



Focus on China Compliance

Welcome to the third issue of *Focus on China Compliance* for 2015. According to the FCPA Blog's October 2015 [Corporate Investigations List](#), China leads the countries reported to be involved in FCPA investigations with 29 mentions. This statistic may well increase in the next 12 months as the long arm of FCPA enforcement has extended to cover individual employees more aggressively, including those working at non-US companies, even if they live and work outside the United States. In addition to the effects of foreign legislation, China has this year experienced an outbreak of compliance-related laws and enforcement campaigns. Most notable are those relating to environmental protection before and after the Tianjin explosion, and the Ninth Amendment to the PRC Criminal Law, which has impacted corruption, personal privacy, and data security. This issue reviews some of the most significant changes from the last 12 months, and their practical impact on businesses.

McDermott Will & Emery LLP enjoys a unique strategic alliance with MWE China Law Offices in Shanghai. We intend for this publication to provide regular insight into the rapidly evolving China compliance landscape. If there is a topic you would like to see covered in a future issue, please e-mail an editor.

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New US DOJ Policy Will Further Extend the FCPA's Reach in China

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The US Foreign Corrupt Practices Act (FCPA) prohibition on bribery of foreign officials is often perceived by Chinese companies as placing strict limitations on what US companies can do overseas, while having no power to reach Chinese companies' activities inside China. This perception is not surprising; most US companies do not spend much time assessing how Chinese law can affect their conduct in the United States. Any company that is active in the United States must, however, be mindful that US authorities may aggressively pursue them and any employees involved in

bribery that has any connection to the United States, regardless of how remote that connection might be.

The FCPA's anti-bribery provisions generally apply to

- "Issuers," which primarily are companies traded on a US stock exchange. This includes Chinese companies with American Depositary Receipts listed on a US exchange, and other companies with stock traded in the United States that are required to file reports with the US Securities and Exchange Commission
- "Domestic concerns," which includes companies organized under US law, including state law; companies that have their principal places of business in the United States; and US citizens, nationals and residents

- Employees, officers, directors, agents and shareholders of issuers and domestic concerns
- Other companies and persons that directly, or through someone else, engage in any act in the United States in furtherance of a payment of money or delivery of other item of value, or the offer, authorization, or promise of payment of money or anything of value, that would violate the FCPA if performed by a US company or citizen. Employees, officers, directors, agents and shareholders of such companies are also potentially liable under the FCPA in these situations.

The authority of the US Department of Justice (DOJ) under US law to pursue criminal prosecutions of any company or person in the last category above gives DOJ a very broad reach, and DOJ interprets its statutory jurisdiction as extensively as possible. The FCPA allows DOJ to pursue an indictment of any company or person that makes a telephone call or sends an e-mail message into the United States that furthers a bribe scheme in any way, or uses the US banking system to transfer money in furtherance of a bribe scheme, even if the payment does not originate or terminate in the United States.

DOJ may also pursue criminal charges against companies and individuals outside the United States, based on “conspiracy” or “aiding and abetting” theories. Under these theories, DOJ can obtain indictments of companies and individuals who agree with others to violate the FCPA, or who knowingly assist others in violating the FCPA, even if the companies and individuals did not themselves engage in any conduct in the United States.

The risks for companies and individuals outside the United States who might be involved in bribery schemes has recently increased markedly. Companies facing FCPA investigations in the United States typically cooperate with the authorities, in the hope that they will not be charged. Alternatively, if they are charged, they typically seek resolutions that include substantially lower penalties than they would have faced if convicted after a trial.

In September 2015, however, DOJ issued new policies that will deny companies credit for cooperating in an investigation of their misconduct, unless they provide DOJ all relevant facts relating to individuals responsible for the misconduct. This will include individuals working at non-US companies, even if they

live and work outside the United States. In addition, partially in response to concerns that prosecuting corporations, but not individual employees, does not have a meaningful effect on deterring corporate misconduct, DOJ is requiring its prosecutors to give greater consideration to actions against individuals in criminal or civil cases involving corporate misconduct, including FCPA matters.

Of course, many questions remain regarding whether or not China will extradite nationals to the United States for prosecution on criminal charges. The landscape in this area could evolve as China pursues the extradition of individuals who are charged with anticorruption offenses in China but reside in the United States. Regardless, an FCPA indictment will have dramatic consequences on a Chinese company's or national's reputation. An individual facing FCPA charges also faces the risk of being extradited to the United States by any country he or she visits that has an extradition treaty with the United States.

Chinese companies with activities in the US should ensure that they have effective anti-corruption compliance programs in place that take into account the FCPA, as well as China's anti-bribery laws. Such programs will go a long way to preventing encounters with the long reach of the US authorities.

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Increased Enforcement of Environmental Law After the Tianjin Explosion

Wilson Wan

The huge explosion in Tianjin on August 12, 2015 caused hundreds of casualties. The explosion was so violent, it severely damaged several clusters of residential buildings several hundred of meters away.

The chemicals involved in the explosion include sodium cyanide, which is extremely poisonous. Large quantities of sodium cyanide have reportedly leached into the environment, seriously polluting the air, water and soil around Tianjin. Surviving residents have demanded that the government buys their contaminated homes and provides additional

compensation. Ruihai International Logistics Company (the company which reportedly stored toxic chemicals close to residential properties) and other relevant parties will undoubtedly be pursued for compensation and restoration.

The Tianjin explosion has attracted massive national and international attention. We have seen since its occurrence a series of “aftershocks,” including such as a dramatic and rapid change of personnel in the Tianjin local government, the launch of a publicized anti-corruption investigation, and highly visible enforcement of environmental protection laws. While the personnel changes and anti-corruption investigations will have a significant impact on Tianjin and the companies and people associated with the accident, the flurry of environmental protection activity will have the most significant and lasting impact on businesses throughout China.

An Emerging Trend in China’s Enforcement of Environmental Law: Strict Enforcement and Severe Punishment

A campaign for safe chemical production and storage has begun in earnest. The PRC Government reacted to the explosion by ordering a sharp increase in the inspection of chemical production and storage facilities, among other actions. Businesses located in Shandong, Beijing and Guangzhou, and probably in other locations, have already received notices from the Department of the Environment of forthcoming on-site inspections.

Previously, some high profile environmental protection campaigns have started with enthusiasm, but have tended to tail off rather quickly and quietly, suggesting a general lack of motivation or appetite for environment law enforcement. Politicians were evaluated primarily on gross domestic product considerations, so local governments typically focused narrowly on economic development rather than concerns that could impede growth. Local politicians were reluctant to take a stand against polluting companies. Compounding this situation, the prime objective of the director of the Department of the Environment in some regions was to stimulate investment in the region. The enforcement of environmental protection laws has, as a result, been considered a low priority in many areas for a long time.

Judging from the volume and type of environmental enforcement activity that has recently attracted media attention, the current campaign looks to be vastly different from previous campaigns. For example, in Jinan, Shandong Province, the local Department of the Environment has conducted a high profile, extensive inspection of a business that included a very detailed examination of permits, storage facilities, and records, and a review of the business’s policies on potentially hazardous activities, such as waste disposal. The inspectors even provided advice and established a long term association and cooperation framework with the company. These actions suggest that the current campaign is focused not only on immediate corrections, but includes a thoughtful approach to improvements. This is an unprecedented shift from prior law enforcement activities.

These factors in addition to the Tianjin explosion are driving this change. The first is a shift in the national development strategy. Since President Xi Jinping and Premier Li Ke Qiang came to power, China’s economic focus has transitioned from exports and China’s position on the world stage, to developing the country’s internal economy and the quality of life of its citizens. The new priorities require a balanced economy and upgraded industry, along with an emphasis on societal structures such as health care and education. As a result, the quality of the environment has become an important consideration in evaluating politicians. Increased environmental law enforcement parallels this change in the nation’s development strategy.

Responsibilities and Risks Likely to Escalate

A new environmental protection law that came into effect on January 1, 2015 has facilitated some of the swift actions that have been taken since the explosion. The new law has substantially strengthened the government’s enforcement powers and the potential for deterrence.

1. Article 68 specifies that if an environmental violation has severe consequences, the local official in charge of the relevant local Department of the Environment must resign and assume responsibility. This is a powerful incentive for local, responsible officials to ensure that the businesses under their oversight are fully compliant with environmental regulations and effectively managed.

2. Article 59 states that when a business, public institution or other entity is fined and ordered to clean up an illegal discharge of pollutants but refuses to do so, the administrative entity that applied the fine has the option to impose the fine cumulatively on a daily basis from the day after the original fine should have been paid.
3. A violating entity will be placed on an environmental blacklist, which could impact its ability to obtain financing and operate effectively.
4. The new law has strengthened the provisions for criminal liability. There have been more than 1,000 criminal cases brought since the enactment of the new law so far this year, far more than the entire total of all criminal environmental cases brought in the years before the new law.

The fines levied against entities found guilty of breaches of the new law are substantial. In January 2015, the first major fine was levied in Shanxi province; the company had discharged more pollutants than permitted and was required to pay a fine of RMB 200,000 (US\$ 31,433). It reportedly failed to correct its behavior or pay the fine. The fine was increased to RMB 15.8 million (US\$ 2.4 million) after 79 days, which was paid by the company at a later stage, according to local media reports.

Businesses Need to Clean Up

We can expect enforcement activity in this area, and corresponding penalties will continue to increase. Companies' previous practice of stalling and dodging environmental responsibilities and compliance obligations now face considerable risk. To be able to pass a government inspection and avoid large fines, entities should identify areas of non-compliance and rectify them immediately.

Environmental laws are, however, intricate and complex, and breaches are therefore not always immediately identifiable. Moreover, as indicated by the investigations in Tianjin, failures in environment compliance may go hand-in-hand with other internal control issues, such as fraud, corruption and conflicts of interest. As a result, investigations can prove to be extremely challenging.

The situation is exacerbated by some entities that unfortunately resort to what they believe are smart practices that are, in fact, extraordinarily risky. These include

1. Foreign companies entrusting their Chinese joint venture partners with investigations and handling of environmental accidents, limited follow-up with their Chinese partners or ownership of remediation.
2. Companies fully entrusting local consulting firms with handling environmental accidents or applications for relevant permits, with limited oversight or minimal attention to results.
3. Companies fully entrusting third parties to dispose of waste with little or no supervision.
4. Companies consulting with individual officials privately during inspections or after environmental accidents, and trying to address incidents or compliance failures through private understandings with the officials.

The companies best positioned to address the new landscape in China are the ones that treat environmental compliance as seriously as other China compliance risks, consult with experienced professionals, adopt effective policies and procedures, and maintain close oversight of concerns.

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Conducting an Effective Internal Investigation

Angel Wang

In China, the volume of white-collar crime is increasing annually. Generally speaking, white-collar crime in China has developed its own striking features in recent years. "Power-for-money" deals have become very common and are seriously damaging the economy and perceptions of the state and government. The financial losses caused by white-collar crimes now exceed those caused by blue-collar crimes, such as robbery. The number of major prosecutions and the amount of money involved have also increased sharply. White-

collar crime in China has evolved from conduct involving sums of from a few thousand to several million yuan, to now involving hundreds of thousands, millions and even tens of millions yuan.

Regardless of whether or not allegations of white-collar crime are sufficiently serious to prompt a legal authority to pursue an investigation, companies in China should consider undertaking their own internal investigation to determine the veracity of allegations, identify possible perpetrators and learn valuable lessons that can lead to improvements in policies and procedures.

General Procedure

Allegations of corporate misconduct typically arise with a whistleblower's report, often made anonymously. Because the improper handling of information provided by a whistleblower, or the mishandling of information that is uncovered during an internal investigation, may result in potential criminal violations, it is vital that proper steps are taken at the outset and the correct protections put in place.

Internal investigations conducted in other countries tend to reserve until the end of the process of the interviews with the employee suspected of wrongdoing, or the manager in charge of the department alleged to have been involved in wrongdoing. Internal investigations in China, however, have traditionally started with these interviews. This approach allows investigators to gather upfront important information that could shape the rest of the investigation, but it raises risks that data will be compromised or subjects will try to influence others improperly. If the internal investigation is to be conducted discreetly, the order and scope of interviews must be considered carefully, and adjustments to the traditional approach made appropriately.

After initial interviews, data is typically collected and reviewed. Forensic audits are often advisable as they can identify key information about potential financial violations that could be missed in interviews and other data reviews.

The review of data and forensic audit will often identify issues that require additional interviews, including follow-up interviews of the initial interviewees. This cycle could repeat,

as more interviews are conducted and additional relevant data identified and reviewed.

Along the way, investigators must be particularly sensitive to information that creates risks under China's state secrets law and personal privacy protection laws, or involves protected confidential business information. Reports should avoid such information, and companies and their advisors must be careful not to disseminate any reports in a manner that could violate laws in these areas.

Common Approaches and Risk Exposure

While most large companies have a general idea about how to handle internal investigations, they need to proceed cautiously; an improperly handled internal investigation may not only reduce the value of any evidence collected and the credibility of any conclusions, but could lead to civil claims, criminal charges or administrative penalties. Certain element of internal investigations that would be appropriate in other countries may be beyond an employer's right to pursue in China. For example, some information that may be obtained during an internal investigation might be considered personal and sensitive under Chinese law, and impermissible to access without authorization.

COLLECTING, MONITORING, AND USING CORRESPONDENCE

When an employer accesses or reviews an employee's correspondence, such as e-mails or phone messages, the employee's right to privacy is implicated. The collection, monitoring and use of employee' correspondence may lead to privacy disputes and may constitute an invasion of the employee's "moral rights" by the company.

Releasing images or text of correspondence, unlawfully opening or reading another person's letters, or accessing personal e-mail or voicemail without permission may result in criminal liability, instead of mere civil tortious liability.

SURVEILLANCE AND MONITORING

Conducting surveillance and monitoring employees is relatively common in certain investigations in China, but it carries a high level of risk for the companies and individuals involved. Various laws and regulations in China prohibit private surveillance and monitoring activities, such as watching employees without their knowledge, secretly taking photos or

videos and using certain eavesdropping equipment to listen to conversations.

If the consequences of this surveillance are serious, such as unlawful surveillance causing a suicide, mental disorders, assault or significant economic losses, the company and individuals involved may face criminal prosecution.

USING OUTSIDE RESOURCES TO OBTAIN INFORMATION

Companies often need to contact outside resources and access information to investigate allegations comprehensively. The company must, however, be sure to only use lawful methods and avoid accessing information that is protected by law.

Accessing an employee's personal information, e.g., bank account details or banking records, fingerprints, personal tax records or personal property information, is strictly illegal. If this type of information is gathered, the company and individuals involved may be found guilty of various crimes that lead to fixed-term imprisonment.

PHYSICAL SEARCHES

While there are no specific PRC laws or regulations to restrict physical searches of company offices, physical searches of an employee's person or personal items should only be conducted by government authorities authorized to exercise criminal investigation powers under the current PRC legal regime.

Searching an employee's body or personal items, even items that are provided by the employer for use in connection with the employment, may still violate privacy rights or lead to a conviction for committing the crime of unlawful search.

ENGAGEMENT OF THIRD PARTIES TO CONDUCT INTERNAL INVESTIGATION

Although private detective agencies and similar entities that provide investigations into private information are prohibited in China, many types of third party investigators, such as consulting firms, conduct investigations in China as "business consultations" or "market research." There have been several recent crackdowns against these types of businesses and their unrestricted use is typically discouraged by lawyers.

Third party investigators have been known to go beyond the control of the company when they conduct an investigation, such as by expanding the investigation's approach, scope, or resources. The company and the third party may become joint tortfeasors or be found to have committed joint crimes if the third party conducts an investigation or provides illegal consulting services to the company.

Minimize Risk

A successful and compliant internal investigation can not only identify relevant and useful information, but also help a company mitigate risks or reduce liability for its part in any wrongdoing. Nevertheless, significant attention must be paid to the potential risks inherent in internal investigations in China. Thorough planning and consultation with experienced counsel is necessary to minimize exposure to potential legal liabilities.

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The Effect of The Ninth Amendment to the PRC Criminal Law Part 1: Bribery and Corruption

Jacky Li

The Standing Committee of the National People's Congress promulgated the Ninth Amendment to the PRC Criminal Law (the Ninth Amendment) on August 29, 2015, implementing an expansive set of changes that closely follow the significant Eighth Amendment, which was promulgated in 2011. The Ninth Amendment covers a wide variety of topics, including

- Revisions to the death penalty
- Increased focus on terrorism and extremist crimes
- More severe and comprehensive punishments for internet-related crimes
- Changes to crimes involving offenses against individuals
- Enhanced punishment for corruption-related crimes
- Criminalizing activities relating to the alteration, theft or sale of citizens' identity papers

- Criminalizing activities such as organizing cheating on national exams, or providing devices or other assistance to facilitate cheating
- Criminalizing certain activities to maintain societal security after the abolition of re-education through labor
- Clarifying and strengthening laws relating to protected information and data compliance.

For multinational and local companies operating in China, the most significant changes in the Ninth Amendment are those related to corruption, protected information and data compliance. The amendments relating to corruption expand the scope of the crimes and the type and severity of potential punishments. The amendments relating to protected information and data compliance provide a series of significant changes to a wide variety of areas, but most notably expand the scope of the crime of illegally obtaining or providing personal information.

Amendments to Corruption Laws

There are six articles related to corruption and bribery crimes within the Ninth Amendment. These include the new crime of offering bribes to close relatives or others with close connections to state functionaries, and monetary fines being added to certain corruption-related crimes.

Broadly speaking, the amendments to corruption-related crimes have the following five characteristics.

THRESHOLD FOR CONVICTION AND SENTENCING CHANGED FROM FIXED AMOUNTS TO GENERAL STANDARDS

Under the Criminal Law of the Republic of China (the Criminal Law), monetary figures like “RMB 5000”, or “RMB 50,000” were used as thresholds for conviction and sentencing on corruption-related crimes. In the Ninth Amendment, these thresholds have been replaced with general standards such as “a relatively large amount” and “huge amount”.

For instance, Article 383 of the Criminal Law originally stipulated that “an individual who embezzles not less than 100,000 yuan shall be sentenced to fixed-term imprisonment of not less than 10 years, or life imprisonment, and may also be sentenced to confiscation of property. If the circumstances are particularly serious, he shall be sentenced to death and also to confiscation of property.”

In comparison, in the Ninth Amendment, Article 383 has been revised to

An individual who embezzles an especially huge amount, or with other particularly serious circumstances, shall be sentenced to fixed-term imprisonment of not less than ten years, or life imprisonment, and concurrently sentenced to a fine or confiscation of property. If he embezzles a particularly huge amount, which causes significantly serious loss to the interests of the State and the people, he shall be sentenced to life imprisonment, or the death penalty, and concurrently sentenced to confiscation of property.

Factors such as the fast growth of China's economy and existing gaps in development among different commercial sectors have been taken into consideration in the Ninth Amendment. Changes such as this one, which eliminate clear thresholds, have subsequently improved the flexibility and fairness of the implementation and enforcement of the law.

RESTRICTIONS ON SENTENCING REDUCTIONS FOR EMBEZZLERS

One key characteristic of the embezzlement law is that a violation requires the perpetrator to be a state functionary, who is very likely to have a strong political background or powerful connections. It is therefore common to see some criminals, who committed serious crimes and were sentenced to death, being granted a reprieve to a life sentence and, even further, reductions in their prison sentences. In the Ninth Amendment, life imprisonment has been set as the reprieve for the death penalty. This is likely to act as a strong deterrent for those who previously thought they would be able to influence their way into a shorter sentence.

THOSE WHO OFFER BRIBES NOW ALSO PUNISHED

In practice, people offering bribes tend to gain much more than those who receive them. In the past, owing to a blind spot in the law, those who offered bribes were subject to imprisonment and the removal of certain political rights, but not financial penalties. In order to fill the gap and improve the legislation, monetary fines and confiscation of property have been added to the Ninth Amendment as mandatory penalties for the crimes of offering bribes to individuals, offering bribes to entities, offering bribes to close relatives of state functionaries and introducing bribes. The government hopes

that the introduction of these punishments for the bribe-giver will deter more people from committing this crime.

REFINED THRESHOLD FOR EXEMPTION FROM PUNISHMENT

Before the Ninth Amendment, Article 390 of the Criminal Law stated “any briber who, before he is investigated for criminal responsibility, voluntarily confesses his act of offering bribes, may be given a mitigated punishment or exempted from punishment.” There was no clear boundary or standard to differentiate under which circumstances exemption should be applied. As a result, a large amount of discretion on this issue could be exercised by those with ulterior motives. In order to reduce ambiguity and maintain the principles of justice, the threshold for punishment exemption has been refined and raised to where “the circumstances of the crime are relatively minor, or his act plays a critical role in detecting a major case, or if he performs any major meritorious services”.

EXPANDED SUBJECT OF CORRUPTION CRIMES

In the Seventh Amendment, promulgated in 2009, the category of individuals who could be convicted of accepting bribes was expanded from state functionaries to anyone who has a close relationship with a state functionary. Similarly, in the Ninth Amendment, Article 390a has been added after Article 390 of the Criminal Law, in which, the individuals who could be convicted of *offering* bribes has been expanded to anyone who has a close relationships with a state functionary:

Whoever, for the purpose of securing illegitimate benefits, offers bribes to any of the close relatives of a State functionary, or persons closely related to a State functionary, or a State functionary who has left their post, their close relatives or other persons closely related to them, shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention and concurrently sentenced to a fine.

The Ninth Amendment revisions to the Criminal Law demonstrate the government’s determination to eradicate corruption in China. They certainly represent a step in the right direction, and send a clear message that corruption will no longer be tolerated or subject to influence.

In the next issue of *Focus on China Compliance*, we will examine the changes in the Ninth Amendment that relate to protected information and data compliance.

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McDERMOTT HIGHLIGHTS**McDermott Partners Named to International Tax Review's "Tax Controversy Leaders Guide"**

Five McDermott lawyers have been selected for inclusion in the 2015 International Tax Review's (ITR) "Tax Controversy Leaders Guide".

Congratulations to the following:

- Thomas Borders, Chicago
- Elizabeth Erickson, Washington D.C.
- Roger Jones, Chicago
- Jean Pawlow, Washington D.C.
- Todd Welty, Dallas

The 5th edition of the "Tax Controversy Leaders Guide" highlights the leading tax dispute resolution lawyers and advisers in the world. Inclusion in the guide is based on a minimum number of nominations received, on top of evidence of outstanding success in the past year and consistently positive feedback from peers and clients.

This is the fifth year that Jean Pawlow has been included in the guide; the fourth year for Thomas Borders and Roger Jones; the third year for Todd Welty; and the second year for Elizabeth Erickson.

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