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## *Hot Issues Alerts – Law Firms*

### **Chinese Anti-Bribery Law: An Overview Of The Chinese Laws And Their Importance To Foreign Companies Doing Business In China – Part I**

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Nearly all U.S. companies that engage in international business and have operations in China or elsewhere recognize the importance of strict compliance with the U.S. Foreign Corrupt Practices Act (“FCPA”). U.S. companies doing business in China, however, must also ensure that they comply with the various Chinese anti-bribery and anti-corruption laws that also apply to their operations in China. These laws apply to commercial activities within China, including those conducted by foreign companies. Chinese laws on anti-bribery and anti-corruption do not overlap in all respects with the FCPA. Thus, it is critical that U.S. companies doing business in China ensure compliance with the applicable Chi-

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nese laws in this area as well.

#### **The Problem In China**

Anti-corruption cases in China have received considerable attention in recent years as a result of the well-publicized efforts by the Chinese government to crack down on rampant corruption in the country. The Communist Party views corruption as a threat to the legitimacy of the party and is attempting to crack down on perceived corrupt and illegal activities by government officials and, in some cases, third parties. For example, three senior officials at the Chinese Ministry of Commerce (MOFCOM) and senior officials of the State Administration of Industry and Commerce (SAIC) and the State Administration of Foreign Exchange (SAFE) were arrested in 2008 for allegedly accepting bribes in connection with the approval and registration of foreign investment projects in China. In May 2010, one of the MOFCOM officials was sentenced to death with a two-year reprieve for accepting bribes of over RMB8 million. In January of this year, three senior officials of the China Football Association were arrested for accepting bribes to fix soccer matches. Recent statistics confirm that Chinese authorities are actively investigating at least some corruption allegations. In 2009, the SAIC and its local counterparts throughout China investigated 3,775 commercial

bribery cases, while Chinese courts tried 10,805 criminal commercial bribery cases.

China’s efforts to attack corruption have not been limited to Chinese officials or Chinese entities. In August 2009, in a high-profile case, four employees of Australia’s Rio Tinto’s China office in Shanghai were arrested for alleged bribery and were eventually sentenced to imprisonment ranging from 7 to 14 years for taking bribes from certain Chinese steel companies and for “trade secrets infringement.” In 2005, several managers and employees of Carrefour’s hypermarkets in Beijing were sentenced to fixed-term imprisonment for accepting bribes from suppliers. And in 2006, IBM and Hitachi were cited in a Beijing local court’s verdict in a criminal bribery case against a former vice minister of the Chinese Ministry of Construction.

#### **The Chinese Anti-Bribery And Anti-Corruption Legal Framework**

China maintains a two-layered regime pursuant to the PRC Criminal Law and the PRC Anti-Unfair Competition Law (“AUCL”) that apply, *inter alia*, to activities in China by foreign companies and/or their subsidiaries in China. In addition, the Communist Party of China (CPC) and the State Council have issued internal disciplinary rules governing attempted corruption or bribery of Communist Party members and certain Chinese government officials. These CPC and State Council rules, however, do not create liability for foreign companies.

In general, more severe cases of bribery involving more significant bribes (discussed below) fall under the jurisdiction of the PRC Criminal Law and are subject to criminal sanctions. Less-severe bribery cases fall under the AUCL and are subject to administrative penalties.

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### Criminal Law Provisions

China's criminal anti-bribery laws are based primarily on the PRC Criminal Law promulgated in 1979 and amended numerous times, most recently in 2009, and by various interpretations issued by the Supreme People's Court, the Supreme People's Procuratorate and/or the Ministry of Public Security. *The Opinions on Several Issues Concerning Law Application and Handling Criminal Commercial Bribery Cases*, jointly issued by the SPC and SPP in November 2008, are the most recent interpretations providing further guidance on criminal bribery cases.

As an initial matter, foreign corporations doing business in China are subject to Chinese criminal bribery laws pursuant to article 6 of the PRC Criminal Law. Chinese criminal laws apply to crimes that take place within the territory of China, whether committed by Chinese persons or foreigners. The criminal law prohibits "giving" bribes to public servants or State entities as well as to non-State (i.e., private) personnel. In addition, the criminal law prohibits State personnel, State entities or non-State personnel from "accepting" bribes. Note that, as discussed below, unlike the FCPA, which only covers bribes offered to government officials, the Chinese criminal law also criminalizes bribes offered to non-State personnel.

### Elements Of The Offense

Criminal law prohibits, *inter alia*, any individual or entity from giving "money or things" to State personnel or entities or to non-State personnel to seek improper gains. In addition, no State personnel or entity or non-State personnel shall accept "money or things" to make use of his or her position to seek benefits for the person giving the bribe. See Articles 163, 164, 385, 387, 391, 392 and 393 of the PRC Criminal Law. The term "money or things" is a key jurisdictional concept in Chinese anti-bribery law. According to judicial interpretations, "money or things" includes money in the form of cash; "properties or things"; and various "proprietary interests" that can be measured by money, such as home furnishings, memberships in clubs, cards with monetary value, cash-equivalent cards (e.g., bank cards, credit cards or shopping cards) and travel expenses. But giving bribes can also be established if "money or things" are given through disguised forms, for example by purchasing commodities at a price that is "obviously" lower than the market price or selling items at a price that is "obviously" higher than the market price; accepting company shares, dividends or profits without corresponding investments in the company; or accepting payment for non-existent services such as a security investment, financial management or gambling proceeds, etc. Nevertheless, under the current Chinese law, the action of proposing or promising to

offer a bribe without actually "giving" the bribe to others does not constitute an offense.

In addition to giving or accepting "money or things," generally it must also be shown that the party giving a bribe has the intent to seek an "improper gain." Similarly, when establishing a "bribe-accepting" crime, the prosecutor needs to prove that the recipient of the bribe has used his or her power, authority or position to seek a benefit for the party giving the bribe. However, the offender's "intent" is not an absolute pre-condition for a finding of bribery in practice. In fact, in reality, most bribery cases are established and prosecuted without establishing that the party offering the bribe indeed sought an "improper gain" or that the recipient of the bribe had a specific intent to seek a benefit for the party giving the bribe. Moreover, when money or things are provided to State personnel or State entities in connection with economic activities, there is no need to prove that they were given for purposes of seeking "improper gains" if (1) the value of the "money or thing" is a "relatively large amount" (generally over RMB10,000, about \$1,470), or (2) the "money or thing" can be characterized as a "kickback" to the State entity or personnel. Thus, for this reason, in practice, defendants charged with bribery crimes normally cannot rely on arguing that they did not have illegal or malicious intent or purpose to "give" or "accept" bribes as a means to successfully defend themselves. Note that in China, charges for giving bribes are usually filed against individuals rather than an entity because Chinese law has complex theories and pre-conditions for charging an entity.

Generally, the criminal sanctions for bribery crimes involving State personnel or State entities are more severe than those involving non-State personnel or entities. The definitions of the terms "State" personnel or entities and "non-State" personnel or entities are therefore important. Under Chinese law, the term "State personnel" is quite broad, and includes persons who perform public services in State organs, or in State-owned entities, as well as persons who are assigned by State organs or State-owned entities to perform public services, and other persons who perform public services according to law. The term "State entity" is similarly broad and refers to any entity that functions as a State organ to provide public services and/or perform administrative duties in accordance with law.

### Thresholds For Prosecution Of Bribery Crimes

Chinese criminal law sets out specific monetary thresholds for prosecution of bribery crimes. For prosecutions of persons giving bribes, liability attaches if (1) in the case of bribes given by individuals to either State personnel or non-State personnel, the

bribe equals or exceeds RMB10,000 (approximately US\$1,470); or (2) in the case of bribes given by individuals to State entities, the bribe equals or exceeds RMB100,000 (approximately US\$14,700). In the case of actions introducing a party giving a bribe to a bribe recipient, liability attaches if the amount of the bribe equals or exceeds RMB20,000 (approximately US\$2,940). Finally, in the case of bribes given by entities to State personnel, non-State personnel or State entities, liability attaches if the amount of the bribe equals or exceeds RMB200,000 (approximately US\$29,400). Note that the prosecution standards for criminal liability for accepting bribes are considerably lower. Chinese criminal law imposes liability for bribes accepted by non-State personnel or State personnel that equal or exceed a lower threshold of RMB5,000 (approximately US\$735). Also, in the case of bribes accepted by State entities, criminal liability exists if the amount of the bribe received equals or exceeds RMB100,000 (approximately US\$14,700). Importantly, however, the amount of the bribe involved is not the sole criteria for prosecution of bribery cases involving State personnel or State entities. In certain circumstances, such as when the bribe-offering party gives bribes to more than three State personnel or entities, cases may still be prosecuted even if the amount of the bribe given or accepted does not reach the above threshold.

### Criminal Penalties

Criminal penalties vary depending on whether the party offering or accepting a bribe is an individual or an entity. If the party offering or accepting a bribe is an individual, then criminal sanctions include criminal detention up to six months, a fixed-term imprisonment ranging from six months to 15 years, life imprisonment and confiscation of property, depending on the specific circumstances and seriousness of particular cases. In addition, the death penalty can be imposed against State personnel convicted of extremely serious "accepting bribes" crimes. Generally, the criminal sanctions for accepting bribes are more severe than those for giving bribes. If an entity is convicted of a bribery crime, the entity itself will be subject to a criminal fine, and the employees of the entity directly responsible for the crime, including the employees who arrange for and pay the bribe as well as management staff who participated in and/or approved the activities giving rise to the crime, will be subject to imprisonment as well.

In Part II of this article, we will examine the administrative liability imposed by the AUCL, the CPC and State Council internal disciplinary rules, issues surrounding the giving of gifts and entertainment, and how Chinese anti-bribery and anti-corruption law differs from the FCPA.