

Amendments to China's Criminal Procedure Law May Impact Enforcement and Defense of Bribery and Corruption Cases in China

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Anti-corruption/FCPA

On March 14, 2012, China's National People's Congress ("NPC") enacted a set of amendments ("Amendments") to the PRC Criminal Procedure Law ("CPL").

The Amendments, which take effect January 1, 2013, number 111 in total and cover the following eight principal areas: due process, rules of evidence, coercive measures (such as warrants, detention, or residential surveillance), criminal defense, investigative measures, trial procedure, judicial enforcement, and special proceedings for juveniles or the mentally handicapped.

Several of the Amendments may impact the enforcement and prosecution of corruption and bribery cases in China, including allowing the retention of defense attorneys during the initial stages of investigation, explicitly allowing certain technological means (such as wiretapping and hidden cameras) for investigation of bribery and corruption cases, and permitting the confiscation of illegal gains from criminal suspects who have died or fled the country. Other potentially relevant provisions include providing suspects with modest protections against self-incrimination and excluding certain types of illegally obtained evidence.

Background and Significance

The CPL was adopted in 1979 and amended previously by the NPC in 1996. The NPC Standing Committee began the legislative process for amending the CPL again in 2009, publishing a draft set of amendments for public comment on August 30, 2011. These draft amendments garnered significant attention from scholars, lawyers, and other professionals in China and abroad, particularly in the wake of several high-profile detentions in China. Following a public comment period, the NPC Standing Committee further revised the amendments before final passage on March 15, 2012.

Notable Provisions in the Amendments Potentially Affecting Enforcement and Defense of Bribery and Corruption Cases

Several of the Amendments may affect enforcement and defense of cases involving corruption and bribery in China:

1. ***Defense attorneys may represent suspects during the investigation phase, and attorneys are granted more rights in their defense.***ⁱ The Amendments now permit suspects to retain a defense lawyer following the first questioning of the criminal suspect or after compulsory measures (such as the issuance of a warrant, detention, or residential surveillance) have been used against him. The Amendments provide that a defense attorney may, from the start of the investigation, provide legal advice to a criminal suspect, interview and correspond with the suspect, file petitions on their behalf, and find out the exact crimes the suspect is charged with along with other information regarding the case. Previously, a suspect could not retain a defense attorney until the prosecutorial stage had begun (following the filing of formal charges with the court). Pre-approval for attorney meetings with clients will still be required, however, for an individual is suspected of crimes endangering State security, terrorism, or for “particularly serious bribery crimes,” though this term is not defined.
2. ***The Amendments explicitly allow the use of technological means for the investigation of the crimes of embezzlement, bribery, or for serious crimes carried out by State actors, and for crimes endangering society carried out by individuals. Undercover investigation is now officially sanctioned.***ⁱⁱ The Amendments permit the people’s procuratorate (the principal PRC investigative and prosecutorial body) to employ technological surveillance methods (e.g., wiretapping, hidden cameras, and other methods) to gather evidence for serious crimes of embezzlement, bribery, serious crimes carried out by State actors, and for crimes endangering society carried out by individuals. Technical surveillance also is permitted for public security organs to investigate crimes that endanger State security, or involve terrorist activities, organized crime, drugs, or other crimes seriously endangering society. Undercover investigations also may be carried out so long as the undercover agent does not induce another to commit a crime, endanger public security, or seriously threaten another’s personal safety.

While we understand both technological and undercover investigations have long been a part of China’s public security apparatus, their inclusion in the CPL formally brings them within an existing legal framework to reflect significant technological changes since the CPL was last amended in 1996. The Deputy Procurator-General of the Supreme People’s Procuratorate has announced that a specific regulation concerning investigations using technological means will be released shortly. In addition, “electronic data,” the type of evidence that often arises in such investigations, has now been added to the types of evidence admissible in a criminal proceeding.ⁱⁱⁱ

3. ***The Amendments provide for detention of suspects in China accused of crimes related to of terrorism, national security, or particularly serious bribery crimes.***^{iv} The “residential surveillance” provisions in the pre-existing CPL allowed detention of criminal suspects at their residence for a period not to exceed six months. As modified in the Amendments, a suspect may now also be detained at a “designated residence” (i.e., a non-public facility) if the suspect has no residence, or if suspected of involvement in crimes endangering state security, terrorism, or “particularly serious bribery activities.” This is generally viewed as explicitly legalizing an existing practice by enforcement officials and has received significant criticism from commentators and the public. Similar to the requirement in the preexisting CPL, the family of those detained in a designated residence must be informed of the reason and place for the detention within 24 hours, unless they are unavailable or the crimes involve State security, and notification might obstruct the investigation, in which case no notification is necessary.

4. ***The Amendments allow for the confiscation of illegally obtained money from terrorists and corrupt officials who have escaped or died.***^v The Amendments outline a procedure for confiscation of funds held by escaped or deceased suspects or defendants in corruption, bribery, and terrorism cases. Where a public security organ believes that such funds exist, they may submit a written notification to the people's procuratorate, and the case will be heard by a judicial panel formed by the intermediate people's court of the place where the crime was committed or where the residence of the suspect or defendant is located. Commentators have observed that this procedure aims to harmonize China's CPL with similar provisions in the [United Nations Convention Against Corruption](#).
5. ***The scope of perjury is extended to cover all parties and not just attorneys.***^{vi} The previous version of the CPL provided that "defense attorneys and any other defenders [i.e., persons acting in a similar capacity]" may not help the suspect to conceal, destroy or falsify evidence, to intimidate or induce witnesses to modify their testimony, or conduct any other acts which would interfere with judicial proceedings. The Amendments modify this language to extend the provision to "defense attorneys and *all other people*" (emphasis added).

For a company whose employee has been detained or arrested, this would appear to mean that evidence that is potentially relevant to the investigation should be handled in a way to allow ongoing access by government authorities.

6. ***The Amendments provide modest protections against self-incrimination.***^{vii} The Amendments add a provision that "no suspect shall be forced to provide evidence proving his/her own guilt." This provision is added to the preexisting CPL article prohibiting judges, procurators, and investigators from extorting confession from torture and other illegal means. This amendment may provide some limited protections for criminal suspects, including corruption and bribery suspects, from extorted confessions. However, Article 93 of the CPL as amended also contains a provision requiring criminal suspects to "answer the investigators' questions truthfully," and it is currently unsettled how these two conflicting provisions will be reconciled.
7. ***The Amendments introduce certain exclusionary rules for illegally obtained evidence.***^{viii} The Amendments provide that evidence and confessions collected through torture, violence, threats, or other unlawful means shall be excluded and may not serve as the basis for prosecution or judgment. Procuratorates are instructed to investigate allegations of evidence being collected illegally, and interrogators suspected of collecting confessions or evidence through illegal methods will be prosecuted as criminals.
8. ***The Amendments introduce a "reasonable doubt" component into the "reliable and sufficient" standard necessary for a guilty verdict.***^{ix} Previously, a suspect could be found guilty if the evidence was "reliable and sufficient" to establish culpability. The Amendments clarify that evidence for a guilty verdict is "reliable and sufficient" when it meets three criteria: "(1) evidence exists for each fact needed to determine guilt and sentencing; (2) the evidence being used for deciding a case has been verified in accordance with legal procedures; and (3) based on an overall evaluation of the evidence, all facts are proven beyond a reasonable doubt." This inclusion of a "reasonable doubt" standard has been hailed by some Chinese scholars and lawyers for significantly strengthening evidence law and the rights of the accused to a fair trial.

9. **The Amendments allow the suspect’s direct relatives to decline to give court testimony.**^x Under the preexisting CPL, if a family member of a suspect declined to testify against the suspect, a risk existed that the family member could be convicted of the crime of shielding an offender. The Amendments, while requiring *non*-family witnesses to testify in court, specifically exclude the spouse, parents, and children of a suspect from being compelled to give such testimony. However, this protection applies only to court testimony and would not extend to questioning undertaken during the investigation phase.

Principal Differences between the Preexisting CPL and the CPL as Amended

The chart below compares the main differences between the preexisting CPL and the CPL as amended.

Para. Above	Preexisting CPL	CPL as Amended
1	<p>“A criminal suspect in a case of public prosecution shall have the right to entrust persons as his defenders from the date on which the case is transferred for examination before prosecution. A defendant in a case of private prosecution shall have the right to entrust persons as his defenders at any time.</p> <p>“A people’s procuratorate shall, within three days from the date of receiving the file record of a case transferred for examination before prosecution, inform the criminal suspect that he has the right to entrust persons as his defenders. A people’s court shall, within three days from the date of accepting a case of private prosecution, inform the defendant that he has the right to entrust persons as his defenders.”</p> <p>(Preexisting CPL, Art. 33)</p>	<p>“A criminal suspect shall have the right to appoint a defender as of the date on which the suspect is first interrogated by the investigating authority or is subject to compulsory measures. During the investigation period, he may appoint only an attorney as his defender. A defendant has the right to appoint a defender at any time.”</p> <p>“When the investigating authority first interrogates a criminal suspect or subjects a criminal suspect to compulsory measures, the criminal suspect should be informed of the right to appoint a defender. The people’s procuratorate should notify the criminal suspect of the right to appoint a defender within three days of receiving case materials transferred for review and prosecution. The people’s court should notify the defendant of the right to appoint a defender within three days of accepting the case. . . .”</p> <p>(Art. 5 of the Amendments; CPL as amended, Art. 33)</p>
1	(none)	<p>"During the investigation period, a defense attorney may provide legal assistance to the criminal suspect, make a complaint or accusations on the suspect’s behalf, apply for the alteration of compulsory measures; and find out from the investigating authority about the crimes suspected of and relevant information about the case and offer opinions."</p>

Para. Above	Preexisting CPL	CPL as Amended
		(Art. 8 of the Amendments; CPL as amended, Art. 36)
1	<p>“Defense lawyers may, from the date on which the people’s procuratorate begins to examine a case for prosecution, consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material, and may meet and correspond with the criminal suspect in custody. Other defenders, with permission of the people’s procuratorate, may also consult, extract and duplicate the above-mentioned material, meet and correspond with the criminal suspect in custody.</p> <p>Defense lawyers may, from the date on which the people’s court accepts a case, consult, extract and duplicate the material of the facts of the crime accused in the current case, and may meet and correspond with the defendant in custody. Other defenders, with permission of the people’s court, may also consult, extract and duplicate the above-mentioned material, and may meet and correspond with the defendant in custody.”</p> <p>(Preexisting CPL, Art. 36)</p>	<p>“Defense lawyers may meet and correspond with a criminal suspect or defendant in custody. Other defenders, with the permission of the people’s court and people’s procuratorate, may also meet and correspond with a criminal suspect or defendant in custody.”</p> <p>“Where a defense lawyer holding a lawyer’s practice license, the certification documents and letter of authorization from his/her law firm, or a legal aid document, requests to meet a criminal suspect or defendant in custody, the detention facility shall arrange their meeting in a timely manner, not to exceed 48 hours.</p> <p>“During the investigation period for crimes of endangering State security, involving terrorist activities, or involving particularly serious bribery crimes, defense lawyers shall obtain the approval of investigating organs before they meet with the criminal suspects. The investigating organs shall first notify the detention facilities of information relating to the aforesaid cases.”</p> <p>“Defense lawyers shall have the right to enquire about the case and provide legal advice when they interview the criminal suspect or defendant in custody and may, from the date on which the case is transferred for examination before prosecution, talk to the criminal suspect or defendant to verify relevant evidence. The conversation between the defense lawyer and the criminal suspect or defendant shall not be monitored.</p> <p>(Art. 9 of the Amendments; CPL as amended, Art. 37)</p>
2	(none)	<p>“Section 8: Technical Investigation Measures”</p> <p>“After the public security authority has filed a case, it may, insofar as required for investigating</p>

Para. Above	Preexisting CPL	CPL as Amended
		<p>a crime and after passing through strict approval procedures, employ technical measures to investigate cases involving crimes endangering state security, crimes of terrorism, organized crimes with characters of the underworld, major drug-related crimes, or other crimes that pose a serious threat to society.”</p> <p>“After a people’s procuratorate has filed a case, it may, insofar as required for investigating a crime and after passing through strict approval procedures, employ technical measures to investigate serious cases involving crimes of corruption and bribery or serious crimes where the abuse of power seriously violates the personal rights of citizens, and have such measures carried out by relevant authorities.”</p> <p>(Art. 57 of Amendments; CPL as amended, Art. 148-152)</p>
2	<p>“All facts that prove the true circumstances of a case shall be evidence. There shall be the following seven categories of evidence . . . (7) Audio-visual materials.</p> <p>Any of the above evidence must be verified before it can be used as the basis for deciding cases.”</p> <p>(Preexisting CPL, Art. 42)</p>	<p>“. . . (7) Audio-visual materials, electronic data”</p> <p>(Art. 13 of Amendments; CPL as amended, Art. 48)</p>
3	(none)	<p>Residential surveillance shall be enforced at the domicile of the suspect or defendant. Where there is no permanent domicile, surveillance may be enforced at a designated place of residence. Where there is suspicion of crimes of endangering state security, crimes of terrorism, or particularly serious crimes of bribery, and residential surveillance at the domicile may impede the investigation, residential surveillance may, upon approval by the next higher people’s procuratorate or public security authority, be enforced at a designated place of residence. However, residential surveillance may not be</p>

Para. Above	Preexisting CPL	CPL as Amended
		<p>enforced at a detention facility or an investigation facility.</p> <p>Where residential surveillance is enforced at a designated place of residence, the family members of the person under surveillance should be informed within 24 hours upon enforcement, unless it is impossible to furnish a notice.”</p> <p>(Art. 24 of Amendments; CPL as amended, Art. 73)</p>
4	(none)	<p>“In cases of crimes of corruption and bribery, terrorism and other serious crimes, where the suspect or defendant has absconded and fails to appear in court one year after an arrest warrant has been issued, or where the suspect or defendant is dead, and the illegal earnings or other assets of the suspect or the defendant related to the case should be recovered pursuant to the provisions of the Criminal Law, the people’s procuratorate may apply to a people’s court for confiscation of such illegal earnings.”</p> <p>(Art. 109 of Amendments; CPL as amended Arts. 280-283)</p>
5	<p>“Defense lawyers and other defenders shall not help a criminal suspect or defendant conceal, destroy, or falsify evidence or give a colluded statement, and shall not intimidate or induce witnesses to modify their testimony or give false testimony or conduct other acts to interfere with the proceedings of the judicial organs.”</p> <p>(Preexisting CPL, Art.38)</p>	<p>“Defense lawyers and any other person shall not help a criminal suspect or defendant conceal, destroy, or falsify evidence or give a colluded statement”</p> <p>(Art. 11 of Amendment; CPL as amended, Art. 42)</p>
6	<p>“. . . It shall be strictly forbidden to extort confessions by torture and to collect evidence by other unlawful means. Conditions must be guaranteed for all citizens”</p> <p>(Preexisting CPL, Art. 43)</p>	<p>“. . . It shall be strictly forbidden to extort confessions by torture and to collect evidence by other unlawful means. No one shall be forced to provide evidence proving his/her own guilt. Conditions must be guaranteed for all citizens”</p>

Para. Above	Preexisting CPL	CPL as Amended
		(Art. 15 of Amendments; CPL as amended, Art. 50)
7	(none)	<p>“Confessions by a suspect or a defendant obtained through torture and extortion and other illegal means, and witness testimonies and victim statements obtained through the use of violence, threats, and other illegal means should be excluded. Where physical or documentary evidence is collected in ways violating legal procedures and severely affecting judicial justice, corrections should be made or reasonable justifications provided. Where no correction or reasonable justification is provided, such evidence should be excluded.”</p> <p>“Where evidence that should be excluded is found during the investigation, procuratorate review or trial, such evidence should be excluded in accordance with the law and should not be used as a basis for making recommendations on prosecution, procuratorate decisions, and judgments.”</p> <p>(Arts. 18 -21 of Amendments; CPL as amended, Arts. 54-58)</p>
8	<p>“In the decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral statements. A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence; the defendant may be found guilty and sentenced to a criminal punishment if evidence is sufficient and reliable, even without his statement.”</p> <p>(Preexisting CPL, Art. 46)</p>	<p>“. . . Evidence should meet the following requirements to be reliable and sufficient:</p> <p>(1) Evidence exists for each fact serving as the basis for conviction and sentencing;</p> <p>(2) The authenticity of all evidence needed to decide a case has been verified through legal procedures; and</p> <p>(3) Based on a comprehensive evaluation of all evidence, facts have been proven beyond a reasonable doubt.”</p> <p>(Art. 17 of Amendments; CPL as amended, Art. 53)</p>
9	(none)	“Where a witness, without good reason, fails to appear in court to give testimony after being

Para. Above	Preexisting CPL	CPL as Amended
		<p>notified by the people’s court, the people’s court may compel the witness to appear, unless the witness is the spouse, parent, or child of the defendant.”</p> <p>(Art. 71 of Amendments; CPL as amended; Art. 188)</p>

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If you have any questions concerning the material discussed in this client alert, please contact the following Beijing-based members of our [Global Anti-Corruption practice group](#):

Eric Carlson 86.10.5910.0503 ecarlson@cov.com
Tim Stratford 86.10.5910.0508 tstratford@cov.com

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ⁱ Arts. 5, 8, and 9 of the Amendments; CPL as amended, Arts. 33, 36, and 37.

ⁱⁱ Art. 57 of the Amendments; CPL as amended, Arts. 148-152.

ⁱⁱⁱ Art. 13 of Amendments; CPL as amended, Art. 48.

^{iv} Art. 24 of the Amendments; CPL as amended, Art. 73.

- v Art. 109 of Amendments; CPL as amended Arts. 280-283.
- vi Art. 11 of the Amendments; CPL as amended, Art. 42.
- vii Art. 15 of the Amendments; CPL as amended, Art. 50.
- viii Arts. 18-21 of the Amendments; CPL as amended, Arts. 54-58.
- ix Art. 17 of the Amendments; CPL as amended, Art. 53.
- x Art. 71 of the Amendments; CPL as amended, Art. 188.