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New Round of Draft Revisions to China's Anti-Unfair Competition Law Brings Substantial Changes to Commercial Bribery Rules

September 27, 2017

China's National People's Congress (NPC) released a new round of draft revisions to the *Anti-Unfair Competition Law* (AUCL) for public comment on September 4, 2017 (the "September 2017 Draft"). The September 2017 Draft is the second round of draft revisions to the AUCL issued by the NPC. In February 2016, the State Council issued a draft revised law to be presented to the NPC, and in February 2017, the NPC issued the first round of draft revisions for public comment, which contained substantial changes to State Council's original draft.

As China's social and economic situation has changed dramatically since the AUCL was enacted in 1993, a key concern for the increasingly complicated China market is commercial bribery. Each revised AUCL version has attempted to overhaul the provisions prohibiting commercial bribery, and the revisions in the earlier drafts have led to heated discussions in legal and business circles. This alert summarizes the key changes to the bribery and other related provisions in the September 2017 Draft.

Clarified Scope of Bribery Conduct

Article 8 of the current AUCL lays the legislative foundation for China's existing rules against commercial bribery. It provides that "business



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operators shall not practice bribery by using money, materials or other means to sell or buy commodities.” Article 8 further deems bribery as offering of a “secret off-the books rebate” to a business counterparty, including a natural person, or the acceptance of such rebates.

Article 8 permits the payment of “express” discounts to counterparties and commissions to intermediaries in the course of “buying and selling commodities,” provided that they are accurately recorded in the parties’ accounts. Over the last two decades, this brief statutory prohibition has been fleshed out through SAIC implementing measures, such as the Interim Rules Prohibiting Commercial Bribery, ^[1] but the implementation of law and these measures have been subject to wide discretion on the part of local AICs. For example, in 2016 five international tire manufacturers were penalized in Shanghai for offering performance-based compensation incentives to distributors or retailers in the form of shopping gift cards, gas cards, or trips, though as least three of the manufacturers recorded such expenses as sales expenses, or promotional or marketing expenses in their accounts. (See our alert: Avoiding Fines and Disgorgement of Profits under PRC Anti-Bribery Provisions). This particular enforcement case caused a lot of confusion within the business world. There has been wide expectation that the revisions to the AUCL will provide more clarity and guidance on the prohibition of commercial bribery.

The last two draft revisions introduced the concept of “a third party that has influence over a transaction” as a potential recipient of a bribe. The NPC reported that there has been feedback that the scope and meaning of a “third party that has influence” is vague and should be further clarified. Also, the NPC takes into consideration that Chinese Criminal Law addresses both bribery to government officials and bribery to non-government officials. Combining the foregoing two concerns, NPC clarifies in the September 2017 Draft that a business operator is prohibited from bribing the following entities or individuals via money, materials, or other means to pursue transaction opportunities or competitive advantages:

- i. employees of the business counterparty;
- ii. entities or individuals authorized by the business counterparty to handle relevant matters;
- iii. government agencies, state-owned companies and enterprises, public institutions
- iv. other entities or individuals who may take advantage of the power of state functionaries to influence a transaction.

There are several noteworthy points in this new revision of the rules:

- In the new draft, these categories of entities and individuals appear to all have some sort of legal duty vis-a-vis a business counterparty, as opposed to the prior draft’s usage of the term “third party that has influence over a transaction,” which could cover those without such a duty.

- This new draft narrows the scope of “third party that has influence over a transaction” by excluding third parties that do not owe any legal duty to a business counterparty. This appears to be consistent with the practice of other jurisdictions in which an essential element of bribery offenses is the intent to induce the recipient to breach the recipient’s own legal duty to a third party. Under this new draft, an influential third party needs to owe a duty to the business counterparty either as an employee, authorized agent, or civil servant. Under the earlier drafts, paying a third party who does not have any prior relationship with the business counterparty could be considered as giving a bribe. For example, if a business operator pays an industry expert for misleading business publicity which causes a business counterparty to purchase its products, under the earlier drafts, the business operator’s conduct could be considered bribery. This would make the scope of bribery conduct overly expansive. This new draft clarifies this issue and avoids creating an overlap between bribery conduct and other unfair trade practices, such as commercial torts and antitrust offences.
- The new draft clarifies that bribery of government agencies and state functionaries can be penalized under the AUCL. Under the current AUCL, it is unclear whether bribery acts subject to the AUCL are only limited to bribery between business parties, which is the usual understanding of commercial bribery, or also includes bribery of government officials for the purpose of influencing a business transaction. In practice, some AICs have enforced cases involving paying bribes to government officials for securing transaction opportunities. The September 2017 Draft clarifies this issue. It does not attempt to define commercial bribery, but focuses on whether an act could result in an unfair business advantage. With this change, bribery of government agencies, state functionaries, and people closely related to state functionaries could lead to both criminal liabilities and administrative liabilities.
- Interestingly, this new draft does not prohibit bribery of a business counterparty. This is different from the February 2017 Draft, which provides that a business partner is prohibited from bribing the counterparty or any third party that may affect the transaction with money, materials, or by other means. Under the new draft, some acts that have been considered commercial bribery in AIC’s enforcement cases, such as the payment of a “display fee” or “entry fee” (i.e., a fee paid by manufacturers to retail stores for displaying their products in a prominent place) may not fall within scope of the prohibition against bribery because business counterparty is not mentioned as one of the possible recipients of a bribe in the new draft. It is unclear whether excluding business counterparties as bribe recipients is the legislator’s intent, especially considering that the same provision also allows discounts to the “counterparty.” It remains to be seen whether improper benefits given to a business counterparty directly would be considered bribery.

Vicarious Liability for Employee Misconduct

The current AUCL is silent on vicarious liability for employees' bribery conduct. Although the SAIC's Interim Rules Prohibiting Commercial Bribery provides that bribery on the part of an employee to sell or purchase commodities for its employer shall be attributed to the employer,^[2] in practice not all local AICs adopt this strict liability standard and have different practices for determining employer liability for employees' bribery conducts. Compared with the February 2017 Draft, the September 2017 Draft makes it more difficult for an employer to rebut the presumption of vicarious liability. Under the September 2017 Draft, an employee's bribery is attributable to the employer unless the employer has evidence to prove that the act of the employee is unrelated to seeking business opportunities or competitive advantages for the employer. In most cases in practice, employees pay bribes to win businesses or competitive advantages relating to their employers' business. Under this new formula of a rebuttable presumption, it would be more difficult for employers to distance themselves from employees' wrongdoings, even in cases where employees embezzle the illegal profits to harm the employers' interests.

Increased Penalties

The September 2017 Draft keeps the increased penalty amount for violation of the anti-bribery provision as provided in the February 2017 Draft, i.e., a penalty ranging from RMB100,000 to RMB3,000,000, compared with the range of RMB10,000 to RMB200,000 under the current AUCL. The September 2017 Draft also imposes both penalty and confiscation of illegal gains as liability for bribery acts, while the February 2017 Draft only imposes penalty but not confiscation of illegal gains.

Investigation Power

The September 2017 Draft keeps the expanded investigation power of the AICs as provided in the earlier drafts. Compared with the current AUCL, AICs will be able to seal and seize money or property involved in the suspected acts of unfair competition and access the bank account of the business operator suspected of unfair competition. These measures are usually considered effective and critical for uncovering wrongdoings.

As a check on the AICs' power, the September 2017 Draft provides that a local AIC needs to submit a written report and obtain an approval from the head of that local AIC before taking certain investigation and evidence collection measures, and it needs to submit a written report and obtain approval from the key people-in-charge of an AIC at the municipal level that have districts or above for seizing a company's property or accessing a company's bank accounts. However, the September 2017 Draft does not mention whether the AICs should present such approval to companies being inspected. Although the Chinese Administrative Compulsion Law^[3] requires AICs to make and deliver on the spot a written decision on seizure, in practice, it may be difficult for companies to question whether AICs have obtained the necessary approvals for the decision if AICs do not need to

present such approval to the companies being inspected.

In addition, the September 2017 Draft takes away AICs' power to order a cessation of the suspected unfair competition acts during an investigation. This may help check AICs' discretion and protect companies' interests.

The extent of any further amendments to the AUCL and the timing of their final adoption remain uncertain. However, multinational companies operating in China should assess their current commercial practices and compliance programs in anticipation of the AUCL's revision.

[1] Issued by the State Administration of Industry and Commerce on November 15, 1996, effective as of November 15, 1996.

[2] *Id.* Art. 3.

[3] Issued by the Standing Committee of the National People's Congress on June 30, 2011 and effective as of January 1, 2012.

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