



## Doing (Or Thinking of Doing) Business in China: A Summary Of China's Two Anticorruption Statutes And How They Differ From The FCPA

JENNIFER ARMSTRONG | LITIGATION TRENDS | FEB 05, 2014

While many multinational companies have adopted policies to comply with the Foreign Corrupt Practices ("FCPA") Act or the UK Bribery Act, fewer companies have developed and put in place compliance systems designed specifically to ensure compliance with Chinese anticorruption laws. China had not traditionally enforced its anticorruption laws, but the recent investigation of GlaxoSmithKline (click here for my recent blog post) demonstrates this is changing.

An excellent Corporate Counsel article (click here) summarizes the legal framework of China's two main anticorruption statutes, discusses the differences between these statutes and the FCPA, and opines on the potential impacts of Chinese anticorruption law on U.S. companies. Among the highlights:

- Chinese anticorruption laws and regulations are scattered across a variety of sources. Two statutes in particular constitute the primary controlling authority: (1) The Criminal Law of the People's Republic of China ("Criminal Law"); and (2) The Anti-Unfair Competition Law of the People's Republic of China ("AUCL").
- The AUCL addresses only commercial bribery. Where the violation does not amount to a criminal act, penalties typically include a fine of up to RMB 200,000 (approximately \$32,000) in addition to disgorgement of illegal income (if any). The AUCL also gives rise to a cause of action for competitors who can allege they were harmed by such commercial bribery, allowing such competitors to bring a civil claim for damages before a People's Court.
- The Criminal Law recognizes two forms of bribery, each based on the identity of the bribe recipient: "official bribery" (offering a bribe to a state functionary) and "commercial bribery" (offering a bribe to a representative of a private enterprise or institution). Because the Criminal Law broadly defines a "state functionary" to include any person who performs public services in a state organ, it is prudent for multinational companies to proceed carefully when dealing with the managerial staff of state-owned enterprises. Actions perceived as official bribery may trigger severe criminal liability.
- The penalties for the bribe-giver under the Criminal Law can be substantial. For acts involving official bribery, an individual bribe-giver may face penalties from criminal detention to life imprisonment, and possible confiscation of property. For an act of commercial bribery, an individual bribe-giver may be subject to penalties from criminal detention to 10 years' imprisonment, and a possible criminal fine. Further, in case of an entity bribe-giver, the entity may face criminal fines; the management personnel or other staff of the entity who are directly responsible for the matter may also be subject to similar criminal penalties as in an individual bribery case.
- While the SEC and DOJ have imposed large fines against companies and individuals for FCPA violations, the longest prison sentence has been 15 years. Conversely, while China has imposed modest fines for violation of its anticorruption statutes, violations of Chinese anticorruption laws carry the potential for life imprisonment - a significant and obvious concern for executives and other individuals operating in China.
- In light of the fact that companies as sophisticated as GSK have run afoul of Chinese anticorruption laws, companies should reassess: (1) whether their procedures are sufficient; (2) whether the practical implementation of them is robust enough; and (3) whether (and to what extent) they need to be further developed and updated.
- Experts warn multinationals to expect an onslaught of new investigations and enforcement actions from Chinese authorities.



JENNIFER ARMSTRONG

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