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

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In Part I, we examined the Chinese criminal anti-bribery laws and their application to foreign companies doing business in China. China also has a set of administrative laws that proscribe bribery and other anticompetitive activities. The Chinese Anti-Unfair Competition law ("AUCL"), promulgated on September 2, 1993, sets out rules for administrative liability for commercial bribery. The State Administration for Industry and Commerce in 1996 issued the *Provisional Regulations on Prohibition of Commercial Bribery Actions*, which set out more detailed provisions implementing the commercial bribery sections of the AUCL. Like the criminal bribery laws, these administrative laws also apply to foreign companies doing business in China. For example,

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in 2009, Pepsi-Cola's Chinese subsidiary was penalized by the Chinese authorities under the AUCL for alleged commercial bribery actions relating to its sale of products in China.

Here, in Part II, we discuss the application of the AUCL and its implementing regulations to foreign companies doing business in China. We also discuss certain internal Chinese government regulations governing anti-corruption activities applicable to government personnel. We then discuss key issues under the Chinese criminal bribery laws, including the distinction between the legitimate provision of gifts versus unlawful bribes, and the legitimate provision of entertainment and hospitality versus bribery actions. Finally, we discuss certain key differences between the application of the U.S. Foreign Corrupt Practices Act and the Chinese criminal bribery laws.

Chinese Administrative Laws Govern Commercial Bribery Actions

The AUCL prohibits all "business operators" in China from providing bribes, consisting of "money or things" or through "other means," for the purpose of selling or purchasing goods or services, or obtaining other competitive advantages. The AUCL applies not only to the sale or purchase of goods, but also to the sale or purchase of services or with the intent of obtaining other competitive advantages. The term "business operators" refers to entities and individuals who are engaged in commercial activities in China, as well as other parties or persons who may impact commercial activities, including commercial entities and for-profit or non-profit entities such as healthcare institutions, schools, etc.

The term "money or things" under the AUCL includes cash or property given to the other party or its employees, including money or things provided in the context of promotion expenses, publicity expenses, sponsorships, research expenses, service fees, consultation fees, commissions or reimbursement of expenses. Thus, the AUCL applies not only to the provision of cash itself, but also to a wide variety of means by which one party may attempt to bribe another. In addition, the AUCL prohibits the provision of "kickbacks" in which an entity fails to clearly and truthfully record kickbacks in the company's financial accounts.

The AUCL also proscribes providing bribes by "other means." This broad term provides the authorities in China considerable flexibility in pursuing possible commercial bribery actions. At the moment, there is no specific definition of the term "other means," and it is possible that the Chinese authorities may expand the scope of commercial bribery actions in the future. In addition, note that unlike the Chinese criminal bribery laws, the AUCL does not set out any thresholds in terms of the value of the bribes involved. (As discussed below, however, it does make an exception for "advertising-related gifts of small value.")

AUCL cases are handled by local offices of the Administration for Industry and Commerce. Administrative penalties under the AUCL for commercial bribery activities

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include administrative fines ranging from RMB10,000 (approximately US$1,500) to RMB200,000 (approximately US$29,000) and confiscation of any illegal gains.

Exceptions To Prohibition Against Commercial Bribery Actions

Despite its broad coverage, the AUCL does allow business operators to provide other parties with lawful discounts, commissions and "advertising-related gifts of small value." The term "discounts" refers to the normal commercial practice of offering a reduced price or returning a proportion of monies paid for the sale or purchase of goods or services. The AUCL requires that any discount or commission provided be clearly set out and the amount of the discount recorded in the company's financial statements. Discounts not satisfying these criteria could theoretically be considered a bribe. Similarly, the term "commissions" refers to monies provided by a business operator to a party who provides services to the business operator. Under the AUCL, that party must have the legal qualifications necessary to provide the services for which the commission was earned (usually, the question of legal capacity can be verified according to the business license of the third party), and both the provider and recipient of any commission must clearly record the commission amounts in their accounts. Again, theoretically, a commission not satisfying these criteria could be considered in violation of the AUCL. Requiring otherwise normal and competitive actions such as provision of discounts or commissions to be accurately recorded in the company's accounts or risk violating the AUCL has been controversial. Nonetheless, Chinese authorities continue to construe the AUCL in this manner. Finally, the AUCL allows "advertising-related gifts of small value" provided during business operations. Unfortunately, there is no guidance or further detail defining when such gifts are allowable. Some commentators have opined that "advertising-related gifts" generally refers to low-priced items affixed with the gift provider's name and business logo for the purpose of promoting the provider's business.

Chinese Government Internal Disciplinary Rules

In addition to the AUCL and Chinese criminal anti-bribery laws, the Communist Party of China's Central Committee and the Chinese State Council have issued internal disciplinary rules prohibiting corruption and bribery activities by Communist Party members, government officials and senior officers of state-owned enterprises. These internal disciplinary rules include the *Code of Ethics for CPC Leaders and Cadres on Clean Government* (updated February 2010). Under these internal disciplinary rules, government officials and Communist Party members are prohibited from accepting gifts above certain thresholds when handling their business affairs. For gifts received from a foreign party, recipients are allowed to keep gifts that do not exceed 200RMB (approximately US$30) in value. If the market value of a gift exceeds 200RMB on one occasion or the total value of the gifts received by one person within one year exceeds RMB600 (approximately US$90), the recipient is required to turn over to the government any items above those thresholds. In addition, certain government authorities in some state-owned enterprises have additional internal disciplinary rules prohibiting their officials or staff members from receiving higher value "entertainment" or "hospitality." These internal disciplinary rules do not apply to the activities of foreign companies. Nonetheless, they do provide foreign companies with useful guidelines to avoid situations that might cause embarrassment or awkwardness for a government official receiving the gift.

Key Issues Under Chinese Criminal Anti-Bribery Law

In Part I, we discussed the application of Chinese criminal anti-bribery law to activities of foreign companies doing business in China. One key issue that frequently arises is the often murky distinction between merely providing a "gift" to a Chinese individual or entity versus providing an unlawful "bribe." Unfortunately, Chinese law does not explicitly define the difference between "gifts" and "bribes" under the criminal law. However, the *Opinions on Several Issues Concerning Law Application and Handling Criminal Commercial Bribery Case,* issued in 2008, does provide some guidance in this respect. Chinese law sets out factors that will be examined when determining whether a specific activity is a reasonable gift or an unlawful bribe. These are (1) the circumstances surrounding the gift, e.g., whether the parties are relatives or friends, as well as the nature of their relationship; (2) the value of the gifts provided; (3) the purpose, timing and manner of delivery of the gifts, particularly whether the party providing the gift has asked for a favor from the party receiving the gift in relation to the recipient's official position; and (4) whether the recipient has taken advantage of his or her position to seek to or in fact promote the interests of the party providing the gift. In practice, prosecutors or judges have considerable discretion to determine whether a gift is an unlawful bribe in the context of the particular case. In these circumstances, the safest and most conservative way for foreign companies to handle the issue of providing gifts in China is to follow strictly the limits discussed above and in Part I. For example, providing advertising-related gifts of small value to others should not constitute an unlawful bribe, nor should making gifts of relatively small value to government officials below the threshold set out in their internal disciplinary rules discussed above. These conservative guidelines would help foreign companies avoid even the appearance of potentially inappropriate behavior in this regard.

A second key issue is the (again) murky distinction between legitimate "entertainment/hospitality" versus unlawful bribery. Unfortunately, there is no definition of allowable "entertainment" or "hospitality" set out under Chinese law. Chinese law does explicitly prohibit any party from paying the expenses for others to "travel," "study," or participate in inspection tours either domestically or overseas for the purpose of seeking improper gains. However, the current law does not explicitly clarify whether providing other kinds of entertainment or hospitality – for example, treating others to meals or inviting others to cultural events – could in some circumstances constitute "bribery."

U.S. Foreign Corrupt Practices Act vs. Chinese Criminal Anti-Bribery Laws

The FCPA does not overlap entirely with the anti-bribery provisions under Chinese criminal and administrative law. Foreign companies doing business in China therefore should be alert to these differences and ensure compliance with both the FCPA and the relevant Chinese laws. There are some important differences between the two sets of laws. For example, the FCPA proscribes only bribes provided to "foreign officials" (as well as political party officials and candidates for public office), whereas the Chinese law applies to bribes provided to nearly all types of entities or individuals, including private companies and employees of private companies in China.

Another difference between the FCPA and Chinese law is that the FCPA provides a narrow exception that allows for the provision of anything of value to a foreign official to expedite provision of "routine governmental action," such as the granting of licenses, permits, etc. In contrast, there is no such facilitation exception under Chinese law. No bribes of any kind may be provided to expedite a non-discretionary service.

In conclusion, foreign companies doing business in China should be aware of and comply with Chinese criminal and administrative laws governing anti-bribery activities. U.S. companies doing business in China should monitor further developments in Chinese anti-bribery laws and review their internal compliance programs to ensure compliance with both the FCPA and relevant Chinese laws.