CHAIRMAN’S MESSAGE

In AmCham China’s 2016 Business Climate Survey Report, respondents reported an uptick in the perception that foreign business feels unwelcome and unjustly targeted in regulatory investigations. This is unfortunate given that American business in China has made a huge contribution to the Chinese people and represents billions of dollars of investments, employ hundreds of thousands of employees, and bring to the market unique technology and innovative products and services.

Tougher enforcement of China’s recently adopted laws and regulations – ranging from antimonopoly to food safety to data privacy to tax rules to anti-corruption standards – is a step in the right direction, so long as the laws are implemented in a fair, uniform, and transparent manner. Although American business in China has exemplary compliance programs in place, there are increasing concerns about transparency, predictability and fairness of the regulatory environment, and especially in the absence of effective judicial remedies.

Indeed, selective and capricious enforcement practices and the lack of due process are unpalatable for foreign business, and a key trigger for why business oftentimes feels unwelcome. The same goes for situations where local employees remain in detention indefinitely or are forced to sign incriminating statements without the right to counsel present. The recognition of due process, the right to legal counsel, and an opportunity to be heard are fundamental, and these are topics that AmCham China has encouraged progress as foundational necessities to support an effective compliance environment.

In addition, the movement to a true independent judiciary – and without political intermeddling – can help counterbalance the potential for overreaching as government agencies go through the inevitable learning curve inherent in the enforcement of new laws and regulations. While the Chinese leadership has emphasized that the country will follow the rule of law, there is still a perception that the regulatory and judicial processes are less than fair and without adequate oversight.

The 2016 Compliance Spotlight is intended to raise awareness of the significant challenges and complications that AmCham China and U.S. Chamber of Commerce member companies face as they implement practices to ensure full compliance with the law. The Spotlight is also intended to offer general policy suggestions to support the government agencies as they proceed to implement and enforce the myriad of laws and regulations impacting business operations in China. We look forward to continuing to support both the government agencies and our member companies in ensuring full compliance with the law, and in a manner where fairness and transparency are the norm.

James Zimmerman
Chairman, AmCham China
March 2016
主席致辞

在中国美国商会的 2016 年度《商务环境调查报告》中，受访者表示外国企业感到不受欢迎，并且在监管调查中受到针对性、不公正待遇的情况有所增加。这令人非常遗憾，因为美国在华企业对中国人民做出了巨大贡献，代表着数十亿美元的投资，雇佣了成千上万的员工，并为市场带来了独特的技术和创新产品及服务。

中国近期通过了一系列法律法规（涉及反垄断、食品安全、数据隐私、税收规则、反腐标准等），并加强了执法力度，但只要执法遵循公平、统一、透明的原则，就是朝着正确的方向迈进。尽管美国在华企业已经有示范性的合规计划，但对监管环境的透明度、可预见性和公正性，特别是缺乏有效司法救济的担忧正日益增长。

事实上，有选择性的和反复无常的执法行为和缺乏正当程序让外国企业无以适从，也正是让企业感到不受欢迎的关键因素。此外，当地员工会在律师缺席的情况下，因不明原因被拘留或被迫签署认罪陈述书，而重视正当程序、法律咨询权利、有权申诉都是最基本的支持有效合规环境的基本必要条件，因此，中国美国商会促请中国在这些方面取得进展。

此外，真正的司法独立（没有政治介入）可以帮助平衡政府机构在执行新法律法规时可能出现的过度干预。虽然中国领导层强调，中国将遵循法治，但仍有看法认为监管和司法程序不够公平且缺乏充分的监督。

2016 年的合规聚焦报告是为了提高中国美国商会和美国商会的会员企业对践行合规时面临的重大挑战和难题的认识。报告还提供了一些一般的政策建议，以支持政府机关实施和执行影响在华运营活动的各种法律法规。我们期待继续支持政府机构和会员企业为确保合规所做的努力，争取让公平和透明成为常态。

吉莫曼
中国美国商会主席
2016年3月
FOREIGN businesses face important and complex compliance concerns in China. A foreign-invested enterprise (FIE) must not only comply with the wide range of laws and regulations enforced by China’s central and local governments, including laws and regulations relevant to its particular industry, but also with laws and regulations of the legal jurisdiction of its parent company and, in some cases, other legal jurisdictions in which the parent company operates. A key objective of any compliance policy is to effectively guide employees with regard to compliance with applicable laws and regulations. To achieve this objective, companies require a legal environment that supports the rule of law, including reliable and transparent regulatory enforcement. Effective rule of law, therefore, is of central importance to AmCham China’s member companies.

In addition to the traditional anti-corruption focus of their China compliance departments, the operating challenges of many member companies require that they focus on a variety of other compliance areas, including competition law, customs, third-party compliance, data security and sovereignty, privacy, labor laws, national product technical standards, taxes, and free trade/investment regulations. This report consists of a collection of comments from our members regarding the challenges of complying with relevant laws and regulations when operating in China. It is intended to provide input of both a policy and practical nature to the broader community and to identify specific challenges in regard to compliance for both the Chinese and US governments. In this report, we focus on recent developments, challenges and opportunities regarding corruption compliance, data policy compliance, and Anti-Monopoly Law (AML) compliance.

Ongoing Macro-Challenges

AmCham China understands the need for our member companies to abide by the laws of the US, China, and wherever else they operate. Given the importance of compliance for FIEs in China, there is a strong need to train employees to understand the application of local and foreign laws and regulations to a company’s business. Chinese and international anti-corruption laws are an important element of such training. In-house professionals face the difficult task of harmonizing an FIE’s global compliance culture to local legal and regulatory requirements and training employees accordingly.

As part of their compliance programs, companies must also develop appropriate procedures to enable them to respond when management discovers that employees or specific actions of the company are not compliant with applicable regulations. The most successful compliance procedures are developed when there is a strong understanding of the regulatory and enforcement environment. If the legal and regulatory environment is predictable, transparent, stable, and specifies accountability for both business and government, with legal due process provided to those under investigation, compliance is both simpler and more robust.

The regulatory environment in China has matured dramatically over the last two decades, as China has developed its governance framework in tandem with its rapidly evolving economy. However, predictable enforcement is sometimes lacking, and understanding and navigating the legal system continues to be a top concern for AmCham China members. For the first time inconsistent regulatory interpretation and unclear laws was the top business challenge for respondents in our 2016 Business Climate Survey Report. Inevitably, any lack of clarity regarding implementation and interpretation of laws and regulations by administrative authorities increases the regulatory compliance burdens for FIEs. Sometimes these difficulties are exacerbated by uneven and inconsistent implementation of laws and regulations by provincial, municipal, and lower level enforcement agencies.

Below, we focus on three foundational issues necessary to support an effective compliance regime in China: rule of law, transparency, and due process.

Rule of Law

As discussed above, inconsistencies in the application of Chinese laws and regulations create obstacles for companies seeking to comply. The World Justice Project’s annual “Rule of Law Index” assesses and ranks countries around the world according to their constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. The 2015 report ranked countries on their combined average value, with China ranking 71st among the 102 assessed countries, up four spots from its
引言

外商投资企业（FIE）不仅要遵守中国中央和地方政府所实施的各类法律法规，包括与其特定行业相关的法律法规，而且还要遵守其母公司司法管辖区（甚至包括其运营所在地的其他司法管辖区）的法律法规。任何合规政策的主要目的都是为员工提供有效的指导，以便其遵守适用的法律法规。为了实现这一目标，公司需要一个支持法治的法律环境，包括可靠和透明的监管执法。因此，有效的法治对中国美国商会的会员企业至关重要。

除了公司在华合规部门的传统反腐重点，许多会员公司面临的运营挑战要求他们关注其他各种合规领域，包括竞争法、海关、第三方合规、数据安全和主权、隐私、劳动法、国家产品技术标准、税收和自由贸易/投资法规。本报告涵盖了我们的会员针对在华运营时遵守相关法律法规情况的反馈意见。旨在向更广泛的人群提供既具有政策性又具有实践性的意见和建议，并确定中美两国政府在合规方面面临的具体挑战。在本报告中，我们重点关注近期的事态发展、相关的挑战和机遇、腐败合规、数据政策合规和反垄断法（AML）合规。

现存的宏观挑战

中国美国商会理解我们的会员遵守美国、中国和其他运营所在地法律的需要。鉴于合规对于在华外资投资企业的重要性，培训员工理解当地和外国法律法规对公司业务的应用的需求非常强劲。中国和国际防腐败法律是此类培训的一项重要内容。协调外资投资公司的全球合规文化与当地法律法规要求，并向员工提供相应的培训，是内部专业人员面临的难题。

作为合规计划的一部分，公司必须制定适当的程序，以便发现公司员工或公司的具体行为不被准法规时能够及时响应，只有充分理解监管和执法环境，才能制定出最成功的合规程序。如果法律和法规环境是可预见的、透明的、并且具体规定了企业和政府的责任，那么合规就会更加简单稳固。

随着中国制定了与之快速发展的经济相关的治理框架，监管环境在过去二十年来发生了极大的变化。然而有时执法的可预见性仍然缺乏，理解并成功应对这种法律制度仍然是中国美国商会会员企业最为关切的一个问题。在商会的2016年度《商务环境调查报告》中，法律法规解释不一致和模糊不清是受访者的最大商业挑战。行政部门在执行和解释法律法规方面存在专业知识度，有时省级、市级和更低级别的机构的执法不均衡和不一致加剧了这些困难。

接下来，我们重点关注支持在华有效合规制度的三个基本问题：法治、透明度和正当的法律程序。

法治

如上所述，中国法律适用方面的不一致给努力遵守相关法律法规的企业造成了障碍。世界正义工程的年度《法治指数》报告根据政府权力限制、没有腐败、开放的政府、基本权利、秩序与安全、监管执法、民事审判和刑事审判等方面对世界各国进行了评估和排名。2015年的报告按照平均排名对各国进行了排名，其中中国在102个被评估的国家中排名第71位，比2014年的排名第4位。考虑到中国市场的规模以及中国在全球经济中的重要性，我们希望中国政府进一步加强法律法规对商业环境的支持，确保对外商投资企业给予公平对待，提高法治建设。

2012年，美国商会发布的《全球市场法治联盟》报告指出了与法治相关的5个关键因素，这些因素有助于把企业投资和运作吸引到一个国家（见表格），中国美国商会相信，随着中国经济改革的继续推进以及法治在全国的加强，这些因素对于确保对外商开放的环境及其投资得到公平对待将是
In 2012, the U.S. Chamber of Commerce’s “Coalition for the Rule of Law in Global Markets” pointed to five key factors applicable to the rule of law that help to attract business investment and operations to a country (see box). AmCham China believes that as economic reform in China continues, and the rule of law is strengthened throughout the country, these points will be essential in ensuring that the trade and investment environment remains open to foreign business and that foreign investments are treated fairly in accordance with the rule of law. Two key factors in relation to the implementation of the rule of law, transparency, and due process are discussed in more detail below.

Rule of Law:

1. **Transparency:** Laws and regulations applied to business must be readily accessible and easily understood.

2. **Predictability:** Laws and regulations must be applied in a logical and consistent manner regardless of time, place, or parties concerned.

3. **Stability:** The government’s rationale for the regulation of business must be cohesive over time, establishing an institutional consistency across administrations, and free from arbitrary or retroactive amendment.

4. **Accountability:** Investors must be confident that the law will be upheld and applied equally to government as well as private actors.

5. **Due Process:** When disputes arise, they must be resolved in a fair, transparent, and predetermined process.

**Transparency**

Transparency in the development and enforcement of laws strengthens confidence in the predictability and certainty of the regulatory and legal framework. Transparency in the legal and regulatory environment assists investors, companies, and individuals to meet the needs of the marketplace more efficiently. By contrast, uncertainty and opacity in the legal and regulatory environment increase the cost of doing business and sometimes deter companies from pursuing productive, beneficial activities.

Historically, Chinese laws and administrative regulations have been broadly drafted and substantial discretion is available to administrative authorities regarding their implementation. Further, administrative authorities have not been required to provide detailed reasons for their decisions. In some instances, regulations and interpretative guidelines released by different administrative agencies potentially conflict, leading to a lack of clarity regarding which rules apply. Furthermore, administrative rulings and judgments are often not made public and administrative authorities are reluctant to give prospective guidance on the requirements of specific measures, preventing companies from determining the legality of proposed courses of action. Consequently, when government agencies fail to publish their decisions, companies cannot effectively monitor enforcement actions to determine how best to comply with relevant laws and regulations.

Although there has been substantial improvement in this area, some foreign firms still encounter policies disseminated and enforced on the strength of unpublished internal measures. As reported in the 2015 Business Climate Survey Report, 65 percent of our member respondents perceive rule making that is not transparent, unclear, or inconsistent limits their ability and willingness to invest in China. AmCham China recognizes and applauds steps that have been taken to promote disclosure and transparency in recent years, and hopes to see the comprehensive publication of administrative rulings and court judgments in the coming years.

**Legal Due Process**

Legal due process permits a company to understand and evaluate any administrative enforcement actions or criminal charges that have been brought against it, as well as similar actions or charges brought against other companies in prior cases. This is essential if a company is to correct its policies and ensure that it does not unwittingly follow a course of action that will lead to further violations. The right to address and appeal any administrative action or court judgment and receive a fair hearing is vital in order to ensure that companies are not targeted unfairly or without cause.

Currently, AmCham China members increasingly perceive that multinational companies are often under selective and subjective enforcement by Chinese government agencies using a range of administrative, legal, and extra-legal approaches, through regulations that are not clearly applied and in an environment where due process is sometimes weak. Further, many companies cite the complication of carrying the burden of proof when the accusations are unclear, and sometimes being required to make statements to government authorities without having been informed of the grounds for the investigation.
合规

法治:

1. 透明度：适用于企业的法律法规必须易于获得和易于理解。
2. 可预见性：法律法规的适用必须符合逻辑并且保持一致，不论时间、地点或相关各方。
3. 稳定性：政府的企业监管理念必须随着时间而具有衔接性，要在各管理部门间建立一致的制度，不得进行随意的或迟钝的修改。
4. 责任性：投资者必须坚信法律会得到维护并且会平等地适用于政府以及私营参与者。
5. 正当程序：发生争议时，必须通过公平、透明和预定的程序予以解决。

透明度

制定和执行法律的透明度会增强人们对监管和法律框架的可预测性和确定性的信心。法律和法规环境的透明度使投资者、企业和个人能够更有效地满足市场需要。与之相反，法律和法规环境的不确定性和不透明度提高了在华运营的成本，有时候不可避免地阻碍了企业从事生产活动及有益的活动。

从历史上来看，中国法律和行政法规倾向于宽泛地制定，在执行法律时给予行政管理部门大量的自由裁量权。此外，很少要求行政管理部门对它们做出的决定提供详细的理由。有时候，不同的行政管理部门发布的法规和解释性准则存在潜在冲突，导致对适用法律缺乏明确定义。此外，行政裁定和司法意见往往不公诸于众，行政管理部门往往不愿意就具体办法的要求给予清晰性的指导，导致企业无法确定行动的合法性。因此，当各政府部门未能透明地公布其决定时，企业就不能有效地监控其执行行为以确定如何最好地遵守相关法律和法规。

虽然这方面已经有了很大的改善，但是一些外资企业仍然会碰到一些根据未公开发布的内部办法而宣传和执行的政策。根据商会 2015 年年度《商务环境调查报告》，65% 的受访会员认为，法律制定不透明、不清晰或不一致限制了它们在华投资的能力和意愿。中国美国商会承认并且赞赏中国最近几年来促进信息披露和透明度所采取的各种措施，并且希望看到在未来的几年中及时公布所有相关的行政裁定和法院判决。

正当的法律程序

正当的法律程序允许企业理解和评价任何行政执法行为和对其提起的刑事指控，以及在先前的案例中对其它企业所提起的类似行动和指控。如果企业要改正其政策，并且保证他们不会在不知情的情况下遵循会导致他们进一步违法的做法，那么这一点必不可少。解决和申诉任何行政行为或法院为确保企业不会受到不公平或无理的对待，有权对任何行政行为或法院判决提出处理和进行上诉至关重要。

目前，中国美国商会会员越来越感觉到跨国企业正面临中国政府部门有选择的和主观性执法。这些部门利用一系列行政、法律和超越法律的方式，通过适用不明确且缺乏正当程序的法规进行执法。此外，许多企业引用了在指控模糊时举证责任的复杂性，以及有时在未被告知调查理由的情况下被要求向政府部门进行陈述。

许多会员企业担心，外商投资企业比内资企业受到政府部门更严格的执法，导致外商企业必须遵守那些不会对内资竞争对手严格执法的法律法规。在某些情况下，中国地方政府针对被指称可疑的运营的报道导致了政府部门针对外国企业的不一致调查和执法，支持这种调查的法律证据几乎没有。这种公开且不公平的执法会造成灾难性的声誉损害。事实上，会员企业担忧政府机构可能具体授权而针对特定行业内的特定外商投资企业进行执法。

这些有针对性的且不一致的执法案例以及模糊不清的法规，使得外商投资企业的管理层很难预料潜在的问题，从而加大了合规难度。我们支持政府政策继续加强其监管和法律制度的透明度以及正当法律程序，并且对行政裁决和法院判决，包括关于处罚的信息进行披露。
Many member companies are concerned that FIEs are subject to more stringent enforcement than domestically invested companies by government authorities, with the consequence that foreign companies must comply with laws and regulations that are not as rigorously enforced against their domestic competitors. In some cases, local media coverage targeting alleged questionable operations by companies appears to have resulted in inconsistent investigations and enforcement against FIEs by government authorities, even with little legal evidence to back up the investigation. Such public and disproportionate enforcement can result in serious reputational harm. Indeed, there is ongoing concern among member companies that specific mandates for government agencies may target enforcement against FIEs in designated sectors.

Cases of targeted and inconsistent enforcement and unclear regulations make it difficult for FIE management to anticipate potential problems, thereby increasing compliance risks. We support the government’s policies to increase both transparency and legal due process in its administrative and judicial systems, and to provide disclosure regarding the enforcement of administrative rulings and court judgments, including information regarding penalties and punishments.

Recent Developments in PRC Criminal Law

The “Criminal Law of the People’s Republic of China” (Criminal Law) applies to both state and private officials and defines bribery as giving money or property to an official or non-official for the purpose of seeking to secure “improper benefits” that are directly in violation of government policy. This also includes any improper request of a state official to violate a government policy in order to realize unfair commercial advantage. Any individual, business unit, or firm found to have contravened the Criminal Law faces a minimum punishment of three years’ imprisonment.

Anti-Unfair Competition Law

The Anti-Unfair Competition Law (AUCL) states very generally that the government at all levels will prohibit unfair competition and create conditions for fair competition. Unfair competition is defined, again quite generally, as activities made by managers that damage another’s legal rights and interests. The “Interim Rules on the Prohibition of Commercial Bribery” interpret the AUCL in commercial
近年来，中国已经加大力度调查国有和私营领域的腐败行为指控。特别值得注意的是重申对贪污腐败的零容忍，不仅涉及中国共产党内部，同时也对涉及国内和跨国公司的贪污进行严厉惩罚。许多反腐败案例已经得到国内外媒体的关注，这往往会损害一个公司的声誉。在华运营的外商投资企业有必要了解相关的中国法律和法规，以便符合法律法规，从而避免负面新闻或巨额罚款等处罚。

2014 年，政府因商业贿赂对 4056 名公务员进行起诉，有迹象表明，相应的起诉数量也与之相当。本节将介绍中国对外国个人、商业部门和企业提起诉讼的法律依据，希望我们的会员对政府政策如何直接影响在华运营的外商实体有更加清晰的认识。鉴于中国复杂的监管环境，为了探索减轻其带来的风险的建议前，近期中国刑法和对受严格审查影响的公司的案例研究将会继续发展。

近期中华人民共和国刑法的发展

《中华人民共和国刑法》(刑法)适用于国家官员和个人，并将行贿定义为为谋取不正当利益，向公务人员或非公务人员给予财物，直接违反了政府政策。这也包括国家官员的任何违反政府政策的不正当要求，以实现不正当的商业优势。任何个人、商业单位或公司发现有违反刑法的，将面临最低三年监禁的处罚。

反不正当竞争法

《反不正当竞争法》(AUCL)普遍规定，各级政府都要禁止不正当竞争行为，并为公平竞争创造条件。不正当竞争被普遍定义为经营者损害其他经营者合法权益的行为。《关于禁止商业贿赂行为的暂行规定》将商业贿赂案卷解释为以排除竞争的行为购买或销售产品。贿赂是换取不正当利益所提供的任何金钱或财产。

2016 年 2 月 25 日，国务院法制办公室 (SCLAO) 公布了《反不正当竞争法（修订草案送审稿）》以征求公众意见。送审稿涉及多个法律学科，包括竞争政策、商标、商业秘密和反贿赂。特别值得注意的是，建议将原有的第 8 条替换为新的第 7 条，为商业贿赂提供一个更加明确的定义，需要付款背后的腐败意图作为商业贿赂的先决条件。此外，修订后的第 7 条引入了企业为员工作为行为员替代责任的概念，员工的商业贿赂“应被视为企业经营者的活动”。截至目前，该法的最终版本尚未发布。

中华人民共和国刑法修正案（九）

《中华人民共和国刑法修正案（九）》于 2015 年 8 月通过并自同年 11 月 1 日生效。对腐败制定了更严格的法律，包括以下条款：

- 禁止向现任或离任国家工作人员的近亲属行贿；
- 减少可能使用免罪情形的减罪因素；
- 删去刑事责任定罪的固定金额标准；
- 个人禁止从事犯罪领域的工作；
- 修改数据隐私侵犯，扩大适用行业范围。

行贿犯罪档案查询系统

行贿犯罪档案查询系统于 2012 年推出，面向公众开放，记录并维护着 1997 年起在中国发生的贿赂相关的起诉案件。
bribery cases as the purchase or sale of products conducted in a manner which excludes competition. A bribe is any money or property provided in return for inappropriate interests and illegitimate benefits.

On February 25, 2016, the State Council Legislative Affairs Office (SCLAO) published a revised draft of the AUCL for public comment. The proposed revisions involve multiple legal disciplines including competition policy, trademark, trade secrets, and anti-bribery. Of particular note is the proposed replacement of the original Article 8 by a new Article 7 which provides a clearer definition of commercial bribery requiring that corrupt intent be behind payment as a prerequisite for commercial bribery. In addition, the revised Article 7 introduces the notion of vicarious liability of a corporate for the wrongdoing of its employees, providing that commercial bribery on the behalf of employees “shall be viewed as the activities by the business operators.” To date, the final version of the law has not been released.

**Ninth Amendment to the Criminal Law**

The Ninth Amendment to the Criminal Law was adopted in August 2015 and went into effect on November 1, 2015. It imposes tougher laws on corruption and includes the following provisions:

- The offering of bribes to close relatives of current or former state personnel is prohibited,
- A reduction in the number of mitigating factors which reduces circumstances in which exemption from punishment may be applied,
- The removal of a fixed monetary number for an action to fall under the category of criminally liable,
- An individual may be prohibited from their career field in which the crime was committed, and
- Amendments to violations of data piracy will be expanded in scope to include applicable industries.

**Bribe-Giving Crime Record System**

A publically accessible website launched in 2012 maintains a database of bribe-related cases prosecuted in the PRC since 1997. Listed information includes the company name, nature of the charge, and degree of punishment. If listed, a firm’s qualifications for procurement are likely to suffer as a result of damage to public reputation. There is no English language version available.

**Case Study: Inspections in Work Safety**

In August 2015, there was a disastrous fire and subsequent explosion at a hazardous goods warehouse 40 miles east of central Tianjin. As reported by various media outlets, at least 165 people died, with eight remaining missing, and nearly 17,000 apartments were damaged as were factories, other commercial property, and a light rail station. In the aftermath of the Tianjin incident, substantial inspections were conducted across the country. Over 2,500 individual cases were referred to prosecutors for possible criminal charges. Currently, many provincial and local authorities are mandating minimum resource levels for industries that present a risk of industrial accident. Resourcing those needs, and mitigating operating risks effectively, will likely require a fresh look at current practices.

**Case Study: Investigations within the Healthcare Industry**

Healthcare companies in particular have faced increased scrutiny by Chinese regulatory enforcement authorities in recent years. According to the “Provisions on the Establishment of the Adverse Records of Commercial Briberies in Pharmaceutical Products and Sales,” a firm’s purchase and sales contracts for drugs and medicinal products must be non-corrupt in nature and include the names of the relevant firm’s sales representatives, commitments to not engage in bribery, and consequences for contravening such commitments.

Foreign firms are not immune from scrutiny and should maintain compliance with all relevant laws and regulations. In May 2015, a European firm faced investigations by Chinese authorities on suspicion of having committed commercial bribery actions which contravened the AUCL’s prohibition of donations that impede fair competition. The Bribe-Giving Crime Record System mentioned above contains a list of those firms found to have breached such non-corrupt sales and purchase contracts.

**2015 Donation Regulations**

The National Health and Family Planning Commission issued the “Administrative Regulations on Acceptance of Public Welfare Donations by Healthcare and Family Planning Organizations (Trial Implementation)” (Donation Regulations) on October 20, 2015. The Donation Regulations state that a healthcare firm must handle the donation process through the creation of a “Donation Management Department” as opposed to putting the task in the hands of an individual or pre-existing division. Furthermore, the Donation Regulations distinguish non-permissible donations and outline the donation process to include pre-evaluation procedures, measures to increase the disclosure of regulations, and audits.

In September 2014, another European company was fined billions of RMB and a number of senior executives faced prison sentences for offering bribes to doctors and government officials with the intent of boosting sales. After a one-year investigation by the Public Security Bureau, the firm was found to be in violation of the Criminal Law and
案例研究：工作安全检查

2015年8月，距离天津市中心以东40英里处的一处危险品仓库发生了严重火灾和爆炸。根据各媒体报道，至少有166人丧生，8人失踪，近17000间房屋及工厂、其他商业地产及一个轻轨车站被损坏。天津事故发生后，大量检查工作在全国范围内展开。超过2500件可能面临刑事指控的案件被提交至检察机关。目前，许多省级和地方部门对存在行业事故风险的行业规定了最低资源水平。鉴于对这些需求进行资源配置并有效降低运营风险，这就可能需要重新审视当前的做法。

案例研究：医保行业调查

近年来，医疗保健行业尤其面临着中国监管执法部门更加严格的审查。根据《关于建立医药购销领域商业贿赂不良记录的规定》，一家企业的药品和医疗器械购销合同必须属于非腐败性质，并包含相关企业销售代表姓名，不参与贿赂的承诺，以及违反该承诺的后果等。

2015年受赠管理办法

2015年10月20日，国家卫生和计划生育委员会发布了《卫生计生单位接受公益事业捐赠管理办法（施行）》（《受赠管理办法》）。《受赠管理办法》规定医疗保健企业必须通过建立一个捐赠管理部门来受理捐赠，不得由个人或已有部门接受。此外，《受赠管理办法》区分了不允许的捐赠，并列明了捐赠程序包括预评估程序，增加了法规披露的措施和审计。

2014年9月，另一家欧洲公司被查以数十亿元人民币的罚款，一批高级管理人员因向医生和政府官员行贿而面临有期徒刑。经过公安局为期一年的调查，该公司被认定违法，刑法并受以下指控：

1. 对公司、企业人员行贿罪（第164条）
2. 单位行贿罪（第393条）
3. 对单位行贿罪（第391条）

还发现该公司使用假发票通过旅行社行贿，违反了中国税法。中国政府预计将继续打击跨国医疗保健、药品和医疗器械公司腐败行为的行动。

对在华外国企业的启示：下一步

近期的发展包括反不正当竞争法拟议版和《中华人民共和国刑法修正案（九）》的实施，以及有传闻表明，中国政府正在加强商业行为审查。为了降低风险，外商投资企业应该遵守相关影响和规定，以减轻复杂的监管制度造成的风险。公司在采取新做法前必须审查和分析新法律，并且仔细审查和分析当前做法，以确保它们符合刑法、反不正当竞争法和其他规定贿赂定义和处罚外商企业工作法案。建立坚实的合规计划，以分配优先原则建立内部控制和调查监督专业人员是理想的风险控制机制，必须成为公司在华运营战略的重要组成部分。

《反海外腐败法》

《反海外腐败法》颁布于1977年并修改于1988年和1998年，是全球反腐败的一项重要法律。该法律是由美国司法部(DOJ)和证券交易委员会(SEC)共享执法权。《反海外腐败法》包括了两套实质性的规定：反贿赂和内部控制。前者禁止一切FCPA法律对象为了获得或保留业务或取得任何不正当的利益而向外国（即非美国）政府官员提供或承诺提供任何有价值的物。而内部控制规定则要求“发行人”（一般是在一家美国交易所拥有一类交易证券的公司或被美国证券交易委员会提交某些报告的公司）制作并保持正确的账簿和记录并且设计和维持一种适当内部控制系统。从严格意义上的来说，任何未能保持正确的文件或任何试图伪造此等账簿和记录的情况都可能构成违反《反海外腐败法》，故而引起民事罚款或者受罚刑，制裁，赔偿金等，包括被罚款和监禁。

《反海外腐败法》的范围具有较强的广泛性。它不仅仅涵盖腐败性金钱支付，而且也涵盖向外国官员提供或承诺任何有价值之物，包括服务或其它货币利益。要注意的是，该
charged on the following counts:

1. Bribery to non-state officials (Article 164)
2. Bribery by a unit (Article 393)
3. Bribery to a unit (Article 391)

The company was also found to have violated PRC tax laws by offering bribes through travel agencies using false and fraudulent invoices. The Chinese government is expected to continue its crackdown on investigating corrupt practices in multinational healthcare, pharmaceutical, and medical device firms.

Implications for Foreign Firms in China: Next Steps

Recent developments including proposed revisions to the AUCL and implementation of the Ninth Amendment to the Criminal Law, as well as anecdotal evidence, reveal that the Chinese government is intensifying scrutiny of commercial actions. To mitigate risks, FIEs should review relevant implications and strategies to mitigate risks stemming from a complex regulatory regime. Companies must review and analyze laws before the adoption of new practices, and carefully review and analyze current practices to ensure they are in line with the Criminal Law, AUCL, and other foreign working acts governing the definition and punishment of bribes. The building of a solid compliance program with allocated priority establishing internal controls and investigative regulatory specialists is a recommended risk control mechanism, and must be a key component of a firm’s strategy when operating in China.

Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA), enacted in 1977 and revised in 1988 and 1998, is a critically important statute for combating corruption around the globe. The FCPA contains both anti-bribery and accounting provisions with enforcement authority shared by the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Anti-bribery provisions prohibit FCPA subjects from providing, authorizing, or promising to provide/authorize anything of value, directly or indirectly, to foreign (i.e., non-US) government officials in order to obtain or retain business or secure any improper advantage. Accounting provisions require registered “issuers” (generally, companies that have a class of securities traded on a US exchange or that are required to file certain reports with the US SEC) to make and keep accurate books and records and to devise and maintain an adequate system of internal controls. Any perceived failure to keep accurate books and records or any attempt to falsify such documents may constitute an FCPA violation which can lead to civil and criminal penalties, sanctions, and remedies, which can include fines, disgorgement, and/or imprisonment.

The scope of the FCPA is broad and covers not just monetary payments but the offer or promise of anything of value to a foreign official, including services or other non-monetary benefits. In relation to corruption, the FCPA defines the intent or desire to wrongfully influence the recipient as a violation, regardless of whether a corrupt act succeeds in its purpose. Under the FCPA, the definition of “foreign officials” includes not just those holding official positions in foreign government agencies but any officer, employee, or person acting in an official capacity or on behalf of a public international organization, a foreign government or its department, agency or instrumentality. This can include low-level employees of government departments, employees of state-owned enterprises (SOEs) and even members of the CCP, depending on the organization’s or individual’s ownership, control, status, and function.

Challenges

Local Culture

Chinese culture has traditionally embraced personal connections in business transactions and dealings with government officials, where generous offers of hospitality and exchanges of gifts are often welcome and sometimes even expected as social courtesies. Without clear corporate policies or close monitoring and controls, entertainment and gift-giving practices can easily become potential sources of FCPA liabilities for companies in China.

The central government continues an anti-corruption campaign and has widened its scope beyond SOEs. However, the country remains a high corruption risk area for many MNCs. China scored 37 on a scale of zero to 100 on Transparency International’s 2015 Corruption Perceptions Index, ranking 83rd out of 168 countries globally. The National People’s Congress (NPC) Standing Committee, China’s top legislative body, has vowed to strengthen anti-corruption efforts in the coming years. AmCham China supports enforcement of the rule of law and we encourage the Chinese government to adopt a more transparent policy regarding entertainment and travel allowances for government officials and SOE employees, to allow companies to implement more effective compliance programs in accordance with relevant regulations.

Use of Third-Party Agencies

It is not uncommon for businesses to engage third-party agents or consultants in navigating the often complex administrative and regulatory environment in China. However, a third party’s conduct on behalf of a company can be attributed to the company and expose the company to FCPA liability. It is thus important for companies to conduct comprehensive due diligence on potential agents or
合 规

项法律极度重视可能影响受贿者的“意图”或“目的”。这表明了这项法律的制裁不仅限于已发生的腐败事件，腐败的意图和目的都可被认定为犯罪。《反海外腐败法》对外国官员的定义也非常广泛，不仅包括在外国政府机构担任公职的人员，而且包括以官员身份代表外国政府或其部门或机构或国际公共组织而行动的任何官员、员工或个人。这些人员包括政府官员的较低级雇员以及国有企业或国家控制企业的员工，甚至视情况可包括党员，这取决于企业的所有权、控制权、以及个人的地位和作用等。

挑 战

本地文化

中国文化传统上把人际关系包含于与政府官员进行的业务交易之中，在交易中热情款待和互送礼物经常是受欢迎的，有时甚至被认为是社交礼仪。如果没有明确的公司政策或密切的监督和控制，娱乐和赠送礼物的行为可能很容易在华运营企业承担反腐败法责任的潜在源头。

中央政府将继续反腐政策，并且把原有的反腐目标拓宽到国企之外。但是，目前反腐是本地比较严重的风险之一，例如，根据国际透明组织，中国在2015年全球清廉指数表上得分37，全球168个国家中排名第83位。全国人大常委会、中国最高立法机构立誓要在未来几年加大反腐力度。比如，根据国际透明组织，中国在2015年全球清廉指数表上得分37，全球168个国家中排名第83位。全国人大常委会、中国最高立法机构立誓要在未来几年加大反腐力度。

第三方代理机构的使用

企业通常会聘用第三方代理或顾问来处理中国复杂的行政和监管环境。然而，第三方代表公司行为可能会归属于该公司，使公司面临承担反腐败法律责任的风险。因此，重要的是要对潜在的代理人或其第三方中介进行尽职调查。建议程序包括以包含有明确约定的支付条款，反腐败规定以及审查与终止权力的书面合同形式记录他们将会提供（和不会提供）的服务，并且监控该第三方的行为以确保《反海外腐败法》合规。评估第三方时，公司也应特别关注第三方的业务，以防止可能存在的不道德行为。

我们的会员建议公司将监控和管理第三方的商业行为纳入公司的日常销售经营中，例如获得充足证据或文件，提供第三方服务以及获取回报的付款的证据。公司应特别注意地会计工作可能不足以满足《反海外腐败法》要求。

政府官员的广泛定义

除了在大多数业务领域中的大量国有企业外，在中国提供基本服务的许多机构和企业，包括银行、医院、学校和大学等，至少部分为政府所有或控制，因此有可能使它们成为政府的机构。因此，反腐败政策的定义越广泛，在实际中会有更多可能受到法律影响的人员。《反海外腐败法》的反贿赂条款适用于在任何地方意识到应支付或承诺支付的任何官员、员工或个人，这包括政府官员的较低级雇员以及国有企业或国家控制企业的员工，甚至视情况可包括党员，这取决于企业的所有权、控制权、以及个人的地位和作用等。

2015年8月24日，中共中央、国务院印发了《深化国有企业改革的指导意见》，详细介绍了重组和巩固国有企业的计划。正在推行的国有企业改革将使《反海外腐败法》对“政府官员”的定义更加广泛，因为国有部门的人员变更职位，承担新角色，有可能成为《反海外腐败法》合规的潜在风险。

母公司—子公司责任

美国的母公司可能要对其海外子公司的支付行为负责。美国多个公司因其在华子公司的不当行为已经受到了美国当局的调查。因此，确保子公司遵守《反海外腐败法》不仅要求有书面政策，还要有针对每个机构所有权、管理结构、文化以及业务模式而制定的有效的内部控制措施。

承继人责任和收购后合规

一个企业在合并或收购另一个过去存在《反海外腐败法》问题的企业时可能要承担《反海外腐败法》责任。因此，重要的是要进行尽职调查，确认过去潜在的《反海外腐败法》风险，并在收购后要改进合规计划和内部控制措施。

美国和中国监管机构的重叠管辖

对于发生在中国的某种不当行为，企业可能会受到中美两国政府的执法行动。各国政府的监管机构可能需要加强合作，包括在反腐和执法领域。因此，企业不仅应该注意其在《反海外腐败法》项下的义务，而且还应该注意在其本地适用法律和法规项下的义务。
other third-party intermediaries. Recommended procedures include documenting the services they are to provide (and are not to provide) in written contracts with clearly stipulated payment terms, anti-corruption provisions, audit and termination rights, and to monitor the third party’s conduct to ensure FCPA compliance. When evaluating third parties, companies should also focus on the way third parties conduct their business, in order to identify possible unethical behaviors.

Our members recommend companies to consider monitoring and managing their third party’s business behaviors into the company’s normal sales operation, such as obtaining sufficient evidence or documentation to provide proof of the services performed by the third party as well as payments rendered in return. Companies should pay particular attention to local accounting practices that may not be sufficient to satisfy FCPA requirements.

**Broad Definition of Government Officials**

In addition to the large number of SOEs in most business sectors, many organizations and businesses that provide essential services in China, including banks, hospitals, schools, and universities, can be partly owned or controlled by the government. As such, they may be considered instrumentalities of the government and their employees “government officials” as defined by the FCPA. Companies’ interactions with these employees may be governed by the FCPA and should be treated accordingly. The FCPA’s anti-bribery provisions apply to any person aware that all or a portion of the payment would be offered, given, or promised to an individual falling within the definition of “foreign officials.” In this sense, an individual in “conscious disregard” of business misconduct could also be held liable and face prosecution.

The CCP Central Committee and the State Council released the “Guiding Opinions on Deepening the Reform of State-owned Enterprises” on August 24, 2015 which detail plans to restructure and consolidate the state-owned sector. Ongoing SOE reforms can further complicate the FCPA’s categorization of “government officials” as individuals in the state-owned sector change positions and take on new roles, and may become potential risks for FCPA compliance.

**Parent-Subsidiary Liability**

A US parent company may be liable for payments made by its foreign subsidiaries. US authorities have pursued multiple US companies for misconduct committed by their subsidiaries in China. Ensuring subsidiaries’ compliance with the FCPA requires not only written policies, but also effective internal controls tailored for each organization’s ownership and management structure, culture, and business model.

**Successor Liability and Post-Acquisition Compliance**

The FCPA recognizes successor liability and provides that buyers can be held liable for violations committed by the target company before acquisition. It is thus important to conduct risk-based due diligence to identify potential historical FCPA violations and to continuously improve compliance programs and internal controls after acquisition.

**Overlapping Jurisdiction of US and Chinese Regulatory Authorities**

For certain misconduct taking place in China, a company may be subject to enforcement actions by both Chinese and US authorities. Cooperation by regulators in different jurisdictions around the world continues to increase, including in anti-corruption enforcement. Accordingly, companies should be mindful of their obligations not only under the FCPA but also under applicable local laws and regulations in China.
中国没有规范数据的单一、统一的法律制度。相反，中国的数据制度是涵盖数据隐私、数据本地化、跨境数据流、数据安全和其他数据相关事项的法律、法规、规章和自愿准则的集合。这个制度大体管辖数据的获得、储存和使用。除了一般的法律制度，行业监管机构还发布了具体行业的法规和法律，产生了更多的数据合规要求。

最近，中国当局重点关注于数据安全，以确保国家安全利益。2015年，中国出台了《网络安全法（草案）》，其中包含了名为“网络信息安全”的数据隐私章节。《网络安全法（草案）》指出，这一章将包含个人数据保护制度，统一其他国内法律法规已经包含的各种数据保护概念。《网络安全法》是包含数据安全法规的数个新法律法规之一。2015年7月颁布了《国家安全法》，强制要求对核心领域信息和数据系统的国家控制，为数据安全合规设定了新的保护主义基调。近年来中国的数据安全制度已经变得越来越复杂，为在华运营外国公司带来了重大的合规挑战。本节将包含国家和行业特定立法的近期发展，并重点关注三个主要领域：数据隐私、数据本地化和大数据。

数据隐私

由于中国监管环境要适应新兴技术，隐私政策和法律正在不断发展。从历史上看，中国的数据制度非常零碎，难以定位。与数据隐私保护相关的法定要求存在于国家和省/市级法律法规中，同样也让隐私权法规更加复杂。

2012年12月，全国人民代表大会发布了《关于加强网络信息安全的决定》，其目的在于提高网络信息安全和个人隐私。2015年9月，中国发布了《网络安全法（草案）》，其中包含了名为“网络信息安全”的数据隐私章节。2015年7月颁布了《国家安全法》，强制要求对国家控制的信息和数据系统的国家控制，为数据安全合规设定了新的保护主义基调。近年来中国的数据安全制度已经变得越来越复杂，为在华运营外国公司带来了重大的合规挑战。2016年1月颁布的《网络安全法》是包含数据安全法规的数个新法律法规之一。2015年7月颁布了《国家安全法》，强制要求对核心领域信息和数据系统的国家控制，为数据安全合规设定了新的保护主义基调。2015年7月颁布了《国家安全法》。

数据政策合规

全国人大代表大会决定为收集和使用电子个人数据确立了基本规则，为中国提供了一般性合规标准。我们赞赏中国政府采取了国际化数据隐私最佳实践，与其他司法管辖区的实践相协调。电子个人信息包括“可被用于识别个人的电子信息”和“关于公民隐私的电子信息”。

全国人民代表大会决定要求收集或使用电子个人信息的实体要说明目的、方法和收集或使用的范围，并得到被收集或使用个人信息的个人同意。2013年的《个人信息保护法》是第一个自愿性的国家标准，为收集和使用个人信息提供了指导，为数据安全合规设定了新的保护主义基调。近年来中国的数据安全制度已经变得越来越复杂，为在华运营外国公司带来了重大的合规挑战。2015年7月颁布了《国家安全法》。

除了国家标准和指南，中国还有与个人信息保护有关的多种行业特定法规。例如，2014年10月颁布《关于加强网络信息安全的决定》，强制要求对网络信息安全和保护个人信息。2014年3月国家邮政局发布了《寄递服务用户个人信息安全管理规定》，禁止寄递服务国内公司和个人未经用户的书面同意，泄露用户的个人信息。2014年4月颁布的《旅游法》要求旅游企业保护在商业过程中获得个人信息。2013年4月颁布的《消费者权益保护法》包含类似的规定。以往的行业或具体领域数据隐私法规案例包括：

• 对于在雇用或招聘过程中获得的个人数据，《就业服务与就业管理规定》（2007年）要求雇主对员工和求职者的个人信息予以保密，并且禁止雇主在未经事先书面同意的情况下公开员工的个人信息或利用其技术或
DATA POLICY COMPLIANCE

There is no single, uniform legal regime in China regulating data. Instead, China’s data regime is a matrix of laws, regulations, rules, and voluntary guidelines that cover data privacy, data localization, cross border data flows, data security, and other data-related matters. This regime broadly governs access to, storage, and use of data. In addition to the general legal regime, industry regulators have issued sector-specific regulations and rules which create additional data compliance requirements.

More recently, Chinese authorities have focused on data security to pursue perceived national security interests. China released a draft Cybersecurity Law in 2015 which contains a chapter on data privacy entitled “Network Information Security.” This chapter describes the creation of a personal data protection regime that harmonizes various data protection concepts already found in other domestic laws and regulations. The Cybersecurity Law is one of several new laws and regulations containing provisions on data security. The National Security Law, promulgated in July 2015, mandates state control over information and data systems in core areas and sets a new protectionist tone for data security compliance. China’s data security regime has become increasingly complex in recent years and poses significant compliance challenges for foreign companies operating in China. This section will include recent developments in national and industry-specific legislation and focus on three major areas of concern: data privacy, data localization, and big data.

Data Privacy

Privacy policies and laws are evolving as the Chinese regulatory environment adapts to address emerging technologies. Historically, China’s data privacy regime has been fragmented and difficult to navigate. Regulation of privacy rights is also complicated by the fact that statutory requirements relating to data privacy protection exists in laws and regulations at both national and provincial/municipal levels.

In December 2012, the NPC issued the “Decision on Strengthening Network Information Protection” (NPC Decision), which aims to improve network security and protect personal information. Although some provisions apply only to network service providers, the NPC Decision sets out basic rules for the collection and use of electronic personal information that provides a general compliance standard for China. We commend the Chinese government for adopting international data privacy best practices that harmonize with those of other legal jurisdictions. Electronic personal information includes “electronic information that can be used to identify the identity of individual citizens” and “electronic information concerning the privacy of citizens.”

The NPC Decision requires entities that collect or use electronic personal information to specify the purpose, method, and scope of the collection or use, and to obtain consent from the person(s) whose electronic personal information is collected or used. The 2013 “Guidelines on Information Security Technology and Personal Information Protection in Information Systems for Public and Commercial Services” (Guidelines), a voluntary national standard, provides guidance on personal information protection. The Guidelines demarcate general and sensitive personal data and provide guidance regarding the collection, handling, cross-border transfer, and deletion of personal data. The standard has been widely adopted by MNCs operating in China and could form the basis for future data protection legislation.

In addition to national standards and guidelines, there exist various industry-specific rules related to personal information protection in China. For example, “Certain Opinions on Accelerating the Development of Commercial Health Insurance,” issued in October 2014, requires government authorities and commercial insurance institutions to strengthen the protection of personal information of insurance participants and prevent disclosure or misuse of such information. The “Regulations on the Security and Management of Personal Information of Postal and Delivery Service Users,” issued by the State Post Bureau in March 2014, prohibit postal and delivery service companies and their personnel from disclosing users’ personal information.
互联网协议（IP）。

- 《中华人民共和国刑法修正案（七）》（2009年）对出售或非法提供在金融、电信、交通、教育或医疗活动中所获得个人数据的国家机关和/或国有企业员工的严重不当行为规定为犯罪行为。
- 《电子病历基本规范》（试行）（2010年）禁止在未经授权的情况下披露患者的医疗记录。在销售商品和提供服务时获得的消费者的个人信息受“消费者权益保护法”（2013年）的保护。
- 《电信和互联网用户个人信息保护规定》（2013年）要求互联网服务提供商保护用户的隐私，各电信用户真实身份信息登记规定》（2013年）要求电信服务提供商对用户的任何个人信息予以保密。
- 《征信业管理条例》（2013年）规定了信用调查机构收集、披露和保护个人数据的规则。“商业银行法”（2003年）要求商业银行对存款人的个人数据保密。

公司应密切关注数据隐私监控的不断发展，同时确保自己符合所在行业的相关规定。

数据本地化

从历史上看，中国还没有出台关于数据本地化的综合性政策，虽然上述《信息安全技术公共及商用服务信息系统个人信息保护指南》禁止未经使用者同意或政府许可向海外转移个人数据。《关于加强在境外发行证券与上市相关保密和档案管理工作的规定》要求在境外发行证券与上市过程中的审计工作文件存储在中国。

其他司法管辖区在一定程度上规定了数据本地化要求，然而，在中国的数据本地化要求与国家安全趋势相结合，表明政策确实可能妨碍中国成为现代全球生态系统创新领导者的努力。例如，如果外国企业无法使用它们现有的信息技术供应商和基础设施，或无法进行跨境贸易，过于繁琐的数据本地化政策可能会抑制外资，从而阻碍中国经济增长。与此同时，国内企业可能会无法参与跨境数据流，发现自己与全球市场分隔。在国内储存数据的要求可能需要外国公司建立昂贵的独立数据结构，尤其寻求在华经商的小公司无法承受本地化成本。

其他行业也有类似的要求，例如2013年1月1日，国务院发布了《征信业管理条例》，要求征信机构在中国境内收集的信息在中国境内整理、存储和处理。同样，2014年5月5日，国家卫生和计划生育委员会发布了《人口健康信息管理办法（试行）》，明确禁止在中国服务器储存人口和健康信息。

着眼于提供需要信息技术基础设施的跨境服务的公司需要密切关注数据本地化的发展，以确保自己符合相关规定。

大数据

2015年9月5日，国务院发布了关于《促进大数据发展行动纲要》实施的通知。纲要强调了大数据在中国经济发展中的重要作用，并概述了四个主要目标：

- 开放政府数据；
- 促进研发与产业化；
- 加强政府和公共领域的应用，以及
- 增强隐私和数据保护。

作为新兴领域，数据带来的影响刚刚开始被全世界了解。如何更好地规范大数据处理，什么是可接受的规范等问题，对国家和非国家行为者都在继续发展。目前全世界正在开发、评估和改善新框架，以理解大数据处理的影响。这些努力包括对大数据处理涉及的风险进行说明和分类的问题。
without the users’ written consent. The “Tourism Law” promulgated in April 2014 requires tourism businesses to protect personal information obtained during the course of business. The “Law on the Protection of Consumer Interests” promulgated in April 2013, contains similar provisions.

Previous examples of industry- or sector-specific data privacy regulations include:

- With regard to personal data acquired in the process of employment or recruitment, the 2007 “Provisions on Employment Services and Employment Management” require that employers keep employees’ and candidates’ personal data confidential and prohibit employers from publicizing employees’ personal data or exploiting their technology or IP without written consent.

- The 2009 “Seventh Amendment to the Criminal Law” criminalizes serious misconduct by employees of state organs or SOEs who sell or illegally provide personal data obtained in connection with finance, telecommunications, transportation, education, or medical treatment activities.

- The 2010 “Basic Norms for Electronic Medical Records (for Trial Implementation)” prohibit unauthorized disclosure of patients’ medical records. The personal data of consumers acquired while selling goods and providing services is protected under the 2013 “Protection of Consumer Rights and Interests Law.”

- The 2013 “Provisions on Protecting the Personal Information of Telecommunications and Internet Users” require internet service providers to protect the data privacy of subscribers and the 2013 “Provisions on the Registration of True Identity Information of Telephone Subscribers” require telecommunication service providers to keep confidential any identifying information of subscribers.

- The 2013 “Regulations on the Administration of Credit Investigation Industry” provide rules on collection, disclosure, and protection of data privacy by credit investigation organs. The 2003 “Revision to the Commercial Bank Law” requires commercial banks to keep depositors’ personal data confidential.

Companies are advised to closely follow ongoing regulatory developments in data privacy, while ensuring they comply to relevant regulations in their own industry.

Data Localization

Historically, China has not issued comprehensive policies regarding data localization, although the previously mentioned “Guidelines on Information Security Technology and Personal Information Protection in Information Systems for Public and Commercial Services” prohibits transfer of personal information overseas without user consent or government permission.

Chinese authorities have sought to protect certain types of data using industry-specific rules to prohibit the export of data outside China. For example, in the banking industry, the Chinese central bank issued the “Notice of the People’s Bank of China on Improving Work Related to the Protection of Personal Financial Information by Financial Institutions in the Banking Industry” (PBOC Notice) in 2011. The PBOC Notice requires banks to protect personal financial information and requires personal financial information collected in China to be stored, processed, or analyzed within China, this prohibiting financial institutions from providing such information to foreign parties.

Other industries have similar requirements, for example, the “Administrative Regulations on the Credit Reporting Industry” issued by the State Council on January 1, 2013 requires information collected by credit reporting agencies within the territory of China to be organized, stored, and processed within China. Similarly, the “Administrative Measures for Population Health Information (Trial),” issued by the National Health and Family Planning Commission on May 5, 2014, specifically prohibit storing population and health information on foreign servers. The “Regulations on Strengthening the Protection of Secrets and Archive Management Related to the Issuance and Listing of Securities Overseas” require audit work papers prepared in the course of issuing or listing securities overseas to be stored within China.

Other jurisdictions also impose data localization requirements to some degree; however data localization requirements in China when combined with state security trends are indicative of a policy trend that could hinder China’s efforts to be a leader of innovation in the modern global ecosystem. For example, overly burdensome data localization policies could hamper China’s economic growth by deterring foreign investment if foreign companies can no longer use their existing information technology suppliers, their infrastructure, or conduct cross border trade freely. At the same time, domestic companies could find themselves cut-off from the global marketplace by their inability to participate in cross-border data flows. Requirements to store data in-country will most likely require foreign companies to build costly stand-alone data structures, and will be particularly damaging for foreign small and medium-sized companies seeking to do business in China that are unable to bear the costs of localization. With regard to innovation, data localization has the potential to significantly undermine many innovative information industries and applications such as the Internet-of-Things, cloud computing, and big data.

Companies looking to provide cross-border services that require information technology infrastructure will need to follow these developments in data localization closely to ensure they comply with relevant regulations.
中国美国商会鼓励中国政府继续与国际大数据治理规范趋同。新规范的通过将需要持续的国际合作努力，中国的参与将大有裨益。与此同时，我们相信在国际规范开发和纳入现有数据保护制度之前，中国不应该对大数据规定过于严格的制度。

中国数据政策制度的发展有潜力支持创新技术的巨大增长，为先进服务业创造框架，支持现代全球经济生态系统。在华运营或寻求在华投资的公司应当密切关注这种发展，以便确保符合可能需要数据基础设施重组工作的法律。

类似其他司法管辖区的反垄断法，中国的反垄断法（AML）旨在为了消费者的利益，保障企业之间的良性竞争。反垄断法通过禁止以下行为来保护市场竞争：限制或消除竞争的协议；滥用市场主导地位来限制或消除竞争（俗称垄断）；可能会限制或消除竞争的交易；以及利用政府行政权力来限制或消除竞争。

政府的反垄断执法

不像其他司法管辖区的反垄断法是集中式的，在中国有三个机构在执行反垄断法：国家发展和改革委员会（NDRC）、国家工商行政管理总局（SAIC）和商务部（MOFCOM）。

与反竞争行为相关的案件由国家发改委（发改委）和国家工商总局处理。发改委通过其价格监督检查局处理价格相关的反垄断执法案件。国家工商总局通过其反垄断与反不正当竞争执法局处理非价格相关的反垄断案件。商务部历来负责外商投资有关的问题。反垄断法是商务部内部负责通过并购审查执行反垄断法。

在反垄断法存在前，发改委实施了《价格法》，国家工商总局实施了《反不正当竞争法》（AUCL）。两部法律都有与反垄断问题相关的规定，禁止价格操控、串通投标或掠夺性价格等反竞争行为。《价格法》和《反不正当竞争法》仍然有效，对于发改委和国家工商总局在执行特定行动时如何协调《价格法》、《反不正当竞争法》和反垄断法没有监管和指导。2016年2月国务院发布了反不正当竞争修订办法草案以征求意见。根据国务院的解释性说明，一些修订与反垄断法保持一致。例如，修订版不再有针对公用事业反竞争行为、滥用行政权力、低于成本销售和搭售协议的规定，因为这些议题现在已经由反垄断法覆盖。然而，本次修订草案可能会有变动。

目前有三个机构正在修订《滥用知识产权反垄断规制指南》（草案），发改委也在研究与接受承诺、宽大处理程序、汽车行业、处罚计算和豁免程序相关的其他指南。所有这些指南将有助于提高反垄断法的透明度和可预见性。
Big Data

On September 5, 2015, the State Council published a notice concerning implementation of the “Action Plan to Promote Big Data Development.” The plan highlights the critical role of big data in China’s macroeconomic development and outlines the four primary objectives of:

- opening government data,
- boosting R&D and industry,
- enhancing government and public domain applications, and
- increasing privacy and data protection.

Big data continues to disrupt the digital world, challenging long standing data governance concepts. As discussed in the data privacy section, China has introduced a number of internationally recognized data privacy concepts. These provisions will become increasingly challenging to administer as big data applications become more common in China.

As an emerging field, the implications of big data are only beginning to be understood globally. Issues such as how best to regulate big data processing and what constitutes acceptable norms, for both state and non-state actors, continue to evolve. New frameworks for understanding the impact of big data processing are now being developed, evaluated, and refined around the world. Such efforts include projects for the clarification and categorization of risks involved in big data processing, and for the development of a data governance framework that bases data processing decisions on an evaluation and prioritization of risks. They also include a project to develop a system of international data processing norms that would offer guidance to big data processors on whether and how to process personal data.

AmCham China encourages the Chinese government to pursue convergence with international norms for big data governance. The adoption of new norms will require a sustained international collaborative effort, which China should participate in and could help lead. At the same time, we believe China should not impose an overly restrictive regime on big data before international norms have been developed and integrated into existing data protection regimes.

The development of a data policy regime in China has the potential to support immense growth in innovative technologies and to create the framework for advanced services industries to support the modern global economic ecosystem. Companies operating or looking to invest in China should follow such developments closely in order to ensure compliance to laws that may require burdensome restructuring in their data infrastructure.

ANTI-MONOPOLY LAW COMPLIANCE

Similar to the antitrust laws of other jurisdictions, the Anti-Monopoly Law of China (AML) aims to safeguard healthy competition among companies for the benefit of consumers. The AML protects competition in the marketplace by making the following unlawful: agreements that restrict or eliminate competition, abuse of a dominant position in a relevant market to restrict or eliminate competition (commonly known as monopolization), transactions that have the potential to restrict or eliminate competition, and the use of a government administrative organ to restrict or eliminate competition.

Enforcement of the AML by the Government

Unlike other jurisdictions where antitrust enforcement is centralized, in China three agencies enforce the AML: the...
查看 2015 年发改委和国家工商总局处理的相关执法案例和商务部处理的并购审查案例的总结，请参阅中国美国商会 2016 年《美国企业在中国白皮书》的“竞争法规”章节。

私人主体的反垄断执法

反垄断法在第 50 条指出私人执法：“经营者实施垄断行为，给他人造成损失的，依法承担民事责任”。这一法律语言的简短，加上反垄断原则对中国律师来说是新鲜事物，可能促使了 2008 年至 2014 年提起的 270 多起民事反垄断案件中的大多数被驳回。虽然只有相对较少的私人反垄断行动涉及外国公司，这并不意味着应该忽略被起诉的风险。

与竞争对手打交道

反垄断法禁止竞争者之间签订反竞争协议，并列明了此类协议的示例类型，例如限定价格、限制产量或产品销售量、分配采购市场或销售市场、限制购买新技术或新设备或限制开发新技术或新产品的协议，以及实施联合抵制的协议。虽然串通投标未被具体列出，它也属于限定价格或市场分配。

发改委基于下列活动类型对价格垄断的违法行为提出指控：

1. 保费折扣率协议（一组保险产品为 x%，另一组为 y%）；
2. 根据卡塔尔参与者的市场份额制定统一手续费或服务费的协议；
3. 贸易协会对违规者的处罚机制；
4. 制造商的分销商彼此商定限制产品交付前检查的价格；
5. 制造商的分销商彼此商定将保养和维修服务费标准化；
6. 供应商在竞标制造商合同时彼此商定产品报价，以减少竞争；以及
7. 供应商商定提高策略、时间、涨价范围和交换价格信息，以便实施策略。

尽管在其它司法管辖区运营的多数企业已经拥有合规计划，来培养其销售人员和管理人员有关避免与竞争对手联系以及监控信息交流和行业协会会议的重要性，但中国提出了某些特有的挑战。例如，当地职工可能不完全明白利益冲突的概念，因此按照当地传统的方式开展业务可能不符合反垄断规则。虽然没有关于以竞争对手一致行动为基础的价格垄断公开决定，但公司应该对交换信息持谨慎态度，无论是在商业协会内或直接与其他竞争对手交换信息。

合规计划也应告知员工通知公司正在进行的违反反垄断法行为的好处，因为如果能及时收集这些信息，公司可以申请宽大处理，从而避免支付罚款或减少罚款，然而这取决于向发改委提供的信息的时机和类型。

供应链中的交易：维持转售价格

反垄断法禁止贸易合作伙伴（即供应链上的伙伴）之间签订下列情况的反竞争协议：1. 确定向第三方所售产品价格的协议；或 2. 限制向第三方所售产品最低价格的协议。

发改委就统一零售价格执行反垄断法，并针对汽车厂家为汽车经销商设定最低价格和白酒厂家为其分销商规定最低价格进行了惩罚。

虽然中国的司法系统已经采取了一种与美国和其他地区类似的倾向于以实际效果为依据的判定方式，但发改委把这种统一价格行为视为本身违法，然而根据发改委的方式，就不可能接受统一零售价格能促进竞争的合理性，比如促进产品质量和销售（尽管按照反对垄断法此等保护在技术上是可提供的）。迄今为止，此类豁免还未曾授予给任何机构。发改委已经调查了 IT、医药、奶粉、眼镜/隐形眼镜和汽车行业等行业的外国企业，检查了它们与分销商的销售协议并且询问了自律措施。此外，发改委执行的罚款标准（年销售额的 1%到 10%）会根据受调查方的配合程度而有所不同。发改委表示它考虑了其它因素，比如违法的严重性以及危害的程度。然而，从实际情况来看，配合似乎是影响罚款严重程度的主要因素。

合规计划应当包含供应商、分销商和零售商关系，以及董事会政策。销售和营销部门必须理解限制或排除竞争的基本禁止概念。
National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and the Ministry of Commerce (MOFCOM).

Cases related to anticompetitive conduct are split between the NDRC and the SAIC. The NDRC, through its Price Supervision and Antimonopoly Bureau, handles price-related violations and SAIC, through its Antimonopoly and Unfair Competition Enforcement Bureau, manages the non-price related violations. MOFCOM has historically been responsible for foreign investment-related issues. The Antimonopoly Bureau is the department within MOFCOM that is responsible for enforcing the AML through merger reviews.

Before the AML existed, the NDRC enforced the Price Law while the SAIC enforced the Anti-Unfair Competition Law (AUCL). Both of these laws have provisions that relate to antitrust issues, prohibiting anticompetitive conduct such as price fixing, bid-rigging or predatory pricing. The Price Law and AUCL are still in effect and there is no regulation or guidance as to how the NDRC and SAIC will reconcile enforcement of the Price Law, AUCL and AML for a particular conduct. In February 2016, the State Council circulated a draft of the revised AUCL requesting comments. According to the explanatory note of the State Council, some of the revisions were made to conform with the AML. For example, the revised version no longer has provisions on public utilities’ anticompetitive conduct, abuse of administrative power, selling below cost, and tying arrangements, as such topics are now exclusively covered by the AML. However, this draft revision is subject to change.

Currently, the three agencies are revising the “Antimonopoly Guidelines on Abuse of Intellectual Property Rights (Draft),” and the NDRC is also working on other guidelines on the procedures related to the acceptance of commitments, the leniency procedure, the automobile industry, calculation of penalties, and the exemption procedure. All of these guidelines will contribute to increasing the transparency and predictability of antitrust enforcement.

To review summaries of relevant enforcement cases handled by the NDRC and SAIC and merger review cases handled by MOFCOM in 2015, see the Competition Law chapter of AmCham China’s 2016 White Paper.

**Enforcement of the AML by Private Parties**

The AML refers to private enforcement in Article 50: “companies are liable for civil damages caused by their anticompetitive conduct.” The brevity of this statutory language combined with the fact that antitrust principles are new to the Chinese bar may have contributed to the situation that the majority of the more than 270 civil antitrust cases that were filed between 2008 and 2014 were dismissed in favor of the defendants. Although there have been relatively few private antitrust actions involving foreign companies, this does not mean the risk of being sued should be ignored.

**Dealings with Competitors**

The AML prohibits anticompetitive agreements among competitors and lists examples, such as those that fix prices, limit output or sales volumes of products, allocate purchasing markets or sales markets, restrict the purchase of new technology or new facilities or restrict the development of new technology or new products, finally, those that implement group boycotts. Although bid-rigging is not specifically listed, it falls under price-fixing or allocation of markets.

The NDRC has based allegations of price-fixing violations on the following types of activities:

1. Agreements on discount ratios for insurance premiums (x% for one group of insured products, y% for another group);
2. Agreements on unified handling or service fees that are based on market shares of the cartel participants;
3. Trade associations’ punishment mechanisms for violators;
4. Distributors for a manufacturer agree among themselves to fix the price of pre-delivery inspection of products;
5. Distributors for a manufacturer agree among themselves to standardize maintenance and repair service fees;
6. Suppliers agree among themselves on price quotations of products to minimize competition when bidding for contracts from manufacturers; and
7. Suppliers agree on price increase strategies, timing, range of price increases, and exchange price information in order to implement the strategies.

While most companies doing business in other jurisdictions will already have compliance programs to educate their sales personnel and senior management on the importance of avoiding contact with competitors and monitoring information exchanges and trade association meetings, China poses certain unique challenges. For example, local staff may not be fully aware of the concept of conflict of interest; thus conduct based on traditional ways of doing business may be inconsistent with anti-trust principles. Although there has been no published decision regarding price-fixing based on concerted action by competitors, companies should be cautious about exchanging information, whether in a trade association context or directly with other competitors.

A compliance program should also inform the staff about the benefits of informing the company about on-going conduct that violates the AML. If this information is gathered
供应链中的交易：垄断或滥用市场主导地位

反垄断法禁止拥有相关市场主导地位的公司以不公平的高价销售，或以不公平的低价购买。此外，公司没有正当商业理由参与以下行为是违反行为：低于成本价销售、拒绝交易、排他性交易、搭售或基于价格或其他条件区分客户。

政府造成的垄断案例相对较少。国家工商总局已经从非价格行为的角度调查了交易合作伙伴间的搭售、捆绑和歧视行为。目前大部分此类国家工商总局案例涉及国内公司恶化当地产业。目前至少有两起待定的国家工商总局的调查涉及外商公司。

发改委已经调查了超高定价、搭售和价格歧视，尤其重点关注知识产权，详情见如下文。

并购审查

反垄断法禁止可能反竞争以及可能排除或限制相关市场竞争的并购交易。

反垄断法规定，公司向商务部通知交易以进行并购控制审查，如果并购触发了相关阈值。违反规定的公司将面临高达50万元（76000美元）的罚款，商务部可以禁止实施并购，甚至对公司救济，如剥夺财产。2015年商务部加强行动打击未能根据反垄断法进行申报的公司，并公布了四项决定处罚六家公司，对未向商务部申报并购处以人民币15万至20万元的罚款。两个公开案例涉及未申报一家跨国公司与中国国企合作伙伴之间的合资企业。另外两项决定涉及商务部批准前的收购。

除了对是否已经到达申报阈值的一般审查，合规计划还应考虑发现未申报并购的方法：第三方投诉、当事方自己发现要求，以及商务部审查并购申请时的发现。

利用政府行政机构限制或消除竞争

企业还应在合规计划中考虑反竞争政府行为。尤其是，如果企业拥有市场主导地位，通过下列政府行为滥用这种地位，不能达成和执行反竞争协议：限制、授权或立法和规定。这种禁止源自反垄断法禁令，来解决政府行政机构的行为。具体来说，反垄断法禁止政府行政机构滥用它们的官职来限制或消除竞争，当地政府实体禁止以下行为：

- 迫使企业或个人与政府实体指定的企业独家交易；
- 阻止区域内贸易；
- 在招投标活动中的歧视；
- 在投资和建立当地分支机构中的歧视；
- 迫使企业参与反垄断法禁止的反竞争行为；
- 批准会排除或限制竞争的法规。

2015年6月，发改委云南省局命令云南省通信管理局停止和纠正与四个国有电信运营商相关的行为，云南省通信管理局曾组织与国有电信运营商的云南分支机构的会议，会上商定了各种问题，包括给予促销礼品的类型、价格和方式。协议包括四家公司如何向云南省通信管理局申报和报告违规行为的规定。此外，发改委云南省局发现，根据云南省通信管理局制定的法规中的争议解决法规，这四家国有电信运营商签订协议限定了促销礼品的价格，违反了反垄断法，这些国有企业受到了罚款。

2015年11月，国务院宣布做出除地方保护主义的承诺。在这种政府鼓励下，如果企业依托当地政府的反竞争法，可能会有反垄断风险。

知识产权和反垄断法

在中国拥有重要知识产权的企业在执行其知识产权的权利时还必须特别注意遵守反垄断法。尤其是，滥用标准关键专利（SEPs）的问题已经得到了执法部门的特别重视。

根据发改委最近两次高调调查的质控，下列行为可能被认为构成了无线通信标准关键专利市场中过分的差别定价活动：

- 把整部手机用作计算许可使用费的基础；
- 在许可时把标准关键专利与非标准关键专利进行绑定；
- 拒绝把专利许可给某些芯片制造商。
in a timely fashion, the company could apply for leniency and potentially either avoid paying fines or fines may be reduced, depending on the timing and type of information it provides to the NDRC.

**Dealings in the Supply Chain: Resale Price Maintenance**

The AML prohibits anticompetitive agreements among trading (i.e., supply chain) partners that 1) fix the price of goods sold to third parties and/or 2) limit the minimum price at which goods can be sold to third parties. The NDRC enforces the AML with regard to retail price maintenance (RPM) and has, for example, punished automobile producers for setting minimum prices for dealers to sell vehicles and punished liquor producers for imposing minimum prices on their distributors.

The NDRC treats such RPM agreements as per se illegal, although the Chinese judicial system has adopted a more effects-based approach similar to the US and a number of other jurisdictions. Given the NDRC’s approach, it is unlikely to accept pro-competitive justifications for RPM, such as promotion of quality of products and sales, although such justifications are technically available under the AML as exemptions. To date, such exemptions have not been granted. The NDRC has investigated foreign companies in the IT, pharmaceutical, milk powder, eyeglass/contact lens, and automobile industries, by examining sales agreements with distributors and inquiring about disciplinary action. The fines imposed by the NDRC (one to ten percent of annual revenue in China) vary depending on the level of cooperation of the investigated parties. The NDRC has stated that it also considers other factors such as the gravity of the violation and extent of harm. However, based on practice, cooperation appears to be a major factor affecting the severity of fines.

A compliance program should encompass supplier, distributor, and retail relationships as well as board of director policies. The sales and marketing departments must understand the underlying prohibited concept of restricting or eliminating competition.

**Dealings in the Supply Chain: Monopolization or Abuse of Dominance**

The AML prohibits a company that has a dominant position in the relevant market from selling at unfairly high prices or buying at unfairly low prices. Moreover, it is a violation for such a company to engage in the following conduct without legitimate business justification: selling below cost, refusing to deal, exclusive dealing, and tying arrangements or discriminating customers based on price or other conditions.

There have been relatively few monopolization cases brought by the government. The SAIC has investigated tying, bundling, and discrimination among trading partners from a non-price conduct perspective. The majority of such SAIC cases involve domestic companies and local industries. Currently there are at least two pending SAIC investigations involving foreign companies.

The NDRC has investigated excessive pricing, tying and price discrimination, with particular focus on intellectual property rights as discussed below.

**Merger Review**

The AML prohibits merger transactions that are potentially anticompetitive and that may eliminate or restrict competition in the relevant market.

The AML requires companies to notify transactions to MOFCOM for merger control review if the merger triggers the relevant threshold. Companies found to violate the provision will face a fine up to RMB 500,000 (US$ 80,000), and MOFCOM may prohibit the implementation of the merger or even impose remedies upon the company, such as a divestiture of assets. In 2015, MOFCOM intensified action against companies for failure to file under AML, and published four decisions penalizing six companies with fines between RMB 150,000 and 200,000 (US$ 24,000 and 32,000) for failing to notify MOFCOM of the mergers. Two of the published cases involved the failure of the notification of a joint venture between a multinational company and its Chinese SOE partner. The other two decisions involved an acquisition prior to MOFCOM’s approval.

In addition to the usual inquiry into whether or not thresholds for filing have been reached, compliance programs should take into account the sources for discovering failures to notify a merger: third party complaints, discovery of the requirements by parties themselves, and discovery by MOFCOM while reviewing the merger application.

**Using a Government Administrative Organ to Restrict or Eliminate Competition**

Companies should also take into account anti-competitive government action in their compliance programs. In particular, companies must not conclude and implement anti-competitive agreements, or if they have a dominant market position, abuse this position based on any of the following government actions: restrictions, authorizations or legislation and provisions. This prohibition is derived from the underlying AML prohibition that addresses conduct of government administrative organs. Specifically, the AML prohibits government administrative organs from misusing
• 要求被许可人免费回授专利和／或；

• 对专利许可和芯片销售施加不合理的交易条款。

在这些案件中，有关监管机构的分析没有披露详细内容。因此不清楚发改委是否和法院采取同样的分析方法。在涉及标准关键专利的案件中，法院认为每个标准关键专利因为其不可替代的排他性都构成一个独立的“相关市场”，从而有效地判定标准关键专利持有人享有市场支配地位。因此，专利持有人对标准关键专利的任何滥用均被认为是构成了对其市场支配地位的滥用。根据反垄断法，此等滥用包括：

• 以不正当的高价进行许可；

• 拒绝许可或进行歧视性的许可；

• 进行排他性的许可；

• 把许可绑定在一起；或

• 把知识产权许可与产品销售进行捆绑。

在近期有条件的诺基亚和阿尔卡特－朗讯并购中，商务部提出了与以往涉及标准关键专利的并购类似的担忧，包括标准关键专利的许可市场、标准关键专利持有者公平、合理和非歧视义务的实施条件。这些包括标准关键专利持有者寻求禁令的条件，转让标准关键专利的条件。尽管每个案件的事实都是特定的，但是关键知识产权而且尤其是标准关键专利持有人必须知道其在反垄断法项下的权利、义务和潜在的风险。
their official positions to restrict or eliminate competition. Local government entities are prohibited from:

- forcing companies or individuals to deal exclusively with companies designated by the government entity;
- blocking inter-regional trade;
- discriminating in the context of tendering and bidding activities;
- discriminating in the context of investing and establishing local branches;
- forcing companies to engage in anticompetitive conduct that is forbidden by the AML; and
- passing provisions that would eliminate or restrict competition.

In June 2015, the NDRC’s Yunnan Province Bureau instructed the Yunnan Communications Administration to cease and correct its behavior relating to four state-owned telecommunications carriers. In the past the Yunnan Communications Administration organized meetings with the Yunnan branches of the state-owned telecommunications carriers where they agreed on a variety of issues, including the types, values, and ways of giving promotional gifts. The agreement included provisions on how the four companies would monitor and report violations to the Yunnan Communications Administration. In addition, the NDRC’s Yunnan Province Bureau found that, on the basis of the dispute resolution provision of the rules formulated by the Yunnan Communications Administration, these four state-owned telecommunications carriers entered into agreements to fix prices of promotional gifts in violation of the AML. These state-owned companies were fined.

In November 2015, the State Council announced its commitment to remove regional protectionism. In light of such governmental encouragement, companies could be at potential antitrust risk if the company is relying on local government’s anticompetitive legislation.

**Intellectual Property Rights and the AML**

Companies with important intellectual property in China must also take special care to comply with the AML in enforcing their intellectual property rights (IPR). In particular, the enforcement agencies have shown particular concern over the abuse of Standard Essential Patents (SEPs).

According to allegations in two recent high-profile NDRC investigations, the following practices may be found to constitute excessive and discriminatory pricing activities in the wireless communication SEP market:

- using whole handsets as the basis for calculating royalties;
- tying SEPs with non-SEPs in licensing;
- refusing to license patents to certain chip-makers;
- requiring licensees to grant back their patents without charge; and/or
- imposing unreasonable transaction terms on patent licensing and chip sale.

Few details have been disclosed about the regulator’s analysis in these cases. It is therefore unclear whether the NDRC will take the same analytical approach as the courts. In a case involving SEPs, the court reasoned that each SEP constituted an independent “relevant market” because of its irreplaceable and exclusive nature, effectively determining that the SEP holder enjoys a dominant market position. As a result, any perceived abuse of SEPs by a patent holder could be found to constitute an abuse of its dominant market position. Under the AML, such abuses could include, among others:

- licensing at unfairly high prices;
- refusing to license or licensing on a discriminatory basis;
- licensing on an exclusive basis;
- tying licenses together; or
- bundling IP licensing with product sales.

In the recent conditionally approved merger Nokia/Alcatel-Lucent, MOFCOM raised similar concerns as in earlier mergers involving SEPs over the licensing market for SEPs, MOFCOM then imposed conditions related to the fair, reasonable and non-discriminatory obligations of the SEP holder. These include the conditions under which SEP holders seek injunctions and the conditions under which SEPs can be transferred. While the facts of each case are specific, holders of key IPR and especially SEPs must know their rights, obligations, and potential risks under the AML.