How Can the ICAC Help Foster the Widespread Adoption of Company Anticorruption Programs in Hong Kong

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How Can the ICAC Help Foster the Widespread Adoption of Company Anticorruption Programs in Hong Kong

Cover Page Footnote
International Law; Commercial Law; Law
How Can the ICAC Help Foster the Widespread Adoption of Company Anticorruption Programs in Hong Kong?

Bryane Michael† and Indira Carr††

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I. Introduction

Business measures against corruption represent the bulwark against bribery and other corruption offences in most upper-income jurisdictions.\(^1\) Businesses take these measures in response to the incentives legislation, executive regulations, and other rulemaking provides to them.\(^2\) As early as 1980, scholars documented the effect that anti-corruption law—and specifically the Foreign Corrupt Practices Act—has had on encouraging businesses to adopt changes to their accounting and compliance programs.\(^3\) Anti-corruption laws have had an impact on the measures businesses take to prevent, detect, and curb corruption committed by their agents and partners.\(^4\) These measures—in turn—significantly affect the extent of corruption committed by companies’ principals, agents, and partners.\(^5\) Yet, Hong Kong companies do not implement many of the common measures used

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1. The Organization for Economic Co-operation Development ("OECD") provides detailed analysis, even from non-OECD jurisdictions like Singapore, of the various ways that the corporate sector serves as the primary agent responsible for preventing, detecting, and responding to corruption before law enforcement even becomes involved. See 6th Regional Anti-Corruption Conference for Asia and Pacific, Sing, Nov. 26-28, 2008, Strategies for Business, Government, and Civil Society to Fight Corruption in Asia and the Pacific, 36, 67, 71, 174, 176, 190.

2. See id.


4. See id. at 768.

5. Several papers have outlined the effects these company programs have had on corruption. For example, Wu (2005) finds—using regression analysis on cross-country data from a number of countries (including Hong Kong)—important statistically significant effects of corporate governance arrangements on corruption. See Xun Wu, Corporate Governance and Corruption: A Cross-Country Analysis, 18 GOVERNANCE 151, 168–69 (2005) ("The empirical results here support a theoretical projection that good corporate governance can lead to reduced level of corruption.").
to prevent and/or detect. As shown in this paper, Hong Kong’s companies rank among the worst in terms of implementing anti-corruption measures. Most of the blame falls on Hong Kong’s legislative framework (and the lack of incentives this framework provides).

Hong Kong’s Legislative Council (“LegCo”) should pass a set of provisions, found in most upper-income countries, which provide strong incentives for companies to adopt internal policies and programs aimed at preventing, detecting, and sanctioning corruption. In the first section, we review the international “law” in place that incentivizes companies to adopt anti-corruption measures. The second section shows how specific countries (we focus on the United States) have adopted these principles into their domestic legislation. The third section provides an overview of anti-corruption measures taken by Hong Kong companies and demonstrates the need for a more activist policy approach to fight corporate corruption tacitly or directly condoned by Hong Kong’s companies. In the fourth section, we describe how the Prevention of Bribery Ordinance (“POBO”) could introduce a “business measures defense” similar to the approach taken in U.S. and U.K. anti-corruption legislation. The following sections provide recommendations for policy changes that would encourage the development of anti-corruption business measures by business associations (fifth section) in financial accounting and auditing (sixth section) through corporate whistleblowing (seventh section) and internal investigations (eighth section) by business partners (ninth section), through public disclosure (tenth section), and training (eleventh section). In the penultimate section, we discuss how the Ethics Development Centre can play a stronger role in encouraging companies to adopt anti-corruption business

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6 See infra Section IV.
7 See id.
8 See id.
9 See infra Section II. We put the word law in quotes as such law consists of non-binding guidelines and soft law norms as promulgated by the U.N. and the OECD.
10 See infra Section III.
11 See infra Section IV.
12 See infra Section V.
13 See infra Sections VI-XII.
II. International Law and Corporate Measures Aimed at Reducing Corruption

International law provides little guidance on the specific measures companies should take to tackle corruption. The United Nations Convention Against Corruption 2003 ("UNCAC") provides only the most general framework to legislators as they decide on the types of laws they need to adopt in order to encourage companies to adopt effective anti-corruption measures (and we define some of these measures below). Article 12 of the UNCAC concerns private sector measures aimed at fighting corruption, and outlines three areas of action. These three areas include company anti-corruption programs, accounting standards, and penalties. Specifically, the UNCAC asks parties (and their legislatures who pass the legislation aimed at adopting the Convention’s provisions) “to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative, or criminal penalties for failure to comply with such measures.”

The UNCAC provides a bit more clarification as to the type of measures businesses should take to fight corruption, but not much. Figure 1 shows the provisions from Article 12.2 of the Convention (which outlines specific measures private sector bodies should take to tackle corruption). The UNCAC encourages several of the business measures often associated with fighting corruption, yet conspicuously omits others. The UNCAC cites the important

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14 See infra Section XIII.
15 See infra Section XIV.
16 See infra Section II.
18 Id.
19 Id.
20 See infra Figure 1.
21 Some commentators note that these measures miss the point of private measures aimed at reducing corruption. Berger and Holland (2006) in particular, argue that the private sector’s main role in fighting corruption consists of pressuring governments in civil courts to reduce political and administrative corruption. See Ethan Burger & Mary Holland, Why the Private Sector is Likely to Lead the Next Stage in the Global Fight
roles of codes of conduct and standards (Art. 12.2.b), internal audits (Art. 12.2.f), accounting standards (Art. 12.3), and whistleblowing programs (Art. 33). However, the UNCAC is conspicuously silent on business partner oversight and anti-corruption training/education in the private sector. The UNCAC basically defines the ends (or goals) of member state legislation: to "take measures . . . to prevent corruption involving the private sector . . . ." Member states themselves determine how best to achieve that goal.

Figure 1: Business Measures Outlined in the UNCAC

<table>
<thead>
<tr>
<th>Item of the Convention</th>
<th>Article</th>
<th>Potential responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Promoting cooperation between law enforcement agencies and relevant private entities&quot;</td>
<td>12.2.a</td>
<td>Community policing and regulatory investigation (corporations' own internal investigations).</td>
</tr>
<tr>
<td>&quot;Promoting the development of standards and procedures... including codes of conduct&quot;</td>
<td>12.2.b</td>
<td>Codes of conduct at the business association and individual company level.</td>
</tr>
<tr>
<td>&quot;Promoting transparency among private entities&quot;</td>
<td>12.2.c</td>
<td>Encourages transparency in corporate reporting (and has led to global initiatives aimed at standardizing types of anti-corruption information to disclose).</td>
</tr>
</tbody>
</table>

22 The Convention neither explicitly gives nor limits private sector participation in such programs. The article encourages Parties to adopt "appropriate measures to provide protection against any unjustified treatment for any person" (presumably public or private) who has made a corruption-related report to "the competent authorities." Competent authorities presumably may also include corporate authorities—though different legal systems (and scholars) may interpret such authorities differently. United Nations Convention Against Corruption, supra note 17.

23 See id.

24 Id.

25 See id. ("Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector . . . .").
"Ensuring that private enterprises... have sufficient internal auditing controls"

"maintenance of books and records, financial statement disclosures and accounting and auditing standards"

"appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds"

12.2.f. Deals with accounting and auditing standards largely under self-regulating associations and professional organizations.

12.3 Accounting and audit standards

33 Encourages whistleblower protection programs (in both public and private sectors).

*We do not look at controls on public officials who regulate the private sector as our paper focuses on business measures aimed at fighting corruption. We omit sections 12.3 and 12.4 of the Convention as largely irrelevant to our discussion.

What about companies (and countries) looking for more specific guidance about specific anti-corruption business measures? The Organization for Economic Co-operation Development’s guidelines point to the direction of likely legislation by upper-income jurisdictions (like Hong Kong) seeking to encourage businesses to take adequate measures to deter corruption.26 Figure 2 shows the twelve main aspects of corporate behavior likely to represent the focus of increased rulemaking in the upcoming years.27 In layperson’s language,


27 We use company and corporation interchangeably in our report since the likely targets of such rulemaking would be large corporations who represent large bribery risks (and can comply with increased anti-corruption regulating). We naturally appreciate that the corporate form of business organization presents certain types of agency and corporate governance issues which do not arise in other forms of business organization. For more on the way that corporate structure may affect a company’s propensity to bribe, see George Clarke & Lixin Xu, Ownership, Competition, and Corruption: Bribe Takers versus Bribe Payers, 2783 WORLD BANK POL’Y RES. WORKING PAPER (Feb. 2002).
these rules are likely to focus on increasing management's support for anti-corruption control (recommendation one), a clear policy against bribery (recommendation two), and a duty held at all levels of the corporation to prevent or reduce corruption (recommendation three). Other elements consist of setting up independent oversight of corporate behavior (recommendation four), setting up and enforcing compliance programs (recommendations five, six, eight, ten, eleven, and twelve), and having proper accounting practices (recommendation seven).

**Figure 2: OECD Recommended Business Measures for Internal Control and Compliance for Companies**

1. senior management support for the company's anti-corruption internal controls;
2. a clear "policy [against] foreign bribery";
3. clear "duty . . . at all levels" to comply with anti-corruption policies;
4. set up independent oversight ("such as internal audit committees of boards of directors or of supervisory boards");
5. "compliance program[]s . . . applicable to all entities over which a company has effective control, including subsidiaries [which control], inter alia, the following areas: gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations . . . ; facilitation payments; and solicitation and extortion [payments]");
6. "properly documented risk-based due diligence" of business partners and the company's compliance program;
7. "a system of financial and accounting procedures [which ensures] the maintenance of fair and accurate books, records, and accounts [which] cannot be used for the purpose of foreign bribery or hiding such bribery";
8. "periodic communication, and documented training, for all levels of the company, on the company’s . . . compliance program[]";
9. [omitted due to general nature];
10. "appropriate disciplinary procedures to address . . . foreign bribery";
11. "providing guidance and advice" on complying with the company's compliance program, including when they need urgent advice, whistleblowing, and taking "appropriate action in response to [whistleblowing] reports";
12. "periodic reviews of . . . compliance program[s]."

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28 See OECD Guidelines, supra note 26, at Annex II § A.
Even if jurisdictions like Hong Kong slavishly adopt the OECD’s guidelines, the initial evidence suggests that many business measures have little effect in reducing corruption. In one of the most comprehensive studies in its field, Carr and Outhwaite looked at the extent to which international companies adopted many of the commonly accepted measures aimed at preventing corruption.\(^{29}\) Figure 3 shows the proportion of companies Carr and Outhwaite surveyed that adopted various anti-corruption measures as well as the percent of respondents who thought those measures provided highly effective methods of preventing corruption.\(^{30}\) They found that only five activities are widely perceived as effective among businesspersons in reducing corruption (namely that more than 40% of their sample think work).\(^{31}\) These measures include internal audit and financial statement disclosure, anti-corruption measures aimed at suppliers, the in-house monitoring of those measures, and penalties for breaching the company’s anti-corruption policies.\(^{32}\) As we shall see later, the Foreign Corrupt Practices Act provides strong incentives for businesses to adopt these measures.\(^{33}\)

*Figure 3: Existing Law Has a Weak (though Positive) Effect on Encouraging Businesses to Adopt Measures Aimed at Reducing Corruption*  
(items in grey not widely perceived as effective)

<table>
<thead>
<tr>
<th>Business Measure Aimed at Reducing Corruption</th>
<th>Percent adoption</th>
<th>Percent highly effective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal Audit</td>
<td>80%</td>
<td>50%</td>
</tr>
</tbody>
</table>


\(^{30}\) Carr & Outhwaite, *supra* note 29, at 54.

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) See infra Section III.
Current trends in international lawmakers (and the data which reflect on those trends) provide three lessons for jurisdictions, like Hong Kong, seeking to strengthen business measures against corruption. First, most legislatures should focus on the ends of lawmaking (preventing corruption) while leaving the types of programs companies implement up to the companies themselves.\(^34\) Second, more specific lawmaking (such as adopting the OECD’s guidelines through administrative rulemaking) seems unlikely — given the lack of certainty that these provisions actually reduce corruption.\(^35\) According to Carr and Outhwaite’s data, only 20% of respondents think that a measure (which most people mistakenly think works)—namely, monitoring by industry bodies—actually works.\(^36\) Third, more specific guidance probably will not come from organizations like the OECD or the U.N. any time soon.\(^37\) Article 12 of UNCAC and the OECD’s guidelines

<table>
<thead>
<tr>
<th>Issue</th>
<th>Efficacy</th>
<th>Less than 40% Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>External Audit</td>
<td>85%</td>
<td>30%</td>
</tr>
<tr>
<td>Appointment of Compliance officers</td>
<td>55%</td>
<td>30%</td>
</tr>
<tr>
<td>Involvement of independent non-EDs</td>
<td>70%</td>
<td>25%</td>
</tr>
<tr>
<td>Composition of Board</td>
<td>60%</td>
<td>35%</td>
</tr>
<tr>
<td>Vetting of personnel</td>
<td>65%</td>
<td>35%</td>
</tr>
<tr>
<td>Compliance into HR</td>
<td>35%</td>
<td>20%</td>
</tr>
<tr>
<td>Financial statement disclosure</td>
<td>75%</td>
<td>45%</td>
</tr>
<tr>
<td>Pay (wage) policies</td>
<td>70%</td>
<td>35%</td>
</tr>
<tr>
<td>Promotion policies</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Director’s shareholdings</td>
<td>75%</td>
<td>40%</td>
</tr>
<tr>
<td>Anti-corruption provisions for suppliers</td>
<td>70%</td>
<td>50%</td>
</tr>
<tr>
<td>In-house supplier monitoring</td>
<td>75%</td>
<td>60%</td>
</tr>
<tr>
<td>Penalties for breach of AC policies</td>
<td>70%</td>
<td>60%</td>
</tr>
<tr>
<td>Hotlines</td>
<td>80%</td>
<td>40%</td>
</tr>
<tr>
<td>Monitoring by NGO</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>Monitoring by industry body</td>
<td>25%</td>
<td>20%</td>
</tr>
</tbody>
</table>

Figures have been rounded to the nearest 5% (the most meaningful level of rounding given the imprecision of these data). We have deemed activities not widely perceived as effective with less than 40% rate of efficacy.

\(^{34}\) Id. at 42–43.
\(^{35}\) Id. at 48.
\(^{36}\) Id.
\(^{37}\) See id. at 37 (stating that companies perceive non-governmental organizations to be of little relevance).
remain general and vague.\textsuperscript{38} The vague nature of advice given by international organizations probably reflects a lack of empirical evidence that shows that particular measures work better than others. Given this lack of guidance, countries will need to decide for themselves how to encourage their companies to adopt effective measures aimed at reducing corruption.

III. Legal Measures Encouraging the Use of Business Measures in Various Jurisdictions (and especially the United Kingdom and United States)

Four approaches describe the differences in the ways that national legislation provides incentives for companies to adopt internal anti-corruption programs. Figure 4 provides an overview of these four approaches—the no regulation approach, the methods-based approach, the results-based approach, and the self-regulating approach.\textsuperscript{39} We also provide examples of countries adopting each method. No obvious pattern explains differences in the ways various legislatures encourage companies to adopt anti-corruption measures.

\textit{Figure 4: Four Approaches to Legislating/Regulating Business Measures Against Corruption}

<table>
<thead>
<tr>
<th>Approach</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>No regulation approach</td>
<td>Most jurisdictions. Corruption focuses on natural persons and so legislation provides no incentives for companies to protect themselves. <strong>Examples:</strong> Hong Kong*, Singapore, and most developing-world jurisdictions</td>
</tr>
<tr>
<td>Methods-based approach</td>
<td>Provides a prescriptive list of programs companies must have in place. <strong>Examples:</strong> none so far (except for state-owned companies). China likely to follow this approach.</td>
</tr>
<tr>
<td>Results-based</td>
<td>Offers companies prosecuted for isolated cases of</td>
</tr>
</tbody>
</table>

\textsuperscript{38} See United Nations Convention Against Corruption,\textit{ supra} note 17.

\textsuperscript{39} See Miriam Baer, \textit{Governing Corporate Compliance}, 50 B.C. L. Rev. 949, 951, 961–62, 965, 1013 (laying out taxonomy of the four methods). We slightly simplify the Hong Kong case. Legislation provides some liability of companies (in theory) by identifying companies themselves with their corrupt controlling persons and/or making them vicariously liable. However, such an indirect route does not compare with the direct liability faced by their U.S./U.K. brethren.
Most jurisdictions do not provide any kind of legislative-mandated incentives for companies to adopt anti-corruption measures. In the case of Hong Kong, the POBO’s focus on natural persons rather than legal persons makes such compliance programs relatively unnecessary. In the case of Singapore’s Prevention of Corruption Act, similar wording to the POBO refers to “a person.” Because corruption focuses on offences committed by natural persons, most anti-corruption laws worldwide do not define specific offences against legal persons. Those jurisdictions where corporate criminality exists (Switzerland, Belgium, and others) tend to treat corruption like any other crime and make companies and natural persons culpable. Legislation (or regulation governing the prosecution of corruption offences) provides no specific defenses for company anti-corruption compliance programs.

No jurisdiction we know of currently uses a methods-based approach to regulate business measures aimed at reducing corruption (by providing a prescriptive list of measures businesses must take to prevent corruption). Notable exceptions come from state-owned enterprises and other business entities operating under executive and/or civil service regulations. Anti-corruption

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40 Prevention of Bribery Ordinance, Cap. 201, 2–3, § 2 (2003) (H.K.). The ordinance refers to “any person” in most of the articles. The plain meaning of the Ordinance suggests that a person refers to natural persons and not legal persons. However, the lack of corporate prosecutions suggests that such persons (in practice) refer to natural persons.


compliance programs in government-owned or managed companies usually come from action plans developed on the authority of a strategy promulgated by the head of government. For example, as of November 26, 2009, the Croatian Anti-Corruption Strategy and Action Plan requires all state owned companies to devise their own anti-corruption compliance programs. Croatia Control Ltd.—a state owned company—provides an example available to the reader on the Internet. The company provides air navigation, air traffic services, communication, navigation and surveillance, aeronautical information, and aeronautical meteorological services. Bound by administrative law, the enterprise must adopt the same kinds of anti-corruption compliance activities as other public sector bodies. Croatia serves as the example we want to focus on because the country has been one of the most vigorous in adopting anti-corruption advice from the E.U., U.N., and Council of Europe. Croatia’s work in this area may represent early adoption of similar administrative measures.

Both the United Kingdom and United States have strongly adopted a results-based approach to regulating business anti-corruption methods. Neither the U.S. Foreign Corrupt Practices Act (“FCPA”) nor the United Kingdom’s Bribery Act of 2010 (“UKBA”) define specific business measures companies should take. However, they both provide strong incentives for companies to implement anti-corruption compliance programs. Both pieces of legislation create these incentives by allowing for the existence of compliance programs and other business measures
against corruption as a defense if a company faces prosecution for the corruption of its agents.\textsuperscript{51} In the U.S. case, the Department of Justice takes the existence of compliance programs into account during prosecution, as provided for by \textit{Corporate Charging Guidelines} (which we discuss in more detail later in this paper).\textsuperscript{52} In the U.K., companies may specifically rely on provisions in the UKBA, which makes having "adequate procedures" (namely a compliance program) a defense at trial.\textsuperscript{53} Rational corporate directors would adopt these business measures as a type of insurance that they can call upon in the event their company faces prosecution for corruption. We now look at the specific provisions in both sets of legislation that encourage U.S. and U.K. companies to adopt internal anti-corruption programs.

While the FCPA does not define specific measures that companies should take, a series of subsidiary rulemakings provides more guidance. The \textit{Corporate Charging Guidelines}, in particular, define the set of factors prosecutors should keep in mind when the Department of Justice decides whether to bring charges and/or seek a specific settlement during a deferred (or non-) prosecution agreement.\textsuperscript{54} Specifically related to compliance programs, these factors include:

1. "the pervasiveness of wrongdoing within the corporation," including managerial complicity;\textsuperscript{55}

2. the corporation's "disclosure of wrongdoing" and "willingness to cooperate"\textsuperscript{56},

3. the "existence and effectiveness" of the corporation's compliance program;\textsuperscript{57}

4. "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to


\textsuperscript{52} DEP'T OF JUSTICE, United States Attorneys' Manual § 9-28 (2008).

\textsuperscript{53} Indira Carr, Development, Business Integrity and the UK Bribery Act 2010, in MODERN BRIBERY LAW (Jeremy Horder & Peter Aldridge eds., 2013).

\textsuperscript{54} DEP'T OF JUSTICE, supra note 52, at § 9-28.3.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.
cooperate with the relevant government agencies.\textsuperscript{58}

An anti-corruption program that incorporates many of the elements we previously discussed (namely the measures outlined in Figure 3) provides a defense during prosecution in a number of ways. First, anti-corruption measures taken by companies are likely to lead to a decrease in the "[p]ervasiveness of [w]rongdoing [w]ithin the [c]orporation."\textsuperscript{59} Individual cases of bribery and other corruption may occur for reasons beyond the control of corporate managers. However, such anti-corruption programs would reduce the likelihood that such corruption extends beyond isolated cases. Second, specific provisions related to internal audit promote "the corporation's . . . disclosure of wrongdoing and willingness to cooperate."\textsuperscript{60} Compliance programs generally contain provisions related to corporate actions during regulatory investigations and may also include policies for self-reporting.\textsuperscript{61}

Certain types of compliance programs received favorable treatment by U.S. prosecutors (or become required as part of agreements). In their review of twelve prosecutions of FCPA violations, Mr. Finder and his colleagues found several common business measures companies undertook to decrease prosecution.\textsuperscript{62} Figure 5 shows the most common business measures that the U.S. Department of Justice required companies to take during their non- or deferred prosecution agreement talks. Most of these nine points repeat many of the measures we have already mentioned. However, they have received the U.S. Department of Justice’s stamp of approval as anti-corruption business measures.\textsuperscript{63} Thus—in the United States at least—companies should consider these nine business measures as necessary measures for helping to deflect a corruption-related prosecution.\textsuperscript{64}

\begin{footnotes}
\footnote{58} {Id.}
\footnote{59} {Id. at § 9-28.5.}
\footnote{60} {DEP'T OF JUSTICE, supra note 52, at § 9-28.3.}
\footnote{61} {For a discussion of the way that self-reporting policies may assist a company prosecuted for violations of the FCPA, see Gary Spratling, Detection and Deterrence: Rewarding Informants for Reporting Violations, 69 GEO. WASH. L. REV. 798 (2001).}
\footnote{63} {Id.}
\footnote{64} {Id.}
\end{footnotes}
Figure 5: Common Business Measures Serving a Partial Defense Against a FCPA-Related Prosecution

1. Adopt internal accounting, control system, and record retention system, and "help-Line."
2. Adopt a new corporate policy against bribery and establish compliance committee on Board.
3. Appoint one or more senior corporate officials who shall report directly to the Board to oversee compliance.
4. Retain new senior management with understanding of FCPA requirements.
5. Communicate the new procedures to officers and employees through a revised training program and periodic certifications.
6. Adopt new disciplinary procedures for employees who violate the FCPA.
7. Allow an independent audit of the new compliance program and procedures by outside counsel and auditors at three-year intervals.
8. Implement procedures designed to ensure that the corporation will not do business with partners likely to violate the FCPA.
9. Provisions in contracts designed to prevent FCPA violations including the right to conduct audit of partners and right to terminate agents/partner for FCPA issues.

The UKBA, on the other hand, has paradoxically provided more explicit and less explicit guidance on the types of business measures companies should undertake to prevent and otherwise frustrate corruption committed by its agents. However, the UKBA (specifically the Ministry of Justice) provides less explicit guidance than the FCPA. On the other hand, the companies looking to defend themselves from prosecution under the UKBA have far more explicit guidance than their American counterparts had one year after the adoption of the FCPA. The Ministry's Guidance provides six explicit principles used when assessing whether a company's anti-corruption compliance program provides "adequate measures" for deterring corruption. As shown in Figure 6, the UKBA also provides specific policies and procedures companies can put in place to follow each of these principles.

Figure 6 shows that the Ministry of Justice provides companies with a wide range of (mostly cosmetic) business measures. Many

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65 Id.
66 See Bribery Act, supra note 49, § 9.
67 See id.
68 See Bribery Act, supra note 49, § 9.
69 Id.
of these measures include pronouncements and trainings.

**Figure 6: The Six Principles and Related Business Measures Available as a Defense to Companies under the UKBA Guidance**

<table>
<thead>
<tr>
<th>Principle</th>
<th>Policies and/or Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Proportionate Procedures</strong></td>
<td>Commitment to bribery prevention, a general approach to mitigation of specific bribery risks, an overview of its strategy to implement its bribery prevention policies, risk assessment procedures, due diligence on existing or prospective associated persons, a policy on gifts, policies on direct and indirect employment, adequate bookkeeping, auditing and approval of expenditure, separation of functions and the avoidance of conflicts of interest, a policy on information disclosure, disciplinary procedures and sanctions for breaches of the organization’s anti-bribery rules, whistle- blowing procedures.</td>
</tr>
<tr>
<td><strong>Top Level Commitment</strong></td>
<td>Management’s communication of the organization’s anti-bribery policies, personal involvement in developing bribery prevention procedures as well as written and/or verbal statements that the company has a commitment to carry out business fairly, honestly and openly, zero tolerance towards bribery, a statement that the company will punish employees, managers and associated persons for violating the company’s anti-corruption policies. Managers should also state the benefits of rejecting bribery, make public declarations about the work the company does to prevent corruption, mention key people and/or departments responsible for tackling corruption, and mention the company’s work in collective anti-corruption efforts (like in business associations). Other work should include selecting and training senior managers to lead anti-bribery work, leading code of conduct work, endorsing all bribery prevention related publications, ensuring effective compliance.</td>
</tr>
</tbody>
</table>

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70 *Id.* at 20-22.

71 *Id.* at 23–24.
dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons.

<table>
<thead>
<tr>
<th>Risk Assessment&lt;sup&gt;72&lt;/sup&gt;</th>
<th>Company risk assessment procedures and practices will usually have oversight by top management, appropriate resourcing, proper information sources, conduct of due diligence enquiries and appropriate documentation of risk assessment practices.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due Diligence&lt;sup&gt;73&lt;/sup&gt;</td>
<td>Conducting risk assessments and due diligent (based on risk) on persons associated with the company or performing services for the company. On-going information collection may be required.</td>
</tr>
<tr>
<td>Communication (including training)&lt;sup&gt;74&lt;/sup&gt;</td>
<td>Communications about policies, establishment of hotlines, statements, codes of conduct, information on bribery prevention policies, training on anti-corruption policies for higher corruption risk areas, for new employees and associates.</td>
</tr>
<tr>
<td>Monitoring &amp; Review&lt;sup&gt;75&lt;/sup&gt;</td>
<td>Financial control systems, staff surveys, annual reports, compliance with anti-bribery standards.</td>
</tr>
</tbody>
</table>

IV. The Current State of Play in Hong Kong Companies’ Adoption of Corporation Measures

Hong Kong’s businesses, by all measures, play a far less important role in preventing corruption than their peers in other upper-income countries.<sup>76</sup> According to a Factiva search of anti-corruption conferences, codes of conduct, and/or regulations focused at business associations, Hong Kong had only seven media citations.<sup>77</sup> This number equals less than half of those for China and only about five percent of citations coming from the United States. In practice, as shown below, Hong Kong’s professional and business associations spend far less time encouraging their members to adopt anti-corruption provisions.

<sup>72</sup> Id. at 25–26.
<sup>73</sup> Id. at 27–28.
<sup>74</sup> BRIBERY ACT, supra note 49, at 29–30.
<sup>75</sup> Id. at 31.
<sup>76</sup> See infra Figure 7.
<sup>77</sup> We used the search terms “anti-corruption conference” or “code of conduct” or “anti-corruption” and “Hong Kong.”
than business associations in other countries. As a result, far fewer Hong Kong companies have codes of conduct and/or other measures aimed at curbing corruption.

Compared with other countries, Hong Kong’s large companies have relatively undeveloped business measures aimed at preventing corruption. Figure 7 shows scores given by Transparency International to corporations from various jurisdictions related to the extent that corporations from these jurisdictions report the existence of anti-corruption measures (like codes of conduct and/or other measures). As shown, Canada, the United States, and the United Kingdom rank among the top five countries whose companies report pro-active anti-corruption policies and practices. These countries, as we will see later, also have some of the most proactive legislative measures aimed at providing companies with incentives to reduce corruption. Hong Kong ranks toward the bottom of the list, with its companies adopting few of the roughly fifty anti-corruption measures assessed by Transparency International.

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78 See infra Figure 9.
79 See id.
81 See infra Figure 7.
82 Specific assessment criteria included the existence (and defined targets) of a code, membership in various initiatives (like the Global Compact), existence (and clearly defined targets) of an over-arching anti-corruption policy, specific policies related to anti-bribery, facilitation payments, gifts, political contributions, charitable donations and lobbying, systems of managing/monitoring agents, as well as programs related to training, communication, whistleblowing, internal review, and external audit. TRANSPARENCY INT’L, TRANSPARENCY IN REPORTING ON ANTI-CORRUPTION, A REPORT ON CORPORATE PRACTICES 23 (2009).
Several examples illustrate the difference between foreign companies and Hong Kong companies’ anti-corruption policies. Coca-Cola has a code of conduct and a special hotline dedicated to taking complaints about bribery and other misconduct.\(^83\) Indeed, among the top-200 of the Global 500 (the world’s largest international companies), very few companies do not have an anti-corruption code of conduct or policy.\(^84\) Those that do not have these codes tend suspiciously to congregate in the oil industry (Gazprom, Lukoil, Petronas), the financial services industry (Nippon Life Insurance, Wachovia, Zurich Financial, China Life Insurance, China Construction Bank, Sumitomo Mitsui Financial), the retail industry (Auchan, AEON), and about five other various industries.\(^85\) Hong Kong’s largest companies paint a different picture. Hutchison Whampoa, the parent company of Hutchinson Port Holdings, claims to “take[] its anti-corruption responsibilities very seriously”\(^86\) and allegedly has an anti-corruption policy.\(^87\)


\(^85\) TRANSPARENCY INT’L, supra note 80.


The company provides no evidence of either statement. The Li & Fung Group does better, providing a statement against bribery and corruption in its code of conduct. CLP Holdings Ltd. has a fraud statement, which buries a mention about corruption and bribery as forms of bribery. Anti-corruption policies and measures have not spread even among the less revenue-rich (but more well-known companies). Ocean Park, for example, only has a simple three-line policy statement, though also provides a hotline number.

More rigorous evidence shows that most Hong Kong companies do not even have basic codes of conduct or statements of principles against corruption. Figure 8 shows the percent of companies participating in the Hong Kong Institute of Chartered Secretaries survey that have various provisions in their codes of conduct. Only 52% of the companies they surveyed even had codes of conduct. Of the 52%, most have anti-bribery provisions (specifically admonitions against accepting or asking for an advantage). Roughly 80% of the companies that have a code of conduct also included admonitions against conflicts of interest. Only about half of the codes defined any kind of reporting channels in case breaches of code occurred. This data reflects the lack of incentives for Hong Kong companies to adopt such codes of conduct.

88 Id.
92 See id.
94 Id. at 14.
95 Id. at 15.
96 Id.
97 Id.
Other data support the claim that Hong Kong's companies face few incentives to adopt anti-corruption measures. Figure 9 shows Hong Kong companies' adoption of business ethics programs compared with the adoption of such programs in other jurisdictions. 98 In the United States, most companies have some kind of ethics program, if even a basic one (as defined by the study's authors). 99 In the United Kingdom, in contrast, about half of the companies with an ethics program have a comprehensive program covering various aspects of potential corruption and other wrongdoing. 100 Norway, according to these data, probably reflects the most advanced jurisdiction in terms of providing its companies with incentives to adopt "advanced" ethics programs. 101 Hong Kong and Singapore, with their laissez-faire traditions of business regulation, represent jurisdictions that provide their businesses with few incentives to adopt effective anti-corruption measures. 102

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99 See infra Figure 9.
100 Id.
101 Id.
102 As we discuss below, both jurisdictions focus liability on the individual rather than on the corporate entity. The distribution of liability explains in part these international differences.
Figure 9: Hong Kong Ranks Second Last on Quality of Businesses’ Ethics Programmes

The data show the percent of companies in the All-World Developed index from each country having basic, intermediate and advanced ethics programmes. The Hong Kong assessment consisted of 102 companies. Source: Corporate Codes of Business Ethics: An International Survey of Bribery and Ethical Standards in Companies, ETHICAL INVESTMENT RESEARCH SERVICES 1, 5 (2005), available at http://www.eiris.org/files/research%20publications/corporatecodesofbusinessethic sep05.pdf.

The lack of business measures has led to undesirable policy outcomes. Hong Kong’s high Transparency International Perceptions Index scores suggest the effectiveness of anti-corruption law on the archipelago. However, local experiences diverge from these international perceptions. Figure 10 shows the number of respondents in a sample of Hong Kong businesspersons who had a “common” experience with several types of misconduct. More than half of the respondents saw Conflict of Interest as a common problem. Worryingly, roughly 40% of respondents noted that bribery represented a common problem in Hong Kong. If the most recent ICAC survey data are correct, then roughly 40,000 people experienced corruption in

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104 See ETHICAL INVESTMENT RESEARCH SERVICES, supra note 98, at 7–9.

105 Id.
These data suggest that Hong Kong’s relatively low incidence of corruption comes despite a lack of incentives provided to businesses to prevent corruption. Until now, the ICAC’s successful education of the population as a whole has rendered it unnecessary to reach businesses through their respective business associations.107 In such a low-corruption environment, business associations have not needed to promulgate these kinds of regulations, as have their counterparts in countries such as Germany and the United Kingdom.108 Because of the personal, rather than corporate, liability imposed under current Hong Kong law, few incentives encourage Hong Kong’s businesses to adopt anti-corruption measures.109 However, a number of factors suggest that Hong Kong’s authorities will need to adopt a more pro-active approach for encouraging its companies to adopt anti-corruption measures.

106 See INDEPENDENT COMMISSION AGAINST CORRUPTION, ICAC ANNUAL SURVEY 2013 EXECUTIVE SUMMARY 15 (2013) (estimating that 1.2% of the territory’s four million residents had personally experienced corruption that year).

107 See infra Section XII.

108 See ETHICAL INVESTMENT RESEARCH SERVICES, supra note 98, at 7-9.

109 See id.
measures.\textsuperscript{110}

Hong Kong’s authorities will need to provide stronger incentives, through pro-active law making, aimed at encouraging companies to adopt effective anti-corruption measures. First, closer integration with the mainland has made the previous laissez-faire policies obsolete.\textsuperscript{111} Chinese companies increasingly compete in Hong Kong markets, often against Hong Kong-based companies.\textsuperscript{112} In 2011, 640 of the 1,496 companies listed on the Hong Kong Stock Exchange were headquartered on the mainland.\textsuperscript{113} These companies represent a market capitalization of $1.25 trillion, or 55\% of the exchange’s total valuation.\textsuperscript{114} These companies face few incentives from mainland law to adopt measures against corruption.\textsuperscript{115} Hong Kong law will therefore need to raise the bar in order for all companies to compete at the same level. Second, the imposition of liability on companies, as distinct from natural persons, will provide very strong incentives for these corporate persons to protect themselves. Once such legislation appears, Hong Kong companies are certain to seek guidance on implementing effective measures aimed at minimizing the risk of bribery prosecution.

V. Introducing a Business Measures Defense into the POBO

Two new innovations in Hong Kong legislation will soon provide the same incentives for the widespread adoption of anti-corruption business measures as those found in other upper-income jurisdictions.\textsuperscript{116} First, the introduction of corporate


\textsuperscript{112} See id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.


criminal (or even administrative) liability for bribery will encourage Hong Kong’s corporations to adopt anti-corruption measures.117 Second, expanded use of vicarious liability118 will encourage senior managers to use business measures to minimize their own personal liability.119

Under current Hong Kong law, corporations possess some degree of liability for corrupt acts committed by their agents, to the extent corporations may “identify” with their directors or hold vicarious liability for them.120 However, the explicit criminalization of corruption committed by Hong Kong legal persons would provide strong incentives to Hong Kong directors to adopt business measures against corruption.

Hong Kong’s legislators will need to decide which of the four traditional measures aimed at encouraging businesses to adopt measures against corruption to rely on. Figure 11 shows the pros and cons of each approach.121 We do not describe the results-based approach here, but rather later in the section and in greater depth. The no-regulation approach would basically keep the status quo. In all likelihood, if the ICAC wanted to pursue companies as criminally liable for corruption, it would need to test the bench’s indulgence with the various theories of identification and vicarious liability it might try to introduce through case law.

117 Id. at 201.
120 See Magistrates Ordinance, Cap. 227, § 87 (1997) (allowing a corporation to be served with documents and to respond in court via a corporate officer or other representative); Criminal Procedure Ordinance, Cap. 221, § 49 (3)–(4) (1997) (allowing corporation to enter plea via a representative at arraignment); Interpretation and General Clauses Ordinance, Cap. 1, § 3 (2009) (defining “persons” to include legal as well as natural persons); see also ASIAN DEVELOPMENT BANK & OECD, THE CRIMINALISATION OF BRIBERY IN ASIA AND THE PACIFIC 165–66 (2011) (discussing the shortcomings of identification, a currently prevailing common-law doctrine of corporate liability, which imputes liability to a corporation whose “directing mind” commits a crime), available at http://www.oecd.org/site/adboecdanti-corruptioninitiative/46485272.pdf.
121 See generally Patrick Delaney, Transitional Corruption: Regulation Across Borders, 47 VA. J. INT’L L. 413 (2007) (discussing several of the approaches summarized in Fig. 11); Baer, supra note 39 (discussing elements of these approaches).
Figure 11: The Pros and Cons for Hong Kong’s Companies of Each of the Four Approaches to Encouraging Corporations to Adopt Anti-Corruption Measures

<table>
<thead>
<tr>
<th>Approach</th>
<th>Pros</th>
<th>Cons</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-regulation approach</td>
<td>Low cost and preserves the status quo.</td>
<td>Give up gains from industry-wide co-operation, needs to rely on case law to develop UKBA- and FCPA-like “adequate procedures” doctrines.</td>
</tr>
<tr>
<td>Methods-based approach</td>
<td>Provides a consistent approach used by all companies. Hong Kong would be the first to try this approach in its pure form.</td>
<td>Expensive and inappropriate for many kinds of companies.</td>
</tr>
<tr>
<td>Results-based approach</td>
<td>Approach generally adopted by most upper-income OECD. United Kingdom-United States uses a “results plus” system (results with a bit guidance on means).</td>
<td>Provides little guidance to companies and exposes them to risks.</td>
</tr>
<tr>
<td>Self-regulating approach</td>
<td>Companies know what measures should work best for them.</td>
<td>Self-regulation tends to work for members’ own self-interest rather than social benefit. Less harsh than legislators might be.</td>
</tr>
</tbody>
</table>

The methods-based approach to regulating business measures represents the least likely option for POBO reform. Any specific requirements that companies engage in certain kinds of activities would represent too large a financial burden for small, low-risk companies.122 The U.S. Department of Justice (“DOJ”) has tended to encourage particular companies to engage in specific business

measures as part of settlement agreements. The U.K. Ministry of Justice provides representative lists of the kinds of activities companies could undertake. Given the diversity of the Hong Kong economy, such a methods-based approach appears highly unworkable.

A good case can be made for a self-regulating approach to business anti-corruption measures. Namely, the POBO does not need to provide incentives by allowing corporate compliance programs to serve as a defense from corporate prosecution for corruption. Instead, business associations, industry groups and other organizations in Hong Kong can impose rules on members (on either a voluntary or mandatory basis). Such self-regulation seems to fit with Hong Kong's established business practices. Hong Kong's businesses are also very well organized into associations and other groupings. As we describe below and in the Appendix, we predict the LegCo will choose this (sub-optimal) approach instead of the more optimal results-based approach.

Our brief discussion above points to three approaches to law making aimed at encouraging Hong Kong's companies to introduce corporate measures against corruption. The first approach basically embodies the status quo, encouraging the ICAC to chase individuals and to rely on foreign law enforcement to deal with the difficult corporate corruption cases. The second approach


124 See Bribery Act, supra note 49, at § 9.

125 See Hong Kong Trade Development Council, Economic and Trade Information on Hong Kong (Aug. 26, 2014), http://hong-kong-economy-research.hktdc.com/business-news/article/Market-Environment/Economic-and-Trade-Information-on-Hong-Kong/ethink/en/1/1X000000/1X090VUL.htm (estimating the difficult-to-monitor service sector at more than 90% of the territory's GDP, including a combined 40% share for finance, trade, and logistics).


focuses on industry-based self-regulation (already in use to a limited extent). The third approach argues that if the POBO will include corruption-related offences for corporate criminality, then the POBO should also offer counter-balancing defenses.

A. Allow the United States and the United Kingdom to police corporations while ICAC focuses mostly on individuals

Such an option represents the status quo (or no regulation approach). Advocates of the “corporate criminalization plus compliance program defense” approach would need to prove that corporate criminalization addresses some harm that prosecution focused on natural persons does not address. In other words, why prosecute companies when the Independent Commission Against Corruption (“ICAC”) and Department of Justice can actually investigate and prosecute the persons committing the corruption directly? The FCPA was Congress’s response to public demands for action in the face of recent corruption scandals and seeming inaction by government.128 The UKBA had a similar genesis fresh from a recent corruption scandal and widespread dissatisfaction with the United Kingdom’s anti-corruption measures, which were laxer than those of other OECD members.129 The public in both cases considered foreign bribery a problem.130 Hong Kong suffers from none of this “mischief” which led to the passage of the FCPA and UKBA.

The other reason why Hong Kong could take a lax position of corporate criminalization is that Hong Kong authorities know that U.K. and U.S. prosecutors will do this work for them. Both the


130 See id.
ICAC AND COMPANY ANTICORRUPTION PROGRAMS

FCPA and UKBA have extra-territorial application and allow for corporate prosecution. The FCPA does not even face a double jeopardy limitation. After China, the United Kingdom and United States represent two of Hong Kong’s largest trading partners. The LegCo could comfortably wait while U.S. and U.K. prosecutors impose criminal sanctions on Hong Kong’s most egregious corporate bribers abroad. The alternative would represent rethinking Hong Kong’s approach to criminal liability (or at least part of it). Indeed, we predict the LegCo will follow exactly this strategy in the short-term.

B. Introduce a system of industry self-regulation, combined with scorecards and sanctions.

Many upper-income countries, particularly those with a strong corporatist approach to industrial relations, have opted for industry-based self-regulation rather than Anglo-American-style corporate criminality. France, Norway, Germany and several other countries have encouraged labor unions and management unions to work together on lists of business measures their national companies should take to reduce corruption. Nothing suggests that Hong Kong must slavishly follow the United States

135 See generally Roland Czada, From Muddling Through to Struggling Through, in GERMANY AND JAPAN AFTER 1989: REFORM PRESSURES AND POLITICAL SYSTEM DYNAMICS 75 (Roland Czada & Kenji Hirashima eds., 2009) (describing how West Germany’s corporatist regulatory systems retrenched and adapted after reunification with East Germany).
and the United Kingdom because of their shared common-law heritage. Indeed, as Hong Kong policymakers design an approach to discourage their companies from paying bribes, they will need to think about the applicability of that system in the mainland.\textsuperscript{136}

Hong Kong's industry groups could devise business measures appropriate for their members. Such measures would benefit from consultation by these groups' members, and benefit from a specificity that national-level programs cannot achieve. Industry associations and groups could also engage in limited policing (at least as to the extent to which different members have complied with business association requirements to adopt codes of conduct and other business measures).

We argue against the industry-based regulation in Hong Kong for three reasons. First, government-led cheerleading of industry-based regulations runs against accepted practice. Hong Kong regularly ranks among the least regulated, most free economies in the world.\textsuperscript{137} Attempts to coerce business associations to engage in industry-wide anti-corruption measures would probably fail. Second, the fragmentation of Hong Kong's industry would make an industry-by-industry approach impossible.\textsuperscript{138} Hong Kong has over 450 industries, representing literally hundreds of thousands of companies.\textsuperscript{139} Asking each of these industry groups to consult with their members would impose a large regulatory-based cost on business. Third, making trade associations vicariously liable for the lack of anti-corruption business measures of their membership would break the classical agency chain relationship the UKBA and

\textsuperscript{136} We have reviewed the arguments for making "Chinese-compatible" law in another paper. With closer political and legal integration between Hong Kong and the mainland, Hong Kong's policymakers will want to look at models that have worked in both common-law as well as civil-law systems. Having laws that provide appropriate incentives in a civil-law system will help ensure that companies do not attempt to engage in "regulatory arbitrage"—seeking defenses in Hong Kong unavailable in China (and visa versa).


\textsuperscript{138} Brian C. Fong, Hong Kong's Governance Under Chinese Sovereignty: The Failure of the State-Business Alliance After 1997 133 (2014) (suggesting that Hong Kong's industries are fragmented).

\textsuperscript{139} See Hong Kong Trade Development Council (2012), http://service-providers.hktdc.com/.
FCPA try to create.\textsuperscript{140} Legal persons "socialize" their agents and members into conduct they might not otherwise commit.\textsuperscript{141} These principals should have measures aimed at preventing such socialization, though the efficacy of such measures has not been empirically proven.\textsuperscript{142}

\textit{C. Introduce a "results-plus" system modeled roughly on U.K. and U.S. systems into the POBO, thus mixing corporate liability with corporate defenses}

Both the United States and United Kingdom have a "results-plus" legislative structure, which provides incentives to firms to adopt anti-corruption business measures.\textsuperscript{143} The results-based approach comes from the fact that legislation in both the United States and the United Kingdom outlines the results that corporate anti-corruption compliance programs must achieve: namely a business culture free of bribes and corruption.\textsuperscript{144} The legislation in force leaves the decision about the means of achieving those results to companies.\textsuperscript{145} In fact, the system differs from others such as those in France, Germany or other upper-income jurisdictions, in that both the U.S. and the U.K. justice administrations have provided specific guidance to companies about the types of programs that may bring partial relief from prosecution.\textsuperscript{146} The compliance programs outlined in the \textit{U.S. Corporate Sentencing Guidelines} and \textit{UKBA Guidance} do not represent mandatory requirements.\textsuperscript{147} However, companies would

\begin{itemize}
  \item \textsuperscript{141} See generally Saviour Nwachukwu & Scott Vitell, \textit{The Influence of Corporate Culture on Managerial Ethical Judgments}, 16 J. Bus. ETHICS 757 (1997) (discussing empirical studies).
  \item \textsuperscript{142} See Margaret Anne Cleek & Sherry Lynn Leonard, \textit{Can Corporate Codes of Ethics Influence Behavior?\textsuperscript{,} 17 J. Bus. ETHICS 619 (1998) (presenting empirical study's findings that codes of conduct do not modify employee behavior).
  \item \textsuperscript{143} See generally Baer, \textit{supra} note 39 (describing these systems' basic features).
  \item \textsuperscript{144} See Brian P. Loughman & Richard A. Sibery, \textit{Bribery and Corruption: Navigating the Global Risks} ("The goals of [anti-corruption compliance] programs are . . . to deter, detect, and prevent bribery and corrupt payments.").
  \item \textsuperscript{145} See id.
  \item \textsuperscript{146} See Bribery Act, \textit{supra} note 49.
  \item \textsuperscript{147} See infra note 159, 320.
\end{itemize}
be remiss to ignore the specific programs outlined in these documents. In this way, the UKBA and FCPA provide a results-based approach to corporate measures, plus guidance about specific measures companies (in general) can take.

The LegCo should adopt changes to the POBO that encourage companies to adopt anti-corruption compliance programs. As shown above, Hong Kong companies fall far behind companies from other countries in the quality of their corporate compliance and anti-corruption reporting. We argue for a legislative approach (providing incentives for companies to engage in anti-corruption compliance programs directly in legislation) for three reasons. First, legislative provisions remove the discretion currently exercised by U.S. prosecutors. Second, legislative provisions would be easier to put into practice. Given Hong Kong's current legal system, the only way to introduce all the needed provisions at the regulatory level would be to have various government departments create new regulations on the companies they regulate. Third, a legislative provision in the POBO provides a credible signal to companies that the Hong Kong DOJ will apply corporate criminality analysis and consider anti-corruption business measures as a legitimate defense to such charges. The U.S. experience shows that uncertainty and prosecutorial caprice result from the U.S. Department of Justice’s wide latitude to decide how thoroughly a company’s business measures indemnify it from criminal liability.

We cannot predict what those business measures will look like, or the extent to which they should shield the legal person from liability. The variance of business measures adopted by companies, and even proposed measures by the U.S. Department of Justice and the U.K. Ministry of Justice, suggests that one size

148 See id.
149 See id.
150 See supra Section IV.
151 Because of the fragmentation of Hong Kong's executive structure, describing such an approach would take too long. Because we dismiss this approach, we do not spend much time describing this approach.
152 See Erik Paulsen, Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements, 82 N.Y.U. L. REV. 1434, 1450–52 (2007) (describing the shifting set of factors the Justice Department has asked prosecutors to consider when deciding whether to prosecute a company).
does not fit all.\textsuperscript{153} The POBO should offer an “adequate procedures” defense similar to those offered by U.S. and U.K. legislation. However, we cannot predict what those defenses may look like. We therefore recommend that the public be consulted before the POBO is amended in any way, so that appropriate affirmative defenses can be included.

We recommend Option 3, introducing an “adequate procedures” provision into the POBO, after consultation with the public. This option would provide companies with a defense from prosecution for having strong anti-corruption compliance programs. In practice, though, we predict that Hong Kong’s legislators will choose Option 1, “no regulation,” for next year (as the result of natural inertia). Without the tactics we recommend in the Appendix, Hong Kong’s legislators will choose Option 2 as their final option (leaving the POBO intact). We provide the political-economy analysis in the Appendix showing that only Option 2 would manage to win a majority of votes in the LegCo. We also show in the Appendix the steps promoters of our recommendation would need to take in order to make voting for our recommendation “politically incentive compatible.” If the ICAC or another agency engages in this adoption strategy, we predict the LegCo will adopt the recommendation by a narrow majority.

What elements of a compliance program should provide relief from prosecution? We suggest a public debate should define these elements. But what shapes the public debate? The International Chamber of Commerce (“ICC”) suggests various corporate policies to reduce corruption.\textsuperscript{154} By and large, these policies follow similar guidance in the OECD Guidelines.\textsuperscript{155} The rules focus on bribery, extortion/solicitation, trading in influence, and laundering the proceeds of the corrupt practices.\textsuperscript{156} Figure 12 shows the ICC Anti-Corruption Rules in summary form.\textsuperscript{157} The

\textsuperscript{153} See Bryane Michael, Making Hong Kong Companies Liable for Foreign Corruption, J. FINANCIAL CRIME (forthcoming).


\textsuperscript{155} See id; OECD Guidelines, supra note 26.

\textsuperscript{156} See OECD Guidelines, supra note 26.

\textsuperscript{157} See INTER’L CHAM. COM., supra note 154.
list proves most enlightening, as many of its recommendations lack the severity of Anglo-American law. Rules related to third parties provide a useful example. In the UKBA and FCPA, as we have mentioned, companies may hold vicarious liability for the bribery of their business partners. As such, business measures recommended by the U.K. Ministry of Justice and the U.S. Department of Justice focus on conducting due diligence and auditing business partners. The ICC anti-corruption rules, in contrast, merely ask companies to keep lists of their business partners (in case prosecutors come asking) and to inform them of the company’s anti-corruption policies.

Figure 12: The ICC’s Anti-Corruption Rules

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prohibited Practices</strong></td>
<td>Bribery, extortion/solicitation, trading in influence, and laundering the proceeds of the corrupt practices.</td>
</tr>
<tr>
<td><strong>Third Parties</strong></td>
<td>Provides a list of third-parties. Admonishes to inform third-parties not to engage in corruption and to not hire these parties for matters unrelated to the company’s business.</td>
</tr>
<tr>
<td><strong>Corporate Policies on Business Partners</strong></td>
<td>Encourages companies to sign agreements with partners that they will uphold the company’s anti-corruption policies, permit an audit of its practices, and not make payments in cash. The company should keep a record of all transactions with public bodies (and allow auditors to inspect that list). Should also ensure that partners adopt similar measures. Avoid dealing with companies suspected of paying bribes. Ability to contractually suspend relationship if concerned partner is paying bribes, conduct due diligence on partners, and transparent procurement.</td>
</tr>
<tr>
<td><strong>Corporate Policies</strong></td>
<td>Political contributions should be made according</td>
</tr>
</tbody>
</table>

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160 See INTER’L CHAM. COM., supra note 154, at art. 3.
<table>
<thead>
<tr>
<th><strong>Corporate Policies</strong></th>
<th><strong>Description</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>on Gifts and Hospitality</strong></td>
<td>Sets out five conditions for giving gifts and hospitality (namely they comply with local laws and the procedures of the giver and receiver).</td>
</tr>
<tr>
<td><strong>on Facilitation Payments</strong></td>
<td>Facilitation payments should not be made. If made under duress, they should be accurately and properly accounted as such.</td>
</tr>
<tr>
<td><strong>on Conflicts of Interests</strong></td>
<td>Conflicts of interest should be disclosed and/or avoided. Companies should observe any “cooling off” periods if hiring former regulators.</td>
</tr>
<tr>
<td><strong>on Human Resources</strong></td>
<td>Staff should be hired based on competence (rather than other factors), they should not be punished for whistleblowing and persons in high-risk positions should be trained in anti-corruption.</td>
</tr>
<tr>
<td><strong>on Financial and Accounting</strong></td>
<td>All transactions appear in the books and no “off-books” transactions may be made. No non-existent expenditures are recorded, and cash payments are carefully recorded. No accounting records should be destroyed. Independent auditing should bring improper activities to light.</td>
</tr>
</tbody>
</table>

Elements of a Corporate Compliance Program

Statements of commitment to the company’s anti-corruption program at various levels of the organization and most of the measures in the OECD Guidelines.

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Which parts of the ICC Anti-Corruption Rules might best serve the DOJ as concrete and objective tests of a company’s commitment to preventing corruption? We argue that Hong Kong’s prosecutors could potentially use six measures to test the extent of “adequate procedures” in a company (assuming that the POBO eventually allows these procedures to serve as a defense against corporate bribery). First, prosecutors could assess the extent to which a company hired third parties for matters unrelated to the company’s business.\(^{161}\) Widespread contracts of this nature

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\(^{161}\) See INTER’L CHAM. COM., supra note 154, at art. 2 (laying out specific policies that a company could enact to deter suppliers and other partner companies from fraud and other corruption).
may provide tangible proof that company managers had not exercised adequate care to control risks related to giving intermediaries bogus payments under the guise of employment contracts. Second, investigators could assess the extent to which the company insisted on auditing its partner companies’ accounting records and business practices. Openness to third-party audits signals that the company has nothing to hide. Third, investigators could assess the extent to which the company reviews political contributions for potential self-serving. By closely controlling political contributions itself, the company could forestall potential ICAC investigation for inappropriate, and potentially corrupt, campaign contributions. Each of these three provisions might serve as a tangible list for further public consultation.

Public consultations about defenses available in the POBO may focus on three other tangible areas of ICAC and DOJ surveillance. First, facilitation payments: if made under duress, they should be accurately and properly accounted as such. The POBO does not allow for extortion as a defense. Nevertheless, to the extent the company has self-disclosure arrangements in place and a clear system of accounting for extortion payments, these systems will probably show the company has nothing to hide from prosecutors. Second, prosecutors can find comfort that the company has adequate measures to prevent bribery if its staff, or preferably its board of directors, conduct periodical risk assessments and independent reviews of compliance and engage in corrective measures. These reviews and corrective measures constitute a stock of papers and evidence showing the company’s active vigilance in preventing corruption. Third, companies can prove their desire to prevent corruption by appointing one or more senior officers (full- or part- time) to oversee and coordinate the corporate compliance program with adequate authority to make

162 See id. at art. 3(A)(b).
163 See id.
164 See id. at art. 4(e).
165 Id.
166 See id. at art. 6
167 See INTER’L CHAM. COM., supra note 154, at art. 6.
168 See id. at art. 10(c).
169 See id.
decisions and take action. Such internal systems demonstrate
that the company at least has tried to prevent, detect, and remedy
corruption.

Public consultation on appropriate procedures defenses should
use the ICC anti-corruption rules as a framework for organizing
the public consultation. The ICAC has published numerous books
and guides for various industries in Hong Kong, which we discuss
in this article’s final section. These should serve as a base for
discussion, rather than as a definitive model. The data we have
presented have shown that the majority of Hong Kong companies
have not taken up these materials. During the public
consultation, specific business measures can focus on the six items
we have mentioned from the ICC anti-corruption rules. The
ICAC materials and other business measures (such as those listed
in Figure 2) can also serve as a basis for further discussion.

While our analysis indicates that Hong Kong’s business
associations should not serve as the primary source of work on
business anti-corruption measures, these business associations
have an important role to play. As we argued above, Hong Kong’s
roughly 450 business associations and groupings can provide
guidance. Given the positive experiences in other jurisdictions, we
think Hong Kong’s business associations have a role to play in
helping companies adopt anti-corruption measures.

VI. Hong Kong’s Business Associations and their Role in
Promoting Business Measures

Business associations play an important role worldwide in
encouraging members and non-members alike to adopt anti-
corruption measures. The OECD Guidelines outline four roles of
business associations in encouraging members and other
businesses to adopt anti-corruption measures. First, business
associations should “disseminat[e] information on foreign bribery
issues, including regarding relevant developments in international
and regional forums, and [provide] access to relevant

170 See id. at art. 10(e).
171 See id.
172 See infra Section XII.
173 See id.
174 See supra Section V.C.
Second, business associations should "mak[e] training, prevention, due diligence, and other compliance tools available . . .". Third, they should provide "general advice on carrying out due diligence . . .". Fourth, they should give "general advice and support on resisting extortion and solicitation."

Much of the guidance provided by business associations worldwide looks relatively similar. For example, the Federation of German Industries has published a series of recommendations in Preventing Corruption. These address compliance with the law, exemplary behavior of corporate management, policies to deal with suppliers and customers, policies to deal with gifts and other remunerations, separating business and private expenditures, managing conflicts of interest arising from outside professional commitments or capital interests and rules on the engagement of agents. The Federation recommends to members five blanket business measures, including training and continuing education, staff rotation in sensitive areas, internal checks-and-balances, sourcing from alternative suppliers, and implementing strict accounting, auditing and reporting requirements.

Hong Kong's business associations should not take the lead in promoting business measures through self-regulation. Figure 13 shows the number of business associations in various industries operating in Hong Kong (or by Hong Kong companies). Roughly 450 associations exist in Hong Kong, serving literally hundreds of thousands of companies. Creating pan-association rules through

176 Id. at B.1.
177 Id. at B.2.
178 Id. at B.3.
179 Id. at B.4; see also David Hess & Thomas Dunfee, Fighting Corruption: A Principled Approach: The C2 Principles, 33 CORNELL INT'L L. J. 593 (2000) (arguing that public opinion and large business groups have been successful and pushing individual companies to adopt anti-corruption measures).
181 See id.
182 See id.; see also INTER'L CHAM. COM., supra note 154 (reflecting principles roughly parallel to those in the German federation's brochure and guidance from similar industry groups).
183 See infra Figure 13.
organizations like the Federation of Hong Kong Industries or the Association of Hong Kong Business Associations Worldwide would eliminate the gains each association could achieve by focusing on each industry’s corruption risks. However, rules embodied in legislation or regulation would represent too great a regulatory burden, for reasons we discussed in the previous section.

**Figure 13: Too Many Associations in Hong Kong for Self-Regulation**

<table>
<thead>
<tr>
<th>Category</th>
<th>No. of assocs.</th>
<th>Category</th>
<th>No. of assocs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting Services</td>
<td>14</td>
<td>Advertising Services</td>
<td>2</td>
</tr>
<tr>
<td>Architecture &amp; Planning</td>
<td>2</td>
<td>Auto Parts &amp; Accessories</td>
<td>2</td>
</tr>
<tr>
<td>Baby Products</td>
<td>1</td>
<td>Banking Services</td>
<td>3</td>
</tr>
<tr>
<td>Books &amp; Printed Items</td>
<td>2</td>
<td>Building &amp; Construction Services</td>
<td>20</td>
</tr>
<tr>
<td>Building Materials, Hardware &amp; Machinery</td>
<td>7</td>
<td>Business Management &amp; Consultancy Services</td>
<td>3</td>
</tr>
<tr>
<td>Design Services</td>
<td>4</td>
<td>Education &amp; Training</td>
<td>2</td>
</tr>
<tr>
<td>Electronics &amp; Electrical Appliances</td>
<td>11</td>
<td>Engineering Services</td>
<td>7</td>
</tr>
<tr>
<td>Environmental Services</td>
<td>3</td>
<td>Film / Audio-Visual Production</td>
<td>6</td>
</tr>
<tr>
<td>Finance &amp; Investment</td>
<td>14</td>
<td>Food &amp; Beverages</td>
<td>26</td>
</tr>
<tr>
<td>Footwear</td>
<td>3</td>
<td>Furniture &amp; Furnishings</td>
<td>4</td>
</tr>
<tr>
<td>Garments, Textiles &amp; Accessories</td>
<td>23</td>
<td>General / Chambers of Commerce</td>
<td>130</td>
</tr>
<tr>
<td>Handbags &amp; Travel Goods</td>
<td>1</td>
<td>Health &amp; Beauty</td>
<td>1</td>
</tr>
<tr>
<td>Household Products</td>
<td>8</td>
<td>Information Technology Services</td>
<td>20</td>
</tr>
<tr>
<td>Insurance</td>
<td>8</td>
<td>Interior Design Services</td>
<td>1</td>
</tr>
<tr>
<td>Jewellery</td>
<td>12</td>
<td>Legal Services</td>
<td>6</td>
</tr>
<tr>
<td>Logistics &amp; Transport Services</td>
<td>17</td>
<td>Medical &amp; Healthcare Services</td>
<td>2</td>
</tr>
<tr>
<td>Medical Supplies &amp; Medicine</td>
<td>17</td>
<td>Packaging Materials</td>
<td>4</td>
</tr>
<tr>
<td>Photographic</td>
<td>4</td>
<td>Public Relations</td>
<td>1</td>
</tr>
</tbody>
</table>
Equipment
Raw Materials & Chemicals
Stationery & Office
Equipment Technology
Toys & Games

<table>
<thead>
<tr>
<th>Industry</th>
<th>Listed Non-Government (Statutory Agency) Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>None.</td>
</tr>
<tr>
<td>Insurance Sector</td>
<td>The Life Underwriters Association of Hong Kong, General Agents and Managers Association of Hong Kong, The Hong Kong Federation of Insurers, The Hong Kong Confederation of Insurance Brokers, Institute of Financial Planners of Hong Kong, Professional Insurance Brokers Association.</td>
</tr>
<tr>
<td>Estate Agency Trade</td>
<td>None.</td>
</tr>
<tr>
<td>Travel and Tourism Industry</td>
<td>None (Hong Kong Tourism Board is government-subsidized)</td>
</tr>
<tr>
<td>Handling of</td>
<td>None.</td>
</tr>
</tbody>
</table>


Hong Kong’s business associations have a key role to play as effective conduits for communication from the ICAC and a reformed Ethics Development Centre (see below). Hong Kong’s business associations at present play little part in promoting the work of the ICAC or the Ethics Development Centre. Figure 14 shows the industries targeted by each of the ICAC’s industry-specific guidance. Eight out of the eleven sectors covered have guidance produced ostensibly exclusively by the ICAC (without external partners). Given our review of the materials, the abstract nature of the material strongly suggests the lack of local partners in the development of much of this material.

Figure 14: Little Business Involvement in ICAC’s Business Measures Work

184 See Figure 14.
Business associations also have a role to play in providing direct advice and guidance following the ICC model. In other countries, business associations and non-profits have provided more guidance to individual companies than government agencies have. Figure 15 shows several prominent examples of NGOs that have produced business guidance, often with business funding. Most Transparency International chapters produce educational materials with government and/or business-sector funding.

Figure 15: Private Sector Prevention Work Internationally Done by the Private Sector Itself Rather than a Preventive Anti-Corruption Agency


186 Id.

<table>
<thead>
<tr>
<th>NGO</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transparency International Norway</td>
<td>Published Anti-Corruption Handbook for the Norwegian Business Sector. Funded by the Finance Market Fund and oversaw by representatives from 6 law firms, three international accounting firms and several local firms.</td>
</tr>
<tr>
<td>Business Unity South Africa (BUSA)</td>
<td>BUSA Anti-Corruption Guide for South African SMEs. Produced on behalf of BUSA by the Ethics Institute of South Africa.</td>
</tr>
<tr>
<td>Center for International Private Enterprise</td>
<td>Reform Toolkit - Combating Corruption: A Private Sector Approach. Financed by the National Endowment for Democracy (NED) and a joint effort with the Colombian Confederation of Chambers of Commerce, Center for the Study of Democracy, and the Armenian Association for Foreign Investment &amp; Cooperation.</td>
</tr>
</tbody>
</table>

The ICAC’s monopoly position in leading the private sector on anti-corruption issues might “crowd out” work that the private sector and NGOs could do better. Almost all the upper-income countries have one or more NGOs dealing with anti-corruption matters. The evidence strongly suggests that independent NGOs that work on anti-corruption have strong and sustainable effects on reducing corruption. Indeed, recent academic evidence suggests that the heavy-handed approaches to fighting corruption in Asia worked despite the lack of anti-corruption efforts from civil society, not because of any such efforts. Academic observers note that the ICAC’s manpower and budget eclipse those of

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190 See GOVERNMENTS, NGOs AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS 45–49 (Luis de Sousa, Barry Hindess & Peter Larmour eds., 2008).
counterpart agencies in other jurisdictions. However, the ICAC has more staff than the total of all fourteen that de Sousa studied, which includes several in low-corruption European jurisdictions.

Such generous resource utilization suggests that the ICAC could better "leverage" the private sector.

What does the ICAC’s work on preventing corruption have to do with reforming the POBO and promoting the role of business associations? Neither the POBO nor the ICAC Ordinance give the Commission the explicit mandate to engage in prevention work. The ICAC has hitherto not needed preventive authorities explicitly inserted into the POBO. However, we think an explicit mandate to engage in the work the Commission already does would help it promote effective business anti-corruption measures in three ways. First, the Commission can specifically delegate, sub-contract and otherwise allocate its legislatively mandated preventive authorities. At present, the ICAC might have difficulty delegating the authority to engage in education and other prevention work — because the ICAC’s competence for such work comes from tradition rather than legislative mandate. Second, specifically defined mandates may help prevent mission creep currently exhibited by the ICAC’s work. As previously discussed, the ICAC’s existing budget and manpower dwarf the budgets and employment of its peers in other upper-income countries. In a situation of budget surpluses, the ICAC may have few resource constraints. However, with more than 15% of the population falling below the poverty line, the resources the government spends on over-mandated corruption prevention necessarily represent an opportunity cost to fund social and welfare programs. Third, an explicit mandate for prevention will serve

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192 Id. at 9.
193 See MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG 201–08 (2004) (explaining how the ICAC’s prevention role emerged organically as a set of operational and organizational mandates by the Commissioners to help the ICAC fulfill its mandate).
194 See id.
195 Id. at 206.
196 Sousa, supra note 191, at 9.
197 Fox Hu and Michelle Yun, Hong Kong Poverty Line Shows Wealth Gap with
as a model for Chinese provinces looking to set up ICAC-like organizations. The ICAC exerts an important effect on the larger People’s Republic and its provincial authorities. An explicit prevention mandate can only encourage “copy cat” Commissions in China’s other regions to follow suit.

With an explicit prevention mandate, the ICAC can work more effectively with business associations on business measures. The ICAC can spend time and resources to “crowd in” advice from business associations and NGOs on ways that businesses and commercial industries can reduce corruption risks among their members. We describe the specific mechanisms the ICAC can use in the last section of this paper.

VII. Measures Related to Accounting and Financial Audit

Accounting and audits can be seen as a central business measure aimed at preventing, detecting and investigating corruption. However, given the highly creative and task-specific nature of accounting and auditing, international law and specific countries’ domestic legislation cannot give specific guidance for companies. The United Nations Convention encourages signatories to outlaw the following six practices: (1) the establishment of off-the-books accounts; (2) the making of off-the-books or inadequately identified transactions; (3) the recording of non-existent expenditure; (4) the entry of liabilities with incorrect identification of their objects; (5) the use of false documents; and (6) the intentional destruction of bookkeeping documents earlier than foreseen by the law. In other words, the United Nations Convention Against Corruption ("UNCAC") seeks to outlaw practices already condemned by Generally Accepted Accounting Principles ("GAAP") and other accounting/audit self-regulation.

The American strategy has revolved around criminalizing...
inadequate accounting procedures and practices. Professors Kathleen A. Lacey and Barbara C. George see two accounting provisions from the FCPA as providing the basis for prosecutions for lax accounting standards. Section 13(b)(2)(A) establishes recordkeeping requirements by “mandating that all corporations ‘make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.’” Section 13(b)(2)(B) requires corporations to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions and assets are properly maintained.” In theory, the SEC could apply sanctions to companies who do not possess sufficiently adequate accounting standards. In practice, though, the SEC applies these provisions only once a bribery-related impropriety occurs. For corruption they cannot prove beyond a reasonable doubt, U.S. prosecutors may obtain a conviction for inadequate accounting.

Yet, the FCPA’s provisions extend beyond issuers of listed securities. Provisions in the Act also strongly encourage partners of U.S. listed firms to implement accounting and auditing controls. Stuart Deming highlights a number of other partners who need to take appropriate accounting and audit measures to provide reasonable assurance that bribery and corruption do not occur in their commercial transactions. Specifically, U.S.

203 Id. (citing 15 USCS § 78m (b)(2)(A)).
204 Id. (citing 15 USCS § 78m (b)(2)(B)).
205 Id.
207 Id. at 497.
209 Deming, supra note 206, at 472–74 (“The accounting and record-keeping provisions . . . to issuers of securities, as defined by § 3 of the Securities Exchange Act of 1934 (“Exchange Act”), which are required by the Exchange Act to register under § 12 or file reports under § 15(d) or which have filed a registration statement that has not yet become effective under the Securities Act of 1933.”).
210 Id.
corporations may be held liable under the accounting provisions of the FCPA if they know of inadequate accounting and auditing standards of related third parties and agents. As we have alluded to previously, Deming explicitly notes that, “proving a violation of the record-keeping provisions is more straightforward and more likely to succeed than proving a violation under the anti-bribery provisions.” He argues that “[t]he evidence necessary to establish a violation is much simpler and less likely to confuse a jury.” Different from the anti-bribery provisions, “there is no need to prove ‘corrupt intent,’ to prove whether a ‘foreign official’ was involved, or to prove whether a promise, offer, or payment was made to ‘obtain or retain business.’”

The recent trend in U.S. law has shifted toward increased legislation on accounting and accounting provisions aimed at detecting – and preventing – corruption. Laura Kress argues that the Sarbanes-Oxley Act (“SOX”) has led to the revitalization of the FCPA. Figure 16 shows several of the provisions, which she argues, have led to greater self-policing by companies. As Kress notes, “Sections of the Sarbanes-Oxley Act regarding the maintenance of proper books and records mirror the provisions of the FCPA, which had already existed for twenty-five years before the SOX was enacted.” Furthermore, “[i]t is almost as if the SOX reminded the DOJ and SEC to ‘rev up’ the enforcement of the FCPA.” Other provisions criminalize making false statements to auditors. Specifically, the SEC Rule on the Improper Influence on Conduct of Audits and the subsequent decision in SEC v. World-Wide Coin Investments, Ltd., provide the

211 Id. at 476 (“An individual or entity can be held vicariously liable for the conduct of a third party when the third party is acting for or on behalf of the individual or entity.”).
212 Id. at 492.
213 Deming, supra note 206, at 492.
214 Id.
215 See generally Laura E. Kress, How the Sarbanes-Oxley Act Has Knocked the “SOX” off the DOJ and SEC and Kept the FCPA on Its Feet, 10 U. Pitt. J. Tech. L. & Pol’Y 2 (2009) (arguing that the SOX has allowed the FCPA to get back on its feet and finally take a step in the right direction toward combating bribery and fraud).
216 Id.
217 Id. at 16.
218 Id.
219 See Kress, supra note 215, at 17-18.
legal basis for providing complete, true and fair disclosure of financial information.220

Figure 16: Provisions of the Sarbanes-Oxley Act Related to Fighting Corruption

<table>
<thead>
<tr>
<th>Provision</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 404 of the Sarbanes-Oxley Act</strong></td>
<td>Compels both management and external auditors to report on the adequacy of a company's internal control over financial reporting.</td>
</tr>
<tr>
<td>15 U.S.C. § 7262(a) (2006)</td>
<td>Requires companies to implement a system that documents and tests its financial controls. Under this system, a company's management must annually create an internal control report, which affirms management's personal responsibility in establishing and maintaining the accuracy of internal controls.</td>
</tr>
<tr>
<td><strong>Section 302 of the SOX 15 U.S.C. § 7241</strong></td>
<td>Requires a company's principal executive officer and principal financial officer to verify the accuracy and fairness of the company's financial reports.</td>
</tr>
<tr>
<td>15 U.S.C. § 7241 (2006)</td>
<td>These officers must verify that they are responsible for the establishment and maintenance of &quot;internal controls,&quot; and that they have disclosed to their auditors and audit committees any significant problems in the design and operation of such controls.</td>
</tr>
<tr>
<td>15 U.S.C. §§7241a(4-6)</td>
<td>Company officers must certify that they have disclosed in the reports any significant changes in their internal control system that might affect these controls after their evaluations.</td>
</tr>
</tbody>
</table>

Source: Kress, supra note 215.

No other jurisdiction comes close to imposing the kinds of requirements faced by companies under U.S. law.221 The U.K.

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221 See generally Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 1 § 27 (U.K.) (enacted to amend the law relating to company auditors and accounts, to the provision that may be made in respect of certain liabilities incurred by a company's officers, and to company investigations); see also Bribery Act, supra note 49, at § 7.
adopted provisions similar to SOX in the Companies (Audit, Investigations and Community Enterprise) Act, 2004 and a weak requirement to maintain adequate accounting records in the UKBA. Hong Kong – for its part – has adopted several provisions making financial dissimulation a criminal offense. For example, Chapter 32, Section 274 of The New Companies Act provides sanctions for failing to keep proper accounts. Auditors may also face liability for reporting false information. Yet, Hong Kong’s directors and bookkeepers face nowhere near the same level of liability as their American peers.

We think that U.S. law goes too far to serve as a model for Hong Kong. First, we agree with Black, that the FCPA has given the U.S. Securities and Exchange Commission (SEC) powers it does not want, nor should have. The SEC serves as a watchdog for investors’ rights – and does not serve as an anti-corruption agency. Second, the UKBA has not adopted the extensive accounting provisions contained in U.S. law. The UKBA has only a brief section, noting that companies should have “adequate procedures” – including accounting procedures. Third, Hong Kong’s accounting profession – and its professional organizations – can regulate over the tiny area of Hong Kong. Governments worldwide have traditionally left accounting and auditing as a self-
regulating profession given its complex and principles-guided nature. Hong Kong’s accounting and audit professionals know the weaknesses of the current system better than government regulators.

The Hong Kong accounting profession as a self-regulating body should develop a set of standards – with the U.S. experience in mind. The Hong Kong Society of Accountants knows best the weaknesses of the current accountant standards in terms of allowing for fraudulent accounting of corruption-related transactions. The ICAC – for its part – has an important role to play as facilitator and government agent. The ICAC should host meetings of the Society and encourage them to consider changes, which may harm individual interests in the short-run, but improve the profession and business climate in the long run.

The ICAC also has a role to play as an honest broker for auditors, as well as accountants. In the last ten years, auditors – both internal and external – have learned a great deal about conducting corruption-focused audits. Internal audits can assess the control environment, the performance of a company’s anti-corruption policies, and compliance by staff with those policies. Internal auditors can also assess systems, risks and the extent to which information technology (IT) systems allow for corruption. The assurance audit, which provides “reasonable assurance” that the annual accounts provide an accurate view of the company’s finances, represents a key anti-corruption business measure.

Yet, the annual assurance audit will not look specifically for corruption unless corruption enters into the audit plan. The

233 Id.
234 See generally MUHAMMAD A. KHAN, A PRACTITIONER’S GUIDE TO CORRUPTION AUDITING (Pleier, Jan. 2006) (providing a framework for internal auditors and government auditors that is effective in the audit of corruption).
235 Id.
236 Inter’l Cham. Com., Corporate Responsibility and Anti-corruption: ICC Rules on Combating Corruption § 2-9 (2011) (covering the role of these audits).
237 Id.
238 We do not have space to describe the audit methodology or describe the role that auditing for corruption plays in the annual financial statements assurance audit. We can
ICAC can lead a discussion about whether the audit profession wants to insist on a basic corruption-related focus during the annual assurance audit exercise. We do not list the pros and cons of this recommendation because Hong Kong’s audit profession can outline these pros and cons for the ICAC.

VIII. Corporate Whistleblower Protection Programs

Corporate whistleblowing policies have become an important business measure in detecting and remedying the harms from corruption. As with other business measures, legislation has provided companies with strong incentives to set-up these internal whistleblowing procedures. In the jurisdictions most relevant to Hong Kong – namely the United Kingdom and United States – both have had legislation in place, which has encouraged companies to implement whistleblowing programs. In the U.S., the Sarbanes-Oxley Act of 2002 (“SOX”) provides whistleblower protection for employees of publicly traded companies against retaliation in fraud cases. In the United Kingdom, the Public Interest Disclosure Act 1998 (“PIDA”) has provided strong incentives to U.K. companies seeking relief from more serious disclosures made to law enforcement agencies. In both cases, companies have sought to provide employees with an avenue to denounce corruption and other forms of malfeasance before they turn to law enforcement agencies.

The U.S. legal framework protecting private sector whistleblowers has gradually strengthened over the years – for better or for worse. As mentioned above, the whistleblower

only flag here that auditors will not look specifically for evidence of corruption unless they have a strong reason to look.

239 See The Foreign Corrupt Practices Act, supra note 49; Bribery Act, supra note 49.

240 18 U.S.C. § 73-1513(e) (making retaliation against employees for whistleblowing a criminal offense); cf. New York Stock Exchange [NYSE], Listed Company Manual § 303A.10 (2009) (requiring listed companies to adopt a code of ethics for directors, officers, and employees, and that this code must contain compliance standards and procedures that will facilitate – among other things – whistleblower protection).

241 See generally Public Interest Disclosure Act (1998) (enacted to protect individuals who make certain disclosures of information in the public interest and to allow such individuals to bring action in respect of victimization).

242 See id.
protection afforded by the Sarbanes-Oxley Act of 2002 represents the most important measure, even more than the FCPA, which has encouraged companies to adopt whistleblowing measures. 243 Section 806 of this Act protects whistle-blowers who disclose FCPA violations by publicly held U.S. companies – at home and abroad. 244 However, most academics question the efficiency of the SOX on theoretical grounds. 245 Particularly the Anglo-Saxon concept of "employment at will," which leads to serious difficulties in proving that dismissal does not stem from whistleblowing. 246 Other difficulties stem from the fact that most whistle-blower protection does not cover complaints made to company officials rather than law enforcement agencies. 247

At present, U.S. law does not extend whistle-blower protection for complaints made abroad. In Carnero v. Boston Scientific Corp., Mr. Carnero, an Argentinean citizen residing in Brazil, tried to sue his employer for retaliation in the form of unfair dismissal related to his informing company management in the U.S. 248 He argued that his subsidiary’s management had inflated sales figures

243 See Matt A. Vega, The Sarbanes-Oxley Act and The Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees, 46 HARV. J. LEGIS. 427, 479 (2009) (pointing to several features of these whistleblower protections).


245 See generally Meghan E. King, Blowing the Whistle on the Dodd-Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley, 48 AM. CRIM. L. REV. 1457 (2011) (arguing that Sarbanes-Oxley’s whistleblower provisions do not protect all private-sector employees and that it has led to difficulties in obtaining protection and relief).


247 See generally David Aron, “Internal” Business Practices?: The Limits of Whistleblower Protection for Employees Who Oppose or Expose Fraud in the Private Sector, 25 A.B.A. J. LAB. & EMP. L. 277 (2010) (arguing that federal whistleblower laws that expressly protect reports of fraud do not apply to employees unless their employer contracts with the federal government, is a publicly traded company, or has violated a federal statute); see also Gerard Sinzdak, An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements, 96 CALIF. L. REV. 1633, 1634 (2008) (arguing that states should “provide protection to employees who report either internally or to a supervisor or externally to a government body . . . [s]tate laws should also extend protection to employees who report to the media or to other third parties”).

and created false invoices.\textsuperscript{249} The First Circuit Court ruled that whistle-blower protections contained in the SOX do not have extra-territorial effect.\textsuperscript{250} While the court's holding seems relatively secure, for now, academics have suggested a doctrinal approach toward making whistleblowing extra-territorial.\textsuperscript{251} Vega specifically argues that the Southern District of New York Court's recent decision in \textit{O'Mahony v. Accenture Ltd.} may provide for the extra-territorial application of cases like \textit{Carnero v. Boston Scientific Corp.} to the extent whistleblowing is conducted or affects U.S. interests.\textsuperscript{252} Such conduct and effects-based tests could provide future plaintiffs with standing in these kinds of cases. Indeed, well aware of the weaknesses of the Sarbanes-Oxley whistleblowing measures, several U.S. legislators have led recent efforts to unify U.S. legislation governing private sector whistleblowing in the Private Sector Whistle-blower Protection Streamlining Act of 2012.\textsuperscript{253} However, most experts would agree that the Bill has a negligible chance of Congressional adoption.

Private sector observers also question the SOX and the effectiveness of the FCPA's whistleblowing measures on empirical grounds. According to recent survey data of U.S. businesses, "[i]n 2011, 9\% of employees observed a potential FCPA violation compared to 5\% in 2009."\textsuperscript{254} Only 65\% of employees who observed unethical conduct reported such conduct in 2011.\textsuperscript{255} In one recent case, whistle-blowers allegedly brought their concerns to their company's management several times before going public.\textsuperscript{256} The United States has far more


\textsuperscript{250} Camero, 433 F.3d at 2–4.

\textsuperscript{251} See Vega, supra note 243, at 494–98.

\textsuperscript{252} Id.; see also O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (holding that it would not be unreasonable nor against Congressional policy to extend jurisdiction because the alleged wrongful conduct and other material acts occurred in the United States).


\textsuperscript{255} Id. at 23.

\textsuperscript{256} See Tides v. The Boeing Co., 633 F.3d 809, 811 (9th Cir. 2011).
whistleblowing cases than all other countries combined and a higher proportion of companies with ethics programs than in other jurisdictions. 257 However, data like these, and others that we provided earlier, suggest that the Sarbanes-Oxley inspired model of whistleblower protection may not be the best for Hong Kong’s companies. Recent innovations introduced by the Dodd-Frank Act only pull the United States’ framework further away from a workable system for Hong Kong. 258

Whistleblower laws in the various U.S. states provide no more, and probably less, guidance for Hong Kong. The states have a hodgepodge of rules, with many states’ legislatures deciding not to afford whistleblowers any kind of protection. 259 Indeed, of the fifty states and the District of Columbia, sixteen out of the fifty-one states lack any state-level whistleblowing laws. 260 Of the rest with state-level whistleblower protections, seventeen out of the fifty-one states have laws applicable only for those working in the public sector. 261 Most states with whistleblower protection provisions in state legislation allow for a ninety-day limit to bring civil suits for unfair dismissal and/or retaliation (such as California and Connecticut). 262 However, several examples show how these rules can diverge between states. 263 Nebraska—for example—limits the application of its whistleblower protection provisions to companies with fifteen employees or more. 264

The Hawaii Whistle-blowers Protection Act provides one of the greatest measures of protection to private sector whistle-


260 Id.

261 See id.

262 CAL. GOV’T CODE § 53297 (West 2014); see also CONN. GEN. STAT. § 31-51m (2012).

263 See, e.g., NEB. REV. STAT. §§ 48-1102, 48-1114 (2013).

264 See id.
The Act provides the "usual" protections—and allows greater protections provided for by collective bargaining agreements to take precedence. Victims of retribution can bring a civil suit within two years and courts may order reinstatement, back-pay, as well as court and legal costs/fees. Employer may be fined up to $5000 for each violation of the Act.

Yet, outside of the United Kingdom and United States, most countries have not passed legislation that encourages corporate whistleblowing programs. Figure 17 provides an assessment for a range of European countries—and the extent of their legislative framework which incentivizes whistleblowing programs. Most countries rely on labour law and criminal law to provide their (inadequate) provisions related to whistleblower protection. Concomitant with this relatively lacking legal framework, these countries' companies generally do not tend to denounce corruption. The figure (by showing that countries without whistleblower protection tend to have widespread corruption) provides strong support for the assertion that legislation provides the incentives for corporate measures against corruption. These countries' lack of legislation also provides a strong case for proactive legislation in Hong Kong aimed at encouraging whistleblowing.

Figure 17: Private Sector Whistleblowing Provisions in Selected Civil Law Jurisdictions

<table>
<thead>
<tr>
<th>Legislative basis</th>
<th>Bulgaria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative basis</td>
<td>Labour Code and Criminal Law provide basic treatment of private sector whistleblowing.</td>
</tr>
<tr>
<td>Practice</td>
<td>Large companies tend to use Western methods of handling</td>
</tr>
</tbody>
</table>

266 Id.
269 TRANSPARENCY INTERNATIONAL, ALTERNATIVE TO SILENCE WhISTLEBLOWER PROTECTION IN 10 EUROPEAN COUNTRIES (2009), available at http://www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries.
whistleblowing. SMEs handle through HR departments on ad hoc basis.

<table>
<thead>
<tr>
<th><strong>Czech Republic</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Legislative basis</strong></td>
<td>Labour Code allows employees to take complaints to employers. But no procedures about handling such complaints. Employers may not retaliate through dismissal.</td>
</tr>
<tr>
<td><strong>Practice</strong></td>
<td>Companies can protect themselves from whistleblowing using provisions related to slander and false accusation. The TI evaluation found no internal reporting mechanisms, except anonymous telephone lines or email addresses. Companies do not react to complaints effectively.</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th><strong>Estonia</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legislative basis</strong></td>
<td>Employment Contract Act gives employees right to compensation if punished for whistleblowing. The Penal Code provides 2 paragraphs stating that non-disclosure and failure to report first-degree criminal offences (including some cases of bribery) are punishable.</td>
</tr>
<tr>
<td><strong>Practice</strong></td>
<td>No known whistleblowing practice in Estonia.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Hungary</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legislative basis</strong></td>
<td>Labour Code provides general admonitions about both employer and employee acting in each others’ best interests. A 2009 Bill aimed to set up new body—the Directorate for the Protection of Public Interest (DPPI). The DPPI would receive reports of wrongdoing and protect whistleblowers. Another Bill would cover all kinds of retaliation for whistleblowing. Under the Bill, the employee would have to prove that he or she had submitted a whistleblower report. The employer would have to prove that punitive measures carried out against the employee were unrelated to that report. The DPPI would provide the whistleblower with financial assistance for legal representation and living costs. The whistleblower would also receive ten per cent of the fine imposed on the wrongdoer by the DPPI.</td>
</tr>
<tr>
<td><strong>Practice</strong></td>
<td>Whistleblower reports used as personal retaliation for injustices committed against staff. Only 17% of economic crimes in 2007 found through whistleblowing (according to private sector survey). Only three court cases even remotely related to whistleblowing in the last 10 years.</td>
</tr>
</tbody>
</table>

| **Ireland** |  |
### Legislative basis
No laws in place, even in labour and criminal code or in sectorial codes, related to whistleblowing. The 2012 Protected Disclosure in the Public Interest Bill seeks to remedy this defect.

### Practice
Whistleblowers get little relief or protection under Irish law.

#### Italy

**Legislative basis**
The Labour Law protects workers against dismissal, but not against other forms of reprisal (physical threat, demotion, transfer, etc.). Legislative Decree 231/2001 provides an internal reporting procedure for companies to encourage whistleblowing.

**Practice**
The TI reports sums up nicely that, “whistleblowing is barely known in Italy and is often confused with treason.” Big companies have recently established specific whistleblowing procedures, often in order to comply with the Sarbanes-Oxley Act. SMEs usually have no internal reporting procedures.

#### Latvia

**Legislative basis**
Criminal Law requires employees to disclose information on serious crimes (like bribery). The Labour Law prohibits the punishment of employees for whistleblowing and gives the employer primary responsibility for ensuring compliance.

**Practice**
No known cases exist where employees relied on Labour Law to protect themselves from retaliation for whistleblowing. The Corruption Prevention and Combating Bureau (KNAB), the Ombudsman and the State Labour Inspectorate receive reports of wrongdoing in the workplace, including whistleblowing incidents.

#### Romania

**Legislative basis**
Romania has a Whistleblower Protection Act. However, the Act is limited to the public sector. The Witness Protection Law contains a brief reference to whistleblowing and protects people who report corruption and fraud. The Labour Code contains provisions regarding abusive dismissal.

**Practice**
Confidentiality agreements limit possibility of whistleblowing. Few companies have whistleblower policies or internal regulations regarding disclosure.

Source: See TRANSPARENCY INTERNATIONAL, supra note 269.
Unlike in many jurisdictions, Hong Kong still does not have special legislation in place to encourage companies to protect whistleblowers. The POBO does not require whistleblowing. Like the European jurisdictions we have reviewed, Hong Kong’s law does afford some protection to whistleblowers. Hong Kong Employment Ordinance and Crimes Ordinance require employees to denounce corrupt practices. However, beyond this minimum, Hong Kong’s policymakers have determined that no further law-making is needed. The Hong Kong LegCo’s Panel on Administration of Justice and Legal Services has recently observed that no particular demands exist in society for whistleblower protection legislation. In their findings, they note that “the Administration therefore does not see a practical and justified need for whistleblower legislation.” We disagree.

The data suggest that law making would greatly motivate companies to adopt the measures needed to encourage whistleblowing. Figure 18 shows data about the whistleblowing policies and mechanisms available in a sample of Hong Kong companies. Only 50% of the respondents noted that their company has a policy for protecting whistleblowers. Roughly 30% of respondents noted that their companies had whistleblower protection schemes that protect the anonymity of the person providing information. Less than 10% of the respondents worked for companies that penalized retribution for employees who complained about unethical or illegal behavior in the firm. Like in other countries, the majority of complaints go to

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270 See Prevention of Bribery Ordinance, supra note 40, at § 1–35.
271 See id.
272 Gareth Thomas and Helen Beech, Employment and Employee Benefits in Hong Kong: Overview, EMPLOYMENT AND EMPLOYEE BENEFITS MULTI-JURISDICTIONAL GUIDE 1, 1 (2014).
273 LegCo Panel on Administration of Justice and Legal Services, Review of the Jurisdiction of the Office of The Ombudsman, LC Paper No. CB (2)1384/08-09(07) (2009).
274 See id. (referring to protections governing whistleblower protections in the public sector, despite the fact that most lawmakers and academics have considered public sector whistleblower protections as a sin qua non for their private sector equivalents).
275 BUSINESS ETHICS: A PATH TO SUCCESS, supra note 93.
276 Id. at 27.
277 Id.
278 Id. at 29.
superiors.\textsuperscript{279}

\textit{Figure 18: Mechanisms and Steps to Protect Whistleblowers in Hong Kong}

The figure shows the mechanisms available to protect whistleblowers, including the ability to remain anonymous, confidentiality of complaints, handling by independent persons, and penalisation retaliation. The steps employees can take include contact their supervisor, the HR department, hotlines, internal auditors, and others. Source: Hong Kong Institute of Chartered Secretaries and Hong Kong Shue Yan University (2007).

Hong Kong should adopt the framework for codes of conduct and ethics recommended by the Institute of Chartered Secretaries.\textsuperscript{280} The framework consists of three major points. First, the Code on Corporate Governance Practices of the Listing Rules should recommend adopting codes of ethics as a good practice.\textsuperscript{281} Roughly 90\% of the respondents to the Institute of Chartered Secretaries survey endorsed this action.\textsuperscript{282} Second, the Corporate Governance Code for listed companies should include a provision recommending codes of ethics. Roughly 75\% of respondents agreed with this recommendation.\textsuperscript{283} Third, companies should put whistleblowing policies in place. Roughly 90\% of participants endorsed this approach.\textsuperscript{284} The ICC

\textsuperscript{279} Id.
\textsuperscript{280} Id. at 30.
\textsuperscript{281} BUSINESS ETHICS: A PATH TO SUCCESS, \textit{supra} note 93, at 28–35.
\textsuperscript{282} Id.
\textsuperscript{283} Id. at 31.
\textsuperscript{284} Id.
Guidelines on Whistleblowing provides a useful model. Incentives should seek to make the company’s managers the first stop before reporting potential crime to other authorities.

IX. Creating a Market for Anti-Corruption Corporate Counsel: Internal (Regulatory) Investigations, Disciplinary Sanctions and Settlements

Hong Kong law does not provide the same incentives for companies to self-police as in the United Kingdom, United States, and increasingly throughout the E.U. In these other jurisdictions, most of the largest law firms now offer compliance-related services for dealing with government investigators and/or offer internal investigations services. As shown in Figure 19, U.S. firms clearly dominate their U.K. colleagues in anti-corruption knowledge and experience. Such a difference clearly exists due to their longer history with pro-active anti-corruption legislation (the FCPA). Activist regulation in the United States—and laws which encourage corporate responses to an ever-changing regulatory landscape—have encouraged the development of legal counsel (both inside companies and in the large law firms) capable of helping their clients avoid corruption. These firms also help companies fight anti-corruption charges—and sometimes even influence at trial the evolution of anti-corruption law.

Figure 19: Why Can’t Law Firms Offer the Same Anti-

287 See Figure 19.
288 See id.
291 See id.
Corruption Advice in Hong Kong as in Other Jurisdictions?

<table>
<thead>
<tr>
<th>Firm</th>
<th>LE</th>
<th>II</th>
<th>Brief Description and/or Emphasis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baker &amp; McKenzie²⁹²</td>
<td>X</td>
<td></td>
<td>Focus on law enforcement—given their counsel’s former government experience.</td>
</tr>
<tr>
<td>Skadden, Arps, Slate, Meagher &amp; Flom²⁹³</td>
<td>X</td>
<td>X</td>
<td>Focus on individual liability and particularly internal investigations.</td>
</tr>
<tr>
<td>Clifford Chance²⁹⁴</td>
<td>X</td>
<td>X</td>
<td>Focus on prevention, risk assessment and learning through their online COMPLY program. Relatively under-developed anti-corruption offering—probably because of U.K. orientation.</td>
</tr>
<tr>
<td>Linklaters²⁹⁵</td>
<td></td>
<td></td>
<td>Latham is “best known for its representation of corporations and boards in matters [including] FCPA . . . allegations.” - Chambers USA 2012 Very poorly reported services related to FCPA.</td>
</tr>
<tr>
<td>Latham &amp; Watkins²⁹⁶</td>
<td></td>
<td></td>
<td>Probably the number one firm in the area. Relatively under-developed FCPA and anti-corruption practice. Work</td>
</tr>
<tr>
<td>Freshfields Bruckhaus Deringer²⁹⁷</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Allen &amp; Overy²⁹⁸</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Jones Day²⁹⁹</td>
<td></td>
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</tbody>
</table>

advising Saudi oil company and other companies on due diligence.

<table>
<thead>
<tr>
<th>Firm</th>
<th>LE</th>
<th>X</th>
<th>X</th>
<th>Well-covered in the major areas of anti-corruption representation.</th>
<th>Along with Allen &amp; Overy, one of the best internationally poised firms for global anti-corruption work.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kirkland &amp; Ellis</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sidley Austin</td>
<td>X</td>
<td>X</td>
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</tr>
</tbody>
</table>

LE means the firm has extensive focus and experience in representing clients during anti-corruption investigations and/or prosecutions. II means the law firm has extensive focus and experience in representing clients during internal investigations.

Source: *The American Lawyer* for rankings (ranked by 2010 revenue) and company websites for other information.

Hong Kong’s current legal structure discourages the development of these kinds of legal markets—particularly those related to expanding the use of regulatory investigations. Regulatory investigations still remain under-used in Hong Kong for three reasons. First, under Hong Kong law, the risk to the corporation (as a legal person) is much less than other jurisdictions like the U.S. or U.K. Under U.S. and U.K. law, principals (both natural and legal persons) may hold vicarious liability for corruption-related offences of their agents. In Hong Kong, liability still primarily imputes to the agent. Second, Hong Kong law does not recognize criminal investigations conducted within the corporation by non-law enforcement officers. Third, regulatory investigations strike at the heart of attorney-client privilege. The POBO certainly recognizes this privilege.

302 Baer, supra note 39; Bribery Act, supra note 49, at § 14.
303 See Bryane Michael, Can the Hong Kong ICAC Help Reduce Corruption on the Mainland? 52 (2013).
304 See Prevention of Bribery Ordinance, supra note 40.
306 Prevention of Bribery Ordinance, supra note 40, at § 15.
However, as we discussed previously, the POBO offers no positive incentives for companies to engage in these kinds of “self-inflicted” investigations. Nevertheless, policy has a role to play in encouraging broader use of internal measures in companies aimed at reducing corruption.

Unlike in Hong Kong, U.S. law delegates a relatively important role to corporate counsel in setting and enforcing anti-corruption business measures. Under U.S. law, corporate counsel provides advice to their employers—and can face similar penalties for complicity and/or negligence (malpractice). Corporate counsel—unlike in many jurisdictions—may receive certain types of “undiscoverable” information (information that prosecutors may not ask for and/or use at trial). However, the current legal framework has not necessarily yielded strong incentives for companies to self-investigate and self-report to the Department of Justice. In a recent empirical analysis of FCPA enforcement actions, Professors Choi and Davis find that self-reporting has not resulted in more lenient treatment of corporations. Thus, no rational corporation should in the future self-report (unless the Department of Justice reacts to this statistical analysis). Corporate counsel’s role thus increases as companies have the incentives to fight to the bitter end... a bad outcome to be sure.

U.K. law—with its emphasis on equity—promises to provide Hong Kong with a more appropriate legal framework by encouraging internal investigations conducted by companies themselves. Already, the United Kingdom’s financial firms have implemented widespread measures aimed at detecting, investigating, and curing any harms arising from corruption among corporate members. Unlike in the United States, internal investigation procedures related to finding corruption constitute a


much stronger statutory defense.\textsuperscript{311} In addition, with the United Kingdom’s emphasis on shifting part of the regulatory cost of conducting such investigations onto the private sector, the U.K. model promises to be far less heavy-handed than the U.S. model.\textsuperscript{312}

Whichever model Hong Kong legislators choose, the data strongly suggests that providing corporations with positive incentives to conduct internal investigations and other corporate measures pays off. These incentives can include the use of such investigations as a defense against corporate prosecution, tax write-offs, and as a type of “insurance” against widespread corruption in the company.\textsuperscript{313} In a rather dated (though still relevant) study of U.S. law, Professors Ruhnka and Boerstler find strong international evidence showing that regulatory investigations should rely on positive rather than punitive measures.\textsuperscript{314} They specifically find a dramatic growth in the enactment of voluntary corporate codes of conduct by the \textit{Fortune 1000} companies in the period 1985–1994 that broadly parallels the growth in positive governmental incentives for such programs.\textsuperscript{315} In addition, several dramatic increases in code enactment and revision activity coincided with specific governmental incentives for private compliance programs offered during that period.\textsuperscript{316} In the UNODC’s review of anti-corruption policies and codes of conduct, they find a strong correlation between the company’s home country legislation and the presence of these policies and codes.\textsuperscript{317} We therefore recommend that Hong Kong policymakers conduct a study to see to what extent they can encourage self-

\begin{itemize}
  \item \textsuperscript{311} See generally id.
  \item \textsuperscript{312} See \textit{Corporate Internal Investigations: An International Guide}, Oxford U.P. (Paul Lomas & Daniel Kramer eds, 2008) (discussing internal investigations in the U.K. private sector and the incentives government provides to shift part of the burden for conducting these investigations onto the private sector).
  \item \textsuperscript{315} \textit{Id}.
  \item \textsuperscript{316} \textit{Id.} at 323.
  \item \textsuperscript{317} See U.N. OFFICE ON DRUGS AND CRIME, \textit{supra} note 84.
\end{itemize}
policing by Hong Kong’s companies.\footnote{318}{As we have previously mentioned, the ICAC’s budget far exceeds all its upper-income country peers. A smarter legislative design may help the ICAC save money while more effectively tackling corruption.}

\section*{X. Introducing Contractual Anti-Corruption Obligations for Business Partners}

Changes to domestic legislation worldwide increasingly impose criminal and \textit{de facto} administrative sanctions on companies whose business partners engage in corruption.\footnote{319}{These \textit{de facto} administrative sanctions come from non-prosecution agreements with the U.S. Department of Justice. Companies reach a monetary settlement with the DOJ -- which in effect, equals a discretionary administrative fine.} The FCPA, the Federal Sentencing Guidelines for Organizations, and Sarbanes-Oxley have increased liability on companies for the criminal activities of their business partners at home and abroad.\footnote{320}{See 15 U.S.C.A. §§ 78m(b)(2)–(7), 78dd-1, 78dd-2, 78dd-3, 78ff(c) (2005); Sentencing Guidelines Manual § 8B2.1 (2005); 15 U.S.C. § 7211 (2005).} Three types of liability arise from the legislation in place—direct liability, indirect liability, and agency liability.\footnote{321}{Justin Marceau, \textit{A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions under the Foreign Corrupt Practices Act}, 12 \textit{Fordham J. Corp. \\& Fin. L.} 285, 296 (2007).} At the risk of over-simplification, direct liability stems from payments made by parent corporations to subsidiaries, indirect liability arises from payments made by business partners, and agency liability comes from payments made by individuals in the interests of the enterprise.\footnote{322}{We do not include the UKBA in our discussion, as these provisions are new and untried in U.K. law.} How far down the agency-chain does liability travel?

Wal-Mart provides a simple illustration of the problem in defining where liability should stop in the agency chain.\footnote{323}{See Aaron Grieser, \textit{Defining the Outer Limits of Global Compliance Programs: Emerging Legal and Reputational Liability in Corporate Supply Chains}, 10 \textit{Or. Rev. Int'l L.} 285, 285 (2008).} Around 2004, the company trained almost 8,000 suppliers and factory managers on Standards for Suppliers (largely in response to the potential indemnification from corporate liability offered in the U.S. Sentencing Guidelines for Organizations).\footnote{324}{Id. at 304.} The company has accounting and ethics reporting standards that comply with the FCPA and §301 of the Sarbanes-Oxley Act, as
well as a whistleblowing policy for "[t]he receipt, retention and treatment of complaints regarding accounting matters; and the confidential, anonymous submission of complaints regarding questionable accounting or auditing matters." Yet, Grieser estimates if Wal-Mart had conducted anti-corruption trainings and due diligence monitoring for all its suppliers and partners, such work would have cost the company $125 million in 2005 (or roughly 1% of net profits for that year).326

Even a worldwide compliance program did not protect Wal-Mart from investigation (and informal inquiries) in a number of jurisdictions.327 Wal-Mart managers in Mexico allegedly paid Mexican officials $24 million for permissions to open new stores throughout the 2000s.328 Senior U.S. managers further allegedly knew about these payments and stopped an internal investigation into the matter.329 Subsequent to public revelations about the Mexican subsidiary’s bribery, local officials in Los Angeles, San Diego, Boston, and New York sought to look into the company’s business dealings with local officials in those areas.330 With almost 9,000 stores world-wide and thousands of suppliers, Wal-Mart management will naturally wonder to what extent they should monitor the work of their agents and partners at home and abroad.331

Just how many agents and business partners does Wal-Mart need to supervise in order to minimize its FCPA liability? Jane Doe I, et al. v. Wal-Mart Store, Inc. recently tested that question.332 In that case, the International Labor Rights Fund (ILRF) lodged complaints—on behalf of Wal-Mart workers—that the company had violated its Standards for Suppliers agreements and other code

325 Id. at 305.
326 Id. at 312.
329 Id.
331 See id.
of conduct provisions. The case represents one of the first attempts to sue a company for corporate negligence for failing to enforce its anti-corruption (and other) codes of conduct. The U.S. District Court for the Central District of California dismissed the claims in 2007. However, the case represents the first of many likely cases seeking to hold companies liable for their codes of conduct and compliance programs. In our opinion, the court implied that public policy concerns shall determine whether companies possess the common law duty of care to its "stakeholders." However, the court reiterated the prevailing risks-based approach to compliance as the balance of probability-adjusted harms and benefits. Figure 20 shows the exact test proposed by the court.

**Figure 20: The California Test for Establishing an Anti-Bribery Duty of Care**

A series of recent rulings have helped create common law doctrine limiting liability for corruption on long or far-linked agency chains. Under California common law, courts must weigh considerations such as the likelihood and predictability of harm, probability of injury, the closeness of the defendant's conduct and the injury suffered, and the public policy implications of enforcing a company's code of conduct abroad and on third parties. In other words, they must use a Hand Test—balancing the probabilities and value-at-risk.


Despite such a seemingly simple test for establishing potential

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333 *Id.* at 680.
334 *See id.* at 683.
336 *See id.* at 680.
337 *See id.* at 681-85.
338 *Id.* at 684.
339 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (outlining the well-known "Hand Rule" on calculus of negligence).
liability, federal enforcement action shows that no simple test exists (or will likely exist) to guide corporate compliance officers. U.S. Department of Justice enforcement of the FCPA has varied widely between similar cases.\(^{340}\) To cite a few examples, in the FCPA enforcement action against Schering-Plough (a large pharmaceutical company), foreign partners made payments to foreign official "without the knowledge or approval of any Schering-Plough employee in the United States."\(^{341}\) In another case, the Department of Justice took an FCPA enforcement action against Dow Chemical for improper payments made by DE-Nocil, a fifth-tier subsidiary of Dow.\(^{342}\) Again, no Dow employee had knowledge of, or approved, the payment.\(^{343}\) Similar to the California ruling (and the underlying Hand Test doctrine), the FCPA finds a breach "if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."\(^{344}\)

What does the Wal-Mart case suggest to Hong Kong’s policymakers? The FCPA experience suggests that the costs of trying to establish a "balance of probabilities" standard with regard to the duty of corporate anti-corruption care exceed any possible benefits. In other words, U.S. prosecutors cannot reliably tell if a company assessed the risks of third-party bribery correctly. A large number of U.S. companies have adopted codes of conduct and other anti-corruption business measures—in fear of possible enforcement of the almost capricious and arbitrary standards set by the FCPA.\(^{345}\) Commentators have suggested the principles based tests for the UKBA will encounter the same problems.\(^{346}\)


\(^{343}\) Id.


\(^{345}\) See Cheryl Evans, The Case for More Rational Corporate Criminal Liability: Where Do We Go From Here, 41 Stetson L. Rev. 21, 35 (2011).

\(^{346}\) Id.
We do not think that the LegCo should consider requiring the same principles-based approach requiring corporations to have “adequate procedures” like the approach adopted by U.S. and U.K. legislators. First, unlike in the United States, Hong Kong legislators and law enforcement bodies are much less comfortable with imposing sanctions on companies based on a balance of probabilities than their U.S. colleagues. We see few enforcement actions for violation of section 7 of the UKBA as evidence of this reticence (which Hong Kong’s institutions have inherited). Second, the Hong Kong Department of Justice does not have the same kind of resources the United States and United Kingdom have to empirically define an “adequate procedures” test. In the United States, such a test has been notoriously and ambiguously applied by Department of Justice officials, and has changed significantly overtime. The United Kingdom—despite Guidance on adequate procedures issued by Ministry of Justice—has yet to test the Guidance in actual cases (as of this writing). Third, fewer of Hong Kong’s largest companies have the ability to impose anti-corruption conditions on their business partners than their U.S. or U.K. counterparts. The largest Hong Kong companies—like Hutchison Whampoa—rank almost 300 on the Fortune Global 500. Compared with their larger colleagues, they would have much less negotiating power of suppliers and other partners.

XI. Public Disclosures and Transparency as Anti-Corruption Measure

Reporting practices represent an important anti-corruption business measure. We have already presented data showing the extent to which companies that report extensively on their corporate activities (and on their anti-corruption activities as well)

347 See Bribery Act, supra note 49, at § 7.
349 See id. at § 9.
350 See id. at § 9.
engage in less corruption. However, corporate transparency and reporting would represent a contentious area of anti-corruption work. Transparency can jeopardize a company’s competitive position where much of its action and strategy must be done away from the eyes of its competitors. As such, unilateral transparency (the company reports transparently without legal requirements) is unlikely. Only industry standards and/or legal norms could encourage such transparency.

Hess has proposed one method for improving transparency in corporate transactions. Echoing proposals made by the former U.S. SEC General Counsel, he suggests that prosecutors take into account the degree of public disclosure of a company’s activities during non-prosecution or deferred prosecution agreements. In order to promote a level playing field, public disclosures would contain a description of the corporation’s compliance program, including its code of conduct, training policies, and monitoring practices. To address concerns about the need for privacy, in order to maintain a company’s competitive advantage, some disclosures could remain exclusively private (only to government). Some of these disclosures may include lists of specific projects in foreign countries, their budgets, information about joint venture partners and local agents’ contracting terms. Such private information—if provided quickly during the initial stages of an investigation—could increase the probability that a company escapes from further investigatory and/or prosecutorial action (at least by the SEC).

The Global Reporting Initiative (GRI) and the U.N. Global Compact represent two standards that will likely set the bar for

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353 See supra Part III.


355 Hess, supra note 352, at 65.


357 Id. at 1236-37.

358 Id. at 1246-47.

359 Id. at 1246.

360 Id. at 1246-47.
such reporting. In Figure 21a, we show the recommended disclosures that companies (including Hong Kong companies) might make under the GRI scheme. As shown, the qualitative analysis companies can conduct under the GRI standard leaves much to be desired. Companies can describe—in as much or little detail as they like—their anti-corruption policies. They do not need to describe any actual cases or enforcement actions pending.

Figure 21a: The Global Reporting Initiative and Public Disclosure as a Measure to Reduce Corruption

GRI reports represent analyses conducted by companies themselves about (among other things) their anti-corruption business measures. They describe the corporation's general managerial approach toward corruption and self-reported performance in several economic, environmental, and social categories. Work on anti-corruption falls into the social category, and three "core" indicators help gauge a company's performance on anti-corruption policies and practices.

The reporting corporation must disclose:
(1) what business units it has analyzed for corruption risks;
(2) the training provided to employees on the corporation's anti-corruption policies; and
(3) how the company has responded to any incidents of corruption related to its business activities.

Related to reporting on its anti-corruption policies and practices, the company should disclose its operational responsibilities, and its monitoring procedures.

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361 Both the GRI and the Global Compact represent voluntary agreements that organizations (not countries) agree to. Hong Kong has only five organizations that have signed on to the Global Compact. See United Nations, Global Compact Participant Search, available at https://www.unglobalcompact.org/participants/search?utf8=✓&commit=Search&keyword=hongkong&joined_after=&joined_before=&business_type=all&sector_id=&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search&sort_by=country_name&direction=ASC.


363 Id.

364 Id.
The U.N. Global Compact, however, asks for an extremely extensive set of information.\footnote{U.N. Global Compact (July 26, 2000), https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.} Principle 10 of the Compact covers 22 points of a company’s anti-corruption policy, implementation and evaluation.\footnote{U.N. Global Compact Principle 10 (July 26, 2000), https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html.} Figure 21b shows the information that companies should report on. The U.N. considers only seven of the reporting measures mandatory, with the other fourteen measures “desired.”\footnote{U.N. Global Compact, Reporting Guidance on the 10th Principle Against Corruption (2009), available at https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGCAntiCorruptionReporting.pdf.} The U.N. publishes reports showing best practice in reporting on these anti-corruption measures.\footnote{U.N. Global Compact, Global Compact for the 10th Principle: Corporate Sustainability with Integrity (2012), available at https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/GC_for_the_10th_Principle.pdf.} The report does not highlight the experience of any Hong Kong companies. Instead, the report focuses on specific practices from companies like the U.K. Royal Institutions of Chartered Surveyors, the anti-virus software company Symantec, Kenya Power, and Alcatel-Lucent.\footnote{Id.} The U.N. provides no model reports by companies covering all the points listed in Figure 21b. The lack of reports suggests these reporting requirements pose too great a regulatory burden.

Nevertheless, many of the items listed in Figure 21b comprise reporting obligations for companies wishing to list on the New York Stock Exchange (“NYSE”) or foreign markets.\footnote{NYSE, LISTED COMPANY MANUAL § 303A.10 (2013).} Specifically, a company’s listing must have a publicly stated commitment to work against corruption and other forms of crime and fraud in its annual report.\footnote{Id.} As part of their normal management and audit functions, listed companies must also carry out risk assessment of potential areas of corruption and enact policies for dissuading corruption and other forms of crime.\footnote{Id.}
Companies must monitor anti-corruption work under Exchange rules.\textsuperscript{373}

We recommend that the Hong Kong Exchange consider the same listing requirements as those found on the NYSE and other exchanges as a way to help promote the adoption of the U.N. Global Compact reporting standards.\textsuperscript{374} We recommend this approach for three reasons. First, as we already described, a statutory or regulatory approach to forced anti-corruption reporting may impose an undesirable regulatory burden on some of Hong Kong’s companies. Second, the voluntary reporting norms promulgated by the United Nations have gotten little traction in the business community at large. Third, listing requirements “replicate” the voluntary norms contained in the Global Compact. Each of the Global Compact’s twenty-two points corresponds to one or more NYSE listing requirements to some degree.\textsuperscript{375} Thus, instead of imposing another set of reporting requirements, listing requirements would effectively make the U.N.’s voluntary norms compulsory.

\textbf{Figure 21b: The U.N. Global Compact and Public Disclosure as a Measure to Reduce Corruption}

\textit{10\textsuperscript{th} Principle Guidance (* means desired)}

\textbf{COMMITMENT & POLICY}

1 Publicly stated commitment to work against corruption in all its forms, including bribery and extortion
2 Commitment to be in compliance with all relevant laws, including anti-corruption laws
3* Publicly stated formal policy of zero-tolerance of corruption
4* Statement of support for international and regional legal frameworks, such as the UN Convention against Corruption
5* Carrying out risk assessment of potential areas of corruption
6* Detailed policies for high-risk areas of corruption
7* Policy on anti-corruption regarding business partners

\textbf{IMPLEMENTATION}

\textsuperscript{373} \textit{Id.} at § 3.
\textsuperscript{374} See \textit{id.}
\textsuperscript{375} \textit{Id.}
Translation of the anti-corruption commitment into actions
2 Support by the organization's leadership for anti-corruption
3 Communication and training on the anti-corruption commitment for all employees
4 Internal checks and balances to ensure consistency with the anti-corruption commitment
5* Actions taken to encourage business partners to implement anti-corruption commitments
6* Management responsibility and accountability for implementation of the anticorruption commitment or policy
7* Human Resources procedures supporting the anti-corruption commitment or policy
8* Communications (whistleblowing) channels and follow-up mechanisms for reporting concerns or seeking advice
9* Internal accounting and auditing procedures related to anticorruption
10* Participation in voluntary anti-corruption initiatives

MONITORING

1 Monitoring and improvement processes
2* Leadership review of monitoring and improvement results
3* Dealing with incidents
4* Public legal cases regarding corruption
5* Use of independent external assurance of anti-corruption programs

Instead of changing listing requirements outright, the government should convoke an ad hoc, tripartite commission to consider the issue. The managers of the Hong Kong Stock Exchange would not seriously consider these listing requirements if the matter were left to them. They represent the short-term interests of their members, rather than the broader social good. On the other hand, a government-only study would not adequately incorporate the preferences of NGOs and other potential users of company anti-corruption reports. We thus follow international best practice and recommend consideration by a commission that would include representatives from business, government and civil society.376 The commission should only come together to consider

376 See generally ORG. ECON. COOP. DEV., CIVIL SOCIETY EMPOWERMENT (draft, 2013) (discussing policies that promote cooperation among NGOs, corporations, and governments), available at http://www.oecd.org/cleangovbiz/CivilSocietyEmpowermentDraft.pdf; Jeff Huther & Anwar Shah, ANTI-CORRUPTION POLICIES AND PROGRAMS: A
the issue of listing-related anti-corruption reporting. In that way, we would not create another costly permanent bureaucratic structure.

XII. Anti-Corruption Education and Training

Recent innovations in U.S. and U.K. law practically make anti-corruption training for corporate directors and managers a statutory requirement. Under U.S. federal prosecutors’ guidelines for prosecuting and charging corporations, prosecutors may consider a company’s compliance and training programs in deciding whether to bring charges or otherwise resolve an alleged violation. For Huskins, such training should address five points in order to minimize the probability of corruption and maximize its qualifications for prosecutorial lenience. These five points provide lessons for other companies—like companies from Hong Kong—looking to deal with anti-corruption provisions coming into force worldwide. As these five points have been relatively “tried-and-true,” with many exceptions which we will describe below, Hong Kong companies looking to comply with possible future POBO “duty to prevent corruption” provisions may look to these points.

The first three aspects of a company’s anti-corruption training should deal with making the training specific to the company. First, to what extent does the training set the right tone by senior managements about the firm’s culture of compliance? Such training helps assure staff that they do not have the tacit consent of management for engaging in bribery and/or other corrupt behaviors. Second, is the written policy (and training about that policy) practical and specific? Such training should provide specific guidance about the situations or moral dilemmas

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379 See id.
380 See id.
381 See id. at 1453.
382 Id. at 1453-54.
employees will most likely confront. In that way, the company’s directors can credibly claim at trial that they prohibited bribery in the situation for which prosecutors target their company. Third, has the company focused its training on the specific risks faced by its staff in the relevant jurisdictions? According to Huskins, Transparency International provides relatively reliable data about the extent of corruption risks faced by companies operating in various jurisdictions. Companies can use data like this—and specifically the experiences of its field staff—to tailor training to that company’s specific needs.

The next two features of anti-corruption training deal with the breadth of that training. First, is training mandatory and periodically updated? Mandatory training means that employees cannot use ignorance of the law as a defense. Second, can employees easily obtain guidance on following the company’s FCPA compliance program? If employees have numerous resources, they cannot claim that they had no recourse to advice. Combined, these 5 points attempt to minimize the potential vicarious liability of the corporate principal(s) for the acts of its agents. Because the common law system provides ample room for agents to attempt to impute liability for their actions on their principals, training provides an important shield in the corporate armor aimed at minimizing corporate liability for corruption.

Companies often use training as a core component of their compliance programs, particularly after DOJ enforcement actions. Koehler (2012) reports that Siemens trained 300,000 employees worldwide on FCPA compliance procedures after its settlement with the DOJ. Converse Technology serves as a common example of the way that training figures into a DOJ settlement.

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383 Id. at 1454.
384 See Huskins, supra note 378, at 1455.
385 Id., at 1454.
386 Id.
387 Id. at 1455-56.
388 Id.
In its non-prosecution agreement with the DoJ, the company promised, among other things, to train individuals associated with the company (including third-parties) on its anti-corruption policies. Such a requirement had the effect of forcing Comverse Technology to train foreign parties about U.S. laws because, as the settlement insinuates, Comverse employees and managers probably had no knowledge of payments made by their Israeli agent to government officials. The cases against Watts Water Technologies and Lucent Technologies specifically cite the failure to train partners as a reason for DOJ enforcement action. In the Tyson and Maxwell deferred prosecution agreements, the DOJ required annual certifications attesting to the training on the FCPA of all key company staff and business partners.

The UKBA promises to increase the importance of training as part of a company’s anti-corruption compliance and defense strategy. The Act specifically requires companies to have “adequate procedures” (as we have discussed several times), which explicitly includes training. While most U.K. firms have these adequate procedures, fewer have training on these procedures. According to a recent survey, 91% of U.K. firms have adequate procedures, but only 53% have adequate training about those adequate procedures. Training represents a core compliance strategy, yet one many companies even in the U.K.

\[\text{npa.pdf.}\]

391 *Id.* at 1–4.

392 *Id.*


395 *See Bribery Act, supra* note 49, at § 9.

396 *Id.*


398 *Id.*
have not implemented. Hong Kong’s legislators will need to think about more than a statutory admonition to have anti-corruption training in order for more Hong Kong companies to engage in such training.

Hong Kong companies have more than enough training materials at their disposal, even if 67% of Hong Kong’s companies they do not use them. Figure 22 shows some of the many manuals the anti-corruption agency offers to private businesses looking to train their staff on preventing corruption. The ICAC offers more educational and training materials than most other anti-corruption agencies covering jurisdictions of its size (or much larger). The mismatch between the supply and demand (namely use) of these programs suggests improper social marketing. Hong Kong’s companies do not need more manuals and guidance—they need incentives in order to use them.

Figure 22: The ICAC Has Covered Hong Kong With How-To Anti-Corruption Manuals

<table>
<thead>
<tr>
<th>Industry</th>
<th>Titles Available</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>Integrity - The Key to Business Success</td>
</tr>
<tr>
<td>Insurance Sector</td>
<td>&quot;The Noble Means&quot; Practical Guide on Professional Ethics for Life Insurance Intermediaries</td>
</tr>
<tr>
<td>Estate Agency Trade</td>
<td>'Integrity in Estate Agency Transactions' A Joint EAA and ICAC Publication for Estate Agency Practitioners</td>
</tr>
<tr>
<td>Travel and Tourism Industry</td>
<td>'Integrity - Our Winning Edge' A Practical Guide for the Travel and Tourism Industry</td>
</tr>
<tr>
<td>Handling of Credit Card Data</td>
<td>Guideline on Secure Handling of Customers' Credit Card Data</td>
</tr>
<tr>
<td>Telecoms Industry</td>
<td>Code of Practice on Protection of Customer Information for Fixed and Mobile Service Operators</td>
</tr>
</tbody>
</table>

399 See id.


| SMEs | Integrity & Compliance with the Law: A Guide to the Prevention of Corruption for SME Entrepreneurs Investing in Guangdong & Hong Kong, Corruption Prevention Kit on Cross-Boundary Business |
| Constructi on Industry | Managing Integrity and Striving for Excellence - Corruption Prevention Package for Construction Industry |
| Professionals | Ethics in Practice - E-Learning Packages for Construction-related Professionals |


Yet, the data do not suggest that the POBO should provide the same very aggressive standards to companies as the FCPA and the UKBA. Empirically, little evidence suggests that anti-corruption training reduces the propensity for taking bribes. Dormaels and Vande Walle (2012) find, using a statistical sample of anti-corruption training evaluations, that only about 10% of participants found such trainings “useful on a daily basis.”

The majority of participants (over 50%) found training on corruption legislation, methods of “disarming” corruption, and role-playing particularly unhelpful. The most “useful” type of training consisted of training on gifts procedures, and only 66% found this “occasionally useful” or useful more often. In a more rigorous study, Professors Healy and Serafeim (2012) find that companies that have extensive training and disclosure programs tend to have statistically significantly less future public corruption

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402 See Arne Dormaels & Gudrun Vande Walle, Preventing Corruption: Lessons Learned from Anti-Corruption Training for Belgian Customs and Excise Officers, 5 WORLDCUS. J. 2 (2011).
403 See id. at 37.
404 Id.
scandals. In another recent study, Professors Ioannou and Serafeim find that training and codes of conduct reduce bribery by firms, but only when coupled with strong law enforcement and other factors. These results imply that training, when coupled with stronger corporate measures and preferably a previous scandal, tends to reduce corruption.

Given the relatively low effectiveness of the ICAC’s marketing of its training materials (and the uncertain effects of such training on corruption), we recommend against adding FCPA and UKBA style provisions which make anti-corruption training almost a mandatory “tick” in the box of measures companies must take. Instead, we recommend that the ICAC provide this training through local NGOs. We recommend that the ICAC set up a grants scheme for NGOs offering the most useful and/or innovative training.

The Government should use an NGO grant scheme, rather than spending even more resources on over-supplied training, for four reasons. First, international donors like USAID and the World Bank have found these the best practice schemes to fund training (instead of providing direct funding to the government agency responsible for preventing corruption) very effective. Second, as we will describe below, the ICAC Ethics Development Centre has had teething problems. These problems suggest the Centre is only at the beginning stages of learning how to teach ethics, rather than having an undisputed competency in this area. Third, outside of the ICAC, far fewer resources exist to prevent corruption than in other countries. The U.S. and E.U. have vibrant markets for ethics training by NGOs and law professionals. In Hong Kong, the ICAC dominates ethics training (as we have already described). While such an approach may have served Hong Kong well in the later part of the 20th century, international best practice has moved on. Fourth, as we describe below, the

407 See Huther & Shah, supra note 376.
408 See infra Section XIII.
410 See Figure 22.
Ethics Development Centre should be independent from the ICAC. The management should not be ICAC staff, nor depend on ICAC funding. With its newfound independence, the grants scheme will be one source for finance for this new non-profit organization.

XIII. Reforming the ICAC’s Ability to Promote Corporate Ethics

The ICAC continues to serve as one of the most successful models for an anti-corruption agency. Anti-corruption practitioners worldwide cite the ICAC’s community engagement programs as models in the field. The Commission has clearly succeeded in ensuring low levels of corruption in Hong Kong. However, the data suggest that the ICAC plays a far less effective role in providing adequate training and ethics-related guidance to Hong Kong business than its foreign peers in their jurisdictions.

The new Hong Kong Ethics Development Centre provides an important forum for helping companies to develop ethics programs. However, the Centre lags behind its comparators in terms of engaging with the public, affecting the probable success of any revisions to the POBO aimed at encouraging businesses to adopt measures aimed at fighting corruption. Figure 23 shows announcements made by the EDC from 2010 to September 2012. Announcements came, on average, about every two months. Yet, roughly half of these announcements consisted of non-training or core related activities. For example, the most recent announcement (that business executives should attend the Annual Corporate and Regulatory Update organized by corporate secretaries) does not provide information useful for improving an organization’s

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411 See infra Section XIII.


413 See id.

414 See text accompanying note 200.


416 See Figure 23.
ethics. Other activities, particularly in 2010, publicize the Centre without specific mention of its achievements in improving ethics in Hong Kong's companies.

Figure 23: The Ethics Development Centre Has Had a Difficult Start

(news items in grey not actual events)

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Critique</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/04/19</td>
<td>The Centre encourages business executives and professionals to attend ACRU 2012</td>
<td>Advertisement</td>
</tr>
<tr>
<td>2011/10/27</td>
<td>Seminar on UK Bribery Act and Doing Business with the United Kingdom</td>
<td>Small 1.5 hour “briefing” without engagement</td>
</tr>
<tr>
<td>2011/08/29</td>
<td>&quot;Integrity and Professionalism - Key to Business Success&quot; Conference for SMEs in Guangdong, Hong Kong and Macao</td>
<td>Not directly relevant to ethics</td>
</tr>
<tr>
<td>2011/07/11</td>
<td>The Centre encourages companies and directors to participate in the “Directors of The Year Awards 2011”</td>
<td>Not directly relevant</td>
</tr>
<tr>
<td>2011/05/03</td>
<td>The Centre encourages business executives and professionals to attend ACRU 2011</td>
<td>only as advertisement for another professional association event</td>
</tr>
<tr>
<td>2011/01/24</td>
<td>The Centre Offered Summer Internships to University Students</td>
<td>Not news</td>
</tr>
<tr>
<td>2010/12/10</td>
<td>Lunch to bid farewell to retiring EDAC members and welcome new members</td>
<td>Not “news one can use”</td>
</tr>
<tr>
<td>2010/09/21</td>
<td>The 10th Issue of &quot;ICAC Post&quot; Released</td>
<td>Self-promotion piece rather than useful news</td>
</tr>
<tr>
<td>2010/08/12</td>
<td>The Centre's 15th Anniversary</td>
<td>Self-promotion rather than actual</td>
</tr>
</tbody>
</table>

417 See Agenda 15 Annual Corporate and Regulatory Update (ACRU) 2014 http://app.norrayhk.com/acru2014/M02_agenda.asp (indicating no agenda topics related to ethics)
Other ethics organizations worldwide offer a useful contrast to the Centre for Ethics Development. The U.S.-based Ethics Resource Center serves as one of many examples. Figure 24 shows the recent news items of the Ethics Resource Center, and provides analysis of the way the Center adopts a “social marketing” approach. On their website, they announce regular events that engage with businesses and provide support to ethics trainers alike. For example, the first event—announcing the results of a survey about whistleblower retaliation—takes a strong social marketing approach. Readers of the news can use these data directly, both to frame their own compliance programs and as evidence related to the general policy environment. The news attracts the attention of the reader as an issue directly relevant in their everyday work experience. Unlike the guidance given by


419 Id.

420 Id.

421 See id.

422 See id.
the ICAC, the ERC guidance provides specific examples and support with actual cases rather than hypothetical cases.\footnote{Id.}

\textit{Figure 24: Ethics Resource Center Shows How Poorly CED is Managed}

(bold indicates news item, normal text represents our comments)

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 September 2012</td>
<td>Retaliation Against Whistleblowers Rising Faster than September Reporting, Ethics Resource Center Reports Study Shows Companies With Strong Programs Reduce Retaliation ERC provides “news you can use,” namely objective data on whistleblowing and policy recommendations for companies and government.</td>
</tr>
<tr>
<td>24 July 2012</td>
<td>Ethics Resource Center Releases Findings on Workplace Misconduct at Fortune 500 Companies Findings represent a way to keep the topic interesting and the business sector involved.</td>
</tr>
</tbody>
</table>
| 31 May 2012 | Just What is a Whistleblower? Ethics Resource Center Report Challenges Traditional View, Says Whistleblower is not a Rogue Employee Most Whistleblowers Report Concerns to Employers before Going Outside of the Company with Concerns
The news fits into a “stream” of news and events about whistleblowing. This gives the Center’s work coherence and longevity. |
| 1 May 2012 | Blue-Ribbon Report Says Corporate Ethics Would Improve with Changes to Sentencing Guidelines Implementation To Mark Milestone for Groundbreaking Law, ERC Advisory Group Calls for Greater Consistency by Enforcement Agencies Shows an independence from government—something the EDC needs before being a credible interlocutor for business. |
| 13 March 2012 | Former TI-USA Leader Boswell Joins ERC Board of Directors Old style press release (not every Center is perfect). |
| 12 January 2012 | Patricia Ellis of Raytheon is First Recipient of ERC’s Carol R. Marshall Award Ellis Leads Raytheon’s Ethics and Compliance Efforts, Developed Innovative Ethics Education |
The announcement is about Patricia Ellis, but the story provides lots of news the reader can use about Raytheon's compliance program.

9 January 2012

Leading Ethics Research Organization Wants Social Networkers to Provide Insight & Questions

Brings up cutting edge issue of social media and the ethical issues involved in using social media. The topic is hot and relevant to the business community.

5 January 2012


Links the survey with a webinar to cover the law related to issues covered in the survey. Their work is critical of current approaches (by both business and government), and thus relevant and useful to both sectors.


We think the large difference in performance between the EDC and other ethics advisory bodies (like the Ethics Resource Center) stem from its affiliation with the ICAC. The Centre is a non-profit organization “established under the auspices of the Community Relations Department of the ICAC.”424 The Centre has a staff of two persons: Monica Yu (Executive Director) and Lawrence Chung (Deputy Executive Director).425 We found no evidence that these individuals have engaged in the grueling in-firm training that their colleagues in other ethics training organizations abroad do.426 The EDC has a similar mandate to the ERC, to “offer client-focused services to cater for specific needs.”427 However, the website does not make clear what those needs are, or how the EDC caters to them.428 EDC clearly adopts the ICAC’s risk-averse approach to dealing with the public.429 While such risk-aversion may have protected the Commission and its staff in the past, keeping the Center as part of the ICAC would do more harm than good.

425 Id.
426 See id.
428 See id.
429 See id.
The EDC’s Board of Advisors should also be reorganized to provide actual competencies in ethics rather than support for the ICAC’s work from the business sector. At present, the EDC Board represents several of the major business associations, including the Hong Kong Chinese Enterprises Association, the American Chamber of Commerce in Hong Kong, the Chinese General Chamber of Commerce, and others. The profile suggests a prestige board rather than a working board. In contrast, one of the major proponents of U.S. whistleblowing legislation, former Rep. Michael Oxley, heads the ERC. Seven ERC Board Members come from law firms, while four come from large business and three from ethics related trade or academic associations. Most of the U.S.’s ERC board members earn at least part of their salary from daily ethics related consulting and advice giving. Such experience provides the ERC with a knowledge of ethics that the generalist business ties of the Hong Kong’s EDC cannot match.

Once the ICAC has a clear mandate to engage in the same hard-hitting ethics development work (through its independence and new managerial outlook), the Centre should actively work with local businesses associations and businesses to adopt anti-corruption compliance programs. The Centre may benefit from financing from the grants scheme we proposed previously. However, the break from the ICAC’s risk-averse institutional culture—combined with the need to raise its own funds through market offerings—should increase the number and scope of its training programs.

If the ICAC wishes to continue providing support to the EDC, two avenues may crowd in (rather than crowd out) other work. First, we have mentioned that the ICAC can provide funds through grant programs open to all organizations (for which the EDC would need to compete). Second, the ICAC may work with the

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431 See id.
433 Id.
434 See id.
435 See id.
EDC to engage in any post-enforcement monitoring or advice. In the United States, companies often retain legal counsel to provide advice on business measures that might qualify for prosecutorial lenience under a monitorship or other arrangement.\textsuperscript{436} To avoid the criticisms of the U.S. approach—and to encourage the development of a market for anti-corruption advice—the ICAC should provide advice to NGOs, private companies and the new (and completely independent) EDC. In this way, the ICAC could reach far more companies through these intermediaries than trying to educate Hong’s Kong’s business single-handedly.

Reorganizing the Ethics Development Centre (currently under ICAC “auspices”) will directly affect the likely success of the revisions we propose to the POBO, which encourage businesses to adopt anti-corruption measures. First, if the POBO does offer defenses against corporate liability for corruption, then advisors should be ready to provide advice on such adequate procedures, to use the UKBA’s language. Companies attempting to comply with similar defenses available under U.S. law struggled because of the lack of such advice.\textsuperscript{437} By allowing the EDC to respond to corporate needs, reform of the EDC would directly affect the success of revisions to the POBO. Second, if the POBO will apply to transactions outside of Hong Kong, the ICAC must encourage greater self-enforcement by Hong Kong’s businesses themselves. We have presented data showing that Hong Kong’s companies’ policies are not adequate to engage in such self-policing. Having a strong and independent EDC would provide these companies with a valuable resource.

XIV. Conclusions

In this paper, we have looked at many of the standard business measures adopted by companies for preventing and addressing corruption. We have seen how legislation, particularly in the United States, has provided companies with incentives to undertake many of these measures. We have reviewed the common measures adopted by businesses worldwide to tackle corruption—including internal policies and procedures, codes of conduct, accounting and auditing standards, education and other measures. We also showed that Hong Kong’s legislative

\textsuperscript{436} See supra Section IX.
\textsuperscript{437} See id.
framework fails to provide many of the incentives provided by other systems for companies to tackle corruption. We have argued for several changes to the POBO and other regulations aimed at promoting integrity in Hong Kong’s commercial activity (particularly abroad).