

DOJ Steps Back From China Initiative but Remains Focused on China-Related Enforcement

Skadden

02 / 27 / 22

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

Steve Kwok

Partner / Hong Kong
852.3740.4788
steve.kwok@skadden.com

Jessie K. Liu

Partner / Washington, D.C.
202.371.7340
jessie.liu@skadden.com

Sherry (Qiong) Tao

Associate / Washington, D.C.
202.371.7313
sherry.tao@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

On February 23, 2022, Assistant Attorney General (AAG) Matthew Olsen, the head of the Department of Justice's (DOJ) National Security Division (NSD), announced that a review of the China Initiative begun under the Trump administration had concluded that it was "not the right approach" and that DOJ would adopt a broader framework, the Strategy for Countering Nation-State Threats, to address threats from hostile nation-states.¹ This client alert reviews the China Initiative, highlights the key points from AAG Olsen's remarks and shares practical takeaways from the announcement.

China Initiative's Mixed Record

DOJ's China Initiative, launched on November 1, 2018, and led by DOJ's NSD, was designed to counter threats to U.S. national security from China. The initiative's stated goals included: (i) identifying priority trade secret theft cases; (ii) developing an enforcement strategy concerning nontraditional collectors (e.g., researchers in laboratories, universities and the defense industrial base) who allegedly were being co-opted into transferring technology to China contrary to U.S. interests; (iii) applying the Foreign Agents Registration Act to unregistered Chinese agents seeking to advance China's political agenda; and (iv) identifying Foreign Corrupt Practices Act cases involving Chinese companies.²

While DOJ secured a number of convictions against individuals during the three years of the China Initiative's existence, it also encountered some major and high-profile setbacks in court, especially related to fraud and false statements charges against researchers and scholars who allegedly failed to disclose their affiliations with the Chinese government or Chinese state-funded entities.³ Most recently, in January 2022, DOJ dismissed criminal charges against Dr. Gang Chen, a professor at Massachusetts Institute of Technology, for his alleged failure to disclose awards and grants from various Chinese entities.⁴

Highlights From AAG Olsen's Remarks

In his speech, AAG Olsen acknowledged concerns that the China Initiative was fueling a perception that DOJ "treats people from China or of Chinese descent differently" and chilling academic collaboration. He emphasized, however, that "genuine national security concerns" posed by the Chinese government and other regimes remained as great as ever. Among other things, his remarks highlighted the following:

- DOJ is launching the Strategy for Countering Nation-State Threats to counter threats from nations such as China, Russia, Iran and North Korea. The identified threats include transnational repression of freedom of expression, foreign malign influence campaigns, hacking and cyberattacks, espionage activities and export controls evasions.

¹ "Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats," DOJ (Feb. 23, 2022).

² "Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018," DOJ (Nov. 19, 2021).

³ "Former Cleveland Clinic Employee and Chinese 'Thousand Talents' Participant Arrested for Wire Fraud," DOJ (May 14, 2020); see also "Researchers Charged With Visa Fraud After Lying About Their Work for China's People's Liberation Army," DOJ (Jul. 23, 2020); see also "Chinese National Charged With Destroying Hard Drive During FBI Investigation Into the Possible Transfer of Sensitive Software to China," DOJ (Aug. 28, 2020).

⁴ "Statement From U.S. Attorney Rachael S. Rollins on the Dismissal of the Gang Chen Case," DOJ (Jan. 22, 2022); see also "MIT Professor Arrested and Charged With Grant Fraud," DOJ (Jan. 14, 2021).

DOJ Steps Back From China Initiative but Remains Focused on China-Related Enforcement

- Threats posed by the Chinese government and its agents remain a key focus for DOJ. Examples of actions allegedly taken by the Chinese government include government and military secret theft, economic espionage, intellectual property and technology theft, malicious cyber campaigns and silencing dissent.
- NSD will pursue three strategic imperatives: (i) defending the United States from threats of espionage, export controls evasions, sanctions violations and interference with American critical infrastructure; (ii) protecting key technologies, private information about American people and U.S. supply chains; and (iii) defending democracy and values from malign influence posed by authoritarian regimes.
- NSD will rely on various tools to combat and mitigate threats to national security, economic security or democracy and freedom: (i) taking criminal enforcement action to investigate and prosecute crimes sponsored by foreign government authorities and their agents; (ii) using civil and administrative tools to detect and mitigate foreign influence on public opinion in the U.S.; (iii) supporting diplomatic engagement and resilience-building in domestic and overseas communities; and (iv) engaging with democratic allies to share information and develop strategies.

Takeaways

The shift away from the China Initiative does not mean that the Biden administration is relaxing its enforcement posture against perceived threats from China. As AAG Olsen made clear in his remarks, NSD will continue to apply an all-tools approach

to counter nation-state threats, and he asserted that “it is clear that the government of China stands apart.” The director of the Federal Bureau of Investigation (FBI) publicly sounded the same theme in a speech earlier this year, underscoring FBI’s continuing commitments to deterring and combating perceived threats posed by the Chinese government in the areas of espionage, intellectual property theft and cybercrimes.⁵ And other U.S. enforcement and regulatory authorities — for example, the Departments of Commerce and Treasury — have also promised to bring to bear the full arsenals of their investigative and enforcement tools.⁶ The existing China-related regulatory and enforcement mechanisms of those agencies, such as CFIUS reviews, sanctions and entity lists, are not affected by DOJ’s announcement. Multinational companies with operations in both the United States and China would be well advised to remain vigilant and to adopt or refresh policies and procedures reasonably designed to ensure compliance with the U.S. laws and regulations within the scope of the Strategy for Countering Nation-State Threats.

⁵ “Countering Threats Posed by the Chinese Government Inside the U.S.,” FBI (Jan. 31, 2022).

⁶ “Commerce Acts To Deter Misuse of Biotechnology, Other U.S. Technologies by the People’s Republic of China To Support Surveillance and Military Modernization That Threaten National Security,” Department of Commerce (Dec. 16, 2021); see also “Treasury Identifies Eight Chinese Tech Firms as Part of the Chinese Military-Industrial Complex,” Department of Treasury (Dec. 16, 2021).