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Jun He Law Offices

# Complying with PRC Anti-bribery Laws

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# Recent Cases and Developments



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## Rio Tinto Case

- On March 29, 2010, four executives/employees of Australia's Rio Tinto in China were sentenced to 7-14 years in prison for “non-state working personnel accepting bribes” and “infringement of trade secrets”. Mr. Hu Shitai, an Australian citizen and Chief Representative of Rio Tinto Shanghai Office received 10 years in prison.

## Huang Guangyu Case

- In May 2010, once the richest person in China Huang Guangyu was sentenced 14 years in prison for three crimes of “entity giving bribe”, “inside trading” and “illegally conducting business”.



# Recent Cases and Developments (cont.)



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## Guo Jingyi Case

- In May 2010, Mr. Guo Jingyi, formerly Deputy Director of Department of Treaties & Law of MOFCOM was sentenced to death with two-year probation and confiscation of all personal property for accepting bribes of roughly US\$1.3 million. Three other former government officials – Mr. Deng Zhan, formerly Deputy Director of Department of Foreign Investment Administration of MOFCOM, Mr. Xu Mangang, a Department Director of SAFE, and Mr. Liu Wei, Division Chief of SAIC were also prosecuted for accepting bribes.

## Recent Cases and Developments (cont.)



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- Courts in China adjudicated 10,315 commercial bribery cases involving state working personnel in 2008 and 10,805 cases in 2009.
- SAIC conducted a lot more investigations in “commercial bribery” cases during the same period.
- 2006 was declared ‘the year for tackling commercial bribery’ - Chinese Government officially launched a nationwide campaign to fight “commercial bribery”.



# Basic PRC Anti-bribery Laws



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## **Bribery related crimes are prohibited and penalized under eight sub-categories under PRC's Criminal Code:**

- Crime of accepting bribes (by state working personnel)
- Crime of giving bribes (to state working personnel)
- Crime of entity accepting bribes
- Crime of entity giving bribes
- Crime of giving bribes to entities
- Crime of non-state working personnel accepting bribes
- Crime of giving bribes to non-state working personnel
- Crime of introducing bribes

# Basic PRC Anti-bribery Laws (cont.)



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## Crime of giving bribes to state working personnel

- A person shall be guilty of giving bribes if he/she:
- gives money, things of value or other benefits to state working personnel
- in order to obtain unjust benefits
- **Penalty** – up to five years in prison, between 5-10 years in prison for serious offense, and up to life imprisonment for especially serious offense
- **Prosecution threshold** – RMB10,000 (US\$1,492)
- **Exception** – if giving of money, things of value or other benefits is due to extortion where no unjust benefit is obtained



## Basic PRC Anti-bribery Laws (cont.)



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### Crime of giving bribes to non-state working personnel

A person shall be guilty of giving bribes to non-state working personnel if he/she:

- gives money, thing of value or other benefits to personnel of a company, an enterprise or other entity in order to obtain illegal gains.
- **Penalty** – up to three years in prison for offense involving relatively large amount and between 3 - ten years in prison for offense involving very large amount, as well as monetary fine.

*If committed by entity*, the entity will be subject to fine and the entity executive and personnel directly responsible for the offense will be treated according to individual committing the offense.

- **Prosecution threshold** – RMB10,000 (US\$1,492) for offense committed by individual and RMB 200,000 (US\$29,850) for offense committed by entity.



## Basic PRC Anti-bribery Laws (cont.)



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### Crime of giving bribes to entities

A person shall be guilty of giving bribes to entities if he/she:

- gives money, thing of value or other benefits to state organs, state-owned company, enterprise, people's organizations or other social entity in order to obtain illegal gains.
- **Penalty** – up to three years in prison.  
*If committed by entity*, the entity will be subject to fine and the entity's executive and personnel directly responsible for the offense will be treated according to individual committing the offense.
- **Prosecution threshold** – RMB100,000 (US\$14,925) for offense committed by individual and RMB 200,000 (US\$29,850) for offense committed by entity.

# Basic PRC Anti-bribery Laws (cont.)



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## Crime of entity giving bribes

An entity shall be guilty of giving bribes if it:

- gives money, thing of value or other benefits to state working personnel in order to obtain illegal gains.
- **Penalty** – monetary fines for the offending entity; and the entity's executive and personnel directly responsible for the offense will be subject to up to five years in prison; treated according to individual committing the offense.
- **Prosecution threshold** – RMB200,000 (US\$29,850) for offense committed by entity.



## Basic PRC Anti-bribery Laws (cont.)



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### Who are “state working personnel”?

Under PRC Criminal Code (Art. 93), “state working personnel” include the following:

- Persons working in state organs who are engaged in public affairs such as government and party officials;
- Persons working in state-owned companies, enterprises and institutions who are engaged in public services;
- Persons dispatched by state organs, state-owned companies, enterprises and institutions to non-state-owned companies, enterprises and institutions to engage in public services (director of non-state-owned hospital, etc.); and
- Persons who are engaged in public services according to law.

## Basic PRC Anti-bribery Laws (cont.)



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### What is included as “object of giving”?

- Money, including kickbacks, payments and reimbursement under various names such as hardship fees, promotion fees, dissemination fees, sponsoring fees, research fees, remuneration, consulting fees, commission;
- Properties, including tangible things of value such a house and cars; and
- Other means or benefits, including free overseas travel, entertainment, financial support for children’s education at foreign schools, financial and other help with immigration, special personal services, etc.



## Basic PRC Anti-bribery Laws (cont.)



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- *Factors to distinguish bribery and permissible gift giving/receiving:*
  - the background situation in which the giving and acceptance occur, such as whether the two parties are related
  - the amount of money or value of things given and accepted
  - the reason, occasion and manner of the giving and acceptance
  - whether the recipient takes advantage of his/her position to offer benefits to the giving party

# Enforcement

## Enforcement authorities

- People's Procuratorates (prosecutor)
- Police
- Court
- Communist Party Disciplinary Committee
- State Administration of Industry and Commerce (“SAIC”)

## Liability

- Civil
- Administrative
- Criminal



# Official Bribery v. Commercial Bribery



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- “Commercial bribery” is not a separate or distinct crime under PRC Criminal Code, but can be prosecuted under different sub-categories of bribery provided in the Criminal Code if the conduct reaches the level of criminal offense.
- Judicial Interpretation of PRC Supreme Court and Supreme People’s Procuratorate issued on November 25, 2008 (“*Judicial Interpretation*”) clarifies certain issues on application of PRC Criminal Law to commercial bribery.

# Official Bribery v. Commercial Bribery (cont.)



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- Judicial Interpretation practically expands the scope of “other entities” subject to the crime of commercial bribery to include any entity such as hospitals, educational institutions, bidding/tendering committees, social societies/associations, sport event organizing committees, etc.
- Medical professionals, school administrators/teachers and members of bidding/tendering committees are singled out to be subject to criminal liabilities for commercial bribery due to increasing violations in recent years.



# Official Bribery v. Commercial Bribery (cont.)



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- “Commercial bribery” generally occurs in the business or commercial context and involving product sale and purchase, project procurement, obtaining and retention of business and competitive advantage, etc.
- “Commercial bribery” is also prohibited under PRC Anti-unfair Competition Law.
- “Commercial bribery” cases are often initially investigated by local offices of SAIC for civil and administrative liability and penalties may include warning, monetary fines and confiscation of illegal income. If circumstances warrants, SAIC may refer the case to the police and/or prosecutor’s office for criminal investigation.

# Commercial Bribery



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- Definition – “Commercial bribery” is defined as “ the conduct of a business operator to resort to bribery by giving money/ things of value or other means to the counterparty (entity or individual) for the purpose of selling or purchasing products.”
- Essential elements– Purpose – the legality of such giving of money/things of value, etc. depends upon whether such giving is for the purpose of selling or purchasing products.



## Commercial bribery (cont.)



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### Prohibited conduct:

- Giving money: business operator, for purpose of selling or purchasing products, gives counterparty money in various forms such as reimbursement, sales promotion fees, dissemination fees, sponsoring fees, research fees, remuneration, consulting fees, commission and etc.
- Giving things of value or other benefits: these may include uncustomary gifts, free overseas travel, entertainment, financial support for children's education at foreign schools, etc.

## Commercial Bribery (cont.)



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- Granting secret off-the-book rebates:
  - “Rebate” refers to certain percentage of sale price refunded to counterparty in cash or in kind or otherwise.
  - “secret off-the-book” rebate refers to rebate that is not actually recorded in the accounting books of the parties that provides and accepts the rebate in their ordinary course of business.
  - Providing and accepting “secret off-the-book” rebate is treated as act of “commercial bribery” subject to legal liability.



## Commercial bribery (cont.)



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### Permissible conduct:

- In their sale or purchase of products, business operators may grant aboveboard discount to the counterparties provided that such discount is entered truthfully in the books of both parties
- “Discount” as rebate in connection with product sale, refers to preferential price, given to counterparty by business operator during product sale, which is overboard and recorded in the books of both transaction parties, and may take the form of price reduction pro rata upon payment or refund pro rata after payment.

# Comparison between China's Anti-bribery Laws and FCPA



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## Scope of Application

- While FCPA prohibits corrupt payments to foreign government and party officials (including officials of public international organization), China's anti-bribery laws apply to government officials (state working personnel), as well as all businesses and their employees.



# Comparison between China's Anti-bribery Laws and FCPA (cont.)



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## Meaning and scope of “what’s being given”

- Although described in various different terms such as “things of value”, “Cai Wu” (meaning “money” and “property” in Chinese), “means” and “benefits” under FCPA and China’s anti-bribery laws and enforcement practice, the meaning and scope of what’s being given in bribery inquiries are essentially similar.

# Comparison between China's Anti-bribery Laws and FCPA (cont.)



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## Exceptions

- Facilitating payment or “grease money” allowed under FCPA.
- Payment to state working personnel due to extortion where no benefit is obtained is not treated as “giving bribery” under China’s Criminal Code.
- Provisional Regulations on the Prohibition of Commercial Bribery permits “small and customary advertising gifts”.



# Comparison between China's Anti-bribery Laws and FCPA (cont.)



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## Affirmative defenses

- FCPA has two affirmative defenses that may make otherwise prohibited payments permissible
  - 1) The payment was legal under the written laws of the country in which it was made.
  - 2) The payment was made for reasonable and bona fide business expenditures of the foreign official, such as travel and lodging, directly related to the promotion, demonstration, or explanation of products or services or to the execution or performance of a foreign government contract. This defense is not available if a quid pro quo (i.e. a favor) is involved, and such expenditures must not be excessive.
- China's anti-bribery laws and regulations do not contain such defenses.

# Comparison between China's Anti-bribery Laws and FCPA (cont.)



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|                  | <b>PRC Anti-unfair Competition Law</b> | <b>PRC Criminal Law</b>              |   | <b>FCPA</b>                                     |
|------------------|--|--------------------------------------|---|---|
|                  | Commercial Bribery                     | Crime of Giving Commercial Bribery   | Crime of Giving Bribery   |   |
| Intent           | To sell products                       | To obtain illegal gain               | General intent  | general intent or deliberate ignorance of facts |
| Threshold amount | No requirement                         | RMB 10,000 (US\$1,492)               | RM B 10,000 (US\$1,492)   | Any monetary value                              |
| Accepting party  | Entities and individuals               | Entities and individuals             | State working personnel   | Foreign officials                               |
| Punish-ment      | Fine and confiscation of illegal gain  | Imprisonment under 10 years and fine | Up to life imprisonment, fine and confiscation of personal property | Fine, civil liability and imprisonment          |
|                  |  |                                      |   | 26  |



## Conclusive Remarks



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- Bribery is a serious issue in China, and has been the focus of enforcement during the recent years. There are important similarities and differences between FCPA and China's anti-bribery laws. Both must be complied with.
- Even if no criminal liability is found, violators may still be held liable for civil or administrative liability, and further may suffer loss of reputation/goodwill.
- Investigation for bribery in China may trigger or lead to FCPA investigation in the U.S. and vice versa.
- It's essential to have company policy (SOP, Code of Conduct, etc.) in place to provide guidance to employees on compliance.
- It's important to conduct training and periodic compliance audit to employees in China.
- Consult with legal counsel in case of uncertainty.



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