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**Cross-Border Issues – Compliance, Employment,
and What Could Possibly Go Wrong**

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Compliance Investigations in China

Anti-Corruption Investigations – FCPA, UKBA and China anti-corruption campaign

Revenue Recognition investigations

Employment Investigations

- Fraud
- Embezzlement
- Conflict of interests
- IP theft

Antitrust Investigations

Other Regulatory Investigations

- Cybersecurity and Data Protection
- Export Control
- Customs
- Tax
- Product registrations (CFDA)

The China Risk Factors

- High risk country on corruption and continued FCPA enforcement focus
- The “New Normal” under President Xi’s anti-corruption campaign and inconsistent local enforcement practices
- “The Enemy Within” - the devil gets wicked
- 2018 - Three antitrust regulators (MOFCOM, NDRC and SAIC) merged into one

When should you conduct an internal investigation?

The source of compliance red flags:

- Internal or external whistleblower reports
- Employee exit interviews
- Findings in audits and due diligence
- Improper requests from employees or third parties
- Government investigations or inquiries

Whether an internal investigation is needed and the allocation of resources:

- Did you turn a blind eye to a red flag vs. leaving no stone unturned
- The “China risk factor” vs. false alarm with ulterior motives
- Risk-based approach and outside counsel opinion

Are you TRULY ready for an internal investigation?

- We have a global code of conduct in English which applies to all of our subsidiaries, including those in China.
- What do you mean my Employee Handbook in China is not legally binding even if we translated into Chinese, posted on our website and sent it to all employees by e-mail?
- We don't have a privacy policy tailored for China. We never asked our employees to sign a privacy consent form.
- We don't have a specific policy about using WeChat in China. I am told that everyone in China uses WeChat, and a strict "No WeChat policy" is impossible.
- We don't have a conflict of interest policy, and we didn't think one is needed. We do not require our senior management to sign conflict of interest disclosure letter on an annual basis.
- We require all of our employees to conduct online Code of Conduct training, and that's about the breadth of the compliance trainings we do.

Key Issues in Managing Compliance Investigations in China

Attorney-Client Privilege Issues

- Why does it matter?
- Is the concept of “privilege” recognized under PRC law?
- Understood by local employees and local counsels?
- Use of (internal and external) auditors and other vendors in the investigation
- The China Joint Venture dilemma – how much can / should you disclose to your Chinese partner while protecting privilege?
- Disclosure to U.S. and Chinese regulators and waiver of privilege

Key Issues in Managing Compliance Investigations in China

Data Collection, Storage, Transfer and Review

- Should you send a litigation hold memo before collection?
- How far should I go? Server e-mail, laptop hard disk, cell phone short messages, WeChat contacts and messages.
- Notarization of data collection process
- Can the employees refuse to cooperate? What can / should the company do if they do refuse to cooperate?
- Should the data be hosted locally? Can I transfer the data collected in China to the U.S. for further review? What about sending a copy to the U.S. or having someone from the U.S. to remotely access the data stored in China?
- What is state secret review and when is it required / recommended?
- What is cybersecurity assessment and when is it required / recommended?
- Review of documents in Chinese and other languages
- Doing a thorough document review vs. keeping costs under control

Key Issues in Managing Compliance Investigations in China

Interviews

- Timing of the interviews
- Order of the interviews
- Who should conduct the interviews and the language of the interviews?
 - Flying lawyers in from abroad
 - Local Chinese lawyers
 - Dual qualified lawyers
- Who else can / should attend the interview?
 - In-house counsel?
 - Executive from China or APAC?

Key Issues in Managing Compliance Investigations in China

Employment Considerations

- PRC Employment Law 101
- Evidence of wrongdoing vs. evidence to sustain a termination
- Unilateral termination vs mutual termination agreement
 - Can / should the company pay severance to terminated employees to avoid labor arbitration and lawsuits?
 - “Skeletons in the closet”
 - Risks of litigating this issue in public forum
 - Whistleblower concerns
- Can a mutual termination agreement include:
 - Confidentiality and Non-Disparagement Clause?
 - Prohibition against Disclosure to Authorities?

Key Issues in Managing Compliance Investigations in China

Self-reporting and Disclosure Obligations – US vs. China

- Is there an express obligation to self-report under Chinese law?
- Is self-reporting recommended in China?
 - Leniency – legend vs empirical data
 - Predictability on process and outcome
 - Control over process, scope
 - Protection of privilege
- Are there any exceptions to the general rule?

Key Issues in Managing Compliance Investigations in China

Blocking Statute

- The International Criminal Judicial Assistance Law of the People's Republic of China (effective on October 26, 2018);
- It requires approval by PRC governmental authorities before any institution, organization or individual within the territory of the PRC can provide evidence, materials or assistance to any foreign countries' criminal proceedings;
- It covers service of documents, investigations and evidence collection, witness testimony, seizing ,detaining and freezing properties, confiscation and return of illicit gains and transferring sentenced individuals;
- Its actual enforcement and interpretation is yet clear;
- It has significantly impact on MNCs doing business in China when they face potential criminal enforcement, in particular, it could potentially complicate disclosures to criminal enforcement agencies outside China.

What can MNCs do

- Monitor new guidance and implementing rules, and foreign criminal enforcement and settlement cases involving China.
- Consider the blocking statute early when an MNC is facing potential criminal proceedings or considering voluntary disclosure to foreign enforcement agencies.
- Timely and effectively communicate all relevant issues to respective regulators and authorities.
- Consider potential PRC enforcement impact.

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The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel lines in shades of red and orange streak across the frame, creating a sense of rapid movement. These lines transition into a more solid, bright blue area on the right, which also contains some lighter blue streaks. The overall effect is one of high energy and modern technology.

RECENT ANTI-CORRUPTION DEVELOPMENTS IN CHINA

Recent developments in Anti-Corruption legislation in China

The 2018 National People's Congress ("NPC") introduced a series of changes designed to enhance the central government's anti-corruption campaign

- Supervisory agency reform:
 - Creation of National Supervisory Commission ("NSC") – *public servants*
 - Creation of State Market Regulatory Administration – *market players*
- Legislation development:
 - Supervision Law, effective on March 20, 2018
 - New Anti-unfair Competition Law ("AUCL"), effective on January 1, 2018

Creation of the NSC

Jurisdiction of the Supervision Law

- Covers activities and offences committed by public servants in connection with performing their public duties
- The scope of “public servants” is broader than persons subject to the CCP’s previous supervision system
e.g., in January 2018, a contract worker of a local urban management agency in Guangzhou was investigated by the local supervision commission for taking bribes. The individual in this situation was not a formal civil servant or CCP member.
- Excluding non-managerial staff of SOEs and public institutions
e.g., teachers and doctors without managerial positions

• Investigative Powers of the NSC

- Private sector businesses and their employees may be required to provide information or evidence to assist supervision commissions’ investigations
- An individual employee or officer of a company may be detained by supervision commissions if they are suspected of giving bribes to public servants.

E.g., in the second half of 2017, a local supervision commission in Zhejiang province detained a shareholder of a local privately owned company in connection with an investigation of a government official. The shareholder was reported to destroy certain evidence and colluded with other people in responding to inquiries from the local supervision commission.

Amendments to Anti-unfair Competition Law (“AUCL”)

Scope of bribe-takers

- staff members of transaction counterparties;
- entities or individuals entrusted by transaction counterparties to handle relevant matters; and
- entities or individuals who may take advantage of the work position or influential power to exercise influence on transactions.

Vicarious liability of employer

- Employers to be liable for employee bribes insofar as aim of bribes is to “seek transactional opportunities or competitive advantage” for the employer
- Only exception is where employer “has evidence to prove” that conduct was performed in employee’s personal capacity
- The law do not make clear what evidence would be sufficient to show that employee was acting rogue

B2B incentives

- Business operator’s counterparties are now removed from the scope of bribe-takers

China Anti-Corruption Campaign Update and Architecture

- **Xi Jinping's anti-corruption campaign:** Since 2012, campaign led by CCDI has resulted in an estimated 100,000+ convictions for corruption offenses, discipline, or jail time
 - Campaign has focused primarily on public sector, including current and former politicians and military personnel, as well as senior officials at state-owned enterprises
 - Recent uptick in sentencing for such officials ahead of upcoming leadership transition
 - Wu Xiaohui, Chairman of Anbang Insurance Group is recently sentenced for 18-year imprisonment —Anbang had been on foreign investment spree, including significant U.S. acquisitions
- Xi seen as increasingly focused on financial sector—especially regulators in high-risk sectors (e.g., insurance)
- **Medical Probe:** Public Security Bureau has launched major bribery probe in Nanjing
 - Appears to focus on doctors and **pharmaceutical sales representatives**
 - So far, scope is limited—Nanjing only, principally **focused on individuals**, not entities
- **Operations Foxhunt** (repatriation of fugitive officials) and **Skynet** (freezing of assets) continue

Commercial Bribery – Recent Enforcement Cases (from Q3, 2017 through present)

Date	Enforcement Agency	Company	Violation	Penalty
20171107	Yangpu AIC	Squipp	Sponsor doctors to attend meetings in London	Confiscation of illegal gains; CNY880,000 fine
20171122	Shanghai AIC	NT Pharma	Sales representatives bribed responsible doctors for procurement	Confiscation of illegal gains; CNY11.6 million fine
20171206	Pudong AIC	Weiyi Medical Technology Co.,Ltd.	Leased medical equipment to a hospital in Shanghai for free. In return, the hospital bought test papers from a vendor designated by Weiyi	Confiscation of illegal gains; CNYCNY 100,000 fine
20171208	Putuo AIC	Giacomo Chiesi	Invited doctors to travel and sightsee during seminar	Confiscation of illegal gains; CNY150,000 fine

The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel lines in shades of red and orange streak across the frame, creating a sense of rapid movement. These lines transition into a more structured, blue-toned pattern on the right, consisting of multiple parallel lines that resemble a perspective view of a road or a series of tracks receding into the distance. The overall color palette is dominated by deep blues, bright reds, and oranges, set against a dark, almost black background.

RECENT ANTITRUST DEVELOPMENTS IN CHINA

Recent antitrust developments

In 2017 the National Development and Reform Commission (NDRC) undertook a number of legislative and antitrust enforcement activities.

- 80+ investigations launched into enterprises and administrative agencies and CNY500 million+ imposed in fines (versus CNY353.1 million in 2016)
 - Notably, the NDRC has published 18 cases relating to horizontal monopoly agreements, 5 of which were against trade associations.
- In terms of legislation, NDRC published two guidelines concerning pricing activities of market players:
 - Guidelines on Trade Association Pricing Activities
 - Price Conduct Guidelines for Operators of Drugs Prone to Shortages and APIs
- Further, NDRC promoted the implementation and enforcement of the fair competition review system, particularly by publishing:
 - Detailed Rules of Implementation of the Fair Competition Review System (Interim); and
 - Work Plan to Remove the Existing Policies and Measures which Restrict or Exclude Competition 2017-2018.

Recent antitrust developments

PVC Case

- In October 2017 NDRC imposed penalties, including fines of CNY457 million, on the 18 enterprises involved in the polyvinyl chloride resin (PVC) cartel case. This was the largest fine to have been imposed by NDRC in a domestic cartel case.
- In this case, 18 PVC suppliers colluded with regard to price increases multiple times via a WeChat group.
 - This was the first investigation in which messages exchanged via WeChat were used as key evidence.

Recent antitrust developments

Paper Manufacturers Case

- In July 2017, NDRC published its penalties, including decision of deregistration, on the 17 paper manufacturers and 1 trade association involved in this cartel case.
- 17 paper manufacturers reached and implemented a horizontal monopoly agreement under the organization of the Fuyang Paper Manufacturers Association.
 - This was the first instance of a Chinese antitrust authority invoking Article 46(3) of the Antimonopoly Law to deregister a trade association.

QUESTIONS?

A long-exposure photograph of a highway at night, showing vibrant red and blue light trails from traffic. The trails curve from the top left towards the bottom right, creating a sense of motion and speed. The background is a dark, deep blue.

Biography



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Todd Liao works with clients on a wide range of financial transactions and legal issues involving China. He frequently works with multinational corporations on cross-border mergers and acquisitions, foreign direct investment and investment financing, disposal of Sino-foreign joint ventures and assets, and the structuring of complex commercial transactions. Todd also handles intellectual property (IP) work, specifically assisting clients with managing their trademark portfolios. He is admitted in New York only.



Biography



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Daniel Chia is a corporate and commercial litigator who acts for clients in complex, cross-border, and multi-disciplinary high value disputes. He is sought for his experience – both as legal advisor and counsel, in devising and executing litigation strategies for disputes relating to commercial crime, professional indemnity insurance, shareholder litigations, insolvency claims and securities and regulatory enforcement. He also represents clients, either as defendants or plaintiffs, in a wide range of white collar criminal proceedings, involving allegations of money laundering, corruption and tax evasion.



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