Growing Up in the Shadows of the FCPA: Chinese Anti-Bribery Laws and International Companies

Ashley Jackson

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Growing Up in the Shadows of the FCPA:

Chinese Anti-Bribery Laws and International Companies

By Ashley Jackson

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I. INTRODUCTION

Something significant happened in anti-bribery enforcement in 2013. A bribery investigation began into one of the world’s largest pharmaceutical companies. "Four Glaxo China Executives Held in Criminal Probe," \(^1\) read an article in a major news outlet. Reports of the Glaxo Smith Kline (GSK) investigation\(^2\) were followed with announcements that the life sciences industry would be subject to enhanced scrutiny.\(^3\) UCB announced that it was being investigated.\(^4\) Authorities visited the local offices of Bayer,\(^5\) Novartis, AstraZeneca, Eli Lilly, and Sanofi.\(^6\) At the same time, the government was engaging in a broader crackdown on bribery in the public sector with high profile trials.\(^7\)

These events rattled international businesses with operations in China—a group already accustomed to bribery investigations. Corruption inquiries have become common in the life science industry\(^8\) and China is notorious for its corruption.\(^9\) But even for this seasoned

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\(^2\) The Chinese government accused GSK of paying USD 490 million in bribes to doctors and government officials. The bribes were apparently funneled through inflated travel-agency expenses. *Id.*


\(^4\) Ben Deighton and Ben Hirschler, China widens drug industry probe, visits Belgium’s UCB, REUTERS (July 19, 2013), http://www.reuters.com/article/2013/07/19/us-gsk-china-ucb-idUSBRE96H0XQ20130719.


\(^6\) Andrew Jack and Patti Walmeir, *Eli Lilly drawn into pharmaceutical corruption claims in China*, FINANCIAL TIMES (Aug. 22, 2013), http://www.ft.com/cms/s/0/d011b670-0b11-11e3-bffe-00144feabdec0.html#axzz2zoZZIZ4t


\(^8\) For an explanation of why life science companies are targeted frequently, see Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep’t of Justice, Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), www.ehcca.com/presentations/pharma congress10/breuer_2.pdf , ("nearly every aspect of the approval, manufacture, import, export, pricing, sale, and marketing of a drug product in a foreign country will involve a ‘foreign official’...under the FCPA.").

community, the news was startling because the reports resulted, not from a U.S. Foreign Corrupt Practices Act\(^\text{10}\) (FCPA) investigation, but rather, from a Chinese investigation of Chinese domestic anti-bribery laws.

For the most part, China’s domestic anti-bribery laws are not new.\(^\text{11}\) China’s Criminal Law has addressed bribery since 1979.\(^\text{12}\) Administrative law, through the Anti-Unfair Competition Law (AUCL), has prohibited bribery since 1993.\(^\text{13}\) Still these laws have failed to shape the way companies operate in China. Enforcement was nearly non-existent. When the Chinese government did target bribery, it tended to focus on the officials receiving bribes, letting sources of bribes and non-government recipients off the hook.\(^\text{14}\) Companies referred to the Chinese laws as “local laws,”\(^\text{15}\) a politically correct way of paying lip service to domestic laws in countries with high corruption levels and weak or unenforced bribery laws.

The FCPA, meanwhile, has driven international corporations to adopt policies, procedures, training, due diligence, auditing, and other controls intended to battle bribery in operations all


over the world. Since 2004, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have engaged in dramatic FCPA enforcement efforts. In 2013 alone, companies paid fines totaling over USD 720 million and twelve individuals were charged. The corporate fines in 2013 averaged USD 80 million per corporation. Its significant extraterritorial reach has made the FCPA a concern of any business with a whisper of a connection to the U.S.

On one hand the FCPA has served to raise the profile of bribery as a worldwide problem. On the other hand, the relative dominance of the FCPA has meant that companies have not spent much time ensuring compliance with other bribery laws.

Most countries now have some form of law against bribery. Some are broader than the FCPA. The most prominent other national law has been the UK Bribery Act (Bribery Act). Because it is the strictest law on paper, it garnered a lot of attention when it passed in 2010.

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18 Id.

19 Id.


22 For more on the early buzz around the Bribery Act, see e.g., Richard Wachman and Larry Elliott, Serious Fraud Office Promises Crackdown on Firms Offering Bribes Abroad, THE GUARDIAN (Oct. 10, 2010), http://www.theguardian.com/law/2010/oct/10/serious-fraud-office-bribery-crackdown.
Lack of enforcement\textsuperscript{23} though, has meant that the fledgling law that has yet to significantly impact corporate behavior. No other laws have had the teeth or the enforcement drive to capture the corporate attention, so the FCPA has remained the dominant anti-bribery law.

That focus on the FCPA does not mean that companies are unaware of Chinese corruption risks. In fact, most executives are keenly aware that Chinese operations pose FCPA bribery dangers. \textsuperscript{24} Chinese operations have proved problematic under the FCPA. China has been the scene of more violations than any other country, save Nigeria.\textsuperscript{25} Companies doing business in China have been under enhanced scrutiny relating to bribery for years.\textsuperscript{26} Avon has been under investigation since 2011 for bribery in China.\textsuperscript{27} Pfizer, IBM, Morgan Stanley, and JPMorgan Chase are among the many other companies that have faced highly-publicized FCPA inquiries stemming from conduct in China.\textsuperscript{28}

\begin{footnotesize}
\textsuperscript{23} For more on the Bribery Act’s early enforcement or lack thereof, as well as predictions on its future, see Neil Baker, \textit{U.K.’s Bribery Act Fails to Deliver Significant Cases,} COMPLIANCE WEEK (Feb. 20, 2013), http://www.complianceweek.com/cks-bribery-act-fails-to-deliver-significant-cases/article/280865/: see also, Kevin Roberts, Jarod GTaylor, & Duncan Grieve, \textit{UK Bribery Act Comes to Life.} Morrison & Foerster Client Alert (Aug. 15, 2013) http://www.dwt.com/Chinese-Probe-Into-GSKMedia-Reports-and-Legal-Analysis-07-29-2013/#_ftn7: http://www.mofo.com/files/Uploads/Images/130815-UK-Bribery-Act.pdf. (The Bribery Act contains some of the strictest laws against corruption, but enforcement has been minimal since the act was passed in 2010. No cases have been brought against international actors so far. Although guidance revisions have indicated a tougher stance towards enforcement, the few cases brought against corporate entities ultimately involved charges under previous laws. Still, the SFO has indicated that a number of cases are currently being investigated, and may lead to prosecutions in the future.”).


\textsuperscript{25} Voreacos, \textit{supra} at note 9.


\textsuperscript{27} Julie DiMauro, \textit{Avon sets aside millions more for FCPA Settlement}, FCPA BLOG (Feb. 14, 2014, 3:18 AM), http://www.fcpablog.com/blog/2014/2/14/avon-sets-aside-million-more-for-fcpa-settlement.html#.

\textsuperscript{28} Voreacos, \textit{supra} at note 9.
\end{footnotesize}
If that was not enough, companies often look to Transparency International (TI),\(^\text{29}\) for information about a country’s corruption risk. TI gives China a Corruption Perceptions Index score of 40 out of 100 with 100 being “very clean” and zero being “highly corrupt.”\(^\text{30}\) Under their assessment, China is the 80th worst for corruption perceptions out of 177 countries included in the survey.\(^\text{31}\) In response to the 2012 survey placing China in the same position, Chinese citizens posted comments on the internet joking that the Chinese government must have bribed TI in order to achieve such a moderately bad ranking.\(^\text{32}\) TI also publishes a Bribe Payers Index, ranking 28 of the world’s largest economies according to the perceived likelihood that companies from these countries will pay bribes abroad. China is second only Russia in that ranking.\(^\text{33}\)

Various aspects of China’s political, economic, and cultural environment contribute to systemic risk of venality. If power corrupts, China, dominated by one party rule for over sixty years, is ripe for corruption. The Chinese government controls not only the political system, but also the economy, and many of its most important industries.\(^\text{34}\) As a result, there is frequent interaction between the government and companies.


\(^{30}\) For reference, Singapore received an 86, the U.S. received a 73, and Brazil received a 42, Corruption Perception Index 2013, TRANSPARENCY INT’L, [http://cpi.transparency.org/cpi2013/results/#myAnchor1](http://cpi.transparency.org/cpi2013/results/#myAnchor1).

\(^{31}\) Corruption Perception Index 2013, TRANSPARENCY INT’L, [http://www.transparency.org/country#CHN_DataResearch](http://www.transparency.org/country#CHN_DataResearch).


\(^{33}\) For reference, companies from the Netherlands and Switzerland are seen as least likely to bribe, http://www.transparency.org/country#CHN_DataResearch.

\(^{34}\) For an overview of the relationship between the Chinese government and industry, see Capitalism confined, ECONOMIST (Sept. 3, 2011), [http://www.economist.com/node/21528262](http://www.economist.com/node/21528262).
Each interaction creates an opportunity for a corrupt official to request or accept bribes. The potential for corruption is especially high in highly-regulated fields like life sciences, energy, and communications, where interaction with the government is common. In addition, the complicated Chinese regulatory structure has meant that corporations must rely on third parties to navigate the regulatory environment and to interact with the government on their behalf. The high bribery risk posed by third parties is underscored by the fact that ninety percent of FCPA cases involve conduct by third parties.35

To make matters more worse, individuals working in many state-owned or state-controlled industries receive paltry sums for their work leading to the expectation that they will supplement their income.36 Finally, cultural norms around cultivating personal relationships, giving gifts, and providing hospitality have made bribery a ubiquitous part of life in China.37 One author even published Chinese Guanxi, described as an “advice book that teaches people how to cultivate social connections with dinners, expensive gifts and “red packets,” or cash-filled envelopes.”38 It is no shock then that Chinese business operations pose a risk of bribery.

But while companies are keenly aware of FCPA-related bribery risks in China, they remain largely oblivious to Chinese bribery laws. Chinese laws have not played a meaningful role in corporate policies, procedures, or crisis plans. If China’s bribery laws do come up, the discussion

37 Voreacos, supra note 9.
often turns to the potential for triggering or impacting a parallel FCPA investigation\textsuperscript{39} or other carbon-copy inquiry.\textsuperscript{40} It is true that Chinese investigations can alert the DOJ to FCPA violations,\textsuperscript{41} but FCPA investigations are not the only risk.

Myopic focus on the FCPA and even the potential of the Bribery Act can lead to compliance gaps in China that leave international companies and their employees in jeopardy. In the wake of the GSK bribery scandal, a growing number of international companies are recognizing this reality. In a 2013 survey conducted by the American Chamber of Commerce in Shanghai, nearly half of the 399 respondents claimed that compliance with local Chinese law is more important than compliance with the FCPA or the Bribery Act.\textsuperscript{42} The number of firms with that opinion had doubled since 2012.\textsuperscript{43} That is a sea change in attitude toward “local Chinese law.” And while it might be a stretch to say that compliance with Chinese laws is more important than compliance with the FCPA, it is certainly crucial. The GSK investigation and its aftermath should provide a much-needed wake-up call for foreign companies with operations in China who remain focused exclusively on FCPA-based concerns. It is a good time then, to take stock of Chinese bribery laws and their implications for international companies.

\textsuperscript{39} See e.g., Daniel Chow, The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act, 73:5 Oh. St. L. J. 1015, 1019 (2013), http://moritzlaw.osu.edu/students/groups/oslg/files/2013/02/73.5.Chow_.pdf, (arguing that MNCs should view Chinese commercial bribery cases with gravity because they can trigger parallel FCPA action); See also, Daniel C.K. Chow, China’s Crackdown on Commercial Bribery, Corruption in State-Owned Enterprises, and the Impact on U.S.-based Multinational Companies Doing Business in China, Oral testimony, November 21, 2013, http://www.ececc.gov/sites/chinacommission.house.gov/files/CECC$20Roundtable$20-%20Corruption%20in%20China-%20%20Daniel%20Chow%20Written%20Statement.pdf, (concluding that the “highest risk is not prosecution under China’s anti-bribery laws for commercial bribery but prosecutions under the FCPA, which has much stiffer monetary penalties and also the possibility of imprisonment for U.S. executives involved directly or indirectly in the giving of the bribe.”)


\textsuperscript{41} Chow, supra note 39.


\textsuperscript{43} Id.
This paper seeks to underscore why and how Chinese laws should factor more prominently into corporate policies and planning. Part II addresses the “why”—why Chinese laws should matter to international companies. Chinese laws are broader in some respects than the FCPA. Dual compliance with the FCPA due diligence requirements and Chinese laws might be problematic. The consequences of violating Chinese laws can be steep. Also, enforcement against international companies will likely continue. Part III speaks to the “how”—how international companies should be altering their policies and procedures to account for Chinese laws. This paper then offers modest prescriptions for how to prevent non-compliance with Chinese laws as well as how to prepare for allegations of bribery.

II. WHY COMPANIES SHOULD BE CONCERNED WITH CHINESE LAWS

There are multiple reasons why foreign companies should be devoting more attention to Chinese laws. Section A explains that Chinese anti-bribery laws are broader in some respects than the FCPA, creating a potential compliance gap. Section B alerts companies to the possibility that their FCPA “best practices” conflict with Chinese laws on collecting information. Section C underscores the fact that the consequences for breaking Chinese bribery laws, or even appearing to, can be weighty. Section D argues that continued enforcement against international companies is likely.

A. Chinese Anti-bribery Laws Are Broader in Some Respects than the FCPA

Corporations must realize that compliance with the FCPA will not ensure compliance with Chinese laws. Some Chinese bribery laws do focus on official bribery meaning that they overlap
with the FCPA. But China’s other anti-bribery laws are broader than the FCPA. Whereas the FCPA only targets bribery of foreign officials, Chinese laws proscribe commercial bribery as well. Additionally, while the FCPA has an exception for “facilitation payments,” Chinese law does not contain such an exception.

1. Chinese Laws Proscribe Commercial Bribery

Many companies are accustomed to thinking about bribery, but they are usually worried about the type of bribery that would violate the FCPA—bribery of a government official. And while bribery of a government official is illegal China, so is commercial bribery, where the party receiving the bribe is a private individual or entity. Thus, if a supplier pays a kickback to a private company manager in return for a lucrative contract, it can violate Chinese law even if there are no government personnel involved in the transaction. Or, if the sales group of a foreign corporation pays for a lavish trip for employees of a private company in exchange for those employees purchasing from them, it would violate Chinese laws, but not the FCPA. Or, if, as in GSK’s case, executives receive financial and sexual kickbacks from third party, non-government, intermediaries, it would violate Chinese laws on commercial bribery. Thus, even

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44 Laws that generally overlap with the FCPA include art. 389, 390, and 393 (prohibiting giving bribes to PRC officials), art. 391 (prohibiting giving bribers to government organs and state-owned entities), art. 392 (prohibiting the facilitation of bribes), and the 2011 amendment to art. 164 (prohibiting Chinese individuals or entities from bribing foreign government officials or officials of public international organizations).

45 See Appendix A.

46 Defined as bribery where the party receiving the bribe is a private individual or entity.


48 Because the U.S. has taken an expansive view of “government official,” some “commercial bribery” under Chinese laws would still be considered official bribery under the FCPA. Still, the FCPA certainly does not apply to purely private actors or entities and it does not address recipients of bribes.

49 PRC Criminal Law, Article 163 and 164

50 See, e.g., Emily Ford, Leo Lewis, & James Dean, Glaxo’s travel agents organized bribes and prostitutes, say police, THE TIMES (July 16, 2013), http://www.thetimes.co.uk/tto/business/industries/health/article3816774.ece.
companies that are in full compliance with the FCPA may be non-compliant with Chinese laws.\textsuperscript{51}

While most company policies technically prohibit all forms of bribery, corporate procedures and controls are meant to prevent and detect official bribery. For example, heightened due diligence requirements are reserved for parties who will be interacting with government officials. Also, auditors do not scrutinize records of interactions with private entities. They do not look for employees’ kickbacks. As a result, companies face a risk that employees will violate Chinese laws around commercial bribery.

It is important to note that Chinese law is not alone in prohibiting commercial bribery. In fact, banning commercial bribery appears to be part of a larger trend. A 2003 European Union Council Framework Decision orders all European Union states to proscribe commercial bribery.\textsuperscript{52} The United Nations Convention against Corruption (UNCAC) signatories must “consider” the criminalization of commercial bribery.\textsuperscript{53} As discussed, the Bribery Act notably forbids engaging in commercial bribery.\textsuperscript{54} Companies stringently complying with the Bribery Act would probably be complying with Chinese laws relating to commercial bribery, but the Bribery Act has not been very effective yet.

\textsuperscript{51} See Appendix A
Some U.S. state laws actually prohibit commercial bribery. Such laws can be “federalized” 55 under the U.S. Travel Act (Travel Act).56 For instance, Control Components, a U.S. company was charged under the Travel Act for payments to private entities in addition to being charged under the FCPA for illegal payments to foreign government officials.57 Still, generally, commercial bribery has received limited attention in the corporate world.58 Without enforcement, companies have not had enough incentive to radically alter their company procedures.

If companies need another incentive to tackle commercial bribery though, they have it. Both Chinese Criminal Law and administrative law prohibit commercial bribery. Criminal law punishes the most serious or “relatively large”59 bribery cases. According to official guidelines, “relatively large” involves bribes over RMB 10,000 for individual and RMB 200,000 for entities.60 Article 163 of the Criminal Law addresses non-official bribe-takers;61 Article 164

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58 For one commentator discussing commercial bribery, see supra note 55.


60 Id.

61 Article 163 of the PRC CRIMINAL LAW, supra n. 11, provides:

Whoever from the staff of a company or enterprise takes advantage of his office to extort or accept illegally property from others and makes profits for others shall, if the amount involved is relatively huge, be sentenced to fixed-term imprisonment of not more than five years or criminal detention. If the amount involved is huge, the offender shall be sentenced to fixed-term imprisonment of not less than five years, and may concurrently be sentenced to confiscation of property.
addresses non-official bribe-givers. Together, Article 163 and Article 164 make it unlawful to offer to, or accept money or property from, the staff of a company or enterprise in return for illegitimate benefits.

Those found to be in violation of these provisions can be imprisoned, fined, or subject to property confiscation. In 2010, four employees of Rio Tinto, an Australian company were sentenced to prison for 7 to 14 years for taking bribes from Chinese steel mills. In 2008, eight supervisors of the French supermarket chain, Carrefour, received jail sentences ranging from one year to five years. The supervisors’ crime was taking kickbacks from suppliers in violation of Article 163.

Commercial Bribery is also addressed under administrative law. Article 8 of the AUCL prohibits “business operators from paying bribes for the purpose of selling or purchasing foods

Whoever from the staff of a company or enterprise, in the course of economic activities, accepts whatever kind of rebate or commission in violation of the state's stipulations, and takes possession of it, shall be punished according to the provisions of the preceding paragraph.

Article 164 of the PRC CRIMINAL LAW, supra n. 11, reads, in relevant part:

Whoever offers property to the staff of a company or enterprise in order to make illegal profits shall, if the amount involved is relatively huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the amount involved is huge, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years, and concurrently be sentenced to a fine.

If a unit commits a crime mentioned in the preceding paragraph, the unit shall be sentenced to a fine, and persons directly in charge and other persons directly responsible for the crime shall be punished according to the provisions of the preceding paragraph.

62 Id.
63 Id.
65 Stephanie Wong, Carrefour Employees Jailed for Taking Bribes, China Daily Says. BLOOMBERG NEWS (July 1, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=auidv3MhHX0E.
or services or obtaining other competitive advantages.” Offenses falling within the definition of criminal law commercial bribery, but falling short of the criminal law threshold of RMB 10,000 per individual and RMB 100,000 for the entity could be prosecuted under this law. The definition of commercial bribery under the AUCL is also broader than under criminal laws. Under the AUCL, commercial bribery includes “offering other business parties property or using other means to purchase or sell products in a manner that excludes competition.”

Administrative fines, under the AUCL, range from RMB 10,000 to RMB 200,000. Pepsi Guangzhou was investigated in 2009 after the State Administration for Industry and Commerce found that Pepsi had committed bribery in violation of the AUCL when it gave display fees to stores. Pepsi paid approximately RMB 100,000, most of which was confiscated profit. The judicial explanation referred to the language of the AUCL, saying that Pepsi had clearly engaged in “bribery… in order to buy or sell products and services.”

66 Article 8.1 and 8.2 of the AUCL:

Managers shall not use money or properties or the other methods to bribe to others in order to sell or purchase commodities. It shall be guilty of giving bribe if managers give a secret commission to the other organisations or individuals without the normal accounting records. It shall be guilty of taking bribe, if the organisations or individuals accept the secret discount without normal accounting records.

Managers may offer a discount to the others in public, or may pay commission to the middle man in selling or purchasing commodities. However, managers who give discount to the others or pay commission to the middle man, or the others who take the discount or commission shall make accounting strictly according to the facts.

67 AUCL, Article 8.


At the time, the decision was heavily criticized by businesses and legal groups, making it unclear whether actions like Pepsi’s would normally be prosecuted. Nonetheless, given the current anti-bribery crackdown, the case may actually reflect present enforcement attitudes. If nothing else, the Pepsi prosecution provides insight into the breadth with which the AUCL’s commercial bribery provisions can be read.

Together, PRC Criminal Law and the AUCL create significant potential liability beyond the scope of the FCPA. Another aspect of Chinese laws is broader than the FCPA as well.

2. Chinese Laws Contain No Exception for Facilitation Payments

The FCPA’s bribery provision makes an exception for facilitating or expediting payments made in furtherance of “routine government action,” that involve non-discretionary acts. Examples include visa processing, supplying utilities, or providing mail service. In contrast to the FCPA, under Chinese laws, there are no exceptions for facilitation payments.

Companies should be informed regarding the difference between U.S. and Chinese laws, but it is unlikely that companies are relying on this FCPA exception in crafting their policies and procedures. There are no examples of it being used as defense to a bribery charge under the FCPA. Moreover, it would be unwise to allow employees to decide whether something is a facilitation payment. Finally, in order to comply with the books and records requirement of the

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72 DOJ Guidance
FCPA, it would then have to be recorded in the company’s records, so then companies would have a possible bribe recorded in their books.

Most companies have correctly adopted zero-tolerance approach to official bribery. The companies that do still view the FCPA facilitation exception as a safe harbor, however, should be aware that this would not be available as a legal defense under Chinese laws. Companies paying what would be considered facilitation expenses under the FCPA could be committing official bribery subject to serious penalties.74

The breadth of Chinese bribery laws naturally gives pause to all companies with a Chinese presence. Corporations have an extra incentive to tackle bribery whether it falls within the FCPA or outside the FCPA scope. But, alarmingly, there is the possibility that a primary method of avoiding bribery, due diligence, might be threatened by Chinese laws on information sharing. While these laws are not bribery laws, per se, they are intricately linked to a company’s ability to assess and address bribery risks. Once again companies need to be aware of developments in Chinese laws so that they can order their compliance efforts accordingly.

B. Chinese Information Rules May Threaten Corporate FCPA Due Diligence

Due diligence is a key pillar of anti-bribery compliance75 whether for retaining a new third party, considering a joint venture partner, or evaluating a possible acquisition. For third parties, the DOJ has articulated its expectations. Companies, the enforcement agency says, “should understand the qualifications and associations of its third-party partners, including its business

74 Discussed infra, Part.II.C.
75 See generally, DOJ Guidelines.
reputation, and relationship, if any, with foreign officials." Investigation is also expected in mergers and acquisitions. Thorough due diligence can detect bribery in an acquisition. This can allow a company to walk away from potential successor liability arising from the acquisition. Alternatively, the purchaser can continue with the acquisition, but account for the compliance issues in the price. Either way, due diligence is crucial. In joint ventures information gathering is key since potential partners could be considered government officials or be in corrupt relationships with government officials that could put the foreign company in legal peril. But as the need for corporate investigations has increased under the FCPA, China has been tightening access to business information, creating a catch-22 for companies.

Two laws attempt to restrict access to this type of material. Passed in 2009, an amendment to Article 253 of the Criminal Code bans certain industries from "selling or unlawfully transferring personal information." Purchasing the information is also illegal. The law carries a penalty of

77 Id.
80 PRC Criminal Law art. 253:

Where any staff member of a state organ or an entity in such a field as finance, telecommunications, transportation, education or medical treatment, in violation of the state provisions, sells or illegally provides personal information on citizens, which is obtained during the organ’s or entity’s performance of duties or provision of services, to others shall, if the circumstances are serious, be sentenced to fixed-term imprisonment not more than three years or criminal detention, and/or be fined.

81 Id. (Whoever illegally obtains the aforesaid information by stealing or any other means shall, if the circumstances are serious, be punished under the preceding paragraph. Where any entity commits either of the
up to three years in prison.82 In 2013, the government issued more regulations restricting the flow of “personal information.”83

These laws were ostensibly passed to limit identity theft or other scams.84 Certainly, most companies would welcome improvements in China’s information protection. And the actual provision is similar to OECD guidelines85 and European Union privacy laws,86 but China is different from other countries with strict privacy limitations. In China, there is very little in the way of public records or transparency. Also many Chinese citizens have the same names so it is difficult to confirm company ownership without identification numbers. In addition, China has a far greater risk of corruption than many of other countries with strict privacy laws.87 Finally, in addition to these laws’ stated purpose, it is hard to avoid the conclusion that they are geared toward suppressing access to information about government officials that might embarrass the Chinese Communist Party (CCP).88

Regardless of the purpose of the restrictions though, the rules have crucial implications for corporate due diligence. At the very least, these laws will jeopardize the quality of companies’ risk assessments and their ability to combat bribery. At worst, these rules could render impossible dual compliance with the FCPA and Chinese laws.
Typical due diligence material is limited or completely unavailable. Access to corporate records about company structure or individual *hukous* is very restricted. Government Bureaus have been sealing files that record a business’s owners. These are often the only way to determine the true owners of an entity and “uncover suspicious relationships and transactions.”

As is often the case with Chinese laws, these sometimes-vague laws also lend themselves to total lack of predictability. There has been a recent case defining personal information under Article 253, but that does not mean that other courts will take that interpretation. The unpredictability is heightened because similar types of information are still being sold.

The possible conflict between FCPA due diligence and Chinese laws is visible in the arrest of Peter Humphrey and Yu Yingzeng. The two are founders of ChinaWhys. The company’s website describes its mission as “walking multinationals through the labyrinth of opportunity, risk and unfamiliar cultural environment.” The website boasts that the group “specializes in discreet risk mitigation solutions, consulting and investigation services to corporate clients in matters of high sensitivity across Greater China and the Asia Pacific.” The two individuals had reportedly been doing FCPA-related investigations on behalf of GSK when they were detained by Chinese police. Police said that they had purchased private identification information.

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89 Kathrin Hille, *Peter Humphrey case shows effects of China’s tightened privacy laws*, FINANCIAL TIMES (Aug. 29, 2013), http://www.ft.com/intl/cms/s/0/ea906e13-e-105a-11e3-99e0-00144feabdc0.html#axzz2zZZpR1gC.


91 Swanson, supra note 84.

92 Id.


95 Id.

96 Perlez, supra note 93.
police investigator claimed ChinaWhys had bought and sold details about “personal registrations, automobile and home ownership records, family member names and details of cross-border travel.” While this seems like exactly the type of information that might help companies detect bribery, obtaining the information was illegal under Article 253.

China has charged other business researchers with similar offenses. The government arrested a Canadian man after he provided fodder for a negative report about a mining operation. In 2012, four executives of a Dun & Bradstreet China subsidiary were arrested, sentenced to two years in jail, and fined between US 800 and US 3,200.

These restrictions raise the cost. Investigators might be leery of doing due diligence. Or they may choose not to do it anymore. Either way, the information will be difficult to obtain and more expensive. In May of 2013, just months before he was arrested, Peter Humphrey penned Exploring the Impact of China’s Clampdown on Public Records. In that article, he lamented the increasing difficulty of conducting adequate due diligence at a time when it is more important than ever. Humphrey said, "[a]s an anti-fraud worker in China serving purely corporate clients on corporate matters or in litigation support, I find this a very dark day for due diligence and forensics work." The new limits on information collection may mean that more

99 Perlez, supra note 93.
102 Id.
103 Id.
companies find themselves in this catch-22 where they might be violating Chinese information laws when they attempt to detect bribery risks in compliance with the FCPA. It is clear that this will continue to be something which companies will have to continue to monitor lest they run afoul of these broad laws.

C. Consequences of Violating Chinese Anti-Bribery Laws Can Be Significant

Sections A and B addressed ways that Chinese laws are broader than or potentially conflict with the FCPA. Those sections focused on Articles 163 and Article 164, part of PRC Criminal Law; Article 8 of the AUCL, dealing with commercial bribery; and Article 253 and other information access rules that can negatively impact FCPA bribery due diligence. This section, Section C, casts a wider net, looking at the possible consequences for international companies for violating any of the Chinese laws relating to bribery. This includes then, laws that overlap with the FCPA in their prohibition on bribery of officials.

Until recently, most of the focus Chinese laws had nothing to do with Chinese laws. Instead, it was on the potential that Chinese investigations would trigger a parallel FCPA investigation. Investigations by one country often lead to investigations in other countries. Under UNCAC, “[c]ountries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders.” Under the Convention,

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104 Perlez, supra note 93.
105 Laws that generally overlap with the FCPA include art. 389, 390, and 393 (prohibiting giving bribes to PRC officials), art. 391 (prohibiting giving bribers to government organs and state-owned entities), art. 392 (prohibiting the facilitation of bribes), and the 2011 amendment to art. 164 (prohibiting Chinese individuals or entities from bribing foreign government officials or officials of public international organizations).
106 Chow, supra note 39.
countries are also supposed to “render specific forms of mutual legal assistance…”108 That degree of cooperation may be largely aspirational, but parallel investigations are still likely since U.S. investigators follow Chinese law enforcement actions very closely.

It is already well-established that FCPA investigations are significant, but the incessant focus on parallel investigations might lead to the perception that there are no meaningful consequences for Chinese laws themselves. That is not the case. Chinese penalties can be severe. The fines may not be as large as those under the FCPA, but the consequences of violating or being investigated for violating Chinese bribery laws can be dire for the individual and the entity.

1. **Individuals are Likely to be Prosecuted**

Under the FCPA, large corporate fines and costly investigations are widely considered the most serious outcome. Though on the rise, FCPA actions against individuals have been rare. To some, this has undermined the deterrent effect of the FCPA. Chinese law, on the other hand, makes it difficult to charge entities,109 making a focus on the individual more likely. For example, in the GSK case, Chinese executives will likely be charged, while the company will not.110 Under Chinese laws, individuals can face a range of severe legal and extra legal consequences.

Of the potential consequences, the most serious, albeit an unlikely one for foreign employees, is the death penalty. The death penalty is a possibility in bribery cases. Though there is relatively little information about China’s use of the death penalty, estimates are shockingly high at several

108 *Id.*
110 *Id.*
thousand a year.\textsuperscript{111} Despite the lack of transparency around it, it is clear that the government has used the death penalty in many official bribery cases. In one case, an executive of China Mobile was sentenced to death for accepting bribes from Seimans.\textsuperscript{112} Another official, Zheng Xiaoyu, was executed after he took bribes in exchange for approving medicines, some dangerous, in his role as head of the SFDA. \textsuperscript{113}

To be clear, there are no examples of employees of international companies being executed for bribery. Any use would be greeted with outrage around the world and fear in the foreign business community. While execution of corporate personnel is not likely, the fact that it is an option should frighten international companies.

A less severe, but still very frightening prospect is the possibility of a prison sentence in China. Prison sentences have been uncommon under FCPA enforcement. One former assistant U.S. Attorney argued, “you throw a couple of executives in jail in the U.S.—that’s going to catch people’s attention in a much more significant way than a $100 million fine.”\textsuperscript{114} If that is the case, then Chinese laws should grab people’s attention in a significant way.

Under Chinese law, prison time is likely if the case is a serious one. If the bribery involves “official bribery,” the individual could face a lifetime prison sentence.\textsuperscript{115} Individuals convicted of giving commercial bribes could face up to ten years.\textsuperscript{116} Individuals who receive commercial

\textsuperscript{111} Margaret K. Lewis, \textit{Chapter 5: Legal Systems in China} in \textit{THE ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY} 51, at 53 (Liqun Cao, et. al. eds., 2014).
\textsuperscript{115} PRC Criminal Laws Articles 390, 391, 392, and 393.
\textsuperscript{116} PRC Criminal Law Article 164.
bribes face up to fifteen years in prison.\textsuperscript{117} No employees of international companies want to be in a Chinese jail. And yet, it has happened.\textsuperscript{118}

Related to imprisonment, is the possibility of prolonged detention, possibly incommunicado. Extended detention, without formal charges, is a reality in China because law enforcement can legally hold people for long periods without making a formal arrest.\textsuperscript{119} In many cases this means they have no access to lawyers or consular officers.\textsuperscript{120} These types of restrictions have been used widely by the Chinese government. The \textit{New York Times} reported that Peter Humphrey and Yu Yingzeng were held for a month without seeing friends and family.\textsuperscript{121} During the early days of the GSK probe, more than 30 employees were placed under house arrest and subject to round the clock surveillance.\textsuperscript{122}

Any lengthy detention is a serious concern. But it carries with it an additional worry: the potential for coerced testimonies. Like the U.S. law, Chinese criminal law allows for reduction in sentence with “voluntary confession.”\textsuperscript{123} But mounting a defense under Chinese or other countries’ laws could be difficult after confessing while in Chinese custody. After Peter Humphrey was paraded on television, face blurred, in an orange jumpsuit, the British Embassy

\textsuperscript{117} PRC Criminal Law Article 163
\textsuperscript{118} DANIEL C.K. CHOW & ANNA M. HAN, DOING BUSINESS IN CHINA: PROBLEMS, CASES, AND MATERIALS 77 (2012).
\textsuperscript{120} Id.
\textsuperscript{121} Perlez, \textit{supra} note 93.
\textsuperscript{123} Article 164 of the PRC CRIMINAL LAW, \textit{supra} note 11, reads, in relevant part, “[t]he briber who confesses actively his bribery before being prosecuted may be given a mitigated punishment or be exempted from punishment.”
expressed its frustration that Humphrey was “publicly interviewed about the details of his case, which is currently under investigation and has yet to come to trial.”124

China has a rich history of public apologies. During the Cultural Revolution, many Chinese were subjected to self-criticisms.125 The practice has continued with the government with recent self-criticism sessions.126 The importance of public confessions or apologies has been important for foreign businesses and individuals as well. Four GSK senior executives gave full confessions to “serious economic crimes” after their arrest.127 GSK’s head of emerging markets, also expressed regret for the crimes committed by GSK China employees.128 One commentator refers to the corporate “art of the ChinApology,”129 humorously addressing the difficulty navigating the major Western laws and the Chinese expectations.

Oddly, the least severe prospect of Chinese legal penalties is the financial penalty for individuals. Fines and confiscation of property, are much lower than U.S. fines. For official bribery or that involving commercial bribery, there is no predetermined amount. Penalties for a non-criminal offense of commercial bribery range between RMB 10,000 and RMB 200,000. Still, most employees would prefer to avoid financial fines.

124 Perlez, supra at note
126 Id., (“one official admitted he had sat on too many sofas and not enough wooden stools, and raised too many goblets but only a few simple teacups.”).
128 Id.
2. Corporate Entities Can also Suffer Serious Consequences

As the section above indicated, charges against entities are relatively rare. When they are assigned, fines have been low by FCPA standards. Still, there are many ways that a Chinese violation or investigation can negatively impact a company’s operations.

One extreme possibility is for the government to revoke the company’s business license.\(^\text{130}\) This would probably only be possible in the event of significant popular outrage at a product that killed or seriously injured someone.

A more likely consequence of a bribery investigation is negative regulatory attention. This can lead to a failure to renew an important regulatory license. For example, in China, the Chinese Food and Drug Administration (CFDA) must renew license every five years. Failure to renew a license on a major drug product could be devastating to a company’s financial outlook.

Increased regulatory attention can also lead to other violations being discovered. For example, while the GSK investigation started with a bribery inquiry, it quickly turned to accusations about price-fixing.\(^\text{131}\) Other records violations may come to light. The relationship between various types of government scrutiny is illustrated by the fact that the 2009 Pepsi investigation for commercial bribery violations followed closely on the heels of a yeast contamination issue in its frozen orange juice.\(^\text{132}\)

Another significant effect of a bribery investigation is a drop in sales. Under the FCPA, companies talk about reputation damage, but it seems unlikely that U.S. consumers will stop

\(^{130}\) Jourdan, supra at note 111.


shopping at Wal-Mart because it engaged in bribery in Mexico. It might be more likely in China where China Central Television frequently makes inflammatory appeals to anti-foreigner sentiment.

Even more likely, business associates might avoid doing business with the company out of fear of getting snared in the probe. This could apply to consumers, middle-men, suppliers, and consultants. This was evident after the GSK probe when sales of GSK vaccines and other medicines declined after doctors refused to meet with GSK’s sales reps. They were afraid of being associated with the probe.\textsuperscript{133} Sales also dropped after Chinese media accused French company, Danone SA of paying bribes to medical staff in return for pushing their formula for new mothers.\textsuperscript{134}

Companies with recognizable brand names and key competitors may find themselves especially vulnerable to a decline in customer demand, either through an organized boycott or as an effect of third parties avoiding the company representatives and products. This can happen in after an FCPA investigation too, but the relationship between the domestic climate in China means that it will have a greater impact in China.

A few months after the investigation began, GSK’s sales had dropped by 61%.\textsuperscript{135} The company’s CEO noted that their China numbers had suffered most where other options were

\textsuperscript{133} Adam Jourdan, Kaznouri Takada, & Ben Hirschler, Analysis Bribery Scandal dents Big Pharma sales in China, GSK hardest Hit.,

\textsuperscript{134} Adam Jourdan, China Milk Powder Crackdown is Tough Medicine for Doctors, Sales Reps, UK REUTERS (Oct. 15, 2013), http://uk.reuters.com/article/2013/10/15/uk-china-milkpowder-idUKBRE99E0ZS20131015.

For instance, GSK sales slumped on one key drug with AstraZeneca, a competitor, offering an alternative option.\textsuperscript{137}

Disruptions in marketing and sales, management can also result. GSK has had to change its sales model rapidly\textsuperscript{138} and fire hundreds of people.\textsuperscript{139} This will have important ramifications for GSK in China in coming years. Danon SA was under pressure to make changes in its marketing techniques as well.\textsuperscript{140} These noteworthy consequences for both individuals and entities should worry international companies—especially in light of the trend toward greater enforcement of Chinese laws.

D. International Companies Should Expect More Enforcement

Considering Section C, it is clear that the consequences of violating Chinese laws can be dire. But these laws and these penalties have been on the books for years; they were just unenforced. These bribery laws are merely in the news now because of a recent uptick in enforcement efforts.

This is not the first time China has promised to crack down on bribery. In the past, China has engaged in significant anti-corruption campaigns. Leaders under Mao were concerned with corruption, launching various campaigns against it.\textsuperscript{141} In 1986, the government popularized the


\textsuperscript{137} Id.


\textsuperscript{140} Adam Jourdan, China Milk Powder Crackdown is Tough Medicine for Doctors, Sales Reps, UK REUTERS (Oct. 15, 2013), http://uk.reuters.com/article/2013/10/15/uk-china-milkpowder-idUKBRE99E0ZS20131015.

\textsuperscript{141} KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 180 (1995).
slogan “[b]eat the tiger [of corruption] in the year of the tiger.” And in 1989, preceding the Tiananmen Square event, corruption was a key complaint. As with now, leaders claimed that the very legitimacy of the CCP was at stake in the corruption issue. Clearly those campaigns were short-lived.

Under Xi’s leadership, China made some high profile moves to enforce its bribery laws against foreign companies in China. The question for international companies then is whether they can expect this recent enforcement to continue. It is impossible to predict exactly what China will do. But this paper argues that there are many reasons that the Chinese government will continue to focus on international companies. At its core, the government has to do something about corruption and international companies are the most convenient targets.

1. China Needs to do Something About Corruption

Any discussion about China’s domestic political environment begins with a discussion of legitimacy. It is mentioned so frequently it seems cliché, but the legitimacy, or the lack thereof, helps frame the enforcement environment around bribery. In short, endemic corruption imperils the existence of the CCP. It undermines good governance. It angers Chinese citizens.

In the past, the CCP was able to maintain tight control over the information about public officials. That has changed with the internet and social media. The past several years have seen other governments topple when angry citizens use social media to organize themselves. In that same time, numerous reports have surfaced pointing to grotesque levels of corruption within the CCP. One report, intended for internal investigation, revealed staggering corruption over a

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143 Id. at 155
fifteen year period where over ten thousand Chinese officials embezzled or otherwise illegally obtained USD 120 billion and fled the county.\textsuperscript{145} Another news story exposed then-Premier Wen Jiabao’s wealth.\textsuperscript{146} Several news stories shined a light on the wealth amassed by Xi Jinping’s family as well.\textsuperscript{147}

Then came the Bo Xi Lai trial. A Congressional Research Service (CRS) report notes of the trial, “[a]s details of the Bo family’s wealth emerged, it also highlighted the degree to which the families of top Party officials have been able to parlay access to political power into vast personal wealth, information that risks further harming the Party’s already fragile legitimacy.”\textsuperscript{148} The CRS also said, “with the role micro-bloggers played in moving events in the Bo saga forward, the Bo affair highlighted the challenge the Communist Party faces in controlling information and narratives in a social media age.”

In the wake of these scandals, Chinese citizens flocked to social media to express their outrage, speak about their own experiences, or reveal corrupt officials. There was a slew of sometimes sordid exposes on lower-level Chinese officials, some involving mistresses with Hermès Birkin Bags, inconceivable on a clean-government-bureaucrat budget.\textsuperscript{149} Xinhua reports that 15\% of 2013’s whistleblowers were scorned mistresses of corrupt officials. Reporting


\textsuperscript{148} LAWRENCE \& MARTIN, supra note 154, at 18.

\textsuperscript{149} See, e.g., Martin Patience, \textit{China’s Scorned Mistresses Take Revenge on ‘Corrupt Lovers,’} BBC (Oct. 9, 2013); see also, Jia Lynn Yang, Ji Ying and Other Jilted Mistresses Expose Chinese Officials’ Corruption, WASH. POST (July, 25, 2013), \url{http://www.washingtonpost.com/world/ji-yingnan-and-other-jilted-mistresses-expose-chinese-officials-corruption/2013/07/25/8d8d35f6-eb02-11e2-aa9f-c03a72e2d342_story.html}. 

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corruption is not just for scorned mistresses. It can come from employees, business associates, competitors, or political rivals.\footnote{See Chow, supra note 1, at 1019, 1031-1032.} Competitors might “blow the whistle” not out of moral outrage, but in an effort to gain a competitive edge.\footnote{Id.} Or, an angry official might attempt to get retribution by investigating the company. Regardless of how or why the information gets into the public arena, the government is under tremendous pressure to take action.

President Xi Jinping and many other top officials recognize the danger to CCP rule posed by corruption. Xi has spoken relatedly about it. In one speech, he singled out graft and corruption as “pressing problems” that needed to be resolved “urgently.”\footnote{Xi Jinping, Pres. of China, Nov. 15, 2013, \url{http://www.cnn.com/2012/11/15/world/asia/china-xi-jinping-speech/}, (“There are many pressing problems within the Party that needs to be resolved urgently, especially the graft and corruption cases that occurred to some of the Party members and cadres, being out of touch from the general public, bureaucracy and undue emphasis on formalities – they must be resolved with great efforts. The whole Party must be vigilant against them”).} In an address to the Politburo, he warned, “a mass of facts tells us that if corruption becomes increasingly serious, it will inevitably doom the party and the state.”\footnote{Edward Wong, New Communist Party Chief in China Denounces Corruption in Speech, N.Y. Times (Nov. 19, 2012), \url{http://www.nytimes.com/2012/11/20/world/asia/new-communist-party-chief-in-china-denounces-corruption.html?_r=0}.} Speaking to the Central Committee in 2012, he echoed this cautionary statement again saying, “facts have shown that if corruption becomes increasingly severe, it will ultimately lead to the ruin of the Party and the country.”\footnote{Xi Jinping’s Speech at the First Collective Study Session of the 18th Chinese Communist Party Political Bureau, \url{http://www.cecc.gov/publications/commission-analysis/combating-corruption-in-china-advances-and-problems-and-suppression}.}

President Xi has presided over the most significant anti-corruption drive in recent history, referred to as “[d]rastic medicine.”\footnote{Sui-Lee Wee, China’s Xi Warns of Grim fight against Corruption, Reuters (January 14, 2014), \url{http://www.reuters.com/article/2014/01/14/us-china-corruption-idUSBREA0D0PN20140114}.} At the time of writing this paper, there is actually timeline on the government’s official website for China’s anti-corruption drive.\footnote{Timeline: China’s anti-corruption drive, \url{http://www.china.org.cn/china/2014-01/26/content_31311325.htm}.} When this latest
crackdown began, some China-watchers argued that the fight on corruption would be a short one. But the numbers actually support a meaningful increase in corruption efforts, convincing some of the same skeptics.

There is the typical talk about limiting banqueting and banning the distribution of extra toiletries. But there have also been more high-level corruption charges than any other period since the CCP came to power. Unlike previous campaigns, the government has been more likely to prosecute senior executives of SOEs as well as mid to high-level officials and business people. In fact, Zhou Yongkang is the most powerful Chinese official to be prosecuted during CCP rule.

Domestic legitimacy is not the only thing at stake. There are also international motivations for China to continue to crackdown on bribery, official and commercial. Tackling corruption is part of China’s obligations under numerous treaties and agreements. China acceded to the UNCAC in 2005. China is a member of the World Trade Organization, an organization that

158 Sui-Lee Wee, China’s Xi Warns of Grim fight against Corruption, Reuters (January 14, 2014), http://www.reuters.com/article/2014/01/14/us-china-corruption-idUSBREA0D0PN20140114. (“13.3 % increase in people punished.”).
159 Though note, Andrew Hall Wedeman, Xi Jinping’s Tiger Hunt, China Policy Institute Blog (Mar. 17, 2014), https://blogs.nottingham.ac.uk/chinapolicyinstitute/2014/03/17/xi-jinping’s-tiger-hunt/. (“Sixteen months on, however, it appears that far from a smoke and mirrors attempt to create the impression of action, Xi Jinping’s anti-corruption campaign may well be the most sustained and most intensive drive against corruption since the advent of the reform era in the late 1970s.”).
160 Adam Rose, China tells officials training should not involve tourism, Reuters (Jan. 3, 2014) http://www.reuters.com/article/2014/01/03/us-china-tourism-idUSBREA0209X20140103
requires that China increase its transparency and anti-corruption efforts. Many other memberships also require Chinese action against corruption.

But while the government does recognize the need for reform, it does not want to draw unnecessary attention to official bribery. Prosecuting corrupt officials tends to highlight the general corruption of the CCP. In order to continue to control the flow of information, China’s government has waged simultaneous campaign against transparency advocates, and journalists, and corporate investigators.162 Nowhere is this more apparent than in the conviction and jailing of Xu Zhiyong. Xu had raised official ire by demanding that officials disclose their assets. The conviction was based on disturbing the public order, but most believe Xu was targeted because of his reform and transparency advocacy.163

Journalists and other social media reporters have also been targeted. The New York Times reporter who investigated Wen Jiabao was unable to get his visa renewed.164 After a report by the International Consortium of Investigative Journalists pointed to wealth of many Chinese elite’s families and use of tax havens, censorship seemed obvious. "offshore" and "princeling" - the term for the children of senior Chinese leaders - caused the page to go blank on Sina Weiba165

Responding to a spate of internet exposes, the government criminalized “rumors” on the internet—this led to significant drop in corruption exposes. There have also been changes in the law around gathering information reducing the information available about Chinese citizens,

162 See supra Part.II.B.
165 China Condemns report on elite’s “hidden” wealth, censors discussion, REUTERS (Jan. 22, 2014), http://www.reuters.com/article/2014/01/22/china-politics-wealth-idUSL3N0KW2U20140122
corporations, and officials. Many perceive them as being intended to stop investigations of the sort above.

Too much prosecution of official corruption threatens the stability of the party as well. It could paralyze the government, take down too many leaders, or reveal to citizens just how corrupt the government really is. Powerful ex-leaders Hu Jintao and Jiang Zemin reportedly indicated that Xi’s actions against CCP officials were going too far. The government has said, “[o]nly if there is social stability can reform and development continue to proceed.” A little steady reform is good. Too much, and the system might collapse. This fits with the CCP modes operandi.

While the Communist Party has shown little to no interest in reforms that might threaten its rule, for most of the last 30 years it has been undertaking… [reforms] …intended to improve China’s governance in ways that might help solidify the Party’s hold on power. Recent efforts have focused on ways of increasing the legitimacy of the political system by making it more competitive, transparent, and participatory, without going so far as to cede the Party’s ultimate control over all major decisions.

Investigating domestic companies carries its own problems since they are often well connected with officials. The Economist recently provided this law-enforcement anecdote illustrating the relationship between domestic entities and the government:

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167 See e.g., (“I and others have always perceived this law as intending to preclude private investigations ... The purpose of this is to maintain secrecy for important people and companies in China.”

168 Jamil Anderlini & Simon Raminovitch, Ex-president Jiang urges Beijing to curb anti-corruption drive, FINANCIAL TIMES (March 31, 2014), http://www.ft.com/intl/cms/s/0/1bc9c892-b8c7-11e3-a189-00144feabd0.html#axzz30f3aTr9rW.


Official investigators pounced. But unable or unwilling to find and jail the actual crooks, says an industry source, officials have instead been strong-arming innocent shipping firms. These are now being squeezed to under-invoice future shipments from Shenzhen, and to claim instead that goods are leaving from other ports. Why? Because then the trade figures would show superiors in Beijing that the local investigators had “solved” the problem of invoice-faking in Shenzhen. When looking for easy targets to fulfill their quotas of corruption-bashing, local officials may find it simpler to pick on foreign firms than on local ones that have good connections with local or national politicians.171

This is not to say that domestic firms haven’t been under scrutiny. In fact, numerous SOEs and other private companies have faced bribery probes.172 But there are difficulties in tackling domestic companies’ bribery. Unlike targeting officials and foreign companies, however, investigating international companies has a lot of advantages and few downsides.

2. International Companies Make Excellent Targets

International companies do indeed engage in corruption. When they do they can easily be caught in the prosecution of an official. For example, IBM and Hitachi were both implicated as part of a case against a Vice Minister of the Chinese Ministry of Construction. But prosecution of foreign companies is best when the corruption does not embarrass the government. It is a way to crack down on bribery, looking tough on corruption, without displaying the dirty laundry of party members. It also has many other advantages.

The anti-foreigner language is often very effective domestic tool. During the initial GSK scandal, the state-owned media played on nationalist sentiments within China.173 Bribery


investigations have also proved a way to address populist demands and consumer dissatisfaction with prices.\textsuperscript{174} A National Health and Family Planning Commission spokesman said, China will “resolutely crack down” on commercial bribery in pharmaceuticals. Such action, he claimed, raises drug costs and putting a burden on consumers.\textsuperscript{175} Recently, the government has attacked Apple, Yum Brands, Walmart, and Volkswagen.\textsuperscript{176} The Chinese government has launched probes of foreign dairy companies in an effort to reduce the high cost of infant formula and additional milk products.\textsuperscript{177} GSK promised to review GSK’s business model and lower drug prices in China.\textsuperscript{178}

Many have also viewed it as part and parcel of China’s protectionist measures. After tainted milk killed six infants, foreign companies captured almost 80% of the market share for formula. It seemed that the bribery investigations were meant to benefit domestic competitors. China also wants to use domestic prosecutions to affect international outcomes with Chinese companies. One China-watcher commented, “[b]y flexing regulatory muscle at home [against foreign companies], they’re aiming to make sure their companies will be taken care of overseas.”

\textsuperscript{177} Bruce Einhorn, Corruption Charges in China Against Glaxo: There’s More to Come, BUS. WK. (July 16, 2013), http://www.businessweek.com/articles/2013-07-16/corruption-charges-in-china-against-glaxo-theres-more-to-come.
\textsuperscript{178} http://www.dwt.com/Chinese-Probe-Into-GSKMedia-Reports-and-Legal-Analysis-07-29-2013/
Chinese regulators want to prevent overseas court rulings and trade decisions that aren't in China's favor, he said.\(^{179}\)

Some scholars and commentators have argued persuasively that the recent corruption drive will be ineffective without other legal and social reforms.\(^{180}\) That is probably true. Others skeptics claim that the recent crackdown on bribery is largely for show,\(^{181}\) or driven by political\(^{182}\) or protectionist motivations.\(^{183}\) Even if all those things are true, this paper argues that those criticisms should not stop companies from making changes to account for Chinese laws. Looking at China's domestic environment and the international environment, the Chinese government has a lot of incentive to continue to go after foreign company corruption.

### III. HOW COMPANIES SHOULD BE RESPONDING TO CHINESE LAWS

Some companies might decide that the hassles and potential costs of Chinese enforcement are too great. For instance many companies said that one concern was that regulatory system was


\(^{180}\) See, e.g., Fighting Corruption in China, Transparency International (Nov. 8, 2012), http://www.transparency.org/news/feature/fighting_corruption_in_china , (“China’s government decree on access to information in theory opens a space for people to ask the government for information. In practice, the government routinely denies requests for important information. There needs to be effective enforcement of this right to information. In addition, the government must enforce mandatory asset declarations for both government and party officials both as a deterrent to corruption and as a way for citizens to hold their government and party officials to account. This is a prerequisite for fighting corruption that as yet is missing in China.”).

\(^{181}\) See, e.g., William Wan, *China’s Xi Jinping charts a new PR course*, WASH. POST (March 13, 2013), http://www.washingtonpost.com/world/chinas-xi-jinping-charts-a-new-pr-course/2013/03/12/84ca53c2-8743-11e2-9d71-f0eafdd1394_story.html (quoting a former PRC official noting that “[Xi has] been targeting those things most visible to the public”).


harder on foreign companies.\textsuperscript{184} Those corporations might decide that China, with slowing growth, is not worth it.\textsuperscript{185} But most companies, even those burned by investigations,\textsuperscript{186} are committed to doing business in China. China has the second largest economy in the world.\textsuperscript{187} It has one of the highest growth rates in the world at an enviable 7.6%.\textsuperscript{188} It has the world’s largest population.\textsuperscript{189} Many continue to see China is a key market of the future.\textsuperscript{190} Those many international businesses who are committed to staying in China cannot continue with business as usual.

These organizations need to pay more attention to the changing Chinese anti-bribery landscape. Then they need to take steps to prevent or deal with possible problems. But even those compliance officers who recognize the potential liabilities associated with Chinese laws might be unsure of what more they should be doing. In contrast to the FCPA, there is a lot less guidance, official or otherwise, to help companies comply with Chinese laws.

Commentators will continue to parse the GSK investigation and the current bribery climate, offering analysis of China’s enforcement. Companies need to stay abreast of this information and

\textsuperscript{186}GlaxoSmithKline sales plunge in China after scandal, \textit{BBC} (Oct. 23, 2013), http://www.bbc.com/news/business-24637195, (quoting GSK chief executive claiming “there was ‘absolutely no question’ of the company pulling out of China”); \textit{see also}, \textit{GSK has too much at stake to exit China}, \textit{Telegraph} (Oct. 23, 2013), http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10400477/GSK-has-too-much-at-stake-to-exit-China.html, (agreeing that it is unlikely that GSK leaves China because of GSK’s significant investment in the country as well as the future potential in the Chinese pharmaceutical market).
\textsuperscript{190}See, \textit{e.g.}, Andrew Ward, \textit{GlaxoSmithKline sticks with bet on emerging markets}, \textit{FINANCIAL TIMES} (Feb. 5, 2014), http://www.ft.com/intl/cms/s/0/0846f824-8e53-11e3-98c6-00144feab7de.html#axzz30Df0qxRL, (noting that GSK has looked to emerging markets like China’s to make up for ebbing sales in other major developed markets).
make necessary changes. But considering the possible consequences of violations,\(^{191}\) there are several steps companies should be taking now. Section A will discuss the obvious ways companies should adapt to comply with Chinese law. Section B offers some suggestions of steps companies should take to prepare for a bribery-law violation in China.

**A. Complying with Chinese Laws**

First, companies need to adjust policies and procedures to reflect the areas where Chinese laws are broader than the FCPA.\(^{192}\) This means the company needs to prohibit all bribery—not just bribery of officials.

Companies should revamp their international policies to explicitly forbid commercial bribery. Considering the trend toward addressing commercial bribery, it makes sense for companies to make this change worldwide.\(^{193}\) At the very least, however, address it in China through a China-specific procedure. After prohibiting commercial bribery, companies need to draw attention to the prohibition since current procedures might technically prohibit it, but not be targeted prevent it. Training materials should then offer clear definitions and examples of prohibited commercial bribery. Employees need to accurately record expenses related to private entities and official. Then the company needs to explain the severe possible consequences employees that engage in bribery in China—both within the company and without. Companies also need to reinforce the total ban on facilitation payments as well.\(^{194}\)

Both these changes need to be communicated to third party suppliers and consultants. Those third parties should be trained as well. Contracts should contain clear language prohibiting

\(^{191}\) Discussed *supra*, Part II.C.

\(^{192}\) Discussed *supra*, Part II.A.

\(^{193}\) Discussed *supra*, Part II.A.1.

\(^{194}\) Discussed *supra*, Part II.A.2.
bribery of any entities, official or private.195 As usual, the contract should also include language allowing the company to audit the third party records if needed and warning the third party that the contract will be terminated if bribery violations occur.

Then companies need to audit well. Internal and external controls should be geared toward detecting all kinds of bribery, not just official bribery. Regardless of why they were retained, companies need to then evaluate interactions with similar scrutiny.

Second, companies need to follow will be China’s laws and practices regarding information access. Due diligence remains imperative under both the FCPA and Chinese laws. But as Part II.B tells us, risk assessments for future employees, third party suppliers and consultants, and potential partners might get companies and their information providers into trouble as well. This will mean companies will need to walk a fine line, continuing to emulate best practices while carefully complying with Chinese laws. They will need to insure that the entities doing the investigations are not subjecting the company to risk.

More generally, companies need to take the same kind of action they are supposed to be taking under the FCPA, but they need to do it better than they have been in China. It is always important to valuate country-, industry-, and company-specific risks. This includes tailored oversight of Chinese operations. Companies need to keep abreast of common schemes and audit for them. GSK apparently failed to detect the large sums being funneled illicitly to doctors through travel agencies. Some have questioned why Price Waterhouse Cooper, GSK’s external

auditor did not detect the travel agency scheme.\textsuperscript{196} Travel agencies have been a common conduit for bribes; it has been used before at IMB in China.\textsuperscript{197} Chinese counsel can help evaluate what types of things internal and external audit should be examining.

On that note, companies may consider a change in sales and marketing programs. Commentators often credit sales pressures credited incentive for sales personnel to bribe.\textsuperscript{198} Recognizing this, GSK announced that it would no longer tie employee compensation to the number of prescriptions doctors write.\textsuperscript{199} In December of 2013 GSK announced that it would stop paying doctors commissions to prescribe drugs.\textsuperscript{200} They are also getting rid of prescriptions targets for marketing, presumably to reduce incentive for corruption.\textsuperscript{201} Though they denied that it was related to the Chinese bribery investigation,\textsuperscript{202} the connection seems clear.

Organizations should also consider changing marketing and communication strategies as well. Continuing medical education (CME), for example, provides ample opportunity for corruption or the appearance of corruption. Companies might want to adopt some of their strict rules around CMEs in the United States.\textsuperscript{203} Infant formula firms are doing the same things after

\textsuperscript{196} Ben Hirschler, \textit{How GlaxoSmithKline missed red flags in China}, Reuters (July, 19, 2013), http://www.reuters.com/article/2013/07/19/us-gsk-china-redflags-idUSBRE9d0L420130719, (quoting former PwC partner saying “[t]ravel agencies are used like ATMs in China to distribute out illegal payments. Any company that does not have their internal audit department all over travel agency spending is negligent.”).


\textsuperscript{198} See, e.g., Benjamin Shobert and Damjan DeNobel, \textit{Compliance After China’s Healthcare Bribery Scandals}, CHINA BUS. REV. (Oct. 10, 2013), http://www.chinabusinessreview.com/compliance-after-chinas-healthcare-bribery-scandals/, (“…much of the questionable behavior that the GSK scandal has exposed is a symptom of sales organizations under extreme strain to generate sales.”).


\textsuperscript{200} Adam Jourdan, \textit{China Arrests Former Shanghai Health Deputy}, UK Reuters (December 19, 2013), http://uk.reuters.com/article/2013/12/19/uk-china-corruption-idUKBRE9B10BF20131219.

\textsuperscript{201} Id.

\textsuperscript{202} Id. (“company said the measures were not directly related to its Chinese problems and were rather part of a broad effort to improve transparency.”).

\textsuperscript{203} Hirschler, \textit{How GlaxoSmithKline missed red flags in China}, (“In the United States and western Europe, such CME funding for doctors is now tightly controlled. But there is little oversight in emerging markets.”).

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their marketing practices came under scrutiny.\textsuperscript{204} Other companies are taking note. A quarter of U.S. companies surveyed in recent American Chamber of Commerce survey said that they had made changes to business practices or incentives as a result of the GSK scandal.\textsuperscript{205} The best companies work to ensure that compliance violations do not occur, but they also plan for a problem.

### B. Preparing for Chinese Enforcement

GSK had a program in China than any other country except the U.S.\textsuperscript{206} They did twenty audits per year in china.\textsuperscript{207} And they did an extensive investigation earlier in the year.\textsuperscript{208} Corporations need a contingency plan. This should be the case in Chinese operations.

Companies and their Chinese-based employees need to know what to do in the event of an investigation. They need to plan for Chinese authorities to conduct investigations and raids.\textsuperscript{209} Under the FCPA, companies are encouraged to self-report. Chinese laws apparently encourage voluntary disclosure and confession.\textsuperscript{210} There is vigorous debate about the kind of circumstances in which companies should self-report to the DOJ. A company facing a potential issue would have to consider whether they would go to Chinese authorities with a confession.

\textsuperscript{204} Jourdan, \textit{China Milk Powder Crackdown is Tough Medicine for Doctor}.
\textsuperscript{206} Hirschler, \textit{How GlaxoSmithKline missed red flags in China}.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{211} Interpretations on Several Issues Concerning Application of Law for Handling Criminal Cases of Bribe Offering (Promulgated by Sup. People’s Ct. & Sup. People’s Procuratorate, Dec. 31, 2012 effective Jan. 1, 2013) art. 12 (China) .
Finally, international companies need to plan for their employees’ safety and well-being. The possibility of length detentions and forced confessions mean that companies need to have safeguards to protect executives and other workers that might be targeted in an investigation. The increased focus on and enforcement of Chinese laws should make companies wary of continuing to be driven solely by FCPA concerns.

IV. CONCLUSION

International companies will continue to be drawn to China. While many companies recognize that Chinese operations are at risk for bribery, they still focus on FCPA-related concerns. Though the FCPA will continue to be a source of anxiety, responsible corporate officers are remiss if they are not paying close attention and making changes when necessary, to account for developments around Chinese laws. FCPA compliance is not enough. International companies should be more concerned with China’s domestic anti-bribery laws—and not just because they might trigger or impact parallel FCPA investigations.

Chinese bribery laws matter and international companies ignore those laws at their peril. Every executive and compliance officer should know that Chinese laws are broader in certain ways than the FCPA. Certain due diligence practices might conflict with some Chinese laws. Penalties, particularly for individuals, are high. Enforcement is likely to continue. Companies should take steps now to incorporate Chinese laws and enforcement into their own corporate strategies. Chinese laws are growing up.

Appendix A: Compliance Gap Chart

211 See generally Part II.C.1.