China Law & Policy (December 2017) - China’s Revised Anti-Unfair Competition Law Brings Significant Changes to Commercial Bribery Rules

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China’s revised Anti-Unfair Competition Law comes into effect on January 1, 2018. It overhauls China’s regulatory framework and administrative enforcement regarding commercial bribery, and brings positive updates to address increasingly complicated bribery schemes. It also adopts some key international standards regarding anti-corruption laws, such as recognition of indirect bribery and availability of defense for employer liability. Companies doing business in China will need to be aware of these amendments and their implications.

**Background**

On November 4, 2017, China’s National People’s Congress (NPC) passed and published revisions to the 1993 Anti-Unfair Competition Law (the “Revised AUCL”), concluding a 14-year-long rule-making process first commissioned by the State Council in 2003. This is the first time that the AUCL has been revised since its enactment in 1993. While revising the AUCL, three rounds of drafts were released for comment by the State Council and NPC, respectively, from February 2016 to September 2017. Each draft presented major changes on the anti-bribery provision from the previous AUCL, which sparked heated discussions among business leaders, lawyers, and academics.[1]
This alert discusses the following salient changes of the anti-bribery provision under the Revised AUCL and compares them with the previous AUCL, as well as earlier drafts.

**Scope of Bribery Conduct Clarified**

Article 7 of the Revised AUCL clarifies that bribery acts should have the *intent* of “pursuing business opportunities or competitive advantages” (the previous AUCL did not discuss intent). Article 7 also lists the following three types of bribe recipients:

- *any employee of the counterparty to a transaction*;
- *any entity or individual authorized by the counterparty to a transaction to handle relevant affairs*; and
- *any entity or individual that is likely to take advantage of powers or influence to affect a transaction.*

The above provision raises the following noteworthy changes compared with the previous AUCL and earlier drafts.

- **Only employees of the counterparty—not the business counterparty itself—may be deemed the recipient of bribes.** This suggests that payments and benefits given to business counterparties may not be considered commercial bribery if they are accurately recorded in the books of the giver and receiver. This could include such things as “entry fees,” “display fees,” certain sales incentives, and donation of equipment. It remains unclear whether items and benefits given to a business counterparty that are ultimately used by its employees, such as gift cards, would be considered bribes. O’Melveny will be monitoring how the relevant administrations for industry and commerce (AIC) will implement this provision, and whether the State Administration for Industry and Commerce (SAIC) will issue any implementing rules to further interpret this provision.

- **Bribes given to third party entities or individuals authorized by the business counterparty are expressly prohibited.** This is the first time that Chinese law explicitly prohibits indirect bribery through third parties.

- **Establishment of concept of a third party that has influence over a transaction as a potential bribe recipient.** The scope of such third parties is potentially extremely broad, including entities and individuals who have the power of public office (such as government officials, government agencies, state-owned enterprises), close relatives of government officials, or decision makers of the business counterparty. As discussed in our earlier client alert, for example, if a business operator pays an industry expert for misleading business publicity to cause a business counterparty to purchase its products, under the Revised AUCL, the business operator’s conduct could be considered bribery.
The requirements that discounts and commissions shall be expressly and accurately recorded in the books of the giver and receiver are restated, but deletes the provision under the previous AUCL that considers off-the-book kickbacks as bribery. Without treating off-the-book kickbacks as bribery, it is unclear whether the administrative penalty and sanctions for bribery acts under the Revised AUCL will apply to business operators that do not property record discounts or commissions into their books.

Vicarious Liability to the Business for Employee Misconduct

The Revised AUCL adopts the rebuttable presumption of vicarious liabilities contemplated in the draft revisions of September 2017—an employee’s misconduct is attributable to the employer, unless the employer can prove that such misconduct is not related to seeking business opportunities or competitive advantages for the employer. As discussed in our earlier client alert, in practice it would probably be difficult for employers to distance themselves from their employees’ misconduct, as bribes paid by employees are ostensibly to win businesses or competitive advantages relating to their employers’ businesses, even if the employees also stand to gain personally. O’Melveny will monitor how regulators will enforce this provision and what evidence regulators will accept to rebut the presumption of liability of employers.

We note that the existing SAIC Interim Rules Prohibiting Commercial Bribery (the “SAIC Interim Rules”) provide that employees’ commercial bribery acts for selling or purchasing commodities for their employers should be deemed as acts of their employers. Therefore, we await whether SAIC will amend the SAIC Interim Rules or issue new rules to conform with the Revised AUCL.

Increased Sanctions

The Revised AUCL keeps the provisions on increased sanctions for bribery as contemplated in the draft revisions in September 2017. Penalties for bribery have increased from the range of RMB10,000 - 200,000 to RMB100,000 - 3,000,000. The Revised AUCL also includes revocation of business license in instances of serious violations as sanctions for bribery. This did not exist under the previous AUCL.

Expanded Investigation Power

The Revised AUCL expands the AIC’s investigation powers to include sealing and seizure of money or property concerned in the misconduct and access to the bank account of the business operator under investigation. Before exercising these new powers, a local AIC needs to obtain approval from the key person-in-charge of an AIC at the municipal level that has districts or above. It is worth noting that for sealing or seizures, a written decision needs to be delivered on the spot, as required under the PRC Administrative Compulsion Law.

Conclusion
It is expected that the regulatory authorities will issue more detailed rules for implementing the Revised AUCL. On November 8, 2017, the SAIC issued a notice[3] to provincial AICs, notifying them to be ready for the implementation of the Revised AUCL. The SAIC also calls for local AICs to step up enforcement efforts against unfair competition conduct, especially counterfeiting, bribery, and unfair competition in the internet industry. This suggests that anti-bribery will remain an enforcement priority for the AICs under the Revised AUCL. It is important for companies operating in China to review their compliance programs and commercial practice to be prepared for the implementation of the Revised AUCL.


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