

China Releases Draft Amendments to Law Governing Commercial Bribery

中国公布商业贿赂法规修订草案

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Anti-Corruption
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On February 25, 2016, China released draft amendments (“Draft Amendments”) to the Anti-Unfair Competition Law (“AUCL”) for public comment. Because the AUCL is the primary legal authority in China on commercial bribery,¹ the Draft Amendments could significantly reshape the commercial bribery regime by: (1) more precisely defining commercial bribery, including liability for bribes paid through third parties; (2) clearly including vicarious liability for employers for the actions of their employees; (3) significantly increasing penalties for commercial bribery for companies and for those facilitating bribes; (4) expanding the scope of liability for inaccurate accounting records to include unrecorded payments of economic benefits that constitute commercial bribery; and (5) including actions of certain public-facing entities within the scope of commercial bribery.

2016年2月25日，中国公布《中华人民共和国反不正当竞争法》（以下简称《反不正当竞争法》）的修订草案送审稿（以下简称“修订草案”），向公众公开征求意见。鉴于《反不正当竞争法》是中国目前现行反商业贿赂的主要法律依据^[1]，本修订草案将对反商业贿赂领域作出如下重大调整：（1）进一步明确商业贿赂的定义，并包括增加通过向第三方贿赂而产生的责任；（2）明确规定经营者对员工为其谋求利益而实施的商业贿赂行为的承担雇主替代责任；（3）显著加强对商业贿赂行为及忽视商业贿赂行为且为其提供便利的处罚力度；（4）增强合同与会计账目如实记载的要求，对任何给付的经济利益未如实进行记载的，认定为商业贿赂行为；（5）将面向公共服务领域的实体新增纳入至反商业贿赂领域。

¹ The AUCL also regulates trade secrets, abuse of dominant position, misleading publicity, certain promotional activities, spreading false information, and bid-rigging.

[1] 《反不正当竞争法》同时对商业秘密、滥用独占地位、误导公众、特定推销行为、传播虚假信息宣传及串标等行为进行规范。

Background of the Draft Amendments 修订草案背景

In releasing the Draft Amendments, the State Council Legislative Affairs Office acknowledged that the current AUCL, enacted in 1993, no longer reflects current market realities and the legal framework in China, specifically, that the penalties under the current AUCL are too lenient. Similarly, China amended its Criminal Law in 2015, adding new bribery-related crimes and also increasing penalties for corruption-related crimes. (See Covington's e-alert [here](#).)

在修订草案的起草说明中，国务院法制办公室表示，现行《反不正当竞争法》自 1993 年起实施，已不再适应目前市场现状及中国法律的框架。而尤其重要的是，现行的《反不正当竞争法》的处罚的力度过弱。同样，中国于 2015 年对刑法进行修订，新增贿赂相关的罪名并加大对腐败相关犯罪行为的处罚。（见科文顿电子期刊，[点击此处阅读](#)。）

Amendments to the AUCL Related to Commercial Bribery 相关商业贿赂方面的修订

1. Clearer definition of “commercial bribery”

进一步明确界定“商业贿赂”行为

The existing AUCL does not define “commercial bribery.” Rather, the existing AUCL simply states that “business operators” (defined broadly²) shall not use “money, property, or any other means” to bribe others in order to sell or purchase goods. Secret kickbacks or off-book payments to other organizations or individuals to violate the provision.

现行《反不正当竞争法》对什么是商业贿赂行为并未进行明确的定义。且仅规定“经营者”（定义范围宽泛^[2]）不得采用“财物或其他手段”对他人进行贿赂以销售或购买商品。经营者在帐外暗中给予其他单位或者个人回扣的将被视为违法行为。

² The Draft Amendments would expand the definition of “business operators” slightly to include “natural persons, legal persons, or other organizations engaged in the production or trade of goods, or the provision of services.” Draft Amendments, Art. 2. This parallels the definition of “business operators” in Art. 12 of Anti-Monopoly Law.

[2] 修订草案第二条将“经营者”的概念界定为包括“从事或者参与商品生产、经营或者提供服务（以下所称商品包括服务）的自然人、法人和其他组织”。该定义与反垄断法第 12 条所规定的经营者概念相一致。

The Draft Amendments would definition “commercial bribery” more specifically:
修订草案将进一步明确界定商业贿赂行为：

Commercial bribery refers to a business operator providing or promising to provide economic benefits to the opposing party in a transaction, or to a third party able to influence the transaction, to entice it to seek a transaction-related opportunity or a competitive advantage for the business operator. Providing or promising to provide economic benefits is [considered] offering a commercial bribe; accepting or agreeing to accept an economic benefit is [considered] accepting a commercial bribe.

“商业贿赂是指经营者向交易对方或者可能影响交易的第三方，给付或者承诺给付经济利益，诱使其为经营者谋取交易机会或者竞争优势。给付或者承诺给付经济利益的，是商业行贿；收受或者同意收受经济利益的，是商业受贿。”

Under this definition, parties to a transaction are subject to enforcement for violating anti-bribery laws, as are third parties that may or may not be part of the transaction, but nonetheless have influence on the transaction. This change parallels recent amendments to China’s Criminal Law to include bribes given to “other closely related persons” within the scope of triggering criminal liability for giving bribes. (See Covington e-alert [here](#).)

基于该定义，反商业贿赂执法不仅对商业交易双方适用，同时也适用于可能并不参与交易但对交易具有影响的第三方。该规定充分体现出最新刑法修订条文新增行贿罪所包含的“其他与其关系密切的人”的刑事责任之规定。（见科文顿电子期刊，[点击此处](#)阅读）

2. Vicarious liability for employers for the actions of their employees

明确基于员工行为导致雇主替代责任

The Draft Amendments would more clearly specify under what situation employers will be liable for commercial bribes paid by employees.

修订草案将进一步明确规定雇主将在何种情况下为其员工的商业贿赂行为而承担责任。

The Draft Amendments would distinguish between “giving bribes” and “taking bribes.” The Draft Amendments would establish a presumption that bribes used by an employee to obtain “business opportunities or a competitive advantage” for the employer should be viewed as the act of the employer. In contrast, where there is evidence that an employee takes bribes against the best interest of a business operator, the Draft Amendments would not hold the employer liable. While additional clarification would be helpful, this new provision would seem to reiterate the importance for companies of implementing adequate anti-corruption procedures.

在厘清经营者及其员工的责任认定上，修订草案对“商业行贿”和“商业受贿”的行为进行区分。修订草案将假定员工任何基于“争取交易机会”或“竞争优势”而从事的商业贿赂行为均为经营者的行为。而与此相对应的是，如存在证据证明员工为违背经营者利益而进行贿赂的，修订草案则将会不将员工的行为认定为经营者的商业贿赂行为。该项规定似乎拟在重申经营者执行有效的反腐败内控流程的所具有的重要性。

3. More severe penalties for commercial bribery **显著加强对商业贿赂行为的处罚力度**

For non-criminal commercial bribery, the existing AUCL (Art. 22) imposes a fine of between RMB 10,000 and RMB 200,000 (about US \$1500 to \$30,000), along with confiscation of illegal income. The Draft Amendments would impose fines of between 10% and 30% of business revenue attributable to the illegal conduct.

对于不构成犯罪行为的商业贿赂行为，现行《反不正当竞争法》除对违法所得予以没收外，仅对其处以一万元以上二十万元以下的罚款（大约为 1500 美元至 3 万美元之间）（《反不正当竞争法》第二十二条）。但修订草案则规定将对其违法经营额的百分之十以上百分之三十以下处于罚款（修订草案第二十条）。

In addition, the Draft Amendments (Art. 28) also would impose liability on others who knew or should have known that someone is in violation of the unfair competition provisions of the AUCL, but who continues to facilitate production, sales, warehousing, transportation, network services, technical support, advertising, payment and settlement, and other services. Fine for such “facilitators” is between RMB 100,000 and RMB 1 million (about \$15,000 to \$150,000). The provision would seem to require a business operator to monitor the marketing and sales activities of its business partners and distributors. 除此之外，修订草案（第 28 条）规定对于明知或应知存在不正当竞争行为，而仍为其提供生产、销售、仓储、运输、网络服务、技术支持、广告推广、支付结算等便利条件者，需承担相应的法律责任。在该种情况下，其法律责任为十万元以上一百万元以下的罚款。该项规定似乎将要求经营者紧密关注其商业伙伴或经销商的市场推广和销售行为。

In addition to the existing administrative enforcement measures under the AUCL, the Draft Amendments (Art. 15) also would provide additional administrative enforcement powers to the enforcement agency (the State Administration for Administration and Commerce and its local affiliates, or AIC), such as seizing evidence and shutting down the business operator. 除现行《反不正当竞争法》所现有的行政强制措施外，修订草案（第 15 条）也对监管机构新提供了查封、扣押等行政强制措施。

The Draft Amendments (Art. 28) would call for a lighter or mitigated punishment for those who cooperate with investigative authorities, including providing evidence. Simultaneously, the Draft Amendments (Art. 30) would impose more severe penalties for non-cooperation (Art. 30).

修订草案（第 28 条）除明确规定与相关部门配合将可被从轻或减轻处罚，包括为监管机构提供相应证据而获得从宽外，与此同时修订草案（第 30 条）也加大对不配合作为的处罚力度。

4. False accounting entries or unrecorded payments of economic benefits may constitute commercial bribery.

对于经营者之间对任何给付的经济利益未在合同及会计凭证中如实记载的，将认定为商业贿赂行为

The existing AUCL (Art. 8) states only that business operators are permitted to expressly give discounts and commissions to a counterparty or to an intermediary, provided that the business operators that make or receive those payments accurately record them in their accounting books.

现行《反不正当竞争法》规定，经营者在如实入账的前提下，可明示的给予对方折扣，以及给予中间人佣金（《反不正当竞争法》第八条）。

The Draft Amendments would broaden these provisions by requiring business operators to accurately record all economic benefits in their accounting books and contracts, and that failure to do so constitutes commercial bribery. The Draft Amendments do not provide additional guidance on what level of detail or accuracy is required to comply with this provision, but the provision seems to echo the books and records provisions of the US Foreign Corrupt Practices Act.

修订草案对该要求的范围进行扩大，规定经营者必须在合同及会计凭证中如实的记载经济利益给付情况，否则将被认定为商业贿赂行为。尽管修订草案并未给出进一步的明确规范，来引导说明经营者如实记账须包括何种细节或达到何种程度才能满足本项下的规定。但是，该要求看起来与《美国反海外腐败法》的会计条款的要求保持一致。

5. Benefits Leveraged from Public-Facing Services

通过公共服务领域谋求经济利益

The Draft Amendments would prohibit benefits obtained by business operators “in the course of” or “through” public service. The language of the specific provision is not clear, but it would seem to apply to misuse of authority to reap improper benefits (for an organization or individual) in the context of public-facing organizations -- potentially public utilities, public hospitals, public institutions, or similar organizations. (Covington's e-alert

summarizing the most recent FCPA case involving payments to employees of state-owned entities in China can be found [here](#).)

修订草案同时禁止经营者“在公共服务中”或“依靠公共服务”谋取利益。尽管该条款的具体含义尚不明确，但可能适用于那些在公共服务领域滥用其职权（为某机构或个人）谋取不正当利益的机构 -- 潜在的适用于公用设施、公立医院、事业单位（见科文顿电子期刊, 行贿中国国企员工之最新 FCPA 案件, 点击[此处](#)阅读），或其他类似机构。

This new provision suggests that legislators realize the existence of economic benefits in the area of public service that may well constitute commercial bribery. For example, various recent amendments to and new regulations in the healthcare sector point the potential for healthcare institutions and individual healthcare providers to benefit from improper interactions with external companies. (See Covington's [e-alert](#) and translation of the "Notice of Nine Prohibitions for Strengthening Ethical Conduct in the Healthcare Industry" in 2013 [here](#), and [e-alert](#) and [translation](#) of new rules on healthcare donations.).

该新规定表明立法机关已认识到公共服务领域中存在着可能导致商业贿赂的情形。举例而言，目前各项医疗领域相关的最新法规修订表明医保机构及个人医保服务提供商在与外部企业之间的来往过程中谋利。（见科文顿电子期刊, 点击[此处](#)阅读, 2013 年“国家卫生计生委国家中医药管理局关于印发加强医疗卫生行风建设“九不准”的通知”中、英文文稿, 点击[此处](#)阅读, 科文顿电子期刊, 点击[此处](#)阅读以及对医保捐赠新规定的中、英文文稿, 点击[此处](#)阅读）。

Next Steps

后续步骤

Covington is tracking these developments closely. The comment period ends on March 25, 2016. We anticipate that following the review, the Draft Amendments may be further revised but should likely move quickly to China's legislative body, the National People's Congress, for enactment.

公开征求意见期将于 2016 年 3 月 25 日终止。我们预计审核之后，该修订草案可能会进一步进行修改，但将很快被中国的立法机关 -- 全国人大通过并予以实施。

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If you have any questions concerning the material discussed in this client alert, please contact the following China-focused members of our Anti-Corruption Practice Group:

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