

China Releases Judicial Interpretation Clarifying Application of Law to Criminal Bribery Cases

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Anti-Corruption

On April 18, 2016, the Chinese government released a judicial interpretation (“Interpretation”) that clarifies certain aspects of the PRC Criminal Law with regard to bribery and corruption. The Interpretation provides additional clarity in understanding the [amendments to the Criminal Law that took effect last year](#), most notably by (1) expanding the definition of bribes to include certain intangible benefits, (2) clarifying that gifts of money or property will still be viewed as bribes when given after benefits are received, (3) re-establishing monetary thresholds and standards for bribery prosecutions, including raising the thresholds for bribes involving government officials and non-government officials, and (4) providing additional details on the requirements for leniency and voluntary disclosure.

Background

The Interpretation, titled “Interpretations of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery,” was jointly issued by the Supreme People’s Court and the Supreme People’s Procuratorate. The Interpretation is effectively immediately.

Covington prepared a translated version of the Interpretation as well as corresponding key provisions of the Criminal Law, available [here](#).

Expands definition of bribes to include certain intangible benefits

The Criminal Law criminalizes giving “money and property” to “state functionaries” or to business counterparties in exchange for improper benefits.¹ The Interpretation defines, for bribery purposes, “money and property” to include money, material objects, and also “property-like benefits.”² “Property-like benefits” include “material benefits that can be calculated monetarily, such as home renovation, debt relief, etc., and other [intangible] benefits that need to be paid using money, such as

¹ Criminal Law, Art. 389 (“为谋取不正当利益，给予国家工作人员以财物的，是行贿罪。”)； Art. 164 (“为谋取不正当利益，给予公司、企业或者其他单位的工作人员以财物，数额较大的，处三年以下有期徒刑或者拘役，并处罚金；数额巨大的，处三年以上十年以下有期徒刑，并处罚金。”).

² Interpretation, Art. 12. (“贿赂犯罪中的‘财物’，包括货币、物品和财产性利益。”).

membership services, travel, etc.”³ The term “property-like benefits” first appeared and was defined in a judicial interpretation in 2008 in the context only of commercial bribery.⁴ This expansion of the definition to explicitly include certain intangible benefits seems aimed at giving prosecutors more tools to investigate and prosecute criminal cases where a service provider offers its own services to a government official for free or confers benefits through intermediaries.

Clarifies that “bribes” include payments given after benefits are received, and when the official knows of a specific request

The interpretation clarifies that an official accepting money or property after the benefits are sought or received could still constitute bribery.⁵ This closes a perceived loophole where some companies or individuals believed that later “thanking” an official for their help (e.g., giving them a lavish gift or other transfer of value) should not be considered bribery because the transfer of value was not an inducement to the official providing the benefit.

The Interpretation also clarifies that an official who receives money or property will be found to have acted to “seek benefits for another person” (an element of several bribery offenses) if the official “knows that the person has a specific matter requesting [the official’s] help.”⁶ This may suggest a potential violation if an official accepts money or property from a person or company in a situation where the person or company has a specific need from the official but does not explicitly raise such need with the official. This closes a perceived loophole where money or property is exchanged for benefit based on an unspoken but mutual understanding between the official and the person or company.

³ *Id.* (“财产性利益包括可以折算为货币的物质利益如房屋装修、债务免除等，以及需要支付货币的其他利益如会员服务、旅游等。后者的犯罪数额，以实际支付或者应当支付的数额计算。”)

⁴ The concept of “property-like benefits” was first articulated in 2008 in a joint “Opinion Concerning Several Issues in the Application of the Law in Cases of Commercial Bribery” (《关于办理商业贿赂刑事案件适用法律若干问题的意见》). Article 7 reads: “In the context of commercial bribery, money and property may include money and material objects, and may also include property-like benefits that can be calculated monetarily, such as offering home renovation, membership cards carrying monetary value, gift cards (or vouchers), travel cost, etc.” (“商业贿赂中的财物，既包括金钱和实物，也包括可以用金钱计算数额的财产性利益，如提供房屋装修、含有金额的会员卡、代币卡(券)、旅游费用等。”). The recent Interpretation formally expands the concept to cover criminal bribery cases.

⁵ Interpretation, Art. 13, para. 1 (“具有下列情形之一的，应当认定为‘为他人谋取利益’，构成犯罪的，应当依照刑法关于受贿犯罪的规定定罪处罚：（一）实际或者承诺为他人谋取利益的；……（三）履职时未被请托，但事后基于该履职事由收受他人财物的。”）.

⁶ Interpretation, Art. 13, para. 1 (2) (“明知他人有具体请托事项的”); *see also*, Criminal Law, Art. 163 (“公司、企业或者其他单位的工作人员利用职务上的便利，索取他人财物或者非法收受他人财物，为他人谋取利益，数额较大的，处五年以下有期徒刑或者拘役；数额巨大的，处五年以上有期徒刑，可以并处没收财产。”), Criminal Law, Art. 385 (“国家工作人员利用职务上的便利，索取他人财物的，或者非法收受他人财物，为他人谋取利益的，是受贿罪。”）.

Re-establishes monetary thresholds and standards for bribery prosecutions

Last year's amendments to the Criminal Law replaced monetary thresholds with more general terms such as "relatively large," "large," and "especially large."⁷ The Interpretation re-established the monetary thresholds, which are somewhat convoluted depending on the crime and certain conditions, but of particular note is raising the minimum bar for most prosecutions for offering bribes from RMB 5,000 (about \$770) to RMB 30,000 (about \$4,600),⁸ unless certain other factors are involved, such as bribing three or more people, using "unlawful gains" for the bribe, or giving bribes to officials of certain government agencies.⁹ Similarly, the monetary thresholds for prosecutions of bribery crimes not involving state functionaries, *i.e.*, between two private parties, are set as double the thresholds for bribery crimes involving state functionaries.¹⁰

It is noteworthy that the Interpretation lists various factors to provide guidance on the standards for certain terms used in the Criminal Law as amended last year, such as "other relatively serious circumstances," "other serious circumstances," "other especially serious circumstances," and "causing heavy loss to State interests."¹¹ In the past, even though the 1997 Criminal Law expressly included identical terms, in practice, Chinese courts have based sentences mostly on the amount of improper payments involved in bribery cases. The replacement of monetary thresholds with general standards, coupled with the Interpretation's articulation of specific factors for applying the general standards, suggest that we may see Chinese courts shift the basis of their sentencing from one grounded largely on the amount of improper payments towards a comprehensive matrix that includes the amount of improper payments as one factor among other case-specific factors in the future.

The Interpretation also clarifies the standard for application of the death penalty in bribery cases. While these provisions attracted significant media attention, they apply only to state functionaries who take bribes and are therefore not directly applicable to multinational companies.

⁷ See [Covington E-alert: China Amends Criminal Law: Impact on Anti-Bribery Enforcement](#).

⁸ Interpretation, Art. 7, para. 1 ("为谋取不正当利益, 向国家工作人员行贿, 数额在三万元以上的, 应当依照刑法第三百九十条的规定以行贿罪追究刑事责任。").

⁹ Interpretation, Art. 7, para. 2 ("行贿数额在一万元以上不满三万元, 具有下列情形之一的, 应当依照刑法第三百九十条的规定以行贿罪追究刑事责任: (一) 向三人以上行贿的; (二) 将违法所得用于行贿的; (三) 通过行贿谋取职务提拔、调整的; (四) 向负有食品、药品、安全生产、环境保护等监督管理职责的国家工作人员行贿, 实施非法活动的; (五) 向司法工作人员行贿, 影响司法公正的; (六) 造成经济损失数额在五十万元以上不满一百万元的。").

¹⁰ Interpretation, Art. 11, para. 3 ("刑法第一百六十四条第一款规定的对非国家工作人员行贿罪中的 '数额较大' '数额巨大' 的数额起点, 按照本解释第七条、第八条第一款关于行贿罪的数额标准规定的二倍执行。"). The Interpretation does not specify whether and how the exchange of bribes for benefits below the given threshold between two private parties would be handled or by which agency. But historically, such commercial bribery is enforced by local Administrations for Industry and Commerce (AICs).

¹¹ See Interpretation, Art. 1.

Provides additional details on the requirements for leniency and voluntary disclosure

Last year's amendments to the Criminal Law changed slightly the requirements for punishment to be reduced or waived.¹² In particular, "If [a bribe-giver] 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."¹³ The Interpretation provides definitions of "minor crime" and "significant case," which are respectively dependent upon the term of imprisonment and the effects of the crime.¹⁴ The Interpretation also provides a laundry list of what will be considered as having "perform[ed] major meritorious behavior" in a bribery investigation, most of which require "voluntary confession" that has significant impact on the investigation of the crime.¹⁵

Related developments

The release of the Interpretation follows on the heels of the release in February of draft amendments to the Anti-Unfair Competition Law, which mirrors several of these changes. (See Covington's summary and analysis [here](#) and [here](#).)

The release of the Interpretation also follows the release in late March of a new regulation regarding whistleblowers. The regulation (available in Chinese [here](#)) largely restates existing provisions on whistleblowers (amended most recently in 2014) and is focused on encouraging individuals to report "state functionaries" who are involved in crimes while conducting their official duties. The regulation reiterates the opportunity for rewards of up to RMB 200,000 (about \$31,000) for whistleblowers in certain cases and provides protection from retaliation for whistleblowers and their family members. The regulation does not directly apply to reports of improper conduct by *non*-state functionaries (e.g., private companies or their employees).

Few of the provisions are new, but the release of the regulation, particularly in conjunction with the release of the Interpretation, suggests ongoing efforts by the Chinese government to encourage individuals in China to report improper conduct by government officials.

Implications

The Interpretation does not represent a sea change in anti-corruption enforcement in China. The Interpretation does, however, give prosecutors in China more tools to

¹² See [Covington E-alert: China Amends Criminal Law: Impact on Anti-Bribery Enforcement](#).

¹³ 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。")

¹⁴ See Interpretation, Art. 14.

¹⁵ *Id.*

enforce criminal bribery and corruption, and somewhat more certainty for companies and individuals caught in the cross-hairs of a criminal bribery prosecution.

The expansion of “money and property” to include some forms of intangible benefits marks a shift away from traditional enforcement against bribery in the public sector, which focused on tangible property. The expansion may be helpful to multinational companies when explaining to local employees in China the need to look at transfers of value broadly.

The Interpretation also clarifies certain concepts -- such as bribes given after an official has provided a benefit -- that previously have been viewed by some as exempt from bribes. While not clear, the provision related to “seeking benefits for others” could theoretically apply very broadly to criminalize any transfer of value to a state functionary with power to affect the economic interests of a company or individual. It remains to be seen how this provision will be utilized in practice by prosecutors and applied by the courts.

Because most criminal verdicts in China are not published or publicly accessible, it will take some time to determine the impact of the Interpretation.

Taken together, last year’s amendments to Criminal Law, the recent Interpretation, and the draft amendments to the Anti-Unfair Competition Law reaffirm the Chinese government’s ongoing focus on investigating and enforcing bribery and corruption against both givers and receivers of bribes.

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