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## Significant Revisions to China's Commercial Bribery Law

***China clarifies the scope of its commercial bribery law, which has important implications for companies and individuals doing business in China.***

**Key Points:** The Standing Committee of the National People's Congress has passed and published an amendment to China's Anti-Unfair Competition Law, which substantially changes the existing commercial bribery law. The amendment:

- Redefines commercial bribery by specifying three categories of bribe recipients, while excluding transaction counterparties as potential bribe recipients
- Retains the safe harbor provisions for providing rebates or commissions
- Distinguishes between vicarious liability for employers and individual liabilities for employees
- Provides measures to mitigate penalties for commercial bribery
- Increases administrative penalties for commercial bribery
- Refines authorities' investigatory and inspection processes

### Background

On November 4, 2017, the Standing Committee of the National People's Congress (the NPC), the People's Republic of China (PRC), approved and published an amendment to the Anti-Unfair Competition Law (AUCL) that substantially changes current law. The amended AUCL (the AUCL 2018) will be effective as of January 1, 2018.

An extensive review process led up the passage of the AUCL 2018 on November 4, 2017. In early 2017, the State Council of PRC submitted a draft amendment to the AUCL to the NPC Standing Committee for review (the First Draft). On August 8, 2017, the NPC Law Committee submitted a further modified draft amendment to the AUCL for a second reading (the Second Draft) before the NPC's Standing Committee. The NPC Law Committee later published the Second Draft online for public comments. (For more information, see Latham & Watkins' related [Client Alert](#).)

This *Client Alert* highlights a number of key differences between the current AUCL, that has been in effect since 1993 (the AUCL 1993), and the AUCL 2018, as well as certain notable revisions to the Second Draft's recommendations.

## Key Revisions

### 1. Identifies Three Categories of Commercial Bribery Recipients

Article 7 of the AUCL 2018 lists three specific categories of entities and/or individuals who could be the recipients of bribes, including:

- Employees of the counterparty in a transaction
- Any entities or individuals hired by the transaction counterparty to handle matters related to the transaction
- Any entities or individuals that may affect a transaction through abuse of their power, function, or influence

The Second Draft for the first time had introduced four specific categories of bribe recipients. However, the AUCL 2018 merges the third and fourth categories set forth in the Second Draft: the third category — “state authorities, state-owned companies and enterprises, state institutions, peoples’ organizations, and government officials” — merges with the fourth category — “other entities or individuals that may affect a transaction by taking advantage of the powers and functions of a government official” — into a single category. The newly combined category broadly includes “any entities or individuals that may affect a transaction through abuse of their power, function or influence.”

Significantly, according to the AUCL 2018 legislation notes, this change was made because the NPC determined the two categories in the Second Draft referred to the same group of recipients and further determined that in a free market economy there is no need to emphasize state-owned entities because they hold equal market positions as other entities. These notes make clear that the new law considers government entities, private entities, and individuals to all be potential commercial bribery targets.

### 2. Excludes Transaction Counterparties as “Bribe Recipients”

Notably, although the AUCL 2018 defines transaction counterparty employees as potential bribe recipients, the law does not include transaction counterparties among the bribe recipient categories — adopting the same approach as the Second Draft.

The apparent omission or exclusion of transaction counterparties from the scope of bribe recipients appears to contradict the AUCL 1993's defined concept of commercial bribery, as well as the current views and practices of enforcement agencies. One possible reading of the omission or exclusion is that the Chinese legislature sees no need to punish and strike down payments between two parties in a transaction as long as such payments are made on an entity-to-entity basis.

However, the AUCL 2018's second paragraph of Article 7 has a provision that may create complications: according to this provision, business operators may accurately record discounts that are explicitly provided to transaction counterparties. This provision is almost identical to what had been interpreted as a safe harbor in the AUCL 1993. But now, this language, combined with the apparent exclusion of transaction counterparties, raises questions as to whether any inaccurately recorded or unrecorded

discounts that transaction counterparties receive could lead to commercial bribery violations, or even whether the category of commercial bribery recipients definitely excludes transaction counterparties.

In this regard, Latham expects that the State Administration of Industry and Commerce (SAIC), the national agency delegated to enforce the AUCL, with its 1996 Provisional Regulations on the prohibition of commercial bribery being repealed, will draft and issue detailed implemental rules and regulations that provide further guidance on the scope of potential bribe recipients. However, in the meantime — and until the SAIC issues implementing rules and regulations or the AUCL 2018 becomes effective, whichever is later — the authors recommend that companies conduct their business practices in accordance with both the AUCL 1993 and the AUCL 2018. Specifically, for the time being, companies should refrain from providing benefits to transaction counterparties in order to obtain business opportunities or competitive advantages, except for accurately recorded discounts.

### **3. Retains Safe Harbor Provision for Business Operators**

Similar to the current AUCL 1993 and the Second Draft, the AUCL 2018 retains a degree of leeway afforded to business operators in respect of discounts and commissions.

The second paragraph of Article 7 of the AUCL 2018 states 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.”

This provision means that business operators may pay or accept discounts or commissions in the course of a transaction, provided that such arrangements are transparent and are clearly and accurately recorded.

### **4. Clarifies Corporate Liability for Commercial Bribery**

The AUCL 1993 does not distinguish between an employee’s unauthorized conduct of commercial bribery and that directed by a business operator. In practice, local Administrations of Industry and Commerce (AICs) have typically regarded commercial bribery carried out by an individual employee as having been directed by the business operator who hired the individual employee.

Both the First Draft and the Second Draft introduced a rebuttable presumption rule using slightly different language. The Second Draft provided 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, 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, the business operator will not be held liable for the bribe.

The AUCL 2018 retains the same provision contemplated in the Second Draft to require local AICs to separate their considerations on corporate liability for a business operator from individual liability for an employee. The burden of proof would remain on the business operator, should it seek to argue no corporate liability. The AUCL 2018 provision will likely encourage AICs to effectively assess objective evidence up front and properly draw conclusions about business operators’ corporate liability.

## **5. Refines Enforcement Agency's Investigation Processes Regarding Suspected Commercial Bribery**

Compared to the AUCL 1993, the AUCL 2018 expands enforcement agencies' investigation powers. However, the AUCL 2018 also imposes more processes and procedures on these agencies to prevent them from abusing their power and in order to address due process requirements.

The AUCL 2018 specifies and refines the investigation procedures that law enforcement agencies, (*i.e.*, AICs) may use during investigations of potential commercial bribery violations, including when:

- Entering business premises to conduct inspections
- Questioning business operators and other related entities and individuals, and requiring them to explain relevant situations and to provide evidentiary materials or related information
- Accessing or copying related evidentiary materials
- Sealing and/or detaining property related to suspected unfair competition
- Inquiring about bank accounts of business operators suspected of unfair competition

Officers in charge of the enforcement agencies must receive a written report before the agency takes any of the above investigative measures. In addition, agencies must release investigation results to the public in a timely manner. The AUCL 2018 also requires the agencies and their officers to keep confidential any business secrets obtained during investigations.

## **6. Increases Administrative Penalties for Commercial Bribery**

The AUCL 1993 provides for fines ranging from RMB 10,000 to RMB 200,000. In comparison, Article 19 of the AUCL 2018 sets forth that, in cases of commercial bribery violations, administrative authorities can “confiscate illegal gains resulting from illegal conduct, and impose a fine of between RMB 100,000 and RMB 3 million,” as well as revoke a business operator's business license in cases of severe misconduct.

In addition, Article 26 of the AUCL 2018 provides that if a business operator receives an administrative penalty for engaging in commercial bribery, enforcement agencies will record the penalty in the business operator's public credit record. Such credit record documentation could not only harm the business operator's credit record, but also its reputation.

Both the enhanced penalties and credit record will likely be a more effective deterrent to business operators that are considering an act of commercial bribery, in addition to the criminal liabilities on commercial bribery set forth in the PRC Criminal Law.

## **7. Emphasizes Independent Administrative Penalties for Commercial Bribery**

The AUCL 2018 removes the phrase “not constituting a criminal offense” that had been included in the Second Draft as a precondition of administrative penalties for commercial bribery.

The Second Draft had suggested that administrative penalties could only be imposed if the conduct in question did not constitute a criminal offense. That provision appeared to imply that administrative penalties could be assessed only on commercial bribery that had not yet reached the threshold for prosecution under the PRC Criminal Law. However, this provision directly contradicted common

jurisprudence and court practices that acknowledged civil liability, administrative liability, and criminal liability could be imposed concurrently.

By removing the “not constituting a criminal offense” phrase, the AUCL 2018 emphasizes that administrative penalties can be imposed on wrongdoers regardless of whether or not an act of commercial bribery constitutes a crime.

## **8. Provides Measures to Mitigate Administrative Penalties for Commercial Bribery**

The Second Draft provided that business operators who committed minor violations would not face administrative penalties if they correct such misconduct in a prompt and timely fashion. The AUCL 2018 further expands the measures to mitigate administrative penalties.

The AUCL 2018 provides that business operators that have committed minor violations can mitigate administrative penalties by proactively eliminating or reducing the harms that the violations caused. Although the provision does not specify the extent of harm that should be eliminated or reduced, it provides business operators with an avenue to mitigate their exposure to penalties.

This change addresses concerns from the business community that the AUCL 1993 did not credit business operators for maintaining effective compliance programs, and/or for taking steps to discover and rectify acts of misconduct.

## **Conclusion**

The AUCL 2018 enacts substantial changes to the commercial bribery law in China. These new changes, including redefining commercial bribery, refining authorities’ investigation processes, and providing business operators with penalty-relieving/reduced measures, amongst others, increase the sophistication of China’s overall commercial bribery framework. However, certain ambiguities and uncertainties still surround the AUCL 2018, including the definition of commercial bribery recipients. The SAIC will likely provide further implemental rules and regulations to address some of these questions.

Companies doing business in China should continue to closely monitor administrative rules and regulations that SAIC is about to issue as the amended law approaches implementation. These companies should also be aware of potential changes in local AICs’ enforcement trends in the coming months when the AUCL 2018 becomes effective. In the meantime, companies are advised to begin assessing and analyzing their business models, marketing strategies, and sales practices, as well as to begin making appropriate changes in compliance with the AUCL 2018.

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