

November 6, 2018

U.S. Department of Justice Announces Expanded Criminal Trade Secrets Enforcement Targeting China

On Thursday, U.S. Attorney General Jeff Sessions ordered the creation of a “China Initiative” expanding and accelerating U.S. criminal trade secrets enforcement against Chinese companies and individuals. The remarks announcing the China Initiative are notable for their singular focus on China and the severity of their language describing alleged Chinese theft of U.S. companies’ trade secrets. In the same remarks, Sessions announced an indictment against Chinese and Taiwanese companies and individuals alleging theft of trade secrets from Micron Technology, Inc., an Idaho-based company that develops and manufactures dynamic random access memory (DRAM). The indictment is the latest in a growing line of criminal trade secrets cases focused on China. It is essential that potential targets of these efforts—including Chinese companies, their U.S. affiliates, and U.S. investors in Chinese companies—prepare for this enforcement environment. At a minimum, companies should design and implement robust policies and procedures focused on respecting third-party trade secrets, and promptly and thoroughly investigate potential violations.

Attorneys
[Geoffrey M. Atkins](#)
[Peter M. Brody](#)
[David Chun](#)
[Colleen A. Conry](#)
[Chong S. Park](#)
[Mimi Yang](#)
[Anthony C. Biagioli](#)

Accelerating Enforcement Against China

The Attorney General described China’s alleged trade secrets theft in harsh and unyielding terms: “enough is enough”; “[w]e’re not going to take it anymore”; “[i]t is unacceptable”; “the cheating must stop”; “China cannot be a safe haven for criminals.” These were not the first such remarks. As early as 2016, a policy paper by then-presidential candidate Donald Trump declared a “zero tolerance” policy toward China’s alleged trade secrets theft. In September 2018, John Demers, head of the Department of Justice’s National Security Division, stated that alleged Chinese economic espionage “is not an isolated incident. It is part of an overall economic policy of developing China at American expense. We cannot tolerate a nation’s stealing our firepower and the fruits of our brainpower.”

The recent enforcement record backs up these remarks. In the last year, the U.S. government continued its already robust record of enforcement by bringing 10 criminal theft of trade secrets prosecutions (compared to approximately 8-9 per year from 2009-2017 and approximately 7 per year from 1996-2009). More striking is the increased focus on China specifically: Of the 10 prosecutions brought in the last year, 6 involve China.

The Micron Case

The indictment alleging theft of trade secrets from Micron presents a typical fact pattern. There, three individuals who previously worked at Micron’s Taiwan subsidiary (including the subsidiary’s president) departed Micron to join one of two companies—a state-owned Chinese company or a Taiwanese company—cooperating to compete with Micron. Per the indictment, those companies and individuals allegedly stole Micron trade secrets valued up to USD 8.75 billion. If convicted, the individuals face up to 15 years in prison and millions of dollars in fines. The companies could face forfeiture and fines worth more than USD 20 billion.

The U.S. government’s enforcement focus on China spans industries. For example, the government has prosecuted Chinese companies and individuals for allegedly stealing trade secrets relating to, among others, aviation and aerospace, driverless car technology, wind turbines, semiconductors, cast iron manufacturing, titanium dioxide production, and pharmaceuticals.

Mitigating Risk

In this environment, Chinese companies, their U.S. affiliates, and U.S. investors in Chinese companies should take steps to mitigate their criminal (and related civil) exposure. At a minimum, such companies should design and implement robust compliance policies and procedures to respect third-party trade secrets. Such procedures should describe relevant

trade secrets laws and prohibitions on conduct; describe procedures to handle inadvertently obtained third-party intellectual property; include protocols governing hiring of employees and engagement of agents; require strong contractual representations and warranties in agreements with such individuals; and require robust training for company personnel and agents regarding the importance of respecting third-party trade secrets.

Even where companies implement strong procedures and training, companies can be criminally liable for theft of trade secrets by their employees and agents, even when the individuals acted contrary to company policies and express instructions. However, strong procedures do not only deter and prevent misconduct. Strong compliance procedures can assist company counsel in persuading prosecutors to exercise discretion to decline to prosecute the company or otherwise resolve the matter favorably. Strong compliance procedures can also affect a company's fine calculation under the U.S. sentencing guidelines, in the event of a criminal resolution. Even on the question of corporate liability, despite challenges under the law described above, multiple cases have left open the possibility that sufficiently strong and robustly enforced compliance procedures can, in theory, help companies avoid criminal liability.

Companies should also consider designing and implementing crisis response protocols addressing appropriate steps in the event of government enforcement, such as a dawn raid or detaining company personnel.

Ropes & Gray has assisted clients with developing trade secrets compliance programs designed to mitigate risk associated with theft of third-party trade secrets by their employees and agents, as well as crisis response protocols. In addition, Ropes & Gray has represented multiple companies accused of trade secrets theft as well as alleged victims of trade secrets theft before the United States Department of Justice, and conducted internal investigations for companies facing allegations of potential trade secrets theft.

For further information, please contact your usual Ropes & Gray attorney.