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China Amends Criminal Law to Cover Foreign Bribery: Bribery of Non-PRC Government Officials Criminalized

ERIC CARLSON, ELLEN ELIASOPH, AND TIM STRATFORD

In this article, the authors explain a recent amendment to the People's Republic of China Criminal Law which criminalizes paying bribes to non-PRC government officials and to officials of international public organizations.

The legislature of the People's Republic of China ("PRC"), the National People's Congress, recently passed a slate of 49 amendments to the Criminal Law, one of which is a provision that criminalizes paying bribes to non-PRC government officials and to officials of international public organizations ("the Amendment"). This Amendment represents the first instance in which PRC law has prohibited PRC nationals and PRC companies from paying bribes to non-PRC government officials. The Amendment, which took effect on May 1, 2011, appears to be an attempt to bring China's anti-corruption laws into closer alignment with the provisions of multilateral conventions. The ultimate effectiveness of the

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Amendment in preventing overseas bribery, however, will depend on interpretation and enforcement.

TEXT OF THE AMENDMENT

The pre-existing Article 164 of the PRC Criminal Law criminalizes the act of “giving money or property to any employee of a company or enterprise or other entity” “for the purpose of seeking illegitimate benefits.” If the amount is “relatively large,” violators “shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the amount involved is huge,” violators “shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall, in addition, be fined.” If an entity commits such a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished accordingly.

The newly enacted Amendment adds a second provision to Article 164 that criminalizes bribes given to foreign (i.e., non-PRC) public officials or officials of an international public organization:

Whoever, for the purpose of seeking illegitimate commercial benefit, gives property to any foreign public official or official of an international public organization, shall be punished in accordance with the provisions of the preceding paragraph [i.e., the pre-existing Article 164].

The Amendment does not contain any affirmative defenses or exceptions to, or exemptions from, the provisions of Article 164.

JURISDICTION

The PRC Criminal Law applies to all PRC citizens, wherever located, all natural persons of any nationality within China, and all companies, enterprises, and institutions organized under PRC law, which generally includes, in addition to PRC domestic companies, Sino-foreign joint ventures, wholly foreign-owned enterprises (“WFOEs”), and representative offices. Thus,

under the Amendment, a joint venture between a PRC company and a non-PRC company organized under PRC law could be prosecuted for the payment of bribes to non-PRC government officials. Paying bribes to Chinese government officials is already illegal under pre-existing law.¹

INTERPRETATION

The Amendment does not define key terms such as “illegitimate commercial benefit,” “property,” or “foreign public official.”

Neither the current nor the amended PRC Criminal Law defines what constitutes “seeking illegitimate benefit.” (The term also might be translated as “seeking improper advantages” or “seeking illicit interests.”) However, the Supreme People’s Court (“SPC”) and the Supreme People’s Procuratorate (“SPP”) have jointly issued an opinion in the context of PRC commercial bribery laws that may hint at a possible interpretation. The opinion explains that the term “seeking illegitimate benefit” means that “a briber seeks any advantage in breach of laws, regulations, rules or policies; or requires the other party to provide assistance or facilitation that is in breach of laws, regulations, rules, policies, or industry codes of practice.”²

The pre-existing provision prohibiting bribery of domestic officials prohibits “giving property” for the purpose of “seeking illegitimate benefits.” In contrast, the Amendment prohibits “giving property” for the purpose of seeking “illegitimate *commercial* benefits.” While not entirely clear, the narrowing of the intent requirement may mean that certain activities that are prohibited in a domestic context may be permissible in a foreign context, for instance, the transfer of value to a foreign official for a non-commercial benefit.

Both the Amendment and the pre-existing law are silent on the definition of the term “property,” although it has been defined in other contexts. A related regulation on commercial bribery, which may be used to interpret the term, defines property broadly as:

cash and cash in-kind, including properties offered by a business operator to a counterparty entity or individual, for purpose of sale or purchase of commodities, disguised as a promotional fee, publicity fee,

sponsorship fee, research fee, labor fee, consulting fee, commission etc., or by way of reimbursement of various fees.³

The term “foreign public official” is not defined in the PRC Criminal Law or in other laws. PRC law does not use this term, but it is possible that China will adopt the definition found in Article 2 of the United Nations Convention Against Corruption, which China ratified in 2006: “‘Foreign public official’ shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.”

It seems likely that, similar to other areas of PRC Criminal Law, the SPC and SPP will issue additional interpretive guidance.

IMPLICATIONS

The new Amendment does not directly affect non-PRC companies, though the Amendment could affect a joint venture between a PRC company and a foreign company where the joint venture is organized under PRC law, or a representative office in China of a non-PRC company that is involved in sales outside of China.

The Amendment is, in concept, similar to laws of other jurisdictions prohibiting bribery of foreign government officials. Unlike many other such laws, however, the Amendment does not contain any exceptions, exemptions, or affirmative defenses. The Amendment is silent in many areas that have caused interpretative difficulties for other jurisdictions’ anti-bribery laws, such as how gifts and entertainment are to be handled, what types of officials are covered by the prohibition, whether expenses directly related to sales and promotion of company products are *per se* exempted, whether employees of state-owned enterprises are regarded as “foreign public officials,” whether a company’s policies and procedures with regard to preventing bribery provide a defense to bribery charges, and definitional interpretations. As is the case of many other PRC laws and regulations, much will depend on how the Amendment is interpreted and enforced.

NOTES

¹ PRC Criminal Law, Art. 389.

² Supreme People's Court and Supreme People's Procuratorate, *Opinions on Issues Concerning the Application of Law in the Handling of Commercial Bribes Cases* (Fa Fa [2008] No. 33), Nov. 20, 2008, Art 9.

³ State Administration for Industry and Commerce, *Interim Provisions on Forbidding Commercial Bribes*, Nov. 15, 1996. Art. 2.