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Anti-bribery Enforcement with Chinese Characteristics: Not All Official



In 2012, expect to see the global trend of increasing anti-corruption enforcement persist as regulators around the world continue to show zeal in enforcing anti-corruption laws. This is not to say, however, that anti-corruption enforcement will pose the same types of risk in different jurisdictions across the globe. In fact, understanding the differences in the kinds of bribery and corruption subject to stricter enforcement vigilance will be critical to formulating effective compliance strategies to mitigate risks on the ground in key markets.

Considerable Western media attention has focused on the 2011 amendment to China's Criminal Law, which outlaws bribery of foreign (*i.e.*, non-PRC) officials in connection with commercial transactions. The amendment of this offense, known as the ["Crime of Offering Bribes to Officials of Foreign Countries and International Public Organizations"] (often referred to as "China's FCPA"), brings China towards compliance with the OECD Anti-bribery Convention. The seriousness with which the Chinese Communist Party (CCP), the ruling party of China, considers this matter is highlighted by significant coverage by Xinhua News, China's official news agency, of recent remarks by He Guoqiang, a member of the Standing Committee of the CCP's Political Bureau

and the head of the CCP's Central Commission for Discipline Inspection. Mr. He noted that China's long-term development depends on systemic, grass-roots anti-corruption reform and improvements to the current corruption prevention and enforcement regime. Mr. He's comments are not remarkable in themselves, but it is worth noting that Mr. He speaks as a senior party member, not as a government official. Thus, his voice in articulating the importance of improving anti-corruption enforcement underscores the extent to which the CCP views this issue as fundamental.

Given the CCP's interest in protecting its status and reputation as the ruling party, investigation and prosecution of official bribery cases tend to focus on the recipients—that is to say the government

officials and CCP members—rather than on the donors of the bribes. The recent suspended death sentences meted out by Chinese courts against two former China Mobile executives, who were senior party members, for accepting bribes (with relatively little attention given to the investigation of the person(s) giving the bribes) suggest that the CCP has not swayed in its enforcement focus on officials. However, while the amendment of China's Criminal Law and continued efforts against official bribery are notable developments, they are by no means the sole focus of China's anti-corruption enforcement efforts.

Arguably, in terms of PRC anti-corruption enforcement risk, the primary hazard for foreign-invested enterprises operating in China comes instead from commercial bribery. Unlike the U.S. FCPA, but more similar to the UK Bribery Act, China's anti-bribery laws extend beyond offenses involving official bribery and cover commercial bribery as well. Under PRC law, commercial bribery involves the provision of improper benefits in a purely commercial setting, thereby extending

legal risks beyond improper payments to government and party officials. Violations can result in administrative sanctions and also criminal prosecution. But, unlike official bribery enforcement, which tends to focus on the recipient official, commercial bribery enforcement generally targets both the donor and the recipient (both of which can be foreign-invested enterprises or their employees). Hence, foreign-invested enterprises may be exposed to the risk of both making and receiving improper payments in a commercial bribery context.

Compounding this enforcement risk is the fact that the continued prevalence of state-ownership in the PRC economy can cause a commercial bribery case to escalate beyond legal consequences arising solely under PRC law. Today's interconnected and global enforcement landscape poses a new and multifaceted kind of risk—that a *commercial* bribery investigation in one location could implicate *official* bribery enforcement risks in another. This is particularly true because many goods and service providers that are typically private enterprises in Western economies are, in China, state-owned enterprises. Thus, for example, a PRC commercial bribery investigation of potentially improper payments by personnel of the China branch of a U.S.-headquartered airline services provider to a Chinese airline (which are predominantly state-owned in China) could draw the attention of U.S. law enforcement officials and spark an FCPA investigation of the same set of circumstances.

Despite various well-publicized prosecutions of officials, some of China's most active anti-corruption enforcement efforts have actually focused on commercial bribery, and this seems likely to continue in 2012. Nearly 31,000 commercial bribery cases were investigated by the Administration of Industry and Commerce (the administrative commercial bribery enforcement agency) during the previous five years, with approximately another 6,500 cases investigated over the same period by the Ministry of Public Security (the national law enforcement agency in China). These cases frequently implicate foreign-invested companies: the Anbound Group, a Beijing-based consultancy firm, estimated that over 60 percent of the total corruption investigations in the 10 years prior to 2009 involved foreign companies.

Sales and distribution are areas where the problems of commercial bribery are particularly prevalent, and cases reported in the Chinese media often involve distributors or suppliers paying kickbacks to sellers or purchasers to favorably influence distribution of their products or the use of their products and services in projects. For example, in 2009, two employees of Shenmei Beverage and Food Co., Ltd., a partially-owned subsidiary of Coca-Cola, were arrested by police for allegedly receiving over \$1.5 million in kickbacks from suppliers. In that same year, an employee of Ying Zhi Jian, a Chinese company, was convicted of giving benefits to Amway (China) Co., Ltd., a subsidiary of Amway, to secure its position as a supplier. The employee was sentenced to three years imprisonment and criminally fined. The case did not reveal that Amway (China) was investigated for receiving benefits.

From a policy perspective, commercial bribery is considered to have a negative impact on social welfare by driving up the cost of goods to consumers and end users, as well as potentially compromising product safety. Thus, the CCP and government are attuned to the potential threat that these negative effects pose to social stability—a concern at the forefront of the CCP's policy considerations. Next year, a transition in the CCP's leadership will occur, which is likely only to heighten concerns about demonstrating the CCP's continued ability to shepherd Chinese society through a period of growth and development. A strong stand in terms of stepping up law enforcement aimed at punishing commercial bribery can be anticipated.

Thus, if your company is operating in China, the chief enforcement risk you face *vis-à-vis* PRC regulators in 2012 will be that of commercial bribery, with the unwelcome possibility of FCPA enforcement as an exacerbating consequence.

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