

# Legal Flash

## Managing corruption in Hong Kong – be wary of risks near and far

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### An introduction

Much has been said about the extra-territorial reach of the United States' ("US") Foreign Corrupt Practices Act 1977 ("FCPA") and the impact it has on companies operating internationally that are within the reach of US enforcement agencies.

The most recent example being a US retailer's settlement in June 2019 with more likely to come with a number of ongoing investigations including one into another US company in China involved in transportation. Further examples of FCPA enforcement in the last 18 months in Greater China are listed in the appendix section.

Looking at such enforcement trends, companies and individuals are right to be concerned about the FCPA given the US ever-aggressive enforcement but they are also well advised to look closer to home. In Hong Kong through the powers contained in the Prevention of Bribery Ordinance 1971 ("POBO"), the Independent Commission Against Corruption ("ICAC") and other enforcement bodies are quietly going about their business bringing prosecutions and enforcement action to deter bribery and corruption in Hong Kong, with a particular focus on prosecuting individuals.

This proactive and aggressive approach is most clearly highlighted by the joint investigation by ICAC and Hong Kong's Securities and Futures Commission ("SFC") into suspected corruption and misconduct in public office by a former joint head of the listing department at Hong Kong Exchange and Clearing ("HKEX") in relation to the vetting of listing applications of two listed companies which led to the individual's arrest in June 2019. This follows previous prosecutions against senior figures in Hong Kong society, including the former Chief Executive and other government officials as well as high profile business executives. It is clear that ICAC and the SFC are not intimidated by status or seniority in their attempts to rid Hong Kong of corruption.

In this article, we look at the corruption environment in Hong Kong and undertake an overview of the FCPA and POBO. We also provide some recent real life practical case studies to highlight corruption risks and to emphasise that given the recent flurry of activity now might be a good time to be proactive and stress-test existing bribery and corruption compliance frameworks to ensure you are not the next in the firing line.

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### Corruption framework in Hong Kong

Hong Kong is perceived to be one of the lowest risk countries for corruption by Transparency International in their [Corruption Perceptions Index 2018](#), currently ranked the 14th least corrupt country out of the 180 assessed. This perception is driven in part by the strong anti-corruption legal and regulatory framework in Hong Kong through the POBO as well as active enforcement.



## What is the anti-corruption framework in Hong Kong?

The primary anti-corruption legislation is POBO and offences are split between public sector (e.g. corruption involving government officials) and private sector (e.g. corruption between commercial bodies). Undertaking the following acts without lawful authority or reasonable excuse is an offence:

- Similar for both public and private bribery, offering an advantage to a public servant/commercial agent (or as a public servant/commercial agent soliciting or accepting an advantage) as an inducement or reward or on account of the public servant/commercial agent (not) performing or influencing the performance of any act in their capacity as a public servant;
- Soliciting or accepting an advantage as an inducement or reward or on account of the public servant giving assistance in connection with a contract with, the withdrawal of a tender for an auction conducted by or on behalf of a public body; and
- Offering an advantage to a prescribed officer (a type of civil servant) while having dealings with the relevant government department.

For those in the banking sector, it is also worth noting that the Banking Ordinance (Cap 155) also includes provisions around the prohibition of the receipt of advantages, such as commissions and gifts, for the award of financial benefits such as credit.

### Key additional points to note:

- Corporate liability – unlike the UK Bribery Act (“UKBA”), or France’s Sapin II or other international legislation, the POBO does not have a specific corporate criminal offence. Therefore, prosecutors are reliant on applying the “controlling mind” principle. Given the evidential difficulties with this ICAC primarily focuses on the prosecution of individuals.
- Facilitation payments – facilitation payments are illegal under POBO and there are no de minimis exceptions;
- Foreign companies – foreign businesses can be prosecuted for corruption in Hong Kong;
- Gifts and hospitality – the offering of gifts, hospitality and other such benefits can bring criminal liability under POBO; and
- Indirect liability – as with other leading anti-corruption legislation indirect bribery through intermediaries is illegal.

In summary, Hong Kong has a robust and long standing legal framework for managing corruption risks. The noticeable area of weakness is around corporate liability, however, there have been calls recently to remedy this with the introduction of a “failure to prevent” bribery and corruption style offence to mirror other international laws such as those in the UK and France.

### So, how has this robust legal framework been enforced?

The main investigatory authority in Hong Kong is ICAC and whilst it does not get the same headlines as its American counterpart, the Department of Justice (“DOJ”), it is highly regarded as an effective law enforcement body; in 2018 ICAC completed 162 prosecutions.

ICAC is assisted with robust penalties under POBO which can include fines of up to HK\$1m and more significantly up to 10 years in prison. Hong Kong courts also advocate the need for deterrent sentences which means custodial sentences can be expected, particularly in more serious cases. Further, POBO also allows courts to stop the convicted person from taking or continuing employment for up to seven years – which for many would have serious financial consequences.

For those in the banking sector, under Section 124 of Banking Ordinance (Cap 155) offenders can be liable for a fine of up to HK\$100,000 and up to five years in prison.

### ICAC in action – a case study

The recent charges brought against Catherine Leung Kar-cheung puts Hong Kong’s anti-corruption framework into context. Before we continue, it is important to note that Ms Leung Kar-cheung has only been charged and has not been found guilty of any offences; however, in many ways the damage has already been done. Ms Leung Kar-cheung’s reputation will have been tarnished by these allegations and she faces the prospect of a long and costly investigation and trial in relation to her conduct.

By way of background, Ms Leung Kar-cheung is the former managing director of the subsidiary of a US headquartered investment bank. She was charged by ICAC with bribing the chairman of a logistics company with the employment of their son in return for the chairman showing favour to the bank for the initial public offering of the company. The alleged offences offering an advantage to an agent.

The charges relate to a client referral programme which the investment bank had previously, in 2016, been charged by the DOJ for violating the FCPA by awarding jobs to relatives and friends of Chinese government officials to secure business opportunities, the so called “sons and daughters” programme. The bank paid US\$164m in penalties to resolve the enforcement action.



### Key points to take from this case study:

- ICAC has the power to bring prosecutions and they use their powers vigorously;
- Bribery can take many forms – as long as there is something of value and there is an intention to influence and gain a benefit, then a bribe doesn't have to be in monetary form;
- The investment bank and its employees faced prosecution from different jurisdictions and under various legislation;
- As we will explore further below, the US claims jurisdiction over bribery and corruption globally, as long as there is a US nexus;
- The DOJ as part of any settlement will expect corporates to assist them with information to bring prosecutions against responsible individuals; and
- Global enforcement bodies collaborate and exchange information to support investigations and prosecutions in their own respective jurisdiction.

### ICAC in action – some further examples

ICAC is very active, with a focus very much on prosecuting individuals. In addition to the high profile investigations and prosecutions as identified above, you will see from the range of prosecutions brought that ICAC do not just focus on high profile and high value cases but with no de minimis level for prosecution they have a varied case load impacting on a wide range of individuals:

- A business development executive at a bank was jailed for 13 months following bribes paid to secure confidential customer data;
- A sales supervisor was jailed for 15 months for accepting illegal commission in the sum of HK\$1.2m relating to a property transaction;
- Three individuals were jailed for 9 months each for bribery in relation to the handling of credit facilities of a client at a bank and disclosing the identity of a person under its investigation respectively;
- A relationship manager of a bank, was jailed for 17 months for soliciting illegal commissions of about HK\$920,000 in total from a client for handling her securities transactions;
- A developer and his associate, were each sentenced to 40 months' imprisonment for a conspiracy to offer bribes totalling HK\$600,000 to a village resident representative for not opposing small house development projects; and
- A man was sentenced to eight months in prison after admitting he had offered a bribe to an officer of the Immigration Department to secure entry into Hong Kong.

### Extra-territorial reach – the FCPA

Whilst ICAC is an effective investigatory and enforcement body in Hong Kong, it is important that companies doing business in Hong Kong and internationally are aware of overseas legislation with "extra-territorial reach" e.g. legislation which can impact on parties outside the jurisdiction in which the legislation originates. The most high profile and aggressively enforced example being the FCPA.

#### The FCPA – an introduction

The FCPA is a US federal law which includes two primary elements:

- Anti-bribery provisions – prohibits giving or offering money, gifts, or anything of value to a foreign government official in order to secure or retain business; and
- Accounting provisions – the requirement to maintain accurate books and records and adequate internal accounting controls.

The DOJ and Securities and Exchange Commission ("SEC") enforce the FCPA, the latter with respect to listed companies, and do so aggressively and proactively. For those who believe FCPA enforcement is in decline, 2018 was a record year with penalties totalling US\$2.9bn, up from US\$1.9bn the year before.

To increase the risk of enforcement further, at the end of 2018, the DOJ launched the "Chinese Initiative" which included a focus on identifying FCPA cases against Chinese companies which compete with US companies. Hong Kong companies and individuals need to take steps to ensure they do not get caught in the cross-fire.

#### Below are some of the key features of the FCPA:

- Relates only to the bribery of foreign government officials not commercial bribery;
- Applies to both individuals and corporates;
- Bribes can be paid directly or indirectly (e.g. through third party intermediaries such as agents or brokers); and
- Unlike in Hong Kong and other jurisdictions facilitation payments are allowed for the purpose of facilitating or expediting routine government action (e.g. customs checks) if recorded appropriately in books and records.



Individuals found guilty of an offence under the anti-bribery provisions of the FCPA face up to five years' imprisonment for each violation or up to 20 years for wilful violations (e.g. voluntarily and purposefully with bad purpose). Corporations and other business entities may be fined up to US\$2m per violation and individuals up to US\$100,000. The maximum fine may be increased to US\$25m for corporations and other business entities and US\$5m for individuals in the case of wilful violations.

### Why is the FCPA relevant in Hong Kong?

The FCPA has extra-territorial reach – that is, the legislation can be enforced beyond the boundaries of the US. It applies to three categories of persons:

- Issuers – if you are a Hong Kong company with securities registered in the US or are otherwise required to file periodic reports with the SEC then you are likely to be caught and you can be prosecuted for actions inside and outside the US;
- Domestic concerns – if you are in Hong Kong but are a US citizen, national or resident of the US then your actions can be caught. It also applies to any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation or sole proprietor whose principal place of business in the US or is organised under the laws of the US state, territory, possession or commonwealth; and
- Actions in furtherance of violation whilst in the US – if you undertake an action whilst in the US for example attend a meeting, send an email or take a call whilst in the US this could catch the action under the FCPA and such an action can be indirect or direct.

The above principals have been interpreted widely by US authorities with jurisdiction being claimed when US mail or a US server are used, when wire transfers are being made via a US bank account or when actions to further corrupt conduct occur whilst travelling in the US.

Therefore, the US claims a broad jurisdiction for the FCPA which could capture offences which on the face of it do not have an obvious US connection. Applying this to Hong Kong, in simple terms, if you do business in the US it is likely that the US authorities could claim jurisdiction over your actions if you were to breach the FCPA and such risks need to be managed.

### Other international laws

It is worth also highlighting two other pieces of extra-territorial legislation at this point, particularly for those considering corporate liability:

- The UKBA introduced the corporate offence of failure to prevent bribery. Under the UKBA if an organisation or someone connected with it pays a bribe then the company itself can be criminally liable unless it can show it has in place reasonable procedures to manage the risks of bribery in its business. As with the FCPA, the law is interpreted widely and therefore if you do business in the UK then you should be aware of the UKBA and implement policies and procedures to manage bribery risks;
- In France under Sapin II, there are similar provisions, however, in addition, for companies which meet certain criteria there is a positive obligation to implement an anti-corruption compliance programme. Failure to do so can lead to fines.

Therefore, for a Hong Kong organisation you need to understand both your local risks (such as the POBO) but also international expectations (such as FCPA, UKBA and Sapin II) to ensure you are compliant across your global business and all relevant employees know their obligations and liabilities in order to protect themselves and your business.

### FPCA action with a Hong Kong nexus – a case study

In March 2019 Patrick Ho, a former senior official in Hong Kong was sentenced to 3 years in prison and fined US\$400,000 for violations of the FCPA and money laundering offences. The US Court found that Mr Ho had schemed to bribe leaders of Chad and Uganda in order to secure an unfair business advantage for a Chinese energy company, which he served. Mr Ho was a citizen of the People's Republic of China who resided in Hong Kong, who allegedly paid bribes in Africa and had no obvious US nexus, so how is the FCPA relevant?

The US authorities relied on the following to claim jurisdiction for FCPA enforcement:

- Mr Ho was the secretary of non-governmental organisation (“NGO”) based in Hong Kong and Virginia, US. The NGO was funded by the Chinese energy company who he served and it was used to conceal Mr Ho's criminal scheme;
- Mr Ho also had various roles at the United Nations and the DOJ claimed that some of the transactions were negotiated on their premises in New York; and
- Some of the payments made to influence senior politicians in Chad and Uganda went to the recipients from Hong Kong via US clearing houses in New York.

This case highlights that the US authorities will take a wide interpretation of the reach of the FCPA and will aggressively seek to enforce foreign corruption.



## Conclusion

In today's increasingly flat and technology enabled world comes great opportunities as well as risks. For multi-national enterprises, it is essential that they think global as well as local when assessing these risks, particularly around corruption and other regulatory compliance risks. Enforcement action can be brought in multiple jurisdictions on the same set of facts or actions and in various forms so it is important that companies and individuals take steps to educate their people and assess and manage their corruption risks through compliance frameworks. Failing to do so may lead to difficult conversations with ICAC, the DoJ, the SEC or one of the many international enforcement bodies.

As the saying goes, if you think compliance is expensive you should try non-compliance as Mr Albert Ho, Ms Catherine Leung Kar-cheung (even if not prosecuted) and many others have found out the hard way.



## Appendix – Examples of FCPA enforcement

As a snapshot, below are some examples of FCPA enforcement in the last 18 months against companies and individuals in Greater China.

Year	Company	Local jurisdiction(s)	Summary of offences	Penalties
2019	US retailer	China (also Brazil, India and Mexico)	Improper payments were made through third party agents and intermediaries to government officials in China to secure permits and licenses to open and operate stores.	Fines of US\$282m and 2 year monitorship.
2019	Patrick Ho	China/Hong Kong	Bribes to secure business opportunities in Africa (see above for further details).	3 years in prison.
2018	US technology company	China	Breach of books-and-records and internal controls provisions and the provision of discounts to distributors or resellers to be used to fund improper payments to government end customers.	Fines, disgorgement and interest totalling over US\$16m.
2018	US medical devices company	China (also in India and Kuwait)	Failure to maintain internal accounting controls and use of unauthorised sub-distributors in breach of company policy.	Fines of US\$7.8m plus requirement to retain an independent compliance consultant to review and evaluate internal controls.
2018	US manufacturer	China (also Indonesia, South Korea, Thailand and others)	Through a joint venture partner paid improper commissions to a third party agent to sell jet engines to state owned airlines. Also, kickbacks to an official of a state owned bank to win a contract and also allegations of improper funding of travel for foreign officials.	Fines of US\$13.9m.
2018	European financial services company	Hong Kong	Hired candidates referred to by/or related to Chinese government officials and executives of state-owned entities to secure business without a proper hiring process or necessary skills to fulfil the role.	Fines of c.US\$80m.
2018	US technology company	China	Bribes paid to Chinese government body via third-party agents to obtain financial data and falsely recorded the payments as legitimate business expenses.	Fines of US\$8.1m.
2018	Ng Lap Seng (David Ng)	Macau	Payments made to UN officials to gain support for the construction of a conference centre in Macau.	4 years in prison and over US\$3m in fines, forfeiture and restitution.



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