Bribery and corruption (China): overview

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A guide to the types of work that in-house counsel and private practitioners may expect to encounter in relation to bribery and corruption in China, including compliance, investigations, operations management and due diligence. The note includes an overview of the bribery and corruption regimes that companies active in China need to comply with (including the FCPA, BA 2010 and the domestic Chinese regimes and Hong Kong’s Prevention of Bribery Ordinance), introduces the enforcement authorities for each regime and covers recent developments within China in this field.

Scope of this note
Bribery concerns the practice of offering something, usually money, to gain an illicit advantage.

Corruption is the abuse of entrusted power for private gain.

Companies with operations in China must comply with Chinese legislation which prohibits bribery and corruption in China and overseas. Chinese law penalises official bribery (that is, the bribery of state personnel) and commercial bribery.

Multinationals, as well as domestic Chinese companies with operations outside China, must also comply with overseas anti-corruption regimes such as the US Foreign Corrupt Practices Act of 1977 (FCPA) and the UK Bribery Act 2010 (BA 2010) (see Enforcement agencies for bribery and corruption).

This note provides an overview of the legal and practical issues arising for in-house counsel and private practitioners from bribery and corruption carried out in China, including:

• Matters that practitioners can most commonly expect to advise on.
• Regimes that companies active in China need to comply with.
• Chinese and relevant foreign enforcement authorities.
• Recent developments in this field.

Bribery and corruption in a Chinese context
Corruption and bribery in China can take many forms. According to a Center for International Business Ethics study on corruption and bribery in China, a non-exhaustive list of the forms of corrupt conduct that are often encountered in commercial dealings includes:

• Fixed or rigged contract bidding.
• Outright bribes.
• Kickbacks in the form of commission.
• Bribes disguised as gifts.
• Service or consultancy fees that are not linked to the provision of genuine services or consultancy.
• Junkets, travel and accommodation, lavish entertainment and meals.
China is perceived to be a high-risk jurisdiction in which to do business.

**What work to expect in relation to bribery or corruption in China**
Acts of bribery and corruption typically create work for lawyers in four areas:

- Investigations.
- Compliance.
- Operations.
- Investments and M&A.

In-house counsel with oversight of China may also be required to help to determine the corruption risk profile of their company's China business and to regularly report this to the company's governing body. For a guide to the practical steps in-house counsel with responsibility for China should take to ensure that bribery and corruption are deterred or at least promptly detected, see *Article, Bribery and corruption compliance risk in China: a guide for the in-house practitioner*.

**Bribery or corruption investigations**
These may comprise:

- External investigations carried out by criminal investigators or industry regulators.
- Internal investigations carried out by a company as part of a routine compliance audit:
  - due to a whistleblower; or
  - because red flag issues have been identified in an unrelated context.

Of these, the most common trigger for bribery and corruption investigations in China is exposure or the threat of exposure by a whistleblower.

Due to the significant financial loss and reputational damage for a company that can result from an investigation, in-house counsel and external legal advisers are involved at each step. The use of third-party agents to carry out investigations is common in China, but this can lead to complications if not handled carefully.

Enforcement authorities may launch investigations on little notice and the situation on the ground can develop quickly. Consequently, counsel’s role often involves preparing detailed instructions for staff in China offices on how to respond to an investigation or dawn raid. For a step-by-step guide explaining what to do during an anti-bribery dawn raid carried out by the principal enforcement agencies, see *Practice note, What to do during a SAIC or Ministry of Public Security dawn raid*.

For more information on counsel’s role in bribery and corruption investigations in China, see *Practice note, Investigating corrupt behaviour: China and Hong Kong*. 
**Bribery and corruption compliance**

Companies are required to comply with a range of obligations that may be affected by bribery and corruption. For example, listed companies must disclose material information to investors under the rules of the stock exchange on which they are listed, and companies doing business in the US must comply with restrictions on trading with individuals who are subject to US government sanctions. All companies must comply with applicable criminal and civil legislation aimed at preventing corrupt behaviour.

Corrupt acts by employees may cause substantial harm to companies (as a result of official sanctions or because of reputational damage). Therefore, in-house counsel and compliance professionals with oversight over China operations should ensure that:

- Staff and senior management are trained to recognise and avoid corrupt behaviour.
- The company has adequate systems in place to detect and deter corrupt behaviour.
- The company has clear and comprehensive policies to prevent corrupt behaviour which are communicated to and accepted by all staff.
- The company has the contractual right to take remedial steps if corrupt behaviour is detected (for example, terminating a corrupt employee or a third party agent who has been obtaining business through bribery).
- These systems and materials are updated as new rules and guidelines emerge.
- The company carries out regular compliance audits.

In addition to actually detecting and preventing corrupt behaviour, in-house counsel's goal is to ensure that the company has a clear record that it had adequate procedures in place to do so. This is because implementing strong controls can mitigate companies’ liability if employees or agents are involved in corrupt acts within China on the company's behalf (see *Adequate procedures defence*).

For information on the disclosure obligations most likely to be relevant to companies with China operations, see *Practice note, Bribery and corruption reporting obligations: China*.

Disclosure obligations may on occasion conflict with obligations to withhold information, particularly information that has been classified as a *state secret* under Chinese law, or with the desire to protect privileged information.

For a list of key questions that should be asked to identify red flags for bribery or corruption violations during a compliance audit, see *Checklist, Questions to identify red flags for bribery or corruption violations: China*.

**Adequate procedures defence**

Companies that implement adequate procedures to prevent their employees or agents from conducting bribery in China (or elsewhere) can reduce or avoid liability under the FCPA and BA 2010 regimes. There is no formal adequate procedures defence under Chinese law, although the strength of a company's compliance programme will be taken into account by enforcement authorities.

- For further details of the Chinese regime, see *Practice note, Bribery and corruption offences, enforcement and penalties: China: no statutory defence that adequate compliance procedures were in place*.
- For an example of the successful application of the adequate procedures defence under the FCPA in relation to an investigation in China, see *Article, Corporate crime and investigations column: August 2012*.
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• For guidance on the adequate procedures defence under the BA 2010 see Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010).

Bribery and corruption in commercial operations
In addition to specific anti-bribery compliance procedures, companies should also carry out their operations in such a way as to minimise their risk profile. Counsel’s role in this can include:

• Setting policies for travel and entertainment spend, and the payment of fees demanded by authorities.
• Reviewing commercial contracts to ensure that payment terms, incentive structures and penalties discourage corrupt behaviour by counterparties.

For an example of the bribery and corruption considerations counsel should have in mind when drafting commercial agreements for use in China, see Practice note, Anti-corruption provisions in commercial agreements: China.

For a standard anti-corruption policy suitable for use by staff in China (which should be included in an employee handbook), see Standard document, Employee code of conduct and standard anti-bribery operating procedures: China.

For a standard memorandum that can be provided to the directors or senior management of a company in China on their duties under Chinese and applicable foreign bribery and corruption laws, see Standard document: Memorandum to board of directors regarding bribery and corruption compliance: China.

Bribery and corruption implications for investments and M&A transactions
Buyers contemplating acquisitions or investments in China typically engage counsel to carry out legal due diligence into the acquisition targets, and to ensure that the acquisition documents protect the buyer if false or misleading disclosures are made about whether the target has conducted bribery or corrupt practices. For a list of key questions that should be asked to identify red flags for bribery or corruption violations during a due diligence exercise, see Checklist, Questions to identify red flags for bribery or corruption violations: China.

For a standard set of questions to ask to identify issues with a company's bribery and corruption record and a standard report to provide to a corporate or internal client, see Standard documents: Bribery and corruption supplemental due diligence questionnaire: China and Bribery and corruption supplemental due diligence report: China.

For a set of standard clauses to include in acquisition documents, see Standard clauses: Anti-corruption warranties: share purchase agreement: China and Anti-corruption clauses: joint venture contract: China.

The use of third party agents to carry out due diligence and background checks is common in China. However, this can lead to complications if the process is not handled carefully.
Legal framework governing bribery and corruption in China
All individuals and companies working and operating in China must comply with Chinese legislation prohibiting bribery and corruption. Companies with operations outside China, particularly multinational corporations headquartered overseas, likely also must comply with obligations arising from the legislation of the other jurisdictions in which they operate. Typically, these include the FCPA and the BA 2010. For a high-level overview of how these obligations interact, see Practice note, Anti-corruption regimes in China, the UK and the US: a comparative guide. Chinese individuals and companies operating overseas must also comply with Chinese legislation that targets bribery committed in other countries.

Many companies with operations in China also have operations or staff in the Hong Kong Special Administrative Region (HKSAR). These are additionally subject to Hong Kong’s Prevention of Bribery Ordinance (POBO), breach of which can give rise to an investigation by the Independent Commission Against Corruption (ICAC).

Chinese anti-corruption legislation
Chinese law prohibits three basic categories of bribery:

• **Public sector bribery.** This applies when the recipient of a bribe is serving or former state personnel (国家机关工作人员), or a close connection of serving or former state personnel. The list of acts constituting public sector bribery offences is broader than for commercial bribery. The penalties are also more serious, including the death penalty for officials who accept a bribe in the most serious cases. It is an offence to give or receive a public sector bribe, or to act as an intermediary in public sector bribery. For more information about public sector bribery and a detailed list of the elements and penalties, see Practice note, Bribery and corruption offences, enforcement and penalties: China: Public sector bribery.

• **Commercial bribery.** This includes the giving or receiving of bribes by private parties for business purposes (that is, where no state personnel are involved). It is an offence to give or receive a commercial bribe, but not to act as an intermediary in commercial bribery. Cases that fall below the threshold for criminal prosecution may still attract administrative liability. For more information about commercial bribery and a detailed list of the elements and penalties, see Practice note, Bribery and corruption offences, enforcement and penalties: China: Commercial bribery.

• **Overseas bribery.** This includes the bribery of foreign officials or the officials of international public organisations. It is an offence for a Chinese company or individual to give such a bribe, with the aim of seeking an improper commercial benefit. The punishment is the same as for commercial bribery. For more information about commercial bribery and a detailed list of the elements and penalties, see Practice note, Bribery and corruption offences, enforcement and penalties: China: Overseas bribery.

For a detailed explanation of the legal framework for Chinese law applicable to bribery and corruption, see Practice note, Bribery and corruption offences, enforcement and penalties: China: Statutory basis for anti-bribery regime.

On 1 November 2015, the ninth amendment to the Criminal Law of the People's Republic of China 1997 (1997 Criminal Law) came into force. The ninth amendment increased the penalties for crimes of bribery, brought former officials and their close connections within the scope of public sector bribery offences and reduced the circumstances in which voluntarily disclosing bribery could lead to more lenient treatment. For more information on the changes made in the ninth amendment, see Legal update, Criminal law amendment: changes to China’s anti-bribery regime.
On 18 April 2016, the **Supreme People’s Court** (SPC) and the **Supreme People’s Procuratorate** (SPP) jointly issued the *Interpretation on Certain Issues concerning the Application of Law in Handling Criminal Cases Involving Embezzlement and Bribery*. The interpretation defines the monetary thresholds and identifies the specific circumstances that trigger various punishments for certain bribery and corruption offences under the 1997 Criminal Law. For more information on the items clarified in the interpretation, see *Legal Update, SPC and SPP issue interpretation on Criminal Law provisions on bribery and corruption*.

**FCPA (US)**

The FCPA applies to companies whose securities are listed in the US, US citizens, nationals and residents, and corporations, partnerships and other entities that are registered in, or have their principal place of business in, the US. The FCPA includes two key elements:

- **Anti-bribery provisions.** These prohibit the giving or offering of money, gifts or anything of value to a foreign (that is, non-US) government official, to obtain or retain business.
- **Accounting requirements.** These seek to prevent accounting practices designed to hide corrupt payments, by requiring companies to maintain accurate books and records and adequate internal accounting controls.

The FCPA is also relevant when a transaction involves **state-owned assets** (SOAs) or **state-owned enterprises** (SOEs), as SOE employees are generally considered as foreign government officials for the purposes of the FCPA.

Due to the close economic ties between China and the US, the high standards required under the FCPA, and the highly active US enforcement agencies, practitioners generally consider compliance with the FCPA as the most important non-China regulatory consideration.

For more information on FCPA offences, the steps companies must take to comply, enforcement, and penalties, see *Practice note, The Foreign Corrupt Practices Act: Overview* and its related materials.

**Bribery Act 2010 (United Kingdom)**

The BA 2010 applies to acts of bribery that are carried out in the UK, or overseas, by a person or corporate with a close connection to the UK. The law creates the following offences:

- **Giving a bribe.** It is an offence to offer, promise or give financial advantage to another person to bring about improper performance by that person of their function (or where receiving the advantage is intrinsically improper performance of that function).
- **Receiving a bribe.** It is an offence to receive such a bribe, directly or through any number of intermediaries, on one’s on behalf, or on behalf of any other person (whether or not the benefit accrues to the recipient).
- **Bribing a foreign public official.** It is an offence to offer, promise or give a bribe whose intention is to influence a foreign official (which includes those working for government agencies and the employees of international public organisations), in their capacity as a foreign public official.
- **Failure of a commercial organisation to prevent bribery.** Corporations commit an offence under the BA 2010 when any person pays a bribe to another person, intending to obtain or retain business (or a business advantage) for the corporation. The offence can be committed in the UK or overseas.
For more information on the offences under the BA 2010, the steps companies should take to comply, enforcement, and penalties, see *Practice note, Bribery Act 2010* and its related materials.

**Prevention of Bribery Ordinance (Hong Kong)**

The POBO is the main anti-corruption law in Hong Kong. It is directed at the corruption of public officers (public sector offences) and corrupt dealings with agents. This includes employees of private companies (private sector offences). The Independent Commission Against Corruption Ordinance (ICACO) sets out the scope and parameters of the ICAC. The ICAC is responsible for investigating corruption in Hong Kong.

Private sector bribery offences under the POBO relate to corrupt transactions with agents. They include carrying out the following acts without lawful authority or reasonable excuse:

- **Giving a bribe.** A person offering an advantage to an agent without the permission of his principal, in connection with the agent's performance, or abstaining from performance of any act in relation to his principal's affairs or business.
- **Receiving a bribe.** As an agent, soliciting or accepting an advantage without the permission of his principal, in connection with his performance, or abstaining from performance of any act in relation to his principal's affairs or business.

The term "advantage" under the POBO is broadly defined to include any gift, loan, fee, reward, commission (consisting of money, valuable security, property or interest in property), office, employment, contract, loan payment, service or favour (other than entertainment or meals).

Public sector bribery offences under the POBO include carrying out the following acts:

- **Prescribed officer receiving a bribe.** Any prescribed officer (as defined in the POBO) who, without permission of the chief executive, solicits or accepts any advantage.
- **Offering a bribe to a public servant.** Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers an advantage to a public servant or the chief executive, in connection with the acts (including the performance of, or abstaining from performance of any act) in his capacity as a public servant or the chief executive; or in connection with his influence in the transaction of any business with a public body.
- **A public servant receiving a bribe.** Any public servant or the chief executive who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts an advantage in connection with the acts (including the performance of, or abstaining from performance of any act) in his capacity as a public servant or the chief executive; or in connection with his influence in the transaction of any business with a public body.

In addition, there are specific public bribery offences relating to:

- Giving assistance in relation to contracts.
- Bribery for procuring withdrawal of tenders.
- Bribery in relation to auctions and bribery of public servants by persons having dealings with public bodies.

Further, it is an offence for the chief executive (or a prescribed officer) to be in possession of unexplained property.
Enforcement agencies for bribery and corruption

There are several domestic Chinese agencies responsible for enforcing compliance with China's bribery and corruption regime, including:

- Central Commission for Discipline Inspection (CCDI) (中央纪律检查委员会), if members of the Communist Party of China (CCP) are involved.
- SPP and its local counterparts, referred to as the Local People's Procuratorate.
- Ministry of Supervision (监察部), if civil servants are involved.
- **State Administration for Industry and Commerce** (SAIC) and its local counterparts, referred to as the local AIC.
- SPC and its local counterparts, referred to as the **Local People's Court**.
- **Ministry of Public Security** and its local counterparts, referred to as the local **Public Security Bureau**.

The FCPA is enforced by the **Department of Justice** and the **Securities and Exchange Commission**.

The BA 2010 is enforced by the **Serious Fraud Office**.

The POBO is enforced by the ICAC.

Central Commission for Discipline Inspection

The CCDI is the CCP's anti-corruption body, and is empowered to investigate CCP officials suspected of violating party rules in each province, city and county. CCDI staff can summon any party or government official under its jurisdiction for questioning, and have them immediately put under house arrest for investigation.

The CCDI is also responsible for implementing a system for CCP officials to report their personal assets.

The CCDI is a key agency supporting the new Chinese leadership's anti-corruption campaign.

Supreme People's Procuratorate

The SPP is the sole judicial organ that investigates and prosecutes corruption cases concerning public servants and state functionaries in China. The SPP and the Ministry of Supervision both investigate alleged wrongdoing by public servants and state functionaries, but only the SPP has the power to initiate public prosecutions. The SPP can also directly file cases of job-related crimes committed by state functionaries for investigation.

The SPP is responsible for investigating embezzlement of state property and bribery of public servants and public functionaries through its General Bureau of Anti-Embezzlement and Bribery (反贪贿赂总局) (also referred to as the Anti-Corruption and Bribery Bureau), which also investigates high-profile corruption cases involving CCP officials.
Ministry of Supervision
The Ministry of Supervision is similar to the SPP in that it also investigates corruption allegations against public servants and state functionaries, but these investigations concern violations of administrative regulations. If there is sufficient evidence of wrongdoing, the case is transferred to the SPP to initiate public prosecution.

National Bureau of Corruption Prevention
The NBCP is focused on corruption prevention. This entity is primarily responsible for researching corruption prevention measures and both orchestrating and overseeing nationwide anti-corruption work. The NBCP co-ordinates corruption prevention systems for government agencies, private businesses, non-governmental organisations, and other civil society groups. The NBCP is also responsible for international co-operation and international aid in relation to corruption prevention. However, it does not have the power to investigate individual corruption cases.

State Administration for Industry and Commerce
SAIC is a central government ministry directly under the State Council. It is responsible for market supervision and regulation, and related law enforcement through administrative means.

SAIC regulates the areas of business registration, competition, consumer protection, trademark protection and economic crimes. It also co-ordinates the local AICs at or below provincial level.

In addition to investigation and enforcement against unfair competition, commercial bribery and smuggling, SAIC also has a major role to play in the enforcement of the Anti-Monopoly Law of the People's Republic of China 2007 around:

- Monopolistic agreements.
- Abuse of dominant market position.
- Practices undertaken by offending entities to eliminate or restrict competition through the abuse of administrative power (excluding price monopoly).

Recent developments: focus on rule of law to tackle bribery and corruption
In response to widespread public concern over official corruption, the Chinese government is currently conducting a robust anti-corruption campaign. As part of this, in October 2014 at the fourth Plenum of the CCP Central Committee, the Central Committee promoted the "rule of law" (with socialist Chinese characteristics) as a headline theme of the government’s strategic policy. The government went on to undertake a series of related macro-level reforms, such as making adherence to the rule of law part of the metrics on which government officials are assessed for promotion.
This emphasis on the rule of law is a welcome development for companies operating in China. One of the key aims of the reforms is to enhance productivity and efficiency. A more transparent, rules-based system in the economy is expected to create a more level playing field and a friendlier business environment for companies over time. In the short term, however, the campaign also elevates the risk of anti-corruption enforcement, in particular against foreign companies. Compliance with this regime will likely remain a significant concern for companies operating in China.

For more information on recent trends in bribery and corruption enforcement affecting China, see Article, Recent trends in anti-corruption enforcement in China.