

反贪污贿赂：合规及最佳实践

正在规划或准备通过首次公开发行上市的公司，需要确保其董事和管理层遵守相关法律和监管要求，其中包括申请上市目的。

一旦公司上市，“上市规则”（连同“公司条例”及香港普通法）的公司治理守则要求董事遵守各项规定，其中包括：

- 诚实和真实地以公司的整体利益行事；
- 避免实际和潜在的职务及利益冲突；
- 完全及公平地披露他在公司的合同中的利益

IPO过程的其他利益相关者和参与者，例如保荐人、承销商和配售代理人，在处理IPO时也需要保持高标准的行为。于二零一七年一月二十日，证券及期货事务监察委员会（“证监会”）向参与上市及配售创业板的保荐人、承销商及配售代理人发出指引。中介人亦须根据“证监会牌照或注册人士行为守则”所载的一般原则进行其活动，包括诚实、公平地并符合其客户利益和市场的完整性。

此外，根据“公司融资顾问操守准则”，作为企业融资顾问的发起人需要作出一切合理的尝试，确保其客户理解相关监管要求及其在交易各阶段期间的影响。

因此，当中一个重要的部分是确保在申请上市的过程中，公司的董事和高级职员以及公司本身没有从事任何贪污贿赂活动或违反任何香港反贪污贿赂的法律。



衛紹宗律師
合伙人



香港反贪污贿赂法律简介

1. 防止贿赂条例第201章

“防止贿赂条例”由香港廉政公署执行，以打击公营和私营机构的贪污贿赂行为。

“防止贿赂条例”第9条主要适用于私营机构。第9(1)条禁止代理人就其负责的业务征求及接受利益：

- 任何代理人（例如雇员，包括私人或上市公司的董事）；
- 未经其负责人（例如雇主或公司，包括董事会）许可或任何合理辩解；
- 索取或接受任何利益；
- 作为代理人作出或不作出任何与其负责人的事务或业务有关的作为；
- 即属犯罪。

《防止贿赂条例》第201章

- 代理人的贪污交易 (第九条)
- 对公职人员的贿赂 (第四及八条)

负责人是指雇主 (亦即该公司)



“代理人” (任何董事或员工)是一个人

- 包括公职人员及受雇于他人或代他人办事的人；
- 以全职或兼职形式被委任；
- 收取固定薪水或一笔报酬。



“利益”指

- 任何贵重财产，包括：金钱、礼物、佣金、雇用工作及服务。



“款待”可以是

- 在当场享用的食物或饮品，以及任何与此有关的其他款待。



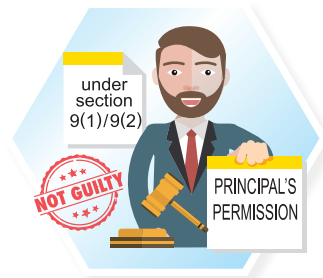
“公职人员”包括

- 公务员、公共机构的干事及其雇员。



“公共机构”包括

- 行政会议、立法会、各区议会、公共服务机构或营运商，以及半官方组织，如：证监会及港交所。



代理人并不算触犯条例，若

- 代理人获得其负责人许可而索取或接受利益 (第九条(1)或(2))。



任何人将被视作提供利益，若

- 他直接、间接或同意向他人提供利益。



任何人将被视作索取或接受任何利益，若

- 他直接或间接要求/接受或同意为包括自己在内的任何人收受利益。



以下情况不能作为抗辩理由

- 如所收受或提供的利益对任何专业、行业、职业或事业而言已成习惯。

如被裁定犯下“防止贿赂条例”第9条的罪行，最高刑罚为罚款港币500,000元及监禁七年。法院还可以命令将被定罪的人所收到的利益归还给该负责人或公司，他亦可能被取消担任公司董事的资格多年。

“防止贿赂条例”第9(2)条规定，任何人未经代理人的负责人许可，不得向代理人提供任何利益，作为代理人作出或不作出任何与其负责人的事务或业务有关的作为，即属犯罪。

根据“防止贿赂条例”第9条，提供和接受贿赂均构成犯罪。

如果一个人或代表他行事的任何其他人士直接或间接要求或要求/接受或同意接受某种利益，无论是为自己还是为另一人，都被视为要求/接受利益。

“防止贿赂条例”第19条规定了专业/交易或惯例不是提供或接受任何利益的免责辩护。因此，不可能说，这是一个习惯做法，例如在中秋节期间发放红包或月饼，并将其作为给予或接受利益的辩护。

此外，“防止贿赂条例”第9(5)条规定，在接受利益之前应当取得许可，或者在接受后尽快在合理可能的范围内取得许可。必须注意的是，许可权限需要来自接收人的负责人（或公司），该许可并不是指雇主或代理人的负责人允许代理人提供利益。

“利益”指任何贵重财产，包括：金钱、礼物、佣金、雇用工作及服务。

“款待”可以是在当场享用的食物或饮品，以及任何与此有关的其他款待。

根据“防止贿赂条例”第9条，为上市公司行事的董事是公司的代理人，是董事的负责人。公司的“意向”即是董事会董事的意向。因此，在“防止贿赂条例”第9条的目的下，董事会是与个别董事有关的负责人。公司的股东（即使是大股东）并不是担任公司代理人的董事的负责人。

公司可能因“刑事罪行条例”所订罪行而须负法律责任，因为罪行中“人”的定义包括任何团体，不论是法人团体或不具有法人资格（“释义及通则条例”第1章第3条）。但实际上，通常只对个人提出起诉。

如任何公司涉及贿赂罪行，而该罪行是在有关公司管理的董事或高级人员同意或纵容下作出的（“刑事诉讼程序条例”（第221章）第101E条），该罪责将由该董事或高级人员承担。

“防止贿赂条例”也适用于公务员和公共机构的员工：

任何人如属下列情况，即属犯罪：

- 根据“防止贿赂条例”第4条，该人在世界上任何地方向公职人员提供任何利益，作为执行/放弃执行/加快/延迟任何协助/支持任何人的行为的诱因/报酬；

- 根据“防止贿赂条例”第8条，任何公职人员在与该政府部门或公共机构进行任何种类的交易时，向该公职人员提供任何利益；
- 公职人员如果在上述情况下索取或接受这种利益作为诱因或报酬，即属犯罪；
- 公职人员一般包括官员（公务员）及公共机构的干事和雇员；“公共机构”包括行政会议、立法会、各区议会、公共服务机构或营运商，以及半官方组织，如：证监会及港交所。

2. “廉政公署条例”（第204章）

该条例赋予廉政公署调查，搜查及扣押财产，以及逮捕，扣留及准予根据“防止贿赂条例”被控人的保释。

3. 反贪污贿赂执法权

廉政公署有法定责任：

- 接受和调查怀疑涉及贪污贿赂行为的投诉；及
- 调查“防止贿赂条例”等法令下的违法行为。

根据“廉政公署条例”及“防止贿赂条例”，廉政公署具有广泛的调查权力：

- 授权人员进行查讯或讯问；
- 授权廉政公署人员查阅与任何政府部门及公共机构的工作有关的所有纪录、簿册及文件；
- 可以在没有搜查证的情况下逮捕任何合理地怀疑犯有“刑事诉讼法”或“防止贿赂条例”下的罪行的人士可申请搜查令进行搜查及检取处所；
- 有权强制获取信息；
- 可以拦截通讯，对嫌疑人进行秘密监视；
- 会与香港以外的执法机构联络，就刑事事宜提供司法协助。廉政公署与中国最高人民检察院订有协助计划，以面谈跨境证人。

4. 合规及最佳实践

公司的董事和高管只是人，有时他们可能忽视了他们的职责和责任。在某些极端情况下，公司的管理层和专业人员甚至可能为了个人利益，在损害公司利益下而作出公司贪污、欺诈和其他不当行为。廉政公署等执法机关并不易于就有关行为进行调查和整理证据，以检控违法者的罪行。预防胜于治疗，除了执法和威慑，公司必须有足够和适当的领导、制度（

检查和监管)，以发人员培训和文化，以面对道德和公司治理的挑战，以防止贪污、欺诈和不当行为的发生。

除法律规定外，公司董事在履行职责时应遵守有关规定和指引。就上市公司而言，主板及创业板上市规则分别适用于主板及创业板上市公司。

审计委员会

“主板上市规则”第3.21条规定，每间上市公司均须设立一个由非执行董事组成的审核委员会。

审计委员会的主要职能之一是监督内部控制制度并遵守相关法律法规（包括反贪污贿赂法律）。审计委员会必须确保，公司有足够和良好的内部控制，能够及早发现贪污和欺诈行为。

公司治理守则

“上市规则”（“附录十四”）的“企业管治守则”及“企业管治报告”（附件十四）要求上市公司的董事会确保公司维持良好及有效的内部监控，以保障股东的投资、公司的资产。这将包括内部控制，可以防止和监管公司的任何贪污或不当行为而导致公司损失。

“公司治理守则”提供守则条文和建议上市公司遵守的最佳实践。

董事的义务和利益冲突

“主板上市规则”第3.08条及“创业板上市规则”第5.01条“上市规则”订明香港联合交易所预期上市公司董事须履行以下责任：

- 诚实和真实地以公司的整体利益行事；
- 避免实际和潜在的职务及利益冲突；
- 完全及公平地披露他在公司的合同中的利益。

董事不得允许个人利益与公司利益发生冲突，不得利用其董事职位为自己或其他人获取任何利益或对公司造成不利的影响。

如果董事能够遵守和遵守这些原则和规则，以避免他的个人利益与公司利益发生任何冲突，则作为上市公司代理人的董事不太可能违反“防止贿赂条例”第9节。由于，如果有任何出现这种冲突的风险，董事在遵守这些原则下将向公司披露并寻求许可。如果获得许可，则不会有任何违法的行为。

内部政策和行为守则

清晰的内部政策和行为准则将使董事和工作人员能够了解他们需要和期望的商业道德标准是什么。制定高度诚信的行为准则有助于保护公司员工免坠贪污贿赂的陷阱或误解，并增强投资者和其他利益相关者的信任。

行为守则也将作为反映公司核心价值观的政策和指导方针，允许其董事和雇员接受与公司的业务或事务有关的利益（关于防止贿赂条例”第9条列明，董事和雇员可以或不能接受）。

廉政公署建议，禁止代表公司行事的董事、职员及代理人：

- 索取或接受他人的任何利益，作为对公司业务的任何行为的诱因或报酬；
- 向另一人的代理人提供任何利益，作为对该人的负责人的业务作出任何作为的诱因或报酬；以及
- 向任何政府或公职人员提供任何利益，作为报酬或诱使以官方身份执行任何行为，或与他/她所属的政府部门或公共机构进行业务往来。

• 实用提示 •



• 应经常检视公司在收受利益方面的政策和操守准则，以界定哪些情况下能够或不能够收受利益。

- 如有疑问，应咨询管理层的意见。
- 对于服务提供商、业务合作伙伴或客户赠送的任何礼物或提供的任何利益，应保持披露及透明度。
- 如果您需要赠送礼物或提供利益，请考虑将其交给该公司或相关部门，而不是任何一个特定的人。



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Anticorruption: Compliance and Best Practice

A company that is planning or preparing to go public via an initial public offering (“IPO”) needs to ensure that its directors and management comply with the relevant legal and regulatory requirements for the purpose of, among other things, the listing application.

Once the company has gone public, the Corporate Governance Code of the Listing Rules (together with the Companies Ordinance and the common law in Hong Kong) requires directors, among other things, to:

- act honestly and in good faith in the interests of the company as a whole;
- avoid actual and potential conflicts of interest and duty;
- disclose fully and fairly his interests in contracts with the company.

Other stakeholders and players of the IPO process such as sponsors, underwriters and placing agents also need to maintain a high standard in terms of their conduct when dealing in IPOs. On 20 January 2017, the Securities and Futures Commission (“SFC”) issued a guideline to sponsors, underwriters and placing agents involved in the listing and placing of GEM (Growth Enterprise Market) stocks. An intermediary is also required to conduct its activities in accordance with the general principles (“GP”) set out in the Code of Conduct for Persons Licensed by or Registered with the SFC, including acting honestly, fairly, and in the interest of its clients and the integrity of the market.

Furthermore, a sponsor, in its capacity as a corporate finance advisor, is required under the Corporate Finance Advisor Code of Conduct to, among other things, use all reasonable effort to ensure that its client understands the relevant regulatory requirements and their implications at all stages of a transaction.

One important aspect is therefore to ensure that the directors and senior staff of the company that is going for an IPO and the company itself have not engaged in any corrupt activities or violated any Hong Kong anti-corruption laws.

Brief overview of Hong Kong anti-corruption laws

1. Prevention of Bribery Ordinance (Cap. 201)(“POBO”)

The POBO is enforced by the Independent Commission Against Corruption (“ICAC”) to combat corruption in the public and private sectors.

Section 9 of the POBO mainly applies to the private sector. Section 9(1) prohibits the solicitation and acceptance of advantage by an agent in connection with his/her principal’s business:



Dominic Wai

Partner



Prevention of Bribery Ordinance (Cap. 201)

- Corrupt Transactions with Agents (section 9)
- Bribery of Public Servants (sections 4 and 8)

A principal is the “employer” (i.e. the company).



An agent (any director or employee) is a person:

- acting for, or employed by, the principal in business dealings;
- appointed full-time or part-time; and
- whether or not receives a fixed salary or a fee



An “advantage” refers to

- any valuables such as money, gift, commission, employment, and services.



Entertainment can be

- in form of food or drink and any other connected entertainment.



Public servants include

- government officers, members and employees of public bodies.



Public bodies include

- the Executive Council, the Legislative Council, all District Councils, public service providers/operators, and many quasigovernmental Organisations such as the SFC and the HKEx”



An agent is not guilty if

- the agent solicits or accepts an advantage with the principal's permission (section 9(1)/9(2)).



A person is regarded as offering an advantage if

- the person directly or indirectly gives or agrees to give an advantage to another person.



A person is regarded as soliciting/accepting an advantage if

- the person directly or indirectly asks for/receives or agrees to receive an advantage for any persons, including himself/herself.



It is not a defence for

- any advantage accepted or offered that is customary in any profession, trade, vocation or calling.

- any agent (e.g. an employee, including a director of a private or public listed company);
- without the permission of his principal (e.g. the employer or the company including the board of directors) or any reasonable excuse;
- solicits or accepts any advantage;
- for doing or forbearing to do any act in relation to his/her principal's affairs or business;
- shall be guilty of an offence.

If convicted of a section 9 POBO offence, the penalty is a maximum fine of HK\$500,000 and an imprisonment of 7 years. The Court may also order that the amount of advantage received be paid to the principal or company and the convicted person may be disqualified from being a director of a company for a number of years.

Section 9(2) of the POBO states that any person, without the permission of the agent's principal, offers any advantage to an agent as an inducement to or reward for the agent's doing or forbearing to do any act in relation to the affairs or business of the agent's principal, commits an offence.

Under section 9 of the POBO, both the offer and acceptance of bribes constitute an offence.

A person is regarded as soliciting/accepting an advantage if he, or any other person acting on his behalf, directly or indirectly demands or asks for/receives or agrees to receive, an advantage, whether for himself or for another person.

Section 19 of the POBO states that profession / trade or customary practice is not a defence for offering or accepting any advantage. Accordingly, it is not possible to say that it was a customary practice such as giving red packets during Chinese New Year or moon cakes during Mid Autumn Festival and use that as a defence for giving or accepting an advantage.

Also, section 9(5) of the POBO specifies that the permission should be given before the advantage is accepted or as soon as reasonably possible after such acceptance. It is important to note that the permission needs to be from the principal (or company) of the recipient (the agent). It is not referring to a permission from the employer or boss of the agent allowing the agent to offer the advantage.

"Advantage" refers to tangible and intangible things such as money, gift, commission, loan, employment, service or favour, except entertainment.

"Entertainment" refers to the provision of food or drink for consumption on the occasion when it is provided, and any other entertainment connected with such provisions.

Under section 9 of the POBO, a director who acts for a listed company is an agent of the company, which is the principal of the director. The company's "mind" is the board of directors and so the board is the principal in relation to the individual directors for the purpose of section 9 of the POBO. A shareholder (even the majority shareholder) of a company is therefore not the principal in relation to a director acting as an agent of the company.

A company may be liable for an offence under the POBO because the definition of "person" in offences includes any body of persons, corporate or unincorporated (section 3 of the Interpretation and General Clauses Ordinance, Cap. 1). But in practice, prosecutions are usually only made against individuals.

If a company is involved in a bribery offence, where the offence was committed with the consent or connivance of a director or officer concerned in the management of the company (section 101E of the Criminal Procedure Ordinance, Cap. 221), the director or officer will be liable.

For civil servants and employees of public bodies, the POBO also applies:

Any person shall be guilty of an offence if:

- under section 4 of the POBO, the person offers any advantage anywhere in the world to a public servant as an inducement/reward for performing/abstaining from performing/expediting/delaying any act of assisting/favouring any person; or
- under section 8 of the POBO, the person offers any advantage to any public servant while having dealings of any kind with that government department or public body;
- A public servant commits an offence if he solicits or accepts such an advantage as an inducement/reward in the circumstances as set out above;
- Public servants in general include government officers (civil servants), members and employees of public bodies;
- Public bodies include the Executive Council, the Legislative Council; all District Councils, public service providers/operators, and many quasi governmental organizations such as the SFC and the Stock Exchange of Hong Kong Limited.

2. Independent Commission Against Corruption Ordinance (“ICACO”, Cap. 204)

The ordinance provides powers for the ICAC to investigate, search and seize property, as well as arrest, detain and grant bail to persons accused under the POBO.

3. Anti-corruption law enforcement powers

The ICAC has a statutory duty to:

- receive and investigate complaints alleging corrupt practices; and
- investigate offences under ordinances such as the POBO.

By the ICACO and POBO, the ICAC has extensive investigative powers:

- authorizes officer to conduct enquiry or examination;
- empowers ICAC officers to gain access to all records, books and documents relating to the work of any government department and public bodies;
- can arrest without warrant anyone reasonably suspects to be guilty of offences under ICACO or POBO;
- can apply for search warrants to carry out search and seizure of a premises;
- has the power to compulsorily acquire information;
- can intercept communications and carry out covert surveillance on suspects;
- would liaise with law enforcement agencies outside Hong Kong for mutual legal assistance on criminal matters. The ICAC has an assistance scheme with the PRC Supreme People’s Procuratorate to interview witnesses cross-border.

4. Compliance and Best Practice

Directors and executives of a company are humans, and sometimes they might neglect their duties and responsibilities. In some extreme cases, the company’s management and professionals might even commit corporate corruption, fraud and other malpractices for their own personal gain and benefit at the expenses of the company’s interest. It is not easy for law enforcement agencies like the ICAC to investigate and collate evidence to prosecute the wrongdoers for their crimes. Prevention is always better than cure and apart from law enforcement and deterrence; a company must have sufficient and proper leadership, system (checking and monitoring), people training and culture to face the ethical and corporate governance challenges so as to prevent corruption, fraud, and malpractices from happening.

Apart from the law, company directors should comply with the relevant regulations and guidelines in performing their duties. For listed companies, the Main Board and GEM Listing Rules apply to the Main Board and GEM board listed companies respectively.

Audit Committee

Rule 3.21 of the Main Board Listing Rules provide that every listed company must establish an audit committee comprising non-executive directors only.

One of the main functions of the audit committee is to provide oversight of the system of internal controls and compliance with the relevant laws and regulations (including anti-corruption laws). It is important for the audit committee to see that the company has sufficient and good internal controls that would enable the early detection of corrupt and fraudulent practices.

Corporate Governance Code

The Corporate Governance Code (“CGC”) and Corporate Governance Report of the Listing Rules (Appendix 14) requires the board of a listed company to ensure that sound and effective internal controls are maintained by the company for the sake of safeguarding shareholders’ investment and the company’s assets. That would include internal controls that could prevent and detect any corruption or malpractices in the company as such activities would cause loss to the company.

The CGC provides Code Provisions and recommended best practices for Listed companies to comply with.

Directors' duties and conflict of interest

Rule 3.08 of the Main Board Listing Rules and Rule 5.01 of the GEM Board Listing Rules lay down that the Stock Exchange of Hong Kong expects listed company directors to fulfill fiduciary duties to:

- act honestly and in good faith in the interests of the company as a whole;
- avoid actual and potential conflicts of interest and duty;
- disclose fully and fairly his interests in contracts with the company.

Directors must not allow personal interests to conflict with the company's interests and must not use his position as a director to gain any advantage for himself, or someone else, or which causes detriment to the company.

If a director is able to follow and comply with these principles and rules to avoid any conflict of his personal interest with the interest of the company, then it will be unlikely that the director, as an agent of the listed company, would violate section 9 of the POBO. This is because if there is any risk of such conflict, by complying with these principles, the director would make disclosure to the company and seek permission and if permission is given, then there would not be any violation of the law.

Internal policies and Code of Conduct

Clear internal policies and a code of conduct will allow directors and staff to know what business ethical standards are required and expected of them. A code of conduct setting a high standard of integrity helps safeguard the company's staff from corruption pitfalls or misunderstanding and enhance the trust of investors and other stakeholders.

A code of conduct will also serve as a policy and guideline reflecting the core values of the company on the permission given to its directors and staff for the acceptance of advantage that relates to the company's business or affairs (in relation to s.9 of the POBO on what the directors and staff can or cannot accept).

The ICAC suggests that directors, staff and agents acting on behalf of a company should be prohibited from:

- soliciting or accepting any advantage from others as a reward for or inducement to doing any act about the company's business;
- offering any advantage to an agent of another as a reward for or inducement to doing any act about the latter's principal's business; and
- offering any advantage to any government or public servant as a reward for or inducement to performing any act in his official capacity, or while having business dealing with the government department or public body he/she belongs to.

• Practical Tips •



• Always review the company's policies and code of conduct on acceptance of advantages to know what can be accepted and what can't.

- If in doubt, seek advice from management.
- Always disclose and be transparent about any gifts or advantages from service providers, business partners or customers.
- If you need to give a gift or advantage, consider giving it to the company or a department instead of any particular individual.



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