

Grease, gift or graft? Boundaries of business courtesies in China

Anti-corruption compliance-minded companies understand the importance of linking an all-expenses paid trip to training and product demonstration, the use of logo-embossed knick-knacks to generate goodwill, and carefully verifying recipients of charitable donations to avoid issues with the Foreign Corrupt Practices Act (FCPA). But where does Chinese “Guanxi” fit in?

Many Chinese business relationships are backed by close personal relationships, sometimes referred to as “Guanxi” in Chinese. Building these networks of connections is critical for successfully doing business in China. But network access traditionally requires meals, entertainment, traditional gift-giving and, for some occasions, cash gifts before business even begins.

All of which leads to a question some companies aren’t quite sure how to answer: Is it grease, gift, graft or Guanxi?

Business courtesies in China are typically a grey area where international companies have to navigate between local business practices or expectations and the boundaries set out by the FCPA and the People’s Republic of China (PRC) anti-corruption laws. Failure to understand the distinction may land a company in the legion of companies operating in China now charged with bribery under these laws.

Boundaries under the FCPA

Within certain boundaries, the gifts so critical to building Guanxi – including cash, travel, and entertainment – are permitted under the FCPA. While lavish gifts provided to influence the recipient’s actions; to obtain, retain, or direct business to any person; or to otherwise secure an inappropriate advantage are prohibited, there are business courtesy exceptions that regulators recognise do not necessarily imply a corrupt intent.

“Grease payments” fall under the FCPA exception for “facilitating payments” if intended to “expedite or to secure the performance of a routine governmental action.” The term “routine governmental action” is defined as “an action which is ordinarily and commonly performed by a foreign official,” and includes, for example, obtaining permits, licences or other official documents. The facilitating payment must be intended to prompt an official to do what the official is otherwise bound to do, as opposed to a discretionary action such as a decision to award business or to continue business with a company. There is no de minimis exception.

Key issues

- Traditional Chinese business courtesies could fall foul of both US and China anti-corruption regimes
- Reasonable and bona fide expenditure should not cause problems but businesses need to be aware of the current interpretations by the US authorities
- China's AUCL regime may also prohibit many gift-giving traditions
- Thresholds for criminal bribery under the AUCL are low

The FCPA also recognises an affirmative defence for “reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official directly related to” either “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”

Subject to a strict assessment of the actual circumstances surrounding it, this exception may apply, for instance, to the provision of reasonable travel and meals to employees of a commercial State-owned entity in the course of negotiating a deal. But US authorities have taken a rather narrow view as to whether expense reimbursements or outlays are “reasonable and bona fide” and “directly related” to the “promotional” activities.

Regulators will infer corrupt intent if a gift to a public official is likely to have an influence on the business of the gift giver, in particular when the gift giver eventually obtains a favourable decision from the public official. The value and the total number of advantages provided to the public official, the nature of the relationship, the way it has been authorised within the organisation and recorded, would be examined by the regulators in order to determine if a corrupt intent could be inferred from such circumstances.

The US Department of Justice has provided some guidance as to what should qualify for the affirmative defence: modest travel conditions (economy class flights; standard business hotels); payments made directly to the service providers, not to the officials; and no expenses for family members. Gifts of a nominal value branded with the company’s logo are also likely to qualify as a promotional gift covered by the affirmative defence.

Boundaries under the PRC law

In China, the tradition of gift-giving is inevitable and even expected, especially on certain cultural occasions such as traditional festivals or celebrations. Contrary to what one may expect, these traditional business practices may also run foul of the PRC Anti-unfair Competition Law (AUCL) and the PRC’s criminal law.

Under the AUCL, commercial bribery is defined as business operators giving money or property or *inter alia*, granting secret or off-the-books kickbacks to sell or purchase goods and services.

Under the PRC criminal law, it is an offense for any individual or entity to offer to any State official or institution (including State-owned enterprises) “articles of property” to obtain “improper benefits”, or for any State official to solicit or accept “articles of property” to provide benefits, whether improper or not (which would be tantamount to public sector bribery).

It is also an offence for any individual or entity to offer non-State official of any State-owned entity, non-State owned enterprise or institution, “articles of property” of relatively high value to obtain improper benefits, or for any such member of staff to accept or solicit “articles of property” of relatively high value to provide benefits, whether improper or not (in this case, considered private sector bribery). Notably, since 1 May 2011, bribing foreign public officials or officials of international public organisations to obtain inappropriate commercial benefits is also a criminal offence.

“Articles of property” involve any form of advantages/benefits having a monetary value – for example, cash, stock, securities or in-kind gifts.

In 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* (2012 Interpretation), which defined "improper benefits" as including any act for the purpose of seeking a "competitive edge against the principle of fairness and justice in economic activities or personnel management activities".

De minimis exception?

There is no de minimis exception under the AUCL and there is no exception for facilitating payments. Whether a gift or small bribe is legal depends on the intention associated with the payment.

The Administration of Industry and Commerce (AIC) does investigate and may impose significant penalties for even small bribes. In one case, the local AIC branch in Jiangxi Province held a baby formula distributor liable for paying bribes to nurses for each newborn baby that is fed first with its brand of formula. The total bribe paid was RMB1,680, but the AIC confiscated profits of RMB18,000 and imposed a fine of RMB78,160.

In contrast, under the PRC Criminal Law, the SPP promulgated the *Rules on the Standard for Filing Cases that are Directly Filed for Investigation to People's Procuratorate (Trial)* (1999 Interpretation) which adopted value thresholds (considered in aggregate if there are multiple bribes) for criminal bribery:

- RMB5,000 (approx. US\$750) or above for an individual who accepts a bribe,
- RMB100,000 (approx. US\$15,000) or above for a state institution that accepts a bribe,
- RMB10,000 (approx. US\$1,500) or above for an individual offering a bribe and
- RMB200,000 (approx. US\$30,000) or above for an entity offering a bribe.

Under the 1999 Interpretation, bribery below the thresholds will only be considered criminal in specified circumstances – for example, bribes paid to three or more State officials or State-related institutions, or where the bribery causes severe damage to national/social interests. Accordingly, business courtesies below these thresholds should not give rise to prosecution absent such aggravating circumstances.

The threshold (RMB10,000) for criminalising an individual for offering a bribe is re-affirmed in the 2012 Interpretation. However, it is unclear from the 2012 Interpretation's sole mention of the monetary threshold whether the aggravating circumstances set out in the 1999 Interpretation remain effective.

Reasonable business expenditures

Although not expressly an affirmative defence, a reasonable and bona fide business expenditure, as described in the FCPA, is unlikely to trigger liability under the AUCL as long as it is supported by a genuine underlying transaction.

However, in practice, the frontier between a bona fide and reasonable business expenditure and a bribe is uncertain. Whether a particular expenditure is problematic depends not only on the type and value of the gift/entertainment offered, but also the circumstances under which it is provided (i.e., the nature of the parties' relationship and purpose of the gift). For example, a working lunch of a reasonable value following a business

meeting is unlikely to be regarded as a bribe, while inviting clients to a night club and ordering expensive wines for them is obviously more problematic.

Business gifts

The AUCL allows small-value promotional gifts in recognition of China's gift-giving culture. In practice, the focus should be on the purpose of the gift and its value. The seller's logo or any other advertisement information printed on the gift would normally justify the promotional purpose of the gift.

In addition, and with regard to commercial bribery, a 2008 opinion provides some guidance when determining whether a gift should be regarded as a bribe: the nature of the relationship between the parties (e.g., whether the parties are relatives or friends); the value of the gift; the context, timing and method in which the gift is provided; whether the gift provider requests any position-related favour in return; and whether any improper benefit is provided by the gift recipient by using the power or convenience derived from his/her position.

Commissions and discounts

In accordance with the AIC Regulation, explicitly agreed commissions or discounts are allowed as long as they are properly recorded on the books of both parties to the transaction. A typical discount clause should specifically describe the relation between the commission (its nature and its amount) and the service provided. Moreover, the recipient, the description and the categorisation of the payment should be consistent with the alleged purpose.

The recommended practice is therefore to:

- (i) conclude a written agreement specifying the scope and price of the service remunerated by a commission/discount;
- (ii) set out detailed anti-corruption clauses committing the parties to comply with the applicable local and international legislation in this respect;
- (iii) record properly these commissions in the books; and
- (iv) preserve any evidence that the services were actually provided.

Conclusion

Complying with the FCPA and the PRC anti-corruption law in a context where gift-giving is a common business practice, and where the Chinese government has broad ownership over commercial enterprises, requires constant diligence and strict compliance policies to avoid abuses.

A gift of mooncakes may be acceptable, but a cash gift in lieu of a truckload of mooncakes will not be acceptable under either country's laws.

Commissions and discounts must be agreed and recorded properly to avoid problems.

Contacts

Wendy Wysong

Partner

T: +852 2826 3460 (Hong Kong)
+1 202 290 7634 (Washington)
E: wendy.wysong@cliffordchance.com

Yu Bing

Counsel

T: +86 21 2320 7372
E: bing.yu@cliffordchance.com

Lei Shi

Registered Foreign Lawyer

T: +852 2826 3547
E: lei.shi@cliffordchance.com

Montse Ferrer

Registered Foreign Lawyer

T: +852 2826 3562
E: montse.ferrer@cliffordchance.com

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Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

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