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SEC Expands Its Aggressive Approach to Connected Hires in Qualcomm Enforcement Action

In our last issue, we noted the Securities and Exchange Commission ("SEC") had concluded three FCPA enforcement actions in February 2016, continuing the trend of aggressive (and usually SEC-only) FCPA enforcement actions from 2015.[1] On March 1, this continued with a Cease-and-Desist Order (the "Qualcomm Order") against Qualcomm, a San-Diego based designer and seller of wireless telecom products.[2]

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1. Paul R. Berger, Andrew M. Levine, Bruce E. Yannett and Philip Rohlik, "SEC Brings First FCPA Enforcement Actions of 2016," *FCPA Update*, Vol. 7, No. 7 (February 2016) , http://www.debevoise.com/insights/publications/2016/02/fcpa-update-february-2016.
2. *In the Matter of Qualcomm Inc.*, Securities Exchange Act of 1934 Rel. No. 77261, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order, Accounting and Auditing Enforcement Rel. No. 3751, Administrative Proceeding File No. 3-17145 (March 1, 2016).

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Without admitting or denying the allegations, Qualcomm agreed to pay a civil penalty of $7.5 million and submit to a two-year reporting obligation.[3] The Qualcomm Order comes shortly after the Department of Justice ("DOJ") indicated it would not pursue criminal charges[4] and almost two years after receiving a Wells notice from the SEC.[5] In addition to alleging violations of the anti-bribery, books and records, and internal controls provisions of the FCPA, where the DOJ previously closed its investigation, the Qualcomm Order is notable for expanding further the SEC's already far-reaching[6] theory of liability in relation to hiring individuals connected to "foreign officials."

Connected Hires

Since August 2013, news organizations have widely reported that the SEC and DOJ have been investigating a number of financial services companies in connection with hiring relatives of foreign officials, principally in connection with China (the so-called "Princeling Investigation"). Since that time, questions have been raised among practitioners and academics as to how providing employment to a relative comports with the FCPA's prohibition on giving "anything of value to any foreign official"[7] or "to . . . any person knowing that all or a portion of such money or thing of value will be offered, given or promised [to a foreign official.]"[8] For example, can "anything of value" be purely psychological?[9] Moreover, what factors turn the practice of taking relationships into account in the hiring process — a practice that is common in the commercial sector, both in the United States and abroad[10] — into an FCPA violation?

In August 2015, the SEC (without any parallel DOJ action) brought an enforcement proceeding against Bank of New York Mellon (the "BNYM Order").[11]

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3. Qualcomm Order §§IV.B, IV.C.
4. Qualcomm Inc., Quarterly Report (Form 10-Q), at 16 ("On November 19, 2015, the DOJ notified the Company that it was terminating its investigation and would not pursue charges in this matter.") (Jan. 27, 2016).
5. *Id.* at 15 ("On March 13, 2014, the Company received a Wells Notice from the SEC's Los Angeles Regional Office...")
6. *See* Sean Hecker, Bruce E. Yannett, Philip Rohlik and David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," *FCPA Update*, Vol. 7, No. 1 (August 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.
7. 15 U.S.C. § 78dd-1(a)(1).
8. 15 U.S.C. § 78dd-1(a)(3).
9. *See* Hecker et al., *supra* note 6.
10. *See* Andrew Ross Sorkin, "Hiring the Well-Connected Isn't Always a Scandal," New York Times (Aug. 9, 2013), http://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?_r=0.
11. *In the Matter of Bank of New York Mellon Corporation*, SEC Exchange Act Release No. 75720 (Aug. 18, 2015); see also Hecker et al., *supra* note 6.

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Although unconnected to the Princeling Investigation, the BNYM Order was the first SEC proceeding clearly relating to hiring practices since the Princeling Investigation had focused attention on such practices. The BNYM Order involved internships (one unpaid) outside of the normal hiring process provided to children and a nephew of officials of a Middle Eastern sovereign wealth fund that was a longstanding client of BNYM.

"In addition to alleging violations of the anti-bribery, books and records, and internal controls provisions of the FCPA, where the DOJ previously closed its investigation, the Qualcomm Order is notable for expanding further the SEC's already far-reaching theory of liability in relation to hiring individuals connected to "foreign officials.""

The BNYM Order occasioned a significant amount of commentary.[12] In response to criticism of the BNYM Order, Andrew Ceresney, the SEC's Director of Enforcement, described the key facts of the BNYM Order in a speech as follows:

> The sovereign wealth fund officials explicitly and repeatedly requested the internships and the BNY Mellon employees viewed providing the internships as important to keeping the sovereign wealth fund's business and potentially obtaining new business. . . . In addition, the bank did not evaluate or hire the officials' relatives through its internship program, which had stringent standards, including a minimum grade point average, relevant prior work experience, and multiple rounds of interviews. In fact, the family members hired did not meet the basic entrance standards for any established BNY Mellon internship program, did not have the requisite academic or professional credentials, and were not even required to interview before being offered the positions.[13]

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12. *See e.g.*, Hecker et al., *supra* n.6.

13. Andrew Ceresney, Director, Division of Enforcement, Sec. & Exch. Comm'n, "ACI's 32nd FCPA Conference Keynote Address" (Nov. 17, 2015), http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

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Director Ceresney's speech about the BNYM Order appears to set forth a variety of facts that the SEC saw as important with regard to hiring:

- "Explicit[] and repeated[]" requests from a foreign official;
- Employee emails stating that they viewed the provision of internships as important in keeping and/or obtaining business;
- Evaluation of applications outside the normal channels; and
- Hires not meeting hiring standards.

Based on the facts alleged in the Qualcomm Order, it appears that the SEC has taken the position that a FCPA violation can occur even if only some of these facts are present.

The Qualcomm Order

The Qualcomm Order deals with Qualcomm's operations in China between 2002 and 2012.[14] In addition to allegations regarding gifts, meals, entertainment and corporate hospitality[15] (provided to officials and their family members),[16] the Qualcomm Order focuses on hiring practices. In particular, the Order deals with "provid[ing] things of value to . . . high-ranking employees of state owned enterprises ("SOEs") and government ministers."[17] Like the BNYM Order, the Qualcomm Order is not connected to the ongoing Princeling Investigation.

With regard to hiring relatives of Chinese officials, the Qualcomm Order states:

- hires were "often" made "at the request of these foreign officials"
- "in some cases . . . the individuals did not satisfy Qualcomm's hiring standards"
- "Certain hires also had previously failed to obtain employment with Qualcomm through the standard hiring practices"
- "in some cases, new positions were created for these hires"[18]

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14. Qualcomm Order at ¶ 1. Unrelatedly, Qualcomm began 2015 by agreeing to a $975 million fine paid to Chinese authorities related to alleged violations of China's competition law. *See* Noel Randewich and Matthew Miller, "Qualcomm to pay $975 million to resolve China anti-trust dispute," Reuters (Feb. 10, 2015); http://www.reuters.com/article/us-china-qualcomm-idUSKBN0LD2EL20150210.
15. These benefits included "lavish hospitality... at the Beijing Olympics," even more expensive than that described in the enforcement action against BHP Billiton and other recent orders. Qualcomm Order at ¶¶ 35-36; *see also*, Berger et al., *supra* note 1 at 11-13. The Olympic packages were valued at $95,000 per couple and were offered without compliance oversight. Interestingly, compliance became involved at a later period, and five invitations were rescinded immediately prior to the Olympics. Qualcomm Order at ¶¶ 35-39. While some observers might say "better late than never," management's failure to identify FCPA risk is cited as an internal control failing, even though it appears to have been rectified prior to the event. Qualcomm Order at ¶ 36.
16. Qualcomm Order at ¶¶ 28-31.
17. Qualcomm Order at ¶ 1. The Qualcomm Order merely asserts that SOE employees were "foreign officials," *see id*. without reference to whether these SOEs are "instrumentalities" under the test set forth in *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).
18. Qualcomm Order at ¶¶ 20-21 (emphasis added).

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Although three examples follow these somewhat vague descriptions in the general discussion at the beginning of the "Hir[ing] Relatives of Chinese Officials" section of the Qualcomm Order, these examples do not provide much additional clarity regarding what the SEC views as hiring decisions that violate the FCPA.

The first hiring example is a request by a Deputy General Manager of a SOE subsidiary to find an internship for her daughter, who was studying in the United States. Internal communications suggested that Qualcomm employees thought that providing an internship "would be important … given our cooperation with [the SOE subsidiary]" and "would be good because we are doing quite a bit with [the subsidiary]."[19] Internal emails also noted that the daughter's parents "gave us great help for … new business development."[20] There is no allegation in the Qualcomm Order that the daughter was not otherwise qualified for an internship or was hired outside of normal processes.

The second hiring example provided in the Qualcomm Order is a clear case of providing significant benefits, in addition to employment, to a not-otherwise-qualified son of an executive at a Chinese SOE. Qualcomm provided: (i) a $75,000 research grant to an American university, where the son was studying, enabling him to continue his PhD studies; (ii) an internship at Qualcomm; (iii) subsequent employment at Qualcomm despite being classified as a "No Hire" who did not meet minimum standards for the position; (iv) a business trip, followed by vacation to visit his parents over Chinese New Year; and (v) a $70,000 personal loan from a senior Qualcomm executive to buy a home.[21] In internal communications, the hiring was described as a "favor [the telecom company] has asked of Qualcomm" which should be provided because Qualcomm might "then turn around and ask the same person we just rejected to do us a special favor."[22]

Despite appearing in the "Hir[ing] Relatives of Chinese Officials" section, the third example does not involve a relative of an official, but merely someone "referred by a director general" of a Chinese government agency. A Qualcomm employee described the intern as a "MUST PLACE," as "he was referrd [sic] by [the director general of the Agency] and has influence in China." When asked how critical the hiring was, the employee responded "[Q]uite important from a customer relationship perspective."[23] There is no allegation in the Qualcomm Order that the

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19. Qualcomm Order at ¶ 23.
20. *Id.*
21. Qualcomm Order at ¶¶ 24-25.
22. Qualcomm Order at ¶ 25.
23. Qualcomm Order at 26.

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referred intern was otherwise unqualified, was hired outside the normal process, or that a special position was created for him.

A Comparison with the BNYM Order

While the second example provided in the Qualcomm Order is similar to the internships described in the BNYM Order, the first and third examples provided in the Qualcomm Order reflect an even more expansive view of what can constitute a FCPA violation in the hiring context. The factual allegations relating to the first and third example in the Qualcomm Order can be contrasted with the BNYM Order in four ways:

First, unlike in the BNYM Order, there is no allegation that the two hires were not otherwise qualified for the positions they received or that the hire occurred outside the normal process or that the internships were bespoke.

Second, in the BNYM Order, one of the officials told his primary contact at BNYM that the internship request represented "an opportunity" for the bank, that he could "secure internships for his family from a competitor bank," and that he was "angry" with delays in granting the internship.[24] The Qualcomm Order lacks allegations of such "explicit[] and repeated[] requests."[25]

Third, both the Qualcomm Order and the BNYM Order exhibit a "*quid pro quo* lite" approach, in that neither ties the employment opportunities to any specific business.[26] As we noted at the time, the internal communications in the BNYM Order could also be read as internal speculation as opposed to a *quid pro quo*.[27] That said, the internal communications in the BNYM Order were significantly more emphatic with regard to "keeping the . . . business"[28] than those provided as the first and third examples in the Qualcomm Order. The internal communications quoted in the BNYM Order reflected employee belief that the internships were connected to (undefined) business. For example, employees said that "by not allowing the internships we potentially jeopardize our mandate" and that one of the officials was "crucial to retaining and gaining new business."[29] By contrast, the internal communications at Qualcomm were much less emphatic: the internship "would be important for us to support given our cooperation with [the subsidiary]," or

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24. BNYM Order at ¶ 15.
25. Ceresney, *supra* note13.
26. Sean Hecker et al, *supra* note 6 at 5-6.
27. *See Id.*
28. Ceresney, *supra* note13.
29. BNMY Order at ¶¶ 16-17.

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"would be good because we are doing quite a bit with [the subsidiary]," or would be "quite important from a customer relationship perspective."[30] While it is possible to read more into the language quoted, the Qualcomm Order also could be read to suggest that communications showing that a relationship was considered in the hiring process, without more, should be viewed of evidence of bribery.

Fourth, and without explanation, the third example in the Qualcomm Order – hiring a candidate referred by, but not related to, a government official – highlights the question addressed by the SEC only in passing in the BNYM Order: when a company hires a foreign official's relative, what is the "thing of value" provided to the foreign official? In the BNYM Order, the SEC appeared to settle on the belief that a thing of value can be purely psychological as the "officials derived significant personal value in being able to confer [the] benefit on their family members."[31] The Qualcomm Order's third example does not involve a family member but merely a referral of a non-relative. No relationship is alleged in the order. The question arises as to whether the "significant personal value" of conferring a benefit on family members also should be assumed for *anyone* referred by a foreign official.

"The Qualcomm Order provides a clear example of the consequences of rule-making by settlement, or "prosecutorial common law.""

Prosecutorial Common Law

The Qualcomm Order provides a clear example of the consequences of rule-making by settlement, or "prosecutorial common law." Of the three hires described in the Qualcomm Order, only one (the second) clearly fell into the same category as the hires described in the earlier BNYM Order. The SEC then included two additional examples and language suggesting much broader categories, potentially greatly expanding the scope of what it deems to be a violation of the FCPA.

Although possible that the SEC viewed the internal communications quoted in the Qualcomm Order as so pregnant with subtext as to make further elaboration unnecessary, it would have been relatively simple to allege the hires were unqualified or to describe other communications that might provide relevant context. Does its

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30. Qualcomm Order at ¶¶23, 26.

31. BNYM Order at ¶ 21.

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absence mean that whether or not a candidate is qualified or hired through the normal process is irrelevant where an employee expressed a relationship-based desire to hire a candidate? Does the SEC consider that the same scrutiny applied to sons and daughters should be applied to anyone a "foreign official" happens to refer?

The Qualcomm Order leaves these questions open.

Meanwhile, as with the BNYM Order, the DOJ decided not to proceed against Qualcomm despite an obvious US nexus: all of the internships were in the United States. Until the regulators provide greater clarity, companies regulated by the SEC should make sure to consider FCPA compliance as part of the hiring process and to provide FCPA training to human resources employees, something Qualcomm was specifically criticized for not doing.[32] Companies will also want to ensure that hiring decisions involve the customary human resources process and avoid the suggestion that fostering or continuing a relationship with a foreign official impacted the hiring process. In situations involving the hiring of individuals connected to "foreign officials," companies should consider requiring independent reviews of these decisions by someone within the legal or compliance function. Finally, companies should consider including in their compliance review of hiring decisions scrutiny not only of the sons and daughters (and other relatives) of "foreign officials," but also of anyone else referred by such officials.

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32. Qualcomm Order at ¶ 27.

China Proposes Amendments to its Commercial Bribery Legislation

On February 25, 2016, China's State Council released a set of draft amendments to the Anti-Unfair Competition Law[1] ("**AUCL**") for public comment ("**Draft Amendments**"). If passed, these amendments could clarify the definition of commercial bribery in China, escalate the penalties for the same and otherwise update the law to make it consistent with enforcement practice.[2]

In addition to addressing a wide variety of unfair business practices, the Anti-Unfair Competition Law has long been a method of administratively enforcing China's prohibition on commercial bribery (itself an unfair business practice), more serious cases of which can also be punished under the Criminal Law of the PRC.[3] Under the AUCL, the State Administration for Industry and Commerce ("**SAIC**"), along with its provincial and local offices ("**AICs**" or "**local AICs**"), investigates and punishes commercial bribery with various administrative measures and fines. The SAIC is also responsible for providing additional guidance to the provincial and local AICs on matters relating to the interpretation of the AUCL.[4] In line with the broader focus on anti-corruption in China, recent years have seen increasing anti-bribery enforcement actions under the AUCL.

The commercial bribery provisions of the AUCL and the activities of the various AICs are important for multinational corporations, in part because actions under the AUCL against foreign companies in China have been more frequent than criminal bribery prosecutions (for both commercial bribery and bribery of a state functionary). More importantly, US regulatory authorities would consider much of what is dealt with in China as commercial bribery as also violating the FCPA's anti-bribery provisions. This is because the term "foreign official" under the FCPA, and even more so as interpreted in practice by the United States Department of Justice and Securities and Exchange Commission, is much broader than

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1. Anti-Unfair Competition Law of People's Republic of China [in Chinese: *Fan Bu Zheng Dang Jing Zheng Fa*] (effective on Dec.1, 1993). Unofficial English translation available at NPC.GOV, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm.
2. Legal Affairs Office of the State Council, Anti-Unfair Competition Law of People's Republic of China (Draft Amendments For Review), http://zqyj.chinalaw.gov.cn/index (in Chinese).
3. AUCL, Art.22. Commercial Bribery can also be punished under Arts. 163 & 164 of the Criminal Law of the People's Republic of China (recently revised on Aug. 29, 2015 and effective on Nov.1, 2015).
4. *See, e.g.*, Reply of the State Administration for Industry and Commerce to Instruction regarding Whether the Anti-Unfair Competition Law Applies to the Conduct of Taking Bribes by Public Schools (effective on May 15, 2006).

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"state functionary" (国家工作人员) as defined in the Criminal Law of the People's Republic of China.[5] As a result, an AIC investigation into commercial bribery can (but does not always) signal an FCPA problem. For example, in the October 2013 enforcement action against Diebold, the SEC used an investigation by the Chengdu AIC into travel provided to bank employees as a reason why the company was "on notice" of potential corruption issues at Diebold China.[6]

The need for updating the AUCL has become clearer, in part given China's growing and changing economy over the years, deficiencies in the definition and interpretation of the offense, and ambiguity in enforcement practice.[7] The most significant proposed changes are: (i) a clearer definition of "commercial bribery;" (ii) a clear explication of the three "commercial bribery practices" covered by the law (bribery of third parties, bribery in connection with public services, and a type of false accounting offense); (iii) clarification regarding companies' vicarious liability for the acts of their employees; and (iv) harsher monetary fines for commercial bribery.

Clearer Definition of Commercial Bribery

The existing AUCL does not define "commercial bribery." Instead, the current definition of commercial bribery was provided by a SAIC implementing regulation issued in 1996 ("**1996 Provisions**").[8] The 1996 Provisions define commercial bribery as "a business operator's act of bribing the other party's organization or individual with property[9] or by other means[10] for the purpose of selling or purchasing commodities."[11] As the provisions make clear, commercial bribery under Chinese law can entail either bribery of individuals (such as through a kickback) or bribery of

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5. Art. 93 of the Criminal Law of the People's Republic of China. For example, the Supreme People's Court and Supreme People's Procuraturate have issued Opinions relating to acceptance of kickbacks by state health care professionals in China. According to the Opinions, a doctor who receives a kickback for prescribing medication to a patient is normally considered to have engaged in commercial bribery. It is considered a state function when a doctor contracts on behalf of the state, so his illegal acceptance of money or property would be prosecuted as public bribery. See Paragraph 4 of the Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery ("**Criminal Commercial Bribery Opinions**", Fa Fa [2008] No. 33) (Nov. 20, 2008).
6. *Securities and Exchange Commission v. Diebold, Inc.*, Complaint at ¶ 28, Case No. 1:13-cv-01609-ABJ (D.D.C. Oct. 22, 2013).
7. Legal Affairs Office of the State Council, Explanation on Drafting the Anti-Unfair Competition Law of People's Republic of China (Draft Amendments For Review), http://zqyj.chinalaw.gov.cn/index (in Chinese).
8. Interim Provisions on Prohibition of Commercial Bribery, promulgated by the SAIC (effective on Nov.15, 1996).
9. "Property" means cash and physical items, which shall include property offered by a business operator to the other party's organization or individual either as a fee for promotion, publicity, sponsorship, scientific research, labor, consultancy, commission, etc. or by means of paying reimbursement for any expenses. See 1996 Provisions, Art.2 (Westlaw China unofficial translation).
10. "Other means" refer to the means used to provide benefits other than offering property, such as providing a domestic or international trip or visit in any name. See 1996 Provisions, Art.2 (Westlaw China unofficial translation).
11. 1996 Provisions, Art.2 (Westlaw China unofficial translation).

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entities (such as through undisclosed rebates). The Draft Amendments aim to broaden the definition of commercial bribery, addressing additional situations not explicitly covered by the definition in the 1996 Provisions. For example, where a business operator bribes relatives of its counterparty's CEO, or where bribes are given outside the sale-of-goods context, such as when bribes paid in order to obtain advantages in a stock transaction. Although these types of situations arguably could be treated as commercial bribery by the AICs, the Draft Amendments clarify what was uncertainty in the law.

"US regulatory authorities would consider much of what is dealt with in China as commercial bribery as also violating the FCPA's anti-bribery provisions."

The Draft Amendments propose an entirely new definition of commercial bribery:

> Commercial bribery means that a business operator provides or promises to provide economic benefits to a counter-party in a transaction or a third party that may be able to influence the transaction, in order to entice such party to secure a transactional opportunity or a competitive advantage for the business operator. Providing or promising to provide economic benefits is considered giving a commercial bribe; accepting or agreeing to accept economic benefits is considered taking a commercial bribe.[12]

This new definition better reflects the complexity of current transactions and bribery schemes. By replacing the existing limited language dealing with transactions "selling or purchasing commodities" with more general terms, such as "transactional opportunity" and "competitive advantage" the Draft Amendments make clear that the law applies beyond the sale of goods context. By referring to "economic benefits" rather than "property or by other means" the Draft Amendments likewise broaden and clarify the definition of a bribe.

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12. Draft Amendments, Art. 7 (Debevoise & Plimpton LLP unofficial translation).

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Most importantly, the Draft Amendments broaden the definition of bribery to include promising to provide or an agreement to accept an economic benefit, in addition to the actual provision or acceptance of that benefit.

"Commercial Bribery Practices"

Bribing Third Parties

As an introduction to the new definition of commercial bribery, the Draft Amendments provide a non-exhaustive list of three prohibited "commercial bribery practices."[13] One such prohibited practice deals with bribing third parties, addressing the situation where the bribe is paid to an entity or person other than the counterparty. This is described as "giving or promising to give economic benefits to any third party who is influential to the underlying transaction, which damages the legitimate interests of other business operators or customers."[14] This scenario can be compared to, but is potentially broader than, the recent amendments to China's Criminal Law (effective November 2015), which explicitly criminalized the giving of bribes to "close relatives or relations" of state functionaries.[15]

The explicit reference to third parties in the scenario is intended to codify existing SAIC enforcement practice. For example, already in 1999, the SAIC determined that payments made to a travel agent to encourage the travel agent to bring tour groups to a particular shop was a form of commercial bribery, even though the travel agent was not the counterparty to any of the shop's sales.[16]

The Draft Amendments would establish a more general prohibition, under which "a third party" could be any entity or individual that may exert influence on the transaction, including, for example, relatives to the counter-party's person in charge, the management of the counter-party's parent company or other third party with influence on the counterparty.

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13. Draft Amendments, Art. 7 (Debevoise & Plimpton LLP unofficial translation).
14. Draft Amendments, Art. 7 (Debevoise & Plimpton LLP unofficial translation). No official translation of the Draft Amendments is currently available. The Chinese translation of this provision reads: " 给付或者承诺给付对交易有影响的第三方以经济利益，损害其他经营者或消费者合法权益".
15. For details about China's recently amended Criminal Law, please see *FCPA Update*, Vol. 7, No. 2, http://www.debevoise.com/insights/publications/2015/09/fcpa-update-september-2015.
16. Reply of the State Administration for Industry and Commerce regarding Determination of the Nature of the Acceptance by Travel Agencies or Tour Guides of "Capitation Fees" and "Parking Fees" Paid by Shopping Malls (effective on Jun. 22, 1999).

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Bribery in "Public Service Sectors"

Another "commercial bribery practice" outlined in the Draft Amendment concerns bribery in public service sectors. The Draft Amendments prohibit "economic benefits obtained for a company, a department or an individual in the course of or through public service."[17] Unfortunately, the draft does not clarify what this rather vague language means, in particular what exactly constitutes a public service. This practice appears to be designed to deal with bribery relating to companies, organizations and individuals in sectors such as healthcare, utilities, and education, but further clarification will be necessary.

These sectors have become a high-risk area for commercial bribery in recent years. For example, it is common for teachers to supplement their incomes with gifts from parents hoping to curry favor for their children,[18] and corruption in the health care sector is so endemic that it has been written about even in the normally nationalistic *Global Times*.[19] China has already focused attention on these issues through other legislative efforts[20] and increased enforcement against pharmaceutical and healthcare companies.[21] The public service provision in the Draft Amendments appears to be a further escalation of the fight against this type of bribery. The Draft Amendments likely signal increasing scrutiny on the healthcare and other sectors from the AIC (a government body), in addition to the ongoing anti-corruption campaign carried out by the Discipline and Inspection Commission (an organ of the Communist Party of China). Of course, this scrutiny supplements the already aggressive FCPA enforcement against healthcare companies doing business in China.

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17. Draft Amendments, Art. 7 (Debevoise & Plimpton LLP unofficial translation).
18. Ben Blanchard, "China to target gift giving, extra fees in school graft campaign," Reuters, June 16, 2015, http://in.reuters.com/article/china-corruption-education-idINKBN0OW0OZ20150616.
19. Liu Dong, "Underpaid doctors trapped in chain of medical corruption," Global Times, August 4, 2013 (reporting that 90% of medical staff in one city were found to be involved with corruption), http://www.globaltimes.cn/content/801320.shtml.
20. For example, the Criminal Commercial Bribery Opinions, which clarified criminal liability in relation to healthcare institutions and schools. See Paragraphs 4 and 5, Criminal Commercial Bribery Opinions (effective on Nov.22, 2008). Another example is the Opinions on Correctly Grasping the Policy Borderlines in the Specific Campaign against Commercial Bribery, issued by the Central Leading Group for Combating Commercial Bribery under the Central Government (Zhong Ban Fa [2006] No.9), which distinguished bribes from discounts, commissions, gifts and donations.
21. For example, since 2014, Chinese authorities have established a "blacklist" system for healthcare companies that have allegedly attempted to improperly influence medical professionals. Currently, there are at least 13 pharmaceutical and medical device companies that have been blacklisted. Li Jiang, "Thirteen pharmaceutical companies have been black listed", Yiyaojie.com (Oct.12, 2015), http://www.yiyaojie.com/bg/qy/20151012/90597.html (Chinese).

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False Accounting

The existing AUCL does not contain a general requirement on contracting and accounting, but provides a safe-harbor when dealing with commercial bribery of entities. Under the existing AUCL, legitimate discounts and commissions are not treated as bribes so long as the business operators "truthfully enter them in the account."[22]

The Draft Amendments appear to turn this defense into an affirmative requirement. Instead of proper accounting serving as a defense to commercial bribery, "not having payments of economic interests accurately recorded in contracts and accounting books" is listed as a "commercial bribery practice."[23] The Draft Amendments are, however, silent as to what constitutes "accurately recorded," leaving the issue for future implementing rules or the enforcement authorities' discretion.

Vicarious Liability for the Conduct of Employees

Although the existing AUCL does not define when companies should be held vicariously liable for bribes paid by their employees, the SAIC and local AICs often impose vicarious corporate liability in their enforcement actions. As described in the 1996 Provisions, "where a business operator's employees sell or purchase commodities for the business operator by means of commercial bribery, the act shall be determined as the business operator's act."[24]

The Draft Amendments would formally incorporate vicarious liability into the law and update the definition of vicarious liability to conform with the updated definition of commercial bribery. An employee "procuring a transactional opportunity or competitive advantage for a business operator through commercial bribery" will be considered an act of the business operator.[25] The business would also be vicariously liable where an employee *receives* a bribe, unless it can establish, as an affirmative defense, that the employee's acceptance of the bribe was contrary to the employer's interest. As the burden of proof for this defense would rest on the employer, the provision would further call for adequate internal control procedures (for example, the affirmative defense might not be available to an employer who turns a blind eye to bribery of his employees in order to justify low wages paid to those employees).

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22. AUCL, Para.2 of Art.8.
23. Draft Amendments, Art.7 (Debevoise & Plimpton LLP unofficial translation).
24. 1996 Provisions, Art.3 (Westlaw China unofficial translation). For example, in a 2013 enforcement action, the Shanghai AIC found a conference and exhibition service company liable for commercial bribery for an employee who had given kickbacks to its customers, although the company had been unaware of the employee's conduct before the investigation.
25. Draft Amendments, Art.7 (Debevoise & Plimpton LLP unofficial translation).

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Increased Penalties for Commercial Bribery

The existing AUCL imposes two types of administrative penalties on non-criminal commercial bribery: (i) a fine of RMB 10,000 (approx. USD 1,540) to RMB 200,000 (approx. USD 30,800) and (ii) confiscation of illegal income.[26] The range of the fine was first adopted in 1993, when those amounts were very significant, but has become outdated given the growth of the Chinese economy. Further, there is ambiguity over what constitutes "illegal income" under the existing AUCL.

"By updating and broadening the scope of the anti-commercial bribery provisions of the AUCL, the Chinese government is once again signaling the importance it attaches to rooting out corruption."

The Draft Amendments would substitute percentages of *revenue* attributable to the corrupt transaction for both the numerical range and the confiscation provisions. Under the Draft Amendments, the AIC would be permitted to levy a single penalty of a fine of 10% to 30% of the revenue attributable to the bribery conduct.

Moreover, the Draft Amendments introduce a form of accomplice liability. If any person knew or "should have known" of commercial bribery practices, but nonetheless continued to provide facilities for the conduct (with regard to production, sales, warehousing, transportation, network services, technical support, advertising, payment and settlement, etc.), the person would be fined between RMB100,000 (approx. USD15,500) to RMB 1 million (approx. USD 155,000).[27] The Draft Amendments do not define under what circumstances a third party "should have known" thereby providing significant discretion to the AICs until additional guidance is provided. Under these circumstances, companies will be advised to raise the level of attention they pay to the practices of their business partners, such as distributors and agents.

The Draft Amendment also empowers the SAIC and local AICs by creating new administrative enforcement measures that do not exist under the current laws. For example, the SAIC and local AICs would be granted the power to seize or impound property related to commercial bribery during an investigation.[28]

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26. AUCL, Art. 22.
27. Draft Amendments, Art. 28 (Debevoise & Plimpton LLP unofficial translation).
28. Draft Amendments, Art. 15 (v) (Debevoise & Plimpton LLP unofficial translation).

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Conclusion

Although there is still room for changes, it is likely that much of the Draft Amendments will become law. The current public comment period ended on March 25, 2016. After further revisions the Draft Amendments will be sent to the National People's Congress for enactment. By updating and broadening the scope of the anti-commercial bribery provisions of the AUCL, the Chinese government is once again signaling the importance it attaches to rooting out corruption. With the Draft Amendments, it is doing so in relation to a law that has traditionally and regularly been applied to private businesses, including foreign corporations doing business in China. Both because of the relatively severe penalties included in the Draft Amendments and because US regulatory authorities would view many violations of the AUCL's commercial bribery provisions as FCPA violations, companies doing business in China should consider updating their local policies, and in particular their local accounting controls, in response.

Debevoise & Plimpton LLP, as all other foreign firms in China, is not admitted to practice PRC law in China. This article is based on our general experience in dealing with such matters and consultation of published compilations of Chinese law. We would be pleased to recommend a licensed Chinese counsel should you require a formal opinion as to any of the matters set forth herein.

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