

Antibribery/Foreign Corrupt Practices Act (FCPA) Alert

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Recent Developments in Chinese Antibribery Laws and Enforcement

The Chinese government investigation of GlaxoSmithKline (GSK) for alleged bribery has been front page news in China for several weeks. The press has also featured numerous other stories about a broader investigation into corruption and other possible criminal violations of foreign pharmaceutical and food supplement firms in China. It remains to be seen whether the rumored investigations mark the beginning of a new trend towards more rigorous and sustained enforcement activities against foreign firms doing business in China, or if the investigations are just the latest in a series of on-again, off-again government anticorruption crackdowns. A cynic might regard the GSK investigation as timed to draw attention away from the recently announced Bo Xilai indictment. The recent, very public crackdowns against alleged bribery activities by foreign firms, however, should be seen in a broader historical context and as a manifestation of developments in the legal arena that have been taking place over some time.

Overview of Chinese Antibribery Laws

Traditionally, the Chinese government has focused more on penalizing bribe recipients, usually government officials, than bribe givers, and historically China has rarely taken action against foreign companies paying bribes in China. Ironically, there has probably been more enforcement activity by the United States government under the Foreign Corrupt Practices Act (FCPA) of bribery activities by U.S. firms in China than by the Chinese government itself. This imbalance has begun to change in recent years as the Chinese government has started to crack down on the bribery activities both of its own citizens and of executives at foreign firms.

The Chinese laws against bribery can be found in the *PRC Criminal Law*, first promulgated in 1997. Importantly, in contrast to bribery laws in many other jurisdictions, the Chinese law applies only to the actual giving of a bribe, not to the offering of one; there is no law against *attempted* bribery in China. In contrast to the FCPA, the rules in China apply to bribing private individuals and entities, not just government officials.

Recent Developments

Several recent developments, all of which became effective in January 2013, set out and define more clearly the various levels of bribery, based, among other things, on the amount of money involved and the identity of the recipient, and set out various fines and prison terms appropriate to each level of activity, termed either “serious” or “extremely serious.” *The Interpretations on Several Issues Concerning the Application of the Law in the Handling of Criminal Bribe-Giving Cases*, adopted jointly by the Supreme People’s Court and the Supreme People’s Procuratorate in December 2012, provide that the crime of bribery is “extremely serious” if the amount proffered is more than RMB 1 million (approximately USD 160,000), or if the amount proffered is more than RMB 500,000 (approximately USD 81,500) and (i) more than three people are bribed, (ii) the bribe is given to a government official who has a duty of supervision

in the areas of food, drugs, work safety or environmental protection, (iii) the bribe is given to an officer of any law enforcement authority or judicial body for the purpose of perverting the course of justice or (iv) the bribes are sourced from the offender's illegal gains. In addition, a bribery action will be considered "extremely serious" if the economic loss caused by the bribe is more than RMB 5 million.

Individuals found to have engaged in "extremely serious" bribery face lifetime imprisonment. Furthermore, although the prosecution of companies, as opposed to individuals, for bribery has been far less frequent for various evidentiary and technical reasons, the government has now fully implemented a database that documents all cases of convictions for bribery and lists all parties involved, whether or not those parties have been criminally pursued. The database is generally open to the public and can have particular relevance in cases where a company is tendering a proposal for a government or government-financed project, since inclusion in the database can be grounds for exclusion from the tender. Finally, the new *Interpretations* also provide that the benefits gained by the bribe giver in exchange for the bribe, such as a governmental approval or license or other business reward, shall be revoked or suspended.

Challenges for Corporate Compliance Programs

The lessons to be learned from these legislative, judicial and enforcement developments for foreign companies doing business in China are fairly obvious. Thorough and rigorous compliance programs covering any company employee who may be in a position to engage in bribery should be virtually mandatory, particularly for those companies engaged in the food, drugs, manufacturing and environmental protection industries, or in any activity where public health and safety are at risk. These compliance programs should clearly spell out what activities constitute illegal bribes under the new laws and set forth clear rules for what is permitted and what is prohibited.

The practical challenges of effectively implementing such programs, however, should not be underestimated. While egregious acts of bribery will be easily recognized, what constitutes an illegal bribe, as opposed to lawful gift giving, is not always straightforward, especially in a society where long-term relationship building is as important to business dealings as it is in China. Various Chinese court rulings provide some guidance on the issue; per these rulings, the following factors are key: (i) the nature and history of the relationship between the parties; (ii) the value of the gift; (iii) the purpose and timing of the gift relative to what is obtained; and (iv) to what extent the recipient has used his or her position to promote the interests of the gift giver. Not surprisingly, given the general nature of these guidelines, prosecutors and judges have considerable discretion in determining whether a particular act amounts to an illegal bribe.

Given these rather general standards and broad prosecutorial discretion, fashioning a set of compliance rules that is not only effective in avoiding the legal pitfalls, but is also practical and realistic as a business matter, is far from straightforward. In addition, more often than not, companies get into trouble not because they do not have rules and guidelines, but because they have inadequate systems in place for supervising adherence to those rules. Here too, implementing an effective system is easier said than done.

Looking Forward: Coordinating Compliance and Enforcement

For many years, U.S. companies doing business in China have had to concern themselves only with the strictures of the FCPA. The recent developments in antibribery enforcement in China will add to those burdens. While the FCPA and Chinese antibribery laws are similar in many respects, they are not identical. For example, as noted above, the FCPA applies only to bribery involving government officials; the Chinese law is not so limited. Furthermore, the FCPA contains an exception for “facilitation payments,” while the Chinese law contains no such express exception. Effective compliance programs for U.S. firms operating in China will therefore need to take account of, and address, both sets of laws.

These developments in China raise another intriguing question: Will the enforcement authorities in the United States and China at some point develop a coordinated enforcement program and share information about their respective investigations? The recent agreement between the U.S. Securities and Exchange Commission and the Chinese Securities Regulatory Commission regarding access to audit the work papers of Chinese companies listed in the United States could be a harbinger of things to come.

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