

C L I F F O R D  
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GOLD

A GUIDE TO ANTI-CORRUPTION  
LEGISLATION IN ASIA PACIFIC  
VII<sup>TH</sup> EDITION



## **CLIFFORD CHANCE'S ASIA PACIFIC ANTI-CORRUPTION GROUP**

Risks arising from bribery and corruption continue to intensify in Asia Pacific as a number of countries in the region adopt more stringent anti-bribery and corruption measures. Consequently, it is increasingly important for companies to detect, respond to and prevent bribery and corruption.

Clifford Chance's extensive on-the-ground anti-corruption team in Asia Pacific combines compliance, corporate, investigations, litigation, dispute resolution, and defence specialists to help you navigate the plethora of risks associated with bribery and corruption. Our teams regularly advise on a range of issues including upstream - risk management and front-line compliance, advisory, M&A due diligence and in-house training workshops - and downstream - investigations, crisis management, remedial actions and defence work - legal support.

We have a strong regional offering, with experienced white-collar and regulatory lawyers across Asia including Australia, Singapore, Hong Kong, PRC and Japan. Due to the extraterritorial reach of laws such as the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, our team in Asia Pacific also includes a number of US and UK-qualified lawyers who are experts on the FCPA and UK Bribery Act. We benefit from extensive resources throughout our global network with highly recognised capabilities in the US (FCPA practitioners), London (UK Bribery Act practitioners), Europe and the Middle East, and are able to manage multi-jurisdictional and complex anti-corruption enforcement risks.

Welcome to the latest edition of our Guide to Anti-Corruption Legislation in Asia Pacific.

Businesses need to ensure that they are compliant with applicable anti-corruption laws in each of the countries in which they operate as well as with applicable international anti-corruption legislation with extraterritorial reach, such as the US Foreign Corrupt Practices Act and the UK Bribery Act. The need for such compliance is more acute now than ever. Anti-bribery sentiment across Asia Pacific has increased during the pandemic, which has in turn increased the political impetus to clamp down on bribery.

A Transparency International survey<sup>1</sup> conducted during the pandemic revealed that bribery continues to damage trust in governments across Asia. According to the survey, almost one fifth of respondents revealed that they had paid a bribe to access essential services including health care. However, the survey did also reveal some signs of optimism, with around two thirds of respondents indicating that they considered ordinary people are able to make a difference in the fight against corruption and that their state anti-corruption agency was doing a good job.

Asia Pacific countries vary in their anti-corruption legislation and in their enforcement practices. There are different standards for criminal enforcement and civil liability in each of the jurisdictions that should be taken into account when developing your anti-corruption compliance program. For example, countries define bribery differently and vary in how they view facilitation payments. Some countries provide exemptions for local customs and social or religious practices, whilst others implement a de minimis threshold for liability and others have anti-bribery laws with extra-territorial effect. If your anti-corruption compliance program does not encompass local standards, you risk running foul of local laws and triggering an enforcement action. Such actions can carry significant penalties, but perhaps more worryingly, draw the attention of international law enforcement authorities. Consequently, a company can find itself fighting multiple cross-border anti-corruption enforcement actions simultaneously rather than a single local prosecution. The reputational damage associated with falling foul of anti-bribery legislation can be hugely damaging for international businesses and can potentially affect the ability of a business to continue operating in a jurisdiction where it has been sanctioned under anti-bribery laws.

To assist businesses to navigate their way through the different anti-corruption regimes, we have produced this Guide which sets out the legislative anti-bribery framework in thirteen major jurisdictions across Asia Pacific and, in Annexures 1 and 2 respectively, we have summarised the provisions of the US Foreign Corrupt Practices Act and UK Bribery Act, which are major pieces of anti-bribery legislation that has extraterritorial reach. For each jurisdiction, we also offer insight and analysis in relation to the enforcement of the relevant legislation.

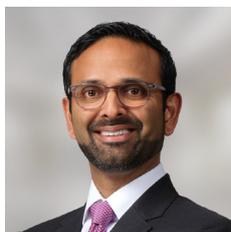
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<sup>1</sup> <https://www.transparency.org/en/press/corruption-remains-a-major-problem-in-asia-damaging-trust-in-government-survey-finds>

It is our hope that the Clifford Chance Guide to Anti-Corruption Legislation in Asia Pacific will assist you in understanding the local laws that may apply to your company's operations to help you ensure that you comply with applicable laws in the Asia Pacific jurisdictions where you operate. Proactive compliance with legislation and remaining mindful of enforcement are crucial to shielding your business from the financial and reputational repercussions of bribery and corruption.



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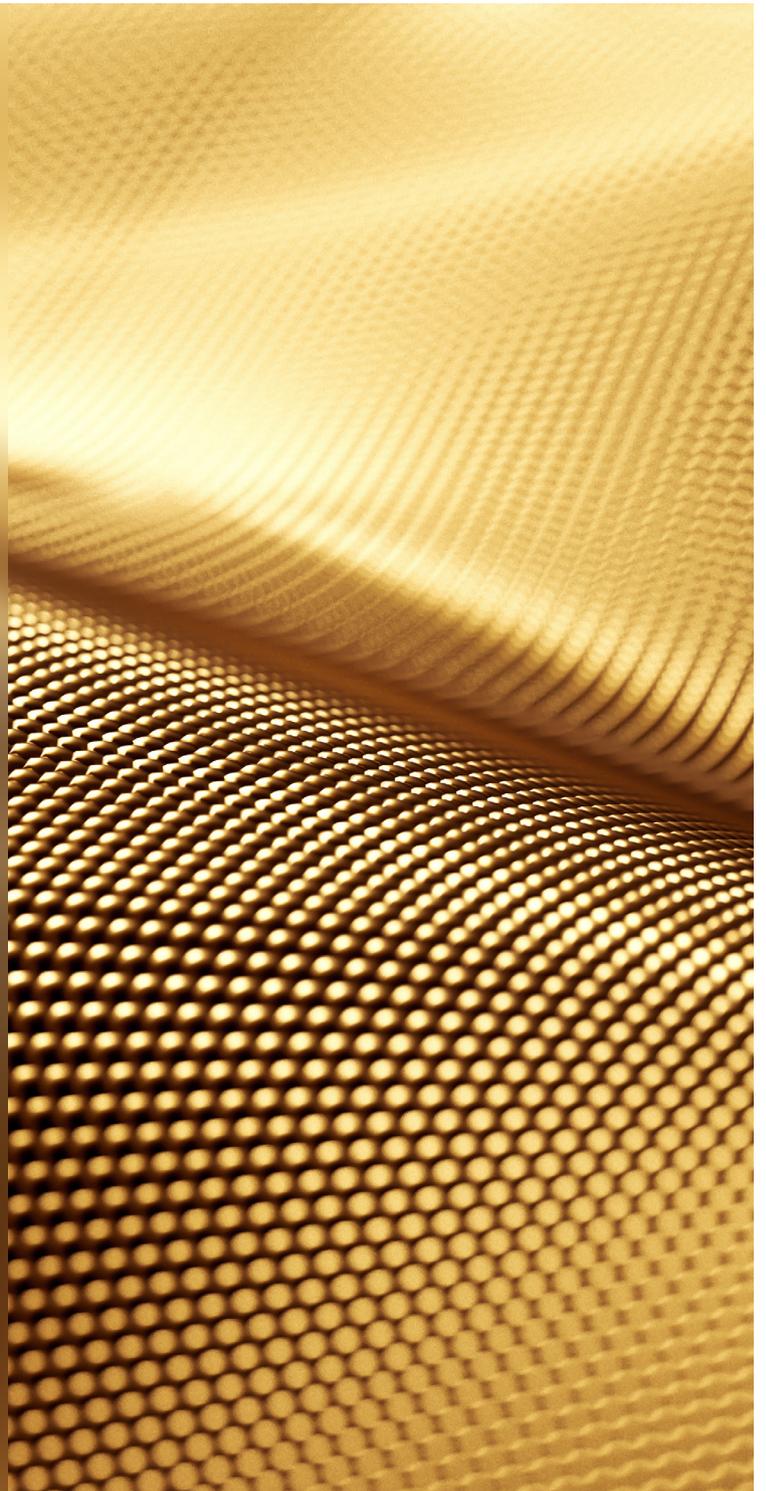


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# INTRODUCTION



The purpose of this Guide is to provide an up-to-date overview of the anti-corruption regimes in Asia Pacific. Bribery and corruption issues in Asia Pacific continue to grab international headlines: a widespread corruption crackdown continues in the PRC, revelations surrounding the 1MDB scandal in Malaysia continue to emerge years later and notable jail time and fines for high ranking executives are being meted out in South Korea. Local and international businesses alike should be aware of the applicable corruption laws in each of their operating jurisdictions in Asia Pacific and the penalties, both financial and reputational, associated with transgression.

Corruption is a global phenomenon which presents an increasingly significant risk in Asia Pacific. Contracting with intermediaries and agents, providing corporate hospitality, giving charitable donations, hiring employees, dealing with state-owned enterprises, starting up operations abroad, or just carrying on daily business, all raise anti-corruption risks.

Perhaps a local government official has asked for a favour or an agent offers to arrange a private meeting with the government minister awarding a contract. Maybe a customs official will demand an “expediting fee” before releasing a company’s goods or an agreement inherited as part of a takeover or merger situation seems to involve unusually high fees.

Corruption is obviously illegal everywhere in Asia Pacific and all the jurisdictions included in this handbook (except Taiwan) have signed the United Nations Convention against Corruption. As the global fight against corruption gains ever greater prominence, jurisdictions across the region have sought to increase awareness of corruption and strengthen their anti-corruption frameworks.

High-profile enforcement actions in Australia have illustrated the continuing crackdown on corruption and recent years have seen significant reforms to the legislative framework surrounding anti-bribery and corruption in Australia, in areas such as whistleblowing, with more to come with the prospect of establishment of a Federal Commission on corruption still on the cards. Over in Malaysia, from

1 As of 1 January 2018, when the Penal Code becomes effective.

2 Private sector bribery is only criminalised in specific cases.

3 Private sector bribery is only criminalised to the extent that the bribery is intended to cause a person to do something or refrain from doing something in his or her line of duty in contravention of his or her authority or obligations affecting the public good.

This Guide does not purport to be comprehensive or constitute any legal advice. It is only a guide. The information and the laws referred to are correct as of no earlier than 16 February 2022 (unless otherwise stated). If you would like advice or further information on anything contained in this Guide, please contact Clifford Chance.

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2020 commercial organisations have been liable for the corrupt acts of their associated persons, effectively exposing an organisation and its management to strict liability unless it can prove it had adequate policies and procedures in place to prevent bribery, and the authorities made their first arrest under the updated legislation in March 2021. Further, in India, among other legislative developments, there have been significant amendments to the Prevention of Corruption Act, one of the core anti-bribery statutes. South-East Asian countries continue to co-operate and adapt to the increasing sophistication of bribery schemes through increased inter-governmental co-operation. Thailand hosted the 2022 Asia-Pacific Economic Cooperation meeting in June 2022, and has highlighted anti-corruption as one of its main priorities with the current APEC members. Countries in Asia Pacific have taken increasingly proactive steps to improve cooperation with other regional and worldwide enforcement authorities. However, what constitutes corruption still varies from jurisdiction to jurisdiction. Significant differences remain, causing headaches for multinationals seeking to implement a global anti-corruption policy. For instance, private sector bribery is expressly criminalised in more and more jurisdictions, including Hong Kong, Singapore, the PRC, South Korea and Vietnam,<sup>1</sup> and in Malaysia, but generally not in Japan,<sup>2</sup> India or Indonesia.<sup>3</sup> Facilitation payments are exempt in Australia and Thailand under certain conditions but not in other countries.

Giving a bribe to a foreign public official is a criminal offence in Taiwan and Thailand but not in the Philippines. Such discrepancies amplify the murky grey area between acceptable corporate behaviour and corruption for companies doing business in Asia Pacific.

This Guide, based on contributions from Clifford Chance’s regional network in Asia Pacific as well as local partner firms, sets out the key elements of the bribery offences in each jurisdiction, looks at how the offences are treated in relation to intermediaries, private sector bribery, facilitation payments, gifts and hospitality, extraterritorial applicability and identifies key developments in enforcement trends.



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# COMPARISON TABLE

# COMPARISON TABLE

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	Is bribery of foreign public officials criminalised?	Is private sector bribery criminalised?	Is bribery through an intermediary criminalised?	Is there any de minimis threshold?	Are facilitating payments exempted?
<b>Australia</b>	Yes	Yes	Yes	No	Yes
<b>China</b>	Yes	Yes	Yes	Yes	No
<b>Hong Kong</b>	Not expressly	Yes	Yes	No	No
<b>India</b>	No. The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill 2011 has lapsed and has not been reintroduced in Parliament to date	No. However in some cases, the facts may fit the larger offence of fraud under the Companies Act, 2013. Certain offences under the Indian Penal Code, 1860 can, depending on facts, also be attracted	Yes	No	No
<b>Indonesia</b>	No	Only if public interest involved	Only through “aiding and abetting” principles	No	No
<b>Japan</b>	Yes	Only in specific cases	Yes	No	No
<b>Malaysia</b>	Yes	Yes	Yes	No	No
<b>Philippines</b>	No	Yes, but only when it relates to an official act or function	Yes	No	No
<b>Singapore</b>	Yes	Yes	Yes	No	No
<b>South Korea</b>	Yes	Yes	Yes	No, except through administrative guidelines	No
<b>Taiwan</b>	Yes	No	Yes	No	No
<b>Thailand</b>	Yes	Only in specific cases	Yes	No	No, unless they are given on an ethical basis and in accordance with the criteria and amounts prescribed by law
<b>Vietnam</b>	Yes	Yes	Yes	Yes	No
<b>US FCPA</b>	Yes	No	Yes	No	Yes
<b>UK Bribery Act</b>	Yes	Yes	Yes	No	No



**AUSTRALIA -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN AUSTRALIA CONTRIBUTED BY CLIFFORD CHANCE (SYDNEY AND PERTH OFFICES)

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## Key points:

<b>Key legislation</b>	Commonwealth: Criminal Code Act 1995 (Cth) (Criminal Code) Overseas: Bribery of Foreign Public Officials (Division 70 of Criminal Code) Domestic: Bribery of Commonwealth Public Officials (Divisions 141 and 142 of Criminal Code)
<b>Private sector bribery</b>	Yes, but covered by state, territory and federal legislation such as the Corporations Act 2001 (Cth) (Corporations Act)
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	Yes
<b>Defences</b>	<ul style="list-style-type: none"> <li>• In certain circumstances where the conduct is lawful in the foreign public official's country</li> <li>• For facilitation payments in certain circumstances</li> </ul>
<b>Penalties for individuals</b>	Up to ten years imprisonment and/or a fine of 10,000 penalty units (A\$2.2 million, approx. US\$1.6 million)
<b>Penalties for companies</b>	<p><b>A fine of not more than the greatest of the following:</b></p> <ul style="list-style-type: none"> <li>• 100,000 penalty units (A\$22.2 million, approx. US\$16 million)</li> <li>• if the value of the benefit can be determined, three times the value of the benefit attributable to the offence conduct</li> <li>• if the court cannot determine the value of the benefit, 10% of the annual turnover of the 12 months ending in the month the offence occurred</li> </ul>
<b>Collateral consequences</b>	<p>Criminal: proceeds of crime actions, false accounting offences</p> <p>Civil and Regulatory: tax adjustments and tax penalties, private or regulatory actions for breaches of directors' duties, suspension from acting as a director</p>
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"> <li>• United Nations Convention against Corruption</li> <li>• OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)</li> <li>• Member of the Financial Action Task Force</li> </ul>

## What is the definition of a bribe?

*The description below, and the remainder of this chapter, focuses on the key anti-corruption law contained in the Commonwealth's Criminal Code. Additional relevant Commonwealth and state/territory-based anti-corruption legislation provide varying definitions of a "bribe" and "bribery".*

A "bribe" is not defined under the Criminal Code on a stand-alone basis. It can be described as any conduct that would constitute one or more of the bribery offences pursuant to Divisions 70, 141 and 142 of the Criminal Code. The elements of these offences are broad but can be summarised generally as: the providing or offering of a benefit, or the causing of a benefit to be provided, offered or promised to another person where the benefit is not legitimately due and is intended to influence an official in the exercise of official duties for the purposes of obtaining or retaining business or a business advantage. Domestic bribery also requires an element of "dishonesty". It is unnecessary to prove: (i) that there was an intention to influence a particular official; (ii) that any official was a recipient of the benefit; or (iii) that the bribe was successful. A "benefit" includes any advantage, and is not limited to tangible property.

## What is the definition of a public official and a foreign public official?

### Domestic public official

The Criminal Code defines a public official broadly to include:

- a Commonwealth public official;
- an officer or employee of the Commonwealth or of a state or territory;
- an individual who performs work for the Commonwealth, or for a state or territory, under a contract;
- an individual who holds or performs the duties of an office established by a law of the Commonwealth or of a state or territory;
- an individual who is otherwise in the service of the Commonwealth or of a state or territory (including service as a member of a military force or police force);
- a member of the executive, judiciary or magistracy of the Commonwealth or of a state or territory;
- a member of the legislature of the Commonwealth or of a state or territory; and
- an officer or employee of:
  - an authority of the Commonwealth; or
  - an authority of a state or territory.

Various state and federal laws also provide for their own definitions of public officials.

### Foreign public official

A foreign public official is broadly defined to include:

- an employee or official of a foreign government;
- a member of the executive, judiciary or magistracy of a foreign country;
- a person who performs official duties under a foreign law;
- a member or officer of the legislature of a foreign country;
- an employee or official of a public international organisation (such as the United Nations); and
- an authorised intermediary of a foreign public official or someone who holds themselves out as an authorised intermediary.

A director or an employee of a foreign state-owned enterprise is likely to be considered a foreign public official.

## **Is private sector bribery covered by the law?**

Private sector bribery is covered by a variety of state, territory and Commonwealth offences (such as the Crimes Act 1900 (NSW) or the Corporations Act).

## **Does the law apply beyond national boundaries?**

The law has extraterritorial application if the offence occurs wholly or partly in Australia, on board an Australian aircraft or ship or if the offence occurs outside Australia but the person is a citizen, resident of Australia or a corporation under a law of the Commonwealth, state or territory of Australia.

## **How are gifts and hospitality treated?**

Gifts and hospitality can qualify as a bribe as these are likely to be viewed as a “benefit” under the legislation. Whether or not there is an intention to influence a foreign public official when providing reasonable gifts and hospitality which relate to the promotion, demonstration or explanation of products or services will be relevant in determining whether the legislation applies.

## **How is bribery through intermediaries treated?**

A bribe paid to an intermediary of a foreign public official is captured by the legislation. Bribes paid by an intermediary of an Australian company, citizen or resident will be captured if the principal is found to have aided, abetted, counselled or procured the offence. In order for such an offence to be established, the person must have intended that his or her conduct aids, abets, counsels or procures the offence.

## **Are companies liable for the actions of their subsidiaries?**

Ordinary criminal principles of derivative liability may apply in these circumstances to render a company liable for the action of its subsidiary.

## **Is there an exemption for facilitation payments?**

There is a defence if the benefit paid constituted a facilitation payment. To apply, the benefit must be minor in value, and be “offered for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature”. The payments must be recorded in a prescribed amount of detail and retained for a period of seven years.

The practical application of this defence is likely to be narrow as there is no legislative or judicial guidance as to what constitutes a benefit that is of a “minor nature”.

## **Is there a defence for having adequate compliance procedures?**

There is no specific defence at the time of this publication, although the existence of a robust anti-corruption program is likely to be taken into account in an enforcement action against the company and may assist in negating any allegations that a company was liable for the actions of its employee or subsidiary. Under Australian law, a company may be held criminally liable for an offence if its culture directed, encouraged, tolerated or led to the offence, or if the company failed to create a culture that required compliance with the law.

## **What are the enforcement trends in the business area?**

Recent defining elements determining the tide of enforcement trends include:

- In May 2016, the Australian government committed A\$15 million (approx. US\$10.9 million) in funding to bolster law enforcement efforts to detect and combat corruption. A new specialist fraud and anti-bribery and corruption team was formed, with teams in three major cities in Australia. Whilst enforcement of foreign bribery offences is possible against both companies and individuals, prominent proceedings continue to show an emphasis on targeting individuals in senior positions for alleged wrongdoing.
  - The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was tabled in Parliament on 4 February 2019 and uncovered widespread misconduct in the banking industries. As a result, enforcement of domestic bribery intensified. Corporate watchdog, the Australian Securities & Investments Commission (ASIC) embraced – at least for a short period of time – a “why not litigate” mantra.
  - Logistical and financial impacts of COVID-19 have posed increased risk of corruption, bribery and other financial crimes, due to increased pressure faced by companies and individuals. Some enforcement agencies announced changes to their enforcement approach and priorities in light of the pandemic, although regulatory and enforcement activity remains broadly unchanged.
  - In 2019, the government effected a ten-fold increase in maximum penalties under Australia’s Corporations law through the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019:
    - Corporations found to have committed criminal offences under the Corporations Act are now subject to a maximum penalty of 45,000 penalty units (A\$9.99 million, approx. US\$7.3 million, increased from A\$1 million) or, alternatively, three times the benefit(s) received, or 10% of annual turnover. Individuals are now subject to a maximum penalty of 4,500 penalty units (A\$999,000, approx. US\$720,000, increased from A\$100,000), or three times the benefit(s) received. The maximum penalties for the most serious offences have increased to 15 years’ imprisonment.\*
    - The increase in civil penalties was even higher. Corporations found liable of a civil offence now face maximum penalties of the greater of 50,000 penalty units (A\$11.1 million, approx. US\$8 million, increased from A\$1 million), three times the benefit(s) received or detriment avoided, or 10% of the company’s annual turnover (up to a cap of 2.5 million penalty units, currently translating to A\$555 million, approx. US\$402 million). Individuals meanwhile may face civil penalties of up to 5,000 penalty units (A\$1.11 million, increased from A\$200,000) or three times the benefit(s) obtained and detriment avoided.\*
- \*The former maximum penalties reflect the penalty unit value at the time of the offence.
- The Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 received Royal Assent in March 2019. The Act broadens the whistleblower protections in the Corporations Act. Key reforms include extending the range of people who are “eligible whistleblowers”, changing the range of people who are eligible to receive protected disclosures, extending protected disclosures to matters beyond criminal breaches, and providing stronger protections for whistleblowers including through anonymity, increased immunities against prosecution, and non-victimisation. The Act also introduces a new requirement for certain companies, including public companies and large proprietary companies, to have compliant whistleblower policies in place.
- The following cases provide examples of recent enforcement trends:

1. Former NSW Labour ministers, Ian Macdonald, Eddie Obeid and Mr Obeid's son, Moses Obeid, were found guilty of conspiring to commit misconduct in public office in July 2021. The three individuals had conspired for Mr Macdonald, then Minister for Mineral Resources, to wilfully misconduct himself in connection with the grant of a lucrative coal mining exploration licence over the Obeid family farm, to benefit the Obeids and their associates. Mr Macdonald was found to have provided confidential information to the Obeid family who had subsequently made A\$30 million (approx. US\$22 million) from the deal. The three individuals were sentenced to jail and are currently in the process of appealing their sentences.
2. Leighton Holdings Limited (now known as CIMIC Group Limited) has been under investigation by the Australian Federal Police (AFP) and ASIC since 2011 for foreign bribery. The former CFO of Leighton Holdings, Peter Gregg, was convicted of falsification of books following a five-week trial that concluded in December 2018, however, has since had his convictions quashed on appeal. Another former executive was found not guilty of aiding and abetting the commission of the offence by Mr Gregg. In November 2020, former Leighton Holdings managing director, Russell Waugh, was charged with foreign bribery and other offences for alleged bribes paid in connection with two contracts with Iraq Crude Oil Export worth US\$1.46 billion. David Savage, the former COO of the company, was also charged with two counts of knowingly providing misleading information. Further foreign bribery charges were laid against Mr Waugh in February 2021 in relation to suspicious payments worth US\$4 million made in connection with a US\$66.48 million infrastructure contract in Tanzania. These charges followed an investigation under the Corporations Act, rather than under anti-bribery legislation.
3. Health department executives John Fullerton and David Mulligan were charged with fraud and bribery offences in 2019-20 following an investigation into Perth's North Metropolitan Health Service conducted by the Western Australian Corruption and Crime Commission. The Commission tabled a report in 2018 which alleged that misconduct including fraudulent activity, bribery, inflated invoicing, bid rigging and manipulation of procurement had gone undetected among senior Western Australian Health staff for up to a decade. The executives were alleged to have accepted kickbacks in return for lucrative government contracts allocated to building and maintenance firms. In 2021, Mr Fullerton pleaded not guilty to 47 corruption charges while Mr Mulligan pleaded guilty to nine counts of acting corruptly in public office and one count of being a public officer and omitting to make an entry in any record. Five contractors involved in the scandal also pleaded guilty to multiple charges and have received varying sentences.
4. In late January 2021, Rosemary Rogers, former chief of staff to the CEO of National Australian Bank Limited, was sentenced to a combined eight years in jail. Ms Rogers had pleaded guilty to several charges including dishonestly obtaining a financial advantage by deception and being an agent corruptly receiving a benefit. The charges arose from Ms Rogers' acceptance of bribes amounting to around A\$5.5 million (approx. US\$4 million) to approve bloated invoices worth more than A\$44 million (approx. US\$32 million) over a period of four years. The counter-party allegedly involved in this fraudulent scheme, chief executive of Human Group, Helen Rosamond, has pleaded not guilty and is currently awaiting trial, expected to take place in July 2022. The scheme was first revealed by a corporate whistleblower, indicating how the enhanced whistleblower protections in the private sphere (described above) may play an important role in enforcement trends.
5. In June 2018, criminal charges were brought against Sinclair Knight Merz Pty Ltd (since acquired by Jacobs Group (Australia) Pty Ltd) and several individuals for conspiracy to

1. bribe foreign public officials. The investigation commenced after the company self-reported that it had, through its South-East Asian subsidiaries, made illegitimate payments to foreign public officials to secure World Bank and Asian Development Bank-financed loan projects in Vietnam and the Philippines. In 2021, the company pleaded guilty and was fined over A\$1.4 million (approx. US\$980,000). In 2022, the accused individuals, which comprised the former chief executive of the company alongside four other executives, were acquitted in relation to conspiracy offences relating to the Philippine offences in the first foreign bribery case to go to trial. The prosecutors have since dropped the allegations in relation to the Vietnam offences.
2. On 11 February 2020, Mozammil Bhojani, director in the Radiance International Group of companies, pleaded guilty to two foreign bribery offences of causing bribes to be paid to foreign government officials. The conviction followed an investigation conducted by the AFP and involved bribes of a cumulative value of A\$129,500 (approx. US\$94,000) paid between 2015 and 2017. In exchange, Mr Bhojani received a timing advantage relating to the allocation of phosphate for shipment by Radiance Minerals. In August 2020, Mr Bhojani was sentenced to a custodial sentence of two years and six months.
3. In July 2020, Dennis Teen, a Melbourne property developer, was charged with bribing a foreign public official along with four counts of false accounting. The charges arose from Mr Teen's alleged 2013 sale of a student accommodation block to a Malaysian government-owned entity at an inflated price. In return, Mr Teen allegedly provided the sum of A\$4.75 million (approx. US\$3.44 million) to Malaysian public officials via sham invoices. No further details relating to Mr Teen's pending trial, pleas and/or sentencing were publicly available at the time of this publication.

The following developments will likely continue to shape Australia's enforcement landscape moving forward:

- The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Bill) has been tabled in the Senate. The Bill includes a new strict liability corporate offence of failing to prevent foreign bribery, which will mean that a company will be automatically liable for foreign bribery unless it can establish it had "adequate procedures" in place. Consistent with the Bill, the Attorney-General's Department has published draft "adequate procedures" guidance on the steps a body corporate can take to prevent an associate from bribing foreign officials. Once passed, these changes will expand the breadth of offences relating to foreign bribery, as well as provide additional defences. The Bill introduces a Deferred Prosecution Agreement Scheme which will apply to anti money-laundering and sanctions offences, foreign bribery and specific offences under the Criminal Code and the Corporations Act.
- It remains unclear if and when the Bill will be passed and become law. In March 2020, the Senate Legal and Constitutional Affairs Legislation Committee recommended that the 2017 Bill (in substantially the same form as the 2019 Bill) be approved, (although the opposition party published a dissenting report, expressing concern over the Deferred Prosecution Agreement Scheme). In February 2021, the Government published its response to the Senate Committee Report, ultimately agreeing that the Bill should be passed.
- In March 2016, in compliance with the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Code was amended to introduce new offences for false dealing with accounting documents.
- In December 2017, the AFP and the Commonwealth Department of Public Prosecutions (CDPP) released joint

best practice guidelines on the self-reporting of foreign bribery and related offences by a corporation. The Guidelines outline how the AFP and CDPP will treat the investigation and prosecution of a company that self-reports, and how self-reporting affects sentencing.

- Proposals have been put forward over recent years to establish a Federal Independent Commission Against Corruption (Commission) to supplement existing equivalent state and territory corruption commissions. Exposure draft legislation was released in November 2020 and a consultation process finalised in March 2021. The draft legislation has been heavily criticised and the Commission's timeframe, the extent of its proposed powers, and governance structure remain unknown. The government has confirmed that the Commission will not be established until at least after the 2022 federal election.
- On 31 August 2020, the Australian Law Reform Commission tabled its final report into Australia's regime of corporate criminal responsibility. The Report contains 20 recommendations purported to simplify and strengthen the scheme of corporate criminal responsibility in Australia. If the

recommendations are implemented, substantial legislative reform is expected.

- In November 2021, the federal government announced a proposed reform of whistleblowing laws in the public sector to supplement the recent private sector reform. This reform will support the majority of recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit sectors. The aim of the reform will be to ensure the legislative framework promotes transparency and accountability within government, provides protections to those who allege wrongdoing and empowers government agencies to address wrongdoing.



**CHINA -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN THE PEOPLE'S REPUBLIC OF CHINA

## CONTRIBUTED BY CLIFFORD CHANCE (MAINLAND CHINA AND HONG KONG OFFICES)

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### Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"> <li>• Criminal Law</li> <li>• Anti-Unfair Competition Law (amended in 2019 and taking effect on 23 April 2019, the 2019 AUCL)</li> <li>• Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery, promulgated jointly by the Supreme People's Court (the SPC) and the Supreme People's Procuratorate (the SPP) on 18 April 2016 (the 2016 Interpretation)</li> <li>• Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases of Bribery, promulgated jointly by the SPC and the SPP on 26 December 2012 (the 2012 Interpretation)</li> <li>• Opinions on Several Issues of Application of Law concerning the Handling of Criminal Cases of Commercial Bribery, promulgated jointly by the SPC and the SPP on 20 November 2008 (the 2008 Opinions)</li> <li>• Opinions on Issues concerning the Application of Law in the Handling of Criminal Cases Involving the Acceptance of Bribes, promulgated jointly by the SPC and the SPP on 8 July 2007 (the 2007 Opinions)</li> <li>• Rules on the Standard for Filing Cases that are Directly Filed for Investigation by the People's Procuratorate (Trial), promulgated by the SPP on 16 September 1999 (the 1999 Rules)</li> <li>• Provisional Measures on Prohibition of Commercial Bribery promulgated by the former State Administration of Industry and Commerce (currently State Administration for Market Regulation) on 15 November 1996 (the 1996 Measures)</li> </ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	No

<b>Defences</b>	<b>Criminal Law:</b> <ul style="list-style-type: none"><li>• Extortion payments with no <i>quid pro quo</i></li></ul> <b>2019 AUCL:</b> <ul style="list-style-type: none"><li>• Small gifts for marketing and promotional purposes</li><li>• Individual employee’s conduct of bribery which is irrelevant to seeking transaction opportunities or competitive advantages for the employer</li></ul>
<b>Penalties for individuals</b>	<b>Criminal Law:</b> <ul style="list-style-type: none"><li>• Bribing public officials or public entities: criminal detention, fixed term or life imprisonment, criminal fine or confiscation of property</li><li>• Bribing non-public officials: criminal detention or imprisonment of up to 10 years; criminal fine</li><li>• Receiving bribes as a public official: criminal detention, fixed term or life imprisonment, up to the death penalty; criminal fine or confiscation of property</li><li>• Receiving bribes as a non-public official: criminal detention, fixed term or life imprisonment combined with criminal fine</li></ul> <b>2019 AUCL:</b> <ul style="list-style-type: none"><li>• An administrative fine ranging from CNY100,000 (approx. US\$15,800) to CNY3,000,000 (approx. US\$475,000) and confiscation of illegal income</li></ul>
<b>Penalties for companies</b>	<b>Criminal Law:</b> <ul style="list-style-type: none"><li>• Unlimited criminal fine</li></ul> <b>2019 AUCL:</b> <ul style="list-style-type: none"><li>• An administrative fine ranging from CNY100,000 (approx. US\$15,800) to CNY3,000,000 (approx. US\$475,000) and confiscation of illegal income, and revocation of business license in severe cases</li></ul>

**Collateral consequences**

**The SPP public database of convicted bribe givers:**

The SPP has set up a public database of convicted bribe givers (criminals) (the SPP database), which has been connected to local databases across the nation. In many industries and regions, the authority has set up blacklists, which prohibit entities that have been convicted of bribery from being involved in public tenders

**The blacklist for public procurement in healthcare sector:**

In accordance with the Provisions on the Blacklisting of Commercial Bribery in Healthcare Procurement, which took effect on 1 March 2014 and apply to the procurement of drugs, medical equipment and consumables, a company shall be blacklisted if its offence of paying bribes:

- results in a conviction by a court judgment or is minor, in which latter case criminal penalties are exempted
- is minor, and the prosecutor decides not to prosecute
- results in the imposition of penalties by the Chinese Communist Party’s Discipline Inspection Commission or the Administrative Supervision Authority
- results in the imposition of administrative penalties by the authority of Finance, Shanghai Administration of Industry and Commerce (Shanghai AIC), or the Food and Drug Administration

Penalties for blacklisted companies include being barred from procurement tenders by public hospitals from provincial level to national level for two years, depending on the number of times a company is blacklisted

**The general bribe giver blacklist system:**

In accordance with an opinion issued in September 2021 by the Central Commission for Discipline Inspection (CCDI), the anti-corruption watchdog of the PRC Communist Party, along with six other PRC authorities, a general blacklist system for bribe givers (the blacklist) shall be established.

Unlike the SPP database, the blacklist has a broader scope and applies to both bribe givers who have been criminally convicted and those who have not been convicted but have carried out acts of bribe giving.

While relevant PRC authorities are yet to publish any implementation rules and/or specific guidance in relation to the blacklist, the blacklist has piloted in several provinces. Penalties imposed against blacklisted individuals and entities include, in addition to the relevant criminal and/or administrative penalties, barring them from public procurement tenders, revoking their qualifications for financial subsidies, and increasing applicable loan interest rates, etc.

**Anti-corruption treaties**

- United Nations Convention against Corruption
- Member of the Financial Action Task Force

## What is the definition of a bribe?

Anti-bribery rules are mainly set out in the Criminal Law and the 2019 AUCL.

A bribe under the Criminal Law refers to money or property provided in return for an “illegitimate interest”. It also refers to money or property received or requested by the relevant individuals or entities for the purpose of securing/providing benefits by taking advantage of their positions. The 2016 Interpretation has particularly expanded the definition of “money and property” to cover benefits that can be measured or obtained by money, such as home renovation, debt relief, membership services and travel.

- The 2019 AUCL covers commercial bribes paid by business operators to: (i) employees of the transaction counterparties; (ii) entities or individuals entrusted by the transaction counterparties to handle relevant matters; and (iii) entities or individuals that take advantage of their positions or influence to affect the transactions. It remains unclear whether benefits provided to transaction counterparties off-the-books still constitute commercial bribery. Pursuant to the 1996 Measures (which are expected to be updated for the purpose of implementing the 2019 AUCL), a “commercial bribe” refers to: (i) any money or property such as promotional fees, advertising fees, sponsorship, research fees, service fees, consultation fees or commissions; or (ii) other forms of benefits such as overseas trips provided to an entity or an individual for the purpose of selling or purchasing goods.

Unlike the 2019 AUCL, the Criminal Law and relevant judicial interpretations set out a monetary threshold for initiating criminal investigations. Specifically, a criminal investigation shall be commenced when the bribe offered to a public official by an individual is at least CNY30,000 (approx. US\$4,750), in the absence of specific circumstances, or, when offered by an entity, is at least CNY200,000 (approx. US\$31,650). When the bribe offered by an individual to a state organ, state-owned

enterprise, public institution or association (entity or entities) is at least CNY100,000 (approx. US\$15,800) or, when offered by an entity, is at least CNY200,000 (approx. US\$31,650).

However, lower thresholds will not apply to the offence of offering a bribe to a public official or an entity if: (i) illegal income was used for the bribe; (ii) bribes were paid to three or more public officials or entities; (iii) the bribe was paid to a judicial official, or had the effect of prejudicing judicial justice etc.; (iv) the bribe caused economic damages of more than CNY500,000 (approx. US\$79,120); (v) the bribes were paid to public officials whose duties involve food, drug, safety production, environment protection, etc. for illegal conduct; or (vi) the bribes were paid for job/position promotion or adjustment, etc.

Attempted bribery may still be punishable if the payment does not actually take place due to an external event as opposed to when the offer is voluntarily withdrawn.

Both soliciting and accepting bribes are equally criminalised under the Criminal Law.

## What is the definition of a public official and a foreign public official?

### Domestic public official

Under PRC law, a public official refers to any person conducting public duties within state institutions, state-owned companies or enterprises, or any public organisations, as well as any person dispatched by a state authority, a state-owned company or enterprise or a public organisation to a non-state company or enterprise or social organisation to perform public duties.

In other words, public officials include not only those working in governmental institutions and state-owned entities, but also in other entities, provided that they perform public duties authorised by the state.

On 29 August 2015, the National People’s Congress promulgated the ninth Amendment to the Criminal Law, which added a new provision to Article 390 (penalties for the crime of

individuals bribing government officials). This provision targets giving bribes to “influential persons” who may exert influence on a current or former government official. Such “influential persons” include any close relative of, or any person who is closely associated with, a current or former government official.

### **Foreign public official**

The Eighth Amendment to the Criminal Law promulgated in 2011 included the crime of bribing foreign public officials or officials of international organisations under Article 164.

However, it does not provide a definition of foreign public officials or officials of international organisations.

### **Is private sector bribery covered by the law?**

Yes, as provided under Articles 163 and 164 of the Criminal Law. It is a crime for any individual from a private entity (or any non-public official from a public entity) to request or receive money or property for the purpose of securing/providing an illegitimate benefit by taking advantage of his or her position. It is also a crime for any individual or entity to provide money or property to any person from a private company (or any non-public official from a public entity) with the intention of seeking an illegitimate interest.

- The 2019 AUCL also covers private sector bribery from the perspective of administrative law. Under the 2019 AUCL, it is an offence for a business operator to bribe any: (i) employee of the transaction counterparty; (ii) entity or individual entrusted by the transaction counterparty to handle relevant matters; and (iii) entity or individual that takes advantage of their positions or influence to affect the transactions. The 1996 Measures provide a more detailed interpretation of the 2019 AUCL.

### **Does the law apply beyond national boundaries?**

Yes, the Criminal Law has extra-territorial effect.

If a PRC citizen commits a crime under the Criminal Law outside the PRC, the Criminal Law is applicable to this crime unless the maximum penalty for the crime is less than three years of imprisonment. However, PRC public officials may be prosecuted for an offence committed abroad regardless of the maximum penalty.

Also, the Criminal Law is applicable if a non-PRC citizen bribes anyone outside the territory of the PRC in seeking inappropriate benefits, which harms the interest of the state. The minimum penalty for the offence under PRC law is more than three years imprisonment (the minimum penalty for bribing a public official in severe circumstances is five years imprisonment), unless the act is not a crime in the country where the offence is committed.

The 2019 AUCL may also have extra-territorial effect when, for example, both the bribe giver and bribe receiver are incorporated in the PRC, while the offence of commercial bribery takes place overseas. In practice, however, regulatory investigations into overseas transactions are not common.

### **How are gifts and hospitality treated?**

Under the Criminal Law, whether a gift is legitimate depends on the following factors: (i) the background of the gift (e.g. whether the parties are relatives or friends and the history of their personal relationship); (ii) the value of the gift; (iii) the timing, form and context of the gift; and (iv) whether the gift giver requested the receiver to act in a certain way in his or her relevant position or whether the receiver takes advantage of his or her position in the relevant entity. Hospitality, particularly if excessive or lavish, may be regarded as a bribe if the other elements of bribery are satisfied.

The 2019 AUCL and the 1996 Measures are silent on how to distinguish legitimate gifts or items of hospitality from commercial bribes. The scope of bribes defined under the 2019 AUCL and the 1996 Measures includes “other forms” of bribes which is sufficiently wide to cover any kind of gift and hospitality. However, advertising gifts of nominal value, provided in

accordance with relevant market practice, are exempted. In practice, reasonable and occasional hospitality is unlikely to be investigated or penalised.

### **How is bribery through intermediaries treated?**

Paying, receiving or soliciting bribes through an intermediary or a third party would not exempt the party who actually pays, receives or solicits the bribes from criminal liability. Also, it is a criminal offence to facilitate a bribe as an intermediary.

For example, communicating an intention to give a bribe or transferring money between the bribe giver and bribe receiver is a crime.

Similarly, the 2019 AUCL enhances the prohibition of bribery through intermediaries. Specifically, it is an offence for a business operator to bribe any entity or individual entrusted by the transaction counterparty to handle relevant matters, or any entity or individual that takes advantage of their positions or influence to affect the transactions for the purposes of seeking transaction opportunities or competitive advantages.

### **Are companies liable for the actions of their subsidiaries?**

As a general principle under PRC law, a company is legally independent from its subsidiary, and not liable for its subsidiary's actions, unless the company itself is involved in such action.

For instance, a parent company may be held liable if it authorised or instructed its subsidiary to commit the bribery or if it had knowledge that its subsidiary was involved in such criminal conduct.

The 2019 AUCL and the 1996 Measures are silent on a company's liability for its subsidiary's acts. Even if, in principle, a company is legally independent from its subsidiary and therefore not liable for its subsidiary's conduct, the rules on principal-agent relationship under PRC civil law may apply.

In other words, if the subsidiary involved in bribery is used as an agent by the parent company, the latter may be held liable, as described in the section on bribery through intermediaries.

### **Is there an exemption for facilitation payments?**

No, there are no specific provisions or exemptions under either the Criminal Law or the 2019 AUCL.

### **Is there a defence for having adequate compliance procedures?**

Such a defence is not explicitly provided under the Criminal Law or the 2019 AUCL. Under the Criminal Law, if a payment is made under extortion and no illegitimate interest is obtained in return (i.e. no quid pro quo), the payment should not be regarded as a bribe. This exemption does not exist under the 2019 AUCL.

Under the 2019 AUCL, an employee's conduct of bribery shall be deemed as the employer's conduct, unless the employer can prove that the employee's action is irrelevant to seeking transaction opportunities or competitive advantages for the employer. In practice, the PRC regulators will likely consider the adequacy of an employer's compliance procedures when assessing the evidence advanced by an employer to prove its employee's conduct of bribery is irrelevant to seeking transaction opportunities or competitive advantages for the employer.

Since March 2020, the SPP has initiated a pilot program in designated areas. In the pilot program, where a corporate entity is involved in certain potentially criminal activities such as commercial bribery, and is willing to establish and/or strengthen its compliance programs to the procuratorate's satisfaction (among other actions), the procuratorate may decide not to prosecute the entity. Practitioners and scholars expect that if the pilot program proves to be effective in enhancing corporate compliance and deterring corporate offences, the

legislators may consider incorporating this mechanism into relevant legislation.

### **What are the enforcement trends in the business area?**

As envisaged in our 6th edition in 2019, the nationwide anti-corruption crackdown that started in 2012 continues. According to the CCDI, as of June 2021, over 3.8 million corruption-related cases have been docketed. Over 4 million individuals have been disciplined. Approximately 400 officials at or above province-head level, 170,000 officials at county-head level, and 616,000 officials at town-head level were prosecuted.

Beginning in 2013, PRC regulators have also been actively pursuing commercial sector bribery cases. The initial focus of the investigations was on medical products and the healthcare industry, targeting major multinationals. The GSK investigation has been the highest profile case. As a result, multinationals are treating local investigations much more seriously, both in reaction to the significant fines being imposed by PRC authorities, but also given the likelihood of triggering extraterritorial investigations by US and UK authorities.

At the end of 2018, the Shanghai AIC announced a series of administrative penalties imposed on multinational pharmaceutical companies including Bristol Myers Squibb, China NT Pharma Group and Chiesi Farmaceutici for commercial bribery. The enforcement actions targeted the pharmaceutical companies' provision of benefits to doctors in the form of conference sponsorship, meals, gifts, travel and related expenses for the purpose of promoting sales of

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pharmaceuticals to relevant hospitals. The penalties were mainly disgorgement of revenues obtained through offering bribes ranging from CNY300,000 to 11,400,000 (approximately US\$47,500 to 1,803,880), as well as administrative fines ranging from CNY100,000 to 180,000 (approximately US\$15,800 to 28,480).

In April 2021, PRC regulators including the National Health Commission issued a notice which emphasised again that illegal activities including medical institutions and personnel taking “kickbacks” from pharmaceutical companies would be investigated and prosecuted. Such notice reflects the PRC regulators' constant focus on combating commercial bribery in high risk sectors such as healthcare.

Furthermore, given the uncertainties arising out of the 2019 AUCL, several provinces and/or municipalities have promulgated local implementation rules thereunder. The PRC regulators are expected to update the implementation rules at national level (including but not limited to an update of the 1996 Measures) to provide specific guidance for business operators in the PRC.

Another remarkable trend is the strengthening of cross-border cooperation. According to the Anti-Corruption Coordination Task Force of the Communist Party of China, since launching the “Sky Net” campaign in April 2015 (which targeted suspects of corruption offences who have escaped overseas), 9,165 suspects (including 2,408 public officials) have been extradited or persuaded to return to China as of June 2021.

It is envisaged that these enforcement trends will continue over the next few years.

**HONG KONG -  
ANTI-CORRUPTION  
LEGISLATION**



# ANTI-CORRUPTION LEGISLATION IN HONG KONG CONTRIBUTED BY CLIFFORD CHANCE (HONG KONG OFFICE)

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## Key points:

<b>Key legislation</b>	Prevention of Bribery Ordinance (Cap. 201) (POBO)
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes, with limitations
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	Statutory defences of: (1) “lawful authority”, which may include permission for the acceptance of the advantage by the public body that employs the prescribed officer or by the agent’s principal; and (2) “reasonable excuse”, a deliberately vague term which allows the courts discretion to decide based on the facts.
<b>Penalties for individuals</b>	<p><b>Penalties for individuals on indictment, maximum penalties for:</b></p> <ul style="list-style-type: none"> <li>• Possession of unexplained property: fine of HKD1,000,000 (approx.US\$128,000) and imprisonment for 10 years</li> <li>• Bribery in relation to any contract with a public body or for procuring withdrawal of tenders: fine of HKD500,000 (approx. US\$64,000) and imprisonment for 10 years</li> <li>• Other bribery offences: fine of HKD500,000 (approx. US\$64,000) and imprisonment for seven years</li> </ul> <p><b>On summary conviction, maximum penalties for:</b></p> <ul style="list-style-type: none"> <li>• Soliciting or accepting an advantage: fine of HKD100,000 (approx.US\$12,800) and imprisonment for one year</li> <li>• Possession of unexplained property: fine of HKD500,000 (approx.US\$64,000) and imprisonment for three years</li> <li>• Other bribery offences: fine of HKD100,000 (approx. US\$12,800) and imprisonment for three years</li> </ul> <p>In addition, the court may order the convicted person to disgorge the advantage received to any public body or person in such manner as the court may direct.</p> <p>The court also has the power to prohibit the convicted person from taking or continuing employment for up to seven years if it is in the public interest.</p> <p>There are no specific provisions on leniency or plea-bargaining. Generally, a defendant who cooperates with the prosecution ordinarily receives a discount on sentence reflecting the nature and extent of the cooperation offered. Deferred Prosecution Agreements have not been introduced in Hong Kong.</p>

<p><b>Penalties for companies</b></p>	<p>Same as the penalties for individuals; however, in practice the Hong Kong authorities have not to date brought a criminal prosecution against a corporate entity for acts of bribery or corruption under the POBO.</p>
<p><b>Collateral consequences</b></p>	<p>The Organized and Serious Crimes Ordinance (Cap. 455) (OSCO) contains a restraint and confiscation regime in respect of proceeds of crime. The proceeds of the specified offence must be HKD100,000 (approx. US\$12,800) or more for OSCO to apply.</p> <p>The Criminal Procedure Ordinance (Cap. 221) (CPO) is the main forfeiture legislation in respect of property that has come into the possession of a court or of a law enforcement agency arising from the commission of a criminal offence. It applies to property in the possession of the Independent Commission Against Corruption (ICAC).</p> <p>There is no mandatory duty to report suspected bribery or corruption under the POBO. That said, it is an offence to make a false report to the commission of an offence or mislead an investigating officer under the POBO.</p> <p>Further, any person who knows or suspects that any property is connected with an indictable offence including bribery must disclose that information as soon as reasonably possible under the OSCO.</p>
<p><b>Anti-corruption treaties</b></p>	<p><b>Hong Kong is party to a number of international and regional anti-corruption conventions and organisations, including:</b></p> <ul style="list-style-type: none"> <li>• United Nations Convention against Corruption</li> <li>• United Nations Convention against Transnational Organised Crime</li> <li>• Asian Development Bank (ADB) / Organisation for Economic Cooperation and Development (OECD) Anti-Corruption Initiative for Asia Pacific</li> <li>• Financial Action Task Force on Money Laundering</li> </ul>

**What is the definition of a bribe?**

The Prevention of Bribery Ordinance adopts the neutral word “advantage” instead of “bribe”. What makes an “advantage” a “bribe” is the illegitimate purpose for which it is offered, solicited or accepted. “Advantage” is broadly drafted under the POBO to capture a wide range of circumstances in which bribes may be offered, including, in particular, money, gifts, loans, commissions, offices, contracts, services, favours and discharge of liability in whole or in part.

There is no de minimis threshold. Our view is that, given the wide scope of “advantage”, the courts would be wary of applying the de minimis approach and of allowing themselves to be influenced by the insubstantial nature of the benefit in determining whether it is an advantage. However, evidence of the insignificance of the advantage may be regarded as relevant to the proof of the illegitimate purpose or the establishment of a defence. Whether or not a benefit constitutes an “advantage” under the POBO is a very fact-sensitive analysis and should be considered on a case-by-case basis.

Active bribery by giving, offering or promising an advantage and passive bribery by soliciting or accepting an advantage are both criminal offences under the POBO.

## What is the definition of a public official and a foreign public official?

### Domestic public official

Public servant is defined under the POBO to mean: (1) any prescribed officer; and (2) any employee of a public body. Prescribed officers include government officials, officials of the Hong Kong Monetary Authority, members of the ICAC, judicial officers and the Chairman of the Public Service Commission in Hong Kong. Public body is defined to mean the Hong Kong Government, the Executive Council, the Legislative Council, any District Council, any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Chief Executive or the Chief Executive in Council, and any board, commission, committee or other body (including government owned enterprises) as set forth in Schedule 1 to the POBO. The concept of public servant is far broader than merely the civil service and encompasses all persons employed by, or associated in any way with, an organisation which the government decides has such a substantial and important role in the public affairs of Hong Kong that it should constitute a public body. For instance, any member of a club or an association vested with any responsibility for the conduct or management of its affairs is considered a public servant. “Club” is not defined and should be given its general meaning.

### Foreign public official

The POBO does not expressly apply to foreign public officials, but case law shows that personnel employed by foreign governmental bodies in Hong Kong are also covered by the POBO. As such, while case law has established that bribery of a foreign public official is an offence captured by the broad definition of “agent” under section 9 of the POBO, it is only an offence if the bribery takes place within Hong Kong (see below).

Section 9 covers private sector bribery (see below) and public official bribery not covered by other sections of the POBO. It is noted that the common law offence of misconduct in public office is maintained in Hong Kong and may also deal with public official bribery not covered under the POBO.

## Is private sector bribery covered by the law?

Yes. Private sector bribery is covered by the POBO.

Under section 9 of the POBO, private sector bribery is defined as any solicitation to, offer to or acceptance by, an agent, without the permission of the principal, of any advantage for doing or forbearing to do any act in relation to his principal’s affairs or business. The permission of the principal can be given before or reasonably after the offer or acceptance of such advantage. The principal-agent relationship includes where a person is employed by another or where a person is acting for another. A principal may therefore include, for example, an employer, an investor, a company director or a fund. These offences are punishable by a fine of up to HKD500,000 (approx. US\$64,000) and imprisonment of up to seven years.

In terms of the principal-agent relationship required for section 9 to apply, there need not be a pre-existing legal relationship for a person to be an agent, or even for a request for an agent to act. A person is an agent by agreeing or choosing to act in circumstances giving rise to a reasonable expectation and duty to act honestly and in the interests of another to the exclusion of the person’s own interests. In *HKSAR v Chu Ang* [2020] HKCFA 18, a private violin teacher, who helped her student’s parent purchase a violin at a discount, received a commission without informing the parent. The Court of Final Appeal held that this put herself in a position of conflict because the size of the commission was greater the smaller the discount for the parent. She was found to have accepted an advantage pursuant to section 9.

Another requirement for section 9 to apply is that the advantage in question received by the agent has to be in relation to the principal's affairs or business. In *HKSAR v Cheung Ling Chu Sally* [2021] HKDC 188, the defendants, being an employee of a bank and a director and general manager of a registered remittance agent, were acquitted of the section 9 offence. The bank employee referred clients of the bank to the remittance agent for remitting money from Mainland China to Hong Kong. The exchange rate offered included a profit margin for the bank employee and constituted the alleged advantage. On the facts, the District Court held that since the remittances in question were outside the banking system, they fell outside the ordinary business of the bank. More importantly, the remittance agent treated the bank employee as its client and had no direct contact with the bank clients referred. The bank employee was thus found to be running a side business and her conduct did not influence or affect the principal's affairs or business.

### **Does the law apply beyond national boundaries?**

Section 4 of the POBO, which criminalises bribery of Hong Kong public servants, has extra-territorial effect, since there is express reference to the advantage being offered "whether in Hong Kong or elsewhere" in the section. For other corruption offences (i.e., under sections 5 (Bribery for giving assistance in regard to contracts), 6 (Bribery for procuring withdrawal of tenders), 7 (Bribery in relation to auctions), 8 (Bribery of public servants by persons having dealings with public bodies), and 9 (Corrupt transactions with agents) of the POBO), the position is less certain as there is no such inclusion of the words "whether in Hong Kong or elsewhere". Such omission may well be construed as a legislative intention not to afford extra-territorial effect to these sections. Indeed, case law has held that, with regard to section 9 of the POBO, the whole course of offer, solicitation or acceptance of illegal advantage should take place within the Hong Kong jurisdiction in order to be caught. For example, in relation to a conspiracy to offer an advantage to an

agent contrary to section 9(2) of the POBO, it is not sufficient for the conspiracy to have been formed in Hong Kong if the offering of the advantage did not occur in Hong Kong. The same logic should therefore apply to sections 5 to 8 as well.

Whilst the ICAC does not have extraterritorial jurisdiction to carry out investigations outside of Hong Kong, it may request enquiries into corruption-related matters be made by authorised overseas law enforcement agencies and vice versa, pursuant to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime. In 2020, the ICAC handled 76 incoming requests and overseas counterparts handled 10 requests from the ICAC.

### **How are gifts and hospitality treated?**

Gifts and hospitality can qualify as a bribe given the wide definition of "advantage" under section 2 of the POBO.

Under the POBO, there is no specified monetary value or threshold that would generally be considered reasonable or customary for a gift accepted by a public officer in his public capacity or by a private sector agent. However, there are several types of entertainment, gifts and advantages which are generally permitted under Hong Kong law. Examples of generally permitted exceptions include: promotional items of insignificant value, offered free of charge to clients in compliance with the practice of the industry; client meals of modest value that are held for general goodwill purposes; and training programmes offered to clients on a new product which involves meals, trips or accommodation being offered to clients free of charge. Such hospitality and facilities provided must be reasonable and compatible with the professional or educational nature of the event. In deciding whether or not the advantage should be construed as a bribe, the substance, the position of the agent, the relationship between the donor and the agent and whether or not an obligation might be created must all be considered.

The definition of “advantage” specifically excludes “entertainment”. “Entertainment” means provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time. “Connected with” should not be construed too broadly, and it is suggested that any entertainment which occurs at a place other than the premises at which the food or drink is being served is prima facie not connected with the provision of that food and drink. Travel, accommodation and nightclub entertainment during all expense overseas holidays (including meals) for a resident engineer on a residential development project where short-piling was concealed has been held to fall outside the definition of the entertainment exception and to constitute bribery. Further, public servants are subject to their own guidelines and the acceptance of entertainment by a public servant (even if it falls within the statutory definition) may nonetheless be the subject of disciplinary proceedings.

### **How is bribery through intermediaries treated?**

A bribe through an intermediary is an offence under the POBO, in relation to both the bribe giver and the bribe receiver.

### **Are companies liable for the action of their subsidiaries?**

There does not appear to be any case law in Hong Kong which directly relates to parent companies’ liability for bribes or corruption committed by their subsidiaries. However, it has been accepted in Hong Kong case law that, as a matter of general principle in the context of public policy or illegality, the courts are inclined to look at the substance of the entity and its activities, rather than its form. Thus, in an extreme case, such as where the parent company uses a wholly owned subsidiary to do something illegal, the court may be more than ready to equate the subsidiary with its parent company. Therefore, a parent company may be liable for bribes or corruption

committed by its subsidiary, particularly a wholly owned subsidiary. Regardless, and as noted above, there has not been any published case in Hong Kong where a company is prosecuted for bribery offences.

### **Is there an exemption for facilitation payments?**

Under Hong Kong law, there is no exemption for facilitation payments.

### **Is there a defence for having adequate compliance procedures?**

There is no similar defence in the POBO. It does not seem that having a robust compliance programme can be admitted as a “reasonable excuse” defence under the POBO.

### **What are the enforcement trends in the business area?**

Hong Kong’s anti-corruption law enforcement has followed international trends in a number of areas. In particular, Hong Kong has seen a shift in emphasis to enforcement against misconduct or “corporate fraud” by listed companies and their directors and senior management. There has also been an increasing focus on preventing and investigating any corrupt activities related to the financial services industry. In the ICAC’s 2020 Annual Report, the finance and insurance subsector was cited as one of the subsectors generating the most private sector corruption complaints, albeit they also registered the highest drop (39%) when compared to 2019. By way of example, in October 2021, four persons, including two former senior executives of a then listed company, were sentenced to imprisonment for conspiracy to defraud over the placement of bonds whereby the placing agent engaged did not place any bonds, but engaged an undisclosed sub-placing agent, which received a commission and bonus, to do so. This was the result of a joint operation in December 2017 between the ICAC and

Securities and Futures Commission (SFC) arising from complaints alleging breaches of the POBO and the Securities and Futures Ordinance (SFO).

Hong Kong will see greater cooperation with international authorities in combating corruption, including the UK, the US and Mainland China, as well as with other local enforcement agencies and regulatory bodies such as the police, customs and excise, immigration and the SFC. For example, in a joint operation in July 2021, as part of the SFC's combatting of ramp and dump schemes, a senior executive of a listed company was arrested for suspected corruption associated with such a scheme while the operation involved a search of the offices of the listed company and one of its underwriters. The focus on fighting bribery is also evident from the SFC's recent issuance of anti-bribery guidance in December 2020, as well as the SFC's disciplinary action against licensed persons following bribery convictions – in August, September and November 2019 and October 2021 respectively, the SFC banned four formerly licensed persons from re-entering the industry for life as a result of criminal conviction under the POBO. The courts in

Hong Kong have consistently reiterated that they are intolerant of corruption.

Hong Kong regulators have consistently emphasised the importance of corporate governance, effective internal controls and ethics in combatting corruption. The ICAC provides corruption prevention advice to the private sector upon request and holds thematic seminars for business organisations to equip them with the legal knowledge and skills to prevent corruption. It has also issued guidance, including a Sample Code of Conduct (which private companies can adopt when preparing their anti-corruption guidelines and policies on matters such as the avoidance and declaration of conflicts of interest and procedures for reporting on receipt of gifts); an Anti-Corruption Programme – A Guide for Listed Companies (which provides guidance for the formulation, implementation and review of corporate anti-corruption policies recommending best practices with reference to international standards, as well as a Toolkit on Directors' Ethics comprising case studies and practical tools including checklists), and a Corruption Prevention Guide for Insurance Companies.

**INDIA -  
ANTI-CORRUPTION  
LEGISLATION**



# ANTI-CORRUPTION LEGISLATION IN INDIA CONTRIBUTED BY AZB & PARTNERS

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>• Prevention of Corruption Act, 1988 (PCA)</li><li>• Central Civil Services (Conduct) Rules, 1964</li><li>• All India Services (Conduct) Rules, 1968</li><li>• Indian Foreign Service (Conduct and Discipline) Rules, 1961</li><li>• Central Vigilance Commission Act, 2003 (CVC Act)</li><li>• Right to Information Act, 2005</li><li>• Lokpal and Lokayuktas Act, 2013 (Lokpal Act), and state Acts</li><li>• Companies Act, 2013 (Companies Act)</li><li>• Foreign Contribution (Regulation) Act, 2010</li><li>• Fugitive Economic Offenders Act, 2018</li></ul>
<b>Private sector bribery</b>	<p>No laws specifically prohibit bribery in the private sector in India. However, the Companies Act, 2013 (Companies Act) penalises “Fraud” in relation to the affairs of a company. The definition of fraud under the Companies Act is wide and could be invoked to penalise private sector bribery. Certain offences under the Indian Penal Code, 1860 (IPC) (primarily those relating to cheating and criminal breach of trust, among others) can, depending on the facts, also be attracted.</p> <p>The bribery related offences under the PCA are restricted to bribery of “public servants”.</p>
<b>Extra-territorial effect</b>	<ul style="list-style-type: none"><li>• PCA – Yes (to Indian citizens only)</li><li>• Lokpal Act – Yes (to Indian public servants outside India)</li><li>• CVC Act – Yes (to Indian public servants outside India)</li></ul> <p>Note: Extraterritorial effect can also be achieved through prosecution under the Prevention of Money Laundering Act, 2002 as amended (PMLA) (which can be initiated for offences under the PCA).</p>

<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	<ul style="list-style-type: none"> <li>• The PCA was amended in 2018, and now provides for an “adequate procedures” defence for firms and companies accused of corruption offences. However, guidelines in this regard are yet to be notified by the Indian government.</li> <li>• A bribe giver who is compelled to pay a bribe and reports the matter to a law enforcement agency within seven days may raise that as a defence to his or her prosecution.</li> <li>• Directors and officers of companies and firms accused of bribery may argue that the offence took place without their consent and connivance.</li> </ul>
<b>PCA</b>	<p>The PCA as amended in 2018 criminalises: (i) the taking of bribes by a public servant; (ii) influence-peddling by any person; (iii) offers and payments of bribes to a public servant; (iv) bribery by commercial organisations; (v) obtaining of undue advantage by public servants in transactions; and (vi) other misconduct by public servants.</p> <p>The expression “public servant” is very widely defined.</p> <p>Punishments under most of the offences under the PCA include imprisonment for a period between three to seven years as well as a fine. Abetment of offences is also criminalised by the PCA.</p> <p>However, public servants who commit criminal misconduct or who are habitual offenders may be subjected to imprisonment for a period of up to ten years as well as a fine.</p>
<b>Lokpal Act</b>	<p>The Lokpal Act provides for the establishment of an anti-corruption ombudsmen (Lokpal) at the federal level. Justice (Retd.) Pinaki Chandra Ghose has been appointed as the first Lokpal of India. States have separately established state level ombudsmen via separate legislation.</p>
<b>Companies Act</b>	<ul style="list-style-type: none"> <li>• The Companies Act criminalises “Fraud” by a company or perpetrated on a company. The Companies Act provides for imprisonment for a term between six months and ten years as well as a fine ranging between the amount involved in the fraud and up to three times that amount.</li> </ul>
<b>Indian Penal Code</b>	<ul style="list-style-type: none"> <li>• The IPC is a general law that relates to criminal offences in India. Certain offences under the IPC (primarily those relating to cheating and criminal breach of trust, among others) can be attracted in case of offences involving private and public bribery depending upon the facts and circumstances of the case.</li> </ul>

<b>Penalties for companies</b>	<ul style="list-style-type: none"> <li>• Under the PCA, the penalties for companies include fines. In certain cases, directors and other officers in charge of a company may be held personally responsible for an offence and may be liable to imprisonment</li> <li>• Additionally, companies can also be held liable for criminal conspiracy under the IPC</li> </ul>
<b>Collateral consequences</b>	Investigations for tax evasion, money-laundering, blacklisting etc.
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"> <li>• United Nations Convention against Corruption</li> <li>• Member of the Financial Action Task Force</li> <li>• United Nations Convention against Transnational Organized Crime</li> <li>• Member of the trilateral India-Brazil-South Africa Cooperation Agreement (IBSA)</li> </ul>

### What is the definition of a bribe?

The PCA uses the wide expression “undue advantage” to cover both pecuniary and non-pecuniary illegitimate benefits received by a public servant. The term “undue advantage” has been defined as any gratification whatsoever, other than legal remuneration that a public servant receives from their employer entity or is permitted by the public servant’s employer entity to receive.

The PCA criminalises the receipt or solicitation of illegal gratification by “public servants” and the payment of such gratification by other persons.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The expression “public servant” has a wide import under the PCA and includes: (i) persons in the service or pay of the government; or (ii) persons remunerated by the government for the performance of any public duty; or (iii) persons in the service or pay of a local authority or of a corporation established by or under legislation; (iv) persons in the service of a body owned, controlled or aided by the government; (v) persons in the service of a government company; (vi) judges; (vii) court appointed

arbitrators; or (viii) office bearers of certain registered cooperative societies that have received financial aid from any government agency. In terms of the above definition, an employee of a company that is controlled by the central or state government, or 51% of whose shares are held by the central or state governments, would be a public servant and his or her actions would fall within the purview of the PCA. The Supreme Court has held that employees of banks (whether public or private) are “public servants” under the PCA (CBI v Ramesh Gelli & Ors., 2016 (3) SCC 788).

#### Foreign public official

There are no Indian laws that apply specifically to the bribery of foreign public officials.

### Is private sector bribery covered by the law?

No laws specifically prohibit bribery in the private sector in India. Laws such as the PCA are only confined to bribery to and by “public servants”. However, companies typically prohibit such bribes through internal codes of conduct in the private sector. While the Companies Act does not define bribery as a distinct offence, it penalises fraud in relation to the affairs of a company. The definition of fraud under the Companies Act is wide. Fraud

includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. This wide definition of fraud under the Companies Act could be invoked to penalise private sector bribery (including for incorrect entries in books of accounts).

The punishment for fraud under the Companies Act includes imprisonment for a term which may extend to ten years and a fine which may extend to three times the amount involved in the fraud.

### **Does the law apply beyond national boundaries?**

The PCA extends to Indian citizens outside India. A reading of the provisions of the PCA along with the statement of its extent makes it clear that this statute applies to situations where an Indian “public servant” accepts illegal gratification from any person whether in India or abroad.

The PCA does not apply to the payment of bribes or other illegal gratifications to foreign public officials.

### **How are gifts and hospitality treated?**

Various rules govern different government employees with regard to the acceptance of gifts and hospitality. They set out restrictions on public officials accepting offerings and gifts or any other pecuniary or non-pecuniary benefits including free transport, boarding and hospitality from any person unless such acceptance is sanctioned by the government. During weddings or funerals where it is a religious and social practice to accept gifts, the public official may accept gifts from near relatives or personal friends who have no official dealing with him or her. If such offering is accepted by the public official, acceptance of gifts exceeding a certain threshold, depending on his or her

post, is required to be disclosed as per the applicable rule governing his or her conduct. The motive and intent of all such offerings is key in determining whether an offence has been committed. The term gratification can cover an insignificant amount paid to influence the public servant, if it is not within the legal remuneration of the public servant. The Supreme Court of India has set out that the amount paid as gratification is immaterial and that conviction will depend on the conduct of the public official and the proof established by the prosecution regarding the demand and acceptance of the gratification (AB Bhaskara Rao v Inspector of Police, CBI, Visakhapatnam 2011 (4) KLT(SN) 35).

The PCA presumes a bribe to be the act of giving or offering to give any gratification or any valuable thing by an accused as a motive or reward to a public official for doing or forbearing to do any official act without consideration or for a consideration which he or she knows to be inadequate, unless the contrary is proved. The intent with which the gratification or valuable thing was given or attempted to be given to the public official is crucial.

There is no de minimis threshold regarding the receipt of offerings by public officials. However, conduct rules applicable to some kinds of public officials permit them to accept gifts and hospitality within certain prescribed limits and accordingly gifts and hospitality that meet such criteria are permitted. Such limits vary depending on the rules applicable to the public official in each case. For example, the All India Services (Conduct) Rules, 1968 applicable to some officials provide an exception for the receipt of “casual meals” or “casual lifts” or gifts worth up to a de minimis amount of INR5,000 (approx. US\$66.89). Further, such rules also permit such officials to accept gifts of up to INR25,000 (approx. US\$334.47) from near relatives or from personal friends having no official dealings with them, on occasions such as weddings, anniversaries, funerals and religious functions when the making of gifts is in conformity with the prevailing religious and social practice.

## How is bribery through intermediaries treated?

Section 7A of the PCA covers: (i) any influence peddlers or intermediaries who, in exchange for any undue advantage, induce a public servant, by corrupt or illegal means or by exercise of personal influence, to cause the improper or dishonest performance of public duty; and (ii) any bribe-givers who provide or promise to provide, or any persons who abet the provision of, any undue advantage to any other person (irrespective of whether such person is a public servant or not) with the intention to induce or reward a public servant to improperly or dishonestly perform public duty. Therefore, the PCA targets the conduct of “middlemen”, influence peddlers or intermediaries who facilitate bribery, by criminalising the act of taking any undue advantage to cause the improper or dishonest performance of public duty. Such influence peddlers may also be charged with abetment and “criminal conspiracy” to commit offences under the PCA.

## Are companies liable for the action of their subsidiaries?

Indian law does not ordinarily hold a company liable for the acts of its subsidiaries.

However, there may be some circumstances where a court may ascribe liability to a parent company for acts of its subsidiaries. These circumstances include situations where the two companies in reality constitute a single economic entity, or the parent company uses its subsidiary as a device to perpetrate fraud, or illegally evade taxes, or if the parent company exercises shadow directorship over the subsidiary.

Indian courts have the power to lift the corporate veil and look into the internal workings of a company in cases where they are of the view that doing so is essential in order to prevent fraud or improper conduct and to affix liability.

A 2018 amendment to the PCA has explicitly included provisions relating to bribery by a commercial organisation. Under the new provision, a commercial organisation would be liable in case a person “associated with the commercial organization” provides illegal gratification for such a commercial organisation. A subsidiary of a company has also been explicitly recognised as a “person associated with the commercial organization”.

## Is there an exemption for facilitation payments?

Facilitation payments are expressly considered bribes under the PCA and there is no exemption for such payments. Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments – this has also been clarified by an illustration in the PCA, which states that if a public servant demands money to process a routine application on time, the same would be an offence under the PCA.

The Supreme Court of India has held that it has “little hesitation in taking the view that “speed money” is the key to getting lawful things done in good time and “operation signature” be it on a gate pass or a pro forma, can delay the movement of goods, the economics whereof induces investment in bribery”, and that, if speed payments are allowed, “delay will deliberately be caused in order to invite payment of a bribe to accelerate it again” (Som Prakash v State of Delhi, AIR 1974 Supreme Court 989).

## Is there a defence for having adequate compliance procedures?

Amendments to the PCA introduced a proviso to sub-section (1) of section 9 of the PCA. This proviso states that in the event that an offence under the PCA is alleged to have been committed by a commercial organisation, a valid defence is available to the commercial organisation to prove that it had in

place adequate procedures, in compliance with guidelines prescribed under the PCA, to prevent persons associated with the commercial organisation from undertaking any conduct that results in the commercial organisation providing or promising to provide any undue advantage to a public servant. However, such guidelines have not yet been issued by the government.

### **What are the enforcement trends in the business area?**

Recent cases have demonstrated strong and substantive enforcement activity.

Prevalence of a strong public sentiment against corruption has led to increased enforcement activity, in addition to several key changes being incorporated to the PCA in 2018.

Of late, several cases of financial defaulters absconding from India came into the limelight. To tackle this problem, the Fugitive Economic Offenders Act, 2018 was introduced in 2018 which provides for the confiscation of property of individuals who evade summons or warrants issued by court in connection with certain economic offences (including bribery) by leaving the country. The confiscation under this statute ceases to take effect the moment the alleged offender returns to the country and participates in the proceedings against him.

The scope of the offence of money laundering under the Prevention of Money Laundering Act, 2002 has also been

broadened by the inclusion of fraud under the Companies Act as a predicate offence. That is to say, any funds connected to an alleged fraud are now treated as proceeds of crime.

In addition, the Companies Act and rules thereunder contain a provision making it mandatory for listed companies to establish a “vigil mechanism” for reporting of “genuine concerns”. Rules issued by the Ministry of Corporate Affairs extend this to companies which accept deposits from the public and companies which have taken money from banks and public financial institutions, of more than INR500 million (approx. US\$6.69 million). The Companies Act also imposes an obligation on the directors of companies to devise proper systems to ensure compliance with the provisions of all applicable laws and ensure that such systems were adequate and operating effectively. Fines and imprisonment are mandated for violating the provisions.

The Companies Act provides statutory backing to the Serious Fraud Investigation Office (SFIO) for the purpose of investigating the affairs or frauds relating to a company. The statute contemplates that once a case is assigned to the SFIO, it shall be the sole authority to investigate the case and all the papers, documents and the information shall be transferred to the SFIO, which has the power to arrest people for violations of the Companies Act.



**INDONESIA -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN INDONESIA CONTRIBUTED BY ABNR

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>• Indonesian Criminal Code (Criminal Code)</li><li>• Law No. 31 of 1999 on the Eradication of the Crime of Corruption as lastly amended by Law No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of the Crime of Corruption (Anti-Corruption Law)</li><li>• Law No. 11 of 1980 on Bribery (Anti-Bribery Law)</li><li>• Law No. 30 of 2002 on Corruption Eradication Commission as last amended by Law No. 19 of 2019 on Second Amendment to Law No. 30 of 2002 on Corruption Eradication Commission (Law 19/2019)</li><li>• Law No. 46 of 2009 on the Court of Criminal Acts of Corruption (Law 46/2009)</li><li>• Law No. 7 of 2006 on the Ratification of the United Nations Convention Against Corruption, 2003 (Law 7/2006)</li><li>• Law No. 28 of 1999 on State Governance that is Clean and Free from Corruption, Collusion, and Nepotism</li><li>• Government Regulation Number 43 of 2018 on Implementation Procedures of Community Participation and the Award in the Prevention and Eradication of Corruption (GR No. 43/2018)</li></ul>
<b>Private sector bribery</b>	Covered by the Anti-Bribery Law, but only if the act of bribery involves public interest
<b>Extra-territorial effect</b>	Yes, both the Anti-Corruption Law and Anti-Bribery Law contain express provisions asserting their extra-territorial applicability
<b>Exemption for facilitation payment</b>	No
<b>Defences</b>	There is no specific defence for bribery offences. Although under the Anti-Corruption Law, if the state official reported the gratuity that they receive to the Corruption Eradication Commission (KPK) within 30 working days after such gratuity is received, then the gratuity will not be considered a bribe. However, whether the reported gratuity can be accepted or not, and the bribery offence waived, is subject to further review by the KPK.

### Penalties for individuals

Under the Anti-Corruption Law, criminal sanctions that can be imposed on individuals include:

- Imprisonment, ranging from one year to a lifetime
  - Fines, ranging from IDR50 million (approx. USD3,500) to IDR1 billion (approx. USD69,960)

Additional criminal sanctions may also be imposed in the form of:

- Payment of restitution money (up to the maximum amount of assets proven to have been obtained through the corruption offence, determined on an examination of merits in the court of criminal acts of corruption)
- Revocation or abolishment of all or certain rights (e.g. political right to vote or to be elected as a government official), or facilities obtained or to be granted by the government to the convicted party
- If the convicted party's assets (after being confiscated and auctioned by the state) are not enough to pay the restitution penalty, then additional imprisonment may be applied to him/her, of which the prison term should not exceed the penalty pursuant to the principal provision.

The range of criminal sanctions will depend on the provision applied by the prosecutor and will be further subject to the panel of judges' consideration on the merits of the case, including the impact and seriousness of the offence.

### Penalties for companies

Under the Anti-Corruption Law, criminal sanctions imposed on companies (in addition to imposition of criminal sanctions in the form of fines), include:

- Seizure of movable tangible or non-tangible assets or non-movable assets used to carry out or obtained from corruption, including company/(ies) owned by the convict where corruption was committed, and any substitutes of such assets (e.g., any money gained from the sale of the assets);
- Payment of restitution money up to the maximum amount equaling the value of the assets obtained from the corruption offences
- Complete or partial closure of business for a maximum period of one year (according to court decision); and/or
- Revocation of all or several certain rights or erasure of all or certain parts of profit, which can be given by the Government to the convict

The management of a company, i.e., Board of Directors, Board of Commissioners and any relevant officers may also be held responsible for any act of bribery or corruption

<b>Collateral consequences</b>	The state apparatus who has been convicted for corruption crime will be dishonorably discharged for corruption. Additionally, seizure of any goods that the investigator deems to be related to the bribery act can be imposed. Furthermore, any properties owned by the convicted party, can later be seized, and auctioned by the state to pay the fine and restitution money.
<b>Anti-corruption treaties</b>	United Nations Convention against Corruption.

### What is the definition of a bribe?

Definitions of bribe/bribery are found in the following laws and regulations in Indonesia:

- **Under the Criminal Code:** gifting or promising a public official for the purpose of inducing them to commit or omit to do something which violates their duty; or as a reward for the public official for having committed or omitted to do something which violates their duty.
- **Under the Anti-Corruption Law:** gifting or promising something to a public official or state apparatus for the purpose of inducing them to commit or omit to do something in their line of duty, which contravenes their professional obligations; or as a reward for or in relation to a matter which contravenes their professional obligations, whether or not it is done within their office. A public official or state apparatus who receives such gift or promise shall also be held liable for receiving a bribe.
- **Under the Anti-Bribery Law:** gifting or promising something to someone for the purpose of inducing them to commit or omit to do something within their line of duty, which contravenes their authority or professional obligations which concern public interest. A party who receives such gift or promise shall also be held liable for receiving a bribe. However, unlike the Anti-Corruption Law, the recipient of a bribe under the Anti-Bribery Law is not limited to a public official or state apparatus only. Rather, the Anti-Bribery Law uses the broad term “barangsiapa”, which roughly translates as “whoever”, to refer to a party who may be charged with receiving a bribe.

### What is the definition of a public official and a foreign public official?

#### Public official

The Anti-Corruption Law provides a very broad and inclusive definition for the term “public official”, which includes the following:

- the public officials defined in Law No. 5 of 2014 on State Civil Apparatus, i.e., people appointed with an employment agreement to carry out their duty in an office of the state or who are given other state duties and paid salary in accordance with the prevailing laws and regulations;
- the public officials defined in the Indonesian Criminal Code, i.e., people who become members of, by way of election or otherwise, a legislative institution, a government institution or a peoples’ representatives institution formed by or on behalf of the government. This also includes judges, including chiefs and members of religious courts, and members of the Armed Forces;
- a person who receives salary or wage from the state or regional government’s payroll;
- a person who receives salary or wage from a corporation which receives support from state or regional government’s payroll; or
- a person who receives salary or wage from another corporation which utilises capital or facilities provided by the state or the public.

#### Foreign public official

The current legal regime does not contain any definition, nor does it discuss any issues regarding bribery of foreign public officials.

## Is private sector bribery covered by the law?

The Anti-Corruption Law only applies to public sector bribery and does not contain provisions on private sector bribery. However, the Anti-Bribery Law applies to “bribery outside the scope of the existing laws and regulations”. Accordingly, it could reasonably be interpreted that the Anti-Bribery Law applies to private sector bribery.

Pursuant to the Anti-Bribery Law, the act of gifting or promising something to someone for the purpose of inducing them to commit or omit to do something within their line of duty, which contravenes their authority or obligations which concern public interest, is punishable with imprisonment for up to five years and fines up to IDR15,000,000 (approx. USD1,049). In addition, the recipient of such gift/promise may also be charged with imprisonment for up to three years and fines of up to IDR15,000,000 (approx. USD1,049).

The Anti-Bribery Law does not provide further definition for the term “public interest”, leaving the term open for interpretation on a case-by-case basis. In the Decision of Banjarnegara District Court No. 50/Pid.Sus/2019/PN Bnr., the Panel of Judges presiding over the case found the defendant guilty of receiving a bribe meant to ensure the victory of a football team in a match in the Indonesian third-tier football league. In their legal reasoning, the Panel of Judges considered that “the interests of both teams, the supporters, and the Indonesian public watching the match” amounted to “public interests” under the Anti-Bribery Law.

## Does the law apply beyond national boundaries?

Yes, both the Anti-Corruption Law and Anti-Bribery Law expressly provide that it is applicable to any such crime which was committed outside the territory of Indonesia. The Anti-Corruption Law further provides that every party outside the

territory of Indonesia who provides any aid, opportunity, means or statement which enables corruption to take place shall be charged as a perpetrator of corruption.

According to the Anti-Corruption Law, individuals who reside outside the territory of Indonesia are subject to it (Article 16, Anti-Corruption Law). These individuals may be held liable for corruption if they provide any assistance, opportunity, infrastructure or information for a transnational criminal act of corruption in Indonesia that leads to an act of corruption specified under the Anti-Corruption Law. The Bribery Law also has extraterritorial reach (Article 4, Bribery Law).

## How are gifts and hospitality treated?

The Anti-Corruption Law classifies gifts and hospitality to public officials or state apparatus as “gratuity”.

Upon receiving a gratuity, the recipient public official or state apparatus must report the receipt of such gratuity: (i) within 10 days to the Gratuity Control Unit (Unit Pengendalian Gratifikasi or UPG) in the relevant government institution where the recipient is employed; and (ii) within 30 working days to the KPK.

The KPK will then decide within 30 working days as to whether the gratuity may be kept by the public official or if it will be seized by the KPK and become state property. All gifts and/or hospitality given or offered to public officials which are not reported to the KPK in accordance with the terms above will be deemed as bribes.

Pursuant to KPK Regulation No. 2 of 2019 on Reporting of Gratuity, the following types of gratuities are exempt from the obligation to report:

- gifts from within the family, i.e. grandfather/grandmother, father/mother/in-law, husband/wife, child/son-in-law, adopted child/legal guardian, grandchildren, in-laws, uncle/aunt, brother/sister/in-law, cousin and nephew, provided there is no conflict of interest;

- profit or interest from fund placement, investment or private share ownership which is generally applicable;
- benefits from cooperatives, personnel organisations or similar organisations based on generally applicable memberships;
- tools or equipment provided to participants in official activities such as seminars, workshops, conferences, training, or similar activities, which are generally applicable;
- gifts not in the form of money or other means of exchange, which are intended as a promotional or socialisation tool and which bears a logo or socialisation message, provided there is no conflict of interest and it is generally applicable;
- prizes, appreciation or awards from tournaments, contests or competitions in which the relevant public official participated at their own expense and which are not related to official service;
- prizes in the form of money or goods related to improvement of work performance given by the government in accordance with the applicable laws and regulations;
- direct gifts/raffles, discounts/rebates, vouchers, point rewards, or souvenirs that are generally applicable and not related to the public official's office;
- compensation or honorarium for professions outside of official activities that are not related to the public official's duties and obligations, provided that there is no conflict of interest and the compensation or honorarium does not violate the regulations/code of ethics of the employee/officer concerned;
- compensation received in relation to official activities such as honorarium, transportation, accommodation and financing that has been determined by the applicable cost standards at the institution where the gratuity recipient is employed, provided no double financing occurred, there is no conflict of interest, and no applicable provisions at the institution where the gratuity recipient is employed were violated;
- bouquets of flowers given in events such as engagement, marriage, birth, death, akikah, baptism, circumcision, potong gigi, or other traditional/religious ceremonies, farewell, retirement, promotion;
- gifts related to engagement, marriage, birth, baptism, circumcision, tooth cutting, or other traditional/religious ceremonies with a limit value of IDR 1,000,000.00 per giver (approx. USD70);
- gifts related to a catastrophe or disaster suffered by the gratuity recipient, or the husband, wife, child, father, mother, in-laws, and/or son-in-law of the gratuity recipient provided there is no conflict of interest, and it is fair and proper;
- gifts from co-workers for the purpose of a farewell, retirement, job transfer, or birthday which is not in the form of money or other means of exchange with maximum value of IDR 300,000.00 (approx. USD209) for each gift per person, with the total value of the gifts not exceeding IDR 1,000,000 (approx. USD70) within one year from the same provider, as long as there is no conflict of interest;
- gifts from co-workers that are not in the form of money or other means of exchange, and are not related to work, with maximum value of IDR 200,000.00 (approx. USD140) for each gift per person, with the total value of the gift not exceeding IDR 1,000,000.00 (approx. USD70) within one year from the same giver;
- gifts in the form of dishes or cuisines that are generally applicable; and
- souvenirs/placards to institutions in the context of official and state relations, both domestic and abroad as long as they are not given to an individual public official or state apparatus.

The giver/provider of a gratuity is also subject to liability under the Anti-Corruption Law and can be any person who works for a public or private sector entity, while a recipient is subject to the Anti-Corruption Law only if he or she is a civil servant or state administrator.

### **How is bribery through intermediaries treated?**

The Anti-Bribery Law and the Anti-Corruption Law apply to any person. Both the beneficiary of an intermediary and the intermediary of a criminal offence that aids and abets such offence, including a bribery offence, are subject to the Anti-Bribery Law and the Anti-Corruption Law. This is evident in the recent high-profile bribery cases which involved Indonesia's Social Affairs Minister, Juliar Batubara, and Indonesia's Minister of Maritime Affairs and Fisheries of Indonesia, Edhy Prabowo. In these cases, the prosecutor at KPK prosecuted both the former ministers and their intermediaries for accepting bribes.

Recent case law has also shown the application of Article 15 of the Anti-Corruption Law which penalises the act of attempting, abetting or maliciously conspiring to commit a bribery offence, particularly in the case of Joko Soegiarto Tjandra, whom along with his intermediaries, including officers from the national police and state attorney office, were prosecuted under this provision.

Furthermore, under the Anti-Corruption Law and Supreme Court Regulation No. 13 of 2016 concerning the Implementation Procedure for Corruption Offences by Corporations (SCR 13/2016), a corporation and its managers can also be held criminally liable for a bribery offence, if it can be proven that the bribery was made on behalf of or for the benefit of the corporation.

### **Are companies liable for the action of their subsidiaries?**

SCR 13/2016 explicitly stipulates that a parent company can be held criminally liable for the act of bribery committed by its subsidiary if the parent company is involved in the act of its subsidiary. Although SCR 13/2016 does not explicitly mention the extent of involvement necessary to establish criminal liability for the parent company, as a general rule under Indonesian criminal law, liability regarding any criminal offence can be established if the parties knowingly and willingly cooperated to commit the criminal offence.

### **Is there an exemption for facilitation payments?**

There is no exemption for facilitation payments under the Anti-Corruption Law. Although the Anti-Corruption Law does not expressly mention the term "facilitation payments", such conduct may be classified as a gratuity (i.e. the providing of money, goods, discounts, commissions, interest-free loans, travel tickets, lodging, travel, free medical care, and other facilities which is accepted in or outside Indonesia). If the gratuity is: (i) provided to a public official or government official; (ii) related to their position; and (iii) is contrary to their official duty or obligations, then such gratuity will be considered a bribe.

Pursuant to the Anti-Corruption Law and KPK Regulation No. 2/2019, the provision of a gratuity will not constitute a bribery offence if the recipient of such gratuity reported the gratuity to the KPK. The report should be made by the recipient not later than 30 business days after the gratuity is received. KPK shall within 30 business days thereafter, determine whether the relevant civil servant or state administrator can keep the gratuity, or if it should be surrendered to the state. However, KPK can also reject the gratuity report under certain circumstances.

Furthermore, as previously mentioned, in accordance with KPK Regulation No. 2/2019, there is a IDR1,000,000.00 (approx. USD70) threshold of gratification which is exempt from the obligation to be reported to KPK. Multiple Ministries in Indonesia (e.g. Ministry of Trade, Ministry of State-Owned Enterprises, Ministry of Marine Affairs and Fisheries) have also enacted regulation which aligns with the guidance set out in KPK Regulation No. 2/2019. However, if the gratuity is: (i) provided to a public official or government official; (ii) related to their position; and (iii) is contrary to their official duty or obligations, then such gratuity will be considered a bribe.

There is no minimum amount that a payment must reach to constitute a gratuity - a facilitation payment may be considered a gratuity.

Civil servants who receive a facilitation payment must report it to the KPK. An unreported facilitation payment will be considered a bribe.

### **Is there a defence for having adequate compliance procedures?**

There is no specific defence against bribery charges for having adequate compliance procedures set out under the Anti-Corruption Law. However, inadequate action by a corporation to prevent bribery is an indicator for a judge to determine the fault of a corporation. Accordingly, a robust compliance procedure may be considered by a judge as a reason for delivering a more lenient verdict.

### **What are the enforcement trends in the business area?**

Amidst recent controversies and public scrutiny, ranging from the discharge of 57 KPK employees to the ethical sanction of its deputy chairman related to her communication with a subject of investigation by KPK, law enforcement led by KPK remained relatively strong in the past year. KPK reported that in 2021, it had prosecuted 88 cases, with 85 of them having received a final and binding verdict by the courts.

According to publicly available sources, the enforcement trends by KPK related to the business sector have mostly remained the same from previous years. Multiple sting operations and subsequent prosecutions have been conducted by KPK against officials in the central and local government, including private entities, concerning bribery related to government procurements, tax avoidance, and the issuance of permits. KPK has also been cited as prioritising enforcement in the renewable energy sector in 2022.

Moreover, the Attorney General's Office (AGO) through their official website has also announced that they have handled 1,852 corruption and money laundering cases in 2021, to which they further claimed to have also saved the state finances IDR21.2 trillion (approx. US\$763,000).

It is worth noting that the AGO has coordinated with the State-Owned Enterprise Minister in investigating and prosecuting corruption related to multiple state-owned enterprises and private companies.



**JAPAN -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN JAPAN CONTRIBUTED BY CLIFFORD CHANCE (TOKYO OFFICE)

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"> <li>• Japanese Criminal Code</li> <li>• Unfair Competition Prevention Act</li> <li>• Punishment of Organised Crimes and Control of Crime Proceeds Act</li> </ul>
<b>Private sector bribery</b>	Generally no, but there are several laws that criminalise certain private sector bribery
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	No
<b>Penalties for individuals</b>	<ul style="list-style-type: none"> <li>• For bribing a domestic public official: imprisonment of up to three years or fine of up to JPY2.5 million (approx. US\$18,500)</li> <li>• For bribing a foreign public official: imprisonment of up to five years and/or fine of up to JPY5 million (approx. US\$37,000)</li> </ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"> <li>• For bribing a domestic public official: nil</li> <li>• For bribing a foreign public official: fine of up to JPY300 million (approx. US\$2,200,000)</li> </ul>
<b>Collateral consequences</b>	Suspension of the right to vote, ineligibility for directorship during the term of imprisonment, and possible ban from public tender for companies
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"> <li>• United Nations Convention against Corruption (signed and approved, but not ratified)</li> <li>• OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)</li> <li>• Member of the Financial Action Task Force</li> <li>• United Nations Convention against Transnational Organised Crime (signed and accepted)</li> </ul>

## What is the definition of a bribe?

The offences of bribery are set out in the Japanese Criminal Code (Law No. 45 of 1907, as amended) (the Criminal Code) and the Unfair Competition Prevention Act (Law No. 47 of 1993, as amended) (the UCPA). The Criminal Code deals with the bribery of public officials belonging to Japanese governmental/

official bodies and the UCPA deals with the bribery of public officials belonging to foreign (non-Japanese) governmental/ official bodies.

A “bribe” is construed under both the Criminal Code and the UCPA to mean any benefit that amounts to illegal compensation, including any economic or other tangible benefit

which could satisfy the needs/desires of a person. There is no *de minimis* threshold amount for a bribe.

The Criminal Code prohibits a public official from accepting, soliciting or agreeing to receive a bribe in connection with his or her duties and provides penalties for both the public official and the individual who offers, gives or promises such a bribe.

Recently, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a Japanese government/official whilst outside of Japan.

The UCPA provides that no person shall give, offer or promise to give a bribe to a foreign public official for the purpose of having such an official act or refrain from acting in a particular way in relation to his or her duties, or having the official use his or her position to influence another foreign public official to act or refrain from acting in a particular way in relation to that official's duties, in order to obtain illicit gains in business with regard to international commercial transactions. The UCPA only penalises the giver, offeror or promisor of the bribe.

Gifts or hospitality can amount to a "bribe". However, Japanese courts generally consider that gifts or hospitality do not constitute a "bribe" if given within the bounds of "social courtesy" (*shakouteki girei*). The following elements will be taken into account in order to determine whether a gift or hospitality is given within the bounds of social courtesy: the relationship between the giver and receiver; the value of the gift; the social status of the giver and receiver; and the social circumstances.

## What is the definition of a public official and a foreign public official?

### Domestic public official

The Criminal Code defines a public official as a national or local government official, a member of an assembly or committee or other employees engaged in the performance of public duties in accordance with laws and regulations.

Thus, a director or an employee of an enterprise, will generally not be considered a public official, unless for a certain enterprise he or she is categorised under an applicable law as a "quasi-public official" (*minashi koumuin*) and therefore, regarded as a "public official" under the Criminal Code.

For instance, employees of a state-owned enterprise are likely to be designated as quasi-public officials.

### Foreign public official

The UCPA defines a foreign public official as meaning any of the following:

- an official of a foreign national or local government;
- a person engaged in the performance of duties for an entity established under foreign laws and regulations in order to perform specific duties in respect of public interests
- a person engaged in the performance of duties for an entity:
  - (a) a majority stake of which is owned, or a majority of the officers (director, statutory auditor, liquidator and other persons engaged in management of the entity) of which is appointed, by foreign national and/or local government(s); and
  - (b) which is granted specific rights and interests for the performance of its business by a national or local government, as well as a person who is considered similar to the aforementioned person as designated in a cabinet ordinance;
- an official of an international organisation consisting of governments or intergovernmental organisations (IO); or
- a person engaged in the performance of duties over which a national or local government or an IO has power and authority and which are delegated to such a person by a national or local government or an IO.

As a result of this definition, a director or an employee of an enterprise will be considered as a foreign public official if the issued voting shares or subscribed capital of the enterprise owned by a state exceeds 50%.

### **Is private sector bribery covered by the law?**

Under Japanese law there are no general criminal laws against bribery in the private sector.

However, there are several laws addressing private sector bribery in specific situations, for example:

- Certain laws in relation to specific companies which perform public services include laws prohibiting the bribery of employees. For example, the Nippon Telegraph and Telephone (NTT) Corporation Act (Law No. 85 of 1984, as amended) forbids the bribery of NTT employees; and
- The Companies Act (Law No. 86 of 2005, as amended), specifically Articles 967, prohibits giving economic benefits to directors (or similar officers) of stock corporations with the request of unlawful actions or inactions in respect of their duties. Both the director and the person giving the bribe are liable to imprisonment or a fine. The bribe will be confiscated or the value of the bribe levied as a further penalty.

### **Does the law apply beyond national boundaries?**

Yes.

Under the Criminal Code, public officials can be found guilty of being bribed even where the bribery was committed outside Japan. Recently, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a Japanese government/official whilst outside of Japan.

Any person, whether foreign nationals or Japanese nationals can be found guilty of the bribery of foreign public officials under the UCPA if part of the bribery is committed within the territory

of Japan. In addition, Japanese nationals can be found guilty of the bribery of foreign public officials under the UCPA notwithstanding that the bribery was committed outside Japan.

### **How are gifts and hospitality treated?**

Gifts or hospitality can be a “bribe”. However, Japanese courts generally consider that gifts or hospitality do not constitute a “bribe” if given within the bounds of social courtesy (*shakouteki girei*). The following elements shall be taken into account in order to determine whether a gift or hospitality is given within the bounds of social courtesy or not: the relationship of the giver and the receiver; the value of the gift; the social status of the giver and the receiver; and the social circumstances.

### **How is bribery through intermediaries treated?**

Liability for bribing public officials (domestic or foreign) is not just restricted to those who physically pay the bribe. Under the Criminal Code and the UCPA, an individual who expressly or impliedly consents that money given to an intermediary be used for the payment of a bribe to a public official will also be guilty of an offence (conspiracy to commit a crime). Knowledge of the principal is required, but such knowledge can be recognised impliedly based on the circumstances.

### **Are companies liable for the action of their subsidiaries?**

There is no provision for corporate liability under the Criminal Code.

Corporate liability is possible under the UCPA. Moreover, a parent company may be liable for the action of its subsidiary if it had some involvement in the subsidiary’s bribery or if the bribe-giving employee of the subsidiary could be seen as virtually an employee of the parent. Parent companies are expected to ensure that subsidiaries establish and operate systems to prevent bribery as appropriate to the degree of risk, as indicated in the Guidelines for the Prevention of Bribery of Foreign Public

Officials released by the Ministry of Economy, Trade and Industry in 2004, as subsequently amended (METI Guidelines).

### **Is there an exemption for facilitating payments?**

Under the Criminal Code, there is no exemption for facilitating payments. The UCPA does not make an exemption for facilitation payments either. The METI guidelines provide that facilitation payments can amount to bribery, even in circumstances where a person seeking the performance of a routine administrative process in compliance with local laws may experience significantly prejudicial treatment as a result of not making such a payment. Whether or not facilitation payments are considered to violate the Unfair Competition Prevention Act turns on whether the intention “to obtain a wrongful advantage in business” can be established.

### **Is there a defence for having adequate compliance procedures?**

No. However, a Supreme Court ruling indicates that for a company to escape liability for an employee’s actions, the company should have taken actions to prevent the violation in the form of proactive and specific instruction. Also, the existence of a strong compliance program may be taken into consideration by the courts in determining penalties.

### **What are the enforcement trends in the business area?**

There have been few prosecutions in Japan for bribery of foreign public officials under the UCPA.

In response to the OECD Working Group on Bribery’s (Working Group) report in December 2011 relating to Japan’s application of the OECD Anti-Bribery Convention, Japan publicly released in February 2014 a written response to the OECD. In the report, Japan disclosed certain enhancements, increased resources

and additional steps it was taking to investigate and prosecute foreign bribery more effectively. In particular, Japan reported taking several measures, including: raising the profile of its foreign bribery law, such as additional training for its prosecutors and police; strengthening the coordination with law enforcement authorities; enhancing the use of mutual legal assistance requests; including foreign bribery enforcement explicitly within the duties of economic and financial crimes prosecutors; focusing on suspicious transactions reports to detect foreign bribery cases; increasing awareness of foreign bribery law among Japanese companies; and utilising overseas missions to detect foreign bribery by Japanese companies.

These developments have the potential for facilitating more active detection, investigation and prosecution of foreign bribery cases. The OECD Working Group on Bribery in International Transactions sent a high-level mission to Japan in June 2016 to urge the government to step up its efforts to fight international bribery. The OECD issued a statement imploring Japan to “make fighting international bribery a priority” noting that, amongst other things, prosecutions for bribery offences have been few and far between and legislation allowing for the confiscation of proceeds of bribery has yet to be enacted. This issue was highlighted again in the OECD’s Phase 4 monitoring report in July 2019. According to METI’s Guidelines, there were just 9 prosecutions in the first half of 2020.

In a recent high-profile case of public sector bribery, senior officials at the Ministry of Education, Culture, Sports, Science and Technology were arrested and indicted for (i) overseeing a system whereby retired Ministry officials were able to illegally secure lucrative positions at institutions which were previously supervised by the same officials and (ii) providing government subsidies to a top university in exchange for promises to modify entrance exam results for the son of a Ministry official.

## **Plea-Bargaining**

As of June 2018, persons accused of certain crimes (including bribery) are now able to enter into plea bargain arrangements. This means that they may receive lighter punishment (or no punishment) for their own crimes provided that they reveal information which may be used to prosecute other implicated persons. However, plea bargain arrangements are likely to be available in only very limited circumstances.

Doubts have since been raised as to the effect of such a regime. Early examples of enforcement have stoked fears that corporations may seek to use the plea-bargaining regime to potentially recuse themselves of wrongdoing and instead

scapegoat their employees. This is despite the fact that guidance issued by the Supreme Prosecutors Office in March 2018 provides that plea-bargaining agreements should only be struck in cases where the public would be expected to support their use.

In March 2019, plea bargain arrangements were entered into with a company in respect of a crime under the UCPA, in which the directors of the company gave bribes to foreign public officials through a third party (who was engaged by a local subcontractor). As a result of the plea bargain arrangements, the company was not prosecuted in this case.

The image features the national flag of Malaysia, which consists of a blue canton with a yellow crescent and a 14-pointed star, and seven horizontal stripes of red and white. The left side of the flag is blurred, while the right side is sharp. The text is overlaid on the blue canton.

**MALAYSIA -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN MALAYSIA CONTRIBUTED BY RAHMAT LIM & PARTNERS

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## Key points:

<b>Key legislation</b>	Malaysian Anti-Corruption Commission Act 2009 (MACC Act)
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	Section 17A of the MACC Act sets out far-reaching corporate liability provisions seeking to penalise commercial organisations for the corrupt practices of its associated persons. An “adequate procedures” defence in respect of such an offence is available under Section 17A(4) of the MACC Act.
<b>Penalties for individuals</b>	For serious bribery, imprisonment up to 20 years and a fine of not less than five times the sum/ value of the gratification where it is capable of being valued or is of a pecuniary nature, or MYR10,000 (approx. US\$2,400), whichever is higher. There is also a general penalty of a fine up to MYR10,000 (approx. US\$2,400) or imprisonment up to two years or both.
<b>Penalties for companies</b>	Any commercial organisation which commits an offence under Section 17A will be liable to a fine of not less than 10 times the sum or value of the gratification which is the subject of the offence, or MYR1,000,000 (approx. US\$239,000), whichever is higher, and individuals can face imprisonment for up to 20 years, or both.
<b>Collateral consequences</b>	No
<b>Anti-corruption treaties</b>	United Nations Convention against Corruption

## What is the definition of a bribe?

The MACC Act makes it an offence when “any person who by himself, or by or in conjunction with any other person corruptly solicits or receives or agrees to receive for himself or for any other person; or corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to or a reward for, or otherwise on account of any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned”. Active bribery therefore includes the act of giving, offering and promising gratification under the conditions mentioned above. Passive bribery includes accepting and soliciting a gratification.

Instead of the word “bribe”, the MACC Act uses the word “gratification”, which includes both pecuniary and non-pecuniary bribes. Gratification is defined as money, donation, gift, any valuable thing of any kind, any forbearance to demand any money or money’s worth or valuable thing, any other service or favour of any kind or any offer, undertaking or promise of such gratifications. The MACC Act does not contain provision for a de minimis threshold.

## What is the definition of a public official and a foreign public official?

### Domestic public official

Under the MACC Act, “officer of a public body” is defined as any person who is a member, an officer, an employee or a servant of a public body. This includes a member of the administration, a member of parliament, a member of a state legislative assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and where the public body is a sole corporation, includes the person who is incorporated as such.

The courts have adopted a broad approach in defining and determining who falls within the definition of “an officer of a public body”. In the MACC Act, the term “public body” includes any company or subsidiary over which or in which any public body has controlling power or interest. By this interpretation, a director or even an employee of a state-owned enterprise, more commonly known as a Government-linked Company (GLC) in Malaysia, falls under the scope of the MACC Act as they could be considered officers of a public body.

### Foreign public official

Under the MACC Act, a foreign public official includes “any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected; any person who exercises a public function for a foreign country including a person employed by a board, commission, corporation, or other body or authority that is established to perform a duty or function on behalf of the foreign country; and any person who is authorised by a public international organisation to act on behalf of that organisation”.

## Is private sector bribery covered by the law?

The MACC Act does not make a distinction between private sector bribery and bribery of public officials. The provision dealing with the offence of accepting gratification has general application and so it applies to any person regardless of whether the bribery was between two private individuals or whether a public officer was involved.

## Does the law apply beyond national boundaries?

Yes, the MACC Act has extraterritorial effect, as it applies when an offence is committed outside Malaysia by a citizen or a permanent resident.

Additionally, dealing with, using, holding, receiving or concealing a gratification or advantage which forms the subject matter of

offences under the MACC Act can be prosecuted in Malaysia even if committed abroad.

### **How are gifts and hospitality treated?**

Gifts and hospitality would generally fall under the definition of “gratification” under the MACC Act. Additional guidance on giving and receiving gifts can be found in the Public Officers (Conduct and Discipline) Regulations as amended by the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 (Regulations) and the Guidelines for Giving and Receiving Gifts in the Public Service (Guidelines). The Guidelines serve to support the Regulations and set out specific situations in which gifts from the private sector or any other persons may be prohibited or may require the approval of the Secretary-General or the Security Office, depending on their value.

Accordingly, a public official is not allowed to receive or give gifts or allow their spouse or any other person to receive or give on their behalf any gift, whether in tangible form or otherwise, from or to any person, association, body or group of persons if receiving or giving such a present is in any way connected, either directly or indirectly, with his or her official duties. However, there are exceptions for certain personal celebrations such as retirement, job transfer or marriage.

There is also an exception if the circumstances make it difficult for the officer to refuse the gift. For example, the Guidelines provide that an officer would be allowed to receive a gift given to him or her when carrying out public duties at a seminar, symposium, workshop or any official event and the public officer was not informed of the presentation of the gift beforehand. However, the officer is required to submit a written report detailing the gift.

### **How is bribery through intermediaries treated?**

The provision dealing with the offence of accepting gratification, which has general application, states that “any person who by

himself, or by or in conjunction with any other person” receives or gives any gratification commits an offence.

The MACC Act states that “any person who by himself, or by or in conjunction with any other person” bribes a foreign public official will be guilty of an offence (Section 22), whilst similar wording in respect of bribery of a domestic public official may be found in the general offence set out under Section 16.

Additionally, it should be noted that the MACC Act makes it an offence for an intermediary (referred to as an “agent”) who “corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do”. Thus, if a person acts as an intermediary (i.e., for or on behalf of any other person as an agent) it would amount to an offence. This would also appear to cover the use of intermediaries in the receipt of bribes by both foreign public officials and domestic ones.

### **Are companies liable for the action of their subsidiaries?**

The MACC Act does not contain any specific provision on the liability of parent companies for their subsidiaries’ conduct. In such situations, general company law principles (e.g., lifting of the corporate veil) would apply. The general rule is that the parent company and its subsidiaries are separate legal entities and are legally autonomous. Accordingly, the parent company’s liability would depend on the facts surrounding the case, particularly its involvement in the subsidiary’s conduct.

### **Is there an exemption for facilitation payments?**

No, the MACC Act does not provide for any exemptions in relation to facilitation payments.

## Is there a defence for having adequate compliance procedures?

Yes, the MACC Act provides an “adequate procedures” defence.

Section 17A of the MACC Act provides far-reaching corporate liability provisions seeking to penalise commercial organisations for the corrupt practices of its associated persons. An “adequate procedures” defence in respect of such an offence is available.

A commercial organisation will commit an offence if a person associated with it corruptly gives or offers to any person any gratification with intent to obtain or retain business or advantage for the commercial organisation (Offence). A commercial organisation for this purpose includes local companies, foreign companies and partnerships, carrying on business in Malaysia.

The liability imposed on a commercial organisation with regard to the Offence will extend to a director, officer, partner, or any person who is concerned in the management of the affairs of the commercial organisation at the time of the commission of the Offence, regardless of whether they had knowledge of the Offence. To avoid liability, they would have to prove that the Offence was committed without their consent and that they exercised due diligence to prevent the commission of the Offence. If a commercial organisation is charged with committing an Offence, it is a defence for the commercial organisation to prove that it had in place adequate procedures to prevent persons associated with the commercial organisation from undertaking the corrupt conduct.

Section 17(A)(5) of the MACC Act provides that guidelines must be issued relating to the procedures mentioned in Section 17A(4). In this regard, the Prime Minister’s Department has

issued Guidelines on Adequate Procedures (Adequate Procedure Guidelines). The objective of the Adequate Procedure Guidelines is to assist commercial organisations in understanding the adequate procedures that should be implemented to prevent the occurrence of corrupt practices in relation to their business activities, and are based upon certain principles, including, *inter alia*, top level commitment from management, conducting risk assessments, undertaking control measures, systematic reviews, monitoring and enforcement as well as training and communication.

The Offence carries a substantial fine of not less than 10 times the sum or value of the gratification if it is capable of being valued, or MYR1,000,000 (approx. US\$238,000), whichever is higher, or imprisonment for a term not exceeding 20 years, or both.

## What are the enforcement trends in the business area?

The MACC provides for two investigatory approaches in relation to its enforcement operations: proactive-based investigation; and intelligence-based investigation.

Based on the statistics on the MACC website, the number of arrests made by the MACC in 2021 (as of the date of writing) numbered 847 people.

On March 2021, the MACC made their first arrest under the newly enacted corporate liability provisions under Section 17A of the MACC Act. A ship leasing company and its former director were the first to face charges under Section 17A with respect to bribes allegedly paid to secure a sub-contract to lease ships for oil and gas mining work.



**PHILIPPINES -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN THE PHILIPPINES CONTRIBUTED BY CASTILLO LAMAN TAN PANTALEON & SAN JOSE

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>• The Revised Penal Code</li><li>• The Anti-Graft and Corrupt Practices Act</li><li>• The Code of Conduct and Ethical Standards for Public Officials and Employees</li><li>• The Anti-Plunder Act</li><li>• An Act Making It Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas</li><li>• The Anti-Red Tape Act</li></ul>
<b>Private sector bribery</b>	Yes, but only when it relates to an official act or function
<b>Extra-territorial effect</b>	Yes, but only for public officers abroad who accept bribes in the exercise of their public functions
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	Bribe given as a result of force or intimidation under certain conditions, the bribe or gift giver may also apply for informant's immunity by voluntarily providing information on the offence and testifying against the public official
<b>Penalties for individuals</b>	<ul style="list-style-type: none"><li>• Direct Bribery under the Revised Penal Code: (i) imprisonment of up to 12 years; (ii) a fine of not less than three times the value of the gift; and (iii) disqualification from office, practice of a profession/calling and/or the right to vote during the term of the sentence</li><li>• Indirect Bribery under the Revised Penal Code: imprisonment of up to six years and public censure</li><li>• Qualified Bribery under the Revised Penal Code: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended)</li></ul>

<p><b>Penalties for individuals</b></p>	<ul style="list-style-type: none"> <li>• Violation of the Anti-Graft and Corrupt Practices Act: (i) imprisonment of six years and one month to 15 years; (ii) perpetual disqualification from public office; (iii) disqualification from transacting business with the Philippine Government; and (iv) confiscation or forfeiture in favour of the Philippine Government of the gift or wealth acquired, subject to the right of the complaining party to recover the amount or thing given to the offender under the circumstances provided by law</li> <li>• Prohibited acts or transactions under the Code of Conduct and Ethical Standards for Public Officials and Employees: (i) imprisonment of up to five years; (ii) a fine not exceeding PHP5,000 (approx. US\$97); and/or (iii) disqualification from holding public office</li> <li>• Plunder under the Anti-Plunder Act: (i) imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended); and (ii) forfeiture of ill-gotten assets in favour of the Philippine Government</li> <li>• Violation of An Act Making It Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas: (i) imprisonment of one year to five years; and (ii) perpetual disqualification from public office</li> </ul>
<p><b>Penalties for companies</b></p>	<p>The company's officers, directors or employees who participated in the crime or offence shall suffer the penalties described above</p>
<p><b>Collateral consequences</b></p>	<p>Rejection or revocation of registration of the company's securities if a company officer, director or controlling person, among others, is convicted of an offence involving moral turpitude or fraud. Bribery is an offence involving moral turpitude</p>
<p><b>Anti-corruption treaties</b></p>	<ul style="list-style-type: none"> <li>• United Nations Convention against Corruption</li> <li>• United Nations Convention against Transnational Organized Crime</li> </ul>

**What is the definition of a bribe?**

Generally, a bribe includes any offer, promise or gift received by or given to a public official or employee in connection with the performance of their official duties. This may be money, property, services or anything of value.

There is no de minimis threshold for the bribe but the fact that a gift was of an insignificant value is taken into account by the

courts, among other circumstances, when considering whether or not it should qualify as a bribe. Both the bribe giver (by giving, offering or promising a benefit to a public official or employee) and the bribe receiver (by soliciting or accepting a prohibited benefit) are liable.

## What is the definition of a public official and a foreign public official?

### Domestic public officials

The term “public official” has several definitions under Philippine law.

Under the Revised Penal Code, a public official is “any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class”.

Under the Anti-Graft and Corrupt Practices Act, a public official includes “elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government”. The term “government” here refers to the national government, local governments, government-owned and controlled corporations and all other branches and agencies of the Philippines.

As a rule, officials or employees of government-owned and controlled corporations (GOCCs) with original charters (i.e. those chartered by special law as distinguished from GOCCs organised under the Corporation Code) are considered public officials or employees. The Supreme Court also considers presidents, directors, trustees or managers of GOCCs, regardless of their nature, to be public officials under the anti-bribery laws.

### Foreign public officials

Anti-bribery laws refer to Philippine public officials only. There is no indication that they apply to foreign public officials.

## Is private sector bribery covered by the law?

Anti-bribery laws have a narrow application to bribery between private persons, as they must somehow involve public officials or functions, such as employing a family member of a public official when one has business with the official or giving a gift to a private person at the request of a public official to secure a government permit or licence.

The Revised Penal Code proscribes the bribing of “assessors, arbitrators, appraisal and claim commissioners, experts or any other persons performing public duties.” Thus, the bribing of these private persons in connection with the performance of their duties as assessors, arbitrators, etc. falls within the coverage of anti-bribery laws.

## Does the law apply beyond national boundaries?

Philippine anti-bribery laws are territorial in their effect. However, the Revised Penal Code provides for extraterritorial effect for its anti-bribery provisions when a bribery offence is committed abroad by a Philippine public official or employee in the exercise of their functions.

## How are gifts and hospitality treated?

Under the Code of Conduct and Ethical Standards for Public Officials and Employees, a gift will not qualify as a bribe if it is unsolicited, of nominal or insignificant value and is not given in anticipation of, or in exchange for, a favour from a public official or employee.

Similarly, under the Anti-Graft and Corrupt Practices Act, a gift will not qualify as a bribe if it is an unsolicited gift of small or insignificant value offered or given as a mere token of gratitude or friendship according to local customs or usage.

However, the Act Making It Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas makes it illegal for any public official or employee to receive, and for private persons to give, or offer to give, any gift or other valuables on any occasion, when such gift, present or other valuable is given by reason of their official position, regardless of whether or not the same is for: (i) a past favour; or (ii) the bribe giver hopes or expects to receive a favour or better treatment in the future, from the concerned public official or employee in the discharge of their official functions. This prohibition includes parties or other entertainment organised in honour of the official or employee or immediate relatives.

As a result, a gift will not to be considered as a bribe where:

(i) it is unsolicited; (ii) its value is nominal or insignificant; (iii) it is not given as or for a favour; (iv) it is not given by reason of official position, or in connection with the performance of official duties; and (v) it is given in accordance with local customs or usage.

There are no clear statutory or jurisprudential standards on what would be considered nominal or insignificant value or what would be acceptable in accordance with local customs or usage. These matters are decided by the courts on a case-by-case basis.

### **How is bribery through intermediaries treated?**

The principal's use of an intermediary to pay a bribe does not exempt the principal from liability for bribery. If the principal instructed or induced the intermediary to pay the bribe, then the former is liable for bribery.

### **Are companies liable for the action of their subsidiaries?**

In principle, the parent company and subsidiary companies are separate and distinct legal entities and the act of one is not necessarily imputable to the other. However, under Philippine jurisprudence, the officers, directors or employees of the parent company may be held liable for the criminal acts of the officers, directors or employees of the subsidiary if there is evidence that the former planned or otherwise endorsed the criminal acts committed by the latter. However, mere knowledge of the crime is not sufficient to impose criminal liability.

### **Is there an exemption for facilitation payments?**

There is no exemption for facilitation payments.

### **Is there a defence for having adequate compliance procedures?**

There is no such defence. However, a company's anti-corruption program or procedures may be provided as evidence before the court to show that the employee who allegedly committed the bribery was not authorised to do so on behalf of the company.

### **What are the enforcement trends in the business area?**

Philippine President Rodrigo Duterte is a staunch anti-corruption advocate. While campaigning for the presidency in 2016, he vowed to fight corruption by the end of his term. Since assuming office, he has enforced numerous measures to combat corruption.

Among others, he issued Executive Order No. 06 on 14 October 2016, establishing the 8888 Citizens' Complaint Hotline, which is designed to serve as a "mechanism where citizens may report their complaints and grievances on acts of

red tape ... and/or corruption...”. Around 100 government employees from various agencies, such as the Bureau of Customs, the Bureau of Internal Revenue, the Land Transportation Franchising and Regulatory Board and the Land Transportation Office, have been dismissed or suspended for alleged corruption.

On 4 October 2017, President Duterte issued Executive Order (EO) No. 43, creating the Presidential Anti-Corruption Commission. The commission is mandated “to directly assist

the President in investigating and/or hearing administrative cases primarily involving graft and or corruption against all presidential appointees.” EO No. 43 also provides that, “upon the instructions of the President or *motu proprio*, the commission may conduct lifestyle checks and fact-finding inquiries on acts or omissions of all presidential appointees, including those outside the executive branch of government.”

**SINGAPORE -  
ANTI-CORRUPTION  
LEGISLATION**



# ANTI-CORRUPTION LEGISLATION IN SINGAPORE CONTRIBUTED BY CLIFFORD CHANCE ASIA

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"> <li>• Prevention of Corruption Act 1960 (the PCA)</li> <li>• Penal Code 1871 (the Penal Code)</li> </ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	None
<b>Penalties</b>	<p><b>For private sector bribery:</b></p> <ul style="list-style-type: none"> <li>• Fine not exceeding SGD100,000 (approx. US\$72,000)</li> <li>• Imprisonment for a term not exceeding five years or both</li> </ul> <p><b>For public sector bribery:</b></p> <ul style="list-style-type: none"> <li>• Fine not exceeding SGD100,000 (approx. US\$72,000)</li> <li>• Imprisonment for a term not exceeding seven years or both</li> </ul>
<b>Collateral consequences</b>	<p>Where a person is convicted for accepting a gratification in contravention of the PCA, if the value of that gratification can be assessed, the amount of the gratification accepted may be recoverable as a penalty</p> <p>See also consequences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992</p>
<b>Anti-Corruption treaties</b>	<ul style="list-style-type: none"> <li>• United Nations Convention Against Corruption</li> <li>• Member of the Financial Action Task Force</li> <li>• Asia Pacific Economic Cooperation Anti-Corruption &amp; Transparency Experts' Working Group</li> <li>• Asian Development Bank (ADB)/OECD Anti-Corruption Initiative for Asia-Pacific</li> <li>• South East Asia – Parties Against Corruption</li> </ul>

\* Clifford Chance Asia is a Formal Law Alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP

## What is the definition of a bribe?

A bribe is referred to under the PCA by use of the term “gratification”, which is broadly defined to include the giving, promising or offering of:

- (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- (b) any office, employment, or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation, or other liability whether in whole or in part;
- (d) any other service, favour, or advantage of any description including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d) above.

The PCA prohibits any person (by himself or in conjunction with others) from:

- bribing, i.e. giving, promising, or offering; or
- being bribed, i.e. soliciting, receiving, or agreeing to receive, for himself or others, any gratification as an (i) inducement to, or (ii) reward for, or (iii) otherwise on account of:
  - any person doing or forbearing to do anything in respect of any matter or transaction (whether 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 (whether actual or proposed), in which such a public body is concerned.

- The term “person” covers companies as well as individuals.
- The PCA prohibits certain corrupt dealings by or with “agents” in relation to their “principal’s affairs or business”. These terms are defined to cover both the public and private sector.
- There is no de minimis threshold.
- The PCA stipulates that evidence that any such gratification is customary in any profession, trade, vocation or calling is inadmissible in any civil or criminal proceedings.
- Under the Penal Code, “gratification” is the term used but not expressly defined. However, the explanatory notes to the relevant section stipulate that the word is not restricted to pecuniary gratifications, or to gratifications estimable in money.

## What is the definition of a public official and a foreign public official?

### Domestic public official

The PCA does not define “public official”, but rather makes express reference by way of example, to certain types of public officials, namely a “member of parliament”, “public body” with the power to act underwritten by law and also a general reference to a “person in the employment of the government or any department thereof.” As noted above, the PCA contains express prohibitions with respect to dealings with “agents” in relation to their “principal’s affairs or business”. “Agent” includes a person serving the government or under any corporation or public body. “Principal” includes the government or a public body. Where the defendant is a public official and the gratification is paid to or received by him or her, there is a rebuttable presumption that where the gratification has been paid or given to or received by a public official, it has been paid or given and received corruptly.

The Penal Code provides a broad and exhaustive definition of “public servant”. It not only covers “public servants” but also persons “expecting to be a public servant”.

### **Foreign public official**

The Singapore legislation does not expressly deal with bribery of foreign public officials. However, the drafting of the PCA prohibitions is sufficiently broad to include bribery of foreign public officials by Singapore citizens.

### **Is private sector bribery covered by the law?**

Yes, private sector bribery is covered by the PCA but not the Penal Code.

### **Does the law apply beyond national boundaries?**

Yes, both the PCA and the Penal Code apply beyond national boundaries.

The PCA expressly states that its provisions apply to citizens outside as well as within Singapore. Where an offence under the PCA is committed by a citizen in any place outside Singapore, he or she may be dealt with in respect of that offence as if it had been committed within Singapore. The PCA also expressly provides that a person who abets the commission of an offence outside Singapore in relation to the affairs or business or on behalf of a principal residing in Singapore, shall be deemed to have committed the offence.

In addition, under the abetment provisions in the Penal Code, a person who abets an offence (including an offence under the PCA) from outside Singapore shall be liable for the offence, notwithstanding that the acts of abetment were carried out outside Singapore.

The Penal Code expressly provides that every public servant who, being a citizen or a permanent resident of Singapore, when acting or purporting to act in the course of his

employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force, is deemed to have committed that act or omission in Singapore.

The Penal Code also provides that any person liable to be tried for an offence committed beyond the limits of Singapore is to be dealt with according to the provisions of the Penal Code for such act, in the same manner as if the act had been committed within Singapore.

### **How are gifts and hospitality treated?**

As the statutory definition of “gratification” under the PCA is very wide, gifts and hospitalities (including sexual favours) fall within its scope. Under the Penal Code, although the term “gratification” is not defined, the explanatory notes make clear that the term is not restricted to gratification in monetary terms and would presumably cover gifts and hospitality.

In practice, in the private sector, gifts and hospitality provided on a “one-off” basis and are of a reasonable amount are unlikely to be prosecuted. There is no industry-specific anti-corruption legislation in Singapore.

### **How is bribery through intermediaries treated?**

Liability of principals for bribery by intermediaries is expressly dealt with under the PCA, in that a person will be liable for actions taken by themselves and “in conjunction with any other person” (i.e. an intermediary). The PCA does not specify the knowledge required of the principal of bribery committed by its intermediary in order for it to also be found liable.

The Penal Code does not expressly provide for the liability of the principal for acts of intermediaries.

## **Are companies liable for the action of their subsidiaries?**

No, the laws do not provide for the liability of a parent company for the actions of its subsidiary.

Although the reference to “person” is sufficiently broad under the PCA and Penal Code to cover companies, based on a review of current reported case law, no company has been prosecuted yet under the PCA and/or Penal Code.

## **Is there an exemption for facilitating payments?**

There is no exemption for facilitating payments under the PCA and Penal Code, nor under any other law. Indeed, the PCA expressly prohibits the offering of any gratification to a member of a public body or reward for the official’s “performing, or ... expediting ... the performance” of any official act.

## **Is there a defence for having adequate compliance procedures?**

No, the legislation does not have any provisions akin to the UK Bribery Act’s adequate procedures defence. Nevertheless, a robust anti-corruption program would most likely be taken into consideration by the Singapore courts in any proceedings against a company.

## **What are the enforcement trends in the business area?**

Singapore has earned a reputation for being one of the least corrupt nations. Since the inception of the Corruption Perceptions Index (CPI) by Transparency International in 2005, Singapore has been ranked consistently amongst the least corrupt countries in the world. In the past 5 years, Singapore has been placed amongst the top 10 globally, and was tied at 4th place with Sweden and Norway in 2021. Singapore scored 85 on a scale where zero denotes a country with a very high risk of corruption and 100 denotes a very clean country.

Singapore has also been ranked top in the 2022 Political and Economic Risk Consultancy (PERC) annual survey as the country where perceptions of corruption are most favourable among 16 major Asia-Pacific economies and the USA, a position it has maintained since 1995.

Singapore has been ranked consistently well by the World Bank in the area of control of corruption. In the past 5 years, it has maintained the top 10 positions.

Corruption in Singapore remains low. The number of new corruption cases registered by the Singapore Corrupt Practices Investigation Bureau (CPIB) has been on a downward trend, from 119 in 2019 to 83 in 2021. Of the 83 cases registered for investigation in 2021, 16 were from anonymous sources. The majority of the cases registered for investigation in 2021 were from the private sector, which accounted for 74 cases, while the public sector only accounted for 9 cases.

CPIB has also stepped up its efforts to partner with the private sector. In February 2021, CPIB signed a Memorandum of Understanding with the Institute of Singapore Chartered Accountants (ISCA), which has enabled the Bureau to develop anti-corruption programmes with the accountancy profession and the wider business community. In 2018, CPIB established the Anti-Corruption Partnership Network (ACPN) to promote ownership amongst private sector entities over the prevention of corruption. ACPN membership was also expanded to include selected financial institutions and associations. The network currently has a total of 58 organisations having joined as members.

Singapore continues to increase its cooperation with other governments. In January 2021, two Singaporeans were charged in court for offences under the PCA for, amongst other things, corruption offences that took place in the People’s Republic of China. These offences were investigated under section 37 of the

PCA, and were committed in China between April 2007 and November 2010. In the course of its investigation, the CPIB worked with the Chinese authorities such as the Shanghai City Zhabei District People's Procuratorate and received valuable assistance from them, leveraging on its framework for international cooperation with overseas legal, law enforcement and regulatory agencies.

On 5 July 2017, the CPIB joined law enforcement agencies from Australia, Canada, New Zealand, the UK and US in launching a new International Anti-Corruption Coordination Centre (IACCC). The multinational centre is intended to coordinate law enforcement action against global grand corruption.

Grand corruption includes acts of corruption by politically exposed persons that may involve vast quantities of assets and those that threaten political stability and sustainable development. These can comprise bribery of public officials, embezzlement, abuse of functions or the laundering of the proceeds of crime. The London-based IACCC is envisaged to improve information sharing by bringing together specialist law enforcement officers from multiple jurisdictions into a single location. As part of its commitment as a founding member, CPIB will be contributing an officer to serve at the IACCC.

There is a developing expectation that senior officers should be taking a stand against corrupt practices. On 26 September 2016, a senior executive involved in one of the largest corporate graft scandals in Singapore, concerning a major shipbuilding company, was sentenced to 20 weeks' jail and a fine of SGD100,000 (approx. US\$73,700). Mok Kim Whang was the company's senior vice-president from June 2000 to July 2004 and was found to have continued a pre-existing practice at the company of paying bribes to its customers' employees and

covering up the kickbacks with a false paper trail of "entertainment expenses". The sentencing judge remarked that the jail term for Mok "adequately recognises the need to send a strong signal to deter like-minded offenders that there are painful consequences that will flow from weak-willed corporate executives". Significantly, the judge noted that it will be "incumbent on senior officers to take a stand and if it is not possible to put an end to such illegal activities – then they should part company or ... report the activities to the authorities".

In March 2018, the Criminal Justice Reform Act was passed by the Singapore Parliament, encompassing a wide range of revisions to the Criminal Procedure Code. In particular, a Deferred Prosecution Agreement (DPA) framework was introduced in the Criminal Procedure Code in October 2018, which shares various similarities with the UK DPA law. Only body corporates may enter into DPAs (not individuals) in relation to certain offences. A DPA comes into effect pursuant to a declaration of the High Court. The High Court will make such a declaration if it is of the view that the DPA is in the interests of justice and the terms of the DPA are fair, reasonable and proportionate. To date, enforcement action in relation to corruption cases has typically been taken against individuals. The introduction of a DPA framework signifies a potential shift in focus towards enforcement against corporates, rather than individuals.

In January 2015, the Singapore Government announced that it would be reviewing the PCA with a view to keeping pace with international developments. However, to date, no details of the proposed amendments have been released.

The image features a close-up, slightly blurred view of the South Korean national flag, the Taegeukgi. The flag is white with a large Taegeuk symbol in the center, composed of a red upper half and a blue lower half. In the four corners, there are black trigrams (Gwan) separated by white lines. The text 'SOUTH KOREA - ANTI-CORRUPTION LEGISLATION' is overlaid in white, bold, sans-serif font on the left side of the image.

**SOUTH KOREA -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN SOUTH KOREA CONTRIBUTED BY BAE, KIM & LEE LLC

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>• Korean Criminal Code (Criminal Code)</li><li>• Aggravated Punishment of Specific Crimes Act (Specific Crimes Act)</li><li>• Aggravated Punishment of Specific Economic Crimes Act (Specific Economic Crimes Act)</li><li>• Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission</li><li>• Code of Conduct for Public Officials of Korea (CoC)</li><li>• Combating Bribery of Foreign Public Officials in International Business Transactions Act (Foreign Bribery Act)</li><li>• Improper Solicitation and Graft Act (the Graft Act), also commonly known as the “Kim Young-ran Act”</li></ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	No
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	The CoC, Graft Act and Foreign Bribery Act each set out exemptions to what is considered a bribe. The CoC and the Graft Act allow public officials to receive gifts and hospitality up to a certain threshold amount. Under the Foreign Bribery Act, a payment that would otherwise be considered a bribe is allowed if it is required or permitted under written law in the foreign official's country.

**Penalties for individuals**

**For public sector bribery:**

Bribes in connection with domestic public officials:

- Under the Graft Act, a domestic public official who receives over KRW1 million (approx. US\$834 on a single occasion or, over the course of a year, KRW3 million (approx. US\$2,503) in aggregate, is subject to: (i) imprisonment of up to three years; or (ii) a fine of up to KRW30 million (approx. US\$25,033)
- Under the Graft Act, a domestic public official who receives, or a bribe giver who gives, a bribe amounting to KRW1 million (approx. US\$834) or less on a single occasion or, over the course of a year, KRW3 million (approx. US\$2,503) in aggregate, is subject to a maximum fine of two to five times the pecuniary benefit of the bribe
- Under the Specific Crimes Act, a public official who: (i) accepts a bribe; (ii) causes a bribe to be given to a third party; or (iii) takes advantage of their position, demands or agrees to receive a bribe, is subject to a fine of two to five times the amount of the accepted bribe and imprisonment, as follows:
  - if the bribe is KRW100 million (approx. US\$83,445) or more, an indefinite term (but such term subject to a maximum of 30 years under the Criminal Code) or not less than 10 years;
  - if the bribe is KRW50 million (approx. US\$41,722) or more but less than KRW100 million (approx. US\$83,445), not less than 7 years;
  - if the bribe is KRW30 million (approx. US\$25,033) or more but less than KRW50 million (approx. US\$41,722), not less than 5 years
- Under the Criminal Code, if the bribe is equal to or less than KRW30 million (approx. US\$25,033), a public official is subject to imprisonment of up to 5 years or suspension of qualifications of up to 10 years

Bribes in connection with foreign public officials:

- A person who bribes a foreign public official may be subject to: (i) imprisonment of up to five years; or (ii) a fine of up to KRW20 million (approx. US\$16,689)
- If the pecuniary benefit derived from the unlawful activity exceeds KRW10 million (approx. US\$8,344), the bribe giver will be subject to: (i) imprisonment of up to five years; or (ii) a maximum fine of twice the pecuniary benefit of the bribe

**For private sector bribery:**

- A bribe receiver may be subject to: (i) up to life imprisonment; and (ii) a fine of two to five times the value of the bribe, depending on the size of the bribe
- A bribe giver may be subject to: (i) up to five years imprisonment; and (ii) a fine of up to KRW30 million (approx. US\$25,033)

<p><b>Penalties for companies</b></p>	<p>For bribing a domestic public official: Under the Graft Act, companies may be jointly liable for their employees’ violations and may be subject to a fine of up to KRW30million (approx. US\$25,033), unless the company has shown “due attention and supervision” to prevent the violation in question</p> <ul style="list-style-type: none"> <li>• For bribing a foreign public official: Companies may be jointly liable for their employee’s violation and may be subject to a fine of up to KRW1 billion (approx. US\$834,452). If the pecuniary advantage derived from the bribe exceeds KRW500 million (approx. US\$417,226), the fine is twice the pecuniary advantage received. However, a company is not liable for the foreign bribery offences committed by its employees if it proves it has shown “due attention and supervision” to prevent the violation in question</li> </ul>
<p><b>Collateral consequences</b></p>	<ul style="list-style-type: none"> <li>• Any benefits given to public officials or persons who knew about the bribery are forfeited. If the benefits cannot be forfeited, an equivalent amount is to be recovered from the bribe receiver</li> <li>• Under the Contracts to Which the State is a Party Act, a company can be debarred from government procurement contracts for up to two years if an employee has, in relation to the bidding, conclusion or execution of a contract with a government authority, offered a bribe to a public official of such authority</li> <li>• The Defence Acquisition Program Act has a similar provision with respect to defence procurement contracts, which restricts a company’s participation in bidding and execution of contracts with a government authority for up to five years</li> <li>• The Framework Act on Construction Industry similarly contemplates administrative sanctions such as suspension of business for up to one year and an administrative fine of up to KRW1 billion (approx. US\$834,452) when a constructor provides or receives an economic benefit in response to an improper request</li> </ul>
<p><b>Anti-corruption treaties</b></p>	<ul style="list-style-type: none"> <li>• United Nations Convention against Corruption</li> <li>• OECD Convention on Bribery of Foreign Public Officials in International Business Transactions</li> <li>• Member of the Financial Action Task Force</li> </ul>

**What is the definition of a bribe?**

There is no explicit definition of a “bribe” in the Criminal Code. However, the term has been interpreted broadly to cover any valuable advantages received by the recipient and therefore includes money as well as other types of tangible and intangible advantages, such as gifts and acts of hospitality. Under the Criminal Code and the Specific Crimes Act, a domestic public official who solicits, promises to accept or accepts a bribe in connection with his duties may be subject to a criminal

sentence. An individual who gives, offers or promises to give, a bribe to a domestic public official may also be charged with a criminal offence.

The Graft Act makes it a criminal offence for a domestic public official to receive an amount exceeding: (i) KRW1 million (approx. US\$834) or its equivalent at one time; or (ii) KRW3 million (approx. US\$2,503) or its equivalent per annum, regardless of whether there is a link to their duties. Domestic public officials are also entirely prohibited from accepting,

requesting, or promising to accept cash or benefits in connection with their duties, even below the above-mentioned threshold. The Graft Act provides for certain exceptions to the prohibition of the receipt of money or valuables, such as: (i) for food and drink, KRW30,000 (approx. US\$25); (ii) for gifts (excluding agricultural products or processed goods with more than 50% of agricultural content), KRW50,000 (approx. US\$41); (iii) gifts that are agricultural products or processed goods with more than 50% of agricultural content, KRW100,000 (approx. US\$83), temporarily relaxed to KRW200,000 (approx. US\$166) before and after recent Korean traditional holidays; and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$41), except in case of condolence flowers, up to KRW100,000 (approx. US\$83). Additionally, the Graft Act prohibits the “improper solicitation” of a domestic public official’s influence. The Graft Act sets out 15 forms of improper solicitation which are prohibited irrespective of whether there is any benefit offered or received in connection with it.

The CoC closely follows the Graft Act in this regard, although the monetary thresholds for exceptions are to be determined by the relevant government authority to which the public official belongs. Under the CoC, only domestic public officials (and not the bribe giver) are punishable via disciplinary action.

## What is the definition of a public official and a foreign public official?

### Domestic Public Official

Although the Criminal Code does not define “public official”, it is commonly understood to include any employee of a government entity such as a government agency or ministry. In addition, specific statutes provide that certain individuals are deemed to be public officials (Deemed Public Officials) under anti-corruption law. For example, the maximum criminal sentence imposed by the Criminal Code on arbitrators who receive bribes is the same as that imposed on domestic public officials. The Specific Crimes Act considers managers of

government-controlled organisations or companies to be Deemed Public Officials and provides a list of specific entities falling under the category of government-controlled organisations or companies. An organisation or company is generally “government-controlled” if the amount of the paid-in capital invested by the government exceeds 50%, or the government is able to exercise substantial control over the organisation through statutory supervision or as a shareholder. Moreover, there are a number of provisions under construction-related legislation, e.g., the Construction Technology Promotion Act, the Building Act, the National Land Planning And Utilization Act, etc., which dictate certain individuals involved in the construction project such as the construction supervisor and proposal review committee members should be deemed to be public officials for the purposes of bribery provisions of the Criminal Code.

The Graft Act expands the meaning of “public official” to include not only public sector employees such as government officials and covered employees of state-owned entities, but also employees of certain public and private schools, such as those established under the Elementary and Secondary Education Act, the Higher Education Act, the Early Childhood Education Act and the Private School Act as well as employees of media companies covered by Article 2(12) of the Act on Press Arbitration and Remedies Etc. for Damage Caused by Press Reports, regardless of whether there is any state ownership or control. The Graft Act, which prohibits the receipt of bribes by domestic public officials, also prohibits the receipt, request or promise to receive bribes by the spouse of a public official in connection with his or her official duties.

### Foreign Public Official

Under the Foreign Bribery Act, the scope of a “foreign public official” is broad and includes: (i) a person who provides a legislative, administrative or judiciary service for a foreign government; (ii) a person to whom a business of a foreign government was delegated; (iii) a person who works for a public

statutory institution/organisation; (iv) a person who works for a corporation in which the investment made by a foreign government accounts for more than 50% of the paid-in capital, or which is controlled by a foreign government; and (v) a person who works for a public international organisation. Under the Foreign Bribery Act, the acts of giving, offering or promising a bribe to a foreign public official for the purposes of obtaining an improper benefit in connection with international commercial transactions are all punishable.

### **Is private sector bribery covered by law?**

Yes, the Criminal Code prohibits the giving of economic benefits to, and accepting of such economic benefits by, a person who is entrusted with conducting the business of either an individual or a legal entity, if such benefits are related to an improper request made in connection with their duties.

In principle, the difference between private sector bribery and public sector bribery is the requirement of proof of an “improper request”: whereas the request must amount to a crime of bribery in the private sector (e.g., a request to award a bid in exchange for cash), this is not necessarily required for public sector bribery (so long as the economic benefits are connected to the public official's duties (Criminal Code) or above a certain threshold amount (Graft Act)). However, in practice, the courts have not strictly insisted on this requirement being satisfied in recent private sector bribery cases.

The Specific Economic Crimes Act also expressly prohibits the giving, offering and promising of unlawful economic benefit to, and soliciting of, accepting of or promising to accept such unlawful economic benefit by the employees of financial institutions. A “financial institution” includes both government-controlled as well as private financial institutions, including commercial banks, securities companies, etc. The Specific Economic Crimes Act does not require that an improper request be made.

Pursuant to the Framework Act on the Construction Industry, if a constructor provides or receives an economic benefit in

response to an improper request, that constructor shall be punished by imprisonment for a term of not more than five years, or a criminal fine not exceeding KRW50 million (approx. US\$41,722).

### **Does the law apply beyond national boundaries?**

It is generally understood that South Korean anti-corruption laws do not have an extra-territorial effect. They are only applicable to the crimes committed by Korean nationals (regardless of where the crimes occur) and/or in Korea (regardless of the nationalities of the persons/entities who commit the crimes).

### **How are gifts and hospitality treated?**

There is no statutory provision which distinguishes between gifts/hospitality and bribes. The Graft Act and the CoC set out certain exceptions that are not deemed to be bribes, which include:

- transportation, accommodation and meals which are provided by the host of official events to all of its attendees, provided that such event is related to the recipient's official duties;
- items of value provided by relatives;
- promotional items or souvenirs that are distributed to numerous and unspecified persons;
- cash and valuables provided in order to aid a public official who is in under a financial strain due to a disease or a disaster; and
- otherwise such gifts/hospitality within socially acceptable boundaries.

Under the Graft Act, meals, gifts and other hospitality up to the following values are generally permissible: (i) for food and drink, KRW30,000 (approx. US\$25); (ii) for gifts (excluding agricultural products or processed goods with more than 50% of agricultural content), KRW50,000 (approx. US\$41); (iii) gifts that are agricultural products or processed goods with more than

50% of agricultural content, KRW100,000 (approx. US\$83), temporarily relaxed to KRW 200,000 (approx. US\$166) before and after recent Korean traditional holidays; and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$41), except in the case of condolence flowers, up to KRW100,000 (approx. US\$83).

In addition to these general rules, there are some specific business sector regulations allowing for exceptions to the prohibition of giving or accepting benefits under certain conditions. The regulated business sectors include pharmaceutical and healthcare (Medical Service Act), Insurance (Insurance Business Act), financial investment (Financial Investment Services and Capital Markets Act) and defence (Code of Conduct of the Acquisition Program Administration).

### **How is bribery through intermediaries treated?**

Under the Graft Act, the influencing of a domestic public official through a third party is prohibited. A person who influences a public official through a third party is subject to a fine not exceeding KRW10 million (approx. US\$8,344).

Under the Criminal Code and the Specific Crimes Act, a domestic public official is prohibited from directing a bribe to a third party upon acceptance of an unjust request in connection with his or her duties. This offence is punishable with up to five years imprisonment.

Furthermore, if an instigator gives a bribe to an intermediary to deliver to a domestic public official on behalf of the instigator, both the instigator and the intermediary are punishable by the same penalties applicable to a bribe giver without any intermediaries under the Criminal Code. Whether or not the bribe is actually delivered to the public official will not affect the statutory penalties applicable to the instigator. Knowledge of the specific acts of the intermediary is not a required element of the bribery; the instigator's act of instructing the intermediary to deliver the bribe will be sufficient. Where no directions were

given by the instigator, it is generally understood that a person with the knowledge of such acts may be liable as an accomplice to the offence of bribery and may be liable for up to half of the maximum penalties for the offence of bribery.

In relation to foreign public officials, the Foreign Bribery Act itself does not contain specific regulations concerning payments through intermediaries. However, in light of court precedents involving domestic public officials which have focused on whether the domestic public official can be deemed to have received the payment based on the relationship between the third party and domestic public official, similar concepts are likely to apply to bribery of foreign public officials.

### **Are companies liable for the action of their subsidiaries?**

Companies will not be held liable for the action of their subsidiaries in cases of bribing domestic public officials.

As for bribing foreign public officials, companies will not be liable for the actions of their subsidiaries unless the parent companies are directly involved in the criminal conduct or the subsidiary acted as an agent or intermediary for the benefit of the parent company.

### **Is there an exemption for facilitating payments?**

No, facilitation payments are not permitted. Under the Foreign Bribery Act there is no exemption for facilitation payments, however, payments permitted or required under written law in the foreign official's country are exempt from being considered a bribe.

### **Is there a defence of having adequate compliance procedures?**

Yes. Under the Foreign Bribery Act the company which employed or appointed the individual will not be found guilty if the company had exercised reasonable care and supervision in order to prevent the commission of offence. The efforts made

by the company to prevent criminal acts from being committed will be considered. Additionally, under the Graft Act if a company has shown “due attention and supervision” to prevent a violation of the Graft Act by its employee or agent the company will not be liable. It is likely that Korean courts will carefully examine the company’s internal compliance programme (or lack thereof) when determining if reasonable care, due attention and supervision has occurred, even if, strictly speaking, having such a programme in place would not necessarily exempt the company from criminal liability.

Although not directly related to anti-corruption, on 11 November 2021, the Supreme Court ruled that the board members of a company can be liable for failing to establish a proper internal compliance program for monitoring the acts of a company’s directors in a shareholder derivative lawsuit. In this case, the Korea Fair Trade Commission imposed large administrative fines against the company for its involvement in market collusion practices. In this context, Korean corporations are increasing their efforts to implement and strengthen their compliance programs.

### **What are the enforcement trends in the business area?**

Since coming into force on 28 September 2016, the Graft Act has brought significant change to the regulatory landscape. It has done this through introducing what is effectively a strict liability offence where the mere receipt of KRW1 million (approx. US\$834) (or KRW3 million (approx. US\$2,503) over a year) is a criminal offence and there is no need to show a connection between the bribe and a domestic public official’s performance of their duties. This has drastically increased awareness of, and compliance with, anti-corruption laws and made anti-corruption a matter of sustained public debate and focus. Many Korean companies are now, for the first time, actively policing their anti-corruption or anti-bribery policies and compliance programmes or rapidly introducing them where these policies and programs did not already exist. It is also indicative of what is an avowed effort by the South Korean government to combat bribery.

Since its introduction, we have not seen any major successful prosecution actions under the Graft Act. Between September 2016 and December 2020, approximately 10,735 violations of the Graft Act were reported. To date, most violations of the Graft Act have resulted in minor fines. For example, a parent and interviewer were ordered to pay an administrative fine of KRW12 million (approx. US\$10,013) and a criminal fine of KRW3 million (approx. US\$2,503), respectively after the parent, working at a public institution, asked the interviewer to favorably evaluate his/her child who was eventually hired at the same public institution.

Although there is yet to be a major case brought under the Graft Act since its introduction, the combined effects of the new law and recent enforcement actions have already left their mark on Korean business culture. Popular dining and nightlife spots have seen a significant decline in business, and it is commonly observed that public officials are increasingly wary of parties proffering gifts and entertainment.

Another notable high-profile corruption case was that of Lee Jae-yong, vice chairman of Samsung Electronics, who was sentenced to two and a half years in jail without probation for providing KRW8.6 billion (approx. US\$7,176,294) in company money to Park Geun-hye, former president of Korea, and her confidante Choi Seo-won (formerly known as Choi Soon-sil) in exchange for his smooth succession as the head of Samsung. Samsung created an independent compliance committee in February 2020 following the Seoul High Court’s orders to prevent ethical and legal lapses. Lee Jae-yong was released on parole on 13 August 2021.

In terms of legislative developments, the National Assembly recently passed the Act on the Prevention of Conflict of Interest in Public Office, which prevents and manages conflict-of-interest situations that may be faced by public officials, and eradicates pursuits of improper private interests, in force from May 2022.

A blurred, light-colored sun emblem with rays, centered in the upper left quadrant of the blue field.

**TAIWAN -  
ANTI-CORRUPTION  
LEGISLATION**



# ANTI-CORRUPTION LEGISLATION IN TAIWAN CONTRIBUTED BY LCS & PARTNERS

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>• Criminal Code</li><li>• Anti-corruption Act</li><li>• Money-Laundering Control Act</li><li>• Public Officials' Honest and Upright Guidelines</li></ul>
<b>Private sector bribery</b>	Not criminalised but may constitute other crimes punishable under the Criminal Code or other laws
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	None
<b>Penalties for individuals</b>	<ul style="list-style-type: none"><li>• For active bribery, the penalty depends on whether the requested activity violates the public official's duties, regardless of whether such public official takes any action to fulfil the requests of the bribe. If the bribe is paid to induce a violation of the public official's duties, the penalties are imprisonment of one to seven years and a fine of up to TWD3 million (approx. US\$107,900). If the bribe is paid to induce an act or an abstention that does not violate the public official's duties, then the penalties are imprisonment for up to three years or criminal detention and/or a fine of up to TWD500,000 (approx. US\$18,000)</li><li>• For passive bribery by a public official, the penalty depends on whether the requested activity violates the official's duties, regardless of whether the official actually takes any action to fulfil the request or receives the bribe. If the bribe is in exchange for a violation of the public official's duties, the penalties for the official are imprisonment of no less than ten years to life and a fine of up to TWD100 million (approx. US\$3.597 million). If the bribe is in exchange for an act or an abstention that does not violate the public official's duties, the penalties are imprisonment for no less than seven years and a fine of up to TWD60 million (approx. US\$2.158 million). If the bribe is for a public official who is in charge of investigations, prosecutions or the trial of a case, the penalty shall be increased by 50%</li></ul>

<p><b>Penalties for individuals</b></p>	<ul style="list-style-type: none"> <li>• Any person who is sentenced to a term of imprisonment under the Anti-Corruption Act will be deprived of his or her civil rights for a certain period</li> <li>• If a legitimate source of property or valuables (acquired up to three years after the act of bribery was committed) held by the receiver of the bribe, his or her spouse, or their children under the age of 20, cannot be established, the property and valuables will be deemed the proceeds of bribery and confiscated</li> </ul>
<p><b>Penalties for companies</b></p>	<p>No penalties for companies are specified under the Criminal Code and the Anti-Corruption Act but violations of other laws are possible, depending on the specific activity</p>
<p><b>Collateral consequences</b></p>	<p>A bribery offence can also result in a money laundering offence under the Money-Laundering Control Act. A person may be sentenced to imprisonment of up to seven years and fined up to TWD5 million (approx. US\$179,800) if he or she commits or attempts to commit money-laundering, defined as follows:</p> <ul style="list-style-type: none"> <li>• knowingly disguises or conceals the origin of the proceeds of bribery, or transfers or converts such proceeds to help others avoid criminal prosecution</li> <li>• disguises or conceals the nature, source, movement, location, ownership, right of disposition or other rights and interests of the proceeds of bribery</li> <li>• accepts, obtains, possesses or uses the proceeds of bribery committed by others</li> </ul> <p>The proceeds of bribery refers to any property or any other financial interests acquired or converted from the bribery and any yields derived therefrom</p> <p>The property or property interests transferred, converted, concealed, obscured, accepted, obtained, possessed or used in such money-laundering will be confiscated. If the confiscation of all or part of the above property or property interests cannot be enforced, an amount equivalent to the value of the same shall be levied.</p>
<p><b>Anti-corruption treaties</b></p>	<ul style="list-style-type: none"> <li>• APEC Anti-Corruption and Transparency Working Group</li> <li>• Complementary Anti-Corruption Principles for the Public and Private Sectors, 2007</li> <li>• APEC Guidelines on Enhancing Governance and Anti-Corruption, 2009</li> <li>• APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws and the General Elements of Effective Voluntary Corporate Compliance Programmes, 2014</li> </ul>

## What is the definition of a bribe?

With respect to a bribe receiver, bribery occurs when a public official demands, solicits, receives, accepts or agrees to receive or accept any bribe or other unjust enrichment in return for actions or abstentions that are in connection with his or her official duties.

As for a bribe giver, bribery occurs when a person tenders, promises to give or gives a bribe or other unjust enrichment to a public official in return for that official's actions or non-actions that are in connection with his or her official duties.

The term “bribe” is not statutorily defined. Both bribes and unjust enrichment are considered bribes under the Criminal Code and the Anti-corruption Act, and are determined by the court on a case-by-case basis without any de minimis threshold. According to Taiwanese courts, a bribe refers to money or any property that has monetary value and unjust enrichment refers to any tangible and intangible interests that can meet one's needs or satisfy one's desires, which is not limited to economic interests (for example, food, sexual hospitality or the discharging of a debt).

When determining whether bribery has occurred, the court will take into consideration the intent of the bribe giver, the underlying actions of the public official, the relationship between the giver and receiver, the types and value of the bribe, the timing of the gratification, etc.

## What is the definition of a public official and a foreign public official?

### Domestic public official

The term “public official” is defined under the Criminal Code. It refers to persons:

- serving an organisation of the state or a local
- self-governance body with statutory function and authority and others engaged in public affairs with statutory function and authority; or

- entrusted by an organisation of the state or a self-governance body in accordance with the law to handle the public affairs that fall within the authority of the organisation.

The personnel of a state-owned institution would not necessarily be considered a public official unless he or she is engaged in public affairs according to the law, with a statutory function and authority or he or she is engaged according to the law in the discharge of trusted public affairs. For example, if an employee of a state-owned enterprise conducts procurement under the Government Procurement Act, he or she is considered a public official.

Prior to becoming a public official, if a person demands, solicits, receives, accepts or agrees to receive or accept any bribe or other unjust enrichment in return for actions or abstentions that are in connection with his or her future official duties and thereafter fulfils the requests of the bribe, he or she will be punished as a public official.

A non-public official who joins, solicits or aids a public official in a bribery offence shall be considered a principal offender or solicitor or accessory, but the punishment imposed on such person may be reduced.

### Foreign public official

Although the Anti-Corruption Act, when applicable, punishes active bribery of a public official from a foreign country under certain circumstances (including cross-border trade, investment or other commercial activities), there is no definition of foreign public official under Taiwanese law. The Anti-Corruption Act does not punish passive bribery by a foreign public official but other criminal laws will apply.

## Is private sector bribery covered by the law?

No, private sector bribery is not currently criminalised. However, a company's employees, representatives, and managers have the duty of candour and honesty and cases of private sector

bribery may be punishable under the Criminal Code or other laws for breach of that duty.

## Does the law apply beyond national boundaries?

Yes, both the Criminal Code and the Anti-Corruption Act apply beyond national boundaries.

- The Criminal Code applies to public officials committing a bribery offence outside Taiwan. Accordingly, a Taiwanese public official is punishable under the Criminal Code and the Anti-corruption Act for bribes inside and outside the territory of Taiwan. Any person giving a bribe to Taiwanese public officials or any Taiwanese giving a bribe to foreign officials (with respect to cross-border trade or investment or other commercial activities), regardless of whether such bribery occurs inside or outside of the territory of Taiwan, shall be punishable under the Anti-Corruption Act, regardless of whether such action is punishable under the law of the jurisdiction where the crime was committed.

## How are gifts and hospitality treated?

The term “bribe” is not statutorily defined, therefore gifts and hospitality might constitute a bribe or unjust enrichment if they are paid to public officials in return for their actions or non-actions in connection with their official duties.

The “Governmental Public Officials’ Honest and Upright Guidelines” (the “Guidelines”) set out the standards of gifts and hospitality that public officials can or cannot accept.

According to the Guidelines, it will be assumed that a gift was received by the public official if it was:

- received in the name of the public official’s spouse, lineal relatives or residence and property sharing family members; or
- given indirectly through a third party to the public official, his or her spouse, lineal relatives or residence and property sharing family members.

A public official should not demand, solicit or accept gifts from people with whom he or she has interests that are connected with his or her official duties, except in certain limited circumstances as set out below:

- civil etiquette;
- bonuses, aid or consolation money from his or her supervisor;
- a gift for an individual public officer with market price in an amount no more than TWD 500 (approx. US\$18), or, for multiple public officers in an organization, a gift with market price in an aggregate amount of no more than TWD 1,000 (approx. US\$36); or
- a gift received by reason of an engagement, marriage, birth, moving to a new residence, inauguration, promotion or transfer, retirement, resignation or injury, sickness or death of a public officer, his or her spouse or intimate relatives and does not exceed the normal standard of social etiquette (i.e. the value of a gift in an amount no more than TWD3,000 (approx. US\$ 108) and the value of the gifts given from the same source within the same year in an amount no more than TWD10,000 (approx. US\$360)).

As for gifts from people with whom he or she does not have interests and who are not his relatives or friends of usual contact, the value of the gifts may not exceed TWD3,000 (approx. US\$108) and the gifts must be given in the ordinary course of social interaction. In addition, the value of the gifts given from the same source within the same year may not exceed TWD10,000 (approx. US\$360). Otherwise, the public official must report receiving such gifts to his or her supervisor.

As for hospitality, a public official may not attend social gatherings with people with whom he or she has interest in relation to his or her duty except for certain limited exceptions as follows:

- the attendance is required due to civil etiquette;

- the event is held in relation to a traditional festival and is open to the public;
- bonuses or recognition from his or her supervisor; or
- the event is held for an engagement, marriage, birth, moving to a new residence, inauguration, promotion or transfer, retirement or resignation and does not exceed the normal standard of social etiquette (i.e., the value of a gift in an amount no more than TWD3,000 (approx. US\$ 108) and the value of the gifts given from the same source within the same year in an amount no more than TWD10,000 (approx. US\$360)).

Public officials must refrain from attending social gatherings with people with whom they do not have interest concerning their duties if their attendance is not appropriate considering their position and public duties.

### **How is bribery through intermediaries treated?**

To be held liable for bribery through intermediaries, the principal must have an intentional liaison and act in participation with the intermediaries. Therefore, to impute intermediaries' action to the principal, the latter must have knowledge of the bribery and have participated in the criminal acts, for example, providing the funding, etc.

### **Are companies liable for the actions of their subsidiaries?**

Taiwan legislation does not expressly provide for the liability of parent companies for the actions of their subsidiaries in connection with bribery and the issue will be decided by the court on a case-by-case basis.

### **Is there an exemption for facilitation payments?**

No, there is no exemption for facilitation payments.

### **Is there a defence for having adequate compliance procedures?**

Taiwan legislation does not have any provisions similar to the UK Bribery Act's adequate compliance procedures defence.

### **What are the enforcement trends in the business area?**

In 2015, the Act to Implement the United Nations Convention against Corruption (UNAC) was passed and took effect in Taiwan. In accordance with the UNAC, the government is obligated to take measures to prevent corruption involving the private sector. The National Congress on Judicial Reform held in March 2017 reiterated the same position, concluding that it is necessary to criminalise private sector bribery (a bribe paid by a private sector entity to another private sector entity).

The authorities are considering whether to amend legislation to put this into effect. Separately, back in 2013, legislators in Taiwan proposed the "Prevention of Bribery in the Private Sector Act" with the intention of criminalising private sector bribery. If it is enacted, private sector bribery will be criminalised in Taiwan.

**THAILAND -  
ANTI-CORRUPTION  
LEGISLATION**



# ANTI-CORRUPTION LEGISLATION IN THAILAND

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### Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"> <li>• Thailand Criminal Code (Criminal Code)</li> <li>• Organic Act On Anti-Corruption B.E. 2561 (2018) (Organic Act)</li> <li>• Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) (Act on the Submission of Bids)</li> </ul>
<b>Private sector bribery</b>	Only in relation to submissions of bids to government agencies
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No, unless it is on an ethical basis and under the criteria and amounts prescribed by laws
<b>Defences</b>	No
<b>Penalties for individuals</b>	<ul style="list-style-type: none"> <li>• For active bribery - Imprisonment for a term not exceeding 5 years or a fine of not exceeding THB100,000 (approx. US\$3,100), or both</li> <li>• For passive bribery - Imprisonment for a term of 5 - 20 years or life imprisonment and a fine of THB100,000 – 400,000 (approx. US\$3,100 – 12,400)</li> </ul>
<b>Penalties for companies</b>	<p>Under the Criminal Code, companies would receive the same punishment as an individual if a representative of the company commits an offence under the scope of his or her authority within the company.</p> <p>Moreover, under the Organic Act, in cases where the offence was committed by a person associated with the company and for the benefit of such company, and provided that the company does not have appropriate internal control measures in place, the company shall be liable to a fine of one to two times the damage caused or benefit received.</p>
<b>Collateral consequences</b>	All properties relating to the commission of the offence shall be forfeited, except for the properties that belong to a third party, who is not involved in the commission of the offence
<b>Anti-corruption treaties</b>	United Nations Convention against Corruption

### What is the definition of a bribe?

There is no definition of a bribe under Thai law. However, according to Section 144 of the Criminal Code and Section 176 of the Organic Act, bribery is an offence, as constituted by law, in which there is an act of grant, an offer to grant, or a promise to grant any property or benefit to a public official to induce such person to wrongfully perform, not perform or delay the performance of their duty.

The act of active bribery does not have a minimum threshold, and it also includes the giving of any kind of property or benefit to public officials. The offence of bribery would also be deemed to have been committed as soon as the giver offers or promises to give a bribe to a public official.

In terms of passive bribery, Section 149 of the Criminal Code and Section 173 of the Organic Act state that a public official, foreign public official, or official of a public international organisation who accepts or agrees to accept any property or benefit for themselves, or for any person, to perform or not to perform any duty of his or her office, regardless of whether such act is wrongful, would be liable for passive bribery.

While the Criminal Code contains statutes on general crime and offences in Thailand which include the offence of bribery, the Organic Act is a specific statute on the prevention and suppression of corruption in Thailand and is enforced by the Office of the National Anti-Corruption Commission (NACC), which is an independent organisation established under the Constitution to prevent and suppress corruption in Thailand. The current Organic Act came into effect on 22 July 2018 and is the latest version of the law on anti-corruption; it contains numerous changes in order to increase compliance with the United Nations Convention against Corruption treaty (UNCAC), to which Thailand is a party.

The Organic Act has expanded the range of bribery from bribing a public official to also include bribing a foreign public official and an official of a public international organisation.

### What is the definition of a public official and a foreign public official?

As the Organic Act is the specific legislation on anti-corruption, in the context of anti-corruption law, the definition of a public official and a foreign public official can be found in the Organic Act as follows:

- (i) “public official” means:
  - (a) a state official, who is a government official or a local official holding a position or receiving a regular salary; a person performing duties in a state agency or a state enterprise; a local administrator; a deputy local administrator; an assistant local administrator and a member of a local assembly; an official under the law on local administration or any other official as provided by the law, which includes a member of a Board/ Commission/Committee or of a Sub-Commission/Sub-Committee; an employee of a government agency, state agency or state enterprise and a person or group of persons permitted by law to exercise or be assigned to exercise the administrative power established under the government system, state enterprise or other state administration; however, it shall not include a person holding a political position, a judge of the Constitutional Court, a person holding a position in an independent organisation, or the committee of the NACC;
  - (b) a person holding a political position;
  - (c) a judge of the Constitutional Court;
  - (d) a person holding a position in an independent organisation; and
  - (e) the committee of the NACC.
- (ii) “foreign public official” means any person holding a legislative, executive, administrative or judicial office of a foreign country, and any person performing duties for a foreign country, including for a public agency or public enterprise, whether appointed or elected, permanent or temporary, and whether receiving salary or other remuneration or not.

## Is private sector bribery covered by the law?

There are no general criminal laws for private sector bribery in Thailand.

However, the Act on the Submission of Bids governs the private sector on the submission of proposals to acquire the right to enter into a contract with a state agency and prevents the private sector from bidding in collusion with others. It also criminalises the act of bribing another person for the purpose of a bid which confers a benefit on any person in the form of a right to enter into a contract with a state agency, or to induce such person to submit a higher or lower bid than the standard price.

The penalty for private sector bribery under the Act on the Submission of Bids is imprisonment for a term of between one year and five years, and a fine of 50% of the highest bid price submitted by the joint offenders or of the value of the contract that has been entered into with the state agency, whichever is higher.

## Does the law apply beyond national boundaries?

In general, criminal laws apply to offences committed within the Kingdom of Thailand. However, if any offence is partially committed within Thailand, or the consequence of the commission of such offence, as intended by the offender, occurs within Thailand, or the consequence of the commission would occur within Thailand by nature, or it can be foreseen that the consequence would occur within Thailand, such offence shall be deemed to have been committed within Thailand. This includes the preparation or an attempt to commit such crime, even where the preparation or attempt occurs outside of Thailand. Similarly, a co-principal, supporter, or instigator, as defined in the Criminal Code, would be deemed liable where the act of being a co-principal, supporter, or instigator is committed outside of Thailand.

Moreover, Section 140 of the Organic Act states that if an offence is committed against a person of Thai nationality or a

public official, even though the offence is committed outside the Kingdom, the offender shall be liable to punishment in the Kingdom.

In addition, the NACC has the power to conduct an inquiry and form an opinion or make a decision in accordance with the Organic Act. In this regard, under the Organic Act, the NACC has power over a person who commits the offence of bribery outside of Thailand.

However, the NACC cannot exercise its power over a person or juristic person outside of its jurisdiction freely. It is only able to do so in accordance with the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992) (Mutual Assistance Act), which is the law on cooperation between states in criminal matters.

According to the Mutual Assistance Act, if a local authority in Thailand requires documents or evidence from another country, it will be processed through the Office of the Attorney-General, which will prepare a request for assistance from the relevant country. The request will then be submitted to the Ministry of Justice of the relevant country.

## How are gifts and hospitality treated?

Gifts and hospitality are not treated as bribes in Thailand, and a person is not liable for giving gifts and hospitality. However, a public official, as well as a person who has vacated a public office for less than two years, cannot receive gifts and hospitality unless they fit the criteria for legal exceptions.

According to the Organic Act and the Notification of the NACC on the provisions of the acceptance of property or any other benefit on an ethical basis by State officials B.E. 2563 (2020), public officials can receive a gift or hospitality only if:

- (i) it is an asset or other benefit received from ancestors, heirs or relatives in accordance with custom or on an ethical basis, however, it must be within the appropriate amount;
- (ii) an asset or other benefit received from an unrelated person is worth less than THB3,000 (approx. US\$90); or
- (iii) an asset or other benefit is given to people in general.

If a public official receives an asset or other benefit worth more than THB3,000 or is outside of the legal exceptions, such person must report the matter to his or her superior to decide whether it is appropriate to keep such gift.

### **How is bribery through intermediaries treated?**

If any person or juristic person gives a bribe through an intermediary, such person can be liable for bribery as the deemed instigator of the bribery.

According to the Criminal Code, an instigator is a person who employs, forces, threatens, hires, asks for a favour from, or instigates another person, or by any other means, causes another person to commit any offence. Therefore, by giving a bribe through an intermediary, the person who employs such person would be deemed liable as the instigator of the bribery.

Regarding the penalty for the instigator, if the employed person carried through and committed the offence, the instigator will be subject to the same punishment as the employed person. If the employed person does not consent to commit or has not yet committed the offence, the instigator shall be liable to only one-third of the punishment for such offence.

Moreover, if the intermediary is a person who demands, accepts or agrees to accept any property or benefit for himself or herself, or for any other person, in return for giving a bribe, such person would be liable as the intermediary under Section 143 of the Criminal Code. If such person gave the bribe, they would also be liable for active bribery under Section 144 of the Criminal Code.

### **Are companies liable for the actions of their subsidiaries?**

In general, a company will be held liable if a representative of the company commits an offence under the scope of his or her authority within the company. However, since subsidiaries are considered separate entities from the parent company, the

actions of the subsidiaries are separate from those of the parent company.

Notwithstanding, according to the Organic Act, a parent company can be held liable for the action of a person who is associated with the parent company, e.g., a representative, employee, agent, or affiliated company, or any person acting for or on behalf of such juristic person if:

- (i) a person who is associated with the juristic person gives, offers to give, or promises to give any property or benefit to a public official, foreign public official, or official of a public international organisation, with the intent to induce such person to wrongfully perform, not perform or delay the performance of any duty of his or her office;
- (ii) the action was taken for the benefit of such juristic person; and
- (iii) such juristic person does not have in place appropriate internal control measures to prevent the commission of such offence.

In this regard, the juristic person will be deemed to have committed the offence of bribery under the Organic Act and shall be liable to a fine of one to two times the damage caused or benefit received.

### **Is there an exemption for facilitating payments?**

The act of giving facilitating payments is not criminalised in Thailand. The Criminal Code states that bribery is an act of giving a bribe to a public official to wrongfully perform, not perform or delay the performance of any duty of his or her office. Therefore, if the facilitating payments are for the public official to perform his or her duty normally, the giver would not be liable for such action.

However, the public official who received such facilitating payments could be liable for such action, as the Criminal Code and the Organic Act do not permit public officials to accept any

property or benefit for themselves to perform any duty, regardless of whether such performance is wrongful according to their duty.

### **Is there a defence for having adequate compliance procedures?**

In general, a company can be held liable if a representative of the company gave a bribe under his or her scope of authority of the company, even where the company has in place compliance procedures or an internal policy on anti-corruption.

However, when bribery is committed by an employee, or a person associated with the company, Section 176 Paragraph 2 of the Organic Act states that a juristic person can be guilty of the bribery offence if the action was committed by a person associated with the juristic person and was taken for the benefit of the juristic person, and the juristic person did not have appropriate internal control measures.

Accordingly, having and applying an internal policy on anti-corruption may benefit a company when bribery is committed by a person associated with the company.

### **What are the enforcement trends in the business area?**

Corruption is one of the main socio-political issues in Thailand. Thailand has been focusing on anti-corruption for many years, and anti-corruption is one of the current National Strategies. 2022 is a particularly significant year for anti-corruption in Thailand as Thailand hosted the 2022 Asia-Pacific Economic Cooperation (APEC) meeting in June 2022, and has highlighted anti-corruption as one of its main priorities with the current APEC members.

In this regard, the NACC has hosted annual meetings with the Anti-Corruption and Transparency Experts Working Group, an established Anti-Corruption Task Force of APEC, and its subsidiary body, the Network of Anti-Corruption Authorities and Law Enforcement Agencies to strengthen relationships and build

efficient cross-border cooperation between the APEC members, as well as to share experiences, case studies, investigative techniques, investigative tools, and effective practices for the prevention and suppression of crimes relating to anti-bribery and corruption.

In addition, Thailand established specific organisations for the enforcement of anti-corruption laws, which are the NACC and the Public Sector Anti-Corruption Commission (PACC), with the purpose of preventing and suppressing crime relating to corruption in Thailand, including investigating corruption and enforcing the anti-corruption laws. Thailand also established a specialised court for corruption cases in 2016, called the Criminal Court for Corruption and Misconduct Offences, to deal with the large number of cases relating to corruption in Thailand. However, Thailand's attempts at anti-corruption have not yet been completely successful despite these efforts. According to the Corruption Perception Index by Transparency International, Thailand scored 35 out of 100 points on the index in 2021, placing it 110 out of 180 countries.

Based on the statistics of crimes reported to the NACC and the PACC, corruption cases relating to bidding for contracts with state agencies are the second most reported type of cases in Thailand. Cases relating to wrongful acts of officials in the performance of their duties are the most reported type of case.

Nonetheless, the NACC has made an effort to improve anti-corruption policy, including introducing a time limit to complete inquiries and form an opinion or reach a decision on each case to speed up the investigation. In addition, the NACC established the Corruption Deterrence Center (CDC) to focus on the prevention of corruption and to raise awareness of corruption in Thailand, by collecting information and reporting any clues and risks of corruption in government agencies and private entities in Thailand and foreign countries. The CDC also keeps watch for, monitors and analyses possible crime relating to corruption, and cooperates with the NACC to assist with investigations.

The image features a solid red background with a large, bright yellow five-pointed star centered on the right side. The star is slightly offset to the right, with its left edge overlapping the text area. The text is white and bold, positioned on the left side of the image.

**VIETNAM -  
ANTI-CORRUPTION  
LEGISLATION**

# ANTI-CORRUPTION LEGISLATION IN VIETNAM CONTRIBUTED BY VILAF

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"> <li>• Penal Code</li> <li>• Law on Anti-Corruption 2018</li> <li>• Law on Cadres and Public Officials</li> <li>• Law on Public Employees</li> <li>• Decree 59 of the Government dated 1 July 2019 implementing the Law on Anti-Corruption 2018 (Decree 59)</li> <li>• Decree 130 of the Government dated 30 October 2020 on controlling asset and income of persons holding titles and powers in agencies, organizations and entities (Decree 130)</li> <li>• Law on dealing with Administrative Offences</li> </ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitation payments</b>	No
<b>Defences</b>	Certain circumstances are regarded as mitigating factors when determining penalties, but a robust compliance procedure is not an express mitigating factor
<b>Penalties for individuals</b>	<ul style="list-style-type: none"> <li>• Criminal penalties (including imprisonment of up to 20 years for giving a bribe and the death penalty for receiving a bribe)</li> </ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"> <li>• Criminal penalties are not applicable to companies under the Penal Code</li> </ul>
<b>Collateral consequences</b>	<ul style="list-style-type: none"> <li>• Individuals receiving a bribe may be dismissed from their official position and subject to debarment from opening or managing companies, or holding official posts for a certain period of time</li> <li>• Bribery assets may be confiscated</li> <li>• Possible revocation of official acts related to the bribe</li> </ul>
<b>Anti-corruption treaties</b>	United Nations Convention against Corruption

## What is the definition of a bribe?

A bribe is defined as: (i) money, an asset or other “material benefit” in any form, which has a value of VND2,000,000 (approx. US\$90) or more (or less than VND2,000,000 (approx. US\$90) if the bribe recipient was disciplined for the same offence or has a previous conviction for any corruption related crimes which have not been expunged); or (ii) “non-material benefit”, which is either provided, offered or promised to a person holding an official position or position of power “with the intent of taking advantage of his or her official position or power in order to perform or refrain from performing certain acts for the benefit of, or as requested by, the person who offers the bribe”. Case law suggests that a bribe under Vietnamese law can be with money, property or other material interests which have an economic value. The Penal Code does not provide any further explanation on what constitutes a non-material benefit

Active bribery (i.e., giving, offering and promising a gratification) and passive bribery (i.e., receiving bribes, soliciting or accepting a gratification) are both criminalised.

## What is the definition of a public official and a foreign public official?

### Domestic public official

The notion of “public officials” under the Law on Anti-Corruption 2018 means a person who is appointed, elected or recruited, or works under a contract or in another form, with or without receiving salaries, is assigned to perform a certain task or public duty and has a certain power while performing such task or duty. These persons include:

- Cadres: Vietnamese citizens elected, approved and appointed to hold official positions or titles for a given term of office in state agencies;
- Public officials: Vietnamese citizens recruited and appointed to ranks, positions or titles in state agencies with an indefinite term of office, leaders and managerial officials in

public non-business units of the state agencies, except professional officers working in the army and the public security forces;

- Public employees: Vietnamese citizens recruited under employment contracts to work in public non-business units, which provide public services (e.g., schools or hospitals);
- Professional officials working in the army and in the public security forces;
- Persons acting as representatives of state capital amount at enterprises
- Persons holding managerial titles or positions in enterprises or organizations including the owner of a private enterprise, unlimited liability partners, the chairman of amembers’ council, members of a members’ council, the chairman of a company, the chairman of the board of management, members of the board of management, the director or general director, and individuals holding other managerial positions as stipulated in the charter of acompany; and
- Persons assigned to exercise a duty or an official task and having such power.

### Foreign public official

The Penal Code stipulates that foreign public officials consist of foreign officials and officials of public international organisations, but does not provide a detailed definition of foreign public officials.

## Is private sector bribery covered by the law?

Through the adoption of the Penal Code, Vietnam has officially criminalised private sector bribery. In particular, a person holding a position or title in a company or non-governmental organisation: (i) who receives a bribe; or (ii) a person who offers a bribe to such person, could be prosecuted in the same manner as public sector bribery.

The Law on Anti-Corruption 2018 covers various corrupt acts in the private sector including property embezzlement, taking or giving bribery or bribery brokerage conducted by a person holding a position or having power in a company or non-governmental organisation to facilitate the operations of such company or organisation for self-seeking purposes.

### **Does the law apply beyond national boundaries?**

The Penal Code applies beyond national boundaries in the following cases:

- Any Vietnamese citizen committing a crime under the Penal Code (i.e., offering or receiving bribe) outside the territory of Vietnam; or
- Any foreigner committing a crime outside the territory of Vietnam which infringes a Vietnamese citizen's lawful rights and interests or Vietnam's interests or under an international treaty to which Vietnam is a party.

### **How are gifts and hospitality treated?**

The giving/receiving of gifts and hospitality can qualify as a bribe under Vietnamese law if it satisfies the elements of a bribery offence as described above.

Under Decree 59, agencies, organizations, units or public officials must not, by any means, receive gifts from the agencies, organizations, units or individuals involved in their work or under their management. However, if it is not possible to reject such gift, the agencies, organizations or units must follow the procedure below:

1. For cash or financial instruments, the heads of agencies, organizations or units must preserve the cash gift and apply it to the state budget.
2. For gifts in kind, the heads of agencies, organizations or units must preserve the gift and proceed to:
  - a) Determine the price of the gifts based on the price provided by the giver (if any) or the price of similar products on the market. If the price of the gifts cannot be determined, the competent agencies may be required to determine the price;
  - b) Sell the gifts;
  - c) After taking into account the cost of handling the gifts, transfer the proceeds minus costs to the state budget within 30 days from the day on which the gifts are sold.
3. For gifts in the form of services such as domestic or overseas sightseeing, travel, medical, education and training, internship, practice and other services, the heads of the agencies, organizations or units must inform the corresponding service providers that such gift cannot be used.
4. For gifts in the form of animals, plants, food and other products difficult to preserve, the heads of the agencies, organizations or units must comply with regulations and laws on handling confiscated material evidence in administrative sanctions and report to the competent agencies for further consideration.
5. Within five working days after handling gifts, the agencies, organizations or units in charge of handling the gifts must submit reports to the superiors of the agencies, organizations, units or individuals who presented the gifts for further consideration.

## **How is bribery through intermediaries treated?**

The Penal Code imposes a criminal penalty on the person offering or receiving the bribe through an intermediary.

## **Are companies liable for the action of their subsidiaries?**

Companies are not liable for the actions of their subsidiaries because under Vietnamese laws: (i) only individuals can be subject to criminal liability in respect of corruption-related crime (companies can only be administratively sanctioned); and (ii) a subsidiary is usually regarded as a separate legal person from its parent company and is therefore only responsible for its own conduct.

## **Is there an exemption for facilitation payments?**

There is no express exemption for facilitation payments if the person is offering or making the facilitation payments with the intention of requiring the public official to perform or refrain from performing certain acts. Under the Penal Code, a person

receiving a bribe (including facilitation payments) may still be subject to criminal liability even if the ensuing action is in accordance with the law.

## **Is there a defence for having adequate compliance procedures?**

The laws of Vietnam do not expressly provide that having adequate compliance procedures in the context of anti-corruption is an express defence or a mitigating factor. That said, if the anti-corruption program or compliance procedures help to prevent or reduce the consequence of the violation that can be taken into account by the court as a mitigating circumstance.

## **What are the enforcement trends in the business area?**

While the government has repeatedly indicated its willingness to tackle corruption in many circumstances, it remains widespread in Vietnam and the government's efforts have not led to substantive improvements. That said, the number of corruption cases handled by the court has increased in recent years and we expect this trend to continue.

**ANNEXURE 1 –  
THE US FOREIGN  
CORRUPT  
PRACTICES ACT**



# ANNEXURE 1 – THE US FOREIGN CORRUPT PRACTICES ACT

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## What is the definition of a bribe?

The Foreign Corrupt Practices Act (FCPA) prohibits corruptly offering, paying, promising to pay, or authorizing the payment of “anything of value” to a non-US government official. “Anything of value” is interpreted broadly to include tangible and intangible benefits or services including, for example, benefits offered to friends and relatives of the official. Significantly, the FCPA provides no *de minimis* exception for the value promised or conferred. Moreover, the FCPA can be violated even if no payment is actually made.

The FCPA, however, does not prohibit all benefits extended or offered to non-US officials. Rather, the offer or payment must be made “corruptly” – it must be intended either to influence the official action of the recipient or to induce the recipient to use his or her influence to affect the official decisions or actions of others “in order to assist [the issuer or domestic concern] in obtaining or retaining business for or with, or directing business to, any person,” or to secure an improper advantage.

In addition to the FCPA’s anti-bribery provisions, the FCPA also includes the accounting provisions, which are applicable to US issuers – companies that list securities registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act) or that are required to file reports with the Securities and Exchange Commission under section 15(d) of the Exchange Act. The accounting provisions require issuers to make and keep accurate books and records and maintain an adequate system of internal accounting controls. Violations of the accounting provisions do not require underlying bribery conduct.

## What is the definition of a public official and a foreign public official?

The FCPA prohibits bribes to any “foreign official”. The FCPA does not apply to bribes involving US government officials although other US Federal and State statutes apply to such conduct. Neither does the FCPA prohibit payments to foreign governments.

The term foreign official is defined under the FCPA as “any officer or employee of a [non-US] government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”. This definition is expansive and broadly construed by US authorities. It includes individuals who are not necessarily considered government officials under the locally applicable law, such as employees or officers of government-owned or controlled commercial enterprises and officials of public international organisations. The FCPA’s anti-bribery provisions also prohibit bribes to foreign political parties and party officials and candidates for foreign political office.

While the FCPA does not define the term “instrumentality” of a foreign government, US authorities note that the term is broad and can include state-owned and state-controlled entities. A series of court decisions have recognized that whether an entity is an instrumentality, and thus whether its employees may be “foreign officials” under the FCPA, requires a fact-specific analysis of multiple factors.

## Is private sector bribery covered by the law?

Private sector bribery is not covered by the FCPA.

## Does the law apply beyond national boundaries?

Yes. The FCPA’s anti-bribery prohibitions have broad extraterritorial reach. The provisions can apply to violative acts by issuers, domestic concerns (including citizens, nationals or residents of the United States, and corporations other entities organised under the laws of the United States or that have their principal place of business in the United States), and their directors, officers, employees, stockholders and agents acting on behalf of such issuer or domestic concern that occur outside

US territory. The FCPA's anti-bribery provisions also apply to foreign nationals or entities that are not issuers or domestic concerns that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or offer, promise, or authorisation to pay) while in the territory of the United States.

### **How are gifts and hospitality treated?**

While lavish gifts provided to influence a foreign official's actions to assist the giver in obtaining, retaining, or directing business to any person or to otherwise secure an inappropriate advantage are clearly prohibited, there are business courtesy exceptions that US authorities recognise do not necessarily imply a corrupt intent.

In particular, the FCPA recognises an affirmative defence for "reasonable and bona fide expenditures", such as travel and lodging expenses incurred by or on behalf of a foreign official directly related to either "the promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof".

Subject to a strict assessment of the surrounding circumstances, this defence may apply, for instance, to the provision of reasonable travel and meals to employees of a commercial state-owned entity in the course of negotiating a deal. But US authorities have taken a rather narrow view as to whether expense reimbursements or outlays are "reasonable and bona fide" and "directly related" to "promotional" activities. US authorities can infer corrupt intent if a gift to a public official is likely to have an influence on the business of the gift giver, in particular when the gift giver eventually obtains a favourable decision from the public official. The value and the total number of advantages provided to the public official, the nature of the relationship, and the way the expenditure has been authorised within the organisation and recorded, would be examined by US authorities in order to determine if corrupt intent could be inferred from such circumstances.

The DOJ has provided some guidance as to what types of expenditures may qualify for this affirmative defence: modest travel conditions (economy class flights, standard business hotels); payments made directly to the service providers, not to the officials; and no expenses for family members. A gift of nominal value branded with the company's logo is also likely to qualify as a promotional gift covered by the affirmative defence.

### **How is bribery through intermediaries treated?**

The FCPA prohibits indirect as well as direct improper payments. In this regard, the FCPA expressly applies to action taken through "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly," to any non-US government official for a prohibited purpose. Under the FCPA, a company or an individual is deemed to be "knowing" if they are "aware" that such a person is engaging in such conduct, or if they are "aware" or have a "firm belief" that such circumstance exists or "is substantially certain to occur". In addition, a person is deemed to have knowledge under the FCPA if he or she is aware of a "high probability" that the conduct did or will occur.

Further, a company's or an individual's "conscious disregard," "wilful blindness" or "deliberate ignorance" of culpable conduct or suspicious circumstances may be adequate to support a violation of the FCPA. In this way, companies are effectively charged with knowledge of the activities of their business associates that they could have obtained through reasonable due diligence efforts.

### **Are companies liable for the action of their subsidiaries?**

Yes. Parent companies can be held liable for the violative acts of their non-US affiliates if, for example, they are found to have participated in the conduct (e.g., by authorising the prohibited payment) or where the affiliate acted as an agent of the parent company.

## Is there an exemption for facilitation payments?

The FCPA has an express exception for “facilitating or expediting” payments – relatively insignificant payments made to facilitate or expedite performance of a “routine governmental action”. Such routine actions do not include acts within an official’s discretion or that would constitute misuse of the official’s office. This exception would not apply to decisions by a foreign official on whether to award new business to or to continue business with a particular party, but could apply to processing visas, providing mail service, or supplying utilities.

## Is there a defence for having adequate compliance procedures?

No, the FCPA does not provide for a compliance program defence. However, the existence of a strong compliance program may be taken into account by US enforcement authorities when determining whether to prosecute certain companies or may support mitigation of the ultimate penalty.

## What are the enforcement trends in the business area?

Since President Biden took office, he has made countering corruption a mainstay of his Administration’s agenda. In June 2021, President Biden issued the *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* (Memorandum). The Memorandum established “countering corruption as a core United States national security interest” and directed that an interagency review be conducted to develop a strategy to bolster US government efforts to combat foreign and domestic corruption.

In December 2021, the Biden Administration issued the *United States Strategy on Countering Corruption* (Strategy), which outlines a whole-of-government approach to prioritizing anti-corruption efforts. The Strategy presents a strategic plan based on five “mutually reinforcing pillars of work” for fighting corruption. The pillars are: (1) modernizing, coordinating, and

resourcing US Government efforts to fight corruption; (2) curbing illicit finance; (3) holding corrupt actors accountable; (4) preserving and strengthening the multilateral anti-corruption architecture; and (5) improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals. Each of these pillars include a number of strategic objectives for the Government to take.

On October 2021, Deputy US Attorney General (DAG) Lisa Monaco announced significant changes to the Department of Justice’s (DOJ) policies for prosecuting and resolving corporate criminal cases, which were reflected in a memorandum titled *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*. The policy changes included (1) reinstating the requirement, previously established in the Yates Memorandum issued in 2015, that companies provide all relevant facts relating to individuals responsible for misconduct in order to receive cooperation credit (which had been revised during the Trump Administration); (2) requiring DOJ prosecutors to consider the full history of prior violations by a company, including conduct in front of other criminal and civil/administrative regulators, when deciding whether a resolution short of a guilty plea is appropriate; and (3) encouraging the use of monitorships in resolutions where appropriate (DOJ had previously announced a move away from imposing monitors as part of corporate resolutions). In her speech, DAG Monaco stated that these policy changes were just “first steps.” She stated that DOJ was also forming a Corporate Crime Advisory Group that will focus on reviewing DOJ’s approach to prosecuting criminal conduct, including corporate cooperation, corporate recidivism, and factors used to determine how enforcement actions are resolved (e.g., by non-prosecution agreement, deferred prosecution agreements, or plea agreement).

While we have seen a declining number of FCPA enforcement actions over the last several years, the Biden Administration’s commitment to countering corruption and DOJ’s revised corporate criminal enforcement policies could foreshadow increased anti-corruption enforcement, including against individuals, in the future.

**ANNEXURE 2 –  
THE UK  
BRIBERY ACT**



# ANNEXURE 2 – THE UK BRIBERY ACT

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## What is the definition of a bribe under the UK Bribery Act?

The Bribery Act provides that any “financial or other advantage” can, accompanied by the other requisite conduct that makes up a bribery offence, amount to a bribe. There are no de minimis thresholds set by the Bribery Act. As a result, any sort of monetary or non-monetary advantage can amount to a bribe, regardless of its value.

The Bribery Act contains six general bribery offences, two of which relate to the offering/promising and giving of a bribe (commonly referred to as “active bribery” offences) and four of which relate to requesting, agreeing to receive or accepting a bribe (commonly referred to as “passive bribery” offences).

There are two elements common to all six of the general offences: (i) an advantage, financial or otherwise is offered, promised, given, requested, agreed to be received or accepted; (ii) for the improper performance of a function or activity (and the mere request, agreement to receive or receipt of an advantage alone in some cases will amount to improper performance – for example, a judge requesting a bribe), be it of a public nature or connected with a private business.

The Bribery Act also has two further offences, the offence of bribing a Foreign Public Official and the offence of a commercial organisation failing to prevent bribery by an associated person (commonly referred to as the “Corporate Offence”; more details on this offence are set out below).

The offence of bribing a Foreign Public Official is stricter than the general bribery offences as there is no requirement to show that the advantage (financial or otherwise) was offered, promised or given for the improper performance of a function or activity. The offence occurs where an advantage is offered, promised or given to the Foreign Public Official to influence him or her in his or her public capacity and with the intention of obtaining or retaining business or a business advantage (in circumstances where the Foreign Public Official is not permitted by written law

applicable to him or her to be influenced by the offer, promise or gift). In reality, such activity is likely to involve the improper performance of the official’s function or activity, but the offence does not require proof of it or an intention to induce it (hence making it easier to secure a prosecution).

## What is the definition of a public official and a foreign public official?

### Domestic public official

The Bribery Act does not provide a definition of a domestic public official. This is because the Bribery Act’s general offences and the Corporate Offence are applicable to the bribery of any person (private sector or public sector).

### Foreign public official

The Bribery Act sets out a separate offence of bribing a Foreign Public Official. A Foreign Public Official is defined as “an individual who:

- holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory);
- exercises a public function (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision); or
- is an official or agent of a public international organisation.”

“Public international organisation” means an organisation whose members are any of the following:

- countries or territories;
- governments of countries or territories;
- other public international organisations; or
- a mixture of any of the above.

## What is the Corporate Offence of failing to prevent bribery under the UK Bribery Act?

The Corporate Offence creates one of the strictest regimes in the world for commercial organisations, making them effectively vicariously liable for both public and private sector bribery by associated persons (for example, an associated person may be an employee, agent or other more loosely connected party that performs services for or on behalf of the organisation). The definition of a person “associated with” a commercial organisation is set out in further detail below. The offence can be triggered by acts of bribery anywhere in the world.

A commercial organisation will be guilty of an offence if a person associated with the organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation. The commercial organisation does not need to be an entity incorporated in the UK to be caught by the offence. Any organisation, wherever formed in the world, is subject to the Corporate Offence if it carries on a business, or part of a business, in the UK.

There is one defence to the Corporate Offence - if the organisation is able to prove that it had “adequate procedures” in place designed to prevent persons who are associated with it from bribing. Statutory guidance for companies has been issued by the UK Ministry of Justice on adequate procedures (the MoJ Guidance), but this is not intended to provide any form of safe harbour for companies and is not binding on the courts.

Under the Crime and Courts Act 2013 (section 45 and Schedule 17), an organisation (but not an individual) can avoid prosecution for bribery (and certain other offences) by entering into a deferred prosecution agreement (DPA). The substance of the DPA is that the prosecutor agrees to suspend an indictment against the organisation, and, subject to compliance with the terms of the DPA, to discontinue the proceedings after a given length of time. The agreement is subject to scrutiny and

approval by the court. One of the considerations when determining whether a DPA will be offered and/or approved is the extent to which the organisation has cooperated with the prosecutor, including proactive self-reporting. The first DPA was approved on 30 November 2015 and there have been several more since.

DPAs are not available in Scotland, where the Crown Office and Procurator Fiscal Service operates a self-reporting scheme whereby businesses that self-report bribery offences that have taken place within, or predominantly within, the relevant jurisdiction may in certain circumstances (including where the business has conducted a thorough investigation and offers full disclosure of its findings) be referred for civil settlement rather than criminal prosecution. Every case is considered on its own merits and with a view to the public interest; the first such civil settlement for the Corporate Offence by the Crown Office and Procurator Fiscal Service in Scotland was announced in September 2015.

## What is an associated person under the UK Bribery Act?

For the purposes of the Corporate Offence described above, a person is “associated with” a commercial organisation if he or she performs services for, or on behalf of, the organisation. Obvious examples of an associated person may include employees (the Bribery Act has a rebuttable presumption that employees are associated persons), agents and subsidiaries that perform services for their parent company. The government indicated during debates on the Bribery Bill that the definition had been deliberately drafted widely and could include parties with which there was no formal relationship. It is clear from this that there is a real risk that companies may become criminally liable where an act of bribery has been committed by joint venture or consortia partners or by agents of any sort. The Corporate Offence does not require the associated person to be connected to the UK nor does it require any part of the bribery to have taken place in the UK.

The MoJ Guidance aims to provide assistance in determining who is an associated person. It confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies that where a joint venture entity pays a bribe, the members of the joint venture will not be liable “simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture”.

### **Is private sector bribery covered by the law?**

Yes. The Bribery Act’s six general offences of bribing and being bribed as well as the “Corporate Offence” apply equally to bribery in the public and the private sectors.

### **Does the law apply beyond national boundaries?**

Yes. Even where no part of an offence takes place within the UK, a person/entity may be prosecuted in the UK if that person/entity has “a close connection” with the UK. A person/entity has a close connection with the UK if they are:

- a British citizen;
- a British overseas territories citizen;
- a British national (overseas);
- a British Overseas citizen;
- a person who under the British Nationality Act 1981 was a British subject;
- a British protected person within the meaning of that Act;
- an individual ordinarily resident in the United Kingdom;
- a body incorporated under the law of any part of the United Kingdom; or
- a Scottish partnership (Section 12(4), Bribery Act).

In addition, under the Corporate Offence, a commercial organisation may be prosecuted in the UK for failing to prevent bribery even where no part of the underlying bribery offence took place in the UK, the associated person who did the bribing is not closely connected to the UK and the commercial organisation is formed outside the UK (so long as it carries on part of its business in the UK).

### **How are gifts and hospitality treated?**

Gifts and hospitality to private sector individuals and to UK public officials will only be an offence where there is some element of impropriety, e.g. an intention that the recipient perform his or her job improperly (but note that such intention may be inferred by lavishness of the gift/hospitality).

Gifts and hospitality to Foreign Public Officials remain problematic because, as explained earlier, this offence does not include any element of impropriety. However, the MoJ Guidance recognises that the offence of bribing a Foreign Public Official has been drafted very broadly and says “it is not the Government’s intention to criminalise behaviour where no such mischief [i.e., some form of improper performance] occurs, but merely to formulate the offence to take account of the evidential difficulties”.

It stresses that the prosecution must show that “there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage”, but says “the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return”. Adhering to market practice or business sector norms will not, it specifies, be sufficient.

## How is bribery through intermediaries treated?

The Bribery Act covers bribes given, offered, promised, requested, agreed to be received, received directly or through a third party.

## Are companies liable for the action of their subsidiaries?

The Corporate Offence of the Bribery Act makes it an offence for a commercial organisation to fail to prevent bribery by its associated persons.

Consequently, where a subsidiary bribes, its parent company will be liable for this bribery if the subsidiary was performing services for or on behalf of the company (this is the test for whether a person is “associated”), and where the bribery was intended to obtain business or an advantage in the conduct of business for the parent company. The parent company has a defence if it can prove that it had adequate procedures in place to prevent bribery by its associated persons.

## Is there an exemption for facilitation payments?

There is no exemption in the Bribery Act for facilitation payments<sup>1</sup> (nor was there under the UK’s former anti-bribery laws). The MoJ Guidance describes facilitation payments as “small bribes” and says that “exemptions in this context create artificial distinctions that are difficult to enforce ...”.

However, the Serious Fraud Office (the SFO) has stated<sup>2</sup> that “[i]t would be wrong to say there is no flexibility” [with respect to prosecution for facilitation payments] and that “[w]hether or not the SFO prosecutes in relation to facilitation payments will always depend on (a) whether it is a serious or complex case

which falls within the SFO’s remit and, if so, (b) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted”. By way of example, cases will usually satisfy these criteria where they involve significant international elements and/or where complex legal or accountancy analysis is likely to be required. Companies may wish to consider in particular the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010, which indicates that prosecution will be less likely where a single, isolated payment is made and where the organisation had a clear and appropriate policy in place, with procedures which were correctly followed.<sup>3</sup>

On the other hand, a prosecution is more likely where there are large or repeated payments, where facilitation payments are “planned for or accepted as part of a standard way of conducting business” and where “a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed”.

A case study published with the MoJ Guidance (but which is not officially part of the MoJ Guidance) sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or the UK embassy; and the use of UK diplomatic channels or participating in “locally active non-governmental organisations” to apply pressure on the relevant governmental authorities.

<sup>1</sup> It should be noted however that a person may be able to avail themselves of the common law defence of duress in situations where, but for the making of a facilitation payment, there would be risk to life, limb or liberty.

<sup>2</sup> <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

<sup>3</sup> See page 9 of the Joint Prosecution Guidance of The Director of the SFO and The Director of Public Prosecutions, published on 30 March 2011.

## Is there a defence for having adequate compliance procedures?

Yes, for the Corporate Offence. A commercial organisation charged with the Corporate Offence has a defence if it can show that it had “adequate procedures” in place designed to prevent persons who are associated with it from bribing.

The MoJ Guidance sets out six principles (described as “not prescriptive”) that should inform an organisation’s corporate anti-corruption program:

### **Principle 1: Proportionate procedures**

A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.

### **Principle 2: Top-level commitment**

The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

### **Principle 3: Risk assessment**

The commercial organisation assesses the nature and extent of its exposure to the potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

### **Principle 4: Due diligence**

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

### **Principle 5: Communication (including training)**

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

### **Principle 6: Monitoring and review**

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

The MoJ Guidance makes it clear that more is expected of large commercial organisations when it comes to adequate procedures.

## What are the enforcement trends in the business area?

While the significant increase in foreign bribery enforcement in recent years is certainly due in part to the Bribery Act, it also reflects an increased appetite on the part of enforcement authorities to pursue foreign bribery charges, even in the case of conduct which occurred before 1 July 2011 (when the Bribery Act came into force), which continues to be prosecuted under the legislation which predated the Bribery Act.

A clear trend has developed in the use of DPAs by the Serious Fraud Office (the SFO) to settle bribery charges against corporates.

The SFO’s first DPA was agreed with a major international bank in 2015 and related to charges of failing to prevent bribery (i.e., the Corporate Offence). Subsequently, the SFO has agreed DPAs in respect of bribery offences with several other companies across a range of industries.

Whilst one of the considerations when determining whether a DPA will be offered and/or approved is whether the company has proactively self-reported, a DPA was offered to Rolls-Royce, even though the matter came to the attention of the SFO through online postings by a whistleblower rather than being raised by Rolls-Royce. However, the court approved the offer of the DPA on the basis that Rolls-Royce had provided an “extraordinary” level of cooperation, and that what it had reported on was “far more extensive (and of a different order)” than what was likely to be uncovered without their cooperation.

In a warning, however, that DPAs would not be available in every case, Sweett Group plc was convicted after pleading guilty in December 2015 to a charge of failing to prevent bribery intended to secure and retain a contract with Al Ain Ahlia Insurance Company in Dubai. The SFO said that it did not consider that the company had cooperated with it and therefore saw no reason to offer it a DPA.

In the first instance of a company pleading not guilty to the corporate offence of failing to prevent bribery (under section 7 of the Bribery Act 2010), a small UK interior refurbishment company (Skansen Interior Limited) was convicted on 21 February 2018 of failing to prevent its former managing director from bribing a project manager in a property company in connection with office refurbishment contracts worth GBP6 million. Skansen Interior Limited (with a staff of only 30 employees) conducted its own internal investigation, proactively brought matters to the attention of the City of London Police and cooperated with their investigation, but was not offered a DPA. Skansen sought to rely on the defence that it had adequate procedures in place to prevent bribery which were proportionate to its (small) size. However the jury did not accept that the company’s general policies and procedures on ethics, which required everybody to act honestly and ethically, or its financial controls on the payment of invoices, amounted to adequate procedures. There was no specific anti-bribery policy

in place at the time of the conduct, no proper training and no individual with specific responsibility for ABC compliance. No penalties could be imposed on the company, which has been dormant since 2014. Two senior executives at the company pleaded guilty to bribery and corruption offences.

While a clear trend has been developing in the use of DPAs by the SFO to settle bribery charges against corporates, cases such as Skansen and Sweet Group plc have shown that the SFO has the willingness and desire to pursue prosecution. Furthermore, until recently the SFO had only been prosecuting cases of the Corporate Offence of failing to prevent bribery. However, the SFO has shown that it will also seek to prosecute companies for substantive bribery offences (i.e., offences other than the offence of failing to prevent bribery). In June 2022, an energy company was convicted of seven offences under the Bribery Act, including five substantive charges under section 1 (bribing another person) and two charges under the Corporate Offence.

The SFO has been calling for reform to corporate criminal liability in the UK. The Bribery Act’s bespoke corporate criminal liability regime should not be conflated with the general corporate criminal liability regime in the UK, the bar for prosecution of which still remains high.

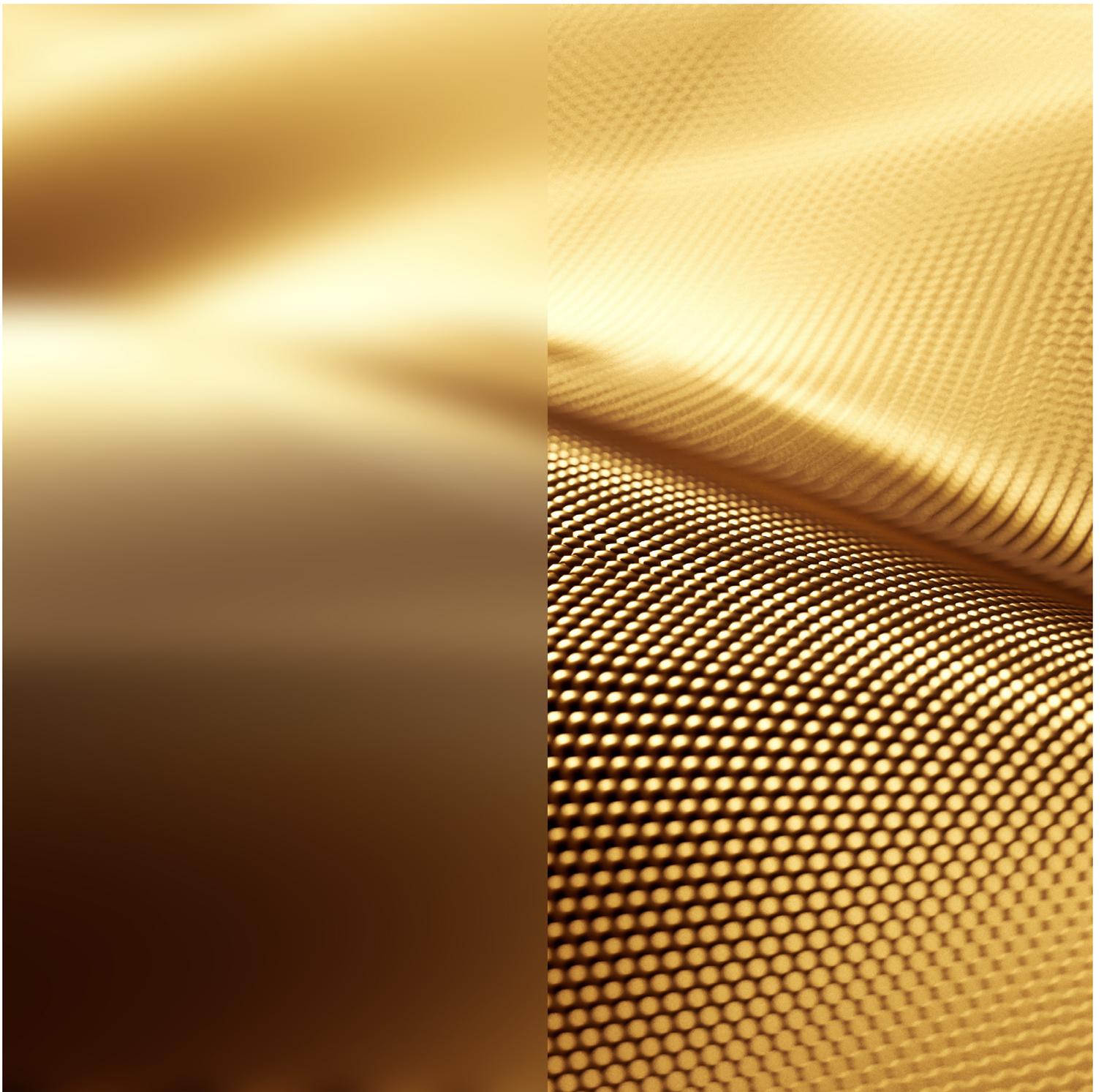
### **Director of the SFO**

Lisa Osofsky began her five-year tenure as the Director of the SFO on 28 August 2018. The personality and priorities of the Director can be influential in terms of prosecution strategy. Ms Osofsky is a former US federal prosecutor, pursuing a range of white collar crimes, and joined the SFO from Exiger, a risk and compliance consultancy.

Ms Osofsky’s time as Director has been characterized by a willingness and desire to co-operate internationally with anti-bribery authorities with a view to improving enforcement of the Bribery Act. Ms. Osofsky stated that the SFO’s focus “is very

*much international. Most of our cases have an international component. We are either working with foreign authorities or getting evidence from overseas. We help other countries get the evidence they need, so it is collaboration and working*

*internationally, especially given the fact that crime has moved online and does not stop at borders.”*



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