PROLOGUE

ROLE OF THE ELECTORAL AFFAIRS COMMISSION AND THE GUIDELINES ON ELECTION-RELATED ACTIVITIES

1. Under the Electoral Affairs Commission Ordinance (Cap. 541) ("EACO"), the Electoral Affairs Commission ("EAC") is an independent, impartial and apolitical body responsible for conducting and supervising public elections in accordance with the electoral law and strives to conduct public elections under the principles of openness, honesty and fairness. Although the EAC is responsible for making the subsidiary legislation on electoral procedures, the guidelines on election-related activities, and the related practical arrangements, it is not part of the government structure. All along, the EAC does not formulate electoral policies nor take into account any political considerations, but considers whether the relevant arrangements do comply with the law and are reasonably practicable and will facilitate the smooth operation of the election. Under the EACO, the EAC shall perform its function through the Director of Home Affairs ("DHA") for the Rural Representative ("RR") Election. The Home Affairs Department ("HAD") is the executive arm of the EAC for the RR Election. Apart from making the practical arrangements for the elections, the HAD also advises the EAC on the practicality of the various electoral arrangements.

2. All electoral arrangements in Hong Kong are regulated under the relevant primary legislation and subsidiary legislation. The EAC must conduct and supervise the conduct of elections in strict compliance with the subsisting law. Under the present institution, matters relating to electoral policies and the system are under the purview of the executive authorities, whereas the legislature is responsible for the enactment and amendment of the primary legislation. On the other hand, pursuant to the principles and provisions in the primary

legislation, the EAC makes the corresponding subsidiary legislation to set out the detailed electoral procedures for the various elections. The EAC shall not act beyond the power conferred by the primary legislation. Where necessary, the EAC would provide its advice from practical and operational points of view for reference of the Government.

3. The EAC is empowered by the law to issue guidelines on election-related activities. The guidelines on election-related activities are not law, and cover the following two aspects: (1) to explain in simple language the subsisting electoral law so as to remind candidates and other stakeholders of the provisions and requirements under the electoral law. The EAC is not a court of law. It has no authority to make judicial interpretation for disputed legal provisions; and (2) with regard to the election-related activities not stipulated by the law, to promulgate a code of conduct based on the principles of fairness and equality.

Legislation Aspect

4. With regard to the legislation aspect, all relevant provisions are enacted by the legislature. The guidelines only explain in simple language the relevant provisions based on the electoral law, and where applicable illustrate with examples the best practices.

5. In order to ensure the fairness of an election, safeguarding the autonomy and secrecy of voting are the most important principles of the electoral law. Electors must mark the ballot papers by themselves inside the voting compartments, and are not required to disclose their voting preference. It is a criminal offence to influence the voting preference of electors by corrupt conduct such as the use of force, threat, coercion, inducement, deception or obstruction; or by the illegal conduct of making false statements about a candidate. It is also a criminal offence to require an elector to disclose his voting preference. In any case, the voting choice must ultimately be made by the elector voluntarily and

under the protection of secrecy. Nevertheless, electors may well discuss among themselves their voting preference, but in no case should any corrupt or illegal conduct be involved.

6. One of the important aspects of the law is to prescribe the maximum limit for election expenses. The setting of a maximum limit of election expenses is to ensure that the candidates do compete on a level playing field within a reasonable level of expenditures. According to the law, election expenses mean the expenses in promoting or prejudicing the election of a candidate, whereas candidate is defined as a person who stands nominated as a candidate at an election and includes a person who has publicly declared an intention to stand for election before the close of nominations. The "public declaration of the intention to stand as a candidate" is a legal issue which must be determined on the basis of actual facts and intention, rather than on the face of any statement alone. It is a criminal offence for a candidate to incur election expenses in excess of the prescribed maximum limit. Hence, the candidate must, in accordance with the law, submit a return and declaration of election expenses and election donations ("election return") after the election to rigorously declare all the election expenses incurred by him; otherwise, he commits an offence.

7. For the effective sanction of the maximum limit on election expenses, the law also stipulates that only candidates and their authorised election expense agents may incur election expenses. It is a criminal offence for other unauthorised persons, no matter it is for the purpose of promoting or prejudicing the election of a candidate, to incur election expenses. Nevertheless, with regard to the opinions published on the Internet, even though they are to promote or prejudice the election of a candidate and amount to election advertisements ("EAs"), if the publisher is a third party (i.e. neither the candidate nor the election expense agents) and the only expenses incurred are electricity charges and/or charges for accessing the Internet, he is exempted from the relevant criminal

liability. However, if the publisher is a candidate or his election expense agent, the exemption does not apply. Candidates should declare election expenses in their election returns, including election expenses incurred in relation to the Internet and all other media.

8. EAs have always been an important part of election expenses, and therefore the publication of EAs should be regulated for calculation of election expenses. Notwithstanding that EAs are regulated, the paramount principles of freedom of speech, press freedom and the dissemination of election information must be guaranteed. Therefore, when determining whether certain statements are EAs and whether election expenses are involved, the overall circumstances and evidence must be taken into consideration, including the nature of those statements, the expenses involved and the intention of promoting or prejudicing the election of any candidate.

9. As the EAC is not a law enforcement agency, if a complaint involves any offence, the EAC will refer it to the law enforcement agencies for follow-up and investigation. Any disputes over the law or fact will ultimately be a matter for the adjudication of the Court.

10. The EAC will seek to provide a statement of principle on how to comply with the electoral law. However, the EAC is not the legal advisor for candidates. Any person who has any questions on any particular matter should seek independent legal advice.

Code of Conduct

11. Apart from the electoral law mentioned, the EAC has established a code of conduct in the guidelines based on the principles of fairness and equality. However, the code of conduct set out by the EAC is not legally binding. Any breaches of the code of conduct will not constitute a legal offence. However,

where necessary, the EAC may issue a public reprimand or censure in order to inform the electors and the general public of important matters that have occurred during the elections. An important application of the principles of fairness and equality is concerned with the utilisation of the public resources, for example:

(a) the guidelines prescribe a fair and equal system in allocating the designated spots for display of EAs on government land, premises and roadways;

(b) licensed radio and television stations as well as registered newspapers and magazines should uphold the fair and equal treatment principle in their treatment of the candidates;

(c) building management organisations and owners' corporations should observe the principles of fairness and equality in handling the requests of the candidates for the display of EAs and the conduct of electioneering activities in the common parts of the buildings under their management; and

(d) a candidate must not make use of any public resources for electioneering.

The organisations mentioned under (c) of this paragraph should handle applications from the candidates fairly and equally. If an organisation allows a particular candidate to conduct electioneering activities in the common parts of the buildings under its management, it should apply the same standard to allow other candidate(s) in the same Rural Area to conduct electioneering activities in the common parts of building under its management (if other candidate(s) make(s) the same request). On the contrary, if an organisation rejects an application from a candidate, the same applications (if any) from other candidate(s) in the same Rural Area should also be rejected. However, this principle does not apply to election-related activities and EAs concerning private properties.

12. It is noteworthy that Hong Kong is a pluralistic society with different sectors of people who may have different pursuits. There are often conflicting views on whether a particular matter is fair or not. Achieving absolute fairness is ideal, but not always feasible. The bottom line is to guard against serious and critical unfairness.

13. The EAC will solemnly handle complaints against any breach of the principles of fairness and equality as set out in the electoral guidelines. However, investigation must be based on factual evidence and be in accordance with the principle of procedural justice. Therefore, the parties concerned must be given the opportunity to make representations in defence, and the EAC will make a decision after duly taking into account all relevant circumstances. If the conduct does not contravene any law, when considering whether the conduct concerned is unfair, the EAC would not make a judgement recklessly without careful consideration of all relevant matters and circumstances. Furthermore, while complaints are often made shortly before the polling day, the EAC would not circumvent or compress the established procedure because of the time constraint so as to avoid any unfairness.

14. If a complaint is substantiated, the EAC would, where necessary, issue a public reprimand or censure in order to inform the electors and the general public of important matters that have occurred during the elections. The EAC would also issue press statements on matters of principle which have attracted widespread public concern in order to set the record straight. Apart from that, the EAC, as a long-standing practice, does not comment on the political platforms of candidates, individual comments and reporting, or hearsays.

15. Electors rely on fair and orderly elections to elect their representatives. Election is a solemn matter. The electoral procedures are strictly sanctioned by the relevant electoral law. Therefore, persons who wish to run for an election and other stakeholders must understand and comply with the requirements of the electoral law so as to avoid committing any criminal offence inadvertently.

16. Apart from the legislation aspect, candidates and stakeholders should also make reference to the code of conduct and good practices provided in the guidelines on election-related activities in order to ensure that the elections are conducted in an open, honest and fair manner.

17. The EAC appeals to members of the public to be acquainted with and to uphold the electoral law and electoral guidelines in order to carry on the good election culture in Hong Kong, so that the elections can be conducted smoothly in a fair and equal manner.