

## China Further Revised Commercial Bribery Law in the Latest Draft Amendments to Anti-Unfair Competition Law

***The modified draft amendments clarify the scope of commercial bribery, provide helpful exceptions, and increase penalties.***

**Key Points:** The Law Committee of the National People's Congress has released a Second Draft of proposed amendments to the PRC Anti-Unfair Competition Law, which contains fewer changes to the current law than previous versions.

- Although the definition of commercial bribery remains relatively unchanged, the draft identifies for the first time four categories of potential commercial bribe recipients.
- The proposed amendments might exempt business operators from liability for unauthorized misconduct of their employees.
- The proposed amendments would increase the administrative penalties on business operators for committing commercial bribery.

### Background

In early 2017, the State Council submitted a draft (the First Draft) containing proposed amendments to the Anti-Unfair Competition Law (the AUCL) of the People's Republic of China (the PRC) to the Standing Committee of China National People's Congress (the NPC) for review. Nearly six months later, on August 8, 2017, the Law Committee of the NPC submitted a modified draft of proposed AUCL amendments (the Second Draft) to the NPC's Standing Committee. Shortly thereafter, the Standing Committee approved and published the Second Draft. In addition, the Standing Committee submitted a request for public feedback on the revised draft amendments.

The current AUCL has been in effect for the past 24 years. However, recent economic developments have necessitated revisions to the AUCL. This Second Draft contains fewer changes to the current AUCL than the First Draft and several earlier versions circulated for public comments prior to the legislative readings. This *Client Alert* highlights a number of key differences between the current version of the AUCL, the First Draft, and the Second Draft related to commercial bribery, which is viewed as an element of unfair competition by the PRC authorities.

### The Scope of Commercial Bribery Under the Second Draft

#### The Definition of Commercial Bribery Stays Relatively the Same

The AUCL provides that business operators shall not commit bribery — through the use of money or other means — in the course of purchasing or selling goods. The First Draft sought to amend this

provision by expanding the ambit of the provision from the purchase and sale of goods to a broader concept of transactions in general.

Article 7 of the Second Draft gives the following definition of commercial bribery “Business operators shall not offer bribes *to the following entities or individuals* by the means of giving money, property or other benefits, in order to obtain business transaction opportunities or other competitive advantages.”

So the Second Draft retains the concept of transactions used in the First Draft, and further adds an element of purpose “to obtain transaction opportunity and competitive advantage.” Hopefully, with this addition, it would guide enforcement agencies, *i.e.*, the local Administrations of Industry and Commerce (AICs), to distinguish regular hospitalities between business operators to maintain normal client relationship from improper practice to obtain business or seek other advantages by means of money or other corrupt methods.

### **Recipients of Commercial Bribery Are Clarified**

The AUCL in its current form does not identify specific categories of potential commercial bribe recipients. The First Draft sought to define potential bribe recipients as transaction counterparties and third parties that may influence a transaction’s outcome.

The Second Draft goes a step further by listing four categories of entities or individuals as potential recipients of commercial bribes. Article 7 of the Second Draft spells out “[b]usiness operators shall not offer bribes *to the following entities or individuals* ...”

- Employees of the counterparty in a transaction
- Agent entities or individuals hired by the transaction counterparty to handle matters related to the transaction
- State authorities, state-owned companies and enterprises, state institutions, peoples’ organizations, and government officials
- Other entities or individuals that may affect the transaction by taking advantage of the powers and functions of a government official

These categories can be summarized as individual employees, hired third-party agents, government agencies, state-owned enterprises (SOEs), and officials, as well as any other entities or individuals with influence.

Notably, the Second Draft defines transaction counterparty employees as a potential bribe recipient category but excludes the transaction counterparties themselves from such classification. The change seems to suggest that, beneficial payments made between two transactional parties, such as donations and sponsorships, might be excluded from the scope of commercial bribery. Such a change appears inconsistent with the concept of commercial bribery defined in the AUCL’s current form and appears contrary to the existing views and current practice of enforcement agencies.

### **Safe Harbor Provision for Business Operators Is Retained**

Similar to the current version of AUCL and the First Draft, the Second Draft retains a degree of leeway afforded to business operators in respect of discounts and commissions.

Article 7 of the Second Draft continues in the second paragraph that, “[i]n transactional activities, business operators may, in an express manner, give discounts to buyers or commissions to middlemen with the amount of such discounts or commissions being entered into the accounts, and business operators may accept discounts or commissions with the amounts being entered into the accounts.”

Business operators may pay or accept discounts or commissions in the course of a transaction, provided that such arrangements are transparent and are clearly recorded in the books of accounts.

### **Corporate Liability of Commercial Bribery Is Revised**

The AUCL does not currently separate unauthorized conduct of commercial bribery by an employee from that of a business operator. In practice, however, local AICs typically regard any commercial bribery carried out by an employee as an instance of commercial bribery carried out by the individual’s employer.

The First Draft sought to formally introduce this concept into the AUCL by providing that any bribe offered by a business operator employee who is seeking a transaction opportunity or competitive advantage for the business operator shall be deemed to be the conduct of the business operator. The exception would be if the business operator could prove that the bribery was conducted as a result of the employee’s own personal will.

The Second Draft refines the above formulation of the First Draft. In the third paragraph of Article 7, it states that “[a]ny commercial bribe offered by an employee shall be seen as the conduct of the business operator, except if the business operator can prove the bribe offered by the employee is not related to the business operator’s objective of obtaining specific business transaction opportunities or other competitive advantages.”

Similar to the First Draft, the Second Draft provides that if a business operator uses its employee to engage in commercial bribery, the activity should be viewed as the conduct of the business operator. However, the business operator will not be held liable for the bribe if the operator can prove that the employee’s activity does not relate to the business operator’s objective of obtaining specific business transaction opportunities or other competitive advantages. Compared to the First Draft, the Second Draft shifts the emphasis away from the subjective will of the employee towards the objective of the bribe. This change will likely encourage enforcement agencies to effectively assess objective evidence and properly draw conclusions on business operators’ corporate liability.

### **Penalties for Commercial Bribery Increase**

The AUCL in its current form provides for fines ranging from RMB 10,000 to RMB 200,000. In comparison, Article 19 of the Second Draft sets forth that if the conduct in question constitutes an administrative offense of commercial bribery but not a criminal offense, the relevant authorities will confiscate illegal gains resulting from the offensive conduct, and impose a fine of between RMB 100,000 and RMB 3 million. The Second Draft further empowers authorities to revoke the business operator’s business license if the conduct in question is sufficiently serious. This will likely be a more effective deterrent to business operators, in addition to the criminal liabilities on commercial bribery set forth in the PRC Criminal Law.

Furthermore, according to Article 26 of the Second Draft, if business operators receive an administrative penalty for engaging in commercial bribery, the relevant authorities will record the penalty in the business operator’s credit record as a matter of public record, which would not only affect the credit record of but also cause reputational harm to the business operators. The First Draft also proposed these penalty-related amendments.

The Second Draft added in Article 25 that business operators that have committed minor violations will not face administrative penalties if they correct such misconduct in a prompt and timely fashion. This change will likely help to address criticism from the business community that the current version of the AUCL does not credit business operators for maintaining effective compliance programs and/or for taking proper rectification after uncovering misconduct.

### **Civil Action Is Available for Victims of Commercial Bribery**

The First Draft introduced a provision clarifying that business operators are to bear civil liability and pay compensation for damage caused to third parties as a result of commercial bribery.

Article 17 of the Second Draft further provides that the amount of civil liability compensation payable shall be determined with reference to the actual loss third parties suffered. If such loss is difficult to determine, the amount of civil liability compensation payable shall be assessed based on the illegal gains received by the business operator in question, including compensation for reasonable expenses damaged parties incurred in seeking to cease the illegal conduct.

Article 27 of the Second Draft prioritizes civil liability compensation over administrative and criminal penalties if the business operator does not have enough assets to cover all of its liabilities.

### **Conclusion**

Given the significance of the AUCL and its potential impact on Chinese businesses, China's general public likely will provide many comments on the Second Draft for the NPC to consider before a third reading, as the Second Draft still appears to lack clear guidance on how to define and assess certain new terms, like "to obtain business opportunity" or "competitive advantage." So it remains unclear what the final version of the amendment will look like before it is unveiled.

But the Second Draft appears to represent an important revision to the current AUCL by attempting to clarify several key aspects that the business community have heavily criticized for a lack of transparency for many years. Companies doing business in China should continue closely monitoring the legislative development of the amendments to the AUCL, and be prepared to swiftly adjust business models, marketing and sales strategies, as well as business practices when the official amendment is formally approved by the NPC.

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