China Law & Policy (May 2018) - Hitting Tigers, Flies, and Passersby: China’s Anti-Corruption Campaign Intensifies under New Supervision Law

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As part of its sweeping reform to tackle corruption, China has established a new nationwide anti-corruption agency – the National Supervision Commission (the NSC) – and passed the Supervision Law, which authorizes extensive supervisory and investigative powers to the NSC.

These measures of March 2018 demonstrate the Chinese Communist Party’s (CCP) commitment to strengthening CCP’s leadership of China’s anti-corruption campaign and bringing all “public power holders” (discussed below) under supervision. Establishing the NSC required amending China’s constitution. The NSC reports directly to the National People’s Congress and effectively takes over the investigative power for official corruption and duty-related crimes from the former Ministry of Supervision, the former National Bureau of Corruption Prevention, and the Supreme People’s Procuratorate. It consolidates anti-corruption responsibilities and resources for corruption by public power holders into this agency.

Although private sector businesses are not direct targets of the Supervision Law, it is vital for them to understand the implications of the law, especially businesses that have frequent dealings with government agencies, state-owned enterprises (SOEs), and public institutions in China. This alert summarizes the salient points of the Supervision Law and their implications for companies operating in China.
Before the formal establishment of the NSC, China had already started pilot programs for reforming the supervision system in Beijing and certain other provinces as early as 2016. By February 2018, it was reported that supervision commissions at provincial, municipal, and county levels had been set up across China, which paved the way for establishment of the NSC.

**Jurisdiction of the Supervision Law**

The Supervision Law created a new term: “public power holders.” The law covers activities and offences committed by public power holders in connection with performing their public duties. Offenses include corruption and bribery, abuse of power, dereliction of duty, power rent-seeking, tunneling of interests, playing favoritism, and squandering State assets.

Specifically, public power holders may be:[1]

- civil servants of organs of the CCP or democratic parties, and civil servants of legislatures, governments, courts, procuratorates, and political advisory bodies, and persons subject to management with reference to the PRC Civil Servants Law;
- persons engaged in public affairs at organizations authorized or entrusted to administer public affairs;
- managerial staff of SOEs;
- managerial staff of public institutions in the sectors of education, scientific research, culture, healthcare and sports and etc.;
- managerial staff of grassroots mass self-governance organizations; and
- other personnel who perform public duties.

In January 2018, a contract worker of a local urban management agency in Guangzhou was investigated by the local supervision commission for taking bribes. This case shows the expansive scope of public power holders, as the individual in this situation was not a formal civil servant or CCP member. [2]

This scope of public power holders is significantly broader than persons subject to the CCP’s previous supervision system. It appears to be similar to the scope of “state functionaries” under the PRC Criminal Law. This will supposedly make it easier for a case to be transferred from the supervision commissions to the people’s procuratorates for prosecution.

Note that non-managerial staff of SOEs and public institutions are not subject to the Supervision Law. Thus, teachers and doctors without managerial positions in their respective organizations do not fall under the NSC’s reach. This is relevant for companies that frequently deal with doctors or teachers, such as healthcare companies and education companies, to know.

**Investigative Powers**

The supervision commissions are empowered with the following broad investigative powers when investigating a case:
require the relevant entities or individuals provide information or evidence;
- interrogate suspects;
- question witnesses and other persons concerned;
- detain (liuzhi) suspects, as well as people suspected of giving bribes or joint duty-related offences;
- make inquiries into and freeze assets of the entities and individuals involved in the case;
- search the body, effects, domicile, and other relevant places of a suspect or the person who might be hiding the suspect or evidence;
- collect, seal, or seize relevant information such as property, documents, and electronic data;
- appoint or hire experts to conduct inspection, examination, or appraisal;
- instruct the police to issue fugitive notices or block suspects from leaving the Mainland China territory.

Any person suspected of giving bribes may be detained under the Supervision Law – not just public power holders. Detention may be for up to six months: an initial detention for up to three months, extendable once for up to three months, under special circumstances. The extension period should be reported to the supervision commission at the next higher level for approval. The Supervision Law is silent on whether a detained individual has access to a lawyer. The general view is that detainees would be denied access to a lawyer, and this has raised concerns over potential abuses of power.

Note that this is a step up from the practice under CCP’s Central Committee for Disciplinary Inspection (CCDI), also known as Shuanggui, where bribe givers from the private sector could not be detained.

If supervision commissions believe that the particulars of offence are clear and the evidence is true and sufficient, they shall transfer the case to the people’s procuratorates for initiating public prosecutions.

**Implications for Companies Operating in China**

Although private sector businesses are not direct targets of the Supervision Law, it is still important for them to understand the implications of the law, especially if the businesses have frequent dealings with government agencies, SOEs, and public institutions in China. Private sector businesses and their employees may be required to provide information or evidence to assist supervision commissions’ investigations. An individual employee or officer of a company may be detained by supervision commissions if they are suspected of giving bribes to public power holders.

There have already been cases of detention of businesspersons in the private sector under the pilot programs of the new supervision system. For example, in the second half of 2017, a local supervision commission in Zhejiang province detained a shareholder of a local privately owned company in connection with an investigation of a government official. The shareholder was suspected of giving bribes to the official in exchange for higher compensation for relocating a factory. It is reported that the
shareholder destroyed certain evidence and colluded with other people in responding to inquiries from the local supervision commission. In order to prevent the shareholder from further obstructing the investigation, the local supervision commission, with the approval of a higher supervision commission, detained the shareholder. Both this shareholder and his company were finally convicted of bribery in December 2017.

Thus, companies, especially those that deal with Chinese government agencies, SOEs, and public institutions will want to review and strengthen their compliance policies, as necessary, not only addressing FCPA compliance risks, but very importantly compliance requirements under Chinese law.

[1] Article 15 of the Supervision Law, promulgated on March 20, 2018 and effective on the same date.

[2] See here


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