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Memorandum to: Our Clients and Friends

A Brief Analysis of PRC Commercial Bribery Law and Practice as Applicable to MNCs

As the largest developing country in the world, the Chinese market has attracted worldwide investors. In order to enter into the Chinese market quickly and obtain more business opportunities and interests, some multinational enterprises (or MNCs) resort to giving or otherwise offering properties or monetary benefits to their business counterparties and/or Chinese government officials. There have also been cases where the MNCs become subject to investigations and penalties by Chinese government authorities or authorities of their home jurisdictions due to commercial bribes committed by their subsidiaries, employees and/or agents in China out of their knowledge. Once a MNC gets involved in commercial bribery, no matter whether such bribery activity is committed deliberately or inadvertently, its interests and/or reputation will inevitably be damaged in one way or another. Therefore, how to prevent and cope with risks associated with commercial bribes has become an increasingly important operational and legal issue faced by MNCs with operations or other business activities in China.

Based on our observations of limited cases involving MNCs, we have prepared this memorandum to illustrate some major commercial bribery challenges for MNCs doing business in China and some useful anti-bribery strategies from both the legal and practical perspectives for the general reference by our clients and other interested investors.

I. Major Anti-Bribery Challenges Faced by MNCs in China

According to a research report recently publicized by a Chinese non-governmental economic analysis institute, the number of commercial bribery cases committed by MNCs has increased in recent years. In the last decade, China has at least investigated some half million bribery/corruption cases, among which some 64% are related to international trades or foreign investors. Based on publicly available information, we have summarized below some representative commercial bribery cases involving MNCs to provide a general idea about the major risks of commercial bribery faced by MNCs with a presence in China.

#	MNCs or their Employees Involved	Commercial Bribery Behaviors	Charges and Penalties	Case Closing Time
1.	Pfizer Inc.	From 2003 through 2007, absent Pfizer	Pfizer was charged by SEC of	2012

#	MNCs or their Employees Involved	Commercial Bribery Behaviors	Charges and Penalties	Case Closing Time
	("Pfizer")	<p>headquarters' knowledge, a PRC subsidiary of Pfizer, through its employees and agents, provided cash payments, gifts and other benefits (e.g., accommodations for international trips and domestic/overseas conferences) to doctors of Chinese state-owned medical institutions to influence such doctors' decision on prescribing medicines produced by Pfizer, which expenses have not been recorded by the PRC subsidiary in its accounting books.</p> <p>Pfizer disclosed voluntarily the aforementioned bribes of its PRC subsidiary to the U.S. Department of Justice and Securities and Exchange Commission ("SEC") in October 2004 and then reported findings of a thorough internal investigation of its global operations. In addition, Pfizer also undertook to adopt a comprehensive compliance review of its operating model, enhance its internal control and compliance systems.</p>	<p>violating accounting provisions of the U.S. Foreign Corrupt Practices Act (the "FCPA") and lacking internal control system.</p> <p>Pfizer finally settled with SEC and paid certain amount of penalty.</p>	
2.	Watts Water Technologies Inc. ("Watts")	<p>Watts acquired Changsha Valve Works in April 2006. The acquired entity adopted a sales policy containing commercial bribery strategies that were not discovered by Watts during its due diligence for the acquisition, pursuant to which policy the expenses related to travels, meals and entertainments as well as consulting fees were provided to staff of a state-owned design institute so as to cause them to recommend Watts' products to SOEs and to set up favorable design standards to Watts' products.</p> <p>After the acquisition, Watts failed to provide adequate anti-bribery trainings to the employees of the acquired entity or adopt any other proper internal control system and the acquired entity continued commercial bribery behaviors for a while.</p>	<p>Watts was charged by SEC of violating the accounting provisions of the FCPA and lacking internal control system.</p> <p>Watts finally settled with SEC and paid penalty of USD3.77 million.</p>	2011
3.	Garth R. Peterson <i>(Former managing director of Morgan Stanley's real estate investments and funds business in China)</i>	<p>From 2004 through 2007, Peterson offered bribes to the former chairman of a Chinese state-owned enterprise by inviting the chairman to invest in several Morgan Stanley projects at favorable prices and giving him kickbacks in order to have the chairman help Morgan Stanley's real estate funds explore businesses in China.</p> <p>Morgan Stanley reported Peterson's illegal behaviors to SEC and assisted with the consequent investigations.</p>	<p>Peterson was charged by SEC of offering bribes, violating accounting provisions of the FCPA and committing fraud. Morgan Stanley was not charged as a result of its voluntary disclosures and full cooperation and supports in the investigations.</p> <p>Peterson finally settled with SEC, disgorged the illegal income of USD254,600 and relinquished his interest in a real estate property with an appraised value of USD3.4 million in Shanghai. Besides, Peterson was permanently barred from the financial industry and</p>	2012

#	MNCs or their Employees Involved	Commercial Bribery Behaviors	Charges and Penalties	Case Closing Time
			sentenced to prison for 9 months.	
4.	Toyota Motor Finance (China) Co., Ltd. ("Toyota Finance")	From 2008, Toyota Finance provided monetary interests in the name of "processing fees" and "service fees" to Hangzhou Jinfeng Toyota Motor Sales and Service Co., Ltd. and several other Toyota distributors in order to obtain auto financing business opportunities.	In September 2010, Jianggan Branch of Hangzhou SAIC (as defined below) office issued a hearing notice of administrative penalty to Toyota Finance, stating that the activities of Toyota Finance have constituted commercial briberies and Hangzhou SAIC office proposed to confiscate its illegal gains for about RMB420,000 and to impose a fine of RMB140,000. In addition, SAIC offices in other cities such as Ningbo have also initiated administrative investigations in their respective administrative regions against Toyota Finance with respect to its commercial bribery activities.	Unknown
5.	Hu Shitai, Wang Yong, Ge Minqiang, Liu Caikui (<i>Chief Representative and employees of Shanghai Representative Office of Australia Rio Tinto Co., Ltd. ("Rio Tinto")</i>)	From 2003 through 2009, the four defendants had repeatedly asked for or accepted money from Chinese enterprises by taking advantages of their positions in the iron ore trades with China and gave such Chinese enterprises chances of long term cooperation with Rio Tinto, with a total amount of bribes for more than RMB90 million.	The four defendants have been convicted of bribery and sentenced to fixed-term imprisonments by Shanghai No.1 Intermediate People's Court. Fines and confiscation of illegal gains have also been imposed.	2010
6.	InVision Technologies, Inc. ("InVision")	From 2002 through 2004, after InVision became aware that its agents and middlemen in China and a few other countries offered bribes to the local government officials in order to sell its airport equipment products, InVision did not take any action to prevent those briberies, nor did it record related expenses in its accounting books.	InVision was accused by SEC of violating both anti-bribery and accounting provisions of the FCPA. InVision agreed to disgorge its illegal gains plus interests, and pay civil fines of USD1.1 million to SEC.	2005

From the above-listed cases, it is easy to see that MNCs may face at least two major risks related to commercial bribery during their investment and operation activities in China:

First, when acquiring a Chinese company, MNCs may face the risk of assuming liabilities for the commercial briberies committed by the target company that they failed to identify. The primary cause is that MNCs are unfamiliar with the PRC anti-bribery laws and regulations, not to mention the variety of the commercial bribery methods in practice which makes it sometimes difficult for them to timely discover the commercial briberies committed by the target company, and thus adequately assess and properly deal with the associated risks (*e.g., under case #2, Watts was charged and penalized by SEC for the continued commercial briberies committed by the target Changsha company before and after the acquisition*).

Second, during their operation in China, MNCs may be liable for (or at least suffer

reputational damages from) the commercial bribes committed by their subsidiaries, employees or agents in China that are known to or even permitted by them. In order to obtain business opportunities or improper benefits in China, MNCs may simply follow the illegal local precedents to engage in commercial bribes (e.g., under case #4 above, *Toyota Finance offered bribes to its distributors*; in case #6, *InVision allowed its agents and middlemen to offer bribes to Chinese government officials after it was aware of such bribes*), or become negligent of taking precautionary measures and fail to establish and carry out appropriate anti-bribery internal control systems to have their employees and agents in China properly trained and supervised (e.g., under cases #1, #4 and #5, *bribes of these MNCs' China affiliates and employees are all seem to be beyond their overseas headquarters' knowledge*).

II. Suggested Anti-Bribery Strategies

1. Understanding PRC Anti-Bribery Laws and Regulations

To prevent and cope with risks and liabilities associated with commercial bribes in China, MNCs will always need to get themselves familiar with applicable PRC anti-bribery laws and regulations, in addition to complying with anti-bribery rules of their home countries.

(a) PRC Anti-Bribery Legal Framework

China currently does not have any integrated anti-bribery law. Rules are sporadically provided under such laws, regulations, judicial interpretations as well as criteria of industrial associations as the *PRC Anti-Unfair Competition Law*, the *PRC Criminal Law*, the *Interim Provisions on Prohibiting Commercial Bribery*, the *Opinions on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery* and the *Interpretations regarding Certain Issues Related to Specific Application of Laws in Handling Criminal Cases Involving Offering Bribes*, among others. In order to facilitate the implement of the anti-bribery principles and provisions under the superior laws and regulations, many local government authorities also promulgated their own local rules.

In addition, for the industries with high risks of commercial bribery (e.g., *medical service, government procurement, nature resources, finance, construction and etc.*), specific anti-bribery rules such as the *Provisions on the Establishment of Bad Record of Commercial Bribery in Process of Pharmaceutical Sale and Purchase*, the *Opinions on Further Carrying Forward the Specific Campaign against Commercial Bribery in the Area of Land and Resources*, the *Implementation Opinions on Carrying out Specific Campaign against Commercial Bribery in Insurance Industry*, and etc. are further promulgated.

(b) Major Features of Commercial Bribery Activities

(i) Definition of Commercial Bribery

Under PRC law, the term of “commercial bribery” was firstly defined in the *Interim Provisions on Prohibiting Commercial Bribery* (the “Interim Provisions”) issued by the State Administration for Industry and Commerce (“SAIC”) in November, 1996, which refers to the behavior that a business operator bribes its counterparty by providing properties or through other methods in order to sell or purchase commodities.

The term of “commercial bribery” has yet to be further modified or re-defined, but it is noteworthy that the Interim Provisions was issued approximately two

decades ago and both the connotative and denotative meanings of the commercial bribery defined thereunder are way too narrow to cover evolved features of commercial bribes in today's practices. For example, nowadays the purpose of offering bribes is not only for sale and purchase of commodities but also for providing/receiving services; the parties accepting bribes not only include transaction counterparties, but also include other parties who may have influence on the underlying transactions. Therefore, based on other applicable laws and regulations and the prevailing practices, "commercial bribery" should generally be interpreted as follows: during the process of a business transaction, a business operator directly or indirectly offer properties or other improper benefits to its business counterparty or any other organization or individual who has influential power to the proposed transaction in order to obtain transaction opportunities, favorable transaction terms and/or other economic interests. Offering properties or improper benefits constitutes the act of "offering bribes", while accepting properties or improper benefits constitutes the act of "accepting bribes" and introducing people for bribery purpose constitutes the act of "introducing bribes". In a word, offering, accepting or introducing bribes in or for the purpose of business transactions should all be regarded as commercial bribery behaviors.

(ii) Parties Involved in Commercial Bribery

Under currently effective PRC anti-bribery rules, only for-profit business operators (no matter they are organizations or individuals) will be charged for offering bribes, and individuals (instead of organizations) for introducing bribes. While on the other hand, any party, no matter it is an individual or an organization, and whether it is the counterparty to the transaction or anyone who is or might be influential to the transaction (e.g., any PRC state functionary,¹ PRC or foreign government official, employee of international public organizations and etc.) that accepted commercial bribes will be charged for accepting bribes.

(iii) Means of Commercial Bribery

Commercial bribes might be provided in the forms of money, in-kind assets and/or other property interests, the value of which could be measured by money (e.g., providing prepaid membership cards, debit cards, coupons, travel accommodations, house decoration service and etc. for free, or trading commodities or services at a price obviously lower or higher than the fair market value to improperly benefit the counterparty or any other interested party). It is noteworthy that providing benefits or interests the pecuniary value of which are unable or difficult to be measured (e.g., admission to school, job promotion, registration of *hukou*, and etc.) will almost not be

¹ According applicable PRC anti-bribery laws and practices, "state functionaries" in terms of commercial bribes mainly include: (a) persons engaged in public services at various state and local organs including legislative, administrative, judicial and military authorities; (b) persons engaged in public services at organizations exercising administrative powers of the state in accordance with laws and regulations; (c) persons engaged in public services at the organizations exercising administrative power as authorized by state organs; (d) persons engaged in official business of state organs who are not included in the establishment of functionaries of state; (e) persons engaged in public services at Chinese Communist Party or the Chinese People's Political Consultative Conference or its offices at or above country (township) level; (f) persons engaged in public services at state-owned companies, enterprises, institutions or organizations; (g) persons who are assigned by state organs, state-owned companies, enterprises or institutions to non-state-owned companies, enterprises, institutions or social organizations to engage in public services, and (g) the other persons engaged in public services by law.

deemed a criminal offense under the applicable *PRC Criminal Law*, it is still chargeable for administrative liabilities in China.

(iv) Differences Between Commercial Bribery and Legitimate Acts

- (A) Discount: In business practice, it is quite common in a transaction that the selling party offers favorable prices or discounts to its counterparties under certain circumstances to promote the sale of its products. As long as the favorable prices or discounts offered to the counterparties have been duly and accurately recorded in the selling party's accounting books in accordance with applicable accounting principles, they are permitted and legal under PRC laws and practice.

MNCs will need to know how to differentiate discounts and kickbacks offered to the counterparties during their operations. Kickback is a typical form of commercial bribery, under which certain portion of the sales price was refunded by the selling party secretly off the book to the counterparties in cash, in-kind assets and/or other means. "Secretly off-the-book" means the failure of explicitly and truthfully recording the favorable prices or discounts offered to the counterparties in the selling parties' accounting books (*e.g., failing to record the discounts in the books, recording the discounts under other accounting items, making false accounting records or otherwise*), and as a result the revenue and expenditure of the underlying transaction as well as the business operation of the selling party are distorted.

- (B) Commission Fees: In practice, a business operator may engage an intermediary (or an agent) to facilitate its business activities and pay commission fees to such intermediary/agent as consideration for the intermediary services so provided. The commission fees paid by the business operator to the agent will be treated as legitimate expenses, provided that the intermediary/agent is qualified to conduct the relevant intermediary business and such payment is duly and accurately recorded in the business operator's accounting books in accordance with applicable accounting rules; otherwise, payment of commission fees may constitute commercial bribery. Therefore, in order not to involve in commercial bribery when making payments to business agent, MNCs will need to make sure that the agent to be engaged is qualified for providing the underlying intermediary service and the payment made to such agent will be timely and accurately recorded in their financial books pursuant to applicable accounting rules.

- (C) Bonus Gift: According to the Interim Provisions and other PRC anti-bribery regulations, if a business operator provides an extra amount of properties or benefits to the counterparty in a transaction for the purpose of obtaining more business opportunities (whether directly or indirectly), such business operator will most probably be deemed to have committed commercial bribery unless the extra properties or benefits so provided are of an advertising nature with a very small value and the provision of such properties or benefits is a common practice in deals of the same or similar kind. Therefore, in order to avoid commercial bribery, MNCs will need to pay special attention to the appropriateness of the value of the bonus gifts they may offer (*which should always significantly below the value of the commodity to be sold*) and whether the provision of bonus gifts is generally consistent with the common practice.

- (D) Presents: In business practice, giving a presents is a way to express

courtesy and usually will not be considered as commercial bribery. To distinguish a behavior of giving a present and commitment of commercial bribery, it mainly depends on the background, purpose, occasion and pattern when the present is given, the relationship between the two parties, as well as the value of the property. Generally speaking, an appropriate present without bribery purpose or seeking interests by taking advantage of one's position does not constitute commercial bribery.

(E) *Donations*: Commercial bribery in the disguise of donation is quite imperceptible. To differentiate legal donation from commercial bribery, the following aspects should be taken into consideration: whether the donation is conditioned on obtaining or retaining business; whether there is any business relationship between the donor and recipient; whether the donor and recipient agree to use the donation only for pro bona purposes; and whether the donor properly recorded the donation on its accounting books, among others.

(v) Legal Consequences of Commercial Bribery

In China, competent PRC government authorities including SAIC offices are empowered to impose fines ranging from RMB10,000 to RMB200,000 on the business operator who has committed commercial bribery and to confiscate its illegal gains. If a business operator has been convicted of commercial bribery crime, it will be subject to criminal fines (its business license and critical operating permits might also be revoked if it is in such special industries as pharmaceutical and etc.), while the concerned individuals (including the person in charge and the person who are directly responsible for the crime) will be subject to criminal detention or imprisonment for a fixed term or even a life time. Confiscation of personal properties may also be imposed. Moreover, if any third party suffered loss as a result of the charged commercial bribery, it will be entitled to claim for indemnifications against the business operator. Business operators may also be held liable for commercial bribes committed by employees on behalf of or for the benefit of them.

Further, where a MNC or its subsidiary or employee in China offers commercial bribery to PRC governmental officer, state-owned enterprise, political party member or candidate, among others, it might have also been violated anti-bribery or anti-corruption statute of its home country (e.g., the FCPA and the *Bribery Act* of U.K.), which means even if such MNC (or its PRC subsidiary/employee) did not get caught in China, it may still be subject to investigations and punishment in its own country (e.g., under cases #1 and #2 introduced above, Pfizer and Watts were not investigated in China but have been charged and penalized by SEC due to the bribes committed by their China subsidiaries).

2. *Conducting Adequate Anti-Bribery Due Diligence Review*

When MNCs plan to make equity investment in China (especially in such areas as pharmaceutical, telecommunications and etc., or through M&As where any domestic Chinese company or assets are targeted), it is always advisable for them to conduct adequate anti-bribery review and investigations on the potential business partner or the target company/assets to discover potential anti-bribery risks and to better evaluate the proposed transaction. If a satisfactory anti-bribery due diligence is not feasible for any reason prior to the transaction, it will still be prudent for MNCs to conduct (or further conduct) due diligence review post transaction and to procure an appropriate internal anti-bribery mechanism to be established and duly implemented as soon as

practical.

To better protect their interests in M&A deals, MNCs may also require the target, its controlling shareholder and/or the selling party (as the case may be) to provide representations, warranties and indemnification undertakings in the underlying transaction documents in connection with the history of the target company/assets' anti-bribery compliance practice.

3. *Establishing Appropriate Internal Anti-Bribery Control System*

In order to prevent potential corruptions and commercial bribes in China, MNCs may consider precautionary measures, including without limitation, (a) establishing and constantly improving their internal anti-bribery policies and system in terms of expenses and reimbursement, business entertainment, limitation of donation and etc., according to applicable laws and regulations of both their home country and China; (b) ensuring their accounting books and records duly and accurately reflected their operational activities in all material aspects without material omissions or misleading information; (c) providing regular anti-bribery trainings to employees (specifically, the directors, sales and management team members as well as any other employee who might be somehow connected to any government official, among others), agents and business partners of their PRC subsidiaries; and (d) establishing internal anti-bribery reporting and warning system under which any suspected commercial bribery act of the company's director, employee, or third party agent could be reported to the legal/compliance department of the company so that internal investigation could be initiated in a timely manner.

In addition, MNCs should also try to conduct necessary investigations on their business partners, agents, and other third party service providers before entering into transactions or serious business relationships with them, and to obtain their written undertakings to comply with all applicable anti-bribery laws and regulations.

Once discovering suspected commercial bribes of their subsidiaries, employees or agents in China, MNCs should always try to carry out thorough internal investigations in a prompt way and to report to and cope with the competent law enforcement agencies so that the potential economic and reputational damages could be minimized.

* * *

The above is a brief summary and analysis of the commercial bribery risks that MNCs may face in their investments and operations in China. Some suggested precautionary measures have also been discussed based on applicable PRC laws and prevailing practices which we hope could somehow benefit the investors interested in this subject. This memorandum is however for general reference purpose only and should not be used or otherwise relied on as any formal legal opinion from us.

If you have any questions, please feel free to contact us at inquiry@hanyilaw.com.

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跨国企业在华商业贿赂法律问题浅析

中国作为全球最大的发展中国家，拥有广阔的市场和资源，吸引着各国的投资者，其中不乏一些跨国企业为快速进入中国市场，谋取更有利的商业机会和利益，不惜使用各种手段向交易对方、中国相关政府官员等提供各种财物和好处。当然，也有一些跨国企业在其本身不知情的情况下，因其在华子公司、员工、代理商等实体的商业贿赂行为，而遭受其本国或中国主管机关的调查和处罚。无论跨国企业是主动还是被动，是知情还是不知情，一旦与商业贿赂发生牵连，其利益和声誉均会受到遭到不同程度的不良影响。因此，如何防范和应对在华投资和经营过程中的商业贿赂风险已经成为跨国企业必须面对和重视的问题。

本备忘录观察和总结了跨国企业在华涉及商业贿赂的若干案例，并将从中国反商业贿赂的法律和实务两个方面简要探讨跨国企业在华主要面临的商业贿赂风险和应对策略，供对此有兴趣的投资人和企业参考。

一、跨国企业在华经营面临的主要商业贿赂风险

国内一家民间经济分析机构近期公布的一份研究报告显示，近年来跨国企业在华行贿事件一直呈上升趋势，中国在近 10 年内至少调查了 50 万件贿赂/腐败事件，其中 64% 与国际贸易和外商有关。根据相关公开信息，我们选取并整理了如下几个涉及跨国企业在华商业贿赂的典型案列，从中可以大致看出跨国企业在华投资和经营所面临的主要风险：

#	涉及的跨国企业/人员	商业贿赂行为	所受指控及处罚	结案时间
1.	Pfizer Inc. (“Pfizer”)	<p>2003 年至 2007 年，Pfizer 的中国子公司在总部不知情的情况下，通过其个别雇员和代理商向中国相关国有医疗机构的医生提供现金和礼物，并提供招待、出国旅行、国内外会议等其他利益，促使医生在开处方时使用 Pfizer 的药物，并且未在其会计账簿中记录上述支出。</p> <p>Pfizer 于 2004 年 10 月向美国司法部和美国证券交易委员会 (“SEC”) 主动披露了其中国子公司行贿的情况，展开全球性的内部调查，并定期报告调查结果；Pfizer 还承诺对其运营模式进行合规审查，增强内控及合规措施。</p>	<p>Pfizer 被 SEC 指控违反美国《反海外腐败法》 (“FCPA”) 下的会计条款和缺乏内控制度。</p> <p>Pfizer 与 SEC 达成和解，缴纳了一定金额的罚款。</p>	2012 年
2.	Watts Water Technologies Inc. (“Watts”)	<p>Watts 于 2006 年 4 月收购了长沙阀门厂，并成立沃茨阀门 (长沙) 有限公司。该被收购企业在被收购前后一直采用一项包含商业贿赂内容的销售政策，对相关国有设计院的员工提供差旅费、餐费、娱乐费、咨询费等，以使该设计院推荐国有机构采购该公司的产品，并起草有利于该公司产品的设计标准。</p> <p>Watts 在收购的尽职调查中未发现此项政策，在收购完成后也没有执行完善的内部控制措施，且未对被收购方的员工提供充分的反商业贿赂培训。</p>	<p>Watts 被 SEC 指控违反 FCPA 下的会计条款，缺乏内控制度。</p> <p>Watts 与 SEC 达成和解，支付约 377 万美元罚金。</p>	2011 年
3.	Garth R. Peterson (原 Morgan Stanley 中国房地)	<p>2004 年至 2007 年间，Peterson 向一家中国国有企业的前董事长行贿，邀请该董事长个人以优惠的价格投资 Morgan Stanley 的多个项</p>	<p>Peterson 被 SEC 指控行贿、违反 FCPA 下的会计条款及欺诈。Morgan Stanley 因主动报告雇员的商业贿赂</p>	2012 年

#	涉及的跨国企业/人员	商业贿赂行为	所受指控及处罚	结案时间
	产投资和基金业务董事总经理)	目, 并给予该董事长一定的回扣, 促使该董事长协助 Morgan Stanley 房地产基金在中国招揽业务。 Morgan Stanley 主动向 SEC 报告了 Peterson 的违法行为并配合调查。	行为并配合 SEC 调查, 而未受到指控。 Peterson 与 SEC 达成和解, 退还非法所得 25.46 万美元, 放弃一套位于上海房产权益 (估值 340 万美元), 被永久剥夺金融行业从业资格, 并获刑 9 个月。	
4.	丰田汽车金融(中国)有限公司(“丰田金融”)	自 2008 年起, 丰田金融以“手续费”或“服务费”等名义向杭州金丰丰田汽车销售服务有限公司等多家丰田品牌汽车经销商提供财物, 从而获得汽车消费贷款业务。	2010 年 9 月, 杭州市工商局江干分局向丰田金融下达行政处罚听证告知书, 认为丰田金融的行为构成商业贿赂, 拟没收其人民币 42 万余元的违法所得、并处罚款人民币 14 万元。 除杭州工商局之外, 宁波等地工商部门也已对丰田金融在其辖区内的商业贿赂行为进行立案调查。	未知
5.	胡士泰、王勇、葛民强、刘才魁(澳大利亚力拓有限公司(“力拓”)驻上海代表处首席代表及中国雇员)	2003 年至 2009 年间, 被告四人利用职务上的便利, 在对华铁矿石贸易中, 多次索取或收受数家中国企业提供的钱款, 以给予该等中国企业与力拓长期合作的机会。四人受贿共计人民币 9,000 余万元。	上海第一中级人民法院判决被告四人构成非国家工作人员受贿罪, 并处罚金及有期徒刑, 追缴全部违法所得。	2010 年
6.	InVision Technologies, Inc. (“InVision”)	2002 年至 2004 年间, InVision 在意识到其在中国等国家的销售代理和中间商为了销售 InVision 生产的机场设备而向当地官员支付现金的情况下, 仍然允许该等代理和中间商进行行贿活动, 并且未正确地记录该些支出。	SEC 指控 InVision 违反 FCPA 下的反贿赂条款和会计条款, 该公司同意向 SEC 支付违法所得及其利息, 并支付民事罚款, 共计约 110 万美元。	2005 年

综观上述涉及跨国企业在华商业贿赂的案例, 可见跨国企业在华投资和经营中面临的主要商业贿赂风险及产生的主要原因大致如下:

其一、在跨国企业投资并购境内企业时, 跨国企业可能会因为未被其发现的被收购公司的商业贿赂行为而承担相关法律责任。产生该风险的主要原因在于, 跨国企业可能不熟悉中国的反商业贿赂规定, 也不了解中国商业实践中花样繁多的商业贿赂手段, 难以在投资并购中及时发现、充分评估和适当处理被收购企业潜藏的商业贿赂风险和问题(比如案例 2 中的 Watts 因长沙阀门厂在被收购前后持续存在的商业贿赂行为而被 SEC 指控和处罚)。

其二、跨国企业在中国经营的过程中, 可能会因其中国子公司、员工、代理商等的在华商业贿赂行为, 而承担相应的法律责任或至少受到声誉上的损害。前述情况的出现或是由于跨国企业在华经营过程中无视或忽视中国有关反商业贿赂的法律规定和执法实践, 为谋取不当利益而进行商业贿赂(比如案例 4 中丰田金融的商业贿赂及案例 6 中 InVision 对其代理和中间商行贿活动的暗许); 或是由于跨国企业在华经营的过程中疏于防范监督, 未能建立或执行完善、有效的反商业贿赂内控制度(比如案例 1 中 Pfizer 中国子公司在境外母公司不知情的情况下通过中国员工和代理商在华进行商业贿赂, 案例 3 中 Morgan Stanley 的在华高管私自行贿, 案例 5 中力拓在华代表处的代表和员工擅自受贿)。

二、跨国企业在华应对商业贿赂风险的策略

1. 了解和熟悉中国有关反商业贿赂的规定

跨国企业在华投资及经营的过程中，除需遵守其本国反海外商业贿赂方面的相关法律外，还应充分了解和熟悉中国法下的反商业贿赂规定，这是跨国企业防范和应对上述商业贿赂风险和责任的的首要前提和基础。

(a) 中国反商业贿赂的法律框架

中国目前尚未制订一部专门针对商业贿赂问题的法律。与反商业贿赂有关的规定散见于若干法律、部门规章、司法解释以及部分行业的行业协会制订的规定中，主要包括行政法体系下的《反不正当竞争法》、《关于禁止商业贿赂行为的暂行规定》等，刑法体系下的《刑法》（包括修正案）、《关于办理商业贿赂刑事案件适用法律若干问题的意见》、《关于办理行贿刑事案件具体应用法律若干问题的解释》等。很多省市也针对其行政辖区内的商业贿赂问题，出台了一些地方性法规，以进一步贯彻和落实上位法下的反商业贿赂要求。

针对一些商业贿赂高发的行业（如医疗、政府采购、资源开发、金融、工程建设、土地出让、产权交易等领域），相关政府主管部门还专门制定和颁发了一些特别规定，比如《关于建立医药购销领域商业贿赂不良记录的规定》、《关于深入推进国土资源领域治理商业贿赂专项工作的意见》、《关于保险业开展治理商业贿赂专项工作的实施意见》等。

(b) 商业贿赂行为的主要特征

(i) 商业贿赂的概念

“商业贿赂”作为一个中国法下的专门术语，其明确定义首次出现在国家工商行政管理局于1996年11月发布的《关于禁止商业贿赂行为的暂行规定》（“《暂行规定》”）中。根据该规定，“商业贿赂”是指经营者为销售或者购买商品而采用财物或者其他手段贿赂对方单位或者个人的行为。

需注意的是，《暂行规定》出台较早，其对商业贿赂概念的界定在内涵和外延上均过于狭窄（比如，商业贿赂的目的仅限于为销售或购买商品，而不包括服务；行贿对象限定于对方单位和个人，而不包括其他对交易有影响的单位和个人；强调行贿行为，而未明确涵盖受贿、介绍贿赂的内容）。根据《暂行规定》出台前后颁布的相关法律法规（包括《反不正当竞争法》、《关于办理商业贿赂刑事案件适用法律若干问题的意见》等）和执法实务，目前商业贿赂一般可以理解为，在商品交易和提供服务的过程中，经营者为获得商业交易机会、交易优惠条件或其他经济利益，直接或间接给予交易相对人单位或个人，或其他对交易结果有一定影响的单位或个人财物或其他不正当利益的行为；其中，提供财物或不正当利益的行为为行贿，收受财物或不正当利益的行为为受贿，在行贿人与受贿人之间进行撮合、使行贿与受贿得以实现的行为是介绍贿赂。概言之，

凡是发生在商业领域的行贿、受贿和介绍贿赂现象，都可以称之为商业贿赂。

(ii) 商业贿赂的主体

在中国反商业贿赂法律框架下，商业行贿的主体为经营者，即，从事商品经营或者营利性服务的法人、其他经济组织和个人。介绍贿赂的主体则只包括个人，而不包括单位。

在一项商业贿赂中，受贿的主体通常包括商业活动中的交易对方单位和个人，以及其他对交易行为有影响力的单位和个人。具体而言，受贿主体既可以是交易相对方，也可以是非交易相对方；既可以是国家工作人员，²也可以是非国家工作人员；既可以是中国官员，也可以是外国公职人员和国际公共组织官员。

(iii) 商业贿赂的手段

根据相关规定，商业行贿的主要方式是提供财物，包括金钱和实物，也包括可以用金钱计算数额的财产性权益，比如提供房屋装修、含有金额的会员卡、代币卡（券）、旅游费用等，还包括以明显低于或高于市场的价格与受贿人进行交易，以合作开办公司、委托投资理财、为“挂名”的特定关系人支付薪酬等形式提供财物。对于无法或难以用金钱计算的非财产性权益，比如入学资格、职位升迁、户口迁移等，目前暂不属于中国刑法下商业贿赂犯罪的贿赂手段，但仍会被认定为行政法下的商业贿赂手段。

(iv) 商业贿赂与合法的类似行为的联系与区别

(A) **折扣**：在销售商品或者购买商品的过程中，为商品营销之目的，销售方通常会在一定的条件下给予交易对方一定的价格优惠。只要该等优惠是以公开明示并如实入账的方式给予交易对方的，即属于合法的折扣，属于正常的商业交易行为，不构成商业贿赂。

跨国企业在商业经营中，应注意回扣与折扣的区分。回扣是一种典型的商业贿赂行为。根据《暂行规定》，“回扣”是指经营者销售商品时在账外暗中以现金、实物或者其他方式退给对方单位或者个人的一定比例的商品价款。所谓“账外暗中”，是指未在依法设立的反映其生产经营活动或行政事业经费收支的财务账上按照财务会计制度规定明确如实记载，包括不记入财务账、转入其他财务账或者做假账等。

(B) **佣金**：经营者在市场交易中经常会向中间人寻求服务，并支付劳务报酬

² 根据相关法律法规和司法实践，在商业贿赂案件中，国家工作人员主要包括在各级国家权力机关、行政机关、司法机关和军事机关中从事公务的人员；在依照法律、法规规定行使国家行政管理职权的组织中从事公务的人员，或者在受国家机关委托代表国家行使职权的组织中从事公务的人员，或者虽未列入国家机关人员编制但在国家机关中从事公务的人员；在乡（镇）以上中国共产党机关、人民政协机关中从事公务的人员；国有公司、企业、事业单位、人民团体中从事公务的人员；国家机关、国有公司、企业、事业单位委派到非国有公司、企业、事业单位、社会团体从事公务的人员；以及其他依照法律从事公务的人员。

(即佣金)，但该等中间人必须具有提供中介服务的经营资质，且给付佣金的经营者应将该等佣金如实入账，否则可能会构成商业贿赂行为。为避免涉嫌商业贿赂，跨国企业在聘用中介机构提供中介服务时，需注意中介机构是否具有相应的资质，且向其支付的佣金应及时、如实入账。

(C) 附赠：根据《暂行规定》等反商业贿赂规定，一般认为，经营者在销售商品或提供服务的过程中，为了直接或间接获得更多的交易机会，向对方单位或者个人附赠现金或物品的，视为商业贿赂行为，但按照商业惯例赠送小额广告礼品的除外。跨国企业在商品交易中进行附赠时，为避免涉嫌商业贿赂，所进行的附赠应注意礼品价值的适当性（一般应远低于所销售商品的价值），并且应符合商业惯例。

(D) 馈赠：在商务实践中，馈赠礼品通常是一种表达礼节的方式，一般情况下并不构成商业贿赂。区分馈赠和商业贿赂主要根据双方财物往来背景、目的、时机、方式、双方的关系及财物价值等方面进行判断。一般而言，不具有职务上请托、贿赂目的的适当财物赠送不会构成商业贿赂。

(E) 捐赠：借助捐赠的名义开展商业贿赂是一种较为隐蔽的方式。区分合法捐赠和商业贿赂主要根据捐赠是否附有取得或维持业务有关的条件、受赠方的身份、捐赠与受赠双方是否存在业务关系、捐赠与受赠双方是否明确捐赠财物的公益用途、捐赠方是否将捐赠财物按会计准则的规定入账等方面进行判断。

(v) 商业贿赂的法律后果

根据中国相关规定，经营者进行商业贿赂的，工商局等有权主管部门可以根据情节处以 1 万元以上 20 万元以下的罚款，并没收违法所得。商业贿赂行为构成犯罪的，相关单位会被处以数额不等的罚金；相关个人（包括犯罪单位的直接负责的主管人员和其他直接责任人员）视情形可能被处以拘役有期徒刑甚至无期徒刑，且可并处没收财产。对于一些特殊行业（如药品行业），经营者可能会被吊销营业执照及生产经营许可证。此外，因经营者的商业贿赂行为遭受损害的第三方，还可以向行为人主张民事损害赔偿责任。需注意的是，根据相关规定和实践，员工代表经营者或为了经营者的利益而采用的商业贿赂行为也可能被认定为经营者的行为，从而导致经营者承担相应的民事、行政及/或刑事责任。

另外，跨国企业向中国各级政府、其任何部门和机构的各级官员及雇员、中国政党的官员及候选人、相关国有企业的员工、国际公共组织的官员及雇员进行的商业贿赂，还可能同时违反其本国的相关法律规定，如美国《反海外腐败法》、英国《反贿赂法》等。由此，该等行为即使未受到中国法律的处罚，亦有可能被其本国监管部门查处（比如，案例 1 及案例 2 中 Pfizer 和 Watts 因其中国子公司的贿赂行为而被 SEC 指控和处罚）。

2. 进行反商业贿赂尽职调查

跨国企业在进行境内投资时，尤其是在并购中国境内企业/资产（特别是涉及药品、通信等行业）时，应首先对被收购公司/资产及其商业伙伴进行反商业贿赂方面的尽职调查，这是防范商业贿赂风险的第一道屏障。通过该等尽职调查，跨国企业可以了解被收购企业/资产在反商业贿赂方面的合规情况及可能存在的贿赂问题和风险，以适当评估被收购企业/资产的商业价值，并掌握继续或终止交易的主动权。如果并购前的尽职调查因任何原因而未进行或未全面展开，跨国企业应在交易完成后迅速开展（或进一步开展）适当的尽职调查，并促使被收购企业尽早建立和实施反商业贿赂合规制度。

为进一步保护自身的利益，跨国企业还可以根据反商业贿赂尽职调查的情况，在交易文件中要求被收购企业、其控股股东、实际控制人及/或卖方对其过往的反商业贿赂合规情况作出声明、保证和补偿承诺，并就实施或配合被收购公司未来的反商业贿赂内控制度作出相应承诺。

3. 建立和实施反商业贿赂内控制度

为防止在华运营过程中滋生腐败，危害其利益及名誉，跨国企业还应考虑根据其本国及中国反商业贿赂方面的法律规定，建立和完善其自身及其中国子公司的反商业贿赂政策和程序（如报销制度、商务宴请和招待制度、财物捐赠的标准和限额等），保持准确、完整的会计账册及会计记录，定期对其在华子公司的员工（尤其是董事、高级管理人员、销售人员及其他可能与政府官员或其他可能向公司提供商业利益的人员进行接触的员工）、中间商及商业伙伴提供适当的反商业贿赂培训，并建立内部举报机制等。

跨国企业在华运营中需与代理人、顾问、商业伙伴等第三方合作或与相关方进行交易的，还应在其与该等第三方建立正式商业关系之前，对其进行审慎尽职调查，并促使该等主体亦遵守反商业贿赂的相关规定。

此外，跨国企业在华经营过程中一旦发现其中国子公司、员工、代理商等存在商业贿赂问题或嫌疑的，应及时开展内部调查，并视情况及时与其本国及中国相关监管部门沟通、汇报，配合调查，以最大程度地减少区域性商业贿赂行为对跨国企业整体的损害。

* * *

以上是我们根据中国反商业贿赂的相关法律法规和一般实践，对跨国企业在华投资经营所面临的主要商业贿赂风险及应对策略的简要分析和探讨，希望对阁下有所启发和帮助。本备忘录仅供一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。

如阁下对于本备忘录述及之内容有任何疑问或希望与我们进行任何进一步讨论，敬请随时与敝所联系（inquiry@hanyilaw.com）。

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