

Recent Amendments to China's Bribery Laws Further Strengthen its Enforcement Powers

On 29 August 2015, the National People's Congress of China promulgated the 9th Amendment to the Criminal Law. Included in the amendment are changes to the bribery-related provisions to expand the criminal fines applicable to individuals, to criminalize the act of giving bribes to "influential persons," and to restrict the availability of penalty exemption as leniency for bribe-givers. These changes are consistent with China's anti-corruption crackdown and bring China's statutory enforcement authority amongst the world's strictest.

Criminal fines are applicable to a broader group of individual offenders

Prior to the 9th Amendment, criminal fines for giving bribes were primarily applicable to entity offenders, whilst those applicable to individual offenders were relatively limited. The 9th Amendment expanded the application of criminal monetary fines to the following four types of individual offenders:

1. any individual who commits the crime of giving bribes to anyone (non-government officials, government officials, "influential persons" or entities)
2. any individual who commits the crime of brokering bribery
3. any person-in-charge of an entity that commits the crime of giving bribes¹ and
4. any person who is directly responsible for bribery committed by an entity.²

¹ Prior to the 9th Amendment, the person-in-charge of the entity or any individual who is directly responsible for the crime could also be penalized together with the entity, but criminal fines would only be imposed on the individuals if the value of the bribe was "huge."

² Specifically, such changes were made to Article 164 (the crime of individuals bribing non-government officials), Article 390 (penalties for the crime of individuals bribing government officials), Article 391 (the crime of individuals bribing public entities), Article 392 (the crime of individuals brokering bribery to government officials) and Article 393 (the crime of entities bribing government officials).

As the calculation of criminal fines is not specifically set forth under the Criminal Law, local courts have wide discretion. Therefore, local Chinese courts may impose unpredictable and potentially very high criminal fines on individual bribe payers, especially to directors and senior managers of multinationals, following the historically and astronomically high amount of criminal fines imposed in the last year. It may further complicate any interaction with the authorities during an anti-bribery investigation since the new provision may lend more leverage to the authorities in negotiation.

Bribing “influential persons” is included in the crimes of bribing government officials

The 9th Amendment added a new provision to Article 390 (penalties for the crime of individual bribing government officials). While “influential persons” who receive bribes have been subject to prosecution since 2009, the 9th Amendment added a new provision to Article 390, targeting those who give bribes to a person who may exert influence on a current or former government official. Such “influential persons” include any close relative or any person who is closely associated with a current or former government official.

This amendment is an effort to further prevent government officials from receiving bribes through their “inner circle,” whether during or after their service in the government. Corporate compliance due diligence should broaden payee background checks to “red flag” not only current and former government officials, but also any of their close associates to prevent being caught for giving bribes to friends and families of government officials.

Leniency for bribe givers is greatly restricted

Prior to the 9th Amendment, bribe payers might be eligible for leniency in reduced or exempted penalties if they voluntarily confess their crime before being prosecuted.

Now, mere pre-prosecution confession may still lead to less serious penalties, but is insufficient alone to completely exempt the bribe payer from penalties. In addition to pre-prosecution confession, at least one of the following circumstances should exist in order to qualify the bribe payers to be exempted from penalties: (1) the offense is relatively minor, (2) the bribe payer has provided crucial information leading to a successful investigation of others in a significantly important case, or (3) the bribe payer otherwise makes significant contributions.

This provision tries to resolve a long-existing problem in practice that bribe payers were prosecuted or penalized far less harshly than were the bribe recipients. This disparity was based on an assumption that a bribe payer is often a reluctant participant in the bribery transaction, but in reality, bribe givers and payers are often interdependent on each other. To multinationals, this change means increased risks, as once a bribery case is escalated to criminal prosecution, it will be more difficult to escape criminal penalties.

Conclusion

The 9th Amendment provides further means of strengthening the enforcement of China's anti-bribery laws by expanding the targets and penalties available to punish those who violate those laws. Multinational companies should ensure that their due diligence and compliance programs rise to this new challenge.

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