

Newsletter

June 2016

Quarterly Compliance Newsletter Vol. 1

Introduction

We are delighted to present the inaugural edition of our Asia Pacific Compliance Newsletter, a quarterly round-up of major developments in the compliance field. We hope this will be a valuable resource enabling both risk management and compliance specialists and business teams on the ground to keep abreast of regulatory changes throughout the Asia Pacific region.

In this edition, we focus on: (i) proposed new anti-corruption legislation in China; (ii) reforms to the scope of bribery offences in Vietnam and Thailand; (iii) ongoing efforts to weed out corruption in the Indonesian judicial system; and (iv) new marketing guidelines in the pharmaceutical and medical sectors in the Philippines.

China

Proposed Amendments to the PRC Anti-Unfair Competition Law

As part of the ongoing corruption sweep in China, on 25 February 2016, the State Council released for public consultation draft amendments to the Anti-Unfair Competition Law ("AUCL"). This is the first time changes have been proposed in the 20 years since its enactment.

Notably, the Draft Amendments introduce new definitions, enhanced enforcement measures and tougher sanctions to regulate commercial bribery. In outline, the key changes put forward for public consultation are:

- A specific definition of 'bribery', namely the payment of or promise to pay economic benefits by a business operator to a counterparty or third party that may influence a transaction, thereby enticing them to seek trading opportunities or a competitive advantage for the business operator.
- Vicarious liability on the part of corporate entities, subject to a defence where the employee's acts against their employer's interests.
- An extended books and records offence whereby the failure to record any economic benefit truthfully would be unlawful.
- Tougher financial sanctions - fines of between 10% and 30% of unlawfully-derived revenues would be available to the authorities.

After the close of the consultation period, the Legislative Office of the State Council may make revisions to the Draft Amendments as needed based on the feedback obtained through public consultation. After the updated draft is adopted by the State Council, the draft will be submitted to the Standing Committee of the National People's Congress for review. During the review process, the Standing Committee will consult with relevant government authorities and further update the draft for final approval and adoption by the

NPC. In practice, this process may take anything from a few months to several years.

Vietnam

Bribery - Changes to the Penal Code

On 1 July 2016, the 2015 Penal Code will come into force, superseding the current version. The most notable aspect of the revised legislation from a compliance perspective is the adoption of an expanded definition of bribery.

Under Article 364 of the 2015 Penal Code, it will be an offence to give or to offer money, property or other pecuniary interests worth at least VND 2 million or any non-pecuniary interest in order to induce the recipient of the bribe to perform or to refrain from performing an official task for the benefit of or at the request of the bribe-giver. The offence can be committed directly or through intermediaries. This provision differs from the existing legislation in three key respects:

- The offence's territorial scope has been extended to bribery of foreign public officials and officials of public international organizations.
- There is no longer a requirement that the recipient of the bribe be a public official; inducements given to actors in the private sector to perform their official functions improperly are now caught by the offence.
- The nature of the inducements that qualify as bribery also has been widened. Whereas the existing legislation limits the definition of a bribe to "*money, property or other pecuniary interests in any form*", the new legislation also encompasses "*any non-pecuniary interest*".

One respect in which the new legislation does not mirror developments elsewhere is that it does not provide for corporate liability for bribery or other corruption offences. Nonetheless, the Penal Code prescribes stringent penalties for bribery. The maximum sentence for receiving a bribe is death, and as regards the giving of a bribe, the potential penalties include a custodial sentence of between 6 months and 20 years and/or a fine.

Thailand

Bribery - Amendments to the Organic Act on Counter-Corruption

Amendments made to the Organic Act on Counter-Corruption in July 2015 have expanded the scope of Thai anti-corruption laws. In summary:

- The NACC (National Anti-Corruption Commission) now has the power to investigate and recommend the prosecution of private individuals in connection with corruption and bribery involving state, foreign state, and NGO officials. This extends to offenses committed internationally.
- It will be an offence punishable by up to 5 years, a fine of up to THB 100,000, or both, for a person to give or offer a bribe to state, foreign, or NGO officials, or for such an official to demand or accept a bribe.
- Periods spent outside the country by the defendant do not count towards the calculation of time under the Statute of Limitations.

The Act also provides for corporate liability where such offences are committed by a person related to, and for the benefit of, a legal person. The maximum penalty is a fine of up to two times the damages incurred or benefits

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obtained. It will, however, be a defence for the legal person to show that it had in place "*appropriate internal control measures to prevent such offences*".

Notable cases

The proceedings against former Prime Minister Yingluck Shinawatra for dereliction of duty over her government's rice pledging scheme continue. The most notable recent development is the finding of a government investigation committee as to the amount of compensation to be claimed from Ms. Shinawatra (THB 286.64 billion). The defence is due to open its case in July.

In March, the Criminal Court sentenced Supachai Srisupa-aksorn to 16 years in jail for embezzling THB 22.1 million from Klongchai Credit Union, of which he was formerly chairman. This is the culmination of the first of seven high-profile Department of Special Investigation (DSI) investigations into the alleged money laundering of up to THB 11.3 billion, mainly by ordained and lay members of the controversial Wat Dhammakaya temple. The abbot of the temple was due to be questioned by the DSI in April, but this has been postponed. The investigation is ongoing.

Indonesia

Senior Court Officials Arrested

Corruption within the court system has been among the main concerns in Indonesia, and the relevant anti-corruption authorities including the Corruption Eradication Commission ("KPK") have focused their energies on the judicial system, as illustrated by three recent high-profile arrests

On 12 February 2016, the KPK arrested Andri Trisianto Sutrisna, the head of the Civil Appeal and Civil Review Sub-Directorate of the Supreme Court. He is alleged to have received a bribe to delay the execution of a criminal sentence. The fact that Mr. Sutrisna handles civil and not criminal cases has been taken as an indication that other Supreme Court officials may be implicated.

On 20 April 2016, the KPK arrested Edy Nasution, the Chief Registrar of the Central Jakarta District Court, in light of allegations that he received a bribe to delay the transfer of a civil appeal. The case is particularly notable because this court is regarded as Indonesia's flagship institution, with jurisdiction over the principal business areas of Jakarta. The alleged bribe-giver (who is alleged to have bribed Nasution on a previous occasion) also was arrested. In a reportedly linked matter, the KPK recovered cash at the home of the Supreme Court Secretary, Nurhadi, the following day. Nurhadi was immediately made subject to a travel ban.

While Indonesia's court system suffers from corrupt practices from time to time, there is a promising development towards a better and cleaner court system. This can be seen from, among other things, the KPK's actions against corrupt officials in the court system. These show Indonesia's continued commitment to purge the court system of corruption at all levels.

Philippines

Guidelines on the Promotion and Marketing of Prescription Pharmaceutical Products and Medical Devices

The Department of Health ("DOH") issued Implementing Guidelines on the Promotion and Marketing of Prescription Pharmaceutical Products and Medical Devices ("PPPMs"). These Guidelines enshrine the APEC-endorsed Kuala Lumpur and Mexico City Principles, voluntary codes of ethics for the medical device and biopharmaceutical sectors respectively.



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Prior to the Guidelines, interactions between so-called Covered Entities, healthcare professionals and healthcare organizations were self-regulated through voluntary ethical codes. By contrast, the Guidelines impose mandatory standards on all individuals and entities concerned in the promotion and marketing of PPPMDs.

In particular, they require Covered Entities to establish a written compliance program approved by the company head. This must include the development of policies and procedures which promote compliance with the Guidelines in a manner consistent with APEC Principles and related circulars and orders issued by the DOH and the Food and Drug Administration ("FDA"). Both the market authorization holder and the holder of the Certificate of Listing of Identical Drug Product are made responsible for ensuring compliance with the Guidelines through the highest ranking officer of the PPPMD company and its compliance officer.

The FDA is empowered under the Guidelines to recommend the filing of administrative or criminal charges and to impose sanctions pursuant to the general provisions under the FDA Act, the Universally Accessible Cheaper and Quality Medicines Act of 2008, and the Consumer Act. Accordingly, failure to comply may result in:

- Administrative penalties, such as cancellation or suspension of authorizations issued by the FDA or of licenses to operate, fines, destruction of the PPPMDs and/or closure of the Covered Entity.
- Criminal penalties for individuals, such as imprisonment of up to 5 years, a fine of up to PHP100,000, or both, at the court's discretion; and, in the case of foreigners, immediate deportation after serving their sentence.
- Revocation of a foreign entity's license to do business in the Philippines.
- Injunctions or cease-and-desist orders and damages.

However, the Guidelines do not clearly state which penalties under the legislation cited above will apply to each of the specific prohibitions in the Guidelines, and it may be that the DOH will issue supplementary guidelines to provide clarity on this. Moreover, the Guidelines provide that they are to be implemented in full by 10 February 2017. It remains to be seen whether and to what extent the DOH implements individual provisions before then.