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公司法务人员、你们准备好了吗？

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商法词汇：案件，
事务和利益冲突

Lexicon: cases, matters
and conflicts of interest

在中国进行商业腐败调查

Managing a corruption investigation in China



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您将采取什么样的行动？您在中国生产厂的雇员在您美国总部管理层雇员的资助下，可能已经贿赂中国政府官员、逃避中国税款、且可能从事违反中国管理法规和刑法的违法行为。许多法律评论员建议在《海外反腐败法》加强执行的过程中，为了管理风险而必须实施合规计划，贵司虽然也因此坚定地实施合规计划，但仍然会发生上述腐败行为。《海外反腐败法》是一部有效的反腐法规，管辖范围非常广阔，在某些情况下，甚至大量适用于美国领域之外的公司。即使贵司采取了避免《海外反腐败法》问题而能够采取的一切措施，有时仍会发生不法行为。我们在此提供一些实用的优先措施，以帮助贵司渡过难关。

了解您聘请的法律顾问

在您聘请具有《海外反腐败法》专业知识的律师之前，您应当先熟悉了解这些律师。一旦您发现潜在的不法行为，您可能没有足够时间斟酌将要采取的行动：您可能向美国证券交易委员会（证监会）或投资者或其他人承担报告义务，也可能根据其他法律和商业上的原因，您需要尽快开展内部调查。您的法律顾问应当具有处理复杂刑事问题的丰富经验，尤其是涉及中国的《海外反腐败法》执法行动，也应当具备与证监会交涉的经验（证监会与美国司法部均享有《海外反腐败法》的执法权。）该法律顾问应当博得您个人的好感——您可能曾经在压力下与其一起工作过一段时间。

地方智慧是要点

中国各省以及香港和澳门特别行政区之内

与之间政治和文化的差异是非常重要的。您需要中国的法律顾问——但要记住，中国律师协会的律师与国际律师事务所注册的外国律师存在重大区别，这可能会影响您对中国大陆律师的选择。外国律师（包括注册的外国律师，比如美国律所在华办事处的执业律师）不能在中国法院出庭。

自从香港和澳门分别于1997年和1999年回归中国后，其法律制度50年内保持与大陆法律制度的不同。这就使香港保持有效的英国法律制度，而澳门保持葡萄牙法律制度。外国律师不能在香港法院和澳门法院出庭。

聘请合适的中国律师是极其重要的，他们不仅可以协助进行内部调查，也可以就禁止贿赂的中国法律提供咨询意见。中国的反腐败法律非常严厉（与美国类似）。3月份，力拓公司的澳大利亚管理人员胡士泰因受贿等行为被处以10年有期徒刑。力拓公司的3名中国雇员被处以7年至14年不等的重罚。

内部调查也需要会计专业知识。如必须利用电子数据，您可能需要聘请熟悉保密以及中国特有的潜在劳动问题的电子数据专家。在如此辽阔且多样化的国家，不要忽视后勤工作，比如地方复印能力以及差旅安排。

需要特别关注国有企业

根据《海外反腐败法》，为了影响政府行为而向“外国官员”提供任何贵重物品都是非法的。尽管该界定比较简明，但国有企业的情形可能比较复杂。国有企业是中国政府享有所有者权益的公司。要对国有企业进行准确定义可能比较困难，因为中国政府参与企业的程度差别巨大，且经常不甚明确。甚至中国企业与非中国企业设立的合资企业也可能属于国有企业，

因而具有担任雇员和管理人员的“外国官员”。

美国公司因此需要注意向国有企业支付的款项：该等款项可能被视为向“外国官员”提供的非法贿赂。在某个案例中，美国官方认为，一家外国公司参股的合资企业，虽然大部分权益被私营跨国公司拥有，但部分权益被外国国家拥有，该合资企业也属于国有企业。根据该观点，美国官方认为国有企业的雇员属于《海外反腐败法》界定的“外国官员”。根据该解释（尚未经过法院认可），国有企业的雇员收到的不当款项视为违反《海外反腐败法》，因为该行为涉及向“外国官员”支付不当款项。

如果贵司是一家合资企业，且有被视为国有企业的中国公司参股，则会出现其他实际问题。当您的律师调查可能发生的不法行为之时，让中国合作伙伴提供协助是非常重要的，尤其是该合作伙伴的雇员卷入其中之时。贵司及贵司的律师必须注意哪些信息与中国合作伙伴共享，因为国有企业的中国管理人员和雇员可能有义务向中国执法部门报告犯罪行为。

律师—客户保密权？

如果中国律师（与注册的外国律师不同）参与调查，他们可能有义务向有关部门报告某些犯罪活动；不要认为美国规定的律师及其客户的不可侵权的保密权也适用于在中国执业的中国律师。您或您的律师在中国进行刑事或民事事项的调查之前，您应当认真考虑调查结果将向哪些有关方面汇报。上述措施仅为初步措施。一旦发生腐败问题，最好的办法是熟悉这些问题并让经验丰富的团队做好准备以便随时采取行动。■

What are you going to do now? Employees in your production plant in China, aided by a couple of management-level employees in your home office in the US, may have bribed Chinese government officials, avoided paying Chinese taxes, and possibly engaged in a host of other regulatory and criminal violations of Chinese laws. This seems to have occurred despite your company's robust compliance programme, implemented as advocated by the many legal observers who, for good reason, counsel that such programmes are essential in managing risk against the increasingly enforced *Foreign Corrupt Practices Act* (FCPA).

The FCPA is a potent anti-corruption statute with a broad jurisdictional reach extending, under certain circumstances, even to companies largely outside the United States. Sometimes, even if your company has done all that it could do to avoid FCPA issues, misconduct still occurs. We offer here some practical first steps to take when navigating the treacherous waters your company may face.

Prepare to act quickly

You should acquaint yourself with lawyers who have FCPA expertise before you ever need them. Once you discover potential misconduct, you may not have much time to swing into action: you could have reporting obligations to the US Securities and Exchange Commission (SEC), or investors, or others, and there may be other legal and business reasons to expedite your internal investigation. You need counsel with a proven track record of handling complex criminal matters, particularly with FCPA enforcement actions involving China, who also have experience with the SEC (which, along with the US Department of Justice, has enforcement powers regarding the FCPA). And this should be someone you personally like – you may be working with him or her, under stressful circumstances, for some time.

Location, location, location

Political and cultural differences within and among China's provinces, and the special administrative regions of Hong Kong and Macau, can be significant. You will need Chinese counsel – but bear in mind that there are important distinctions between members of the Chinese Bar and registered foreign lawyers in in-

ternational law firms, which could affect your choice of lawyer in mainland China. Foreign lawyers (including registered foreign lawyers like those practising in American law firms in China) cannot appear in Chinese courts.

In Hong Kong and Macau, the legal systems are to remain distinct from the legal system in mainland China for 50 years following their return to Chinese sovereignty, in 1997 and 1999 respectively. This has, effectively, left an English legal system in Hong Kong and a Portuguese legal system in Macau. Foreign lawyers may not appear in the Hong Kong courts or the Macau courts. The fact that the languages of the law in Macau are Portuguese and Chinese may add further complications for foreign litigants.

Having the right Chinese lawyer is critically important, not only to assist with the internal investigation, but to advise regarding Chinese laws that proscribe bribery. Anti-corruption laws are serious business in China (as in the US). In March, Stern Hu, an Australian executive with Rio Tinto, received a 10-year prison sentence for, among other things, receiving bribes. Three Chinese employees of Rio Tinto received stiff sentences of between seven and 14 years.

An internal investigation will also require accounting expertise. If electronic data must be harvested, you may need to retain electronic data experts sensitive to confidentiality and potential labour issues unique to China. And in such a large and diverse country, don't neglect logistics, such as local copying capabilities and travel arrangements.

Special consideration for SOEs

Under the FCPA, it is illegal corruptly to give anything of value to a "foreign official" to influence a government action. Although the concept is relatively straightforward, state-owned enterprises (SOEs) can complicate matters. SOEs are companies in which the Chinese government has an ownership interest. Defining an SOE can be problematic because the level of Chinese government involvement in a business can vary widely and is often unclear. Even joint ventures between Chinese and non-Chinese companies can be considered to be SOEs, and hence by definition have "foreign officials" as employees and managers.

American companies thus need to be wary of payments to SOEs: such payments

could be construed as illegal bribes to "foreign officials."

In one case, US authorities took the position that a joint venture involving a foreign company that was partially owned by the foreign state but majority-owned by private multinational companies was an SOE. Based on this theory, US authorities maintained that employees of the SOE were "foreign officials" within the meaning of the FCPA. Under this interpretation (which has not yet been tested in court) an improper payment received by an employee of the SOE was considered a violation of the FCPA because it involved an improper payment to a "foreign official."

Other practical issues can arise if your company is in a joint venture with a Chinese company that is considered to be an SOE. As your lawyers investigate possible misconduct, it may be critical to have the assistance of your Chinese joint venture partner, particularly if employees of that partner may have been involved. Yet both your company and its lawyers must be careful what information is shared with a Chinese partner because the Chinese managers and employees of an SOE may have obligations to report criminal conduct to Chinese law enforcement authorities.

Attorney-client privilege?

If Chinese lawyers (as opposed to registered foreign lawyers) are involved in an investigation, they may have their own obligations to report certain crimes to authorities; don't assume that the sacrosanct confidentiality afforded attorneys and their clients in the US applies to Chinese attorneys in China.

Before you or your lawyers undertake an investigation of possible criminal and civil matters in China, you should consider carefully to whom the results of the investigation will be communicated. The steps outlined above are just the beginning. Your best move is to be aware of the issues and to have an experienced team ready to act if corruption problems surface. ■