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CHINESE ANTI-CORRUPTION LAW

The Developing Anti-Corruption Battle Between the United States and China

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As the United States-China trade war rages on, anti-corruption enforcement appears to have become a singular battleground for the two global powers. The United States Department of Justice announced in late 2018 that it would specifically target Chinese companies for aggressive enforcement of the FCPA. China, for its part, has taken preemptive measures to curtail foreign authorities' ability to conduct investigations on Chinese soil, with a clear intent to block U.S. efforts in particular. How this conflict plays out in the coming months could shape anti-corruption enforcement in the world's two largest economies.

See our two-part series on China's State Secrets Law: ["A Primer for Anti-Corruption Practitioners"](#) (Jun. 29, 2016); and ["Six Things to Consider When Engaging in Internal Investigations in China"](#) (Jul. 13, 2016).

The DOJ's China Initiative

On November 1, 2018, then Attorney General Jeff Sessions [announced](#) the "China Initiative," a Department-wide effort to identify and prioritize Chinese economic espionage cases, allocate appropriate resources to them and ensure that such cases are concluded quickly. The China Initiative [specifies](#) ten goals, including to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese

companies that compete with American businesses."

The Initiative appears to be the first overt effort to employ FCPA enforcement as a tool to achieve political goals with respect to a particular country and represents a sharp departure from the DOJ's historically apolitical approach. In announcing the Initiative, Sessions stated that China "must decide whether it wants to be a trusted partner on the world stage – or whether it wants to be known around the world as a dishonest regime running a corrupt economy." Assistant Attorney General for the Criminal Division Brian Benczkowski [explained](#): "We know that Chinese companies and individuals also have bribed government officials in other countries in order to win contracts. The Criminal Division is committed to fully enforcing the Foreign Corrupt Practices Act. Bringing these offenders to justice will help create a level playing field for American companies in foreign markets."

Attorney General William Barr has indicated that he will continue to aggressively pursue the Initiative's goals. At his confirmation hearing in January, Barr identified China as the "paramount economic and military rival" of the United States and testified that he plans to continue providing to the Initiative the resources it requires.

To advance the Initiative, the DOJ has formed a [China Initiative Working Group](#) led by Assistant Attorney General for National Security John C. Demers and a team composed of a senior FBI executive, five U.S. Attorneys, and other DOJ leaders and officials, including Benczkowski. The U.S. Attorneys serving on the Initiative span the nation: Richard P. Donoghue from the Eastern District of New York, Andrew E. Lelling from the District of Massachusetts, Alex G. Tse from the Northern District of California, Erin Nearly Cox from the Northern District of Texas and Jay E. Town from the Northern District of Alabama.

Since the Initiative was announced, the DOJ has announced two enforcement actions against Chinese companies and individuals, both of which were brought by U.S. Attorneys' Offices in the China Initiative Working Group. On the same day that the DOJ announced the Initiative, the U.S. Attorney's Office for the Northern District of California [unsealed](#) an [indictment](#) against Taiwan-based United Microelectronics Corporation, China's state-owned Fujian Jinhua Integrated Circuit Company, and three individuals, charging theft of trade secrets and economic espionage violations. According to the indictment, the defendants engaged in a conspiracy to steal research and other proprietary information worth up to \$8.75 billion from Idaho-based Micron Technology, Inc., a semiconductor company.

In the Eastern District of New York, a 13-count [indictment](#) was [filed](#) against China-based Huawei Technologies, the world's largest telecommunications equipment manufacturer, and Huawei's Chief Financial Officer, Wanzhou Meng. The E.D.N.Y. indictment, unsealed on January 28, 2019, charges Huawei and Meng with conspiracy, bank fraud, wire fraud,

sanctions violations, money laundering and obstruction of justice on allegations of deceiving financial institutions about Huawei's business activities in Iran. Huawei faces a penalty of more than \$100 million for transactions it cleared through the United States between 2010 and 2014 related to Huawei's alleged Iranian subsidiary. At the request of the United States, Meng was arrested in Canada in December 2018, where she remains under house arrest. The U.S. government is seeking Meng's extradition.

Huawei faces a separate [indictment](#) in the Western District of Washington, also [unsealed](#) on January 28, 2019, over the alleged theft of trade secrets from T-Mobile USA. According to the indictment, Huawei stole information concerning T-Mobile's proprietary phone-testing robot and offered bonuses to employees who succeeded in stealing confidential information. In connection with the indictment, FBI Director Christopher Wray announced that firms like Huawei "pose a dual threat to both our economic and national security, and the magnitude of these charges make clear just how seriously the FBI takes this threat."

In addition, one Chinese individual – who was charged before the Initiative was announced – recently was [convicted](#) of FCPA and money laundering violations, following a jury trial in the Southern District of New York. Patrick Ho, the former head of the China Energy Fund Committee, a nongovernmental organization based in Hong Kong and Arlington, Virginia, paid millions of dollars in bribes to top officials of Chad and Uganda in exchange for business advantages for a multi-billion dollar Chinese conglomerate that operates internationally in multiple sectors, including oil, gas, and banking.

See “[Former High-Level Chinese and Senegalese Officials Charged With Bribing Foreign Leaders in Chad and Uganda](#)” (Dec. 13, 2017).

While it is still early, these prosecutions appear consistent with the announced goal of the Initiative, to prioritize the prosecutions of Chinese companies and individuals.

See “[Corruption Enforcers Discuss Benefits and Pitfalls of Increasing International Cooperation](#)” (Jan. 9, 2019).

China’s Anti-Corruption Efforts

Perhaps in anticipation of targeted U.S. enforcement activities against Chinese companies and nationals, China adopted – shortly before the announcement of the China Initiative – the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from providing foreign countries with evidence or assistance in criminal investigations, absent authorization from Chinese authorities. The legislation purportedly is intended to strengthen international cooperation without harming China’s sovereignty, security and social interests, or violating China’s laws, but is widely perceived as an attempt to harden China’s borders against extraterritorial enforcement of foreign anti-corruption laws.

Making the tension explicit, on January 23, 2019, during the World Economic Forum, China’s Vice President, Wang Qishan, criticized U.S. policies such as the China Initiative, stating that China “rejects the practices of the strong bullying the weak and self-claimed supremacy,” and touted the benefits of

globalization over protectionism and populism. Less than one week later, the DOJ announced the dual indictments against Huawei.

Most recently, on March 6, 2019, Huawei took the extraordinary step of [suing](#) the United States, accusing it of unconstitutionally targeting Huawei and its rival ZTE Corp., which also is a China-based company. Huawei alleged that, by enacting the National Defense Authorization Act for 2019 – which bars federal agencies from using equipment developed by Huawei or ZTE, purportedly over concerns about cybersecurity and their alleged ties to the Chinese government – the U.S. Congress violated Huawei’s and ZTE’s constitutional rights.

Relatedly, perhaps in an effort to send a strong message that foreign meddling in China is unnecessary, the Chinese government has taken significant strides to investigate and prosecute corrupt actors. According to the Chinese government, more than one million Chinese officials have been punished for corruption since Xi Jinping assumed power in 2012. To give a recent example, Sun Zhengcai, former Chongqing Party secretary and member of the Politburo, pleaded guilty in May 2018, to taking bribes of more than \$26.7 million and was sentenced to life in prison. Lu Wei, China’s former internet regulator, pleaded guilty in October 2018 to committing bribery. Most recently, in February 2019, Fang Fenghui, former Chief of Joint Staff of the Chinese People’s Liberation Army, was found guilty of bribery and of unaccounted wealth and sentenced to life imprisonment.

On the legislative front, the Standing Committee of the National People’s Congress adopted [amendments](#), which took effect in January 2018, to the country’s Anti-Unfair

Competition Law, which specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees and provide for increased penalties. China also [amended](#) its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to introduce trials in absentia, including for bribery and corruption.

In addition, China adopted the [PRC Supervision Law](#), which creates commissions with broad authority to supervise public functionaries who exercise public power, including by investigating occupation-related wrongdoings and criminal activities. The commissions have “retention in custody” authority to detain suspects for prolonged periods while investigating serious corruption cases. Amnesty International has criticized the Supervision Law, and particularly the retention in custody provisions, as a threat to human rights in China.

As the trade negotiations between the global powers play out in the coming months, it will be interesting to see whether DOJ FCPA enforcement actions are, in fact, being used as bargaining chips in the talks, and to see what happens to the Initiative when a trade deal ultimately is reached.

See [“Practitioners Take the Pulse of Anti-Corruption Compliance and Enforcement in China”](#) (Mar. 15, 2017); and the Anti-Corruption Report’s two-part series on data security in China: [“Crossing the River by Feeling the Stones”](#) (Sept. 14, 2016); and [“Performing Due Diligence and Internal Investigations”](#) (Sep. 28, 2016).

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