

# FCPA Update

A Global Anti-Corruption Newsletter



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## China Revises Draft Amendments to Commercial Bribery Legislation

The Law Committee of China's National People's Congress recently released a second revised draft of amendments ("New Draft Amendments")<sup>1</sup> to the Anti-Unfair Competition Law ("AUCL"),<sup>2</sup> which governs a wide range of unfair competition practices, including commercial bribery. The AUCL, which is overseen by the State Administration of Industry and Commerce ("SAIC") and enforced by

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1. Solicitation of Public Opinions on Anti-Unfair Competition Law (Second Revised Draft For Deliberation), released on Sept. 5, 2017, unofficial draft translation available at Westlaw China, <http://app.westlawchina.com/maf/china/app/document?&docguid=i00000000000015e5174dc4d6c67b5c0&hitguid=i00000000000015e5174dc4d6c67b5c0&srguid=i0ad6a4730000015ec18f3ebdf7ba21da&spos=1&epos=1&td=13&crumb-action=append&context=5&lang=en>.
2. Law of People's Republic of China Against Unfair Competition (effective Dec. 1, 1993), unofficial translation available at Westlaw China, <http://app.westlawchina.com/maf/china/app/document?&docguid=i0adf589b0000011e6d83e8fed238abf3&hitguid=i0adf589b0000011e6d83e8fed238abf3&srguid=i0ad6a4730000015ec195f66947d6e237&spos=1&epos=1&td=19&crumb-action=append&context=63&lang=en>.

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provincial-level Administrations of Industry and Commerce (“AICs”), treats bribery of both private and state-owned enterprises (and employees thereof) in commercial transactions as commercial bribery.<sup>3</sup> If passed, the New Draft Amendments would expand the scope of the commercial bribery offense and impose harsher administrative penalties on business operators.

The New Draft Amendments are the third time the government has sought public consultation on amendments to the AUCL. The first round of amendments was released on February 25, 2016 (“First Draft Amendments”).<sup>4</sup> In a previous issue, we noted how the existing AUCL has long functioned as a method of administratively enforcing China’s prohibition on commercial bribery (while more serious cases trigger criminal punishment under the PRC Criminal Law), as well as how the First Draft Amendments, if enacted, would refine the current legal landscape.<sup>5</sup> About one year later, the government made substantial revisions to its first draft, resulting in a second draft released for public consultation on February 26, 2017 (“Revised Draft Amendments”).<sup>6</sup> The three drafts have proposed widely varying approaches to modifying the commercial bribery provisions in the existing AUCL, as can be seen in the table at the end of this article comparing the changes from the existing AUCL across the various proposed amendments.

The key changes proposed in the New Draft Amendments are: (i) a broader scope of commercial bribery practices, with a specific list of potential commercial bribe-takers; (ii) a presumption of corporate liability for commercial bribery, along with an affirmative defense; and (iii) increased penalties, including greater monetary fines and revocation of business licenses.

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3. This aspect of the AUCL is made explicit in Article 7 of the New Draft Amendments, which lists state organs and state-owned enterprises as counterparties that can be bribed. In Chinese criminal law, there are specific crimes relating to bribery of a “state functionary” (Criminal Law Art. 389), which is narrower than the FCPA’s definition of “foreign official,” and bribery of “State organ, State-owned company, enterprise, institution or people’s organization” (Criminal Law Art. 391), which includes state-owned enterprises.
  4. Anti-Unfair Competition Law (Revised Draft for Review), unofficial draft translation available at Westlaw China, <http://app.westlawchina.com/maf/china/app/document?&docguid=i0000000000001531771f8666c4c53b5&hitguid=i0000000000001531771f8666c4c53b5&srguid=i0ad628330000015ec1947773efbb97e8&spos=1&epos=1&td=1&crumb-action=append&context=40&lang=en>.
  5. Andrew M. Levine, Philip Rohlik, and Christina Jie Wang, “China Proposes Amendments to its Commercial Bribery Legislation,” FCPA Update, Vol. 7, No. 2 (Mar. 2016), <http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016>.
  6. Solicitation of Public of Opinions on the Anti-Unfair Competition Law (Revised Draft), unofficial draft translation available at Westlaw China, <http://app.westlawchina.com/maf/china/app/document?&docguid=i00000000000015a7dc5d5a26c5ed3ce&hitguid=i00000000000015a7dc5d5a26c5ed3ce&srguid=i0ad6a4730000015ec18f3ebdf7ba21da&spos=2&epos=2&td=13&crumb-action=append&context=5&lang=en>.

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**Broader Scope of Commercial Bribery**

The existing AUCL generally bans bribery through the use of money, property, or other means in the course of selling or purchasing goods. It specifically treats secret, off-the-books rebates as commercial bribes.<sup>7</sup> The First Draft Amendments sought to introduce a completely separate and new definition of bribery,<sup>8</sup> while the Revised Draft Amendments abandoned this approach, instead expanding the scope from sales and purchases of goods to a broader concept of business transactions.<sup>9</sup> As distinct from these varied approaches, the New Draft Amendments would refine the definition of commercial bribery by introducing a four-category list of potential bribe-takers.

**“If passed, the New Draft Amendments would expand the scope of the commercial bribery offense and impose harsher administrative penalties on business operators.”**

Article 7 of the New Draft Amendments would prohibit a company from using money, property, or other means to:

“bribe any of the following entities or individuals to seek transaction opportunities or competitive advantages:

- Staff members of transaction counterparties;
- Entities or individuals entrusted by transaction counterparties with the handling of relevant affairs;
- State organs, state-owned companies and enterprises, public institutions, or people’s groups, or state functionaries; or
- Any other entities or individuals that may take advantage of the positions of state functionaries to influence transactions.”<sup>10</sup>

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7. Art. 8, AUCL.  
8. Art. 7, First Draft Amendments.  
9. Art.7, Revised Draft Amendments.  
10. Art.7, New Draft Amendments (Westlaw unofficial translation).

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This four-category list would cover a broad range of entities and individuals, which include, in summary, transaction counterparties' employees, third-party agents, government entities, SOEs, public officials, and any other entities or individuals with influence. Notably, the New Draft Amendments regard "staff members of transaction counterparties" – not the transaction counterparties themselves – as potential bribe-takers. This wording could signify that beneficial payments between two entities may be exempted from the scope of commercial bribery. Such a reading would be inconsistent with current enforcement practices of the AUCL, which regularly encompass bribery of a counterparty entity. However, the explicit prohibition on what has been probably the most common form of entity-to-entity bribery in the existing AUCL – secret rebates<sup>11</sup> – is removed in the New Draft Amendments.<sup>12</sup>

In addition, the New Draft Amendments would expand the scope of the AUCL to include not just purchasing or selling goods, but also a broader range of situations where the business operators "seek transaction opportunities or competitive advantages."<sup>13</sup>

The existing AUCL contains a safe harbor provision that permits the payment of discounts and commissions that are truthfully recorded.<sup>14</sup> The New Draft Amendments would retain this provision, with the application scope expanded from the purchase and sale of goods to "transaction activities."<sup>15</sup>

**Vicarious Corporate Liability for the Conduct of Employees**

Although the existing AUCL does not provide for any vicarious corporate liability, enforcement agencies usually take the view that an employee's commercial bribery is attributable to the company. This concept also was reflected in an implementing regulation issued in 1996.<sup>16</sup>

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11. Art. 8 AUCL ("A business operator who offers off-the-book rebate in secret to the other party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.")
  12. Art. 7 Revised Draft Amendments ("During transaction activities, a business operator may provide discounts for the relevant transaction counterparty in an express manner, or pay commissions to the intermediary concerned. A business operator shall truthfully credit relevant amounts into account books if it provides discounts for transaction counterparties or pays commissions to intermediaries. The business operators who accept discounts or commissions shall also truthfully credit such amounts into account books.") and Art. 7 New Draft Amendments (same).
  13. Art.7, New Draft Amendments (Westlaw unofficial translation).
  14. Art.8, AUCL.
  15. Art.7, New Draft Amendments.
  16. See Interim Provisions on Prohibition of Commercial Bribery, promulgated by the State Administration for Industry and Commerce, effective Nov. 15, 1996. Article 3 of this implementing regulation states that "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" (Westlaw unofficial translation).

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Both earlier rounds of draft amendments sought to incorporate explicitly this concept into the AUCL, establishing a presumption that an employee's acts are attributable to the company, but containing different affirmative defenses. In the First Draft Amendments, a company would not be held liable if there was evidence showing that the employee "takes bribes against the interests" of the company,<sup>17</sup> while in the Revised Draft Amendments the defense would require that the company prove that "such acts are the conduct of the staff member in his/her personal capacity."<sup>18</sup>

The New Draft Amendments, as with earlier rounds of draft amendments, would formally establish a rebuttable presumption that an employee's acts are attributable to the company. To defeat the presumption, the company would have to prove that the employee's acts were "irrelevant to seeking for transaction opportunities or competitive advantages" for the company, a higher burden.<sup>19</sup>

**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 (approximately USD 1,506) to RMB 200,000 (approximately USD 30,128); and (ii) confiscation of illegal income.<sup>20</sup> The range of the fine, which was first adopted in 1993, has become largely outdated.

Both earlier draft amendments sought to increase penalties in the AUCL, but they differed in their approach. The First Draft Amendments proposed to replace the existing numerical range with a range of percentages (10% to 30%) of revenue attributable to the corrupt transaction;<sup>21</sup> the Revised Draft Amendments reverted to the numerical range approach in the existing law but with increased amounts (a fine of RMB 100,000 (approximately USD 15,150) to RMB 3 million (approximately USD 450,000)).<sup>22</sup>

The New Draft Amendments use the same fine range as the Revised Draft Amendments: RMB 100,000 to RMB 3 million. The new draft would also impose two other penalties: confiscation of illegal income and – if the conduct in question is sufficiently serious – revocation of business licenses.<sup>23</sup> Interestingly, unlike in the existing AUCL and earlier draft amendments, the New Draft Amendments

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17. Art. 7, First Draft Amendments.

18. Art. 7, Revised Draft Amendments.

19. Art. 7, New Draft Amendments.

20. Art. 22, AUCL.

21. Art. 20, First Draft Amendments.

22. Art. 22, Revised Draft Amendments.

23. Art. 22, New Draft Amendments.

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provide penalties only applicable to companies that give bribes, and (it appears, intentionally)<sup>24</sup> omits provisions that would punish the taking of bribes, although accepting bribes remains punishable under the Criminal Law. Moreover, the New Draft Amendments also propose that if a company receives an administrative penalty – whether it because of commercial bribery or other unfair competition practices – the relevant authorities would record the penalty in the business operator’s credit record as a matter of public record.<sup>25</sup> This proposal effectively would impose a “naming and shaming” penalty that could result in reputational harm to companies.

**Conclusion**

Although there is no fixed schedule for when the amendments to the AUCL may be passed and what the final version will look like, it appears likely that some of the New Draft Amendments will become law. If adopted, they would significantly change the AUCL by broadening the scope of the commercial bribery offense and increasing the corresponding penalties. Together with other legislative and enforcement efforts, the proposed revision of the AUCL signals that the Chinese government is continuing its campaign of targeting commercial bribery.

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24. Compare Art. 8, AUCL (“A business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebate in secret to the other party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.”) (emphasis added) and Art. 7, New Draft Amendments (“A business operator shall not use assets or other means to bribe any of the following entities or individuals to seek for transaction opportunities or competitive advantages”).

25. Art. 26, New Draft Amendments.

**Table I – Comparison of Existing AUCL and Three Drafts of Proposed Amendments**

	Existing AUCL (Arts. 8 & 22)	First Draft Amendments (Arts. 7, 20 & 28)	Revised Draft Amendments (Arts. 7 & 22)	New Draft Amendments (Arts. 7 & 19)
<b>Definition</b>		A business operator provides or promises to provide economic benefits to a counterparty in a transaction or a third party that may affect the transaction, in order to entice such party to secure a transaction 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.		
<b>Prohibited Practices</b>	<ul style="list-style-type: none"> <li>• Using money, property, or any other methods to bribe others in order to sell or purchase commodities.</li> <li>• Offering or accepting a secret off-the-books rebate.</li> </ul>	<ul style="list-style-type: none"> <li>• Obtaining economic benefits for a company, a department, or an individual in the course of or through public service.</li> <li>• Not having payments of economic benefits accurately recorded in contracts and accounting books.</li> </ul>	<ul style="list-style-type: none"> <li>• Using money, property, or any other methods to bribe a counterparty in a transaction or a third party that may affect the transaction.</li> <li>• Accepting bribes by a counterparty in a transaction or a third party that may affect the transaction.</li> </ul>	<p>Using money, property, or any other methods to bribe any of the following entities or individuals to seek a transaction opportunity or a competitive advantage:</p> <ul style="list-style-type: none"> <li>• Staff members of transaction counterparties;</li> <li>• Entities or individuals entrusted by transaction counterparties with the handling of relevant affairs;</li> </ul>

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	<b>Existing AUCL (Arts. 8 &amp; 22)</b>	<b>First Draft Amendments (Arts. 7, 20 &amp; 28)</b>	<b>Revised Draft Amendments (Arts. 7 &amp; 22)</b>	<b>New Draft Amendments (Arts. 7 &amp; 19)</b>
		<ul style="list-style-type: none"> <li>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.</li> </ul>		<ul style="list-style-type: none"> <li>State organs, state-owned companies and enterprises, public institutions or people's groups, or state functionaries; or</li> <li>Any other entities or individuals that may take advantage of the positions of state functionaries to influence transactions.</li> </ul>
<b>Safe Harbor</b>	Providing and accepting "express" discounts and intermediary commissions are allowed, provided that they are truthfully recorded.	N/A	Providing and accepting "express" discounts and intermediary commissions are allowed, provided that they are truthfully recorded.	Providing and accepting "express" discounts and intermediary commissions are allowed, provided that they are truthfully recorded.
<b>Vicarious Liability</b>	N/A	An employee's procurement of a transaction opportunity or a competitive advantage is attributable to the business operator, unless the employee's acceptance of the bribe was contrary to the employer's interest.	An employee's procurement of a transaction opportunity or a competitive advantage is attributable to the business operator, unless the business operator can prove that it was the employee's personal conduct.	An employee's bribery practices are attributable to the business operator, unless the business operator can prove that the employee's acts were irrelevant to seeking transaction opportunities or competitive advantages for the business operator.
<b>Penalties</b>	<ul style="list-style-type: none"> <li>Administrative fine of RMB 10,000 (approx. USD 1,506) to RMB 200,000 (approx. USD 30,128).</li> <li>Confiscation of illegal income.</li> </ul>	<ul style="list-style-type: none"> <li>Order to cease illegal conduct.</li> <li>Administrative fine of 10% to 30 % of the revenue attributable to the bribery conduct.</li> </ul>	<ul style="list-style-type: none"> <li>Order to cease illegal conduct.</li> <li>Administrative fine of 10% to 30 % of the revenue attributable to the bribery conduct.</li> <li>In serious circumstances, revocation of business license.</li> </ul>	<ul style="list-style-type: none"> <li>Administrative fine of RMB 10,000 (USD 1,506) to RMB 3,000,000 (USD 452,038) .</li> <li>Confiscation of illegal income.</li> <li>In serious circumstances, revocation of business license.</li> </ul>

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## Targeted Tips: Asset Managers

This month we commence a series aimed at bringing practical advice tailored to specific industries. Our first set of “targeted tips” is for asset managers.

Over the past two years, FCPA enforcement focus on the financial services industry has increased. The SEC conducted an industry sweep of how asset managers interact with sovereign wealth funds, and both the SEC and the DOJ took action against financial services firms for conduct ranging from bribe schemes in Africa to internships in China. Given recently published reports that the U.S. government is investigating potential corruption at Malaysia’s state investment fund 1MDB, it seems likely that U.S. enforcement authorities will continue focusing on financial services firms. Now is a good time for investment advisers to take a look at how they are managing their anti-corruption risks.

Prudent compliance steps would include the following:

- **Make sure your compliance policy is up to date.** If you haven’t looked at your anti-corruption policy with an eye towards the recent enforcement actions, now is the time. Pay particular attention to your use of introducers, placement agents, and other third parties. Make sure that you have a mechanism in place to track third party usage and ensure that third parties are subject to appropriate risk-based due diligence and are effectively monitored.
- **Broaden the definition of “anything of value.”** Non-cash benefits, such as gifts, travel, and entertainment expenses, must be reasonable and related to legitimate business purposes. For internships (even unpaid) or other offers of employment, make sure that all candidates go through your normal hiring process and are qualified for your program under their own merits.
- **Conduct your pre-acquisition due diligence.** When considering an investment, assessment of anti-corruption risks is an important part of a firm’s pre-acquisition due diligence. To the extent possible, make sure that the deal team has the information needed to accurately evaluate the relevant risks. Focus not just on what the company’s current business model is, but what risks are presented by their future expansion plans. Thorough pre-acquisition assessments of portfolio companies, joint venture opportunities, and other investments will help accurately price a target, plan post-acquisition integration, and reduce the risk of both successor and prospective liability.

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- **Regular risk assessments are key.** A periodic review of your entire portfolio can help you determine your overall exposure to corruption risk and identify portfolio companies and other investments that should be flagged for additional follow-up. The longer your investment horizon, the more important it is to check on your portfolio companies. As a company's business model changes, its anti-corruption risk will change as well. Pay particular attention to companies where the deal team believes that growth prospects will come from emerging markets.
- **Get help in difficult situations.** Experienced counsel can help you determine the right approach to managing FCPA and other anti-corruption risk.

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## Russia Considers Enhanced Whistleblower Protections

Effective anti-corruption compliance programs include protections for whistleblowers who raise corruption concerns. Article 13.3 of Russia's 2008 Federal Law No. 273- FZ on Counteracting Corruption (the "Anti-Corruption Law") addressed Russian lawmakers' expectations regarding effective compliance programs.<sup>1</sup> But the law was silent on whistleblower protections. Recently proposed legislation in Russia may help address this gap.

Even before the Anti-Corruption Law came into effect, Russian law included several provisions that could be interpreted to provide some protection for whistleblowers. For example, Russian employment law prohibits discrimination and sets out an exhaustive list of permissible grounds for dismissing an employee for cause; firing an employee for blowing the whistle on potential corruption is not among them. As a result, firing an employee for whistleblowing could run afoul of Russian employment law. In addition, the Russian government can protect individuals whose security might be threatened as a result of their participation in criminal proceedings that involve alleged corruption. The state might, for example, provide such witnesses with physical protection, relocate them, or even give them new identities.

These legal protections, however, were not specifically tailored to corruption-related offenses and did not address certain key issues. In particular, Russian law does not protect a whistleblower's identity; there is, therefore, no assurance of anonymity for those willing to report potential corruption. The absence of such protections dramatically increases the risk of retaliation by those whose misdeeds are reported and others.

In 2013, the Ministry of Labor and Social Protection of the Russian Federation (the "Ministry of Labor") recognized this shortcoming.<sup>2</sup> The Ministry of Labor identified the importance of establishing a whistleblower hotline and procedures designed to protect whistleblowers from formal and informal sanctions.

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1. For more details, see Paul R. Berger, Dmitry V. Nikiforov, Bruce E. Yannett, Jane Shvets, and Anna V. Maximenko, "Anticorruption Compliance Programs under Russian Law: Article 13.3 and the FCPA/UKBA Experience," FCPA Update, Vol. 4, No. 9 (Apr. 2013), [https://www.debevoise.com/~media/files/insights/publications/2013/04/fcpa%20update/files/view%20the%20update/fileattachment/fcpa\\_update\\_apr\\_2013\\_proof\\_3.pdf](https://www.debevoise.com/~media/files/insights/publications/2013/04/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_apr_2013_proof_3.pdf).
  2. For more details, see Dmitri Nikiforov, Bruce E. Yannett, Anna V. Maximenko, and Jane Shvets, "Russia Issues Detailed Recommendations on Compliance with Russian Anti-Corruption Law," FCPA Update, Vol. 5, No. 5 (Dec. 2013), [https://www.debevoise.com/~media/files/insights/publications/2013/12/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa\\_update\\_dec2013.pdf](https://www.debevoise.com/~media/files/insights/publications/2013/12/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_dec2013.pdf).

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Soon thereafter, the Russian President, in National Anticorruption Plan for 2014-2015, instructed the government to develop a legal framework for protecting whistleblowers from prosecution by officials whose actions they reported. In 2015, the Ministry of Labor drafted a bill,<sup>3</sup> but it did not advance through the legislative process for more than two years.

The Russian government recently resumed its consideration of legislation to protect whistleblowers. In October 2017, the government introduced in the State Duma amendments to the Anti-Corruption Law that would provide state protection to certain persons who inform their employers or state authorities of corruption-related crimes.<sup>4</sup> As drafted, this protection extends to state or municipal officials or employees who allege criminal violations by their employers or state authorities.

In addition to the already-existing protections in criminal proceedings and certain protections in employment relations, the contemplated state protections include the following:

- **Confidentiality:** Information on the whistleblower and the data included in a whistleblower notification are to remain confidential, and cannot be disclosed by the employer, its officials, state authorities, persons rendering legal assistance on a pro bono basis, or attorneys. The whistleblower's personal data can be disclosed only upon his or her consent.
- **Legal assistance on pro bono basis:** Whistleblowers are entitled to pro bono legal assistance to help prepare the reporting of a corruption offense and in connection with any claim of mistreatment resulting from such reporting.
- **Guarantees against mistreatment:** An employer can only take adverse employment action against a whistleblower – e.g., termination, imposition of disciplinary penalties, or transfer to another position – after approval by an ethics and conflict-of-interest commission or similar authority. A state prosecutor must be invited to attend the meetings of such authority. This guarantee is effective for two years from the date of the reporting of the corruption offense. The employee may be terminated earlier only if the information provided in the whistleblower's report is determined to be unfounded in an internal investigation conducted by the employer.

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3. See <http://rosmintrud.ru/labour/public-service/102?wb48617274=A0C926D5>.

4. Information on the bill is available at <http://sozd.parlament.gov.ru/bill/286313-7>.

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The proposed bill leaves room for interpretation. For example, the mechanism of involving an ethics and conflict-of-interest commission or similar authority in employment-related decisions related to a whistleblower is intended to apply to both state and private employers, but it is not clear whether the already-existing authorities of private employers will qualify as “similar authorities” and be able to participate in such decisions. This issue may be further clarified during the next readings of the bill in the State Duma. If the bill is adopted by the State Duma, it will require approval of the Council of Federation and signature of the President to become a law.

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