

Tensions Rise Between China and the United States: Intellectual Property Prosecutions Just the Tip of the Iceberg

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With more than 20 locations throughout the world and a deeply integrated, multidisciplinary platform, Dechert's White Collar Practice and Global Litigation Group represents multiple clients – including defendants, targets and victims – in investigations and prosecutions arising under the Department of Justice's China Initiative. Our diverse, high-impact team of former federal prosecutors, a former White House lawyer, other firm litigators and a deep bench of international trade and government regulation lawyers is regularly called upon to handle a variety of complex, cross-border matters with efficiency, accuracy and speed. Leading companies – whether international, Chinese or American – and their leadership teams count on our strong counseling, litigation, investigative and defense strategies to secure successful results.

Key Takeaways:

- Top Trump Administration officials have recently highlighted the Administration's focus on the perceived national security threat China poses in terms of theft of United States trade secrets by Chinese nationals.
- The DOJ's China Initiative, launched in 2018, focuses on investigating and prosecuting those seen as aiding China's efforts and represents a key part of the Trump Administration's strategic response to these perceived threats.
- Perhaps in response to the increasing number of prosecutions under the DOJ's China Initiative, China has considered a new law that would criminalize the theft of Chinese trade secrets to benefit a foreign entity.
- Irrespective of who wins the White House in 2020, the DOJ is expected to continue to investigate and prosecute trade-secret cases, including those arising out of Chinese-related activities, for years to come. Also, the U.S. government is expected to continue to apply a range of administrative measures to restrict, restrain, and impede Chinese influence. CFIUS as well as the U.S. Departments of Treasury, State, and Commerce are all expected to play a key role in implementing American policy involving China.

Amid escalating tensions between the United States and China over the last few years, the United States Department of Justice ("DOJ") has formally prioritized criminal prosecutions of Chinese nationals and companies, and those who assist them, in connection with the alleged theft of intellectual property, hacking, economic espionage, and efforts to influence the American public and policymakers without proper transparency. Speeches by top Trump Administration officials have honed in on the DOJ and Federal Bureau of Investigation's ("FBI") laser focus on perceived threats posed by China and related criminal investigations and prosecutions. At the same time, China is considering a responsive change in its own criminal laws in order to give Beijing a tool to prosecute foreign businesses who allegedly engage in theft of Chinese trade secrets for the benefit of foreign entities.

Dechert's White Collar Practice and Global Litigation Group are closely monitoring the developing landscape of white collar prosecutions arising from this U.S.-China friction. In this OnPoint, we provide background on the United States' criminal investigation and enforcement efforts that potentially triggered China's consideration of a new set of criminal laws, as well as the expected consequences of the new Chinese law, should it pass.

The DOJ's China Initiative

The DOJ launched the China Initiative in 2018.¹ The launch was triggered in part by federal government reports and investigations regarding China's trade practices and in part by the perceived recurrent theme of Chinese theft of intellectual property in regular intelligence briefings.² Though former Attorney General Jeff Sessions departed from the DOJ almost immediately after the China Initiative's announcement, his successor, William P. Barr, continued with the work.³ Under his guidance, the Initiative has continued to broaden in scope, now targeting perceived unfair business practices with ties to China and deploying criminal and administrative tools available under a variety of statutes, including the Foreign Corrupt Practices Act ("FCPA"), the Foreign Agents Registration Act ("FARA"), the Foreign Investment Risk Review Modernization Act ("FIRRMA"), and even the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Today's Perceived Threat. A series of speeches this summer by top Trump Administration officials has provided the clearest insight yet into the Administration's focus on the perceived threats China poses to United States' interests. On June 24, 2020, National Security Advisor Robert O'Brien told an audience in Arizona that "the challenge the Chinese Communist Party poses to the United States and our allies is of critical importance to us right now."⁴ Adviser O'Brien also warned that China uses American companies and individuals to further China's agenda by making use of its "financial might and market access" and stolen data "to target, to flatter, to influence, to coerce and to even blackmail individuals to say and do things that serve [China's] interests."⁵

Several speeches in July continued to emphasize the Administration's focus on China. First, FBI Director Christopher Wray told an audience that the American people "are the victims of what amounts to Chinese theft on a scale so massive that it represents one of the largest transfers of wealth in human history," and that "[o]ur data," "our health, our livelihoods, and our security" are jeopardized by "the Chinese threat."⁶ Director Wray similarly opined that "[t]he greatest long-term threat to our nation's information and intellectual property, and to our economic vitality, is the counterintelligence and economic espionage threat from China."⁷

Next, Attorney General Barr described China as engaging "in an economic blitzkrieg—an aggressive, orchestrated, whole-of-government (indeed, whole-of-society) campaign to seize the commanding heights of the global economy and to surpass the United States as the world's preeminent superpower."⁸ Barr shared his views that there are "grave risks" to China's influence over the 5G networks, that China plans "to raid the United States," that "China is leveraging its economic power to change America," and that China is "masking its participation in our political process" by using "American voices" to promote pro-China policies.⁹ AG Barr closed his remarks by saying that "our freedom depends" on standing up to China.¹⁰

Finally, Secretary of State Mike Pompeo delivered the last speech of the series at the Nixon Presidential Library, during which he emphasized what he characterized as "corporate acquiescence to the [Chinese Communist Party]" and claimed that "China ripped off our prized intellectual property and trade secrets, costing millions of jobs all across America."¹¹ Secretary Pompeo further explained that the recent speeches by Administration officials "had a very clear purpose": "to make clear that the threats to Americans that President Trump's China policy aims to address are clear and our strategy for securing those freedoms established."¹²

Execution of the China Initiative. Consistent with the Trump Administration's views on the threat, the China Initiative has targeted alleged attempts by China to engage in cyber intrusions, co-opt private sector insiders through its intelligence services, and use non-traditional collectors of intellectual property, such as graduate students participating in university research projects.¹³ Under the Initiative, the DOJ is also targeting violations of the FCPA and FARA and implementing the FIRRMA, "including by working with Treasury to develop regulations under the statute and prepare for increased workflow."¹⁴ In pursuit of these objectives, the FBI is currently conducting more than 1,000 investigations into suspected Chinese theft of U.S. technology involving every sector of the U.S. economy.¹⁵ Similarly, the FBI is "opening a new China-related counterintelligence case about every 10 hours."¹⁶ The DOJ now boasts more than 50 "China-Related Case Examples" on its China Initiative Page.¹⁷ And over the past decade, economic espionage cases with a link to China have increased by 1,300 percent.¹⁸ Today, "[a]bout 80 percent of the economic espionage prosecutions brought by the [DOJ] allege conduct that would benefit the Chinese state, and there is at least some nexus to China in around 60 percent of all trade secret theft cases."¹⁹

The China Initiative has targeted both high-profile companies and rank-and-file individuals, including Chinese businesses, Chinese nationals working in the United States, researchers, professors, and U.S. intelligence officials.²⁰ This has promoted deep concern among Chinese scientists and researchers, who have avoided travelling to the

United States for fear of prosecution, and some have opined that the Initiative has had a “chilling effect” on research partnerships with the United States.²¹

In the context of the China Initiative, the DOJ has deployed aggressive and novel prosecution strategies pertaining to economic espionage, trade secrets, export controls, and unfair business practices. And although COVID-19 effectively closed federal courts and forced many federal employees to telework, law enforcement officials say that the work of combatting Chinese intellectual property theft continues, with more cases likely to be announced in the coming months.

What’s Next. Going forward, we anticipate that China will remain a target of enforcement and regulatory efforts under either a second Trump Administration or a new Biden Administration. Based on the Trump Administration’s recent comments about perceived threats posed by China and the newly expanded focus of the DOJ China Initiative, under President Trump we would expect a continuation of the current spike of indictments against college professors and researchers. In addition, the DOJ may look to charge Americans under FARA for serving as unregistered agents of the Chinese government and also may focus on prosecutions of IP theft related to the development and utilization of 5G technology.

In addition to criminal enforcement, the U.S. government also may apply a range of administrative measures to restrict, restrain and impede Chinese influence. For example, the Committee on Foreign Investment in the United States (“CFIUS”), a multilateral agency that includes the DOJ as a member and reviews foreign investments in U.S. businesses on national security grounds, may more aggressively block or require the unwinding of Chinese investments in U.S. companies, particularly for transactions that could grant Chinese investors access to critical technologies and/or personal data of U.S. citizens. CFIUS’s powers are not limited to prospective investments; CFIUS is authorized to review investment transactions that already have closed, and in recent months has demonstrated particular vigor in doing so. Other administrative measures include adding Chinese companies and/or individuals to various restricted parties lists maintained by the U.S. Departments of Treasury, State and Commerce. Several prominent companies recently have been added to the so-called “Entity List” maintained by the Commerce Department’s Bureau of Industry and Security, resulting in the imposition of severe limitations on their access to U.S.-origin goods and technologies; this trend is expected to continue. Finally, we may see additional Executive Orders flow from the White House requiring, among other things, that additional types of Chinese-origin equipment and technology be removed from existing domestic infrastructure and kept away from future government procurement contracts.

Nor would a Biden Administration necessarily be less aggressive in prosecuting and restricting Chinese interests.²² Indeed, VP Biden has pledged to “get tough on China” and described the nation as “a serious competitor.”²³ As the current China Initiative has involved hundreds if not thousands of career government officials, we expect this work to continue regardless of who occupies the White House.

Proposed Amendment to the Chinese Criminal Code

Meanwhile, the United States’ China Initiative could result in responsive action by China. On July 2, 2020, China’s National People’s Congress released a proposed Amendments to the Criminal Law of the People’s Republic of China (Eleven) (Draft) (the “Amendment”) for comments.²⁴ The Amendment includes a new crime of “corporate espionage,” which seeks to penalize any person for “stealing, spying into, buying or unlawfully supplying business secrets for overseas institutions, organizations, and individuals.”²⁵ In other words, the proposal criminalizes stealing Chinese trade secrets for the benefit a foreign entity (including the United States). According to the Amendment, an individual could be imprisoned for more than five years for such a violation “if the circumstances are serious.”²⁶

Although the public explanation for the Amendment is that it is meant to “strengthen the criminal law protection of enterprise property rights,”²⁷ some might view this provision as a response to the rising number of United States prosecutions of Chinese nationals. Perhaps tellingly, the proposed language is similar to the United States’ law that penalizes those who steal, duplicate, or buy trade secrets to benefit a foreign entity, which the DOJ has commonly used to prosecute Chinese nationals and companies.²⁸ As such, although the Amendment does not target U.S. citizens specifically, it could represent China’s response and reaction to the full-force prosecutions under the China Initiative.

Conclusion

The dynamics at work between the United States and China suggest that the volume and pace of trade secret, espionage, intellectual property theft, and other criminal prosecutions are likely to increase on both sides of the Pacific. China's consideration of the Amendment reveals that the China Initiative may not go unanswered, and it comes at a time that the Initiative appears to be picking-up speed. At this stage, it is difficult to predict what, if any, impact China's counter-measures might have on DOJ's China Initiative and whether U.S. multi-national companies with operations in China might be targeted under the Amendment. But given the recent speeches by Trump Administration officials, it seems likely that the China Initiative is ramping up, not slowing down. And the Biden campaign has similarly pledged aggressive action towards China. Nevertheless, China's potential passing of the Amendment could foreshadow a counter-effort by China to prosecute Americans living in China or American companies doing business in China. Dechert's White Collar Practice and Global Litigation Group are monitoring these developments and will provide updates as they arise.

Footnotes

- 1) Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018, U.S. DEP'T OF JUST. (last updated Oct. 20, 2020) ("DOJ Information Sheet").
- 2) *Id.*; Betsy Woodruff Swan, Inside DOJ's nationwide effort to take on China, POLITICO (April 7, 2020).
- 3) Notably, AG Barr has a long-standing interest in China, having focused on Chinese studies in his undergraduate and graduate work at Columbia University. *See* William P. Barr, U.S. Attorney General, U.S. Dep't of Just., Keynote Address at the Dep't of Justice's China Initiative Conference (Feb. 6, 2020).
- 4) Robert C. O'Brien, National Security Advisor, Remarks Delivered in Phoenix, Arizona (June 26, 2020).
- 5) *Id.*
- 6) Christopher Wray, Director, Federal Bureau of Investigation, Remarks at the Hudson Institute, Video Event: China's Attempt to Influence U.S. Institutions (July 7, 2020).
- 7) *Id.*
- 8) William P. Barr, U.S. Attorney General, U.S. Dep't of Just., Remarks on China Policy at the Gerald R. Ford Presidential Museum (July 16, 2020).
- 9) *Id.*
- 10) *Id.*
- 11) Michael R. Pompeo, Secretary of State, U.S. Dep't of State, Speech on Communist China and the Free World's Future (July 23, 2020).
- 12) *Id.*
- 13) DOJ Information Sheet, *supra* note 1; Letter from Under Secretary Keith Krach to the Governing Boards of American Universities, U.S. Dep't of State (Aug. 18, 2020) (raising a number of Chinese concerns, including IP theft by Chinese-based researchers).
- 14) *Id.*
- 15) Wray, Hudson Institute, *supra* note 6; Christopher Wray, Director, Federal Bureau of Investigation, Opening Remarks at the Center for Strategic & International Studies ("CSIS"), China Initiative Conference (Feb. 6, 2020).
- 16) Wray, Hudson Institute, *supra* note 6.
- 17) DOJ Information Sheet, *supra* note 1.
- 18) Wray, CSIS, *supra* note 15; Wray, Hudson Institute, *supra* note 6; *see* DOJ Information Sheet, *supra* note 1.
- 19) DOJ Information Sheet, *supra* note 1.
- 20) *See generally* DOJ Information Sheet, *supra* note 1.
- 21) Andrew Silver, Scientists in China say US government crackdown is harming collaborations, NATURE (July 8, 2020); *see also* Emily Feng, As U.S. Revokes Chinese Students' Visas, Concerns Rise About Loss of Research Talent, NPR (Sept. 23, 2020); Zhaoyin Feng, Chinese students face increased security at US airports, BBC NEWS (Sept. 5, 2020). Indeed, the China Initiative has resulted in the prosecution of a number of Chinese academics and researchers in the United States. For example, on August 28, 2020, a Chinese national and researcher at the University of California was charged with destroying evidence during an investigation into the potential transfer of sensitive software to China. DOJ Information Sheet, *supra* note 1. And in July 2020, four researchers were charged with visa fraud on allegations that they lied about their status as members of the People's Republic of China's military forces. *Id.*
- 22) Alex Doherty, The US's Cold War With China Won't Disappear if Joe Biden Becomes President, THE

GUARDIAN (OCT. 12, 2020).

23) Steven Lee Meyers & Javier C. Hernandez, *In Biden, China Sees an ‘Old Friend’ & Possible Foe*, N.Y. TIMES (Sept. 23, 2020).

24) *Amendments to the Criminal Law of the People’s Republic of China (Eleven) (Full text of the draft)* [(00)] (promulgated by the Nat’l People’s Cong. Standing Comm., July 2, 2020).

25) *Id.*

26) *Id.*

27) *The Constitution and Law Committee of the National People’s Congress Report on the revision of the “Amendment to the Patent Law of the People’s Republic of China (Draft)”* [] (promulgated by the Nat’l People’s Cong. Standing Comm., July 2, 2020).

28) 18 U.S.C. § 1831.

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