THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

Sixth Edition

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

This sixth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations, and

remediation of internal controls and compliance programmes. The Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2017

Chapter 5

CHINA

Kareena Teh and Philip Kwok[1]

I INTRODUCTION

For some time, the People's Republic of China (China) has been perceived as a jurisdiction with high levels of corruption. This is evident from China's ranking on Transparency International's Corruption Perceptions Index (CPI), where it ranks 79th out of 176 countries and territories.[2] Under President Xi Jinping, China is, however, taking major strides to combat corruption and change this perception. Investigations of corrupt officials have intensified and extend beyond China's borders to repatriate former officials who have fled the country with their ill-gotten assets. In addition, China's authorities increasingly target bribe givers in commercial transactions. Enforcement actions include administrative enforcement on a local level as well as criminal prosecutions, such as the highly publicised case brought against the Chinese subsidiary of a multinational life sciences company that resulted in a record-breaking fine in the amount of 3 billion yuan. Along with aggressive enforcement against corruption, China has also updated its laws to keep up with evolving patterns of corruption and associated compliance risks. Following the updates to the bribery provisions in the Criminal Law, which took effect in 2015, a draft amendment to the Anti-Unfair Competition Law (AUCL), which governs, *inter alia*, administrative offences of commercial bribery, was submitted to the Standing Committee of the National People's Congress (the Standing Committee) for review and approval in February 2017. It remains to be seen whether these concerted efforts will, over time, improve the perceived level of corruption in China and its ranking on the CPI.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The relevant provisions on domestic bribery can mainly be found in two laws: the AUCL, which makes commercial bribery an administrative offence (see Section II.vi) and the Criminal Law, which governs commercial bribery and bribery of government officials. Under these laws, both the giving and the receiving of a bribe constitute a violation of the applicable laws.

1 Kareena Teh is a partner and Philip Kwok is an associate at Dechert. The authors would like to thank Ho Tsz Yau Michele, who was an intern with Dechert, for her assistance with this chapter.

2 Transparency International, CPI 2016: www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

i Definition of a bribe

The definition of what constitutes a bribe in the relevant laws is very wide and has been broadened and clarified through judicial interpretations. The latest of these interpretations, the 'Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery' (the Interpretation) was issued by the Supreme People's Court and Supreme People's Procuratorate on 18 April 2016 and sets out in Article 12 that a bribe can consist of money, goods, proprietary interests consisting of benefits the value of which can be calculated in money (including, for example, house renovation, the release of a debt), and tangible benefits such as memberships or travel that requires payment. Article 13 of the Interpretation further clarifies that bribes given after the fact are also illegal (i.e., if an official receives a bribe after he or she has performed his or her duties and provided the bribe giver with an illegal benefit).

ii Bribery of government officials

Under the Criminal Law, which was revised in 2015, it is an offence to offer a bribe to a government official and for the government official to receive a bribe. Under Article 389 of the Criminal Law, any person offering a bribe to a government official for the purpose of securing illegal benefits commits an offence. Article 390A further clarifies that it is also an offence to offer bribes to a former government official and close relatives of or other persons closely related to a government official (former or current). Article 393 extends the liability for bribing government officials to entities. Finally, if the bribe is directly offered to the relevant government department or organ (or to a state-owned enterprise, company, public institution, etc.) to obtain illegal benefits, the offerer (regardless of whether a person or an entity) commits an offence under Article 391. As for the recipients, it is an offence under Article 385 for any government official to take advantage of his or her position and extort money or property from another party or to illegally accept money or property in exchange for illegal benefits for that party. Article 163 confirms that Article 385 also applies to employees in public service at state-owned enterprises or other state-owned units. According to Article 387, it is also an offence for any government entity or department or state-owned enterprise to extort or illegally accept money or property from any party in exchange for securing illegal benefits for that party. In such cases, the persons at the government entities who are in charge or directly responsible for the relevant conduct will be held liable.

iii Definition of government official

Article 93 of the Criminal Law defines a government official as a person providing 'public service' in government organs. Staff in state-owned enterprises and institutions, and even persons assigned to non-state-owned enterprises and institutions, can be regarded as government officials if they perform 'public service'. The Circular of the Supreme People's Court on Printing and Distributing the Summary of Symposium Minutes on Trial of Economic Criminal Cases by Courts Nationwide confirms that public service entails functions such as the supervision, leadership and management of government organs and government assets; public service does not include activities of a technical or commercial nature. As such, a case-by-case assessment is needed to decide whether a particular staff member of a government organ or state-owned enterprise is a government official, depending on the title or position of the person but also on the conduct and functions that person exercises.

iv Gifts, travel, meals and entertainment

Given the very broad scope of the term 'bribery' under the Criminal Law (and the AUCL as well), any gift, travel, meal or entertainment that has a value that can be calculated in money could constitute a bribe (if there is any causal link to a business benefit for the bribe giver). Industry groups such as the China Association of Enterprises with Foreign Investment R&D-Based Pharmaceutical Association Committee (RDPAC), which many foreign invested life science companies in China belong to, have set out strict rules (the RDPAC Code). While these rules do not have the binding force of laws, they nevertheless provide guidance. In the 2017 version of the RDPAC Code, the giving of gifts to healthcare professionals is prohibited for RDPAC members. Members are only allowed to provide healthcare professionals with promotional aids of minimal value (i.e., below 100 yuan in value). In addition, such promotional aids have to be related to the work of the healthcare professional who receives the same (e.g., notepads or inexpensive pens).

v Political contributions

The Criminal Law and the AUCL do not specifically deal with political contributions. Given the broad scope of the term 'bribery' under the applicable laws, any contribution to an office holder that is made on a *quid pro quo* basis is likely to be considered a bribe.

vi Commercial bribery

Both, the Criminal Law and the AUCL cover commercial bribery. Under Article 8 of the AUCL, it is an administrative offence for business operators to give bribes in the form of money or property (or through other means) for the purpose of selling or purchasing commodities or services. It is also an administrative offence to offer a secret commission (i.e., a commission that is not properly recorded in the parties' books and records). The term 'bribe' is defined broadly in the AUCL and can include anything from payments in cash to other means such as offering trips or entertainment. According to Article 2 of the Interim Provisions on Prohibiting Commercial Bribery, 'property' refers to cash and physical objects, including property given to the other party in a transaction under the guise of promotional expenses, sponsorships, reimbursements, research and consulting fees or commission. 'Other means' include benefits other than money or property, such as overseas and domestic travel.

On 22 February 2017, at the 26th meeting of the Standing Committee, the draft amendment of the AUCL (the Draft) was submitted to the Committee for review and approval. While the Draft still does not provide a precise definition of what constitutes commercial bribery, under Article 7 of the Draft, business operators are prohibited from giving a bribe to the counterparty of the transactions or a third party (whether an individual or an entity) that is in the position and has the power to influence the transactions. It is likewise a contravention of the law if the counterparty or the third party accepts the bribe. Business operators are, however, not prohibited from offering discounts to the counterparty or paying commissions to an intermediary if the discounts or commission are properly recorded in the books of both the offerer and the offeree. Finally, Article 7 of the Draft confirms that an employer is liable for the illegal acts of its employees if those acts were undertaken for the benefit of the employer (i.e., to obtain business opportunities or competitive advantages); if, however, the employer can prove that the employee committed the illegal acts in his or her personal capacity, the employer would not be liable for commercial bribery (e.g., an employee receives a secret commission from a supplier in exchange for the award of a contract that is not the best or lowest bid and is therefore not in the employer's best interest).

If bribes given in commercial transactions reach a certain threshold, the relevant authorities enforcing the AUCL (usually local administrations of industry and commerce (AICs)) can transfer the case to the prosecution. According to Article 164 of the Criminal Law, an individual or an entity commits an offence if it gives money or property in a relatively large amount to a company, enterprise or organisation for the purpose of seeking illegal benefits. Correspondingly, Article 163 makes it an offence for any employee of any company to abuse his or her position and demand money and property in exchange for providing illegal benefits for any person or entity. The term 'in a relatively large amount' in Article 164 sets the threshold for criminal prosecution and has been defined in the Interpretation as a minimum of 20,000 yuan if the specified circumstances[3] exist, or a minimum of 60,000 yuan if the specified circumstances do not exist.[4]

vii Defences

China's laws do not set out any specific defences against the application of the relevant anti-bribery laws. According to Article 390 of the Criminal Law, if a bribe giver confesses voluntarily before his or her prosecution, he or she may receive a lighter (or no) punishment, if the circumstances of the alleged offence are relatively minor, he or she plays a critical role in discovering a major case, or he or she performs any other meritorious service. The Interpretation clarified that a 'critical role in discovering a major case' means actively providing clues to the investigation, confessing the facts surrounding the offer of bribes, providing facts that assist the authorities with collating evidence in the case and providing facts that enable the authorities to track down the offenders and return the bribes. As such, the requirements for leniency under applicable Chinese law are relatively high and require proactive cooperation from the suspect.

viii Penalties

The Criminal Law and the AUCL set out the following applicable penalties.

Penalties for commercial bribery

Under the AUCL, any business operator who bribes in selling or purchasing commodities will be subject to an administrative fine within the range of 10,000 yuan to 200,000 yuan depending on the actual circumstances of the case, and confiscation of the illegal earnings,

3 Such specified circumstances include: (1) bribing three persons or above; (2) using illegally obtained funds for a bribe; (3) seeking promotion or adjustments in position through bribing; (4) bribing state officials responsible for food, medicine, production safety, environment protection, etc., or with other supervision and management responsibilities, and implementing illegal activities; (5) bribing judicial officers and interfering with judicial fairness; and (6) causing economic loss amounting to between 500,000 yuan and 1 million yuan. See Article 7 and Article 11 (paragraph 3) of the Interpretation.

4 Note that these thresholds have been applicable and in effect since 18 April 2016 in accordance with the Interpretation. So far as commercial bribes are concerned, the Interpretation does not differentiate between the threshold for commercial bribes given by individuals versus that given by entities (which existed in the previous Supreme People's Procuratorate and Ministry of Public Security Interpretation dated 7 May 2010 (the 2010 Interpretation). Under the 2010 Interpretation, the threshold for criminal investigation for giving commercial bribes by individuals was 10,000 yuan, and 200,000 yuan when given by entities. It is unclear whether the threshold for entities giving commercial bribes shall be governed by the Interpretation or the 2010 Interpretation.

if any (see Article 22 of the AUCL). These administrative penalties also apply to any entity or individual who accepts a bribe when purchasing or selling commodities (Article 9 of the Interim Provisions on Prohibiting Commercial Bribery).

If the threshold for criminal prosecution is reached, the statutory penalties under Articles 163 and 164 of the Criminal Law will apply on conviction, and the court will determine the penalty based on the amount of the bribes involved. In particular:

a for bribe recipients, the sentence is imprisonment for less than five years if the case involves a relatively large bribe (i.e., over 60,000 yuan), and imprisonment of over five years and possible forfeiture of assets for cases involving very large bribes (i.e., bribes over 1 million yuan); and

b for bribe givers, the sentence range is imprisonment of not more than three years in addition to a criminal fine if the amount of the bribe given is relatively large (i.e., over 60,000 yuan), and imprisonment of three to 10 years plus a criminal fine for cases involving a very large bribe (i.e., over 2 million yuan). In addition, if the bribe giver is an entity, a criminal fine shall be imposed on the entity and the personnel in charge, and other directly liable persons, shall be punished as individual bribe givers in accordance with the thresholds set out above.

Penalties for bribery of government officials

The Criminal Law provides the following statutory penalty ranges for official bribe givers and recipients.

For bribe givers under Article 390, the statutory penalty ranges from a fixed-term imprisonment of less than five years plus a fine to life imprisonment plus a fine or forfeiture of property. For bribe givers under Article 390A (bribes given to close relatives or other persons close to the current or former government officials), the statutory penalty ranges from less than three years' imprisonment and a criminal fine to 10 years' imprisonment. If the bribe is given by an entity, a fine will be imposed on the entity and the personnel involved could be sentenced to a fixed term of imprisonment of less than three years and a fine. For bribe givers who bribe governmental or public organisations under Article 391, the individual bribe givers can be sentenced to less than three years of imprisonment, plus a fine. If the bribe is given by an entity, a fine will be imposed on the entity, and the personnel involved could be sentenced to a fixed term of imprisonment of less than three years and a fine. Finally, under Article 393, an entity that gives a bribe to government officials in the form of rebate or handling fees could be subject to a fine, and responsible personnel could receive prison sentences of up to five years and a fine. For these cases, the ultimate penalty is decided by a range of factors including the seriousness of the circumstances and the amount of the bribe.

For recipients who are government officials under Articles 385 and 388, the statutory penalty ranges from a fixed term of imprisonment of less than three years to life imprisonment or death, depending on, *inter alia*, the monetary amounts involved and the seriousness of the circumstances. If the bribe recipient is a governmental or public organisation, the organisation may be subject to a criminal fine, and the personnel in charge and other directly liable persons may receive prison terms of less than five years according to Article 387. Finally, for bribe recipients who are close relatives of or other persons close to current or former government officials, the statutory penalty under Article 388A ranges from a fixed term of imprisonment of less than three years and a fine to a fixed term of imprisonment of 15 years.

III ENFORCEMENT: DOMESTIC BRIBERY

China's anti-graft campaign has been ongoing for some time, but since President Xi Jinping took office in late 2012, the fight against corruption has been one of the most important political agenda items for the Chinese government. Since then, the focus has broadened from almost exclusively targeting bribe recipients and official bribery (i.e., government officials who misuse their public office) to increasingly pursuing bribe givers and commercial bribery as well.

For official bribery, the Central Commission for Discipline Inspection (CCDI) leads the enforcement efforts. The CCDI is the main internal control authority of the Communist Party of China, and its jurisdiction covers responsibility for investigations into cases involving breaches of party discipline and state law (including, for example, corruption) by party members (which *de facto* means all high-ranking government officials). At the meeting of the 18th National Congress, it was announced that there would be a full-coverage disciplinary and anti-corruption inspection of all party units, including provincial and municipal governments, bureaus, state-owned enterprises, financial institutions and government-controlled universities. It was expected that the whole project, which was divided into 12 rounds of inspection each focusing on a unique area, would be completed by mid 2017. In particular, in 2015, the CCDI conducted several rounds of industry-wide investigations involving state-owned enterprises and government departments. The first round covered the energy and national resources industry as well as telecommunications, the second round focused on the transport industry and the third round investigated the finance industry. Both the Supreme People's Court and the Supreme People's Procuratorate were inspected in 2016. The CCDI has also conducted 're-inspection' of 16 selected provincial and municipal governments, including Beijing, Tianjin, Chongqing and Liaoning. Following these investigations, a large number of government officials and members of state-owned enterprises have faced scrutiny in relation to corruption offences. The CCDI investigations have also served to highlight particular corruption risks in the respective industries and provide guidance for local-level government authorities and their enforcement initiatives that go beyond the official bribery targeted by the CCDI.

In parallel with the enforcement against government officials, investigations against bribe givers have increased. In particular, local AICs have been proactive in enforcing the AUCL and its provisions on commercial bribery against bribe givers. Most prominently, the Chinese subsidiary of the multinational life science company GlaxoSmithKline PLC (GSK) was investigated for bribery of government officials, hospitals and doctors for the purpose of, *inter alia*, obtaining or retaining sales of GSK's drugs at the relevant medical institutions. Ultimately, because of the amount of the alleged bribes (around 3 billion yuan), GSK was prosecuted for commercial bribery and, in a decision issued in September 2014 by the Changsha Intermediate People's Court, fined 3 billion yuan. Five of GSK's executives in China (including the former head of China operations) were also convicted and sentenced to suspended jail terms of up to four years. As of October 2016, there have been no other reported prosecutions of a similar magnitude, but the amount of enforcement actions brought by local AICs suggests that Chinese authorities continue to be vigilant in their enforcement against bribery and corruption.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law and its elements

Since the Eighth Amendment of the Criminal Law, effective as of 1 May 2011, Article 164 of the Criminal Law, which governs commercial bribery, has been extended to include the bribery of foreign officials. Under the amended Article 164, any individual or entity that bribes a foreign official or an official of an international public organisation with property for the purpose of an improper commercial benefit will be guilty of an offence. Notably, this article applies to Chinese nationals and Chinese companies but not to foreign companies. In addition, the specific term 'improper commercial benefit' indicates that the focus of this offence is on commercial transactions or benefits that are obtained through the bribery of a foreign official and is of a more limited scope than the more general term 'improper benefit', which applies to other bribery offences under the Criminal Law.

ii Definition of foreign public official

The terms 'foreign official' or 'official of an international public organisation' are not defined in the Criminal Law.

iii Gifts, travel, meals and entertainment

The term 'property' in Article 164 is not defined in the Criminal Law. However, the wide interpretation of property provided in the Interpretation, including all sorts of tangible benefits, also applies to Article 164 (see Section II.i).

iv Facilitation payments and payments through intermediaries

Article 164 does not specifically address facilitation payments or payments made through intermediaries. Generally speaking, the Criminal Law does not exclude liability for facilitation payments. For the other bribery provisions, the Criminal Law does include liability when payments are made through intermediaries.

v Enforcement

Like most crimes under the Criminal Law (including the domestic bribery offences), foreign bribery is investigated by the public security bureau and prosecuted by the public procuratorate.

vi Leniency and plea-bargaining

According to Article 164(4) of the Criminal Law, a bribe giver who voluntarily confesses (before any criminal investigation commences) may be granted a lesser penalty or may be exempt from punishment. Under the Chinese Criminal Procedure Law, there are no specific rules on plea-bargaining, nor is there any specific practice to that effect in criminal proceedings.

vii Prosecution of foreign companies

Foreign companies do not fall within the scope of Article 164. However, sino-foreign joint ventures or wholly foreign-owned enterprises that are based in China could fall under Article 164 (and the other bribery provisions that would apply to Chinese companies).

viii Penalties

According to Article 164(2) of the Criminal Law, a bribe giver can be fined and sentenced to imprisonment of up to three years, and from three to 10 years if the amount of the bribe is very large.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

The anti-bribery laws do not set out any particular requirements for the keeping of financial records, but Article 8 of the AUCL makes it an offence to give a secret off-the-books commission to a party in commercial transactions (i.e., a commission or rebate that is not properly recorded as such in the company's books). This suggests that the improper keeping of financial records could lead to scrutiny under the AUCL.

Outside the AUCL, the requirements of truthful and complete bookkeeping are specifically set out in national laws including the Company Law and the Accounting Law.

The Company Law as amended in 2013 sets out some general standards for companies in relation to the keeping of financial records and, *inter alia*, requires companies to establish finance and accounting systems, prepare annual financial accounting reports to be audited by an accounting firm, and provide accurate and complete accounting vouchers, accounting books, financial accounting reports and other accounting information to their auditor. Under Article 202 of the Company Law, where a company makes false records or conceals important facts on financial accounting reports, the person in charge and other personnel who are directly responsible shall be liable for a fine ranging from 30,000 yuan to 300,000 yuan.

The Accounting Law also provides that all commercial transactions taking place shall be accurately and completely recorded and calculated in the account books set up by companies, and any violation of the law could result in administrative sanctions or even criminal penalties. For administrative sanctions, Article 43 of the Accounting Law provides that forgery or alteration of an accounting document or accounting book or preparation of a false financial accounting statement can lead to a fine ranging from not less than 5,000 yuan to not more than 100,000 yuan imposed on the company, and a fine within the range of 3,000 yuan to 50,000 yuan on the person in charge and other persons directly responsible.

China's bribery laws do not require self-disclosure of violations and irregularities in financial bookkeeping. However, there are provisions under the relevant laws governing the accounting requirements for companies that require, *inter alia*, accounting staff to report irregularities in the books and records. There are no reported cases where the authorities have relied upon the aforesaid financial record-keeping laws and regulations in their prosecution of bribery-related conduct.

ii Tax deductibility of domestic or foreign bribes

Although there are no explicit provisions regarding the tax deductibility of bribes in current China tax laws and regulations – following the annulment in 2010 of the Measures for Pre-tax Deductions from Income Tax for Enterprises, which explicitly demanded that illegal expenditure such as bribes shall not be deducted from the taxable income – the Corporate Income Tax Law and its implementation regulations require that expenses not directly related or unreasonable in relation to income shall not be deducted when computing taxable income.

iii Money laundering laws and regulations

As a contracting state to the United Nations Convention against Corruption (UNCAC), the United Nations Convention against Transnational Organized Crime and the International Convention for the Suppression of the Financing of Terrorism since the early 2000s, China has become increasingly active in cracking down on money laundering. As part of its fight against money laundering, China amended the Criminal Law to include the crime of money laundering, and promulgated the Anti-Money Laundering Law (AML) in 2006.

Under the Criminal Law (as amended) 'money laundering' is defined to involve disguising or concealing the source and nature of proceeds obtained from seven specified categories of predicate offences (including corruption and bribery). In particular, Article 191 of the Criminal Law provides that any individual or organisation could be held liable if they undertake any of the following conduct for the purpose of covering up or concealing funds obtained from the predicate offences:

a providing any capital account;
b assisting the transfer of property into cash, financial instruments or negotiable securities;
c assisting the transfer of capital by means of transfer accounts or any other means of settlement;
d assisting the remittance of funds overseas; and
e disguising or concealing the origin or nature of any crime-related income or the proceeds generated therefrom by any other means.

Additionally, any income or proceeds generated from such conduct can be confiscated and the person responsible can be sentenced to a prison term of up to 10 years and a criminal fine of up to 20 per cent of the amount laundered.

The AML broadly regulates the activities of organisations and individuals through financial institutions and some specified non-financial institutions in China. The responsible authority is the People's Bank of China (PBOC), which, through internal anti-money laundering departments of financial institutions, leads the implementation of several major rules, namely:

a customer identification and risk rating;
b retention of customer information and transaction records; and
c reporting of high-value transactions and suspicious transactions.

The AML also authorises the PBOC to cooperate with foreign governments and relevant international organisations by exchanging information and materials for the purposes of enforcement based on principles of equality and reciprocity.

The AML sets out administrative offences for financial institutions and responsible employees for, *inter alia*, failing to comply with the above rules. The penalties for the institutions range from disciplinary work to disqualification and administrative fines of up to 5 million yuan. Employees of financial institutions can be subject to an administrative fine of up to 500,000 yuan. The AML does not, however, provide any administrative penalty for individual customers of the financial institutions.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

While China has been very active in hunting down and repatriating Chinese nationals who have committed bribery offences in China and fled China to escape enforcement, it has so

far not demonstrated the same appetite for bringing Chinese nationals who have committed bribery offences overseas to justice. So far, no cases have been reported for foreign official bribery under Article 164.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

China is a member of the UNCAC, which it ratified in 2006. In fulfilling its obligations under the UNCAC, China, among other things, amended the Criminal Law in 2011 and has extended the scope of Article 164 to cover bribery of foreign officials. China is also a member of the United Nations Convention against Transnational Organized Crime and the Financial Action Task Force.

China is not a member of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

VIII LEGISLATIVE DEVELOPMENTS

Over the past few years China has been very active in continuing to develop its anti-bribery legislation both through amendments of the law and through judicial interpretations that provide guidance on the application of the law and the definition of certain terms within it. With the bribery provisions of the Criminal Law having been amended in 2015, the AUCL is the next important piece of anti-bribery legislation that will receive an update. A forecast of the upcoming changes has already been released with the Draft, which was submitted to the Standing Committee on 22 February 2017 (see Section II.vi).

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Privilege

The concept of attorney–client privilege, as in common law countries, does not exist in China. In particular in government investigations, this means that there is no right *per se* to exclude communication between a client and his or her lawyers from production to the authorities. In particular, in cross-jurisdictional investigations involving authorities in China and overseas, this creates risks, as privileged documents that are not protected in China and were disclosed to local authorities may be part of information that is shared as part of cooperation agreements such as the mutual legal assistance agreement between the United States and China. Overseas authorities may therefore get access to documents that would otherwise be protected by attorney–client privilege in their jurisdictions.

While the concept of attorney–client privilege does not exist in China, the Law of the People's Republic of China on Lawyers provides in Article 38 that lawyers are required to keep information they obtain in the course of their representation of clients confidential. Similarly, the Criminal Procedure Law under Article 46 gives a criminal defence lawyer the right to keep client information confidential. Under both laws a broad exception is provided for information that endangers national security, public security or the personal security of other parties. It is also unclear, how effective the confidentiality protection under these laws is in corruption investigations, which could, for example, involve dawn-raids.

ii Data protection

Despite China not having a specific data privacy law, personal data have to be handled with care in compliance investigations. A number of rules and guidelines deal with the protection of personal data. The Cybersecurity Law, which came into force on 1 June 2017, states that the provider of any network product or service that collects the personal information of users shall obtain the users' consent and comply with the relevant laws and administrative regulations. The Guidelines for Personal Information Protection with Public and Commercial Information Systems (the Guidelines) are the most applicable to internal or government investigations and require the disclosure of (potentially private) data of individuals or third parties or employees. Under the Guidelines, 'personal information' is protected generally and express consent is required prior to the collection and handling of any personal sensitive information (Article 5.2.3) and prior to the transfer of any personal information overseas (Article 5.4.5). The term 'personal information' is defined broadly to include data that can be processed by an information system in relation to a specific natural person and that can identify that person alone or in combination with other information. 'Information system' includes any computer and supporting network that 'can collect, process, store, transmit and retrieve information'. Personal information is further classified into 'personal sensitive information' (information that if leaked or modified would have an 'adverse effect' on the subject; for example, ID card numbers, mobile telephone numbers, race, political viewpoints, religion, genes and fingerprints) and 'personal general information' (personal information other than sensitive personal information). The Guidelines do not have the force of law and do not contain any specific penalties for any failure to comply. However, any company that holds personal data (whether of its employees or of third parties) on its computer system will be a 'Personal Information Administrator' and will be expected to comply with the Guidelines. Compliance with the Guidelines may also be considered by judicial and regulatory authorities in determining other legal rights and obligations, including the obligation on employers under Article 13 of the Employment Services and Management Regulations to keep confidential the personal data of its employees.

iii State secrets

A high-risk area in compliance investigations is the handling of (potential) state secret information. The Guarding State Secrets Law defines state secrets as 'matters that have a vital bearing on state security and national interests and that are entrusted to a limited number of people for a given period of time' and prohibits acts such as illegal acquisition, unsecure transfer through the internet or export of state secrets out of China. In addition to the broad definition referred to above, the Guarding State Secrets Law also includes a catch-all provision that defines state secrets as '[o]ther matters that are classified as state secrets by the National Administration for Protection of State Secrets'. Given the broad and vague definition of what constitutes state secrets, it is crucial to assess collated data in compliance investigations prior to any transfer to unauthorised third parties or abroad for the potential existence of state secret data as the Guarding State Secrets Law creates criminal responsibility (including imprisonment on conviction) for individuals involved in acts prohibited under the Law.

iv Whistle-blowing

China's laws include broad protection for whistle-blowers: many laws, including the Criminal Procedure Law of China, include rules encouraging and protecting whistle-blowers. More specifically, the People's Procuratorate, China's authority for prosecution and investigation,

issued the Work Rules on Whistle-blowing, which set out in detail when and how whistle-blowers need to be protected by the authorities, and also include provisions on whistle-blowing rewards to encourage whistle-blowers to come forward. Various authorities, including the CCDI and local level AICs, provide whistle-blower hotlines for that purpose, and, in practice, many of the authorities' investigations into corruption allegations are now based on information obtained from whistle-blowers. As such, it is important for companies operating in China, and in particular when compliance investigations are conducted, to provide proper internal channels for receiving and managing whistle-blower allegations and to have adequate whistle-blower policies in place.

X COMPLIANCE

China's bribery laws do not provide any guidance on compliance programmes and procedures. Companies, therefore, also cannot rely on the existence of an effective compliance programme to defend themselves against allegations of corruption. When investigating corruption allegations, local authorities have a wide discretion as to how to apply the relevant laws. As part of their considerations, the authorities may take the existence of (effective) compliance programmes into account when assessing whether alleged corruption conduct may persist or would have been properly dealt with via internal channels at the affected companies. Given the increased enforcement and the recent focus on commercial bribery, rigorous compliance programmes that incorporate the local anti-bribery laws of China and are tailored to the specific compliance risks in China are indispensable for companies to ensure a compliant operation of their business in China, and to minimise exposure to compliance risks and the threat of enforcement.

XI OUTLOOK AND CONCLUSIONS

China's anti-bribery laws have evolved and cover a large range of bribery and corruption offences. In addition, China's Supreme People's Court and the Supreme People's Procuratorate have been very active in publishing interpretations that extend and explain the broad scope of the anti-bribery laws. The well-developed anti-bribery laws go hand in hand with an increase in anti-bribery enforcement. Under President Xi Jinping, China's anti-graft campaign has further intensified not only to track down corrupt officials, but also to pursue the bribe givers, for both official and commercial bribery. The large number of bribery and corruption cases and enforcement actions suggest that corruption remains a major issue in China and that China has a long way to go to improve the public's perception of its success in fighting the problem. This is also evident from China's position right in the middle of Transparency International's CPI, which ranks China 79 out of 176 countries. As such, it remains important for companies operating in China to have strict compliance policies and programmes in place and to monitor closely the regulatory and enforcement developments to assess the compliance risks of business operations in China.

Appendix 1

ABOUT THE AUTHORS

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Kareena Teh represents corporates and individuals on corporate investigations, including into bribery, corruption, market misconduct, money laundering and securities fraud issues, government prosecutions, administrative actions, and related civil actions. She also advises clients on legal and regulatory compliance, remediation and risks mitigation. Previously a practising barrister in New Zealand, Ms Teh has substantial experience running both civil and criminal defence cases. Her broad grounding in various aspects of contentious legal work and wide range of skills and expertise provides her with a unique advantage when conducting corporate investigations, and defending prosecutions and administrative actions. As the first female solicitor in Hong Kong to be granted higher rights of audience to represent clients in civil matters at all levels of Hong Kong's judicial system, she is also ideally suited to handle associated civil actions that arise out of such investigations.

Ms Teh is 'Highly Commended' in the *Financial Times* 'Asia-Pacific Innovative Lawyers' Report 2017 for her work in the dispute resolution category, and is well regarded by her clients and peers. She is recognised by *The Legal 500 Asia Pacific* 2016 for her regulatory, anti-corruption and compliance work in Hong Kong and *Chambers Asia Pacific* 2017 for her dispute resolution practice in China. In addition, *Global Investigations Review* profiled her as part of their 'Women in Investigations' feature on the 100 top women in investigations globally.

Ms Teh is a qualified lawyer in Hong Kong, New Zealand and England and Wales. She speaks English, Bahasa Malaysia and Chinese.

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Philip Kwok is an associate in the litigation practice group of Dechert's Hong Kong office. Mr Kwok focuses his practice on investigations and compliance, complex commercial dispute resolutions, and technology and e-commerce advisory matters. He regularly assists multinational clients and individuals in investigations by the Securities and Futures Commission, the Independent Commission Against Corruption, the Hong Kong Police, etc. on issues such as cross-border fraud, corruption, money laundering and securities fraud. Having studied law at the University of Hong Kong and Peking University, and having practised in the Beijing and Hong Kong offices of international law firms, Mr Kwok is knowledgeable and experienced in the comparative China and Hong Kong law environments

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Mr Kwok has particular experience handling computer forensics investigations and managing electronic discovery processes, as well as advising on matters relating to cybersecurity, personal data protection, financial technology and other legal issues relating to the latest technology and electronic commerce. He is currently a part-time lecturer at the University of Hong Kong, where he teaches a course on China information technology law.

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