DOJ V. CHINA: IS DOJ ACTING AS AN INSTRUMENT OF FOREIGN POLICY?

Date: 1 October 2019

U.S. Investigations, Enforcement and White Collar Alert

By: Christopher L. Nasson, Neil T. Smith

In August 2019, federal prosecutors indicted Feng Tao, a Chinese scientist conducting research at the University of Kansas ("KU"), on fraud charges. [1] The indictment of a Chinese national by federal prosecutors and the underlying facts may not appear notable at first glance. However, when viewed in light of the Trump administration's escalating trade war and the 2018 announcement of the Department of Justice's ("DOJ's") "China Initiative" aimed at individuals and businesses that break laws of the United States in the name of benefitting Chinese interests, the factual underpinnings of the government's case may tell a deeper story.

Specifically, *Tao* may provide an example of the DOJ acting as an instrument of foreign policy taking aim at U.S. geopolitical adversaries.

The genesis for the criminal action against Tao rests not with the chief U.S. law enforcement officer in the District of Kansas but rather with the former chief law enforcement officer for the federal government. On November 1, 2018, then-Attorney General Jeff Sessions announced, "Chinese economic espionage against the United States has been increasing—and it has been increasing rapidly. We are here today to say: enough is enough. We're not going to take it anymore." [2] After noting that DOJ did not charge anyone with "spying for China" under the Obama administration, Sessions confirmed that DOJ's newly created China Initiative would be tasked with prioritizing trade theft cases involving Chinese targets and routing necessary resources to such cases to efficiently resolve them. [3]

The China Initiative is a working group of federal prosecutors and investigators led by Assistant Attorney General for the National Security Division John Demers. The team also includes Assistant Attorney General for the Criminal Division Brian Benczkowski, five U.S. Attorneys from districts across the country, and senior FBI leadership. [4] Among its other objectives, the China Initiative is aimed at identifying and executing an enforcement strategy for "non-traditional collectors (e.g., researchers in labs, universities, and the defense industrial base)…." [5] Aside from its work in administering justice on these higher-profile investigations, Sessions directed the China Initiative to make recommendations to Congress regarding legislation that could insulate research laboratories and universities from foreign influence and espionage activities.

Fast forward to nearly one year later, and the aggressive enforcement posture of the China Initiative is on full display—even if the factual record contains no evidence of economic espionage. On August 21, 2019, prosecutors filed an indictment against Tao, an associate professor at a KU research center dedicated to the development of technology to conserve energy and natural resources. According to the indictment, Tao failed to disclose an active affiliation with a Chinese university on a KU conflict-of-interest form that Tao was required to file with the university's Board of Regents. The prosecutors allege that this omission allowed Tao to continue to collect his KU salary while also receiving grant funds from the Chinese government. The indictment contains no

©2005-2026 K&L Gates LLP. All Rights Reserved.

allegations of trade secret theft or other forms of economic espionage; instead, Tao was indicted on one count of wire fraud—for having completed an "online certification" that failed to disclose his conflict of interest—and three counts of fraud for the collection of approximately $37,000 in salary from his involvement with three separate KU programs.

One case does not make a trend, so how does Tao compare with other similarly situated defendants? A recent study by the Cardozo Law School analyzing the outcomes from the surge in economic espionage cases in the U.S. over the last twenty years found that defendants of Chinese descent are more likely than defendants of non-Chinese descent to face prison time despite being less likely to have been convicted of a crime involving economic espionage. While the average length of prison sentences for defendants with Western and Chinese last names was comparable, defendants with Chinese last names received probation for such offenses approximately 2.5 times less frequently than their Western-named counterparts. Furthermore, the study concluded that defendants of Chinese descent charged with economic espionage are two times more likely than their Western-named counterparts to be acquitted at trial, have charges dropped, or to plead guilty to lesser offenses such as making false statements. In sum, although DOJ has ramped up its investigations of Chinese nationals and Chinese-Americans, actual findings of economic espionage against such targets are less frequent, and the penalties defendants with Chinese last names receive are disproportionately heavier than their Western-named counterparts.

Whether you are a Chinese national, a Chinese-American with family ties to China, an educational institution, or an American business organization that employs or partners with individuals who might be affected by this shift in enforcement, DOJ's evolving understanding of who and what constitutes a "threat" to national interests will impact your daily business activities. This applies even to mundane and routine activities, like completing policies and certifications during the course of employment. Even if contacts with individuals or organizations appear inconsequential or benign on their face, the Tao case demonstrates the need for additional caution when identifying, documenting, and disclosing ties to China or other countries that stand on less than stable ground with the U.S. government.

NOTES:

[1] Press Release, U.S. Dep't of Justice, "University of Kansas Researcher Indicted for Fraud for Failing to Disclose Conflict of Interest with Chinese University" (Aug. 21, 2019) *available at* https://www.justice.gov/opa/pr/university-kansas-researcher-indicted-fraud-failing-disclose-conflict-interest-Chinese

[2] Remarks of Attorney General Jeff Sessions, U.S. Dep't of Justice, "Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage" (Nov. 1, 2018) *available at* https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage

[3] *Id.*

[4] Press Release, U.S. Dep't of Justice, "Attorney General Jeff Session's China Initiative Fact Sheet" (Nov. 1, 2018) *available at* https://www.justice.gov/opa/speech/file/1107256/download

[5] *Id.*

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.