

ALLEN & OVERY

ANTI-UNFAIR COMPETITION LAW

On 22 February 2017, at the 26th session of the Standing Committee of the 12th National People's Congress (NPC) of China, the State Council put forth a bill to amend the Law Against Unfair Competition (LAUC). The bill was published on 26 February on the NPC's [website](#), and is currently open for public comments until 25 March 2017. If passed, this would be the first time the LAUC is amended since it came into effect on 1 December 1993.

This article highlights specific amendments in the proposed bill that are most relevant to MNC pharmaceutical companies doing business in China.

COMMERCIAL BRIBERY



Vicarious liability

The current LAUC does not provide for vicarious liability on the part of the employer where an employee pays a commercial bribe.¹ This made it possible for some companies to feign ignorance and scapegoat employees when caught bribing in a commercial transaction.² It seems that a policy objective of the government is to curb this perceived problem.

The proposed 2017 amendments would expressly impose on the employer a vicarious liability for acts of commercial bribery by its employees, and they would also place the burden squarely on the employer to prove otherwise. In other words, it would create a rebuttable presumption that the employer is liable for its employee's acts of commercial bribery. Specifically, the 2017 Amendments would provide,

“Where the employee of a business operator acquires transactional opportunities or competitive advantages for the business operator by way of bribery, such act should be found to be an act by the business operator, unless the business operator produces evidence to establish that such act is a personal act by the employee.”³

If this amended provision becomes law, it would have a major impact on the way business is done in China. Because of the presumption of vicarious liability, companies would no longer be able to use their ignorance as a defence and divert all the blame to an individual employee. Instead, the aim of the amendment is put to greater pressure on companies to check and make sure that their employees steer clear of commercial bribery. Feigning ignorance should no longer be a strategy when it comes to commercial bribery, or so the authorities would hope. It remains to be seen whether the amendment will be effective in curbing commercial bribery.



Penalties

Criminal liability aside, the current LAUC imposes a fine for commercial bribery that is capped at RMB 200,000.⁴ After 24 years of inflation, this RMB 200,000 figure that was once probably viewed as a severe deterrent is looking more like a slap on the wrist in 2017.

The 2017 Amendments would raise the cap to RMB 3,000,000.⁵ The lower limit of the fine is also raised, from RMB 10,000 to RMB 100,000. Additionally, the authorities would be authorised to revoke the offender's business licence at its discretion.⁶ However, the confiscation of illegal income, which is a penalty under the current LAUC, would be dropped from the amended LAUC. This amendment would cause the LAUC to be at odds with other statutes, such as the Drug Administration Law, which still provides for the same penalties of a fine between RMB 10,000 and RMB 200,000, and potential confiscation of the illegal income in cases of commercial bribery of certain types, such as in the pharmaceutical context.⁷ It is not yet clear which set of penalties would apply in such a

conflict between the LAUC and, for example, the Drug Administration Law

- ¹ The 1993 LAUC, art. 8.
- ² See e.g., <http://business.sohu.com/20161013/n470200943.shtml> (Prominent Chinese businessman and real estate tycoon plead ignorance to bribery charges against employees of his company), <http://companies.caixin.com/2017-01-19/101046807.html> (Bribery conviction against corporate defendant overturned on appeal on the ground that it lacked knowledge of its employee's acts).
- ³ The 2017 Amendments, art. 7.
- ⁴ The 1993 LAUC, art. 22.
- ⁵ The 2017 Amendments, art. 22.
- ⁶ *Id.*
- ⁷ Drug Administration Law, art. 90, 91.

TRADE SECRETS



Definition

The current LAUC defines trade secrets as information that is, among other things, (a) capable of generating economic interests for the person with right to such information, and (b) of utility.⁸ These two elements have never been clearly teased apart in PRC courts. Subsequent judicial interpretations by the Supreme People's Court do not maintain an exact distinction between the two elements, but only seems to muddy the water.⁹ But this may soon become a moot point. The proposed amendments of the LAUC would lump these two elements into one requirement that the information is "of commercial value."¹⁰

Clearly, the amendment would simplify and broaden the definition of "trade secret". Some types of information worthy of trade secret protection that was left out in the old definition would be captured under the new definition. One example might be results from failed experimentation that reveal the infeasibility or the lack of utility of certain engineering approaches. This type of "teaching away" information may not be able to actively generate economic interests and may even have no utility. But it could definitely be of commercial value in that it could reduce experimentation and cut down on R&D costs.

This broadening of the definition of "trade secret" would likely translate into a broadening of scope of protection under the LAUC – a welcoming change to industry sectors that rely heavily on trade secrets.



Employees

Another noteworthy amendment in terms of trade secret is the addition of express language concerning trade secret misappropriation by employees and former employees. While the current statutory framework imposes criminal liability on the offending individual employees,¹¹ the LAUC only imposes civil liability on business operators and has no express provision against trade secret misappropriation by employees or former employees,¹² even though this type of misappropriation makes up as much as over 90% of all trade secret cases in some PRC courts.¹³

In practice, to claim civil liabilities against former employees, employers often have to rely on confidentiality or non-compete clauses in their employment contract. If such clauses are found unenforceable (for any of a wide variety of reasons), or if none exists, the employers would probably be left with no remedies. The amendments seek to address this problem by stipulating that, as with acts of misappropriation by business operators, acts against the employer by employees and former employees should be deemed to be misappropriation of trade secret.¹⁴ Under this new rule, employers would be able to go after rogue employees even in the absence of contractual obligations of confidentiality or non-compete.

In addition to employees, the proposed amendments would also impose an express confidentiality obligation on civil servants and professional service providers, such as lawyers and accountants.¹⁵



Penalties

As with the penalties for bribery, the penalties for trade secret misappropriation under the LAUC would also increase in monetary value. While a business operator or third party is currently subject to a fine of RMB 10,000 to RMB 200,000,¹⁶ they would be fined RMB 100,000 to RMB 500,000, and potentially even up to RMB 3,000,000 under the amendments.¹⁷

The amendments would impose new fines of no more than RMB 100,000 against employees and former employees and against professional service providers. Additionally, they would provide for the disbarment of lawyers and the discipline of civil servants.¹⁸

⁸ See the 1993 LAUC, art. 10 (“Trade Secret as used in this Article refers to technical information and business information that is not known to the public, capable of generating economic interest for the person with right to such information, of utility, and subject to confidentiality protection by the person with right to such information.”).

⁹ 最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释, art. 10.

¹⁰ See the 2017 Amendments, art. 9 (“Trade Secret as used in this statute refers to technical information and business information that is not known to the public, of commercial value, and subject to the relevant confidentiality protections by the person with right to such information.”).

¹¹ PRC criminal law, art. 219.

¹² The 1993 LAUC, art. 10.

¹³ 《商业秘密司法保护实务》, p. 234

¹⁴ The 2017 Amendments, art. 10.

¹⁵ *Id.*

¹⁶ The 1993 LAUC, art. 25.

¹⁷ The 2017 Amendments, art. 24.

¹⁸ *Id.*

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