The Growing Uncertainty in the US and China’s Regulatory Environments

Tips for Multinational Corporations (MNCs) on Global Compliance

“Latest Anti-Corruption Actions and Tips for MNCs on Internal Investigations” – June 18, 2019

Highlights and Key Takeaways

- Countering threats to national security and foreign policy interests, as well as safeguarding economic interests, are high priorities for both the US and Chinese governments.
- Greater enforcement of anti-corruption and anti-bribery laws in both countries may constrain MNC operations in both countries.
- In order to avoid legal violations, businesses should bolster compliance policies through internal reviews, risk assessments, vigilant documentation, and comprehensive training.

Executive Summary

In order to protect national security and economic interests, both the US and Chinese government have escalated enforcement of anti-corruption and anti-bribery campaigns, in addition to leveraging tariffs and other economic restrictions. Contextualized within the broader political tensions, these efforts suggest the growing significance of compliance management. Recently, AmCham China hosted a panel to help member companies understand how to better comply with new anti-corruption measures and handle any subsequent economic and/or legal challenges.

The Department of Justice’s China Initiative

On November 1, 2018, the US Department of Justice (DOJ) announced the creation of a new “China Initiative,” using the Foreign Corrupt Practices Act (FCPA) to investigate and aggressively prosecute Chinese companies for alleged trade theft, economic espionage, and corruption offenses. The FCPA prohibits the making of payments to foreign government officials for assistance in obtaining or retaining business and addresses accounting transparency requirements.

In light of these new developments from the DOJ, members are advised to take the following actions:

- Ensure that any China-based internal reviews are supervised by US counsel to safeguard attorney-client privilege and the resulting work product.
Prepare multiple summaries of documents, along with redactions. These will be necessary if either
government conducts an investigation that requires classified information.

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<th>Aims of “China Initiative”</th>
<th>Special Objectives</th>
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<td>Identify FCPA cases “involving Chinese companies that compete with American businesses”</td>
<td>Increase scrutiny on Chinese investments in the US, especially those involving “critical technology”</td>
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<td>Ensure that the US has enough resources dedicated to relevant investigations</td>
<td>Address supply chain threats in the telecom sector</td>
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<td>Make sure that the US can bring investigations to an appropriate conclusion quickly and effectively</td>
<td>Prevent the transfer of certain technology from US labs, universities, and the defense industry</td>
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Recent Enforcement Trends in China

Recently, China has also enforced compliance with anti-bribery laws with greater consistency and intensity. Most notably, a recent amendment to the Anti-Unfair Competition Law (AUCL, 反不正当竞争法) clarifies and broadens the scope of commercial bribery. The amendment implicates that employees are a greater liability as it is difficult to demonstrate absence of improper intent when an employee is under an employer’s supervision. Accordingly, companies should ensure that an effective supervision policy is in place and avoid taking a “head-in-the-sand” approach.

Amendment to Article 7 of the AUCL

- Improper Intent: pursuing business opportunities or competitive advantages
- “Bribery Recipients” now include:
  - Employees of the counterparty
  - Third party entities or individuals authorized by the business counterparty
  - Any individual or entity that has influence over a transaction – potentially including government officials

The Entity List

The US entity list, managed by the US Department of Commerce’s Bureau of Industry and Security (BIS), is another mechanism used to protect US national security and/or foreign policy interests by subjecting identified entities to specific license requirements for export, reexport and/or transfer (in-country). Applications for a license will be subject to a license review policy of “presumption of denial,” which means that applications will be denied in most cases.
On May 16, 2019, the BIS added Huawei Technologies Co., Ltd. and 68 of its non-US affiliates to the Entity List. The indictment alleges that Huawei knowingly and willfully provided financial services to Iran, thereby violating US sanctions.

At the G20 Osaka Summit on June 29, 2019, US President Trump said that Huawei would be allowed to buy US products that do not impact national security. However, according to subsequent media reports, Huawei remains on the entity list and BIS officials have been instructed to continue to review any license requests with “presumption of denial.” Speaking at a conference in Washington on July 9, 2019, Commerce Secretary Wilbur Ross reiterated President Trump’s comments. While the likelihood of obtaining approval remains unclear, it appears the administration may be signaling that those with clear cases should submit a license application.

**China’s Unreliable Entity List**

On May 31, 2019, the Ministry of Commerce of China (MOFCOM) announced that the Chinese government will introduce an “Unreliable Entity List (不可靠实体清单).” According to MOFCOM, as the world economy faces growing factors of instability and uncertainty as well as rising unilateralism and protectionism, the Unreliable Entity List seeks “to maintain the international economic and trade rules and multilateral trading system.” The measure is widely seen as a response to US actions against Huawei as well as the broader trade dispute between the two nations.
Best Practices for MNCs on Compliance

MNCs should view these escalations of regulatory pressure as signals of the need to implement strong anti-corruption, anti-bribery, and supply chain compliance programs. Companies should also undertake a risk assessment of their day-to-day operations to understand the additional risks that the newly added measures may pose to their business.

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<th>Risk Assessment</th>
<th>Documentation</th>
<th>Compliance Policies</th>
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<td>❖ Conduct regular risk assessments to identify compliance threats</td>
<td>❖ Require documentation for all business dealings with government officials and State-Owned Enterprise (SOE) customers</td>
<td>❖ Employ a system of internal controls to assure that transactions are executed in accordance with management’s authorization</td>
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<td>❖ Use data analytics to monitor business operations, including expenses, sales, and other risks</td>
<td>❖ Allow employees to report suspicious behavior without fear of retaliation</td>
<td>❖ Establish China-specific rules about gifts and entertainment, specifying allowable activities, thresholds, and approval authorities</td>
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<td>❖ Implement a document retention policy addressing the use of WeChat in corporate settings</td>
<td>❖ Conduct spot tests and random audits to ensure that updated procedures are effective</td>
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Training | Third Parties | Remedial Action
- Based on risk assessments, hold and document regular compliance training for all employees who are in direct contact with customers or government officials.
- Increase training for employees in high-risk positions as opposed to exclusively targeting top-level management.
- Combine online and interactive training, in-person education, and use real-word examples.
- Conduct training specifically for employees who monitor the company’s relationship with third parties to ensure that they are particularly aware of the company’s compliance policy.
- Require third parties to comply with company policy, including audit rights and training of third parties in relation to these requirements.
- Identify and report FCPA violations immediately both internally and with government regulatory institutions. (In the US, the DOJ’s Corporate Enforcement Policy encourages self-reporting by giving credit.)
- Demonstrate that investigatory and sufficient remedial actions have been taken in similar areas of risk.

If you have questions about the event and or would like to join AmCham China’s Legal Affairs Committee, please contact Baojian Sui.

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