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Newsletter

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Legal Updates

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1. Electronic Commerce Law (Second Review Draft) For Public Comment to Strengthen Platform Operator Obligation Rules (Authors: Jun LI, Xuezhou CHEN)

From October 30 to November 4, 2017, the 30th Session of the 12th NPC Standing Committee held a review of the second draft of *Electronic Commerce Law of the People's Republic of China* (Draft) ("**Second Draft**"). Compared with the first draft released in December 2016 ("**First Draft**"), the Second Draft simplifies and integrates the relevant provisions of the *Cybersecurity Law*, *Anti-Unfair Competition Law*, *Postal Law* and *Law on Protection of Consumer Rights and Interests* with respect to personal information protection, anti-unfair competition, express logistics and consumer protection based upon the principle of "highlighting key points and simplifying by removing duplication." The Second Draft further regulates the conduct of e-commerce operators, especially platform operators, according to the characteristics and practices of e-commerce, and expands and strengthens the obligations and responsibilities of platform operators based on the nature and function of those platforms.

In this article, we will summarize and analyze the changes to the regulatory provisions over platform operators provided under the Second Draft, including in the following aspects:

Further strengthen the management responsibilities of platform operators

According to the First Draft, platform operators should undertake certain administrative responsibilities. For example, platform operators are obliged to examine the identity and administrative license information of the vendors who log onto the platform ("**Vendors**"). The Second Draft modifies this platform operator obligation by changing it from a duty to "examine" such information to instead "verify" it (Article 23), which will substantially relieve the examination obligations that would have otherwise been imposed. Although the Second Draft does not explicitly provide the specific methods for verification, generally speaking, the obligation to "verify" should be considered fulfilled if the platform operator conducts a formal check of the information provided (including examining the QR code information on the business license).The Second Draft also increases the information reporting obligations of platform operators, who are required to report the identity and operating information of Vendors on the platform to the industry and commerce authorities and tax authorities in accordance with the relevant provisions (Article 23). However, the Second Draft only provides general principles of this obligation, and does not articulate the purpose (whether it is for general statistics or the investigation of illegal business activities or for other administrative purposes), scope (whether it only includes statistical or desensitized information, or also contains raw data involving personal privacy and trade secrets), conditions (whether the report is to be issued only on the basis of law and administrative regulations, or also under rules and local

laws and regulations) and procedures (whether it is necessary to obtain the consent of the parties concerned, or it is necessary to give the concerned parties appropriate notice) of the reporting. According to the existing regulations, platform operators are required to report statistical market transaction information of the Vendors, or as a response to an investigation proceeding against suspected violations within the platform, to provide the registration information and transaction data of the suspected illegal Vendor. The Second Draft imposes broader information reporting obligations on platform operators. While these broadened obligations will increase the compliance burden on platforms, they will also render sensitive information to be circulated more widely, which may bring additional information security concerns for Vendors. We recommend that the follow-up drafts further clarify and limit the information reporting obligations of platform operators.

Improve platform operators' formulation of service agreements and rules of trade

As providers of e-commerce transaction platforms, platform operators need to sign relevant service agreements with Vendors that join the platform, and clarify trading rules and policies applicable to the transactions occurring on the platforms. Although such agreements and rules are regarded as internal policies developed by platforms, they have a significant effect on the health of the e-commerce ecosystem due to their wide-ranging application and the large transaction volumes involved.

According to the First Draft, platform operators are to develop service agreements and rules of trade based on the principles of openness, fairness and impartiality. Such rules should clearly specify rights and obligations of Vendors joining and exiting the platforms, the warranty of goods and services, the protection of consumer rights and personal information (Article 27). Platform operators are to display platform service agreements and rules of trade in a conspicuous manner and on continuous basis (Article 28). If the platform intends to revise the rules of trade, it should release an announcement for public comment for such revisions in a prominent location on the homepage, and the revised content is to be publicized 7 days before being implemented. If the Vendors refuse to accept the changes, they have the right to withdraw from the platform and assume relevant responsibilities in accordance with the original rules (Article 29). The Second Review further improves the abovementioned provisions by requiring amendments to the platform service agreement to also go through public comment before being implemented (Article 29).

In light of the significant effect that service agreements and rules of trade have on the e-commerce ecosystem, the Second Draft further stipulates that platform operators may not impose unreasonable restrictions or impose unreasonable conditions to the transactions that occur on their platforms via services agreements or rules of trade, and platform operators may not charge Vendors unreasonable fees (Article 30). To some extent, this requirement echoes the provisions of the *Anti-Unfair Competition Law* that prohibits the "abuse of market dominant position." However, under the Anti-Unfair Competition Law, if Vendors claim that the platform has committed any act of abuse of market dominant position, they initially need to define the relevant market, and then prove that the platform occupies a dominant position in the relevant market and that the platform has committed acts of

abusing that dominant position. This directly leads to uncertainty in practice when establishing whether a platform operator has committed any acts of abuse of market dominant position, although some of the platforms with advantageous position in the market have committed some obviously unfair behaviors. In contrast, the Second Draft is tailored to online transactions by providing more simplified and practical protections for Vendors. According to the Second Draft, Vendors only need to prove that the platform has imposed some unreasonable restrictions or conditions on them, and the Vendors will then be deemed to have fulfilled their burden of proof. This will help to further regulate conduct of platforms and to establish a fairer market environment.

Strengthen the obligations of platform operators to protect consumer rights and interests

Platforms do not directly enter into sales or service contracts with consumers. If the goods or services sold on the platform damage the rights and interests of consumers, the consumers would initially raise claims against the manufacturer or seller of the goods or the provider of services. However, as the provider of the transaction platform, the platform also undertakes certain duties to consumers, including upholding consumers' right to information, right of choice, right to fair trade and right to compensation for damages. The Second Draft supplements and improves the relevant provisions in this regard.

To protect consumers' right to information and the right of choice, the First Draft required that platform operators establish and improve the evaluation system and publicize evaluation rules (Article 33). Based on this provision, the Second Draft specifies that platform operators are to provide consumers with a means of making comments regarding the products or services purchased on the platform; platform operators may not delete the consumers' comments other than those containing insulting, defamatory or clearly false information (Article 33). In addition, the Second Draft also requires platform operators to display search results for products or services in various ways such as by price, sales volume and credit level, and mark paid product rankings as "advertisements" prominently (Article 34). According to the *Interim Measures for the Administration of Internet Advertising* promulgated by SAIC in 2016, online paid ranking is deemed to be advertising and shall be clearly identified as an "advertisement". The Second Draft clarifies that in the context of e-commerce, paid ranking is also a type of advisement and shall be marked prominently, which will help consumers to assess search results in a more informed manner. Since platform operators engaging in paid rankings are regarded as engaging in advertising, the platform, as an advertisement distributor, must comply with the laws and regulations related to advertising, including the obligation to review the qualifications of advertisers and the content of advertisements.

With respect to consumers' right to compensation for damages, the Second Draft incorporates certain provisions of the *Law on Protection of Costumers' Rights and Interests*, by providing that if the consumers require the platform operators to pay compensation in advance, the relevant provisions of the *Law on Protection of Costumers' Rights and Interests* shall apply (Article 51). According to Article 44 of the *Law on Protection of Costumers' Rights and Interests*, "Consumers whose legitimate

rights and interests are infringed via an online trading platform shall have the right to claim compensation from the vendor of the goods or the provider of the services. Where the operator of the online trading platform cannot provide the true name, address and effective contact information of the vendor or service provider, the consumers shall have the right to claim compensation from the operator of the online trading platform. Where the operator of the online trading platform has made commitments on more favorable terms to consumers, the operator is required to perform those commitments. After compensating the consumers, the operator of the online trading platform is entailed to claim compensation from the vendor or service provider." Therefore, the platform is obligated to review on qualifications of Vendors on the platform and should actively assist consumers in safeguarding their rights. Otherwise, the platform may be required to compensate consumers for any loss incurred. In addition, if the platform makes, inter alia, "advance compensation" or "rapid refund" commitments, consumers may also request the platform to perform such commitments.

In connection with the protection of consumers' supervision rights, the Second Draft requires that e-commerce operators, including platform operators, establish a convenient and effective complaint and reporting mechanism, publicize complaint and reporting methods, and accept and handle complaints and reporting in a prompt manner (Article 52).

Strengthen the intellectual property rights protection responsibilities of platform operators

In terms of intellectual property protection, the Second Draft improves the application of the "notice - remove" rule in the e-commerce sector based on the Internet infringement provisions specified in the *Tort Liability Law*. According to the Second Draft, if a platform fails to take necessary measures in a timely manner after receiving a notice of infringement from an intellectual property rights owner, the platform will bear joint and several liability with the infringing party on the platform for the expanded part of the loss (Article 36). The platform must take proper measures if the platform operator knows or should have known that Vendors on the platform are violating other parties' intellectual property rights. If no such necessary measures are taken, the platform is also subject to joint and several liability with the infringing party on the platform (Article 39). Compared with the First Draft that requires platform operators to take measures only if they "receive an infringement notice" or "know of the existence of infringement," the Second Draft further requires that platform operators also take measures when they "should have known" the existence of infringement. This means that the platform cannot claim to be exempt from the liability for infringement on the grounds that it has not received an infringement notice. As such, the Second Draft places a higher standard of duty of care on platforms with respect to intellectual property rights protection. If the platform has fulfilled its duty of care but still fails to detect the infringing behaviors, the platform can be exempt from liability for such infringement; otherwise, the platform will assume joint and several liabilities for the infringement. In general, a platform's duty of care should be commensurate with its business model, scale of operation and technology and management capabilities. In order to comply with this new standard under the Second Draft, we recommend that platforms establish a proactive monitoring system to ensure that an alarm can be raised immediately the moment any obvious or

easily identifiable infringement is detected so that the platform can take necessary measures in a timely manner.

Corporate compliance suggestions

In general, draft legislation undergoes three rounds of review by the NPC Standing Committee before it is submitted for a vote. Considering the Second Draft sees significant changes compared to the First Draft, we expect that opinions among the various parties are still diverse with respect to the draft content and more revisions can be expected in the future. Having said that, based on the contents of the Second Draft, we suggest that the platform operators can improve their compliance efforts in the following aspects:

a. Improve platform service agreements, strengthen management and control of Vendors through contract arrangements. Establish and implement Vendor information disclosure and verification systems; require Vendors to provide truthful information and update in a timely manner; require Vendors to cooperate with information verification work implemented by the platform as the platform requires.

b. Improve the process for modifying rules of trade and service agreements, modify relevant documents according to the procedure and manner required by law, change the practice having modification immediately take effect upon notice via system emails or messages, and seek public comment for changes before those changes are implemented.

c. Mark paid product and service rankings in a prominent manner, establish and implement a system for advertisement engagements, the examination of the qualifications of advertisers and the advertising content in accordance with the *Advertising Law* and other regulations.

d. Establish and implement an intellectual property rights monitoring and control system based on the platform's business model, scale of operation and technical capabilities; try to detect and control infringing behaviors in a timely manner by supervising and analyzing any irregularities in product prices, sales volumes, credit ratings and market opinion and reception.

e. Improve the complaint and reporting system, ensure the effectiveness of complaint and reporting channels to ensure the platform can notice and deal with the infringing behaviors in a timely manner. and clearances, and liability for damages from product defects. CMO Contracts and drug quality agreements complement and are indispensable to each other in a manner similar to the relationship between GMP operating procedures and process specifications.

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2. New Anti-Unfair Competition Law – Changes to Commercial Bribery (Authors: David TANG, Serina WEI)

On November 4, 2017, the Standing Committee of the National People's Congress adopted a revision to the *Anti-Unfair Competition Law of the People's Republic of China* (the "**Revised Law**"). The Revised Law substantially revises the currently effective *Anti-Competition Law of the People's Republic of China* (the "**Current Law**") which was enacted in 1993. In response to the tremendous changes in business models in the market over the past 24 years following the implementation of the Current Law, apart from redefining and regulating unfair competition behaviors provided under the Current Law, such as misleading conduct, false statements in advertising and the infringement of trade secrets, the Revised Law also introduces provisions to regulate unfair competition behaviors conducted via the Internet and by technical means in order to adapt to the growing Internet economy. The Revised Law will come into effect on January 1, 2018.

One of the most significant changes in the Revised Law is the substantial changes made to the commercial bribery provisions found under Article 8 of the Current Law (Article 7 of the Revised Law). The scope of commercial bribery under the Revised Law will no longer be limited to "for the purpose of distributing or purchasing commodities," and has been expanded to include "for the purpose of seeking transaction opportunities or competitive advantage." Meanwhile, the Revised Law also redefines the targets, content and penalties regarding commercial bribery.[1] Below is a comparison of the commercial bribery provisions found in the Current Law and the Revised Law (the red color represents content that has been revised or eliminated):**Current Anti-Unfair Competition Law**	**Revised Anti-Unfair Competition Law**
Article 8 Business operators shall not	Article 7 Business operators shall not resort to

1 With respect to the penalties, Article 19 of the Revised Law increases the range of fines from "ten thousand to two-hundred thousand" to "ten thousand to three million". In addition, cancelling the violator's business license in aggravated cases is included as a new type of penalty. It is also provided that penalties against the enterprise will be recorded in the enterprise's credit files. These revisions are in line with the current economic condition and the penalties of cancelling business license and credit record will heighten the enterprise's cost for violating the law.

resort to bribery by offering money or goods or by other means for the purpose of distributing or purchasing commodities. ~~Any undercover rebates to units or individuals which have not been entered into the accounts shall be treated as bribes, and the acceptance by any unit or individual of such rebates shall be treated as the acceptance of a bribe.~~ Business operators in purchasing or distributing commodities, may, in an express manner, give discounts to buyers or commissions to middlemen with the amount of such discounts or commissions being entered into the accounts, and business operators may accept discounts or commissions with the amounts being entered into the accounts.	bribery, by offering money or goods or by any other means, to any of the following entities or individuals, for the purpose of seeking transaction opportunities or competitive advantage: 1. any staff member of the counterparty to a transaction; 2. any entity or individual entrusted by the counterparty to a transaction to handle relevant affairs; and 3. any entity or individual that is likely to use power of authority or influence to affect a transaction. Business operators may expressly give a discount to the counterparty or pay a commission to the middleman in a transaction while carrying out transaction activities, and shall truthfully enter the discount or commission in their accounts if they do so, while business operators that accept such discount or commission shall also enter the discount or commission into their accounts. Bribery committed by staff member of a business operator shall be deemed to be the conduct of the business operator, unless the business operator otherwise proves with evidence that such bribery is not related to efforts to seek a transaction opportunity or competitive advantage for the business operator.

We have summarized below several issues regarding changes to the commercial bribery provisions found in the Revised Law that should be of interest to business operators in China. Along with the summary, we have provided a preliminary analysis of these issues in combination with specific cases which we believe will be of assistance in discerning the future trends in regulating commercial bribery.

Issue I: Does giving a "benefit" to the counterparty to a transaction constitute commercial bribery?

The biggest change found in the Revised Law is that offering benefits directly to the transaction counterparty is not considered a commercial bribe, and instances in which offering benefits would constitute commercial bribery are only where the recipients are: (i) any staff member of the counterparty to a transaction; (ii) any entity or individual entrusted by the counterparty to a transaction to handle relevant affairs; and (iii) any entity or individual that is likely to use power of authority or

influence to affect a transaction.[2] This revision alters the definition of the targets of commercial bribery as provided under the Current Law as well as the *Interim Provisions on Prohibition of Commercial Bribery* (the "**Interim Provisions**"), passed by the State Administration for Industry and Commerce in 1996.

The Current Law does not specify the targets of commercial bribery; however, the Interim Provisions include counterparties as possible targets of commercial bribery. Therefore, for a long period of time, the regulatory authorities have tended to regard benefits provided to counterparties by entities and certain business arrangements between them as the transfers of improper interests and have deemed such conduct to constitute commercial bribery.

In fact, there is another different view among academia and legal practitioners, which is that there are three parties in a commercial bribery scenario and the essence of commercial bribery is that a third party (the "**Agent**") other than the counterparty accepts benefits from the briber by using its power of influence in the transaction or over the counterparty, and transfers or causes a transfer of the interests which should have belonged to the counterparty. For example, the Agent excludes other competitors through its influence or causes the counterparty to contract with the briber at a price higher than the market standard. Commercial bribery is a behavior that satisfies the Agent's self-interest through infringement of the interests of a counterparty, competitor, or consumer. It is consistent with the Criminal Law's protection of the public interest to criminalize the offering or accepting of bribes. That is to say, the reason why bribery must be prevented is because it infringes upon the interests of other parties. In the context of the Criminal Law, the interest being harmed is the public interest, while under the Anti-Unfair Competition Law, it is the interests of counterparties, competitors, or consumers. Thus, since the parties to a transaction are private entities who themselves bear profits and losses, normal arrangements between them such as concessions or discounts should not be treated as commercial bribery because such arrangements do not directly harm the interests of other parties.

Article 7 of the Revised Law responds to and affirms this understanding. We believe that, in the future, providing benefits to counterparties in a transaction will not be treated as commercial bribery under the Revised Law. For example, site-use fees, sponsorships and display fees that suppliers provide to supermarkets or shopping malls; various sponsorships or "buy supplies, receive free medical equipment" marketing strategies provided by medical equipment companies to hospitals, and free display closets or rewards provided by vintners to malls or nightclubs based on their sales volumes will be treated as regular business arrangements between business operators and will not constitute commercial bribery under the Revised Law. Nevertheless, it should be noted that under the Criminal Law framework, if a party to a transaction provides benefits to state-owned enterprises, public hospitals or other entities owned by the state, it remains possible to commit the crime of offering a bribe as stipulated by Article 391 of the Criminal Law, and it remains possible for a state-

2 Section 1, Article 7 of the New Anti-Unfair Competition Law. For the sub-section 3, please refer to the further analysis as set forth in Issue II.

owned enterprise or public hospital to commit the crime of accepting a bribe under Article 387 of the Criminal Law.

There are apparent conflicts between the Revised Law and the Interim Provisions. For now, the Interim Provisions remain valid, and they continue to treat counterparties as targets of commercial bribery. Therefore, it is yet unclear as to how to reconcile the conflicts between these new and existing provisions. We believe the State Administration for Industry and Commerce will revise the Interim Provisions pursuant to the regulations and principles under the Revised Law.

Issue II: How to interpret "entity or individual that uses its influence"?

Upon adoption of the Revised Law, extensive discussions have been undertaken on how to interpret the scope of "entity or individual that uses authority or influence to affect a transaction," as provided in clause 3 of the commercial bribery targets. The discussions primarily focus on two issues, one is how to define influence, the other is whether the counterparty itself could constitute an "entity that uses its influence to affect the transaction."

What is "using influence"? The Revised Law does not further provide a clear answer to this question. We believe the term "influence" means influence that has a critical and decisive impact on the transaction. For example, the administrative authorities, industry organizations or their officers may interfere in a transaction by using their administrative authority or inclination. Such influence could certainly affect the terms or even conclusion of a transaction. Considering that Article 388 of the Criminal Law defines "influence" as "convenient conditions created by using one's authority or position," we believe that the Revised Law refers to the concept found under the Criminal Law, and accordingly the term "using influence" means influence in connection with one's authority or position, rather than the influence that an ordinary entity or individual involved in the transaction would have. However, there exists a different point of view which holds that the term "influence" includes any kind of influence which may be imposed on the transaction, regardless of the extent of such influence or whether it is material. By this logic, any entity or individual using its influence could possibly be the target of commercial bribery. This view is similar to that which is reflected in the Current Law and other regulations, as well as in administrative practice.

The discrepancy in these understandings makes it difficult to determine whether certain specific cases would constitute commercial bribery under the Revised Law. For example, a distribution agreement between a manufacturer and distributor may provide that the distributor is to distribute products to downstream customers; meanwhile, the manufacturer will provide bonuses as an incentive to the distributor's salespersons based on their sales performance. We understand that, although the salespersons are employees of the distributor, due to the existence of the distribution agreement, providing bonuses to the salespersons will not increase the manufacturer's competitive advantage or transaction opportunities. Therefore, in such transactions, the bonuses provided by the manufacturer to the salespersons will not constitute commercial bribery. On the other hand, with respect to the possible transaction between the distributors and downstream customers,

although the salespersons' promotion work will influence the transaction to some extent, in our view, such influence is not great enough to be deemed as "influence," and consequently the bonuses provided by the manufacturer to the salespersons would not constitute bribes offered to individuals who have influence under the Revised Law. However, some views hold that influence over the salespersons in this transaction would be deemed to be "influence" under the Revised Law, and the bonuses provided by the manufacturer would constitute commercial bribery. In addition, simply based the context of the Revised Law it is difficult to determine whether the guiding role played by a doctor's prescription in a patient's decision to purchase drugs or the effect of a tour guide's arranging of an itinerary can constitute "using influence." Therefore, we are hopeful that the State Administration for the Industry and Commerce can issue further implementing opinions to clarify the definition of "influence" under these circumstances.

Could a counterparty itself constitute an "entity that uses its influence to affect a transaction"?
Based on the text of the Revised Law, a counterparty could certainly have influence over a transaction and not be excluded from the definition of an "entity that uses its influence to affect a transaction." It could be interpreted that a counterparty may be regarded as a target of commercial bribery under the theory that it is an "entity that uses its influence to affect a transaction." However, such understanding is against the original intent of the Revised Law's changes to the commercial bribery provisions, in which lawmakers have recognized that the essence of commercial bribery is the misappropriation or infringement by a third party of the counterparty's rights and interests. Also, as discussed above, "influence" means the influence generated by any person's authority or position and does not include the decision-making power of the counterparty to the transaction itself based on its judgment from the perspective of its economic interest. Therefore, no matter whether a party gives a benefit to the counterparty in the form of a discount, reward, cash or goods, as long as it is a business arrangement between the parties, such benefit is not a commercial bribe as provided under the Revised Law. Due to ambiguities in the meaning of "entity that uses its influence to affect a transaction," the understanding of local government authorities may also vary as to Article 7 of the Revised Law. We expect that the industry and commerce authorities will further refine this definition.

Issue III: Will "off-the-book" rebates no longer be illegal since this language has been deleted?

Another major revision to the commercial bribery provisions under the Revised Law is that it deletes the clause which specifies that "off-the-book" rebates to counterparties (entities or individuals) constitute commercial bribery. With respect to rebates and commissions, lawmakers have only retained the requirement of "express and accurate bookkeeping" in the Revised Law. A pertinent question is, therefore, does this deletion mean that "off-the-book" rebates will no longer violate the Anti-Unfair Competition Law? In our opinion, this revision indicates the lawmakers' attitude towards rebates between enterprises that, while not expressly, accurately or properly recorded on the enterprises' books, are commercially reasonable. By eliminating the above clause, lawmakers aim not to treat all such rebates as commercial bribery without further considering their respective legality. Enterprises will still be required to comply with the "express and accurate booking" requirement when

providing rebates.

Despite the above, we understand that "express and accurate bookkeeping" is not an essential element in identifying commercial bribery. For those rebates provided to a third party which are not expressly or accurately recorded, the law enforcement authorities should conduct examinations and investigations as to the background of the transaction and the reasonableness of the rebates on a case by case basis. If the rebates are made for the purpose of seeking transaction opportunities or competitive advantage, then the law enforcement authorities could still identify such rebates as commercial bribery based on their discretion under Article 7 of the Revised Law. However, a precondition for the administrative penalties under Article19 of the Revised Law is that the business operator violates Article 7 by offering a bribe to other parties, while Article 7 does not specify whether inaccurate bookkeeping should be treated as commercial bribery. Therefore, it needs to be further clarified by the State Administration for Industry and Commerce as to whether inaccurate bookkeeping may be subject to administrative penalties for commercial bribery.

Based on our discussion in Issue I, if a rebate is provided to a counterparty to a transaction, such rebates are business arrangements between the parties and would not be treated as commercial bribery. However, such rebates might violate other regulations, for example, unrecorded entries or inaccurate bookkeeping may violate tax laws.

Issue IV: Will employers be subject to greater potential liability for bribery committed by its employees?

Lawmakers added an additional paragraph to Article 7 of the Revised Law, which stipulates that "bribery committed by a staff member of a business operator shall be deemed to be the conduct of the business operator, unless the business operator otherwise proves with evidence that such bribery is not related to efforts to seek a transaction opportunity or competitive advantage for the business operator." This paragraph, for the first time specifies that the employer is responsible for commercial bribery committed by its staff members under the Anti-Unfair Competition Law. However, such stipulation is not new, in fact Article 3 of the Interim Provisions already provides that the "acts of employees of a business operator engaging in commercial bribery for the purpose of selling or purchasing commodities for the business operator shall be regarded as the acts of the business operator," without providing any exceptions. Compared to the employer's liability for commercial bribery committed by employees under the Interim Provisions, the Revised Law expands the concept of "employee" to "staff member," and does not limit the purpose of the bribery to "distributing or purchasing commodities for the business operator."[3] Without a doubt, the scope of an employee's commercial bribery conduct is expanding, as a result there are stricter requirements on employers with respect to their employee management.

In fact, a noteworthy exception provided in Article 7 specifies that an employer can be exempt from

3 "Staff member" in this context is broader than "employee" and may include independent contractors and other dispatch agency workers. We expect to see a refined definition of the term in future regulations.

liability if it proves that there is no relationship between itself and the conduct of its staff members, which is a significant improvement by providing a “safe harbor” to the employer. However, it will be difficult in practice to prove that there is no relationship between the staff member’s conduct and the employer’s seeking of competitive advantage or transaction opportunity. The employer will not only have to prove that it was not aware of the staff member’s bribery, but also prove that it had not gained competitive advantage or transaction opportunity from the staff member’s behavior or that such competitive advantage or transaction opportunity was irrelevant to the staff member’s behavior. Therefore, the Revised Law acts to impose a higher requirement on the employer with respect to employee management and risk control.

Summary

The Revised Law’s innovations with respect to its commercial bribery provisions are remarkable. They show that the government is willing to reduce intervention in normal market activities among enterprises and also respond to and affirm existing business models in the market. However, further work needs to be done in order to realize a smooth transition from the old provisions to the new ones. Also, there are issues under the Revised Law that need to be clarified and improved. We hope that the administrative authorities can introduce implementing rules shortly, and we will continue to follow up the progress of relevant rules and regulations.

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If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office
Tel.: +86-10-8525 5500
9/F, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Wenyu JIN Attorney-at-law
Tel.: +86-10-8525 5557
Email: wenyu.jin@hankunlaw.com

Shanghai Office
Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law
Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office
Tel.: +86-755-3680 6500
Room 2103, 21/F, Kerry Plaza Tower 3, 1-1 Zhongxinsi Road, Futian District, Shenzhen 518048, Guangdong, P. R. China

Jason WANG Attorney at-law
Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com

Hong Kong Office
Tel.: +00852-2820 5600
Suite Rooms 2001-02, 20/F, Hutchison House, 10 Harcourt Road, Central,
Hong Kong, P. R. China

Dafei CHEN Attorney at-law
Tel.: +852-2820 5616
Email: dafei.chen@hankunlaw.com