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## China Aims to Strengthen Regulations on Commercial Bribery

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*Recently, the Legal Affairs Office of the State Council released draft amendments (Draft Amendments) to the Anti-Unfair Competition Law (AUCL) of the People's Republic of China (PRC) for public comments. The Draft Amendments aim to revise the existing AUCL, which was promulgated more than 20 years ago, and the proposed amendments are for the purpose of further promoting fair competition in the market and providing consumers with better protection.*

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The Draft Amendments address various types of unfair competition conduct, such as commercial bribery, infringement of trade secrets, misleading marketing activities, creating market confusion by using improper business marks, or prize-awarding promotions, etc. This alert focuses on the proposed amendments to the commercial bribery provisions in the Draft Amendments.

### **1. Three Types of Commercial Bribery Are Identified**

The Draft Amendments identify the following three types of conduct by business operators as commercial bribery:

1. Seeking personal economic benefits for such business operator, its departments or any related individuals which are public service activities. It is worth noting that the Draft Amendment aims to crack down on commercial bribery given to an organization or individual in the public-service sectors, such as public schools, public hospitals and other public organizations.
2. Failing to correctly and accurately record any economic interest in one's contracts and accounting books. This provision echoes the books and records requirements of the United States Foreign Corrupt Practices Act (FCPA). It requires business operators to make correct and accurate booking entries of any payment of economic benefits, a standard that is broader than the previous scope of booking requirement for discounts and kickbacks under the old AUCL.

3. Providing or promising to provide economic benefits to third parties who have influence on a transaction, or damaging the rights and interests of other business operators or consumers. As discussed in detail below, the Draft Amendments add the concept of bribery to a “third party” that may or may not be a direct party to a transaction, but has influence on the transaction. Also, like the FCPA, the Draft Amendments specify that a promise to provide economic benefit will also be deemed to be commercial bribery, even though a bribe has not been actually provided.

## **2. Adding Concept of Commercial Bribery to a “Third Party”**

The Draft Amendments add the concept of bribery to a “third party” that may or may not be a direct party to a transaction, but has influence on the transaction.

Such “third parties” typically include bidding agencies, appraisal agencies, distributors and other entities that may not be a party to a transaction but may be able to influence a transaction. For example, a construction material supplier may violate the anti-bribery provisions under the Draft Amendment if the supplier offers or provides economic benefits to a design institute in order for such design institute to set forth requirements on construction materials that favor the products of such supplier, whereby the supplier will have a better chance to sell its products to the project owners and/or contractors. In practice, in a number of enforcement cases handled by the State Administration of Industry and Commerce (SAIC) prior to the release of the Draft Amendments, the SAIC has already determined that business operators had engaged in commercial bribery by giving economic benefits to third parties in exchange for transaction opportunities and therefore were held liable and punished. As such, business operators need to pay special attention to dealings with third parties that may not be a direct party to a transaction and establish a robust compliance program regarding the selection and engagement of third party service providers, setting forth strict and practical policies in relation to how to deal with such third parties.

## **3. An Employee's Improper Conduct May be Regarded as the Employer's Violation**

The Draft Amendments provide that if an employee offers or provides commercial bribes to seek transaction opportunities or competitive advantages for its employer, it will be regarded as an act of the business operator unless the employer can demonstrate sufficient and clear evidence that the employee was doing so against the interest of the business operator.

This will impose greater requirements on the business operators to closely monitor the acts of their employees. A business operator needs to review its current code of conduct and relevant anti-corruption protocols to determine whether it has implemented an adequate program to manage employees' interactions with their counterparty in a transaction or any third party.

## **4. More Severe Penalties Will Be Imposed**

In the current AUCL, the penalty for non-criminal commercial bribery is a monetary fine between RMB 10,000 (around USD\$1,538) and RMB 200,000 (around USD\$30,770) depending on the specific circumstances, as well as confiscation of any illegal income. The proposed Amendments abolish the penalty of confiscation of all illegal income and have changed the amount of monetary fine to “10 percent to 30 percent of business revenue as a result of illegal conduct”.

The proposed Amendments also introduce a number of enforcement measures available to SAIC and other investigative authorities in addition to those under the current AUCL, which include (1) right of entry into the place of business and other places for any on-site investigation, (2) seizure of relevant evidence, and (3) application to court to freeze capital.

The Proposed Amendments provide a clearer legal framework defining commercial bribery and support enforcement by SAIC and other governmental authorities in attacking commercial bribery. We suggest that business operators review their existing compliance program with the help of their legal department and external counsel to mitigate risks. In the meantime, we will review developments and keep you posted of any major changes.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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