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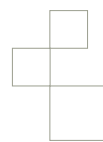
CHINA'S UPDATED ANTI-CORRUPTION REGULATIONS

BY **CINDY YU**

AFTER LEAVING ITS ANTI-BRIBERY LAWS untouched for more than two decades, the People's Republic of China has recently begun to crack down on corporate corruption and fraud with sweeping revisions to its Anti-Unfair Competition Law (AUCL), which took effect on Jan. 1, 2018. In addition, the State Administration for Market Regulation (SAMR) was created in March 2018, which combines the regulatory oversight responsibilities of five separate enforcement agencies into one organization.

Since its formation, the SAMR has brought more than 20 enforcement actions, signaling its commitment to curtail bribery, fraud and unfair competition across the country. Given the trade war and the resulting strain between U.S. and China relations currently, U.S. companies operating in China will likely experience more scrutiny and enforcement actions by SAMR. Below are key changes under the amended AUCL, as well as tips for bolstering compliance programs in order to help multinational companies of all sizes navigate and comply with these new regulations.

UNDERSTANDING THE REVISIONS TO AUCL
The new AUCL regulations help to



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clarify the definition of commercial bribery, impose liability on companies and increase administrative penalties for commercial bribery acts. The following three key elements are essential for multinationals to know and understand:

■ **Clarifies corporate liability for commercial bribery:** The amended AUCL clarifies that if an employee engages in commercial bribery, that

activity should be viewed as the conduct of the company and not solely the individual. A company is not liable if it can prove no advantages were obtained by the employee's commercial bribery and that the employee's activity does not relate to the company's obtaining business opportunities or other competitive advantages. The burden of proof remains with the company and it must prove that it has adopted proper

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compliance policies, implemented effective measures to supervise and control its employees' activities, and did not participate in its employees' bribery activities.

■ **Increases administrative penalties:** Fines and penalties have been enhanced under the amended AUCL regulations, allowing agencies to confiscate gains, impose fines ranging from RMB 100,000 to RMB 3 million (or \$16,000 to \$474,000), revoke a company's business license and record a penalty in the company's public credit record. Additionally, penalties are now imposed regardless if an act constitutes a crime with the removal of the phrase "not constituting a criminal offense," which was originally included in AUCL 1993 as a precondition of administrative penalties for commercial bribery.

■ **Includes safe harbor provision:** Companies are now allowed to pay discounts to counterparty or commission to an intermediary, however, the transaction must be transparent and clearly recorded by both parties.

Recent enforcement actions shed some light on how the SAMR will likely apply these amended regulations. One example is the Lepu Medical Technology investigation, which began in January 2018 and is still ongoing because the decision is being challenged. In this case, Lepu paid doctors to speak at an April 2017 academic conference to promote its implantable cardiac pulse generator to attendees and recorded the speaking fees as sales expenses. The Shanghai Qingpu District Market Regulation

Bureau used the AUCL provision that outlaws payments to "third parties influential to a transaction" and fined Lepu \$22,000 (or RMB 150,000) for commercial bribery, alleging that Lepu affected the judgement of the doctors in the audience thereby gaining competitive advantage, even though no actual transactions were cited. Physicians in China are often employed by public hospitals and hence qualify as "foreign officials" under the U.S. Foreign Corrupt Practices Act (FCPA). Thus, for example, multinational life science companies operating in China and subject to the FCPA need to closely watch their conference speaking arrangements with local physicians and health care providers as it relates to both FCPA and AUCL risks. In particular, as a primary defense, companies should ensure that the speaking fees are recorded accurately with appropriate descriptions to be able to utilize the safe harbor provision.

STEPS TO TAKE TO MITIGATE RISK

It seems likely that commercial bribery through third parties will be the focus of future investigations and enforcement actions in China, which follows a similar pattern under U.S., U.K. and Brazilian anti-corruption laws. Additionally, the SAMR will undoubtedly want to use a significant enforcement matter to show its intent and power under the amended law and new reorganization. Multinational companies with operations in China should take these four steps now:

■ Carefully review existing policies and procedures in order to mitigate risk and ensure there are no gaps or exposure under the new rules.

■ Conduct a focused review of existing business arrangements involving transaction counterparties and third parties, including agents, distributors, or other intermediaries to identify processes or relationships that need to be mitigated.

■ Policies should be established that require due diligence prior to engaging third-party vendors who are intended to facilitate a transaction with a counterparty, as well as include terms and conditions for requiring compliance by the third-party in audit rights, periodic audits and training of third parties.

■ Internal controls and policies regarding giving or receiving gifts, payments, property, hospitality and other incentives by an employee need to be reviewed and revised where necessary, with a focus on the risk of vicarious liability.

Senior management and employees in China need to be trained to ensure they are aware of these important changes and that sufficient controls are in place to ensure compliance with these new regulations across the organization.

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