

## GSK Bribery Conviction Signals Increased Risks in China

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On September 19, 2014, a Chinese court found pharmaceutical giant GlaxoSmithKline PLC (GSK) guilty of bribing doctors and hospitals in order to increase sales of the company's products in China. Among other things, the company was charged with using travel agencies and pharmaceutical industry groups to channel bribes to recipients. Chinese officials announced an investigation of GSK executives in late June 2013<sup>1</sup> and announced the conviction 15 months later.

The company was fined 3 billion yuan (\$489 million) — the largest corporate penalty ever imposed by Chinese authorities. For comparison, the three largest settlements under the U.S. Foreign Corrupt Practices Act (FCPA) are Siemens AG (\$800 million), KBR Inc./Halliburton Co. (\$579 million) and BAE Systems (\$400 million).

The court also convicted GSK's former country manager and four other executives who "actively organized, pushed forward and implemented sales with bribery."<sup>2</sup> The individuals each received suspended sentences of between two to three years in prison; these reduced sentences reflected the court's conclusion that they "confessed the facts truthfully and were considered to have given themselves up."<sup>3</sup>

The GSK case highlights China's increased emphasis on enforcing its anti-corruption laws against non-Chinese companies and individuals who offer or pay bribes. China's anti-corruption efforts have historically focused on the Chinese government officials who solicit or receive bribes. For example, in January 2013, China's president, Xi Jinping, announced a

new campaign to crack down on corruption by both "tigers" (*i.e.*, powerful officials) and "flies" (*i.e.*, low-level bureaucrats). The GlaxoSmithKline convictions demonstrate that China has moved beyond its historical focus, and that foreign companies doing business in China must be mindful of China's own anti-corruption laws in addition to the FCPA.

Commercial bribery between private parties, such as kickbacks paid by pharmaceutical companies to doctors dispensing their drugs, is reported to be widespread in China and deeply engrained in business culture. Although commercial bribery is illegal in China, companies have not historically perceived this type of corruption as a serious compliance risk, especially when compared to a potential FCPA violation.<sup>4</sup>

This perception is changing. A survey conducted by the American Chamber of Commerce in Shanghai of 400 U.S.-based companies with operations in China reveals an increased emphasis on compliance with China's laws and regulations.<sup>5</sup> In 2013, 46 percent of companies indicated that compliance with China's domestic laws was more important than compliance with international anti-bribery laws such as the FCPA, up from 31 percent in 2012.<sup>6</sup>

Failing to comply with China's laws prohibiting commercial bribery may also increase the risk of an FCPA investigation by the U.S. Securities Exchange Commission (SEC) and U.S. Department of Justice (DOJ). U.S. regulators have adopted the position, largely untested in courts, that state-owned enterprises (SOEs) and state-controlled enterprises in China are instrumentalities of the government and that any employee of an SOE qualifies as a "foreign

<sup>1</sup> Louise Armitstead, "Chinese police probe GSK managers for 'economic crimes,'" *The Telegraph*, June 30, 2013, <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10151412/Chinese-police-probe-GSK-managers-for-economic-crimes.html>.

<sup>2</sup> "GSK China hit with record fine," *Xinhua*, Sept. 19, 2014, [http://news.xinhuanet.com/english/china/2014-09/19/c\\_133656449.htm](http://news.xinhuanet.com/english/china/2014-09/19/c_133656449.htm).

<sup>3</sup> *Id.*

<sup>4</sup> Daniel Chow, *The Interplay Between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 *Ohio St. L.J.* 1015, 1017 (2012).

<sup>5</sup> The American Chamber of Commerce in Shanghai, *China Business Report* (2013-2014).

<sup>6</sup> *Id.*

official” within the meaning of the FCPA.<sup>7</sup> Under this broad interpretation of the FCPA, bribes paid to individuals in violation of China’s commercial bribery laws may also violate the FCPA. Proving the point, GSK remains under investigation by the DOJ, SEC and the U.K. Serious Fraud Office.

As a practical matter, this means that companies doing business in China should take proactive measures to prevent and detect bribery, which include the following:

- Understand your exposure. Where does your business intersect with a foreign government or with companies that are government-owned? What are your higher-risk areas? Who are the employees “on the front lines” in those areas?
- If possible, determine the types of schemes for making improper payments that are routinely used in a certain region, industry sector or with a particular type of government agency. Remember, the fact that “everyone is doing it” is a red flag, not an endorsement.
- Adopt policies that prohibit bribes not only to government officials (including employees of government-owned businesses), but also to parties in the private sector. In the GSK matter, the Chinese regulators viewed the hospital employees to whom bribes were allegedly paid as private parties.
- Ensure that your internal compliance program addresses the risks under both Chinese and international anti-bribery laws.
- Educate, educate, educate. Make sure employees understand your policies and what you expect for ethical and legal behavior. While the conduct in GSK was far from the “gray area,” local cultures may embrace practices within a gray area under the FCPA or other anti-bribery laws. Train your finance team and supervisors to spot issues and raise them quickly with in-house counsel or other compliance personnel.

- Create a game plan for how the company will respond to issues before they arise. The first interactions with regulators in any country are often critical to how the regulators view the company. Having a plan in place before an issue arises can be invaluable in setting the right tone, driving toward an optimal outcome, protecting the company’s privileged materials and avoiding collateral damage.

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<sup>7</sup> *Id.*; Mike Koehler, The Façade of FCPA Enforcement, 41 *Geo. J. Int’l L.* 907, 916-17 (2010).