

China Releases New Judicial Interpretation on Offering Bribes

On 26 December 2012, the Supreme People's Court ("**SPC**") and the Supreme People's Procuratorate ("**SPP**") jointly promulgated the *Interpretation of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery* (the "**Interpretation**") which took effect on January 1, 2013. The Interpretation primarily concerns bribes offered by individuals to government officials under Article 389 and 390 of the Criminal Law.¹

Threshold of Prosecution under the Interpretation

Article 1 of the Interpretation specifies that the criminal threshold for investigation of individuals for bribery remains at RMB 10,000, as it has been since an interpretation issued in 1999 by the SPP.² It is unclear from the new interpretation's sole mention of the monetary threshold, however, whether the additional triggers set forth in the 1999 Interpretation remain effective, where the dollar-amount threshold is not met.³

Key issues

- Threshold of Prosecution under the Interpretation
- Consideration for Penalties
- Leniency for Confession
- Inappropriate Benefits

Consideration for Penalties

Articles 2 to 4 of the Interpretation provide guidance in determining whether a bribe is considered a serious case, potentially triggering higher penalties. The determination turns on the definitions of "severe," "causing significant losses to the State," and "significantly severe" under Article 390 of the Criminal Law. For ease of reference, these are summarized in the below table.

¹ In accordance with Article 389 of the Criminal Law, bribing governmental officials with money or property in kind in return for inappropriate benefits constitutes a criminal offence. In addition to confiscation of property, Article 390 sets out three ranges of imprisonment as penalties based on the severity of the offence. Article 393 concerns bribery by entities, the criminal threshold for which was set at RMB 200,000.

² *Rules on the Standard for Filing Cases that are Directly Filed for Investigation to People's Procuratorate (Trial)*(the "**1999 Interpretation**") which is promulgated on 9 September 1999.

³ These circumstances are: (i) the bribe is paid to three or more government officials; (ii) the purpose of the bribe is to secure an illegitimate benefit; (iii) the bribe is paid to a Party or government leader, judicial official, or administrative law enforcement official; or (iv) the bribe results in severe damage to national or social interest.

| | Non-severe | Severe | Causing significant losses to the State | Significantly severe |
|---|--|--|---|---|
| Solely based on value of the bribe (RMB) | 10,000-200,000 | 200,000-1,000,000 | N/A | Above 1,000,000 |
| Other circumstances | (i) the bribe is paid to three or more government officials; (ii) the purpose of the bribe is to secure an illegitimate benefit; (iii) the bribe is paid to a Party or government leader, judicial official, or administrative law enforcement official; or (iv) the bribe results in severe damage to national or public interest. | The value of the bribe is between RMB 100,000-200,000 and one of the circumstances under Article 2 of the Interpretation is present. ⁴ | The bribe causes direct economic loss to the State of more than RMB 1,000,000 | The value of the bribe is between RMB 500,000-1,000,000 and one of the circumstances under Article 4 of the Interpretation (the same as those under Article 2) is present; or the bribe causes direct economic loss to the State of more than RMB 5,000,000 |
| Penalties | Detention up to six months to imprisonment for no more than 5 years | Imprisonment for 5 to 10 years | Imprisonment for 5 to 10 years | Imprisonment for 10 years to life and confiscation of property |

It is notable that the circumstance of causing damage to the public interest through bribery focuses on bribes to officials responsible for food, drugs, product safety, and environmental protection, thereby indicating the priority placed on protecting the public's health and safety.

Leniency for Confession

The interpretation sets forth several incentives for confession. For example, a bribe payer's pre-prosecution confession that leads to the discovery of other crimes committed by the recipient of the bribe **may** be rewarded with a reduction in or even exemption from penalties. Mitigation or exemption from penalties based on confession is possible for both entities and individuals (Article 7). A post-prosecution confession may also result in lighter penalties within the applicable spectrum. If the confession also prevents a significantly severe consequence, the penalty may be reduced (Article 8). Given this leniency, companies may consider whether to confess to bribery prior to prosecution or encourage their employees to do so, especially when prosecution seems imminent.

⁴ Article 2 circumstances are (i) the bribe is paid to more than three government officials; (ii) the bribe is paid from illegal income; (iii) the bribes is offered to officials responsible for food, drugs, product safety, and environmental protection to induce crimes that would seriously harm public interest and endanger life and property; or (iv) the bribe is offered to officials in administrative enforcement or judicial departments, which would affect justice.

Inappropriate Benefits

The definition of inappropriate benefits is similar to that provided under another SPC interpretation of commercial bribery issued in 2008.⁵ It also includes "*competitive advantage obtained through unfair measures in economic activities.*" Therefore, bribes paid to government officials for obtaining an unfair competitive advantage may also fall under Article 389 of the Criminal Law.

Inappropriate monetary benefits shall be confiscated, ordered to be refunded or returned to the victim. Non-monetary benefits, such as operating licenses or promotions, shall be dealt with by the relevant department in accordance with "applicable regulations," meaning perhaps suspension or cancellation of such benefits (Article 11). Therefore, in addition to fines and reputational damage, a company committing such a crime may also suffer significant additional economic loss as a result of conviction.

Contacts

Wendy Wysong

Partner

E: wendy.wysong@cliffordchance.com

Yu Bing

Senior Associate

E: bing.yu@cliffordchance.com

This briefing is designed to provide a general commentary on aspects of the subject matter covered. It does not purport to be comprehensive and it does not constitute legal advice. We expressly disclaim any liability in respect of the consequences resulting from acting or refraining from acting on the basis of any matter contained in this publication. All rights are reserved.

Clifford Chance, 28th Floor, Jardine House, One Connaught Place, Hong Kong

© Clifford Chance 2013

The above is based on our experience as international counsel representing clients in their business activities in China. As is the case for all international law firms licensed in China, we are authorized to provide information concerning the effect of the Chinese legal environment, however, we are not permitted to engage in Chinese legal affairs in the capacity of a domestic law firm. Should the services of such a firm be required, we would be glad to recommend one.

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.

⁵ An inappropriate benefit refers to a benefit that is in violation of relevant laws or regulations, or any assistance or facilitation provided by government officials in violation of relevant laws or regulations.

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Application of Law for the Handling of Criminal Cases of Bribery.

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery (the "**Interpretation**"), adopted at the 1547th meeting of the Judicial Committee of the Supreme People's Court on 14 May 2012 and the 77th meeting of the Eleventh Procuratorial Committee of the Supreme People's Procuratorate on 21 August 2012, is hereby promulgated and shall be implemented as from 1 January 2013.

Supreme People's Court
Supreme People's Procuratorate
26 December 2012

Fa Shi [2012] No. 22

Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Application of Law for the Handling of Criminal Cases of Bribery

(Adopted at the 1547th meeting of the Judicial Committee of the Supreme People's Court on 14 May 2012 and the 77th meeting of the Eleventh Procuratorial Committee of the Supreme People's Procuratorate on 21 August 2012)

To penalize the criminal act of giving a bribe, the application of relevant provisions of the Criminal Law for criminal bribery cases are interpreted as follows:

Article 1 Anyone who, for the purpose of seeking improper benefits, gives a bribe of more than RMB10,000 to a government official shall be subject to criminal investigation and prosecution in accordance with Article 390 of the Criminal Law.

Article 2 An act of giving a bribe for the purpose of seeking improper benefits shall be considered "severe" in Paragraph 1 of Article 390 of the Criminal Law if the bribe meets one of the following conditions:

1. the value of the bribe is more than RMB 200,000 but less than RMB1,000,000; or
2. the value of the bribe is more than RMB100,000 but less than RMB200,000 and the act of bribery meets one of the following conditions:
 - (i) the bribe is paid to more than three persons;
 - (ii) the bribe is made with a form of illegal income;
 - (iii) the bribe is to a government official responsible for the supervision of food, drug, product safety, or environmental protection; and is meant to induce a criminal act which may cause serious harm to the social welfare such as the endangerment of public safety or public property; or

2 Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Application of Law for the Handling of Criminal Cases of Bribery

(iv) the bribe is to an official belonging to the administrative enforcement or judicial departments, and may affect or influence acts of carrying out administrative enforcement or judiciary fairness.

3. other factors which may be considered serious circumstances.

Article 3 An act of giving a bribe for the purpose of seeking improper benefits that causes a direct economic loss of more than RMB 1,000,000 shall constitute a circumstance of "causing significant loss to the State" in Paragraph 1, Article 390 of the Criminal Law.

Article 4 An act of giving a bribe for the purpose of seeking improper benefits shall be considered "significantly severe" in Paragraph 1, Article 390 of the Criminal Law if the bribe meets one of the following conditions:

1. the value of the bribe is more than RMB1,000,000; or
2. the value of the bribe is more than RMB 500,000 but less than RMB1,000,000 and the act of bribery meets one of the following conditions:
 - (i) the bribe is paid to more than three persons;
 - (ii) the bribe is made with a form of illegal income;
 - (iii) the bribe is to a government official responsible for the supervision of food, drug, product safety, or environmental protection; and is meant to induce a criminal act which may cause serious harm to the social welfare such as the endangerment of public safety or public property ; or
 - (iv) the bribe is to an official belonging to the administrative enforcement or judicial departments, and may affect or influence acts of carrying out administrative enforcement or judiciary fairness.
3. the bribe causes a direct economic loss of more than RMB5,000,000 to the State; or
4. other factors which may be considered significantly severe.

Article 5 Multiple counts of bribery that have not yet been prosecuted shall be punished according to the cumulative amount of the bribes.

Article 6 If a briber, when seeking improper benefits, also commits a criminal act, the briber shall be punished for the crime of bribery concurrently with the associated crime.

Article 7 A briber shall not be awarded for a "meritorious act" under Article 68 of the Criminal Law when his/her voluntary confession, before the prosecution of his crime of bribery, leads to successful discovery of the corresponding crime of receiving the bribe. Instead the briber may be granted a reduced or exempted punishment in accordance with Paragraph 2, Article 390 of the Criminal Law.

If the briber is an entity, and the entity or the responsible person for the entity initiates a confession before being prosecuted, the entity and the responsible person may be allowed a reduced or exempted punishment in accordance with Paragraph 2 of Article 390 of the Criminal Law. A person entrusted to give a bribe for an entity, who on his own initiative confesses his knowledge of the acts of bribery by the entity, may be allowed a reduced or exempted punishment in accordance with Paragraph 2 of Article 390 of the Criminal Law.

Article 8 A briber who has been prosecuted and confesses truthfully to his or her crimes may be sentenced with lighter penalties from within the applicable spectrum in accordance with Paragraph 3, Article 67 of the Criminal Law; where the confession of the briber prevents his crime from having significantly serious consequences, the briber can be given a reduced punishment.

Article 9 A briber that exposes other criminal activities of the bribe recipient which are unrelated to his/her bribe and which are verified to be true, may be allowed a reduced or exempted punishment in accordance with the award for a "meritorious act" under Article 68 of the Criminal Law.

Article 10 In general, the punishment for bribery cannot be suspended or exempted if the offence has one of the following conditions:

- (i) the offender bribed more than three persons;
- (ii) the offender has previously been subject to an administrative or criminal punishment for bribery;
- (iii) the bribery was for the purpose of inducing a criminal act;
- (iv) the bribe resulted in a serious harm; or
- (v) the offence falls under other circumstances where suspension of sentence or exemption from criminal punishment shall not apply.

An act of giving a bribe that falls into the circumstances set out in Paragraph 2, Article 390 of the Criminal Law shall not be limited by the preceding paragraph.

Article 11 Any property improperly obtained from bribery shall be confiscated and ordered to be paid back or returned to the victim, in accordance with Article 64 of the Criminal Law.

Any non-property benefits improperly obtained from bribery, such as operating licenses, qualifications, or promotions, shall be rescinded or revoked by the relevant department in accordance with relevant regulations.

Article 12 "Seeking improper benefits" through the crime of giving a bribe shall mean that the benefits sought are obtained in violation of laws, regulations, rules or policies, or that the briber requests a government official to give assistance or facilitation in violation of applicable laws, regulations, rules, policies or professional standards.

Any act for the purpose of seeking a competitive edge against the principle of fairness and justice in economic activities or personnel management activities shall be determined to be "seeking improper benefits".

Article 13 "Before or prior to prosecution" is defined in Paragraph 2, Article 390 of the Criminal Law, and refers to the period prior to the date when the procuratorial authority files a criminal case against the briber for his acts of bribery.

This briefing is designed to provide a general commentary on aspects of the subject matter covered. It does not purport to be comprehensive and it does not constitute legal advice. We expressly disclaim any liability in respect of the consequences resulting from acting or refraining from acting on the basis of any matter contained in this publication. All rights are reserved.

Clifford Chance, 33/F, China World Office 1, No. 1 Jianguomenwai Dajie,
Chaoyang District, Beijing 100004, People's Republic Of China
© Clifford Chance 2013

The above is based on our experience as international counsel representing clients in their business activities in China. As is the case for all international law firms licensed in China, we are authorized to provide information concerning the effect of the Chinese legal environment, however, we are not permitted to engage in Chinese legal affairs in the capacity of a domestic law firm. Should the services of such a firm be required, we would be glad to recommend one.

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.