



你合规了吗? Are you compliant?

近期引人关注的判决不过是反腐严打的冰山一角。国内外公司及其顾问所面临的挑战，
实则是建立企业的合规文化

Recent high-profile convictions are only one indication of a major crackdown on corruption. The challenge for domestic and foreign companies, and their advisers, is to establish a culture of corporate compliance
George W Russell reports from Shanghai

王守信，黑龙江省共产党官员，1980年因贪污被公开枪决。她侵吞了当地的煤矿贷款约人民币50万元。在去年刚公布的一组行刑照片中，王守信拒绝下跪，行刑法警只好从后面踢她的腿。这组照片如今声名大噪。

这组 30 年前的老照片引起了相当多的讨论：有人呼吁恢复对贪官的公开处决，有人批评制度的残酷性，说王守信肯定是当了上面其他官员的替罪羊。在很多人看来，王守信死前的行为体现了另一个问题，那就是贪污犯拒不认罪。

腐败问题困扰中国已久，在过去，政府机构、党委机关和国有部门也不乏出现重大的贪污腐败案件，比如王守信案就是如此。而且这些案件仍然在继续着。王益，原国家开发银行副行长，4月份因受贿人民币1200万元被判处死刑，缓期2年执行。黄松有，原最高人民法院副院长，1月份因贪污受贿被判无期徒刑。

但真正对全球商界造成冲击的还属今年的国美黄光裕案和力拓胡士泰案。黄光裕是私营电器零售商国美电器集团董事局的前主席，胡士泰为前力拓公司上海首席代表。这两起案件将腐败

Wang Shouxin, a Communist Party official in Heilongjiang province, was publicly executed for corruption in 1980. She had embezzled about RMB500,000 from a local coal mine. A now-famous series of photographs, released only last year, showed her refusing to kneel before the firing squad until police kicked her legs from under her.

The 30-year-old photographs stirred up considerable public debate. Some people called for a return of public executions of corrupt officials. Others criticized the brutality of the system: Wang, they said, was surely a scapegoat for other, higher officials. For many, Wang's behaviour before her death symbolized another problem: the defiance of those accused of graft.

Corruption has long been an issue in China but, as in Wang's case, the highest-profile cases have historically occurred in the bureaucracy, the Party apparatus and the state sector. These cases continue. Wang Yi, a former vice president of China Development Bank, was sentenced to death (with a two-year reprieve) in April for taking bribes worth RMB12 million. Huang Songyou, the former vice-president of the Supreme People's Court, was jailed for life for corruption in January.

But it is this year's convictions of Huang Guangyu, the former

腐败问题仍然对中国的政治经济构成重大挑战

Corruption continues to loom as a major political and economic challenge for China



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chairman of private electrical goods retailer Gome, and former Rio Tinto executive Stern Hu, that have delivered a major shock to the global business community. The two cases have pushed corruption to the top of the agenda for both international and private domestic companies.

Hu was jailed for 10 years in April after a Shanghai court convicted him of taking kickbacks worth millions of dollars from Chinese steel firms and misusing company secrets. He and three other Rio Tinto employees had been arrested in July 2009 during contentious iron ore contract talks between foreign mining companies and the Chinese steel industry, sparking concern that the men were victims of political intrigue and anti-foreigner sentiment.

Much of the trial was held behind closed doors, which did little to allay fears that Hu wasn't getting a fair hearing. Yet some independent experts deplored Hu's supporters – especially the partisan Australian media—for their refusal to take account of the evidence against Hu and his co-defendants. "Some Australian newspapers cheered Stern Hu as a national hero," says Liao Ran, Asia Pacific programme director at Transparency International, a Berlin-based anti-corruption watchdog which publishes an influential annual list of countries and their perceived levels of corruption. "That is quite incorrect."

The Gome case, on the other hand, was a purely domestic affair. Huang, a high-school dropout who built a multibillion

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问题推到风口浪尖，一时成为国外公司和国内私营公司首先要解决的问题。

4月，胡士泰因收受中国钢铁企业价值数百万美元的回扣和滥用公司商业机密被上海法院判处有期徒刑10年。他和其他三名力拓员工于2009年7月被逮捕，此时正值外国矿业公司和中国钢铁业为铁矿石谈判激烈交锋之际，于是当时有人担心他们是政治谋划和排外情绪的牺牲品。

由于审判大多是不对公众开放的，有人担心胡士泰是否获得了公平审理。一些独立专家极力谴责胡士泰的支持者——尤其是澳大利亚党派媒体——有意忽略胡士泰及同犯的犯罪证据。“有些澳大利亚报纸为胡士泰叫好，称他为民族英雄”，“透明国际”亚太区的高级项目协调员廖燃说，“这太不对了。”透明国际是一家总部在柏林的独立反贪腐组织，该组织每年公布一份各国家和他们的清廉指数的排行榜，极具影响力。

另一方面，国美电器案纯粹是中国的家务事。黄光裕高中辍学，白手起家，打造了价值数十亿美元的零售帝国。5月，黄因犯贿赂罪被判处有期徒刑14年，罚金人民币6亿元。据检察官透露，2006至2008年间，国美电器向政府官员行贿共计人民币450万元。

律师们认为胡士泰案更是给企业敲响了警钟。“对力拓案的裁决中，这家知名国际矿业公司的四名负责人被判贿赂罪和盗窃商业秘密罪，这很有可能表明中国反腐败法的执行锋芒正在转向在华经营的跨国公司，”总部位于美国华盛顿的Greenberg Traurig律师事务所股东Gary Anderson指出。

“腐败问题仍然对中国的政治经济构成重大挑战。”美国奥睿律师事务所驻香港办事处的高级合伙人施德宏(Christopher Stephens)说。

跨境合规问题愈来愈频繁

Cross-border compliance issues are occurring with increasing frequency



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dollar retailing business from scratch, was sentenced to 14 years in prison and fined RMB600 million in May after being convicted of bribery. Gome's illegal payments to officials totalled RMB4.5 million between 2006 and 2008, according to prosecutors.

Lawyers see the Hu case in particular as a wake-up call. “The Rio Tinto verdict, in which four executives of a high-profile international mining company were found guilty of bribery and theft of commercial secrets, may signal that China's aggressive prosecution of its anti-corruption laws is shifting its focus to multinational companies operating on its soil,” notes Gary Anderson, a shareholder with Greenberg Traurig in Washington DC.

“Corruption continues to loom as a major political and economic challenge for China,” says Christopher Stephens, senior partner of the China offices with Orrick Herrington & Sutcliffe in Hong Kong.

Turning the screw

Legally, Beijing has been tightening the screws on suspected bribery. In 2009, amendments to the *PRC Criminal Procedure Law* extended liability for corruption and bribery offences to the relatives of officials. The government also issued the *Honest Practices in the Leadership of State-Owned-Enterprises Several Provisions* in 2009.

Legislative reform has been accompanied by one of the most intensive crackdowns on corruption in recent memory. “We've seen spectacular crime-busting-style dawn raids on entire administrations,” says Andrew Halper, a partner at CMS, China. “They're not just clamping down but smashing down on corruption.”

Not only corruption, but also fraud and other failures of internal controls, anti-competition, consumer protection, and environmental, health and safety issues have all been put in the spotlight, says Gary Seib, a Hong Kong partner and co-chair of the Asia Pacific compliance practice at Baker & McKenzie. “In the past year all of these areas have received very public focus by China's central and local governments in the form of policy statements and new or amended laws and regulations.”

重要的合规问题

问题	示例	评论*
1 腐败行为	贿赂、不正当优势等	性质是不留记录的非正式交易，因此很难证明。
2 银行外交易	资产负债表外账户	不一定是挪用或窃取。可能存在有效理由，例如向雇员支付与其真正价值相当的报酬。
3 关联交易	中方亲友的不当交易	总经理拥有自己的公司，但该公司与其担任总经理的实体进行贸易往来。中层员工拥有自己的公司，但该公司与其效力的雇主进行贸易往来。
4 盈余管理	公司收入大幅增长	公司会发现很难使公司收入持续增长或在上市前持续增长。
5 合资纠纷	中外合作伙伴闹翻	利润分配可能出现偏差，资金外流。
6 剽窃知识产权	当地剽窃者或合作伙伴在一段时间后开始仿冒行为	外国实体没有采取措施保护自己的知识产权，也不与中方合资伙伴接洽。

来源：毕马威会计师事务所

* 评论人为毕马威上海法证会计主管合伙人麦宝华。

Corruption and compliance: in-house or out?

When Scott Lane first began educating companies in China about the fight against corruption, he made much use of the term “red flag”, denoting a danger signal or a cause for concern. His students asked him why he was associating the term with such negative connotations, given that red flags flutter proudly over every Chinese city.

Lane believes he has cleared up the confusion – enough for him to name his Hong Kong-based, China-focused consultancy The Red Flag Group – but the initial puzzlement underscored the difficulties inherent in promoting the idea of “compliance” in Chinese corporate culture.

Lane’s company is one of a number of consultancies that are looking to exploit the potential of China’s emerging compliance market. “Much of our work is for large US-based multinational companies who are looking to improve their compliance infrastructure in emerging markets like China,” says Lane.

Specialist risk consultancies say they can offer a multi-disciplinary approach. “Very few companies are equipped to investigate fraud and corruption when they become its victim,” says Steve Vickers, president and chief executive officer of FTI-International Risk in Hong Kong. “Fraud and corruption is often complex, difficult to unravel, and handling it requires specialist knowledge.”

China is also attracting attention from another segment of the compliance industry, vendors of software and other products that support the human skills of lawyers and consultants. “We think China is our largest potential market,” says Woon-Kee Baeg, director of pre-sales and marketing at GT One Governance Technology, a Seoul-based outfit that sells software to monitor potential money-laundering activity.

Vendors meet resistance

One niche that outside vendors have managed to break into is databases. Dow Jones – the international media company owned by Rupert Murdoch’s News Corporation – offers three updated lists of potential money launderers: DJWatchList, DJSanctionsAlert and DJAntiCorruption. “China corruption-related work forms a lot of what we do,” says Richard Butler, a risk and compliance solution specialist at Dow Jones in Sydney.

However, many vendors and consultancies have met resistance from many companies, which believe that sensitive investigations and monitoring are best conducted internally. “There is a strategy of not airing dirty laundry among third parties,” says Violet Ho, managing director of the Beijing office of Kroll, the global risk consulting firm.

Companies, especially those conducting internal investigations into suspected corruption, have a tendency to maintain strict confidentiality. “In-house counsel’s value is knowing the business model, the jargon and the sensitivity,” says Erica Wang, general counsel at Eli Lilly in Shanghai. “Internal staff know the business and we can smell something fishy.”

Some internal counsel are even more appalled at the

idea of “outsourcing” compliance-related investigations to external counsel or consultants. “Offshoring presents challenges,” says Patricia Sullivan, Asia-Pacific regional head of anti-money laundering and anti-bribery compliance at UBS Investment Bank in Hong Kong. “Certain control measures cannot be outsourced.”

Other corporate lawyers add that any kind of third-party offshoring would require regulatory approval from all the jurisdictions involved. “You would need local approvals and a real compliance risk management policy,” says Daniel Au, vice president and country anti-money-laundering manager for Deutsche Bank in Hong Kong.

However, small and medium sized companies might lack the resources to fund their own in-house compliance staff. Aub Chapman, a Sydney-based compliance consultant, says companies with as few as five employees have already fallen foul of Australia’s regulatory system. “Small financial institutions cannot afford to do this,” he says. “Outsourcing could be the only answer.”

Credibility and privilege

Lawyers acknowledge there are often issues of confidentiality and corporate secrecy involved in such investigations. But wholly in-house reports can have their own problems. “A company’s internal investigation might not be considered credible by governmental authorities,” says Peter Wang, a partner and head of the Shanghai office at Jones Day.

Major matters, Wang adds, would require the appointment of external lawyers. “You may need outside counsel to represent the company and independent board members may need to engage their own counsel,” he says. “The idea of using only in-house counsel goes out the window if it’s too serious.”

There are concerns relating to the extent of privilege applying to in-house investigations. “In Europe, there are issues concerning the extent to which in-house counsel have the benefit of legal professional privilege,” says Grace Ng, a consultant at Lister Swartz, a firm of Hong Kong solicitors in association with US-based Edwards Angell Palmer & Dodge. “[This] makes it highly advisable for investigation to be co-ordinated by external counsel.”

Law firms can draw on deeper levels of resources, lawyers point out. “In-house law teams are small and external law firms are large,” says Andrew Halper, a partner at CMS China in Shanghai. “We can do a lot of things and we can be an extra pair of eyes.”

Beatrice Schaffrath, a Beijing-based partner and a member of the China compliance practice at Baker & McKenzie, says outside counsel can fulfil a multitude of roles. “Our assistance includes structuring and conducting internal investigations, advising the company on its responses to government-initiated investigations and information requests, developing and implementing compliance programs, policies and training, and identifying and managing corruption-related risks.”

Sample article

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人们也不清楚中国执法部门对国内外企业采取的执法标准是否相同

It is not clear whether Chinese authorities apply the same standards of enforcement to foreign and domestic enterprises



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加强惩治

从法律上看, 中国政府一直在加强对涉嫌贪污行为的惩治。2009年, 《中华人民共和国刑事诉讼法修正案》扩大了官员亲属的贪污贿赂违法行为的法律责任。国务院还在2009年发布了《国有企业领导廉洁从业若干规定》。

最近看来, 立法改革一直伴随着对腐败的重拳出击。“我们已经对整个行政体系进行声势浩大的击碎犯罪突袭式搜查, ”CMS, China上海代表处合伙人何安愚(Andrew Halper)说, “他们不是遏制这么简单, 而是直接摧毁腐败行为”。

不仅是腐败, 还有舞弊和其他内控失效、不正当竞争、消费者权益保护以及环境、健康和安安全等问题都成了公众关注的

同时被美国《反海外腐败法》和中国反腐败法起诉实在太可怕了

The prospect of being prosecuted under the FCPA in the US and under local anti-corruption law is scary



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Lesli Ligorner, a partner at Paul Hastings Janofsky & Walker in Shanghai, notes that in many areas that might loosely be termed ‘compliance’, China’s laws have moved closer to international standards. “Cross-border compliance issues are occurring with increasing frequency as compliance with home country laws and regulations often overlap with compliance with local PRC laws and regulations,” she says.

Enforcement remains inconsistent

Not all breaches of compliance regulations would have such severe repercussions as the Rio Tinto and Gome cases. “Such high profile cases are criminal cases and could be deemed as extreme cases,” says Kevin Xu, a partner at Martin Hu & Partners in Shanghai. “Many less serious cases need to be regulated by government or local administrative authorities.”

But some identify variable attitudes towards punishment as another problem. “China has extensive and stringent laws and rules against corruption, but uniformity and efficiency in enforcement is uneven,” says Stephens.

“Enforcement of Chinese law in this regard is inconsistent,” echoes Eugene Chen, of counsel at Hogan Lovells in Shanghai, “and it is not clear whether Chinese authorities apply the same standards of enforcement to foreign and domestic enterprises. Accordingly, many companies are opting for ‘super-vigilance’, making sure that their compliance policies meet the most stringent requirements of foreign and domestic law.”

Others warn that anti-corruption purges in China can have a strong political element. “It is not necessarily the case that the recent high-profile anti-corruption cases have a corollary in an enhanced risk to our clients,” says Carl Hinze, an associate at Eversheds in Shanghai. “Nonetheless, if anti-corruption

Corruption and compliance: major issues

Issue	Examples	Comments*
1 Corruption	Bribery, unfair advantage	Difficult to prove as it's an off-record transaction by nature
2 Off-bank transactions	Off balance sheet accounts	Not necessarily embezzlement or stealing. There can be valid justification, such as paying an employee what they're really worth
3 Related party transactions	Friends and relatives of Chinese partner trade improperly	General managers own companies that trade with entities of which they are also general manager. Mid-ranking employees have companies that trade with their employer
4 Earnings management	Inflation of revenues	A company finds it hard to keep its numbers up or the numbers go up ahead of a listing
5 Joint venture disputes	Foreign and domestic partners fall out	Profits distributions can go awry and money leaks out
6 Intellectual property theft	Local ripoffs or partners start a duplicate factory down the road	Foreign entities don't take measures to protect their IP and don't engage with their Chinese JV partner

Source: KPMG

* Comments by Mark Bowra, a partner in the Shanghai forensic unit of KPMG

反腐败与合规：内部消化还是借助外援？

Scott Lane 最初开始在华公司提供反腐败培训时多次使用“红旗”一词，用来代表一个危险信号或隐患。要知道，红旗在中国每个城市的上空迎风飘扬，代表着光荣和骄傲。既然如此，他的学员不免发问了：为什么要用红旗表达这么负面的含义？

Lane深信这一疑虑已经得到了解答，至少他已经将其总部位于香港、以中国为重点的咨询公司命名为“红旗集团”(The Red Flag Group)。但是学员们最初的困惑却彰显了在中国企业文化背景下推行“合规”理念所固有的困难。

无数咨询公司希望开发中国的新兴合规市场，Lane的公司当然也是其中一员。Lane说：“我们的客户主要是那些希望改善在像中国这样的新兴市场中的合规构架的美国跨国公司，为他们提供服务。”

专业风险顾问公司表示可以提供一种跨领域的合规方法。“很少有公司在出问题具备调查舞弊和腐败的能力”，FTI-International Risk 调查公司香港办事处的总裁兼首席执行官维克斯(Steve Vickers)称，“舞弊和腐败行为往往非常复杂，揭露起来困难，而且还需要专业知识才能处理。”

中国还吸引了合规业另一组人的目光，那就是各大软件和其他提升律师和顾问的人际技能的产品供应商。“中国是我们最大的潜在市场”，GT One Governance Technology 公司的预销售与市场总监 Woon-Kee Baeg 说。这家总部位于汉城的公司主要从事销售用于监控潜在洗钱可能性活动的软件。

供应商遭遇抵制

外部供应商瞄准了数据库这个缝隙市场。道琼斯公司是 Rupert Murdoch 新闻集团旗下的国际传媒公司，它列出了三个最新的潜在洗钱公司：DJWatchList、DJSanctionsAlert 和 DJAntiCorruption。“我们主要从事与中国腐败有关的工作，”道琼斯公司悉尼办事处的风险与合规解决方案专家 Richard Butler 说。

尽管如此，很多供应商和咨询公司还是遇到了来自各大公司的阻力，这些公司认为敏感性调查和监控最好由内部人员执行。“他们有一项‘家丑不外扬’的策略，也就是对第三方保密，”全球风险咨询公司 Kroll 北京办事处的执行董事何越说。

各公司都倾向于严格保密，对涉嫌腐败行为进行内部调查的公司尤其如此。“公司法律顾问的价值在于他们熟知商业模式、行业术语和敏感性，”上海礼来公司的总顾问 Erica Wang 表示。“作为内部人员会了解业务，一有不对劲我们马

上就能知道”。

一些公司内部法律顾问更是对将合规调查“外包”给外部律师或顾问的做法感到震惊。“离岸外包意味着挑战，”瑞银投资银行(香港)亚太区反洗钱和反贿赂合规部主管 Patricia Sullivan 说。“某些监控管理不能外包。”

其他公司律师则补充说，第三方离岸外包行为须获得所有相关司法管辖区的监管批准。“不仅要获得当地批准，还需要有真正的合规风险管理政策，”德意志银行香港分行的副总裁兼反洗钱经理 Daniel Au 称。

不过中小型公司可能资源有限，负担不起设立内部合规人员的费用。悉尼的合规顾问 Aub Chapman 说，按照澳大利亚的监管制度，如果公司少于五人是不容许有合规人员的。“小型金融机构负担不起，”他说，“外包是唯一的解决之道。”

信用与特权

律师承认，敏感性调查往往涉及保密性和企业秘密等问题。但完全依靠内部法律顾问的报告也有其自身的问题。“政府机构可能觉得公司的内部调查不可信，”众达律师事务所上海代表处合伙人王智平表示。

他又补充说，重大事项必须委任外部律师。“可能要聘请外部律师代表公司，独立董事会的成员可能要自行聘请律师，”他说。“一旦遇上非常严重的问题，单纯依靠公司内部法律顾问将不适用。”

也有人对免内部调查特权的适用范围表示担忧。“在欧洲，内部法律顾问享有的法律特权的范围存在很多问题，”李兆德施华慈律师行的吴嘉莉说。“所以让外部律师配合调查非常可取。”李兆德施华慈律师行是一家与美国 Edwards Angell Palmer & Dodge 律师事务所联合的香港律所。

深层资源

律师们指出，律师事务所可以利用更深层的资源。“公司内部法律团队小，律师事务所团队大，”CMS, China 上海代表处的合伙人何安愚(Andrew Halper)说，“我们能做很多事，可以做他们的好帮手。”

Beatrice Schaffrath 是贝克·麦坚时国际律师事务所北京代表处的合伙人，同时也是中国合规业务部成员，她认为外部律师可发挥多种作用。“我们能帮助构建实施内部调查，就回应政府的调查和资料要求向公司提供意见，能制定并实施合规计划、政策和培训，还能确定并管理与腐败有关的风险。”

焦点, 贝克·麦坚时国际律师事务所香港代表处合伙人、亚太地区合规实践部联合主席薛嘉理 (Gary Seib) 说, "在过去一年里, 中国的中央和地方政府以出台政策声明、颁布或修订法律法规的形式对这些领域进行了关注。"

普衡律师事务所上海代表处合伙人李蕾思 (Lesli Ligorner) 指出, 在泛称 "合规" 的众多领域中, 中国的法律已经更加接近国际标准。她说: "遵守本国法律法规和要遵守中华人民共和国法律法规往往出现重叠, 导致跨境合规问题愈来愈频繁。"

measures were ever diminishing as a concern for our clients, the recent cases have had the effect of bringing these issues to their attention."

A climate of concern has certainly permeated some multi-national clients. "These cases certainly raise the stakes," says David Simon, a partner at Foley & Lardner in Milwaukee in the US, who devotes much of his practice to helping corporate clients manage crises. "The prospect of being prosecuted under the FCPA in the US and under local anti-corruption law is scary – especially given the harsher sanctions in China." (See box: *One more result of the crisis*, page 34.)

Both law firms and in-house counsel, say lawyers, will have to pay more attention to compliance issues in China. "High-profile cases such as Rio Tinto and Gome have forced foreign clients to become much more educated about local laws and regulations and to ensure that they are compliant," says Chen.

提供合规与反腐败咨询服务之机构

律师事务所

与中国有关的主要合规实践*

贝克·麦坚时国际律师事务所
CMS, China 国际律师事务所
科文顿·柏灵律师事务所
英国安永律师事务所
美国富理达律师事务所
国浩律师集团
美国GT国际律师事务所
Harris & Moure 律师事务所
霍金路伟国际律师事务所
金杜律师事务所
李兆德施华慈律师行
胡光律师事务所
美国摩根路易斯律师事务所
美国普衡律师事务所
美国必百瑞律师事务所
美国盛智律师事务所

*按英文字母顺序排列

其他服务机构

公司	产品与服务
AML Solutions	反洗钱 (AML) 软件
Astbury Marsden	猎头服务
ChinaWhys	尽职调查、调查、安全和风险管理
Control Risks	风险与战略咨询
道琼斯	风险筛检数据库
都赛商务咨询有限公司	事件管理
East Nets	合规与支付服务
Ethical Beacon	事件管理
FTI-Risk International	风险与战略咨询
GT One	反洗钱银行业软件
Kroll	风险与战略咨询
Legal Futures	法律猎头服务
Sungard	金融服务、公共部门软件和制程
华胜天成	IT 相关软件
The Red Flag Group	风险与战略咨询
World Check	风险筛检数据库

*按字母顺序排列

Establishing compliance

One of the challenges in China—where gift-giving to cement business relationships is widely considered an acceptable practice—is to establish a culture of compliance that reaches to all levels of a company.

Compliance, it should be noted, means different things to different people. At its most basic, it simply means adherence to laws and regulations. In normal business usage, however, the term compliance is usually applied to a more limited – but still wide – range of issues, which might include competition laws, tax rules and labour and environmental standards as well as bribery and corruption.

Internationally, the term "compliance" has referred to a body of domestic and trans-national laws and standards applying to the prevention, detection and suppression of corruption and other white-collar crime. It has also covered related issues such as bribery and influence peddling and the diversion of money due to embezzlement, money laundering or the financing of terrorism.

Individual lawyers also offer their own interpretation. "Generally speaking, compliance has a two-pronged meaning in China," says Zheng Tang, an associate at Grandall Legal Group in Beijing. "The first prong is that the internal management system of an enterprise shall abide by laws, regulations and rules; and the second is that company's internal regulations

国际反腐败运动已经扩大到私营领域

The international anti-corruption movement has expanded into the private sector



廖燃
透明国际
Liao Ran
Transparency
International





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执法不一

并不是所有违反合规的行为都会产生力拓案、国美案这样严重的后果。"这种大案属于刑案范畴,可以说是比较极端的案例," 上海的胡光律师事务所合伙人许江晖表示,"很多性质较轻的案件需要由政府或地方行政机构规管。"

但有人发现了另外一个问题,即惩处不一。"中国制定了大量严格的反腐败法律和规则,但执法统一性和执法效率是有差异的," 施德宏说。

should be implemented and function well."

Even the term "corruption" can be open to interpretation and reinterpretation. "Before 2001, Transparency International defined corruption as 'misuse or abuse of public power for private gain'," recalls Liao Ran. "Since then, we have defined it as 'the misuse or abuse of entrusted power for private gain'. The international anti-corruption movement has expanded into the private sector."

A major issue

Whatever the nuances of definition, the twin issues of cor-

金融危机的“副产品”：全球涌现合规浪潮

律师们普遍认为金融危机使得反腐和合规在很多法域成为倍受关注的问题。贝克·麦坚时国际律师事务所香港代表处合伙人、亚太地区合规业务部联合主席薛嘉理 (Gary Seib) 说:"全球金融危机促使世界许多国家细查并修订一系列与合规问题相关的法律法规。"

国内外新出台的反腐败法律法规促使企业求助于律师事务所。"近几年来,全球许多国家越来越重视反腐败法的执行。"美国GT国际律师事务所华盛顿分所资深合伙人 Gary Anderson 说。

最新出台的法律之一是英国的2010年《反贿赂法》。伦敦 Forensic Risk Alliance 公司的合伙人兼法务会计师 David Lawler 最近在谈到对这部法律的看法时说:"2010年《反贿赂法》的出台是对英国已经过时、难以续用的贿赂法的大规模更新"。他说的贿赂法指的是先前由1889年《公共机构贿赂法》、1906年《防止贿赂法》和1916年《防止贿赂法》组成的英国反贿赂法律框架。

英国《反贿赂法》对域外管辖权的规定与美国1977年《反海外腐败法》(FCPA) 极其相似,而美国的这部法律在很多人看来开启了现代反腐败立法的先河。美国在1977年签署了《经济合作与发展组织反国际商业交易中贿赂外国公职人员公约》之后,于1998年对《反海外腐败法》做出修订,将美国境内的外国公司和个人纳入管辖范围。

在世界主要经济体的反腐法律中,这部《反海外腐败法》是最为严厉的一部,在2008年和2009年,每年与中国有关的强制执行诉讼就有5起。"合规失误的后果非常严重," 纽约联邦储备银行的高级副总裁 Jonathan Polk 说,"有直接后果,比如罚款、惩罚、诉讼、施加限制,还有间接后果,比如重大合规问题引起的声誉损失。"

中国向来是《反海外腐败法》诉讼案件触及较多的国家:今年4月,美国美容产品制造商雅芳公司宣布,公司针对其中国分公司受到的行贿指控,已经准备了一份可提交给美国监管部门的内部报告。3月,德国汽车和卡车制造商戴姆勒-克莱斯勒公司遭到美国司法部和证券交易委员会指控,理由是戴姆勒公司为赢得业务向中国和其他外国官员送礼,后来该公司同意支付 1.85 亿美元才平息这场风波。

在近期其他的案件中,我们可以看到,依照《反海外腐败

法》对美国朗讯科技公司发起的调查以该公司在2007年支付250万美元罚金告终;另外,2005年,总部在俄勒冈州的美国金属回收商史尼索钢铁工业有限公司,因向中国钢厂提供回扣,被处以超过1500万美元的巨额罚款和其他处罚;还有总部设在德克萨斯州的炸弹探测设备制造商 GE InVision 公司(现在的通用电气安防公司),由于在中国发生了涉及《反海外腐败法》的违规行为,在2004年支付了100多万美元的罚款。

当各企业制定合规策略时,美国的法律制度往往是考虑之重。"在前不久,我们的客户还一直密切关注国外的反腐败规则," 美国众达律师事务所上海代表处的合伙人兼首席代表王智平说,"原因是如果他们遵守美国的法律,那么中国的法律便不会为难他们。"

然而,中国为了加强对合规的监管也在研究制定自己的法律法规。美国必百瑞律师事务所上海代表处管理合伙人胡梅 (Meg Utterback) 说:"从最近发布的关于执行商业贿赂规则的通知可以看出,政府越来越重视商业环境里的执法问题"。

东方华银律师事务所上海分所的吴芳律师则列出了国务院发布的《证券公司监督管理条例》和中国证监会颁布的《证券公司合规管理试行规定》作为例子。"将来会有更多适用于国有企业和上市公司的合规规则。"她补充道。

5月,最高人民检察院和公安部联合发布公告,规定非政府人员收受5000元以上贿赂者将受到刑事起诉。

另外,根据最近颁布的条例规定,公司必须为其代理机构的行为负责。"诸如 '我们不知道代理商在做什么' 之类的说辞是没用的",全球风险咨询公司 Kroll 北京代表处的执行董事何越说。

不仅如此,中国政府还推出了反腐热线和网站,使人们可以匿名举报。"最近政府扩大了对有过行贿赂违规记录的公司的可公开访问数据库。" 科文顿·柏灵律师事务所北京代表处的合伙人柯礼晨 (Eric Carlson) 说,"所有这些都意味着不当行为受到举报或起诉的可能性更大了。"

还有几起案件是因为互联网用户揭发官员滥用职权才立案的。周久耕是南京市江宁区房管局局长,网民们将他价格不菲的凯迪拉克轿车和江诗丹顿手表的照片贴在网上后,周久耕于2009年被立案起诉。

专家策略

赠送礼品的合规性法律问题



吴巍

近年来，我们的反商业贿赂专业律师团队已经连续为50余家国内外公司的上百起案件及项目提供咨询与案件代理服务。在开展反商业贿赂法律服务过程中，我们发现这些公司普遍对如何既满足开拓市场的现实需要，又避免涉嫌商业贿赂感到困惑。公司普遍对中国法律的实际适用难以把握，问题往往集中在：如何向官员赠送礼品？能否邀请官员观看世界杯、参观世博会？以会务费、广告费名义支付折扣合法吗？向医疗机构提供捐赠有构成贿赂的风险吗？涉嫌商业贿赂的员工被采取强制措施能否解除劳动合同？等等。在这里，我们就实践中最为常见的与赠送礼品相关的合规性问题作简要的分析。

接受赠送的官员可以自行保留的礼品价值

根据《国务院关于在对外公务活动中赠送和接受礼品的规定》，国家工作人员在对外公务活动中，接受价值二百元以下礼物可以自行保留和使用。而对外公务活动之定义包括海外访问，与国内外人交流及参与由外国个人或团体组织的活动。需要注意的是，根据该规定，在对外公务活动中，对方赠送礼金、有价证券时，官员应当予以谢绝，即公司应当避免向官员赠送礼金、有价证券等。由于国务院对国内公务活动赠送和接受礼品的相关规定没有明确可以自行保留和使用的礼品价值，我们认为，在管理国内公务活动的实践中，纪检监察机关会参照适用上述关于对外公务活动的规定中关于礼品价值的标准。违反上述规定，会导致接受礼品的官员受到行政纪律处罚，因此，作为礼品的赠送方，公司也应当在这个范围内安排赠送礼品的价值。

给付多少金额的财物可能被追究刑事责任

根据《刑法》的规定，结合司法解释中的具体衡量标准，为谋取不正当利益给付财物达到以下数额的，有被追究刑事责任的可能：个人向单位行贿10万元以上的；个人向个人行贿1万元以上的。单位向单位行贿20万元以上的；单位向个人行贿20万元以上的。此外，行贿金额低于上述标准，但具有一些法定严重情节的，也有构成上述犯罪的可能。需要特别注意的是：如果某公司向同一国家机关、国有公司、企业、事业单位、人民团体多名工作人员赠送礼品，或向同一工作人员多次赠送礼品，查处贿赂犯罪的国家机关依法将这些礼品的价值累计计算，一般累计的数额都会达到行贿犯罪的立案标准。

如何认定商业贿赂犯罪中的给付行为和财物

《最高人民法院、最高人民检察院〈关于办理商业贿赂刑

事案件适用法律若干问题的意见〉》对于贿赂犯罪中的给付行为作了具体规定，除了直接给付现金、实物等行为外，特别明确规定以下一些行为属于贿赂行为：以交易形式收受财物，如低价买房买车；收受干股；以开办公司等合作投资名义收受贿；以委托请托人投资证券、期货或者其他委托理财的名义收受贿赂；以赌博形式收受贿赂；在职为请托人谋利，离职后收受财物等。

根据《关于办理商业贿赂刑事案件适用法律若干问题的意见》第七条，商业贿赂中的财物，包括可以用金钱计算数额的财产性利益，如提供房屋装修、含有金额的会员卡等。

如何认定商业贿赂犯罪中的主体范围

按照商业贿赂犯罪主体、涉及对象的不同，刑法中针对具有特殊身份的国家工作人员犯罪的规定主要见于分则第八章“贪污贿赂罪”。而对于公司、企业等市场竞争主体的商业贿赂犯罪的规定主要见于分则第三章“破坏社会主义市场经济秩序罪”的多个条文，涉及的罪名有非国家工作人员受贿罪、对非国家工作人员行贿罪。受贿罪主体主要是国家工作人员，即一切国家机关、企业、事业单位和其他依照法律从事公务的人员，在一些特定犯罪中也包括离职和退休的国家工作人员。此外，根据《关于办理商业贿赂刑事案件适用法律若干问题的意见》，国家工作人员的特定关系人也可构成受贿的共犯，这里的特定关系人指与国家工作人员有近亲属、情妇（夫）以及其他共同利益关系的人。除以上两类主体外，根据刑法修正案（七）关于影响力受贿罪的规定，受贿的主体还包括可以利用国家工作人员影响力的人员。刑法对行贿犯罪的主体没有做特别的限制。

总之，随着中国反商业贿赂法律的是益完备，在最新的司法实践中，越来越多隐蔽、间接的给付财物行为被认定为贿赂行为，越来越多的主体被认定为贿赂犯罪的主体，如“挂名”领取薪酬却不实际从事工作；官员从没有真实出资的合营企业中分取红利等。

通过为国内外多家公司提供法律服务，我们发现目前多数公司在反商业贿赂合规性方面的工作仅限于应对司法机关的查处。实际上，跨国公司完全可以从源头防止商业贿赂行为的发生，可以通过调查工作发现公司经营过程中存在的相关法律风险，还可以通过对公司业务的整体合规性审查和规章制度建设，将构成商业贿赂的风险消除于萌芽状态。

吴巍是金杜律师事务所北京总所的合伙人。有关企业合规的策略查询，可联系吴律师。她的联系方式是：+86 10 5878 5061（直线）及 wuwe@kingandwood.com（电邮）

你可以决定反腐到哪一个程度
You decide at what level of the corruption spectrum you want to be



麦宝华
 合伙人
 毕马威会计师事务所, 上海
Mark Bowra
 Partner
 KPMG, Shanghai



"中国法律执行层面并不统一," 霍金路伟律师事务所上海代表处的陈道正律师表示, "人们也不清楚中国执法部门对国内外企业采取的执法标准是否相同。因此, 很多公司都选择"高度警戒"的做法, 确保自己的合规政策符合中外法律的最严格要求。"

其他人则警告说, 中国的反腐风暴可能带有强烈的政治因素。"有人认为最近这些重大的反腐案件并不一定必然增加客户的风险," 安永实律师事务所上海代表处律师徐凯 (Carl Hinze) 说, "不过, 假设说我们的客户对反腐败措施正掉以轻心的话, 最近的案件已成功让他们重新注意到了这些问题。"

一些跨国公司客户无疑对此高度关注。"这些案件确实使风险变大了," 美国富理达律师事务所密尔沃基的合伙人 David Simon 说。Simon 致力于帮助企业客户进行危机管理, 他补充说:"如果被美国《反海外腐败法》(加框文字《金融危机的"副产品") 和中国反腐败法双重起诉实在太可怕了, 特别是在中国有这么严厉的制裁的情况下。"

律师们认为, 律师事务所也好, 公司的法律顾问也罢, 都应该更加关注中国的合规问题。"力拓和国美这类重大案件已经迫使外国客户越来越注意当地的法律法规, 生怕自己跨越雷池半步," 陈道正律师说。

建立合规文化

通过送礼加强业务关系在中国是被普遍接受的, 这种环境下, 在公司各个层面建立起合规文化成为企业面临的一项挑战。

应该指出的是, 合规在不同层面含义不同。它最基本的含义是遵守法律和法规。在一般的商务用语中, 合规这个词的适用范围较为有限但仍然广泛, 可以涵盖包括竞争法、税收法规、劳工和环境标准以及贿赂和腐败在内的领域。

在国际层面上, "合规" 这个词指的是用于预防、侦查、制止腐败和其他白领犯罪的国内外法律和规范的集合。它也涉及到贿赂、招权纳贿以及由于挪用、洗钱或资助恐怖主义活动进行资金转移等问题。

ruption and compliance combine to pose a major issue for companies of all kinds. "Numerous companies do not have sound internal control systems and therefore are often exposed to potential risks. In addition, after the risks have occurred, those companies are inclined to rely on law firms or their internal legal departments," says Zheng.

With businesses needing to ensure both external and internal compliance, a cottage industry of compliance consultants has emerged. Many multinational companies have established

Service providers

LAW FIRMS

MAJOR CHINA-RELATED COMPLIANCE PRACTICES*
Baker & McKenzie
CMS, China
Covington & Burling
Eversheds
Foley & Lardner
Grandall Legal Group
Greenberg Traurig
Harris & Moure
Hogan Lovells
King & Wood
Lister Swartz (in association with Edwards Angell Palmer & Dodge)
Martin Hu & Partners
Morgan Lewis & Bockius
Paul Hastings Janofsky & Walker
Pillsbury Winthrop Shaw Pittman
Sheppard Mullin

*Listed alphabetically

OTHER PROVIDERS

Company	Products and services
AML Solutions	Anti-money-laundering (AML) software
Astbury Marsden	Executive recruitment
ChinaWhys	Due diligence, investigations, security and risk management
Control Risks	Risk and strategic consulting
Dow Jones	Risk-screening databases
Duxes Business Consulting	Event management
East Nets	Compliance and payment services
Ethical Beacon	Event management
FTI-Risk International	Risk and strategic consulting
GT One	AML banking software
Kroll	Risk and strategic consulting
Legal Futures	Legal recruitment
Sungard	Financial services, public sector software and processing
TeamSun	IT-related software
The Red Flag Group	Risk and strategic consulting
World Check	Risk screening databases

*Listed alphabetically

律师们也有自己的见解。"一般说来,合规在中国有两方面的含义,"国浩律师集团事务所北京办公室合伙人唐诤表示。"一是企业的内部管理制度应当遵守法律、法规和规则,二是公司内部规章的执行和良好运作。"

甚至"腐败"一词也可以被解释和重新解释。"2001年前,透明国际将腐败定义为'滥用公共权力谋取私利',廖燃回忆说,"从那时起,我们就将腐败定义为'滥用委托的权力谋取私利'。国际反腐败运动已经扩展到私营领域。"

主要问题

无论这些定义的细微差别是什么,腐败和合规密切相关,共同构成了不同企业面临的主要问题。"许多公司没有健全的内部控制系统,因此往往受到潜在风险的威胁。另外,风险发生以后,这些公司都倾向于依靠律师事务所或内部法务部门解决问题。"唐律师说。

随着企业内外部合规需求渐长,合规顾问这种职业应运而生。许多跨国公司建立了内部合规团队来协助高管人员和公司法律顾问。比如说过去几年里一直遭受腐败指控的德国工程集团西门子公司,它在全球设有600名合规专员,其中在中国有60名。

在国内营业的国际律师事务所很快组建了业务团队提供合规意见,同时国内的一流律所如金杜律师事务所等则开始设立专责小组(见29页专家策略)。以美国普衡律师事务所上海代表处为例,他们设立了专门的中国合规部。李蕾思说:"我们的咨询领域包括向政府官员行贿、商业贿赂、反不正当竞争、回扣和其他非法营销结构等"。

这些法律业务部门又可以与业务和风险顾问合作,以提供咨询、监控和培训服务。而众多私人顾问、软件和其他服务提供商在软件、数据库、过滤器以及其他用来加强员工自身反腐努力的产品中赢利。(见26页提供合规与反腐败咨询服务之机构)。

合规业务的发展在靠佣金、双重课税、回扣、虚增开支等手段增加收入的公司的高管和员工中引起了强烈的反应。公司法律顾问承认很多公司都面临来自内部的阻力。"他们对合规有一种被动反应,认为合规对业务造成了限制," Visa Worldwide 驻新加坡的亚太地区合规主管 Mariam John 说。

中国合规方面的专家承认,提高标准意味着成本的增加。"你可以决定反腐到哪一个程度," 麦宝华 (Mark Bowra) 是毕马威会计师事务所上海分所法证部合伙人,他是仅有的几名懂合规业务的全球商务顾问之一。"做到一清二白是有其商业后果的," 麦宝华说,"反腐很大程度上就是商业问题。"

in-house compliance teams to work with senior management and corporate counsel. A large company such as Siemens, the German engineering group that has been dogged by corruption allegations for the past several years, has nearly 600 compliance officers worldwide, including 60 in China.

International law firms operating in China have raced to build practice groups to give compliance advice, while leading domestic firms such as King & Wood have begun to set up their own units (See *Practitioner's perspective*, page 32). Paul Hastings Janofsky & Walker in Shanghai, for example, operates a dedicated China compliance unit. "Our advice spans issues such as corrupt payments to government officials, commercial bribery concerns, anti-unfair competition, kickbacks and other illegal sales structures," says Ligorner.

Such practice groups, in turn, may work with business and risk consultancies to provide advice, monitoring and training, while an army of private consultants, software vendors and other service providers have made an income from software, databases, filters and other products designed to augment human anti-corruption efforts. (See *Service providers*, page 30).

The growth of the compliance industry has already created a backlash among company executives and employees who rely on commissions, double-dipping payments, backhanders and inflated expenses to boost their income. In-house counsel acknowledge there is resistance within many companies. "There's a reactive response to compliance, that it limits business," says Mariam John, Asia-Pacific regional head of compliance for Visa Worldwide in Singapore.

China compliance experts acknowledge that higher standards carry a cost. "You decide at what level of the corruption spectrum you want to be," says Mark Bowra, a partner in the Shanghai forensic unit of KPMG, one of several global business consultants that have entered the compliance industry. "Being squeaky clean has business consequences," he says. "It's very much a commercial issue."

Building a team

Compliance executives acknowledge that recruiting, nurturing and managing an in-house compliance team in China can be daunting. "This can be a difficult task that starts with gaining the trust of employees," says Wan Kwong Wen, senior vice president and general counsel at Mapletree, a property and investment group based in Singapore. "Management must mean business in compliance and not only pay lip service."

Recruiters say a certain amount of flexibility is required when hiring compliance-related legal staff. "We look carefully at technical skills, regulatory relationships, communication skills and comparable experiences with firms similar to the client," says Julio Orr, a consultant with the Astbury Marsden recruitment company in Hong Kong. "Global institutions doing business in China still struggle to find the level of talent they are able to find in other more mature markets."

Sales and distribution departments are among the most susceptible to corruption. Erica Wang, general counsel at Eli Lilly in Shanghai, tries to staff her compliance team with sales and marketing people to create integration between compliance and sales. "We look for people who have been ethical in past dealings and are close to our sales team," she says. "Regional compliance officers are able to speak the same language as the sales team."

组建团队

合规执行官承认，在中国招聘、培养和管理公司合规团队任重而道远。“这是项艰巨的任务，开始时必须赢得员工的信任，”新加坡丰树产业的高级副总裁和法律总顾问温广荣说。“管理意味着在实际业务中遵纪守法，而不只是嘴上说得好听。”

企业招聘人员表示，聘请合规法务人员时要有一定灵活性。“我们注重应聘者的技术技能、政府关系、沟通技巧以及是否有与类似客户的公司打交道的经验，”Astbury Marsden 人力资源顾问公司香港办事处的顾问 Julio Orr 表示。“在华运营的国际机构仍在继续努力，希望能像在其他成熟市场上那样找到优秀的人才。”

销售和分销部门最容易滋生腐败。美国礼来亚洲公司上海代表处的法律总顾问 Erica Wang 试图将销售和市场人员纳入自己的合规团队，从而实现合规和销售的整合。“理想的人员要满足两个

However, some companies seem to struggle to shake off the curse of corruption allegations. Since 2006, Siemens, Europe's largest engineering company, has been embroiled in cases concerning €1.3 billion (US\$1.6 billion) in suspicious transactions, including in China. The allegations have cost the jobs of its chairman, CEO and other senior executives and the company more than US\$1.6 billion in fines to the US and Germany.

Since then, Siemens has held itself up as a poster child for the compliance movement. Senior executives give lectures and attend conferences on compliance and the company is widely touted as a former offender that learned its lesson. “Siemens is now regarded as a benchmark in compliance,” says Zhao Aili, vice president and regional compliance officer with Siemens China in Beijing. “But we need to remain vigilant.”

Recent events suggest that such vigilance is justified. In April 2010, Chinese state media reported that Shi Wanzhong, an executive at China Mobile, China's largest cellular-phone carrier, had been under investigation since December 2009

Practitioner's perspective

Giving gifts within the law

Over the past few years, our specialist team of anti-commercial bribery lawyers has advised and acted for more than 50 domestic Chinese and foreign companies in more than 100 cases and projects. In providing these services, it has become clear that our clients have often been puzzled by a problem: how to meet the practical need to expand in the market, while avoiding alleged involvement in commercial bribery. It has often seemed difficult for companies fully to understand the way Chinese legislation works in practice. Common questions include: in what ways should gifts be given to officials? Can we invite officials to watch the World Cup or visit the Expo? Is it lawful to offer discounts on conference fees or advertising fees? Do donations to medical institutions risk being classified as bribery? If an employee has had criminal charges brought against him, can that employee's employment be terminated for this reason? This article will briefly analyze some compliance issues regarding the giving of gifts, which is the issue most commonly encountered in practice.

What value of gifts can officials receive and keep?

Pursuant to the *State Council Giving and Receiving Gifts in External Official Activities Rules*, public sector staff can receive, keep and use for themselves gifts given during “external” official activities which have a value of less than RMB200. “External” official activities includes visits abroad, contact with foreigners in China and involvement in the foreign activities of individuals and organizations. It should be noted that according to the Rules, if a party offers gifts of cash or negotiable securities during or in connection with external official activities, government officials should decline them. In practice, this means a company should refrain from giving gifts such as cash and ne-

gotiable securities to officials. As relevant rules of the State Council regarding the giving and receiving of gifts during or in connection with official activities in China do not specify the value of a gift that may be retained and used by officials, we believe the disciplinary inspection and supervisory authorities will refer to the standard in the above Rules regarding the value of a gift. Failure to comply with these Rules will render the officials who accepted the gifts subject to administrative disciplinary penalties. Therefore, companies must fix the value of a gift within the range outlined above.

What value of property risks criminal liability?

Pursuant to the *PRC Criminal Law* and specific guidelines contained in judicial interpretations, if an individual gives a bribe of more than RMB100,000 to a work unit or a bribe of more than RMB10,000 to another individual, or if a work unit pays a bribe of more than RMB200,000 to another work unit or to an individual for the purpose of seeking improper benefit, they are likely to be held criminally liable. If a bribe is less than the above amount but is particularly serious, it is also likely that a bribery offence will be committed. It should be noted that if a company gives a gift to a number of staff members working at the same state agency, state-owned company, enterprise, institution or mass organization, or gives a number of gifts to the same staff member, the state authorities responsible for investigating bribery will calculate the cumulative value of these gifts according to law. The cumulative value can easily reach the level at which a bribery case may be placed on file for investigation and prosecution.



Wu Wei

他们不是遏制这么简单，而是直接摧毁腐败行为

They're not just clamping down but smashing down on corruption



何安愚
合伙人
Andrew Halper
Partner
CMS, China

”

条件：一是在过去的业务中操作规范，二是与我们的销售团队密切协作，”她说。“区域的合规人员要与当地的销售团队心有灵犀。”

然而有些公司似乎还在挣扎着从贪污控的泥潭中脱身。2006年以来，欧洲最大的工程公司西门子公司卷入了涉及13亿欧元(合16亿美元)的可疑交易(包括发生在中国境内的)，公司的董事长、首席执行官和其他高管为此向美国和德国支付了超过16亿美元的罚金。

从那时起，西门子就一直以合规典范出现在公众视野中。高管人员做演讲、参加合规会议，人们普遍认为这个有“前科”的公司已接受教训。“西门子现在已成为合规的标杆，”西门子(中国)有限公司北京总部的副总裁兼地区合规检查官赵爱立表示。“但我们还是需要保持警觉”。

最近的事件表明西门子确实有先见之明。据中国官方媒体2010年4月报道，中国最大的移动电话运营商中国移动的高管施万中，因涉嫌收受西门子员工贿赂，从2009年12月起一直在接受调查。

The act of payment and the property involved

The *Supreme People's Court and Supreme People's Procuratorate Application of Laws to Criminal Commercial Bribery Cases Opinions* set out specific provisions defining the act of payment in bribery offences. In addition to acts of direct payment in cash and in kind, the Opinions specifically identify the following acts as acts of bribery: the acceptance of property in the form of a transaction such as the purchase of a car or a house at a low price; the acceptance of shares in a company without making actual capital contributions; the acceptance of a bribe in the guise of investment such as the formation of a company; the acceptance of a bribe in the guise of entrusting a person to invest in securities or futures or to engage in other financial management; the acceptance of a bribe in the form of gambling; and a person seeking advantages for a client while serving in office and receiving property after leaving office.

According to Article 7 of the *Application of Laws to Criminal Commercial Bribery Cases Opinions*, the property involved in a case of commercial bribery comprises property interests the amount of which is calculable in monetary terms, such as the provision of housing renovation and a membership card with an intrinsic value.

How to identify the recipient of commercial bribery?

The provisions of the *PRC Criminal Law* governing public sector staff who enjoy a special status are mainly found in Chapter 8, *Corruption and Bribery*, while the provisions governing companies, enterprises and other market competitors are primarily found in Chapter 3 *The Offence of Disrupting Order in the Socialist Market Economy*, covering charges such as the acceptance of bribes by non-state staff and the offer of bribes to non-state staff. The recipients involved in the acceptance of bribes are mainly public sector staff, i.e. the staff of all state agencies, enterprises and institutions

as well as other persons engaged in official business in accordance with the law, and departed and retired State staff involved in certain crimes. Furthermore, according to the *Application of Laws to Criminal Commercial Bribery Cases Opinions*, the connected parties of public sector staff may also become accomplices in the acceptance of a bribe, where connected parties refer to the close relatives or mistresses (or paramours) of public sector staff and other persons who have common interests with public sector staff. In addition to these two types of recipient, according to the provisions of the *Criminal Law Amendment No. 7*, the recipients who take bribes also includes any persons who can make use of the influence of public sector staff. The *PRC Criminal Law* does not contain any special provisions governing parties who offer bribes.

In short, as China's anti-commercial bribery law is evolving, more and more indirect acts of the giving of property are identified as potential bribery, and more and more people are identified as recipients in bribery crimes. For example, this may include a person who receives salary without actually working, or an official who receives dividends from a joint venture to which he or she did not make any capital contribution.

During the provision of legal services to a number of domestic Chinese and foreign companies, it has become clear to us that most such companies focus their anti-commercial bribery compliance efforts on the need to cope with judicial investigation. In fact, companies can prevent commercial bribery at its source by investigating and identifying relevant legal risks in their business activities, carrying out a comprehensive compliance review of their businesses and formulating rules and regulations to eliminate the risk of commercial bribery before it occurs.

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for allegedly accepting bribes from employees of Siemens.

Ben Wootliff, director of corporate inquiries in the Shanghai office of Control Risks, a London-based risk consultancy, wonders if repeat offenders should ask themselves hard questions about their future: "There's enough research to show that if you have to pay bribes to keep going in business you have to ask yourself if you're in the right business, or if you need a better business model." ■

总部位于伦敦的风险咨询公司化险咨询上海分公司的企业不当行为查询主管 Ben Wootliff 对于重蹈覆辙的企业表示不解: 他们是不是该认真考虑一下企业的未来? "大量研究显示, 如果企业必须用贿赂的方式来确保业务增长, 那它们就该好好反省一下自己选择的业务是否正确, 是否需要更好的商业模式," 他说。■

One more result of the crisis: a global compliance push

Lawyers say the financial downturn has turned corruption and compliance into live issues in many jurisdictions. "The global financial crisis has spurred many governments in the world to review and revise legislation concerning a range of compliance-related issues," says Gary Seib, a Hong Kong partner and co-chair of the Asia Pacific compliance practice at Baker & McKenzie.

New anti-corruption legislation in China and overseas has encouraged companies to seek the services of law firms. "In recent years, there has been a greater emphasis on the enforcement of anti-corruption laws in numerous countries throughout the world," says Gary Anderson, a shareholder with Greenberg Traurig in Washington.

One of the most recent pieces of legislation is Britain's Bribery Act 2010. "This act represents a wholesale update of the antiquated and discredited UK bribery laws," David Lawler, a partner and forensic accountant at Forensic Risk Alliance in London, noted in a recent assessment, referring to a previous patchwork of legislation that included the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

The British act contains extra-territoriality provisions similar to that of the United States Foreign Corrupt Practices Act of 1977 (FCPA), considered by many to be the grandfather of modern anti-corruption legislation. The FCPA was amended in 1998 to cover foreign firms and persons within US territory after the signing in 1977 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The FCPA is one of the more stringent anti-corruption laws among major economies, with five China-related enforcement actions each in 2008 and 2009. "There are serious consequences for lapses in compliance," says Jonathan Polk, a senior vice president of the Federal Reserve Bank of New York. "There are direct consequences, such as fines, penalties, lawsuits and restrictions, and there are indirect consequences such as damage to reputation as a result of a major compliance problem."

China has always been fertile ground for FCPA prosecutions: In April, Avon Products, a US maker of beauty products, announced it had made an internal report available to US authorities in connection with bribery allegations concerning its China unit. In March, German car and truck maker Daimler agreed to pay US\$185 million to settle charges by the US Justice Department and Securities and Exchange Commission over gifts to Chinese and other foreign officials to win business deals.

In other recent cases, US company Lucent Technologies resolved FCPA investigations in 2007 by paying a US\$2.5 million fine, while Oregon-based metal recycler Schnitzer Steel

paid more than US\$15 million in fines and other penalties in 2005 because of kickbacks to Chinese mills and Texas-based GE InVision (now GE Security), a manufacturer of bomb detection equipment, paid more than US\$1 million in fines in 2004 for FCPA violations in China.

The US regime has often been foremost in the minds of companies when devising compliance strategies. "Until recently, our clients had been focused on foreign anti-corruption rules," says Peter Wang, a partner and head of the Shanghai office at Jones Day. "The thinking was that if they comply with US laws, the Chinese laws will take care of themselves."

However, China has also developed its own laws and regulations to enhance supervision of compliance. "The recent issuance of the notice relating to enforcement of the commercial bribery rules signals that the government is more focused on enforcement in the commercial setting," says Meg Utterback, managing partner of the Shanghai office of Pillsbury Winthrop Shaw Pittman.

Christina Wu, an attorney with Capital Law & Partners in Shanghai, cites the *State Council Securities Companies Supervision and Management Regulations* and the *China Securities Regulatory Commission Securities Companies Compliance Management Tentative Provisions* as examples. "There will be further compliance rules applicable to state-owned enterprises and listed companies," she adds.

The Supreme People's Procuratorate and the Ministry of Public Security issued a joint document in May, stating that non-government personnel who accept bribes of more than RMB5,000 will be subject to criminal prosecution.

In addition, recently issued regulations make companies responsible for the actions of agents. "It is not good enough to say 'we don't know what our agents are up to'," says Violet Ho, managing director of the Beijing office of Kroll, a global risk consultancy.

The government has also rolled out an anti-corruption hotline and website to allow anonymous reporting of corruption issues. "It has very recently expanded the scope of a publicly accessible database of companies that have been convicted of bribery offences," says Eric Carlson, an associate at Covington & Burling in Beijing. "All of this means that there is a greater likelihood of improper conduct being reported and prosecuted."

Several prosecutions have resulted from Internet users highlighting abuses of power. Zhou Jiugeng, the head of a district property management unit near Nanjing, was prosecuted in 2009 after photographs of his expensive Cadillac car and Vacheron Constantin watch were posted online.