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Anti-Corruption

China

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Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

In December 2000, the Chinese government signed the United Nations Convention against Transnational Organised Crime (the Convention), which took effect in China on 13 October 2003. While the Convention is universally applicable to all transnational organised crimes, corruption is one of its main focuses, requiring States' parties to take measures through legislation and enforcement to promote anti-corruption.

As for the international conventions specially regulating corruption that China has signed up to, the United Nations Convention against Corruption (Anti-corruption Convention) officially took effect in China on 12 February 2006. China was actively involved in the formation stage of the Anti-corruption Convention, and was among the first countries to ratify it, except for one reservation on paragraph 2 of Article 66 regarding a dispute-settlement channel. The Anti-corruption Convention is the only and first legally binding universal anti-corruption instrument with the framework established on five pillars, ie, Preventive Measures, Criminalisation and Law Enforcement, International Co-operation, Asset Recovery, and Technical Assistance and Information Exchange. After ten years upon China's ratification of the Anti-Corruption Convention, in 2016, the United Nations Office on Drugs and Crime issued a status review report on China's implementation of the Anti-Corruption Convention, and China's efforts in and dedication to combating corruption through active law enforcement, successive international co-operation and sustainable good practices have been well recognised.

1.2 National Legislation

There is currently no independent and consolidated statute in China that is similar to the Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act. Bribery and corruption in China are governed by multiple authorities in accordance with various laws and legislation.

The legal framework can be divided into three levels, depending on the severity of the offences and the identity of the individuals involved. Firstly, the Anti-unfair Competition Law and other laws and regulations under civil, administrative, and economic spheres are the foundations for the widespread administrative enforcement against commercial bribery in China. Secondly, the Criminal Law and the corresponding legislative and judicial interpretations such as the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in Handling of Criminal Cases of Embezzlement and Bribery and the Circular of the Supreme People's Court and the Supreme People's Procuratorate on Issuing Opinions on Issues concerning the Application

of Law in Handling of Criminal Cases of Commercial Briberies thereof stipulate criminal violations and criminal offences. Thirdly, there are disciplines and regulations promulgated by the Central Committee of the Communist Party of China (CPC), which are binding on all CPC members and set a much lower threshold for the constitution of the corruption-related violations.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

There are no official guidelines on the interpretation and enforcement of anti-corruption laws in China. Supervisory authorities in various industries would publish certain notices and working plans for the enforcement actions.

1.4 Recent Key Amendments to National Legislation

There have been no significant legislative amendments to the key corruption statutes in 2020.

China newly enacted the International Criminal Justice Assistance Law (ICJAL) in October 2018. Article 4 of the ICJAL expressly prohibits institutions, organisations and individuals in China from providing evidence materials and assistance provided in this law to foreign countries, without the consent of China's competent authorities. Moreover, the ICJAL applies to a variety of activities in criminal proceedings. This has had a significant impact on common internal investigations conducted within companies for foreign law considerations, such as the Foreign Corrupt Practices Act (FCPA).

Another notable amendment is the revision to the Anti-unfair Competition Law in January 2018. In particular, Article 7 has excluded the situation where an entity offers commercial interests (eg, discounts) to its transaction counterparties (as opposed to those transaction counterparties' employees) even in a secret manner (eg, off the book) which was previously recognised as bribery and thus prohibited.

2. Classification and Constituent Elements

2.1 Bribery

Definition of a Bribe

The current administrative law and criminal law have different definitions of bribery, and the connotation of bribery varies from criminal law and administrative law perspectives.

From the criminal law perspective, it stipulates a total of ten crimes relating to bribery, which generally forbid the act of offering a bribe to any state functionary and non-state function-

ary, and the receiving of that bribe by any state functionary and non-state functionary. For example, any state functionary who extorts property from others by taking advantage of his or her position or illegally accepts others' property in return for securing benefits for them shall be convicted of acceptance of bribes.

From the administrative law perspective, in a broad sense, bribery refers to offering or taking money or goods and other acts conducted for the purpose of offering or obtaining trading opportunities or other economic benefits, in violation of the fair competition principle.

Public Official

The law distinguishes between the bribery of a public official and that of an ordinary individual. There is a specific term for public official in China, which is "state functionary", which means persons who perform a public service in state organs, state-owned enterprises and institutions, and other persons who perform a public service according to law. The Criminal Law defines the boundary of crimes related to the bribery of a state functionary and the bribery of an ordinary individual, and also stipulates different crimes depending on the involvement of duty or influence of the state functionary. For example, an individual offering bribes to a state functionary will be convicted of the crime of offering bribes to a state functionary, and will be subject to criminal liabilities of up to life-time imprisonment, along with confiscation of property. With respect to the act of offering bribes to an executive in a private entity, it will constitute the crime of offering bribes to a non-state functionary, and will be subject to criminal liabilities ranging from criminal detention to imprisonment of up to ten years, along with a monetary fine where the amount of the bribes is large.

Bribery of Foreign Public Officials

Further, according to the criminal law, anyone giving any property to a functionary of a foreign country or an official of an international public organisation for any improper commercial benefit will be convicted of the crime of bribery of foreign public officials and international public organisation officials, and will be subject to imprisonment of up to ten years and a monetary fine.

Hospitality Expenditures, Gifts and Promotional Expenditures, and Facilitation Payments

Hospitality expenditures and promotional expenditures would not necessarily constitute bribery if they incur in the ordinary business circumstances such as maintaining a client relationship, promoting products and services, and are reasonable in scope and accurately recorded in the books and records.

For gifts, small advertising gifts with the value of less than RMB200 are permitted under the Provisional Regulations on

the Prohibition of Commercial Bribery and are generally recognised by the enforcement authorities in practice.

There is no official definition for facilitation payments in China. In practice, any payment that is made in exchange for illegal business opportunities, advantages or other interests could potentially be deemed as bribery.

2.2 Influence-Peddling

From a criminal law perspective, with respect to influence-peddling practices there are several crimes stipulated in the Criminal Law, the conviction of which needs to take various considerations into account, such as whether the person conducting the influence-peddling is a state or non-state functionary or any person who has a close relationship with the state functionary, and the specific manifestations of the influence on decision-making. For example, any of the close relatives of the state functionary, or other persons closely related to that state functionary, who secures illegitimate benefits for an entrusting person through that state functionary's performance of his or her duties or through another state functionary's performance of his or her duties by taking advantage of that state functionary's functions, powers or position, and extorts from the entrusting person or accepts the entrusting person's money or property, shall be convicted of the crime of accepting bribes via influence. Anyone who, for the purpose of securing illegitimate benefits, offers bribes to any of the close relatives of the state functionary or other persons closely related to that state functionary, or any state functionaries who have been removed from their positions, their close relatives, or other persons closely related to them, shall be convicted of the crime of offering bribes to persons with influence.

From the administrative law perspective, influence-peddling is prohibited because it is categorised as a form of commercial bribery in violation of the fair-competition principle. A business operator bribing the organisations or individuals who take advantage of their functional authority or influence to impact a transaction may face a fine of up to RMB3 million, confiscation of illegal gains and revocation of their business licence where circumstances are severe.

2.3 Financial Record-Keeping

With respect to inaccurate corporate records, the Criminal Law stipulates multiple different crimes. For example, anyone concealing or intentionally destroying account books or financial reports that are required to be kept in accordance with the law, if the circumstances are severe (eg, the money involved is more than RMB500,000), shall be sentenced to fixed-term imprisonment of up to five years, and concurrently or separately, a fine of up to RMB200,000; entities committing the aforesaid crime shall also be fined, with the directly liable persons being punished.

Moreover, if during the process of its liquidation, an enterprise records false information in its balance sheet or inventory of assets, causing serious harm to the interest of the creditors (eg, causing economic losses of more than RMB500,000), that enterprise shall be convicted of the crime of impairing liquidation, and will have imposed upon them a fine of up to RMB-200,000, with its directly responsible persons to be sentenced to fixed-term imprisonment of up to five years. It should be noted that the above crimes are not necessarily related to corruption, and are separately and independently stipulated under the Criminal Law.

From the perspective of administrative law, companies forging or tampering with accounting documents, accounts books and other accounting materials, or providing false financial accounting reports, shall be criticised by a notice and may have imposed upon them a fine of up to RMB10,000, with its directly accountable person in charge to be subject to a fine of up to RMB50,000. Likewise, the foregoing legal liabilities exist independently and are not necessarily involved with acts of corruption. In addition, in accordance with the Anti-unfair Competition Law, where a business operator gives a discount to its transaction counterparty or pays a commission to a middleman, it shall truthfully record that discount and commission in its account books. The same requirements also apply to the counterparty or middleman receiving the discount or commission who shall also truthfully record such information respectively into its account books.

In respect of the offences of false information dissemination, from the criminal law perspective, whoever fabricates and spreads false information that adversely affects securities or futures trading, thus disrupting the securities or futures trading market, if the consequences are severe (eg, losses caused to investors exceed RMB50,000), shall be sentenced to fixed-term imprisonment and be fined up to RMB100,000.

From the administrative law perspective, the legal liabilities related to false information dissemination are mainly regulated in the Securities Law. Specifically, making use of false or uncertain significant information to induce investors into securities trading is strictly prohibited as market-manipulating practices, and the violator shall be ordered to dispose of the illegally held securities pursuant to the law, with illegal gains confiscated and a fine imposed. In the case that the aforesaid violator is a company or other organisation, the directly accountable persons would receive a warning and a fine of up to RMB5 million would also be imposed upon them concurrently. In addition, anyone distributing fraudulent information to disrupt the order of the securities market is subject to such legal liability as the imposition of a fine and confiscation of illegal gains concurrently.

2.4 Public Officials

Misappropriation of public funds by any state functionary as a result of taking advantage of his or her position would result in them being convicted of the crime of misappropriation of public funds, which contains three specific categories, ie, (i) misappropriation of public funds for his or her own use or for conducting illegal activities, (ii) misappropriating a relatively large amount of public funds for profit-making activities, and (iii) misappropriating a relatively large amount of public funds without returning it after the lapse of three months. The state functionary in question who is convicted of the crime would be sentenced to imprisonment of up to a term of life. Where the aforesaid misappropriated funds or materials were allocated for significant public purposes, such as disaster relief, emergency rescue, flood prevention and control, special care for disabled servicemen and women and the families of revolutionary martyrs and servicemen and women, aid to the poor, migration and social relief, the criminal shall be given a heavier punishment.

In accordance with Criminal Law, any state functionary who extorts or accepts money or property from another person by taking advantage of his or her position in order to seek benefits for that person, or illegally accepting rebates or service charges of various descriptions, would be guilty of accepting bribes.

In accordance with the Criminal Law, any state functionary who unlawfully takes public property into his or her possession by embezzlement, theft, fraud or any other means, by taking advantage of his or her position, shall be convicted of corruption; and, where the amount involved is extremely huge (over RMB3 million) and extremely severe losses are caused to the interests of the State and the people, the maximum punishment is the death penalty.

In Criminal Law, favouritism is an aggravating factor when the state functionaries commit the crime of abusing power or the crime of negligence of duty, and it is not an independent crime. The crime of abusing power refers to the state functionaries' decisions and handling of matters beyond their authority in violation of the law, and the crime of negligence of duty refers to negligence of duty by state functionaries who are seriously irresponsible and fail to perform or conscientiously perform their duties. The state functionaries committing the crime of abusing power or the crime of negligence of duty, thus causing heavy losses to the interests of the State and the people, could be sentenced to fixed-term imprisonment up to seven years. With the aggravating factor of favouritism, the term of the imprisonment could be up to ten years. In addition, the Criminal Law also stipulates several crimes committed by state functionaries in specific government functions through practising favouritism, such as the crime of failing to collect or collecting insufficient tax by practising favouritism, etc.

2.5 Intermediaries

With respect to the commission of bribery through an intermediary, depending on the identity of the intermediary and how the intermediary works, the Criminal Law generally stipulates the following three kinds of crimes: (i) the crime of mediatory bribery; (ii) the crime of accepting bribes by using influence and (iii) the crime of introducing bribes.

The crime of mediatory bribery is one sub-category of the crime of accepting bribery; the main characteristic of the former is that when conducting the crime of mediatory bribery, the state functionary, by taking advantage of his or her own powers or position, secures illegitimate benefits for an entrusting person through another state functionary's performance of duties, not his or her own performance of duty. In respect of this, it should be noted that the state functionary whose performance of duty has been taken advantage of should be not aware of the existence of bribery, otherwise he or she would also be convicted of the crime.

The crime of accepting bribery by using influence is an independent crime, the main characteristic of which is that the person accepting the bribery is not a state functionary but the state functionary's close relative or any other person who has a close relationship with that state functionary. As a person with a close relationship to the state functionary, by using their influence, the perpetrator seeks improper benefits through the performance of any duty of the state functionary or any other state functionary.

The crime of introducing a bribe is also an independent crime. Whoever introduces a bribe to a state functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. In practice, where the intermediary is neither a state functionary, nor anyone who has a close relationship with the state functionary, he or she would be convicted of the crime of introducing bribery by introducing and facilitating a bribery-related transaction.

From the administrative law perspective, explicitly paying the intermediary a commission which has been truthfully recorded into the account book does not fall within the scope of commercial bribery. However, anyone who offers bribery to a third party who has influence on the transaction counterparty, for the purpose of seeking transaction opportunities or competitive advantages, will be subject to administrative penalties, as this constitutes commercial bribery.

3. Scope

3.1 Limitation Period

The statute of limitation in the Criminal Law is stipulated according to the gravity of the maximum legally prescribed punishment, and shall be calculated from the date when the crime is completed. The maximum period is 20 years and shall apply to crimes for which the maximum legally prescribed punishment is life imprisonment or the death penalty. For example, for the crime of offering bribery to a state functionary, the period is further divided into three grades: five years, ten years, and 20 years, depending on the maximum legally prescribed punishment. Expiry of the limitation period does not render prosecution entirely impossible. For example, for a crime in which the maximum statutory punishment is life imprisonment or the death penalty, even if 20 years have elapsed, the criminal suspect may still be prosecuted upon the approval of the Supreme People's Procuratorate. In addition, where a criminal suspect commits a new crime after the occurrence of a crime but before the expiry of the limitation period, the limitation period of the former crime shall also be re-calculated from the date of the new crime. Under the circumstances where the criminal suspect escapes after the case is filed by the relevant judicial authority or where the victim brings a complaint against the criminal suspect, the limitation period shall not apply.

From the administrative law perspective, where an act in violation of the administrative law is not discovered within two years from the date the illegal act is ended, no administrative penalty shall be imposed.

3.2 Geographical Reach of Applicable Legislation

The Criminal Law mainly adopts the principle of territorial jurisdiction over criminal offences, supplemented by the extraterritorial jurisdiction over the circumstances where the perpetrator is a Chinese citizen or a foreign national commits a crime against China or a Chinese citizen. Article 10 of the Criminal Law stipulates the principle of Passive Recognition of Foreign Criminal Judgments, stating that any Chinese citizen who commits a crime outside the territory of China may still be investigated for his or her criminal liabilities under Chinese law, even if he or she has already been tried in a foreign country. However, if he or she has already received criminal punishment in the foreign country, he or she may be exempted from punishment or given a mitigated punishment. Article 8 further states the principle of Protective Jurisdiction, meaning that the Criminal Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of China against China or against any Chinese citizens, if for that crime this Law prescribes a minimum punishment of fixed-term imprisonment of not less than three years; however, this does not apply to a crime that is not punishable according to the laws of the place where it was committed.

There is generally no extraterritorial application from an administrative law perspective.

3.3 Corporate Liability

On a criminal level, bribery committed by an employee of a company could be deemed as either an individual crime, or a unit crime, depending on various factors, including whether the company is engaged in the bribery (specifically, whether it is the company's decision to conduct the bribery), the possession of the illegal gains, and whether the bribes are offered in the name of the company or the individual employee. If the charge is raised against the individual employee, the company would not bear legal liabilities. However, if the charge is against the company as a unit crime, the dual punishment system would then be applied, which means that not only would the company be punished by a monetary penalty, but also the main responsible persons (ie, the legal representative, and other persons in charge) could be subject to criminal detention or imprisonment.

The administrative enforcement differs as there is a default mechanism in place, namely, that the acts of bribery committed by the employee of the company shall be deemed as the acts of the company, unless it has evidence to prove that such acts of the employee are irrelevant to seeking for transaction opportunities or competitive advantages for the employer. Only the company would be imposed with administrative liabilities, including a fine ranging from RMB100,000 to RMB3,000,000, confiscation of illegal gains, and revocation of its business licence where circumstances are severe.

With respect to whether the corporate's legal liabilities will be pursued when it is merged or divided after committing an offence, on the criminal level, as long as an entity that assumes the rights and obligations of that entity exists, the criminal liability of the predecessor entity and the relevant responsible persons shall still be pursued. The predecessor entity shall still be listed as the defendant, and the legal representative or the person chiefly in charge of the new entity that succeeds the rights and obligations of the predecessor entity shall be the litigation representative. As for the successor entity, it shall bear the criminal liability of the predecessor entity to the extent of the property it inherited.

In terms of administrative liability, the general principle may be found in the Implementation Regulations of the Customs of the People's Republic of China on Administrative Penalties, which specifies that the predecessor entity shall be the liable subject, and the successor entity that assumes the rights and obligations shall be the person subject to the property penalty. Based on law enforcement practice, this principle may also be applicable in other areas.

4. Defences and Exceptions

4.1 Defences

For the criminal offence of bribery, the Criminal Law explicitly stipulates that any person who provides benefits to a state functionary as a result of extortion by the state functionary, and does not obtain an undue advantage, would not be criminalised for bribery. In addition, any briber who, before he or she is investigated for criminal responsibility, voluntarily confesses his or her act of offering bribes may be given a mitigated punishment or be exempted from punishment. Even without voluntary surrender as mentioned above, a criminal suspect who truthfully confesses his or her crimes may be given a lighter penalty and may be given a mitigated penalty if any extremely severe consequence is avoided due to his or her truthful confession.

In a commercial context, the criteria commonly used by the administrative enforcement agencies for substantiating commercial bribery mainly focus on (i) whether there is any lure of improper interests; and (ii) whether there is any illegal purpose to obtain business opportunities or competitive advantages. The key for differentiating between legitimate interests exchange and inducement for illegitimate interests lies in whether the interests exchanged have potential influence on the fair competition in the market, or the interest and benefits of the consumers. Notably, the Anti-unfair Competition Law adopts the new method of listing all the possible scenarios of the statutory bribery-receiving parties, including; (i) "employee of a transaction counterparty", (ii) "any entity or individual entrusted by the counterparty", and (iii) "any entity or individual that is likely to take advantage of powers or influence to affect a transaction", and that in its literal meaning excludes the counterparty itself as the bribery-receiving party. Therefore, considering the above-mentioned, the corresponding defences for the company could be composed from the nature of the bribery-receiving party, the non-existence of the exchange of illegitimate interests, and the lack of potential influence on the fair competition or consumer's benefits. In addition, another possible defence for the company could be sustained in the Anti-unfair Competition Law if a company has evidence to prove that such acts of the employee are irrelevant to seeking transaction opportunities or competitive advantages for the company.

4.2 Exceptions

Although in accordance with the Anti-unfair Competition Law, the counterparty of a transaction does not fall into the scope of the bribery-receiving party, due to the stricter requirements in some industry-specific laws and regulations such as the Drug Administration Law, offering unlawful interests to the counterparty, such as offering interests to the public hospital by a pharmaceutical company, could still be deemed as bribery.

In respect of voluntary surrender or confession of one's guilt, the court is also empowered not to mitigate the penalty in the case that the circumstances of the crime are severe or even flagrant.

4.3 De Minimis Exceptions

The Criminal Law sets forth the threshold for prosecuting bribery and corruption offences. For example, the threshold amount for bribing a non-state functionary is RMB60,000 (USD8,500), and the threshold amount for bribing a state functionary is RMB30,000 (USD4,250).

In comparison, the Anti-unfair Competition Law does not stipulate the threshold of the bribery amount. One relevant exception is in regard to small advertising gifts that are permitted by the Provisional Regulations on the Prohibition of Commercial Bribery, which is usually less than RMB200 in practice. Other than that, Article 83 of the Discipline Rules for the Communist Party of China stipulates that payment, cash, or shopping cards that might potentially influence their execution of duty would be strictly prohibited, which seems to set aside an exception for such a payment in a relatively small amount, with less likelihood of it being deemed as bribery.

4.4 Exempt Sectors/Industries

There are no sectors or industries exempt from the above offences.

4.5 Safe Harbour or Amnesty Programme

According to the Anti-unfair Competition Law, the bribery of employees of a company shall be deemed as the act of the company, unless there is evidence to prove that the bribery of employees is not related to seeking transaction opportunities or competitive advantages for the company. However, no specified regulations or judicial interpretations regarding what evidence would be most valid have been made available. In practice, some multi-national and local companies have already implemented compliance projects and preventive measures such as providing regular compliance training and requiring employees' written compliance commitment letters in preparation for any potential legal liability concerns. Furthermore, it has been suggested by the enforcement authorities that, if the business operator has formulated legal, compliant and reasonable measures, and has taken effective measures for supervision, and does not connive at the staff's bribery or do so in a disguised form, the company could be relieved from legal liabilities. To date, there has been no further guidance provided by the State Administration for Market Regulation (SAMR). Therefore, it is strongly recommended that companies continue their efforts in this regard.

5. Penalties

5.1 Penalties on Conviction

From the administrative law perspective, where a business operator bribes any other party in violation of the Anti-unfair Competition Law, the supervision and inspection authority shall confiscate its illegal gains, and impose on it a fine of between RMB100,000 and RMB3 million. Where the circumstance is severe, its business licence shall be revoked. Moreover, there is a general article in the Anti-unfair Competition Law stipulating that business operators that have caused damages to others shall be subject to the civil liabilities, but without any further specification of the details. Unlike other jurisdictions such as the United States where the enforcement authorities would implement the civil penalties on the offenders, civil consequences in China are generally resolved through civil disputes where the aggrieved party of the bribery could bring a lawsuit in court or use other alternative dispute resolution channels.

From the criminal law perspective, there are ten different crimes regarding commercial bribery stipulated in the Criminal Law with corresponding criminal penalties for each one. In sum, the consequences of crime include punishment for liberty and deprivation of property. For individuals, the consequences include criminal detention or life imprisonment, as well as fines or confiscation of property. Similarly, for crimes committed by an entity, a fine is imposed on the entity itself and criminal detention is imposed on its responsible persons.

5.2 Guidelines Applicable to the Assessment of Penalties

The guidelines to assess criminal liability are mainly based on the provisions of the Criminal Law and relevant judicial interpretations, while in respect of administrative liability, the assessment guidelines are mainly based on the discretion benchmark for administrative penalties formulated by each province and municipality.

For the same crime, the Criminal Law usually stipulates multiple levels of punishments (with minimum and maximum sentences for each level) according to the gravity of the circumstances, ie, ordinary circumstances, severe circumstances and extremely severe circumstances. Judicial interpretations would provide the details for the level of gravity. To take bribery as an example, the Criminal Law stipulates that anyone who commits the crime of offering bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, with a fine; if illegal gains are obtained and the circumstances are severe, or severe loss is caused to the interests of the State, he or she shall be sentenced to fixed-term imprisonment ranging from five to ten years and a fine; if the circumstances are extremely severe, or the State has suffered extremely severe loss in its interests, he or

she shall be sentenced to fixed-term imprisonment of more than ten years or life imprisonment, a fine, and confiscation of his or her property concurrently. Further, the judicial interpretation provides the determining factors for “severe circumstances” and “extremely severe circumstances”, which mainly refer to the amount of the bribes offered.

In addition, the Criminal Law also stipulates the application of heavier or lighter punishment within the limits of the prescribed punishment. For example, the judicial interpretation takes the circumstances, such as offering bribes to three or more persons, offering bribes to judicial functionaries for impacting judicial justice, as aggravated circumstances, and applies a heavier punishment accordingly. Also, voluntary confession of a crime and adoption of measures actively to reduce the losses caused by the crime would generally be seen as factors for considering a lighter punishment.

As for the administrative punishment, many provinces and cities have formulated their local administrative punishment discretion benchmark within the scope of administrative punishment stipulated by laws and regulations. Taking Shanghai Municipality as an example, at the beginning of 2020, Shanghai Administration for Market Regulation (AMR) issued the Standards and Factors to Assessing and Determining Administrative Penalty in Market Regulation Enforcement (Standards), which provides practical metrics on how to determine the level of an administrative penalty to an individual and an entity violating the Anti-Unfair Competition Law and other laws that the AMR is responsible for enforcing. The Standards set out three levels of administrative penalty, ie, low, middle, and high. A few factors are taken into account when the AMR evaluates the penalty level, including the number of recipients accepting bribes and the times of that bribery, the duration of illegal acts, the amount of bribery or transaction amount involved, whether such bribery is subject to the risk of causing personal or property damage, and the impact on the whole society.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

In November 2018, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which is the governing authority for all the state-owned enterprises in China, released a compliance guidance for all the state-owned enterprises governed by the central government. Although the compliance guidance applies primarily to state-owned enterprises governed by the central government, other companies can also use it as a primary reference for establishing sound compliance systems. A wider range of compliance issues

are identified as the key focuses including anti-corruption and bribery, anti-unfair competition and the like. The compliance guidance also outlines specific requirements for policy development, the establishment of risk identification and response systems, audits, accountability, compliance training, compliance assessment and continuous improvement.

Additionally, in June 2017, Shenzhen municipal government published the Shenzhen Standard for Anti-Bribery Management Systems (Shenzhen Standard) as a recommended practice. The Shenzhen Standard was drafted based on ISO 37001 Anti-bribery Management Systems, developed by ISO technical committee ISO/TC 309. The recommended elements of an effective corporate compliance programme include due diligence on third parties, financial and operational internal control, standardisation on the gift and entertainment policies, management of business partners, an effective reporting mechanism, a proper investigation process, a crisis-management process, and corrective measures for discovered issues.

The Criminal Law and administrative regulations do not provide specific legal consequences for failure to prevent bribery. Nevertheless, if bribery occurs, it would be subject to corresponding legal liabilities as discussed above.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

From the criminal law perspective, according to the Criminal Procedure Law, any entity or individual, upon discovering the facts of a crime or a criminal suspect, shall have a duty to report the case or provide information to a public security organ, a people's procuratorate or a people's court.

From the administrative law perspective, there is no explicit requirement for self-disclosing the violations of anti-bribery and anti-corruption provisions. However, if there are administrative or criminal investigations initiated against a listed company, the Securities Law and the Administrative Measures on Information Disclosure by Listed Companies stipulates explicit information disclosure obligations. In addition, the listed company shall disclose and state the cause, the current status, and the likely effect of the event in a timely manner.

6.3 Protection Afforded to Whistle-Blowers

For the protection of whistle-blowers, some specific rules such as the Rules of the Supreme People's Procuratorate on Protecting the Citizens' Tip-off Rights were formulated to provide a comprehensive mechanism from both substantial and procedural levels. Enforcement authorities are required to keep confidential the identity of the whistle-blowers throughout the reporting handling process. In addition, the authorities are required to take measures to ensure the safety of the whistle-blower and

their close relatives whenever and wherever necessary. Retaliation against the whistle-blowers is entirely prohibited by law, and legal liabilities such as administrative punishment, criminal detention or imprisonment can be imposed.

6.4 Incentives for Whistle-Blowers

On 9 April 2016, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Finance jointly issued the Several Provisions on the Protection and Reward of Whistle-blowers of Duty-Related Crimes (Provisions), improving the protection and reward system for real-name whistle-blowers of duty-related crimes. According to the Provisions, rewards for whistle-blowers of duty-related crimes shall be granted by the People's Procuratorates. Generally, the amount of reward for each case shall not exceed RMB200,000; where the informant has made significant contributions, upon approval, a reward of more than RMB200,000 (but not exceeding RMB500,000) may be granted. Where the informant has made particularly significant contributions, upon approval of the Supreme People's Procuratorate, the amount of reward shall not be limited by the aforementioned amount.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

The provisions regarding whistle-blowing can be found in the Constitution, the Criminal Procedure Law, the Anti-unfair Competition Law and the Rules of the Supreme People's Procuratorate on Protecting the Citizens' Tip-off Rights, and Several Provisions on the Protection and Reward of Whistle-blowers of Duty-Related Crimes.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

There is criminal and administrative enforcement of anti-bribery and anti-corruption in China, and civil prosecution is not applicable in China.

7.2 Enforcement Body

From the administrative law perspective, offences with respect to bribery and corruption are mainly investigated and penalised by the State Administration for Market Regulation (SAMR). The SAMR was established on 21 March 2018, and merges and undertakes the responsibilities previously held by multiple authorities.

From the criminal law perspective, illegal acts not involving state functionaries shall be investigated and handled by the Public Security Bureau (PSB) and transferred to the prosecution department of the People's Procuratorate (Procuratorate) for

prosecution. Criminal cases involving state functionaries were previously investigated and prosecuted by the Procuratorate (of which the anti-corruption division shall be responsible for investigations, and the prosecution division shall be responsible for prosecution), whilst the authority for criminal investigation has been transitioned to the Supervisory Commission in accordance with the Supervision Law that entered into force on 20 March 2018, with the prosecution duty still being performed by the Procuratorate.

It is worth noting that, for the same misconduct committed by a company, the criminal and administrative regimes are mutually exclusive. The regulatory framework for the conversion between administrative and criminal cases is established by the Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Agencies and other relevant regulations. According to these regulations, while investigating an administrative case, if the administrative agency suspects that the case should be prosecuted as a criminal case, based on the required elements such as the involved amount and the conduct patterns or the consequences, the case must be transferred to a PSB and the PSB will examine the cases transferred. Likewise, if a PSB discovers that a case should not be criminally prosecuted but may be potentially subject to administrative liability, it shall transfer the case to the relevant administrative agency for further investigation and handling.

7.3 Process of Application for Documentation

This is not applicable in China.

7.4 Discretion for Mitigation

Article 67 of the Criminal Law generally encourages self-reporting of criminal activity by stipulating mitigation or even exemption from the criminal penalties under voluntary confession circumstances. Similar principles and approaches may also be found in some other provisions prescribed in the Criminal Law. For example, Article 164 of the Criminal Law provides that any briber who confesses the bribery voluntarily prior to prosecution may be given a mitigated punishment or be exempted from punishment.

7.5 Jurisdictional Reach of the Body/Bodies

Investigation in criminal cases shall be conducted by the Public Security Bureau (PSB), except for a case regarding a crime committed by a state functionary, by taking advantage of his or her functions, and will be investigated by the Supervisory Commission according to the Criminal Law and the Supervision Law.

With respect to the administrative cases, the investigation shall be generally conducted by the Administration for Market Regulation of county level and above. However, for administrative violations involving state functionaries, they shall also be inves-

tigated by the Supervisory Commission in accordance with the Supervision Law. Other industrial supervision authorities such as the China Banking and Insurance Supervision and Regulatory Commission are empowered with the investigating powers for specific industries that do not involve state functionaries. Unless the violation is escalated to criminal level upon investigation, it will not involve any further prosecution process.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

Over the past few years, as is reiterated by China's top leadership, China has had zero tolerance for corruption and bribery, and anti-corruption has been and will be a key area for law enforcement.

The Fourth Plenary Session of the 19th Central Commission for Discipline Inspection further stressed the importance of insisting on investigating bribe offering and bribe taking together, as well as imposing severe punishment on bribery cases involving huge amounts or repeated offences. To implement the requirements of the plenary meeting's deployment, disciplinary organs at all levels should give full play to their functions and responsibilities, focusing on strengthening the leadership of the Communist Party of China, improving working mechanisms, enhancing system construction and innovating working methods to rectify resolutely the problem of active and passive bribery in such high-risk industries as construction, healthcare, financial, and automobile, and to form a linkage between disciplinary organs, industry authorities and judicial organs. In particular, the healthcare sector remains among the top priorities for the law enforcement of anti-bribery and anti-corruption.

Notably, for the healthcare industry, based on the published criminal judgments from 2013 to 2019, there are more than 3,000 cases against perpetrators in the healthcare industry. In June 2020, the National Health Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security and another nine central government authorities jointly issued the Notice on the Issuance of Work Points for Correcting Unhealthy Practices in the Field of Medical Purchases and Sales and in Medical Services in 2020 (Notice). The Notice clearly proposes to carry out special governance to combat the collection of kickbacks by employees of medical institutions, focusing on the acceptance of drugs, medical devices, medical and health materials and other medical products, production, business enterprises or distribution personnel in various names and forms of kickbacks given by medical institutions. Those medical institution employees who have committed crimes or violations should be seriously dealt with in accordance with the rules and regulations according to the law, the evidence of the medical product operators involved in the case of kickbacks should be provided to the market supervision authority, and the

enterprises involved in the administrative punishment should be publicised through the national enterprise credit information disclosure system. Arrangements have also been made to consolidate the effectiveness of reforms in the field of pharmaceutical distribution.

7.7 Level of Sanctions Imposed

From the criminal law perspective, based on the relevant statistics, the average length of a sentence for the crime of offering bribes in the healthcare industry ranges from probation to imprisonment of up to ten years. The average sentence for the crime of offering bribes to non-state functionary ranges from probation to imprisonment of up to three years. For the crime of offering bribery by an entity, the majority of the persons in change would have probation imposed upon them and the minority would be sentenced to criminal detention or imprisonment of up to five years.

From the administrative law perspective, the sanctions imposed on companies in the healthcare industry usually include a fine ranging from RMB100,000 to RMB3,000,000 and confiscation of illegal gains. Revocation of a business licence is rarely imposed in practice.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

Each year, the Supreme People's Court and the Supreme People's Procuratorate issue a working report to the National People's Congress, which includes a summary of the number of anti-corruption cases and focus of their work in the previous year.

According to the publicly available working reports issued throughout the past few years, the general trend of anti-corruption law enforcement is to maintain a high-handed attitude to punish corruption and accurately to reflect the criminal policy of combining punishment with leniency. In terms of legislation, importance will be attached to the mechanism for the connection between national supervision and criminal justice, and the working mechanism for the commutation, parole and temporary serving of the sentence outside prison for duty-related criminal offenders will be improved, in order to put an end to under-the-table operations. In terms of judicial decisions, punishment of bribery crimes by applying the procedure of confiscation of illegal gains and life imprisonment will be intensified. In addition, attention will be paid to cases involving people's livelihoods, such as embezzlement and land-requisition compensation, subsidies for dilapidated houses and subsidies for agricultural supplies.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

The main legislation efforts that are foreseeable should be reducing inconsistencies among relevant laws and regulations on commercial bribery. For example, before the revision of the Anti-unfair Competition Law in 2018, the Interim Provisions on Prohibition of Commercial Bribery (Interim Provisions) was another important legal authority in enforcement actions. However, after the revision in 2018, the Anti-unfair Competition Law now takes a different approach in determining commercial bribery, with conflicting articles against the Interim Provisions. In order to resolve such conflicts in different legislations, the State Market Regulatory Administration (SAMR) has included the revision of the Interim Provisions in the legislative plan in 2019, but it has not yet been promulgated.

In addition, more detailed implementing rules for the Anti-unfair Competition Law as well as special rules for respective industries are expected to be formulated by national and local authorities to resolve the issues identified during the enforcement actions.

Notably, establishing the system of non-prosecution of corporate crimes is now actively discussed and explored among the legislators, judicial organs and legal professionals, which may help to alleviate the risk of criminal liabilities for a company if it adopts a robust and effective compliance programme. Furthermore, it is expected that such a system would be incorporated into the legislation plan once the framework takes shape.

Global Law Office dates back to the establishment of the Legal Consultant Office of China Council for the Promotion of International Trade (CCPIT) in 1979, when it became the first Chinese law firm ever approved by the PRC government and has retained the privilege of clients' trust in various areas over four decades. The firm has offices in Shanghai, Beijing, Shenzhen and Chengdu, with 135 partners and over 500 lawyers across China. The firm is experienced in meeting all aspects of public and private enterprises' regulatory compliance needs, including risk assessment, compliance policy, reporting, training and investigation. Clients have benefited from the professionalism

of the firm's robust regulatory compliance team as it is able to work closely with the various practice groups to identify regulatory risks for clients and develop internal compliance measures to help them minimise the potential disruption to their operations due to a variety of external challenges that arise in China's business environment. The firm has resolved dozens of government investigation cases relating to anti-corruption, antitrust, promotion and advertising, insider trading, and food and drug safety by the Chinese authorities, as well as cross-border investigations in multiple jurisdictions.

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