China: Government Reorganization and Trade War Suggest More Anti-Corruption Enforcement in China

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China's biggest government reorganization in a generation, coinciding with rapidly escalating U.S.-China trade tensions, will impact many aspects of doing business in China, including an uptick in anti-corruption enforcement.

1. *"Super" enforcement agency targeting government officials is established.* Historically, anti-corruption enforcement has been spread across multiple agencies. The National Supervision Commission (NSC), formally established last week, combines functions of the Central Commission for Disciplinary Inspection (CCDI), Ministry of Supervision, the National Bureau of Corruption Prevention, and the General Administration of Anti-Corruption of the Supreme People's Procuratorate, merging anti-corruption functions of the Party, state, and justice system.

The NSC will have direct enforcement jurisdiction over "traditional" government officials and over key officials at state-owned enterprises (SOEs) and quasi-public institutions (such as public schools and hospitals). The NSC will have powers to investigate, interrogate, detain, and punish, and to seize or freeze assets of these government-affiliated individuals under its jurisdiction.

Although the NSC will not have enforcement jurisdiction over private companies or non-government-affiliated individuals and therefore will not have a direct impact on multinational companies, it will very likely have an indirect impact. More investigations into government-affiliated individuals means more people who tell enforcement officials (and sometimes speak publicly in courts) about the source of bribes they (allegedly) took. And in connection with its investigations into government-affiliated individuals, the NSC has power to collect evidence from private companies and individuals, including search and seizure, and restricting witnesses from leaving the country.

While government-affiliated individuals have always been subject to China's anti-corruption laws, the new NSC, armed with additional staff and jurisdiction, is a significant escalation in these efforts. The NSC will have jurisdiction over about three times the number of individuals as the CCDI, which supervises only Party officials.

The NSC has affiliates at the provincial, municipal, and county/district levels. The new head of the NSC, Yang Xiaodu, is an ally of Xi Jinping from when they both served in Shanghai and more recently, when Yang was a deputy head of the CCDI, the feared internal Party disciplinary authority.

2. *AIC is consolidated with other bureaus into a new State Administration for Market Regulation.* The agency historically tasked with commercial bribery enforcement, the State

Administration for Industry and Commerce (SAIC) and its local affiliates, is being merged with functions from other departments, including antitrust enforcement functions of three agencies, the China Food & Drug Administration, and product quality supervision, to create a State Administration for Market Regulation (SAMR). The new head of the SAMR reportedly will be the current head of SAIC.

Consolidation of these agencies had started to occur at the sub-municipal level on a pilot basis for several years in certain cities, including Shanghai.

The consolidation may not immediately impact commercial bribery enforcement, although we could see medium- to longer-term impacts. The key statute related to commercial bribery enforcement, the Anti-Unfair Competition Law (AUCL), was recently amended (see here and here), and the SAMR may want to bring a significant case to show their enforcement intent under the amended law and new reorganization.

The consolidation of government agencies, of which the SAMR is only one of several consolidations, may result in certain long-term gains in efficiency (and reduced avenues for corruption) if companies have fewer points of contact with government. During (and potentially after) the reorganization, however, the rank-and-file may fear making a decision that could be later criticized by the country's senior leadership, particularly if their individual careers are not secure. As such, officials could put on pause approving applications for new/expanded business/renewed approvals and licenses, which could result in company employees feeling more pressure to use side payments to officials to push forward important business objectives and timelines.

3. *The anti-corruption campaign is the new normal.* The anti-corruption campaign, which began in late 2012 / early 2013 when Xi formally became head of the Party and President, is now more than five years old and counting. Most previous anti-corruption campaigns lasted a few months, so the current crackdown is more a "new normal" than a phase with an endpoint in sight. The establishment of the NSC outlined above is a structural manifestation of that change. In healthcare, the enforcement seems likely to continue: the government has also announced that all of the Level 3 (i.e., largest) hospitals will be inspected in 2018, and by 2020, all of the Level 2 hospitals will be inspected.

Wang Qishan was the former head of the Party's CCDI and wielded significant power both in that office and because of his reported close relationship to Xi. At age 69, he would normally retire from Party and State service. But he was recently appointed to serve as the country's vice president and reportedly continues to join certain meetings of the Standing Committee of the Politburo, the country's most powerful leadership body, even though he formally stepped down from his seat in October 2017. While Wang's new role as vice president reportedly will be overseeing the U.S.-China relationship, we assume that between Xi's continued emphasis on anti-corruption and Wang's continued prominence, Wang would retain significant clout in this "new normal" anti-corruption environment.

4. *A downturn in U.S.-China relations could mean more enforcement actions against U.S. companies in China.* While not directly related to the government reorganization, the recent trade tensions between the U.S. and China likely will result in increased enforcement actions against U.S. companies.

When China has disagreements with another country, it often targets companies from that country for enforcement. Historically, that targeting has ranged from corruption investigations to enforcement for tax or product quality issues, or delays in permits and approvals or customs clearance. The state-affiliated media often become involved in writing critical stories about those companies, sometimes at the nudging of the government. While in some cases these enforcement actions investigate actual shortcomings by the companies, in many cases the investigations appear to be selective enforcement by the government to put pressure on the foreign country.

This summary first appeared as a post on the FCPA Blog.

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