

Draft changes to anti-bribery law may allow more flexibility in promotional activities

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China's National People's Congress recently published new draft amendments to the Anti-Unfair Competition Law 1993 for public comments. This is the second set of amendments introduced in 2017. On the one hand, these changes appear to limit who can be regarded as being the recipient of a commercial bribe and therefore grant companies more flexibility in designing promotional activities. On the other hand, companies are more likely to be held vicariously liable for commercial bribes paid by employees, and to face a harsher penalty.

Background

The State Council released a first set of draft amendments to the Anti-Unfair Competition Law 1993 (AUCL) in February 2016 (see In context article [here](#)). The 2016 amendments were rather harsh and far-reaching as they were drafted by AIC, the enforcement authority of the AUCL. In February 2017, the National People's Congress released the first 2017 draft amendments to AUCL based on input from authorities, trade associations, experts, and judges (see In context article [here](#)). The first 2017 draft tried to strike a balance between the AUCL and the 2016 amendments, by restricting the power of AIC and fines, for example.

Six months later, on 5 September 2017, the second 2017 draft was released after a review by the Standing Committee of the National People's Congress.

Recipients of commercial bribery definition clarified

The first 2017 draft broadly defined the recipient of a commercial bribe as being a "counterparty and third party that might have influence over a transaction". The second 2017 draft replaces this definition by clearly setting out who is regarded as being a recipient: (1) staff of the counterparty; (2) units or individuals delegated by the counterparty; (3) state organs, state-owned enterprises, state-owned institutions, people's organisations or state functionaries; and (4) other units or individuals that may influence transactions by taking advantage of the power of state functionaries.

If this change is kept in the amended AUCL, the private companies themselves acting as a counterparty in a transaction are for the first time excluded from being considered commercial bribery recipients. This means payments to private companies are not only decriminalised under China's criminal law, but they are also no longer punishable under the AUCL. Payments to staff of the private companies do, as stated, fall under the prohibition.

The second 2017 draft would give companies more room to carry out promotional or cooperative arrangements with private

companies. However, we recommend that companies remain cautious and err on the safe side, especially if: (i) they are in highly regulated industries, such as healthcare or TMT, or (ii) the private companies could potentially act as a channel for payments to others. It also remains to be seen whether, how, and when the existing rules regulating commercial bribery that were issued by various authorities would be amended for coherent enforcement across the country.

Broader employer liability exposure

Under the second 2017 draft, unless a company can prove that the bribe paid by its employee is unrelated to seeking transaction or competitive advantages for the company, it will be held liable for the violation of the anti-commercial bribery provision of the AUCL. This implies that even if a company can prove that the bribe paid by its employee was exclusively the employee's personal conduct – this was formerly an effective defence under the first 2017 draft – the company will likely be liable for its employee's behaviour as long as the company gained competitive advantage over the employee's payment of the bribe.

Penalties

Compared with both the AUCL and the first 2017 draft, the second 2017 draft imposes harsher penalties for commercial bribery violations. Confiscation of illegal gains has been reinserted even though it had been previously removed in the 2016 and first 2017 draft amendments. Despite the existence of some AIC guidelines on how to calculate the exact amount of illegal gains in a case, local AICs commonly have wide discretion in determining the amount of illegal gains.

The administrative fines for commercial bribery have been raised significantly from between RMB 10,000 and 200,000 under the AUCL, to between RMB 100,000 to 3 million in the first 2017 draft, and these amounts remain unchanged in the second 2017 draft. Under both 2017 drafts, a company's business licence can be revoked in serious instances of commercial bribery.

While China is now one step closer to adopting an amended AUCL, fundamental changes have been introduced in each set of draft amendments with regard to commercial bribery. This signals the importance of anti-bribery compliance, as well as the lack of consensus among stakeholders. We will continue to closely follow and regularly update our readers on any developments.