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 corporates 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.

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**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.

Corporate enterprises with operations in China (PRC) must comply with domestic Chinese legislation which prohibits bribery and corruption in China and overseas. Domestic Chinese laws penalise official bribery (that is, the bribery of state employees) 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.
BRIBERY AND CORRUPTION (CHINA): OVERVIEW

- Regimes that corporates who are active in China need to comply with.
- Domestic 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 determine the corruption risk profile of their companies’ China business and to regularly report this to the company’s governing body.

BRIBERY OR CORRUPTION INVESTIGATIONS

These may be:

- External investigations carried out by criminal investigators or industry regulators.
- Internal investigations carried out by a corporate as part of a routine compliance audit:
  - due to a whistleblower;
  - 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 corporate 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.

BRIBERY AND CORRUPTION COMPLIANCE

Corporates are required to comply with a range of obligations that may be affected by bribery and corruption. Listed companies must comply with obligations to disclose material information to investors under the rules of the stock exchange on which they are listed; 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.

There is potential for corrupt acts by employees to cause substantial harm to corporates (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 to account 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, below). Disclosure obligations may on occasion conflict with obligations to withhold information, particularly information that
has been classified as a state secret (国家秘密) 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 program will be taken into account by enforcement authorities.

- For further details of the domestic 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.
- 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, corporates 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.

**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 ensure that the acquisition documents protect the buyer in the case of false or misleading disclosures 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.

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 it is not handled carefully.

**LEGAL FRAMEWORK GOVERNING BRIBERY AND CORRUPTION IN CHINA**

All companies operating and individuals working in China are required to comply with domestic Chinese laws prohibiting bribery and corruption. Companies with operations outside China, particularly multinational corporations whose headquarters are overseas, are likely to also have to comply with obligations under the laws 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 Article, Bribery and Corruption: Caught between three regimes. Chinese individuals and enterprises operating overseas must also comply with domestic Chinese laws that target bribery committed in other countries.

Many companies with operations in mainland 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), the breach of which can give rise to an investigation by the Independent Commission against Corruption (ICAC).

**DOMESTIC CHINESE ANTI-CORRUPTION LAWS**

Domestic Chinese laws prohibit three basic categories of bribery:

- **Official bribery.** This applies when the recipient of a bribe is a state functionary (国家机关工作人员). The list of acts that can constitute official bribery offences is broader than for commercial bribery. The penalties are more serious, including the death penalty for serious offences. It is an offence to give or receive an official bribe. It is also an offence to act as an intermediary in official bribery.

- **Commercial bribery.** This includes giving or receiving bribes by private parties for a business purpose (that is, where no state functionary is involved). It is an offence to give or receive a commercial bribe. It is not an offence to act as an intermediary in commercial bribery.

- **Foreign 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 seeking an improper commercial benefit. The punishment is in accordance with the provisions for commercial bribery.
For a detailed explanation of the domestic Chinese laws applicable to bribery and corruption, see Practice note, Bribery and corruption offences, enforcement and penalties: China.

FCPA (UNITED STATES)

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. It includes two key elements:

- **Anti-bribery provisions.** These prohibit giving or offering 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* (SOA) (国有企业 (国企)) or a *state-owned enterprise* (SOE) (国有企业 (国企)), as SOE employees are generally regarded 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 regard compliance with the FCPA as the most important non-China regulatory consideration.

For more information on the offences under the FCPA, the steps corporates must take in order to comply, enforcement, and penalties, see Practice note, 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. It 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.
- **Prescribed officer receiving a bribe.** 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 corporates should take in order 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.** Offering 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.

Moreover, it is an offence for the chief executive (or a prescribed officer) to be in possession of unexplained property.

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.

ENFORCEMENT AGENCIES FOR BRIBERY AND CORRUPTION

There are several domestic Chinese agencies responsible for enforcing compliance with China’s domestic 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.
- **Supreme People’s Procuratorate** (SPP) (最高人民检察院) and its local counterparts, referred to as the Local People’s Procuratorate.
- Ministry of Supervision (监察部), if civil servants are involved.
- **National Bureau of Corruption Prevention (NBCP)** (国家预防腐败局).
- **State Administration for Industry and Commerce (SAIC)** (中华人民共和国国家工商行政管理总局) and its local counterparts, referred to as the local AIC.
- **Supreme People’s Court** (最高人民法院) and its local counterparts, referred to as the **Local People’s Court** (地方人民法院).
- **Ministry of Public Security** (公安部) and its local counterparts, referred to as the local **Public Security Bureau** (公安局).

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

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 him immediately put under house arrest for investigation.

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

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 (反贪污贿赂总局) (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 public 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 (国家预防腐败局) is focused on corruption prevention. It 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. It is also responsible for international co-operation and international aid with regard 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 (中华人民共和国国务院). It is in charge of 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 co-ordinates the local AICs at, or below, the 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 made promoting the “rule of law” (with socialist Chinese characteristics) a headline theme of the government’s strategic policy. The government went on to undertake a series of macro-level reforms in pursuit of this objective, such as making adherence to the rule of law part of the metrics on which government officials are assessed for promotion.

This new emphasis on the rule of law is a welcome development for businesses 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 results in an elevated risk of anti-corruption enforcement, in particular against foreign corporations. Compliance with the domestic regime is therefore likely to remain a significant concern for corporates operating in China.