

The logo for K&L GATES, featuring the text "K&L GATES" in white, uppercase letters on a dark red rectangular background. The background of the entire slide is a blue bokeh effect with light spots.

K&L GATES

K&L Gates Presents:

**"Recent Anti-Bribery  
Allegations: A China  
Case Study"**  
Handout Materials

Presented on July 26, 2013

# Our Experience



## Anti-Corruption - Asia Pacific Competencies

K&L Gates' Anti-Corruption practice stands out for its depth of experience and its geographic reach. Indeed, geographic reach is a big part of why anti-corruption compliance has become the subject of increasingly urgent focus for the companies we serve.

As our clients' businesses grow and prosper in emerging jurisdictions with less-developed rule of law, yet with heavy regulation of economic activity, they find themselves facing heightened corruption risk in their business dealings. The source of that risk is not limited to their home jurisdiction. With increased international collaboration and cooperation among anti-corruption agencies in different countries, enforcement risk can now arise from the United States, the United Kingdom, Australia, and Germany, or local enforcement agencies on the ground in the Asia Pacific region. A common element in many of the engagements we handle is the multi-jurisdictional aspect of matters requiring consideration of complex facts intersecting with sometimes contradictory regulatory requirements. Faced with this amplified threat, our clients have turned to K&L Gates' Anti-Corruption team because of our experience and the breadth of our practice.

- More than 60 of our lawyers have handled FCPA, Bribery Act and other international anti-corruption matters—some for more than 20 years.
- Our Anti-Corruption team includes former high-ranking officials of the U.S. Securities and Exchange Commission and the U.S. Department of Justice, including Dick Thornburgh, who served as Attorney General of the United States.
- We have Anti-Corruption lawyers in 17 of our offices, in North America, South America, Europe, Asia, Australia, and the Middle East. We have handled matters involving every part of the world, with real on-the-ground experience in Africa, Latin America, the Middle East, Europe, South Asia, East Asia, and Australia.
- Reflecting the depth of our on-the-ground knowledge, TRACE International has appointed K&L Gates as its partner law firm for China.

Collectively, we represent or have represented clients on anti-corruption matters that have involved countries including:

|                   |                      |
|-------------------|----------------------|
| Albania           | Lebanon              |
| Algeria           | Libya                |
| Angola            | Lithuania            |
| Argentina         | Malaysia             |
| Australia         | Mexico               |
| Azerbaijan        | Netherlands          |
| Bangladesh        | Nigeria              |
| Bolivia           | Oman                 |
| Brazil            | Pakistan             |
| Canada            | Papua New Guinea     |
| Chile             | Philippines          |
| China             | Poland               |
| Colombia          | Romania              |
| Congo             | Russia               |
| Egypt             | Saudi Arabia         |
| Equatorial Guinea | Serbia               |
| Fiji              | Singapore            |
| France            | South Africa         |
| Gabon             | South Korea          |
| Germany           | Taiwan               |
| Ghana             | Thailand             |
| Greece            | Turkey               |
| Hong Kong         | Turkmenistan         |
| India             | Ukraine              |
| Indonesia         | United Arab Emirates |
| Iraq              | United Kingdom       |
| Israel            | United States        |
| Italy             | Venezuela            |
| Japan             | Vietnam              |
| Jordan            | Yemen                |
| Kazakhstan        | ... and more         |
| Kenya             |                      |
| Kuwait            |                      |

## Why K&L Gates?

- Our Robust Asia Pacific Platform – We have more than 350 lawyers based in China, Australia, Korea, Japan, Taiwan, and Singapore to serve our clients.
- Our Global Interconnections – Whether a whistleblower in China reports corruption allegations to headquarters in the United States or a global oil services company wishes to conduct due diligence for a target in an acquisition spanning Asia, as well as Africa and the Middle East, our team draws on our familiarity with business practices, legal systems and market reputation to provide synthesized, integrated and savvy advice to protect and advance our clients' interests.
- Our Reputation – The annual *U.S. News-Best Lawyers* "Best Law Firms" survey recognized K&L Gates with 202 total first-tier rankings. Rankings included 33 national first-tier rankings, 169 first-tier rankings in 19 metropolitan and state areas, and the national "Law Firm of the Year" distinction for Environmental Law. This is the third straight year K&L Gates has been ranked among the top two law firms with the most first-tier rankings. One of our partners has been recognized as a leading practitioner in China anti-corruption work, having been ranked as Band 1 by *Chambers Asia Pacific* in its Dispute Resolution: Anti-Corruption listing.
- Our Cost Effectiveness – We seek to reduce and manage our clients' budget concerns through preparation of carefully considered cost projections, setting out estimated time scales and costs. Our geographic scope enables us to structure our teams so as to ensure that cases are handled as efficiently as possible.

## Areas of Practice

### Internal Compliance Policies and Procedures

Our lawyers can help to ensure that your organization has in place a rigorous and effective anti-bribery compliance program that takes into account the various legal regimes applicable to your organization's operations. We can work with your HR and legal team members to refine your employment contracts and policies to support your company's compliance aims. In countries with employee-protective employment regulations, this can be a vital link in your overall compliance program. Besides preventing and detecting violations, comprehensive and appropriate compliance policies and procedures will help protect against the likelihood that an enforcement agency will initiate an investigation, and existence of a robustly active program may result in lesser sanctions should violations be uncovered. Using employment tools that take into account each jurisdiction's labor regulatory scheme, we can support your company's ability to take appropriate disciplinary measures should wrongdoing occur.

### International Business Transactions

Our lawyers deal on a regular basis with the anti-bribery issues that arise from international business operations, particularly in the context of M&A transactions and foreign agent relationships. We can help to mitigate the risk to your organization of anti-bribery liability when buying or selling assets, whether through the due diligence process in an acquisition, as part of an internal review prior to a sale or by developing mechanisms for promoting ongoing good governance objectives in the operation of the business. In addition, we can help you to avoid the compliance risks that may arise from the use of foreign commercial agents or advisors, and advise on controls to mitigate those risks.

### Internal Corporate Investigations

K&L Gates frequently conducts internal corporate investigations into possible anti-bribery violations on behalf of management, audit committees, or other interested parties. These investigations often require substantial resources and unique skills, including the ability to conduct a broad inquiry within a short time frame and to

do so taking into account vital local law considerations, such as data privacy, "state secrets" and threats of local enforcement actions. Our experience in conducting such investigations ensures that our clients' strategic interests with respect to attorney-client privilege, multiple jurisdiction enforcement risks, hostile witnesses, voluntary disclosure, and other relevant issues are fully considered.

### Enforcement Proceedings

Enforcement proceedings today frequently involve consideration of multiple agencies and regulatory regimes. We possess experience advising clients on anti-corruption enforcement matters involving not only the U.S. Department of Justice, the U.S. Securities and Exchange Commission, the UK Serious Fraud Office, the UK Financial Conduct Authority (and its predecessor, the Financial Services Authority), and the Australian Federal Police but also local enforcement agencies at the provincial, city, and district levels.

Should a local law enforcement action or violation also necessitate consideration of voluntary disclosure or an enforcement action in the United States, the United Kingdom, or Australia our extensive experience in those jurisdictions is a valuable resource. Our internationally recognized government enforcement and white collar defense practice has represented clients in a number of FCPA enforcement proceedings before the Department of Justice and the Securities and Exchange Commission, and in related grand jury proceedings. We regularly advise clients on whether to voluntarily disclose potential FCPA issues; assist in determining whether SEC public disclosure is warranted; and vigorously defend clients in enforcement proceedings that may arise from alleged FCPA violations.

With respect to UK law matters, our Anti-Corruption team regularly represents clients facing prosecution by the Serious Fraud Office and the UK Financial Conduct Authority (and its predecessor, the Financial Services Authority), and the intersecting concerns arising under the UK Bribery Act and the Proceeds of Crime Act are matters with which we are able to give well-considered and insightful guidance.

## Representative Matters

Represented a U.S. industrial company in an FCPA investigation of its foreign affiliate's payments to Asian government officials and its subsequent voluntary disclosure to SEC and DOJ.

Managed FCPA and fraud investigation for audit committee of China-based company listed on U.S. stock exchange that was the subject of an SEC enforcement proceeding.

Advised a major Asian pharmaceutical company potentially subject to the FCPA on conducting an internal investigation into possibly improper sales practices in its China business and on a PRC enforcement action.

Represented a manufacturing company in the most significant investigation ever conducted by Australian law enforcement officials in connection with bribery of foreign officials in several developing countries in Asia and Africa.

Acted as outside FCPA counsel to a publicly traded U.S. transportation and logistics company with extensive operations in Asia, Europe and North America. We have assisted this client in preparing FCPA compliance policies and procedures, conducting FCPA training of employees in Singapore, Malaysia, India and China, and preparing presentations for the board of directors on FCPA compliance. We also provide ongoing counseling and advice with respect to FCPA and related anti-corruption issues.

Advised an oil company in relation to concurrent criminal investigations concerning bribery of senior public officials in Papua New Guinea, Solomon Islands and Palau, including conduct of multi-jurisdictional investigations and successful negotiations with all prosecuting authorities.

Provided FCPA advice to one of the world's largest charitable organizations with extensive operations in Africa, Asia and the Middle East. We provide ongoing counseling with respect to agent due diligence, interactions with government officials, and related matters.

Advised U.S. companies on FCPA issues, including developing FCPA compliance policies and conducting employee training programs, in connection with acquisitions of or investments in companies based or operating in China.

Advised a livestock carrier in relation to potential criminal liability arising out of alleged bribery of Customs officials in Indonesia.

Conducted anti-corruption-focused diligence of the target and its agents in five jurisdictions as part of a \$700+ million merger in the oilfield services/production sector.

Advised a company subject to the UK Bribery Act and the FCPA, as well as PRC anti-bribery laws/regulations on the conduct of an internal investigation and analysis of whether to withdraw from a public bid to a major Chinese SOE in light of relevant legal considerations of these various jurisdictions.

Assisted one of the largest shipping agencies in the world with the investigation of bribery and related unlawful conduct by its joint venture partner and advised the shipping agency of its potential criminal liability and contractual rights in relation to the unlawful conduct.

## Representative Matters

Counseled a world-leading computer hardware and technology company on various China compliance issues, including advising on FCPA implications of a potential joint venture with an SOE in a highly regulated sector and on integrating PRC employment practices to support discipline in instances required for FCPA compliance.

Acted for the Australian subsidiary of an international freight forwarder in a civil dispute concerning the dissolution of a joint venture in Fiji due to alleged bribery of officials and other corrupt activities by senior employees of the freight forwarder.

Advised a publicly listed manufacturer of equipment used in the aviation industry on an investigation of potential FCPA violations by its distributors in connection with travel by PRC regulators to Europe.

Represented a world-leading chemical company in conducting an investigation of its local agent responsible for liaising with a local Public Security Bureau in China to handle an anti-counterfeiting administrative procedure to determine whether the agent's conduct may have violated the FCPA.

Conducted an anti-corruption due diligence investigation in light of U.S. FCPA and PRC official and commercial bribery considerations for an M&A transaction involving a publicly traded U.S. apparel company and a major consumer goods distributor in the PRC.

Advised and assisted Japanese clients involved in overseas commercial, regulatory, criminal or any other disputes (including, but not limited to, anti-trust/FCPA investigation conducted by U.S./E.U./Australian authorities).

Represented a global agribusiness company in connection with establishment of anti-corruption programs in several developing countries.

Conducted anti-corruption focused due diligence for an Australian engineering firm entering into a joint venture partnership with the Argentinian Ministry of Defense.

Developed corporate governance programs aimed at preventing bribery and corruption for a global electronics company based in Australia.

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Learn more about our Anti-Corruption practice at [klgates.com](http://klgates.com).

### Contacts:

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# Our Lawyers



## Amy L. Sommers

Partner

### Shanghai

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### OVERVIEW

Amy L. Sommers has significant experience with corporate structuring, governance and operations issues in China including FCPA and anti-bribery compliance, customs and other government investigations. She also counsels clients on various real estate investment and development issues. In the FCPA, anti-bribery areas, she has conducted FCPA-specific due diligence, counseled clients on investigations, and developed innovative tools for monitoring 'corporate health.'

K&L Gates is honored to serve as the China partner firm for TRACE International and Ms. Sommers acts as the primary responsible partner for that undertaking. Ms. Sommers is a Vice-Chair of the International Anti-Corruption Committee of the American Bar Association (ABA) Section of International Law. Previously, she served as a Chair of the China Law Committee of the ABA Section of International Law from 2004-07; in 2006-07 the China Committee received the Section's "Best Overall Committee Award". In 2007 the Shanghai Arbitration Commission formed a Shanghai Financial Arbitration Centre, which will handle resolution of banking- and finance-related commercial disputes, and asked Ms. Sommers to serve as one of 14 foreign arbitrators available to decide disputes. She served as Vice Chair of the Legal Committee of the American Chamber of Commerce Shanghai in 2007-08 and is a former Chair of the Real Estate Committee (serving from 2008-2010).

As a recognized authority on PRC anti-corruption/FCPA compliance issues in China, Ms. Sommers is a frequent author and interviewee on this subject. *Compliance Week* interviewed Ms. Sommers in April 2011 for an article "China Passes Anti-Bribery Law." The April 2009 issue of *Counsel-to-Counsel* magazine published an interview with Ms. Sommers titled "Assisting international companies in their fight against corporate corruption."

### PRESENTATIONS

FCPA work by its nature is quite sensitive and does not lend itself to listings of representative engagements. In terms of speaking engagements on **anti-corruption and FCPA** issues, recent examples include:

- At the "2012 Year-End SEC Conference: An Accounting and Reporting Update for US Listed Companies" held in Beijing in December 2012, Ms. Sommers was a co-presenter on the topic of "Conducting 10A Investigations".
- TRACE International invited Ms. Sommers to be a panelist on "**Successful Cross-Border Investigations**" for its **Global In-house Antibribery Network Conference** in Washington, D.C. in April 2012.



## Amy L. Sommers (continued)

- At the World-Check & Ethisphere Symposium: “**Anti-Corruption in China**,” Ms. Sommers was a speaker in December 2011.
- Presenter at the **China Workshop** given as part of the “**26th Annual FCPA Conference**” in Washington, D.C. in November 2011.
- Ms. Sommers was a panelist at the Strafford Publications’ webinar “**New Chinese Anti-Corruption Law Amendment and the FCPA**” in August 2011.
- In December 2010, Ms. Sommers acted as a co-presenter with John Auerbach of Ernst & Young’s Forensics Group on a presentation to the American Chamber of Commerce – Shanghai’s members on “**Understanding Local Anti-Corruption Trends: Operational Considerations**”.
- At the 3<sup>rd</sup> China Summit on Anti-Corruption in June 2010, Ms. Sommers was a panelist on the topic “**Minimizing Bribery Risks in Public Procurement Contracts**” and together with Alexandra Wrage of TRACE International, presented a workshop on “**Monitoring and Auditing Your Business Relationship: Tiered Due Diligence in Practice**”.
- Starting in 2007 through to 2012, Ms. Sommers served as a panelist on the topic “**Foreign Corrupt Practices Act in China: Strategies Given China’s Unique Cultural and Governmental Intricacies**,” telephonic continuing legal education seminars offered by Strafford Publications to lawyers and in-house counsel for major corporations throughout the United States.
- Ms. Sommers gave a workshop on “**The Fundamentals of FCPA Compliance: The US Foreign Corrupt Practices Act Demystified**” to the 2<sup>nd</sup> China Summit on Anti-Corruption in June, 2009.
- At the 21st National Conference on the Foreign Corrupt Practices Act in New York in March 2009, Ms. Sommers gave a workshop on “**Overcoming FCPA Compliance Challenges in China**”.
- At the China Summit on Anti-Corruption in Shanghai in July 2008, Ms. Sommers was a panelist for the session on “**Joint Ventures with State-Owned Entities: How to Manage Risk**”.
- In June 2008 Ms. Sommers acted as a co-presenter at a workshop offered as part of the Third European Forum on Anti-Corruption on “**Overcoming Anti-Corruption Compliance Challenges in China**”.

## PUBLICATIONS

- Co-author, “FCPA and other Anti-Corruption Concerns Facing Sovereign Wealth Funds” *The Sovereign Wealth Fund Bulletin*, April 2012.
- *Getting the Deal Through* Anti-Corruption Regulation 2012 (Law Business Research Ltd, 2012), co-author China chapter.
- Co-author, “Anti-bribery Enforcement with Chinese Characteristics: Not All Official,” 25 No. 22 *Westlaw Journal Government Contract* 1, March 5, 2012.
- Co-author, “Anti-Corruption Compliance,” *Well Servicing Magazine*, May/June 2011.

## Amy L. Sommers (continued)

- “企业如何面对美国海外反腐” (“How Companies Can Deal with America’s Anti-Corruption Efforts”), ” *China Reform (中国改革)*, August 2010
- "Managing Potential Corruption in China," Counsel-to-Counsel, January 2006

### ADMISSIONS

Washington

### EDUCATION

J.D., University of Washington, 1991

Inter-University Program for Chinese Language Studies, 1989 - 90

B.A., University of Washington, 1986 (with distinction)

### ACHIEVEMENTS

Chambers & Partners – Asia Pacific 2012 has recognized Ms. Sommers as “Notable Practitioner,” where she was described by peers and clients alike as “*terrific, very experienced and well connected at a global level ....*” In addition, Ms. Sommers was awarded the Expatriate Professional Women's Society of Shanghai's 2007 Businesswomen Award in the category of Professional Excellence, in part for recognition of her work in helping create stronger ties between the U.S. legal profession and China's growing profession.

### LANGUAGES

- English - native
- Chinese (Mandarin) - fluent



## Matt T. Morley

Partner

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### OVERVIEW

Matt Morley assists clients in responding to investigations by law enforcement authorities and regulatory agencies, and counsels them on complying with the federal securities laws and other regulatory requirements. Mr. Morley also works with companies in developing and implementing corporate compliance programs. His practice concentrates on SEC Enforcement matters, the Foreign Corrupt Practices Act, and internal inquiries regarding potential misconduct by corporate personnel.

Mr. Morley's representations include:

- Defending a Fortune 50 financial institution in connection with an SEC investigation of alleged fraud in the sale of mortgage-backed securities.
- Defending and resolving SEC charges against a registered investment adviser in connection with a mutual fund's approval of management fees.
- Leading an internal investigation of potential FCPA violations relating to the sale of energy infrastructure equipment in the Middle East
- Counseling on the design of a worldwide anticorruption compliance program for a Fortune 100 company.
- Defending various individuals under investigation for aiding and abetting federal securities law violations.
- Representing a former senior executive of an international logistics company in an internal investigation of corrupt payments.
- Defending hedge funds, law firms, and senior executives against insider trading allegations.
- Making a voluntary disclosure of potential FCPA violations to federal criminal and civil authorities, and settling related SEC charges.
- Leading an internal review of potential FCPA violations by personnel of a financial services joint venture in Asia.
- Defending investment advisers in market timing and late trading investigations by federal and state authorities.
- Representing senior insurance executives in federal investigations relating to finite risk insurance.

## Matt T. Morley (continued)

- Representing a major investment bank in the Global Research Analyst Settlement.

### PROFESSIONAL BACKGROUND

Prior to joining K&L Gates in 2008, Mr. Morley was a co-managing partner of the Washington, DC office of a U.S. law firm.

### PRESENTATIONS

- Financial Controls to Support Anti-Corruption Compliance, ACI Summit on Anti-Corruption, Abu Dhabi, January 2012
- Navigating the Dodd-Frank Whistleblower Rules, Financial Markets Association Conference, Washington, D.C., October 2011
- Responding to Bribe Solicitations, ACI Summit on Anticorruption, Abu Dhabi, December 2010
- Dodd-Frank's Whistleblower Provisions: Tips to Minimize Your Risks, K&L Gates Webinar, November 2010
- Transatlantic Deals and Disputes: FCPA Considerations, ABA/DAV joint program, Frankfurt, June 2010
- Subprime and Credit Crisis Issues, Accountants' Liability: Litigation and Issues in the Financial Crisis (ALI-ABA), Boston, July 2010
- Reducing Financial Statement Fraud Risks: Ten Things You Need To Know, Deloitte Risk Intelligence Dbriefs webcast, February 2010

### SELECTED CLIENT ALERTS AND PUBLICATIONS

- "8 Questions Directors and Senior Management Should Ask About Their Company's Anticorruption Compliance Efforts," *Corporate Compliance Insights*, July 2012
- *UK Bribery Act: What Non-UK Companies Need to Know*, K&L Gates Client Alert (March 31, 2011, with Robert V. Hadley, Laura Atherton and Brian F. Saulnier)
- *A Smaller SEC Enforcement Program*, K&L Gates Global Government Solutions 2011 Annual Outlook (January 2011, with Stephen J. Crimmins)
- *The Year Ahead - Anticorruption Law*, K&L Gates Global Government Solutions 2011 Annual Outlook (January 2011, with Brian F. Saulnier and Robert V. Hadley)
- *Dodd-Frank's Whistleblower Bounties: An Effective Hotline May Keep You Out of Hot Water*, K&L Gates Government Enforcement Alert (September 7, 2010, with Michael J. Missal)
- *Investor Protection Provisions of the Dodd-Frank Act*, Harvard Law School Forum on Corporate Governance and Financial Regulation (July 11, 2010, with Kay A. Gordon and Stephen J. Crimmins)

## Matt T. Morley (continued)

- *Reducing FCPA Risks for Pharmaceutical and Medical Device Companies Through Cost-Effective Compliance Strategies*, FDLI Update Magazine, (September/October 2009, with Suzan Onel)
- *Financial Services Firms Face Increased Pressures on Anticorruption Compliance*, K&L Gates Foreign Corrupt Practices Act Alert, (April 30, 2009, with Jeffrey B. Maletta, Robert V. Hadley, Brian F. Saulnier, Matthew J. Fader, and Michael J. King)
- *The Foreign Corrupt Practices Act: US Legislation with Global Implications*, PLC's US Special Report (November 2008, with Dick Thornburgh, Edward J. Fishman, Michael J. Missal, and Jeffrey B. Maletta)

### **ADMISSIONS**

- District of Columbia
- New York

### **EDUCATION**

J.D., Yale Law School, 1983

B.A., Colgate University, 1978 (*magna cum laude*, Phi Beta Kappa)

# Additional Materials

July 22, 2013

*Practice Group(s):*

*Foreign Corrupt  
Practices Act/Anti-  
Corruption;*

*Government  
Enforcement;*

*Global Government  
Solutions*

## “Can You Sleep Well at Night?”: Multinational Executives Detained in China Due to Bribery Concerns

*By Amy L. Sommers, Matt T. Morley*

Any company doing business in China has to wonder whether they might find themselves in the unwelcome spotlight recently turned on certain participants in China’s pharmaceutical market. As has been widely reported, four senior Chinese executives of GlaxoSmithKline’s China operations have been placed under arrest for alleged bribery of public officials and medical personnel, and a fifth executive (and U.K. national) was reportedly prevented from leaving the country.

GSK has disputed the charges, noting that it had reviewed the allegations previously and found nothing to support them. According to press reports, a GSK spokesman said: “We take all allegations of bribery and corruption seriously. We continuously monitor our businesses to ensure they meet our strict compliance procedures. We have done this in China and found no evidence of bribery or corruption of doctors or government officials. However, if evidence of such activity is provided we will act swiftly on it.”

Gao Feng, the head of the economic crimes investigation unit of China’s national police agency, the Public Security Bureau (PSB), said that information had been uncovered suggesting that other pharmaceutical companies operating in China had engaged in similar conduct. He declined to identify them, telling reporters, “Whether they were engaged in illegal behavior, you can go interview them ... You just need to ask them one question: Can you sleep well at night?”

Even if the charges here prove to be completely unfounded or based on a misunderstanding, they provide a sharp reminder for companies operating in China (and elsewhere, for that matter) to pause and take stock of their efforts to avoid entanglement in corrupt activities. Chinese authorities have typically not prosecuted non-Chinese companies for violations of law involving corruption of public officials (although there have been numerous enforcement actions involving commercial corruption). However, these developments may signal the end of that era, or perhaps the beginning of an industry-wide enforcement sweep, much like those that U.S. anticorruption authorities have conducted with regard to the pharma, logistics and energy industries in recent years.

Virtually every company operating in international commerce is already well aware of the risks of becoming the target of law enforcement action by U.S. authorities under the Foreign Corrupt Practices Act (FCPA), and many of these companies refreshed their anticorruption compliance programs in response to the enactment of the U.K. Bribery Act of 2010. But many companies may not have devoted the necessary attention to the risk of law enforcement action by “local” authorities, such as China’s PSB. The PSB’s investigation is a clear warning that these anticorruption laws cannot be overlooked, at least with regard to China. As part of evaluating their potential exposure to these risks, it is important to keep the following ten points “top of mind.”

## “Can You Sleep Well at Night?”: Multinational Executives Detained in China Due to Bribery Concerns

1. **Maintain the correct focus.** Corporate anticorruption compliance programs have one core purpose that overshadows any other: *to stop company personnel and agents from making improper payments*. Success is measured by the impact on corporate conduct and not by merely ticking off items on a checklist. The remaining nine points below address the active application of compliance programs and companies should consider whether their programs are using these applications to achieve maximum impact.
2. **Internal investigations** of potentially corrupt activities may well be tested later on by law enforcement authorities reviewing the same facts. Companies rightfully place enormous significance on the thoroughness, objectivity and accuracy of these internal reviews, and need to pay close attention to the quality of these efforts while controlling the expense and time that they require.
3. **Risk assessment.** “Commercial” bribery, that is, bribery between parties to a business transaction, carries risks that may be as significant as those related to public corruption. Those risks are particularly acute for foreign companies operating in China. In recent years, our experience has been that non-Chinese companies face much higher risks of prosecution by Chinese authorities for commercial bribery than with regard to bribes of public officials, whereas Chinese law enforcement has tended to focus on recipients rather than providers of improper payments.
4. **Internal reporting channels.** Although “whistleblower” mechanisms pose particular challenges in the Chinese environment because of cultural reluctance to use them, their importance cannot be overestimated. A channel for company personnel to raise concerns about potentially improper conduct provides [an opportunity for the company to address issues before reports appear in the press or the PSB comes calling](#).
5. **Anticorruption training** should devote meaningful emphasis to the risks created by paying or receiving kickbacks in commercial transactions. In addition to raising awareness of these issues, training sessions often result in company personnel asking questions or providing information about questionable transactions.
6. **Employee handbooks** should be detailed, clear and specific in terms of permitted and prohibited conduct, as well as the consequences for failing to adhere to company policy. Company policies should address not only FCPA compliance, but also compliance with local antibribery laws, which ordinarily include both commercial and public corruption. Many companies extended their anticorruption compliance efforts to cover commercial bribery when the U.K. Bribery Act became effective in 2011, given that this statute covers commercial bribery as well as corruption of public officials. If company policy fails to address commercial bribery as a ground for discipline, the company may face obstacles in disciplining an employee for causing the company to violate the law unless such employee is found guilty under applicable criminal law.
7. Corporate **promotional and accounting practices** need to adhere to the strict requirements imposed by PRC Accounting Law and the Anti-Unfair Competition Law, as well as associated regulations, in the permissibility and treatment of promotional expenses and discounts. For example, if a customer asks your company to donate funds to sponsor an offsite training for their employees, that is not a deductible business expense under PRC accounting principles, and a transfer of those funds to your customer could constitute an impermissible “off the books” discount or kickback under PRC law.
8. Companies should examine whether their **internal financial controls** are structured to enable their finance teams to evaluate the reasonableness and propriety of marketing and entertainment expenses. If sales, finance, compliance and legal functions operate in separate silos, those



## “Can You Sleep Well at Night?”: Multinational Executives Detained in China Due to Bribery Concerns

departments may lack the capacity for effective cross-group collaboration to verify compliance and to identify potential problems. For example, how is the finance department able to assess the appropriateness of claimed marketing expenses? If a company specifies a policy capping entertainment expenses that may be incurred in a single calendar quarter entertaining an individual, how does it track whether its sales people’s expenses do not in fact exceed the cap?

9. In our experience, the greatest corruption risks tend to involve **third party intermediaries**, and those relationships will often require the lion’s share of compliance efforts. As the U.S. Department of Justice’s FCPA Resource Guide notes, “devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company’s compliance program is ineffective.” News reports regarding the GSK case indicate that the PSB has alleged that hundreds of separate travel agencies were used to facilitate as much as RMB 3 billion in unlawful payments.

This would hardly be the first incarnation of such an arrangement. The use of travel agencies as a conduit for paying kickbacks in Korea and China was alleged in the 2011 Securities and Exchange Commission [IBM case](#). Amy Sommers, a Shanghai-based partner in K&L Gates’ Anticorruption Group, has [discussed elsewhere how such schemes are often structured](#) in China. Given these risks, companies should be particularly careful about tracking the selection, use and expense documentation associated with travel agencies.

10. **Corporate governance.** Both U.S. and U.K. authorities have emphasized the role that the board of directors and senior executives play in assuring the effectiveness of anticorruption compliance. In this regard, U.S. and U.K. authorities have particularly stressed the importance of an ongoing flow of relevant information to enable directors and senior management to understand the company’s specific corruption risks, the systems in place to mitigate those risks, and the effectiveness of those systems.

International businesses operate in dynamic commercial and legal environments, and anticorruption compliance measures should be reassessed, both periodically and in light of significant developments. The recent law enforcement developments in China provide companies with a compelling reason to review the effectiveness of their efforts to prevent and detect corrupt payments.

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## “Can You Sleep Well at Night?”: Multinational Executives Detained in China Due to Bribery Concerns

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# Anti-Corruption Regulation

in 50 jurisdictions worldwide

Contributing editor: Homer E Moyer Jr

# 2013



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# China

**Amy L Sommers and Cecilia Dai**

K&L Gates LLP

## 1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The People's Republic of China (China or PRC) has been a signatory to the United Nations Convention against Corruption (UNCAC) since 2003. The UNCAC was ultimately ratified by Standing Committee of the National People's Congress of PRC (Standing Committee) in 2005.

Prior to joining UNCAC, China became a signatory to the United Nations Convention against Transactional Organized Crime (the Palermo Convention), Article 8.2 of which provides that each state party should consider adopting laws to criminalise bribery conduct involving a foreign public official or an international civil servant. The Standing Committee ratified the Palermo Convention in 2003.

## 2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

With respect to bribery of domestic officials, China's Criminal Law makes it a crime to give bribes to state officials, state institutions, public organisations and state-owned enterprises, as well as for those state officials, state institutions, public organisations and state-owned enterprises to accept bribes.

With respect to bribery of foreign (non-China) officials, since 1 May 2011 China has made it a criminal offence to give bribes to officials of foreign governments and international public organisations to obtain improper commercial benefits. It should be noted that bribery of foreign officials is considered a crime along the lines of criminal commercial bribery (discussed in detail in question 28) and is subject to more lenient punishment than bribery of domestic officials. However, at the time of writing, no PRC case relating to bribery of foreign officials has been found to have been published.

## Foreign bribery

### 3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

To constitute a violation under the newly amended Article 164 of China's Criminal Law (Foreign Bribery Article), which prohibits giving bribes to foreign officials:

- a payment in the form of 'property' must be given;
- the recipient must be a 'foreign public official' or 'official of an international public organisation'; and
- the purpose must be to obtain 'improper commercial benefit'.

There is considerable uncertainty regarding the definitions of the key terms 'foreign public official', 'official of an international public organisation', 'property' and 'improper commercial benefit'. At the time of writing, no official interpretive guidance has been issued.

## 4 Definition of a foreign public official

How does your law define a foreign public official?

Currently, no additional guidance has been issued regarding the scope of a 'foreign public official' and 'official of an international public organisation'.

Because the Foreign Bribery Article is at least partly motivated by interest in complying with the UNCAC, the UNCAC definition may offer insight: it defines a foreign public official as 'any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise'. It also provides a definition of an official of an international public organisation as 'an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation'.

## 5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The language of the Foreign Bribery Article covers the giving of 'property' to foreign officials and does not specifically address gifts, travel expenses, meals or entertainment.

However, the interpretation of 'property' under the offence of 'commercial bribery' provided in the Criminal Law might offer guidance. While foreign official bribery may not, at first blush, appear to fall within a subset of commercial bribery, given that the Foreign Bribery Article (i) specifically references 'improper commercial benefit,' (ii) is drafted in the same article that prohibits giving commercial bribes, and (iii) references the penalties for commercial bribery regulations, these circumstances suggest that rules for commercial bribery might be applied to foreign official bribery cases.

'Property' in the context of commercial bribery is defined as 'either money or physical objects, and includes property-like benefits that can be calculated in monetary value, such as the provision of housing renovations, membership cards and gift cards (coupons) carrying monetary value, travel expenses, etc' (Article 7, Opinions Regarding Issues Concerning the Application of Law in the Handling of Criminal Commercial Bribery Cases, issued by the Supreme People's Court and the Supreme People's Procuratorate, effective since 20 November 2008 – the Notice). These interpretations have been substantially adopted by courts and procuratorates in various cases. For instance, a case decided in 2008 by the Intermediate People's Court of Xinzheng City, Henan Province

showed that two public officials formerly in charge of land zoning and condemnation affairs were punished for the crime of accepting bribes purely for travel arrangements in the United States, which were paid for by a property development company, the expense of which in total was 89,270 renminbi. The case involved no other alleged methods of bribery.

## 6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The Foreign Bribery Article does not provide for any exemptions or affirmative defences. There has also been no judicial guidance to date. Thus, there are no similar exemptions or rules akin to the facilitating and grease payments in the US Foreign Corrupt Practices Act (FCPA). Future regulatory guidance and opinions may provide exemptions and/or affirmative defences.

## 7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The Foreign Bribery Article is silent on the issue of using intermediaries and agents to make improper payments and there are no cases or rules on point. Thus, it is unclear how such cases will be resolved. However, the Criminal Law has established two offences that involve criminals acting as intermediaries in domestic bribery schemes. Article 388 of the Criminal Law provides that public officials (or relatives of or persons closely related with officials who act) by extorting or accepting a party's money or property in order to take advantage of the official's functions and powers or positions, in securing illegitimate benefits for that person through another public official's performance of his or her duties shall be regarded as guilty of accepting bribes. Article 392 stipulates that it is criminal to introduce a bribe to a public official if the circumstances are serious. To commit a crime under article 388, perpetrators must have accepted bribes themselves. To constitute a crime under article 392, the law concentrates on the assistance that is provided by the perpetrator in forming and facilitating a bribery scheme. Both crimes involve perpetrators functioning as intermediaries in brokering bribery schemes. Although effecting payment through such intermediaries is not a necessary element in either crime, practically speaking, arrangement of payments is likely to occur, especially for the second offence.

Notwithstanding these points, neither article 388 nor article 392 has been updated to include mention of a 'foreign official' or 'official of an international organisation', so current law does not directly prohibit intermediary activities involving bribes to foreign officials.

## 8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

The Foreign Bribery Article applies both to individuals and companies. Article 164 of China's Criminal Law specifies that: 'Where a[n] [organisation] violates [the commercial bribery provision or Foreign Bribery Article], [that organisation] shall be subject to criminal fines, and the management personnel and other personnel directly responsible shall be subject to [both imprisonment and criminal fines].'

## 9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The Foreign Bribery Article is set forth under the Criminal Law and makes bribery of foreign officials a criminal offence, punishable

under the same criminal penalty guidelines as criminal commercial bribery. At the current time, there is nothing to suggest civil enforcement of the Foreign Bribery Article.

## 10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Ministry of Public Security, the central law enforcement agency, along with its provincial and local counterparts, generally administers enforcement of criminal laws. The Supreme People's Procuratorate, the central prosecutorial body, together with its provincial and local counterparts, administers the prosecution of criminal violations. However, as there have been no published cases of investigations or prosecutions to date, it is uncertain whether other government agencies will be involved.

## 11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Voluntary disclosure of violation may result in leniency in sentencing. Article 164 of China's Criminal Law provides that: 'Where the person giving bribes voluntarily discloses the conduct of giving bribes, the penalty may be reduced or exempted.' However, because there have not been any published cases adjudicated in reliance of the Foreign Bribery Article, whether and how leniency will be implemented remains to be seen.

## 12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

There are currently no specific guidelines with respect to resolutions of violation of the Foreign Bribery Article outside of the prosecutorial process. The Supreme People's Procuratorate, along with its local counterparts, generally has discretion on how it pursues criminal prosecution. However, owing to the relative lack of transparency in the investigation, enforcement and adjudication processes, it is difficult to ascertain how the office of procurator utilises resolutions outside of formal criminal charges.

## 13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The Supreme People's Procuratorate and the Ministry of Public Security jointly issued a supplemental provision recently, which clarifies that cases of 10,000 renminbi or more given by individuals and 200,000 renminbi or more given by units (legal entities) as bribes to foreign officials should be prosecuted (article 1, Supplemental Provision of the Supreme People's Procuratorate and Ministry of Public Security Regarding Standards for Prosecution of Criminal Cases Under the Jurisdiction of Public Security Authorities (II), promulgated and effective on 11 November 2011). While this does not clearly exempt amounts below those thresholds from being prosecuted, it is suggestive that these threshold amounts might serve as a minimum amount for prosecution.

However, as there have not been any published foreign official bribery investigations or cases involving the Foreign Bribery Article yet, we look forward to seeing guidance as enforcement patterns and policies develop.

#### 14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

While the Foreign Bribery Article does not provide for this directly, China's Criminal Law states that its provisions apply to all criminal acts conducted within China. This would theoretically be broad enough to cover foreign companies (and/or their representatives) giving bribes to foreign (non-China) officials within China's borders, as well as the actions by a China subsidiary or a China representative office of a foreign company. However, the extent to which the Foreign Bribery Article will apply to foreign companies and their China subsidiaries remains to be seen.

#### 15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The Foreign Bribery Article provides that violations are subject to the penalties for criminal commercial bribery. According to the Criminal Law, where the amount of the bribe is large, a sentence of up to three years' imprisonment or detention may be imposed, and where the amount is very large, a sentence of more than three years' but no more than 10 years' imprisonment and criminal fines may be imposed. If the bribe is given by a legal entity, the entity may be subject to criminal fines, and the key management persons and persons directly responsible may be subject to the same sentencing guidelines as above.

While the Foreign Bribery Article does not provide additional sanctions, certain industry-specific sanctions might be applicable. A good example is the drug and healthcare industry, where bribery is especially prevalent in China. In 2010, the Ministry of Health (the central pharmaceutical, medical and health-care industry regulator) established a publicly accessible blacklist of drug manufacturers and their distributors and representatives found to have given bribes. Similar provincial-level blacklists have also been set up in the provinces of Fujian, Sichuan and Hunan. Enterprises on the blacklist may be banned from contracting with state-owned medical institutions for a number of years. Administrative penalties, such as revocation of qualifications of doctors found to have taken bribes, may also be imposed. Similar efforts have been implemented by the State Food and Drug Administration, where a similar blacklist regulation was adopted. Under Article 8 of Administrative Measures on Drug Safety Blacklist (for Trial Implementation) issued in August 2012, operators in the industry who obtain business licences or other certification documents through bribery schemes would be put on the blacklist, in addition to other administrative penalties, including revocations of such certifications illegitimately obtained and three-year ban from entering the industry.

Since 2009, the Supreme People's Procuratorate has been expanding its blacklisting policies by establishing a publicly accessible national database of those convicted of giving bribes. This blacklist can implicate qualification to bid for government procurement projects. In February 2012, the Supreme People's Procuratorate announced completion of an integrated nationwide database of bribers, through which cross-regional inquiries could be processed. More detailed application measures have also been issued. The implementing measures provide for filing of written applications with procuratorates, as well as application by telephone. Whether such programmes will be applicable to foreign official bribery remains to be seen, but these endeavours indicate China's increased efforts to deter bribery on multiple fronts.

#### 16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

At the time of writing, there have not been any published investigations or decisions involving foreign bribery in reliance of the Foreign Bribery Article. Given the large investments made by Chinese enterprises in regions such as Africa and South America, where official bribery and corruption remain problematic, enforcement policies are likely to develop with added economic and political considerations.

Nonetheless, China-related entities have been at the centre of bribery-related sanctions on the international stage. Cases include the China Road and Bridge Corporation and China First Metallurgical Group Co Ltd being debarred by the World Bank for graft-related behaviour in international projects.

#### Financial record keeping

#### 17 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Companies in China are required by law to adopt financial record keeping and accounting practices to ensure that accounts are recorded truthfully and completely. The Accounting Law, last amended in 1999, sets forth basic accounting requirements on keeping accurate and complete books and records, and sound internal controls. Publicly listed companies are also subject to additional accounting requirements per China's Securities Law.

With respect to periodic inspections, all corporate bodies formed in China (including foreign-invested enterprises) are required to create a financial report at the end of each fiscal year. That financial report must then be audited by certified accountants and submitted to regulators as part of the entity's annual licensing procedures.

Additionally, China's Anti-unfair Competition Law contains commercial bribery provisions that prohibit offering and taking 'off-the-book rebates in secret' to/from the counterparty in a commercial transaction. It also provides that a business may 'expressly allow a discount to the other party and pay a commission to the middleman... [but] must truthfully enter them in the account. The business operator who accepts the discount or the commission must also truthfully enter it in the account' (emphasis added) (Article 8, Anti-unfair Competition Law, effective since 1 December 1993). The language suggests that rebates (which are generally understood to include kickbacks and other benefits) that are accurately recorded would not be deemed as commercial bribery under the Anti-unfair Competition Law.

In terms of internal controls, Chinese listed companies are also subject to requirements under the Basic Norms for the Internal Control of Enterprises (Basic Norms) published in 2008 and Supporting Guidelines for Internal Controls of Enterprises (Guidelines) published in 2010. Such regulations established detailed system requirements for companies' internal control and risk management. Particularly for construction enterprises and outsourcing companies, the Guidelines have specified rules to prevent occurrence of bribery activities by employees of such enterprises. However, the Basic Norms and Guidelines, unlike similar internal control regulations in other countries, such as Sarbanes-Oxley Act, lack strong liability provisions to effectuate the obligations they establish.

## 18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

China's accounting laws and regulations require that accounting firms and personnel handle accounting irregularities within their authority in accordance with China's accounting practices and system, or to report to the person in charge and request further investigation if they do not have such authority. With respect to listed companies, China's Securities Law requires covered individuals and companies to cooperate and provide documents and accounting information to the China Securities Regulatory Commission, China's securities regulatory agency. Irrespective of mandatory disclosure obligations, companies may benefit from the fact that voluntary disclosures to the authorities might result in leniency in punishment.

## 19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Because the process of bribery investigations and resulting criminal prosecutions are usually opaque in China, there is little information on the extent to which financial record keeping laws and regulations have been relied upon to prosecute bribery cases. However, we suspect that such laws are not typically seen as a primary tool for prosecuting bribery cases in China. Unlike the FCPA, the bribery provisions under China's Criminal Law do not provide for financial record keeping or internal controls requirements.

## 20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

China's accounting laws and regulations do not impose sanctions specific to the payment of bribes. However, companies that fail to keep accurate accounting books and records in accordance with legal requirements, and the individuals responsible for keeping those books and records, may be subject to administrative sanctions as well as criminal penalties. Criminal fines and imprisonment can result from intentionally falsifying books or using forged receipts. If such behaviour does not constitute a crime, the company involved may still be subject to an administrative fine of not less than 5,000 renminbi but no more than 100,000 renminbi, and any individual responsible may be subject to an administrative fine of not less than 3,000 renminbi but no more than 50,000 renminbi.

## 21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

China's tax laws do not specifically set forth tax consequences for domestic and foreign bribes. However, tax deductions require presentation of authentic '*fapiao*', which is the official standardised receipt for payment of expenses. Often, *fapiao* generated from expenses used as bribes are illegitimate. The creation and use of illegitimate *fapiao* would be a violation of Chinese laws and regulations, and it is illegal to present these *fapiao*s as a basis for deductibility of expenses in calculating taxable income. Additionally, according to the Enterprise Income Tax Law, enacted by the National People's Congress in 2007, deductions may be taken on reasonable expenditures that are actually connected with the revenue of the enterprise. Expenses on bribes might not be considered 'reasonable' expenditures, as giving domestic and foreign bribes are both unlawful under the newly amended Criminal Law.

## Domestic bribery

### 22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Articles 389 to 391 and Article 393 of the Criminal Law prohibit (regardless of whether the perpetrator is an individual or entity) giving state officials, state agencies, state-owned enterprises and civil organisations bribes in order to receive improper benefits. In order to constitute the offence of giving bribes:

- a payment in the form of 'property' or unlawful 'kickbacks or procedural fees' must be given;
- the recipient must be a state official, state agency, state-owned enterprise, unit (an organisation) or civil organisation; and
- the purpose must have been to receive improper benefits.

Individuals and companies, as well as the senior management personnel and persons directly responsible in a company, may be punishable under the prohibition against giving bribes to officials. Article 392 further prohibits brokering and arranging payments of bribes to state officials. Article 388 criminalises the acts of public officials or their related persons (eg, close relatives or other people having an intimate relationship with the officials) in facilitating the securing of improper benefits by bribers through the performance of another public official's duties, thus making it a crime to act as an intermediary in violation of the anti-bribery laws (see question 7).

The Notice (jointly issued by the Supreme People's Court and Supreme People's Procuratorate) clarifies that 'property' should be interpreted to cover money and physical objects, and includes property-like benefits that can be calculated in monetary value, including membership cards and gift cards which contain monetary value, and travel expenses. Thus other benefits, such as entertainment, meals and various gifts with monetary value are likely to be included as well. The Notice also adopts a vague and broad definition for 'improper benefits' to include any benefits in violation of laws, regulations or policy, or requires that the recipient provide aid or convenience in violation of laws, regulations, policies or industry norms.

Additionally, more specific and rigorous restrictions have been established under the Various Rules on Probity in Governance for Member Leaders and Cadres of the Communist Party of China published in 2010 (CPC Rules), which forbid obtaining improper benefit 'through influence arising from one's authority'. This includes 'accept[ing] gifts or invitation [of meals] as well as the arrangement of such activities such as travel, going to the gym or entertainment that may affect the fair execution of public service'. It should be noted that these rules are not supposed to constitute a source of law, given that they are issued by party organs, not administrative agencies. However, considering the peculiar role of the CPC in China and the fact that the majority of government officials are party members, these rules still hold important value of reference. Whether such broader scope of 'property' under CPC Rules will ultimately be adopted as law depends on future legislative action, regulatory and interpretive guidance.

### 23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The Criminal Law also prohibits a state official from accepting bribes. Article 385 of the Criminal Law makes it a crime for:

- a state official to use her/his position to
- use influence of her/his position
- to solicit or unlawfully accept a payment
- which is an item of 'property' or involves 'kickbacks and procedural fees' and



- the acceptance of which was in order to give ‘improper benefits’ to another person.

In addition to bribery involving state officials, the Criminal Law also makes the giving or accepting of bribes by company personnel in a commercial context subject to punishment under Article 163 and Article 164 (‘commercial bribery’).

The prohibition against state officials is also extended to soliciting and accepting bribes through intermediaries and by closely related persons, such as family members, and current and former officials (see question 7).

Furthermore, the Opinions on Issues Concerning the Application of Law in the Handling of Criminal Cases Involving the Acceptance of Bribes (promulgated jointly by the Supreme People’s Court and the Supreme People’s Procuratorate, effective since 8 July 2007 – the Opinions) clarify that the acceptance of pricing benefits, such as premiums on items sold or discounts on items bought, receipt of stocks or shares in a company without making any actual investment are all treated as acceptance of a bribe.

The Civil Servant Law also contains broad language prohibiting giving and accepting bribes, corrupt conduct and abuse of position to seek personal benefits. However, it does not appear that these provisions of the Civil Servant Law currently serve as the basis for prosecutions.

The Regulations Regarding Offer and Acceptance of Gifts in Foreign-Related Activities issued by the State Council in 1993 set forth further requirements for state officials. They require officials of government agencies at various levels to report and hand over any gifts accepted in foreign-related activities exceeding 200 renminbi to the employer or the state treasury depending on the nature and value of the gifts.

Certain rules applicable to members of the Communist Party of China are also relevant. The Measures Regarding Registration and Disposal of Gifts Accepted or Received from Contacts in China by Personnel of Party and Government Agencies jointly issued by the Administrative Office of the State Council and the Administrative Office of the Central Committee of the Communist Party of China in 1995 set forth rules by which state and party officials must disclose and/or hand over certain gifts received. ‘Gifts’ are interpreted broadly to include cash, coupons or any item purchased at unreasonable discounts. This interpretation is arguably sufficiently broad to include intangible benefits as well.

## 24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

As defined under the Criminal Law, a state official may refer to:

- officials in a position of public authority in a government agency;
- a person in a position of public authority in a wholly state-owned company, enterprise, institution or organisation;
- a person assigned by a government agency or wholly state-owned enterprise, company, institution or organisation to a position of public authority in a non-wholly state-owned company, enterprise, institution or organisation; or
- other persons in a position of public authority granted by law.

According to the Minutes of the Symposium on Trial of Economic Crime Cases by Courts Nationwide issued by the Supreme People’s Court in 2003, ‘position of public authority’ means performing organisation, leadership, supervision or management tasks on behalf of state agencies, state-owned company or enterprise, public institutions and other people’s organisations. Specifically for a wholly state-owned company or enterprise, all its directors, supervisors, management members, accountants, cashiers and other personnel who function to manage and supervise state property are generally

considered state officials. Accordingly, personnel whose services do not involve management and supervision or who are without authority in public affairs, eg, administrative staff and labourers, such as salesclerks and ticket sellers, would typically not be considered state officials.

The definitional scope with respect to the broad anti-bribery provisions under the Civil Servant Law is also sufficiently broad to cover state officials. The Civil Servant Law defines ‘civil servants’ as those who perform public duties, are staff of the state administrative system and whose wages and benefits are paid through public finances. Thus state officials are also subject to the Civil Servant Law.

## 25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Chinese state officials are deemed civil servants and thus subject to the Civil Servant Law, which prohibits them from participating in profit-making activities or holding a position in an enterprise or other profit-making organisations.

However, this restriction is unlikely to apply for state officials who are appointed to senior management positions in state-owned enterprises by the state or CPC. While state-owned enterprises generally operate as for-profit businesses, not infrequently senior managers move between government roles as officials and appointments to manage state-owned enterprises. In addition, the Provisions on Honest Business Conduct for Leaders of Stated-owned Enterprises, jointly issued by the State Council and CPC Central Committee in 2009, specify restrictions against the leaders in state-owned enterprises, including those who are state officials appointed to management positions in state-owned enterprises, participating in various business activities, such as engaging in profit-making operations, making equity investment in corporations affiliated with the enterprise that is managed under the appointment, holding leadership positions of other enterprises or organisations without approvals or accepting compensation from such entities without approval. Similar rules are present in the CPC Rules prohibiting leading members of the CPC, who are essentially equivalent to state officials, from engaging in various business transactions.

The possibility that involvement by officials in profit-making operations could be instrumental in bribery schemes has been acknowledged by PRC laws. The Opinions specifically prohibit the acceptance by officials of gift of shares, participation in equity investments or common corporate investments without actual capital inflows injected by such state officials (ie, phantom shareholdings), and other forms of bribery disguised within business transactions.

## 26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The Notice issued in 2008 by the Supreme People’s Court and Supreme People’s Procuratorate includes items that can be measured with monetary value among the things that may be deemed a ‘property’ for the purpose of anti-bribery laws, specifically listing travel expenses as an example of things which may be deemed improper gifts of bribery. Additionally, the Communiqué of the Fifth Plenary Session of the CPC Central Disciplinary Committee, adopted in 1995, provides that Chinese officials should not attend any banquet or entertainment event if such event may affect their impartiality in performing their public duties. This restriction is implemented by internal rules formulated by various government agencies in the state administrative system, under which recreational activities for private purposes involving use of public funds or hospitality activities and

that squander public funds are prohibited; moreover, attendance at foreign-related hospitality activities requires prior approval.

In addition, China has recently adopted the Management Opinions on Regulating Commercial Prepaid Cards, issued on 23 May 2011 (the Cards Opinions), which require registration of purchases of gift cards where the amount exceeds certain limits. In September 2012, two regulations corresponding to the Cards Opinions have been promulgated: Administrative Measures for the Prepaid Card Business of Payment Institutions and Administrative Measures for Single-purpose Commercial Prepaid Cards (for Trial Implementation). These regulations aim to prevent money laundering, arbitrage, tax evasion and bribery by using prepaid gift cards offered by non-financial companies (ie, entities that are not predominantly engaged in the financial industry and thus are not subject to China's financial regulators). The Cards Opinions and two subsequent rules require a purchaser, which can be either an individual or an entity, to register its true identity with the gift card issuer if the card value exceeds 10,000 renminbi in a one-time purchase. Payments for gift cards are required to be made by means of wire transfer, as opposed to cash, if the card value exceeds 5,000 renminbi in a one-time purchase by a company or organisation, or 50,000 renminbi by any individual. The card issuer must record the account name and number from which the wire transfer of payment has been made. This registration requirement would, in theory, allow more efficient enforcement of improper gift-giving as well as create a deterrent effect against gifts given in the form of prepaid cards in place of cash. The Cards Opinions also prohibit state officials from accepting prepaid gift cards.

## 27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Article 389 of the Criminal Law, which prohibits giving bribes to state officials, also includes an exemption: where the property is given as a result of coercion and no improper benefit was obtained by the donor, the conduct is not considered bribery. It is unclear how this exemption has been relied on or used in defence of domestic bribery prosecutions, because such cases are generally opaque and little information on the arguments and decisions is disclosed. However, the exemption suggests that donors who are pressured into giving bribes to state officials and who derive no improper benefit should not be held criminally responsible.

More guidance has been given under paragraph 10 of the Notice. It addresses four factors to contemplate to distinguish valid gifts from bribes, which include: (1) background that leads to occurrences of such property exchanges (eg, whether the bribees and bribers are friends or relatives, or whether they have any relationship or previous contacts and the degree of such contacts, etc), (2) value of property transferred, (3) reasons, timing and means of property exchanges, and (4) whether transferees have secured benefit for the transferor in exchange for the property transferred.

Regulations that establish disclosure and disgorgement obligations for state officials in connection with gifts accepted in international activities also suggest a threshold of 200 renminbi for determining acceptable gifts. As a result, it is not uncommon for companies to have compliance programme requirements adopted with reference to the 200 renminbi mark, using it as a cut-off for entertainment and gifts. It should be noted that this regulation applies to officials and not to the donors of the gifts, and that, because this 200 renminbi limit was set many years ago, the purchasing power intended for the 200 renminbi mark was substantially higher than it is today. Thus, the applicability and reasonableness of using the 200 renminbi threshold as a guideline for incurring hospitality and gift expenses today might need to be revisited.

## 28 Private commercial bribery

Does your country also prohibit private commercial bribery?

China's Criminal Law and Anti-unfair Competition Law prohibit the giving and acceptance of bribes between businesses in a purely commercial context.

The Criminal Law makes it a crime to 'give to the employee of a company, enterprise, or other unit [organisation] any property for the purpose to obtain improper benefits', and for the 'employee of a company, enterprise, or other unit to abuse its position to solicit the property of another or to unlawfully accept the property of another so that such other person may obtain a benefit'. 'Property,' in this case, is interpreted to cover property-like benefits which can be calculated in monetary value, including membership cards and gift cards with monetary value and travel expenses. 'Improper benefits' has a very vague interpretation – any benefits in violation of laws, regulations or policy, or requires that the recipient provide aid or convenience in violation of laws, regulations, policies or industry norms.

Furthermore, China's Anti-unfair Competition Law contains commercial bribery prohibitions different in scope from those under the Criminal Law. For instance, under the provisions of the Anti-unfair Competition Law, 'property' means cash or tangible property, including marketing fees, promotion fees, sponsorship fees, research fees, service fees, consultation fees, commissions and reimbursements, and 'any other manner' refers to offering travel inside or outside China and other benefits besides property. Furthermore, an opinion by China's Anti-commercial Bribery Task Force (a commercial bribery enforcement taskforce) states that 'commercial activity which violates the principles of fair competition by means such as giving or receiving property or other benefits to provide or receive business opportunity or other economic benefit' would be deemed commercial bribery. This added wrinkle in interpretation by the taskforce suggests that the conduct need not be strictly within a sales-purchase transaction and need not be an obvious or substantial benefit – anything that might disrupt fair competition might constitute commercial bribery.

## 29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

### Official bribery

Criminal liability for giving official bribes can carry a sentence of up to five years' imprisonment or, depending on exacerbating circumstances or cases where the 'interests of the state' are seriously damaged, the sentence can be increased to imprisonment of not less than five years and not more than 10 years; if the exacerbating circumstances are severe, imprisonment of more than 10 years and confiscation of property may be handed down. However, voluntary disclosure to the authorities may result in leniency in sentencing.

Penalties for state officials who accept official bribes are harsher. The sentences depend on the amount of bribes accepted. The lesser penalty starts with administrative sanctions if the amount accepted is less than 5,000 renminbi, but life sentences and the death penalty, along with confiscation of property, may be imposed if the circumstances are severe and the amount in question is more than 100,000 renminbi. In the case of acceptance of bribes by state agencies, state-owned enterprises and civil organisations, a criminal fine may be imposed and the senior managers or persons directly responsible may be subject to imprisonment of no more than five years.

The criminal penalty for brokering official bribery is imprisonment for up to three years. However, the sentence may be reduced by voluntary disclosure to the authorities of the improper conduct.

### Commercial bribery

According to the Criminal Law, where the amount is 'large,' a sentence of imprisonment or detention of up to three years may be imposed; where the amount is 'very large,' a sentence of imprisonment of more than three years but no more than 10 years as well as criminal fines may be imposed. The punishment for accepting commercial bribes is more severe: where the amount is 'large,' a sentence of imprisonment or detention of up to five years may be imposed; where the amount is 'very large,' a sentence of imprisonment of more than five years, along with confiscation of property, may be imposed.

Commercial bribery that constitutes a crime under the Anti-unfair Competition Law is also subject to criminal sanctions; where the case is insufficient to constitute a crime, a fine of not less than 10,000 renminbi but not more than 200,000 renminbi and confiscation of illegal earnings may be imposed. Further, administrative fines and sanctions, such as revocation of the business licence (which is necessary for a company to conduct business) may be imposed.

Also, as mentioned in question 15, various blacklisting systems exist at both the central and local levels. These blacklists can disqualify companies for bidding on government procurement projects as well as contracting with state-owned enterprises and organisations. Furthermore, the Supreme People's Procuratorate has shown trends in stepping up efforts to develop these policies in recent years.

### 30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The relevant laws and regulations do not mention facilitating or 'grease' payments. However, the anti-bribery provisions under the Criminal Law prohibit 'procedural payments' alongside 'kickbacks'. While there is little guidance on the definition of 'procedural payments,' this language suggests that 'grease' payments to facilitate non-discretionary procedures are prohibited. Owing to the lack of transparency of bribery investigations and prosecutions in China, it is unclear whether such payments are exempted in practice.

### 31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

A major case involving bribery was brought in 2010, where four Rio Tinto employees were charged with and convicted of stealing commercial secrets and accepting bribes. Stern Hu, an Australian citizen, was sentenced to a seven-year prison term for the bribery charge (and five years for stealing commercial secrets, but reduced to a total of 10 years), one of the harshest sentences meted out to a foreign executive of a multinational corporation. Although the full arguments and judgment were not made public, this case indicates that foreign companies and executives may be at risk to anti-bribery enforcement under Chinese laws. The *Rio Tinto* case aside, the trend of enforcement focus remains with the acceptance of bribes – with the stiffest punishments being handed to state officials for taking bribes.

More recently, a case involving Siemens was adjudicated (although not in a proceeding open to the public) in May 2011 by the Intermediate People's Court of Hebi City, Henan Province. The court found the defendant, Shi Wanzhong, the former chief director of a China Mobile subsidiary for Anhui Province, guilty of accepting bribes. The case was not held openly due to 'involvement of state secrets'. News reports indicate that Shi, in his role as the chief director of China Mobile (Anhui) Limited, had received illicit monies from Siemens before China Mobile (Anhui) entered into a purchase agreement to buy telecommunication equipment from Siemens. The bribes were channelled through an intermediary hired by Siemens, Tian Qu, who was a businessman who enjoyed a close relationship with Shi. The court, finding both received bribes of \$5,060,000 in total, sentenced Tian to imprisonment for 15 years in addition to issuing a death sentence with a two-year reprieve to Shi. Notwithstanding the severity of the case, to date no allegation has been found involving charges by PRC regulators or enforcement authorities against Siemens.

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