

THE  
INTERNATIONAL  
INVESTIGATIONS  
REVIEW

EIGHTH EDITION

Editor  
Nicolas Bourtin

THE LAWREVIEWS

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INTERNATIONAL  
INVESTIGATIONS  
REVIEW

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This article was first published in July 2018  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

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Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-92228-42-3

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

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# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ALVAREZ & MARSAL DISPUTES AND INVESTIGATIONS, LLP

ANAGNOSTOPOULOS

BDO LLP

BOFILL ESCOBAR ABOGADOS

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# PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, there have been few signs – even a year and a half into the new administration – of any significant departure from the trend towards more enforcement and harsher penalties.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a

realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its eighth edition, this publication covers 23 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

**Nicolas Bourtin**

Sullivan & Cromwell LLP

New York

July 2018

# HONG KONG

*Mark Hughes and Kevin Warburton*<sup>1</sup>

## I INTRODUCTION

The key authorities with investigative power in Hong Kong are the Securities and Futures Commission (SFC), the Independent Commission Against Corruption (ICAC), the Competition Commission (HKCC), the Hong Kong Police Force (HKPF), The Stock Exchange of Hong Kong Limited (SEHK), the Hong Kong Monetary Authority (HKMA), the Inland Revenue Department, the Office of the Privacy Commissioner, the Customs and Excise Department and the Companies Registry. The Department of Justice (DOJ) is empowered to prosecute most criminal offences. The SFC may prosecute certain summary offences, including summary market misconduct offences.<sup>2</sup> The DOJ is responsible for prosecuting indictable offences.

In addition to the HKPF, agencies including the SFC, the HKMA, the ICAC and the HKCC may exercise a special power of investigation, namely to carry out dawn raids, permitting entry to a company's offices or an individual's home without notice to investigate relevant potential misconduct. Authorities such as the SFC<sup>3</sup> and the HKCC<sup>4</sup> are also empowered to compel attendance at interviews. Moreover, unlike interviews before the HKPF or the ICAC where the person under investigation is protected by a constitutional right against self-incrimination,<sup>5</sup> the SFC has the power to compel the interviewees to answer questions, where failure to answer or giving a false or misleading answer is a criminal offence.<sup>6</sup> In addition, the SFC can compel the production of documents and records<sup>7</sup> and obtain a search warrant to search for and seize documents.<sup>8</sup>

Domestic priorities often affect enforcement activity and the exercise of prosecutorial functions. For instance, anti-money laundering is a current enforcement priority for Hong Kong. In addition, various agencies publish their enforcement priorities each year and allocate their resources accordingly. For example, the SFC's published enforcement priorities for 2017 included corporate fraud and misfeasance, insider dealing, market manipulation,

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1 Mark Hughes is a partner and Kevin Warburton is a counsel at Slaughter and May.

2 See Section 388 of the Securities and Futures Ordinance (Cap. 571) (SFO).

3 See Section 183(1)(c) of the SFO.

4 See Section 42 of the Competition Ordinance (Cap. 619).

5 A person facing a criminal charge shall be entitled to various minimum guarantees, including, among other things, not to be compelled to testify against himself or herself or to confess guilt. See Article 11(2)(g) of the Hong Kong Bill of Rights Ordinance (Cap. 383).

6 See Section 184(2) of the SFO.

7 See Section 183(1)(a) of the SFO.

8 See Section 191 of the SFO.

intermediary misconduct, gatekeeping by sponsor firms and mis-selling of financial products. Accordingly, the SFC prioritised its resources by forming both permanent and temporary specialised teams, which helped it process increasingly sophisticated cases in a more efficient way as well as sharpening its expertise by addressing each of the key risks identified by its teams that have direct market contact.<sup>9</sup>

Some regulatory agencies have published policies to encourage cooperation with their investigations. In December 2017, the SFC issued its ‘Guidance Note on Cooperation’ (Guidance on Cooperation), in which it stated that it would recognise and give credit for cooperation during an enforcement investigation when determining the applicable sanction. In addition, the Competition Ordinance (Cap. 619) (Competition Ordinance) provides that the HKCC may, in exchange for a person’s cooperation in an investigation or in proceedings, consider entry into a leniency agreement with the party under investigation, with the consequence that it will not bring or continue proceedings for a pecuniary penalty in respect of alleged cartel conduct.

## II CONDUCT

### i Self-reporting

Generally, a person (whether a company or an individual) is not obliged to self-report when it discovers internal wrongdoing; however, there are two key exceptions. First, a person is under a mandatory reporting obligation to the Joint Financial Intelligence Unit (JFIU)<sup>10</sup> as soon as is reasonable or practicable if it knows or suspects that any property represents proceeds of an indictable offence or drug trafficking, or is terrorist property.<sup>11</sup> Failure to make a notification to the JFIU when required to do so constitutes an offence punishable by a fine of HK\$50,000 and up to three months’ imprisonment. Second, under the Code of Conduct for Persons Licensed by or Registered with the SFC, registered or licensed persons are required to immediately report to the SFC when there is any real or suspected breach or infringement of or non-compliance with any law, rules, regulations and codes administered or issued by the SFC. In addition, ‘failing to promptly and fully report a material breach’ may be regarded by the SFC as uncooperative conduct, which will be taken into account by the SFC when considering the appropriate outcome.<sup>12</sup>

In its Guidance on Cooperation, the SFC recognises voluntary and prompt self-reporting of any regulatory breaches or failings to it as a form of cooperation,<sup>13</sup> which will provide the self-reporting person or organisation with the benefit of a reduction in sanction in disciplinary matters. However, in the case of an SFC-licensed corporation or registered institution,

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9 See p. 8 of SFC Annual Report 2016–2017, available at [www.sfc.hk/web/annualreport2016-17/wp-content/themes/sfc/assets/pdf/en/e\\_Strategic%20Priorities.pdf](http://www.sfc.hk/web/annualreport2016-17/wp-content/themes/sfc/assets/pdf/en/e_Strategic%20Priorities.pdf), last accessed on 21 May 2018.

10 The Joint Financial Intelligence Unit is a joint reach force between the Hong Kong Police Force and the Customs and Excise Department.

11 See Section 25A of the Organized and Serious Crimes Ordinance (Cap. 455) and Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), and Section 12 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

12 See Paragraphs 4.3 and 4.4 of the Guidance on Cooperation.

13 See Paragraph 2.1 of the Guidance on Cooperation.

mere compliance with self-reporting obligations under the SFC rules<sup>14</sup> will not amount to cooperation by itself.<sup>15</sup> The SFC may enter into an agreement (Section 201 Agreement) to resolve disciplinary proceedings at an early stage pursuant to Section 201 of the Securities and Futures Ordinance (Cap. 571) (SFO) if it considers it appropriate to do so in the interests of the investing public or in the public interest. Cooperation from the regulated person and the extent and nature of such cooperation are factors considered by the SFC in exercising this discretion. As a general principle, the SFC is more willing to enter into a Section 201 Agreement if the regulated person demonstrates cooperation in the recognised forms,<sup>16</sup> or waives legal professional privilege, or commissions third-party reviews and gives directors' undertakings to address the SFC's regulatory concerns in accordance with the Guidance on Cooperation.<sup>17</sup>

The HKCC has also published a Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy),<sup>18</sup> which is meant to grant leniency to encourage self-reporting by companies that may have engaged in illegal activity, such as bid rigging or price fixing. The Leniency Policy provides that leniency is available only for the first member who reports the cartel conduct to the HKCC and meets all the requirements for receiving leniency. In exchange for a cartel member's cooperation in the investigation of the cartel conduct, the HKCC will enter into an agreement with the undertaking not to take proceedings against it for a pecuniary penalty. The HKCC will also agree not to bring or continue proceedings in the Competition Tribunal or commence any other proceedings other than proceedings for an order under Section 94 of the Competition Ordinance declaring that the cartel member has contravened the First Conduct Rule.<sup>19</sup> However, a leniency agreement offers no immunity from follow-on actions under Section 110 of the Competition Ordinance against cartel members by persons who can prove they have suffered loss or damage as a result of the cartel.<sup>20</sup>

## ii Internal investigations

The authorities in Hong Kong are generally in favour of companies carrying out their own internal investigations provided they receive the results. The Guidance on Cooperation specifically states that the forms of cooperation include making full and frank disclosure of information regarding breaches or failings and, in particular, providing information and

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14 Section 12 of the Securities and Futures (Client Securities) Rules, Section 11 of the Securities and Futures (Client Money) Rules and Section 11 of the Securities and Futures (Keeping of Records) Rules, Paragraph 12.5 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (SFC).

15 See Paragraph 3.1 of the Guidance on Cooperation.

16 These forms include voluntarily and promptly reporting any breaches or failings to the SFC, providing true and complete information regarding breaches or failings, acceptance of liability and taking rectification measures. For more details, see paragraph 2.1 of the Guidance on Cooperation.

17 See Paragraphs 6.2 and 6.3 of the Guidance on Cooperation.

18 Leniency Policy for Undertakings Engaged in Cartel Conduct, the Hong Kong Competition Commission, November 2015, available at [https://www.compcomm.hk/en/legislation\\_guidance/policy\\_doc/files/Leniency\\_Policy\\_Eng.pdf](https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Eng.pdf), last accessed on 21 May 2018.

19 The First Conduct Rule prohibits an undertaking to (1) make or give effect to an agreement, (2) engage in a concerted practice or (3) as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong. See Section 6 of the Competition Ordinance (Cap. 619).

20 See Paragraph 1.7 of the Leniency Policy.

evidence of which the SFC is otherwise unaware, including sharing the results of any internal investigation. However, if there exists a concurrent investigation by the authorities, a company should be cautious and ensure it does not disclose the existence of the authorities' investigations to a third party, including the employees, when conducting an internal investigation.

As in other jurisdictions, the typical means of carrying out an internal investigation include reviewing documents and interviewing relevant individuals. If interviews are conducted in the context of an internal investigation, it is not necessarily common for employees to retain their own lawyers, nor is there such a legal requirement in Hong Kong. Those present at internal interviews usually include in-house legal counsel, compliance or other specialised investigation team members. Depending on the nature and gravity of the potential misconduct, external counsel may also be engaged in the internal investigations.

Hong Kong law recognises legal professional privilege (including legal advice privilege and litigation privilege). Legal advice privilege applies to confidential communications between a lawyer and his or her client that comes into existence for the purpose of giving or obtaining legal advice. Litigation privilege applies to confidential communications between a party or his or her lawyer and third parties that come into existence for the sole or dominant purpose of preparing for actual or contemplated litigation. Thus, documents (e.g., minutes of meetings, interview notes) gathered or generated during an internal investigation for the purpose of giving or obtaining legal advice from a lawyer, or prepared for the dominant purpose of obtaining information or evidence for use in actual or reasonably contemplated litigation, can be privileged. However, one should bear in mind that privilege can be lost by giving or copying privileged documents to a third party, or referring to such documents for non-privileged reasons.

As for waiver of privilege, the Guidance on Cooperation clarifies that a *bona fide* refusal to waive legal professional privilege attached to a document that would otherwise have to be provided to the SFC will not be regarded as uncooperative conduct, thus acknowledging legal professional privilege as a fundamental right protected by Article 35 of the Basic Law of Hong Kong and Section 380(4) of the SFO. Nonetheless, voluntary waiver of legal professional privilege over any document (including on a limited basis, i.e., the waiver of privilege is restricted to the specific party receiving the disclosed information) may be recognised by the SFC as amounting to cooperation, thus invoking the relevant leniency policy.

### **iii Whistle-blowers**

Although whistle-blower reports of potential illegal conduct are far from unknown in Hong Kong, the workplace culture may significantly affect the enthusiasm of some potential whistle-blowers actually to blow the whistle. Employees may hesitate to come forward because of concerns about the effect on their own career prospects. Another reason for there being fewer examples of whistle-blowing than there might otherwise be may be the lack of incentive programmes in most of the regulatory regimes in Hong Kong (although the HKCC has published a leniency policy to encourage whistle-blowing of cartel conduct).

As regards legal protection for whistle-blowers, although there are no stand-alone, comprehensive laws comparable to those in other common law jurisdictions, whistle-blowers can still obtain certain protections under statute or common law in Hong Kong.

First, there is the programme under the Witness Protection Ordinance (Cap. 564), which provides protection and assistance for witnesses whose personal safety or well-being



may be at risk as a result of being a witness.<sup>21</sup> If the Commissioner of the HKPF or the ICAC decides to include a witness in the protection programme or is assessing that person's qualification for the programme, the relevant approving authority shall take such action as it considers necessary and reasonable to protect the witness' safety and welfare.<sup>22</sup>

Second, whistle-blowers are protected from dismissal or discrimination under the Employment Ordinance (Cap. 57) if they are giving evidence in proceedings or inquiries relating to the enforcement of labour legislation, accidents or injuries to an employee or breach of the work safety regulations. An employer in violation of such protection by dismissing, threatening to dismiss or discriminating against a whistle-blower may be liable to pay a fine of HK\$100,000 or compensate the whistle-blowing employee.

Third, whistle-blowers are protected from a claim of breach of confidentiality by various pieces of legislation and common law in respect of certain specified disclosures. Legislation offering this protection includes the Employment Ordinance (Cap. 57), Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) and the Organised and Serious Crimes Ordinance (Cap. 455). Common law also provides protection where it is in the public interest to make a disclosure relating to serious misconduct or important for safeguarding public welfare in matters of health and safety. In certain cases, whistle-blowing of possible corruption or bribery under the Prevention of Bribery Ordinance (Cap. 201) (Prevention of Bribery Ordinance) may constitute such a disclosure and is therefore protected under the common law regime.

A company receiving notification from a whistle-blower should be cautious in managing the information reported and the whistle-blower. Companies listed on the SEHK must follow the 'comply or explain' code provisions in the Corporate Governance Code in the Main Board Listing Rules to require its audit committee to review the arrangements its employees can use to raise concerns in confidence about possible improprieties in financial reporting, internal control or other matters. The audit committee should also ensure that proper arrangements are in place for fair and independent investigation of such matters and for appropriate follow-up action.<sup>23</sup>

### **III ENFORCEMENT**

#### **i Corporate liability**

When it comes to attributing criminal liability to a corporate entity for the conduct of its employees, whether corporate liability can be established depends on the type of conduct and the responsibility of the employee carrying out the alleged misconduct. If the potential liability arises from a statutory offence that imposes absolute liability on the employer (i.e., there is no need to prove fault on the part of the employer), then any such offences by an employee can result in the employer being held vicariously liable. Otherwise, only offences by senior employees (e.g., directors, senior managers, superior officers), who at the material time were the 'directing mind and will' of the company, can be said to be offences of the company. In such circumstances, a corporate entity may be held liable unless the offence is only punishable by imprisonment or can only be committed by natural persons in their

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21 See Section 2 of Witness Protection Ordinance (Cap. 564).

22 See Section 7 of Witness Protection Ordinance (Cap. 564).

23 See Paragraph C.3.7 of Appendix 14 (Corporate Governance Code and Corporate Governance Report) of the Main Board Listing Rules.

personal capacity. However, as the burden of proof for criminal offences is high (beyond reasonable doubt), there are likely to be practical difficulties in establishing corporate criminal liability. In contrast, a plaintiff need only prove its case on a balance of probability to establish civil liability, a lower burden of proof. In addition, civil actions can offer more flexibility by potentially offering preventative and punitive remedies as well as damages.

As long as there is no conflict of interest arising between an employer and its employees, they can be represented by the same counsel. However, if the employee's anticipated defence may contradict that of the employer, for instance, or the evidence to be given by the employee is against the employer, there may arise a potential or real conflict. In such circumstances, the parties should be represented by separate legal advisers.

## ii Penalties

The enforcement actions that the SFC may take include disciplinary proceedings, civil proceedings before the Hong Kong High Court, criminal proceedings before the magistrates' courts in Hong Kong, and proceedings before the Market Misconduct Tribunal (MMT).

For criminal market misconduct offences under the SFO,<sup>24</sup> a person may face upon conviction on indictment a fine of up to HK\$10 million and imprisonment for 10 years, or on summary conviction a fine of up to HK\$1 million and imprisonment for three years.<sup>25</sup> The SFO also prescribes penalties for offences other than market misconduct.<sup>26</sup> For example, a person who breaches Section 114 of the SFO by carrying on regulated activity without a licence is subject to a fine of up to HK\$5 million and imprisonment for seven years.

The SFC may also seek civil remedies in either the MMT or the High Court for alleged market misconduct and other breaches of the SFO. These remedies include orders from the MMT, compensation by way of damages and injunctive relief granted by the Court of First Instance of the Hong Kong High Court. Orders available to the MMT include disqualification orders,<sup>27</sup> cold shoulder orders,<sup>28</sup> cease and desist orders,<sup>29</sup> disgorgement orders,<sup>30</sup> government costs orders,<sup>31</sup> SFC costs orders,<sup>32</sup> Financial Reporting Council costs orders<sup>33</sup> and disciplinary

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24 Market misconduct includes insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions and stock market manipulation.

25 See Section 303 of the SFO.

26 Including failure to disclose interest in securities in accordance with Part XV of the SFO, carrying on a business in a regulated activity without a licence, and issuing unauthorised advertisements, invitations or documents to participate in a collective investment scheme.

27 An order prohibiting a person from being involved in the management of specified corporations. See Section 257(1)(a) of the SFO.

28 An order prohibiting a person from directly or indirectly trading in Hong Kong financial products which the SFC regulates. See Section 257(1)(b) of the SFO.

29 An order prohibiting a person from engaging in any specified form of market misconduct again. See Section 257(1)(c) of the SFO.

30 An order requiring a person to pay the government an amount equal to the profit made or loss avoided as a result of the misconduct. See Section 257(1)(d) of the SFO.

31 An order requiring a person to pay to the government costs of the inquiry, costs incidental to the inquiry and any costs of investigation for the purposes of the inquiry. See Section 257(1)(e) of the SFO.

32 An order requiring a person to pay to the SFC reasonable expenses in relation or incidental to any investigation of their conduct or affairs. See Section 257(1)(f) of the SFO.

33 An order requiring a person to pay to the Financial Reporting Council reasonable expenses in relation or incidental to any investigation of their conduct or affairs. See Section 257(1)(fa) of the SFO.

referral orders.<sup>34</sup> The injunctive relief the court may grant includes an order restraining or prohibiting a person from dealing in any specified property,<sup>35</sup> an order appointing a person to administer the property of another person<sup>36</sup> and other ancillary orders.

Under Part IX of the SFO, meanwhile, the SFC is empowered to discipline regulated persons for alleged misconduct or who may no longer be fit and proper to be licensed or registered. The range of sanctions that could be imposed include:

- a* revocation or partial revocation of the licence or registration;
- b* suspension or partial suspension of the licence or registration;
- c* revocation of approval to be a responsible officer;
- d* suspension of approval to be a responsible officer;
- e* a fine (up to HK\$10 million or three times the profit gained or loss avoided, whichever is the higher); or
- f* private or public reprimand.

The range of potential sanctions will vary therefore depending upon the nature of the proceeding. Taking market misconduct as an example, the sanctions will vary depending on whether it is a civil or a criminal proceeding and, if criminal, whether it is on conviction on indictment (prosecuted by the DOJ) or on summary conviction (prosecuted by the SFC). As the civil and criminal regimes under the SFO are mutually exclusive, the SFC can choose only one regime under which to bring an action. Usually the SFC will refer all market misconduct cases to the DOJ for advice on the suitability of instituting prosecution. The SFC also must obtain consent from the Secretary for Justice before commencing an MMT proceeding.

### iii Compliance programmes

It is important for companies to establish and maintain effectively functioning internal control mechanisms. Although having a compliance programme itself will not exempt a company from liability, it may be recognised as a mitigating factor in the application of sanctions. It may also reduce the risk of corporate liability arising from a breach by an employee, if it could be established that the employee's misconduct was a result of breach of the internal policies established by the employer.

For implementing and improving anti-corruption compliance programmes, the ICAC has published various guidelines for different types of entities, such as listed companies, the catering industry, schools, etc. In the Corruption Prevention Guide for Listed Companies,<sup>37</sup> the ICAC recommends certain components to be covered by a company in its anti-corruption programme: an anti-corruption policy, guidance on ethical standards and anti-corruption for all company personnel, a mechanism for identification and assessment of corruption risk, anti-corruption control, and training and communication. However, these guidelines are

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34 An order giving a copy of the report of the Market Misconduct Tribunal proceedings to any regulatory body that may take disciplinary action against the relevant person. See Section 257(1)(g) of the SFO.

35 See Section 213(2)(c) of the SFO.

36 See Section 213(2)(d) of the SFO.

37 See Section 4.2 of the 'Corruption Prevention Guide for Listed Companies' issued by the Independent Commission Against Corruption in December 2016, available at [http://cpas.icac.hk/UploadImages/InfoFile/cate\\_43/2017/c75487f1-3a08-4ada-980e-7c0e1d5f4cce.pdf](http://cpas.icac.hk/UploadImages/InfoFile/cate_43/2017/c75487f1-3a08-4ada-980e-7c0e1d5f4cce.pdf), last accessed on 16 May 2018.

more advice than ‘best practice’, as the Prevention of Bribery Ordinance does not regard compliance programmes as constituting a mitigating factor or allow them to be treated as a means to mitigate corporate criminal liability.

Notably, in the Guidance on Cooperation, instituting necessary enhancements to internal controls and procedures is recognised as a potential rectification measure and form of cooperation. Thus, enhancing a compliance programme may, depending on the stage when cooperation is effected, allow the company to enjoy a reduction of sanction of between 10 and 30 per cent.

#### **iv Prosecution of individuals**

If an individual is to be prosecuted by government authorities, his or her employer should be careful in managing its relationships with stakeholders. The company may coordinate with the individual’s independent counsel, but should also bear in mind the risk of a conflict of interest arising, as the individual’s conduct may have compromised the company’s position not only in relation to the substantive offence but also reputationally.

The Guidance on Cooperation does not expressly require a company to dismiss or take disciplinary action against an employee under investigation in order to show cooperation. Conversely, an employee’s compliance with a notice to attend an interview, for example, will not be regarded as cooperation that can lead to a leniency benefit.<sup>38</sup> Indeed, were an employer to dismiss an employee because of his or her refusal to be interviewed by the company or the regulators, it may risk that dismissal being regarded as a wrongful dismissal and the company may be liable to pay damages. Thus, during the investigation stage, an employer may prefer, at least initially, to exercise its statutory entitlement to suspend an employee for up to 14 days pending the outcome of any criminal proceedings against the employee arising out of or connected with his or her employment.<sup>39</sup> If the employee is found liable upon conclusion of the investigation, the company can then take disciplinary measures against that employee.

The company may pay the legal fees for employees under investigation. There is no adverse inference from such an arrangement, as long as the company is not enticing the employee to fabricate evidence.

## **IV INTERNATIONAL**

### **i Extraterritorial jurisdiction**

For criminal offences, the courts will be hesitant to claim jurisdiction over conduct occurring outside Hong Kong. However, the SFO extends liability for certain market misconduct taking place outside Hong Kong that affects the Hong Kong markets. This includes false trading, price rigging, disclosure of false or misleading information inducing transactions and stock market manipulation.<sup>40</sup>

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38 See Paragraph 3.1 of the Guidance on Cooperation.

39 See Section 11(c) of the Employment Ordinance (Cap. 57).

40 See Sections 295, 296, 298 and 299 of the SFO for criminal offences and Sections 274, 275, 276 (disclosure of information about prohibited transactions), 277 and 278 of the SFO for civil equivalents.

The Competition Ordinance has extraterritorial reach over agreements and conduct conducted outside Hong Kong but that have the object or effect of preventing, restricting or distorting competition in Hong Kong.<sup>41</sup>

## ii International cooperation

With regulatory misconduct becoming increasingly complex and cross-border, regulatory agencies such as the SFC, the ICAC, the HKCC and the HKMA actively seek to enhance cooperation with their overseas counterparts.

This is particularly common with regard to the SFC's regime owing to the globalisation of securities and derivatives markets. In general, the SFC is empowered by Section 186 of the SFO to provide investigatory assistance to regulators outside Hong Kong if the SFC is satisfied that it is desirable or expedient to provide assistance in the interests of the investing public or in the public interest, or the assistance will enable or assist the overseas regulators to perform their functions and the assistance is not contrary to the interests of the investing public or to the public interest.

The SFC is one of the 117 signatories<sup>42</sup> to the International Organization of Securities Commission Multilateral Memorandum of Understanding (IOSCO MMOU) concerning consultation, cooperation and exchange of information. It also has bilateral collaborative arrangements for investigatory assistance or exchange of information with various overseas jurisdictions.<sup>43</sup> More notably, the SFC maintains a close partnership with the China Securities Regulatory Commission (CSRC) through the IOSCO MMOU, the Memorandum of Regulatory Cooperation, the Enforcement MOU for the Mainland-Hong Kong Stock Connect and the MOU concerning futures dated December 2017.

The international regulatory cooperation can also be illustrated by the framework for extradition and mutual legal assistance. Under the Fugitives Offenders Ordinance (Cap. 503), the DOJ is empowered to handle requests for the surrender of fugitive offenders. As regards providing mutual legal assistance, Hong Kong has mutual legal assistance agreements with 29 jurisdictions under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)<sup>44</sup> for mutual assistance in criminal matters, including assistance in relation to giving evidence, search and seizure, production of material, transfer of persons to give assistance, and confiscation of proceeds of crime.

## iii Local law considerations

When several jurisdictions are implicated in an investigation, the first Hong Kong statutory obligations one may have to bear in mind are secrecy obligations, for example those imposed by the SFO<sup>45</sup> or the Prevention of Bribery Ordinance.<sup>46</sup> Advance approval is needed from the SFC for disclosing relevant non-public information to foreign regulators. In addition,

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41 See Section 8 of the Competition Ordinance (Cap. 619).

42 Up to 27 December 2017, see [www.sfc.hk/web/EN/about-the-sfc/collaboration/overseas/iosco-mmou.html](http://www.sfc.hk/web/EN/about-the-sfc/collaboration/overseas/iosco-mmou.html), last accessed on 16 May 2018.

43 For the full lists, see [www.sfc.hk/web/EN/about-the-sfc/collaboration/overseas/investigatory-assistance-and-exchange-of-information.html](http://www.sfc.hk/web/EN/about-the-sfc/collaboration/overseas/investigatory-assistance-and-exchange-of-information.html) and <http://www.sfc.hk/web/EN/about-the-sfc/collaboration/overseas/exchange-of-information.html>, last accessed on 16 May 2018.

44 Correct as at 8 June 2018. Current full list available at <https://www.doj.gov.hk/eng/laws/table3ti.html>.

45 See Section 378 of the SFO.

46 See Section 30 of the Prevention of Bribery Ordinance (Cap. 201).

although personal data disclosure with consent is generally allowed under Hong Kong data privacy law, an employer is reminded to review the scope of the general consent (if it exists) given by employees, which may need to be supplemented by consent specific to the relevant investigation.

## V YEAR IN REVIEW

Regarding the SFC's work during 2017, the most important update to its rules relating to investigation and enforcement was in its Guidance on Cooperation. It replaced an older version that had been in force for over a decade. The new rules illustrate the SFC's approach to assessing cooperation in a clearer way by providing updated and specific examples and introducing the three-stage mechanism in quantifying a leniency grant.

As regards the SFC's enforcement actions, record fines of HK\$497 million were imposed by the SFC, which can mainly be attributed to the HK\$400 million fine against HSBC's private banking unit; nevertheless, the remaining HK\$97 million represented a 40 per cent year-on-year increase. The SFC has also strengthened its enforcement actions against firms with internal control failures relating to know-your-client or anti-money laundering requirements.

Another trend is the SFC's growing efforts in promoting international cooperation. In January and July 2017, the SFC updated its MOU for exchange of information with the US Securities and Exchange Commission and the UK Financial Conduct Authority, respectively. In December 2017, cross-border cooperation between the SFC and the CSRC also stepped up, as evidenced by the refreshed MOU for exchange of information and investigatory assistance (Refreshed MOU). Moreover, with the support of the court,<sup>47</sup> documentary evidence obtained by a search warrant for an investigation by the SFC in Hong Kong may be transmitted to the CSRC to assist the investigation in the PRC.

Another new development is the Manager-In-Charge (MIC) programme put forward by the SFC in April 2017. It requires companies to identify individuals with oversight of core functions and map out their responsibilities and reporting lines. While this regime was not primarily conceived as a tool for enforcement, it helps the SFC identify responsible individuals and hold them accountable in cases of wrongdoing. The SFC's investigation teams can then hone in on individual culpability at the inception of any investigation. If the evidence supports it, the SFC will take civil or criminal action against culpable individuals. According to the SFC,<sup>48</sup> many firms took the opportunity to strengthen their governance structures, and more than 10,000 individuals had been appointed as MICs as at March 2018.

In terms of the HKCC's enforcement actions, 2017 was also a landmark year in that the HKCC brought the first two cases to the Competition Tribunal under the Competition Ordinance since it came into force in December 2015. The first case was initiated in March 2017 against five technology companies allegedly involved in bid-rigging activities in a tender for the supply and installation of an IT server system.<sup>49</sup> The trial is due to be heard in

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47 Court of First Instance of Hong Kong High Court, see *Tang Hanbo v. The Securities and Futures Commission and another* (HCAL 229/2016).

48 Per Mr Carlson Tong, Chairman of the SFC in his opening remarks at the SFC Regulatory Forum 2018 held on 14 March 2018. See summary of discussions of SFC Regulatory Forum 2018, available at <http://www.sfc.hk/web/EN/files/ER/PDF/SFC%20Regulatory%20Forum%202018%2018th.pdf>, last accessed on 15 May 2018.

49 *Competition Commission v. Nutanix Hong Kong Limited & Ors*, CTEA 1/2017.

June 2018. The second case commenced in August 2017 and again relates to alleged breaches of the First Conduct Rule,<sup>50</sup> in this case by 10 home decorating companies suspected of entering into a market sharing agreement and a price-fixing agreement when providing renovation services to tenants of a public rental housing estate. The trial for this case is also scheduled to be heard in June 2018.

In the first case mentioned above, the Competition Tribunal has already made a few important decisions in the preliminary proceedings. First, it laid down precedents for the treatment of confidential information. Mr Justice Godfrey Lam granted the confidentiality treatment sought by the HKCC regarding tender prices (which was recognised as commercial information of the respondents), the identities of current and former employees of the respondents and the tender receiver, and the identity of the complainant. Second, the Competition Tribunal held that evidence obtained under compulsion from an employee was admissible for incriminating his employer, who was under a separate notice of interview, thus limiting the scope of the anti-self-incrimination provision to a 'direct use prohibition' under Section 45 of the Competition Ordinance.

## VI CONCLUSIONS AND OUTLOOK

In a report issued by the SFC in February 2018,<sup>51</sup> five areas of misconduct have been identified as the SFC's enforcement priorities for 2018: corporate fraud, insider dealing and market manipulation, intermediary misconduct, sponsor misconduct and money laundering. Corporate fraud, which remains the SFC's top enforcement priority, will also draw the regulator's attention to misconduct, such as issuing false or misleading financial statements, sponsor's failures relating to initial public offering fraud, and failures to manage conflicts of interest by senior management of listed companies.

In response to the increasing complexity of insider dealing and market manipulation cases, the SFC will adopt the 'One SFC' investigatory approach, which emphasises cross-divisional collaboration. Focusing on failings that pose systemic risks, the SFC will deal with breaches by an intermediary together, in the same group, to increase deterrence.

Regarding a sponsor's misconduct, the SFC's investigations are extending to more sponsor firms and sponsor principals in 2018, alerting sponsors to maintain the highest standards and to perform due diligence with professional scepticism.

As regards anti-money laundering, following the amendments to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) that came into effect on 1 March 2018, the SFC also published two relevant guidelines in March 2018.<sup>52</sup> It is very likely that 2018 will see a continuing trend of strengthening enforcement actions against firms with internal control failures related to know-your-client or anti-money laundering requirements.

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50 *Competition Commission v. W. Hing Construction Company Limited and Others*, CTEA 2/2017.

51 See SFC's release No. 3 of 2018, 26 February 2018, available at [www.sfc.hk/web/EN/files/ER/Reports/Enforcement%20Reporter/Enforcement%20Reporter\\_Feb2018.pdf](http://www.sfc.hk/web/EN/files/ER/Reports/Enforcement%20Reporter/Enforcement%20Reporter_Feb2018.pdf), last accessed on 15 May 2018.

52 'Guideline on Anti-Money Laundering and Counter-Terrorist Financing' (March 2018) and 'Prevention of Money Laundering and Terrorist Financing Guideline' issued by the Securities and Futures Commission for Associated Entities (March 2018), available at [www.sfc.hk/web/EN/rules-and-standards/anti-money-laundering-and-counter-terrorist-financing/legal-and-regulatory-requirements.html](http://www.sfc.hk/web/EN/rules-and-standards/anti-money-laundering-and-counter-terrorist-financing/legal-and-regulatory-requirements.html), last accessed on 15 May 2018.

In respect of cross-border cooperation, the number of surveillance requests from the SFC to the CSRC for information about suspicious southbound transactions doubled in 2017. With the Refreshed MOU in place and the rolling out of the reform of Hong Kong's listing regime in April 2018 (to attract emerging and innovative companies from mainland China to the Hong Kong capital markets), there is little doubt that the aforementioned cooperation will remain strong (if not grow stronger) in 2018, given the closer connection between mainland China and Hong Kong, at both the regulator level and the market level. Companies under SFC investigation would be wise to consider the consequences of the potential exchange of information and other investigatory assistance between the SFC and the CSRC.

Another observation is that opportunities and challenges coexist in new economies. On the one hand, the new listing regimes in Hong Kong support new economy companies and pre-revenue biotech firms. On the other, the SFC has taken regulatory action against a number of cryptocurrency exchanges and initial coin offering issuers and alerted investors to their potential risks.<sup>53</sup> As the Chairman of the SFC recently acknowledged, the dramatic turnaround of the SFC's attitude regarding weighted voting rights in such a short period of time reflects the saying that 'life is full of surprises'.<sup>54</sup> It will thus be interesting to see if the opening of a window will result in more doors being closed – new economy companies may be subject to closer monitoring from regulators.

The coming year will also be a busy year for the HKCC. With its new leadership<sup>55</sup> bringing enforcement experience from the US and the European Union, and a budget of HK\$200 million allocated to litigation activity, the HKCC is well equipped to bring more frequent and higher profile enforcement actions in 2018. As for the type of cases, although the first two cases in 2017 focused on breach of the First Conduct Rule, the CEO of the HKCC stated that cartels are not the 'sole enemy' and they would actively seek to detect and halt abuses by large firms using their market power to erect barriers to entry or squeeze out competitors. These violations, however, are harder to pursue, as complex economic analysis is needed, which will require the HKCC to devote more resources to its investigations. Nonetheless, companies are reminded to obtain sound legal advice to better understand evolving legal practice in this area and secure protection in current or potential investigations.

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53 See SFC's press release dated 19 March 2018, 'SFC's regulatory action halts ICO to Hong Kong public', available at <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=18PR29>, last visit on 23 May 2018.

54 Per Mr Carlson Tong, Chairman of SFC in his opening remarks at the SFC Regulatory Forum 2018 held on 14 March 2018. See summary of discussions of SFC Regulatory Forum 2018, available at [www.sfc.hk/web/EN/files/ER/PDF/SFC%20Regulatory%20Forum%202018%2018th.pdf](http://www.sfc.hk/web/EN/files/ER/PDF/SFC%20Regulatory%20Forum%202018%2018th.pdf), last accessed on 15 May 2018.

55 In 2017, the HKCC appointed Mr Brent Snyder as Chief Executive Officer, formerly Deputy Assistant Attorney General at the US Department of Justice, and Mr Jindrich Kloub as Executive Director (Operations), formerly an official of the Directorate General for Competition at the European Commission.



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ISBN 978-1-912228-42-3