

Government Contracts Blog

March 16, 2011 by Sheppard Mullin

China Beefs Up Its Anti-Bribery Law With Its Very Own Version Of The FCPA

By [John M. Hynes](#)

Companies doing business in the People's Republic of China ("PRC") have yet another path to potential criminal liability. On February 25, 2011, the PRC legislature passed 49 amendments to the PRC Criminal Law. One such amendment – Amendment No. 8 of the PRC Criminal Law – criminalizes the payment of bribes to non-PRC government officials and to international public organizations (the "Amendment"). While the Amendment is brand new and no interpretive guidance has been issued, it appears to be the PRC's version of the United States Foreign Corrupt Practices Act ("FCPA").

Overview of Pre-Existing PRC Anti-Bribery Law

The PRC currently has various laws prohibiting both commercial and official bribery.

Pre-Existing Commercial Anti-Bribery Law

Two PRC laws prohibit commercial bribery: (1) Article 8 of the PRC Anti-Unfair Competition Law ("AUCL") and (2) Article 164 of the PRC Criminal Law.

Article 8 of the AUCL prohibits business operators from "giving bribes in the form of property or other means for the purpose of selling or purchasing products." The State Administration for Industry & Commerce ("SAIC") enforces the AUCL. According to Article 2 of the SAIC Provisional Rules of Prohibition of Commercial Bribery Activities, commercial bribery is defined as "an activity by which a business operator bribes the other party to a transaction, either an entity or an individual, in the form of property or other means for the purpose of selling or purchasing products." Under Article 20 of the AUCL, violators of Article 8 of the AUCL may be held liable to persons damaged as a result of the bribery. Moreover, Article 22 provides that violators shall be investigated pursuant to the PRC Criminal Law.

Article 164 of the PRC Criminal Law – the other PRC law prohibiting commercial bribery – criminalizes the act of "giving money or property to any employee of a company or enterprise . . . for the purpose of seeking illegitimate benefits." Any person found to be in violation of Article 164 "shall be sentenced to a fixed term of imprisonment of not more than three years or criminal detention" if the amount involved is "relatively large." If the amount involved is "huge," the violating person "shall be sentenced to fixed term imprisonment of not less than three years but not more than 10 years and shall also be fined." An entity that violates Article 164 "shall be fined," and the "persons who are directly in charge and other persons who are directly responsible for the crime shall be punished" as if they themselves committed the crime.

Thus, in addition to the Amendment – which prohibits the making of bribes to non-PRC public officials – and other PRC laws prohibiting the making of bribes to PRC officials, PRC law already provides for civil and criminal liability for making commercial bribes to private parties for the purpose of obtaining illegitimate benefits. Companies doing business in the PRC must remain wary of these PRC anti-commercial bribery laws.

Pre-Existing Official Anti-Bribery Law

The PRC’s pre-existing official anti-bribery law is found in Articles 385 and 389 of the PRC Criminal Law. Article 385 creates criminal liability for *taking* official bribes; Article 389 criminalizes *offering* official bribes.

Article 385 provides in relevant part that “[a]ny State functionary who, by taking advantage of his position, extorts money or property from another person, or illegally accepts another person’s money or property in return for securing benefits for the person shall be guilty of acceptance of bribes.” Violators of Article 385 are subject to fines and imprisonment based on the value of the bribe taken.

Article 389 provides in pertinent part that “[w]hoever, for the purpose of securing illegitimate benefits, gives money or property to a State functionary shall be guilty of offering bribes.” Persons who violate Article 389 are subject to imprisonment based on the seriousness of the offense. Entities that violate Article 389 are subject to a fine.

Thus, before the Amendment, the PRC prohibited bribery of PRC officials, but had no law on the books criminalizing the making of bribes to non-PRC officials. This has all changed with the passing of the Amendment – the PRC’s first statutory assault on the payment of bribes to non-PRC officials.

Text of the Amendment

The Amendment adds the following language to Article 164 of the PRC Criminal Law:

Whoever, for the purpose of seeking illegitimate commercial benefit, gives property to *any* foreign public official or official of an international public organization, shall be punished in accordance with the provisions of the preceding paragraph.^[1] (emphasis added)

The Amendment, which takes effect on May 1, 2011, is short and direct, and contains no affirmative defenses or exceptions. Significantly, while the PRC has long banned the making of bribes to PRC officials, the Amendment marks the PRC’s first stab at prohibiting the payment of bribes to non-PRC public officials.

Jurisdiction

The PRC Criminal Law applies to all PRC citizens (wherever located); all natural persons in the PRC regardless of nationality; and all companies, enterprises, and institutions organized under PRC law. Thus, in addition to PRC domestic companies, the PRC Criminal Law applies to all business entities organized under PRC law, including joint ventures, wholly foreign-owned enterprises (“WFOE”)^[2] and representative offices.

Both PRC companies and non-PRC companies alike must therefore remain cognizant of the Amendment. Any joint venture or other business entity formed under PRC law – including ones involving

non-PRC companies – may be criminally liable under the Amendment. Non-PRC companies with representative offices in the PRC may also be subject to the Amendment.

Interpretation of the Amendment

The Amendment is brand new and contains several key undefined terms, such as “illegitimate commercial benefit,” “property,” and “foreign public official.” While these key terms are surely to be defined or at least explained in the future, companies and individuals in the meantime are left with only interpretations of similar terms in existing anti-bribery laws for guidance.

“Illegitimate Commercial Benefit”

On November 28, 2010, the Supreme People’s Court (“SPC”) and Supreme People’s Procuratorate (“SPP”) jointly issued their Opinion on Some Issues Concerning the Application of the Law in Criminal Commercial Bribery Cases (the “Opinion”), which sheds some light on the meaning of the phrase “illegitimate commercial benefit.” According to the Opinion, the phrase “seeking illegitimate benefits” in the PRC Criminal Law’s commercial bribery law means seeking any advantage in violation of laws, regulations, rules or policies, or requiring the other party to provide assistance or facilitation in violation of laws, regulations, rules, policies or industry codes of practice.

The PRC may very well end up applying this broad definition to the term “illegitimate commercial benefit” in the Amendment. If so, the Amendment will criminalize the making of bribes to foreign officials in exchange for *any* commercial advantage. This would clearly include securing new contracts and renewing existing ones, and would likely include other benefits such as favorable contract terms in otherwise lawful contracts.

“Property”

The Opinion also provides guidance on the definition of “property” in the context of the PRC anti-bribery laws. According to the Opinion, the term “property” in the PRC Criminal Law anti-bribery laws includes any property interest that can be quantified with a monetary value.

Moreover, at least in theory, there is a monetary threshold for criminal prosecution under the pre-existing official bribery laws. According to the Threshold for Criminal Prosecution in Bribery Cases issued by the SPP, criminal prosecution for bribery is justified only if the property offered is at least RMB10,000 for an individual, or at least RMB200,000 for an entity. According to the Opinion, however, other factors are also considered in determining whether criminal prosecution is warranted, including past contacts between the offeree and offeror, whether the offeree and offeror are relatives or friends, the reason for the offer, whether the offeror made any request in connection with the offeree’s official position and whether the offeree actually rewarded the offeror by using his or her official position in a corrupt manner.

Though the term “property” as used in the Amendment has not yet been defined or otherwise interpreted, it is reasonable to predict that the term will be given the same meaning it has been given in other parts the criminal law, *i.e.*, any property interest that can be quantified with a monetary value. If so, the term will cover expense reimbursements, entertainment, gifts and any other benefits that can be assigned a monetary value.

“Foreign Public Official”

Neither the Amendment nor any other PRC law defines “foreign public official.” In fact, the Amendment is the first provision of the PRC Criminal Law to utilize this term. The PRC may, however, borrow the

definition of “foreign public official” from Article 2 of the United Nations Convention Against Corruption, ratified by the PRC in 2006, which defines the term as follows:

‘Foreign public official’ shall mean 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.

If the PRC adopts the broad United Nations definition of “foreign public official,” companies must be careful when dealing with any persons who have any connection to the public functions of a foreign country. Moreover, as with the FCPA, companies must ensure that the businesses that they deal with are not state-owned before taking any action with respect to the businesses that would be considered bribery under the Amendment.

Implications of the Amendment

On its face, the Amendment appears to be the PRC’s version of the FCPA. Like the FCPA, the Amendment is meant to prevent individuals and companies from obtaining unfair business advantages by paying bribes to foreign government officials. The Amendment, however, is in its infancy stages and is not nearly as detailed as the FCPA. The Amendment also has not been the subject of any judicial interpretation. Only time will tell if the Amendment actually develops into the PRC’s analogue to the FCPA.

Even so, the Amendment gives companies around the world – both PRC companies and non-PRC companies – yet another cause for worry when doing business in the PRC. Non-PRC companies that are part of joint ventures or other similar business entities organized under PRC law, or that have representative offices in the PRC, are for the first time subject to the risk of criminal liability under PRC law for bribing non-PRC public officials.

The Amendment will have a great impact on American companies doing business in the PRC. The PRC’s fast-growing economy has made it one of the most attractive countries in which to do business for American companies, so much so that many American companies have offices in the PRC. While American companies should already be cognizant of the FCPA implications of doing business in China, they must now also be aware of the risks posed by the Amendment. More specifically, American companies entering into joint ventures or other business collaborations organized under PRC law, or that have representative offices in the PRC, must take steps to ensure that neither they nor their business partners offer bribes to non-PRC public officials for the purpose of obtaining an unfair business advantage.

The Amendment also gives American companies another reason to carefully choose their business counterparts in the PRC. While companies should always conduct due diligence on any company with which they seek to form a joint venture or other similar business entity, the Amendment further strengthens the incentive to do so. Before teaming up with another company in the PRC, companies should carefully vet the potential partner and identify any red flags suggesting that the partner is prone to engaging in corrupt business practices. In conducting this due diligence, companies should identify and assess any relationships that the potential business partner has with non-PRC public officials themselves, as well as any state-owned business from outside the PRC.

American companies also now have more of a reason to closely monitor the activities of their

representative offices in PRC. Because representative offices in the PRC are subject to the Amendment, companies should take steps to ensure that employees stationed at those offices do not engage in any activities that would violate the Amendment.

Conclusion

As with the FCPA, the first – and most effective – step in avoiding criminal liability under the Amendment is to establish a robust internal compliance program. An effective compliance program should address third party relationships by requiring joint venture partners in the PRC to certify their compliance with the Amendment and all other PRC anti-bribery laws. Due diligence procedures should also be implemented to require a detailed investigation into all potential joint venture partners to minimize the risk of doing business with a partner that is prone to engaging in bribery. Finally, like all compliance programs, regular reviews of the compliance program are essential to ensure that the policy is being properly followed.

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[1]The “preceding paragraph” to which the Amendment refers is the pre-existing Article 164 of the PRC Criminal Code, discussed *supra*.

[2]WFOE is a limited liability company established under PRC law that is wholly owned by foreign investors. There are no PRC investors in a WFOE.