New draft changes in anti-bribery law good news for companies with effective compliance programmes

March 13, 2017

China's National People's Congress recently released new draft amendments to the commercial bribery provisions in China's unfair competition legislation, following the circulation of an initial draft by the State Council a year ago. The new amendments appear to try to strike a balance between the current 23 year-old legislation and the harsh and far-reaching initial draft amendments. One of the most important changes for companies is that liability for bribery committed by employees may be avoided if a company can prove that it has taken necessary steps to prevent bribery from occurring. This looks similar to the adequate procedures defence under the UK Bribery Act. As the draft amendments seem to place greater importance on robust compliance programmes and effective internal control, we encourage companies active in China to continue to implement and update their compliance framework for entities in China.

Background

In February 2016, China's State Council released draft amendments to the Anti-Unfair Competition Law 1993 (AUCL) for public comments. These 2016 amendments included significant changes to provisions governing commercial bribery (see our previous In context article here). After consultations with various authorities, trade associations and experts, and amendments by judges of China's Supreme Court, China's National People's Congress recently released a new version of the draft amendments to the AUCL for public comments (the 2017 amendments).

The 2016 amendments were drafted by the state-level Administration for Industry and Commerce (AIC), a ministerial department. The AIC is the main enforcement body for the AUCL's commercial bribery provisions, and this is why the AIC's authority was broadened under the 2016 amendments. This has now been reversed to a certain extent in the 2017 amendments.

Definition of commercial bribery

Instead of attempting to define the concept of commercial bribery by explicitly requiring corrupt intent behind a provision or promise of financial benefit, as was set out in the 2016 amendments, the 2017 amendments do not include a specific definition of commercial bribery. They only provide that a person "may not use money or property or other means to bribe a counterparty to a transaction or a third party that can influence a transaction". It appears that a promise of a bribe alone is no longer punishable under the 2017 amendments. The term "financial benefit" was also changed back to "money or property or other means" as already being used in the AUCL.

In line with the 2016 amendments, it is prohibited under the 2017 amendments to bribe a "third party that has influence over a transaction". This brings greater clarity that such practice is prohibited. A third party is further defined in the 2017 amendments as "an entity or individual that can use its authority to influence a transaction".

Broadened scope of liability for employees, but with carve-out

The 2017 amendments confirm the vicarious liability of companies for bribes paid by employees as provided in the 2016 amendments. However, the 2017 amendments make an exception to that vicarious liability if a company can provide evidence that the bribery by its employee was exclusively down to an employee's personal conduct. This carve-out would effectively encourage companies to adopt robust compliance programmes and effective internal control, allowing them to use this as evidence that the employee's conduct was not condoned by the company. It remains to be seen what the standard of evidence will be – this could vary significantly between local authorities.

Provisions from 2016 amendments that are not included in 2017 amendments

The 2016 amendments provided for increased liability for bribes paid by a business partner acting on the company's behalf (such as an agent or distributor) if the company should have known that the business partner was committing bribery. This provision is not included in the 2017 amendments.

The 2016 amendments imposed obligations on a company to maintain accurate books and records on benefits between business operators, failing which commercial bribery would be assumed. These provisions were removed from the 2017 amendments. Nevertheless, maintenance of accurate books and records can still be an important consideration in penalty decisions taken by the authorities and would potentially draw a line of distinction between an employee's personal conduct and company practice.

Strengthened inspection power

The 2017 amendments confirm the powers that an authority can exercise to facilitate supervision and inspection, including entering business premises, seizing evidence, attaching assets, and making inquiries to banks. On the other hand, the powers to enter premises other than business premises (such as personal homes), and to freeze funds, as granted in the 2016 amendments, have been removed. Companies are recommended to take these proposed changes into account when implementing or updating their dawn raid guidelines and training. The 2017 amendments also remove fines for companies which refuse to cooperate with authorities in relation to a commercial bribery investigation. However, we still recommend showing willingness to cooperate during an investigation, as authorities may take this into account when determining the amount of the fine for the commercial bribery.

Penalties

The 2017 amendments significantly increase the administrative fines for commercial bribery. Previously these fines ranged from RMB 10,000 to RMB 200,000 as stipulated in the AUCL, whereas they range from RMB 100,000 to RMB 3 million under the 2017 amendments. The possibility to confiscate illegal gains in addition to the penalty (as provided in the AUCL) was removed from both the 2016 and the 2017 amendments.

Under the 2017 amendments, a company's business licence can be subject to revocation in serious instances of commercial bribery.

The timing of the legislative process is currently unknown. Corresponding implementing rules are expected to be released to provide further clarity after the amended legislation has been enacted. We will continue to monitor developments and report any updates.