

DOJ's New "China Initiative" Places Chinese Companies Under the FCPA Microscope as US-China Trade Tensions Run High

December 2018

Authors: [Bingna Guo](#), [Michael Kendall](#), [Darryl Lew](#), [Jonathan Pickworth](#), [William Barrett](#), [Karen Eisenstadt](#), [Kun Yang](#)

On November 1, 2018, then-Attorney General Jeff Sessions announced the US Department of Justice's ("DOJ") new China Initiative aimed at countering national security threats to the United States from China and safeguarding US economic interests.¹

The DOJ fact sheet states that DOJ will implement the China Initiative through several strategies, including prioritizing and identifying Foreign Corrupt Practices Act ("FCPA") cases involving Chinese companies that compete with US businesses.² In connection with the announcement of the China Initiative, Assistant Attorney General for Criminal Division Brian Benczkowski said: "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."³ These remarks demonstrate that DOJ views the FCPA as a means of safeguarding US economic interests and intends to focus and redouble its enforcement efforts on Chinese companies competing directly with American businesses. DOJ's National Security Division, senior officials from DOJ and the Federal Bureau of Investigation, and a working group of US attorneys from five different judicial districts have been tasked with leading enforcement activities in connection with the China Initiative.

Under the FCPA, Chinese companies with securities listed on US exchanges are "issuers" and subject to the FCPA's anti-bribery provisions. Chinese companies with American Depositary Receipts listed on US exchanges are also subject to the FCPA. Importantly, DOJ claims that FCPA jurisdiction also potentially applies to Chinese non-issuers under certain circumstances if the challenged payments have supposed jurisdictional links to the US. In addition, despite a recent court decision disputing FCPA jurisdiction over non-US persons who did not act in furtherance of the bribe while physically present in the US, DOJ will claim that money passing through US bank accounts could nevertheless provide jurisdiction for purposes of an anti-money laundering prosecution (money laundering charges are frequently brought with FCPA charges).

As Chinese companies expand internationally, the US nexus that can trigger FCPA jurisdiction becomes wider—meaning Chinese companies can expect heightened scrutiny from US regulators going forward. Also,

¹ ["Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage,"](#) DOJ, November 1, 2018.

² ["Attorney General Jeff Session's China Initiative Fact Sheet,"](#) DOJ, November 1, 2018.

³ ["Assistant Attorney General Brian A. Benczkowski of the Criminal Division Delivers Remarks Regarding Chinese Economic Espionage,"](#) DOJ, November 1, 2018.

as there has been a trend of increasing international cooperation among regulatory authorities for anti-corruption enforcement actions, an FCPA investigation in the US may also trigger investigations by other countries' regulatory authorities. For example, Chinese companies with a "footprint" in the UK will also come under the jurisdiction of the UK Bribery Act, which penalizes companies if a party associated with it commits an act of bribery on its behalf, anywhere in the world, unless that company has adequate procedures in place to prevent bribery occurring. Therefore, an FCPA investigation by US authorities may also lead to investigations by the UK authority if a Chinese company is also subject to the jurisdiction of the UK Bribery Act. A recent survey conducted by White & Case in conjunction with the University of Manchester revealed that only 80% of respondents confirmed that their company had an ABC policy – without which it is very unlikely that any procedures could be deemed to be "adequate" – so no defence to this otherwise strict liability offence. Given the current climate of hostility and uncertainty in US-China relations, the China Initiative should serve as a cautionary sign to Chinese companies competing with US companies in their international operations that they face a higher prospect of investigation or prosecution by US regulators. The China Initiative makes clear that DOJ is focused on Chinese companies competing with American businesses.

FCPA enforcement against Chinese companies operating abroad has been fairly limited to-date. FCPA enforcement cases against Chinese companies were actually a while ago. In 2013, RINO International Corporation ("RINO"), a Chinese-based company that became a US issuer through a reverse merger, was charged by the US Securities and Exchange Commission ("SEC") with non-bribery books and records and internal controls FCPA violations.⁴ Also in 2013, Keyuan Petrochemicals, Inc., a Chinese-based issuer similarly formed through a reverse merger was charged by the SEC with books and records and internal control violations under the FCPA, as well as making bribes to Chinese government officials through an offshore account.⁵ In connection with the SEC's enforcement action against RINO, the company's CEO and Chairman of the Board agreed to civil penalties and \$3.5 million in disgorgement related to a related class action settlement, and were also barred from serving as officers and directors of a public company for a period of ten years.

The China Initiative may turn the tide and bring more Chinese companies into the crosshairs of FCPA enforcement actions. For example, DOJ and SEC are reportedly investigating a Chinese company regarding allegations that it channeled bribes to foreign officials in connection with its operations outside the United States, but where the company used a bank account in the United States to make the payments. In addition, earlier this month, DOJ tried and convicted Chi Ping Patrick Ho, a Chinese national, of paying bribes to the leaders of two African countries to secure business advantages for a Chinese energy company.⁶ US enforcement agencies appear to be increasingly willing to target foreign issuers, including Chinese companies operating outside the United States. More than ever, such Chinese companies should have effective anti-corruption and bribery procedures and guidelines aimed towards compliance with the FCPA. Chinese companies may also face more requirements from their international business partners for strong compliance programs and procedures. All this highlights the importance of building and maintaining a robust anti-corruption compliance program, as we highlighted in our [Global White Collar Crime Survey](#).

The China Initiative comes during a tense moment in US-China relations, and it may also have implications for American businesses that have operations in China. As US enforcement agencies prioritize enforcement actions against Chinese companies, this could also increase the Chinese government's focus on bringing similar enforcement actions against American companies with operations in China. Recent amendments to the Criminal Procedure Law of the People's Republic of China suggest that Chinese authorities are ramping up anti-bribery enforcement efforts. One key amendment encourages cooperation by corporations and individuals in corruption and bribery investigations by codifying leniency rules for cooperating individuals and entities. Also, the amended Anti-Unfair Competition Law and the newly enacted National Supervision Law give Chinese authorities more power to investigate official and commercial corruption cases. Finally, the Chinese government has already demonstrated its willingness to retaliate against the US government with respect to tariffs, and may take a similar approach in responding to the DOJ's new China initiative and any resulting increase in US enforcement actions against Chinese companies.

⁴ [Securities and Exchange Commission v. RINO International Corporation, Dejun \("David"\) Zou, and Jianping \("Amy"\) Qiu, Civil Action No. 1:13-cv-00711, SEC, May 15, 2013.](#)

⁵ [Securities and Exchange Commission v. Keyuan Petrochemicals, Inc. and Aichun Li, Civil Action No. 13-cv-00263 \(D.D.C.\), SEC, February 28, 2013.](#)

⁶ [Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Convicted Of International Bribery, Money Laundering Offenses, DOJ, December 5, 2018](#)

Europe, Middle East and Africa

Berlin

White & Case LLP
John F. Kennedy-Haus
Rahel Hirsch-Straße 10
10557 Berlin
Germany

T +49 30 880911 0

Brussels

White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Belgium

T +32 2 239 26 20

London

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

Moscow

White & Case LLC
4 RomanovPereulok
125009 Moscow
Russia

T +7 495 787 3000

Paris

White & Case LLP
19, Place Vendôme
75001 Paris
France

T +33 1 55 04 15 15

Prague

White & Case (Europe) LLP
Na Příkopě 14
110 00 Prague 1
Czech Republic

T +420 255 771 111

Warsaw

White & Case
M. Studniareki Wspólnicy- Kancelaria
Prawna sp.k.
al. Jana Pawła II 22
00-133 Warszawa
Poland

T +48 22 50 50 100

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

Americas

Boston

White & Case LLP
75 State Street
Boston, Massachusetts 02109-1814
United States

T +1 617 979 9300

Chicago

White & Case LLP
227 West Monroe Street, Suite 3900
Chicago, Illinois 60606-5055
United States

T +1 312 881 5400

Mexico City

White & Case, s.c.
Torre del Bosque - PH
Bldv. Manuel Avila Camacho #24
11000 Ciudad de México
Mexico

T +52 55 5540 9600

Miami

White & Case LLP
Southeast Financial Center
200 South Biscayne Boulevard, Suite
4900

Miami, Florida 33131-2352
United States

T +1 305 371 2700

New York

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200

Washington, DC

White & Case LLP
701 Thirteenth Street, NW
Washington, District of Columbia
20005-3807

United States

T +1 202 626 3600

Asia

Beijing

White & Case LLP, Beijing Office
19th Floor
Tower 1 of China Central Place
81 Jianguo Lu, Chaoyang District
Beijing 100025
China

T +86 10 5912 9600

Shanghai

White & Case LLP, Shanghai Office
39th Floor, CITIC Square
1168 West Nanjing Road
Shanghai 200041
China

T +86 21 6132 5900

Tokyo

White & Case LLP
White & Case Law Offices
(Registered Association)
Marunouchi Trust Tower Main
26th Floor, 1-8-3 Marunouchi
Chiyoda-ku, Tokyo 100-0005
Japan

T +81 3 6384 3300