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# ALB Legal Guide to the Greater Bay Area 2021



## ALB 粤港澳大湾区 法律指南 2021

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## THE GREATER BAY AREA: ANTI-CORRUPTION AND COMPLIANCE

The 2019 *Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area* identifies robust anti-corruption measures as one of the aims of the development of the region, stating that the intention is: “[T]o actively take forward governance in accordance with the law, **strengthen synergy in the Greater Bay Area’s anti-corruption mechanisms**, establish a quality, efficient and clean government, and enhance the government’s service efficiency as well as the people’s sense of fulfilment...”<sup>1</sup> Various local governments in the mainland China sector of the Greater Bay Area (“**GBA**”) have sought to promote these aims, including the city of Shenzhen, a key technology hub, which has named 2020 its “Year of Compliance.”<sup>2</sup>

### MAINLAND CHINA

The *Criminal Law* and the *Anti-unfair Competition Law* are the principal laws addressing bribery and corruption in the People’s Republic of China (“**PRC**”). They are the applicable anti-bribery and corruption laws in the sector of the GBA located in mainland China. Various government organs, departments and agencies, including the State Council and the Chinese Communist Party Commission for Discipline Inspection (“**CCDI**”) have issued internal anti-corruption rules and regulations that govern state functionaries and other personnel. In the 2019 Transparency International Corruption Perception Index (“**TICPI**”), the PRC scored 41 out of 100 and ranked 80<sup>th</sup> among 180 countries and territories.<sup>3</sup>

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2 See [http://m.cnr.cn/shenzhen/xw/xwzt/20200119\\_t20200119\\_524943453.html](http://m.cnr.cn/shenzhen/xw/xwzt/20200119_t20200119_524943453.html)

3 See <https://www.transparency.org/en/countries/china>.

## **The Criminal Law**

The PRC Criminal Law ("**Criminal Law**"), most recently amended in 2017, prohibits offering and accepting bribes in both the public and private sectors, and draws a distinction between the bribery of "state functionaries" and bribery of employees of private companies. A state functionary is generally defined to include a government official, or an officer or employee participating in public affairs in a state-owned enterprise ("**SOE**").

In general, the provision, solicitation, or acceptance of a bribe for the purpose of, or in return for, securing illegitimate benefits constitutes a criminal offence. Conspiring to commit an offense is also prohibited, as is the use of an intermediary to facilitate a bribe. The Criminal Law applies to both the payers and recipients of bribes. Article 385 prohibits state functionaries from accepting or soliciting bribes; Article 389 prohibits offering bribes to state functionaries; Article 391 prohibits offering bribes to state organs, state-owned enterprises, institutions or people's organizations; Article 392 criminalizes facilitation of bribery of state functionaries; Article 390 (1) prohibits bribery of close relatives of, or any person close to, a state functionary or former state functionary; Article 163 criminalizes solicitation of commercial bribes by personnel of any company or other entity; and Article 164 prohibits offering bribes to non-PRC state functionaries, including providing advantages to foreign officials (or international public organization officials) to secure illegitimate commercial benefits.

The Criminal Law is supplemented by regulations and interpretations. The PRC Supreme People's Court ("**SPC**") and the Supreme People's Procuratorate ("**SPP**") jointly issue interpretative rules ("**Judicial Interpretations**") providing guidance and

setting thresholds for minimum amounts in connection with the investigation and prosecution of offences. Additionally, where the Criminal Law does not clearly define the elements of an offense, Judicial Interpretations sometimes offer clarification. For example, "advantages" are initially defined as "money or tangible property and other advantages which can be quantified with monetary values." In the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning Specific Application of Laws in Handling Criminal Cases of Embezzlement and Bribery* advantages include: money, goods, property benefits, including benefits that can be converted into material benefits involving money, such as house renovations and debt exemptions, and other benefits involving financial payments, such as membership services and travel.

## **The Anti-unfair Competition Law**

The PRC Anti-unfair Competition Law, substantially amended 2018 ("**AUCL**"), promotes fair market competition and prohibits business operators from offering bribes for transactional opportunity or competitive edge. The 2018 amendments clarified and to some extent expanded the scope of commercial bribery violations under the AUCL. These amendments provide that the giving of property or deployment of other means with regard to individuals who take advantage of their functional authority or influence to affect transaction opportunities or competitive advantages constitutes commercial bribery with regard to three categories of recipients: (1) employees of counterparties; (2) entities and individuals entrusted by counterparties to handle relevant matters; and (3) any entities or individuals that use their authority or influence

to impact a transaction. The AUCL expressly imposes vicarious liability on employers such that commercial bribery acts of an employee are deemed to be actions of the employer, unless the employer can prove that the activities of the employee were not relevant to the employer's attempts to gain transaction opportunities or competitive advantages.

### **Anti-Bribery and Corruption Enforcement Authorities**

The PRC government underwent a major organizational reform in 2018, including the establishment of the National Supervision Commission ("**NSC**"), which oversees subsidiary supervisory commissions at all levels of the government. The 2018 *PRC Supervision Law* sets out the powers of the NSC and outlines required procedures of supervision work to ensure due process. The NSC has broad powers to supervise, investigate, and discipline public servants, including government officials, personnel engaged in public affairs, and other officials. The NSC also has the power to coordinate international anti-corruption cooperation initiatives for the PRC.

Government agencies responsible for investigating bribery and corruption offences in mainland China include:

- the NSC (comprising the Ministry of Supervision and local level supervisory commissions, the National Bureau of Corruption Prevention, and the Anti-Corruption Bureau, which was formerly under the SPP);
- the SPP and local-level people's procuratorates;
- the Ministry of Public Security and local-level public security bureaus;
- the CCDI and various local-level discipline inspection commissions; and

- The State Administration for Market Regulation ("**SAMR**") and local-level offices. The SAMR, formerly the State Administration of Industry & Commerce, investigates potential violations and enforces the AUCL.

### **Prosecution and Penalties**

The SPP has set thresholds of bribes above which perpetrators would be prosecuted at RMB 10,000 for individuals and RMB 200,000 for entities. Prosecutors can aggregate the value of separate bribes to meet these thresholds. The 2016 Interpretations specified new thresholds for bribes in connection with some offenses at RMB 30,000 for individuals and RMB 200,000 for entities. The 2016 Interpretations clarify that "relatively large" bribes for private sector bribery offences under Article 164 of the Criminal Law are criminalized if bribery amounts paid by individuals are more than RMB 60,000 and amounts paid by entities of more than RMB 200,000. However, in some circumstances, a lower threshold applies, for example, in connection with bribing foreign organizations, where the threshold for bribery by individuals is RMB 10,000.

For individuals found guilty of bribing state functionaries or their close relatives, penalties are based on the circumstances of the crime and the severity of the offense, and can range from a fixed term of imprisonment of no more than three years to life imprisonment. Confiscation of personal property may be imposed in serious circumstances, as an alternative to criminal fines ranging from RMB 100,000 to twice the amount of the bribe. For criminal bribery offences committed in the private sector, individual offenders face up to ten years' imprisonment and fines ranging from RMB 100,000 to twice the amount of the bribe.

Corporate entities found guilty of bribing state functionaries face fines ranging from RMB 100,000 to twice the amount of the bribe. Meanwhile, officers in charge of companies and other personnel responsible for bribery crimes may be imprisoned for up to five years. Recipients of bribes may be sentenced to life imprisonment and have their property confiscated.

With regard to commercial bribery, penalties imposed by SAMR include confiscation of illegal gains and administrative fines of between RMB 100,000 and RMB 3 million per violation, as well as revocation of business licenses in serious cases.

### **Industry-Specific Enforcement**

In mainland China, anti-bribery and corruption laws, regulations, and enforcement actions are often industry-specific. For example, the *Pharmaceuticals Administration Law*, amended in 2019, significantly increases monetary penalties for bribery in the pharmaceutical industry as compared with general penalties promulgated by the SPP. If pharmaceuticals marketing license holders, pharmaceuticals manufacturers, distributors, and their agents offer illicit benefits to healthcare professionals, such as persons-in-charge of medical institutions, procurement personnel, physicians, or pharmacists, the minimum penalty upon conviction of bribery is RMB 300,000 and the maximum penalty is RMB 3 million. A lifetime industry ban may be imposed on an individual convicted of bribing public officials. If a pharmaceutical enterprise is found to have bribed public officials in the course of R&D, production, or daily operations, its legal representative, principal persons-in-charge, and other responsible personnel could be banned from participating in the production and distribution of pharmaceuticals for life.



## **HONG KONG**

The Hong Kong Special Administrative Region (“**HKSAR**”) maintains its own legal system, and is known for its high standards and rigorous enforcement of anti-bribery and corruption laws. In the 2019 TICPI, the HKSAR scored 76 out of 100 and ranked 16<sup>th</sup> among 180 countries and territories.<sup>4</sup>

### **The Prevention of Bribery Ordinance**

The primary anti-bribery and corruption legislation in HKSAR is the Prevention of Bribery Ordinance (“**POBO**”).<sup>5</sup> The POBO was enacted in 1971 with strong public support to counteract the rampant bribery present in many public service sectors at the time. The Independent Commission Against Corruption (“**ICAC**”) has the statutory authority to enforce the POBO.<sup>6</sup>

The POBO uses the term “advantage” to describe gifts, loans, fees, commissions, employment, contracts, services, or the exercise of certain rights, power, or duty that might be involved in an offense.<sup>7</sup> When an advantage

<sup>4</sup> See <https://www.transparency.org/en/countries/hong-kong#>.

<sup>5</sup> Prevention of Bribery Ordinance, Cap. 201 (POBO).

<sup>6</sup> Independent Commission Against Corruption Ordinance, Cap. 204 (ICACO).

<sup>7</sup> Section 2, POBO.





is offered, solicited, or accepted as an inducement for certain actions or inactions without legal authority or reasonable excuse, it is considered bribery under the POBO.<sup>8</sup>

### **Public Sector Prohibitions**

Under the POBO, public servants include prescribed officers and any employees of a public body. A prescribed officer can be any person who holds an office of the HKSAR government as well as officials of

organizations who are appointed by the HKSAR government, such as those of Hong Kong Monetary Authority, ICAC, and judicial officers. Employees of a public body are defined more broadly, and include those employed by the Executive Council, the Legislative Council, any District Council, and any other government-related organizations or government-owned entities, in addition to employees of the HKSAR government.<sup>9</sup>

The POBO has a general prohibition against any prescribed officer soliciting or accepting any advantage without the express permission of the Chief Executive. It is an offense under the POBO for any individual to offer any advantage to any prescribed officer or public servant in the course of their dealings. Illegitimate intent related to the solicitation or acceptance is not required for the above two categories of actions to be considered an offense.<sup>10</sup>

A bribery offense occurs when any person offers to a public servant, or any public servant solicits or accepts, an advantage as an inducement or reward for performing, abstaining from, delaying, or expediting a public servant's act. Similarly, offering or soliciting an advantage

as a reward for assistance in any contract or subcontract involving a public body, for withdrawal of a tender or refraining from making a tender for any contract with a public body, or for refraining from bidding at any auction conducted by or on behalf of a public body are also considered offenses.<sup>11</sup>

Additionally, possession of unexplained property is an offense. A prescribed officer who maintains a standard of living or is in control of property that is above or not proportionate to his or her official compensation can violate the POBO.<sup>12</sup>

### **Private Sector Prohibitions**

Section 9 of the POBO prohibits corrupt transactions concerning the principal-agent relationship, where a person is employed by or is acting on behalf of another. A principal can be an employer, investor, company director, or even an investment fund. An agent's solicitation or acceptance of any advantage in exchange for doing or forbearing to do any act in relation to a principal's affairs or business is prohibited without the permission of the principal. It is also prohibited for anyone, without lawful authority or reasonable excuse, to offer an advantage in exchange for an agent's doing or forbearing to do any act in relation to the principal's business. The timeliness of a principal's permission is reasonably flexible, and can be given at any time before or after an offer or acceptance of an advantage.<sup>13</sup>

### **Limits of Extraterritorial Application**

Section 4 is the only section of the POBO that has explicit extraterritorial effect, stating that a bribe to a domestic public servant, "whether in Hong Kong or elsewhere," is considered an offense. The omission of this phrase in

<sup>8</sup> *Id.* at Section 4.

<sup>9</sup> *Id.* at Section 2.

<sup>10</sup> *Id.* at Sections 3, 8.

<sup>11</sup> *Id.* at Sections 4-7.

<sup>12</sup> *Id.* at Section 10.

<sup>13</sup> *Id.* at Section 29.

other sections of the POBO suggests that its extraterritorial application was intended to be limited.<sup>14</sup>

Even though the POBO does not explicitly apply to foreign public officials, it can apply to any foreign public official, if that party is offered an advantage in Hong Kong, and the act concerned is in relation to his or her public duties under the principal-agent theory of Section 9 of the POBO.<sup>15</sup> However, unlike domestic public officials, offering an advantage to a non-Hong Kong public official is only considered an offense if the act of bribery takes place within Hong Kong.<sup>16</sup>

### Thresholds and Defenses

The POBO does not have a *de minimis* threshold for enforcement, so that advantages of very little value can constitute an offense. Even advantages considered customary in the relevant profession, trade, or vocation are not permissible.<sup>17</sup> For example, in 2002, the ICAC arrested and charged two workers of a temple for accepting “*lai see*” (red envelopes traditionally given to family, employees, etc. during Lunar New Year) from members of the congregation containing cash of several hundred Hong Kong dollars (HKD 100 is roughly USD 13) in exchange for assistance in conducting certain religious ceremonies during Lunar New Year.<sup>18</sup>

However, providing entertainment, defined as food or drink, or other entertainment consumed when food and drink is provided, is excluded from the definition of an advantage in the POBO.<sup>19</sup> Even so, HKSAR’s Civil Service Bureau

warned that civil servants should not accept lavish, or unreasonably generous or frequent entertainment, or any entertainment that is likely to give rise to any potential or real conflict of interest.<sup>20</sup>

### Penalties

Section 12 of the POBO provides penalties for different offenses. Offenses related to the possession of unexplained property may lead to a fine of up to HKD 1 million and imprisonment for up to 10 years. For bribery offenses related to the procurement or withdrawal of tenders, or for giving assistance in regard to contracts, the punishment can include a fine of HKD 500,000 and imprisonment of up to 10 years. For offenses related to Section 3, the general solicitation or acceptance of an advantage by a prescribed officer, the punishment is HKD 100,000 and imprisonment for one year. All other offenses may incur a fine of HKD 500,000 and imprisonment of 7 years.<sup>21</sup>

### MACAU

The Macau Special Administrative Region (“**MSAR**”) also has its own legal system and laws against bribery and corruption. In 2011, the last year MSAR was rated in the TICPI, the city ranked 46<sup>th</sup> in the world, and 10<sup>th</sup> among Asia Pacific economies.<sup>22</sup> The MSAR anti-bribery and corruption provisions are inscribed in the *Penal Code* and the *Prevention and Suppression of Bribery in the Private Sector* (“**PSBPS**”). The Commission Against Corruption of Macau (“**CACC**”) is the dedicated authority task with enforcement of the anti-bribery and corruption statutes.<sup>23</sup>

14 *HKSAR v. Krieger* (Dec. 18, 2012, CACC99/2012).

15 *B v. Commissioner of the Independent Commission Against Corruption* [2010] HKEC 122.

16 *HKSAR v. Lionel John Krieger* [2014] HKEC 1323.

17 Section 19, POBO.

18 See [https://orientaldaily.on.cc/cnt/news/20120223/00176\\_041.html](https://orientaldaily.on.cc/cnt/news/20120223/00176_041.html)

19 Section 2(1)(d), POBO.

20 See <https://www.csb.gov.hk/english/admin/conduct/138.html>

21 Section 12, POBO.

22 See <https://www.transparency.org/en/cpi/2011>.

23 Law No. 10/2000, Prevention and Suppression of Bribery in the Private Sector (PSBPS).



Under the PSBPS, private sector violations are based on the breach of the fiduciary duty that a person has toward his or her employer, entrusting person, or principal. Such a violation can occur in the context of active or passive bribery, if the advantage is solicited, accepted, given, or promised to be given “as a reward for acting or refraining from acting, in violation of his/her functional duties.”<sup>24</sup>

In the public sector, bribery offenses also are based on the rationale that such acts are violations of duty. “Any civil servant who solicits or accepts an illegitimate advantage

as a reward for doing, or refraining from doing, an act in relation to his/her duty is considered guilty of accepting bribes.”<sup>25</sup> Offering a civil servant an advantage for the same purpose is also considered an offense.<sup>26</sup> The law states that while the actual offer and/or acceptance of advantages is an offense, the most crucial factor is the “intent” behind the offer or acceptance of an advantage, and this intent in and of itself constitutes a crime.<sup>27</sup>

In addition to the above, several fraud offenses under the *Penal Code* apply to corruption in both the public and private sectors, including abuse of trust, fraud, embezzlement, and forgery of documents.<sup>28</sup>

The maximum penalties for accepting or offering a bribe in the private sector are, respectively, three or two years’ imprisonment. With regard to public servants, the legislation distinguishes between passive corruption and active corruption, with penalties of imprisonment ranging from two to eight years.<sup>29</sup>

24 *Id.* at Articles 3-4.

25 Article 339, Law No. 46/1995, Penal Code.

26 *Id.* at Article 338.

27 *Id.* at Articles 337-339.

28 *Id.* at Articles 199, 211, 217, 244.

29 See <https://202.175.23.113/PrivSec/en/poster/gl2012/ch3.pdf>

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