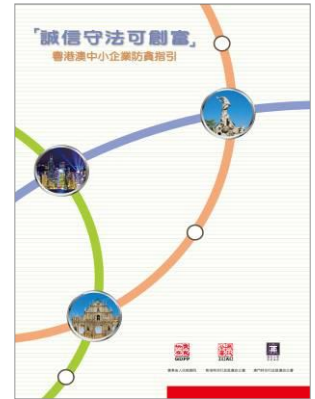


Is it all right for a shareholder to accept rebates?

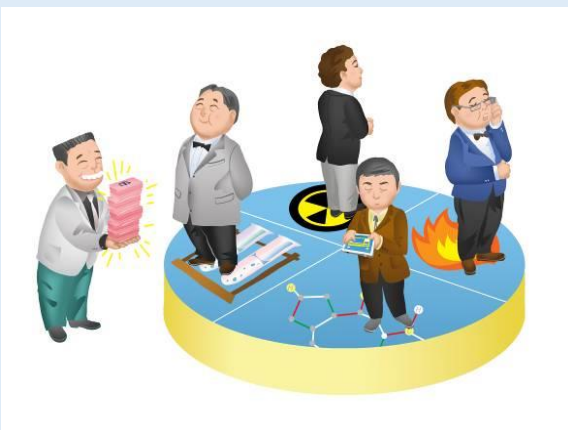
Given the ever increasing economic interaction and integration among Guangdong, Hong Kong and Macao, both opportunities and challenges (including corruption risks) may arise.

The Independent Commission Against Corruption of Hong Kong, the Guangdong Provincial People's Procuratorate and the Commission Against Corruption of Macao have collaborated to produce the "Business Success: Integrity & Legal Compliance Corruption Prevention Guide for SMEs in Guangdong, Hong Kong and Macao" ("The Guide"). This article draws on a case study in the Guide to introduce to cross-boundary business operators the common corruption risks as well as the corresponding safeguards in order to enhance their corruption prevention capabilities.



Case

In his early years, Charlie started a joint venture with three of his friends. They set up a chemical engineering company in Hong Kong and a chemical manufacturing factory in Guangdong. They were directors of the company, each holding 25 per cent of its shares.



Having an extensive business network in Mainland China, Charlie offered to manage the mainland factory as a general manager on top of his role as a director. He often boasted to his business partners that the success of the mainland factory was largely attributable to his networking clout. As the person in charge of the mainland factory, Charlie placed purchase orders of raw materials at his discretion.

When one of the Hong Kong suppliers learned that Charlie had recently bought a property on the Mainland, he presented Charlie with expensive audiovisual equipment, hoping it would help him in securing contracts in return. Finally, he managed to strike the first deal with Charlie. In order to secure future business, the supplier offered a 5 per cent rebate of the contract amount upon Charlie's request and the money was deposited into Charlie's bank account in Hong Kong.

The case was eventually brought to the attention of the Independent Commission Against Corruption (ICAC). Charlie defended that being the shareholder and person-in-charge of the mainland factory, he had the right to receive rebates from suppliers. He also claimed that he had verbally notified two of the shareholders that the rebates were to help cover his entertainment expenses on the mainland. It was later revealed that Charlie had only brought up the issue of the huge entertainment expenses during a casual chat with the two shareholders. However, the third shareholder had all along been kept in the dark.

Is it all right for a director to accept rebates?

Under the Prevention of Bribery Ordinance (PBO), the principal of a company is the entire board of directors, while individual directors are considered as agents. Hence, Charlie should first seek approval from the board of directors (the principal) before soliciting or accepting any advantages in relation to his official duties. As his company had not stated clearly whether or not its agents could accept advantages in relation to their duties, it meant that Charlie had not obtained the principal's permission by the time the acceptance took place. He had also not sought retrospective approval from his principal.

In addition, his acceptance of the rebates was not known to and approved by all directors. One of them who opposed to Charlie's acceptance did not even know about it until ICAC investigation. Charlie claimed that he had informed other directors of the matter, but it was only during a casual conversation did he tell the two shareholders about it. The arrangement had neither been discussed at any board meetings nor formally approved, not to mention the keeping of any information or records of the accepted rebates. His defence plea was rejected by the court and he was finally convicted of accepting bribes

Best practice for company management: formulation of clear policies

Companies should take the initiative to formulate guidelines governing the acceptance of advantages by their board members and staff. They should also state clearly in writing the company's stance and policy in relation to the types of permissible advantages, their maximum values and the criteria for such acceptance. The procedures for declaring acceptance of advantages and the channels for making enquiries should also be laid down and made known to all staff.

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