

China Amends Criminal Law: Impact on Anti-Bribery Enforcement

Anti-Corruption

On August 29, 2015, the Standing Committee of China's National People's Congress ("the NPC") adopted a slate of amendments ("the Amendments") to China's Criminal Law (the "Criminal Law"). In the anti-corruption arena, the Amendments (1) add the crime of providing bribes to state functionaries' close relatives or other persons closely related to them; (2) add monetary penalties in addition to other punishments for corruption-related crimes, (3) raise the bar for bribe-givers to be exempted from punishment, and (4) replace specific monetary figures that trigger different levels of punishments with more general standards such as "relatively large," "huge," and "especially huge."

Draft amendments to the Criminal Law were previously released for public comment on November 3, 2014 (see our e-alert [here](#)), and as expected, the NPC adopted many of the changes proposed in the draft amendments when enacting.¹ The new amendments take effect November 1, 2015.

Please find a comparison of the preexisting PRC Criminal Law to the Amendments on provisions related to bribery and corruption at the end of this e-alert.

Amendments to the Existing Criminal Law for Corruption-Related Crimes

1. Adding a new crime of offering bribes to close relatives of current and former state functionaries. The Amendments add a crime (as Article 390(a)) of offering bribes to "state functionaries' close relatives or other persons closely related to them, or former state functionaries, their close relatives, or other persons closely related to them."² In 2009, the Criminal Law was amended to expand the scope of bribe-receivers to include close relatives and individuals with close relationships with state functionaries and former state functionaries.³ However, the 2009 amendment

¹ The Amendments as enacted do not include one provision mentioned in the draft -- a potential ban on employment for corruption convictions. The draft amendments circulated for public comment proposed that in a situation where one received criminal punishment for "taking advantage of his/her position" or "violating the obligations of one's profession," a court has the discretion to bar him/her from engaging in related profession for five years after completing his/her prison sentence, or for five years after release on parole. The amendments as enacted did not include this provision.

² *The Amendments*, Art. 46, para. 1 ("为谋取不正当利益，向国家工作人员的近亲属或者其他与该国家工作人员关系密切的人，或者向离职的国家工作人员或者其近亲属以及其他与其关系密切的人行贿的，处三年以下有期徒刑或者拘役，并处罚金；情节严重的，或者使国家利益遭受重大损失的，处三年以上七年以下有期徒刑，并处罚金；情节特别严重的，或者使国家利益遭受特别重大损失的，处七年以上十年以下有期徒刑，并处罚金。")

³ See *Amendment VII to the Criminal Law*, February 28, 2009, Art. 13, available at http://www.gov.cn/flfg/2009-02/28/content_1246438.htm. The distinguishing criterion between a "state functionary" and a "non-state functionary" is whether the individual is performing "public duties." PRC Criminal Law, Art. 93. "Public duties" has been interpreted to refer to "public activities" relating to one's functions and powers as well as the activities, related to one's position, to supervise and manage state-owned property.

did not impose criminal punishments on the bribe-givers. The Amendments make it clear that giving bribes to close relatives or associates of state functionaries is punishable by imprisonment and fines -- although with shorter prison terms than the bribe-receivers.

The Amendments also make it clear that the new crime is applicable to entities as bribe-givers and specify corresponding criminal punishment for both the entity and the employees of the entities who are responsible for committing the crime.⁴

2. Adding monetary fines to various corruption/bribery-related crimes. Under the preexisting version of the Criminal Law, fines are imposed for corrupt activities only on legal entities, with one exception: fines are imposed on individual bribe-givers only when (a) bribing an employee of a company or enterprise, or to a foreign party performing official duties or an official of international public organizations; and (b) the amount involved is huge (Art. 164). The new Amendments impose monetary fines against all individuals that are convicted of engaging in corruption and bribery offenses (both bribe-givers and bribe-receivers), in addition to other punishments.

3. Raising the bar for bribe-givers to be exempted from punishment. Article 390 of the preexisting Criminal Law provides that “[a]ny briber who, before he is investigated for criminal responsibility, voluntarily confesses his act of offering bribes may be given a mitigated punishment or exempted from punishment.”⁵ The Amendments retain the voluntary confession requirement and add other requirements for exemption from punishment: “one whose crimes are relatively minor may be exempted from punishment or receive mitigated punishment, if by exposing corrupt activities of others he provided crucial information leading to the successful investigation of a major case, or he performed other major meritorious service.”⁶

Furthermore, from the Amendments’ language, it appears that while lighter or mitigated punishment may be possible for bribe-givers who confess their crimes, exemption from punishment is possible only for bribe-givers whose violations are relatively minor *and* if they helped with prosecution of major cases or otherwise made significant contribution. It remains to be seen what constitutes a “relative minor” bribe-giving violation.

4. Modification of sentencing standards for embezzlement convictions. Instead of sentencing based on the specific monetary amount embezzled under the current Criminal Law, the Amendments impose prison sentences and monetary penalties based on more general criteria that will result in three levels of punishment: (1) embezzling a “relative large” amount -- or if there are “relatively serious” circumstances -- shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention with a fine imposed concurrently; (2) embezzling a “huge” amount -- or if the circumstances are “serious” -- shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years, and he shall also be fined or his property shall be confiscated; and (3) embezzling an “especially huge” amount -- or if the circumstances are “especially serious” -- shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment, and shall also be fined or his property shall be confiscated; if the amount is especially huge, and the interest of the

⁴ *The Amendments*, Art. 46, para. 2 (“单位犯前款罪的，对单位判处罚金，并对其直接负责的主管人员和其他直接责任人员，处三年以下有期徒刑或者拘役，并处罚金。”).

⁵ *Criminal Law*, Art. 390, para. 2 (“行贿人在被追诉前主动交待行贿行为的，可以减轻处罚或者免除处罚。”).

⁶ *The Amendments*, Art. 45, para. 2 (“行贿人在被追诉前主动交待行贿行为的，可以从轻或者减轻处罚。其中，犯罪较轻的，对侦破重大案件起关键作用的，或者有重大立功表现的，可以减轻或者免除处罚。”).

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State or the people suffers heavy losses, shall be sentenced to life imprisonment or death and also to confiscation of property.

Importantly, the Amendments make it clear that individuals given two-year suspended death sentences are eligible only to be commuted to life imprisonment; no further commutation is possible.⁷

The Amendments do not define terms such as “relatively large”, “relatively serious”, “huge”, “serious”, “especially huge”, or “especially serious”. Neither do the Amendments give concrete guidance on how the new sentencing criteria shall be applied by prosecutors or courts in practice. We understand that a future judicial interpretation issued jointly by the Supreme People’s Court and Supreme People’s Procuratorate may give more clarity to the law. Compared to the current provisions, however, this particular amendment will likely give more discretion to judges and prosecutors during sentencing, and it reflects the economic reality in China. Also, due to the wealth gap between different locales in China, the Amendments can potentially allow judicial officers to pay more attention to the facts of the case in the context of the local jurisdiction, instead of relying on a one-size-fits-all approach.

The Amendments will take effect on November 1, 2015.

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⁷ *The Amendments*, Art. 44, para. 7 (“犯第一款罪，有第三项规定情形被判处死刑缓期执行的，人民法院根据犯罪情节等情况可以同时决定在其死刑缓期执行二年期满依法减为无期徒刑后，终身监禁，不得减刑、假释。”)

Comparison of Preexisting PRC Criminal Law to 9th Amendment

Provisions Related to Bribery and Corruption

Preexisting Criminal Law	9th Amendment to Criminal Law (enacted August 2015, effective November 1, 2015)
<p>Whoever, for the purpose of seeking unjustified benefits, gives money or property in relatively large amount to any employee of a company or enterprise, or any employee of other entities, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the amount involved is huge, he/she shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall be concurrently fined.</p> <p>Whoever, for the purpose of seeking unjustified business interests, gives money or property to any foreign party performing official duties or officials of international public organizations shall be punished in accordance with the provisions of the preceding Paragraph.</p> <p>Where an entity commits the crimes as mentioned in the preceding two paragraphs, the entity shall be fined, and the persons directly in charge and other persons subject to direct liabilities shall be punished in accordance with the provisions of Paragraph 1.</p> <p>Any briber who confesses the bribery voluntarily prior to prosecution may be given a mitigated punishment or be exempted from punishment.</p> <p>(Article 164)</p>	<p>Whoever, for the purpose of seeking unjustified benefits, gives money or property in relatively large amount to any employee of a company or enterprise, or any employee of other entities, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and shall be concurrently fined. If the amount involved is huge, he/she shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall be concurrently fined.</p> <p>Whoever, for the purpose of seeking unjustified business interests, gives money or property to any foreign party performing official duties or officials of international public organizations shall be punished in accordance with the provisions of the preceding Paragraph.</p> <p>Where an entity commits the crimes as mentioned in the preceding two paragraphs, the entity shall be fined, and the persons directly in charge and other persons subject to direct liabilities shall be punished in accordance with the provisions of Paragraph 1.</p> <p>Any briber who confesses the bribery voluntarily prior to prosecution may be given a mitigated punishment or be exempted from punishment.</p> <p>(9th Amendment, Article 10)</p>
<p>Persons who commit the crime of embezzlement shall be punished respectively in the light of the seriousness of the circumstances and in accordance with the following provisions:</p> <p>(1) An individual who embezzles not less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property; if the circumstances are especially serious, he shall be sentenced to death and also to confiscation of property.</p> <p>(2) An individual who embezzles not less than 50,000 yuan but less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than five years and may also be sentenced to confiscation of property; if the circumstances are</p>	<p>Persons who commit the crime of embezzlement shall be punished respectively in the light of the seriousness of the circumstances and in accordance with the following provisions:</p> <p><u>(1) Embezzling a relatively large amount, or if there are other relatively serious circumstances, shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention with a fine imposed concurrently.</u></p> <p><u>(2) Embezzling a huge amount or where there are serious circumstances, shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years, and he shall also be fined or his property shall be confiscated.</u></p> <p><u>(3) Embezzling an especially huge amount or where</u></p>

Preexisting Criminal Law	9th Amendment to Criminal Law (enacted August 2015, effective November 1, 2015)
<p>especially serious, he shall be sentenced to life imprisonment and confiscation of property.</p> <p>(3) An individual who embezzles not less than 5,000 yuan but less than 50,000 yuan shall be sentenced to fixed-term imprisonment of not less than one year but not more than seven years; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than seven years but not more than 10 years. If an individual who embezzles not less than 5,000 yuan and less than 10,000 yuan, shows true repentance after committing the crime, and gives up the embezzled money of his own accord, he may be given a mitigated punishment, or he may be exempted from criminal punishment but shall be subjected to administrative sanctions by his work unit or by the competent authorities at a higher level.</p> <p>(4) An individual who embezzles less than 5,000 yuan, if the circumstances are relatively serious, shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention; if the circumstances are relatively minor, he shall be given administrative sanctions at the discretion of his work unit or of the competent authorities at a higher level.</p> <p>Whoever repeatedly commits the crime of embezzlement and goes unpunished shall be punished on the basis of the cumulative amount of money he has embezzled.</p> <p>(Article 383)</p>	<p><u>there are especially serious circumstances, shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment, and shall also be fined or his property shall be confiscated; if the amount is especially huge, and the interest of the State or the people suffers heavy losses, shall be sentenced to life imprisonment or death and also to confiscation of property.</u></p> <p>Whoever repeatedly commits the crime of embezzlement and goes unpunished shall be punished on the basis of the cumulative amount of money he has embezzled.</p> <p>Whoever commits the crime mentioned in the first paragraph of this Article and, prior to public prosecution truthfully confesses the crime, sincerely repents, gives up the embezzled money of his own accord, and avoid or reduces the harm of his actions, under provision (1), may be given a lighter or mitigated punishment or be exempted from punishment; under provisions (2) or (3), may be given a lighter punishment.</p> <p>When one commits the crime mentioned in the first paragraph of this Article and is sentenced to death with a suspension of execution under subparagraph three, the People’s Court may, depending on the circumstances of the crime, at the same time decide that after commuting his suspension of execution to life imprisonment at the expiration of the two-year period, to imprison him for life, without commutation or parole.</p> <p>(9th Amendment, Article 44)</p>
<p>Whoever commits the crime of offering bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention; whoever offers bribes to secure illegitimate benefits, if the circumstances are serious or if heavy losses are caused to the interests of the State, shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property .</p> <p>Any briber who, before he is investigated for criminal responsibility, voluntarily confesses his act of offering bribes may be given a mitigated punishment or exempted from punishment.</p>	<p>Whoever commits the crime of offering bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, and shall be concurrently fined; whoever offers bribes to secure illegitimate benefits, if the circumstances are serious or if heavy losses are caused to the interests of the State, shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years, and shall be concurrently fined; if the circumstances are especially serious, or if especially heavy losses are caused to the interests of the State, he shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment, and may also shall be concurrently fined or subject to confiscation of property.</p> <p>Any briber who, before he is investigated for criminal</p>

Preexisting Criminal Law	9th Amendment to Criminal Law (enacted August 2015, effective November 1, 2015)
<p>(Criminal Law, Article 390)</p>	<p>responsibility, voluntarily confesses his act of offering bribes may be given a reduced or mitigated punishment. If he commits a minor crime, and plays a key role in investigating or solving a significant case, or performs major meritorious behavior, his punishment may be mitigated or waived.</p> <p>Article 390(a) — Any person who, for the purpose of securing illegitimate benefits, bribes State functionaries’ close relatives or other persons closely related to them, or former State functionaries, their close relatives, or other persons closely related to them, shall be sentenced to fixed-term imprisonment of not more than three years, and shall be concurrently fined; if the circumstances are serious or if heavy losses are caused to the interests of the State, shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years, and shall be concurrently fined; if the circumstances are especially serious, or if especially heavy losses are caused to the interests of the State, he shall be sentenced to fixed-term imprisonment of not less than seven years but not more than 10 years, and shall be concurrently fined.</p> <p>Where a unit commits the crime as mentioned in the preceding paragraph, 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 in accordance with the provisions of the preceding paragraph.</p> <p>(9th Amendment, Articles 45 and 46)</p>
<p>Whoever, for the purpose of securing illegitimate benefits, gives money or property to a State organ, State-owned company, enterprise, institution or people’s organization or, in economic activities, violates State regulations by giving rebates or service charges of various descriptions shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.</p> <p>Where a unit commits the crime mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offense shall be punished in accordance with the provisions of the preceding paragraph.</p> <p>(Article 391)</p>	<p>Whoever, for the purpose of securing illegitimate benefits, gives money or property to a State organ, State-owned company, enterprise, institution or people’s organization or, in economic activities, violates State regulations by giving rebates or service charges of various descriptions shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and shall be concurrently fined.</p> <p>Where a unit commits the crime mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offense shall be punished in accordance with the provisions of the preceding paragraph.</p> <p>(9th Amendment, Article 47)</p>

Preexisting Criminal Law	9th Amendment to Criminal Law (enacted August 2015, effective November 1, 2015)
<p>Whoever introduces a bribe to a State functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.</p> <p>Any person who introduces a bribe but voluntarily confesses the act before he is investigated for criminal responsibility may be given a mitigated punishment or exempted from punishment.</p> <p>(Article 392)</p>	<p>Whoever introduces a bribe to a State functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and shall be concurrently fined.</p> <p>Any person who introduces a bribe but voluntarily confesses the act before he is investigated for criminal responsibility may be given a mitigated punishment or exempted from punishment.</p> <p>(9th Amendment, Article 48)</p>
<p>Where a unit offers bribes for the purpose of securing illegitimate benefits or, in violation of State regulations, gives rebates or service charges to a State functionary, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offense shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. Any person who takes into his own possession the illegal gains derived from bribing shall be convicted and punished in accordance with the provisions of Articles 389 and 390 of this Law.</p> <p>(Article 393)</p>	<p>Where a unit offers bribes for the purpose of securing illegitimate benefits or, in violation of State regulations, gives rebates or service charges to a State functionary, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offense shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, and shall be concurrently fined. Any person who takes into his own possession the illegal gains derived from bribing shall be convicted and punished in accordance with the provisions of Articles 389 and 390 of this Law.</p> <p>(9th Amendment, Article 49)</p>