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13 February 2004  
*(Urgent by fax: 2509 9055)*

Mrs Percy MA  
Clerk to Subcommittee  
Legislative Council  
3/F, Citibank Tower  
3 Garden Road, Central  
Hong Kong

Dear Mrs MA,

**Subcommittee on subsidiary legislation  
relating to 2004 Legislative Council elections**

**Electoral Affairs Commission  
(Financial Assistance for Legislative Council Elections)  
(Application and Payment Procedure) Regulation**

Thank you for your letter of 9 February 2004 summarizing the issues raised by Members of the Subcommittee at the meeting on 6 February 2004. Our response is set out below.

**Loans and donations**

Point (a)

A question was raised at the Subcommittee meeting as to whether an elected candidate could receive a donation to meet the auditing fee incurred,

and whether such action would amount to an offence under section 4 of the Prevention of Bribery Ordinance (POBO) (Cap.201).

“Election expenses” is defined in section 2 of the Elections (Corrupt and Illegal Conduct) Ordinance (ECICO) (Cap.554) 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 for the purposes 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”.*

Since the auditing fee is not incurred for the purpose of promoting candidature or prejudicing another candidate, it should not be regarded as an election expense. Accordingly, an elected candidate could accept an advantage to meet the auditing fee incurred and he would not be required to report the acceptance in his election return. Section 4 of the 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.

Point (b)

It was suggested at the Subcommittee meeting that the Administration should consider promulgating guidelines to clarify the status of “conditional loans” and “conditional donations”. We have set out, in our letter of 5 February 2004 to the Subcommittee, how ‘conditional loans’ and ‘conditional donations’ may be regarded under certain specific scenarios. As we explained at the last Subcommittee meeting, it is not possible to anticipate each and every type of “conditional loans” or “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.

Point (c)

Members asked 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 from the Government, without affecting such payment.

In considering this issue, reference has to be made to the relevant provisions of the Legislative Council Ordinance (LCO) (Cap.542) and the ECICO. According to sections 60D and 60E of the LCO, when calculating the amount of financial assistance payable to a candidates, any election expense incurred by the candidate has to be net of any election donation received by the candidate.

“Election donation” is defined in section 2 of the ECICO 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”.*

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, the Chief Electoral Officer (CEO) will calculate the amount payable as financial assistance in accordance with sections 60D and 60E of the LCO.

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 the ECICO if the financial benefit is accepted. The CEO will take account of the revised election return in calculating the amount of financial assistance payable to the candidate.

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, the CEO will require the candidate to repay the amount overpaid under section 60H of the LCO.

## **Financial assistance schemes in Canada and Germany**

### Point (d)

It was requested at the Subcommittee meeting that the Administration should provide information on financial assistance schemes for candidates in Canada and Germany. Some information which is available to us is attached at **Appendix A** for Members’ reference.

As shown in Appendix A, there is much difference between the context of our Regulation and that of Canada and Germany. The purpose of our financial assistance scheme is to provide candidates, with or without political affiliations, with financial assistance to help meet part of their election expenses. In contrast, our understanding of the main purpose of the Canadian and German laws is to regulate and provide financial assistance to the operation of political parties.

### **Guidelines on election-related activities**

Members of the Subcommittee requested a copy of the EAC guidelines on declaration of interest on loan in the election return. A copy of the relevant section in the Guidelines on Election-related Activities in respect of the District Councils Elections is attached at **Appendix B** for Members' reference.

We would be grateful for your assistance in circulating this letter to Members of the Subcommittee.

Yours sincerely,

( Joseph Y T LAI )  
for Secretary for Constitutional Affairs

### Financial assistance schemes in Canada and Germany

#### Canada

In Canada, there is a statutory reimbursement scheme to provide financial assistance to candidates. Under the scheme, a reimbursement of 15% of the election expense limit will be provided to a candidate if he is elected or receives at least 10% of the valid votes cast in his constituency. If the candidate also complies with all the post-election legal requirements, he will qualify for a second instalment representing a reimbursement of 60% of the actual election expenses incurred, minus the amount already received under the scheme. The total amount of reimbursement may not exceed 60% of the election expense limit.

As to registered political parties, they are entitled to a reimbursement of 60% of their actual election expenses incurred if they obtain at least 2% of the total valid votes cast in a general election, or 5% of the valid votes cast in the constituencies where they have endorsed candidates.

In case the total amount of donations and reimbursement received is greater than the amount of election expenses incurred, an independent candidate should transfer the surplus to the Government. However if a candidate is endorsed by a registered political party, he should transfer the surplus to his party. Such transaction should be declared in the party's annual return on financial transactions.

#### Germany

In Germany, the roles and functions of political parties are set out in the German constitution. A state funding scheme is implemented to provide financial assistance to political parties to facilitate their carrying out of their roles and functions. Under the scheme, each year a political party will receive 0.70 euro (HK\$6.90) for each valid vote obtained by its candidates in the most recent parliamentary election. In addition, it is entitled to 0.38 euro (HK\$3.80) for each euro received from membership fees or donations up to 3,300 euro (HK\$32,670) from each individual. The amount of state funds received should not exceed the annual income gained by the political party.

Apart from provision of a state funding scheme, the law also requires political parties to publish accounts and disclose all sources of income. In addition, it seeks to control the internal organization of the parties to ensure that they are democratically run.

15.18 Since election donations can only be lawfully spent for meeting or contributing towards meeting election expenses, donations and expenses are often corresponding to each other. For every item of election expense which is avoided or reduced by obtaining the goods supplied or services rendered free of charge or at a discount, there should normally be a corresponding item of donation. The only exception is voluntary services obtained that are not treated as donations (any goods given incidental to the provision of a voluntary service will however be counted as an election donation). These points are elaborated in the paragraphs under Donations in Kind of this chapter.

15.19 On receiving a donation, of money or in kind, of more than \$1,000, a candidate must issue to the donor a receipt which specifies the name and address of the donor (as supplied by the donor). A standard form of receipt is obtainable from the REO and will be provided to a candidate at the time of his submitting his nomination form. While it is not uncommon that some donors would like to be anonymous, if a donation, in cash or in kind, is more than \$1,000, then only where the donor's name and address (as supplied by the donor) are shown as required by the standard form of donation receipt can it be used as election donation. Donations exceeding \$1,000 or, in the case of an election donation consisting of goods, of more than \$1,000 in value received from anonymous donors must not be used for election expenses and must be given to a charitable institution or trust of a public character chosen by the candidate(s). [S 19(2) of the ECICO.]

### Donations in Kind

15.20 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 form of return. The same

principle applies to loans obtained at no interest or at an interest rate lower than usual. Unless the facility is generally available to others, the interest not charged must be declared and included as a donation and election expense in the form of return. For premises provided free of charge to a candidate for his election campaign, a reasonable amount should be assessed as the deemed rental for the premises and such be included as a donation and election expense in the form of return.

15.21 For services or goods obtained free of charge, a candidate must include in the return their estimated value as if the expenses had been incurred. Where the services or goods are furnished by a person who deals in similar services or goods with the public, their estimated value should be assessed at the lowest price at which the person offers his services or goods to the public at the time when they are furnished. Where such services or goods are furnished by persons who do not deal in similar services or goods with the public, their estimated value should be assessed at the lowest market retail price at the time when they are furnished.

15.22 Voluntary service is the only service rendered free of charge which may be excluded from being counted as election expenses. In addition to being free of charge, the service must be provided by a natural person, voluntarily and personally, in his own time for the purpose of promoting the election of the candidate or candidates, or of prejudicing the election of another candidate or other candidates. [S 2 of the ECICO.] It must not be service normally provided by the person during such time for the purpose of earning income or profit. Otherwise, the service provided should be treated as a donation and counted towards election expenses at a fair estimated value.