

Client Alert.

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China Outlaws Bribery Overseas

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China has joined a growing number of countries that are implementing new criminal laws to prohibit payment of bribes to foreign officials. In doing so, China is seeking to encourage good behavior among the growing number of Chinese companies doing business overseas.

On February 25, 2011, the Standing Committee of the National People's Congress passed the Eighth Amendment to the PRC Criminal Law (the "Eighth Amendment"), which took effect on May 1, 2011. Article 29 of the Eighth Amendment criminalizes, for the first time under PRC law, paying bribes to foreign government officials and to officials of international public organizations (the "Foreign Bribery Provision"). The Foreign Bribery Provision brings China's anticorruption laws into closer alignment with those in other countries, most notably the United States Foreign Corrupt Practices Act ("FCPA").

To date the Chinese government has been more focused on addressing domestic bribery of officials who accept bribes, rather than those parties who pay them.

THE FOREIGN BRIBERY PROVISION

Article 29 of the Eighth Amendment adds the following provision to the existing Article 164 of the PRC Criminal Law:

"Whoever, for the purpose of seeking an improper *commercial* benefit, gives money or property to any *foreign* public official or official of an *international* public organization shall be punished in accordance with the provisions of the preceding paragraph." "The preceding paragraph" refers to existing language in Article 164 that criminalizes commercial bribery.

Under the Criminal Law of the PRC, these provisions apply to (i) any person/entity who engages in bribery within China; and (ii) PRC citizens and legal entities organized under PRC law, including foreign invested enterprises established in China, who engage in bribery anywhere in the world.

INTERPRETATION

The Foreign Bribery Provision is brief and lacks definitions of a number of key terms. The provision's impact will, therefore, depend heavily on interpretive guidance to be issued by the Supreme People's Court and the Supreme People's Procuratorate in the future.

Improper Commercial Benefit

For example, payments are only prohibited if they are in exchange for "an improper *commercial* benefit." The Foreign Bribery Provision appears on its face to supplement the existing provision of Article 164 prohibiting commercial bribery. The existing provision prohibits "giving money or property" for the purpose of "seeking an improper benefit." In contrast, the Foreign Bribery Provision prohibits "giving money or property" for the purpose of seeking "an improper *commercial*

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benefit.” Whether there is any substantive difference between “a benefit” and “a commercial benefit” remains to be seen. In cases where the existing prohibition against commercial bribery has applied, “benefit” has been interpreted broadly, and the term “improper benefit” has been interpreted to include any benefit obtained through a violation of any law, administrative regulation or rule, or policy or by requiring the opposite party to provide aid or convenience in violation of any law, administrative regulation or rule, policy, or industrial norm. Generally speaking, in commercial dealings such as public tenders and government procurements, giving money or property to a person in charge of such activities in violation of the principle of fairness so as to secure a competitive advantage is also interpreted to be within the meaning of “for any improper benefit.”

This broad reading is similar to case law interpreting analogous elements under the FCPA. Although the FCPA only prohibits payments intended to “obtain or retain business,” the courts have essentially held that securing any competitive advantage – such as a reduction in taxes or customs duties – is a means of obtaining or retaining business.

Payment

In other respects, however, the text of the Foreign Bribery Provision appears to be narrower than the FCPA. For example, it is generally understood from statutory provisions that the existing prohibition against commercial bribery prohibits only the actual payment and not merely offers or promises (or even authorization thereof) to pay. In contrast, the FCPA expressly prohibits the offer, promise, or authorization of a corrupt payment intended to obtain or retain business.

Money or Property

At first blush, the Foreign Bribery Provision appears narrower than the FCPA in another respect as well. The Foreign Bribery Provision prohibits the giving of “money or property” to any foreign public official, whereas the FCPA prohibits the giving of “anything of value.” However, according to a judicial interpretation issued by the Supreme People’s Court and the Supreme People’s Procuratorate on November 20, 2008, the term “money or property” used in connection with commercial bribery provisions of PRC law includes not only money and property in kind, but also property whose value may be calculated in monetary terms, such as provision of home decoration, membership cards having monetary value, token cards (again having cash value), and travel expenses. Although this interpretation is broader than a reading of the text may indicate, it is still not as broad as the “anything of value” element in the FCPA. Under the FCPA, for example, hiring a family member of a foreign official or donating to a charity connected to a foreign official can constitute a corrupt payment, even if the foreign official receives no quantifiable, monetary benefit him or herself. It is too early to predict whether PRC courts will interpret “money or property” similarly to the way “anything of value” is interpreted under the FCPA.

Facilitating Payments and Reasonable, Bona Fide Expenditures

Unlike the FCPA, the Foreign Bribery provision does not contain an exception for “facilitating payments,” that is, payments to expedite or secure the performance of a routine governmental action, such as providing a visa or delivering the mail, are permitted under the FCPA. “Reasonable and bona fide expenditure[s]” directly related to the promotion or demonstration of a company’s products or services, such as travel costs for foreign officials to visit the company’s facilities, are also permitted under the FCPA. Given the culture of hospitality prevalent in China, it is possible that modest payments for meals, entertainment, and gifts often seen as falling within the FCPA’s “reasonable and bona fide expenditures” affirmative defense will be interpreted as not being “for the purpose of seeking an improper commercial

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benefit.” In addition, Chinese companies have a large presence in developing countries in sub-Saharan Africa and elsewhere, where facilitating payments are often seen as necessary for conducting business. It will therefore be interesting to see whether such payments are interpreted as falling within the scope of the Foreign Bribery Provision.

ENFORCEMENT

The effectiveness of the Foreign Bribery Provision will depend on its enforcement. On April 11, 2011, an article on this provision appeared on the news portal of the Communist Party of China (<http://fanfu.people.com.cn/GB/14359776.html>), stating that the prevention of corrupt practices overseas is a priority, not only of the government, but of the Party itself. The article voiced concerns over enforcement, noting in particular that while China’s existing antibribery provision prohibited foreign companies from bribing Chinese government officials, China has historically rarely taken action against foreign companies paying bribes, and instead has focused primarily on government officials accepting them. The article also notes that the United States has been more active than China in taking actions against U.S. companies making bribes in China.

Despite China’s history of lax enforcement noted in the article described above, the Chinese government has recently begun to make greater enforcement efforts with regard to those who make bribes in China. It remains to be seen, however, whether the Chinese government will focus those same efforts on entities and persons making bribes outside China pursuant to the Foreign Bribery Provision.

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