



世民律師事務所 SHIMIN LAW OFFICES

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GSK Executives are Under Investigation by China's MPS for Serious Economic Crimes

On July 11, 2013, the Chinese Ministry of Public Security (the "MPS") stated on its official website that several senior executives of GlaxoSmithKline China Investment Co., Ltd. ("GSK") are under investigation for serious economic crimes. The main content is as follows:

Based on clues provided by the relevant authorities, under the unified command of the MPS, the police forces in Shanghai, Changsha and Zhengzhou are currently investigating senior executives of GSK for serious economic crimes.

The MPS has found that, during its operations in China, GSK has paid bribes either in the form of project sponsorship or directly to government officials, medical industry associations and foundations, hospitals, and doctors in order to expand its sales channels and raise the prices of its medicine. The briberies were carried out through various channels, such as travel agency. GSK is also alleged to be involved in tax crimes

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such as falsifying VAT invoices and colluding with travel agencies in writing fake invoices. The violations lasted a long period of time and involved a large amount of money and many individuals.

According to the statement of the MPS, some GSK senior executives are alleged to have taken advantage of their positions to accept bribes in the forms of discounts or project perks through travel agencies.

A number of GSK executives and travel agencies are currently under criminal investigations by the MPS. The suspects candidly confessed their crimes after the preliminary interrogation. The case is still under further investigation.

According to the reports from domestic and foreign media, such as BBC China, facts of the case are as follows:

I. Alleged violations:

GSK China is suspected to have offered bribes to certain government officials, medical industry associations and foundations, hospitals and doctors in the amount of 3 billion RMB through 700 travel agencies in the past 6 years.

GSK China and its staff are suspected to have accepted discounts or perks from travel agencies.

II. Coercive measures by MPS

(I) Suspects under detention or arrest include:

- i. A British officer whose relationship with and position in GSK remain unknown;
- ii. Ten Chinese officers, including:

Four senior executives, whose positions are Vice President and Operations Manager, Vice President and Human Resource Director, Director of Legal Affairs, and Manager of Business Development;

iii. At least ten consultants whose detailed positions remain unknown.

(II) Departure Restrictions

A British senior executive (Chief Financial Officer) was restricted to leave China by the MPS.

III. Possible crimes:

(I) Receipt of Bribery by Non-Governmental Employees

Compliance and Corporate Governance

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- (II) Offering of Bribes to Non-governmental Employees
- (III) Offering of Bribes
- (IV) Falsification of VAT Invoices

In addition, GSK is suspected of being involved in enterprise bribery. The table in the Appendix shows possible enterprise and individual crimes that GSK and its executives may be charged with.

The MPS will likely focus on the following key areas in order to ascertain the criminal liabilities:

- (I) Corporate governance and its implementation;
- (II) Division of responsibilities and its implementation;
- (III) Specifics of the planning, organization, directing and approval of illegal activities;
- (IV) Roles played by the suspects in the case; and
- (V) Purposes of relevant parties and actual beneficiaries

Although media reports are the only source of information so far, the statements made by the MPS and the Ministry of Commerce demonstrate the government's strong determination and decisive action to combat corruption.

Firstly, the targets of the anti-corruption campaign are not limited to government officials. Those who served in companies and industry associations, especially in the industries which are closely related to people's daily life, will also be key targets of this campaign.

Secondly, according to statements by the MPS, the sources of clues have expanded from internal reporting to the exchange of information between governmental departments. Although bribes are usually conducted furtively, the relevant cash transfers will leave a trace on the financial statements that is impossible to conceal. Because the tax authorities and industrial and commercial authorities have access to enterprises' financial data, thorough analysis and comparison will likely allow them to discover problems.

Companies must realize the government's severe sense of crisis and strong determination to crush down on bribery. The GSK case should not be viewed as an isolated instance. Rather, it is an inexorable trend that China will intensify the fight against commercial bribery in order to answer the public outcry and to establish a standardized and orderly market economy. In 2006, the State Council founded the Central Leading Group (the "Group") for Commercial Bribery Control whose duty is to coordinate and manage nation-wide fight against commercial bribery. Twenty relevant departments, such as the Bureau of Taxation, the Bureau of Industry and Commerce, and the Ministry of Justice, joined in the Group. The Group defined six areas as the key areas of the anti-corruption campaign. These areas are: purchases and sales of medicine, governmental procurement, engineering construction, land grant, equity transactions, and resource development and distribution. Subsequently, Chinese government enacted several laws and administrative regulations, such as Opinions on Issues Concerning the Application of Law in the Handling of Criminal Cases of Commercial Briberies and Opinions on Further Promotion of Special Work on Controlling

Commercial Bribery, to intensify the fight against commercial bribery. These laws and regulations have caused the supervision on commercial bribery to have the following characteristics:

- I. A common platform has been set up to coordinate the multiple supervisions by various departments;
- II. Key commercial areas for supervision have been clarified; and
- III. A more sophisticated legal framework has been established to govern the supervision on commercial bribery.

Chinese leaders have demonstrated their determination to fight commercial bribery on many occasions. For example, former premier minister Wen Jiabao stressed on the Fifth Working Conference on Building a Clean Government that commercial bribery is one of the four focuses that the government shall spare no effort to fight against. In this political climate, the cost of engaging in commercial bribery has increased. From July 2005 to December 2011, 102,214 cases of commercial bribery were investigated. The total monetary amount of these cases reached 26.06 billion RMB. The Rio Tinto Group and Stern Hu case and the Gome Group and Huang Guangyu case were famous examples.

The investigation of GSK is a clear signal that China has begun to take actions to remedy the spreading of commercial bribery in the medical industry. In addition to GSK, the Chinese government has also initiated investigations on a number of pharmaceutical companies, both domestically and foreign owned. On July 19, 2013, UCB, a Belgian pharmaceutical company, indicated that officers from the Bureau of Commercial and Industry visited its offices in Shanghai to obtain the compliance information of the company.

Foreign companies and their investors need to realize that the tolerance for commercial bribery by the Chinese society is quickly decreasing. Therefore, as an important lesson learned from the GSK case, foreign companies in China must not assume that their big size and broad influence will shelter their illegal activities from being detected. When it comes to bribery, the attitude of “going with the flow” or “when in Rome, do as the Romans do” will pose significant risks on the companies.

To put an end to commercial bribery, companies must first understand the commercial environment in which they operate and control the risk factors that may lead to corruption. Further, companies should set preventative measures in their corporate governance structure, clarify the roles and responsibilities of each department and employee, and constantly monitor the implementation of governance procedures.

Here are some practical suggestions:

- (I) **Corporate Governance Structure.** In addition to clarifying the responsibilities of each department, companies should “insure” their decision-making procedures by emphasizing the independence and effectiveness of the legal and compliance departments. Companies should carefully prevent the illegal activities of individual executives from being to company-wide practice.
- (I) **Internal Risk Monitoring.** Companies should create independent internal management and control

systems to monitor the daily operations of each department and evaluate each department's level of risk of being involved in commercial bribery. Such systems are aimed to prevent the use of departmental resources for commercial bribery.

- (II) **Employee Management.** Companies should strengthen the management of individual employees, lay emphasis on selecting qualified employees, and strengthen internal training. Each employee's control over the entire business chain should be limited, and different duties should be clearly separated.
- (III) **Corporate Culture.** Companies should establish a culture where the employees sufficiently realize the harm of unlawful acts such as corruption and their companies' zero tolerance policy for such conduct.
- (IV) **Cooperation with Governmental Authorities.** Companies should strengthen communication with governmental entities and stay up to date on the development of anti-bribery regulations. When discovering internal violations, a company should not only take the initiative to timely and frankly report the violations to the relevant authorities, but also actively cooperate with the authorities' investigation.

Furthermore, it is important to note that anti-commercial bribery is not merely the concern of companies in China. In fact, once the Chinese subsidiary of a multinational corporation is charged with bribery, the negative impact goes far beyond China. The company will suffer reputational damages; the foreign investors of the company may also be punished according to the law of their home countries.

For example, the Bribery Act 2010 ("Bribery Act") of the United Kingdom and the Foreign Corrupt Practices Act ("FCPA") of the United States both have provisions stating that bribery activities by the foreign subsidiaries of a parent company can result in liabilities to the U.K. or U.S. parent company if such activities are for the sake of the parent company. The clear message that the Chinese government sent through the GSK case is that multinational companies should not be indifferent to the regulatory compliance of their Chinese subsidiaries just because "the business environment in China is too intricate to deal with."

The Chinese government has strong determination to fight corruption with tough measures. With the support of governmental entities and information technology, careful investigations will reveal bribes regardless of how insidious the methods may be. Chinese government's efforts to eliminate commercial bribery will lead to a fairer business environment, which will eventually benefit the growth of foreign companies in China. In a fairer business environment, competitiveness of the companies will be derived from better corporate governance, mature cooperate culture and smooth logistic channels, which are the strengths of multinational company from countries with established market economies. If multinational

companies can take advantage of the above factors, investors, companies, employees, and even the municipalities where these companies are located will all benefit from the transparency and rapid development.

Appendix Table

Based on the facts reported by the media, the following table analyses the possible crimes that GSK and its executives may be charged for.

CONDUCT	NAME OF CRIME	RELEVANT LAW	PUNISHMENT
Taking advantage of one's position, demands money or property from another person or illegally accepts another person's money or property	Non-governmental Employee Bribery	Criminal Law Article 163	shall be sentenced to fixed-term imprisonment of not less than five years and may, in addition, be sentenced to confiscation of his property
For the purpose of seeking illegitimate benefits, give money or property to any employee of a company or company (including doctors in the hospitals), and the amount involved is relatively large	Offering Bribes to Non-governmental Employee	Criminal Law Article 164	shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined
For the purpose of securing illegitimate benefits, give money or property to a State organ, State-owned company, company, institution or people's organization	Offering Bribes to Entities	Criminal Law Article 391	shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention
For the purpose of securing illegitimate benefits, give money or property to a State functionary or a government official in hospital	Offering Bribes	Criminal Law Article 389 390	shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property
Falsification of invoices for value-added tax or other invoices	Issuance of fake VAT invoices and fake invoices	Criminal Law Article 205	shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment

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