Enforcing the Foreign Corruption Practices Act in China

Nicholas Torres

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ENFORCING THE FOREIGN CORRUPTION PRACTICES ACT IN CHINA

INTRODUCTION

To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history; but, that we will extend a hand if you are willing to unclench your fist.

—President Barack Obama

This Perspective examines the efforts made by the U.S. Security Exchange Commission ("SEC") and the U.S. Department of Justice ("DOJ") to enforce the Foreign Corrupt Practices Act ("FCPA") abroad, specifically within mainland China. Concomitant with the globalization of commerce, China is beginning to open its borders to foreign investors. This raises concerns of whether the SEC and DOJ are sufficiently equipped to detect FCPA violations within mainland China.

The FCPA is a statute enacted to counter corruption in the global economy.\(^1\) It was enacted in the Securities Exchange Act of 1934,\(^2\) and it has two core provisions: anti-bribery and accounting.\(^3\) The DOJ and SEC share FCPA enforcement authority and work with other federal agencies and enforcement partners to investigate and prosecute FCPA violations.\(^4\) The objective of the FCPA is to prohibit foreign publicly traded companies in the United States from making bribes to foreign officials in exchange for business and "promote a fair playing field for U.S. companies doing business abroad."\(^5\) Generally speaking, the DOJ has criminal FCPA enforcement authority whereas the SEC has civil FCPA enforcement authority.\(^6\) The negative consequences that arise out of international corporate bribery cannot be understated. FCPA violations (1) impede economic growth; (2) undermine

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3 FCPA RESOURCE GUIDE, supra note 2.
4 Id. at 4.
5 Id.
6 Id.
democratic values; (3) threaten stability and security on a global level; (4) restrict U.S. efforts to promote freedom and democracy; and (5) harm business—as bribes can lead to distorted prices and honest businesses are harmed.7

Due to the far-reaching negative impacts of FCPA violations, efforts to enforce the FCPA in foreign countries are vital—particularly in China. In 2015, China’s economy, as measured by Gross Domestic Product (“GDP”), is ranked second at $10,354,832, following only the U.S., which is ranked first at $17,419,000.8 The FCPA is the sole enforcement provision put in place to ensure multinational corporations doing business in the world’s two largest economies are following anti-bribery, anti-competition regulations. Moreover, according to the 2014 Corruption Perceptions Index (“CPI”), which measures 175 countries on their level of public sector’s corrupt business practices, China is ranked 100/175.9 The aforementioned factors, combined with enormous cultural and political differences,10 makes China a difficult country to implement and enforce the FCPA.

Part 1 of this Perspective will discuss the importance of the U.S. establishing cooperative arrangements with China,11 especially between the SEC and China’s own domestic securities regulatory commission, the China Securities Regulatory Commission (“CSRC”). Currently, the U.S. and China do not have an enforcement cooperation arrangement, but they do have a

7 Id. at 2–3.
9 Corruption Perceptions Index 2014, TRANSPARENCY INT’L, http://www.transparency.org/cpi2014/results (last visited Jan. 1, 2015) (“The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory’s score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).”).
10 China has an authoritarian, single-party government whereas the U.S. is governed by democracy. Accountability is a primary function of democracy. Access to information, records and similar documents is a primary function of accountability. However, in China, information is often restricted from the general public. Furthermore, local customs generally tolerate the exchange of things of value for business—this custom is referred to as “guan xi” (关系) in Mandarin Chinese. For a discussion on a comparison between governance systems of China and the U.S., see generally Dan Guttman, Song Yaquin & Li Haiming, United States Government Contracting and China’s Shi Ye Dan Wei: Two Shadow Governments – Path Dependency from Opposite Directions, or Mutual Learning?. 35 ASIA PAC. J. PUB. ADMIN. 1, 1–53 (2013) (comparing and contrasting the U.S. and China’s government systems).
11 See infra note 14.
technical assistance agreement, which is inefficient for meeting the goals of the FCPA.

Part 2 of this Perspective will evaluate the U.S. and China’s respective whistleblower programs, and how they should work together to better encourage whistleblowers to report FCPA violations. For example, an effective whistleblower bounty would encourage more employees within mainland China to report potential FCPA violations. However, to do so, the SEC and DOJ must raise domestic awareness of the whistleblower program and offer guidance to U.S. whistleblower practitioners, whom specialize in whistleblower claims to do the same.

PART I

The U.S. has been cracking down on its enforcement efforts of the anti-bribery provisions of the FCPA, but its stricter efforts have not yielded the most effective results. For example, the U.S. has established an “enhanced dialogue” agreement with the CSRC, however this arrangement is insufficient. The efforts to create a better framework for dialogue between the SEC and CSRC have failed because the enhanced dialogue agreement merely called for joint efforts to better identify and discuss regulatory issues of common concern. Instead, the U.S. should have entered into an enforcement arrangement with China, which would have better facilitated the sharing of

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13 The whistleblower program describes the program in which the U.S. offers protection to informants who come forward with information on a possible securities violation. The program provides protections against retaliation and offers a possible bounty (10%–30%) for any fee imposed. This type of program encourages insiders to step forward with information.

14 Daniel Chow, China Under the Foreign Corrupt Practices Act, Wis. L. Rev. 573, 577 (2012) (stating that the DOJ has taken aggressive, broad interpretations of the FCPA when searching for FCPA bribery violations including broad definitions of “foreign officials” and “anything of value”). Between 2010–2015, the SEC brought charges on eight different occasions against Multinational companies for allegedly violating the FCPA. The most recent charge was against Bristol-Myers Squibb in 2015. Bristol-Myers Squibb settled for $14 million. SEC Enforcement Actions: FCPA Cases, SECURITIES EXCHANGE COMM’N., http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified Oct. 5, 2015).


information between the two regulatory agencies by increasing the amount of physical documents—evidence—shared amongst the regulators regarding transactions in bank and brokerage accounts.\(^\text{18}\) The enforcement arrangement is more effective than the enhanced dialogue framework because the exchange of evidence would provide the SEC with better grounds to conduct an investigation on any alleged FCPA violation.

Enforcement arrangements also create more opportunities for regulators to assist one another in investigations and prosecutions of FCPA violations.\(^\text{19}\) The U.S. is currently involved in enforcement arrangements with twenty-one nations—and China should be next.\(^\text{20}\) As China continues to reduce its Negative List\(^\text{21}\) and expand its Free Trade Zone (“FTZ”) to include more provinces,\(^\text{22}\) commerce between the U.S. and China will increase. As a result, cooperation between the SEC and the CSRC should increase as well.

An enforcement arrangement is necessary for the U.S. to maximize its FCPA enforcement efforts because it needs the CRSC’s assistance in getting China-based entities to comply with its measures. For example, there have been instances where China-based, publicly-traded entities have refused to cooperate with the SEC involving investigations. In 2015, China’s Big Four Accounting Networks\(^\text{23}\) refused to produce documents that were vital to the SEC’s investigation of potential fraud.\(^\text{24}\) The SEC disciplined the firms,\(^\text{25}\) but their reluctance to comply with SEC demands raised enormous concerns regarding the SEC’s ability to enforce the FCPA in China. As stated by Andrew Ceresney, Director of the SEC’s Enforcement Division, “...obtaining an audit firm’s workpapers is critical to enforcement staff’s ability adequately

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) U.S. SEC. EXCH. COMM’N, supra note 11.

\(^{21}\) The Negative List is a list of certain business ventures, which China prohibits foreigners to undertake within mainland China. Michael Martina, China Vows to Loosen Market Access ‘Negative List’, REUTERS (Sept. 15, 2015) http://www.reuters.com/article/us-china-economy-market-access-idUSKCN0RF16320150915.

\(^{22}\) In 2015, China has expanded the FTZ to include Tianjin, Guangdong, and Fujian. Previously, Shanghai was the only FTZ. The FTZ has favorable business regulations for foreign investors.

\(^{23}\) The Big Four Accounting Networks include the following firms: (1) Deloitte Touche Tohmatsu Certified Public Accountants Limited; (2) Ernst & Young Hua Ming LLP; (3) KPMG Huazhen (Special General Partnership); (4) and PricewaterhouseCoopers Zhong Tian CPAs Limited Company. U.S. SEC. EXCH. COMM’N, SEC IMPOSES SANCTIONS AGAINST CHINA-BASED MEMBERS OF BIG FOUR ACCOUNTING NETWORKS FOR REFUSING TO PRODUCE DOCUMENTS (2015), https://www.sec.gov/news/pressrelease/2015-25.html.

\(^{24}\) Id.

\(^{25}\) China’s Big Four Accounting Networks are registered with the Public Company Accounting Oversight Board; thus, subject to the sanctions, which the SEC may impose. Id.
to protect investors from the dangers of accounting fraud.” Thus, in addition to enlisting more support from the CRSC, it would serve the interests of the SEC to increase the number of agents working within the SEC headquarters in the enforcement division in Washington D.C. Ideally, the SEC enforcement division should enlist agents trained in Mandarin Chinese and who have a strong understanding of Chinese business customs. These agents would be able to communicate with the CRSC regularly and assist the SEC with facilitating cooperation with accounting firms. Furthermore, if the SEC enters into an enforcement arrangement with the CRSC, thereby increasing the amount of documents the SEC has access to, it will need ample Mandarin Chinese trained agents to evaluate the evidence.

PART II

Whistleblowers are an essential element to discovering U.S. securities violations abroad and keeping foreign corruption in check. Unfortunately, encouraging foreign nationals in China to come forward with information has been problematic for two reasons. First, many Chinese informants fear retaliation from their employers. A U.S. court may refuse to enforce the Dodd Frank anti-retaliation provisions to protect a foreign-national whistleblower, leaving them vulnerable to retaliation without recourse. Second, a Chinese national whistleblower may not have access to adequate counsel and guidance regarding their claims because Chinese attorneys may lack experience or expertise with whistleblower lawsuits.

To encourage more whistleblowing, federal district courts should offer Dodd-Frank anti-retaliation protection to Chinese nationals who come forward with information regarding FCPA violations. In theory, Chinese law provides whistleblower with similar protections that the U.S. does. However, in
practice, the reported protection of whistleblowers within China is weak,\textsuperscript{30} with nearly 70\% of whistleblowers reporting incidents of retaliation.\textsuperscript{31} Thus, it is vital for the federal courts to extend jurisdiction over foreign Dodd Frank anti-retaliation claims and offer foreigners protection.

The federal courts have denied jurisdiction because they refused “‘extraterritorial’ enforcement of the Dodd Frank anti-retaliation proscriptions.”\textsuperscript{32} As a consequence, the Chinese whistleblowers have had no recourse after whistleblowing and being allegedly retaliated against.\textsuperscript{33} The SEC has lobbied for the courts to exercise jurisdiction.\textsuperscript{34} However, the agency faces the difficult task of establishing that the legislative intent of the Dodd-Frank anti-retaliation provision covers extraterritorial enforcement of the Dodd Frank provisions. To accomplish this, the SEC must continue to lobby in order to clarify that the anti-retaliation provisions are intended to have an extraterritorial reach. This will ensure that Chinese nationals will be eligible for protection, which will encourage Chinese national whistleblowers to come forward. Uncovering corrupt business practices will benefit the U.S. because FCPA violations have far reaching negative consequences that harm the general public.

In order to provide more adequate guidance to potential Chinese national whistleblowers, the SEC and DOJ should—at minimum—offer guidance in Mandarin Chinese on the interface of their website. On the SEC website, for example, the only direct link to file a complaint is in English. The DOJ’s website, on the other hand, has an option to change the interface of the home page to Spanish. Moreover, the SEC and DOJ should encourage practitioners to follow Jason Coomer’s example, a small private practitioner located in


\textsuperscript{31} Id.


\textsuperscript{33} See Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2nd Cir. 2014) (“[T]he antiretaliation provision does not apply extraterritorially.”).

\textsuperscript{34} U.S. SEC. EXCH. COMM’N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2014), http://www.sec.gov/about/offices/owb/annual-report-2014.pdf. The SEC has filed Amicus Curiae Briefs encouraging the federal district courts to “defer to the SEC rule and to hold that individuals are entitled to employment retaliation protection if they report information of a possible securities violation. . .” Id. at 19.
Texas, and make it easier for Chinese nationals to report corruption. Jason Coomer’s firm offers a Chinese language version of its website, and has reportedly received around twenty-five whistleblower reports directly from Chinese informants in the past two years. Coomer is taking two cases forward with the SEC that originated from the claims submitted to his website. The SEC and DOJ should focus on raising awareness amongst private practitioners and encourage them to take similar steps as Jason Coomer did. This would certainly lead to more Chinese national whistleblowers coming forward, which will assist the SEC and DOJ in enforcing the FCPA.

In today’s global economy, enforcing the FCPA abroad presents an array of challenges. The SEC and DOJ must focus their efforts on improving the facilitation of discovering potential violations. The SEC should establish an enforcement arrangement with the CSRC, and hire agents that are fluent in the language to best examine the exchanged physical evidence between the two agencies. Lastly, encouraging Chinese whistleblowers to voluntarily report potential violations is essential. The SEC and DOJ must ensure Chinese whistleblowers protection under U.S. whistleblowers protection statutes, which will further the overall goals of the FCPA. Moreover, the SEC and the DOJ should continue to hold joint seminars with private practitioners and encourage them to make it easier for Chinese nationals to submit their claims. The U.S. should not accept Chinese local customs as the norms of doing business. The U.S. has long taken a leading role in writing the laws of international commerce, and now it is time to enforce them.

Nicholas Torres*