# CHARLES LIEBER, FENG TAO, AND THE DOJ'S ONGOING SEARCH FOR CHINESE SPIES AT U.S. RESEARCH INSTITUTIONS

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Late last month, yet another decorated academic from a prestigious American research institution found himself in the crosshairs of a criminal inquiry stemming from alleged undisclosed affiliations with Chinese institutions. On January 28, 2020, federal agents arrested Professor Charles Lieber, chair of Harvard University's Chemistry and Chemical Biology Department, and charged him with making false statements to federal grant-making agencies. [1]

As we previously commented, Professor Lieber is neither the first academic to face criminal charges nor is he likely to be the last given the Department of Justice's ("DOJ's") intense focus on "non-traditional collectors" at American research institutions and universities. [2] On February 6th, federal prosecutors from across the country forecasted a busy year of prosecutions involving those suspected of acting as agents of the Chinese government. [3]

The DOJ's allegations and decision to charge Professor Lieber are instructive for all research institutions that employ professors or researchers who accept foreign grants, particularly with ties to Chinese institutions and/or state-run programs. Not only does *Lieber* illustrate the multitude of enforcement tools at the DOJ's disposal in its war against Chinese economic espionage, it also reinforces the importance that universities proactively monitor and assess professors or researchers who might fall within the scope of a federal investigation. As discussed more fully below, the DOJ has established a long track record of acting on mere omissions and failures to disclose affiliations, financial contributions, and other conflicts of interest with Chinese institutions and/or state-run programs—no evidence of economic espionage is needed. Therefore, institutions must diligently monitor and review their employees' foreign affiliations and funding arrangements to avoid becoming caught in DOJ's crosshairs. We outline below several proactive measures that we believe can assist in mitigating the risk of being subject to a DOJ investigation.

## THE CASE AGAINST PROFESSOR LIEBER

In its complaint, the government alleges that Professor Lieber made false statements to Department of Defense ("DOD") and National Institutes of Health ("NIH") investigators in connection with inquiries into his involvement and affiliation with China's Thousand Talents Plan ("TTP") and the Wuhan University of Technology ("WUT"). [4]

The TTP is a Chinese recruitment initiative designed to attract global experts in science and technology to facilitate technology transfer initiatives, research collaboration, and repatriation of thought leaders. According to

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the U.S. enforcement and intelligence officials, the TTP and other Chinese Talent Plans pose threats to our national security [5] and encourage the theft of U.S. proprietary information by rewarding those who appropriate or transfer such information to China. [6] The FBI estimates the Chinese government has committed significant financial resources to the TTP and similar talent-recruitment efforts. A 2019 report of the Senate Permanent Subcommittee on Investigations estimates that China aims to spend “fifteen percent of its gross domestic product on human resources during the period covered by the plan,” which amounts to more than $2 trillion. [7]

Professor Lieber's undisclosed ties to China stem from three separate agreements with WUT. In November 2011, Lieber agreed to serve as a “strategic scientist,” [8] which required him to conduct research and publish academic papers in leading international scientific journals under an affiliation with the Chinese university. [9] Following Lieber's selection as an expert for the TTP in 2012, WUT and Lieber entered into another contract whereby Lieber agreed to, among other things, conduct research, publish articles and apply for patents in WUT's name, invite international scientists to study at his lab, and work at WUT for at least nine months per year. In exchange for his services, WUT agreed to pay Lieber $50,000 per month, compensate his living expenses up to roughly $158,000 (over three years), and allocate $1.74 million to the joint Harvard-WUT Nano Key Lab and related research. [10]

In January 2013, Lieber signed another agreement allowing WUT researchers to spend two months per year studying high-performance nanowire-based lithium batteries for electric vehicles at Harvard under Lieber's direction. [11] Lieber allegedly entered the 2013 agreement on behalf of Harvard. According to the government, Lieber signed the 2013 agreement on behalf of Harvard University but did not have authorization to do so. [12]

The government asserts that, since 2008, Professor Lieber served as the principal investigator on at least nine grants from the DOD and NIH totaling in excess of $18 million. [13] In applications for these funding opportunities, both Lieber and Harvard were responsible for disclosing foreign sources of research support, foreign collaborators, and other conflicts of interest.

When DOD investigators interviewed Lieber regarding potential failures to disclose foreign sources of support from China, he allegedly denied any participation in the TTP. The NIH directed its inquiry to Lieber's institution as opposed to Lieber himself, and Lieber allegedly “caused Harvard to tell NIH that Lieber 'had no formal association with WUT' after 2012” and that the Chinese institution exaggerated his involvement with the foreign university in more recent years. [14] Lieber's and Harvard's allegedly false statements regarding Lieber's connection to WUT, the TTP, and other Chinese sources of support now form the basis of the government's criminal charge.

## PROFESSOR LIEBER'S ARREST FLOWS FROM DOJ'S “CHINA INITIATIVE”

Lieber's arrest fits squarely within the DOJ's aggressive enforcement posture of its “China Initiative.” [15] Among its other enforcement priorities, the Initiative focuses on identifying and prosecuting those engaged in trade secret theft, hacking, and economic espionage. DOJ has focused its enforcement on “non-traditional collectors”—researchers in labs, universities, and the defense industrial base. [16]

Other recent examples of such researchers who face federal charges relating to the Initiative include Feng Tao, a former scientist at the University of Kansas. [17] In August 2019, Tao was charged with wire fraud and program fraud in connection with his failure to disclose his affiliation with a Chinese institution on a university conflicts of interest form. [18] In addition, on January 24, 2020, former Los Alamos National Laboratory scientist Turab

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Lookman pled guilty to making false statements to a counterintelligence investigator from his laboratory after Lookman denied his involvement in TTP. [19]

Even in the absence of DOJ scrutiny, many research institutions have taken action and stopped supporting those researchers believed to have improper Chinese connections. In December 2019, the H. Lee Moffitt Cancer Center and Research Institute cut ties with CEO Dr. Alan List, Vice President and Director Thomas Sellers, and four other employees for failing to disclose connections with China—specifically personal involvement in TTP. [20] Similarly, Li Xiao-Jiang and Li Shihua, two neuroscientists at Emory University, were fired for failing to disclose Chinese funding and affiliations in May 2019. [21] Moreover, a number of researchers at the University of Florida [22] and MD Anderson Cancer Center [23] have either resigned or been fired due to undisclosed conflicts of interest with Chinese universities and/or the Chinese government.

## WHAT THE LIEBER AND TAO CASES MEAN FOR UNIVERSITIES AND RESEARCH INSTITUTIONS

The charges against Professors Tao and Lieber illustrate the diverse ways in which a researcher and a research institution can incur criminal exposure even in the absence of evidence of economic espionage. Like Tao, Lieber allegedly failed to disclose a conflict of interest with a Chinese institution and that non-disclosure eventually resulted in criminal charges.

Yet the similarities in the cases end there. First, Lieber is charged with making false statements to federal agents whereas Tao was charged with wire fraud and federal program fraud. Second, while Tao's case turns on disclosure forms submitted to University of Kansas officials, the DOJ charged Lieber for his statements and omissions to grant-making agencies. Indeed, the DOJ's charges rest on the assertion that Lieber “caused [the institution] to make materially false and misleading statements” about his connection to foreign governments. [24] As these distinct but related investigations illustrate, undisclosed conflicts of interest can result in criminal exposure arising from both the substantive conflict with a Chinese institution as well as the government's investigation of that alleged conflict.

## HOW INSTITUTIONS CAN MITIGATE THE RISKS OF UNDISCLOSED CONFLICTS OF INTEREST

The ultimate outcome of the government's cases against Professors Lieber and Tao is far from certain. Nonetheless, researchers accepting payments from China like Professors Lieber and Tao will remain a priority for the DOJ. Furthermore, there is an increasing expectation that U.S. research institutions will take responsibility for addressing potential risks arising from undisclosed ties to China. As the Permanent Subcommittee on Investigations noted in its November 2019 report, “If U.S. universities can vet employees for scientific rigor or allegations of plagiarism, they also can vet for financial conflicts of interests and foreign sources of funding. If U.S. researchers can assess potential collaborators' research aptitude and their past publications, they should know their collaborators' affiliations and their research intentions.” [25] Federal prosecutors are calling on research institutions to acknowledge and act on economic and national security threats on campus and not merely dismiss them as conspiracy theories. [26]

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Institutions are therefore left with a delicate balance. A failure to meet the expectation of the DOJ could result in enforcement scrutiny, but overly zealous efforts to identify potential risk could result in what some commentators and members of the academic community believe is unconstitutional targeting of American citizens based solely on their race. [27]

To strike an appropriate balance while being responsive to potential risk, research institutions can consider taking steps to proactively assess the adequacy of researchers' conflicts of interest and to effectively respond to allegations of nondisclosure. Below we outline five strategies in furtherance of that goal.

## 1) Ensure Researcher Education of Disclosure Requirements Outlined in Institutional Policies

As an initial matter, research institutions should ensure that they have clear policies articulating the importance of fully disclosing conflicts of interest, the manner through which such conflicts should be communicated, and the potential penalties for incomplete disclosures. According to a September 2019 report of the Office of Inspector General for the U.S. Department of Health & Human Services, “Of the 1,875 institutions that received NIH funding in fiscal year 2018 and were required to have [foreign conflicts-of-interest] policies, 1,013 did not have [such] policies posted on their websites.” [28]

Aside from memorializing these policies internally and on their websites, institutions can consider implementing, if not already in place, both new-hire and continuous on-the-job training on foreign conflicts of interest for researchers and staff. Researcher education regarding the risks of nondisclosure and the value of timely remediation can mitigate potential legal exposure for both institutions and their staff.

## 2) Assess Sufficiency of Researcher Disclosures Through Proactive Measures

Universities could also proactively pressure-test researchers' conflict of interest submissions using a risk-based approach. For example, researchers could be selected for review based on a variety of factors, including but not limited to: the potential commercial or military applications of scientific research projects, the researchers' professional or personal contacts with higher-risk jurisdictions like China, or researchers' employment disciplinary history at current and prior institutions.

It is important to note that researchers subject to review should include not only tenured faculty like Professor Lieber, but also PhD students, visiting researchers, and any other staff who would have meaningful access to data collected within the laboratory setting. One need look no further than the same DOJ press release announcing Professor Lieber's charges to see additional fruit from the DOJ's investigative efforts into potential collaborations with China. Concurrent with the DOJ's announcement of its charges against Professor Lieber, the DOJ announced that two Chinese nationals studying in the United States were facing charges for, among other conduct, attempting to smuggle biological samples back to China and for acting as an agent of a foreign government while holding herself out as a student at Boston University. [29]

The methodology for evaluating the completeness of a conflict of interest submission can include a reasonable investigation into sources indicating evidence of partnerships with high-risk organizations identified by enforcement authorities. For example, universities can consider conducting a review of publication databases to confirm the existence of any co-authored publications sponsored in whole or in part by a Chinese institution.

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These searches can be conducted in both English- and native-language resources. Additionally, this review could include a public-records search of faculty listings at Chinese institutions to ascertain whether a researcher is listed as a tenured or visiting faculty member.

### 3) Establish Reporting Mechanisms for Allegations of Undisclosed Conflicts of Interest

Aside from establishing a means for proactively identifying conflicts of interest, research institutions can ensure that there is an open means of communication for receiving allegations of undisclosed conflicts of interest. Furthermore, research institutions can establish a protocol for evaluating and investigating credible allegations of nondisclosure.

If a university identifies a potentially undisclosed conflict of interest through either proactive monitoring efforts or through an external complaint, it is important that the university act quickly to preserve relevant electronic and hard-copy information in furtherance of future investigative efforts into a potentially undisclosed conflict.

### 4) Understand Full Scope of Undisclosed Conflicts of Interest

These investigative efforts are necessary not only to identifying potential conflicts but also to ensure a full accounting for the depth of commitments to such undisclosed conflicts. As illustrated by the government's allegations against Professor Lieber, agreements between researchers and foreign sources can be made in the name of the institution rather than an individual researcher. For this reason, it is critical for research institutions to allocate sufficient resources to conduct due diligence on research sponsors as part of the process of authorizing institutional or individual research agreements for activities conducted on their campuses.

### 5) Consider Impact on University Statements to Grant-Making Agencies

Separately, when an undisclosed conflicts of interest is later identified, understanding how that non-disclosure might have been omitted in prior submissions to grant-making agencies is an important step in assessing the magnitude of a potential future enforcement action. Assessing such prior statements will inform future considerations regarding self-reporting, the necessity of corrective submissions to grant-making agencies, and responses to future government inquiries.

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NOTES:

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[3] Nadia Dreid, *Feds Vow To Go Hard Against Chinese IP Theft in 2020* LAW360 (Feb. 6, 2020), *available at* https://www.law360.com/whitecollar/articles/1241413/feds-vow-to-go-hard-against-chinese-ip-theft-in-2020.
[4] Robert Plumb Aff., *United States v. Charles Lieber*, (No. 20-mj-2158-MBB) (D. Mass. Filed Jan. 27, 2020), *available at* https://www.law360.com/articles/1238309/attachments/0.
[5] U.S. DEP'T OF JUSTICE, *supra* note 1.

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[6] STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 116TH CONG., THREATS TO THE U.S. RESEARCH ENTERPRISE: CHINA'S TALENT RECRUITMENT PLANS (2019), *available at* https://www.hsgac.senate.gov/imo/media/doc/2019-11-18%20PSI%20Staff%20Report%20-%20China's%20Talent%20Recruitment%20Plans.pdf.
[7] *Id.*
[8] Robert Plumb, *supra* note 3.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id*.
[14] *Id.*
[15] *See* Christopher L. Nasson, Neil T. Smith, David Peet, *DOJ v. China: Is DOJ Acting as an Instrument of Foreign Policy?,* K&L GATES LLP (Oct. 1, 2019), *available at* http://www.klgates.com/doj-v-china-is-doj-acting-as-an-instrument-of-foreign-policy-10-01-2019/.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Press Release, U.S. DEP'T OF JUSTICE, "Former scientist from Los Alamos National Laboratory pleads guilty in federal court to making false statement about involvement with Chinese government technology program" (Jan. 24, 2020), *available at* https://www.justice.gov/usao-nm/pr/former-scientist-los-alamos-national-laboratory-pleads-guilty-federal-court-making-false.
[20] Justine Griffin, *Moffitt Cancer Center shakeup: CEO and others resign over China ties*, TAMPA BAY TIMES (Dec. 18, 2019), *available at* https://www.tampabay.com/news/health/2019/12/18/moffitt-cancer-center-shakeup-ceo-and-others-resign-over-china-ties/.
[21] Tara Law, *Emory University Fires 2 Neuroscientists Accused of Hiding Chinese Ties*, TIME (May 25, 2019), *available at* https://time.com/5596066/emory-fires-chinese-researchers/.
[22] Justine Griffin, *University of Florida also a target in foreign research scandal,* TAMPA BAY TIMES (Jan. 13, 2020), *available at* https://www.tampabay.com/news/health/2020/01/14/university-of-florida-also-a-target-in-foreign-research-scandal/.
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[24] Robert Plumb, *supra* note 3.
[25] STAFF OF S. COMM. ON INVESTIGATIONS, *supra* note 5.
[26] Nadia Dreid, *Feds Vow To Go Hard Against Chinese IP Theft in 2020* LAW360 (Feb. 6, 2020), available at https://www.law360.com/whitecollar/articles/1241413/feds-vow-to-go-hard-against-chinese-ip-theft-in-2020.
[27] Jodi Xu Klein, *Chinese-American scientists sound alarm over 'racial profiling'*, INKSTONENEWS.COM (July 3, 2019), *available at* https://www.inkstonenews.com/science/chinese-american-scientists-sound-alarm-over-racial-profiling/article/3017068.
[28] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE INSPECTOR GEN., THE NATIONAL INSTITUTE OF HEALTH HAS LIMITED POLICIES, PROCEDURES, AND CONTROLS IN PLACE FOR

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HELPING TO ENSURE THAT INSTITUTIONS REPORT ALL SOURCES OF RESEARCH SUPPORT, FINANCIAL INTERESTS, AND AFFILIATIONS (2019), *available at* https://oig.hhs.gov/oas/reports/region3/31903003.pdf.
[29] *Id.*

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