

Government Investigations

Contributing editors

David M Zornow and Jocelyn E Strauber



2017

GETTING THE
DEAL THROUGH

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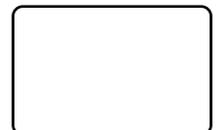


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Enforcement agencies and corporate liability

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

In Hong Kong, the following government agencies are principally responsible for the enforcement of civil and criminal laws and regulations pertinent to businesses, such as serious fraud, money laundering, bribery and securities laws:

The CCB, OCTB and JFIU – serious fraud and money laundering

The Hong Kong Police Force is generally responsible for the maintenance of law and order in Hong Kong, and has the power to conduct criminal investigations and commence prosecutions.

There are specialist arms within the Hong Kong Police Force that handle investigations of serious fraud and money laundering: the Commercial Crime Bureau (CCB) investigates serious and complex commercial fraud, computer and technology crimes, and the counterfeiting or forgery of currency, credit cards and other commercial instruments. The Organised Crime and Triad Bureau (OCTB) investigates organised crimes and syndicated criminal activities including money laundering. In combating money laundering offences, the CCB and OCTB usually work hand in hand with the Joint Financial Intelligence Unit (JFIU), which is jointly run by the Hong Kong Police Force and the Hong Kong Customs and Excise Department and is responsible for receiving and handling reports about suspicious financial activities.

The ICAC – bribery and corruption

Established in 1974 when the city was plagued with syndicated corruption, the Independent Commission Against Corruption (ICAC) is the independent investigative authority for bribery and corruption in Hong Kong. The cornerstone of the ICAC's enforcement mechanism is the Prevention of Bribery Ordinance (POBO), which seeks to combat corruption in both public and private sectors in Hong Kong. The most important prohibition under the POBO is in respect of the solicitation, acceptance or offering of unauthorised advantages (generally referred to as bribes), which are used as an inducement or reward for the performance of duties or using influence in business or contractual matters.

The SFC – securities laws

In response to the stock market crash in Hong Kong in 1987, the Securities and Futures Commission (SFC) was established as an independent body that administers the laws governing Hong Kong's securities and futures markets. The Securities and Futures Ordinance (SFO) bestows the SFC with extensive powers to investigate, discipline and prosecute licensed financial institutions and licensed persons on various forms of market misconduct such as insider dealing, price rigging, false trading and market manipulation, together with other types of regulatory offences.

The SFC has a wide range of enforcement powers under the SFO – criminal, civil and regulatory, and it regulates market participants including listed companies, investment banks, brokers, fund managers, investment advisers and public investors in Hong Kong.

Generally speaking, the Department of Justice (DoJ) of Hong Kong works with the above investigative authorities by providing legal advice, making prosecution decisions and representing the government in legal proceedings; particularly on cases that are complex in nature or those that

involve important points of law or public interest issues. In practice, many prosecutions at the summary level (ie, at the Magistrates' Courts, which are the lowest level of criminal courts in Hong Kong) involve simple cases that are processed by the investigative bodies themselves and do not require the specific involvement of the DoJ.

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

Enforcement authority of the above law enforcement agencies in Hong Kong is conferred by statutes, which generally cover the following.

The CCB, OCTB and JFIU

CCB and OCTB officers are vested with extensive powers to investigate matters involving serious fraud and money laundering, such as declaring arrest on suspects and detaining them for up to 48 hours, interviewing witnesses and suspects, searching premises and seizing documents, compelling parties to produce documents and freezing bank accounts. For offences with an international element, the CCB and OCTB can also issue arrest warrants, put the suspects on the 'stop list' at the immigration control points, or request their extradition from countries where bilateral treaties on the surrender of fugitives are in place.

While the JFIU does not enforce the law, it provides intelligence to its partnering investigation units to assist their investigations, particularly on money laundering. The JFIU's responsibilities include obtaining bank account details from financial institutions, identifying suspicious transactions and advising on whether such accounts should be frozen.

The ICAC

While the ICAC's enforcement authority is by and large similar to those of the CCB and OCTB, it has been given special powers of investigation to combat corruption under the POBO, including the power to compel suspects to disclose details of their assets, income and expenditure that may be relevant to corruption. Further, the ICAC can make an application to courts for confiscating a suspect's travel documents and restraining disposal of property before he or she is even criminally charged.

It is also noteworthy that the ICAC only commences investigation on corruption-related matters. However, if other forms of criminal conduct are discovered during its investigations (which typically include conspiracy to defraud, theft and perverting the course of public justice), the ICAC can always switch its focus of investigation and lay the appropriate criminal charges.

The SFC

An investigation is initiated when the SFC has reasonable cause to believe that market misconduct may have taken place. The SFC does so by issuing notice for interview to interview witnesses and suspects, and notice for production to compel production of documents and records relevant to the market misconduct concerned. For more serious cases, the SFC can also apply to the Hong Kong courts for search warrants to search premises and seize documents.

Generally speaking, the investigative and prosecutorial powers of the government agencies are applicable to both natural and legal persons (except the POBO offences that are applicable to natural persons). In other words, the authorities can pursue investigations and prosecutions against corporate employees as well as the company itself. However, in practice,

given the individualistic nature of offences such as fraud and money laundering, the CCB and OCTB would normally investigate and prosecute employees as individual suspects or defendants, since they are more readily identifiable as the parties at fault.

It is noteworthy that the prosecutions of these offences brought before Hong Kong courts have always focused on the employees of companies, their conspirators, accomplices and other natural persons. Prosecution of companies as corporate defendants for such offences is very rare. The most relevant enforcement action against companies would be office search and seizure of corporate documents to facilitate these agencies' investigations.

By the same token, for individualistic offences such as insider dealing or price rigging, the SFC is more likely to investigate and prosecute individual employees as defendants. That said, it is not uncommon for the SFC to issue a notice for production against companies to compel production of documents, and to issue a notice for interview to make face-to-face inquiries with the company's authorised representatives.

For regulatory offences that could be committed in a corporate capacity (for instance, issuing misleading advertisements, disclosing price-sensitive information or conducting unauthorised financial activities), it is common for the SFC to pursue investigative and disciplinary actions against companies.

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

While the above government entities have different functions, they can and often do simultaneously investigate the same target business in parallel investigations, especially where the same set of conduct could give rise to different criminal implications.

In practice, the enforcement agencies have mutual understanding of their respective scope of authority, and they will normally coordinate among themselves so that there is no duplication of investigation or double jeopardy by prosecuting a defendant on the same subject matter. The investigative authorities may also share information obtained from the target upon request of another agency.

The authorities may also refer a case to the other agencies for further investigation. The most common example is referral of cases by the SFC to the CCB when certain market misconduct (eg, market manipulation) is of such gravity and scale that it would potentially amount to serious fraud.

There are, however, no specific laws or regulations governing the aforesaid coordination of investigations or sharing of information, and these exercises are operated under the internal protocols of the agencies.

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

For CCB, OCTB and ICAC cases, criminal prosecutions can be brought at different levels of criminal courts in Hong Kong depending on the gravity of the offences and the potential sentencing that the charges would attract. For less serious offences, charges can be brought at Magistrates' Courts that can impose a maximum of two years' imprisonment for a single charge and three years' imprisonment for multiple charges.

For more serious cases, the CCB, OCTB and ICAC can prosecute at the District Court, which can impose up to a maximum of seven years' imprisonment. For offences of a severe gravity or significant scale, they can bring charges at the High Court, which can impose a maximum sentence of life imprisonment (this is subject to the statutory maximum penalty of the particular offences concerned).

Trials will be conducted before a jury in the High Court. There is no right to a jury trial in the Magistrates' Courts or the District Court.

The SFO stipulates a dual civil and criminal regime for market misconduct, whereby the SFC can elect to either bring a civil action before the Market Misconduct Tribunal or commence criminal proceedings in the criminal courts in Hong Kong.

As such, the SFC has power to:

- institute summary criminal proceedings at the Magistrates' Courts for less serious market misconduct;
- consult the DoJ's legal advice and institute criminal proceedings at the District Court or the High Court; and
- commence civil proceedings itself before the Market Misconduct Tribunal, with the consent of the DoJ (the DoJ can only withhold consent if criminal proceedings are contemplated or under way).

For regulatory matters, the SFC can take out disciplinary actions by itself against licensed persons or corporations. There is a range of disciplinary sanctions that can be imposed, including revocation or suspension of licences, prohibition of application for licences, fine and reprimands.

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

This is a legal concept of corporate criminal liability in Hong Kong. A company is a legal person capable of being prosecuted for most criminal offences, unless a statute indicates otherwise. The typical exceptions are those offences for which imprisonment is the only penalty (such as murder), and those by their nature can only be committed by natural persons in their personal capacity (such as common assault, arson, etc).

There are two main ways that liability for a criminal offence can be attached to a corporate entity. First, for offences involving a fault element (ie, those that do not impose strict liability), a company will normally only be criminally liable where the commission of the offence can be attributed to someone who at the material time was the 'directing mind and will' of the company or 'an embodiment of the company'. This is the 'identification principle' under the common law which is applicable to Hong Kong. Second, certain statutory offences impose absolute duty on the employer company (ie, strict liability offences), even if the company has not authorised or consented to the act of the employees. This is the principle of 'vicarious liability'.

In criminal proceedings, the prosecution has the burden to prove beyond reasonable doubt that a defendant is guilty of an offence. The above evidential hurdle concerning corporate criminal liability may explain why it is rather rare for the government to prosecute a corporation for individualistic offences with fault element, such as commercial fraud or money laundering. Criminal prosecution of corporations is more commonly seen in strictly liability offences.

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

In deciding whether to bring criminal charges, the DoJ has to abide by the Prosecution Code (latest version dated November 2015), which stipulates two requisite components: sufficiency of evidence and public interest.

In assessing the sufficiency of evidence, the DoJ has to consider whether there is admissible and reliable evidence to support a prosecution and, together with any reasonable inferences able to be drawn from it that the offence will likely be proven. The test is, therefore, whether the evidence demonstrates a reasonable prospect of conviction.

The DoJ will also consider the following non-exhaustive list of factors in evaluating whether a prosecution would be in the public interest:

- the nature and circumstances of the offence, including any aggravating or extenuating circumstances;
- the seriousness of the offence;
- any delay in proceeding with a prosecution and its causes;
- whether or not the offence is trivial, technical in nature, obsolete or obscure;
- the level of the suspect's culpability;
- any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim or cooperated with authorities in the prosecution of others;
- any criminal history of the suspect;
- the attitude, age, nature or physical or psychological condition of the suspect, a witness or a victim; and
- the prevalence of the offence and any deterrent effect of a prosecution.

The above is the Hong Kong government's general prosecution policy, and there is no specific code catering to the prosecution of corporate defendants. However, the same principles should apply.

Initiation of an investigation

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

Government entities can commence a civil or criminal investigation upon receipt of information from a complainant or other sources of information, and upon having reasonable suspicion of any form of crime or misconduct.

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

The CCB, OCTB, ICAC and SFC investigations are commonly triggered by reports made by complainants, who are usually victims or aggrieved parties of the crime concerned. The ICAC also accepts complaints that are made anonymously, albeit it is a less satisfactory way of making a criminal report. Media reports and self-reporting by corporations or their employees concerning a particular crime and misconduct may also trigger investigations by these agencies.

In addition, the SFC monitors the stock market through its Market Surveillance System (MSS), which contains real-time market transaction data, and proactively identifies any irregular and unusual market activities and commences investigations.

9 What protections are whistle-blowers entitled to?

Whistle-blowers who expose misconduct and illegal activities occurring in an organisation would inevitably have to provide information or give statements to the authorities, which turn them into witnesses. A witness protection programme is in place in Hong Kong by virtue of the Witness Protection Ordinance, which aims to provide protection and assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses.

The Commissioner of the Police or the ICAC will carefully review the witnesses' personal circumstances and the information that they provided before including them in the witness protection programme. The witnesses have to sign a memorandum of understanding that sets out the terms and conditions of their participation in the witness protection programme. The approving authority shall take such action as it considers necessary and reasonable to protect the witnesses' safety and welfare, including the non-disclosure of the original identities of witnesses, establishment of new identities, and protection of witnesses when they give evidence in courts.

The Witness Protection Unit of the Hong Kong Police and Witness Protection and Firearms Section (R4) of the ICAC are specialised units responsible for witness protection.

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

During the covert phase of investigation, a government entity would not publicly acknowledge an investigation. This is because any premature disclosure may alert the suspects who are still at large, thereby jeopardising the investigation, preservation of evidence, integrity of potential witnesses and arrest of potential suspects.

The investigation will usually turn overt when arrests and interviews with major suspects and seizure of documents have been completed. However, the authorities may or may not publicly announce such an investigation depending on the nature of the case and whether significant public interest is involved. The recent trend for the ICAC and SFC is that they would only publish a press release or enforcement news on their official websites after the defendants are charged or convicted.

A business under investigation can only request the authorities to maintain its anonymity in the investigation, but there are no formal mechanisms requiring the authorities to entertain such requests.

Evidence gathering and investigative techniques

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

There is normally a covert phase of investigation especially in cases with serious fraud, money laundering, corruption and market misconduct allegations. The authorities will usually gather evidence by interviewing witnesses, seizing documents from various sources and obtaining bank or

securities transactions records during this phase. The duration of the covert phase is highly dependent on the complexity of the case and number of parties involved. It is not uncommon for that phase to last two to six months before the target business is approached by the government.

12 What investigative techniques are used during the covert phase?

Typical investigative techniques used during the covert phase include undercover operations, electronic surveillance, telephone interception and controlled deliveries to infiltrate a crime syndicate and to obtain direct and contemporaneous evidence on the suspects and the illicit transactions.

The authorities would also make applications to the courts to obtain search warrants to search suspicious premises and seize documents, production orders to compel production of documents and records, and restraint orders to freeze bank accounts involving suspicious financial transactions.

In practice, the financial institutions in Hong Kong usually take a firm and swift stance in voluntarily freezing suspicious bank accounts as an interim measure as soon as they are notified by investigating authorities of any suspected criminal activities involved in the accounts, even in lieu of a restraint order issued by courts.

Further, for witnesses who are assisting the SFC and ICAC investigations during the covert phase, a stringent duty of confidentiality is imposed whereby the witnesses are prohibited from disclosing to third parties all matters relating to the ongoing investigations. Any breach of such a duty of confidentiality would not only amount to a statutory offence under the SFO and POBO, but would potentially constitute the offence of perverting the course of justice under the common law.

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

After a target business becomes aware of the government's investigation, it is advisable to conduct an internal investigation by interviewing its own employees and reviewing its business and bank records to develop its own understanding of the facts. Such internal investigations are often conducted with the assistance of in-house counsel or external legal representatives.

Extra caution should be exercised when conducting internal interviews with employees to ensure that no duty of confidentiality imposed by the authorities will be breached (in the event that these employees have already been interviewed by the authorities as suspects or witnesses). Such duty is particularly stringent for offences concerning the SFC and the ICAC. The questions at the internal interviews should not touch upon the details of any interviews or investigations that may have already been conducted by the authorities, and the interviewees should be advised of their right to seek independent legal representation.

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

There is no general duty for the target business to preserve documents, recorded communications and any other materials before it is aware of the investigation. In practice, business entities in Hong Kong will keep their business and financial records for a period of seven years before disposing of them.

However, after the target business is aware of the investigation, it is advisable to preserve all relevant business records to facilitate the authorities' inquiries and to avoid any potential allegations of the wilful destruction of evidence or perverting the course of justice. In particular, if the target business has been served a production order, it is duty-bound to preserve and produce the documents or any other material required under the order.

15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Enforcement agencies are entitled to require the target business to provide all materials related to their investigation, normally by virtue of search warrants or production orders issued by the courts. The search warrants

and production orders usually set out the gist of the allegations concerned and an extensive scope of documents required from target business, which normally includes all hard-copy documents, electronic records, audiovisual records, computer data and mobile devices relevant to the investigation for a specific period of time.

Failure to comply with the enforcement agencies' search warrants or production orders may constitute a statutory offence under the SFO and POBO or amount to a contempt of court. This duty of compliance would generally override the data protection and privacy laws in Hong Kong.

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

The target business can oppose the government's demand for materials on the following grounds:

- legal professional privilege (LPP) – the concept of LPP is well-recognised in Hong Kong. The two main categories of LPP are:
 - legal advice privilege, which applies to communications between clients and their lawyers made for the purpose of giving or receiving legal advice. Advice from in-house lawyers is also generally privileged, provided that the in-house lawyer was performing a legal function in entering into such communications; and
 - litigation privilege, which applies to communications between lawyers (and in some circumstances their clients) and third parties made for the dominant purpose of obtaining legal advice or collecting evidence in respect of existing or contemplated litigation; and
- any public interest grounds that such materials should not be produced to the authorities.

In practice, when the target business or its legal representatives claim LPP on certain documents, such materials will be placed in sealed envelopes by the authorities in the presence of the company's authorised representatives and shall not be used for investigation purposes in the interim. The target business is at liberty to take out an application to the Hong Kong courts to argue that such materials are covered by LPP and should not be disclosed to the authorities.

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

The government can compel testimony of employees by issuing a writ of subpoena (ie, a witness summons) against them to testify in courts. Persons served a writ of subpoena cannot refuse to attend court to testify, or else they would be liable for the offence of contempt of court. However, for the prosecution counsel, careful consideration must be exercised before calling employees as prosecution witnesses to testify against their senior management or employer company, since the employees might refuse to cooperate or adapt their testimony to protect their employer, especially while they are still employed by the target business.

In criminal proceedings in Hong Kong, a person may refuse to testify or produce any document if such evidence might expose them to criminal prosecution. This privilege against self-incrimination is enshrined in the Basic Law, which is the 'mini-constitution' of Hong Kong. The party claiming such privilege must satisfy the court that there is a real and appreciable danger, and not a mere possibility, of self-incrimination.

As such, employees and the target business can claim privilege against self-incrimination and refuse to answer certain questions during the investigations or in criminal court proceedings, if their answers to such questions would expose them to criminal implications. The government may resort to the testimony of other prosecution witnesses, documentary records and circumstantial evidence to obtain such information.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

When there is a potential or real conflict of interest arising between the employees and the employer, employees should be advised to obtain independent legal advice. Typical scenarios of such conflicts are when the employees contemplate giving evidence against the employer, or when

the employees wish to run a line of defence that may contradict that of the employer.

Otherwise, employees can be represented by counsel for the target business.

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Targets may share information to facilitate their respective defences as long as sufficient safeguards are in place to avoid any suspicion of perverting the course of public justice (for instance, exerting pressure on other target businesses to change their testimony or to destroy documents, etc).

Target businesses can claim LPP (details of which have been explored in question 16) or common interest privilege for documents exchanged between parties who have a common interest in the subject matter of the contemplated or existing litigation.

The potential negative consequences of sharing information would be that the target business is, effectively, alerting other potential co-defendants of its defence in contemplated criminal proceedings. There is a risk that other parties may adjust their lines of defence to protect themselves, or, in the worst case scenario, give evidence to the authorities to shift the blame to the target business (without using the privileged documents) and seek immunity from prosecution.

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

Once the investigations have turned overt, target business may notify investors about the investigation based on its own commercial considerations. Listed companies have a general duty to inform investors of any investigations commenced against them, their management or key officers, since it would constitute price-sensitive information for the public. The notification usually takes the form of a public announcement made via the Stock Exchange of Hong Kong. It is advisable for the target business to seek clearance from the authorities before they do so, and to obtain written approval on the exact contents that can be disclosed to the investors and the general public. For SFC and ICAC investigations, it may be useful to make reference of their official enforcement news and press releases when developing the contents of these disclosures to avoid breaching any duty of confidentiality. Generally speaking, any disclosure should be kept factual and concise.

Cooperation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

A target business can always cooperate with the authorities or volunteer information during the course of investigation, or notify the government of its potential wrongdoing by way of self-reporting before an investigation has started. There is no formal mechanism for doing so, but the target business or its legal representatives can approach the relevant agencies directly. Assisting the investigation and voluntarily surrendering itself to the authorities may operate as a powerful mitigating factor if the target business is eventually prosecuted and convicted, or facilitate the prosecution authorities' decision on whether an immunity should be granted to the target business.

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

There are no formal voluntary disclosure programmes in place in Hong Kong that can qualify a business for amnesty or reduced sanctions. However, as stated in question 21, any voluntary disclosure, assistance or surrender to the authorities may operate as a powerful mitigating factor upon conviction or facilitate the prosecution authorities' decision on immunity.

23 Can a target business commence cooperation at any stage of the investigation?

Yes.

Update and trends

Aspects for interpretation – money laundering offences

In May 2016, the Court of Final Appeal (CFA) heard the appeal of the money laundering case of Mr Carson Yeung Ka-sing, the former chairman of English football club Birmingham City FC, (FACC 5-6/2016). Mr Yeung was convicted of five counts of money laundering involving HK\$721 million and was sentenced to six years of imprisonment.

The CFA handed down its authoritative and comprehensive judgment in July 2016 whereby it is ruled that, inter alia, the prosecution does not have to prove the predicate offence as an element of the offence of money laundering. In other words, the prosecution does not have to prove that the property being dealt with was, in fact, the proceeds of crime. The court also clarified the test for the mental element of the offence and set out what would constitute 'reasonable grounds to believe' that the property in question represents proceeds of crime on the part of the defendant.

This judgment brings much needed clarity. The consequence of this judgment is that there is no change to the interpretation of the offence of money laundering by the Hong Kong courts. It is now clear that the money laundering legislation in Hong Kong has departed from the United Kingdom's regulatory framework, and that the regime in Hong Kong will remain draconian in combating these offences.

Aspects for interpretation – section 9 of Prevention of Bribery Ordinance (Cap 201) (POBO)

In the high-profile bribery case of the former general manager of a television broadcasting company (FAMC 4/2016), the convicted defendant Mr Stephen Chan Chi-wan has been granted leave by the Court of Final Appeal (CFA) based on questions of law of great and general importance. Chan was convicted of corruption charges on the premises that he received illicit payment for appearing on a public talk show without informing his employer. The main issues to be determined by the Court of Final Appeal in February 2017 involve the mental element required of an agent to constitute a bribery offence under section 9 of POBO, and the proper approach for courts to adopt considering the defence of reasonable excuse.

Case alert – misconduct in public office

The highest-level corruption trial in Hong Kong's history is now at the final appeal stage. The case involved allegations that two renowned property tycoons, Mr Thomas Kwok and Mr Raymond Kwok, together with their assistants, offered bribes to Mr Rafael Hui, the former Chief Secretary of Hong Kong (which is the second-highest position in the Hong Kong Special Administrative Region (SAR) government). The High Court jury trial lasted for 130 days. Four of the five defendants were convicted and sentenced to imprisonment from five to seven-and-a-half years.

Mr Thomas Kwok's leave application to the CFA (FAMC9/2016) was heard in July 2016. He was granted leave to appeal and bail pending appeal. Among other things, the appellant argues that 'general sweetener payments' made to a prospective public officer before his appointment, but without any agreed or intended act by him in public office, are not sufficient to constitute the offence of misconduct in public office. These legal issues involved are novel and of public importance, and will likely have a significant impact on the interpretation of this common law offence. The appeal proper will be heard in May 2017 at the CFA.

In addition, ICAC has prosecuted the former Chief Executive of the Hong Kong SAR government, Donald Tsang Yam-Kuen, for two counts of misconduct in public office concerning his failure to disclose his interest in a luxury flat in Shenzhen, China. Mr Tsang is Hong Kong's highest-ranking official ever to be charged. His criminal trial is scheduled to take place in January 2017 at the High Court and is expected to last 20 days.

The region is eagerly awaiting the final results of these corruption cases, and it is anticipated that complex legal issues will be canvassed in these proceedings.

24 What is a target business generally required to do to fulfil its obligation to cooperate?

Full and frank disclosure is the general requirement for a target business in fulfilling its obligation to cooperate, regardless of whether it is by answering questions at interviews, producing documents or making written representations to the authorities.

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

A target business is at liberty to pay attorneys' fees for its employees if it decides to cooperate, as long as it does not compel the employees to fabricate evidence or adjust their stories to suit the business's own needs.

Payment of attorneys' fees per se should not in any way influence the government entity's decision in the investigation and prosecution process, and no adverse inference can be drawn by the authorities and the courts.

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

From an individual employee's perspective, the relevant considerations in deciding whether to cooperate with a government investigation would include performing civic duties to combat crimes, absolving him or herself of any potential liabilities, and preserving his or her own job.

In view of the employee's constitutional right against self-incrimination, an employee cannot be compelled to cooperate or give evidence to the authorities. If the employee is dismissed by the target business due to his or her refusal to be interviewed by company counsel or by the government, it may amount to a wrongful dismissal and the target business may be liable to pay damages.

27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

If the target business voluntarily produces documents to the authorities which eventually form part of the criminal evidence referred to in open courts, such documents would not be subject to any privilege and shall be disclosable as evidence in related civil litigation. If these materials are not referred to in open courts, they will be subject to privilege and shall not be used by any third parties in civil proceedings without leave of the court.

Resolution

28 What mechanisms are available to resolve a government investigation?

For criminal investigations by government authorities, the target business can resolve it by entering a guilty plea to the relevant charges in criminal courts, or negotiating with the authorities for immunity from prosecution by offering evidence or assistance as prosecution witnesses. In the event of a not guilty plea, the matter will be resolved in a trial in the criminal courts.

As regards disciplinary actions taken by the SFC, persons or business under investigation may make a settlement proposal to the SFC to resolve the disciplinary proceedings. The SFC can agree to a settlement if it is in the public interest.

29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

Depending on the evidence available and its commercial objectives of the target business, it can admit its wrongdoing by entering a guilty plea in the criminal courts.

Generally speaking, an admission by the target business in criminal proceedings will be prima facie evidence of its fault, which can be used against it in related civil proceedings.

30 What civil penalties can be imposed on businesses?

Common civil sanctions for market misconduct imposed by the SFC include:

- fines;
- disqualification as directors or managers of listed companies;
- 'cold shoulder orders' (ie, prohibition from trading in the market for a fixed period);
- disgorgement of profits;
- revocation and suspension of licences;
- a reprimand; and
- payment of the SFC's investigation costs.

31 What criminal penalties can be imposed on businesses?

Since business entities are not natural persons that can be subject to sanctions such as imprisonment or community service orders, the only viable criminal penalty that can be imposed is a fine. Ancillary orders such as compensation orders and forfeiture orders can also be imposed. Unlike some other jurisdictions, there is no formal scheme of mandatory debarment from public procurements for corporations convicted of criminal offences.

32 What is the applicable sentencing regime for businesses?

Unlike some other jurisdictions, there are no specific sentencing regimes or guidelines for businesses in Hong Kong. In determining the appropriate sentence, the courts usually take into account a number of factors including the seriousness of the offences, the duration of the criminal behaviour, the monetary amount of any damage inflicted on victims, any previous criminal convictions, and whether the businesses fully cooperate with the authorities and plead guilty at the earliest available opportunity.

33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

Admission of wrongdoing may give rise to reputational risks for businesses and undermine the public's confidence in their corporate governance and management staff, particularly for public listed companies. This may in turn adversely affect the prospects of the business's future ventures, especially those that require regulatory licences, tenders and governmental approval.

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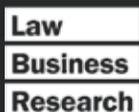
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