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The End of the China Initiative and the Future of U.S. Enforcement Against Chinese Companies

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This communication constitutes the first of our series considering the U.S. enforcement trends relating to Chinese companies. This communication focuses on how the end of the China Initiative does not signal any change in the enforcement focus of the U.S. Department of Justice on Chinese companies, and provides further considerations for Chinese companies going forward.

Under the Trump Administration, the U.S. Department of Justice (“DOJ”) brought several high-profile prosecutions against Chinese companies, charging them with conspiracy, violations of economic sanctions and export control regulations, fraud, and theft of trade secrets, among other crimes. Many of these cases were brought under an umbrella program called the China Initiative, which began in 2018 and was led by the DOJ’s National Security Division (“NSD”). The China Initiative was formed primarily to identify and prosecute priority trade secret and other cases involving individuals and companies in China. The DOJ recently rescinded the program after criticism that it unfairly targeted individuals of Chinese descent. The ending of the China Initiative has raised valid questions about the future of the DOJ’s focus on cases involving China, and in particular, against Chinese companies.¹ The importance of these questions has been amplified given recent DOJ pronouncements concerning the expansion of its corporate enforcement efforts. Insights into the DOJ’s corporate enforcement strategy can be important for Chinese companies seeking to avoid liability in the U.S.

The DOJ Has Not Changed Its Enforcement Focus on Chinese Companies

On February 23, 2022, the Assistant Attorney General (“AAG”) in charge of the NSD announced that the DOJ had rescinded the China Initiative in favor of a new program called the Strategy for Countering Nation-State Threats (“Strategy”). Under this new program, the DOJ will focus on global threats beyond China involving, for example, Iran, North Korea, and Russia. Some in Congress, however, have criticized the cancellation of the China Initiative as a signal that the DOJ has abandoned its focus on China.² Members of Congress have even introduced legislation to force the DOJ to reinstate the program.³

The cancellation of the China Initiative, however, should not materially change the DOJ’s focus on China. The AAG’s speech made clear that the policy changes were limited primarily to cases involving researchers and academics for failing to disclose their connections with the Chinese government. With respect to economic espionage, export controls, and similar cases, it is apparent from the AAG’s remarks that the DOJ’s shift away from the China Initiative to the new Strategy was akin to a re-branding effort, and that the focus on China for these types of cases would remain. The AAG expressed his position that China still presented special risks for U.S. national security, stating for example that the Chinese government continued to use “espionage, theft of trade secrets, malicious

cyber activity, transnational repression, and other tactics to advance its interests.”⁴ Such statements evidence a clear intent by the DOJ to continue its criminal enforcement focus on China.

Indeed, if anything, the focus on China appears to be increasing. In February 2020, the FBI announced that it had approximately 1,000 open China investigations into the theft of U.S. technology.⁵ By May 2022, however, the FBI Director announced that the number of cases had doubled to approximately 2,000 cases.⁶ Emphasizing the continued focus on China, the FBI Director stated that “the greatest long-term counterintel threat, not only to our information and intellectual property, but also to our economic vitality and, ultimately, our national security—comes from China.”⁷ Many of these new China investigations undoubtedly involve Chinese companies, as supported by the recent charges against a China-based telecommunications company for conspiracy to steal trade secrets from a U.S. company. As some of those 2,000 investigations evolve into criminal cases, the number of prosecutions of Chinese companies can be expected to rise. Given this, Chinese companies should pay increased attention to the DOJ’s recent pronouncements expanding its corporate criminal enforcement efforts.

The DOJ’s Increased Focus on Corporate Crimes Will Include Chinese Companies

In October 2021, senior DOJ officials announced significant changes to the DOJ’s corporate enforcement program. For example, the Deputy Attorney General announced that the DOJ was increasing resources to investigate corporate cases, expanding consideration of past corporate misconduct in making charging decisions, raising corporate cooperation requirements, and rescinding prior guidance that may have disfavored monitors.⁸ Around the same time, the Principal Associate Deputy Attorney General announced new priority areas for the DOJ’s corporate enforcement efforts, including economic sanctions, export controls, and money laundering crimes involving cryptocurrency.⁹ Chinese companies will not be immune from the DOJ’s increased focus on corporate crimes.

While the DOJ must still contend with issues related to jurisdiction and access to evidence with respect to cases involving Chinese companies, the DOJ has demonstrated an increased ability to overcome these issues, as supported by the number of corporate prosecutions of Chinese companies since 2017. The focus on Chinese companies can be expected to increase as the DOJ steps up enforcement of violations of Russian economic sanctions¹⁰ and begins paying more attention to Chinese money laundering organizations.¹¹

The DOJ also has increased its capabilities to obtain foreign evidence for investigations of Chinese companies. For example, in recent years, the DOJ has expanded its coordination and cooperation with international partners on cross-border investigations, providing the DOJ with increased access to foreign information and evidence. Moreover, Congress recently revised existing laws to provide U.S. prosecutors with the authority to subpoena any foreign bank that maintains a correspondent bank account in the U.S. for any records related to “the correspondent account or any account at the foreign bank.”¹² This power substantially expanded a prosecutor’s ability to obtain financial documents necessary to trace the international flow of illicit funds. Notably, the new law provides that a court may not quash or modify the subpoena based solely on the fact that compliance with the subpoena “would conflict with a provision of foreign secrecy or confidentiality law.”¹³ Thus, compliance with a subpoena may be required even if Chinese data privacy or other laws prohibit Chinese banks from producing responsive records. Non-compliance may result in penalties and the termination of the correspondent banking relationship.¹⁴

What Should Chinese Companies Consider Going Forward?

Chinese companies should consider the following:

- *First*, Chinese companies should seek advice to understand any potential exposure to U.S. jurisdiction, including assessing how U.S. law enforcement and regulators may view their business operations in relation to U.S. interests. This assessment should be considered in light of the DOJ's increasingly expansive views of extraterritorial jurisdiction, including investigations involving conduct almost entirely outside of the U.S. and foreign actors who have never stepped foot in the U.S.¹⁵
- *Second*, Chinese companies potentially subject to U.S. jurisdiction should understand the DOJ's corporate enforcement framework, which is very different from what they may otherwise be used to. In particular, the DOJ's framework relies upon a low bar for corporate criminal liability and focuses on specific factors when deciding how to resolve a case, including the effectiveness of a corporation's compliance program, the quality of its cooperation with the DOJ's investigation, and the timeliness and effectiveness of its remedial steps. Such factors are important with respect to the DOJ's charging decisions, including the appropriate form of the resolution (i.e., guilty plea, deferred prosecution agreement, or non-prosecution agreement), the amount of the monetary penalty, and whether to impose a monitor. This area remains dynamic, as the DOJ is expected to announce additional changes to its corporate enforcement policies in the coming months.
- *Third*, Chinese companies should work with relevant experts in understanding the DOJ's expectations when assessing the effectiveness of their own compliance programs. DOJ policies make clear that in deciding whether to give credit for a company's compliance program, the DOJ will assess whether the program is: (1) well-designed given the company's risk profile; (2) implemented in good faith and adequately resourced; and (3) tested and proven to work in practice. This understanding is necessary, for example, in conducting a reasonable risk analysis with respect to how to invest in compliance programs to help avoid U.S. scrutiny, or how to access the U.S. markets.
- *Fourth*, Chinese companies should consider that the DOJ's corporate criminal resolutions increasingly involve multiple law enforcement and regulatory authorities from around the globe. Thus, companies that are under investigation by U.S. authorities should be aware of the added complexities and issues that may arise when they are the subject of parallel investigations by several independent government agencies, each with potentially different priorities, goals, and interests.

Given recent actions and statements by the DOJ, we expect that U.S. enforcement scrutiny against Chinese companies will continue, especially in the technology and financial sectors. As we consider the broad set of risks across a range of interrelated issues, it is even more important now for Chinese companies to be prepared ahead of time and seek advice on potential enforcement risks.

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- ¹ See U.S. Dep't of Just., Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats (Feb. 23, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats>.
 - ² See Letter from Sen. Charles Grassley, Ranking Member, U.S. Senate Committee on the Judiciary, to Ass't Atty. Gen. Matthew Olsen (Feb. 28, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_to_doj_-_china_initiative.pdf.
 - ³ See Press Release, Sen. Marco Rubio, Rubio, Scott, Colleagues Introduce Bill to Reestablish DOJ's China Initiative (Mar. 31, 2022), <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=8CD7A1A3-C0B8-405C-B408-236D7BC0AA2E>.
 - ⁴ See Olsen Remarks, *supra* note 1.
 - ⁵ See Center for Strategic & Int'l Studies, FBI Director Christopher Wray's Opening Remarks: China Initiative Conference (Feb. 6, 2020), <https://www.csis.org/analysis/fbi-director-christopher-wrays-opening-remarks-china-initiative-conference>.
 - ⁶ See Fed. Bureau of Invest., FBI Director Christopher Wray's Remarks to the Association of State Criminal Investigative Agencies (May 2, 2022), <https://www.fbi.gov/news/speeches/directors-remarks-to-the-association-of-state-criminal-investigative-agencies-05022>.
 - ⁷ *Id.*
 - ⁸ See U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks at the American Bar Institute's 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.
 - ⁹ See John Carlin on Stepping up DOJ Corporate Enforcement, *Glob. Investigations Rev.* (Oct. 11, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>.
 - ¹⁰ See Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture (Mar. 2, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture>.
 - ¹¹ See U.S. Dep't of Treas., National Money Laundering Risk Assessment, 22-23 (Feb. 2022), <https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf>.
 - ¹² 31 U.S.C. § 5318(k).
 - ¹³ *Id.* § 5318(k)(3)(A)(iv)(II).
 - ¹⁴ *Id.* § 5318(k)(3)(E).
 - ¹⁵ See, e.g., *United States v. Napout*, 963 F.3d 163, 181 (2d Cir. 2020).

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