
China's Own FCPA

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On May 1, 2011, an amendment to China's Criminal Law took effect after passage by the Standing Committee of China's National People's Congress on February 25, 2011. The amendment criminalizes for the first time the bribery of foreign government officials and officials of public international organizations by Chinese companies and individuals. The amendment to Article 164 of the Criminal Law is modeled after Article 16 of the United Nations Convention against Corruption, although there are differences in wording.

Prohibition: The new law prohibits the act of giving "money or property" ("财物") to any foreign government official or official of a public international organization to "obtain an improper commercial benefit" ("为谋取不正当商业利益"). The scope of the phrase "to obtain an improper commercial benefit" under Article 164 appears to be as broad as similar terms contained in Article 16.1 of the UN Convention ("to obtain or retain business or other undue advantage in relation to the conduct of international business") and the FCPA ("to assist ... in obtaining business for or with, or directing business to, any person"). Unlike the FCPA, however, the new Chinese law applies only to officials of governments and public international organizations and not to foreign political parties, officials of such parties, or candidates for political office. "Money and property" has previously been construed by the Supreme People's Court in par. 7 of the Opinions on Some Issues Concerning the Application of Law in the Handling of Commercial Bribery Cases (2008) to include property-like interests with a monetary value such as home decoration, membership cards with a monetary value, debit cards, and travel expenses. It is likely that entertainment expenses would also be included although this issue was not specifically addressed by the Supreme People's Court.

Penalties: When the amount paid is relatively large, an offense is to be punished by imprisonment or detention for up to three years. When the amount paid is very large, an offense is to be punished by imprisonment from three to 10 years plus a fine.

Corporate and Individual Liability: Personnel in an entity (including, but not limited to, companies)

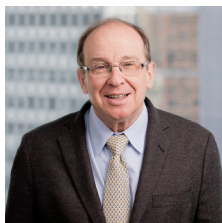
who are in charge of the offense or bear other direct responsibility are subject to such penalties, and the entity itself is subject to a fine.

Size of Payments that Constitute a Criminal Offense: Although Article 164 does not specify the thresholds for criminality, under the Regulations of the Supreme People's Procuratorate on Criminal Investigation Standards (1999), the criminality thresholds for taking a bribe and offering a bribe are RMB5,000 (approximately \$775 US dollars) and RMB10,000 (approximately \$1,550 US dollars), respectively, and these thresholds apply to Article 164. As such, payments of less than RMB10,000 would not constitute a criminal offense.

Voluntary Disclosure: Article 164 provides for leniency if the perpetrator voluntarily reports the violation before an investigation has been initiated.

The definition and impact of specific terms awaits the issuance of opinions by the Supreme People's Court and Supreme People's Procuratorate. Nevertheless, according to Chinese law professors like Prof. Cheng Baoku of Nankai University and Prof. Ren Jianming of Tsinghua University, Article 164 should contribute to the development of ethical practices in Chinese companies who have been criticized for engaging in corrupt practices overseas, particularly in developing countries. It should also help to level the playing field in overseas markets between Chinese and foreign companies, who have long been subject to similar laws. In these respects it marks a change in longstanding Chinese positions based on non-interference in the affairs of other countries, which among other things, excused cooperation with corrupt regimes. Conversely, the statute may also diminish any reluctance that Chinese authorities may have had in the past to prosecute foreign parties which have engaged in bribery of officials in China, as China has generally not taken action in the past even after investigations by other countries with respect to bribery in China have become public. Both Chinese companies and foreign companies doing business in China should be vigilant about corruption risks in their operations worldwide.

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