Doing Business in a Connected Society: The GSK Bribery Scandal in China

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Almost every society could be considered a society based on connections. As Lawrence M. Friedman said, “in this society, as in every society, who you know and what your connections are, whether you are rich or poor, educated or uneducated, articulate or inarticulate, has always mattered greatly—one way or the other.”¹ The logic is very simple. No one will feel safe and secure when entering into a significant transaction with a stranger. The same notion of a “connection,” however, might mean more in the context of the Chinese society than in the context of society in the US. In China, connections, or guanxi, are important, not only in a business context, but also at the personal level.² Compared to US “connections,” which tend to rely primarily on a quid pro quo dynamic, guanxi are typically understood as being primarily socio-emotional relations.³ “Intimately related to family, kinship, ethnic and other personalistic relations,” guanxi thus constitute more meaningful, as well as powerful connections, connections who are frequently relied upon in both business and personal contexts.⁴

A connection per se is neither the angel nor the devil. To the contrary, it is a neutral term. A connection could be used for different, or even opposite, purposes. In some circumstances, a connection could be an angel, as healthy, moral, and lawful connections will benefit both businesses and their stakeholders in the local market.⁵ In other circumstances, connections are abused to advance the interests of firms and their corrupted partners at the

¹ LAWRENCE M. FRIEDMAN, LAW IN AMERICA: A SHORT HISTORY 32 (2002).
⁴ Hsiung, supra note 2, at 17 (“One important feature of guanxi is that it is closely related to family. A popular Chinese idiom captures its spirit vividly: ‘Count on your parents while at home, and count on your friends while away from home.’”). This heightened conception of connections has even been linked to the family/clan-based origins of Chinese thinking on the makeup and proper … function of corporations, Teemu Ruskila, Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective, 52 STANFORD L. REV. 1599, 1616-17 (1999-2000) (citing HILL GATES, CHINA’S MOTOR: A THOUSAND YEARS OF PETTY CAPITALISM 84-120 (1996) (discussing commercially-oriented Chinese clans, which she calls “patricorporations”)).
⁵ See generally HUBERT OESTERLE, ELGAR FLEISCH, & RAINER, BUSINESS NETWORKING: SHAPING COLLABORATION BETWEEN ENTERPRISES (2001).
price of defrauding consumers, bullying small competitors, and polluting the commercial culture.\footnote{Susan Rose-Ackerman, Corruption and the Global Economy 43 (1997); see Jessica Silver-Greenberg & Ben Protess, JP Morgan Hiring Put China’s Elite on an Easy Track, N.Y. TIMES, Aug. 29, 2013; see generally Cindy A. Schipani, Falling Off the Corporate Ladder: Prosecution for Financial Fraud in the United States, 32 COMPANY LAWYER 336 (2011).}

More importantly, connection-based bribery has been a special target in contemporary Chinese society.\footnote{Dingding Chen, 4 Misconceptions About China’s Anti-Corruption Campaign, THE DIPLOMAT, Aug. 6, 2014, http://thediplomat.com/2014/08/4-misconceptions-about-chinas-anti-corruption-campaign/.} Anti-corruption efforts and reforms toward a transparent and competitive market are key elements of the contemporary Chinese culture.\footnote{Id.} A misinterpretation of contemporary Chinese culture may have created, and may continue to create, more bribery scandals on the part of multinational corporations (MNCS).\footnote{Id.}

To analyze this point, this paper focuses on the scandal plaguing global healthcare giant, GlaxoSmithKline LLC (GSK). On July 2, 2012, GSK agreed to plead guilty and pay $3 billion to resolve its criminal and civil liability arising from the company’s unlawful promotion of certain prescription drugs, its failure to report certain safety data, and for alleged false price reporting practices in the US.\footnote{Press Release, U.S. Dep’t of Justice, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), http://www.justice.gov/opa/pr/2012/July/12-civ-842.html [hereinafter Press Release].} The allegations include two counts of introducing misbranded drugs, Paxil and Wellbutrin, into interstate commerce and one count of failing to report safety data about the drug, Avandia, to the Food and Drug Administration (FDA).\footnote{Id.} Furthermore, GSK was accused of paying for publication of articles about their drugs in medical journals.\footnote{Simon Neville, GlaxoSmithKline Fined $3bn After Bribing Doctors to Increase Drugs Sales, THE GUARDIAN, July 3, 2012, http://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals.} The fine was the largest combined federal and state healthcare fraud recovery in a single case in the history of the United States.\footnote{Press Release, supra note 10.}

Before GSK had the chance to rebuild its image, the company was embroiled in another bribery scandal in China. In June 2013, a criminal investigation of GSK began in China. GSK allegedly bribed government officials, medical associations, hospitals, and individual doctors, to open more distribution channels and raise product prices.\footnote{Top Ten White-collar Crimes in 2013, China Daily, http://www.chinadaily.com.cn/business/2014-02/17/content_17287131.htm (last updated Feb. 17, 2014).} The Chinese police claimed GSK funneled up to three billion yuan ($490 million) to travel agencies in order to facilitate bribes to doctors and other officials.\footnote{Id.} More than 700 middlemen and travel agencies were alleged to have helped channel nearly $500 million in kickbacks to those who prescribed pills from the UK pharmaceutical since 2007.\footnote{Id.} The Ministry of Public Security detained four
upper-level executives of GSK China, and at least eighteen other employees were arrested.\(^\text{17}\)

The GSK scandal quickly became one of the “Top 10 White-collar Crimes” in 2013.\(^\text{18}\)

On September 19, 2014, The Changsha Intermediate People’s Court found the company guilty of bribing nongovernmental personnel and imposed on GSK a fine of nearly $500 million, the amount of the company’s bribes\(^\text{19}\) and the largest corporate fine ever imposed in China.\(^\text{20}\) The court also sentenced GSK’s former country manager for Britain, Mark Reilly, along with four other company managers, to prison sentences that could have lasted up to four years (the court has agreed to suspend the sentences so long as the convicted commit no further offenses in China).\(^\text{21}\) In a statement released just hours after the verdict, GSK stated that it “fully accepts the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities... GSK P.L.C. sincerely apologizes to the Chinese patients, doctors and hospitals, and to the Chinese government and the Chinese people.”\(^\text{22}\)

Although GSK has very specific internal rules against commercial bribery, these rules appear to have been easily circumvented through the use of third parties, such as travel agencies.\(^\text{23}\) The major function of the travel agency was to invent corporate meetings that would have required staff travel.\(^\text{24}\) The budget for these fictitious meetings would then be used to bribe doctors to prescribe certain drugs.\(^\text{25}\) The doctors involved were issued a credit card from the company and the kickbacks they received were transferred to the cards the day after drugs were prescribed.\(^\text{26}\)

It has been further alleged that GSK offered bribes to doctors not only in China, but also to doctors in other countries, including Iraq, Lebanon, Jordan, Syria, and Poland.\(^\text{27}\) According to an April 15, 2014 report, GSK was fully cooperating with the Polish government's investigation after the British media accused it of paying bribes to Polish doctors.\(^\text{28}\) Between 2010 and 2012, under the facade of "educational services," GSK representatives allegedly paid Polish doctors to promote GSK’s asthma drug, Seretide.\(^\text{29}\) The local prosecutor has charged eleven doctors and a GSK regional manager over the alleged corruption. The prosecutor of the Polish region of Lodz found evidence in documents given to doctors by


\(^{21}\) Bradsher & Buckley, supra note 19.

\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Hirschler, supra note 15.


\(^{28}\) *GSK Admits Under Bribery Investigation in Poland*, supra note 27.

\(^{29}\) Id.
GSK to support claims of corrupt payments in more than a dozen different health centers, where there was no evidence that "patient education" had taken place. Furthermore, GSK has said that it was "looking into accusations" that its Iraqi business had hired government-employed doctors and pharmacists to act as paid sales representatives for the company. In April 2014, GSK announced that it is investigating similar bribery allegations in Jordan and Lebanon.

In addition, the US Department of Justice (DOJ) has started its own investigation. The US is investigating whether GSK violated US anti-bribery laws, specifically the US Foreign Corrupt Practices Act (FCPA), in China. Additionally, Britain’s Serious Fraud Office (SFO) is taking steps to prosecute or fine companies that commit bribery overseas, which would likely implicate GSK. No charges by either the DOJ or SFO have yet been announced. Furthermore, the GSK bribery scandal is not a singular event in China. Just one month after the investigation of GSK began, Beijing municipal authorities set up a joint investigation team to investigate the French pharmaceutical company Sanofi after a Chinese newspaper published bribery allegations against that company.

Although GSK is not the only multinational pharmaceutical company to be investigated for its business in China, it has suffered the most damage to date as many Chinese doctors have shunned its drugs and sales representatives. While rivals of GSK (such as Roche and Novartis) have experienced continued growth, GSK’s drug sales slumped 61 percent in the third quarter in China following the announcement of the investigation. This dip in sales is greater than investors were predicting and was caused in part by the considerable uncertainty in China concerning the extent of GSK’s continued drug sales, which has led hospitals to turn to more reliable alternatives. Additionally, consumer discontent has likely played a strong role in decreasing GSK’s China sales. There is a common perception in China that foreign medicines are overpriced due to the costs of corruption associated with their marketing. Given the GSK scandal’s considerable publicity, it appears that Chinese patients have directed their resentment of over-priced, foreign medications at GSK, putting pressure on Chinese doctors to avoid prescribing GSK products when possible. The sales hit the hardest were those of drugs with easily accessible substitutes.

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30 Id.
31 Id.
36 Hirschler, supra note 15.
37 Id.
38 Id.
40 Id.
41 Id.
42 Id.
43 Hirschler, supra note 15.
In light of these scandals, we seek to analyze the complicated harms triggered by the alleged corrupt practices of GSK and other multinational corporations (MNCs) in connected societies in order to identify the causes of these scandals and to provide suggestions for reform. Part I provides an overview of Chinese culture followed by identification of some of the harms that may be triggered by corrupt practices of businesses in Part II. Part III examines the international anticorruption framework while Part IV considers why the alleged GSK bribery scandal was possible in China. We then analyze the need for improvement of the evaluation and incentive system for professional sales representatives in Part V, leading to suggestions for reform in Part VI. Concluding remarks then follow.

I. Understanding Chinese Culture and Society

It is difficult to have a deep understanding of China. Historically speaking, China has been a connection-based, agricultural society, with a brief exposure to rule of law (in the modern sense) in comparison with its five thousand years of civilization. Yet, a close examination of Chinese culture reveals that commercial corruption is neither encouraged nor tolerated.\footnote{See generally RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002).}

First, Chinese culture, especially the mainstream philosophy, is against any form of corruption. As President Xi Jinping outlined in his speech at the College of Europe on April 1, 2014, China has a civilization of over 5,000 years. Over 2,000 years ago, there was “the period of one hundred masters and schools of thought.”\footnote{See H. E. Xi Jinping, Pres. of P.R.C., Speech at the College of Europe, Bruges, (Apr. 1, 2014), http://www.chinamission.be/eng/jd/t1143591.htm; Jinxuan Zhang, Moutai, the FCPA and Doing Business with China, 2012 WL 3069984 (WJCODL) (noting the current trend in China toward both increased regulation and prosecution of commercial corruption, including bribery). Many of China’s problems with corruption are relatively recent phenomena, e.g., the abuses caused by the initial grant of too much power to the executives of state-owned corporations, prior to the 1999 reforms. Cindy A. Schipani & Junhai Liu, Corporate Governance in China: Then and Now, 2002 COLUM. BUS. L. REV. 1, 17-18.} Great thinkers, such as Laozi, Confucius, and Mozi, explored a wide range of topics from the universe to the Earth, from men’s relationship with nature to relations among people, and between the individual and society.\footnote{Jinping, supra note 46.} The extensive and profound schools of thought they established covered many important ideas, such as the moral injunction of fidelity to one’s parents and brothers and to the monarch and friends, a sense of propriety, justice, integrity and honor, emphasis on benevolence and kindness towards fellow people, and the belief that man should be in harmony with nature, follow nature’s course, and constantly pursue self-perfection.\footnote{Id.} These values and teachings still carry a profound impact on the Chinese people’s way of life today, underpinning the unique value system in the Chinese outlook of the world. Chinese culture pays close attention to the integrity and morality of people and commercial corruption would thus be contrary to these basic tenets.

\footnote{Id.}
Second, the Chinese market economy operates based on the rule of law, and could be called a legal economy or an economy ruled by law. China introduced the state policy of the rule of law into the Chinese Constitution as late as 1999 and there are legal rules for combatting corrupt practices. Both the Anti-Unfair Competition Law and the Criminal Law, discussed below, prohibit commercial bribery and other corrupt practices. According to the white paper on the Socialist System of Laws with Chinese Characteristics, published by the Information Office of the State Council, by the end of August 2011, the Chinese legislature had enacted 240 laws including the current Constitution, 706 administrative regulations, and over 8,600 local regulations. As a result, all legal branches have been instituted; basic and major laws of each branch have been established; and related administrative regulations and local regulations have been adopted. A socialist system of laws with Chinese characteristics has been solidly put into place. There is no legislation that legalizes corrupt practices.

Third, corrupt practices are contrary to ongoing reforms in China. Although there are unalienable links between the past, the present, and the future, China has undergone and continues to undergo a great number of unprecedented reforms since the late 1970s, especially from November of 2012, when new Chinese leaders came to power. As President Xi Jinping said in the abovementioned speech at the College of Europe, “China is a country undergoing profound changes. Reform, which was first forced upon us by problems, goes deeper in addressing the problems. We know keenly that reform and opening-up is an ongoing process that will never stop. China’s reform has entered a deep-water zone, where problems crying to be resolved are all difficult ones. What we need is the courage to move the reform forward.” In addition to ambitious and comprehensive reform policies concerning the market economy and the rule of law declared by the Chinese Communist Party, China has been vigorously fighting corruption. For instance, the Chinese courts have convicted and punished 31,000 criminals in 29,000 cases of embezzlement, bribery and breach of duty, including several serious cases involving Bo Xilai, the former party chief of Chongqing Municipality, and Liu Zhijun, former minister of railways.

II. Harms Triggered by Corruption

This part turns to an examination of the various harms, which may be triggered by corrupt practices of firms. These include damage to fair and transparent competition, harm to consumer welfare, and harm to commercial culture.

A. Damage to Fair and Transparent Competition

53 Id.
57 Id.
59 Jinping, supra note 45.
Although it is difficult to quantify the exact value of the competitive advantage resulting from bribery, it has been estimated that GSK derived substantial benefits from its bribes in the Chinese market of more than $150 million, including revenue from higher drug prices.61 Because GSK is in direct competition with domestic Chinese firms, as well as other MNCs, the gains of GSK also reflect the losses sustained by competitors who were unwilling to deviate from free-market competition.

Moreover, in addition to putting GSK’s competitors at an unfair competitive disadvantage, GSK’s bribes (and those of other firms)62 have undermined the Chinese government’s efforts to promote a fair and transparent market economy.63 China passed the Anti-Unfair Competition Law of the People’s Republic of China on September 2, 1993 to fight commercial bribery and to promote fair competition in the market.64 Article 8 of this Law specifically targets commercial bribery.65 To strengthen the enforcement of anti-corruption laws, the State Authority of Industry and Commerce (SAIC) issued the Interim Provisions on Banning Commercial Bribery on November 15, 1996.66 Serious commercial bribery is also banned by Chinese Criminal Law.67 According to Zhou Qiang, president of China’s Supreme People’s Court (SPC), Chinese courts have convicted and punished 31,000 criminals in 29,000 cases of embezzlement, bribery and breach of duty in 2013.68 The SPC plans to step up efforts against corruption including cases of embezzlement, bribery and breach of duty.69

By offering bribes, GSK challenged the sincerity of the Chinese government’s extensive legislation on private sector bribery, suggesting that bribery is an unofficial norm within the Chinese market—the law notwithstanding.70 With its record-breaking fine against GSK,71 China has signaled the contrary to the international community, a message that will hopefully

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61 Bradsher & Buckley, supra note 19.
62 See, Pharmaceutical Giants Rethink Rebate Marketing, supra note 35.
63 See Jinping, supra note 45.
65 Id.
69 Id.
71 Plumridge & Burkitt, supra note 20.
diminish the negative effects that the bribes of GSK and other MNCs have had on the integrity of fair play among firms in China. Of course, this may take some time.\textsuperscript{72}

B. Harm to Consumer Welfare

According to an old Chinese proverb, “When the snipe and the clam grapple, the fisherman profits.”\textsuperscript{73} Consumers will be some of the most important beneficiaries of fair competition among pharmaceutical companies.\textsuperscript{74} The fiercer the competition, the more benefits the consumers will acquire in terms of better quality and lower prices.\textsuperscript{75} If, however, competitors are interested in building their competitiveness by bribery, instead of better products or services, the quality of the goods or services will not be improved and the price will not be lowered.\textsuperscript{76} Thus, consumers will suffer double damages from bribery—higher prices and poorer quality of the goods or services.\textsuperscript{77}

Through its bribes in China, GSK inflated its medicine prices and passed on the cost of hundreds of millions of dollars in bribes directly to patients. If patients pay medical bills themselves, they are directly hurt by the increased costs. Even if the medical bills are paid by commercial insurance companies or the social security system, patients are still victims, because patients or their employers will pay increased insurance premiums or taxes.\textsuperscript{78} A GSK senior executive held in detention admitted that the bribes would be reflected in higher medicine prices;\textsuperscript{79} thus, a product that cost only 30 yuan ($4.89) to make could end up costing patients 300 yuan ($48.94).\textsuperscript{80} A significant portion of this differential may constitute a direct imposition of the costs of bribery passed onto consumers.\textsuperscript{81}

C. Harm to the Commercial Culture

In addition to damaging its own image, GSK has also compromised the integrity of the commercial culture.\textsuperscript{82} The Chinese government has been actively welcoming MNCs to do
business in China for the past three decades. Moreover, Chinese consumers and the public in general have considerable expectations of foreign brands, as foreign brands not only mean new products supporting advanced technology, new management skills, and new capital, but also new ideas and a new commercial culture.

Undoubtedly, Chinese businesses and consumers are disappointed with the alleged misbehaviors at GSK and other MNCs. Of course, the laws that forbid MNC bribery apply with equal force to domestic firms. Unfortunately, unspoken bribery is also thought to exist in some domestic firms in China. The public, however, hopes and believes that MNCs will provide good examples for Chinese domestic firms, as the MNCs create a new business culture helping to eradicate local unspoken corruption. It also seems that a consensus has been reached to step up enforcement of China’s anti-corruption laws, which have already been applied to domestic firms, on MNCs.

III. The International Anticorruption Framework

Many countries, including China, have recently enacted statutes to combat foreign corruption and bribery practices. These efforts have taken on two primary paths: public and private. In the United States, the FCPA is a significant example of a dominant public enforcement mechanism. As the first domestic law to criminalize foreign bribery, it inspired the OECD to draft a major treaty on anti-bribery. In the private realm, international arbitration tribunals hold contracts obtained through bribes unenforceable. These arbitration tribunals penalize companies and individuals who pay bribes, not foreign officials. This Part begins with a description of China’s anticorruption laws, continues with an overview of

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84 Indeed, MNC goods and services often demand a premium in Chinese markets, where (regardless of actual quality) consumers tend to believe that MNC goods and services are more reliable than domestic alternatives, due, for example, to better technology and consumer-friendly policies; Benjamin Shobert, The Ethical Challenges of Doing Business in China’s Healthcare Economy, HEALTH INTEL ASIA, Feb. 5, 2014, http://www.healthintelasia.com/ethical-challenges-business-chinas-healthcare-economy/; Jill Gabrielle Klein, Richard Ettenson & Marlene D. Morris, The Animosity Model of Foreign Product Purchase: An Empirical Test in the People’s Republic of China, 62 J. MARKETING 89 (1998); see also Mahajan & Tian, supra note 82.
86 See Hirschler, supra note 15 (explaining how a slump in sales indicates market disapproval).
87 See, e.g., Interim Provisions on Banning Commercial Bribery, supra note 66.
88 Shobert, supra note 84; see SPC Report, supra note 68.
89 Id.
90 Bradsher & Buckley, supra note 19.
94 See id., at 545-46.
the FCPA in the United States, and concludes with a brief comparison of the sanctions of the two regimes.

A. China’s Anticorruption Laws

Two statutes are of particular importance to China’s anticorruption efforts: the Criminal Law of the People’s Republic of China (Criminal Law)\textsuperscript{96} and the Anti-Unfair Competition Law of the People’s Republic of China (AUCL).\textsuperscript{97} Commercial bribery is considered an unfair competition practice under Chinese law.\textsuperscript{98} To restrict unfair competition among firms, China passed the AUCL in 1993. Article 8 of the law states,

[a] business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebate in secret to the other party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.\textsuperscript{99}

China’s Criminal Law also bans commercial bribery. Article 164 penalizes offering bribes to non-public employees in business companies or enterprises.\textsuperscript{100} Article 389 penalizes offering bribes to public employees of state-owned companies or non-profit organizations.\textsuperscript{101} Article 391 penalizes offering bribes to government agents, state-owned companies or non-profit organizations. Article 393 penalizes corporations offering bribes to public employees.\textsuperscript{102} The Chinese Criminal Law is not confined to domestic bribery. As more Chinese firms pursue overseas markets, Paragraph 2 of Article 164 of Chinese Criminal Law punishes Chinese firms offering bribes to public employees in foreign countries or international public organizations, for the purpose of acquiring an unfair commercial interest.\textsuperscript{103} GSK has broken both the Chinese Anti-Unfair Competition Law and the Criminal Law.\textsuperscript{104}


98 See Zhang, supra note 45 (noting the current trend in China toward both increased regulation and prosecution of commercial corruption, including bribery).

99 Law of P.R.C. Against Unfair Competition, supra note 55.

100 Criminal Law of the P.R.C., supra note 67..

101 Id.

102 Id.

103 Id.

104 See Law of P.R.C. Against Unfair Competition, supra note 55; Criminal Law of the P.R.C., supra note 67; Bradsher & Buckley, supra note 19.
The penalties under the Criminal Law depend on the identity of the party offering the bribe. Acts involving official bribery may include penalties anywhere from criminal detention to life imprisonment and/or confiscation of property. Commercial bribery may be penalized anywhere from criminal detention to 10 years’ imprisonment and/or criminal fines. Those involved in the management of the company directly responsible for the issue may be punished as individual bribers. The AUCL provides for penalties including a fine up to approximately $32,000 and disgorgement of illegal income for violations that do not amount to a criminal act. Under the AUCL, the competitors may allege harm by commercial bribery and bring a civil claim for damages before the People’s Court. Although the AUCL and Criminal Law have not always been applied impartially, it is anticipated that foreign and domestic firms, as well as public and private firms, will soon be regulated and protected on an equal basis under the rule of law.

Since the meeting of the 18th National Congress of the Communist Party of China in 2012, President Xi Jinping has reiterated the significance of “rule of law” in the country’s anti-graft efforts. The Fourth Plenum of the 18th CPC Central Committee also set a goal of “governance according to the law” in its detailed Decision on Some Major Questions in Comprehensively Promoting Governing the Country According to Law. Thus, governance based on the rule of law is the guideline in the nation’s massive anticorruption campaign which has become even more powerful and widespread since the 18th Party Congress.

While the law has teeth, the market has eyes. The Chinese Supreme Procuratorate has set up a special data base of commercial bribery cases, which is available to the public for inspection. Once publicly disclosed, a firm’s bribery record will likely have a negative impact on future business. For instance, firms that have engaged in bribery will likely be put at disadvantage when they bid for the government procurement contracts or governmental funds.

B. The Foreign Corrupt Practices Act of 1977 (FCPA)

106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
111 See Strong arm of the law, CHINA ECON. REV., Jul. 13, 2012, http://www.chinaeconomicreview.com/strong-arm-law (“Of the 500,000 corruption investigations undertaken in China between 2000 and 2009, 64% involved foreign companies, according to a 2010 study by Anbound Group, a Beijing-based consulting company.”)
As mentioned above, in addition to China’s investigation of GSK and its corrupt practices, the US Department of Justice has started an investigation. The US is investigating whether GSK violated US anti-bribery laws, specifically the FCPA, in China.\textsuperscript{116}

Through the FCPA, the US criminalized payment of bribes by domestic companies, as well as foreign companies listed on the US stock exchanges, to foreign officials.\textsuperscript{117} The US has encouraged other countries to follow suit.\textsuperscript{118} The OECD, the Organization of American States, the Council of Europe, the United Nations, and the African Union have all adopted anticorruption provisions similar to the FCPA.\textsuperscript{119}

The FCPA was passed as an amendment to the Securities and Exchange Act of 1934 in an effort to eliminate foreign corruption by US firms overseas.\textsuperscript{120} The anti-bribery provisions ban US companies, US citizens, foreign companies listed on a US stock exchange, as well as a “person” acting within US territory, from paying or offering to pay directly or indirectly, money or anything else of value to a foreign official to obtain or retain their business.\textsuperscript{121} These provisions range from prohibiting cash payments to foreign officials to more nuanced prohibitions against indirect gifts with intangible benefits.\textsuperscript{122} Although anyone committing bribery within the US jurisdiction can be found to be violating the FCPA anti-bribery violations, foreign officials who receive the bribe cannot be prosecuted under these provisions.\textsuperscript{123} The FCPA applies to all US businesses and persons, regardless of whether the bribery occurs within the US or abroad and to foreign companies or persons utilizing interstate commerce. To constitute a violation of the FCPA, the foreign official must be aware that the payment received is payment for some illegal action.\textsuperscript{124}

\textsuperscript{116} US Prosecutors Add China Bribery Allegations to GSK Probe, supra note 33.
\textsuperscript{118} At the 1997 OECD Convention signatory countries agreed to enact measures that were similar to the FCPA. In 2009, the OECD Council adopted two more recommendations relating to tax measures and reporting foreign bribery. Amy Deen Westbrook, Enthusiastic Enforcement, Informal Legislation: The Expansion of the Foreign Corrupt Practices Act, GA. L. REV. 489, 511 (2011).
\textsuperscript{119} Id. at 512.
\textsuperscript{120} Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C.J. INT THL. & COM. REG. 83, 84 (2007). Beyond criminalizing the payment of bribes to foreign officials, the FCPA requires public companies meet certain standards with respect to their books, records, and accounting practices. The FCPA was passed in response to the Watergate scandal and the US Securities and Exchange Commission’s (SEC) investigation that discovered over $300 million in payments by US firms to foreign officials. The report included major US MNCs such as Boeing, Gulf Oil, and Exxon Mobil. The FCPA was amended in 1988 and 1998. Foreign Corrupt Practices Act (amendments), Pub. L. 100-418, 102 Stat. 1415 (1988); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366; McSorley, Foreign Corrupt Practices Act, 48 AM. CRIM. L. REV. 749, 750-51 (2011). The provision also applies to entities that are required to file periodic reports routine with the SEC, regardless of which stock exchange the company’s shares are traded. Id. at 765.
\textsuperscript{121} Id. at 750-51.
\textsuperscript{122} Id. at 757.
\textsuperscript{123} Id.
\textsuperscript{124} This is done partly in an attempt to make sure the government contracts are not inhibited by the FCPA. One exception and two affirmative defenses exist for the anti-bribery provisions of the FCPA. “Grease payments” to foreign officials in order to “expedite or secure the performance of routine government actions” are permissible under the statute. Payments fit this exception when they are routine and occur within the ordinary business of the foreign official. Courts focus on the intent of the individual making the payment and what the true purpose of the payment is. U.S. v. Kay, 359 F.2d 738, 740 (5th Cir. 2004). The affirmative defenses to the FCPA anti-bribery provisions are: (1) a payment, gift or promise of “anything of value” to a foreign official . . . if that type of payment is legally allowed under the country’s laws, and (2) the payment for a bona fide expenditure, which
The FCPA imposes both criminal and civil penalties on those acting on behalf of US companies.\(^\text{125}\) Under §2B4.1 of the Sentencing Guidelines, any individual found in violation of the anti-bribery provisions can be fined up to $100,000 and five years in prison per violation.\(^\text{126}\) If a corporation is found to have violated the anti-bribery provisions, the maximum criminal penalty per violation is $2 million.\(^\text{127}\) The DOJ and the SEC may increase the fine by combining both civil and criminal penalties. Penalties vary depending on the level of due diligence and the effectiveness of compliance.\(^\text{128}\) Civil penalties of up to $10,000 may also be added for anti-bribery provision violations.\(^\text{129}\) In addition, if a corporation or individual violates the FCPA, they may be subject to suspension from contracts with government agencies.\(^\text{130}\)

Recently, there has been a surge in the enforcement of the FCPA's anti-bribery provisions.\(^\text{131}\) Corporations are under greater scrutiny by the SEC and the DOJ. Both agencies, along with the federal courts, are interpreting the FCPA more broadly,\(^\text{132}\) increasing not just their enforcement actions, but the penalties imposed on the parties as well.\(^\text{133}\)

Because every instance of bribery or record-keeping violations can count as a separate act for penalty purposes, considerable fines and penalties may be imposed in cases involving longstanding patterns of corruption.\(^\text{134}\) Over the past decade, the DOJ and SEC have made their willingness to take advantage of this provision abundantly clear. In 2008, for instance, lack a corrupt purpose. McSorsley, \textit{supra} note 120, at 765. The courts have not yet interpreted the second defense. An expenditure will likely be considered reasonable and bona fide by the DOJ when (1) it is made directly to the service provider as opposed to the government official, and (2) where the company making the payments does not have pending business with the government agency whose employee is receiving the benefits of the payment. \textit{Id.} at 765-66. See FCPA Op. Proc. Rel. 2004-01 (2004); FCPA Op. Proc. Rel. 2004-03 (2004). The DOJ and the SEC are both responsible for enforcement of the anti-bribery provisions of the FCPA. The DOJ is solely responsible for any criminal investigation and enforcement. The SEC is primarily responsible for any civil investigation; however, the DOJ may conduct a parallel investigation. McSorsley, \textit{supra} note 120, at 767. To provide guidance to issuers and businesses, the DOJ uses advisory opinion letters and the SEC may write no-action letters. \textit{Id.} at 768.

\(^{125}\) Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-123, 91 Stat. 1494; McSorsley, \textit{supra} note 120, at 771. Prior to the 1998 amendments, the penalties were only civil.


\(^{127}\) McSorsley, \textit{supra}, note 120 (in contrast, the maximum penalty for the violation of the accounting provisions by a corporation is $25 million).

\(^{128}\) \textit{Id.}

\(^{129}\) \textit{Id.}

\(^{130}\) \textit{Id.} at 771.

\(^{131}\) Benjamin Gruenstein, \textit{Upswing in FCPA Cases Results in Increased Judicial Oversight}, \textbf{NEW YORK L. J. SPECIAL SELECTION}, Jul. 8, 2013 (“From 2008 through May 2013, the Department of Justice (DOJ) charged over 80 individuals with violating the FCPA, over twice the number that was prosecuted in the 10 preceding years.”).

\(^{132}\) Krever, \textit{supra} note 120, at 94.


Siemens agreed to an FCPA settlement of $800 million with the DOJ and SEC ($450 million in criminal fines to the DOJ and $350 million in civil damages to the SEC). Due to Siemens extensive cooperation with their investigations, the DOJ and SEC agreed to lower criminal fine and penalties; additionally, the DOJ and SEC did not require Siemens to formally plead guilty to bribery charges, allowing the company to continue bidding for public-sector projects in the US. In the years following the Siemens case, other notable fines and penalties imposed under the FCPA’s anti-bribery provisions have included (among many others) $559 million paid by Halliburton to settle charges that it bribed officials in Nigeria while constructing a gas plant, $400 million in fines paid by the British weapons maker BAE Systems, $137 million by the French telecom company Alcatel-Lucent, and $200 million by the German auto manufacturer Daimler.

Today, the US regulatory agencies appear focused on oil and gas, technology, pharmaceuticals and medical supplies industries. In 2012, the SEC charged Eli Lilly and Co. for improper payments made by its subsidiaries to foreign government officials to win business in Russia, Brazil, China, and Poland. Lilly eventually agreed to pay $29 million to settle the charges without admitting or denying any of the allegations. In the same year, the SEC charged Pfizer with making illegal payments to foreign officials through its subsidiaries in Bulgaria, China, Croatia, and Italy (among others) in order to secure regulatory approvals and increased prescriptions for Pfizer products. Pfizer agreed to pay $45 million in its settlements.

The largest fine administered in a single FCPA case thus far was the $800 million penalty imposed on Siemens in 2008. In total, the company paid $1.6 billion in fines and costs in Germany and the US and more than $1 billion for internal reforms and investigations. The combined $1.6 billion US-German fine was the largest imposed for bribery in modern corporate history. Siemens was allowed to plead guilty to violating accounting provisions of the FCPA rather than bribery because of its cooperation with SEC and DOJ investigations.

The Siemens case is significant due to the sheer breadth and amount of money involved. The annual bribery budget of the corporation between 2002 and 2006 was approximately $40 to $50 million. Various Siemens executives and employees arranged payments that eventually were pocketed by officials all around the globe. The company

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136 Murphy, supra note 134, at 24.
137 Slater, supra note 135.
138 Murphy, supra note 134, at 24.
139 Westbrook, supra note 118.
142 Id.
143 Id.
145 Id.
146 Id.
147 Id.
148 Id.
paid its largest bribes in China, Russia, Argentina, Israel, and Venezuela.\textsuperscript{149}

The executives interviewed believed that they had to bribe officials in order to receive the contracts and retain all of their employees. As Mr. Siekaczez, a midlevel executive who was convicted during the scandal, stated, “[w]e thought we had to do it,” or “we’d ruin the company.”\textsuperscript{150} Once various countries began to investigate the company’s suspicious account activities, however, Siemens quickly changed its direction. The corporation hired an American law firm, Debevoise & Plimpton, to conduct an internal investigation and to work with the federal investigators. A number of senior managers were arrested and the CEO resigned.\textsuperscript{151} Almost immediately, the board recruited Peter Löscher to become the first outsider to lead the company as the CEO since Siemens’ founding.\textsuperscript{152} Within months, the company replaced over 80 percent of its top executives.\textsuperscript{153} Ultimately, 80 percent of the managing board members left the company as well.\textsuperscript{154}

Despite the scandal, Siemens was able to revive its reputation and has continuously increased its revenue since the scandal.\textsuperscript{155} Surprisingly, some of its largest contracts in the US in the recent years have come from the US federal government.\textsuperscript{156} Since the scandal, Siemens has hired hundreds of compliance officers and is considered to be “a corporate standard-bearer in its anticorruption efforts.”\textsuperscript{157} Moreover, although some predicted revenues would decrease when bribes were no longer offered to secure contracts, revenues increased.\textsuperscript{158} Bribery is an expensive proposition and the gains in obtaining the contracts were more than offset by the costs incurred in paying bribes.\textsuperscript{159}

The FCPA is not without its critics, however. Most frequently, the Act’s detractors contend that the FCPA is over-enforced and that the statute is vague and overly broad. All this causes the confusion concerning which actions are illegal.\textsuperscript{160} The problem of ambiguity (the argument goes) is “compounded by the fact that fears of the negative consequences of indictment or conviction” make challenging aggressive theories of liability nearly impossible for private firms, whose (financial) success typically depends upon maintaining a positive

\begin{itemize}
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Peter Loscher, The CEO of Siemens on Using a Scandal to Drive Change, HARVARD BUS. REV. 39 (Nov. 2012).
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{158} A giant awakens, THE ECONOMIST, Sept. 9, 2010.
  \item \textsuperscript{159} See id.
  \item \textsuperscript{160} Joseph W. Yockey, Choosing Governance in the FCPA Reform Debate, 38 J. CORP. L. 325, 332 (2013) (“To take one example, critics make much of the fact that the FCPA’s definition of ‘foreign official’ includes ‘any officer or employee of a foreign government or and…instrumentality thereof.’ Concerns arise because the statute does not define the term ‘instrumentality,’ and some experienced attorneys and managers claim that they have a hard time figuring out who or what comes within its scope.” (citation omitted)).
\end{itemize}
Additionally, the FCPA may diminish the ability of US-based firms to compete overseas with corporations who are not within the jurisdiction of the FCPA. These companies do not have the same incentives to avoid the bribing of foreign officials and may benefit unfairly. Finally, the FCPA does not necessarily cause US firms to act more ethically. It may simply induce companies to resort to more sophisticated measures of hiding payments, and push bribery further under the radar. Yet, the Siemens case, discussed above, provides a counter-example to these fears.

C. Comparing FCPA Sanctions to Chinese Sanctions

The potential sanctions against violators available to the governments of the US and China differ notably. Under the FCPA, corporations may face up to a $2 million fine per violation and individuals may face up to a $100,000 fine per violation. Furthermore, for each count of bribery, an individual may face up to five years in prison. The SEC has the ability to pursue the equitable remedy of disgorgement of all profits due to the corrupt activity.

Under China’s Criminal Law, there are also criminal fines and potential confiscation of property. In practice, however, the fines have been modest under both the Criminal Law and the AUCL in comparison to the large settlements seen under the FCPA. Yet, although the fines may have been smaller, there is a potential for life imprisonment in China, something that ought to be a substantial concern for those operating in China, especially corporate executives.

GSK was fined three billion yuan ($489 million) for paying bribes and five senior executives were sentenced to two to four years in prison. Partial to full reprieves were granted for all five by the Changsha Intermediate People's Court in central China's Hunan Province in September 2014. Compared with previous criminal penalties imposed in similar commercial bribery cases, three billion yuan is the largest fine imposed thus far. Yet, it is expected that other foreign firms and domestic firms will be subject to the same or even higher penalties for corruption in the future. Otherwise, there is a risk that GSK will be perceived as a case of selective legal enforcement targeting foreign firms. Enforcement of the laws across all firms may be necessary to demonstrate China’s commitment to the rule of law in the Chinese market economy.

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161 Id., at 332.
162 Krever, supra note 120, at 94.
163 Id., at 101.
164 Foreign Corrupt Practices Act of 1977, supra note 128; McSorsley, supra 120, at 771. Prior to the 1998 amendments, the penalties were only civil.
165 Id.
166 Krever, supra note 120, at 94.
169 See Criminal Law of the P.R.C., supra note 67.
170 See GSK China hit with record fine, says sorry, CHINA DAILY, http://usa.chinadaily.com.cn/china/2014-09/19/content_18630605.htm
172 Id.
IV. Why the GSK Bribery was Possible in China

It is not enough to point out the seriousness and illegality of GSK’s behavior. It is also important to identify the possible underlying causes of the alleged bribery in order to restructure the institutions that allow for commercial bribery. Without a deep understanding of the causes of commercial bribery, it is difficult to prevent other MNCs from engaging in bribery. This Part examines several distinct features of doing business in China that MNCs should consider when designing corporate governance structures to guard against the temptation to offer bribes.

A. Misinterpretation of Contemporary Chinese Culture

MNCs may misinterpret China’s connection-based society and conclude that it is appropriate to bribe potential institutional buyers, especially public hospitals in China.173 But this ignores China’s contemporary efforts at reform. It is true that the Chinese market economy is not yet well-developed.174 It took China three decades to transform from a centrally planned economy to a free market economy since the late 1970s when Deng Xiaoping, the late paramount leader, came to power in China.175 Usually, there is no foreign capital in a planned economy, while there is no legitimacy of bribery in a market economy.176 Unspoken, hidden rules prevailed in the planned economy, while open, transparent legal rules should prevail in a market economy.177 In a free market, consumers choose which goods and services they will purchase on the basis of price and quality.178 Thus, in such a system, consumer access to information concerning the price and quality of goods and services (market transparency) is paramount.179

Unspoken rules might not have completely disappeared in the process of transition from a planned economy to a market economy, as the emerging twins, the rule of law and the market economy, have not been fully-fledged.180 The National People’s Congress, however, inserted the rule of law into the first paragraph of Article 5 of the Constitution on March 15, 1999, declaring, “the People’s Republic of China shall govern the country with the rule of law, and shall build the socialist country with rule of law.”181 One of the latest comprehensive reform policies made by the ruling party, the Chinese Communist Party, on November 12, 2013, endorsed the rule of law. Keeping in mind the bitter lessons of the ten years of the Cultural Revolution, the rule of law has become the social consensus in contemporary

173 Shobert, supra note 84.
175 Id.
176 See Dalton, supra note 74, at 585. An exception to this general rule is Cuba, a planned economy that accepts foreign direct investment, particularly within its tourism industry. See generally Francoise L. Simon, Tourism Development in Transition Economies: The Cuba Case, 30 COLUM. J. WORLD BUS. (1995).
178 See Philip M. Nichols, Corruption as an Assurance Problem, 19 AM. U. Int’l L. Rev. 1307, 1318.
179 Id.
180 In the context of healthcare, the prevalence of bribery resulted from the Chinese privatization of the industry. When China privatized healthcare, needs that had historically been addressed by the government became underfunded, and remained so for decades, leading the people tasked with healthcare delivery to seek additional sources of funding. Shobert, supra note 84.
China. In addition, to further detailed reform plans, China published twelve core values including national goals of prosperity, democracy, civility, and harmony; social goals of freedom, equality, justice and the rule of law; and individual values of patriotism, dedication, integrity and friendship.

Ignoring Chinese contemporary efforts and commitments to a free and open market, the rule of law, and modernization of state governance, some MNCs seek to hire so-called “elites” with good connections in China to join their subsidiaries in China. Retired officers, or relatives or close friends of current officers, are favorite candidates for the positions of senior executives in China subsidiaries. Of course, some of Chinese domestic corporations have been also behaving this way. But in the past few years, China has begun to investigate and punish commercial bribery and the related corrupt activities committed by retired officers, or relatives or close friends of current officers. So far, over 60 government officials at the provincial and ministerial levels, or above, are under investigation.

More importantly, connection-based bribery has been a special target in contemporary Chinese society. Anti-corruption efforts and reforms toward a transparent and competitive market are key elements of the contemporary Chinese culture. A misunderstanding of contemporary Chinese culture may have created, and may continue to create, more bribery scandals on the part of the MNCs. It is important for MNCs to recognize that contemporary Chinese culture does not tolerate bribery.

B. Optimization of Profits

Many MNCs, including GSK, may see maximization of profits as their sole goal. In fact, exploring and expanding their market shares may be the first priority of MNCs entering the Chinese market. Yet, in the age of globalization and the Internet, emerging theories promoting the significance of non-shareholder stakeholders and corporate social responsibility are challenging the conservative notion of maximization of profits at all costs.

As early as October 27, 2005, the Chinese legislature inserted a corporate social responsibility clause into the first paragraph of Article 5 of the Corporate Law stating: “In its operational activities, a company shall abide by laws and administrative regulations, observe social morals and commercial ethics, persist in honesty and good faith, accept supervision by

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182 The Third Plenary Session of the 18th Communist Party of China Central Committee, which concluded on Nov 12, 2013 issued a Communiqué and a Decision, laying down broad policy directions for comprehensively deepening reform and further opening-up. The Decision is widely regarded as being the blueprint for China’s future development. Comprehensively Deepening Reform, supra note 58.
184 Id.
185 See Silver-Greenberg & Protess, supra note 6.
186 Jianxiong, supra note 114.
187 Chen, supra note 7.
188 Id.
189 Id.
190 Waheed Hussain, Corporations, Profit Maximization and the Personal Sphere, 28 ECON. & PHIL. 313 (2012).
191 See LIU JUNHAI, CORPORATE SOCIAL RESPONSIBILITY (1999) for further details regarding corporate social responsibility.
the government and the public, and assume social responsibility.”192

Similarly, as the result of five years of negotiation and bargaining among many different stakeholders across the world, the International Standard Organization issued ISO 26000:2010, Guidance on Social Responsibility on November 1, 2010.193 The Guidance provides harmonized, globally relevant guidelines for private and public sector organizations of all types, based on an international consensus among expert representatives of the main stakeholder groups, and encourages the implementation of best practices in social responsibility worldwide.194

ISO 26000:2010 represents an international consensus to some extent, as more than 600 representatives from 99 governments and 42 international organizations195—including representatives from non-governmental organizations (NGOs), industry, consumer groups, and labor organizations—were involved in its development.196 The text is currently available in 22 languages, and a recent survey performed by the ISO 26000 Post Publication Organization found that “at least 60 countries have adopted the standard,” with 20 other countries actively pursuing adoption.197 Notable applications of the ISO 2600 guidelines have included a project in the Middle East/North Africa to create a pool of national social responsibility experts in eight pilot countries, the use of the guidelines by Germany’s Federal Ministry for Economic Cooperation and Development, and the implementation of the guidelines by many well-known companies.198 Although ISO 26000:2010 is a voluntary standard, it helps clarify social responsibility by translating principles into effective actions, and sharing global best practices.199

Optimization of profits, instead of maximization of profits, is the logical reflection of corporate responsibility and business ethics in the corporate core value framework. Profit optimization represents a certain degree of restraint, requiring reasonable profits to be made

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194 Id. ISO 26000 contains voluntary guidance, not requirements, and therefore is not used as a certification standard like ISO 9001:2008 and ISO 14001:2004.
196 Rudiger Hahn & Christian Weidtmann, Transnational Governance, Deliberative Democracy, and the Legitimacy of ISO 26000: Analyzing the Case of a Global Multistakeholder Process, SAGE PUBLICATIONS (2012), http://bas.sagepub.com/content/early/2012/10/24/0007650312462666.full.pdf, at 15 (“Members of the ISO Working Group (WG) were subdivided in six stakeholder categories (‘Consumers,’ Government,’ ‘Industry,’ ‘Labor,’ ‘NGO,’ and ‘Service, support, research and others [SSRO]’) to support a balanced representation of the different stakeholders that meets the various interests of the addressees of the guideline. ISO member bodies (i.e., those national bodies that represent their country within the ISO) were allowed to nominate up to six persons (one for each of the six stakeholder categories). These nominees held an ‘expert status’ that included the right to participate actively at the different drafting stages.” (internal citations omitted)).
198 Id. (“Various companies have already implemented the standard such as Maersk, NovoNordisk, TeliaSonera, HSB, HM, Suzano, Petrobras, Veolia, Air France, Toshiba, AB Volvo, Takeda, Panasonic, British Telecom, TRS, and Toyota.”).
This conclusion finds ample support in the literature surrounding the recent corporate social responsibility movement, which seeks to augment the factors that motivate corporate decision-making. Proponents of the movement, for instance argue that the myriad interests relate to and should play a direct role in deciding corporate affairs, including (but not limited to) the concerns of environmentalists, creditors, consumers, and employees. According to this theory the possessors of these interests, “stakeholders,” have a right to participate in corporate decision-making.

In contrast, under the more recently proposed Team Production Theory, the actors involved in and affected by corporate affairs are all part of a team. The team comes about because the participants all believe they will gain more from acting in concert than they would through individual action. Because all have participated in bringing about the team production, the (corporate) profits of that production must be allocated accordingly. Under the theory, because the effects of an individual team member’s participation are difficult to isolate, profits must be allocated by the board of directors via a political process.

In recent years, these theories have done much to promote widespread awareness of the corporate social responsibility movement. Yet neither theory is completely satisfactory. While the team production theory conceptualizes corporate work product and decision making as collaborative enterprises dependent upon a panoply of stakeholders, by leaving the allocation of rents up to the discretion of corporate board members, the theory is descriptive rather than normative. Critics claim that in reality, under this theory, the allocation of profit is “a matter of power rather than principle.” Stakeholder theory, by contrast departs from the underlying ideals of the corporate social responsibility movement in the opposite fashion. Rather than live up to the movement’s goals of spurring more sustainable and inclusive business practices, stakeholder theory, taken to its logical extremes, may provide boards with so much discretion in decision-making that being accountable to everyone could result in being accountable to no one.

As reflected in the recent backlash to the GSK scandal, and as embodied by the Chinese Corporate Law mandate that companies “observe social morals and commercial ethics…and

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201 Id. at 1237.
202 Id.
203 Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 VA. L. REV. 247, 265-76 (1999) (“[A] public corporation is a team of people who enter into a complex agreement to work together for their mutual gain. Participants—including shareholders, employees, and perhaps other stakeholders such as creditors or the local community—enter into a ‘pactum subjectionis’ under which they yield control over outputs and key inputs (time, intellectual skills, or financial capital) to the hierarchy.” (citation omitted)).
204 Testy, supra note 200, at 1233.
205 Id.
206 Id.
207 See id. at 1234.
assume social responsibility,” the goal of the corporate responsibility movement is not to hijack the corporate form. To the contrary, its purpose is to impress upon corporations, and especially upon MNCs like GSK, the necessity of subjecting their pursuit of profits to ethical and legal limitations. For this reason, it is the concept of optimizing profits—of maximizing profits within the boundaries set by legal, moral, and cultural standards—that best encapsulates the global movement that continues to call for more sustainable and inclusive business practices.

Moreover, in addition to providing a framework in which firms will be encouraged to protect the interests of their stakeholders, embracing profit optimization will typically be in the companies’ long-term profit-maximizing interests. This is especially true in emerging markets like China, where decreases in corruption have been linked to significant growth in gross domestic product per capita, which should in turn mean increased demand for MNC products in these markets. Additionally, by refusing to engage in corrupt practices, MNCs would avoid paying the heavy transaction costs associated with commercial bribery. Hence, it is important for companies like GSK, which has invested heavily in China, to recognize that there is a great deal to be gained (both for themselves and their stakeholders) through playing by the rule of law. Without such a fundamental change in corporate thinking about maximization of profits, scandals such as the one embroiling GSK are likely to repeat themselves on the global stage.

C. Strengthening Corporate Governance to Address Corruption

Many MNCs, including GSK, oppose corruption in their corporate policies or internal rules. It would be both unwise and almost unheard of for an MNC to be silent on the anti-corruption issue. Therefore, the core issue is not whether the MNC has a corporate anti-corruption policy, but instead, whether the corporate governance policy regarding anti-corruption translates well into commercial practice.

When the Chinese authorities began investigating GSK’s China operations, GSK China issued a statement regarding the ongoing investigation on July 15, 2013, saying:

[w]e are deeply concerned and disappointed by these serious allegations of fraudulent behavior and ethical misconduct by certain individuals at the company and third-party agencies. Such behavior would be a clear breach of GSK’s systems, governance procedures, values and standards. GSK has zero tolerance for any behavior of this nature. GSK shares the desire of the Chinese authorities to

216 Id.
root out corruption. These allegations are shameful and we regret this has occurred.217

This statement demonstrates that GSK has specific systems, governance procedures, values, and standards designed to address the bribery scandal and other corrupt practices.

The Chinese government spokesperson alleged in September 2013 that the wrongdoing was organized by GSK China.218 Furthermore, he claimed “the company passed the buck to the salesforce, but the police investigation has found that GSK China went through the motions in internal auditing so as not to discover these violations.”219 GSK has continuously stated that the head office of GSK had no prior knowledge about the wrongdoing of the Chinese salesforce while fully cooperating with Chinese authorities.220

Despite these claims, five senior executives of GSK were found in violation of the anti-corruption laws.221 In order to prove criminal and civil liability of the top executives in GSK, the Chinese authorities had to prove breach of fiduciary duties.222 This required proof that the executives had knowledge of the bribery or should have reasonably known about it.

Considering GSK’s long-standing position against corruption, the question becomes why is it embroiled in a bribery scandal.223 There must have been a problem with execution of corporate governance policies and translation of formal anticorruption policies and norms into practical reality. After meeting with the officials of the Chinese Ministry of Public Security, Abbas Hussain, the GSK President International – Europe, Japan, Emerging Markets & Asia Pacific, said on July 22, 2013, “certain senior executives of GSK China, who know our systems well, appear to have acted outside of our processes and controls which breaches Chinese law. We have zero tolerance for any behavior of this nature.”224

Hussain’s comment worked to insulate GSK’s head office from the accusation of the corporate wrongdoing at the level of corporate values and policies, and to separate the wrongdoings of senior executives from GSK China and the global GSK group. GSK Chief Executive, Sir Andrew Witty, also admitted that the four executives appeared to have worked around the corporate control processes to commit the alleged crimes.225 No charges have been filed against the global GSK groups to date.

Yet, there were apparently at least two serious failures of the corporate governance policies of GSK. First, certain senior executives of GSK China have breached Chinese law. Five senior executives of GSK were found to have actively organized, pushed forward and

218 Id.
219 Id.
221 See GSK China hit with record fine, says sorry, supra note 170.
222 Id.
225 Campbell, supra note 32.
implemented a sales force involved with bribery. Second, the internal systems of GSK were unable to prevent GSK employees from engaging in corrupt behaviors. Even before the GSK conviction for commercial bribery, GSK’s stated policies were to promote corporate social responsibility and ensure accountability. For instance, its mission is “to improve the quality of human life by enabling people to do more, feel better, [and] live longer,” and it claimed, “we have a robust structure in place to ensure the approach we take on corporate responsibility is appropriate. Our board-level Corporate Responsibility Committee (CRC) has overall oversight and sits within a clear organizational structure that ensures accountability.”

If the corporate governance policies of GSK had functioned effectively, no crimes should have been committed. It is easy to adopt corporate governance provisions and anticorruption rules. It is also easy to organize a committee to address the issue of corruption within a corporation. What is difficult—and even more important—is ensuring that such measures are effective. GSK’s failure lies not in the lack of corporate social responsibility measures, but instead in the functional (in)effectiveness of these governance norms.

GSK acknowledged this failure following the criminal verdict. The company posted an apology on its Chinese website, saying that it "fully accepts the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities." GSK "sincerely apologizes to the Chinese patients, doctors and hospitals, and to the Chinese Government and the Chinese people" and "deeply regrets the damage caused.” It also apologized for harm caused by its illegal private investigation. The apology described the events as a clear breach of GSK’s governance and "wholly contrary to the values and standards we expect from our employees.”

As the GSK scandal illustrates, it is insufficient, or even meaningless, to discuss the institutional innovations of corporate governance on the books without noting the significance of exploring mechanisms for converting good norms into formal and effective practices. Of course, formalization of corporate governance does not mean that all corporate rules are compatible with anticorruption policies. To the contrary, some of GSK’s rules, especially the evaluation and incentive system for professional sales representatives, may have been key factors in triggering the bribery scandal.

V. The Need for Reform of the Evaluation and Incentive System for Professional Sales Representatives

GSK’s evaluation and incentive systems for professional sales representatives may help explain why senior executives and professional sales representatives of GSK were engaging in corrupt practices. Under the traditional compensation system of GSK, bonuses for sales professionals were based on individual achievement of sales targets. Simply put, the more drugs sold, the more bonuses received.

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226 http://www.gsk.com/en-gb/responsibility/
227 See GSK China hit with record fine, says sorry, supra note 170.
229 Id.
On its face, this compensation system sounds reasonable and fair. Yet, professional sales representatives may have been incentivized to offer bribes to gain a competitive advantage. When GSK evaluated its senior executives and professional sales representatives based only on the sales of market shares, employees may have considered offering bribes, regardless of illegality. Great bonuses arising from bribery may have been expected, while legal prosecution was uncertain. From the perspective of GSK employees, bribery may have been a great game of small input and large return. Motivated by the maximization of profits for GSK and the maximization of compensation for the professional sales representatives, it may have been very difficult for the management of GSK to stop or even slow down perceived profitable bribery practices.

In fact, the sales targets-orientated compensation policy may have been the primary cause, not just of bribes to doctors, but also of fraud to consumers. It is likely not a coincidence that GSK was required to execute a five-year Corporate Integrity Agreement (CIA) with the US Department of Health and Human Services, Office of Inspector General (HHS-OIG) in 2012 in the US. The plea agreement and the CIA included novel provisions requiring GSK to implement and/or maintain major changes to the way it does business. These changes include changing the way its sales force is compensated to remove compensation based on sales goals for territories, one of the driving forces behind much of the conduct at issue. Under the CIA, GSK is required to change its executive compensation program to permit the company to recoup annual bonuses and long-term incentives from covered executives if they, or their subordinates, engage in significant misconduct. GSK may recoup monies from executives who are current employees and those who have left the company. Among other things, the CIA also requires GSK to implement and maintain transparency in its research practices and publication policies and to follow specified policies in its contracts with various health care payers. To some extent, the CIA paved the way for GSK to change its traditional compensation system in China in 2014.

A. Fundamental Change in Compensation: From Unitary Sales Target Orientation to Diversified Evaluation Indicators

After recognizing the relationship between its sales target-oriented evaluation and incentive system and the ever increasing amount of bribery, beginning in January 2014, GSK began to implement fundamental changes to its evaluation and incentive system. Under the new system, employees who interact with customers will be evaluated according to their technical knowledge, quality of service, and adherence to the company values of transparency, integrity, respect, and patient-focus. The new system will apply to all GSK sales employees who interact with prescribing healthcare professionals including sales representatives and sales managers. In addition to its implementation in China, the new

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231 Id.
232 Id.
235 Id.
236 Id.
system will be implemented in other markets around the world. GSK promised that the new system would be fully implemented in all of the countries in which it operates by early 2015.237

Regarding the rationale behind the change of the compensation system, Hervé Gisserot, Senior Vice President and General Manager of GSK Pharmaceuticals and Vaccines China, explained: “The new sales compensation system will enable us to put patients’ needs at the heart of everything that we do. Our medical representatives are the gateway to our customers and it is important we inspire, coach and ultimately reward people working within the organization to focus on behaviors, which reflect our values. I am confident that this industry-leading initiative will help GSK to continue to build a sustainable business in China and make a strong contribution to the development of the Chinese healthcare system.”238 Further, according to Gisserot, GSK has demonstrated its determination to pursue a patient friendly business model—to find a means of linking the company’s core values and its sustainable development, the welfare of the patients and the incentives of its medical representatives.239 The rationale behind the new system should be welcome to both medical representatives and patients alike.

Gisserot’s comments suggest the three failures of corporate governance described above: sole reliance on a maximization of profits-oriented philosophy, misunderstanding of Chinese contemporary culture, and the failure of corporate governance policies to combat corruption.240 Identifying the corporate governance failures, however, is only the first step toward stakeholder-friendly governance. The effectiveness of the new compensation system remains to be tested by all stakeholders.

B. Shortcomings of the New Compensation System

The criminal investigation of GSK appears to have prompted the introduction of its new compensation system. Under pressure from the public and the media, GSK changed the visible rules directly contributing to corrupt practices. In addition to developing the strategy with regard to public relations, GSK has weighed the potential benefits and costs associated with the new compensation system.241

As announced by GSK on December 18, 2013, “these changes build on the successful introduction of GSK’s ‘Patient First’ program in the United States in 2011. Experiences from the U.S. have shown this more patient-focused approach has significantly improved customer interactions. It has also coincided with a period of growth for GSK’s U.S. business.”242 This implies that GSK sees positive effects from the CIA. The effects are in the best interests of GSK and the public, especially the patients. Furthermore, it seems that the new compensation system successfully implemented in the US could be applicable to the Chinese market.243 GSK’s new compensation system in China, however, has several shortcomings, compared with the promises made in its US CIA.

237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id.
243 Silverman, supra note 54.
First, the new compensation system introduced in China is less detailed than its CIA Patient First program. Pursuant to the CIA, GSK agrees that it will not provide a financial reward (through compensation, including incentive compensation or otherwise) or discipline (through tangible employment action) to its prescribing field sales professionals (pharmaceutical sales representatives) or their direct managers based on the volume of GSK product sales within an employee’s territory, or within the manager’s district.\textsuperscript{244} The Patient First program includes evaluations for sales representatives based on business acumen, customer engagement, and scientific knowledge about GSK’s products.\textsuperscript{245} GSK agreed to maintain its Patient First Program, or a substantially equivalent program, for at least the duration of the CIA, absent agreement otherwise. The restrictions on such tangible employment decisions are set forth in its Use of Territory/Individual Sales Data policy.\textsuperscript{246} In contrast, the information released on GSK’s website about the new compensation system in China is very general and ambiguous.\textsuperscript{247} This may be because GSK considers the details of the new compensation system in China confidential, but transparency of the new compensation system could win the trust of the public.

Second, there is no financial recoupment program in China. In the CIA, GSK promised to establish and maintain, throughout the term of the CIA, a financial recoupment program that puts at risk of forfeiture and recoupment an amount equivalent to up to three years of annual performance pay (i.e., annual bonuses, plus long term incentives) for an executive who is discovered to have been involved in any significant misconduct.\textsuperscript{248} This financial recoupment program applies to executives who are either current GSK employees or who were former GSK employees.\textsuperscript{249} GSK also committed to maintaining an Executive Financial Recoupment Program for at least the duration of the CIA, absent agreement otherwise.\textsuperscript{250} Both the incentive and the restraint mechanisms are essential to preventing excessive emphasis on sales targets. Although GSK promised a new compensation system in China, it has not yet announced an Executive Financial Recoupment Program in China.

Third, there is no independent review mechanism in China from a third party equivalent to the Independent Review Organization (IRO) as defined in the CIA. In the CIA, within 120 days after the effective date, GSK is required to engage an entity (or entities), such as an accounting, auditing, or consulting firm, to perform reviews to assist it in assessing and evaluating its systems, processes, policies, procedures, and practices.\textsuperscript{251} Without independent verification and oversight, it would be difficult to convince the public of the effectiveness of the new Chinese compensation program. Theoretically speaking, GSK would benefit from the independent review mechanism in terms of better corporate image and long-term development.

Fourth, there is no mechanism for the Chinese government to punish GSK for failure to comply with its promises. In the US, the 2012 CIA has a section on dealing with “breach and

\textsuperscript{244} CIA, supra note 170.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} GSK China to Implement New Compensation Program for Sales Force in 2014, supra note 122.
\textsuperscript{248} See CIA, supra note 170.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} See id. supra note 170, at 35.
GSK agreed that failure to comply with the obligations to establish and implement the employee and executive incentive compensation and recoupment may lead to the imposition of stipulated penalty of $2,500 for each day. As the new compensation system in China is the unilateral policy declared by GSK, it is up to GSK to discipline the breach of the system in the framework of internal controls. The public, however, might not trust the effectiveness of the internal controls of GSK, as they have witnessed the failure of the internal controls in the bribery scandal in 2013.

Fifth, no comprehensive corporate integrity obligation was imposed on GSK in the new compensation system in China. In the 2012 CIA, GSK promised to establish and maintain a compliance program in the US, and especially to add compliance responsibilities for certain GSK employees and the board of directors. This program includes appointing a Compliance Officer, a Compliance Committee, and assigning the Board compliance obligations. The Board is further required to adopt a written Code of Conduct and written policies and procedures relating to the training of management and relevant employees.

Despite the shortcomings of the new compensation system of GSK in China, many pharmaceutical MNCs are eager to know its fate. Although other pharmaceuticals have not yet followed GSK’s new compensation model, some MNCs may be willing to follow it to avoid regulatory risks. On the other hand, some MNCs may be reluctant to follow GSK’s new model before the model proves successful.

VI. Suggested Corporate Governance Reforms

This Part offers our proposals for governance reforms, in an attempt to reduce the incentives for corporate executives to engage in acts of bribery when doing business in China. Our proposals include a reorientation of the corporate purpose from profit maximization to profit optimization, the need to understand Chinese culture and society, and the execution of corporate governance practices that directly address corruption.

A. Reorientation of Corporate Purpose to Optimization of Profits

An ancient Chinese proverb deeply describes the profit driven world: “Jostling and joyous, the whole world comes after profit; racing and rioting, after profit the whole world goes.” Maximization of profits has been one of the most powerful driving forces for entrepreneurship, innovation and progress in the human history, especially in the corporate age. Maximization of profits, however, may incentivize some corporations desperate for profits and ignorant of the interests of other stakeholders.
The tricky issue is that although many corporate citizens condemn corrupt practices as unethical and illegal, or even crimes, and business leaders declare zero tolerance for corrupt practices in their corporate policies, such promises and policies tend to be subordinate to the purpose of maximizing profits for the corporation and its shareholders. The reason some anticorruption policies fail is that corruption is sometimes considered the price the corporation has to pay in certain circumstances. Yet, maximization of profits per se does not justify engaging in corrupt activities.

Because corporations are important members of society, we argue that it is imperative that they revise their mission of profit maximization by replacing “maximization” with “optimization.” First, optimization of profits implies a broader inclusion of stakeholders. Traditionally, the shareholder has been considered the primary corporate stakeholder. The purpose of the modern corporation, however, should be to create wealth for its shareholders and other stakeholders harmoniously, but not necessarily in the same ways. In addition to advancing investment returns for shareholders and compensating directors and executives, the creation and growth of the corporation should also benefit other stakeholders or constituencies. Profit is not adequate to describe the purpose of a corporation, as the interests or stakes owned by the non-shareholder constituencies do not necessarily take the form of profit. It is unnecessary to narrowly interpret corporate interest solely in terms of shareholder interest.

Second, optimization of profits implies legal and ethical profit making. It demands that profits be acquired for various stakeholders—including shareholders, employees, consumers, creditors, competitors, suppliers, retailers, the community, future generations of people, the natural environment, and other stakeholders—in lawful, ethical, and respectful ways. In the pursuit of this ideal balance of interests, we argue for compromise, tolerance, and inclusiveness. Corruption has seriously eroded cooperation among corporations and their stakeholders, infringed upon the rights of consumers and competitors, and thereby destroyed the confidence of both the business community and the public in fair competition in a free market. Optimization of profits does not prohibit corporations from being profitable. Being profitable is not the problem. The problem arises when firms seek to profit in an illegal or unethical way.

Third, optimization of profits implies the sustainable development of the corporation. Indeed, there are tensions between short-term interests and long-term interests, between the shareholder’s interest and non-shareholder constituencies’ interests, between the visible financial interest and invisible public reputation, between short-term tactics and long-term strategy, and between short-term revenue generation and long-term competitiveness. Optimization of profits, however, guides the corporation with a long-term vision of sustainable development and helps to pave the way to sustainable business success. MNCs need to consider their long-term interests, public reputations, long-term strategies, long-term

259 Hills, Fiske, & Mahmud, supra note 214, at 24.
261 Id.
262 Kang, supra note 52, at 13.
263 Id. at 14.
264 Id. at 15-16.
265 Id.
266 Id., at 8; see generally Kenny, supra note 76.
267 See Kang, supra note 52, at 13-21.
competitiveness, and the core interests of their non-shareholder constituencies when optimizing profits.

It is a longstanding maxim in corporate law that business corporations are “organized and carried on primarily for the profit of the stockholders” and that, accordingly, corporate board members and officers owe a fiduciary duty to maximize shareholder profits. Yet such a duty, if it exists at all, can easily coexist with profit optimization. Because a firm’s market reputation plays a considerable role in determining its valuation and profits, it will almost always be in the firm’s best (long-term profit maximizing) interest to pay close attention to the stakeholder concerns noted above. This is particularly true of MNCs. As our GSK case study exemplifies, when such companies fail to live up to stakeholder standards, the news is unlikely to fall on deaf ears. Hence, profit optimization stands, not only to promote a broader array of stakeholder interests, but also to prevent corporate fiduciaries from sacrificing their firms’ long-term financial welfare in the pursuit of short-term profits.

B. The Need for Understanding Chinese Culture

Firms need to bear in mind both China’s past and present and draw conclusions from both China’s accomplishments and the Chinese way of thinking. One can hardly understand China well without a proper understanding of China’s history, culture, the Chinese people’s way of thinking, and the profound changes taking place in China today. It would be unwise for MNCs to follow the so-called “unspoken rules” of corruption. The better choice for MNCs is to conduct their business in lawful and ethical ways, and to adopt a policy of zero tolerance for corruption, despite heavy pressure from the competition. By doing so, MNCs will lower their own transaction costs in China, as well as spur more demand for their products. In promoting these ends, the most important step is to gain a deeper understanding of Chinese culture and rule of law.

C. Corporate Governance Practices Must Address Corruption

As mentioned above, many MNCs, including GSK, have anti-corruption policies. Unfortunately, the policies and the norms of good corporate governance have not always translated into practice. Thus, the key issue is how to implement good corporate governance policies regarding anti-corruption. To achieve this, three factors would be equally important: good people, good norms, and good culture. Furthermore, we suggest that MNCs implement the following practices.

First, a consumer friendly compensation system should be implemented by MNCs to better reflect the competence and performance of the marketing employees or representatives based on consumer primacy. Although it was encouraging for GSK to announce a new compensation system in late 2013, as noted above, its system still has shortcomings and weaknesses. We have several suggestions for reform for GSK and other MNCs facing the

270 See id. (discussing reasons to doubt the existence of a specific fiduciary duty to maximize profits).
271 Jinping, supra note 45.
272 Id.
The most important suggestion is to hear the opinions of the consumers, including the patients. It is unlikely that a compensation system will be truly consumer friendly if the system has not been heard, debated, and discussed by the public consumers. Another important requirement of a revised compensation system is that it must accommodate the core interest of the employees or representatives. Without the support of the marketing employees or representatives, it would be unlikely that a consumer friendly compensation system would succeed. In addition, a consumer friendly compensation system should be made transparent in order to enable and facilitate public supervision. Finally, both corporate employees and independent sales representatives or agents should be evaluated by the consumer friendly compensation system. To control the legal risk of corruption, some MNCs might attempt to outsource marketing to independent agents, representatives, or intermediaries reasoning that this strategy may insulate the firm from corruption. We argue that MNCs should also be held accountable for the selection and oversight of the independent intermediaries. Independent intermediaries must also be prohibited from engaging in bribery.

Second, internal punishments, including financial recoupment, should be adopted to improve governance on anti-corruption. In the 2012 US CIA, GSK promised to establish and maintain a financial recoupment program that puts at risk of forfeiture and recoupment an amount equivalent to up to three years of annual performance pay for an executive who is discovered to have been involved in any significant misconduct. GSK, however, has not announced a similar program in China. A recoupment program could help deter and prevent executives of MNCs from engaging in misconduct, including consumer fraud and bribery. In addition to the executives, the directors and marketing employees should be subject to the recoupment program. To increase the cost of corruption, firms could seek to impose penalties in the case of intentional misconduct or gross negligence resulting in corruption.

Third, an independent third party review mechanism should be established to fight against corruption. An MNC’s internal review of the effectiveness and weakness of anti-corruption practices is unreliable from the perspective of the public, including the competitors and the consumers. Furthermore, if the independent review organization is selected and paid by the corporation, there is a possibility that the corporation will in effect control the review organization. Some review organizations might thus close their eyes to the ongoing corrupt practices. Therefore, corporations should not nominate the members of the organizations. We recommend that the independent review organizations be selected by a government agency based on open, fair, transparent, and competitive procurement procedures. The public should be entitled to inspect the review documents and raise questions before the independent review organizations, either individually or at a hearing procedure organized by the government agency. The review organization could be funded through a fee imposed on corporations.

Fourth, penalties should be imposed on corrupt practices of multinational corporations. The market has eyes, the law has teeth. Civil liabilities, administrative liabilities, and criminal liabilities are different, but interconnected. In the case of massive infringement of consumer rights, the China Consumers’ Association or the consumers associations at the provincial

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273 CIA, supra note 230, at 32.
level may take up public interest lawsuits on the behalf of consumers.\textsuperscript{274} In the case of administrative or criminal penalties imposed on a wrongdoing corporation, the fine should not exclude a consumer’s claim to damages. In addition to consumer litigation, the competitors should be permitted to file lawsuits against a wrongdoing corporation for compensation and injunctions. In China, penalties imposed on those offering bribes are usually less harsh than those imposed on bribe recipients, in order to encourage the bribing firms to report to the government or the judicial system.\textsuperscript{275} Both sides of the transaction, however, benefit from bribes. As a result, MNCs, as the providers and beneficiaries of bribes, are not motivated to act as whistleblowers with respect to corrupt practices. The administrative penalties prescribed by Article 22 of the Unfair Competition Law of 1993 are minimal with regard to briberies not serious enough to amount to crimes; the regulator may fine from RMB 10,000 (equivalent to USD 1,600) up to RMB 200,000 (equivalent to USD 32,000) depending on the circumstances and the illegal income.\textsuperscript{276} Administrative penalties need to be made harsher in order to deter and punish corporate corruption. Although plea-bargaining is unfamiliar to Chinese law, it is highly recommended that China introduce it to decrease the costs of investigation and improve the efficiency of legal enforcement, given the limited resources of regulators and the judicial system.

Fifth, anti-corruption practices should be added to the corporate governance structures of MNCs. Based on the successful experience of the corporate integrity obligation imposed by the 2012 CIA, corporations should be encouraged to establish an anticorruption committee under the board of directors, and to create the position of Chief Anticorruption Officer (CAO) at the management level. The board of directors should be responsible for the CAO’s nomination and removal and the CAO should report on a timely basis. The board of directors should have a duty to monitor and evaluate whether corruption exists within the corporation. A practical code of conduct of anticorruption should be learned and followed by the employees, especially those engaged in marketing. Needless to say, as MNCs and their directors, executives, and employees are sensitive to negative impacts on their reputations, corruption records of directors, executives and employees should be made available to the public.\textsuperscript{277}

In keeping with this approach, it would be helpful for China and other nations hosting MNCs to adopt sentencing policies similar to those found in the US federal Organizational Sentencing Guidelines (OSGs)\textsuperscript{278} and in the US prosecutorial practice of encouraging organizational cooperation through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The OSGs allow leniency if the organization reports an offense to the government, cooperates fully in the investigation, and demonstrates its

\textsuperscript{274} Article 47, Chinese Consumer Protection Law (2013).
\textsuperscript{275} Under Article 163 of the Chinese Criminal Law, the bribery recipients in a corporation shall be sentenced to a maximum of 5 years of imprisonment for a bribery crime of a significant amount. For a bribery crime of a large amount, the recipient can be sentenced between 5 and 20 years of imprisonment. However, under Article 164 of Chinese Criminal Law, the bribery providers in the corporations shall be sentenced to the maximum of 3 years of imprisonment for the bribery crime of significant amount, or sentenced to 3 to 10 years of imprisonment for the bribery crime of a large amount. Furthermore, the bribery providers, who have voluntarily confessed the bribery prior to the initiation of prosecution procedure, shall be entitled to mitigated punishment or exemption from punishment. Criminal Law of the P.R.C., supra note 67.
\textsuperscript{276} Article 22, Chinese Unfair Competition Law (1993).
\textsuperscript{277} On March 1, 2013, the State Authority of Industry and Commerce launched a website with the credit information of every firm in China: http://gsxt.saic.gov.cn.
\textsuperscript{278} U.S. Sentencing Guidelines Manual § 8C2.5(g) (2008).
recognition and affirmative acceptance of responsibility.279

Similarly, by offering NPAs and DPAs, prosecutors create serious incentives for corporate cooperation with criminal investigations. Based on a recent Government Accountability Office report, NPAs and DPAs have significantly reduced the use of court resources in dealing with FCPA violations.280 Moreover, the NPA/DPA process typically allows the DOJ to engage in more active communication with FCPA violators, with favorable settlements often being dependent on the MNC’s adoption of company-specific policies for combatting corruption.281 Such agreements frequently include “monitorship provisions,” which require companies to hire an independent corporate monitor to oversee their compliance efforts throughout the period of the agreement.282 This has been particularly common in cases involving FCPA violations.283 Companies have also been required to employ independent ethics and compliance consultants to examine their ethics and compliance programs.284 Moreover, in addition to stiff fines, 285 NPAs and DPAs typically include non-contradiction clauses, which prevent companies from subsequently denying any admissions of guilt made in an agreement.286 In return for paying penalties and complying with the agreements’ other provisions, companies typically avoid indictment and conviction, along with suspension and debarment from government, a considerable carrot for most MNCs.287

By relying on such strategies, countries hosting MNCs will likely establish an atmosphere much more conducive to the cooperative policing and prevention of corporate corruption. In such an environment, MNCs would have even less reason to avoid seriously engaging in corporate governance measures to prevent crimes like bribery.

Conclusion

GSK acquired significant competitive advantages by bribing hospitals, doctors, officials, and professional medical organizations. It is true that in general, firms seek to be competitive and strong in the market. To this end, however, firms operating in a free market should focus on improving their competitiveness through, for example, diversity and quality of goods or

283 Id.
284 See id. at 5.
285 See id. at 13 (highlighting a 2014 DPA in which JPMorgan Chase agreed to forfeit $1.7 billion “to resolve Bank Secrecy Act violations in connection with the Bernard L. Madoff Ponzi scheme”).
286 Id. at 9 (discussing the 2013 Standard Chartered Bank agreement with the DOJ, which the DOJ threatened to revoke upon discovering that a bank official had contradicted (in a press release) the admission in its agreement that the company had willfully violated U.S. sanctions laws).
287 Id. at 11-12.
services, marketing strategies, post-sale services, internal controls, and public relations. Moreover, firms should acquire or consolidate competitive advantages in a fair, ethical, and lawful manner. Bribery, however, is none of these and is an illegal, inefficient, and immoral trade practice.

Although it is impossible to eliminate all corruption in the global market, a policy of zero tolerance for corruption should acquire global consensus. In addition to tougher punishments of corrupt practices and a more liberal, transparent and competitive market based on the rule of law in the host countries of MNCs, more efficient international coordination mechanisms based on shared information and mutual assistance should be expected. The reason for this is simple. Corrupt practices are the common enemy in the global economy. MNCs should play the leading role in changing traditional corporate governance by reorienting corporate purpose, gaining a deeper understanding of host country culture, and adopting and employing serious corporate governance policies against corruption.

288 See Nichols, supra note 178, at 1318 (citing Mark B. Bader & Bill Shaw, Amendment of the Foreign Corrupt Practices Act, 15 N.Y.U. J. INT’L L. & POL. 627, 627-29 (1983)) (explaining that, in free market systems, economic transactions should be based exclusively on the price and quality of a given product or service).