Commercial Bribery in China

by Thomas M. Shoesmith

The recent death sentence imposed on the former president of Shanghai Pharmaceutical Group reminds the market that China is serious about its crackdown on corruption. Chinese law prohibits corrupt payments in the commercial as well as the government-related context, and international businesses are well advised to keep in mind China’s prohibitions on commercial bribery.

In November 2011, the former president of the state-owned Shanghai Pharmaceutical Group was sentenced to death, with a two-year reprieve, for taking more than $1.8 million in bribes and embezzling another $5 million. Although these types of sentences are often commuted to life in prison, the sentence is a reminder of how seriously Beijing takes the question of corruption in what is now the world’s second-largest economy.

This case involved an official of a state-owned company and violations of criminal law. China also prohibits bribery in the purely commercial context, and these laws are a subject of real importance for every company investing in or doing business with China. This alert will focus on commercial, as opposed to government-oriented corruption. Information on improper payments in the state-owned and government context, including the prohibitions of the U.S. Foreign Corrupt Practices Act, is available on request from our China Practice group.

Background

As in many other countries, bribery is a criminal as well as a civil offense in China. The PRC Criminal Law has long made bribery a crime, but until recently its specific application in the commercial context was unclear. A November 2008 opinion issued jointly by the PRC Supreme People’s Court and the Supreme People’s Procuratorate (the “2008 Opinion”) addressed this issue at length. The PRC Anti-Unfair Competition Law and rules issued by the State Administration on Industry and Commerce also address commercial bribery. And, in a recent development, the Standing Committee of the National People’s Congress amended the Criminal Law in February 2011 to apply China’s anti-bribery laws to bribery of foreign officials.2

1 Opinion Concerning Several Issues in the Application of the Law in Cases of Commercial Bribery (20 November 2008), issued jointly by the PRC Supreme People’s Court and the PRC Supreme People’s Procuratorate. See also an opinion issued by the same two bodies in 2007.
2 See Amendment No. 8 of the PRC Criminal Law (2011). This extension of China’s anti-bribery laws will not be discussed here.
In 2010, China ranked above average among the countries surveyed in Transparency International’s Corrup-
tion Perception Index (78 out of 179). This placed it above India (87th) and Russia (154th), but below Brazil (69th). Compared to China’s ranking, Singapore and the Scandinavian countries made up the top five, fol-
lowed by Canada; the United States ranked 22nd; South Korea 39th; and Italy 67th. China’s ranking has stayed
about the same on this index since 2002, although it took a dip in the 2006-2007 time period. Indeed, during
that period there were some 100,000 corruption scandals investigated by Chinese authorities, and some
observers estimated that 60% or more of those investigations involved foreign companies.

Corruption – both official and commercial – has received considerable attention in the international and
domestic press in recent years. Based on the rankings above, this probably reflects the growing importance
of China in the international economy as much as it does the absolute level of improper business behavior.
In any event, the topic is of acute concern to international businesses investing or doing business in China.

**Discussion**

The PRC Criminal Law makes it illegal:

- to make a bribe, whether the target of the bribe is a state official (Art. 389), a non-state official (Art. 164)
or an entity or working group ("danwei") (Art. 391);
- to accept a bribe, whether by a state official (Art. 385), a non-state official (Art. 163) or an entity or work-
ing group ("danwei") (Art. 387);
- to commit bribery if the actor is an entity or danwei (Art. 393)(individual actors are covered by the sec-
tions noted above; and
- to serve as an intermediary in the commission of an illegal bribe (Art. 392).

The PRC Anti-Unfair Competition Law also prohibits “giving bribes in the form of property or other means for
the purpose of selling or purchasing products.” This law is enforced by the State Administration of Industry
and Commerce ("SAIC") at the national and local levels.

The PRC Law on Drug Administration and other laws and regulations specific to various industry sectors
likewise contain provisions making commercial bribery problematical if not outright illegal.

**What constitutes a bribe?**

The PRC Criminal Law defines bribery in the state context as (i) an offer of property, (ii) to a member of the
working personnel of the state or government, or a state-owned enterprise, 6 (iii) in return for a benefit or for
assistance in obtaining a benefit. Whether the bribe “works” – whether the benefit is actually obtained – is
not relevant.

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3 The survey is available at [www.transparency.org](http://www.transparency.org).
5 Art. 8.
6 Defined in Art. 93 of the Criminal Law, and includes personnel of a state-owned enterprise. It is not clear, but practitioners
assume, that “state-owned enterprise” includes enterprises invested in but not wholly owned by the state.
7 As noted below, the “benefit” should be “improper,” although this is somewhat circular. If a payment must be made to secure
the benefit, then by definition it is an improper benefit.
The Criminal Law defines bribery in the commercial context as (i) an offer of property, (ii) to a member of the working personnel of a company or enterprise,\(^8\) (iii) in return for a benefit or for assistance in obtaining a benefit, (iv) where the amount of the bribe is “relatively” or “very” large.

SAIC has provided some additional definitional guidance, ruling that commercial bribery is “any activity by which a business operator bribes a counterparty to a transaction, whether an individual or an entity, in the form of the transfer of property or other means ….”\(^9\) It is worth noting – but not relying on – the apparent limitation of commercial bribery to transfers made to the counterparty itself, perhaps not including intermediaries, employees, relatives, and others involved in the transaction.

**What constitutes “property?”**

Obviously the outright payment or delivery of money or any other item of value can be a bribe. So can providing entertainment, travel, meals, or paying the expenses of the target person or entity. The 2008 Opinion clarified this issue by making clear that the “item of value” involved can also be legal interests (such as providing services), cards or other pre-paid items, coupons or tickets, etc.

Sometimes the “bribe” is disguised as a commercial transaction, and these are also picked up by the 2008 Opinion. The Opinion listed the following examples of transactions which can constitute bribery under the circumstances of a given case. These are not intended to be exhaustive, but rather reflect the creativity the authorities have seen in the area of improper commercial payments.

- transferring property at a discounted or commercially unreasonable price (cars, houses, land, equipment, etc.)
- issuing or transferring equity (shares) of a company to the target for no compensation or at less than fair value
- granting a profits interest in an enterprise where the target did not make the corresponding investment or contribution to capital or has not provided services or other legitimate value to support that interest
- making payments or other transfers of items of value under cover of handling the target’s securities, investments, etc.
- transfers under cover of “gambling” activities
- putting the target on a payroll or otherwise compensating the person or entity where no services having a reasonably comparable value are delivered
- making a loan or giving the target the use of something valuable, such as an automobile, a house or a vacation condo
- guaranteeing or backstopping overdrafts

The 1996 SAIC Rules take an expansive view of what can constitute a bribe, including:

- any payments or transfers, whether cash or non-cash
- transfers disguised as marketing fees, sponsorships, club memberships, charitable contributions, etc.
- consulting fees and commissions
- R&D and other service fees

\(^8\) Or other organization, see discussion of 2008 Opinion, below.

• expense reimbursements\textsuperscript{10}

And, the SAIC’s reference to “bribery in the form of transfer of property or other means” seeks to expand the reach of the prohibition to include providing vacations, travel, educational services, or any other roundabout way of conferring a benefit on the target.\textsuperscript{11}

The pharmaceutical and health care industries are the subject of particular attention in this area.\textsuperscript{12} Donations, sponsorships, conference fees, speaker fees and other similar items are frequently a part of misconduct in the health care industry, and these are the subject of specific rules promulgated by the PRC Ministry of Health.\textsuperscript{13} The 2008 Opinions specifically called out payments to medical professionals in exchange for prescribing pharmaceuticals as “bribes” which can result in criminal or civil enforcement. Moreover, because many of the parties in this industry are state-owned, the U.S. Foreign Corrupt Practices Act and the PRC laws relating to bribery of state entities and officials are implicated; these are beyond the scope of this memorandum.

\textbf{Is improper intent required; or, when is a gift only a gift?}

Business people often make gifts to their business associates, counterparties, customers, suppliers, etc. In most cases these are not bribes. The PRC Criminal Law provides that a transfer must be made with the intent to “pursue improper gain” in order to constitute a bribe. “Improper gain” means an advantage or benefit which is in violation of PRC laws and regulations, industry practice or government policy, or to gain an advantage in a government bidding or decision-making process. As noted above, this can be a circular analysis – obtaining a contract is not improper, but paying a bribe to obtain a contract certainly makes the award “improper.”

The 2008 Opinion offered some guidance in this area, stating that each case must be evaluated on the basis of the specific facts presented. Factors to be taken into account include the nature of the transaction and the personal history between the parties (giving a long-time business associate your ten-year old car when you buy a new one is suggestive of a gift; buying a Bentley for someone you have never met is not); the totality of the circumstances surrounding the transfer; and whether the parties are in a position to benefit each other, and actually do benefit each other (a transfer to someone in your customer’s organization who has no ability to affect his employer’s purchasing decision suggests a gift; a transfer to your customer’s purchasing officer does not).\textsuperscript{14}

As noted above, the anti-bribery provisions of the PRC Anti-Unfair Competition Law prohibit bribes made “for the purpose of selling or purchasing products;” presumably, if the purpose of the transfer was something else, an argument could be made that the behavior does not fall under the prohibitions of this law. It is likely to be prohibited by another law, however.


\textsuperscript{11} Some additional guidance is provided by the \textit{Opinions on Correctly handling the Policy Boundaries in the Crackdown on Commercial Bribery}, promulgated by the Central Leadership Group on the Suppression of Commercial Bribery, dated 28 May 2007, but it is consistent with the authorities discussed above.

\textsuperscript{12} See, e.g., \textit{PRC Law on Drug Administration} (February 2001); the \textit{Rules Regarding Keeping Records of Commercial Bribery in Medical Sales}, Ministry of Health (2007); the \textit{Opinions of the State Food and Drug Administration Concerning the Implementation of Special Enforcement Programs Against Commercial Bribery}, issued on 24 May 2006.

\textsuperscript{13} \textit{Provisional Rules on the Administration of the Receipt of Donations and Sponsorship by Institutions in the Health Care Sector}, Ministry of Health (6 April 2007).

\textsuperscript{14} To be clear, these are only examples and even those which are suggestive of gifts could be bribes under all the facts and circumstances.
Who are “non-state officials”?
Parties who want to stay well back of the line in this area should assume that everyone is either a state official or a non-state official, and it is illegal to bribe either of them. For the avoidance of doubt, however, the 2008 Opinion made clear that non-state officials include persons working for community, sports, cultural and other non-commercial organizations, as well as persons involved in community and other groups.

Affiliates, relatives, close friends, lovers, mistresses and the like are included within the definition of “state official” under the terms of the 2007 Opinion, but that extension has not been formally applied in the commercial category. It is inadvisable to engage in activity in reliance on a belief that this constitutes a “loophole” in the law, however.

Are the commercial anti-bribery laws ever enforced?
Yes. Particularly in recent years, the authorities in China have found a number of occasions to enforce the commercial anti-bribery laws. Given the relatively widespread nature of this problem, moreover, those who are caught often are treated harshly in order to “send a message” to the marketplace.

What are the potential penalties?
PRC law provides for both civil and criminal liability, including fines and imprisonment, in cases of commercial bribery. Administrative penalties can be imposed by the SAIC, and can include relatively modest fines, confiscation of ill-gotten gains, and revocation of business licenses. Criminal penalties can include imprisonment for up to 10 years as well as fines. Civil suits are possible under Art. 20 of the Anti-Unfair Competition Law, but so far these are unusual.

For further information on this or any other topic relating to doing business and investing in China, please contact a member of our China team or the author:

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