

Newsletter

November 2016

Quarterly Compliance Newsletter Vol. 2

Introduction

We are pleased to present the second edition of our Asia-Pacific Compliance Newsletter. In this edition, we focus on: (i) guidance on new anti-corruption legislation in China; (ii) the establishment of a specialized court for criminal corruption and misconduct cases in Thailand; and (iii) new efforts between the US and Indonesia Partnership to fight corruption in Indonesia. We also have updates on legislation in the Philippines and Vietnam.

China

New Judicial Interpretation Clarifies Criteria and Punishment for Bribery Offences

The Supreme People's Court and the Supreme People's Procuratorate's have released the Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery, which includes clarifying sentencing criteria for official (those involving government officials) and commercial bribery offences. The Interpretation, issued on 18 April 2016, supplements the Criminal Law revised in late 2015 ("Ninth Amendment") and strengthens the continuing anti-graft campaign in China .

The Interpretation provides useful practical guidance as to when and how the bribery provisions of the Criminal Law can be triggered and enforced. Multinational companies doing business in China need to continue to be alert to the current enforcement climate and should monitor the developments in the anti-corruption landscape.

The key features of the Interpretation include:

- The extension of the definition of 'bribe' to include intangible benefits such as material benefits of monetary value and benefits for which payable would have to be made in exchange (such as memberships or travel).
- The definition of "*seeking illegal benefits for others*" has been construed to mean: (a) actually seeking or promising to seek benefits for the bribe giver; (b) knowing that the bribe giver has specific business in connection with the bribe recipient's duty or area of function; and (c) receiving money or property after the recipient's performance of his or her duty as a reward for such performance.
- Additionally, if a government official solicits or receives money or property the cumulative value of which exceeds RMB 30,000 from his or her subordinate or a person subject to his or her administration, which may affect his or her performance of duty, this is deemed as promising to seek benefits for others.

- The sentencing brackets (including the standards applicable when determining whether the death penalty should be imposed) have been clarified. Specifically:

Receipt by bribes by public officials

- Where (a) the bribe is between 10,000 and 30,000 RMB and there are 'relatively serious' aggravating circumstances involving the recipient or (b) the bribe is between 30,000 and 200,000 RMB, a custodial sentence of up to 3 years and a fine between 100,000 and 500,000 RMB may be imposed.
- Where (a) the bribe amount is between 100,000 and 200,000 and there are aggravating circumstances or (b) the bribe amount is between 200,000 and 3 million RMB, a sentence of between 3 and 10 years' imprisonment and a fine ranging from RMB 200,000 to 2 times the amount of the benefit received may be imposed.
- Where (a) the bribe amount is between 1.5 million and 3 million RMB and there are aggravating circumstances or (b) the bribe amount is RMB 3 million or greater, a sentence of up to 10 years' imprisonment, life imprisonment or the death penalty and a fine ranging from RMB 500,000 to 2 times the amount of the benefit received may be imposed.

Making of bribes to public officials

- A sentence of up to 3 years imprisonment and a fine may be imposed if a bribe is paid to an official which is 30,000 RMB or more, or the bribe is between 10,000 and 30,000 RMB and there are aggravating circumstances (including, among other things, the fact that the recipient is a judicial officer or an official responsible for medical or food safety)
- A sentence of up to 5 years imprisonment and a fine may be imposed if a bribe is paid to an official and either (1): the bribe is between 500,000 and 1 million RMB and there are aggravating circumstances; (2) the bribe amount is between 1 million and 5 million RMB; or (3) the state suffers losses in an amount between 1 million and 5 million RMB
- A sentence of up to 10 years imprisonment, a fine and confiscation of property may be imposed if a bribe is paid to an official and either (1): the bribe is between 2.5 million and 5 million RMB and there are aggravating circumstances; (2) the bribe amount is in excess of 5 million RMB; or (3) the state suffers losses in excess of 5 million RMB.

Commercial bribery: receiving bribes

- A sentence of up to 5 years may be imposed for bribes in excess of 60,000 RMB. Sentences in excess of 5 years' imprisonment and confiscation of personal property may be imposed if a commercial bribe exceeds 400,000 RMB.

Commercial bribery: giving bribes

- A sentence of up to 3 years may be imposed for giving bribes in excess of 60,000 RMB. Sentences of between 3 and 10 years' imprisonment may be imposed if a commercial bribe exceeds 2 million RMB.

Thailand

Establishment of a specialized court for criminal corruption and misconduct cases

On 1 October 2016, the Central Criminal Court for Corruption and Misconduct Cases was established. This is a specialized court for trying criminal corruption cases under existing legislation (other than cases relating to politicians or political officials, which are heard by the Supreme Court's Criminal Division for Persons Holding Political Positions).

Its jurisdiction includes:

- Wrongful exercise of duties by a government official.
- Money-laundering by government officials, offences related to tendering and joint ventures between private and government sectors, and other anti-corruption and malfeasance laws.
- Individuals charged with demanding, receiving, accepting, or giving bribes and intimidating, coercing, or using influence to force government officials to act or not to act, under the Criminal Code.
- Individuals charged with deliberately refusing to declare assets, falsely declaring assets, or covering up assets that should have been declared.
- Applications to seize assets due to unusual wealth or increase in assets.
- Individual co-offenders, instigators, or accomplices to offences under its jurisdiction.
- Other charges which arise from the same action as a charge under its jurisdiction.
- Judges sitting in the new court must possess at least 10 years experienced in the anti-corruption field.

The court has certain procedural powers additional to those of the ordinary criminal courts, including a discretionary power to summon and examine witnesses who are not stated in the witness list, and a wider power to confiscate assets, including property or other benefits derived from corruption or misconduct, including interest gained from those actions.

Appeals to the appellate courts follow the same procedure and conditions as ordinary criminal cases, with the exception that the defendant must be present when filing any appeal, provided they are not being detained under the jurisdiction of the court.

Appeals to the Supreme Court are subject to leave from the Supreme Court, and the appellant must prove that there are good reasons for the Supreme Court to hear it.

For further information
please contact



Kengo Nishigaki
Partner (Tokyo)
+81 3 6271 9473
kengo.nishigaki@bakermckenzie.com



Ryosuke Tateishi
Associate (Tokyo)
+81 3 6271 9705
ryosuke.tateishi@bakermckenzie.com



Oliver McEntee
Associate (Tokyo)
+81 3 6271 9511
oliver.mcentee@bakermckenzie.com



Simon Hui
Partner (Shanghai)
+86 21 6105 5996
simon.hui@bakermckenzie.com



Timothy P. Breier
Partner (Bangkok)
timothy.breier@bakermckenzie.com



Hendronoto Soesabdo
Partner (Jakarta)
+62 21 2960 8610
hendronoto.soesabdo@bakernet.com

Indonesia

US-Indonesia Partnership on Anti-Corruption Efforts

The Indonesian Ministry of Law and Human Rights has launched a partnership with the US Agency for International Development (USAID) and 15 other government agencies to create CEGAH, a five year program to strengthen the nation's anti-corruption efforts. This program will receive \$20.8 million in funding to provide continuous support to the government of Indonesia and civil society to create systems that will deter corruption. This partnership also involves NGOs such as Indonesia Corruption Watch (ICW). One of the ways that CEGAH aims to eradicate corruption is by strengthening community accountability. Moreover, CEGAH will support the integration of anti-corruption initiatives across government agencies, and develop the capacity of government auditors and investigators to evaluate flagship government programs such as health, education, forestry, fisheries and public works. By involving stakeholders in the process of preventing corruption, it will push the government to become more transparent and accountable.

KPK's Plan to Impose Social Costs on Bribers

The Indonesian Anti-Corruption Agency, KPK has recently proposed the idea of getting bribers to pay compensation to reflect the social costs of their actions. These will encompass both indirect and direct costs. Direct costs include costs arising from investigations, indictments, court hearings, as well as correctional activities. Indirect costs are those associated with the effects of corruption. According to KPK, the introduction of social costs, a briber may be ordered to pay compensation in an amount greater than the loss sustained by the State as a result of the briber's actions. KPK hopes that this will strengthen the deterrents against corruption.

Arrest of Irman Gusman (Speaker of Regional Representative Council)

On 16 September 2016, Irman Gusman, Speaker of the Regional Representative Council was arrested following his suspected involvement in corruption regarding sugar imports. Mr. Gusman was arrested along with two other suspects, Xaveriandy Sutanto and Memi. All three have been named as suspects. During the arrest, KPK seized Rp 100 million (around \$7,600) from Irman, which was an alleged kickback payment for manipulating the sugar import quota for West Sumatra. Irman received this payment from CV Semesta Berjaya director Sutanto, who allegedly asked Irman to recommend his company to the State Logistics Agency for an increased sugar import quota. Simultaneously, KPK has also been questioning Irman as a witness in a corruption case related to biometric identification cards, or "e-KTP", which resulted in state losses totalling Rp 1.12 trillion. This arrest adds one more name to the list of high-ranking officials being targeted by KPK.

Philippines

Extension of sentencing bracket for corruption offences

The upper sentencing limit under the Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, has been increased from fifteen (15) years to twenty (20) years.

Corruption and maladministration hotline established

In line with the new Duterte administration's emphasis on stopping corruption, the government launched "Hotline 8888", a 24-hour hotline available for



Miguel Galvez
Partner (Manila)
+63 2 819 4950
miguel.galvez@quisumbingtorres.com



Camille Bianca Gatmaitan
Associate (Manila)
+63 2 819 4914
camillebianca.gatmaitan@quisumbingtorres.com



Chi Anh Tran
Associate (Ho Chi Minh)
+84 8 3520 2625
chianh.tran@bakermckenzie.com



Thuy Duong Van
Associate (Ho Chi Minh)
thuyduong.van@bakermckenzie.com

Baker & McKenzie
(Gaikokuho Joint Enterprise)

Ark Hills Sengokuyama
Mori Tower 28F
1-9-10, Roppongi, Minato-ku
Tokyo 106-0032, Japan
Tel + 81 3 6271 9900
Fax + 81 3 5549 7720
www.bakermckenzie.co.jp

citizens to report complaints against government agencies and officials, including corruption, underperformance, and unfinished government projects. The Civil Service Commission, who handles the hotline, then refers the complaints to the government agency concerned, for appropriate action.

Vietnam

Introduction of new Penal Code delayed

In our previous update, we indicated that revisions to the Penal Code (including provisions relating to anti-bribery) were due to be introduced on 1 July 2016. However, the implementing legislation has been delayed until next year.