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Expanding the Boundaries of China's Anti-Corruption Regime

AMY RIELLA AND HOLLY J. WARRINGTON

The author explains a recent amendment to the PRC Criminal Code prohibiting bribes to foreign governmental officials and officials of international public organizations in exchange for illegitimate commercial benefits which suggests that China's enforcement initiatives soon may expand outside the country's bounds to target misconduct perpetrated abroad.

Although China has long prohibited commercial bribery, as well as the bribery of Chinese state functionaries, a recent amendment to the *PRC Criminal Code* prohibiting bribes to foreign governmental officials and officials of international public organizations in exchange for illegitimate commercial benefits suggests that China's enforcement initiatives soon may expand outside the country's bounds to target misconduct perpetrated abroad.¹ Having taken effect on May 1, 2011, the amendment reaches conduct involving non-PRC officials occurring outside the territorial boundaries of the PRC, similar in scope to the U.S. Foreign Corrupt Practices Act of 1977, as amended ("FCPA"). Like the FCPA, the new PRC amendment targets foreign misconduct that impacts business, and is limited to bribes made to foreign governmental officials and officials of international public organizations for illegitimate *commercial* gains (as opposed to "bribes for illegitimate gains" penalized by the *PRC Criminal*

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Code with regard to commercial briberies). While the abundance of state-owned enterprises in China consistently presented significant FCPA risks for U.S. companies operating abroad, the new amendment presents even greater challenges for companies registered or operating in China.

OFFICIAL ANTI-BRIBERY IN CHINA

China has for many years prohibited general commercial bribery² as well as bribery of Chinese state functionaries.³ Like the FCPA, the term “state functionary” broadly encompasses not only those individuals holding positions that fit the traditional notion of “government official,” but also anyone who performs public service in a state-owned enterprise or civil organization; as well as any person assigned by state authorities to perform public service in a non-state-owned enterprise, or otherwise performs public services pursuant to law.⁴ Many of the major industries in China are state-owned or state-controlled, a fact that exponentially increases the number of people who qualify as a government official for the purposes of official bribery and makes the anti-corruption landscape a minefield for large companies with a presence in China. The criminal penalties for state functionaries accepting bribes and individuals offering bribes depend on the amount of, as well as other circumstances related to, the bribe, but can range in jail terms up to life imprisonment and even death penalty for the state functionaries accepting the bribe in serious cases.⁵ Also, property may be confiscated from either party involved.⁶

COMMERCIAL ANTI-BRIBERY IN CHINA

Though prosecuting corrupt government officials has been and remains a top priority, China’s prohibitions against commercial bribery are also robust and can serve as a means to punish illegal conduct perpetrated by international companies operating inside China — or their employees. Prohibitions against commercial bribery are found in multiple parts of the PRC law.⁷ Commercial briberies will, based on the amount of bribe and the seriousness of influence, be exposed to civil liabilities, administrative liabilities, or criminal penalties.

CHINA'S OWN VERSION OF THE FCPA AND ITS IMPACT ON FOREIGN COMPANIES INVESTING IN CHINA

The new amendment to the *PRC Criminal Code*, effective May 1, 2011, expands the scope of China's anti-bribery legislation. The new amendment prohibits bribery of *foreign* government officials as well as officials of international public organizations, when the intent of the briber is to secure some illegitimate commercial interest.

Although the scope of the new amendment expands the reach of China's anti-bribery laws, the amendment does not include a revised penalty scheme. Instead, the newly created crimes will be subject to the same punishments doled out for offering commercial bribes, i.e., individuals who violate the law will be subject to (1) criminal detention or not more than three years imprisonment if the amount of the bribe is considered as relatively large, or (2) three to 10 years imprisonment and a fine if the amount of bribe is considered as huge.⁸

The *PRC Criminal Code* applies to all PRC citizens (wherever located), all natural persons in the territory of PRC regardless of nationality, and all companies, enterprises, and institutions registered under PRC law. As a result, this new provision could affect joint ventures between Chinese and foreign companies, particularly joint ventures organized under PRC law. Wholly-owned foreign enterprises and non-PRC companies with representative offices in China also fall within the scope of the new prohibitions.

In order to implicate the new amendment, the bribes must be offered or made to foreign officials or officials of international public organizations. There are concerns that China's enforcement of the new provision may face difficulties in terms of investigation, evidence collection, and extradition if the events occurred outside China. Combating these concerns is the recent increase in international cooperation for anti-corruption enforcement, most notably between the United States enforcement authorities and European authorities, from which China may enjoy some level of cooperation. China is a party to the *UN Convention against Corruption*, which should help foster cooperation in China's efforts to enforce this new amendment with other signatories such as the U.S. and U.K., which place a strong emphasis on combating corruption.

At this point, no guidance or judicial interpretations explaining the key terms of the amendment have been issued and no relevant cases have been reported. While it remains to be seen how this new provision will be enforced in the future, foreign companies with a presence in China are advised to take steps to ensure their joint ventures, subsidiaries, and representative offices registered in China remain vigilant to activities conducted with foreign officials and international public organizations, whether inside or outside China, to avoid running afoul of this law.

NOTES

¹ Xing fa xiu zheng an (VIII) [Amendment VIII to Criminal Code], Art. 29 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011) (P.R.C.).

² Xing fa [Criminal Code], Arts. 163-164 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.); Art. 13, Xing fa xiu zheng an (VII) [Amendment VII to Criminal Code] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective Feb. 28, 2009) (P.R.C.); Xing fa xiu zheng an (VIII) [Amendment VIII to Criminal Code], Art. 29 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011) (P.R.C.); Fan bu zheng dang jing zheng fa [Anti-unfair Competition Law], Arts. 8 & 22 (promulgated by the Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) (P.R.C.); Guo jia gong shang xing zheng guan li ju guan yu jin zhi shang ye hui lu xing wei de zan xing gui ding [Interim Regulations of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery] (promulgated by the State Admin. for Indust. and Commerce, Nov. 15, 1996, effective Nov. 15, 1996) (P.R.C.); Zui gao ren min fa yuan zui gao ren min jian cha yuan guan yu ban li shang ye hui lu xing shi an jian shi yong fa lv ruo gan wen ti de yi jian [Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Applicable Laws for Handling Criminal Cases of Commercial Bribery] (promulgated by the Sup. People's Ct. and Sup. People's Proc., Nov. 20, 2008, effective Nov. 20, 2008) (P.R.C.); Zui gao ren min jian cha yuan gong an bu guan yu gong an ji guan guan xia de xing shi an jian li an zhui su biao zhun de gui ding (II) [Provisions of the Supreme People's Procuratorate and the Ministry of Public Security on Filing

and Prosecution of Criminal Cases Governed by Public Security Authorities (II)] (promulgated by the Sup. People's Proc. and Ministry of Pub. Sec., May 7, 2010, effective May 7, 2010) (P.R.C.).

³ Xing fa [Criminal Code], Arts. 383, 385-394 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.); Xing fa xiu zheng an (VI) [Amendment VI to Criminal Code], Art. 8 (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective June 29, 2006) (P.R.C.); Zui gao ren min fa yuan zui gao ren min jian cha yuan guan yu yin fa guan yu ban li shou hui xing shi an jian shi yong fa lv ruo gan wen ti de yi jian de tong zhi [Circular of the Supreme People's Court and the Supreme People's Procuratorate on Issuance of the Opinions on Issues relating to Application of Law in the Handling of Criminal Cases Involving Acceptance of Bribes] (promulgated by the Sup. People's Ct. and Sup. People's Proc., July 8, 2007, effective July 8, 2007) (P.R.C.); Zui gao ren min jian cha yuan guan yu xing hui zui li an biao zhun de gui ding [Provisions of the Supreme People's Procuratorate regarding Prosecution Thresholds for Bribery Cases] (promulgated by the Sup. People's Proc., Dec. 22, 2000, effective Dec. 22, 2000) (P.R.C.).

⁴ Xing fa [Criminal Code], Art. 93 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.).

⁵ Xing fa [Criminal Code], Arts. 383 & 386 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.).

⁶ *Id.*

⁷ Xing fa [Criminal Code], Arts. 163-164 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.); Xing fa xiu zheng an (VII) [Amendment VII to Criminal Code], Art. 13 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective Feb. 28, 2009) (P.R.C.); Xing fa xiu zheng an (VIII) [Amendment VIII to Criminal Code], Art. 29 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011) (P.R.C.); Fan bu zheng dang jing zheng fa [Anti-unfair Competition Law], Arts. 8 & 22 (promulgated by the Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993); Guo jia gong shang xing zheng guan li ju guan yu jin zhi shang ye hui lu xing wei de zan xing gui ding [Interim Regulations of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery] (promulgated by the State Admin. for Indus. and Commerce, Nov. 15, 1996, effective Nov. 15, 1996) (P.R.C.); Zui gao ren min fa yuan zui gao ren min jian cha yuan guan

yu ban li shang ye hui lu xing shi an jian shi yong fa lv ruo gan wen ti de yi jian [Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Applicable Laws for Handling Criminal Cases of Commercial Bribery] (promulgated by the Sup. People's Ct. and Sup. People's Proc., Nov. 20, 2008, effective Nov. 20, 2008) (P.R.C.); Zui gao ren min jian cha yuan gong an bu guan yu gong an ji guan guan xia de xing shi an jian li an zhui su biao zhun de gui ding (II) [Provisions of the Supreme People's Procuratorate and the Ministry of Public Security on Filing and Prosecution of Criminal Cases Governed by Public Security Authorities (II)] (promulgated by the Sup. People's Proc. and Ministry of Pub. Sec., May 7, 2010, effective May 7, 2010) (P.R.C.).

⁸ Xing fa xiu zheng an (VIII) [Amendment VIII to Criminal Code], Art. 29 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011) (P.R.C.).