

China Proposes Updates on Commercial Bribery Provisions in AUCL

China's SAMR published a draft amendment to the Anti-Unfair Competition Law, which overhauls the commercial bribery provisions for giving, instructing, and accepting bribes.

Key Points:

In summary, the proposed commercial bribery provisions under the Draft Amendment:

- Explicitly clarify that “counterparties in transactions” are within the scope of bribe recipients, increasing risks for companies that are not explicitly accountable under the current AUCL
- Specify that instructing others to give bribes constitutes an offense of commercial bribery (the current AUCL does not provide a clear rule)
- Prohibit and specify penalties for acceptance of bribes, which are not prohibited under the current AUCL
- Increase the maximum fine for both accepting and giving commercial bribes, from CNY 3 million to CNY 5 million

On November 22, 2022, China's State Administration for Market Regulation (SAMR) published a draft amendment to the Anti-Unfair Competition Law (the Draft Amendment) for public comments. This is the third and latest proposed amendment to the Anti-Unfair Competition Law (AUCL), which was first enacted in 1993 and later amended in 2017 and again in 2019. The Draft Amendment was open for public comments until December 22, 2022, and subsequently will be submitted to the State Council and the Standing Committee of the National People's Congress for further review.

A legislative explanation attached to the Draft Amendment provides the general reasons for its revisions to the AUCL, including (among others): (1) refining rules of new types of unfair competition activities committed by using data, algorithms, platform rules, etc.; (2) updating specific types of existing unfair competition activities; (3) regulating new types of unfair competition activities; and (4) adjusting legal liabilities for certain unfair competition activities.

This Client Alert highlights four key revisions proposed in the Draft Amendment to the commercial bribery provisions under the AUCL and their potential impacts on businesses operating in China.

Key Revision I: Including “Counterparties in Transactions” Within the Scope of Bribe Recipients

1. The current AUCL

The current AUCL prohibits bribes only to “any employee of counterparties in transactions.” Prior to the 2017 amendment, the previous AUCL and its implementation rules prohibited kickbacks to counterparties or individuals. However, the 2017 amendment to the AUCL specifically deleted “counterparties” from the scope of bribe recipients.

The 2017 amendment brought uncertainty regarding whether giving bribes to counterparties would be punished under the AUCL. The 2017 amendment’s commercial bribery provision (i.e., the current version) has attracted heated discussions on whether “counterparties in transactions” fall within the scope of bribe recipients under the AUCL. Some practitioners believed that the AUCL did not prohibit giving bribes to counterparties, as the 2017 amendment intentionally deleted “counterparties in transactions” from its context, while others opined that it was unclear whether the AUCL was entirely exempting giving bribes to counterparties.

In practice, the AUCL enforcement authority did not simply remove giving bribes to counterparties from its enforcement list. A former Director of China’s State Administration for Industry and Commerce’s China Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau viewed “counterparties in transactions” very narrowly by interpreting it as “counterparties in actual transactions.” In addition, SAMR and local Administration for Market Regulations (AMRs) further opined that direct “counterparties in transactions” may actually mean “third parties with relations to the transaction counterparties,” which is provided under Article 7, Paragraph 1 Bullet-point 3, of the current AUCL. This view was illustrated in the five representative enforcement cases of commercial bribery published by SAMR in November 2022.

2. The Draft Amendment

The Draft Amendment explicitly prohibits bribes to “counterparties in transactions or any employee of counterparties in transactions.” The Draft Amendment and its legislative explanation do not provide reasons for restoring “counterparties in transactions” in the scope of bribe recipients. However, as noted above, the proposed revision is consistent with the view of SAMR and the local enforcement authorities.

The proposed revision may again invite discussions, including on the scope of bribe recipients. Some practitioners in support of classic commercial bribery theory may question the legitimacy of penalizing giving benefits directly to counterparties, which is not prohibited as commercial bribery in other countries. According to the classic commercial bribery theory, a business operator bribes a party in order for that party to breach its duty of loyalty to a third party for the purpose of obtaining trading opportunities or competitive advantages. For example, Japan, the United Kingdom, and Singapore do not condemn providing payments to entities as commercial bribery, because there is no third party or duty of loyalty being breached. Another question is how the law and enforcement authorities differentiate bribes to counterparties from other legitimate payments. Article 7 of the AUCL only speaks to discounts provided to “counterparties in transactions”: the discounts are allowed as long as they are explicit and accurately recorded.

Legal practitioners believe that uncertainty remains around whether the amendment concerning restoring “counterparties in transactions” to the scope of bribe recipients would become the effective law. After receiving public comments, SAMR will further revise the Draft Amendment.

The proposed provision, if adopted as a new law, would increase risks for companies that directly give benefits to counterparties to be held liable under the commercial bribery provision, noting that counterparties are not explicitly listed as bribe recipients under the current AUCL.

Key Revision II: “Instructing Others to Give Bribes” Constitutes Commercial Bribery

The Draft Amendment specifies that instructing others to give bribes constitutes commercial bribery. It uses similar language in its other provisions and generally condemns the activity of directing or assisting others to conduct unfair competition activities.

Since the current AUCL does not specify the rules for “instructing others,” some legal practitioners and commentators believe that “instructing others to give bribes” is a new rule for commercial bribery, stating that, under the current AUCL, only self-initiated bribe-giving constitutes commercial bribery. However, in practice, the AMRs have penalized operators who instructed others (entities or individuals) to give bribes.

Although the Draft Amendment prohibits “instructing others to give bribes,” it does not provide clear rules for penalizing the offenders who are instructed to give bribes. Some practitioners believe that those offenders may face the same penalty as the instructing offenders under Article 29 of the Draft Amendment. Other practitioners defer to SAMR to provide further clarifications.

Key Revision III: Prohibiting Business Operators From Accepting Commercial Bribes

The current AUCL does not prohibit the acceptance of commercial bribes. However, both the previous version of the AUCL before 2017 and its implementation rule¹ prohibit accepting certain bribes. The previous AUCL before 2017 prohibits the acceptance of covert or off-book rebates, and the implementation rule prohibits the acceptance or solicitation of bribes. However, the 2017 AUCL amendment deleted the prohibition from the current AUCL, and the implementation rule has been rarely cited in enforcement since the 2017 AUCL amendment.

The Draft Amendment prohibits the acceptance of bribes: Article 8 prohibits the acceptance of commercial bribes, and Article 29 provides that penalties for accepting bribes is the same as giving bribes, unless otherwise provided by other laws and administrative regulations.

According to the SAMR’s legislative explanation, the proposed provisions to prohibit the acceptance of commercial bribes in the Draft Amendment aim to “address significant issues showed in regulatory and enforcement practice” and to capture “additional forms of existing unfair competition.” This corresponds with the law enforcement authorities’ recent campaign of equally punishing “bribe-giving” and “bribe-accepting.” For example, *Opinion on Further Promoting Investigation into the Acceptance and Giving of Bribes on the Same Level*, issued in September 2021, requires law enforcement authorities to investigate “bribe-giving” and “bribe-accepting” activities equally. In addition, in April 20, 2022, the State Supervision Commission of the Central Commission for Discipline Inspection (the CCDI) and the Supreme People’s Procuratorate (the SPP) jointly issued examples of five typical cases of bribe-giving crimes².

If the two proposed provisions to prohibit the acceptance of bribes ultimately become law, then law enforcement authorities may investigate offenses of accepting bribes, which the authorities did not place much focus on in the past, according to the publicly available information. Companies will need to improve or establish further comprehensive and effective compliance systems to detect and prevent not only bribe-giving but also bribe-accepting activities.

Key Revision IV: Increasing Penalty Amount for Commercial Bribery

Article 29 (Paragraph 1) of the Draft Amendments provides that offenders of both giving or accepting bribes will face the following penalties: confiscation of illegal income, a fine ranging between CNY 100,000 and CNY 5 million, and, for serious violations, revocation of business licenses. This proposed provision increases the top fine from CNY 3 million in the current AUCL to CNY 5 million.

SAMR commented in the legislative explanation that the Draft Amendment increases the fine amount to deter offenses that severely impair fair competition and public interest. Legal practitioners believe that this revision illustrates the severity of damages caused by commercial bribery to the market competition and the determination of law enforcement agencies to combat commercial bribery.

Comparison of the Key Revisions

The below chart compares the proposed revisions in the Draft Amendment to the commercial bribery provisions in the current AUCL (proposed revisions are highlighted in red):

	The Current AUCL	The Draft Amendment
Bribe-giving	<p>Article 7 (Paragraph 1) Operators shall not use money, goods, or other means to bribe the following individuals or entities for the purpose of seeking a transaction opportunity or competitive advantage:</p> <ol style="list-style-type: none"> 1) any employee of the counterparty in a transaction; 2) any entities or individuals hired by the counterparty to a transaction to handle relevant affairs; 3) any entities or individuals that may affect a transaction through abuse of their power, function, or influence. 	<p>Article 8 (Paragraph 1) Operators shall not use money, goods, or other means to bribe the following individuals or entities by themselves or instructing others for the purpose of seeking transaction opportunities or competitive advantages:</p> <ol style="list-style-type: none"> 1) counterparties in transactions or any employee(s) of counterparties in transactions; 2) any entities or individuals hired by counterparties to transactions to handle relevant affairs; 3) any entities or individuals that may affect transactions through abuse of their power, function, or influence.
Bribe-accepting	N/A	<p>Article 8 (Paragraph 4) Any entities or individuals shall not accept bribes in transaction activities.</p>
Penalties	<p>Article 19 If operators violate Article 7 and give bribes to others, the supervision and inspection departments shall confiscate the illegal income and impose a fine of more than RMB 100,000 but less than RMB 3,000,000. In serious cases, the enforcement agency shall revoke the operator's business license.</p>	<p>Article 29 (Paragraph 1) If operators violate Article 7 and give bribes to others, the supervision and inspection departments shall confiscate the illegal income and impose a fine of more than RMB 100,000 but less than RMB 5,000,000. In serious cases, the enforcement agency shall revoke the operator's business license.</p>

	The Current AUCL	The Draft Amendment
		<p>Article 29 (Paragraph 2) For operators or their employees who accept bribes in transactions activities, if other laws and administrative regulations have otherwise provided, the bribe recipients shall be punished in accordance with those provisions; if laws and administrative regulations have not provided, the bribe recipients shall be punished in accordance with the preceding paragraph.</p>

Conclusion

The Draft Amendment proposes significant revisions to the commercial bribery provisions in the current AUCL. If those revisions become effective, companies will need to improve their compliance policies and programs to address the concerns raised in the new rules, especially risks related to interactions with counterparties and the acceptance of bribes. Although the Draft Amendment has not been submitted for approval, companies doing business in China, especially those in industries with high corruption and bribery risks, should closely monitor the progress of the Draft Amendment; review in advance their business arrangements with customers, partners and suppliers; and improve and enhance their internal anti-bribery compliance policies accordingly in a timely manner.

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Endnotes

¹ I.e., the *Interim Provisions on Prohibition of Commercial Bribery* issued by the State Administration for Industry and Commerce in 1996.

² See at: https://www.spp.gov.cn/spp/xwfbh/wsfbt/202204/t20220420_554587.shtml#2.