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Paper for the House Committee meeting on 30 June 2006

**Report of the Subcommittee on Three Regulations under the Electoral Affairs
Commission Ordinance Gazetted on 19 May 2006**

Purpose

This paper reports on the deliberations of the Subcommittee on Three Regulations under the Electoral Affairs Commission Ordinance Gazetted on 19 May 2006.

Background

2. The Election Committee (EC) subsector elections will be held on 10 December 2006. The Electoral Affairs Commission (EAC) has reviewed the subsidiary legislation under the Electoral Affairs Commission Ordinance (EACO) (Cap. 541) and has identified that amendments under the following categories will be required to ensure the smooth conduct of the elections –

- (a) amendments consequential to the Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Ordinance 2006 (the Amendment Ordinance) which came into effect on 13 May 2006;
- (b) amendments to align the electoral procedures for EC subsector elections, where appropriate, with those for the Legislative Council (LegCo) election in 2004 and to rationalise certain electoral arrangements; and
- (c) technical amendments to remove obsolete provisions.

The three Regulations

3. On 15 May 2006, EAC made the following Regulations –

- (a) Electoral Affairs Commission (Registration) (Electors for Legislative Council Functional Constituencies) (Voters for Election Committee

Subsectors) (Members of Election Committee) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541B);

- (b) Electoral Affairs Commission (Nominations Advisory Committees (Election Committee)) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541H); and
- (c) Electoral Affairs Commission (Electoral Procedure) (Election Committee) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541I).

The Subcommittee

4. At the House Committee meeting on 26 May 2006, Members formed a subcommittee to study the three Regulations. The membership of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon Howard YOUNG, the Subcommittee has held two meetings with the Administration.

5. The Chairman of the Subcommittee moved a motion at Council meeting on 21 June 2006 to extend the scrutiny period of the three Regulations to 12 July 2006.

Deliberations of the Subcommittee

Electoral Affairs Commission (Registration) (Electors for Legislative Council Functional Constituencies) (Voters for Election Committee Subsectors) (Members of Election Committee) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541B)

Electoral Affairs Commission (Nominations Advisory Committees (Election Committee)) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541H)

6. The Administration has advised that under the Amendment Ordinance, an interim register, instead of a final register, is to be compiled and published under section 40(1) of the Schedule to the Chief Executive Election Ordinance (CEEO) (Cap. 569), for EC members after the publication of the results of the EC subsector ordinary elections. The introduction of an interim register and the revision to the timing for compiling and publishing the final register are to address the problem arising from the situation that the final register of the existing EC will cease to have effect before the expiry of its term, while the final register of the new term EC will take effect before the commencement of its term.

7. The Subcommittee has noted that the following amendments are proposed to be made to Cap. 541B consequential to the amendments made by the Amendment Ordinance –

- (a) to introduce an interim register of EC members and remove the term “relevant date”. These consequential amendments provide for the compilation and publication arrangements in relation to the interim register and replace the term “relevant date” (which has been removed by the Amendment Ordinance from the CEEO) with a reference to the date on which the relevant vacancy declaration was made; and
- (b) to remove obsolete provisions relating to the functional constituencies provisional register and subsector provisional register for 2003.

8. The Subcommittee has also noted that amendments are proposed to be made to Cap. 541H to make it clear that any advice given by the Nominations Advisory Committees (NACs) under Cap. 541H or any refusal of NACs to consider an application for advice or to give advice does not preclude a person from objecting under the Election Committee (Appeals) Regulation (Cap. 569A) to the registration in the interim register (i.e. not only the final register) of a nominee (i.e. a person nominated by a designated body to be a member representing the religious subsector) as a member of the EC.

Electoral Affairs Commission (Electoral Procedure) (Election Committee) (Amendment) Regulation 2006 (Amendment Regulation to Cap. 541I)

Purpose of the Amendment Regulation

9. The Subcommittee has noted that the Amendment Regulation consists of–

- (a) consequential amendments dealing with the disqualification of candidates for the subsectors of the Chinese People’s Political Consultative Conference, Heung Yee Kuk and District Councils introduced by the Amendment Ordinance; and
- (b) amendments made for the purpose of aligning the electoral procedures for the EC subsector elections with those for LegCo election, and rationalising certain technical arrangements.

Qualification for candidature (section 3)

10. By virtue of the Amendment Ordinance, new section 18A is added to the Schedule to the CEEO to provide that, if a person is not a member of a District Council, or a Hong Kong member of the National Committee of the Chinese People’s

Political Consultative Conference, or the Chairman, a Vice-Chairman or a Councillor of the Full Council of the Heung Yee Kuk, he is not qualified to be nominated as a candidate at an election of the respective subsectors, or be elected as an EC member of the respective subsectors.

11. The Subcommittee has noted that section 13 of the principal Regulation is amended to require the Returning Officer to take into account the newly introduced disqualification provisions when deciding whether a candidate for a subsector election is validly nominated.

Revoking appointment of staff assisting in the conduct of elections (sections 5 and 14)

12. Sections 34 and 65 of the principal Regulation are amended to provide that the Chief Electoral Officer (CEO) may at any time revoke the appointment of any Presiding Officer, polling and counting officer.

13. In order to avoid dispute, the Subcommittee has requested the Administration to consider adding “with sufficient or reasonable cause” as a condition for CEO to revoke the appointment of any Presiding Officer, polling or counting officer.

14. The Administration has explained that under administrative law principle, a public officer must act reasonably when exercising his power conferred by the law, and his decision is subject to judicial review. This principle applies to CEO when he exercises his power to revoke any appointment, irrespective of whether the proposed rider is added to the proposed sections 34(3) and 65(4). The Administration does not consider it absolutely necessary to add any condition to the text of the statute, but has no strong views to adding "with reasonable cause", if members do wish to make this clear as a condition for CEO to revoke such appointment.

15. The Subcommittee has noted that under section 42 of the Interpretation and General Clauses Ordinance (Cap. 1), where any Ordinance confers a power upon any person to make any appointment, the person having such power shall also have the power to remove, suspend, dismiss or revoke the appointment. In the light of that provision, members have discussed the need for the proposed sections 34(3) and 65(4). The Administration has explained that the proposed sections seek to make clear that the power of CEO to make appointment includes the power to revoke the appointment if he considers the appointee no longer suitable to discharge his duties. Similar provisions are also provided in the subsidiary legislation for LegCo election.

16. Members consider that revoking appointments of staff assisting in the conduct of elections needs to be handled carefully, and have requested the Administration to add "with reasonable cause" as a condition for CEO to exercise his power. After consideration, the Administration agrees to move an amendment to add “with

reasonable cause” to the proposed sections 34(3) and 65(4) of the Amendment Regulation.

No canvassing zones (section 6)

17. Section 40 of the principal Regulation is amended to, inter alia, prohibit any person from conducting any activity on polling day for canvassing for votes so that the sound of the activity can be heard in the no canvassing zones (NCZs) (proposed section 40(14)(aa)). The Subcommittee has noted that the use of loudspeakers will not be permitted within the NCZ, nor will any such device or any activity be permitted in the vicinity where the sound emitted can be heard within the NCZ.

18. Some members have expressed concern about the effectiveness and enforceability of the proposed provision. The Administration has advised that if any person contravenes proposed section 40(14)(aa), EAC, apart from asking the relevant authorities to take enforcement actions, may make a reprimand or censure in a public statement which may include the name of the candidate concerned. In addition, any person who contravenes section 40(14) commits an offence and is liable to a fine at level 2 and to imprisonment for three months under existing section 45(7).

Addition of “head-dress” and related issues (sections 1, 6 and 9)

19. The definition of “head-dress” is proposed to be added to section 1 of the principal Regulation for prohibiting, by virtue of the newly added sections 40(14)(d) and 45(5), the display or wearing in the NCZ and a polling station of head-dress for election purposes on polling day of an EC subsector election. Proposed sections 40(14)(d) and 45(5) under sections 6 and 9 of the Amendment Regulation stipulate that on polling day, a person must not, without reasonable excuse, display or wear in the NCZ or within a polling station, any badge, emblem, clothing or head-dress which may promote or prejudice the election of a candidate or candidates at the subsector election, or makes direct reference to a political body in Hong Kong or to a body any member of which is standing as a candidate at the subsector election. The Subcommittee has requested the Administration to explain the rationale for introducing the proposed amendment.

20. The Administration has explained that the operational experience of the Registration and Electoral Office over the years is that, from time to time, voters may inadvertently display election advertisements when entering an NCZ or a polling station. Usually the voters will have no difficulty putting away the election advertisements when asked to do so by the polling staff. However, where the election advertisements are clothing, badge or emblem which the voters are wearing, it may not be easy for the voters to remove them on the spot. In such circumstances, the polling staff could turn the voters away, but this might cause great inconvenience to voters who are genuinely ignorant of the legal requirement.

21. The Administration has further explained that existing sections 40(14)(d) and 45(5) of the principal Regulation may provide a “let out” so that a person with a reasonable excuse may put on or wear clothing, badge or emblem (which may be regarded as election advertisements) in an NCZ or a polling station. The current proposal to add “head-dress” to these two “let out” provisions is put forward in the light of recent experiences in elections.

22. Arising from the above discussion, the Subcommittee has also discussed the display of election advertisements in a NCZ and a polling station. Members have expressed concern about the coverage of the existing definition of election advertisements, e.g. whether it could cover distinctive marks on any part of the body which could be a form of election advertisement.

23. The Administration has advised that according to section 2(1) of the Elections (Corrupt and Illegal Conduct) Ordinance (ECICO) (Cap. 554), “election advertisements”, in relation to an election, means –

- “ (a) a publicly exhibited notice; or
- (b) a notice delivered by hand or electronic transmission; or
- (c) a public announcement made by radio or television or by video or cinematographic film; or
- (d) any other form of publication,

published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election”.

According to the same section of the ECICO, “publish” means “print, exhibit, distribute, post up, publicly announce or make publicly known by any other means, and includes continue to publish”. Therefore, election advertisements as defined in the ECICO have a broad coverage.

24. The Administration has explained that the EACO and the principal Regulation, when defining the term “election advertisements”, provide that it has the meaning assigned to it by section 2(1) of the ECICO. There are provisions in the principal Regulation which prohibit the display and exhibition of election advertisements in an NCZ and a polling station. Section 40(14)(a) prohibits any person from engaging in canvassing for votes in an NCZ on the polling day. Section 45(3) states that a person who, on polling day, engages in canvassing for votes or displays an election advertisement within a polling station commits an offence. The prohibition in sections 40(14)(a) and 45(3) covers all forms of election advertisements.

Offence at polling station (section 9)

25. The Subcommittee has noted that section 45 of the principal Regulation is amended to –

- (a) provide that in addition to the Presiding Officer, the Returning Officer, Assistant Returning Officer and any polling officer may also direct a person not to communicate with a voter or an authorised representative, or not to use any device for electronic communication within a polling station; and
- (b) increase the penalty for imprisonment for unauthorised filming, photographing, audio/video recording within a polling station from three to six months.

Procedure for voting (section 10)

26. Proposed section 54(1B)(a) to (d) of the principal Regulation lists four possible voting procedures which the EAC may direct as to the manner in which a voter or an authorised representative must cast the ballot paper into the ballot box, i.e. whether it should be folded or unfolded, and whether it should be put into an envelope. The Administration has explained that the proposed provision will provide the EAC with flexibility to determine the detailed voting procedures in the light of factors such as the size of ballot papers, design of ballot boxes and counting arrangement etc.

27. The Subcommittee has discussed the necessity and desirability for the four possible voting procedures to be set out in proposed section 54(1B). Some members consider that a general provision empowering the EAC to give direction as regards how a ballot paper should be put into the ballot box would suffice and would provide even greater flexibility for the EAC to determine the procedure for voting. However, the Administration remains of the view that the proposed provision is appropriate as it would enhance the transparency of the possible voting procedure involved.

28. The Subcommittee has expressed concern about the design of ballot box and ballot paper in the light of the experience of the 2004 LegCo election. The Administration has assured members that the ballot boxes will be carefully and thoroughly tested by various means, including trial run using dummy papers which are of the same size and thickness as genuine ones, after the actual design of the ballot papers has been firmed up. There will also be an adequate supply of ballot boxes and extra provisions to cater for unexpected situations. In addition, emergency depots and transportation would also be made available for quick replenishment of supplies.

Ballot paper marked “TENDERED” (section 11)

29. The Administration has explained to the Subcommittee that section 58 of the principal Regulation is amended to provide clearly that if a person (the first-mentioned person) representing himself to be a particular voter or authorised representative registered in the subsector final register applies for a ballot paper after a person has been issued with a ballot paper earlier on the basis that he is that first-mentioned person, the Presiding Officer may issue a ballot paper marked “TENDERED” to the first-mentioned person only if –

- (a) the Presiding Officer is not certain that the first-mentioned person is the person who has been issued with a ballot paper earlier, and
- (b) the first-mentioned person answers the appropriate questions to the satisfaction of the Presiding Officer.

The Administration has also confirmed that ballot papers marked “TENDERED” will not be counted in the process of counting votes.

Candidates to appoint counting agents (section 13)

30. Under section 64 of the principal Regulation, a candidate may appoint persons to attend at a counting station to observe the counting of the votes for the subsector contested by the candidate. Section 64(5) is amended to the effect that the notice of appointment must be given to the Returning Officer at least one week before polling day, instead of reaching the Returning Officer at least three working days before polling day as it is now required. The Administration has explained that the proposal to advance the deadline for giving notice of appointment would provide sufficient time for the Presiding Officer to make the necessary arrangements.

31. Some members have expressed concern that the removal of the requirement for the notice of appointment to “reach” the Returning Officer before polling day might give rise to disputes as to whether the notice of appointment has actually been received by the Returning Officer. The Administration has advised that in case of disputes, the candidate could always submit a fresh notice of appointment. In addition, under section 64(6), a notice of appointment could be given on polling day, provided that it is delivered to the Returning Officer by the candidate in person or the election agent of the candidate in person.

Invalid and questionable ballot papers (section 15)

32. The Administration has advised that a new section 74A is added to the principal Regulation to –

- (a) make clear that ballot papers on which there is writing or a mark by which the voter can “possibly” be identified fall under the category of questionable ballot papers;
- (b) specify the types of questionable ballot papers that must be separated for the Returning Officer to decide whether the votes should be counted; and
- (c) specify the types of ballot papers which are clearly invalid by their nature (i.e. tendered, unused, spoilt or unmarked ballot papers) and which must therefore be separated and not counted.

33. In response to members’ enquiries, the Administration has advised that given the large number of seats and candidates for the EC subsector elections, an Optical Mark Recognition system will be used to facilitate the counting of votes. The Administration has also explained the arrangements for counting of votes and verification of the ballot paper account in manual counting and computer counting, which are detailed in sections 73 and 74 of the principal Regulation respectively.

Ballot papers not to be counted (section 16)

34. Section 77 of the principal Regulation is amended to specify a candidate, an election agent or a counting agent may inspect certain kinds of ballot papers in an election but is not entitled to make representation as to the same. Section 77(1) sets out the types of ballot papers the votes recorded on which are not to be counted.

35. The Subcommittee has requested the Administration to consider whether the conjunctive word “and” should be replaced by the disjunctive word “or” in section 77(1)(g). The Administration has reviewed the proposed provision and is of the view that the use of the word “and” is appropriate in the context. Nevertheless, the Administration considers that the wording of the leading clause in the English text could be further refined so as to make the whole provision even clearer. The Administration will introduce an amendment in this respect.

Secrecy of votes (section 20)

36. The Subcommittee has noted that section 93 of the principal Regulation is amended to increase the penalty for imprisonment for violation of secrecy of vote from three months to six months.

Election advertisements (section 22)

37. Section 100 of the principal Regulation is amended to provide that, in addition to the Returning Officer, other persons authorised by the Returning Officer may also

seize and dispose of, or destroy, or obliterate, or cover any election advertisements not complying with the legal requirements. The Administration will rectify a minor textual error in the Chinese version of the amendment to section 100(14).

Amendments to be moved by the Administration

38. The Administration will move amendments to the Electoral Affairs Commission (Electoral Procedure) (Election Committee) (Amendment) Regulation 2006 (paragraphs 16, 35 and 37 refer). The Subcommittee supports the three Regulations and the proposed amendments. The draft resolution to be moved by the Administration is in **Appendix II**.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
29 June 2006

**Subcommittee on Three Regulations under the Electoral Affairs Commission
Ordinance Gazetted on 19 May 2006**

Membership List

Chairman Hon Howard YOUNG, SBS, JP

Members Hon James TIEN Pei-chun, GBS, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Jasper TSANG Yok-sing, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LEE Wing-tat
Hon Ronny TONG Ka-wah, SC

(Total : 7 Members)

Clerk Mrs Percy MA

Legal Adviser Mr Arthur CHEUNG

Date 7 June 2006

Appendix II

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION OF THE LEGISLATIVE COUNCIL

ELECTORAL AFFAIRS COMMISSION (ELECTORAL PROCEDURE) (ELECTION COMMITTEE) (AMENDMENT) REGULATION 2006

Resolution made and passed by the Legislative Council under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) on 2006.

RESOLVED that the Electoral Affairs Commission (Electoral Procedure) (Election Committee) (Amendment) Regulation 2006, published in the Gazette as Legal Notice No. 114 of 2006 and laid on the table of the Legislative Council on 24 May 2006, be amended –

- (a) in section 5(2), in the proposed section 34(3), by repealing “may at any time” and substituting “may, at any time, with reasonable cause”;
- (b) in section 14(2), in the proposed section 65(4), by repealing “may at any time” and substituting “may, at any time, with reasonable cause”;
- (c) in the English text, by repealing section 16(2) and substituting –
 - “(2) Section 77(1) is amended by repealing “The votes recorded on the following ballot papers are” and substituting “Upon counting of votes, a ballot paper of any of the following descriptions is not to be regarded as valid and the vote recorded on the ballot paper is”.”;

- (d) in section 22(2), in the Chinese text, by repealing everything after “修訂，” and substituting “廢除“或銷毀或”而代以“該選舉廣告，亦可銷毀、塗掉或”。”.

Clerk to the Legislative Council

2006

INTERPRETATION AND GENERAL CLAUSES
ORDINANCE

RESOLUTION

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

ELECTORAL AFFAIRS COMMISSION (ELECTORAL
PROCEDURE) (ELECTION COMMITTEE)
(AMENDMENT) REGULATION 2006

RESOLVED that the Electoral Affairs Commission (Electoral Procedure)
(Election Committee) (Amendment) Regulation 2006, published in
the Gazette as Legal Notice No. 114 of 2006 and laid on the table
of the Legislative Council on 24 May 2006, be amended –

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- (b) in section 14(2), in the proposed section 65(4), by
repealing “may at any time” and substituting “may, at any
time, with reasonable cause”;
- (c) in the English text, by repealing section 16(2) and
substituting –

“(2) Section 77(1) is amended by repealing “The votes recorded on the following ballot papers are” and substituting “Upon counting of votes, a ballot paper of any of the following descriptions is not to be regarded as valid and the vote recorded on the ballot paper is”.”;

- (d) in section 22(2), in the Chinese text, by repealing everything after “修訂，” and substituting “廢除 “或銷毀或” 而代以 “該選舉廣告，亦可銷毀、塗掉或” 。”.