THE PROPOSED AMENDMENTS TO CHINA'S AUCL COMMERCIAL BRIBERY PROVISIONS: COMMENTS AND SUGGESTIONS

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Abstract

Since the enactment of the Anti-Unfair Competition Law in 1993, China's economy has changed significantly. To better regulate the current market, a draft amendment to the AUCL was published on February 25, 2016. Specifically, Articles 7 and 20, the commercial anti-bribery provisions of the AUCL, reflect substantial changes to the current law. This paper will identify such proposed changes and analyze implications and potential issues of the elements of the commercial anti-bribery provisions, including burden of proof, vicarious liability of employers, bribery involving public service, books and records provision, extraterritorial jurisdiction, and penalties, etc. It will also look to the United States' domestic commercial anti-bribery laws for comparisons. This paper hopes to shed light on potential improvements the draft amendment should consider to achieve its desired purposes of better curbing commercial bribery and regulating the current market.

I. INTRODUCTION

The Legislative Affairs Office of the State Council of China published for public comment a draft amendment to the *Anti-Unfair Competition Law* (the "AUCL") on February 25, 2016 (the "Draft Amendment"). It was drafted by the State Administration of Industry and Commerce ("SAIC", and "AICs" for its local counterparts), the government agency responsible for the enforcement of the AUCL over the past 23 years. The AUCL is the major administrative legislation regulating various forms of unfair competition practices in China, including commercial bribery, product counterfeiting, monopoly power abuse, misleading commercial advertising and commercial secrets violations, etc. The commercial bribery provisions have been substantially revised by Article 7 and Article 20 of the Draft Amendment.

The preamble of the Draft Amendment acknowledges that the market economy has undergone dramatic changes since the enactment of the AUCL in 1993. Presumably, one of the major purposes behind the Draft Amendment is to adapt the law to current market conditions and address new issues that have emerged in the past two decades. Another possible purpose is to clarify the current law and eliminate inconsistencies between the AUCL and other

overlapping legislations, such as the *Anti-Monopoly Law*, the *Trademark Law*, and the *Advertisement Law*. The legislators also presumably intend to make the anti-bribery provisions consistent with the tightened anti-corruption provisions in the *Criminal Law*.[1]

This paper will introduce the major amendments to the commercial bribery clauses, analyze the implications and potential issues, and propose resolutions based on the legislative and enforcement experience in the United States.

II. PROPOSED AMENDMENTS TO THE COMMERCIAL ANTI-BRIBERY PROVISIONS

A. Business Operators and Commercial Bribery

Article 2 of the Draft Amendment updates the definition of "business operators,"[2] who are the only targets of the "commercial bribery" regulation set forth in Article 7 and administrative penalties under Article 20 for any violations.[3]

Under the current AUCL, the term "business operators" is defined as "legal persons, other economic organizations and individuals engaged in the trade of goods or profit-making services."[4] This definition has been debated extensively by commentators, many of whom have argued that such definition is too narrow.[5] In the Draft

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[1] *See* Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) art. 390 (Lexis China Online) (specifically, more discretion is given to the prosecutor because the new art. 382 replaces the value intervals in the old art. 382 with less quantitatively defined adjectives).

[2] Guowuyuan Fazhi Bangongshi Guanyu Fabu Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa Xiuding Caoan Songshengao Gongkai Zhengqiu Yijian de Tongzhi (国务院法制办公室关于公布《中华人民共和国反不正当竞争法（修订草案送审稿）》公开征求意见的通知) [Circular of the Legislative Affairs Office of the State Council on Promulgating the Anti-Unfair Competition Law of the People's Republic of China (Revised Draft for Review) for Public Opinions] (promulgated by Legislative Affairs Office of the State Council Feb. 25, 2016) [hereinafter *Draft Amendment*] art. 2 (Lexis China Online).

[3] *Id.*

[4] Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) [hereinafter *1993 Anti-Unfair Competition Law*] art. 2 (Lexis China Online).

[5] Zheng Youde (郑友德) & Wu Chunyan (伍春艳), *Woguo Fan Buzhengdang Jingzheng Fa Xiuding Shiwen* (我国反不正当竞争法修订十问) [*Ten Questions about China's Amendment to Anti-Unfair Competition Law*], 1 FAXUE (法学) [LAW SCIENCE] 57 (2009); Meng Yanbei (孟雁北), *Lun Woguo Fan Buzhengdang Jingzheng Fa zhi Xiuding: Baorong,Zengjian yu Xihua* (论我国反不正当竞争法之修订：包容、增减与细化) [*A Study on China's Anti-Unfair Competition Law's Amendment: Pluralism, What to Add and Delete, and Explanations*], 2 ZHONGGUO GONGSHANG GUANLI YANJIU (中国工商管理研究) [STUDY ON CHINA ADMINISTRATION FOR INDUSTRY & COMMERCE] 62 (2015); Li Yougen (李友根), *Lun Jingji Fa Shiye zhong de Jingyingzhe* (论经济法视野中的经营者) [*A Study on the Business Operator In Terms of Economic Law*], 3 NANJING DAXUE XUEBAO (南京大学学报) [JOURNAL OF NANJING UNIVERSITY] 55 (2007); Li Shengli (李胜利), *Lun Fan Buzhengdang Jingzheng Fa zhong de Jingzheng Guanxi he Jingyingzhe* (论《反不正当竞争法》中的竞争关系和经营者) [*A Study on Anti-Unfair Competition Law's Competitive Status and the Business Operator*] 8 FAZHI YANJIU (法治研究) [RESEARCH ON RULE OF LAW] 49 (2013).

Amendment, "profit-making" is deleted from the definition of "business operators."[6] There is also a concomitant change in Article 7(1), which now prohibits a "business operator" to "seek economic benefits for one's own employer or for oneself when performing public service or by performing public service."[7]

These changes were likely made for two reasons. The first is that local courts have been split on whether public service providers, such as public hospitals or public schools, should be subject to the AUCL. Some local courts have thought it would be unreasonable to exclude these entities if they seek economic benefits by performing public service.[8] The second is in response to public concerns over the serious and widely publicized bribery incidents involving public hospitals and pharmaceutical companies in recent years, as demonstrated by the GlaxoSmithKline ("GSK") bribery case in which GSK was fined over 400 million U.S. dollars for bribing public hospitals.[9] Hundreds of public hospitals were involved in the case.[10] The Supreme People's Court has already reacted to such concerns by issuing the *Opinions on Several Issues Concerning the Application of the Law in Handling Criminal Commercial Bribery Cases,* [11] which prohibits public organizations in the medical services industry, education industry, and procurement agencies from taking bribes.[12] A number of highly publicized cases were decided

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[6] *Draft Amendment*, *supra* note 2, art. 7.

[7] *Id*.

[8] Zheng Xuefeng, Chen Guoqing Su Jiangsusheng Renmin Yiyuan Yiliao Fuwu Hetong Jiufen An (郑雪峰、陈国青诉江苏省人民医院医疗服务合同纠纷案) [Zheng Xuefeng & Chen Guoqing v. Jiangsu Province Hospital Medical Service Contract Case] (Nanjing Intermediate People's Ct. June 18, 2003); Hubei Yichangshi Fuyou Baojianyuan Su Hubeishi Gongshangju (湖北宜昌市妇幼保健院诉湖北市工商局) [Hubei Province Yichang City Care Center for Women and Children v. Hubei Province Yichang Administration for Industry & Commerce] (Hubei Province Yichang City Intermediate People's Ct. Nov. 21, 2000).

[9] *See* Yang Ting (杨婷), *Gelansushike Zhongguo Gongsi Beifa Renminbi 30 Yiyuan* (葛兰素史克中国公司被罚人民币30亿元) [*GlaxoSmithKline China Fined 3 Billion Yuan*], XINHUA NET, (Sept. 19, 2014), http://news.xinhuanet.com/legal/2014-09/19/c_1112553520.htm; Li Shengli (李胜利)，*supra* note 5; Guojia Weisheng Jisheng Wei Guojia Zhongyao Guanliju Guanyu Yinfa Jiaqiang Yiliao Weisheng Hangfeng Jianshe "Jiu Buzhun" de Tongzhi (国家卫生计生委国家中药管理局关于印发加强医疗卫生行风建设"九不准"的通知) [National Health and Family Planning Commission and State Administration of Traditional Chinese Medicine Joint Notice on Issuance of Nine Prohibitions to Strengthen Growth of Medical Services Industry] (this notice prohibiting bribery in the medical services industry was sent out in 2013), NHFPC (Dec. 26, 2013), http://www.nhfpc.gov.cn/jcj/s7692/201312/09bd7a8be8f8420d91997a0041aa868e.shtml.

[10] *Id.*

[11] Guanyu Banli Shangye Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti de Yijian (关于办理商业贿赂刑事案件适用法律若干问题的意见) [Opinions Concerning the Application of Law in Criminal Commercial Bribery Cases] (promulgated by Sup. People's Ct. and Sup. People's Procuratorate, Nov. 20, 2008, effective Nov. 20, 2008) (Lexis China Online).

[12] *Id*. (Other entities are defined in Article 2 to include "permanent organizations, such as public bodies, societies, villagers' committees, residents' committees, villagers' groups, and non-permanent organizations, such as organizing committees and preparatory committees for sports events, arts performance or other lawful activities as well as contractors' groups." Article 4 specifically proscribes

since then, in which public hospitals and doctors were charged and sentenced for bribery.[13]

"Business operators" do not include employees or agents acting on behalf of the business operators, and any act of bribery by an employee is regarded as an act of the employer through a form of strict liability. The Draft Amendment does not change that, but it does provide a defense to the bribe recipient's employer.[14]

B. Other Key Amendments

Aside from the important change to the definition of "business operators," the Draft Amendment differs from the current law in the following key aspects.

1. The Definition of "Commercial Bribery"

The current AUCL does not define "commercial bribery." Rather, it states that "business operators" shall not give bribes "in the form of property or other means for the purpose of selling and purchasing

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taking bribes by public servants of medical institutions. It states "[p]ublic servants of medical institutions who, by abusing their positions in purchasing medicines, medical apparatus, medical hygiene materials and other medical products, solicit property from sellers, or illegally accept any property from the sellers in consideration of acting in favor of such sellers shall be convicted for accepting bribes and be sentenced under Article 385 of the Criminal Law." Article 5 specifically proscribes bribe taking by educational institutional public servants. It states "[p]ublic servants schools or any other educational institutions who, by abusing their positions in purchasing teaching materials, teaching equipment, school uniforms or other products, solicit property from sellers, or illegally accepts any property from sellers in consideration of acting in favor of the sellers shall be convicted for accepting bribes and be sentenced under Article 385 of the Criminal Law." Article 6 specifically proscribes bribe taking by procurement group members. It states "[m]embers of lawfully established tender selection committees, negotiation groups in competing procurement negotiation or procurement quotation groups who solicit or illegally accept property at a relatively high value from any third party in consideration of acting in favor of such party in selection of winners of the tenders or suppliers of the government procurement shall be convicted for accepting bribes in capacity as a non-public servant and be sentenced under Article 163 of the Criminal Law.").

[13] *See* Ma Chao (马超), *Zhenjiang Zhongyiyuan Bao Fubai Wo'an Yuanzhang Shouhui 137 Wan Huoxing 11 Nian* (镇江中医院曝腐败窝案院长受贿137万获刑11年) [*Zhenjiang Traditional Medicine Hospital Exposes Corruption Ring, Director Is Bribed 1.37 Million Yuan and Gets 7 Years' Sentence*], LEGAL DAILY, (Jun. 30, 2016), http://www.legaldaily.com.cn/legal_case/content/2015-06/30/content_6147371.htm?node=33816" Tailaixian Renmin Yiyuan Danwei Shouhui Zhangmoumou Shouhui Yian Yishen Xingshi Panjue Shu (泰来县人民医院单位受贿张某某受贿一案一审刑事判决书) [Tailai County People's Hospital Bribery Case, Mr. Zhang Bribery Case, Judgment of Adjudication in the First Instance] (Heilongjiang Province Fuyu County People's Ct., May 20, 2014), http://openlaw.cn/judgement/ 7c51f8d1fd224bc2b91aea84a5e33991; Wu Junfan (吴俊凡), *Chengdu Mou Yiyuan Yisheng Kaiyao Chi Huikou Liangnian Shou 70 Wan Keshi Beipan Shouhui Zui* (成都某医院医生开药吃回扣两年收70万 科室被判受贿罪) [*Chengdu Doctor Gets 0.7 Million Yuan Kickback in Two Years for Writing Subscriptions, Hospital Is Sentenced for Enterprise Bribery*], XINHUA NET, (Aug. 11, 2015), http://www. sc.xinhuanet.com/content/2015-08/11/c_1116207497.htm; *Shu Baijia Yiyuan Juanru Gelansushike An Yi Gongshangju Renyuan Shean* (数百家医院卷入葛兰素史克案 一工商局人员涉案) [*Hundreds of Hospitals Involved in the GlaxoSmithKline Case One SAIC Personnel Implicated*], XILU NET, (Sept. 4, 2013), http://shizheng.xilu.com/20130904/1000010000083600.html.

[14] *Draft Amendment*, *supra* note 2, art. 7.

products and services."[15] In 1996, SAIC promulgated the *Provisional Rules on Prohibition of Commercial Bribery Activities* ("1996 Rules"), but it still uses essentially the same language as the existing AUCL.[16]

The Draft Amendment now provides the definition of "commercial bribery" as a business operator "(1) providing or promising to provide (2) economic benefits to (3) the counter-party in a transaction, or to a third party who is able to influence the transaction, (4) to entice it to seek a transaction-related opportunity or a competitive advantage for the business operator."[17] Additionally, "accepting or agreeing to accept an economic benefit" also constitutes "commercial bribery."[18]

The proposed language substantially broadens the coverage of the statute. First, under the current statute, an action is not bribery unless the bribe has been offered and accepted. The Draft Amendment adds that to "promise to provide" and to "agree to accept" also constitute acts of bribery.

Second, the current statute only proscribes bribes given to a counter party in a transaction. The Draft Amendment states that the bribe may be given to a counter-party as well as to any third party, i.e. to "anyone."

Third, the proposed language uses "economic benefits" to replace "property or other means" in the current statute. The 1996 Rules contain a lengthy definition of "property", providing that "property" means "any cash and non-cash payments, including, but not limited to, property disguised as marketing fees, publicity fees, sponsorship fees, R&D fees, labor service fees, consulting fees, or commission fees, as well as reimbursement of various expenses, etc."[19] It also gives examples of "other means" – offering domestic or international tours, expensive meals or entertainment, etc.[20] In practice, the definition under the 1996 Rules is interpreted as "anything of value."

The proposed language "economic benefits" simplifies the term and makes it consistent with the existing practice carried out in

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[15] Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) [hereinafter 1993 Anti-Unfair Competition Law] art. 8 (Lexis China Online).

[16] Guojia Gongshang Xingzheng Guanliju Guanyu Jinzhi Shangye Huilu Xingwei de Zanxing Guiding (国家工商行政管理局关于禁止商业贿赂行为的暂行规定) [Interim Provisions on Banning Commercial Bribery] (promulgated by the State Administration for Industry & Commerce, Nov. 15, 1996, effective Nov. 15, 1996) art. 2 (Lexis China Online).

[17] *Draft Amendment*, *supra* note 2, art. 7.

[18] *Id*.

[19] Guojia Gongshang Xingzheng Guanliju Guanyu Jinzhi Shangye Huilu Xingwei de Zanxing Guiding (国家工商行政管理局关于禁止商业贿赂行为的暂行规定) [Interim Provisions on Banning Commercial Bribery] (promulgated by the State Administration for Industry & Commerce, Nov. 15, 1996, effective Nov. 15, 1996) art. 2 (Lexis China Online).

[20] *Id*.

accordance with the 1996 Rules. It is also closer to the statutory language used in the anti-bribery statutes adopted by other jurisdictions (e.g., "anything of value" under *U.S. Foreign Corruption Practice Act* (the "FCPA"), "benefits" under the *Brazil Clean Companies Act*, or "financial or other advantage" under the *UK Bribery Act*).[21]

The proposed definition does not clarify whether a bribe giver who has been coerced, e.g., a supplier who involuntarily gives a bribe coerced by a procurement agent, will be accused of commercial bribery. However, SAIC has previously responded to this issue by citing the *Administrative Law*, which states that while coercion is a mitigating factor in assessing the amount of fines, it does not change the nature of the offense.[22] Similar principle applies to the provisions under the *Criminal Law*.[23]

2. Vicarious Liabilities of Employers

The current law does not differentiate between the liability of employers and employees. As noted above, SAIC only regulates and punishes "business operators," i.e. employers. For example, in the published administrative penalty decision against Shanghai Kai En Medical Device Company in 2015, Shanghai Municipal AIC does not differentiate between the conduct of the employee and the employer, but only refers to the conduct of the "accused party" and imposes penalties upon the "accused party," which is the company.[24] The proposed draft does not change this, but rather makes it clear that the employer will be "deemed" liable for commercial bribery paid or received by its employees.[25] However, the employer of the bribe recipient - but only the recipient - is given an affirmative defense. If the recipient's employer can show that accepting the bribe

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[21] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff, amended by Foreign Corrupt Practices Act Amendments of 1988, 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff, and the International Anti-Bribery and Fair Competition Act of 1998, 112 Stat. 3302 (1998) (codified at §§ 15 U.S.C. 78dd-1 to 78dd-3, 78ff) [hereinafter FCPA]; Lei No. 12.846, de 4 de julho de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 8.2.2013 (Braz.); Bribery Act 2010, c. 23 (Eng.).

[22] *See* Zhu Youquan (朱有权), *Ruhe Cailiang Shangye Huilu Anjian Dangshiren Bei Suohui de Qingjie* (如何裁量商业贿赂案件当事人被索贿的情节) [*How to Determine a Bribery Case When the Bribe is Solicited*], CHINA INDUSTRY & COMMERCE NEWS, (Apr. 14, 2016), http://www.cicn.com.cn/zggsb/2015-07/23/cms74296article.shtml; Xingzheng Chufa Fa (行政处罚法) [Administrative Penalties Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) art. 27 (Lexis China Online).

[23] Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) art. 28 (Lexis China Online).

[24] *See* Xingzheng Chufa Juedingshu (行政处罚决定书 沪工商青案处字〔2015〕第290201310628号) [Administrative Penalty Decision No. 290201310628] (Issued by Shanghai Municipal Administration for Industry & Commerce, Feb. 11, 2015), http://www.sgs.gov.cn/shaic/punish!detail.action?uuid=02e48176 4b8b4688014b94e66be018ec.

[25] *Draft Amendment*, *supra* note 2. art. 7.

is contrary to its business interest, the bribery will not be considered as the employer's conduct.[26]

3. Books and Records

Article 7(2) of the Draft Amendment proscribes commercial bribery conduct in which business operators "pay each other economic benefits without truthfully recording in contracts and accounting documents."[27] This clause is already included in the current AUCL, which provides that business operators paying or accepting kickbacks "off the books" shall be punished for offering or taking bribes.[28] The proposed language broadens the coverage of the provision to cover any economic benefits and not just kickbacks.

4. Payments to Third Parties

As noted above, under the Draft Amendment, the bribe recipient could be any party, as opposed to just a counter-party in the current AUCL. Article 7(3) provides that it is commercial bribery if a business operator pays or promises to pay economic benefits to "third parties" who may influence the business transactions, "harming the lawful rights and interests of other business operators or consumers."[29] This clause essentially overlaps with, or even repeats the definition of "commercial bribery." The legislator may have wanted to set out the offense of bribing third parties as a specific example to alert business operators since it is the first time that bribing third parties is proscribed under the law.

However, the new provision appears to be both repetitive and potentially confusing. Under Article 7(3), the element of "harming the lawful rights and interests of other business operators or consumers" seems to imply a carve-out for facilitation payments to third parties because facilitation payments often do not result in harms to competitors or consumers. However, the general definition of "commercial bribery" does not require this element and therefore does not have such a carve-out. SAIC should clarify its legislative intention, or delete Article 7(3).

5. More Severe Penalties

For non-criminal commercial bribery, the current AUCL imposes a fine of between RMB 10,000 and 200,000 (around $1,500 to

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[26] *Id*.

[27] Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 7(2) (Lexis China Online).

[28] *Id*., art. 8.

[29] *Draft Amendment*, *supra* note 2, art. 7(3).

$30,000), along with confiscation of illegal income.[30] Under Article 20 of the Draft Amendment, SAIC would impose fines of between 10% and 30% of business revenue attributable to the illegal conduct without any cap.[31] When commercial bribery is so severe that it comes into the purview of *Criminal Law*, the offender is subject to both incarceration and fines.[32] Any fines imposed by SAIC can be deducted against the fines imposed under the *Criminal Law*, if SAIC had already imposed fines before the conclusion of the criminal proceeding.[33] As to what constitutes "business revenue", although there has not been a clear definition, in practice, business revenue includes illegal income and reasonable costs. This amendment presumably gives SAIC more discretion and allows SAIC to impose appropriate punishment to commercial bribery involving large-scale projects that potentially cause serious negative impacts to society, regardless of how small the illegal income or the bribes are.

III. A COMPARISON BETWEEN U.S. COMMERCIAL ANTI-BRIBERY LAW AND THE DRAFT AMENDMENTS

Commentators on the commercial bribery statute under the AUCL usually compare it with the FCPA.[34] Although the FCPA is a frequently discussed topic when anti-corruption is mentioned, there are two important distinctions.

Firstly, a key element of a FCPA violation is corrupt payments to "foreign officials."[35] The AUCL has no such requirement. Secondly, the FCPA is of broad extraterritorial nature while the AUCL is a domestic law and does not include language that suggests its extraterritorial jurisdiction. The Draft Amendment has not changed that.

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[30] Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 22 (Lexis China Online).

[31] *Draft Amendment*, *supra* note 2, art. 20.

[32] Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) art. 383 (Lexis China Online).

[33] Xingzheng Chufa Fa (行政处罚法) [Administrative Penalties Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) art. 28 (Lexis China Online).

[34] *See* He Ling (何玲) & Chen Jun (陈军), *You Yingmei Fan Huilu Fa Kan Woguo Fan Shangye Huilu* (由英美反贿赂法看我国反商业贿赂) [*Viewing China's Commercial Anti-bribery from English and American Anti-bribery Laws*], 10 FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 171 (2013); Wang Jun (王军), *You Meiguo Haiwai Fan Fubai Fa Kan Woguo Fan Shangye Huilu* (由美国《海外反腐败法》看我国反商业贿赂) [*Viewing China's Commercial Anti-bribery from the FCPA of the United States*], 8 ZHISHI JINGJI (知识经济) [KNOWLEDGE ECONOMY] 31 (2012).

[35] 15 U.S.C. § 78dd-1(f)(1)(A) (2012) (foreign official is defined as "any officer or employee or a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality.").

Therefore, this paper will focus on U.S. domestic commercial bribery laws, instead of the FCPA, compare them with the AUCL commercial bribery provisions, and propose potential improvements to the Draft Amendment based on the comparison.

A. Legislative Structure

Unlike China which has two comprehensive commercial bribery statutes under the AUCL and the *Criminal Law*, the U.S. does not have a general federal level commercial bribery statute,[36] although there have been unsuccessful attempts to enact one.[37] Instead of enacting a single comprehensive statute, Congress has inserted commercial anti-bribery provisions into laws that regulate specific industries.[38] Examples include commercial anti-bribery provisions pertaining to labor representatives,[39] licensed classifiers of cotton or grains,[40] dealers of perishable agricultural commodities,[41] parties involved in the referral of federal health care program business,[42] and federal meat inspectors.[43] If a commercial bribery offense occurs outside of these contexts, it could be prosecuted under the umbrella of several federal statutes, including the *Travel Act*, mail and wire fraud statutes, the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), and the *Robinson-Patman Act*, etc.[44] Congress also enacted a set of civil statutes to deter commercial bribery and compensate parties who are prejudiced by the bribery practices.[45]

On the state level, over three quarters of the states have criminalized commercial bribery across all industries. Of the other states, most of them have enacted targeted statutes that proscribe bribes in particular industries.

The Federal Trade Commission of the U.S. (the "FTC") is the equivalent of SAIC in combatting unfair competition. FTC had used antitrust regulations to challenge commercial bribery in its earlier years. However, commercial bribery had no longer been the focus of

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[36] *See* D.E. Ytreberg, Annotation, *Validity and Construction of Statutes Punishing Commercial Bribery*, 1 A.L.R.3D 1350, 1353 (1965).

[37] *See* United States v. Johnston, 1979 U.S. Dist. LEXIS 12844, at 3.

[38] Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119 (2014).

[39] 29 U.S.C. § 186 (2012).

[40] 7 U.S.C. §§ 60, 85 (2012).

[41] Perishable Agricultural Commodities Act of 1930 § 2, 7 U.S.C. § 499b (2012).

[42] 42 U.S.C. § 1320a-7b (2012).

[43] 21 U.S.C. § 622 (2012).

[44] The Travel Act, 18 U.S.C. § 1952 (2012); Mail and Wire Fraud, 18 U.S.C. §§ 1341, 1343 (2012); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968; Anti-Kickback Act, 41 U.S.C. §§ 8701-8707 (2012); Robinson-Patman Act of 1936, 15 U.S.C. § 13 (2012).

[45] *See* Ytreberg, *supra* note 36, at 1372-1375.

its enforcement activities decades ago.[46] Now, commercial bribery is usually prosecuted under criminal laws at the federal and state levels.

B. Elements of the Criminal Commercial Bribery Statutes

The *Travel Act* prohibits the use of the U.S. mail or interstate or foreign travel for criminal acts, including bribery in violation of the state laws.[47] The *Travel Act* has been frequently used to prosecute domestic commercial bribery cases in the past two decades. Prosecutors brought highly publicized *Travel Act* charges against members of the Salt Lake City Bid Committee for violating the Utah commercial anti-bribery statute in the Salt Lake City Olympic bid scandal.[48] Prosecutors have also used the *Travel Act* in conjunction with the FCPA to combat commercial anti-bribery abroad. For example, in *United States v. Control Components Inc*., California-based valve maker Control Components Inc. pleaded guilty to the *Travel Act* charge for bribing employees of private companies in violation of California's commercial anti-bribery law and the FCPA charges for bribing employees of state-owned companies who are considered as "public officials" under the FCPA.[49]

On the state level, the basic elements of these criminal commercial bribery statutes are generally consistent from state to state: (1) the offering or soliciting, agreeing to accept, or accepting; (2) by the employee or agent; (3) anything of value; (4) intent to influence; (5) done without the knowledge or consent of the employer or principal of the bribe recipient. Some states also require an additional element of "contrary to its interest" in which the prosecutor must show that the bribe recipient's "conduct… actually be contrary to the interests of the employer or principal."[50]

Given that more cases have arisen under the New York statute than that of any other state,[51] we will use the commercial anti-bribery statute in the *New York Penal Code* as an example. The

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[46] *See* Josh Goodman, *The Anti-Corruption and Antitrust Connection*, ANTITRUST SOURCE (April, 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf. ("The use of the antitrust laws, including the FTC Act, to challenge bribery, though uncommon, was not unprecedented. In its early years, the FTC made pursuing and exposing bribery within the United States a significant focus of its enforcement activities. Combating domestic bribery had waned as an FTC priority many decades earlier, however. The FTC's renewed attention to bribery proved short-lived because, with the FCPA's enactment in 1977, the perceived need for antitrust to serve as an enforcement gap-filler for foreign corrupt payments diminished.").

[47] The Travel Act, 18 U.S.C. § 1952; Perrin v. United States, 444 U.S. 37, 38 (1979) (holding the Travel Act encompasses commercial bribery of private employees prohibited by state law).

[48] United States v. Welch, 327 F.3d 1081, 1084 (10th Cir. 2003).

[49] United States v. Control Components, Inc. SA CR No: SACR09-00162 C.D. Cal. (July 31, 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-22-09cci-info.pdf.

[50] Utah Code Ann. § 76-6-508(1)(a) (2015).

[51] *See* Ytreberg, *supra* note 36.

New York statute penalizes any person who pays or promises to pay to an agent or employee, any gift or gratuity, with intent to influence such agent's or employee's action in relation to their principal's or employer's business.[52] Receiving the bribe is also penalized.[53] To convict the offenses, the prosecutors are also required to prove that the bribe is given or received without the knowledge and consent of the principal or employer of the bribe recipient.[54] There is no value threshold for a class A misdemeanor charge. When the bribe's value exceeds $1,000 and causes economic harm to the employer or principal exceeding $250, it becomes a felony.[55]

The basic elements of the Draft Amendment are similar to those in U.S. commercial bribery laws, i.e. they all include (1) giving or promising to give, accepting or agreeing to accept; (2) anything of value; and (3) an intent to influence or entice to be awarded with business opportunities or competitive advantages. However, there are several significant distinctions between the Draft Amendment and the U.S. state commercial bribery laws, and these distinctions will be outlined below.

1. Burden of Proof

The standard of proof of the U.S. criminal prosecutions is "beyond a reasonable doubt," which is the same under China's criminal proceedings. In an administrative enforcement, agencies' actions are usually governed by the preponderance of the evidence standard.[56] The Supreme Court of the U.S. has held that Section 7(c) of the Administrative Procedure Act establishes "a standard of proof and . . . the standard adopted is the traditional preponderance-of-the evidence standard."[57]

The AUCL is an administrative law, which does not provide clear guidance for the standard of proof under China's legal system. There are several different academic views on this issue. Some commentators are of the opinion that the standard should be somewhere between "preponderance of evidence," which is the standard applied in civil cases, and "beyond reasonable doubt."[58] Other commentators believe that SAIC should apply a "beyond reasonable doubt" standard to cases in which potential penalties are

[52] N.Y. PENAL LAW § 180.00 (Gould 2006).

[53] N.Y. PENAL LAW § 180.05 (Gould 2006).

[54] N.Y. PENAL LAW §§ 180.00, 180.05 (Gould 2006).

[55] N.Y. PENAL LAW §§ 180.03, 180.08 (Gould 2006).

[56] Rambus, Inc., Docket No. 9302 (F.T.C. Aug. 2, 2006), https://www.ftc.gov/sites/default/files /documents/cases/2006/08/060802commissionopinion.pdf.

[57] Steadman v. SEC, 450 U.S. 91, 95-102 (1981) (considering standard of proof in SEC proceedings adjudicating alleged violations of the anti-fraud provisions of the securities laws).

[58] Wang Guisong (王贵松), *Yiduiyi Zhengju de Shencha yu Rending* (一对一证据的审查与认定) [*On Examination and Verification of "One to One" Evidence*], 3 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [ECUPL JOURNAL] 69 (2012).

jail time or confiscation of large amounts of personal property, while a "preponderance of evidence" standard should apply to administrative judgments in other cases.[59] In practice, many local AICs choose to adopt the second approach while some do not.[60]

Given that one of the purposes of the Draft Amendment is to clarify the law and to unify the enforcement practices by local AICs, SAIC should provide clear guidance on the standard of proof in sanctioning AUCL violations. Even if the administrative procedure does not provide a clear guidance, the AUCL could provide its own standard of proof. For example, Section 5 of the *Federal Trade Commission Act* of the U.S., which prohibits "unfair or deceptive acts or practices in or affecting commerce,"[61] provides its own standard of proof, which requires the Commission to prove that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[62]

2. Business Operators and Vicarious Liability

In contrast to the FCPA, which frequently targets companies, the U.S. state commercial bribery laws generally regulate the behavior of employees. Their employer may be convicted of bribery if the prosecutors can prove that the organization is vicariously liable for the offenses committed by its agents under the doctrine of *respondeat superior*, which establishes employer's liability when "the employee acts within the scope of his or her employment and with the intent to benefit the organization."[63] Some jurisdictions require that the employer either approves or participates in the employee's or agent's conduct.[64] Some states, such as New York, have included "criminal liability of corporations" in the penal code which reflects similar principles.[65]

The general rationale is that a corporation is a legal fiction comprised only of individuals. Therefore, it has no existence separate and distinct from those whom it has clothed with authority and

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[59] Quanguo Gongshang Xitong Fazhi Zhuanjiaxing Rencai Peixunban Diyi Keti Zu (全国工商系统法制专家型人才培训班第一课题组), *Xingzheng Chufa Anjian Zhengming Biaozhun Youguan Wenti Yanjiu* (行政处罚案件证明标准有关问题研究) [*Research on the Burden of Proof of Administrative Penalty Cases*], 2 GONGSHANG XINGZHENG GUANLI (工商行政管理) [BIWEEKLY OF ADMINISTRATION FOR INDUSTRY AND COMMERCE] 54 (2013).

[60] *Id*.

[61] 15 U.S.C § 45(a)(1) (2012).

[62] *See id*. § (n).

[63] Criminal Liability of Corporations, N.Y. PENAL LAW § 20.20; Commonwealth v. Benefit Fin. Co., 360 Mass. 188, 200, 275 (1971); Szaflarski v. Lurie Co., No. 90 C 6061, 1991 U.S. Dist. LEXIS 11937, at 24 (N.D. Ill. Aug. 23, 1991).

[64] *Id.*

[65] N. Y. PENAL LAW § 20.20; N.J. Stat. § 2C:2-7; ORS § 161.70.

commissioned to act for it, whether such individuals are directors, officers, shareholders or employees.[66]

In contrast, the current AUCL only regulates "business operators" and not their employees or agents.[67] The Draft Amendment emphasizes this point by adding a clause stating that the employers are "deemed" liable for their employees' conduct.[68]

There are potential problems in the Draft Amendment in the following three respects:

First, the proposed language will continue to bring challenges from the employers. In the past, employers have complained that administrative penalties were imposed although they had no knowledge of their employees' corrupt conduct. However, there was no legal basis for their challenges as the word "employee" is not even mentioned in the statute. The Draft Amendment does not adequately address this issue and the employers likely will continue to believe they are being treated unfairly in such situation.

To avoid such challenges, the AUCL could add express language to address the concept of "vicarious liability." The legislator could follow the practice of the U.S. to require proof that the employees engaging in bribery intend to benefit their employer and act within the scope of their employment, instead of imposing strict liability.

Another approach is to follow the *Criminal Law* practice to establish the employers' vicarious liability. The Supreme People's Court has held that crimes committed by the employees or agents in the name of the employer and "with the illegal benefits belonging to the employer" are considered the crimes of the employer.[69]

Secondly, if the law requires proof of vicarious liability and it has been duly established, affirmative defense or mitigating factors should be made available to all employers, not just the employers of bribe recipients. The Draft Amendment only includes "contrary to

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[66] U.S. SENTENCING GUIDELINE MANUAL ch. 8 (U.S. SENTENCING COMM'N 2010); Commonwealth v. Benefit Fin. Co., 360 Mass. 188, 200 (1971).

[67] Fan Buzhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) [hereinafter 1993 Anti-Unfair Competition Law] art. 8 (Lexis China Online).

[68] *Id.*

[69] *See* Zuigao Renmin Fayuan Guanyu Shenli Danwei Fanzui Anjian Juti Yingyong Falü Youguan Wenti de Jieshi (最高人民法院关于审理单位犯罪案件具体应用法律有关问题的解释) [Interpretations of the Supreme People's Court on Issues Concerning the Concrete Application of Law in the Trial of Criminal Cases of Unit Crimes] (Promulgated by Sup. People's Ct., June 18, 1999, effective June 18, 1999) art. 3 (Lexis China Online); Zuigao Renmin Fayuan Guanyu Yinfa Quangu Fayuan Shenli Jinrong Fanzui Anjian Gongzuo Zuotanhui Jiyao de Tongzhi (最高人民法院关于印发《全国法院审理金融犯罪案件工作座谈会纪要》的通知) [Circular of the Supreme People's Court on Printing and Distributing the Minutes of the Forum on Hearing Cases of Financial Crimes by Courts Nationwide] (promulgated by Sup. People's Ct. Jan. 21, 2001, effective Jan. 21, 2001) art. 1 (Lexis China Online).

interest" as an affirmative defense for the employer of bribe recipients. As a practical matter, the bribe givers are more likely to be found to commit the offense to benefit their employers, whereas the recipients usually act for their own benefit. However, the legislation should not make such an overall assumption, since it is possible that a breach of the law will hurt a company's business in the long run, even though it may obtain temporary business opportunities through its employees' bribe giving activities.

In addition, the legislation should give more guidance as to what constitutes "contrary to interest." For example, it could specifically provide that the existence of an effective compliance and ethics program and self-reporting, cooperation, or acceptance of responsibilities may be used as a defense for vicarious liability under the AUCL. Similar guidance has been adopted by the U.S. Sentencing Commission as mitigating factors for employers' vicarious liability.[70] If an employer has (1) already had strict internal policies monitoring employees' behavior and prohibiting them from committing bribery, (2) indicated to the employees that violating the law does not benefit the company but is rather against the company's interest, and (3) reported any violations to SAIC immediately, the "contrary to interest" defense may be established.

Finally, given that the limited jurisdiction of the Draft Amendment does not cover an employee or agent who acts corruptly, such an act may be left unpunished under China's legal system when the bribe is of relatively minor value.[71] The *Criminal Law* only penalizes individuals engaged in commercial bribery practices when the value of the unlawful payment is "relatively large."[72]

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[70] U.S. SENTENCING GUIDELINE MANUAL, *supra* note 66.

[71] There are a few anti-bribery statutes specific to certain industries and do not have value threshold. However, there are no general statutes across all industries to deal with minor offenses committed by employees. *See*, *e.g.*, Zhiye Yishi Fa (执业医师法) [Medical Practitioners Law] (promulgated by the Standing Comm. Of Nat'l People's Cong., June 26, 1998, effective May 1, 1999) art. 27 (Lexis China Online) ("Doctors shall not take advantage of their positions to extort or illegally accept the patients' property or seek other illegitimate gains"); Guojia Ziran Kexue Jijin Tiaoli (国家自然科学基金条例) [Regulations on the National Natural Science Foundation] (promulgated by State Council, Feb. 24, 2007, effective Apr. 1, 2007) art. 39(2) (Lexis China Online) ("If any of the following acts in violation of this Regulation are committed by any entity or individual, and a crime is constituted, he shall be subject to criminal liabilities; Any personnel of the fund management organ or an evaluation expert exacts or illegally accepts the properties of others or seeks for other unjustifiable interests when performing duties prescribed in this Regulation"); Guojia Tiyu Zongju Guanyu Yinfa Guojia Tiyu Zongju Zhili Shangye Huilu Zhuanxiang Gongzuo Shishi Fangan de Tongzhi (国家体育总局关于印发《国家体育总局治理商业贿赂专项工作实施方案》的通知) [General Administration of Sport of China's Notice on the Issuance of General Administration of Sport of China's Implementation of Treatment of Commercial Bribery] (Apr. 6, 2016) (specifically targeting bribery in six areas: construction, sports competition, resource development and events, sports lottery and charity use, bulk goods purchasing, and staff personnel).

[72] *See* Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) art. 164, 383 (Lexis China Online); Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Tanwu Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti

SAIC could resolve this issue by revising the AUCL to cover the employees' liability. There is no legal barrier for an administrative agency to regulate individuals' conduct within China's legal regime, and there are precedents for SAIC to follow. For example, in a 2005 SAIC regulation named the *Administrative Regulations on Direct Selling*, companies engaged in "direct selling" and their employees may both be held liable for the offense.[73]

3. Without the Employer's Consent

The commercial bribery statute in New York, as in most states in the U.S., requires the prosecutor to prove that the bribery is without the recipient's employer's consent or knowledge. As the courts have noted, "secrecy" is a necessary element of commercial bribery,[74] and the essence is "the corruption of the duty that an agent owes his principle,"[75] the logic being that if the recipient takes the bribe under the instruction of its employer, the bribe could presumably be considered as a promotional discount received indirectly by the company in the form of compensation to its employees who take the bribes.[76]

The AUCL does not require this element. SAIC could thus, in theory, convict business activities such as a promotional discount which would otherwise be lawful in the U.S. However, given the fact that the AUCL is an anti-unfair competition law, one can presume that SAIC would not go after business activities that do not have anti-competitive effects.

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de Jieshi (最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释) [Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Corruption and Bribery], (effective Apr. 18, 2016) art. 1 (defining "relatively large" bribery amounts to be between RMB 30,000 and 200,000 and defining "fall[ing] under other relatively serious circumstances" to be corruption or taking bribe amounts of between RMB 10,000 and 30,000 plus engagement in at least one of the following conducts: (1) misappropriation of funds or materials that are allocated for disaster relief, emergency rescue, flood prevention and control, support to disabled servicemen and families of revolutionary martyrs and servicemen, aid to the poor, migration and social relief; (2) having been administratively sanctioned for corruption, bribery, or embezzlement; (3) having been criminally investigated for intentional crimes; (4) using the bribery money or goods for illegal activities; (5) refusing to confess the whereabouts of bribery money or goods or refusing to cooperate, causing failure of recovery; (6) causing bad effects or other serious consequences; or (1) having solicited bribes multiple times; (2) seeking unfair benefits for others, causing a loss of public wealth or major harm to the interests of the State and the people; (3) seeking a promotion or transfer of job position for others.)

[73] Zhixiao Guanli Tiaoli (直销管理条例) [Administrative Regulations on Direct Selling], (promulgated by State Council, Aug. 23, 2005, effective Dec. 1, 2005) art. 5, 6 (Lexis China Online).

[74] JSG Trading Corp. v. Department of Agric., 235 F.3d 608, 615 (2001).

[75] Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F. 3d 212, 221 (2nd Cir. 2004).

[76] *See* Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 2015, effective Aug. 29, 2015) art. 164 (Lexis China Online).

4. Extraterritorial Jurisdiction

The Travel Act prohibits the use of foreign travel for criminal acts. Through the Travel Act, the U.S. state commercial bribery laws obtained extraterritorial jurisdiction.

Commentators have called for adding extraterritorial jurisdiction to the AUCL.[77] The Anti-Monopoly Law, which took effect in 2008, gives very clear extraterritorial jurisdiction to the statute, which covers foreign monopolistic practices that have the effect of eliminating or restricting Chinese market competition."[78] However, the Draft Amendment to the AUCL does not include such language. Given that more and more Chinese companies commit commercial bribery or other unfair competition activities abroad,[79] jeopardizing the fair competition or customers' interest in China, the legislator should consider adding similar language to the AUCL.

5. Books and Records

While the commercial bribery statutes in the U.S. do not regulate accounting violations, Section 13 of the *Securities Exchange Act* of 1934 requires all the registered issuers to make and keep books, records, and accounts, which "in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." A violation of this requirement is often prosecuted under the FCPA.[80] "Registered issuers" refers to issuers who trade securities on a national securities exchange.[81]

Article 7(2) of the Draft Amendment provides that any payment of economic benefits, if not reflected in the books and records, is commercial bribery. It draws no distinction among listed, private, large or small companies.

The language is not clear as to whether the offense under Article 7(2) also requires proof of the "intent" element, i.e. "to seek a transaction-related opportunity or a competitive advantage for the business operator," which is included in the general definition of "commercial bribery," or alternatively, it intends to regulate any

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[77] Chu Zhenbo (初振波), *Qianxi Fan Buzhengdang Jingzheng Fa zhong Cunzai de Yixie Wenti* (浅析《反不正当竞争法》中存在的一些问题) [*A Brief Analysis of Some Problems in Anti-Unfair Competition Law*], 1 JINGJISHI (经济师) [CHINA ECONOMIST] 93 (2015).

[78] Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Dec. 1, 2008) art. 2 (Lexis China Online) ("This Law is applicable to monopolistic practices as part of economic activities occurring within the People's Republic of China. This Law is also applicable to monopolistic practices outside of the People's Republic of China which have the effect of eliminating or restricting Chinese market competition.").

[79] Yang Yichen (杨毅沉) et al., *Shuwanyi Jingwai Guoyou Zichan Jianguan Diaocha: Qiye Haiwai Xinghui Shang Heimingdan* (数万亿境外国有资产监管调查：企业海外行贿上黑名单) [*Regulatory Study on Trillions of Offshore Yuan: Enterprises Are on the Blacklist for Foreign Bribery*], XIN SHANGYE RIBAO (新商业日报) [NEW BUSINESS DAILY], (May 4, 2015), http://www.nbd.com.cn/articles/2015-05-04/913418.html.

[80] Securities Exchange Act of 1934 § 13 (b)(2)(B), 15 U.S.C. § 78m(b)(2)(B) (2012).

[81] Securities Act of 1933 § 2(a)(4), 15 U.S.C. § 77B(a)(4) (2012).

accounting violation, e.g., any mis-categorized payment without a corrupt intent. In effect, SAIC and the AUCL may not have jurisdiction over purely accounting violations, which are governed by other statutes, e.g., *Accounting Law* and *Regulations on Business Enterprise Financial Reporting*.

Therefore, the legislative intent is presumably targeting the hiding or mis-categorization of corrupt payment only, not any payment. In this case, Article 7(2) is redundant, since making a corrupt payment is already commercial bribery under the definition, and failing to record such payment does not add anything.

It is understandable though, that SAIC wants to add Article 7(2). Given SAIC's own experience, accounting violations are frequently an indication of commercial bribery. Imposing penalties on accounting violations under the commercial bribery statute may encourage companies to keep proper books and records. It may also make it easier for SAIC to discover unlawful payments. However, the proposed draft runs the risk of imposing undue burden to business operators, especially small companies. Expenses for compliance with the record and book keeping requirements could be high.

A more sensible approach would be to use more flexible language, leave more discretion to SAIC, and give more guidance as to the level of details of the payments. For example, it may include language such as "reasonable detail," as in the *Securities Exchange Act*. It could also stay consistent with the requirements under the *Accounting Standards for Business Enterprises - Basic Standards (2016)*, which requires that accounting information shall reflect all "important transactions or events" that relate to its financial position, operating results and cash flows.[82]

C. Bribery Involving Public Service

The Draft Amendment broadened the definition of "business operators" to include private entities engaging in public service or public service entities, such as public schools, public hospitals, etc., and Article 7(1) specifically proscribes business operators from soliciting bribes in the performance of public service.[83] This provision has its counterpart in U.S. federal criminal law.

Under 18 U.S.C. §§666 (a)(1) & (2), soliciting or demanding and giving or offering a bribe in connection with non-governmental agencies receiving annual federal funds of $10,000 or more is a

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[82] Qiye Kuaiji Zhunze Di 30 Hao – Caiwu Baobiao Liebao (企业会计准则第30号-财务报表列报) [Accounting Standards for Business Enterprises Interpretation No.30 – Presentation of Financial Statements] (issued by the Ministry of Finance of People's Republic of China, Caikuai [2014] No.7) (last visited Mar. 30, 2016), http://kjs.mof.gov.cn/zhengwuxinxi/zhengcefabu/201401/P020140128570074843379.pdf.

[83] *Draft Amendment*, *supra* note 2.

federal crime.[84] The Department of Justice must also prove that the bribe-giver acted corruptly with the intent to influence or be influenced in connection with the transaction,[85] and that the transaction had a value more than or equal to $5,000.[86]

D. Other Relevant Statutes

The following statutes, among others, have also been used to combat commercial bribery in the United States:

For example, RICO is usually used to combat systematic and more serious organized crimes, including commercial bribery. Different from the Travel Act, it requires that the accused participated in the operation of an enterprise through "a pattern of racketeering activity."[87] Racketeering activity includes "bribery…. which is chargeable under state law and punishable by imprisonment for more than one year."[88] A pattern is established by proving that the defendant committed two or more illegal acts of the type associated with organized crimes.[89]

Commercial bribery cases are also prosecuted under the *Mail and Wire Fraud Act* ("Mail Fraud Act"). The Mail Fraud Act targets fraudulent transactions, which requires elements of "(1) a scheme to defraud, which includes a scheme to deprive another of the intangible right of honest service; (2) an intent to defraud; and (3) use of the mails or wires in furtherance of the scheme."[90] Although mostly used to prosecute public officials who take bribes, courts have held that a purely commercial bribery scheme also constitutes "a scheme to defraud", if the bribe recipient misuses his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty is owed.[91]

Section 2(c) of the *Robinson – Patman Act* proscribes the payments of brokerage fees, commissions, and other compensation to an agent or intermediary of the counterparty in relation to the sale of goods.[92] Courts have held that the Act prohibits bribery in the sale of goods.[93] Although the major enforcement agency of the *Robinson-Patman Act* is FTC, commercial bribery conduct violating Section 2(c) has usually been used in private actions brought by an

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[84] 18 U.S.C. § 666(a)(1) (2012).
[85] *Id*.
[86] 18 U.S.C. § 666(a)(2) (2012).
[87] 18 U.S.C. § 1962(c) (2012).
[88] 18 U.S.C. § 1961(1)(A) (2012).
[89] United States v. Riccobene, 709 F.2d 214, 226-227 (3d Cir. 1983).
[90] United States v. Sloan, 492 F. 3d 884, 890 (7th Cir. 2007).
[91] *See* United States v. Hausmann, 345 F.3d 952, 957 (7th Cir. 2003).
[92] Robinson-Patman Act, 15 U.S.C. §13(c) (2012).
[93] *See* Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245, 246 (4th Cir. 1983); Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 696 (9th Cir. 1976); Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 214 (2d Cir. 2004).

injured party.[94] Similarly, Section 1 of the *Sherman Act*, which prohibits the formation of combinations and conspiracies in restraint of trade,[95] has frequently been used to bring private actions for commercial bribery violations.[96]

IV. CONCLUSION

Proposed changes have been made to the commercial anti-bribery provisions in articles 7 and 20 of the Draft Amendment to better adapt to the growth of the Chinese economy, to conform to other overlapping legislations and to provide more clear enforcement guidance to the enhanced anti-corruption efforts by the government. Compared to the current AUCL, the Draft Amendment also broadens the scope of what constitutes a commercial bribery offense to include a corrupt payment made to any party, and for the first time makes it clear that a business operator engaged in non-profit business may be held liable for commercial bribery the same as for-profit business operators.

The proposed language in Article 7 of the Draft Amendment is similar to what has been adopted in the U.S. commercial bribery laws. There are still a few differences between the U.S. practice and Article 7, some of which may be taken into consideration by the legislator in the next draft:

First, the burden of proof of the offense under the Draft Amendment needs clarification. Currently many courts apply a "beyond reasonable doubt" standard to cases involving jail time or confiscation of large amounts of personal property and a "preponderance of evidence" standard to administrative judgments in other cases, but some do not follow this practice.

Second, further clarification and amendments are required to better address the relationship between employees and employers in a commercial bribery context. For example, an employer's vicarious liability should be established before being held liable. Clearer guidance on affirmative defense or mitigating factors for the employer's liability needs to be provided and applied equally to both the bribe giver's as well as recipient's employer.

Third, an employee's liability, when the bribe amount is relatively small, is addressed in neither the Draft Amendment nor the *Criminal Law*. Adding a provision to such effect would close or at least reduce the loophole.

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[94] *See Id.*; *JSG Trading Corp.*, 235 F.3d at 615.

[95] Sherman Act § 1, 15 U.S.C.§ 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce along the several states, or with foreign nations, is declared to be illegal.").

[96] Fed. Prescription Serv., Inc. v. Am. Pharm. Asso., 663 F.2d 253, 266 (D.C. Cir. 1981).

Fourth, the legislation should draw a distinction between legitimate commercial promotional behavior and bribery. Whether or not the employer of the bribe recipient consents to the gift is an important differentiating factor. For example, when a private company consents to a gift received by its employees, even though the giver's intention may be to seek competitive advantage, it may be considered a form of legitimate discount, not a bribe.

Fifth, one of the main purposes of the AUCL is to limit the ability of business operators to compete unfairly by the use of bribery. Considering that more and more Chinese companies are competing for business overseas, the inclusion of extraterritorial jurisdiction would be appropriate.

Finally, with regards to Article 7(2) which requires companies to record economic benefits received or given, there is no qualification as to the size of the company or guidance as to the level of detail of the book keeping requirements which can put smaller companies at a disadvantage due to the high cost of compliance. Leaving more discretion to SAIC and conforming to already established accounting standards would be more sensible.