

Extraterritorial Effect of the Anti-Corruption Law of the People's Republic of China

BY THE GLOBAL COMPLIANCE AND DISPUTES PRACTICE

Background

On February 25, 2011, the PRC legislature passed 49 amendments to the Criminal Law of the People's Republic of China ("Criminal Law"). One such amendment – Amendment No. 8 of the Criminal Law – criminalizes the payment of bribes to non-PRC government officials and to international public organizations (the "Amendment"). Section XXIX of the Amendment, Revising Article 164 of the Criminal Law, states that:

If an individual gives something of great value to an employee of a company, enterprise or other entity for improper gains and interests, such person shall be sentenced to a fixed-term imprisonment of no more than three years of criminal detention; if the amount of value involved is especially huge, the offender shall be sentenced to a fixed-term imprisonment of not less than three years but not more than ten years, and be concurrently subject to a fine.

An individual who gives something of value to a *foreign public official or official of an international public organization* in pursuit of improper commercial interests shall be punished in accordance with the preceding paragraph of this Article. (Emphasis added.)

If an entity commits crimes which fall into the preceding two paragraphs of this Article, the entity shall be subject to a fine and the chief person in charge who is directly liable for such offense as well as the other persons who are directly involved in the offense shall be punished according to the first paragraph of this Article.

Amendment Extends Criminal Bribery Provisions to "Foreign Officials"

The Amendment extends the definition of commercial bribery to include gifts to foreign officials and officers of international organizations for "improper commercial interests" (不正当商业利益). It is noteworthy that illegal activity directed at national corporations and officials is defined by the pursuit of "improper interests" (不正当利益), suggesting that the scope of punishable actions involving Chinese entities and officials may be broader than that for bribery targeting foreigners. Prior to the Amendment, the Criminal Law only addressed Chinese businesses and government officials, leaving open the question of whether its provisions applied to bribes aimed at foreigners. The Amendment,

which takes effect on May 1, 2011, clarifies this ambiguity and provides for incarceration of up to ten years for serious violations.

Extraterritorial Application of PRC Criminal Law

The Criminal Law applies to (i) natural persons located in the PRC, regardless of nationality, (ii) PRC nationals who commit crimes outside the territory of the PRC, unless the maximum punishment for such crime is a fixed-term imprisonment of not more than three years, and (iii) foreign nationals who commit crimes outside the territory of the PRC against the state or its citizens, so long as the crime carries a minimum punishment of fixed-term imprisonment of not less than three years and the act is deemed a crime in the place where it is committed. (Criminal Law, Arts. 6-8.) The criminal law likewise applies to companies, enterprises, and institutions organized under PRC law regardless of where they operate, including:

- joint ventures (including ones involving non-PRC companies)
- wholly foreign-owned enterprises (WFOEs); and
- representative offices of non-PRC companies. (Criminal Law, Art. 30)

The Amendment, imposing sentences ranging from three to ten years, places squarely within the Criminal Law's crosshairs multinationals whose non-PRC employees working in China or on behalf of Chinese entities engage in bribery of foreign officials. Accordingly, it is foreseeable that the Amendment could be applied in the following scenarios:

- A U.S. company enters into a Sino-foreign joint venture and a U.S. employee of that joint venture offers a bribe to a Kenyan government official to secure a commodity contract in Kenya;
- A WFOE is trying to secure a development contract in Laos and a Chinese employee of the WFOE offers lavish gifts to the director of a local non-governmental organization to secure its endorsement;
- The head of a representative office in China pays for a Vietnamese official's vacation prior to entering into a joint marketing initiative.

Hong Kong, Macau, and Taiwan, which are considered foreign countries for some purposes and part of the PRC for others, present a special risk.

Given the Amendment's brevity and lack of clarifying definitions, it remains an open question whether and how the Amendment will be applied to multinational corporations operating in the PRC. For example, neither the Amendment nor any other PRC law defines "foreign official." In interpreting the law, PRC officials may look to international conventions, such as the United Nations Convention Against Corruption, for guidance. Considering the ambiguity and high stakes involved, multinationals would be well-advised to review their anti-corruption policies and educate their employees in the PRC to ensure they are compliant and do not run afoul of this law.

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Contributors to this alert were partners Palmina Fava and K. Lesli Ligorner and associate Ananda Martin.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

London

Michelle Duncan
+ 44.20.3023.5162
michelleduncan@paulhastings.com

Los Angeles

Thomas P. O'Brien
1.213.683.6146
thomasobrien@paulhastings.com

Thomas A. Zaccaro
1.213.683.6285
thomaszaccaro@paulhastings.com

Milan

Bruno Cova
+ 39.02.30414.212
brunocova@paulhastings.com

Francesca Petronio
+ 39.02.30414.226
francescapetronio@paulhastings.com

New York

Palmina M. Fava
1.212.318.6919
palminafava@paulhastings.com

Shanghai

K. Lesli Ligorner
+ 86.21.6103.2968
lesliligorner@paulhastings.com

Washington, D.C.

Timothy L. Dickinson
1.202.551.1858
timothydickinson@paulhastings.com

Tara K. Giunta
1.202.551.1791
taragiunta@paulhastings.com

Morgan J. Miller
1.202.551.1861
morganmiller@paulhastings.com

William F. Pendergast
1.202.551.1865
billpendergast@paulhastings.com