This note is for in-house or local counsel to provide to the board of directors (or equivalent body) of a legal entity on the key points in relation to the applicable anti-corruption regime in China.

**LAWS**

The two main laws of the People's Republic of China (PRC) that are relevant to bribery and corruption are:

- The Criminal Law of the PRC (Criminal Law).
- The Anti-Unfair Competition Law of the PRC (Competition Law).

**RULES AND REGULATIONS**

There also are a number of rules and regulations relevant to bribery and corruption in the PRC, including:

- Detailed rules and regulations issued by State Council and other administrative authorities. These rules provide detailed implementing guidelines for the main laws and provide guidance on specific areas/topics that are not covered by the main laws. One of the primary sets of rules that regulate commercial bribery is the *Interim Provisions on Prohibition of Commercial Bribery* (issued by the State Administration for Industry and Commerce and effective as from 15 November 1996) (Interim Provisions).
- Interpretations and Guidelines issued by the Supreme People's Court and Supreme People's Procuratorate, including:
  - the 2007 *Opinions of the Supreme People's Court and Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Acceptance of Bribes* (2007 Opinions); and
  - the 2016 *Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases Involving Embezzlement and Bribery* (2016 Interpretations). The 2016 Interpretations essentially expand the definition of bribes to include intangible benefits, clarify that bribes given after benefits are received are indeed bribes, raise monetary thresholds for bribes, and clarify the requirements and benefits of voluntary disclosure.
- Disciplinary Regulations of the Government and the Chinese Communist Party (CCP), such as the Disciplinary Rules of the Chinese Communist Party. These rules are mainly applicable to state functionaries and party members.

**CRIMINAL LAW**

The PRC Criminal Law criminalises the giving by way of bribe of “money and property”. Article 12 of the 2016 Interpretations defines “money and property” to include money, material objects, and “property-like benefits,” which includes material benefits that has a monetary value, including renovations, release of debt, and other intangible benefits that can be paid, such as membership services and travel.

The Criminal Law categorises bribery and corruption offences into two groups: accepting bribes, and giving bribes.

In terms of accepting bribes:

- Public officials and state functionaries. It is an offence for a state functionary, a state-owned company, a state organ or a people's organisation (a non-party organisation united for a particular cause, such as the All-China Federation of Trade Unions, or other members of the “Big Eight Organisations”) to demand or accept a bribe (*Articles 385 and 387, Criminal Law*).

In terms of giving bribes:

- Public officials and state functionaries. It is an offence:
  - for an individual to bribe a state functionary, a state-owned company, a state organ or a people's organisation (Articles 389 and 391, Criminal Law);
- for a company or a legal entity to bribe a state functionary (Article 393, Criminal Law);
- to serve as an intermediary in the commission of an illegal bribe to a state functionary (Article 392, Criminal Law);
- to bribe a close relative of, or another person closely related to, a state functionary or a former state functionary (Article 390a, Criminal Law); or
- to accept a bribe as a close relative of, or another person closely related to, a state functionary or a former state functionary (Article 388a, Criminal Law).

- Private entities and foreign/international officials. It is an offence to:
  - bribe private companies and legal entities (incorporated or unincorporated) to seek illegitimate benefits (Article 164, Criminal Law); or
  - to bribe a foreign public official or official of an international public organisation in pursuit of improper commercial interests (Article 164, Criminal Law).

The 2016 Interpretations have also clarified that a bribe may be made before and after the unlawful benefits are received, thereby closing a previously perceived loophole that a bribe could not be given after the receipt of benefits because the person accepting the money or property cannot be said to have been induced by the same if the money or property was given after benefits were granted.

Article 106(6) of the PRC Criminal Procedure Law defines “close relative” as a person’s husband or wife, father, mother, sons, daughters, and brothers and sisters born to the same parents. The 2007 Opinions clarify that “other persons closely related to” includes close relatives, lovers, and any other person who has a common interest with the state functionary (Paragraph 11, 2007 Opinions).

Where the offence of giving a bribe is not completed because of factors independent of the intent, the action will amount to a criminal attempt, an offence punishable under the Criminal Law (Article 23, Criminal Law).

**OFFICIAL BRIBES**

The above acts of bribery can then further be classified as “official bribes” (those involving state functionaries) and “commercial bribes” (where private enterprises and their staff are involved).

Article 93 of the Criminal Law defines “state functionaries” as persons who:
- Perform public service in state organs.
- Are assigned by state organs, state-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the state, or people’s organisations to perform public service.
- Persons who perform public service according to the law.

**COMMERCIAL BRIBES**

A legal entity will be held criminally liable for the unlawful conduct of its officers, employees and agents, if both the following are met:
- The crime was committed on behalf of or for the benefit of the entity; and
- The entity gained illegal gains.

This is reiterated in Article 3 of the Interim Provisions which provides that “the conduct of commercial bribery by the staff of a business operator for the purpose of sale or purchase of commodities shall be regarded as the conduct of the business operator.”

When a legal entity is found criminally liable for giving a bribe, the “person-in-charge who is directly responsible” and the “other direct participants” of the entity will also be held criminally liable (unit crimes, Articles 31, 164 and 393, Criminal Law).

PRC law is silent on the scope of “person-in-charge who is directly responsible”. However, according to an explanatory document circulated by the Supreme People’s Court within the court system, “a person-in-charge who is directly responsible” refers to those who decide, approve, instruct, connive or direct the crime committed by the legal entity, who may or may not be legal representatives of the entity (Meeting Summary on Hearing Financial Crime Cases of the National Courts, Supreme People’s Court, 2001).

Although this meeting summary does not constitute a judicial interpretation as such, in practice, all the PRC courts follow it as if it were. Similarly, there are no clear definitions of “the other direct participants”. In practice, however, the person who directly handles the bribery payment will be deemed to be an “other direct participant” (Interpretations on Several Questions on the Applying of Laws in Bribery Cases, Supreme People’s Court and Supreme People’s Procuratorate, 26 December 2012).

In summary, any employee of the legal entity will be deemed liable for criminal offences of the entity if they do either of the following:
- Decide, approve, instruct, connive or direct the bribery/corruption offence.
- Directly handle the payment of the bribe.
PROSECUTING AND SENTENCING THRESHOLDS

The prosecuting thresholds are set out in the table below.

<table>
<thead>
<tr>
<th>Bribe</th>
<th>Threshold</th>
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<tbody>
<tr>
<td>Bribing a state functionary and their close relative or any other</td>
<td>RMB 30,000. If less than RMB 30,000 but more than RMB 10,000, the</td>
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<tr>
<td>persons closely related to the state functionary</td>
<td>threshold is deemed met if any of the six conditions under Article 7 of</td>
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<td></td>
<td>the 2016 Interpretations are met (2016 Interpretation Conditions).</td>
</tr>
<tr>
<td>Bribing a non-state functionary, including foreign officials or an</td>
<td>Offeror is an individual. RMB 60,000. If less than RMB 60,000 but more</td>
</tr>
<tr>
<td>officer of a public international organisation</td>
<td>than RMB 20,000, the threshold is deemed met if any of the 2016</td>
</tr>
<tr>
<td></td>
<td>Interpretation Conditions are met.</td>
</tr>
<tr>
<td></td>
<td>Offeror is an entity. RMB 200,000. (2000 Regulations of the Supreme</td>
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<tr>
<td></td>
<td>People’s Procuratorate on Standards for Filing Cases of Bribery Crimes</td>
</tr>
<tr>
<td></td>
<td>(2000 Standards))</td>
</tr>
<tr>
<td>Bribing a state entity</td>
<td>Offeror is an individual. RMB 100,000</td>
</tr>
<tr>
<td></td>
<td>Offeror is an entity. RMB 200,000 (2000 Standards)</td>
</tr>
</tbody>
</table>

The monetary thresholds that have an impact on sentencing have been removed in the 2015 amendments to the Criminal Law and replaced them with general standards—relatively large, huge and especially huge. The 2016 Interpretations have defined these vague standards as follows:

<table>
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<th>Standards</th>
<th>Official bribed</th>
<th>Commercial bribes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relatively large</td>
<td>More than RMB 30,000 but less than RMB 200,000.</td>
<td>Twice the amount for official bribes.</td>
</tr>
<tr>
<td>Huge</td>
<td>More than RMB 200,000 but less than RMB 3 million.</td>
<td>Twice the amount for official bribes.</td>
</tr>
<tr>
<td>Especially huge</td>
<td>More than RMB 3 million.</td>
<td>Twice the amount for official bribes.</td>
</tr>
</tbody>
</table>

COMPETITION LAW

It is an administrative offence and amounts to commercial bribery for a business operator to give by way of a bribe money or property (Article 8, Competition Law) to any legal entity or natural person in the course of selling or purchasing goods. The business operator will also be held vicariously liable for the acts of its employees under the Competition Law (Article 3, Interim Provisions).

“Property” has been interpreted to mean cash and physical items, and include fees for promotion, publicity, sponsorship, travel, scientific research, labour, consultancy, commission, and kickbacks (Article 8, Competition Law and Article 2, Interim Provisions).

“Business operators” include legal persons, any economic organisations, and natural persons conducting commercial businesses.

The monetary thresholds to commence investigations for offences under the Competition Law is not clearly set out and whether an act of commercial bribery is sufficiently serious to warrant an investigation and punishment will be considered on a case-by-case basis (unless they meet the threshold for criminal liability under the Criminal Law as set out above). Acts of commercial bribery that do not meet the Criminal Law threshold will attract administrative fines of RMB 10,000 to RMB 200,000.

IMPLICATIONS FOR COMPANIES, BOARDS, AND MANAGEMENT

As the Company or management may be held vicariously liable for the acts of its employees/employees it supervises and the Criminal Law recognises unit crimes, it is advisable for companies and management to put in place strong, up-to-date and effective anti-bribery policies and systems.

Please note that the company will not be able to use the fact that it had adequate procedures in place as a defence against corruption charges brought against it.

Jurisdictional reach of bribery laws

Only the Criminal Law (and the rules and regulations relating to the interpretation and implementation of the Criminal Law) applies extraterritorially to companies incorporated under PRC law, including joint ventures, wholly foreign-owned enterprises, and representative offices of non-PRC companies, regardless of where they operate. (Article 30, Criminal Law.)
**THE US FOREIGN CORRUPT PRACTICES ACT**

Companies should be aware that even if their anti-bribery programme is compliant with the US Foreign Corrupt Practices Act 1977, this does not ensure the adequacy of their procedures under PRC law and regulations.

**COMMON RED FLAGS FOR BRIBERY**

When considering the actions of agents and consultants, the following should be considered red flags of possible bribery:

- Fee payments are made in a different country to where the activity takes place, in particular an offshore financial centre known to be used to launder money.
- Reluctance to act openly or efforts to hide the nature or extent of interactions with the company from the public or public officials.
- Requests for payment in excess of the amount usually required for the specified services.
- Invoices for services that are lacking in detail, appear unofficial or relate to services that seem too expensive.
- “Consulting agreements” presented include only vaguely described services or the consultant is in a different line of business than that for which the consultant has been engaged.
- Unorthodox corporate structure.

In terms of accounting, the following should be considered red flags of possible bribery:

- Inadequate supporting documents.
- Misreporting of payments.

- Transaction lacking business purpose.
- Pricing discrepancies.
- Off-the-book records of transactions.
- Inadequate internal audit programs.
- Lack of the requisite staff, facilities, or expertise to perform substantial work.

In terms of business deals and contracts, the following should be considered red flags of possible bribery:

- Lavish business meals or entertainment.
- Monetary (Hong Bao or Red Packets) and corporate gifts worth more than RMB 10,000.
- Lack of a written agreement, refusal to execute a written agreement, or requests to perform services without a written agreement where one is sought.
- Misrepresentation or inconsistencies in the party’s statements.
- Failure to co-operate with a due diligence investigation or refusal to answer questions or make representations and warranties.
- Refusal to agree to comply with the US Foreign Corrupt Practices Act 1977 (FCPA), the UK Bribery Act 2010 (UKBA), equivalent applicable anti-corruption legislation, anti-money laundering laws, or other similar laws and regulations.
- Refusal to warrant past compliance with the FCPA, UKBA, equivalent applicable anti-corruption legislation, anti-money laundering laws, or other similar laws and regulations.
- Refusal to accept audit clauses in contracts.