Is It a New Era of Anti-bribery Enforcement in China?

by

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Abstract

Bribery harms the global playing field as it distorts fair completion, undermines honest practices and increases transactional costs, which results in significant uncertainty in transnational business. The Chinese Ministry of Public Security (MPS)’ crackdown on the pharmaceutical company GlaxoSmithKline (GSK)’s bribery and corruption, signals a broad trend toward elevated scrutiny of all foreign corporations operating in China. The case of GSK serves as a timely wake-up call indicating that China’s anti-bribery law has shown its teeth against foreign multinational companies (MNCs). GSK’s bribery may also invoke anticorruption enforcement across multiple major jurisdictions including both the U.S. and UK, as well as, China. The more global approach of enforcement agencies should incentivise greatly MNCs to design and implement anti-bribery compliance programmes commensurate with their risk of corruption, with a particular regard to China’s unique business and legal culture.
1 Introduction

Bribery damages the long-term interests of both host and home countries as well as business itself. Since China’s entry into the global anti-corruption enforcement arena, there has been a significant change in the enforcement landscape of its anti-bribery laws. China has enacted new laws aimed at targeting corporate bribery in the wake of a global crackdown on overseas corporate corruption. Due to the increased allegations of fraudulent behaviour and ethical misconduct on the part of multinational companies (MNCs), China has been targeting high-profile foreign MNCs on multiple fronts with harsh enforcement against bribery. Such an approach forces MNCs to defend their reputation in China where international brands often have a valuable edge over local competitors in terms of public trust.

Part I introduces the contextual circumstances of China’s lucrative but corrupt business environment, which includes arbitrary enforcement as well as a general campaign against bribery and corruption. The case of GSK serves as an epitome of the current anti-bribery campaign against foreign MNCs. Part II looks at China’s anti-bribery legal and regulatory framework, including the Anti-Unfair Competition Law (AUCL 1993) and the The Chinese Communist Party (CCP) Disciplinary System, with a particular regard to an Supreme People's Procuratorate (SPP) & Supreme People's Court (SPC)-jointly issued Judiciary Interpretation 2012 based on the Criminal Law of China. Part III examines the remit of the US Foreign Corrupt Practices Act (FCPA), clarifying some controversial issues like the scope of foreign officials, foreign issuers, affirmative defences and exceptions. It also partly explains whether GSK should be liable under the FCPA’s accounting and anti-bribery provisions. Part IV moves to the UK Bribery Act 2010, widely perceived as the most stringent Act in the anti-bribery arena. However, doubt is cast as to whether an adequate procedure could shield the firm covered from its strict liability under section 7 under UK Bribery Act 2010. Part V challenges GSK’s internal compliance procedures and argues that GSK may not rely on the “rogue employee defence” established in the case of Morgan Stanley, in which vigorous compliance programmes have averted the US enforcement actions against the firm. Before

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3 Michael Martina, ‘GlaxoSmithKline Routed China Bri bies through Travel Agencies–Police’ Reuters (15 July 2013)


5 On 26 December 2012, the SPC and SPP jointly promulgated the Interpretation of Several Issues Concerning the Application of Law for Handling Bribery Cases (Interpretation 2012) which became effective on 1 January 1 2013. The Judicial Interpretation includes significant provisions regarding entities who offer bribes as well as monetary thresholds for criminal prosecution.
turning to the general conclusion, Part VI explores how a foreign multinational could make its global compliance programmes compatible in China’s unique business environment. Among other things, it is indispensable for the MNCs to undertake risk-based due diligence on overseas third parties as well as their subsidiaries.

2 Context

2.1 A Most Lucrative Pharmaceutical Market

As one of the most important markets for future growth, China is too lucrative a market to resist. Building personal relationships (guanxi), which is tantamount to bribery, is critical for successfully doing business in China, and thus engrained in Chinese business culture. Business courtesies constitute a grey area and the complexities of China's hospital and pharmaceutical network make it particularly thorny for foreign MNCs to navigate. In addition, China’s healthcare system is controlled and owned by the state, along with a rooted practice of government patronage and gift-giving. The pharmaceutical manufacturers are more likely to encounter corruption, as such an area is characterised by a high preponderance of state-owned customers. More contentiously, China prefers discretionary administrative policy to predictability, opacity to transparency and decentralised enforcement of the law, which provides incentives for rent-seeking behaviour. Previously, much foreign anti-bribery enforcement did not trigger an investigation in China. With the Chinese agencies reshaping its enforcement landscape, a number of world’s largest pharmaceutical companies have been facing corruption investigation over claims of bribery.

China, being one of the fastest growing emerging markets is expected to overtake Japan as the world's second biggest pharmaceutical market behind the United States by 2016. Sales of

6 Benjamin Shobert and Damjan DeNoble, ‘Compliance after China’s Healthcare Bribery Scandals’ China Business Review (10 October 2013)
8 ‘Glaxo Looks into Alleged Bribery of Chinese Doctors’ Shanghai Business Review (13 June 2013)
11 Kazunori Takada, ‘China to Launch Fresh Pharmaceutical Bribery Probe’ CNBC (14 August 2013)
pharmaceuticals in China reached $82 billion in 2012, up 18.2% from 2011.\textsuperscript{12} China’s health costs are expected to double and the demand for drugs will boom, which is projected to rocket from $357 billion in 2011 to $1 trillion in 2020.\textsuperscript{13} China is an increasingly important market for international pharmaceutical companies drug makers, such as GSK, which rely on growth in emerging markets to offset slower sales in Western markets with the loss of patent protection for key treatments.\textsuperscript{14} GSK earned $1.42 billion from China in 2012, and has five manufacturing plants in the country employing 5000 people. Although it generates only 3% of GSK’s global revenues, China represents one of the fastest-growing drug markets.\textsuperscript{15} Its revenue in China rose 17% in 2012 to nearly $1.2 billion, compared with growth rates of 11% in Latin America and 10% in India.\textsuperscript{16} However, it is important to be aware of the unique Chinese business environment where the giant pharmaceutical firm has generated this impressive growth.

2.2 A Corrupt Business Environment?

2.2.1 The Pervasive Corruption in the Chinese Market

Bribery and corruption are rampant in China.\textsuperscript{17} Personal relationships are indispensible in China which is different from other jurisdictions, and the concept of business ethics is an oxymoron.\textsuperscript{18} Corruption is thought to be endemic in wide swaths of the Chinese health industry, and is perceived as a cost of doing business.\textsuperscript{19} The line is often blurred between what is appropriate and what is perceived as bribery.\textsuperscript{20} The acquiescence to China’s corrupt environment, however, can be a double-edged sword in that foreign MNCs’ agents may view

\textsuperscript{12} Laurie Burkitt and Jeanne Whalen, ‘China Targets Big Pharma’ The Wall Street Journal (16 July 2013)
\textsuperscript{13} ‘Big Pharma in a Little Trouble in China’ Economist (12 July 2013)
\textsuperscript{15} Leslie Hook and Andrew Jack, ‘GSK is test case in China’s rules laboratory’ Financial Times (15 July 2013)
\textsuperscript{16} GSK, ‘GSK Delivers 2012 Core EPS of 112.7p and Returns £6.3 Billion ($10.2billion) to Shareholders’ (6 February 2013)
\textsuperscript{17} Jamil Anderlini and Tom Mitchell, ‘Bribery Built into the Fabric of Chinese Healthcare System’ Financial Times (24 July 2013)
\textsuperscript{19} Virginia Harrison, ‘China Scandal Takes Toll on Glaxo’ CNNMoney (23 October 2013)
Bribery as endemic to Chinese business, and therefore tend to tolerate insufficient compliance with Chinese and foreign anti-bribery laws. Although foreign MNCs may need to adapt to the local environment, they must retain their own values. It is worth identifying certain social, economic and institutional factors that contribute to the corrupt environment in China.

Business courtesies constituting a customary fixture of normal business conduct can present challenges in China, where relationship building drives successful business developments. As a result, China is a high-risk country where offering cash bribes and kickbacks are widespread; bribery and business go hand-in-hand in China. Transparency International (TI) ranked China the 80th out of 176 countries in its 2012 corruption-perceptions index (CPI), which reflects how outsiders perceive levels of corruption in China. Arguably, Chinese doctors do not swear the Hippocratic Oath, and their motivations for professional assistance are financially driven rather than being based upon a moral creed. The bribing of doctors by pharmaceutical companies is an "open secret" in China. Chinese patients must have a doctor’s prescription to buy regulated medicine, and pharmaceutical sales persons meet regularly with doctors to promote their products.

It is common practice for pharmaceutical firms to offer doctors and hospitals bribes to have their products used. One of the primary concerns for MNCs is to balance the embedded and pervasive culture of gift-giving in China with foreign anti-corruption laws. Foreign MNCs must renew their focus on strengthening global compliance programmes to ensure that they are not exposed to such vulnerabilities. Apart from the fertile

21 Michael Martina ‘Compliance the Buzzword for Foreign Firms in China after Glaxo’ Reuters (17 July 2013)
24 Feng Jing, ‘Combating Commercial Bribery’ Beijing Review (25 May 2006); “In China’s pharmaceutical industry, kickbacks for pharmaceuticals alone approach ¥RMB772 million ($126 million) of state assets every year, an amount equivalent to approximately 16% of the tax revenue for the whole pharmaceutical industry.”
26 Dezan Shira, ‘Why Corruption is Inevitable in China’s Pharmaceutical Industry’ Caijing (25 July 2013)
28 Christopher Matthews and Jessica Hodgson, ‘Glaxo Probes China Bribe Claims’ Fidelity (12 June 2013)
29 Susan Rose-Ackerman, ‘Corruption: Greed, Culture, and the State’ (2010) 120 The Yale Law Journal Online 125, 140
2.2.2 Institutional Framework: A Highly-Regulated Market

Corruption in the drugs business is a direct result of the regulatory landscape controlling the sale and prescription of drugs.\(^2\) The government control of China’s health-care system increases the risks for foreign companies.\(^3\) Drug prices are set by the Chinese authorities, which dictate the margin structure for the state-controlled distributors as well as sub-distributors and hospitals.\(^4\) Some Chinese officials often solicit or expect a “facilitation payment” merely for doing their routine job.\(^5\) The direct or indirect extortion put foreign MNCs in a dilemma, that is, either taking the risk of prosecution or refusing to pay or risk adverse consequences for the business. As local entities are not similarly constrained by stringent anti-bribery laws, a Western firm may incur significant costs to avoid the risk of their home law, which arguably puts Western companies at a disadvantage.\(^6\) In an era when the Chinese market is increasingly important, some over-eager MNCs may be tempted to bend the rule of zero tolerance for corruption so as to avoid being left out of business opportunities.\(^7\) This may, to some extent, explain why GSK has failed to make its global compliance procedures compatible to China’s more challenging business environment.

2.3 Arbitrary Prosecution: Protectionism or Politically-Driven Prosecution?

MNCs may complain that they have been penalised selectively. It is worth ascertaining whether the investigations are driven politically or in a protectionist way. Nationalism and protectionism have played a part which should not be overestimated. First, foreign MNCs may feel like scapegoats, in part, in reaction to the economic downturn and, in part, in an attempt to deflect attention from

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31 Leslie Hook, 'Unorthodox Injections Sustain China’s Healthcare System’ Financial Times (16 July 2013)
32 Dezan Shira, ‘Why Corruption is Inevitable in China’s Pharmaceutical Industry’ Caijing (25 July 2013)
34 ‘China’s Bitter Medicine for Foreign Drug Companies’<http://knowledge.wharton.upenn.edu/article/chinas-bitter-medicine-foreign-drug-companies/>
35 Emily N. Strauss, ‘Easing Out” the FCPA Facilitation Payment Exception’ (2013) 93 (1) Boston University Law Review 235, 273
36 Irina Sivachenko, ‘Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance' (2013) 54 (1) Boston College Law Review 393, 431
China’s own domestic drug concerns. The slower economic growth may serve to fuel the public resentment toward those foreign multinationals that are scooping substantial profit. With China’s accession to the World Trade Organisation (WTO), some of the more flagrant barriers imposed against foreign MNCs trying to compete on a very uneven playing field have been softened. As a result, Chinese pharmaceutical companies often find themselves put at a disadvantage against their foreign counterparts with world-known brands and reputations. Second, China has achieved its goals of accumulation of capital. It is a transformative period for the country to upgrade its technology and improve governance capacity. It is also the time for China to realise its vast economic potential primarily by stimulating its domestic consumption instead of relying heavily on exports and investment. The time has passed since China had to queue up to attract MNCs, with super-national treatments; such as the offering of tax breaks. In this vein, MNCs need China more than China needs them. When looking for easy targets to fulfil their quotas of corruption-bashing, local officials may find it simpler to pick on foreign firms than on local ones that have interwoven connections with local or national politicians. Although an element of nationalism and even protectionism cannot be rooted out, it would not be wise to attribute bribery to such an excuse.

The judicial system in China is highly politicised. The Chinese Communist Party (CCP) has effectively institutionalised an entire ecosystem of crony capitalism, which renders business and politics tightly intertwined. The Chinese government is keen to cut the prices of medicines whilst trying to provide universal access to healthcare. The rising cost of pharmaceuticals and medical devices have been sparking widespread frustration, with national healthcare expenses expected to reach $1 trillion annually by 2020. Cost-effective health care represents a critical and challenging

39 Dezan Shira, ‘Why Corruption is Inevitable in China’s Pharmaceutical Industry’ Caijing (25 July 2013)
41 MJ Deen and Nicholas Ward, ‘China pivots its growth strategy to focus on domestic consumption’ Financial Post (21 February 2012)
43 ‘GlaxoSmithKline in China: Bitter Pill’ The Economist (20 July 2013)
45 David Barboza and Sharon LaFraniere, ‘Princelings in China Use Family Ties to Gain Riches’ The New York Times (17 May 2012)
policy objective, thus, the government’s legitimacy would be jeopardised were it not to deliver affordable and accessible healthcare.47

2.4 Crack-down on Bribery: A Toothless Watchdog?

There has been more enforcement by the U.S. agencies under the FCPA against Western firms operating in China than by the Chinese government itself.48 The U.S. Department of Justice (DoJ) has aggressively pursued the pharmaceutical industry for violating the FCPA. Some multinational pharmaceutical giants were penalised for alleged FCPA violations based on their bribery in China. For instance, Pfizer Inc., John son & Johnson and Eli Lilly, have all reached FCPA settlements in recent years.49 Although the corrupt business practices of the pharmaceutical giants were heavily penalised by the Securities and Exchange Commission (SEC) as well as the Department of Justice (DoJ), most of the incidences of the high profile China-related FCPA cases have turned up no parallel Chinese investigations, and have gone unpunished by the Chinese enforcement agencies.50 The Chinese authorities have focused more on punishing bribe recipients than bribe givers,51 resulting in few actions against foreign MNCs paying bribes in China. They have finally escaped scrutiny largely because the anti-bribery agencies have typically not prosecuted non-Chinese companies for violations of law.

47 Michael Martina, ‘Compliance the Buzzword for Foreign Firms in China after Glaxo’ Reuters (17 July 2013)
51 ‘Former Head of Chinese Drug Watchdog Appeals Death Sentence’ People’s Daily (12 June 2007); One of the most striking cases in the pharmaceutical industry was that Xiayu Zheng, former director of China’s State Food & Drug Administration (SFDA). He was executed in 2007 after being convicted of taking bribes of ¥RMB 6.49 million ($1.06million) in return for approving hundreds of new medicines, some of which proved to be dangerous.
involving corruption of public officials. As Transparency International observed, “the ineffectiveness of government regulation was initially caused by China’s sole emphasis on fighting the “demand side of corruption,” which involved close regulation of public officials but ignored the actions of the private sector “suppliers of corruption.” Despite rampant corruption, the Chinese government has not efficiently prosecuted and punished such conduct. The lack of enforcement against foreign violators left observers thinking that the Chinese anti-bribery laws were little more than a “legal sleeping dog.”

This imbalance has begun to change in recent years with the Chinese government launching a campaign to crack down on foreign MNCs’ bribery activities. The scrutiny of the MNCs operating in China has been heightened. Multinational pharmaceutical companies in China face increasing challenges given that corruption is rampant in China’s health system. Although the crackdowns should be seen in a broader context and as a manifestation of developments in the legal arena, the Chinese enforcement agencies are likely to take a hard line with foreign firms and show the teeth of its anti-bribery laws, especially in those markets that have a direct and immediate nexus to Chinese consumers. The case of GSK represents a notable development because it reshaped China’s traditional corruption investigations, demonstrating that the enforcement agencies will target bribers as well as officials receiving bribes.

55 Benjamin Olken and Rohini Pande, ‘Corruption in Developing Countries’ (2012) 4 Annual Review of Economics 479, 509

3.1 Does GSK have Clean Hands?

GSK has been involved in widespread bribery between 2004 and 2010, during which GSK’s China sales staff provided doctors with speaking fees, cash payments, lavish dinners and all-expenses-paid trips in return for prescribing medication. Despite GSK’s guarantee of operating ethically and with high standards of integrity, the Chinese Ministry of Public Security (MPS) charged GSK for breaching the anti-bribery laws based on substantial evidence that the firm had used travel agencies as vehicles to commit the flagrant and repeated bribery.

The charges against GSK resemble those leveled at other pharmaceutical MNCs by the SEC and DoJ, which have been looking into possible violations of the U.S. Foreign Corrupt Practices Act (FCPA) relating to sales in China since 2010. GSK paid $3 billion according to a healthcare fraud settlement on 2 July 2010. The penalty illustrates the upward trend toward increased enforcement and harsh penalties. GSK has been seeking to repair its corporate image after multibillion-dollar settlements with U.S. regulators tied to drug-marketing tactics, where the company admitted that its marketing practices relating to some of its drugs were illegal. It is also executing a five-year corporate integrity agreement, requiring major changes in the way its sales force does business.

It seems that GSK has not been snagged in law that creates a double standard for its business practices. Just one year after the criminal and civil charges of its off-label marketing and related unlawful promotion of prescription drugs, GSK has allegedly uncovered bribery involving $450 million that had been funnelled through more than 700 travel agents and other third parties during the last six years. It has used bribes, kickbacks and other fraudulent means to bolster drug sales in China. On 11 July 2013, the Ministry of Public Security (MPS) lodged a new investigation into the firm. The acceptance of kickbacks from the travel agents or other

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60 Laurie Burkitt and Jeanne Whalen, ‘China Targets Big Pharma’ The Wall Street Journal (16 July 2013)
third parties by such executives has constituted another violation of Chinese Criminal Law (CCL), since the payment or benefit far exceeded the threshold value of ¥RMB 5,000 ($816).\(^{68}\)

GSK’s reputation has been substantially tarnished. It may be worth examining how much of this allegation has been driven by anti-bribery efforts and how much of it is politically-motivated.\(^{69}\) However, it is not well-justified that the case against GSK represents the targeting of foreign companies in competition with domestic industry, rather than an overarching crackdown on corrupt practices. Nevertheless, challenging the anti-bribery prosecution will make little sense. “When in Rome, do as the Romans”, constitutes quite a weak defence in criminal proceedings anywhere. Despite bribery being widely considered as a most common practice in China’s hyper-competitive pharmaceutical markets, it does not mean that foreign MNCs should engage in it. A better practice would be that the foreign MNCs strengthen their global compliance programmes to ensure that they are not exposed to similar vulnerabilities in the increasingly stringent anti-bribery environment.

3.2 Parallel Prosecutions

As possible parallel investigations unfold, MNCs will have to pay more attention to their bribery risk management under Chinese anti-bribery law, which presents some unique challenges. The charges against GSK may again lead to serious penalties. GSK’s holdings and business are under the jurisdiction of the FCPA and the UK Bribery Act 2010, as well as China’s anti-corruption laws. The breadth of GSK’s activities could make the company vulnerable to enforcement action by both the UK’s Serious Fraud Office (SFO) and the US Department of Justice (DoJ), which can levy heavy penalties under their sweeping respective anti-bribery laws if they find evidence of wrongdoing.\(^{70}\) The charges of bribery make the GSK case the highest profile probe in China since four executives of mining giant Rio Tinto plc were jailed in March 2010 for taking bribes and stealing commercial secrets.\(^{71}\) The current prosecution of GSK is apparently the first such parallel investigation undertaken by the Chinese government. It provides further evidence that extraterritorial enforcement of anti-corruption laws is not limited to U.S. government actions. This does not only signal the end of that inaction era and the beginning of an industry-wide enforcement sweep, but also signal an

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68 CCL Article 163

69 Susan Rose-Ackerman, ‘International Actors and the Promises and Pitfalls of Anti-Corruption Reforms’ (2013) 34 (3) University of Pennsylvania Journal of International Law 447, 489

70 Kathrin Hille and John Agleinby ‘China accuses GSK of bribing officials’ Financial Times (11 July 2013)

71 David Barboza, ‘China Sentences Rio Tinto Employees in Bribe Case’ New York Times (29 March 2010); The four executives received jail terms of between seven and 14 years after being found guilty of getting information from confidential strategy meetings of the body representing China’s steel industry in negotiations with iron ore suppliers.
inclination by the Chinese government to affirmatively pursue anti-bribery cases.Foreign MNCs should wake up and accept such a reality that China’s anti-bribery agencies do not turn a blind eye to flagrant breaches of its Anti-bribery laws any more. To join the global fight against corruption, China has updated its laws to reflect the developing global standard in anticorruption enforcement. A brief overview of anti-bribery laws in China is next.

4 The Anti-bribery Framework in China

4.1 The Chinese Criminal Law on Anti-bribery

The flagrant bribery and corruption have posed a fundamental challenge to the legitimacy of the Chinese Communist Party (CCP), which could cause “the collapse of the CCP” and the downfall of the state. In response, China has instituted complex anti-bribery laws from criminal and administrative penalties to disciplinary regimes for CCP members to the standard adjudication process. The system consists of two main parts: the principal piece of Chinese Criminal Law (CCL) and the Anti-Unfair Competition Law (AUCL 1993). The latter prohibits business parties from engaging in "commercial bribery" by giving money or property to another business operator or individual for the purpose of selling or purchasing goods. Firms are forbidden to give ‘money or property’ for the purpose of gaining a competitive advantage. A bribery case under the AUCL 1993 is investigated by the State Administration of Industry and Commerce (SAIC). In addition, it appears that the CCP Regulations on Disciplinary Penalties prohibit any official from accepting ‘any gift that might affect his impartial exercise of a public function’ without registering receipt of the gift and surrendering it to the state. The perceived lack of specificity and guidance in the CCL confers considerable discretion to Chinese enforcement agencies. The SPC and the SPP jointly promulgated a Judicial Interpretation on

72 Amy L. Sommers and Matt T. Morley, ‘Multinational Executives Detained in China Due to Bribery Concerns’ Legal Insight (26 July 2013)
73 Michael J. Boskin, ‘The Global Stake in China’s Anti-Corruption Reform’ Project Syndicate (10 September 2013)
74 Jaime A. FlorCruz, ‘Corruption as China’s Top Priority’ CNN (7 January 2013)
75 AUCL 1993 Article 8
76 The AUCL was adopted in the 3rd Session of the Standing Committee of the 8th National People’s Congress (NPC) on 2 September 1993 and came into effect on 1 December 1993.
77 AUCL 1993 Article 3
79 Irina Sivachenko, ‘Corporate Victims of “Victimless Crime”: How the FCPA’s Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance’(2013) 54 (1) Boston College Law Review 393, 431
Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Cases of Bribery on 26 December 2012 (SPC & SPP Interpretation 2012).\textsuperscript{80}

There are a number of provisions incorporated under the CCL that relate to bribery of public officials for an improper interest.\textsuperscript{81} It constitutes a crime for a person to give "money or property"\textsuperscript{82} to a state functionary for the purpose of obtaining an undue advantage.\textsuperscript{83} The CCL defines ‘state functionaries’ as individuals of government agencies who are engaged in public service.\textsuperscript{84} Pursuant to Interpretation 2012, the threshold for a bribe to a state functionary that will trigger a criminal investigation is ¥RMB 10,000 ($1632).\textsuperscript{85} More specifically, the threshold for bribery to constitute an offence is ¥RMB 10,000 ($1632) where committed by an individual,\textsuperscript{86} and ¥RMB 200,000 ($32639) by companies.\textsuperscript{87} The CCL does not contain an exception for facilitation payments.\textsuperscript{88} China has updated its criminal laws to reflect the developing global standards in anti-bribery enforcement.\textsuperscript{89} Given these rather general standards and broad prosecutorial discretion, fashioning a set of compliance rules that are not only effective in avoiding the legal pitfalls, but also practical and realistic as a business matter will be difficult.\textsuperscript{90}

\textsuperscript{80} The Interpretation 2012 was adopted respectively by the SPC Trial Committee Decree 1547 on 14 May 2012 and SPP Procurator Committee Decree 77 on 21 August 2012. It came into force on 1 January 2013.

\textsuperscript{81} CCL Articles 389-393

\textsuperscript{82}Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP), Opinion on Some Issues Concerning the Application of the Law in Criminal Commercial Bribery Cases (20 November 2008): The concept of "property" in the crime of bribery under the CCL was clarified to include any "property interest" that can be quantified with a monetary value.

\textsuperscript{83} CCL Articles 389

\textsuperscript{84} CCL Article 93

\textsuperscript{85} SPC&SPP Interpretation 2012 Article 1; CCL Article 390

\textsuperscript{86} CCL Articles 164, 389

\textsuperscript{87} CCL Article 391; SPP, The Threshold for Criminal Prosecution in Bribery Cases (22 December 2000)

\textsuperscript{88} The Amendments to the Criminal Law of the People’s Republic of China (VIII) was promulgated by the Standing Committee of the National People’s Congress on 25 February 2011, and became effective on 1 May 2011. <http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content_1625618.htm>; Bribery Act 2010 s6

\textsuperscript{89} The newly enacted Amendment of PRC Criminal Law adds a second provision to Article 164 that criminalizes bribes given to foreign public officials or officials of an international public organization, which came into effect on 1 May 2011.

4.2 SPC & SPP Judicial Interpretation 2012

Under the CCL, the severity of punishment of individuals for bribing government officials depends on the degree of culpability. The Interpretation 2012 sets out some factors and financial thresholds that will determine the level of ‘seriousness’ of the bribery offence, with associated penalties for each categorisation from ‘serious’, to ‘extraordinarily serious’. The crime of bribery is “extraordinarily serious” if the amount proffered is more than ¥RMB 1 million ($163,192), or if the amount proffered is more than ¥RMB 500,000 ($81,596), but less than ¥RMB1 million($163,192, and the defendant has paid bribes to

(i) more than three people;
(ii) to government officials who are responsible for supervising and administering matters in relation to food, pharmaceuticals, manufacturing safety or the environment, etc. that endanger public health or the security of public property;
(iii) to a judicial or administrative authority, thereby interfering with administrative law enforcement and judicial justice; or
(iv) the bribes are sourced from the offender’s illegal gains.

For instance, individuals found to have engaged in “extraordinarily serious” bribery face lifetime imprisonment. The Chinese enforcement agencies usually charge individuals, largely because of complex pre-conditions for charging an enterprise. Although the prosecution of companies, as opposed to individuals, has been far less frequent for various evidentiary and technical reasons, the government has now fully implemented a database that documents all cases of convictions for bribery and lists all parties involved, whether or not those parties have been criminally pursued. This makes greater sense because it is much easier for foreign

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91 CCL Article 390: (i) Payment of bribes is punishable by imprisonment of one month to five years; (ii) If the circumstances are severe or if severe damage has been caused to the interests of the State, punishment is increased to between 5 and 10 years of imprisonment; and (iii) If the circumstances are extraordinarily severe, the defendant is subject to imprisonment of more than 10 years or life imprisonment and all of his/her property may also be confiscated.

92 SPC&SPP Interpretation 2012 Article 2
93 SPC&SPP Interpretation 2012 Article 4
94 SPC&SPP Interpretation 2012 Article 4 (1)
95 SPC&SPP Interpretation 2012 Article 4 (2)
96 SPC&SPP Interpretation 2012 Article 4 (2) (i)
97 SPC&SPP Interpretation 2012 Article 4 (2) (iii)
98 SPC&SPP Interpretation 2012 Article 4 (2) (iv)
99 SPC&SPP Interpretation 2012 Article 4 (2) (ii)
100 CCL Article 390
102 SPP, Centralizes Database of Bribery Convictions (16 February 2012)
MNCs to undertake their risk assessment to avoid potential successor liability. Furthermore, «major loss to the national interest» \(^{103}\) shall be deemed to have been caused to the interests of the State if the direct economic losses are more than ¥RMB1 million ($163,192).\(^{104}\) The Interpretation 2012 clarifies a number of key terms and issues under the CCL with respect to paying bribes and the consequence of the criminal liability. It provides long-awaited guidance and fills gaps in the CCL, with precise financial thresholds and specified aggravating circumstances to assist the courts in producing fair and predictable decisions.

4.3 Implication from the Distinction between the CCL and the Interpretation 2012

Despite the lack of separation of powers in China, the SPC plays a pivotal role in China’s judicial practice, with a particular regard to its indispensable guidance in the judicial enforcement.\(^{105}\) Arguably, the SPC is not constitutionally mandated with the power to interpret the law, but issues statute-like judicial interpretations only when the NPC delegates it the power to do so.\(^{106}\) Generally, Interpretation 2012 is equivalent to law, although it cannot make new rules without the existing legal ground.\(^{107}\) The Interpretation 2012 does provide significant insight into how Chinese judicial organs interpret key principles of anti-bribery laws. The more detailed guidance allows lower-level courts to make more consistent and predictable decisions. In this vein, the Judicial Interpretation helps to insure national standards of justice. Furthermore, Judicial Interpretation enables the court to adapt promptly to legal developments without necessarily revising the relevant laws through the NPC.\(^{108}\) Given China’s long standing civil law jurisdiction, however, the Interpretation 2012 may impede judges to exercise their discretions in making a decision. Keith and Lin observed that the SPC’s interpretation has “narrowed the function of the Court to a more tightly disciplined judicial role as well as for plugging the holes in legal process and structure by creating guiding case law and supporting the freedom of judge’s decision making.”\(^{109}\) Such a unique approach in China’s judicature

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\(^{103}\) CCL 390
\(^{104}\) SPC&SPP Interpretation 2012 Article 3
\(^{105}\) The Organic Law of People’s Court Article 33; The Decision of the Standing Committee of the National People’s Congress on Strengthening Legal Interpretation (1981) Article 2: “Issues of applying laws and regulations in court proceedings shall be interpreted by the Supreme People’s Court”
\(^{106}\) Constitution of the PRC Article 67; PRC Law on Legislation Article 42; Randall Peerenboom, China’s Long March toward Rule of Law (Cambridge, CUP, 2002) 317
\(^{109}\) Ronald Keith and Zhiqiu Lin, ‘Judicial interpretation of China’s Supreme People’s Court as “secondary law” with special reference to criminal law’ (2009) 23 (2) China Information 223, 256 at 229
mechanism may be arguably referred to as codification of SPC’s judicial interpretation. This may result in the discretion of local procuratorate and court to be further restricted. In the pursuit of rule of law and the judicial independence, it remains a long-standing controversy as to whether the current approach would strike a balance between the facilitation of judicial efficiency and the enhancement of the judges’ description in the decision making.

5 The Anti-Bribery Framework in the United States: The Remit of Foreign Corrupt Practices Act (FCPA)

5.1 American and Foreign companies under the FCPA

The Foreign Corrupt Practices Act (FCPA) is a far-reaching statute which is aggressively enforced. It forbids bribing foreign government officials to gain illicit interests. The anti-bribery provision of the FCPA prohibits U.S. issuers, and their officers, directors and agents from bribing foreign officials with ‘anything of value’ to corruptly influence an official decision or to obtain a business benefit. It is illegal for companies with significant U.S. operations to bribe foreign officials in exchange for business. The FCPA imposes certain accounting requirements on foreign issuers in the U.S, which provision is designed to ensure corporate accountability. Maintaining an effective compliance programme will not only mitigate a firm’s exposure to FCPA liability, but also minimise the risk of enforcement action in case of a systematic failure to prevent a violation.

Foreign firms registered with the SEC must comply with U.S. securities laws and rules, including requirements that the issuer maintains certain books and records. The FCPA’s anti-

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110 Ronald Keith and Zhiqiu Lin, ‘Judicial interpretation of China’s Supreme People’s Court as “secondary law” with special reference to criminal law’ (2009) 23 (2) China Information 223, 256 at 224
111 Taisu Zhang, ‘The Pragmatic Court: Reinterpreting the Supreme People’s Court of China’ (2012) 25 (1) Columbia Journal of Asian Law 1, 61
bribery provisions prohibit issuers\textsuperscript{118} from giving anything of value to a foreign official for the purpose of influencing the official’s actions or decision-making.\textsuperscript{119} Designed to operate in tandem with the anti-bribery provisions,\textsuperscript{120} the FCPA requires companies whose securities are listed in the U.S. to meet its accounting provisions, requiring the company covered to

\begin{itemize}
  \item[(a)] make and keep books and records that accurately and fairly reflect the transactions of the corporation; and
  \item[(b)] devise and maintain an adequate system of internal accounting controls.\textsuperscript{121}
\end{itemize}

The issuers are responsible for ensuring that their consolidated subsidiaries and affiliates comply with the accounting provisions,\textsuperscript{122} reflecting the breadth and complexity of the FCPA’s extraterritorial reach. For instance, it is illegal for foreign issuers in the NYSE to bribe foreign officials in exchange for business,\textsuperscript{123} even if it may be common practice in China. Since the term "issuer" covers any business entity that is registered\textsuperscript{124} or required to file reports,\textsuperscript{125} a foreign firm whose American Depository Receipts (ADRs) are listed on a U.S. exchange is recognised as an "issuer", too. It demonstrates that the government has a commitment to vigorously enforce the FCPA against all international business whose conduct falls within such a wide scope.\textsuperscript{126} It is no wonder that many foreign subsidiaries of U.S. issuers based in China have been charged with conspiring to violate the FCPA.\textsuperscript{127} Although GSK is a multinational company based in the UK, its extensive holdings in the U.S. make it subject to U.S. law no matter where the bribery actually takes place. In this vein, the GSK bribes in China fall within the jurisdiction for purposes of the FCPA.

\textsuperscript{118} 15 U.S.C. § 78dd-1(a)
\textsuperscript{119} 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); 78dd-3(a)
\textsuperscript{121} 15 U.S.C. § 78m
\textsuperscript{122} SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 43
\textsuperscript{123} United States v. Statoil, ASA, 1:06-cr-00960-RJH-ALL (S.D.N.Y.2006); DoJ, ‘U.S. Resolves Probe against Oil Company that Bribe Iranian Official’ (13 October 2006)
\textsuperscript{124} <http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html>
\textsuperscript{125} 15 U.S.C. § 78l
\textsuperscript{126} 15 U.S.C. § 78o (d)
5.2 Broader Interpretation of Foreign Official

Under the FCPA, a foreign official includes any officer or employee of a foreign government or any instrumentality. The definition has been further clarified in a DoJ & SEC jointly-issued Guide that any employee of a foreign-government instrumentality, including state-owned hospitals, is a foreign official, in light of their ownership, control, status and function. Consistently, the term "state functionaries" is widely defined in China to include not only public officials, but also employees in state-owned enterprises and other state institutions and persons who perform public services authorised by the state. An entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares, minority-state-owned entities are "instrumentalities" only in exceptional circumstances. The DoJ and the SEC take an expansive view and consider doctors who are employees of overseas state-owned hospitals to be "foreign officials". According to Pfizer, government officials included doctors who held positions on registration committees and other employees of “hospitals, clinics, and pharmacies in countries with national healthcare systems.” In this regard, the majority of Chinese companies are state-owned/controlled or are instrumentalities of the government. Conceptually, all employees of state-run hospitals should fall within the remit of the term of foreign officials.

130 CCL Article 93
135 Mike Koehler, ‘Why Compliance with the US Foreign Corrupt Practices Act Matters in China’ (February) 2008 China Law & Practice 54, 56
5.3 Exceptions and Affirmative Defences

5.3.1 The Narrow Formulation of the Facilitation Payment Exception

The contours of the FCPA’s facilitating payments exception have been long debated, which provides an exception for payments made to further “routine governmental action.” It would not constitute an FCPA violation in the context of “reasonable” and “bona fide” expenditures directly related to promotional or performance functions.

One exception to the anti-bribery provisions is the ‘facilitation/grease payment’ exception, which is exempt from FCPA liability. The sole exception is for “facilitating or expediting payments” to government officials who perform “routine governmental action”, which refers to actions that are ordinarily and commonly performed by the foreign official and do not entail any decision making or discretion. It has been typically defined in terms of "non-discretionary acts," but court decisions and the statute’s terms have left significant ambiguity as to what qualifies. There is no universally accepted standard of what constitutes a permissible facilitation payment. The conception remains unclear with particular regard to how a company should treat gift-giving as a deep-rooted tradition exists in China’s cultural contexts. It is safer to reinforce the narrow formulation of the facilitation payments exception.

5.3.2 Affirmative Defences

The first affirmative defence applies where the payment at issue “was lawful under the written laws and regulations of the foreign official’s country.” Notably, common conduct, such as the

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137 15 U.S.C. § 78dd-1(b)
139 15 U.S.C. §§ 78dd-1(b) and (d)(3) [Section 30A of the Securities & Exchange Act of 1934]
140 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b)
141 15 U.S.C. § 78dd-1(3)
142 Irina Sivachenko, ‘Corporate Victims of “Victimless Crime”: How the FCPA’s Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance’(2013) 54 (1) Boston College Law Review 393, 431
145 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)
overwhelmingly pervasive practice of gift-giving, is insufficient to satisfy this requirement.\textsuperscript{146} This virtually refutes the unlawful approach in China, that is, “in Rome, do as the Romans do”.\textsuperscript{147} Despite the Chinese culture of gift-giving, Chinese law explicitly bars government officials from accepting lavish gifts.\textsuperscript{148} Second, the expenditures "will not give rise to prosecution only if they are reasonable, \textit{bona fide} and directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract."\textsuperscript{149} Regardless of the Guide, many companies are grappling to address where to draw a line between “reasonable and \textit{bona fide}” payments and those that may constitute a violation of the law.\textsuperscript{150} The FCPA contains no \textit{de minimis} for prohibited gifts or payments, including both tangible and intangible benefit.\textsuperscript{151} The applicability of the affirmative defence for reasonable and \textit{bona fide} expenditures necessarily requires a fact-specific analysis.\textsuperscript{152} In practice, DoJ and SEC have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.\textsuperscript{153} Notably, the tension between China’s aims of preventing corruption whilst not penalising modern business practices, such as legitimate corporate hospitality for a \textit{bona fide} business purpose, creates a significant grey area.\textsuperscript{154} As to the evidential requirement, a defendant bears the burden of proof that the payment falls within one of the above two categories.\textsuperscript{155} It is illustrative to look into GSK’s compliance programmes before determining whether its conduct could trigger the FCPA violations.

\textsuperscript{146} Alejandro Posadas, ‘Combating Corruption under International Law’ (2000) 10 Duke Journal of Comparative & International Law 345, 414
\textsuperscript{147} Chen Weihua, ‘Multinationals under scrutiny for corruption’ China Daily (8 September 2010)
\textsuperscript{148} CCL Article 389
\textsuperscript{151} SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (14 November 2012) 15
5.4 Compliance Programmes under the FCPA

The DoJ and SEC’s enforcement of the FCPA has been extraordinarily aggressive, which represents a primary compliance concern facing most MNCs. A competent compliance programme is usually considered as a mitigating factor in determining whether to charge a company and the extent of any penalty. The SEC & DoJ’s joint Guide provides a useful resource for evaluating an effective compliance programme, in which the enforcement agencies provide appropriate credit to corporate compliance efforts.

The Guide illustrates a roadmap of DoJ and SEC’s expectations regarding corporate compliance programmes. Both enforcement agencies have been reluctant to create a formal compliance defence, arguing that the adequacy of the procedures utilised by the company is assessed in casu in the actual process. A company may still be held liable for an FCPA violation even if it has conducted a due diligence check of a third party as part of its corporate compliance programmes. This may seem contradictory to the concept of both reasonableness and foreseeability which are firmly rooted in law of due process. Despite the lack of a guaranteed formal defence, the rigorous anti-bribery compliance programmes reduce the likelihood of acts of bribery and can serve to mitigate the severity of any penalty imposed under the FCPA. Furthermore, DoJ and SEC provide that “in a global marketplace, an effective compliance programme is a critical component of a company’s internal controls and is essential to detecting and preventing FCPA violations.”

While the Guide did not adopt an absolute compliance defence to corporate liability, it seems that SEC and DoJ are truly committed to giving meaningful credit to corporate compliance

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efforts in the FCPA context. When appropriately designed and effectively implemented, a robust compliance programme presents a real opportunity to prevent questionable conduct before it occurs. This stance is perfectly enshrined in the Guide that enforcement agencies “place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.” Even so, the Guide does not provide a bright-line rule on whether companies could use compliance programmes as a defence against criminal prosecution. Both SEC and DoJ view a company’s prompt response to the discovery and immediate self-reporting as commendable. It is imperative that companies implement robust FCPA compliance programmes which are well-designed and tailored to the companies’ specific business operations, geography and areas of corruption risk and that they are enforced.

5.5 Evaluation of the Actions of GSK under the FCPA Provisions: The Interplay between the Two Provisions?

5.5.1 Anti-Bribery Provisions

GSK’s headquarters are in the UK, but it meets the definition of an «issuer» in the US. Therefore it is also subject to the FCPA, which makes it potentially liable to penalties under the US anti-bribery laws.

Criminal penalties for violations of the FCPA have been increased, under which the anti-bribery fine for a firm was raised from $1 million to $2 million and for individuals from $10,000 to $100,000. The maximum imprisonment for bribery for an individual remained

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The FCPA also provides for civil penalties of up to $10,000 for violations of the bribery provisions. As a foreign issuer, GSK could only be subject to the FCPA’s anti-bribery provisions to the extent a “means or instrumentality of interstate commerce” were used in connection with any improper payment scheme. GSK certainly would violate the FCPA if it evinced a corrupt intent, which includes conscious disregard and deliberate ignorance. The term of “knowing” is defined broadly as basically being aware that a payment will raise red flags and not taking any avoidable measures. In this case, GSK knowingly gave cash and some other monetary incentives to state-owned hospitals, and kept the money in its coffers rather than truthfully recording it in its accounts. GSK could, on principle, be criminally liable for bribing doctors. Despite China’s pervasive customary gift-giving, GSK could not refer to the affirmative defence that “its payment is lawful under the laws of the foreign country”, because China criminalises the kind of payment identified as bribery.

### 5.5.2 Accounting Provisions

The ‘Books and Records and Internal Control” FCPA provisions, together known as the accounting provisions, are enforced by the SEC and apply to any company listed on a U.S. stock exchange. The Guide makes it clear that an issuer’s books and records include those of its consolidated subsidiaries and affiliates. Thus, GSK’s obligations under the FCPA extend to ensuring that its consolidated subsidiaries and affiliates in China comply with the FCPA’s accounting provisions. Since bribery is often disguised on a company’s books and rerecorded through mischaracterisation, GSK should under the accounting provisions of the FCPA have ensured that costs and expenses had been accurately recorded in the company’s books and

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173 15 U.S.C. § 78dd-2(g)

174 The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq; Issuers refer to a company listed on a securities exchange in the U.S. either Stock or American Depository Receipts, or the company’s stock traded in the over-the-counter market in the U.S.


176 15 USC §§ 78dd-1(o)(2)(A)


180 CCL Article 389

181 15 U.S.C.§ 78m

records which fairly reflected the issuer's transactions. Failure to maintain accurate books and records may result in both civil and criminal liability. Engaging in systemic efforts to falsify its corporate books and records and knowingly failing to enforce and circumventing existing internal control would violate the accounting provisions.

Notably, a payment that does not violate the anti-bribery provisions may nonetheless violate the accounting provisions if inaccurately recorded or attributable to an internal control deficiency. In reality, the accounting provisions may provide a secondary offence for prosecution charges, and violations thereof may include commercial bribes that would typically fall outside of the 'foreign official' caveat otherwise needed for liability. Accounting provisions violations may result in fines of up to $25 million for a company, and $5 million and/or imprisonment of up to 20 years for culpable individuals. Thus, in theory, the SEC could invoke the accounting provisions against GSK for bribery of its Chinese subsidiary, because the payments were not accurately and sufficiently recorded, and because GSK and its subsidiary lacked reasonable controls to prevent, detect or correct such corrupt conduct. In order to limit legal exposure, it is imperative for GSK to implement and enforce an effective compliance programme. Charges by the Chinese MPC potential charges by the DoJ and SEC could, if proven, put GSK also at risk of prosecution under the Bribery Act of 2010 in the UK.

6 The Anti-Bribery Framework in the United Kingdom: The UK Bribery Act

6.1 A New Strict Liability Corporate Offence

The UK Bribery Act 2010 represents a most significant reformulation of the UK's anti-bribery laws. It adds a set of compliance requirements parallel but not identical to those of the FCPA.

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183 Section 13(b) (2) (A) of the Securities Exchange Act of 1934 [15 U.S.C. §78m]
that affect MNCs doing business overseas.\textsuperscript{191} To invoke a defence, a company must have adequate procedures in place designed to prevent persons associated with it from committing bribery.\textsuperscript{192} Unlike the controversial exception under the FCPA, there is no exemption for facilitation payments which can constitute bribery of another person,\textsuperscript{193} or bribery of a foreign public official\textsuperscript{194} and can trigger the failure to prevent bribery offences.\textsuperscript{195}

The Bribery Act 2010 creates a new criminal offence for failure to prevent bribery by a person associated with the organisation, which aims to be an even more stringent anti-bribery act than the FCPA.\textsuperscript{196} The UK Bribery Act 2010 makes it illegal to either pay or receive an advantage to/from another person with the intent to:

\begin{itemize}
\item[i)] induce a person to perform improperly a relevant function or activity,\textsuperscript{197}
\item[ii)] reward a person for the improper performance of a relevant function or activity.\textsuperscript{198}
\end{itemize}

The Bribery Act 2010 essentially makes it a criminal offence for a person to bribe a foreign public official,\textsuperscript{199} which also applies to a company associated with a person who bribes.\textsuperscript{200} Bribes carried out by third party associates may not constitute grounds for a defence of ignorance by the covered company because it may be assumed that such a company will have appropriately vetted its partners before engaging in business.\textsuperscript{201} Prosecutors do not have to demonstrate prior knowledge, or ‘corrupt intent’ on the part of the company or its officials to charge them under the Bribery Act 2010.\textsuperscript{202}


\textsuperscript{192} BA 2010 s7(2); Michael W. Johnson, ‘The UK Bribery Act and Beyond–Preparing for Change’ The World Financial Review \texttt{<http://www.worldfinancialreview.com/?p=244>}

\textsuperscript{193} BA 2010 s1

\textsuperscript{194} BA 2010 s6

\textsuperscript{195} BA 2010 s7

\textsuperscript{196} BA 2010 s7

\textsuperscript{197} BA 2010 s1 (1) (b) (i)

\textsuperscript{198} BA 2010 s 1 (1) (b) (ii)

\textsuperscript{199} BA 2010 s6

\textsuperscript{200} BA 2010 s7


The Bribery Act 2010 does not include a carve-out for facilitation payments, which, although exempt from the FCPA, are prohibited under the Bribery Act 2010. The Serious Fraud Office (SFO) Guidance reaffirms the zero tolerance approach to facilitation payments irrespective of their size and frequency. Nevertheless, reasonable corporate hospitality is not something that is prohibited. *Bona fide* hospitality, promotional or other legitimate business expenditure is recognised as an established and important part of doing business. Notably, bribes may sometimes be disguised as legitimised business expenditure. Any concerns about criminalising reasonable corporate hospitality would be addressed in the prosecutorial discretion. A broad test used is: whether it is likely to influence someone to make a decision that they might not otherwise make.

The anti-bribery enforcement actions often involve overseas third parties making improper payment on behalf of a company. Potential liability of GSK under the UK Bribery Act 2010 results from its extraterritorial effect, the extent to which GSK has instigated a review of all third party relationships appears vital. Any company, wherever incorporated, which “carries on a business, or part of a business” in the UK falls within the Bribery Act’s remit. A corporate offence can be committed irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere. Prosecutors will be able to tackle the overseas operations of any company that conducts commerce in the UK, seeking unlimited fines for those suspected of bribing foreign public officials or buying influence of commercial counterparts and pursuing company executives with the threat of up to 10 years in prison.

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204 Ministry of Justice, ‘The Bribery Act 2010 Guidance’ (March 2011)
205 SFO & DPR, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*
206 SFO, *The Revised Policies on Facilitation Payments, Business Expenditure (Hospitality) and Corporate Self-Reporting (9 October 2012)*
207 ‘Letter from Lord Tunnicliffe to Lord Henley, House of Lords, (14 January 2010)’
211 BA 2010 s7(5) (a)
212 BA 2010 s12(7)
213 BA 2010 s11(1)(b)
6.2 Statutory Defence to the Corporate Offence: Law in Place ≠ Law in Practice

The Bribery Act 2010 contains the strictest laws against corruption, but enforcement has been minimal since it was passed in 2010.214 Arguably, it consists of a safe harbour provision for a corporation, that is, it has instituted in place “adequate procedures” to prevent such bribes from occurring.215 A company will not be liable if it can prove, on the balance of probabilities, that adequate procedures were in place to prevent persons associated with the company from paying bribes.216 This is in contrast to the U.S. approach where compliance procedures are evaluated as part of the charging process, not as a defence.217 The statutory defence appears to soften the envisioned “strict liability” for all company operations.218 It seems that by putting such an affirmative defence in place, companies may well go down the paper compliance defence route and not dedicate the time and resources to make it compatibly effective.219

In respect to the charges against GSK in China, an irrefutable point is that GSK admittedly has not followed its own stated protocols.220 GSK may try to defend itself by attributing to its compliance which has been challenged by the scale of the company's growth in China.221 If GSK could prove that it "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct",222 it could escape a criminal prosecution, although this is quite a high hurdle to overcome. It remains ambiguous as to what "adequate procedures"223 can be put in place as a defence against the corporate offence of failing to prevent bribery. Even so, a prerequisite condition for GSK to rely on the statutory

215 BA 2010 s7(2)
216 SFO & DPP, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions <http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/>
217 Howard Sklar, ‘Against an FCPA Compliance Defence’ Forbes (18 October 2011)
219 Thomas Fox, ‘GlaxoSmithKline and the Death Knell for the Compliance Defence’ Corporate Compliance Insight (25 July 2013)
222 BA 2010 s7(2)
223 BA 2010 s7(2)
defence is that it must prove that GSK has not only put adequate procedures in place, but also has effectively enforced them.224

7 GSK’s Dysfunctional Internal Compliance Regimes

7.1 Internal Compliance Mechanism: A Code on the Books but Not in Practice

MNCs usually have strict internal controls, such as limits on gift value to doctors, entertainment fees, or a number of days limit for organising overseas trips for doctors so that gift giving or entertaining is not defined as bribery.225 Indeed, GSK’s Code of Conduct states explicitly that:

“The GSK attitude towards corruption in all its forms is simple: it is one of zero tolerance, whether committed by GSK employees, officers, complementary workforce or third parties acting for or on behalf of the company... GSK has an active system of internal management controls to identify company risks, issues and incidents with appropriate corrective actions taken...provides the framework for these internal controls, to ensure significant risks are escalated to the proper levels of senior management.” 226

The above code should, in principle, be aimed at identifying potential compliance risks with embedded preventive measures before serious problems arise, such as massive fines, long-running monitorships and harm to reputation.227 Assumingly, the compliance programme could enable the company to detect wrongdoings in response appropriately to flagrant and systematic bribery. 228

In reality, GSK HQ received information about widespread bribery in China in January 2013. However, just a week before the Chinese government detained the GSK employees, GSK HQ official stated that they had investigated and found no evidence of bribery and corruption.229

225 Xinyuan Wang, ‘Pharma Giant GSK Investigated for Bribery’ Global Times (12 July 2013)
229Kathrin Hille and John Aglionby, ‘China Accuses GlaxoSmithKline of Bribing Official over Prices’ Financial Times (11 July 2013)
Many UK companies would not stand detailed scrutiny should they be investigated. Much worse, they are notoriously defensive in response to any claim, challenge or allegation. The structural inefficiency ensures much time and energy is expended and heavy costs incurred trying to maintain an artificial separation “on the books” for what is, in reality, a single organization. As sophisticated as they are, such an internal compliance mechanism is in place, but surprisingly futile. GSK found no evidence of wrongdoing after completing a four-month investigation into a whistle-blower’s claims of corruption and bribery, which clearly indicates a lack of immediate remediation in response to an emergent crisis. GSK should have ensured that it had implemented effective anti-bribery compliance systems. However, GSK has not adequately addressed applicable anti-bribery and corruption rules, neither has it conducted an adequate anti-bribery risk assessment.

7.2 The Corporate Rogue Employees Defence to FCPA Liability

As an additional enforcement tool, a non-prosecution agreement (NPA) has been used in connection with Morgan Stanley’s anti-bribery efforts. SEC and DoJ have declined to pursue charges against the company, where one of its executives “used a web of deceit” to evade the investment bank’s efforts to maintain adequate anti-corruption internal controls. The case involved a Chinese state-owned enterprise (SOE), which is at the heart of a growing number of

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230 Dezan Shira, ‘Why Corruption is Inevitable in China’s Pharmaceutical Industry’ Caijing (25 July 2013)


235 SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 56-58, 61; DoJ, ‘Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA’ (25 April 2012) <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>; SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (25 April 2012); The compliance programmes included “a robust compliance department with direct reporting lines to Morgan Stanley’s Board of Directors; significant compliance training for Asia-based personnel; regular monitoring and auditing of particular transactions, employees, and business units; extensive due diligence for all new business partners; annual employee certifications regarding adherence to Morgan Stanley’s code of conduct; and a regular review and update of the compliance program.”
FCPA enforcement actions.\(^{236}\) Peterson, a former managing director based in Shanghai, bribed a Chinese government official to illegally win business. Peterson has been characterised as a “rogue” employee, whose deceptions circumvented Morgan Stanley’s robust internal control. Ignoring his fiduciary duties, Peterson made every effort to enrich himself and the Chinese government official millions of dollars through a matrix of off-shore shell companies and unknown payment by Morgan Stanley. The SEC and DoJ found no wilful blindness on the part of Morgan Stanley. Given the bank’s adequate compliance programme, along with its voluntary disclosure of the misconduct and cooperation with the U.S. government’s investigation, no FCPA enforcement action has been taken against the bank. This decision has profound implications for cases involving executives and foreign officials charged with FCPA violations, which is also instructive for multinational companies in several respects.

In Peterson, a rigorous compliance programme protected Morgan Stanley from the actions of an employee that violated the FCPA.\(^{237}\) Self-reporting has particularly been one of the significant factors weighted in the agencies’ exercise of prosecutorial discretion. Morgan Stanley had maintained a system of internal controls and enforced its anti-bribery polices consistently, which provided reasonable assurances that its employees were not bribing government officials.\(^{238}\) DoJ and SEC gave the bank unusual credit for its longstanding and comprehensive FCPA compliance programmes, voluntary reporting of the matter and its extensive cooperation with the agencies’ investigations. It should be noted that “the existence and effectiveness” of the compliance program, and “the company's remedial actions”, where the source of credit.\(^{239}\)

In April 2012, the DOJ charged Peterson with violations of the FCPA’s anti-bribery provisions.\(^{240}\) Peterson pled guilty to one count of conspiring to circumvent the system of internal controls that the bank maintained to prevent violations of the FCPA.\(^{241}\) The SEC also charged him with violating the FCPA and securities laws for investment advisors.\(^{242}\) The Peterson settlement with the SEC included surrendering a $3.4 million interest in Shanghai real estate and $250,000 in damages, a permanent bar from the securities industry and 9 months in a U.S.


\(^{237}\) Laura Fraedrich and Jamie A. Schafer, ‘What Is In It For Me: How Recent Developments in FCPA Enforcement Affect the Voluntary Disclosure Calculus’ (2013) 8 (9) Global Trade and Customs Journal 257, 264

\(^{238}\) DoJ, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (25 April 2012) <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>


\(^{240}\) Section 13(b) (5) of the Securities Exchange Act of 1934, et al

\(^{241}\) United States v. Peterson, Cr. No. 12-224 (JBW) (E.D.N.Y. April 25, 2012)

\(^{242}\) SEC v. Peterson, No. 12-2033 (JBW) (E.D.N.Y. April 25, 2012)
due to the bank’s robust and well-enforced system of internal controls, neither the DoJ nor SEC charged Morgan Stanley itself, highlighting the bank’s effective ethics and compliance programme as the primary basis for the decision. This provides a perfect example to confirm the value of well-formulated and meticulously implemented corporate compliance policies in deflecting the results of FCPA enforcement actions at the entity level.

The assessment of risk is fundamental to developing a strong compliance programme. The compliance programme is designed to effectively mitigate against violations, along with its rigorous periodic review. Paradoxically, it would be difficult to monitor all sales practices. No compliance program can ever prevent all criminal activity by a corporation’s employees. There will always be employees who decide to take matters into their own hands, and even the best compliance program may not stop fraud or corruption from occurring. Morgan Stanley not only discovered the violations and reported it, but also cooperated fully in the investigation by the SEC and DoJ. It is the bank’s pre-existing ethics and compliance programme that made a decisive difference for the DoJ and SEC not to prosecute it. This case underscores the importance of establishing adequate and effective internal anti-bribery controls for global companies in protecting both the entity and individual personnel from such enforcement. The Morgan Stanley case illustrates that an effective compliance program can provide companies facing FCPA enforcement actions with tangible benefits in the form of a more favourable settlement term.

Could the Morgan Stanley rule apply to GSK? Enforcement agencies can give meaningful credit to a company which in good faith applies a comprehensive and risk-based compliance programme, on the condition that the company did devote greater resources in higher-risk

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243 Section 15(b) (4) (C) of the Exchange Act, 15 U.S.C. §78o; A court injunction allows the SEC to permanently bar a defendant from the securities industry, if it finds such sanction in the public interest; 30A(g) and 13(b)(5) of the Securities Exchange Act of 1934; Investment Advisers Act 1940 s206(1) (2); SEC, ‘SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud’ (25 April 2012) <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702>


areas, such as China. In this vein, the quality and effectiveness of the compliance programme plays a vital role for the agencies to determine whether the company could be given credit despite a confirmed violation. It remains uncertain as to whether GSK could use the defence against the failure to prevent the actions of its employees in China. GSK may raise a defence by showing that it has taken reasonable steps to prevent wrongdoing, although it is ultimately powerless if somebody really wants to break the law.

GSK seems to have adequate systems in place for supervising adherence to those rules. The practical challenges of effectively implementing such programmes, however, should not be underestimated. It appears that having a best practices compliance program without effective implementation did not lead to GSK doing business more ethically. As stated above, GSK conducted a four month internal investigation which yielded no evidence of bribery. This is indicative of a dysfunctional compliance system. GSK may encounter two challenges: proving rigorousness of its earlier investigation and giving reasons why the internal procedures failed to detect the flagrant and systemic violations. The likely inability to meet the first challenge and excusing the resulting inaction will make GSK vulnerable to enforcement action by the UK’s Serious Fraud Office (SFO) and the U.S. Department of Justice (DoJ) and Securities Exchange Commission (SEC), both of which can levy severe penalties under their sweeping anti-bribery laws, i.e. Bribery Act 2010 and the FCPA.

While the authorities have discretion, it is more likely in the public interest to prosecute cases where there has been a systemic and major breach of corruption laws. After all, a parent is liable for bribery by a subsidiary’s employees on the ground that it has sufficient knowledge and control of its subsidiary’s actions. Since GSK has confessed to authorising and participating

251 Irina Sivachenko, ‘Corporate Victims of "Victimless Crime": How the FCPA’s Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance’(2013) 54 (1) Boston College Law Review 393, 431
254 BA 2010 s7; 15 U.S.C. § 78dd-l(a): Issuers include (i) companies that have securities registered on a national exchange or listed on the NASDAQ or (ii) that are required to file reports under section 15(d) of the Exchange Act 15 U.S.C. § 78m.; SEC and DoJ, Resource Guide to the U.S. Foreign Corrupt Practices Act (14 November 2012) <http://www.justice.gov/criminal/fraud/fcpa/guidance/> and <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> §10: The Guide explains when a company is an “issuer” for purposes of the FCPA: the company is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or the company’s stock trades in the over-the-counter market in the United States and the company is required to file SEC reports.
in systemic bribery in China, it will have more difficulty in proving that it had sufficient controls to prevent corruption. It appears that GSK has knowingly and wilfully failed to implement anti-bribery compliance measures and reaped financial gains from prohibited activities. For its lack of due diligence, GSK could be held liable for failure to oversee its subsidiary.

8 Make Global Compliance Programmes Compatible in China

8.1 Challenges Arising from Jurisdictional Gaps

In the new era of growing international enforcement, many MNCs have been involved in long-running FCPA investigations covering multiple locations around the world. The increased cooperation between foreign governments will further expose companies to potential liability in multiple jurisdictions. It is never enough to emphasise the significance of implementing adequate and effective compliance programmes. Despite the Bribery Act 2010 and FCPA’s extraterritorial reach, the anti-bribery laws may not put Anglo-American companies at a disadvantage. Instead, the tough anti-bribery laws may help them compete in China. The Western firms would gain a reputation for not paying bribes, which ultimately reduce costs for all concerned.

257 CCL 2011 Article 390 (2): Self-disclosure may lead to a more favourable settlement with enforcement agencies. GSK could benefit from leniency measures linked to voluntary disclosure given its full confession of bribes.


260 Drury D. Stevenson and Nicholas J. Wagoner, ‘FCPA Sanctions: Too Big to Debar?’ (2011) 80 (2) Fordham Law Review 775, 820


263 Bob Davies, ‘When the Anti-Corruption Official Comes Calling’ The Wall Street Journal (8 February 2012)


its subsidiaries.266 It remains questionable how GSK has localised its global anti-bribery compliance programmes in China.

Given the extent of GSK’s systemic and egregious malpractices, China and the U.K. would seem to have a greater and more direct interest in the conduct at issue compared to the U.S. Accusations by the Chinese Ministry of Public Security (MPS), the American DoJ and SEC could, if proven, put GSK at risk of prosecution by U.K. authorities under the Bribery Act 2010 at home, despite its incorporation and the bribes that have taken place in China. The UK, U.S. and China are parties and are subject to the United Nations Convention against Corruption (UNCC),267 which, among other things, stipulates legal and investigative cooperation in combating bribery. The start of the first such parallel investigation indicates that China may be embarking on a more active and cooperative path.268 Most MNC’s holdings and business are under the jurisdiction of the FCPA, the Bribery Act, and China’s anti-corruption laws.269 The FCPA only prosecutes against the bribery of foreign officials, although the definition of ‘foreign official’ remains very vague,270 but under Chinese and British laws, an MNC’s senior executives could also be charged for accepting bribes.271 It should be noted that a corporate compliance policy which has satisfied the FCPA may not be sufficient for compliance with the U.K. adequate procedures guidance published by the SFO.272 It is likely that the GSK case will set a precedent for the future interplay of multinational anti-corruption law.273 It remains to be seen whether China enforcement agencies will draw on the wealth of bribery evidence and admissions generated in most DoJ, SEC and SFO enforcement actions, or vice versa, and whether GSK marks the establishment of a cross-border anti-corruption cooperation, which may render it possible to exchange bribery evidence between the enforcement agencies. It is worth

268 Henry Chen, ‘Pharma bribe probe points to China parallel prosecutions’ FCPA Professor Blog (11 July 2013)
269 Emily Flitter and Ben Hirschler, ‘Exclusive: U.S. Prosecutors Add China Bribe Allegations to GSK Probe’ Reuters (6 September 2013)
271 BA 2010 s1; SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 8; CCL Article 385
looking into an intriguing question as to whether the multiple enforcement agencies will at some point develop coordinated enforcement program and share information about their respective investigations.274

8.2 Risk-Based Due Diligence on Overseas Third Parties and Subsidiaries

8.2.1 Keep Abreast of China’s National Prioritised Objective in a Political & Judicial Context

Operating in China generally entails the use of local partners and agents, whose dealings with the government officials are typically not in the foreign investor’s hand but lie within the Chinese partners.275 In the increasingly complicated environment, the majority of prosecutions and enforcement actions involve corrupt payment made indirectly through intermediaries.276 Due diligence efforts should be conducted on a regular basis, which may help detect and deter the third parties’ misconduct.277 GSK illustrates the importance of recognising red flags associated with third-party intermediaries and embracing more sophisticated compliance mechanisms.278

The allegations against GSK came at a time when regulators were reviewing the prices and production costs of major Chinese and global drug companies in what appeared to have been an effort to lower drug prices.279 Such a kind of approach is normally politically-driven, at least, implicitly. This holds particularly true in China’s health-care sector that is mired in systemic and pervasive corruption,280 which is deemed as a major impediment to government health-care reform initiatives. The Chinese healthcare reform is accompanied by a shifting regulatory regime as new laws and decrees take effect against bribery.281 The growing drug costs appear to have provided the Chinese government with the motivation to widen the probe into the

279 Natasha Khan, ‘China Probes 60 Drug-makers in Effort to Curb Drug Prices’ Bloomberg (5 July 2013)
281 Benjamin Shobert and Damjan DeNoble, ‘Compliance after China’s Healthcare Bribery Scandals’ China Business Review (10 October 2013)
activities of multinational pharmaceutical giants. The case of GSK indicates that the drug giant lacks proper sensitivity in China’s current political and judicial context and ignores the policy and economic repercussions of anti-bribery regulations. Apparently, China is currently prioritising the issue of addressing the problems relating to the disproportionally high prices of pharmaceutical products as well as infant milk with world-known brands. Unfortunately, GSK has failed to respond properly to this national campaign targeting relevant foreign MNCs. The accusation against GSK reflects, again, the long-standing issues of serious deficiencies of multinationals’ strategies of localisation.

8.2.2 Cultivate A Culture of Compliance

An MNC is expected to comply with applicable laws and regulations of each jurisdiction where it operates and promote a culture of high ethical standards in addition to legal compliance. It is essential for MNCs to take active steps to maintain a strong compliance culture, which will maximise the chances of addressing problems internally and solving them before they become serious. A proper “tone at the top” should include unambiguous communication from senior management about the compliance requirements that is “scrupulously followed” and disseminated throughout the organisation. The Guide specifically obligates senior management to set a strong, ethical culture, "inspire" their colleagues to adhere to that culture, and articulate the procedures and standards that underpins that culture. Such a culture should encourage "ethical conduct and a commitment to compliance with the law" and help "prevent, detect, remediate, and report misconduct." However, the as discovered relating to

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283 U Myint, ‘Corruption: Causes, Consequences and Cures’ (2000) 7 (2) Asia-Pacific Development Journal 33, 58


the bribery prosecution of the Ministry of Public Security concern may be raised that a culture of compliance may not be as strongly embedded in GSK, or, at least, such a culture is not perceived as strongly embedded.\footnote{291}

8.2.3 **Corrupt Payment by Intermediaries of Subsidiaries: Parental-Subsidiary Liabilities**

With regard to parentsubsidiary liability, a subsidiary's actions are imputed to the parent if an agency relationship exists.\footnote{292} A long-standing issue always turns on whether the officers and agents of the parent had control over the actions of the subsidiary.\footnote{293} There is an increased trend that parent companies will be held responsible for the actions of local employees and partners.\footnote{294} Foreign subsidiaries are a frequent source of concern for companies subject to the FCPA, although it remains to be clarified about the issues of liability for minority-owned entities in which a parent may have a substantial stake, but no ostensible control.\footnote{295} An increasingly common issue concerns the appropriate degree of oversight that a parent issuer is required to exercise over a minority-owned subsidiary.\footnote{296} Enforcement agencies may consider the formal relationship between the two entities as well as the "practical realities of how the parent and subsidiary actually interact."\footnote{297} Despite the seminal doctrine of the separate legal entity and piercing the corporate veil,\footnote{298} parent companies are likely to be held responsible for the actions of local employees, which underscores the importance of due diligence on

\footnote{291 Glenn Engelmann, John Kocoras et al., 'Observation on a Milestone Bribery Investigation and Increased Security of Foreign Companies in China' \url{<http://www.mwechinalaw.com/news/2013/cla0713b.htm>}
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prospective third parties.\textsuperscript{299} In China’s more increasingly complicated business environment, foreign MNCs must strengthen their efforts in due diligence and transparency to ensure that ethics at the corporate level are translated to ground floor business practices.\textsuperscript{300}

8.2.4 Localise GSK’s Global Compliance Programmes

Global compliance measures superimposed on China’s unique business environment are not enough.\textsuperscript{301} Foreign MNCs should truly localise their global compliance programmes to specifically address their local operations in China. Thus, having a robust home compliance programme makes limited sense, unless it is effectively compatible in China’s social and legal settings.\textsuperscript{302} GSK should always be aware of the degree of risk attributed to particular locations, like China, where an agent may present bigger risks for GSK than the same type of agent in another country.\textsuperscript{303} A truly effective compliance program for China needs to be one that identifies and addresses the issues arising out of local business and legal culture.\textsuperscript{304} Such efforts are helpful in minimising risk and potential consequences, including reputational damage. MNCs operating in China should understand the potential consequences of alleged violations of the Chinese anti-bribery laws, regularly assess their risk profile, and highlight hallmarks of adequate compliance programmes to account for local variations in enforcement standards.\textsuperscript{305} An effective compliance programme “constantly evolves” to reflect the changes to the company’s business over time, including changes to the environment in which the company operates, the nature of its customers and the laws that govern the company’s actions.\textsuperscript{306}

\textsuperscript{299} Jennifer Quartana Guethoff, Marie-Josée Bérubé, et al., ‘Good Practice Guidelines on Conducting Third-Party Due Diligence’ (Geneva, Switzerland, World Economic Forum, 2013)

\textsuperscript{300} Ron Cai, Jeffrey B. Cooper smith and Elizabeth Chen, ‘Chinese Probe Into GSK—Media Reports and Legal Analysis’ (29 July 2013)

\textsuperscript{301} SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 63


\textsuperscript{303} Wendy Wysong, ‘Third-Party Intermediaries in China: Mitigating A Necessary Risk’ Corporate Compliance Insights (29 August 2011)

\textsuperscript{304} Glenn Engelmann and John Kocoras, ‘Observations on a Milestone Bribery Investigation and Increased Scrutiny of Foreign Companies in China’ McDermott Will & Emery China Law Alert (26 July 2013)

\textsuperscript{305} SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 8, 52, 57

Most significantly, GSK should consider undertaking more due diligence to ensure that existing compliance programs are properly implemented in China.\textsuperscript{307} It is paramount to have a robust compliance program covering all critical functions, including sales and marketing personnel as well as legal compliance.\textsuperscript{308} Sales in the UK through legal and compliant channels may warrant less scrutiny from a compliance program than GSK’s deals in China, by way of engaging those high-risk Chinese third party sales agents.\textsuperscript{309} The risk-based compliance approach is only effective if the company in question is realistic about the locale in which it is dealing.\textsuperscript{310} GSK should have devoted more resources, like increasing its budgets, to ensuring compliance with the anti-bribery laws and regularly assess risks and to review and update their policies to reflect evolving best practices.\textsuperscript{311}

8.2.5 Overseas Third Parties: Identify “Red Flags”

“Red Flags” are simply warning signs that a violation may have occurred or may be about to occur.\textsuperscript{312} Since third parties are commonly used to conceal the payment of bribes to foreign officials,\textsuperscript{313} the requisite level of scrutiny of a prospective third party depends on the “red flags” identified through the due diligence process.\textsuperscript{314} Both the FCPA and Bribery Act 2010 impose liabilities on companies for payments made by any third parties acting on its behalf, even if the company was not aware of the third party’s conduct.\textsuperscript{315} It is indispensable to have periodical, thorough due diligence reviews of third-party business partners, including but not limited to: agents, distributors, consultants and travel agents. Mere negligence is insufficient to impose


\textsuperscript{308} Dezan Shira, ‘China’s Criminal Law Tackles Bribery of Foreign Officials’ Caijing (5 August 2013)


\textsuperscript{313} Emily N. Strauss, ‘Easing Out” the FCPA Facilitation Payment Exception’ (2013) 93 (1) Boston University Law Review 235, 273


\textsuperscript{315} Margaret Ryznar and Samer Korkor, ‘Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing’ (2011) 76 (2) Missouri Law Review 415, 453
liability under the statute's third-party payment provision.\(^{316}\) However, proof of conscious avoidance, wilful blindness, and deliberate ignorance are sufficient to satisfy the third-party payment provision's knowledge requirement.\(^{317}\) There should be policies and procedures relating to the risks associated with third parties, including the capacity for ongoing monitoring and the ability to address any "red flags" that may surface during the course of the third party relationship.\(^{318}\)

Individual companies have different compliance needs and there is no "one-size-fits-all" formula to an effective model, but a "common-sense and pragmatic approach to evaluating compliance programs."\(^{319}\) This leaves it to the company to determine what reasonable internal controls are. An effective compliance program is one that is appropriately tailored to meet the needs of the company. The adequacy of a company's compliance "staffing and resources" depends on the "size, structure, and risk profile of the business."\(^{320}\) GSK's compliance programme must be tailored to the size and nature of the business and the particular risks associated with its global location. GSK should have evaluated what type of compliance programme would fit it best.

Due to the failure to conduct due diligence on the agent responsible for the bribes, GSK must identify high-risk activities while concentrating compliance efforts on mitigating potential violations of law.\(^{321}\) Emphasising a risk-based approach, GSK may need to tailor its programme to take into account its size, product and sensitivity with a particular regard to high-risk areas with "red flags".\(^{322}\) When the "red flags" were raised, GSK had an affirmative duty to investigate the suspicious circumstances and took steps to determine whether the anti-bribery laws have been violated. If red flags cannot be justified, GSK may run the risk of having had knowledge that would make the bribery a violation of anti-bribery laws.\(^{323}\) A mere declaration of its innocence would not insulate it from liability. In the wake of the US and Chinese

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\(^{321}\) Dean Giampietro, 'FCPA and UK Bribery Act Updates: Whistleblower Effects' Whistleblower Security (13 June 2013)


\(^{323}\) Emily Flitter and Ben Hirschler, 'Exclusive: U.S. Prosecutors Add China Bribe Allegations to GSK Probe' Reuters (6 September 2013)
governments’ increasingly rigorous stance on enforcement, foreign multinationals should act with more caution in dealing with their foreign agents and business partners.324

9 Conclusion

The recent enforcement of Chinese anti-bribery laws against GSK highlights the compliance challenges faced by foreign companies operating in China and the importance of the maintenance of high legal and ethical standards. Critical to a compliance programme is making integrity and ethics a part of the overall evaluation process, which provides incentives for compliance. GSK represents China’s highest profile bribery investigation of a foreign company since the new bribery rules came into effect in 2013, reflecting broad concerns about the challenges of doing business in China. As a milestone for Chinese agencies to impose far more rigorous enforcement of analogous anti-bribery laws, it is advisable that MNCs should not underestimate the implications of China’s willingness to subject foreign companies to bribery prosecutions.

GSK sends a strong message of deterrence to domestic and foreign actors, and improves China’s overall anti-corruption standing in the world. GSK has a particular far-reaching impact on the pharmaceutical firms, which are expected to re-examine their internal controls and be more legally compliant. It is also imperative that foreign MNCs implement robust anti-bribery compliance programmes which are well-designed and tailored to the companies’ specific high-risk areas. More meaningfully, the first parallel GSK case may set a precedent for the future interplay of multinational anti-bribery law. Given that the Bribery Act 2010 and China’s laws are relatively untested, the landmark case serves an instrumental role in demonstrating how the transnational criminal codes apply to real world issues. In the increasingly complicated environment of multinationals and their foreign subsidiaries, MNCs must strengthen efforts in due diligence to ensure that ethics at the global corporate level are translated to ground floor business practices.

324 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (2011)