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China Releases Draft Criminal Law Amendments, Proposing Changes in the Areas of Anti-Corruption, Life Science, and Trade Secrets Protection

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Anti-Corruption, White Collar, Food/Drug/Device

On October 21, 2020, China's National People's Congress ("NPC") published revised draft amendments ("Draft Amendments") to China's Criminal Law. The legislature will be soliciting public comment until November 19, 2020, and will then review and enact the amendments. Based on previous amendments, we do not expect the final version as enacted to differ substantively from the current draft.

The Draft Amendments — the first substantive revision since 2015[1] — would update the Criminal Law to parallel other major legislative developments in the last five years. The Draft Amendments would also create or strengthen criminal remedies in response to high-profile public events of recent years, including corruption scandals, food and drug safety, public health crises (the gene-edited babies scandal and COVID-19), financial fraud, and ongoing U.S.-China trade frictions.

This alert summarizes the proposed key changes in the areas of anti-corruption, life science, and trade secrets protection, specifically:

- In the anti-corruption area, increasing punishment for corrupt conduct by a non-state functionary (including taking or soliciting bribes, embezzling company assets, and grafting company funds) to parallel punishments for state functionaries. (State functionaries are individuals who perform "public functions," primarily decision-making positions at government agencies, state-owned enterprises, and some private enterprises.)
- In the life science field, echoing the new Drug Administration Law, the Draft Amendments would broaden the scope of the Criminal Law prohibitions on producing or selling counterfeit drugs or those of inferior quality. The Draft Amendments would create new crimes for mishandling human genetic resources and for illegally implanting gene-edited or cloned embryos into humans or animals.

[1] The NPC enacted the tenth amendment to the Criminal Law in November, 2017, adding one clause about the criminal act of desecrating the national anthem.

- Regarding trade secrets protection, the Draft Amendments would enumerate additional types of trade secrets misappropriation and increase the maximum sentence. The Draft Amendments also would regulate trade secrets misappropriations that benefit overseas entities and individuals and impose harsher punishment than if the misappropriation were to benefit a domestic entity.

Anti-Corruption

Under the current Criminal Law, corrupt conduct by a non-state functionary (taking or soliciting bribes, embezzlement, and graft) leads to lighter sentencing than state-functionaries'.[2] The Draft Amendments aim to eliminate that gap by subjecting state functionaries and non-state functionaries to comparable sentencing frameworks.

For example, under the current Criminal Law, Article 163 states that non-state functionaries receiving or soliciting bribes should receive a prison term of no more than five years or criminal detention if the involved amount is "relatively large;" where the amount is "huge," more than five years in prison, and confiscation of property if needed.

The Draft Amendments would add a new sentencing level for cases where the involved amount is "especially huge" or where there are other "especially serious" circumstances, which would result in more than ten years or life imprisonment, plus a fine. The punishment for the two pre-existing sentencing levels would be adjusted accordingly: "relatively large" amount cases would lead to no more than three years in prison or criminal detention, plus a fine, and "huge" amount cases or where there are "serious" circumstances, three to ten years in prison plus a fine.

Amount of bribes solicited or received by non-state functionary	Current Criminal Law for non-state functionary	Draft Amendments		Current Criminal Law for state functionary
"relatively large"	no more than five years in prison or criminal detention	no more than three years in prison or criminal detention, plus a fine		no more than three years in prison or criminal detention, plus a fine
"huge" or "serious"	more than five years in prison, and confiscation of property if needed	three to ten years in prison, plus a fine		three to ten years in prison, plus a fine or confiscation of property
"especially huge" or "especially serious"	N/A	more than ten years in prison or life imprisonment, plus a fine		more than ten years in prison or life imprisonment, plus a fine or confiscation of property

[2] The distinguishing criterion between a "state functionary" and a "non-state functionary" is whether the individual is performing "public duties." Criminal Law, Art. 93.

Amount of bribes solicited or received by non-state functionary	Current Criminal Law for non-state functionary	Draft Amendments		Current Criminal Law for state functionary
"especially huge" *and* "national/public interest severely damaged"	N/A	N/A		life imprisonment or death sentence, plus confiscation of property

These proposed changes would make Article 163 more comparable to the provisions that govern when a state functionary solicits or takes bribes (Articles 383, 385, and 386). The remaining major difference between the two would be that state functionaries could face death sentence and confiscation of property if the involved amount is "especially huge," and the national and public interest has been especially severely damaged.

The Draft Amendments do not spell out the monetary thresholds for "relatively large," "huge," and "especially huge" under Article 163. The Supreme People's Court ("SPC") and Supreme People's Procuratorate ("SPP") will likely issue guidance on these details following the enactment of the amendments. Guidance issued by the SPC and SPP in 2016 defines "relatively large" as above RMB 60,000 and "huge" as above RMB 1 million.[3] It remains to be seen whether the SPC and SPP will update these numbers.

Similar changes were proposed for the crimes of embezzling corporate assets (Article 271) and the graft of corporate funds (Article 272) by non-state functionaries. For the latter, the Draft Amendments would also add a mitigating ground for defendants who return the grafted funds before prosecution and would consider reducing or waiving the penalty for those whose misconduct is minor.

According to the NPC's explanation, the Draft Amendments aim to respond to private companies' desire for equal protection of state-owned and privately-owned assets. These proposed changes would have practical impacts on companies' compliance programs in China. Heightened criminal liability for non-state functionaries' corrupt activities, if made aware of among employees through compliance training, could have a deterrent effect. It would also give companies another remedial avenue when corporate assets were embezzled or grafted, such as stronger penalties for employees who take kickbacks from suppliers.

[3] Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Embezzlement and Bribery (最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释), April 18, 2016, Article 11.

Life Science

The Draft Amendment's revisions in the life science area were mainly in response to recent revisions to the Drug Administration Law and the Regulation on the Administration of Human Genetic Resources ("HGR Regulations") and to public health events, such as the gene-edited babies incident and COVID-19.

Food and drug safety

Articles 141 and 142 of the Criminal Law govern the production and sale of counterfeit drugs and drugs of inferior quality. Under the current Article 141, counterfeit drugs refer to what is defined as a counterfeit drug or circumstances in which drugs will be treated as counterfeit drugs under the Drug Administration Law. Yet revisions to the Drug Administration Law in 2019 deleted the mention of the scenarios that should be treated as counterfeit drugs. This included the circumstances in which drugs are imported without approval, for which the Drug Administration Law now permits lighter penalties if the unapproved drugs imported are approved outside of China and are imported in smaller quantities. The Drug Administration Law made similar revisions to the scope of drugs of inferior quality. These now-obsolete references to Articles 48 and 49 in the prior Drug Administration Law have been removed in Articles 141 and 142 of the Draft Amendments.

Next, the Draft Amendments would add new clauses to regulate several additional scenarios:

- Drug-using entities (such as hospitals and pharmacies) that knowingly offer counterfeit drugs or drugs of inferior quality to others would be treated as selling defective drugs and sentenced under Articles 141 and 142.
- A new article would be inserted after Article 142, as Article 142-1, imposing criminal liability on: (1) producing or selling drugs prohibited by regulators; (2) producing or importing drugs without approval or knowingly selling these drugs; (3) providing false certification, statistics, materials, or samples or employing other fraudulent means in drug registration applications; and (4) fabricating production or inspection records. If the above misconduct is sufficient to cause serious harm to human health, the sentence would be imprisonment of no more than three years or criminal detention, and/or a fine; where the misconduct has caused serious harm to human health or where other serious circumstances are present, the sentence would be imprisonment of three to seven years plus a fine.

Finally, Article 408-1 of the current Criminal Law imposes liability on state functionaries' dereliction of duties to oversee food safety. The Draft Amendments would add drug safety to that scope. The revised Article 408-1 also would list the scenarios of dereliction of duties, including (1) concealing or falsifying the report of food or drug safety incidents; (2) failing to investigate identified serious food and drug safety violations according to relevant rules; (3) granting approvals for unqualified applications during the review of drugs, infant formula, or other special food types; (4) failing to transfer relevant criminal cases to judicial agencies; and (5) other types of abuse of office or dereliction of duties. If the misconduct causes serious consequences or there are other serious circumstances, the sentence would be imprisonment of no more than five years or criminal detention; where the consequences are especially serious or there are other especially serious circumstances, the sentence would be imprisonment of five to ten years.

Human genetic resources ("HGR")

The Draft Amendments would add a new article, as Article 334-1, imposing criminal liability specifically for crimes related to human genetic resources ("HGR"). HGR are currently regulated under an administrative regulation issued by the State Council. HGR consist of two components: (1) human biospecimens (HGR materials) and (2) the data associated with those biospecimens (HGR information). Foreign and foreign-controlled companies may not collect these samples and data and may utilize HGR only through an international collaboration with a China-based party. The Office of Human Genetic Resources ("OHGRA") must approve such international collaborations; OHGRA must also approve any sample export or clear any data transfer to a non-collaborator. The HGR regime has been an important feature of clinical research in China and has become one of the most central issues since 2019 facing foreign companies conducting this research in China.

China issued its first interim regulation on HGR in 1998. In 2015, enforcement and practice under this regime began to change significantly, when the OHGRA began to apply the regulation and its approval to all clinical trials in association with the development of drugs and medical devices. The State Council amended the HGR regulations in 2019 and since then has significantly expanded the control of the HGR regime over samples and, in particular, data.

The Draft Amendments criminalize (1) illegally collecting human genetic resources in China and (2) illegally transporting, shipping, or carrying national HGR materials outside of China. Where the circumstances are "serious," the sentence would be imprisonment of no more than three years, criminal detention, or control, and/or a fine; where the circumstances are "especially serious," imprisonment of three to seven years plus a fine. The first prohibition on collection applies to all HGR, regardless of whether they are samples or data, while the second prohibition — on illegal transportation — applies only to HGR materials, i.e., the samples.[4]

Gene-edited or cloned embryos

The Draft Amendments would add a new article, as Article 336-1, which imposes liability for illegally implanting gene-edited or cloned human embryos into human or animal bodies or implanting gene-edited or cloned animal embryos into human bodies. Under "serious" circumstances, the sentence would be imprisonment of no more than three years or criminal detention, plus a fine, and where the circumstance is "especially serious," imprisonment of three to seven years, plus a fine.

The new article addresses incidents similar to the gene-edited babies scandal in 2018. In that case, the defendants, for experimental purposes, edited the genes of embryos that came from HIV-positive donors, implanted the embryos in healthy females, who gave birth to two babies. Absent appropriate provisions under the Criminal Law, the defendants were sentenced for the crime of practicing medicine without a professional license. The new article proposed by the Draft Amendments would provide for more serious criminal penalties.

[4] Unlike an earlier draft this latest draft does not contain a third prohibited act of transferring data to foreign institutions or individuals or those actually controlled by foreign institutions or individuals without undergoing the required security review.

Trade Secrets

Article 219 of the Criminal Law regulates the misappropriation of trade secrets. The Draft Amendments propose to make several changes to the article:

- Enumerating fraud and electronic intrusions as additional means for illegally obtaining trade secrets
- Including in methods of misappropriation the disclosure, use, or authorizing the use of trade secrets in breach of confidentiality obligations
- Replacing the quantitative, result-based thresholds for the two sentencing levels with qualitative ones, i.e., "causing great loss" replaced with "having serious circumstances," and "causing especially serious consequences" replaced with "having especially serious circumstances"
- Increasing the maximum sentence for "especially serious" circumstances from imprisonment of seven years to ten years

These proposed changes would conform the Criminal Law with the revised Anti-Unfair Competition Law that took effect in 2019.[5] The changes, to some degree, could also serve as the Chinese government's response to its commitments under the Phase I trade agreement between China and the United States.[6]

Further, the Draft Amendments would add an article, as Article 219-1, stating that those who steal, spy, buy, or illegally provide trade secrets to overseas institutions, organizations, or individuals shall be sentenced for fixed-term imprisonment of no more than five years or criminal detention, and/or a fine; where the circumstances are serious, imprisonment of more than five years plus a fine. The proposed new article would subject trade secrets misappropriation cases to separate sentencing regimes (Article 219 and Article 219-1), depending on the nationality of the beneficiary. A defendant in a foreign beneficiary case may be sentenced more harshly than a defendant where the beneficiary was domestic. For example, where circumstances are serious, a defendant in a domestic beneficiary case would face imprisonment of no more than three years or criminal detention, and/or a fine; by contrast, if the defendant were to benefit an overseas entity, the sentence would be more than five years in prison and a fine.

While the practical impact of Article 219-1 remains to be seen, the lower thresholds and harsher punishment might invite more litigation against foreign companies. To minimize the risk, companies should plan proactively and exercise tighter control of their partnership or

[5] See Anti-Unfair Competition Law, 2019, Article 9, available here.
[6] Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America, January 15, 2020, Article 1.4.2: "China shall enumerate additional acts constituting trade secret misappropriation, especially (a) electronic intrusions; (b) breach or inducement of a breach of duty not to disclose information that is secret or intended to keep secret…;" Article 1.7.2 (b): "as a subsequent step, eliminate in all applicable measures any requirement that a holder of a trade secret establish actual losses as a prerequisite to initiation of a criminal investigation for misappropriation of a trade secret;" and Article 1.8.2: "China's criminal procedures and penalties shall at least encompass cases of trade secret misappropriation through theft, fraud, physical or electronic intrusion for an unlawful purpose, and the unauthorized or improper use of a computer system in the scope of prohibited acts," available here.

collaboration with Chinese companies, particularly regarding information sharing.

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