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## China's New Unfair Competition Law and Its Potential Effects on Commercial Bribery

### I. Background

On February 25<sup>th</sup>, 2016, the Legislative Affairs Office of the State Council promulgated the *Notice of the Legislative Affairs Office of the State Council on Promulgation of the "Law of the People's Republic of China Against Unfair Competition (Revised Draft for Review) for Solicitation of Public Comments* and released the full text of *Law of the People's Republic of China Against Unfair Competition* (hereinafter referred to as the "Draft for Review") for public comments until March 25<sup>th</sup>, 2016.

Since the implementation of the *Law of the People's Republic of China against Unfair Competition* (hereinafter referred to as the "Law against Unfair Competition") in 1993, there has been no amendment until now. In view of the implementation of the Law against Unfair Competition, there has been a great increase in the pace of market-oriented development of the economy in China as well as extensive and profound changes in the extent of market competition. The current Law against Unfair Competition can no longer meet the need of economic development. Therefore, the revision of the Law Against Unfair Competition was in place, listed as the preparatory project of the legislation plan of the Standing Committee of the 12<sup>th</sup> National People's Congress, the research project of the legislative work plan of the State Council in 2014, the preparatory plan of the legislative work in 2015 and eventually was determined that the State Administration for Industry & Commerce shall be responsible for the revision of this law.

In 2014, the State Administration for Industry and Commerce formed eight research groups, including university experts, legal practitioners, and regional Industrial and Commercial Bureaus. They discussed in depth vital issues during the revision of the law and held several seminars and symposia concerning the revision work. By taking into comprehensive consideration the opinions from all sectors, they revised the current Law against Unfair Competition and ultimately formed this Draft for Review.

The Draft for Review has changed tremendously compared to the current Law against Unfair Competition. Shimin Law Offices participated in the legislative research and discussions concerning the revision of provisions related to commercial bribery. Based on this experience and our practice in actual commercial bribery cases, the following is our analysis on the changes in the commercial bribery provisions of the Draft for Review.

## II. Main Differences between the Current Law and the Draft for Review

No.	Current Law against Unfair Competition (effective since 1993)	Draft for Review
1	<p>Article 2 A business operator shall, in his <b>market transactions</b>, follow the principles of voluntariness, equality, fairness, honesty and credibility and observe the generally recognized business ethics.</p> <p>"Unfair competition" mentioned in this Law refers to a business operator's acts violating the provisions of this Law, infringing upon the lawful rights and interests of another business operator and disturbing the socio-economic order.</p> <p>"A business operator" mentioned in this Law refers to a legal person or any other economic organization or <b>individual</b> engaged in commodities marketing or profit-making services ("commodities" referred to hereinafter includes such services).</p>	<p>Article 2 Business operators shall, in their <b>economic activities</b>, follow the principles of voluntariness, equality, fairness, honesty and credibility and observe the generally recognized business ethics.</p> <p>For the purpose of this Law, "unfair competition" refers to a business operator's acts violating the provisions of this Law, infringing upon the lawful rights and <b>interests of any other business operators or consumers</b> and disturbing the market order.</p> <p>For the purpose of this Law, "business operators" refer to <b>natural persons</b>, legal persons and other organizations engaging or <b>participating in the production of goods or the operation or provision of services.</b></p>
2	<p>Article 8 A business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebates in secret to another party, an entity or an individual, shall be deemed and punished as offering bribes. Any entity or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.</p> <p>A business operator may, in selling or purchasing commodities, expressly allow a discount to another party and pay a commission to the middleman. The business operator who gives discount to another party and pays commissions to the middleman must truthfully enter them in the account. The business operator who accepts the discount or the commission must also</p>	<p><b><u>Article 7 A business operator shall not commit any of the following acts of commercial bribery:</u></b></p> <p><b><u>(1) Gain organizational, departmental or personal economic benefits through public services;</u></b></p> <p><b><u>(2) Pay economic benefits to another business operator without making truthful records thereof in the contract and accounting documents; or</u></b></p> <p><b><u>(3) Pay or offer to pay economic benefits to a third party having influence on the transaction, and cause harm to the lawful rights and interests of other business operators or consumers.</u></b></p> <p><b><u>Commercial bribery means that a business operator pays or offers to pay economic benefits to the transaction counterparty or a third party that may have influence on the transaction and</u></b></p>

	truthfully enter it in the account.	<p><b><u>thus induce the latter to give the business operator transaction opportunities or competitive advantages. Paying or offering to pay economic benefits constitutes the offering of commercial bribery; accepting or agreeing to accept economic benefits constitutes the taking of commercial bribery.</u></b></p> <p><b><u>Where an employee of a business operator uses commercial bribery to seek any transaction opportunity or competitive advantage for the business operator, such act shall be deemed as an act of the business operator. Where there is evidence showing that the employee receives bribery against the interests of the business operator, such act shall not be deemed as an act of the business operator.</u></b></p>
3	<p>Article 22 A business operator, who resorts to bribery by offering money or goods or by any other means in selling or purchasing commodities and if the case constitutes a crime, shall be investigated for criminal responsibility according to law; if the case does not constitute a crime, the supervision and inspection department may impose a fine of not less than 10,000 yuan but not more than 200,000 yuan in light of the circumstances and confiscate the illegal earnings, if any.</p>	<p><b><u>Article 20 Where a business operator violates Article 7 hereof, the supervision and inspection authorities shall order the business operator to stop the illegal act and impose on it a fine of not less than ten percent but not more than thirty percent of the illegal business revenue in light of the circumstances; if the violation constitutes a crime, criminal liabilities shall be imposed in accordance with the law.</u></b></p>

### III. Our Analysis on the Draft for Review

#### 1. Redefining the Act of Commercial Bribery

The current Law against Unfair Competition does not elaborate the definition of “commercial bribery.” Based on the Law against Unfair Competition, the *Interim Provisions on Prohibition of Commercial Bribery* (hereinafter referred to as the “Interim Provisions”), promulgated by the State Administration for Industry and Commerce, solely defines “commercial bribery” from the perspective of “offering a bribe” and it is meaningless to use the word “bribe” to explain

“commercial bribery.” The Draft for Review comprehensively redefines the act of commercial bribery. The details are as follows:

(1)	Renounce the use of phrases such as “secretly offers a rebate off the book” and “rebate” to define “commercial bribery.”	Recent practice of commercial briberies varies greatly. It is no longer limited to such traditional tricks such as secretly offering a rebate off the book or offering a discount to another party in an explicit way. Determining the existence of commercial bribery solely according to traditional methods is superficial and tends to cause ambiguity. Such rigid terms in the Law Against Unfair Competition makes the enforcement difficult and confuses business operators.
(2)	The party who accepts bribery is no longer only limited to “a counterparty in the transaction”. “A third party that may have influence on the transaction” could be deemed a recipient of bribery.	In commercial bribery, the bribing party oftentimes offers bribes not only to the counterparty of the transaction, but also to third parties that may facilitate the transaction. The receiving party are usually closely related to the transaction and have power to influence the transaction. Such receiving party could be an intermediary agency, a broker, or a government officer. The substantive characteristic of bribe recipients is their ability to influence the transaction. Therefore, the illegal recipient of bribes should not be limited to the counterparty in a transaction. By introducing the concept of the third-party recipient, the Draft for Review has significantly broadened the coverage of this law.
(3)	The Draft for Review specifies the purpose for commercial bribery as “to seek any transaction opportunities or competitive advantages.”	The Draft for Review has expanded the definition of commercial bribery by elaborating the purpose from “to sells or purchases any commodity” to “to seek any transaction opportunities or competitive advantages.” However, from the business operator’s perspective, “to seek any transaction opportunities or competitive advantages” is an inevitable act in normal market competition. Therefore, “to seek any transaction opportunities or competitive advantages” itself shall not consist of the substantive element for judging commercial bribery. Only acts that violate the provisions of the Draft for Review, i.e. infringing upon the lawful rights and interests of any other business operators or consumers and disturbing the market order should be prohibited.
(4)	“Offering to pay” and “agreeing to accept” will also qualify as commercial bribery.	Bribery will not only include acts of directly paying or accepting, but also “offering to pay” and “agreeing to accept” bribes. This is inline with the <i>United Nations Convention against Corruption</i> (hereinafter referred to as "the Convention") and many other countries’ legislation. The Convention defines the act of bribery as “the promise to give, the offering, or the actual giving of bribes.” Moreover, this

		standard is internationally adopted. For instance, the U.S. <i>Foreign Corrupt Practices Act</i> provides that the offering and promise of bribes alone is sufficient to constitute illegal conduct. By adopting these international standards, the Draft for Review has expanded the scope of commercial bribery and clarified the standard for attempted bribery.
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## 2. Employees' Bribery Act Will Not Necessarily Be Deemed the Acts of the Employer

The current Interim Provisions states in Article 3 that where an employee sells or purchases goods or services on behalf of the employer by means of commercial bribery, the act shall be considered an act of the employer.

The Draft for Review on the one hand affirms the Interim Provisions, stating that “where any employee of a business operator makes use of commercial bribery to seek any transaction opportunity or competitive advantage for the business operator, such act shall be deemed as the act of the business operator.” On the other hand, it adds an exception - “where there is evidence showing that the employee receives bribery against the interests of the business operator, such act shall not be deemed as an act of the business operator.” This exclusion limits the liability scope of commercial bribery for employers. However, the definition of “against the interests of the business operator” still remains unknown to the public. The laws and regulations shall further specify whether an employee’s failure to comply with a well-disciplined code of conduct (including the provision on combating bribery) is “against the interests of the business operator.”

## 3. Three Typical Acts of Commercial Bribery

It is certain that the three typical acts of commercial bribery described in Article 7 of the Draft for Review are neither the definition nor an exhaustive list of commercial bribery. It is meant to provide some examples which are often seen in the new market environment, with the purpose of helping the general public understand.

## 4. Heavier Penalties on Commercial Bribery

Compared to the Law against Unfair Competition, the Draft for Review has imposed much heavier penalties on commercial bribery: “The supervision and inspection authorities shall order the business operator to stop the illegal act and impose on it a fine of not less than ten percent but not more than thirty percent of the illegal business revenue in light of the circumstances.”

The Draft for Review eliminated the concept of “illegal gains,” the computing standard of which is controversial in practice. Instead, it bases the calculation of the penalties on illegal business revenue, without limiting the maximum amount of penalties. The formal legislative bill of the new *Law against Unfair Competition* should further specify how penalties are calculated in cases of attempted

bribery.

#### **IV. The Enactment of the Draft for Review Will Take Time**

The Law against Unfair Competition was formulated by the National People's Congress. Pursuant to the Legislation Law of the People's Republic of China, the Draft for Review shall be submitted to the State Council, through the discussion held by the State Council, eventually forming a legislative bill. After the procedures of submission, deliberation, voting, and promulgation, the legislative bill can eventually be enacted into law. If past records can provide any indication, it may still take 1 or 2 years before the new Law against Unfair Competition will be promulgated.

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