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Interpreting the Revised Draft of the Anti-unfair Competition Law: Commercial Bribery

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On February 25, 2016, the Legislative Affairs Office of the State Council promulgated the *Anti-Unfair Competition Law of the People's Republic of China (Revised Draft for Comment)* (“**Revised Draft**”). This is the first time that China has revised the *Anti-Unfair Competition Law of the People's Republic of China* (“**Existing Law**”), which has been in effect for 23 years. The Existing Law was promulgated in 1993 during China's transition from a planned economy to a market economy. With the deepening of reforms, many provisions of the Existing Law have been incompatible with the continued development of the market economy. The SAIC started to revise the Existing Law in 2003 and the revision has been in progress since that time. The Revised Draft revises 30 of the 33 articles of the Existing Law, removes 7 articles and adds 9 new articles, with 35 articles in total. One highlight of the Revised Draft is that it revises the provisions relating to commercial bribery.

Comparing the Provisions

The comparison of relevant provisions before and after the revision is shown in the following chart.

Existing Law and Regulations	Revised Draft
Article 8 of the Existing Law : Business operators shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. Business operators that offer off-the-book rebates in secret to another party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebates in secret shall be deemed and punished	Article 7: Business operators shall not engage in commercial bribery as follows: (1) by being in the public service and seeking, or by relying upon public services to seek, unit, departmental, or personal economic benefits; (2) between business operators, by paying economic benefits that have not been truthfully recorded in the contracts and accounting

<p>as taking bribes. Business operators may, in selling or purchasing commodities, expressly allow a discount to the other party and pay a commission to a middleman. Business operators that give discounts to another party and pay commissions to a middleman must truthfully make such entries in their accounts. Business operators that accept discounts or commissions must also truthfully make such entries in their accounts.</p> <p>Article 2 of the <i>Interim Provisions of the State Administration for Industry and Commerce on the Prohibition of Commercial Bribery</i> (“Interim Provisions”): Commercial bribery shall mean a business operator's act of bribing a counterparty organization or individual with property or by other means for the purposes of selling or purchasing commodities.</p>	<p>documents;</p> <p>(3) by offering or promising to offer economic benefits to third parties to influence transactions which damage the legitimate rights and interests of other business operators or consumers.</p> <p>Commercial bribery refers to the acts of a business operator that induce others to seek business opportunities or competitive advantages for the business operator, such as offering or promising to offer economic benefits to counterparties or to third parties that may influence transactions. Offering or promising to offer economic benefits is regarded as offering a commercial bribe, accepting or agreeing to accept economic benefits is regarded as accepting a commercial bribe.</p> <p>Acts of commercial bribery committed by employees who seek business opportunities or competitive advantages on behalf of a business operator shall be regarded as acts of that business operator. If there is evidence that an employee accepted bribes contrary to the business operator's interests, such acts shall not be regarded as acts of the business operator.</p>
<p>Article 22 of the Existing Law: A business operator that resorts to bribery by offering money or goods or by any other means in selling or purchasing commodities, and, if the case constitutes a crime, shall be investigated for criminal liability according to law; if the case does not constitute a crime, the supervision and inspection department may impose a fine of not less than 10,000 yuan but not more than 200,000 yuan in light of the circumstances and confiscate the illegal earnings, if any.</p>	<p>Article 20: Where a business operator violates Article 7 hereunder, the supervision and inspection authorities shall order the illegal activities to cease and impose a fine of not less than 10% but not more than 30% of the illegal business revenue in light of the circumstances; where the act constitutes a crime, criminal liability shall be prosecuted in accordance with the law</p>

Interpreting the Revised Draft

1. Indirectly bribing “third parties” determined to be illegal

In the Existing Law and Interim Provisions, the provisions on commercial bribery merely mention “counterpart organizations or individuals.” In the Revised Draft, however, the subjects accepting bribes not only include “counterparties” in the conventional sense, but also include “third parties that may influence transactions”, such as supervisors or relatives of the counterpart, managers of the parent or affiliated company and the public officials who have the decision-making authority over the transaction.

In practice, according to some responses issued by the SAIC and the Supreme Court , some acts of business operators that induce and influence the third parties in business transactions have been determined to be commercial bribery. For example, a hospital that gave “referral fees” or “prescription fees” to doctors from other hospitals and induced the doctors to recommend that patients undergo CT scans at the hospital, a shopping mall that gave “personnel fees” or “parking fees” to travel agencies and tour guides to induce them to organize group tours to the shopping mall, a beer brewery that recycled beer bottle caps from bartenders and offered cash to induce the bartenders to recommend the brewery’s products to consumers, and an insurance company that offered “insurance handling fees” to schools and in order to induce the schools to sell such insurance to their students. The Revised Draft reaffirms these determinations in legislative form.

It is worth noting that what matters is that the act is likely to influence the transaction rather than the realization of economic benefits. The new legislation broadens the definition of commercial bribery and gives administrative authorities greater discretion in enforcement.

2. Blaming the “acts of employees” no longer a defense for employers

In judicial practice, many business operators being prosecuted for commercial bribery offenses attempted to avoid punishment by claiming that the acts of commercial bribery were due to the individual actions of their employees. The Revised Draft follows the principle of presumptive fault liability in the civil law field and specifies that acts of commercial bribery committed by employees who seek business opportunities or competitive advantages on behalf of a business operator shall be regarded as acts of that business operator. If there is evidence that an employee accepts bribes contrary to the business operator’s interests, such acts shall not be regarded as acts of the business operator. In this case, a business operator has to produce evidence in support of its claim that the employee’s acts were contrary to its interests, which challenges the business operator’s internal compliance systems. We expect that this revision will also encourage business operators to develop internal compliance policies and employee training.

3. “Promising to offer economic benefits” also constitutes commercial bribery

It is stipulated in the Existing Law that business operators that actually offer or accept commercial bribes should be held legally responsible. However, the Existing Law does not stipulate any consequences for business operators that promise to or propose to offer commercial bribes. In the Revised Draft, the methods of conducting commercial bribery are defined as “offering or promising to offer economic benefits”. The Revised Draft uses identifying principles similar to the U.S. Foreign Corrupt Practices Act for reference and defines the acts of “promising to offer economic benefits” as commercial bribery, which broadens the scope of commercial bribery.

Pursuant to the Revised Draft, some controversial business models that were not explicitly addressed by law may now be regarded as acts of commercial bribery. The widely used “Donate Equipment + Sell Consumables/ Raw Materials” business model in the food and drug industries will probably be determined to be an act of commercial bribery pursuant to the Revised Draft. Such examples of this business model include a medical equipment company that donates medical devices to a hospital in return for agreements to exclusively buy the chemical reagents needed to run the machines, or a food company that donates food-processing devices to a retailer in return for agreements to exclusively buy food ingredients.

4. It is risky if economic benefits “have not been truthfully recorded”

In practice, the contracts prepared by many companies are complete (especially the standard form of business terms and contracts). However, the actual enforcement of a contract may not be completely in line with its terms. In the accounting books, situations may exist in which the account headings are inconsistent with the actual business operations. The inconsistency between the facts and contract terms (or accounting documents) may be caused by mistake, but it is also possible that such inconsistencies are intentional. For example, a pharmaceutical product purchaser clearly records business discounts into its accounts, but the discounts are not used to reduce the purchase cost. The purchaser records the discounts in “other receivables,” “other earnings” or under some other heading that is for a different purpose. In this case, the purchaser may be suspected of receiving kickbacks instead of receiving commercial discounts. Such activity has already been determined to be commercial bribery by the AIC in practice and the Revised Draft reaffirms this administrative determination.

Pursuant to the Revised Draft, if the economic benefits offered by business operators, including discounts, commissions and kickbacks, have not been truthfully recorded in the contracts and accounting documents, such benefits will probably be determined to be commercial bribes. This provision is intended to distinguish commercial bribery from normal business discounts, and to crack down on the illegal activity of business operators that conceal their acts of commercial bribery by using contract terms or account headings. The Revised Draft objectively increases the risks to business operators.

5. Fines proportionate to the extent of fault

Pursuant to the Existing Law, the administrative penalties for commercial bribery mainly include fines and the confiscation of illegal income. The Revised Draft removes the penalty of confiscating illegal income and adjusts the fine amount from “not less than CNY 10,000, but not more than CNY 200,000” as stipulated by the Existing Law to “not less than 10% but not more than 30% of the illegal business revenue.” The amount of the fine imposed is proportionate to the illegal business revenue, which is not a fixed amount. This stipulation reflects the administrative enforcement principle that the amount of the fine should equal the extent of fault.

The main reason that the Revised Draft removes confiscating illegal business revenue as a penalty is because, in practice, it is difficult for administrative authorities to calculate and prove the precise amount of illegal business revenue from commercial bribery. In some situations while the illegal business revenue does exist, the amount is unable to be calculated. It will be convenient for law enforcement authorities to use “illegal business income” amount as the cardinal number, and this stipulation will help to reduce disputes to a large extent. Besides this point, the provision is in line with the legislative trends reflected in the *Food Safety Law* and the *Regulations on the Supervision and Administration of Medical Devices*, which recently changed the language from “illegal income” to “value of goods.”

Regulatory Trends

Although the Revised Draft is still at the consultation stage, it already reflects the trends that China has emphasized in the supervision and enforcement in the area of anti-unfair competition law. In December 2015, the National Symposium on the Anti-unfair Competition Law Cases convened. The Symposium pointed out that, under new situations, the AIC and market supervision departments should enhance the overall awareness, investigate and handle the major cases, which impair market order and strengthen market supervision in key areas.

In recent years, China has strengthened administrative supervision in key industries that are prone to commercial bribery. By last year, the *Circular on Printing and Distributing the Provisions on the Establishment of Adverse Records of Commercial Bribery in the Medicine Purchase and Sales Industry* has been implemented in dozens of provinces and cities. The adverse record system may be used in other key industries prone to commercial bribery in the future. Hence, we recommend companies in such industries to pay more attention to the risks of commercial bribery, develop internal control policies, adjust business practices, conduct internal employee trainings and take measures to avoid these legal risks as early as possible.

● **Important Announcement**

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