Introduction
The increasing global commitment to combat corruption and the enhanced cooperation by international law enforcement agencies in bribery and corruption cases has led to an escalation in the number of investigations and prosecutions in these areas by various regulatory and criminal authorities. China has also embarked upon a sweeping anti-corruption campaign in recent years with vigorous enforcement activities. The implication for Hong Kong companies is that a more active role needs to be taken in addressing bribery and corruption risks.

There has also been an increased focus by various regulatory and enforcement authorities on individual misconduct and they are keen to hold individuals to account for wrongdoings, including chief financial officers, chief executive officers, chief compliance officers, heads of internal audit and heads of the legal department. This means that it is important for management and the board of directors to set the right tone from the top.

This is the first in a series of Guidance Notes designed to assist members of The Hong Kong Institute of Chartered Secretaries (HKICS) and the wider profession and community in bribery and corruption compliance. This guidance is particularly designed to help those who participate in board meetings and who interact frequently with senior management, so that they are able to ask relevant questions when a potential fraud risk is identified.

This first Guidance Note in the series will provide an overview of the regulatory requirements relating to bribery and corruption in Hong Kong, Mainland China and internationally. A second Guidance Note will cover the key elements of effective bribery and corruption compliance.

Overview of the regulatory requirements relating to bribery and corruption in Hong Kong
There are a number of key regulations relating to bribery and corruption in Hong Kong and it is important for practitioners, senior managers and directors to have a good understanding of these regulatory requirements and the consequences of non-compliance.

Prevention of Bribery Ordinance (Cap 201)
The Prevention of Bribery Ordinance (PBO) is the main anti-corruption law in Hong Kong. It covers both the corruption of public officers (public sector offences) and corrupt dealings with agents, which includes employees of private companies (private sector offences). It is enforced by the Independent Commission Against Corruption, which investigates alleged corrupt practices, and the Department of Justice of Hong Kong, which is responsible for prosecuting corruption charges.

Section 9 of the PBO states: 'Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's –

• doing or forbearing to do, or having done or forborne to do, any act in relation to the principal's affairs or business, or
• showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to the principal's affairs or business,
shall be guilty of an offence.'

Specifically PBO Section 9(1) states that any agent who solicits or accepts an advantage in respect of the affairs or business or his principal without obtaining the principal's authorisation or permission is guilty of an offence. PBO Section 9(2) states that a person who offers such an advantage is also guilty of an offence. In effect accepting and offering advantages are offences.

PBO Section 9(3) makes it an offence for any agent, with intent, to deceive his principal, to use any false, erroneous or defective receipt, account or other document in respect of which the principal is interested. There is no need to prove that the agent profited from the deception in order to find guilt under this provision.

'Principal' includes an employer, who, in the case of a limited company, refers to the board of directors. 'Agent' includes any person employed by, or acting for, another, including individual directors or employees of a company. 'Advantage' can be briefly defined as anything of value except entertainment, the latter of which refers to the provision of food and drink for immediate consumption and any other entertainment connected with such provision. An 'advantage' can be:
- any gift, loan, fee, reward or commission
- any office, employment or contract
- any payment, release, discharge or liquidation of any loan, obligation or other liability
- any other service, or favour (other than entertainment), or
- the exercise or forbearance from the exercise of any right or any power or duty.

The Principal's permission should normally be obtained before an agent solicits and/or accepts an advantage. If an advantage has been accepted without prior permission, the agent shall seek retrospective permission from the principal as soon as possible. It is not a defence to claim that it is customary practice to accept or offer the advantage, nor is it a defence that the advantage did not or could not have any effect on the person accepting it.

Foreign officials and staff members may fall into the definition of 'agent' for the purposes of the PBO. Since Section 9 of the PBO prohibits corrupt transactions with agents taking place in Hong Kong, any act of offering advantage in Hong Kong to foreign officials or staff members in respect of the latter's principal's affairs or business without the principal's approval may also breach the PBO.

The maximum penalty of section 9 of the PBO is a fine of HK$50,000 and imprisonment for 7 years. The court may also order the convicted person to make repayment of the whole or partial amount or value of the advantage. Anyone convicted of an offence under the PBO may be prohibited for a period not exceeding seven years from taking up or continuing employment as a professional or as the director or manager of a corporation, public body, partnership or firm.

The Theft Ordinance (Cap 210)
The Theft Ordinance (TO) gives a legal definition to the following offences:

- **Theft** – a person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it (Section 2(1)).

- **Fraud** – if any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either:
  (a) in benefit to any person other than the second-mentioned person, or
  (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person

  then the first-mentioned person commits the offence of fraud (Section 16A(1)).

- **False accounting** – where persons dishonestly, with a view to gain for themselves or another or with intent to cause loss to another:
  (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose, or
  (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to their knowledge is or may be misleading, false or deceptive in a material particular,

  they shall be guilty of an offence (Section 19(1)).

It is also an offence under the TO if officers of a company, with intent to deceive the company's members or creditors about its affairs, publishes a written statement or account which to their knowledge is or may be misleading, false or deceptive in a material particular (Section 21(1)).
Conspiracy to defraud is a common law offence in Hong Kong. Without a statutory definition, it can generally be understood as an agreement between two or more persons to dishonestly bring about a state of affairs which the conspirators realise will or may cause the victim to act or fail to act, thereby causing the victim to suffer financial loss or putting his or her economic interests at risk (see Wai Yu-tsang v R [1992] 1 HKCLR 26).

The Companies Ordinance (Cap 622)
There are legal and regulatory requirements for directors to disclose conflicts of interest and/or take further compliance whenever such conflicts arise. For example, the Companies Ordinance provides that if a company director is in any way, directly or indirectly, interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company that is significant in relation to the company’s business, and the director’s interest is material, the director must declare the nature and extent of the interest to the other directors (Section 536). He will commit an offence if the director fails to satisfy the related disclosure requirements (Section 542).

Duties of company directors
Company directors are expected to carry out their duties as described in the constitution of the company, case law, and statute. They also have to abide by the laws and regulations of the company’s jurisdiction if the company is not a Hong Kong company.

The Companies Registry issued *A Guide on Directors’ Duties* in March 2014 to outline the following 11 general principles for directors in the performance of their functions and the exercise of their powers:

- **Principle 1:** duty to act in good faith for the benefit of the company as a whole
- **Principle 2:** duty to use powers for a proper purpose for the benefit of members as a whole
- **Principle 3:** duty not to delegate powers except with proper authorisation and duty to exercise independent judgement
- **Principle 4:** duty to exercise care, skill and diligence
- **Principle 5:** duty to avoid conflicts between personal interests and interests of the company
- **Principle 6:** duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law
- **Principle 7:** duty not to gain advantage from use of position as a director
- **Principle 8:** duty not to make unauthorised use of company’s property or information
- **Principle 9:** duty not to accept personal benefit from third parties conferred because of their position as a director
- **Principle 10:** duty to observe the company’s memorandum and articles of association and resolutions, and
- **Principle 11:** duty to keep proper books of account.

The majority of the above principles are related to maintaining ethical business conduct and the fiduciary duties of directors under case law.

Hong Kong Listing Rules
To align with the established PBO and other Hong Kong laws, Rule 3.08 of the Listing Rules of The Stock Exchange of Hong Kong Limited requires directors, both collectively and individually, to fulfil fiduciary duties and duties of skill, care and diligence. Directors are reminded of their fiduciary duties to the company and that they must, in the performance of their duties as directors, avoid actual and potential conflicts of interest and duty.

Overview of the regulatory requirements relating to bribery and corruption in Mainland China
In response to the Chinese culture of cultivating business relationships via gift giving, the Criminal Law of People’s Republic of China (PRC) prohibits both the giving and receiving money or property and proprietary interests to obtain any undue benefit. Note that proprietary interests includes material interests and benefits such as tickets to football matches, traveling packages and release from a mortgage loan.

Bribery in the public sector is prohibited by the PRC Criminal Law. It is a criminal offence under Article 389 for any person or under Article 393 for any corporations, entities or organisations, for the purpose of securing illegitimate benefits, to give money or property to a state functionary. A state functionary may be any person performing public duties in state bodies, as well as state-owned companies and enterprises.

Commercial bribery is also prohibited by the PRC Criminal Law and the PRC Anti-Unfair Competition Law (AUCL). It is a criminal offence under Article 164 of the PRC Criminal Law for any person, corporation, entities or organisation, for the purpose of seeking improper interests and benefits, offers money or property to any employee of any company, enterprise or any other entity, and the amount involved in relatively large (Article 164(1)). Under Article 8 of the AUCL, the business operators shall not use properties or other methods to bribe others in order to sell or purchase commodities.
Under the current PRC Criminal Law, a person committing the crime of receiving bribery will be punished depending on the amount of bribes he or she has taken. For instance, commercial bribery is prosecuted if the bribe exceeds RMB60,000. Commercial bribery over RMB60,000 can result in imprisonment of not less than three years, while bribes above RMB2 million can lead to a prison sentence ranging from three to 10 years.

The recent Ninth Amendment to the Criminal Law of PRC, issued on 1 November 2015, added monetary fines for all individuals that are convicted of engaging in corruption and bribery offences. For instance, employees in charge of a business unit will now be responsible for bribe payments made by the unit, even if the employee did not provide the bribe him or herself. Penalties for the offence of bribery also include the confiscation of property, imprisonment and the death penalty.

The PRC Criminal Law has extra-territorial effect over Chinese state functionaries where their crimes, whether the act or consequences, take place within China. Binding judicial interpretations are issued from time to time to interpret or clarify elements in the offences, such as the threshold of the amount of the bribe for prosecution.

International and regional initiatives

Over the past decades, the initial focus on anti-corruption globally was on monitoring financial institutions for anti-money laundering and later combating the financing of terrorism. The regulations and guidelines were later extended to non-financial institutions as well.

There are initiatives with an international character, such as the Organisation for Economic Co-operation and Development Anti-Bribery Convention which establishes regulatory standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.

In addition to the general international and regional initiatives and directives, there are also industry specific regulations for anti-bribery and anti-corruption. US and international enforcement authorities have continued their vigorous pursuit of life sciences companies for US Foreign Corrupt Practice Act (FCPA) and anti-corruption violations, resulting in recent high-profile investigations across the globe and heightened government compliance expectations.

In order to raise the awareness of the fight against increasing fraud, the Department of Justice (DOJ) and the Securities and Exchange Commission of US have stepped up and issued large fines to enterprises and individuals, together with suspension from services. The DOJ has made the prosecution of individual FCPA cases an enforcement priority. On 9 September 2015, the DOJ issued a memorandum entitled ‘Individual Accountability for Corporate Wrongdoing’ outlining specific policy measures intended to empower US prosecutors further in their pursuit of individuals alleged to be involved in corporate wrongdoing.

Global corruption scandals over the last few years have showed that non-compliant behaviour does not only lead to financial losses, but also massive reputational damage. In comparison to possible exclusion from bidding procedures due to a black-listing, or even the imprisonment of managers and employees, reputational damage can be far more serious. Building a good reputation takes a long-term investment and it might take years of effort to win back stakeholders’ trust.