

China and the Foreign Corrupt Practices Act

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Bradley A. Klein

Hong Kong
852.3740.4882
bradley.klein@skadden.com

Steve Kwok

Hong Kong
852.3740.4788
steve.kwok@skadden.com

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42/F, Edinburgh Tower, The Landmark
15 Queen's Road Central, Hong Kong
852.3740.4700

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Recent U.S. Department of Justice (DOJ) policies on corporate crime prosecutions, coupled with the Chinese government's robust anti-corruption campaign, are proving challenging for U.S. corporations with business operations in China. As U.S. and Chinese law enforcement authorities zero in with increasing frequency on similar conduct, companies may find themselves having to respond to authorities from multiple jurisdictions.

The American Landscape

The DOJ's recent shift in its policy on corporate crime prosecutions may affect companies' internal investigations into alleged misconduct overseas. In what has become known as the [Yates memorandum](#), on September 9, 2015, Deputy Attorney General Sally Q. Yates issued a directive to DOJ prosecutors to require corporations to provide, among other things, information on individual employees' wrongdoing to receive credit for cooperating.

If the Yates memorandum was the stick, the carrot came in April 2016, when the DOJ's Fraud Section with responsibility over Foreign Corrupt Practices Act (FCPA) cases [announced](#) a one-year pilot program that holds out the promise of "a 50% reduction off the bottom end of the Sentencing Guidelines fine range" and exemption from monitoring for companies that self-disclose FCPA violations to DOJ before April 5, 2017. (See April 18, 2016, client alert "[DOJ Adds Resources for FCPA Cases, Offers Incentives for Voluntary Disclosures](#).") But to be eligible for "full cooperation" credit, the corporation must, if requested, make "available for Department interviews those company officers and employees who possess relevant information," including those not in the U.S. Beyond its own officers and employees, the company also is expected to assist with "third-party production of documents and witnesses from foreign jurisdictions."

Given the intense focus on China in recent FCPA cases, Chinese employees of multinational companies may well be among the first test cases for DOJ's new policy. (According to the FCPA Blog, of all the enforcement actions the Securities and Exchange Commission (SEC) and DOJ have brought since 2008, the alleged misconduct occurred most often in China — 33 times, more than all other countries combined.) Prosecuting Chinese nationals with tenuous connections to the U.S. will rarely be DOJ's ultimate objective. Rather, putting pressure on lower-level foreign employees may be a means by which DOJ induces them to cooperate and provide inculpatory "information against individuals higher up the corporate hierarchy," according to the Yates memorandum. In a May 10, 2016, [speech](#) at the New York City Bar Association White Collar Crime Conference, Deputy Attorney General Yates acknowledged as much when she explained that the genesis of the memorandum was a response to "restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad" — obstacles that had made it "difficult to determine whether high-ranking executives ... were part of a particular scheme." As recent enforcement actions make clear, to implement its strategy, DOJ continues to take an expansive view (see page 12 of the November 2015 [Cross-Border Investigations Update](#)) of the FCPA's jurisdictional reach over non-U.S. citizens, even where there is no alleged criminal activity in the United States.

DOJ's strategy has significant practical implications for companies. Corporate internal investigations may become more challenging, as even low-ranking employees may become more adverse to their employers early on, concerned that they may become pawns in the high-stakes negotiations between their employer and DOJ. To gain maximum leverage, employees may take the offensive by beating the company to DOJ's door — a development that may make it difficult for the company to control whether and

China and the Foreign Corrupt Practices Act

when to make voluntary self-disclosures to the authorities.

The Chinese Landscape

China's anti-corruption crackdown, meanwhile, shows no signs of abatement. Any illusion that multinational companies were immune from local Chinese enforcement initiatives was shattered by the Chinese authorities' aggressive prosecution of GlaxoSmithKline and its managers in 2014 for allegedly bribing doctors and hospitals to boost drug sales. To most local Chinese employees, the prospect of having to answer to Chinese criminal authorities has likely always been more frightening than speaking with American prosecutors. With the recent amendments to China's anti-bribery laws making it more difficult for bribe-givers to be exempted from punishment, local employees of multinational companies now may have even more to fear from Chinese prosecutors. If the recipients of the alleged bribes were senior party officials or officers of a state-owned enterprise (SOE) — as frequently may be the case given the continued dominance of SOEs in certain sectors of the Chinese economy — the investigation may be spearheaded by the fearsome Central Commission for Discipline Inspection, a Communist Party organ empowered to investigate party members for discipline infractions outside the normal judicial process.

For Chinese employees worried about getting caught up in the Chinese dragnet, evidence of corporate wrongdoing that also is of interest to the U.S. government may be viewed as a bargaining chip. In addition to offering the DOJ information in exchange for immunity, they may be able to secure political asylum or special U.S. visas for law enforcement informants.

Beijing Meets Washington

The interests of the U.S. and Chinese governments in anti-corruption enforcement are gradually converging. Largely outside the view of the media and drowned out by news about frictions in other parts of the bilateral relationship, the U.S.-China Joint Liaison Group on Law Enforcement Cooperation — the mechanism that promotes coordination between the two governments on criminal matters that is now in its 14th year — features greater numbers of joint investigations with each passing year,

and cases involve increasingly sophisticated criminal schemes. We would expect to see more successful instances of collaboration in anti-corruption and financial crime cases as well. But even in the absence of closer collaboration, law enforcement authorities in the U.S. and China are beginning to piggyback on the enforcement actions of each other, as the Massachusetts software company PTC learned all too well. In that case, the SEC, for the first time, entered into a deferred prosecution agreement with an individual — a Chinese national — in an FCPA case. PTC disclosed in April 2016 that the China regulatory authorities had begun an investigation into similar conduct about a month after settlements with DOJ and the SEC.

The prospect of further combined U.S. and Chinese enforcement actions is particularly disquieting given the many areas in which the two governments may have different or even conflicting priorities and demands. For example, China has restrictive data privacy and state secrecy laws that may prohibit the sharing of information with U.S. authorities. The disagreement that the Big Four accounting firms had with the SEC over the production of audit papers concerning Chinese clients is one well-known example. (See January 23, 2014, client alert "[SEC Judge Issues Initial Decision Regarding Chinese Affiliates of the Big Four Accounting Firms](#).") While DOJ's policy makes allowances for these situations, the burden of establishing such a prohibition rests with the company, which may be hard-pressed to do so to DOJ's satisfaction in an area of Chinese law that may appear murky to foreign audiences. Even if data privacy and state secrecy laws do not pose a problem, law enforcement agents in one country sometimes prefer that companies refrain from sharing information with foreign authorities and regard such reporting as a hindrance to their investigations.

Companies should carefully consider these possibilities and potential responses at the outset of an internal investigation, especially if the subject of allegations may be of interest to law enforcement authorities from multiple jurisdictions. This challenging new global enforcement environment also puts a premium on planning, coordination and know-how simultaneously to maintain effective responses to enforcement contingencies in multiple jurisdictions.