

The background of the cover features a grayscale image of financial data. On the left, there are bar charts and line graphs. On the right, a large, detailed image of a silver metal padlock is shown, partially open, resting on a document with a grid and some text. The overall theme is financial security and legal analysis.

THE STRATEGIC **VIEW**

Expert perspectives on international law

Business Crime 2016

Legal analysis, forecasts and opinion by
leading legal experts in key jurisdictions

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THE STRATEGIC VIEW



Business Crime 2016

Contributing Editors
Ryan Junck and Keith Krakaur, Skadden, Arps, Slate, Meagher & Flom LLP

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CHINA

Bradley Klein and Steve Kwok review the U.S. authorities' enforcement of the FCPA based on conduct in China, China's anti-corruption campaign, and the impact of DOJ's new corporate crime prosecution policy on the compliance environment in China

1. What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

For multinational companies subject to the U.S. Foreign Corrupt Practices Act (FCPA), the past 12 months saw a continued focus by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) on companies' business operations in China. According to industry sources, of all publicly announced FCPA enforcement actions brought last year by DOJ and the SEC, China was the most frequently mentioned country where the alleged foreign bribery occurred. Moreover, from 2008 to the present, China has been mentioned 33 times in all publicly

announced DOJ and SEC enforcement actions – more than all other countries combined.

The compliance environment in China becomes even more challenging in light of enforcement actions by the Chinese authorities themselves. The anti-corruption campaign that began more than three years ago under President Xi Jinping is still going strong. Since the GlaxoSmithKline (GSK) case in 2014 where a Chinese court fined GSK's Chinese subsidiary nearly USD \$500 million and sentenced five top China executives to prison for allegedly bribing doctors and hospitals to boost drug sales, it has become clear that multinational companies and their employees are not immune from scrutiny by Chinese law enforcement authorities. PTC, the Massachusetts software company, 

- ◉ is a recent example. Having entered into settlement agreements with DOJ and the SEC over FCPA charges in February 2016, PTC disclosed in April that the Chinese regulatory authorities had begun an investigation into similar conduct about a month after the U.S. settlements.

2. Are enforcement agencies particularly focused on any specific industries or crimes?

Pharmaceutical companies have been frequent subjects of recent FCPA actions by the U.S. authorities for allegedly bribing Chinese hospitals and doctors to increase drug sales. Other FCPA settlements over alleged corrupt conduct in China have involved companies in the banking, computer software, gambling, and telecommunications sectors, among others.

The Chinese authorities have cast a similarly wide net as their U.S. counterparts. According to reports, multinational companies in the automotive, electronics, pharmaceutical, shipping, and software industries have recently been investigated for alleged corrupt conduct and/or anti-competitive practices. In some cases, Chinese officials have executed “dawn raids” at these companies’ offices in China to seize files and computers.

3. Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

Given the intense focus on China in recent FCPA enforcement actions, as well as DOJ’s aggressive litigation posture that seeks to expand FCPA’s jurisdictional reach over non-U.S. citizens for conduct overseas, we would expect DOJ’s new individual accountability policy set forth in the Yates Memorandum, named after Deputy Attorney General Sally Yates, to have a noticeable impact in China. Local Chinese employees may increasingly be viewed as persons of interest by U.S. authorities – both for their own involvement in the alleged misconduct and for their knowledge of wrongdoing by others higher up in the corporate hierarchy.

While the Yates Memo binds only prosecutors in DOJ’s Fraud Section, it is noteworthy that, in the PTC case mentioned above, the SEC, for the first time, entered into a deferred prosecution agreement in an FCPA case with an individual, a Chinese national, “as a result of significant cooperation he has provided during the SEC’s investigation”. (SEC Press Release, February 16, 2016.) This suggests that the SEC is also pursuing the strategy of inducing individuals to cooperate to provide evidence of wrongdoing by their supervisors and companies, especially when the matter involves a jurisdiction like China where securing evidence and witnesses overseas poses special challenges.

For their part, the Chinese authorities have pursued companies (see question 2) and individuals with equal vigour. Recent examples of actions taken against individuals include a sentence of life imprisonment imposed on the former deputy general manager of FAW-Volkswagen Sales (Volkswagen’s Chinese joint venture partner and a state-owned company) in April 2015 for accepting bribes and kickbacks; detention of six former employees of the Chinese social media company Tencent in July 2015 in connection with bribery allegations; and detention of two Chinese managers of Schindler, the Swiss lift and escalator maker, in May 2015 on embezzlement and bribery charges.

4. Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

As the above discussion makes clear, given the expansive jurisdictional reach of the FCPA statute, businesses that operate in China may be subject to prosecution by U.S. authorities, even if the alleged misconduct happened outside of the U.S. Aside from the more obvious bases for jurisdiction, even transitory contacts with the U.S. – e.g., financial transactions conducted through a U.S. bank account, or a meeting that took place on U.S. territory – may suffice.

The closest Chinese analogy to the FCPA is Art. 164 (para. 2) of the Chinese Criminal Code, which makes it a crime to bribe a “foreign official” “to obtain an improper commercial advantage”. Violators are subject to unspecified fines and a maximum of 10 years’ imprisonment. Any Chinese national who violates any provision of the Chinese Criminal Code, including Art. 164, outside of China is subject to prosecution (Art. 7), as is any foreign national whose actions outside China “harm the Chinese nation and its citizens” (Art. 8). Hence, in theory at least, foreign bribery offences are subject to extraterritorial enforcement under Chinese law. It is unclear from publicly available sources, however, whether Art. 164 has ever been enforced.

5. What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that governs business crimes in your jurisdiction?

New amendments to China’s anti-bribery laws became effective as of November 2015. Two changes are of most relevance here. First, the amendment makes it a crime to bribe state officials’ close relatives or other persons closely related to them.

Second, the bar has been raised for bribe-givers to be exempted from punishment. Before

“ Law enforcement authorities in the U.S. and China are beginning to piggyback on the enforcement actions of each other ”

greater numbers of joint investigations with each passing year, and cases that 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 shown by the PTC case discussed above. As a result, companies with a presence in both China and the U.S. can expect an increasing number of joint investigations, or at the very least, serial requests for information from U.S. and Chinese authorities as regulators in the two countries follow in each other’s footsteps.

7. What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

For multinational companies operating in China, the biggest challenge is likely to be unfamiliarity with the Chinese legal system. Bedrock legal precepts that U.S.-trained lawyers take for granted – the attorney-client privilege, the right to silence, separation of powers, etc. – do not apply without substantial modifications, if at all. Compounding the challenge is the fact that there are often multiple Chinese government organs with overlapping jurisdictions over a particular substantive area, making it difficult to figure out all the potential decision-makers with which the company should communicate its concerns and press its defence.

While it is imperative to seek the advice of local Chinese counsel on local law and enforcement matters, companies should not overlook the importance of securing U.S. counsel to ensure that the attorney-client privilege and work product protections – whatever their status and level of protection under Chinese law – will be preserved under U.S. law. This is particularly critical because, as discussed above, suspected corporate misconduct in China involving a multinational corporation with minimum contacts with the U.S. may very well, sooner or later, pique the interests of U.S. investigators and prosecutors as well.

Combined U.S. and Chinese enforcement actions pose yet another challenge because the demands from the two jurisdictions are rarely congruent. To the contrary, they are often different and even conflicting. The company may therefore find itself caught in the middle. 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 recently over the production of audit papers concerning Chinese clients is only

the amendment took effect, the law provided that “[a]ny briber who, before he is investigated for criminal responsibility, voluntarily confesses his act of offering bribes may be given a mitigated punishment or exempted from punishment”. As amended, the law adds the following before a defendant “may be exempted from punishment or receive mitigated punishment”: “one whose crimes are relatively minor . . . , if by exposing corrupt activities of others he provided crucial information leading to the successful investigation of a major case, or he performed other major meritorious service”. (P.R.C. Criminal Law Amendment 9, Art. 45.)

The implication of this amendment, and how it may interact with DOJ’s new policy on corporate crime prosecutions as applied in China, will be discussed in question 8 below.

6. How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

Largely outside of 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 (JLG) – the mechanism that promotes coordination between the two governments on criminal matters that is now in its 14th year – features

- ▶ one well-known example. 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 foreign law that may appear murky to foreign audiences. And 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 investigation.

The interaction of the U.S. and Chinese legal systems raises delicate issues and underscores the importance of advanced planning, seamless coordination, and practical know-how on maintaining effective responses to enforcement contingencies in multiple jurisdictions simultaneously.

8. Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

Yes. As noted above, the amendment to the Chinese anti-bribery laws added a new provision that allows an individual to be "exempted from punishment or receive mitigated punishment" only upon a showing that he "provided crucial information leading to the successful investigation of a major case" "by exposing corrupt activities of others". More generally, the Chinese Criminal Code gives credit, up to and including exemption from punishment, to any defendant who "gives himself up" (自首) (Art. 67) and who provides information that leads to the successful prosecution of the case against others (Art. 68).

For companies in China that are subject to the FCPA, incentives to self-report may also come from DOJ's recently announced pilot programme. In essence, the programme holds out the promise of "a 50% reduction off the bottom end of the Sentencing Guidelines fine range" and exemption from monitorship for companies that self-disclose FCPA violations to DOJ before April 5, 2017. It is too early to tell, however, what practical impact the pilot programme will have. This is because, to be eligible for the benefits of the programme, many conditions will have to be satisfied, with the final determination vested exclusively in DOJ's discretion. Among other obligations, the company must "disclose all relevant facts" concerning the misconduct of individual employees, make "available for Department interviews those officers and employees who possess relevant information", including "officers and employees located overseas", and "facilitate third-party production of

“ DOJ's new policies, combined with the credit given under Chinese law to individuals who "give themselves up", have made companies' decisions whether to self-disclose more challenging because the interests of the company and those of its employees may become more adverse ”

documents and witnesses from foreign jurisdictions". (DOJ Pilot Program Memo at 5.)

DOJ's new policies, combined with the credit given under Chinese law to individuals who "give themselves up", have made companies' decisions whether to self-disclose more challenging because the interests of the company and those of its employees may become more adverse. To avoid becoming pawns in the high-stakes negotiation between their employer and DOJ, local 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 when to make voluntary self-disclosures to the authorities.

9. Do enforcement agencies in your jurisdiction use non-prosecution agreements ("NPA") or deferred prosecution agreements ("DPA")? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies? If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

Unlike DOJ or the SEC in the U.S., the Chinese

authorities do not use non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs). As described above, however, certain features of these agreements can be found in aspects of the Chinese legal system that provide defendants with incentives to self-report, accept responsibility, and

provide information about wrongdoing by others, in exchange for a lighter punishment, or, in an extraordinary case, even exemption from punishment. It remains to be seen whether China will formalise these practices by entering into NPAs or DPAs with defendants.



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Skadden has extensive experience in advising and defending clients in matters involving the U.S. Foreign Corrupt Practices Act (FCPA) and related laws. Our work in this area began long before the recent uptick in enforcement by the SEC and DOJ, and we have represented companies or board committees and individuals in the most significant enforcement matters brought by government authorities. Our global reach, depth and experience enable us to perform fact-finding and analysis in connection with complex business matters in every country in which our clients conduct business.

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