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Asia Pacific insights

Business ethics and anti-corruption

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From the editor

Welcome to Issue 12 of our *Asia Pacific Insights* into Business ethics and anti-corruption matters. After a short hiatus, we return with four articles dealing with corruption and money laundering.

Australia seeks to shift closer in approach to its US and UK counterparts in its new foreign bribery laws. Abigail McGregor and JP Wood compare and contrast the regimes by reviewing the bribery offences, the adequate procedures compliance defences and deferred prosecution schemes. Jeremy Lua and I provide a comprehensive study of Singapore laws on bribery and corruption ahead of impending changes to the Prevention of Corruption Act.

In an article on the impact of US developments on Asia, my US-based partners Gerry Pecht, Jeff Layne and Ben Koplin team up with Singapore-based US counsel Paul Sumilas to examine the Department of Justice guidance titled “Evaluation of Corporate Compliance Programs” and its effect on Asian businesses, in light of similar industry standards like ISO 37001 and the PACT guidebook published by the Singapore Corrupt Practices Investigation Bureau.

Over in China, the financial services regulators take firm steps to impose stringent obligations on the reporting of large-sum and suspicious transactions on a widening scope of financial institutions. Insurance agents, brokers, consumer finance and loan companies, in addition to financial institutions like banks, are now subject to anti-money laundering obligations as part of a global trend to tighten regulation on illicit activities.

I hope these articles are helpful to you. Please let us know if you would like to speak with us on any of these matters. Enjoy reading!

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Australia proposes new foreign bribery laws: A shift closer to the UK and US

Will companies be automatically liable for inadequate policies?

The Commonwealth Government has proposed reforms to Australia's foreign bribery regime, which include expanding the scope of the current offence under the Criminal Code to include

- Expanding the definition of foreign public official, to include candidates for office.
- Removing the limiting requirement of influencing a foreign public official in the exercise of their official capacity.
- Creating a new offence for recklessness.
- Clarifying that the accused need not have a specific business or advantage in mind; and that the business or advantage can be obtained for someone else.

Importantly, the proposed reforms include creating a new offence for corporations for failing to prevent foreign bribery. Australian companies will be liable for significant penalties as a consequence of their rogue employees' conduct.

In addition to the new foreign bribery laws, the government also released its proposed model for a deferred prosecution agreement scheme.

The changes indicate a desire of the Australian government to strengthen its foreign bribery regime and to follow aspects of the UK and US frameworks, thus implementing the OECD Anti-Bribery Convention to a greater degree.

Offence for inadequate foreign bribery policies and procedures

The proposed new corporate offence of failing to prevent foreign bribery places the onus on Australian companies to develop robust anti-bribery and corruption policies and procedures.

Similar to section 7 of the *UK Bribery Act* 2010, the proposed offence renders companies automatically liable for bribery committed by their domestic and foreign employees, contractors, and agents, except where the company can demonstrate it had in place adequate procedures to prevent such conduct.

The company bears the burden of establishing that it had adequate procedures in place, with the courts to make a determination on a case by case basis. It is unclear how the courts will assess adequacy. The reforms propose that the Minister for Justice will publish guidelines to assist Australian companies in formulating policy and procedures. The proposed new offence establishes a maximum penalty of at least A$18 million, and, where the employee's conduct was intentional it may be a higher figure being as much as ten per cent of the annual turnover for the 12 months ending in the month that the conduct occurred. This is the same maximum penalty as exists for corporations that commit the primary offence of bribery.

If enacted, the new legislation will require Australian companies to comprehensively re-evaluate the strength and coverage of their internal controls with a particular focus on closely reviewing their anti-bribery and corruption policies, procedures and training. The new laws will also require Australian companies to be parties to prosecutions of rogue employees and to prove to the court that their policies and procedures were adequate in the circumstances.

Proposed deferred prosecution agreement scheme

The Australian government has also released a consultation paper proposing a model for a Deferred Prosecution Agreement (DPA) scheme in respect of corporate crimes. The proposed model largely mirrors schemes which exist in the UK.

The model contemplates a voluntary negotiation between a company and the Commonwealth Director of Public Prosecutions (CDPP) in which companies may be granted amnesty for an offence in exchange for complying with certain requirements, including an agreed statement of facts and list of offences (with any financial loss or gain detailed), an admission of criminal liability on behalf of the company, agreement to cooperate with investigations that may follow, and

consent to making the DPA available to the public. The DPA then needs to be approved by a retired judge and will only be approved if it is in the interest of justice and the public interest to do so.

As with the model in the UK, any admissions in the statement of facts, are considered to be admissions under the relevant crime legislation. Corporations need to engage in the negotiation of a DPA with care to avoid providing information and materials to the CDPP which can ultimately be used in subsequent proceedings, should a DPA not be finalised. Material that is created ‘solely to facilitate, support or facilitate the DPA negotiations’ cannot be used for a purpose other than the DPA negotiations. However, primary documents including business records, or documents created during an internal investigation will not be captured by the protection.

DPAs have been used extensively in the US and were introduced recently in the UK. Typically they require the company to pay a penalty and to reform its internal compliance mechanisms. Experience in the US and UK has shown that a DPA can carry several benefits, foremost that companies will not be found by a court to have contravened the law, and will not risk being barred from engaging in key operations abroad, and may further avoid the time and expense of managing a prosecution. The ability to negotiate a DPA in Australia in parallel with other jurisdictions is a welcome development given the global nature of anti-corruption regulation.

The reforms have been published in a Consultation Paper and the Attorney General’s Department has sought public submissions which closed on May 1, 2017.

Time will tell whether the Australian government implements the stricter regime further aligning the Australian position with its obligations under the OECD Anti-Bribery Convention.

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Anti-Corruption Regulation in Singapore 2017

We have contributed to Getting the Deal Through's *Anti-Corruption Regulation 2017*, focussing on the Singapore regime. The publication follows a unique format to ease comparative analysis across jurisdictions.

We have provided analysis and insight in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners and directors.

Singapore

International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Singapore became a signatory to the United Nations Convention against Corruption (UNCAC) on November 11, 2005 (ratification on November 6, 2009) and to the United Nations Convention against Transnational Organized Crime on December 13, 2000 (ratification on August 28, 2007).

Singapore has been a member of the Financial Action Task Force since 1992, was one of the founding members of the Asia-Pacific Group on Money-Laundering in 1997 and was admitted as a member of the Egmont Group of Financial Intelligence Units in 2002. Singapore is also a member of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, which it endorsed on December 30, 2001.

Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The primary Singapore statutes prohibiting bribery are the Prevention of Corruption Act (PCA) (Cap 241, 1993 Rev Ed) and the Penal Code (Cap 224, 2008 Rev Ed). Sections 5 and 6 of the PCA prohibit bribery in general. Section 5 makes active and passive bribery by individuals and companies in the public and private sectors an offence.

Section 6 makes it an offence when an agent is corruptly offered or corruptly accepts gratification in relation to the performance of the principal's affairs or for the purpose of misleading the principal. The term 'gratification' is interpreted broadly (see question 5).

Sections 11 and 12 of the PCA prohibit the bribery of domestic public officials such as members of parliament and members of a public body. A 'public body' is defined as 'any corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law'. The Singapore Interpretation Act defines the term 'public officer' as 'the holder of any office of emolument in the service of the [Singapore] Government'. The PCA does not specifically target bribery of foreign public officials, but such bribery could fall under the ambit of the general prohibitions, namely section 6 on corrupt transactions with agents.

The Penal Code also contains provisions that relate to the bribery of public officials (sections 161 to 165). Public officials are referred to in the Penal Code as 'public servants', which have been defined in the Penal Code to include mainly domestic public officials. Sections 161 to 165 describe the following scenarios as constituting bribery

- A public servant taking a gratification, other than legal remuneration, in respect of an official act.
- A person taking a gratification in order to influence a public servant by corrupt or illegal means.
- A person taking a gratification for exercising personal influence over a public servant.
- Abetment by a public servant of the above offences.
- A public servant obtaining anything of value, without consideration or with consideration the public servant knows to be inadequate, from a person concerned in any proceedings or business conducted by such public servant.

In addition to the above, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (the CDSA) (Cap 65A, 2000 Rev Ed) – Singapore's key anti-money laundering statute – provides for the confiscation of the benefits derived from corruption and other criminal conduct.

Foreign bribery

Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

As mentioned in question two, there are no provisions in the PCA or the Penal Code which specifically prohibit bribery of a foreign public official. However, the general prohibition against bribery in the PCA, in particular on corrupt transactions with agents, read together with section 37 of the PCA, prohibits, in effect, the bribery of a foreign public official outside Singapore by a Singapore citizen. Section 37 of the PCA gives the anti-corruption legislation extraterritorial effect because if the act of bribery takes place outside Singapore and the bribe is carried out by a Singapore citizen, section 37 of the PCA states that the offender would be dealt with as if the bribe had taken place in Singapore.

Under section 5 of the PCA, it is an offence for a person (whether by himself or herself, or in conjunction with any other person) to

- Corruptly solicit, receive, or agree to receive for himself or for any other person or
- Corruptly give, promise, or offer to any person, whether for the benefit of that person or of another person any gratification as an inducement to or reward for or otherwise on account of
  - Any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or
  - Any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned.

It is also an offence under section 6 of the PCA for

- An agent to corruptly accept or obtain any gratification as an inducement or reward for doing or forbearing to do any act in relation to his or her principal's affairs.
- A person to corruptly give or offer any gratification to an agent as an inducement or reward for doing or forbearing to do any act in relation to his or her principal's affairs or
- A person to knowingly give to an agent a false or erroneous or defective statement, or an agent to knowingly use such statement, to deceive his or her principal.

Section 4 of the Penal Code also creates extraterritorial obligations for all Singapore public servants and states that any act or omission committed by a public servant outside of Singapore in the course of his or her employment that would constitute an offence in Singapore will be deemed to have been committed in Singapore. Accordingly, if the public servant accepted a bribe overseas, he or she would be liable under Singapore law.

The extraterritorial effects of the PCA and Penal Code are limited in the respect that they only apply to Singapore citizens and Singapore public servants respectively. In *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410, a case involving a constitutional challenge to the extraterritoriality of section 37 of the PCA, the court upheld the provision and concluded that it was 'rational to draw the line at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations'. The court further observed that the language of the provision was wide and 'capable of capturing all corrupt acts by Singapore citizens outside Singapore, irrespective of whether such corrupt acts have consequences within the borders of Singapore or not'. As regards non-citizens committing corruption outside Singapore that could cause harm in Singapore, the court opined that section 29 of the PCA, which deals with the abetment of a corrupt act abroad, could be wide enough to address that scenario.

The CDSA, which primarily deals with the prevention of laundering of the proceeds of corruption and other serious crimes, also has extraterritorial application. The CDSA expressly applies to property whether situated in Singapore or elsewhere. In particular, section 47 of the CDSA provides that any person who knows or has reasonable ground to believe that any property represents another person's benefits from criminal conduct is guilty of an offence if he or she conceals, disguises, converts, transfers or removes that property from the jurisdiction for the purposes of assisting any person to avoid prosecution. Criminal conduct is defined to include any act constituting a serious crime in Singapore or elsewhere.

Definition of a foreign public official

How does your law define a foreign public official?

As the PCA and the Penal Code do not specifically deal with the bribery of a 'foreign public official', the statutes do not define this term.

Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There are no express restrictions in the PCA or Penal Code on providing foreign officials with gifts, travel expenses, meals or entertainment. However, any gift, travel expense, meal or entertainment provided with the requisite corrupt intent will fall foul of the general prohibition under the PCA, and would constitute an offence.

As noted in question three, the PCA prohibits (among other things), the offer or provision of any 'gratification' if accompanied with the requisite corrupt intent. The term 'gratification' is broadly defined under the PCA to include money, gifts, loans, fees, rewards, commissions, valuable security, property, interest in property, employment contract or services or any part or full payment, release from or discharge of any obligation or other liability; and any other service, favour or advantage of any description whatsoever (see *Public Prosecutor v Teo Chu Ha* [2014] SGCA 45).

Under the Penal Code, the term 'gratification' is used but not expressly defined. The explanatory notes to the relevant section stipulate that the term is not restricted to pecuniary gratifications or those with monetary value. The Singapore courts have also held that questionable payments made pursuant to industry norms or business customs will not constitute a defence to any prosecution brought under the PCA (see *Public Prosecutor v Soh Cham Hong* [2012] SGDC 42) and any evidence pertaining to such customs will be inadmissible in any criminal or civil proceedings under section 23 of the PCA (see *Chan Wing Seng v Public Prosecutor* [1997] 1 SLR(R) 721).

Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Neither the PCA nor the Penal Code expressly permits facilitating or 'grease' payments. Such payments would technically constitute an act of bribery under the general prohibitions of both the PCA and the Penal Code. Notably, section 12(a)(ii) of the PCA prohibits the offer of any gratification to any member of a public body as an inducement or reward for the member's 'expediting' of any official act, among other prohibited acts.

Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Corrupt payments through intermediaries or third parties, whether such payments are made to foreign public officials or to other persons, are prohibited. Section 5 of the PCA expressly provides that a person can commit the offence of bribery either 'by himself or by or in conjunction with any other person'.

Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery offences, including bribery of a foreign official. The various provisions in the PCA and Penal Code set out certain offences that may be committed by a 'person' if such person were to engage in certain corrupt behaviour. The term 'person' has been defined in the Singapore Interpretation Act to include 'any company or association of body of persons, corporate or unincorporated'.

In addition, Singapore case law indicates that corporate liability can be imposed on companies for crimes committed by their employees, agents, etc (see *Tom Reck Security Services Pte Ltd v PP* [2001] 2 SLR 70). A test for establishing corporate liability is whether the individual who committed the crime can be regarded as the 'embodiment of the company', or whose acts 'are within the scope of the function of management properly delegated to him'. This test, known as the identification doctrine, was derived from English case law (see *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127). The identification doctrine was subsequently broadened in the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, which held that the test for attributing mental intent should depend on the purpose of the provision creating the relevant offence. This broader approach has been affirmed in Singapore (see *The Dolphina* [2012] 1 SLR 992) in a case involving shipping and conspiracy but not in the context of bribery offences. However, the test for corporate liability is different in relation to money laundering offences. Section 52 of the CDSA introduces a lower threshold of proof for corporate liability. It provides that where it is necessary to establish the state of mind of a body corporate in respect of conduct engaged by the body corporate it shall be sufficient to show that a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, had that state of mind. Likewise, any conduct engaged in or on behalf of a body corporate by a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, or by any other person at the direction or with the consent or agreement of the above, shall be deemed, for the purposes of the CDSA, to have been engaged in by the body corporate.

Generally, individual directors and officers of a company will not be held strictly liable for offences found to have been committed by the company if

they were not personally responsible for, or otherwise involved in, that particular offence. However, section 59 of the CDSA provides that where an offence under the CDSA committed by a body corporate is proved to have been committed with the consent or connivance of an officer or to be attributable to any neglect on his or her part, the officer as well as the body corporate shall be guilty of the offence. It is also possible that an individual such as a director or officer of a company, although not personally guilty of committing a corrupt act, may be held liable for consequential offences including moneylaundering or failure to report a suspicion that certain property or the transfer of assets was connected to criminal conduct. In addition, individual directors who ignore red flags of criminal misconduct committed by employees of the company may also find themselves liable for failing to use reasonable diligence in performing their duties under the Companies Act (Cap 50). An ex-president of a shipyard was recently prosecuted for this infraction (see question 32).

Ultimately, the decision on whether to pursue an individual or a corporate entity for criminal conduct is a matter of prosecutorial discretion. In this regard, an opinion-editorial written by Singapore's attorney general, Mr VK Rajah S C, in November 2015 sheds some light on Singapore's approach on such matters. In his opinion-editorial, Mr Rajah stated that in Singapore both individuals and corporate entities should expect prompt enforcement action for financial misconduct. However, he pointed out that, '[t]he emphasis, if there is one, is placed on holding accountable the individuals who perpetuated the misconduct'. In addition, he stressed that 'significant attention is also given to the culpability of corporations … especially if the offending conduct is institutionalised and developed into an established practice in an entity over time'.

Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In a situation where the acquiring entity purchases shares in the target entity, the acquiring entity is not legally liable for bribery of foreign officials by the target entity that occurred prior to the acquisition. This is because of the common law doctrine of separate legal personality.

Likewise, there is no change to the legal liability or otherwise of the target entity following the change of identity of its shareholder or shareholders.

Subsequent to the acquisition, the commercial value of the acquiring entity may be adversely affected in the event that the target entity is investigated, prosecuted or ultimately held liable for bribery of foreign officials occurring prior to the acquisition. The target entity may be liable for investigation costs, suffer business disruptions and loss of revenue and may have to bear financial penalties or debarment consequences. These may adversely impact the value of the shares in the target entity, which are in turn owned by the acquiring entity.

Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes, criminal enforcement against corrupt activities is provided for in both the PCA and the Penal Code. In particular, if the court rules that there has been a violation of the general prohibitions on bribery in the PCA, a penalty of a fine, imprisonment, or both will be imposed on the offender. The offender may also have to pay the quantum of the bribe received.

With regard to civil enforcement, a victim of corruption will be able to bring a civil action to recover the property of which it has been deprived. Section 14 of the PCA expressly provides that, where gratification has been given to an agent, the principal may recover, as a civil debt, the amount or the money value thereof either from the agent or the person paying the bribe. This provision is without prejudice to any other right and remedy that the principal may have to recover from his agent any money or property. The objective of imposing this additional penalty is to disgorge the offender's proceeds from the corrupt transaction.

The case *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] SGCA 22 provides an example of a company successfully bringing a civil claim against its former CEO and director, Ho Kang Peng, for engaging in corrupt activities. The Court of Appeal dismissed Ho's appeal from the High Court, holding that he had breached his fiduciary duties owed to the company by making and concealing unauthorized payments in the name of the company. The Court of Appeal found that although the payments were for the purpose of securing business for the company, Ho could not be said to be acting in the bona fide interests of the company because the payments were, in effect, gratuities and thereby ran the unjustified risk of subjecting the company to possible criminal liability.

Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The main government agency that enforces bribery laws in Singapore is the Corrupt Practices Investigation Bureau (CPIB). The CPIB derives its powers from the PCA and is responsible for investigating and preventing corruption in Singapore, focusing on corruption-related offences arising under the PCA and the Penal Code.

Under the PCA, the CPIB has extensive powers of investigation, which include powers to require the attendance of

witnesses for interview, to investigate a suspect's financial and other records and the power to investigate any other seizable offence disclosed in the course of a corruption investigation. Special investigative powers can be granted by the public prosecutor, such as the power to investigate any bank account, share account, purchase account, expense account or any other form of account or safe deposit box and to require the disclosure of all information, documents or articles required by the officers.

The CPIB carries out investigations into complaints of corruption but does not prosecute cases itself. It refers the cases, where appropriate, to the public prosecutor for prosecution.

The PCA provides that no prosecution under the PCA shall be instituted except by or with the consent of the public prosecutor.

The Commercial Affairs Department (the CAD) is the principal white-collar crime investigation agency in Singapore that investigates complex fraud, white-collar crime, money-laundering and terrorism financing. The CAD's Financial Investigation Division is specially empowered to combat money-laundering, terrorism financing and fraud involving employees of financial institutions in Singapore and works closely with financial institutions, government agencies and its foreign counterparts. The Financial and Technology Crime Division (the FTCD) was established within the Attorney-General's Chambers (AGC) in November 2014, as part of a redesignation of the Economic Crimes and Governance Division (the EGD) to bring the prosecution of cybercrime under the division's purview. The EGD had been responsible for the enforcement, prosecution and all related appeals in respect of financial crimes and corruption cases within and outside of Singapore. The reorganised division focuses on financial crimes ranging from securities fraud and money laundering to corruption and criminal breach of trust, as well as a broad range of cybercrimes. It is one of two divisions in AGC's crime cluster, with the Criminal Justice Division being the other.

The Monetary Authority of Singapore (the MAS) is responsible for issuing guidelines on money-laundering and terrorist financing to financial institutions and conducting regulatory investigations on such matters. The MAS may also refer potential criminal offences to the CAD for further investigations.

Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The PCA and the Penal Code do not expressly provide for a formal mechanism for companies to disclose violations of bribery laws in exchange for leniency. While there are no formal legislative mechanisms in place, an informal plea bargaining process with the public prosecutor is available. Where charges have not yet been filed, an accused can submit letters of representation to the public prosecutor pleading for leniency and seeking issuance of a stern warning or a conditional stern warning in lieu of prosecution for the offending conduct, highlighting any merits of the case that may warrant the favourable exercise of the public prosecutor's discretion. Even after charges have been filed, an accused can still submit letters of representation to the public prosecutor to negotiate the possible withdrawal, amendment or reduction of the charges, similarly highlighting any merits of the case that may warrant the exercise of the public prosecutor's discretion to do so. At this stage, a withdrawal of the charges may be accompanied by a stern warning or a conditional stern warning. It should be noted that the public prosecutor retains the sole discretion to accede to the requests in such letters of representation.

Apart from the informal plea bargaining process set out above, the Singapore courts introduced a voluntary Criminal Case Resolution programme in October 10, 2011 where a senior district judge functions as a neutral mediator between the prosecution and defence with a view to parties reaching an agreement. If the mediation is unsuccessful, the judge will not hear the case. Once proceedings have been initiated, the accused may, having reviewed the evidence in the prosecution's case, choose to plead guilty and enter a plea mitigation to avoid a public trial. In appropriate cases, the judge may also provide an indication of sentence. However, such indication will only be provided if requested by the accused.

In October 2010 there was a court ruling involving the CEO of AEM-Evertech, a Singapore-listed company, who exposed corrupt practices by the company's top management, including himself (see *Public Prosecutor v Ang Seng Thor* [2010] SGDC 454 – the AEM-Evertech case). In sentencing the CEO, the district judge took into consideration the fact that his whistleblowing helped to secure the conviction of other members of the company's management and consequently did not impose a prison sentence. However, in May 2011, the prosecution successfully appealed against this decision. It was held by the Court of Appeal that the judge in the first instance, had, on the facts, incorrectly found that the CEO's role in the matter demonstrated a low level of culpability (see *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217). It also found that the CEO was not an archetypal whistle-blower, owing to the fact that he only admitted personal wrongdoing when placed under investigation by the CPIB in May 2007 and had failed to approach the authorities directly with evidence of unauthorized activities. The sentence imposed at first instance was therefore set aside and substituted with a

sentence of six weeks' imprisonment and a fine of $25,000 on each of the two charges, with each prison sentence to run consecutively. Although the Court of Appeal overruled the first instance decision, the case confirms that a genuine whistle-blower would potentially be treated with a degree of leniency during sentencing. The exercise of judicial discretion will depend, in part, on the motivation of the whistle-blower and the degree of cooperation during the investigation.

Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The public prosecutor has the discretion to initiate, conduct or discontinue any criminal proceedings. It may be possible for a person under investigation to convince the public prosecutor not to initiate criminal proceedings against him or her or, as described in question 12, if criminal proceedings have already been initiated, an accused person may submit letters of representation (on a 'without prejudice' basis) to the public prosecutor to negotiate the possible withdrawal, amendment, or reduction of charges. The public prosecutor may also direct the enforcement agency to issue a stern warning or a conditional stern warning in lieu of prosecution. A stern warning does not result in a conviction; the accused person will not have any criminal record for the infraction. The public prosecutor has sole discretion whether to accede to such letters of representation. It may also be possible for an accused person to plead guilty to certain charges, in return for which the public prosecutor will withdraw or reduce certain other charges. The accused may also plead guilty to the charges brought against him or her so as to resolve a particular matter without a trial, and then enter a mitigation plea.

In March 2013, the AGC and the Law Society issued the Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and Defence, which is a joint code of practice that sets out the duties of prosecutors and lawyers during criminal trials and deals with various matters including plea bargaining.

Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Significantly, in January 2015 the Singapore prime minister announced that the capabilities and manpower of the CPIB will be strengthened by more than 20 per cent as corruption cases have become more complex, some with international links. This announcement follows the establishment and reorganisation of the EGD to the FTCD (see question 11) signalled an intent by the AGC to actively enforce and prosecute complex bribery offences, including cybercrime, committed outside Singapore that may involve foreign companies and foreign public officials.

The Mutual Assistance in Criminal Matters Act was revised in July 2014 to improve Singapore's ability to provide mutual legal assistance to other countries and demonstrates a commitment to cross-border cooperation. The amendments primarily ease requirements that foreign countries would need to satisfy to make requests for legal assistance and widen the scope of mutual legal assistance that Singapore can provide.

Public sector complaints and prosecutions remain consistently low due, in part, to the aggressive enforcement stance taken by the CPIB, as well as to the high wages paid to public servants that reduce the financial benefit of taking bribes as compared to the risk of getting caught. The majority of the CPIB's investigations relate to the private sector, which for 2015 made up 89 per cent of its investigations registered for action (a four per cent increase from the previous year).

There is a trend of law enforcement agencies using anti-money laundering laws and falsification of accounts provisions (in the form of section 477A of the Penal Code) to prosecute foreign bribery cases (see further details at question 18). This is because it is often difficult to prove the predicate bribery offences in such cases, owing to the fact that key witnesses are often located overseas. An example of this approach can be seen in the prosecution of Thomas Philip Doerhman and Lim Ai Wah (the Questzone case), who were sentenced to 60 and 70 months' jail respectively on September 1, 2016, for falsifying accounts under section 477A and money laundering offences under the CDSA. Doerhman and Lim, who were both directors of Questzone Offshore Pte Ltd (Questzone), were prosecuted for conspiring with a third individual, Li Weiming, in 2010 to issue a Questzone invoice to a Chinese telecommunications company seeking payment of U$3.6 million for a fictitious subcontract on a government project in a country in the Asia-Pacific. Li was the chief representative for the Chinese company in that country. A portion of the monies paid out by the Chinese company to Questzone pursuant to its invoice was then subsequently redistributed by Doerhman and Lim to Li and the then the prime minister of that Asia-Pacific country in 2010.

Even though no corruption charges were brought under the PCA against the parties, it is plainly conceivable that Questzone functioned as a corporate conduit for corrupt payments to be made. On the facts, some key witnesses were overseas – with Li having absconded soon after proceedings against him commenced. The use of section 477A and money-laundering charges under the CDSA allowed

the prosecution to proceed against Doerhman and Lim as they only needed to prove that the invoice was false, in respect of the section 477A charge; and that the monies paid out pursuant to the invoice – which would be proceeds of crime or property used in connection with criminal conduct – were transferred to Li and the then the prime minister of the Asia-Pacific country, in respect of the money-laundering offences.

The use of section 477A of the Penal Code was also employed in the case relating to a Singapore shipyard (see details at question 32), which involved senior executives of the shipyard conspiring to bribe employees of its customers in order to obtain business from these customers. The bribes were disguised as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the senior executives. It is pertinent to note that these senior executives did not carry out the actual payment of the bribes but had approved the fraudulent petty cash vouchers, which they knew did not relate to genuine entertainment expense claims.

Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under the general offences of the PCA, foreign companies can be prosecuted for the bribery of a foreign public official if the acts of bribery are committed in Singapore (see question two). In addition, section 29 of the PCA read together with section 108A of the Penal Code allows foreign companies to be prosecuted for bribery that was substantively carried out overseas, if the aiding and abetment of such bribery took place in Singapore.

Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The PCA provides for a fine, a custodial sentence, or both for the contravention of the general anti-corruption provisions under sections 5 and 6 (which include the bribery of foreign public officials in Singapore, and the bribery of foreign public officials overseas by a Singapore citizen when read with section 37). The guilty individual or company may be liable to a fine not exceeding $100,000 or imprisonment for a term not exceeding five years, if appropriate. Where the offence involves a government contract or bribery of a member of parliament, the maximum custodial sentence has been extended to seven years (see question 30). There are also civil remedies and penalties for the restitution of property pursuant to the PCA (see question 10). A person convicted of an offence of bribery under the Penal Code may be sentenced to a fine and a custodial sentence of up to three years.

There are other statutes imposing sanctions on the guilty individuals or companies. For example, under the CDSA, where a defendant is convicted of a 'serious offence' (which includes bribery), the court has the power, under section 4, to make a confiscation order against the defendant in respect of benefits derived by him from criminal conduct. Under the Companies Act (Cap 50, 2006 Rev Ed), a director convicted of bribery offences may be disqualified from acting as a director.

Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

It has been reported that two Singapore-based companies in the shipbuilding industry and their affiliates may be implicated in relation to transactions entered into with Brazilian national oil company Petróleo Brasileiro SA (Petrobras) and rig builder Sete Brasil Participações SA. These issues arise from a wider investigation by Brazilian authorities – called Lava Jato or 'carwash'. Specifically, it was alleged in US court documents that U$9.5 million in bribes were paid by agents of the two companies to officials of Petrobras, its unit Sete Brasil and Brazil's Workers' Party to procure 12 contracts to build drillships.

In another ongoing case involving foreign bribery, two executives from Glenn Defense Marine Asia (GDMA) were extradited from Singapore to stand trial in the US in a bribery scandal involving GDMA's CEO and chair, nicknamed 'Fat Leonard', and numerous high-ranking US Navy officials. 'Fat Leonard' is a Singapore-based businessman who was arrested in San Diego, US, while on a business trip in September 2013, for allegedly bribing US naval officers to reveal confidential information about the movement of US Navy ships and defrauding the US Navy through numerous contracts relating to support services for US naval vessels in Asia. The US authorities claim that the US Navy has been defrauded of nearly U$35 million. The US government has barred GDMA from any new contracts and terminated nine contracts worth U$205 million that it had with the US Navy. To-date, some 16 defendants, including top US Navy officials and a naval criminal investigative service investigator have been indicted; 'Fat Leonard' and some of the other defendants have also pleaded guilty

to various charges involving bribery. In December 2015, a former US Navy employee, who was the lead contract specialist at the material time, was reportedly charged in court in Singapore with (among others) seven counts of corruptly receiving cash and paid accommodation. The allegation was that she had received a total of $130,278 in the form of cash and paid accommodation in luxury hotels from GDMA as a reward for the provision of non-public US Navy information.

In connection with the transnational money-laundering investigation linked to a Malaysian state investment fund, the MAS ordered the closure of BSI and Falcon Bank for serious lapses in anti-money laundering requirements. Several other major banks in Singapore were also censured and fined for their role in the scandal. In connection with the investigation, several individuals have been charged in court. A former BSI banker, Yak Yew Chee, pleaded guilty to four criminal charges of forgery and failing to report suspicious transactions in November 2016. He was sentenced to 18 weeks' jail and a fine of $24,000. The trial of another former BSI banker, Yeo Jiawei, for witness tampering also began in November 2016. During the course of the trial, details emerged as to how the banker allegedly facilitated the flow of illicit funds through Singapore's financial system. Falcon Bank's branch manager, Jens Sturzenegger was also prosecuted and sentenced to 28 weeks' jail and a fine of $128,000. Among other things, Sturzenegger was charged with consenting to the bank's failure to file a suspicious transaction report to the MAS. The investigation by Singapore authorities is ongoing and is likely to develop further in 2017.

Financial record keeping

Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Companies Act is the main statute that regulates the conduct of Singapore-incorporated companies. Among other things, the Companies Act requires the keeping of proper corporate books and records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets for a period of at least five years, the appointment of external auditors, and filing of annual returns. It was amended in October 2014 to reduce the regulatory burden on companies, provide for greater business flexibility and improve corporate governance. Amendments include revised requirements for audit exemptions, inclusion of a requirement that CEOs disclose conflicts of interest and the removal of the requirement that private companies keep a register of members.

Apart from the requirements set out under the Companies Act, section 477A of the Penal Code also criminalizes the falsification of a company's accounts by a clerk or a servant of the company with intent to defraud.

Singapore-listed companies are also subject to stringent disclosure, auditing and compliance requirements as provided by the Securities and Futures Act, the SGX Listing Rules, the Code of Corporate Governance and other relevant rules. The SGX Listing Rules state that a company's board 'must provide an opinion on the adequacy of internal controls'. The Code of Corporate Governance provides that the board 'must comment on the adequacy and effectiveness of risk management and internal control system'. Companies that do not comply with the laws and regulations may be investigated by the CAD, the Accounting and Regulatory Authority of Singapore or other regulatory bodies.

Disclosure of violations or irregularities

To what extent must companies disclose violations of antibribery laws or associated accounting irregularities?

Section 39 of the CDSA imposes reporting obligations on persons who know or have reasonable grounds to suspect that there is property that represents the proceeds of, or that was used or intended to be used in connection with, criminal conduct. Criminal conduct includes acts of bribery (which potentially extends to acts of bribery overseas) and falsification of accounts under section 477A of the Penal Code. A breach of these reporting obligations attracts a fine of up to $20,000. Section 424 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the CPC) also imposes reporting obligations on every person aware of the commission of or the intention of any other person to commit most of the corruption crimes (relating to bribery of domestic public officials) set out in the Penal Code. Section 69 of the CPC allows the police to conduct a formal criminal discovery exercise during the course of corruption investigations, empowering them to search for documents and access computer records.

Apart from these express reporting and disclosure obligations under the CDSA and the CPC, the requirements imposed by the Companies Act, Securities and Futures Act, Listing Rules, regulations and guidelines issued by the MAS may also impose obligations on a company or financial institution to disclose corrupt activities and associated accounting irregularities.

On May 2, 2012, MAS issued a revised Code of Corporate Governance, which, in conjunction with the Listing Rules, sets out a number of obligations that listed companies are expected to observe. The revised Code has introduced more stringent requirements relating to the role and composition of the Board of Directors (Principles 1 and 2), risk management and internal controls (Principle 11) and the need to have an adequate whistleblowing policy in place (Principle 12). The Listing Rules require listed companies to disclose, in their annual reports, board commentary assessing the companies' internal control and risk management systems. On May 10, 2012, MAS issued Risk Governance Guidance for Listed Boards to provide practical guidance for board members on managing risk.

Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?
No. The laws primarily used to prosecute domestic or foreign bribery are the PCA and the Penal Code.

Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?
Falsifying accounts in order to facilitate the payment of bribes is a violation of section 477A of the Penal Code. The penalty for violating section 477A of the Penal Code is imprisonment for a term of up to ten years, or a fine, or a combination of both.

Apart from section 477A, sanctions for violations of the laws and regulations relating to proper account-keeping, auditing, etc, include fines and terms of imprisonment. The amount of any fine and length of imprisonment will depend on the specific violation in question. Liability may be imposed on the company, directors of the company and other officers of the company.

Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?
Tax deduction for bribes (whether domestic or foreign bribes) is not permitted. Bribery is an offence under the PCA and the Penal Code.

Domestic bribery

Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.
The general prohibition on bribery in the PCA (see question two) specifically states, at section 5, that it is illegal to bribe a domestic public official. Where it can be proved that gratification has been paid or given to a domestic public official, section 8 provides for a rebuttable presumption that such gratification was paid or given corruptly as an inducement or reward. The burden of proof in rebutting the presumption lies with the accused on a balance of probability. In *Public Prosecutor v Ng Boon Gay* [2013] SGDC 132 (Ng Boon Gay case), the prosecution argued that the threshold to establish the presumption was very low and ultimately any 'gratification' given to a public official by someone intending to deal with the official or government would be enough to create the rebuttable presumption. On the facts of the case, however, the defence succeeded in rebutting the presumption. Prohibition of the bribery of a domestic public official is also set out in sections 11 and 12 of the PCA as outlined below. Section 11 relates to the bribery of a member of parliament. It is an offence for any person to offer any gratification to a member of parliament as an inducement or reward for such member's doing or forbearing to do any act in his capacity as a member of parliament. It will also be an offence for a member of parliament to solicit or accept the above gratification. Section 12 relates to the bribery of a 'member of a public body'. For the definition of 'public body', see questions 2 and 25. It is an offence for a person to offer any gratification to a member of such a public body as an inducement or reward for

- The member's voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to that public body
- The member's performing, or abstaining from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of, any official act or
- The member's aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person.

It will, correspondingly, be an offence for a member of a public body to solicit or accept such gratification described above.

The Penal Code also sets out a number of offences relating to domestic public officials (termed 'public servant'). The prohibited scenarios are outlined in question 2. The Singapore government also issues the Singapore Government Instruction Manual (Instruction Manual) to all public officials. The Instruction Manual contains stringent guidelines regulating the conduct of public officials.

Prohibitions

Does the law prohibit both the paying and receiving of a bribe?
Yes. Singapore law prohibits both the paying and receiving of a bribe. In particular, sections 5, 11 and 12 of the PCA prohibit both the paying of a bribe to, and receiving of a bribe by, a domestic public official.

Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official is referred to as a 'member, officer or servant of a public body' under the PCA. There are also specific provisions at section 11 of the PCA in respect of members of parliament. 'Public body' has been defined in section 2 of the PCA to mean any 'corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law (ie, Singapore legislation) relating to public health or to undertakings or public utility or otherwise administer money levied or raised by rates or charges in pursuance of any written law'.

In the *Ng Boon Gay* case and *Public Prosecutor v Peter Benedict Lim Sin Pang* DAC 2106-115/2012 (Peter Lim case) (in which the former Singapore Civil Defence Force Chief was found guilty and sentenced to six months jail for corruptly obtaining sexual favours in exchange for the awarding of contracts), both the Central Narcotics Bureau and the Singapore Civil Defence Force were unsurprisingly held by the courts to be public bodies. In *Public Prosecutor v Tey Tsun Hang* [2013] SGDC 164 (Tey Tsun Hang case) (where the former law professor at National University of Singapore was convicted for obtaining sex and gifts from one of his students but was later acquitted on appeal), despite the arguments of defence counsel, the National University of Singapore (NUS) was also found to be a public body, being a 'corporation which has the power to act … relating to … public utility or otherwise to administer money levied or raised by rates or charges', since 'public utility' included the provision of public tertiary education. The receipt by NUS of funds from the government and its function as an instrument of implementing the government's tertiary education policy further supported the finding that NUS was a 'public body'.

The provisions in the Penal Code pertaining to domestic public officials use the term 'public servant'. This has been defined in section 21 to include an officer in the Singapore Armed Forces, a judge, an officer of a court of justice, an assessor assisting a court of justice or public servant, an arbitrator, an office-holder empowered to confine any person, an officer of the Singapore government, an officer acting on behalf of the Singapore government and a member of the Public Service Commission (PSC) or Legal Service Commission.

It would appear from the above definitions under the PCA and the Penal Code that an employee of a state-owned or state-controlled company may not necessarily be a domestic public official. Such employees of state-owned or state-controlled companies may be considered domestic public officials if they fall within the definitions set out in the PCA and the Penal Code. It should also be noted that the Singapore Interpretation Act defines the term 'public officer' as 'the holder of any office of emolument in the service of the [Singapore] Government'.

Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The Instruction Manual, which applies to all Singapore public officials, is a comprehensive set of rules that govern how public officials should behave in order to avoid corruption. The Instruction Manual allows public officials to participate in commercial activities but sets out certain restrictions, such as public officials not being allowed to profit from their public position. The Instruction Manual details how public officials can prevent conflicts of interest from arising and when consent must be obtained. Consent is required for various investment activities such as holding shares in private companies, property investments and entering into financial indebtedness. The CPIB also advises domestic public officials not to undertake any paid part-time employment or commercial enterprise without the written approval of the appropriate authorities. Subject to such safeguards and approvals, a public official is allowed to participate in commercial activities while in service.

In September 2015, Singapore's prime minister issued a letter to members of parliament (MPs) of the ruling party, the People's Action Party (PAP), on rules of prudence. Among other things, PAP MPs were told to separate their business interests from politics and not to use their parliamentary position to lobby the government on behalf of their businesses or clients. PAP MPs were also told to reject any gifts that may place them under obligations that may conflict with their public duties, and are directed to declare any gifts received other than those from close personal friends or relatives to the clerk of Parliament for valuation. Like public servants, ruling party MPs are required to pay the government the valuation price of the gifts if they wish to retain such gifts.

Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The analysis in question five will apply to both the giving and receiving of such benefits to and by domestic officials. It should also be noted that domestic public officials are not permitted to receive any money or gifts from people who have official dealings with them, nor are they permitted to accept any entertainment, etc, that will place them under any real or apparent obligation.

Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific types of gifts and gratuities that are considered permissible under the PCA and the Penal Code. Any gift or gratuity is potentially caught by the PCA and Penal Code if it meets the elements required by the statutes and is accompanied with the requisite corrupt intent.

Domestic public officials are also subject to the requirements of the Instruction Manual, which details the circumstances in which gifts and entertainment can be accepted and when they must be declared. As a matter of practice, public servants are generally not permitted to accept gifts or entertainment given to them in their capacity as public servants or in the course of their official work unless it is not practicable for them to reject the gift. Upon acceptance of the gift, the public servant is required to disclose the gift to his or her permanent secretary, and only gifts under $50 can be accepted. Any gift valued at more than $50 can only be kept by the public official if it is donated to a governmental department or independently valued and purchased from the government by the public official. By comparison, in the Tey Tsun Hang case, the court heard that the NUS Policy on Acceptance of Gifts by Staff requires consent to be sought for all gifts over $100.

Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. The PCA contains provisions that prohibit bribery in general, and these prohibitions extend to both private commercial bribery as well as bribery involving public officials.

Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The sanctions for individuals and companies violating the domestic bribery rules are similar to those set out in question 16, apart from the following.

The penalties for bribery of domestic public officials under the PCA are more severe than those for general corruption offences. While the general bribery offences under sections 5 and 6 are punishable by a fine not exceeding $100,000, imprisonment not exceeding five years, or both, the bribery of a member of parliament or a member of a public body under sections 11 and 12 respectively may result in a fine not exceeding $100,000, imprisonment for a term not exceeding seven years, or both.

In addition, the domestic public official involved in corruption would be exposed to departmental disciplinary action, which could result in punishment such as dismissal from service, reduction in rank, stoppage or deferment of salary increment, fine or reprimand and/or involuntary retirement.

Furthermore, the Instruction Manual debars companies that are guilty of corruption involving public officials from public contract tenders. Other measures include the termination of an awarded contract and the recovery of damages from such termination.

Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or ‘grease’ payments?

As stated in question 6, facilitating or ‘grease’ payments are technically not exempt under Singapore law. In particular, as regards domestic public officials, section 12 of the PCA prohibits the offering of any gratification to such officials as an inducement or reward for the official’s ‘performing, or ... expediting ... the performance’ of any official act. Accordingly, it is also an offence under section 12 of the PCA for the domestic public official to accept any gratification intended for the purposes above.

Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In *Public Prosecutor v Syed Mostafa Romel* [2015] 3 SLR 1166, the Singapore High Court made clear that private sector bribery was as abhorrent as public sector bribery, tripling the jail term (from two to six months) of a marine surveyor convicted on corruption charges relating to the receipt of bribes to omit safety breaches in his reports. The case is significant for the guidance it gives on sentencing of corruption charges. More importantly, it dispels any perceived distinction between corruption in the private and public sectors.

A Singapore shipyard providing shipbuilding, conversion and repair services worldwide was embroiled in a corruption scandal in which seven senior executives, including three presidents, a senior vice president, a chief operating officer and two group financial controllers, were implicated in conspiracies to bribe agents of customers in return for contracts between 2000 and 2011. A total of at least $24.9 million in bribes were paid out during the period. An integral part of this scheme involved disguising the bribes as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the accused persons. It should be noted that none of these executives carried out the actual bribe payments. Rather, they approved the fraudulent petty cash vouchers,

which they knew were not genuine entertainment expense claims that were presented to them. Between December 2014 and June 2015, the senior executives, were charged with corruption for conspiring to pay bribes, and for conspiring to defraud the company through the falsification of accounts and the making of petty cash claims for bogus entertainment expenses. The prosecution of the case is presently ongoing. To date, the cases against four senior executives have concluded. The former senior vice president and former chief operating officer/deputy president were both sentenced to imprisonment and a fine. The former group financial controller, who was the first to plead guilty and had committed to testifying against his co-conspirators, was handed a $210,000 fine for his role in the conspiracy. The ex- president of the company, who was not alleged to be privy to the conspiracy, was also prosecuted. He was prosecuted under section 157 of the Companies Act for failing to use reasonable diligence to perform his duties and was sentenced to 14 days' jail under a detention order. In this case, the prosecutor alleged that he had ignored information that pointed to criminal wrongdoing in the company.

In *Public Prosecutor v Leng Kah Poh* [2014] SGCA 51 (the *IKEA* case), the Court of Appeal clarified that inducement by a third party was not necessary to establish a corruption charge under the PCA. In doing so, the Court of Appeal overturned an acquittal by the High Court of Leng Kah Poh, the former IKEA food and beverage manager in Singapore, who had originally been sentenced to 98 weeks of jail for 80 corruption charges. Leng had reportedly received a $2.4 million kickback for giving preference to a particular product supplier. The High Court had overruled the conviction of the trial court and acquitted Leng, holding that the conduct did not amount to corruption because he had not been induced by a third party to carry out the corrupt acts. The High Court held that an action for corruption would only succeed when there are at least three parties: a principal incurring loss; an agent evincing corrupt intent; and a third party inducing the agent to act dishonestly or unfaithfully. The High Court held that in this case no third party existed and therefore the conduct alleged was not considered to amount to corruption under the PCA. However, in overturning the decision of the High Court, the Court of Appeal noted that if inducement by a third party were necessary, it would lead to absurd outcomes and undermine the entire object of the PCA.

In *Teo Chu Ha v Public Prosecutor* [2014] SGCA 45, a former director at Seagate Technology International (Seagate) received shares in a trucking company and subsequently assisted that company to secure contracts to provide trucking services for Seagate. The High Court held that the conduct did not amount to corruption as the rewards were not given for the 'purpose' or 'reason' of inducement because they were not causally related to the assistance Teo had rendered. Furthermore, Teo had paid consideration for the shares. The Court of Appeal overruled the High Court decision, finding that a charge of corruption could still be made out when consideration was paid and it was not necessary to prove that consideration was inadequate or that the transaction was a sham. The Court of Appeal noted in particular that the purpose of the PCA would be undermined if it were interpreted to have such a narrow scope that could be circumvented by sophisticated schemes such as the one in the present case.

In a high-profile case involving six leaders of a mega-church in Singapore, City Harvest Church, church founder Kong Hee and five leaders were found guilty by the Singapore state courts of conspiring to misuse millions of dollars of church funds to further the music career of singer Sun Ho, who is also Kong's wife. The six had misused some $50 million in church building funds earmarked for building-related expenses or investments. Five of the six, including Kong, were found guilty of misusing $24 million towards funding Ho's music career by funnelling church funds into sham investments in a company controlled by Kong. Four of the six were also found guilty of misappropriating a further $26 million of church funds by falsifying accounts to cover up the first sum and defrauding the church's auditors. They were sentenced to jail terms ranging from 21 months to eight years. Both the prosecution and the respective accused persons have appealed against the judgment. The appeals were heard in September 2016. A decision is anticipated in 2017.

Update and trends

In a development that will have a significant impact on the anti-corruption landscape in Singapore, the prime minister announced in January 2015 that steps will be taken to boost the manpower of the CPIB by more than 20 per cent, establish a central reporting centre for complaints to be lodged and review and amend the PCA. Although it remains to be seen which aspects of the law will be revamped, there are some key areas that may be the subject of legal reform. These could be the lowering of the evidential threshold for the establishment of corporate criminal liability for bribery offences, the introduction of a compliance defence, the broadening of the extraterritorial effect of the PCA, the establishment of senior officers' liability and the enactment of whistle-blower protection and incentivization laws. Further details on the review of the PCA are to be announced.

In mid-October 2016, ISO 37001 on anti-bribery management systems was published. It is anticipated that the CPIB will be promoting the adoption of compliance programmes by the private sector in general and the ISO 37001 in particular. The CPIB is also developing an integrity package – called PACT (which stands for pledge, assess, control and communicate and track) – to help business owners learn more about corruption issues and implement a practical, integrity-based antibribery management framework in their companies.

There is an increase in instances of anti-money laundering laws and section 477A of the Penal Code being deployed by the authorities in Singapore to bring senior executives to account for their role in foreign bribery schemes. This approach can be seen in the Questzone case and the case involving the Singapore shipyard, where the authorities brought CDSA charges and section 477A of the Penal Code charges against senior executives for their role in such schemes.

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Compliance guidance from DOJ: Another useful resource for Asian businesses

On February 8, 2017, the US Department of Justice (DOJ) released guidance titled 'Evaluation of Corporate Compliance Programs,' which provides insight into how the DOJ evaluates and assesses compliance programs during a corporate investigation. Although the DOJ has consistently stated that it does not use a rigid framework or checklist when evaluating a compliance program, this guidance provides a list of common topics and questions used in such a process. While the guidance notes that much of the information is found in other sources (such as the US Attorneys' Manual, prior corporate settlements, and the DOJ and SEC FCPA Guide), it provides an outline of the DOJ's approach and can assist companies when assessing their own compliance programs. Given the extensive experience of the US authorities in dealing with compliance programs, companies operating in the Asia-Pacific region should look to such guidance when designing and implementing their compliance programs.

Key takeaways

A summary of the topics discussed in the guidance are found at the end of this alert. From a practical perspective, the new guidance offers several takeaways

Continued emphasis on compliance

Over the past few years, the DOJ has issued a number of guidance documents detailing its expectations for compliance programs, all of which build on the US Sentencing Guidelines and DOJ commentary in deferred prosecution agreements. The DOJ and SEC jointly issued detailed guidance in November 2012, and again in April 2016 with the announcement of the FCPA Pilot Program.[1] Combined, these publications, demonstrate a clear emphasis on the importance of well-functioning corporate compliance programs operating in line with the DOJ's expectations.

Another piece of the global puzzle

In addition to the DOJ, recent years have seen regulatory bodies and self-policing organizations outside the US detail their own expectations for compliance programs. In addition to the publications from the Organization for Economic Co-operation and Development (OECD) referenced in this guidance, a number of other entities, including the UK Ministry of Justice, the Singapore Corruption Practices Investigation Bureau, and the International Organization for Standardization (ISO)[2] have each published their own guidance on compliance programs. Multinational companies now have various resources to utilize when creating and assessing compliance programs. This may be particularly useful when determining appropriate procedures in subsidiaries around the world.

Focus on resources

As noted in our prior alert about the Pilot Program, the DOJ is delving deeper into a compliance program to understand not only the framework of the policies and procedures, but also to evaluate the compliance personnel. The DOJ expects that those individuals have the appropriate background and experience to manage the risks that the company faces. Additionally, those personnel must have the autonomy, power, and resources to effectively implement the compliance program.

A common thread

Regulators weigh a company's reaction to reported misconduct – remedial and corrective actions, investigations – quite heavily. We have defended several cases where clients received extraordinary credit for implementing a compliance program even *after* bad conduct came to light. Bear in mind, however, that the DOJ is not officially providing credit for a compliance program that did not exist when company employees were violating the law. But regardless, the DOJ wants to encourage companies to react appropriately to wrongdoing (e.g. taking steps to build a compliant business culture), and credits those actions as 'cooperation.' When a company can show that it responds to wrongdoing with targeted discipline, reporting, and training, the DOJ often concludes that punishing fines and restrictions are not necessary to prevent future wrongdoing. So it is never too early – or too late – to get started on building or enhancing a corporate compliance program. This is particularly true for Asian companies that do not have a historically strong practice of building a culture of compliance.

High-risk relationships and transactions

The two final topics in the guidance, third party management and mergers and acquisitions, are often discussed by the DOJ as high-risk areas for companies and commonly part of the fact patterns resulting in settlements. A high percentage of FCPA actions involve misconduct related to a third party. The use of third parties in Asia is pervasive. A company must understand its universe of third parties and the policies to manage those relationships, including ongoing due diligence and training of third parties. With respect to mergers and acquisitions, the DOJ expects appropriate review before and after the transaction to ensure that any misconduct at the target does not continue and that the acquiror's compliance program is integrated into the new company.

While the new guidance from the DOJ is by no means a step-by-step guide for compliance, it does further illustrate the DOJ's priorities and methodology with respect to reviewing and analyzing compliance programs. When managing a DOJ investigation, being able to provide satisfactory response to DOJ inquiries on these topics is often the determining factor for how the DOJ will resolve an investigation. For companies not facing a DOJ investigation, the guidance is an invaluable resource when instituting best practice.

Summary of topics

Analysis and remediation of underlying misconduct

The DOJ may ask about the root cause of the misconduct, whether or not there were any prior indications that the misconduct was occurring, and what the company has done to help resolve the misconduct.

Senior and middle management

The DOJ continues to emphasize the 'tone at the top' and evaluates whether senior management and the board of directors encourage and instill a culture of compliance, including how senior management and the board interact with compliance and whether there is 'conduct at the top'.

Autonomy and resources

The DOJ wants to ensure that the compliance department is provided with adequate resources and funds to effectively mitigate risk, including whether the compliance department has sufficient autonomy and power, whether compliance personnel have appropriate experience and qualifications, and the compliance department's 'stature' in the company.

Policies and procedures

As the backbone of any compliance program, the DOJ will review aspects of a company's policies and procedures, including their design and accessibility and how well they are integrated in the overall operations.

Risk assessment

The DOJ expects companies to have a rational and appropriate methodology for identifying, analyzing, and addressing their individualized risk profiles.

Training and communications:

To ensure that a compliance program is not simply a 'paper program', the DOJ will review whether employees receive training commensurate with the risk associated with their responsibilities and in the appropriate language and form, and what resources are available in addition to specific trainings.

Confidential reporting and investigation

The DOJ may ask about a company's procedure for receiving, handling, and managing whistleblower reports, including how it collects and analyzes confidentially reported information to properly scope an investigation.

Incentives and disciplinary measures

The DOJ may question a company about how it incentivizes compliance and disciplines employees for misconduct, including whether managers were held accountable for misconduct that occurred under their supervision. Further, the DOJ may look into whether these disciplinary actions were applied consistently and across all groups.

Continuous improvement, periodic testing, and review

A company should be ready to discuss how it reviews and assesses the compliance program on an ongoing basis, including what, if any, internal audits were conducted, how those were

reported to management, and what is the company's process to continually monitor the compliance program.

Third party management

Because the DOJ views third party relationships as being high risk, it will likely request information about how a company manages third-party relationships from a corruption standpoint. This includes what controls are present and how the relationship is managed on an ongoing basis.

Mergers and acquisitions

Companies can often inherit corruption issues through mergers and acquisitions. When relevant, the DOJ may request information about the due diligence process and integration and implementation following the transaction.

1 For further information on the Pilot Program, please see our client alert at http://www.nortonrosefulbright.com/knowledge/publications/138645/doj-launches-pilot-program-for-fcpa-cases.

2 For further information on the new ISO 37001 ('Anti-bribery management systems – Requirements with guidance for use'), please see our client alert at http://www.nortonrosefulbright.com/knowledge/publications/144487/but-does-it-really-work-the-value-of-iso-certification-of-anti-bribery-compliance.

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China financial services regulation: Increased supervision of large-sum and suspicious transactions

On December 28, 2016, the People's Bank of China (PBOC) issued the amended *Administrative Measures on Reporting of Large-Sum Transactions and Suspicious Transactions by Financial Institutions* (the Amended Measures), which took effect on July 1, 2017 to supersede the previous administrative measures which had been in effect since March 1, 2007 (the Previous Measures).

General comments

The Amended Measures revise the Previous Measures substantially and impose greater obligations on financial institutions in the reporting of large-sum and suspicious transactions (Reporting Obligations). Under the Amended Measures, financial institutions will not only need to comply with requirements explicitly set out therein, but also have to formulate their own transaction monitoring standards for suspicious transactions and ensure the effectiveness of such standards in preventing money laundering. This is in line with the overall trend of regulatory reform of China in recent years which gives regulated entities more autonomy in conducting businesses while increasing the risks of non-compliance.

We summarize these major changes introduced by the Amended Measures as follows.

A wider scope of application

The Reporting Obligations under the Previous Measures apply to major financial institutions regulated by financial regulators in China and institutions conducting specific businesses, such as payment or clearing business.

The Amended Measures expressly identify a few additional financial institutions and make them subject to the requirements of the Amended Measures, including insurance professional agents, insurance brokerage companies, consumer finance companies and loan companies. A 'catch-all' provision of the Amended Measures is amended to capture all other institutions (be they financial institutions or otherwise) which engage in financial business and which are determined by PBOC to be performing anti-money laundering obligations. This indicates that it may be more common in the future for non-financial institutions to be required by PBOC to undertake the Reporting Obligations merely because they conduct some type of financial business.

More stringent obligations on the reporting of large-sum transactions

The Amended Measures significantly reduce the reporting threshold of cash transactions (e.g. cash deposit, withdrawal or remittance) denominated in Renminbi (RMB) from RMB200,000 (for a single transaction or all transactions within the same day) under the Previous Measures to RMB50,000. This threshold applies regardless whether the underlying transactions are purely domestic or cross-border and whether the parties thereto are individuals or corporates.

The Amended Measures also add a new reporting threshold in respect of cross-border account transfer in RMB by individuals, which is RMB200,000 for a single transaction or all such transactions within the same day. The Previous Measures only provide for a foreign currency threshold of US$10,000. This change is intended to address the phenomenon of Chinese individuals more actively participating in cross-border transactions denominated in RMB whilst the regulatory regime is gradually relaxed.

Under the Amended Measures, Reporting Obligations should be fulfilled by the obliged institutions within five business days of the occurrence of any large-sum transaction.

For easy reference, we summarize in the table below the various reporting thresholds, calculated on a daily basis for a single transaction or all transactions of the same nature entered into by an individual or a corporate:

	Minimum thresholds for cash transactions (Onshore and Cross border)	Minimum thresholds for account transfers	
		Onshore	Cross border
Individual	• RMB50,000 (amended by the Amended Measure), or • USD10,000 (or its equivalent in any foreign currency).	• RMB500,000, or • USD100,000 (or its equivalent in any foreign currency).	• RMB200,000 (newly added under the Amended Measures), or • USD10,000 (or its equivalent in any foreign currency)
Corporate		• RMB2 million, or • USD200,000 (or its equivalent in any foreign currency).	

More challenging requirements on the reporting of suspicious transactions

Through the Amended Measures, PBOC will change its approach to supervising suspicious transactions by imposing more onerous obligations on obliged reporting institutions, as explained as follows.

In addition to a general provision which requires financial institutions to report transactions which they suspect could constitute money laundering, the Previous Measures provide a comprehensive list of activities and transactions that should be reported as suspicious transactions.

The Amended Measures delete the list of such specific activities and transactions as a whole and introduce a very broad provision requiring a financial institution to file a report if it finds out or reasonably suspects that any of its clients, clients' funds or assets, or any clients' current or potential transactions are related to criminal activities such as money laundering or terrorism financing, regardless of the amount of the assets or funds concerned.

More significantly perhaps, the Amended Measures require financial institutions to formulate their own transaction monitoring standards with regard to suspicious transactions and to be responsible for the effectiveness of these standards. A financial institution is required to consider the following factors in preparing its transaction monitoring standards

- Regulations, guidelines, risk alerts, reports on the types of money laundering activities and risk assessment reports, released by PBOC and its local branches.
- Criminal status quo analyses, risk alerts, reports on the types of crimes and working reports, issued by the public security authority and judicial authorities.
- The assets' scale, geographical coverage, business nature, customers base, transaction specifics and conclusions of risk assessment on money laundering and terrorism financing, of the financial institution itself.
- Regulatory opinions on anti-money laundering issued by PBOC and its local branches.
- Other factors that PBOC requires financial institutions to pay particular attention to.

Financial institutions are expected to conduct regular assessments of their transaction monitoring standards and make improvements in light of the outcome of such assessments. Meanwhile, financial institutions are required to undertake a manual analysis of suspicious transactions selected via the monitoring standards and record the process of such analysis. For those transactions which are not regarded as suspicious transactions after the manual analysis, the reasons should be kept on record, and for those which are determined to be reported, the report shall contain a complete record of the analysis process concerning the specifics of the customer's identification, the transactions or the activities concerned.

Suspicious transactions should be reported by financial institutions within five business days (which is ten business days under the Previous Measures) of transactions being regarded as suspicious.

Without any doubt, most financial institutions will now have to invest more human and financial resources into their anti-money laundering function if they are to comply with the requirements outlined above.

Terrorism reporting obligations

The obligations on terrorism reporting are not addressed in the Previous Measures throughout various notices and circulars of PBOC.

Under the Amended Measures, financial institutions must proactively conduct real-time monitoring of the lists of organizations and individuals that may be involved in terrorism activities, and must carry out required reporting if they reasonably suspect that any of their clients (or their transaction counterparties), any funds or other assets, are or may be associated with any of the following lists

- List of organizations and individuals involved in terrorism activities released or requested to be implemented by the Chinese government.
- List of organizations and individuals involved in terrorism activities set out in the resolutions of the United Nations Security Council.
- List of organizations and individuals which are suspected to be involved in terrorism activities and requested by PBOC to be watched out closely.

It is worth noting that, if any of the above mentioned lists are amended, financial institutions will be expected to carry out retrospective investigations and make reports in light of the requirements of the Amended Measures. The Amended Measure are however silent on the length of period that such retrospective investigations are to cover.

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