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Revisiting the China Initiative: Will the Focus on FCPA Prosecutions of Chinese Companies Produce Results?

By Michael DeBernardis and Jonathan Zygielbaum, *Hughes Hubbard*

On November 1, 2018, then Attorney General Jeff Sessions announced in broad strokes the goals of a new "China Initiative," a strategic priority to counter Chinese national security threats and economic aggression. Among the ten objectives of the China Initiative was a goal to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses." This particular goal was met with surprise and interest both by Chinese companies and the international anti-corruption community more broadly. Not only did it appear to be an outlier among the list of objectives, which otherwise focus on economic espionage and trade secrets, but it also represented a break from the DOJ's long-standing insistence that it does not target specific industries or countries for FCPA enforcement.

But will the inclusion of this goal ultimately matter? After more than six months, the DOJ can point to several prosecutions of Chinese companies and individuals for theft of trade secrets to show that the China Initiative is producing results. The impact of the China Initiative on FCPA prosecutions, however, is far less clear.

See "The Developing Anti-Corruption Battle Between the United States and China" (Mar. 20, 2019).

The China Initiative

According to then Attorney General Sessions, the DOJ adopted the China Initiative in response to acts of economic espionage and related efforts by China to acquire sensitive U.S. technology through various sophisticated means. Through a working group led by Assistant Attorney General John Demers, the China Initiative directs the DOJ to take specific steps to detect, prosecute and deter Chinese trade secret theft and other acts of economic espionage.

The China Initiative, as described in a Fact Sheet released by the DOJ, set out ten specific goals. Five goals were defensive in nature, aimed at increasing resources and improving strategy, knowledge and training to prevent acts of economic aggression by China.

The other five goals set certain priorities and approaches for prosecuting Chinese companies and individuals:

- identify priority trade secrets cases involving Chinese companies and nationals and ensure that the investigation and prosecution of those cases is appropriately resourced;
- develop an enforcement strategy related to researchers in labs and universities that are being coopted into transferring technology to China contrary to U.S. interests;
- apply the Foreign Agents Registration Act to bring enforcement actions against unregistered Chinese agents seeking to advance China's political agenda in the United States;
- identify FCPA cases involving Chinese companies that compete with U.S. businesses; and
- increase efforts to improve Chinese responses and cooperation with requests under the Mutual Legal Assistance Agreement (MLAA) with the United States.

Over the past several months, the DOJ has touted the China Initiative in connection with several prosecutions. In December 2018, for example, the DOJ cited the China Initiative when announcing charges against Hongjin Tan, a Chinese national and U.S. legal permanent resident, for alleged theft of trade secrets from his employer, a U.S. petroleum company. Similarly, in April 2019, the DOJ referenced the China Initiative when announcing charges against a former GE engineer and a Chinese national for alleged economic espionage and theft of GE's trade secrets.

Historic Prosecution of Chinese Companies and Individuals for FCPA Violations

Prior to the China Initiative, efforts to investigate and prosecute Chinese individuals and companies in connection with FCPA violations had met with mixed results. Prosecutors achieved some success in certain cases against Chinese individuals. In July 2017, for example, prosecutors obtained a conviction against Ng Lap Seng, a Chinese real estate mogul, in connection with a scheme to bribe U.N. officials to influence the construction of a conference center in Macau. In December 2018, prosecutors obtained a conviction against Patrick Ho, a Chinese national and the former head of an organization backed by a Chinese energy conglomerate, related to corrupt payments offered to government officials in Uganda and Chad.

Prosecutors have had less success, however, in connection with investigations of Chinese companies. In fact, neither the DOJ nor the SEC has ever resolved an FCPA case with a Chinese company (excluding Chinese subsidiaries of U.S. companies). The few investigations that have been made public have either resulted in no charges or have not yet been resolved. For example, in 2017, Sinovac Biotech, a Beijing-based biopharmaceutical company with shares traded on the NASDAQ exchange, announced that it was being investigated by U.S. authorities for potential FCPA violations related to payments made to Chinese government officials. However, in August 2018, Sinovac Biotech announced that the DOJ had officially closed its investigation without charges. In

August 2017, certain news outlets reported that the DOJ and SEC were investigating China Petroleum & Chemical Corp. (Sinopec) for potential FCPA violations in Nigeria. Sinopec, which is traded on the NYSE, has not formally confirmed the investigation in any of its public SEC filings and no formal action has yet resulted.

The inability of U.S. authorities to successfully prosecute Chinese companies stands in sharp contrast to the DOJ and SEC's overall success in enforcing the FCPA against non-U.S. companies. Since just the beginning of 2014, the DOJ has resolved at least 17 FCPA cases with non-U.S. companies. In the last ten years, the DOJ has resolved cases with companies from at least 13 countries. The lack of a resolution with a Chinese company is a notable exception, particularly given the size of China's economy and the growing activity and investment of Chinese companies in the global economy.

The precise reason for this lack of enforcement against Chinese companies is unclear. One potential explanation is the difficulty in establishing jurisdiction against a Chinese company. Because they are not typically "domestic concerns," Chinese companies are only subject to FCPA jurisdiction if they are "issuers" (*i.e.*, have shares listed in the U.S.) or take some action in furtherance of the corrupt scheme while in the territory of the U.S. While this may serve as a limitation to the DOJ's ability to prosecute Chinese companies, it is not absolute. As of February 2019, there were at least 157 Chinese companies listed on major U.S. exchanges, according to the U.S.-China Economic and Security Review Commission. Each is considered an issuer under the FCPA and subject to the Act's accounting provisions regardless of where the activity occurs. These issuers are also subject to prosecution for anti-bribery violations with only the slightest connection to the U.S., such as sending an email through a U.S. server. Moreover, as Chinese companies continue to expand their international presence, touch points to the U.S. also increase, making it easier for the U.S. to establish jurisdiction. Neither Ho nor Ng, for example, was a "domestic concern," but both took sufficient acts in the U.S. to establish jurisdiction.

Likely a larger factor in the lack of success in prosecuting Chinese companies for FCPA violations is the apparent reluctance of Chinese authorities to provide cooperation to their U.S. counterparts. Investigations involving foreign companies often require access to documents and witnesses in foreign jurisdictions. U.S. prosecutors may not be able to obtain this access without the assistance of local law enforcement, typically through a formal request in accordance with the various Mutual Legal Assistance Agreements (MLAAs) or Mutual Legal Assistance Treaties (MLATs) that the U.S. has in place with foreign countries.

While the U.S. and China have an MLAA in place, it has long been understood that Chinese authorities were slow or reluctant to provide cooperation when the target was a Chinese national or Chinese company. A recent decision in the United States District Court for the District of Columbia provided concrete data to confirm this understanding.[1] In a memorandum opinion, Chief Judge Beryl Howell granted the U.S. government's motion to compel three Chinese banks to comply with subpoenas issued by the U.S. Attorney for the District of Columbia. In determining that the MLAA process did not

provide a viable alternative for the government to obtain the subpoenaed records, Chief Judge Howell cited statistics provided by the DOJ's Office of International Affairs of the Criminal Division that demonstrate the difficulty that U.S. investigators have in obtaining bank records and other forms of assistance from China. For example, Chief Judge Howell noted that only 15 of 50 MLAA requests to China for bank records had received any response over the past decade. Of those 15, many were incomplete or failed to include certification needed for the records to be admissible in a U.S. court. Chief Judge Howell also pointed to specific investigations of Chinese companies in which the Chinese government simply refused cooperation.[2]

Without cooperation from China, and with Chinese companies freely hiding behind Chinese authorities, establishing a case against a Chinese company may be difficult. Despite this difficulty, lack of cooperation from China should not bar every potential FCPA case against a Chinese company. Just last year, the DOJ resolved an FCPA investigation with Mobile Telesystems Pjsc (MTS), the largest mobile telecommunications operator in Russia. While the DOJ credited multiple countries for assistance, Russia was not one of them. In other words, enforcement against a non-U.S. company is possible even without cooperation from the foreign jurisdiction.

See "What the $850 Million MTS Settlement Signals About FCPA Enforcement, Disclosure and Cooperation" (Apr. 3, 2019).

Potential Impact of the China Initiative on FCPA Prosecutions of Chinese Companies

Thus far, it is hard to judge the impact of the China Initiative on FCPA enforcement. The DOJ has yet to bring a case against a Chinese company or individual as a result of the China Initiative. Nor have any Chinese companies publicly announced FCPA-related investigations by the DOJ. This is neither surprising nor telling. FCPA cases take significant time to investigate and resolve. Success in this context must be measured over years, rather than months.

Ultimately, the impact of the China Initiative on FCPA enforcement may depend on how committed the DOJ is to the cause. The China Initiative obviously cannot create jurisdiction where none previously existed. However, the added emphasis may result in prosecutors and investigators finding jurisdictional bases in cases that might have otherwise been sidetracked in favor of cases where jurisdiction was more easily established. The DOJ may also focus closely on those circumstances where jurisdiction is easier to establish, such as those involving Chinese companies that have shares listed in the U.S. Either way, while jurisdiction may serve as a barrier to certain cases, it would likely not prevent the DOJ from successfully prosecuting FCPA cases against Chinese companies if it is truly motivated to find such a case.

With respect to the Chinese government's reluctance to cooperate with FCPA investigations against Chinese companies, it is difficult to see the China Initiative helping

to break the status quo. The DOJ's stated goal of increasing "efforts to improve Chinese responses" to requests under the MLAA is admirable and may ultimately be key to meeting other objectives of the China Initiative. But other aspects of the China Initiative may prove counterproductive to this goal.

Around the same time that the China Initiative was announced, China enacted a new International Criminal Judicial Assistance law (ICJA) governing the process and considerations for cooperating with foreign investigators in criminal investigations. Like the MLAA with the United States, the ICJA provides certain specified circumstances where Chinese authorities must refuse to cooperate with requests for assistance from foreign investigators. These circumstances include investigations that are based on the nationality or race of the target or where the crime is political in nature. Targeting Chinese companies for prosecution, as the China Initiative does, could be viewed as politicizing the FCPA or using it as a tool for extracting a more beneficial trading position. Chinese authorities may therefore invoke the ICJA as explicit justification for refusing to cooperate with a request for assistance in these cases.

As noted above, under the right circumstances, investigators can obtain evidence of an FCPA violation even without the cooperation of the foreign jurisdiction. Because the China Initiative is unlikely to increase cooperation, enforcement against a Chinese company may just be a matter of finding the right case, one where cooperation from China is not essential.

Chinese companies competing with U.S. companies in China or abroad should be wary. Chinese companies listed on a U.S. exchange or operating in close proximity to the U.S., where it is more likely that conduct may trigger U.S. jurisdiction, should be especially concerned. Such companies would be wise to take stock of their FCPA exposure through tailored risk assessments or audits and take steps to ensure that their personnel are operating in full compliance with the FCPA. U.S. prosecutors have the tools and resources, and may now have significant motivation and incentive, to bring an FCPA enforcement action in the right circumstances.

See "Corruption Enforcers Discuss Benefits and Pitfalls of Increasing International Cooperation" (Jan. 9, 2019).

Michael A. DeBernardis is counsel in Hughes Hubbard's Washington office and a member of the firm's anti-corruption and internal investigations and white collar & regulatory defense practice groups. DeBernardis represents corporate and individual clients in criminal, civil and administrative enforcement matters, including matters involving the FCPA and securities and accounting fraud.

Jonathan Zygielbaum is an associate in Hughes Hubbard's Washington office and member of the firm's anti-corruption and internal investigations practice.

[1] *See In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705*, Case Nos. 18-175, 18-176 and 18-177, 2019 WL 2170776 (D.D.C. Mar. 18, 2019).

[2] *Id.* at *20.