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合规热点

《反不正当竞争法（修订草案送审稿）》对反商业贿赂的最新修订
Amendments to Anti-commercial Bribery made by Draft Amendment of Anti-Unfair Competition Law

2016 年 2 月 25 日，国务院法制办公布了《中华人民共和国反不正当竞争法（修订草案送审稿）》（以下简称“送审稿”）。

On February 25, 2016, the Legislative Affairs Office of China's State Council published the Draft Amendment of Anti-Unfair Competition Law of the People's Republic of China (for examination) (hereinafter referred to as the Draft Amendment).

在反商业贿赂领域，送审稿首次从法律层面对“商业贿赂”行为进行了定义。其中，第 7 条明确规定，“商业贿赂”是指经营者向交易对方或者可能影响交易的第三方，给付或者承诺给付经济利益，诱使其为经营者谋取交易机会或者竞争优势。给付或者承诺给付经济利益的，是商业行贿；收受或者同意收受经济利益的，是商业受贿。

In terms of anti-commercial bribery, Draft Amendment for the first time prescribes the definition of “commercial bribery” from legal perspective. As clearly prescribed in its Article 7, “commercial bribery” means a business operator giving or promising to give an economic benefit to the other party in

中伦荣誉
Awards to Zhong Lun

- 荣获投中集团 2015 年度“中国并购市场（跨境）”和“私募股权投资行业”最佳法律服务机构奖项
2015 Best Legal Service Office Awards regarding “PRC M&A Market (Cross-border)” and “PE Investment Industry” by China Venture
- 荣获 ALB2016 “年度最佳房地产律师事务所大奖”奖项
“2016 Annual Award as Best Law Firm in Real Estate” by ALB
- 荣膺 The Lawyer 2016 “年度亚洲律师事务所”奖项
“2016 Annual Award as Asian Law Firm” by The Lawyer
- 荣膺《环球仲裁评论》“国际仲裁年度引人瞩目中国律师事务所奖”
“Annual Award as High-profile China Law Firm in International Arbitration” by Global Arbitration Review

a transaction, or to a third party that can influence the transaction, to induce them to solicit for the business operator a transaction opportunity or competitive advantage. Giving or offering to give an economic benefit constitutes giving a commercial bribe; accepting or agreeing to accept an economic benefit constitutes accepting a commercial bribe.

此外，第7条还明确了三种典型的商业贿赂行为及其构成要件，包括：1) 在公共服务中或者依靠公共服务谋取本单位、部门或个人经济利益；2) 经营者之间未在合同及会计凭证中如实记载而给付经济利益；3) 给付或者承诺给付对交易有影响的第三方以经济利益，损害其他经营者或消费者合法权益。送审稿采用该种列举形式，从某种意义上说是在行政执法阶段加重经营者的举证责任，即如果经营者的行为被监管机构确认符合上述任一种典型商业贿赂行为的构成要件，监管机构即可推定该企业存在商业贿赂行为，除非经营者能举出相反的证据。

In addition, Article 7 also describes three typical “commercial bribery” activities and their respective constitutive components, including: (1) seeking the organizational, departmental or personal economic benefits in public services or by depending on public services; (2) paying economic benefits to another business operator without making truthful record thereof in the contract and accounting documents; or (3) paying or offering to pay economic benefits to a third party having influence on the transaction, causing harm to the lawful rights and interests of other business operators or consumers. To some extent, the adoption of this “examples-citing manner” in Draft Amendment increases the business operators’ burden of proof during the stage of administrative investigation. In other words, once it is confirmed by the competent authority that the business operator’s activities have met the constitutive components of any typical commercial bribery example setting forth in Article 7, unless the business operator could prove otherwise, it could be presumed by the competent authority that the business operator’s activities have constituted the commercial bribery.

较之现行的《反不正当竞争法》，送审稿还对违法经营者的法律责任进行了修改。在不构成犯罪的形势下，由之前的“监督检查部门可以根据情节处以一万元以上二十万元以下的罚款，有违法所得的，予以没收”，修改为“经营者违反本法第七条规定的，监督检查部门应当责令停止违法行为，根据情节处以违法经营额百分之十以上百分之三十以下的罚款”。由于与“所得”相比，“经营额”的认定不存在扣除成本等问题，因此该修改可能会实质性加重违法经营者的被处罚金额，提高其违法成本。

关于中伦 About Zhong Lun

中伦是一家中国领先的律师事务所，能够为客户提供全方位的法律服务。

Zhong Lun is one of the leading law firms providing a complete spectrum of legal services in China.

中伦总部位于北京，另设十三个分所，分别位于上海、深圳、广州、东京、武汉、香港、重庆、青岛、成都、伦敦、纽约、洛杉矶和旧金山。中伦现有 220 多名合伙人和千余名律师及专业人士。

The headquarter office of Zhong Lun is in Beijing. Additionally, Zhong Lun, with over 220 partners and over 1000 professionals working in the headquarter office in Beijing and the other thirteen offices located in Shanghai, Shenzhen, Guangzhou, Wuhan, Chengdu, Chongqing, Qingdao, Tokyo, Hong Kong, London, New York, Los Angeles and San Francisco.

Comparing with the existing Anti-Unfair Competition Law, Draft Amendment also amended the legal consequences of the violation of Article 7. Where the case does not constitute a crime, the legal consequences that “the supervision and inspection department may impose a fine of not less than 10,000 Yuan but not more than 200,000 Yuan in light of the circumstances and confiscate the illegal earnings if any” has been changed into as “where a business operator violates Article 7, the supervision and inspection department shall order the business operator to stop the illegal act and impose on it a fine of not less than 10% but not more than 30% of the illegal business revenue in light of the circumstances”. Unlike “earnings”, no cost should be deducted from the “business revenue”, so this amendment may essentially increase the punishment amount imposed on the violators, whose illegal cost is in fact being raised correspondingly.

海关新政

New Customs Policy

2016年3月24日，财政部、海关总署和国家税务总局共同发布了《关于跨境电子商务零售进口税收政策的通知》（财关税[2016]18号，以下称“18号通知”），该通知已于2016年4月8日生效。18号通知值得关注的两个点为：

On March 24, Ministry of Finance, General Administration of Customs and State Administration of Taxation jointly promulgated the Notice on Tax Policies for Cross-border E-commerce Retail Import (Notice Cai Guan Shui [2016] No. 18, hereinafter referred to as “Notice 18”). Notice 18 has two major implications:

(1) 就跨境电子商务零售进口商品将实行新的征税政策，即在此模式下进口的商品需要按照一般贸易缴纳关税、增值税、消费税等综合税费。

(a) New types of taxes are to be levied on goods imported under the cross-border e-commerce program, i.e. customs duty under normal trade pattern, VAT and consumption etc. should be levied.

在18号通知发布之前，对个人邮递的消费物品和入境旅客行李物品征收的是“行邮税”，而“行邮税”也同样适用于通过跨境电商平台进口的零售商品。根据18号通知，对于跨境电子商务零售进口商品的单次交易价

执业领域

Practice Areas

- 合规/反腐败
Regulatory/Anti-bribery
- 房地产
Real Estate
- 私募股权与投资基金
PE & Investment Funds
- 收购兼并
M&A
- 争议解决
Dispute Resolution
- 建设工程与基础设施
Construction & Infrastructure
- WTO/国际贸易
WTO/International Trade
- 劳动法
Labor and Employment
- 资产证券化与金融产品
Securitization & Financial Products
- 信息技术、电信、传媒与娱乐
Technology, Media and Telecoms and Entertainment
- 海事海商
Shipping
- 资本市场/证券
Capital Markets/Securities
- 公司/外商直接投资
Corporate/Foreign Direct Investment
- 银行与金融
Bank and Finance
- 知识产权
Intellectual Property
- 反垄断与竞争法
Antitrust/Competition
- 海外投资
Overseas Investments
- 税法与财富规划
Taxation & Wealth Planning
- 破产重整与清算
Bankruptcy & Reorganization
- 酒店/旅游开发与管理
Hospitality
- 环境保护、能源与自然资源
Environmental, Energy and Natural Resources

值低于人民币 2000 元的，免关税，同时仅征收 70% 的增值税和消费税；对于完税价格超过 2000 元限值的单个不可分割商品，均按照一般贸易方式全额征税。有电商业内人士认为，18 号通知暂时未将诸如洋码头、淘宝代购等 C2C 平台纳入到本次的征税范畴。但由于目前相关细则等还有待出台，我们将进一步关注此次海关新政的发展。

Before the promulgation of Notice 18, Personal and Parcel Article Tax, a duty designed to facilitate importation of personal articles for personal consumption by postal and courier services or carry-on luggage, was applicable to the cross-border e-commerce program. Under the new Customs policy, for a parcel valued lower than RMB2,000, the customs duty will be exempted, and a 30% discount will be given to the VAT and consumption tax; for a parcel valued more than RMB2,000, the tax shall be levied based on the full amount as per the normal trade pattern. Some insiders in cross-border e-commerce believe that Notice 18 is not applicable to the Customers to Customers platforms, e.g. Ymatou, Taobao private overseas online retailers. For the lack of more detailed implementation rules, the situation is far from settled at this point and we will be closely monitoring the development.

(2) 将允许进口的跨境电子商务零售商品的管理体制由过去的“负面清单”模式变更为“正面清单”模式，即只有在“正面清单”上列明的商品才是可以在跨境电子商务零售模式下进口的商品。

(b) The regime changes from a previous negative list to a positive list of goods permissible, where only goods listed on the positive list can be imported under the cross-border e-commerce program.

在 18 号通知发布后的几天内，税务、海关及质量监督部门相继于 2016 年 4 月 6 日和 4 月 15 日发布了 2 份允许进口商品的“正面清单”。18 号通知及“正面清单”的迅速出台让许多跨境电商措手不及，也给跨境电商的经营带来了巨大影响。因此许多跨境电商请求当局能对在 18 号通知生效前就已经进口的商品予以宽限处理。海关总署于 2016 年 4 月 18 日发布了《海关总署办公厅关于执行跨境电商税收新政有关事宜的通知》，对 4 月 8 日（含 4 月 8 日）前运抵保税区的跨境电子商务进口商品，不论是否属于正面清单范围，均允许电商企业免于补领许可证和通关单，直至售完。

Within couple of days after promulgation of Notice 18, two positive lists were issued by the tax, customs and quality supervision authorities under Notice 18's framework, respectively on 6 April 2016 and then on 15 April 2016. The

cross-border e-commerce vendors were caught unprepared by the prompt promulgation of Notice 18 and the positive lists, which also caused huge impact on the cross-border e-commerce operation. So many of them pleaded to the authorities on more lenient treatment of the goods already shipped before Notice 18 came into effect. On April 18, the General Administration of Customs issued a notification, allowing goods not on the positive lists but already in the bonded zones before April 8 (including the day of April 8) to continue being sold without making a supplementary application for permit and port clearance until the inventory is exhausted.

“重庆高院：知假买假索赔不予支持！”引热议

Hot topic: Chongqing High People's Court: Claim related Know-fake-buy-fake will not be supported

由于消费者权益保护纠纷案件类型复杂，现有的法律法规不能完全解决各个案件中的实际问题，且各个法院裁判尺度也不尽一致，为了能更好的在重庆市范围内适用相关法律法规及尽可能保持裁判尺度一致，重庆市高级人民法院于2016年3月25日印发《关于审理消费者权益保护纠纷案件若干问题的解答》（以下简称《解答》）。《解答》结合了重庆市实际情况，就十二个涉及消费者权益保护纠纷案件的问题进行了详细解答。

Due to the complexity of consumer dispute types, incomplete correspondence between the existing laws and regulations and the practical problems in each case and the different standards for judgment of different courts, in order to apply the relevant laws and regulations in Chongqing better and keep the judgment standards as same as possible, on March 25, 2016, Chongqing High People's Court issued Solutions on Certain Issues in the Hearing of Cases Involving Consumer Disputes (hereinafter referred as "the Solutions"). In the Solutions, combined with the practical situation of Chongqing, there are detailed solutions for 12 issues concerning the protection for consumer interests and rights.

在这十二个问题中，引起最多争议的是第二个问题“明知商品或服务存在质量问题而仍然购买的人是否是消费者？”。重庆高院给出的解答是：除法律、行政法规及司法解释另有规定的以外，明知商品或服务存在质量问题而仍然购买的人是消费者，但是明知商品或服务存在质量问题而仍然购买的人请求获得惩罚性赔偿的，因有违诚信原则，人民法院不予支持。

Among those 12 issues, the most hot-topic is the second issue “Will the person who knows the artificial product or service but still buys be still regarded as consumer?”. The solution issued by Chongqing High People’s Court is, except the situation stipulated by laws, administrative regulations and judicial interpretations, the person who knows the artificial product or service but still buys shall be regarded as consumer. However, if those persons raise claim related to their know-fake-buy-fake, due to violation to principle of good faith, the people’s court shall not support those claims.

争议点在于很多人认为重庆高院对于这一问题的解答是明确表示了对于知假买假索赔不予支持的态度，与《消费者权益保护法》、《食品安全法》以及 2013 年 12 月 23 日最高人民法院发而的《最高人民法院关于审理食品药品纠纷案件适用法律若干问题的规定》中的内容有冲突，有违反上位法之嫌。

The flashpoint of that solution is many people think the solution issued by Chongqing High People’s Court to express the attitude of nonsupport to claim related know-fake-buy-fake has conflict with Law of the People's Republic of China on the Protection of Consumer Rights and Interests, Food Safety Law of the People's Republic of China and Provisions of the Supreme People's Court on Certain Issues concerning the Application of Law in the Hearing of Cases Involving Food and Drug Disputes issued on December 23, 2013 by the Supreme People's Court so that it may have risk of violation to the host law.

但是，细看重庆高院的解答就能发现，重庆高院对于知假买假索赔不予支持的适用是有所限制的，即如果法律、行政法规及司法解释有相应规定的，重庆高院仍严格按照法律、行政法规及司法解释执行；如果没有明确规定的，重庆高院基于立法本意、有利于保护消费者以及维护交易中诚信原则的角度，认为对于知假买假索赔的行为不予支持，并不有违上位法。同时，这种明确的解答对于在重庆市范围内统一裁判尺度有着很好的参照作用。

However, if you research the Solutions in detailed, you may find that Chongqing High People’s Court has restrictions to apply the nonsupport to know-fake-buy-fake, i.e. if there is clear provisions stipulated by laws, administrative regulations and judicial interpretations, it shall be enforcement in practice strictly; if there is no clear provisions, from the perspectives of legislation original intention, to the benefit of protecting consumer and maintain the principle of good faith, Chongqing High People’s Court’s solution to not to support the claim related know-fake-buy-fake doesn’t violate the host

law. Meanwhile, such express solution shall be deemed as a better standard to unify the standard of judgment in Chongqing.

业内新闻

国办：整顿规范医药市场 严打商业贿赂等违法违规行为

General Office of the State Council: Rectify and Standardize the Medical Market and Take Severe Measures against Commercial Bribery and other Violations to Laws and Regulations

国务院办公厅于 2016 年 3 月 4 日发布关于促进医药产业健康发展的指导意见（以下简称“意见”）。

On March 4, 2016, General Office of the State Council issued Guidance Opinion to Accelerate the Healthy Development of Medical Industry (hereinafter referred as “Guidance Opinion”).

意见要求，加强产业协同监管，完善监管部门、行业协会、医药企业沟通机制，健全立体全面的监管网络，形成全社会共治的监管格局，支持行业协会等社会团体开展产业运行监测分析、产业发展战略研究和行业信息发布。

The Guidance Opinion requests to strengthen the cooperative supervision and regulation, complete the communication system among supervision authority, industry association and medical enterprise and establish the supervision net with comprehensive coverage in order to form the regulatory pattern with the whole society governance and support the industry association and other social organization to monitor and analyze the industry operation, research the strategy for industry development and announce industry news.

同时，意见还要求，整顿规范医药市场，严厉打击生产经营假冒伪劣医药产品、实施商业贿赂、暗中操纵价格等违法违规行为。

Meanwhile, the Guidance Opinion further requests to rectify and standardize the medical market, take severe measures against production and management of forged and fake medical product, commercial bribery, price control and other violations to laws and regulations.

民企反腐力度可能会加强

May strengthen the anti-corruption efforts on private enterprises

最近几年，政府的反腐重点都集中在政府机构和国企上。而频发的民企腐败案例，令整个民营经济看到了腐败现状的严重性。以阿里、百度、华为、万达为首的民企反腐事件，在带给民营经济反腐警示的同时，也带来对民企反腐路线和机制的思考。作为来自东莞的全国人大代表，黄建平就曾在今年两会上提出，民营企业内部的腐败问题日益严重，不仅影响了民营企业的健康发展，也影响了国家经济社会发展大局，应将民企防腐工作纳入国家反腐体系。

During these years, Chinese government concentrates on the government internal and state-owned enterprise anti-corruption. However, the frequent corruptions occurred in private enterprises make the private economy find the seriousness of the current status of corruption. Such as the anti-corruption cases by Ali, Baidu, Huawei and Wanda not only alert the anti-corruption in private economy but also cause the consideration on the rout and system of anti-corruption in private enterprises. Mr. Huang Jianping, as the deputy of the National People's Congress from Dongguan, Guangdong Province, proposed on the NPC&CPPCC this year that the increasingly severe corruption within private enterprises not only affect the healthy development of private enterprises but also affect the nation's overall economic and social development. Thus, anti-corruption in private enterprises shall be adopted to the State anti-corruption system.

2016年2月19日，最高检察院发布了《关于充分发挥检察职能依法保障和促进非公有制经济健康发展的意见》，强调各级检察机关要依法惩治侵犯非公有制企业合法权益的金融诈骗、合同诈骗、商业贿赂等破坏市场经济秩序的犯罪。

On February 19, 2016, Supreme People's Procuratorate announced the Opinion regarding Giving Full Play of Procuratorial Duty to Protect and Accelerate the Healthy Development of Non-public Economy. The Opinion emphasizes that the Investigating and Prosecuting Apparatus of all different levels shall punish financial fraud, contract fraud, commercial bribery and other crimes which violate the interests and rights of non-public economy and destroy the order of the market economy.

根据我们的经验，企业腐败的主要原因在于内部的高管，一般发生在业务体系甚至包括一些技术人员身上，分为三种现象：（1）职务侵占，利用职务的便利侵占企业的财物；（2）行贿，在开展业务的时候，采取商业贿赂的行为，出现问题也给企业造成危害；（3）知识产权，如技术人员跳槽后将企业的技术专利带到别的企业去。因此，在政府坚定的反腐决心下，政府今后可能会逐步加强对民企的反腐力度。

According to our experience, the main reason for enterprise corruption is the internal senior executives. Generally, the corruptions happen to the business system of enterprises even some technicians. It can be three kinds of appearance: (1) Job embezzlement: using functionary power to embezzle the property owned by enterprises; (2) Bribery: carrying out commercial bribery in business development, which is also harmful to enterprises if there is negative issue occurred; (3) Intellectual property: for example technician brought the technical pattern or know-how to another enterprise after job-hopping. Therefore, with the firm determination, the government may strengthen the anti-corruption efforts on private enterprises step by step.

新法速递

国家工商总局颁布《流通领域商品质量监督管理办法》并自 2016 年 5 月 1 日起施行

Measures for the Supervision and Administration of the Quality of Products in Circulation Field promulgated by SAIC has been effective since May 1, 2016

国家工商总局颁布的部门规章《流通领域商品质量监督管理办法》（以下简称《监管办法》）自 2016 年 5 月 1 日起施行。

Measures for the Supervision and Administration of the Quality of Products in Circulation Field (hereinafter referred as “Measures”) promulgated by SAIC has been effective since May 1, 2016

《监管办法》共五章三十九条，对《消费者权益保护法》和《产品质量法》规定的从事商品经营销售者的义务作了具体细化。《监管办法》的主要内容有：（1）工商部门开展流通领域商品质量监管的管辖原则、监管制度；

(2) 经营者从事与商品销售相关的经营活动中应当承担的质量责任和义务；(3) 以负面清单的形式明确了经营者禁止销售的商品；(4) 经营者解决消费纠纷、承担退市退货、瑕疵商品提示等义务；(5) 为商品销售服务的运输、保管、仓储以及第三方经营者的质量义务；(6) 工商部门开展商品质量监管的方式方法、检查职权；(7) 对商品下架、溯源及通报、执法信息公开以及行政指导等要求。《监管办法》还规定了经营者未依法承担质量责任义务的法律后果，明确了依法从轻减轻等情形。

Measures constitutes 5 sections with total 39 articles and specializes the obligations of commodity business sellers stipulated in Law of Protection of Consumers' Rights and Product Quality Law. The main contents of Measures are related to: (1) the jurisdiction principle and regulation system for Ministry of Commerce and Industry to carry out the quality supervision to the products in commodity circulation; (2) quality responsibility and obligation shall be borne by the operator in business activities related to the sale of products; (3) clear the product prohibited to be sold by the operator in the form of negative list; (4) the operators' obligations of solving consumption dispute, bearing delist and sales return, reminder the defect of products; (5) the operators' obligations of transportation, safeguard, storage and third party's quality related to the sale of product; (6) ways and means for AIC to carry out the supervision and powers as well; (7) the request for the announcement of pulling the product from the shelves, tracing the source and bulletin, information of enforcing law and administrative guidance. Measures has also stipulated the legal liability for the operator who fail to bear the quality responsibility and obligation and the conditions for reduce or mitigate according to the law as well.

《监管办法》明确，六类商品不得销售。分别是：不符合保障人体健康和人身、财产安全的国家标准、行业标准的产品；不符合在产品或者其包装上标注采用的产品标准的产品，不符合以产品说明、实物样品等方式表明的质量状况的产品，不具备应当具备的使用性能的产品；国家明令淘汰并禁止销售的产品；伪造产地，伪造或者冒用他人的厂名、厂址，伪造或者冒用认证标志等质量标志的产品；失效、变质的产品；篡改生产日期的产品。

Measures has expressly stipulated there are 6 kinds of commodities shall be prohibited to sale: (1) Products that fail to meet the national standards or industry standards on protecting human health and personal or property safety; (2) Products that fail to meet the product standards that are indicated thereon

or on their packaging for adoption, products that fail to meet the quality status as shown by product descriptions, physical samples or other means, and products that do not have the use performance that they are supposed to have; (3) Products that have been expressly ordered to be eliminated by the State and whose sales are prohibited; (4) Products with forged places of origin, products with forged factory names or addresses or for which the factory names or addresses of others are fraudulently used, and products with forged or fraudulently used certification marks and other quality marks; (5) Products that have expired or whose quality has deteriorated; or (6) Products whose date of production has been tampered with.

同时,《监管办法》要求工商部门加大与相关部门的信息通报和执法协作力度,加强商品质量源头治理,发挥监管合力,共同促进商品质量总体水平不断提升,切实营造安全放心的消费环境。

Meanwhile, according to Measures, AIC shall strengthen the information brief and enforcement cooperation with other related authorities to enhance the supervision for the commodity resource, develop the joint efforts in supervision in order to accelerate the promotion of general commodity quality and construct the safety and relieved consumer environment.

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