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FOREIGN CORRUPT PRACTICES ACT ALERT | NIXON PEABODY LLP

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China whistleblower protections may increase FCPA investigations and prosecutions

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The People's Republic of China ("PRC" or "China") has sought to crack down on government corruption for years. In 2015, for example, the PRC introduced new legislation that criminalized the giving of bribes to Chinese officials' close relatives and family members. This year, the PRC expanded the definition of "bribe" to include the giving of intangible benefits to Chinese officials. These enhanced regulations followed years of increased scrutiny from Chinese citizens and the international community. While the new laws show progress, the PRC has not yet resolved its corruption problems. U.S. enforcement activity has demonstrated the continued need for additional progress. As of January 2016, China led all countries with 28 active Foreign Corrupt Practices Act ("FCPA") investigations—ten more than the next leading country, Brazil.

The PRC whistleblower protection regulations

In March, the PRC passed new regulations aimed at protecting Chinese whistleblowers from retaliation in the wake of government corruption allegations. Now, whistleblowers will enjoy greater confidentiality safeguards, employment security and protection of personal property for them and their families if they report government corruption. While the new safeguards may not, at first blush, appear significant to U.S.-based and publicly traded companies with Chinese operations, the regulations' collateral consequences could prove costly for companies lacking effective FCPA compliance programs.

By enacting the new regulations, the PRC has taken another step forward in holding its government officials civilly and criminally liable for accepting bribes. Whistleblowers will now move through the reporting process and even collect rewards while their identities remain confidential. Moreover, whistleblowers will not only enjoy protection from physical threats to themselves, their families, and their property, but also from threats to their employment status and other professional matters. In fact, local police details will now be responsible for guarding whistleblowers and their families' physical safety and personal property. Finally, the new regulations create stronger rewards for whistleblowers, incentivizing the outing of more corrupt Chinese officials.

The Foreign Corrupt Practices Act

The FCPA criminalizes the corrupt giving of bribes to foreign officials by U.S.-based and publicly traded companies for the purpose of getting or keeping business. In recent years, the Department of

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Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) have expanded their investigation and prosecution of businesses engaging in foreign bribery, extracting more than \$132 million in corporate settlements last year, down from over \$1.5 billion in 2014. Moreover, a recent memorandum—released in late 2015 and colloquially dubbed the “Yates” memo—reinvigorated the DOJ’s efforts to punish individuals responsible for violating the FCPA and other federal laws. In 2015, eleven individuals were sentenced to a total of 24 years in prison for violating the FCPA. Moreover, the DOJ and SEC recently added additional FCPA-focused Assistant United States Attorneys to their ranks, and the DOJ created a “Pilot Program” aimed at boosting corporate self-disclosures of FCPA violations.

On the horizon

When viewed alongside the FCPA, the new PRC regulations take on more significance for businesses operating in China. FCPA violations are more likely to be revealed once Chinese citizens feel confident that lodging corruption complaints against officials will not cause them future harm. To date, the DOJ and SEC have mostly pursued FCPA cases against companies engaged in sensitive industries such as health care, natural resources and technology. Indeed, those industries account for almost 50% of FCPA corporate settlements. Meanwhile, the utility, finance and food and beverage industries have faced less FCPA scrutiny in the past. But the DOJ and SEC of old—hamstrung by a lack of resources—were forced to focus investigations on industries vital to U.S. infrastructure and safety. Now, the DOJ and SEC have increased resources, thus giving the next Chinese whistleblower the power to trigger an industry-wide investigation.

Often referred to as “industry sweeps,” at times the DOJ and SEC investigate entire industries after a common denominator signals that corruption may be rampant throughout. That common denominator may take the form of a cultural acceptance (or even encouragement) of bribery, a common third-party supplier or vendor or a common foreign official. Here, business dealings with a particular Chinese official and his or her office may be closely scrutinized after one—or several—Chinese whistleblowers allege that corruption exists.

To protect against becoming the subject of questionable dealings in China, business organizations should be mindful specifically of their Chinese business operations and set a top-down tone that bribery will not be tolerated. Now more than ever, businesses and their executives must be involved in creating, implementing and overseeing FCPA compliance programs to prevent wrongdoing, root out issues if they occur and rectify employee and vendor misconduct. Strong compliance programs allow employees to confidentially report FCPA violations to compliance teams and encourage the unbiased investigation of such complaints. Though no compliance program can guarantee that a rogue employee will not attempt to bribe an official, strong programs will nonetheless reduce the business organization’s criminal and civil liability.

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