "voluntary service", thus the amount of interest waived should not be regarded as a donation. The Administration has advised that that this argument is not compatible with existing

legislative provision. According to section 2 of ECICO, the term "voluntary service" only refers to services provided by a natural person. Thus, an interest-free loan, which is in the form of money rather than service, should not be regarded as a "voluntary service".

31. Members have also requested the Administration to advise how the amount of interest should be calculated if only part of a loan is used for the election. The Administration has advised that while there is no precedent case, it is not unreasonable to say that only that part of the loan actually spent should attract interest, since the unused part would not be counted as election expenses. However, this will be a matter for the court to rule on as and when an actual case comes before it.

32. Members have asked whether REO had received any election return declaring the amount of interest waived, in respect of an interest-free loan, as a donation in the past LegCo elections. The Administration has advised that it is not in a position to provide the information, as the statutory period for the keeping of election returns for 2000 LegCo elections has expired, and REO has since destroyed the relevant returns. However, REO has looked into the records of election returns filed in connection with the 2003 District Councils election. There is one case where a candidate has obtained an interest-free loan, and the amount of interest waived has been declared in the election return as a donation and correspondingly as an election expense.

#### Calculation of financial assistance

33. Financial assistance under the Scheme is not payable if the declared election donations of a candidate or list of candidates equal or exceed the declared election expenses of the candidate or list of candidates. Some members have pointed out that while political parties would provide financial sponsorship to candidates, they would also try to maximize the chance for candidates to claim financial assistance under the Scheme. These members have requested the Administration to clarify whether a candidate would be allowed to receive any financial benefit from a political party in respect of his election expenses after receiving payment of financial assistance under the Scheme, without affecting such payment.

34. The Administration has explained that in considering the issue, reference has to be made to the relevant provisions of LCO and ECICO. According to sections 60D and 60E of LCO, when calculating the amount of financial assistance payable to a candidate, any election expense incurred by the candidate has to be net of any election donation received by the candidate. Under section 2 of ECICO, "election donation" is defined to mean "any money given to or in respect of the candidate or candidates for the purpose of meeting, or contributing towards meeting, the election expenses of the candidate or candidates".



35. The Administration has advised that any financial benefit given by a political party (or, for that matter, any organization or individual) to a candidate for the purpose of meeting, or contributing towards meeting his election expenses should be declared as an election donation and accounted for in the election return. Based on the election return submitted and the number of votes obtained, CEO will calculate the amount payable as financial assistance in accordance with sections 60D and 60E of LCO.

36. In case a candidate is offered, after he has filed his election return and after the statutory deadline for filing such return is passed, financial benefit from a political party with an understanding that it is to be used to meet all or part of his election expenses, he should apply to the court for permission to correct his election return under section 40(3) of ECICO if the financial benefit is accepted. CEO will take account of the revised election return in calculating the amount of financial assistance payable to the candidate.

37. Where the receipt of financial benefit from a political party has affected the amount of entitlement but payment of financial assistance has already been made, CEO will require the candidate to repay the amount overpaid under section 60H of LCO.

38. Some members believe that the design of the Scheme is to enhance transparency and accountability in the use of public money, and do not consider that the Scheme would pose difficulties to political parties in terms of their financial arrangements with candidates. Some other members consider that the Scheme fails to achieve its intended objective, i.e. its implementation would be conducive to the development of political parties and political groups in Hong Kong. These members are of the view that a balance should be struck between disbursement of public funds and provision of financial assistance to candidates standing in LegCo elections. They have requested the Administration to conduct a review on the Scheme in due course, taking into consideration the policies and principles which underpin the Scheme.

39. In response to the request of the Subcommittee, the Administration has provided information on the financial assistance schemes provided to candidates in Canada and Germany for members' reference. The Administration has pointed out that there are differences between the arrangement in Hong Kong and that in Canada and Germany. The purpose of the Regulation is to provide candidates, with or without political affiliations, with financial assistance to help meet part of their election expenses. The main purpose of the Canadian and German laws is to regulate and provide financial assistance to the operation of political parties.

40. Hon Emily LAU has noted that in Canada and Germany, the donations received by candidates will not affect their entitlement to financial assistance. She has requested the Administration to take account of overseas practices in its future review on the Scheme.

### Rectification of claim

41. The Subcommittee has noted that there is no provision for a candidate to rectify a claim after it has been submitted. The Administration has advised that under the present practice for handling election returns, REO allows a candidate to make rectification before the statutory deadline for submission. This practice will be followed when handling claims under the Scheme, i.e. a candidate will be allowed to rectify his claim before the statutory deadline for making a claim. If a candidate needs to rectify his election return accompanying the claim after the statutory deadline, he has to apply for a court order under section 40 of ECICO.

42. Under section 5(3) of the Regulation, CEO may require the candidate who makes the claim or any candidate on the list of candidates in respect of which the claim is made to provide further information as he may reasonably require to verify the claim. The Administration is of the view that, such "further information" may be provided for the purpose of correcting any error identified by CEO during the verification process.

### Part processing of claim

43. Section 6 provides that if an auditor's report states that only part of the election return complies with the requirements set out in section 37(1) and 2(b) of ECICO, CEO may process that part of the return that complies with those requirements and stop processing the part of the return that does not comply with those requirements.

44. The Subcommittee has requested the Administration to explain how section 6, when invoked by CEO, would affect the outcome of the claim and whether the candidate will be allowed an opportunity to rectify his claim or to appeal.

45. The Administration has advised that the processed part will determine the outcome of the claim. Under normal circumstances, CEO will not reject the whole or part of the claim without seeking clarification or "further information" from the candidate under section 5 of the Regulation. The candidate should, therefore, have an opportunity to rectify any error identified by CEO.

46. Hon Andrew WONG has expressed concern on whether processing part of an election return would result in overpayment to a candidate. In his view, if CEO has decided not to process the part of the election return that does not comply with the relevant requirements under ECICO, which is related to the account of election donations (e.g. the candidate has lost the receipt issued to a donor in respect of a donation), the Government may end up making a payment which is in excess of the entitlement of the candidate. This is because when calculating the amount of financial assistance payable to a candidate, any election expense

incurred by the candidate has to be net of any election donation received by the candidate. Mr WONG has sought clarification on whether CEO has the discretion to process the part of the return that does not comply with those requirements.

47. The Administration has advised that the auditor's opinion is not conclusive but for the reference of CEO. Under section 6 of the Regulation, CEO has the discretion to process the part of the return that complies with those requirements and not to process the part of the return that does not comply with those requirements. Under normal circumstances, CEO will not reject the whole or part of the claim, which in the auditor's opinion does not meet the relevant requirements under ECICO, without first seeking clarification or "further information" from the candidate under section 5 of the Regulation.

### **Proposed amendments**

48. The Administration will propose amendments to sections 4, 7 and 10 of the Regulation to -

- (a) provide candidates with increased flexibility and convenience by allowing agents of candidates to present claim forms, notices of withdrawal and notices of variations on behalf of the candidates; and
- (b) specify that the claim form must be presented within the period or extended period provided for in section 37 of ECICO for lodging an election return.

49. The Subcommittee supports the proposed amendments. The proposed resolution on the amendments is in the **Appendix**.

### **Follow-up action required of the Administration**

50. The Administration has agreed to conduct a review on the Scheme, in the light of the experience of the 2004 LegCo elections and taking into account the comments and views made by members of the Subcommittee. The Administration will report the outcome of the review to the Panel on Constitutional Affairs in due course.

### **Recommendation**

51. The Subcommittee supports the Regulation and the proposed amendments.

**Advice sought**

52. Members are invited to note the recommendation of the Subcommittee.

Council Business Division 2  
Legislative Council Secretariat  
19 February 2004

## Appendix

## INTERPRETATION AND GENERAL CLAUSES ORDINANCE

---

**RESOLUTION**

(Under section 34(2) of the Interpretation  
and General Clauses Ordinance (Cap. 1))

---

**ELECTORAL AFFAIRS COMMISSION (FINANCIAL ASSISTANCE FOR  
LEGISLATIVE COUNCIL ELECTIONS) (APPLICATION AND PAYMENT  
PROCEDURE) REGULATION**

RESOLVED that the Electoral Affairs Commission

(Financial Assistance for Legislative Council  
Elections) (Application and Payment Procedure)  
Regulation, published in the Gazette as Legal  
Notice No. 269 of 2003 and laid on the table of  
the Legislative Council on 7 January 2004, be  
amended -

(a) in section 4 -

(i) in subsection (1) -

(A) in paragraph (a), by adding  
"or his agent" after "form";

(B) in paragraph (b), by adding  
"or the agent of one of the  
candidates" after "form";

(ii) by adding -

"(3) The claim form  
must be presented within  
the period or extended  
period provided for in  
section 37 of the Elections  
(Corrupt and Illegal  
Conduct) Ordinance (Cap.  
554) for lodging an  
election return.";

(b) in section 7(4) -

(i) in paragraph (a), by adding "or  
his agent" after "notice";

(ii) in paragraph (b), by adding "or  
the agent of one of the  
candidates" after "notice";

(c) in section 10(3), by adding "or the agent  
of one of the candidates" after "form".

《釋義及通則條例》

---

決議

(根據《釋義及通則條例》(第1章)第34(2)條)

---

《選舉管理委員會(立法會選舉資助)  
(申請及支付程序)規例》

議決修訂於2004年1月7日提交立法會會議省覽的《選舉管理委員會(立法會選舉資助)(申請及支付程序)規例》(即刊登於憲報的2003年第269號法律公告) —

(a) 在第4條中 —

(i) 在第(1)款中 —

(A) 在(a)段中，在“人”之後加入“或其代理人”；

(B) 在(b)段中，在句號之前加入“或其中一名候選人的代理人”；

(ii) 加入 —

“(3) 申索表格必須在《選舉(舞弊及非法行為)條例》(第554章)第37條所規定的提交選舉申報書的限期或延長限期內提交。”；

(b) 在第 7(4)條中 —

(i) 在(a)段中，在“人”之後加入“或其代理人”；

(ii) 在(b)段中，在句號之前加入“或其中一名候選人的代理人”；

(c) 在第 10(3)條中，在“人”之後加入“或其中一名候選人的代理人”。