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## Amendments to China's Anti-Unfair Competition Law Broadens the Scope of Commercial Bribery, Imposes Vicarious Liability, and Increases Penalties

On November 4, 2017, the Standing Committee of the National People's Congress ("NPC") adopted amendments to China's Anti-Unfair Competition Law ("Amended AUCL"). In 1993, the Chinese government enacted the AUCL to encourage and protect fair competition among businesses in a then-burgeoning Chinese economy. In the years since, the AUCL became the seminal governing authority for the State Administration of Industry and Commerce ("SAIC") in combating commercial bribery in China. However, as technology advanced and business dealings in China grew increasingly more frequent and complex, the provisions of the AUCL became outdated and rudimentary. Accordingly, in February 2016, the State Council Legislative Affairs Office, together with the SAIC, released its first set of draft amendments to the AUCL. In February 2017, a second draft of the proposed amendments was submitted. In September 2017, the draft amendments were released for public comment. Finally, early last week, the NPC Standing Committee received the latest draft of the proposed amendments and agreed to amend the AUCL for the first time since the law was enacted in 1993.

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The Amended AUCL will take effect on January 1, 2018. Although the Amended AUCL has updated a number of its provisions, from a commercial bribery perspective, businesses operating in China should take specific note of the following changes.<sup>1</sup> Specifically, the Amended AUCL (1) redefines commercial bribery in a broader yet more precise manner; (2) expressly imposes vicarious liability on employers; and (3) increases administrative penalties.

### Redefining "Commercial Bribery"

The original AUCL did not define bribery. Instead, it stated that business operators, *i.e.*, companies and individuals, were prohibited from using "assets or other means" (*e.g.*, money) "to bribe others in order to sell or purchase products."<sup>2</sup> Although Article 8 provided some examples for what kinds of conduct constituted bribery—*e.g.*, giving a "secret commission" without making proper accounting records was considered bribery, but explicitly offering a discount or commission to a middleman while selling or purchasing products was not considered bribery—the original AUCL never actually defined "commercial bribery." The SAIC sought to clarify the AUCL three years later in its 1996 Interim Provisions on Prohibition of Commercial Bribery ("Interim Provisions") by defining "commercial bribery" as "acts of business operators who bribe the counterpart organizations or individuals by adopting assets or other means for the purpose of selling or purchasing products."

Article 7 of the Amended AUCL seeks to further broaden and clarify the scope of commercial bribery. First, an act of bribery no longer requires the sale or purchase of products. Now, a business operator commits an act of bribery if it provides "assets or other means" merely to obtain "a transaction opportunity or competitive advantage." This change in language expands the types of scenarios in which bribery may be committed. For example, if a telecommunications executive provides a luxury condominium to a government official in exchange for the official

<sup>1</sup> Certain provisions of the AUCL not discussed here also affect other legal disciplines, *e.g.*, antitrust and intellectual property.

<sup>2</sup> While we are aware of other English translations of the original AUCL and Amended AUCL, language quoted here from the original AUCL and the Amended AUCL reflect our own translation of the native Chinese versions.

providing the executive with nonpublic information when the government next solicits bids on a lucrative telecommunications contract, such conduct may not be considered bribery under a strict reading of the original AUCL<sup>3</sup> because there was no sale or purchase of products. Under the Amended AUCL, however, such conduct would more likely constitute an act of bribery. The Amended AUCL's insertion of "transaction opportunity or competitive advantage" into the definition of commercial bribery may be an attempt to focus on the inherent unfairness of receiving an opportunity or advantage in exchange for assets, money, or goods. This language also aligns with international anti-corruption standards such as the United Nations Convention against Corruption and the U.S. Foreign Corrupt Practices Act ("FCPA"), which prohibit persons from receiving an "undue" or "improper" advantage.<sup>4</sup>

Second, Article 7 of the Amended AUCL clarifies the scope of commercial bribery by specifically identifying three categories of bribe recipients. These bribe recipients include "(1) any employee of the counterparty to a transaction; (2) any entity or individual entrusted by the counterparty to a transaction to handle relevant affairs; and (3) any other entity or individual that may influence a transaction by means of authority granted to them or by their power to influence." The categories illustrate the different types of scenarios in which there is an opportunity for a bribe to take place. Such categories of bribe recipients were not expressly identified in the original AUCL.

Companies should take care to remind their employees in China that the Amended AUCL is redefining commercial bribery so that it can be used in a broader and more versatile manner.

### Imposing Vicarious Liability on Employers

The original AUCL was silent on whether vicarious liability—finding an employer liable for misconduct committed by its employees—applied to commercial bribery acts. Article 7 of the Amended AUCL seeks to fill that silence by noting that bribery by employees "shall be deemed an act of the business operator itself. . ." The insertion of this new provision was expected because, in practice, the SAIC started to impose vicarious liability on employers soon after the AUCL was enacted. Specifically, in the 1996 Interim Provisions, the SAIC announced that "[t]he acts of employees of a business operator adopting commercial bribery for the purpose of selling or purchasing products for the business operator shall be regarded as the acts of the business operator."<sup>5</sup> It is no coincidence that the language in the Amended AUCL mirrors much of what was in the Interim Provisions. Including the vicarious liability provision in the Amended AUCL is mainly an attempt to rubber-stamp a principle that the SAIC already practiced.

Conversely, however, the Amended AUCL distinguishes itself from the breadth of the Interim Provisions by creating an exception where vicarious liability does not attach if it is "otherwise proven by the business operator with evidence that such bribery is not related to efforts of seeking a transaction opportunity or competitive advantage for the business operator." In other words, the Amended AUCL was drafted with the recognition that imposing vicarious liability on an employer, where the employee's misconduct clearly did not benefit the employer, contradicts the rationale for enforcing such a principle. Nevertheless, it appears that the employer has the burden of putting forth

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<sup>3</sup> Our assertion here focuses only on how such conduct may be enforced by the original AUCL. We do not comment on whether such underlying conduct would expose an individual to other civil or criminal liability under other PRC laws.

<sup>4</sup> Article 21 of the U.N. Convention prohibits "[t]he promise, offering or giving, directly or indirectly, of an **undue advantage** to any person who directs or works in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting . . ." (emphasis added). Similarly, under the FCPA, § 78dd-1(a) prescribes that "[i]t shall be unlawful . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity, inducing such foreign official to do or omit to do any act in violation of the lawful duty of that official, or **securing an improper advantage** . . ." (emphasis added).

<sup>5</sup> Interim Provisions, Art. 3.

evidence of such conflicting interests. With the insertion of this provision, companies should continue to exercise the utmost vigilance and caution in supervising the actions of their employees.

### Increased Administrative Penalties

Under the original AUCL, penalties for commercial bribery acts were capped between RMB 10,000 – 200,000, and any illegal income that accrued from the transaction was confiscated.<sup>6</sup> The Amended AUCL increases the penalty to RMB 10,000 – RMB 3,000,000.<sup>7</sup>

Moreover, perhaps even more severe than monetary penalties, if a business operator commits a “serious” act of bribery, that operator will have its business license revoked. It remains to be seen what will rise to the level of a “serious” act of bribery, but the threat of losing one’s business license should serve as a strong deterrent for companies at risk of committing bribery.

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The Amended AUCL—albeit long overdue—makes significant changes to the commercial bribery landscape in China. The definition of commercial bribery has been expanded, vicarious liability has been officially inserted, and penalties for misconduct have predictably become more severe. The enactment of the Amended AUCL will affect companies conducting businesses in China, in particular, their business dealings with counterparties and intermediaries, internal compliance programs that monitor and deter employee violations, and books and records practices. Given the more severe penalties, multinational companies in China must pay attention to related enforcement and consider changing their compliance policies to deal with domestic commercial bribery, if not already addressed in their compliance program.

For more information, please feel free to contact a member of Ropes & Gray’s leading [anti-corruption/international risk](#) and [government enforcement](#) teams.

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*The original Client Alert, published on November 8, 2017, relied on an unofficial English translation of the Amended AUCL. This corrected version analyzes the Amended AUCL based on the original Chinese.*

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<sup>6</sup> AUCL of 1993, Art. 22.

<sup>7</sup> Amended AUCL, Art. 19.