

CLIENT ALERT

DOJ Announces New Enforcement Priorities Focused Squarely on China

The “China Initiative” Includes a Focus on FCPA Cases Involving Chinese Companies — But Ultimately Leaves Many Questions Unanswered

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Earlier this month, the U.S. Department of Justice (“DOJ”) announced a new “China Initiative” (“the Initiative”) developed in response to the Administration’s growing concern that China’s economic and trade practices “pose a grave threat to [the United States] national security.”¹ Announced by former Attorney General Jeff Sessions, the Initiative will be led by Assistant Attorney General John Demers and a team composed of a senior FBI Executive, five United States Attorneys, and several other DOJ officials.² The Initiative is especially notable due to its exclusive focus on China and the severity with which the DOJ has described the threat China poses to the United States and its companies. Indeed, former AG Jeff Sessions, AAG John Demers, and FBI Director Christopher Wray have spoken about Chinese threats in stark and

¹ Attorney General Jeff Sessions, Remarks Announcing New Initiative to Combat Chinese Economic Espionage (Nov. 1, 2018), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage> (hereinafter “Sessions Speech”).

² Press release, Department of Justice, Attorney General Jeff Session’s China Initiative Fact Sheet, available at <https://www.justice.gov/opa/speech/file/1107256/download> (Nov. 1, 2018) (hereinafter “China Initiative Fact Sheet”).

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cautionary terms, remarking that: “international trade has been good for China, but the cheating must stop . . .”;³ “China wants the fruits of America’s brainpower to harvest the seeds of its planned economic dominance”;⁴ and “[n]o country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China.”⁵ The Initiative thus serves as the vehicle through which to effectuate the DOJ’s “strategic priority of countering Chinese national security threats and reinforces the President’s overall national security strategy.”⁶

In its announcement, the DOJ outlined ten goals for the Initiative—most of which relate to combating economic espionage, guarding against Chinese influence over U.S. institutions, and coordinating enforcement resources more effectively. Despite the Initiative’s focus on economic espionage and trade secret cases, however, one of the Initiative’s stated goals specifically relates to identifying “Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses.”⁷ Beyond articulating this overarching goal, the DOJ has not announced any additional details about the practical effect and scope of this new objective. For example, the new goal targets Chinese companies that “compete with American businesses,” but it is unclear whether the DOJ will focus exclusively on cases where there is evidence of a demonstrable disadvantage to a U.S. company because of corrupt conduct by a Chinese competitor or whether the DOJ will take a broader approach. Furthermore, while the DOJ’s Fraud Section (where its FCPA unit is housed) has received a resource boost under the Trump Administration—principally in the form of more than a dozen new attorneys—it is unclear how many of these prosecutors or other resources will be devoted to cases involving Chinese companies.

A significant issue under the Initiative will be how the DOJ will handle the historically difficult issue of jurisdiction under the FCPA for Chinese companies. The language of the Initiative suggests that it is focused on Chinese national companies, but enforcement of the FCPA against such companies would likely pose significant jurisdictional hurdles under the FCPA, unless the target companies are U.S. issuers or the alleged wrongful conduct occurred in the United States. In fact, while China has been fertile ground for FCPA actions for the last decade, most actions have involved multinational companies with business operations in China rather than Chinese national companies. It is unclear whether these jurisdictional considerations will influence how the DOJ implements this new enforcement policy. In light of these jurisdictional considerations, it is likely that the DOJ will focus its efforts on Chinese companies with a provable jurisdictional nexus to the United States; that is, Chinese companies whose stock is traded on a U.S. exchange or that have operations in the United States, Chinese joint ventures or subsidiaries of U.S. multinationals, or Chinese companies that seek or maintain investments from U.S. firms.

³ Sessions Speech.

⁴ China Initiative Fact Sheet.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

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Despite the questions left unanswered by the Initiative, Chinese national companies as well as multinational companies with Chinese subsidiaries or joint ventures or other U.S.-based investors in Chinese companies should take the new directive as a signal to design and implement strong anti-corruption and anti-bribery compliance programs. An anti-corruption and anti-bribery compliance health check of any China-related operations would be prudent as well. Companies that discover potential corrupt conduct in their Chinese operations may wish to consider the option of voluntary disclosure under the DOJ's FCPA Corporate Enforcement Program, as that may help secure a favorable outcome, such as a declination or reduced fines. Each of these actions can help protect against the consequences of an FCPA enforcement action for Chinese companies as a result of the Initiative.

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