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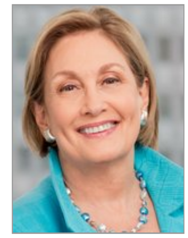
# Decoupling From China: Part 3 — Oversight And The Election

By **Jamie Gorelick, Stephen Preston and Matthew Ferraro** (October 30, 2020, 4:30 PM EDT)

The COVID-19 pandemic and the serious supply chain vulnerabilities it exposed have led to a seismic shift in U.S. policy and regulation, from stepped-up measures to protect U.S. technology, intellectual property and data from theft or acquisition by China to a new national imperative to end U.S. dependence on China for strategically important materials, components and products.



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In this three-part article, we provide a comprehensive discussion of the security-driven, China-focused policy and regulatory developments affecting private sector businesses, with particular attention to recent changes addressing U.S. supply chain concerns. We discuss key U.S. policy and regulatory developments and the consequences for private-sector businesses of efforts to decouple the U.S. and Chinese economies, focusing on potential opportunities, as well as regulatory and enforcement risks.

**Part one** focuses on legislation and federal funding to promote onshoring and Committee on Foreign Investment in the U.S. review of foreign direct investment to impede offshoring.

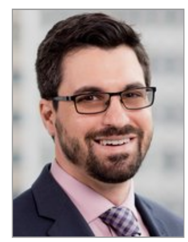
Stephen Preston

**Part two** focuses on security requirements to protect supply chains, U.S. export controls to protect technologies and consequences for international trade.

Part three focuses on oversight and enforcement, and the impact of the 2020 U.S. presidential election.

**Oversight and Enforcement**

The availability of federal funding for COVID-19 relief and the U.S. industrial base may present opportunities, but those opportunities will come with substantial risk of external scrutiny. Companies doing business in China and offshore can expect questions about how they have used any such funds.



Matthew Ferraro

Ensuing investigations by executive agencies likely will be rooted in the False Claims Act and the Foreign Agents Registration Act. Moreover, continued congressional investigations focused on Chinese trade, particularly in the tech sector, are likely.

In recent years, a range of U.S. oversight and enforcement authorities have been reviewing Chinese trade issues. Since the COVID-19 pandemic, both U.S. political parties have emphasized concerns about supply chain vulnerability and U.S. dependence on China. We can expect oversight and enforcement leaders to assess potential inquiries through this lens.

While recipients of federal funding can always expect scrutiny, the global impact of COVID-19 has made all Chinese operations ripe for investigation. New investigations have emerged, and we expect this trend to continue.

Companies doing business in China and offshore can expect scrutiny of how they may have used any Coronavirus Aid, Relief and Economic Security, or CARES, Act, or other COVID-19 relief funds, given the recent focus on onshoring. Ensuing investigations by executive agencies likely will be rooted in the FCA and FARA. Moreover, continued congressional investigations focused on Chinese trade, particularly in the tech and health sectors, are likely on the horizon.

***CARES Act and Other COVID-19 Relief***

The CARES Act makes available trillions of dollars in federal loans, grants and other financial assistance to a wide range of industries that have been affected by the COVID-19 pandemic. Emergency infusions of government funding into the economy are typically followed by significant investigations, both by oversight entities created specifically for this purpose and by the standard constellation of law enforcement organizations, government agencies and congressional committees. These watchdogs have launched inquiries into alleged fraud, waste and abuse associated with CARES Act funds.

So far, the primary focus has been on fraudulent Paycheck Protection Program applications (e.g., on behalf of fake companies); price-gouging (e.g., high cost of eggs); worker protections (e.g., proper personal protective equipment and social distancing requirements for farm workers); and fraudulent sales of supplies (e.g., sham COVID-19 tests).

Recipients of federal funding from the U.S. International Development Finance Corporation or under follow-on COVID-relief legislation can expect the same level of scrutiny that beneficiaries of the CARES Act are getting.

***Executive Agency Enforcement: FCA and FARA***

*Enforcement Context*

The Trump administration has taken a strong stance toward China in both its policy and enforcement actions. In 2018, the U.S. Department of Justice National Security Division launched the China Initiative to target economic espionage, trade secret theft and hacking.

In February, the DOJ indicted Huawei Technologies Co. Ltd. and other defendants, including two U.S. subsidiaries and Huawei's chief financial officer. The charges included conspiracy to steal trade secrets, racketeering conspiracy and violations of sanctions on Iran.

*False Claims Act*

The DOJ has promised vigorous enforcement of the CARES Act and stated that "the False Claims Act is one of the most effective weapons in our arsenal."[1]

The FCA requires companies and individuals seeking federal funds to be truthful and accurate in representations they make about their eligibility for those funds. It imposes treble damages and civil penalties, and it offers rewards for insiders who file claims on behalf of the government. FCA cases may arise based on certifications associated with the receipt of funds under CARES Act programs such as the PPP.

The PPP provides forgivable loans to eligible small businesses that spend the money on employee payroll and other enumerated expenses. To participate in the PPP, borrowers and lenders must make multiple certifications to the U.S. Small Business Administration.

For example, borrowers must certify in good faith at the time of loan origination that, among other things (1) the loan request is necessary to support ongoing operations in light of current economic conditions; and (2) "funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments."

A PPP participant may run afoul of the FCA based on knowingly false certifications of compliance with the PPP's eligibility rules, notwithstanding widespread industry confusion over the scope and meaning of these rules.[2] In the context of China decoupling, companies that accepted PPP funds may face enforcement issues if they use these funds — which are fungible — to benefit China in ways that are inconsistent with their certifications.

Greater scrutiny of a broad range of corporate business activities — including Chinese-focused activities — can spin off from initial questions about the propriety or legality of large corporations, or their subsidiaries, obtaining CARES Act or other COVID-19 relief funds.

*Foreign Agents Registration Act*

FARA requires disclosure of lobbying on behalf of foreign governments. A core goal of the DOJ's China Initiative is to apply FARA "to unregistered agents seeking to advance China's political agenda," and the DOJ regularly pursues such charges.[3]

Attorney General William Barr has delivered a warning shot to American companies by promising FARA enforcement.[4] On July 24, the DOJ entered the guilty plea of a Singaporean who established a fake consulting company and used online career networking sites to solicit U.S. government employees to write paid reports disclosing confidential information. The defendant then provided this information to the Chinese government.[5]

***Congressional Inquiries: National Security Threats and U.S. Exports to China***

Congress is also focused on the relationship between China and U.S. technology companies. For example, the Senate Judiciary Committee's Subcommittee on Crime and Terrorism has held hearings related to China's cybersecurity threats.

Senators introduced legislation to ban all federal employees from using TikTok on government devices[6] a few months before President Donald Trump signed an executive order that would have forced TikTok to be removed from smartphone app stores. The EO is now the subject of litigation.[7]

On June 22, Sens. Elizabeth Warren, D-Mass., and Cory Booker, D-N.J., sent a letter to four meatpacking companies requesting specific information about their exports to China.[8] The senators were responding to reports that these companies prioritized sales to China, which caused meat shortages and high food costs in the U.S.

Congress also has raised concerns about Chinese intrusion into U.S. colleges and universities. The U.S. Senate Permanent Subcommittee on Investigations has held hearings and issued reports titled "China's Impact on the U.S. Education System" and "Securing the U.S. Research Enterprise From China's Talent Recruitment Plans."

Flowing from these inquiries, in June, Permanent Subcommittee on Investigations Chair Sen. Rob Portman, R-Ohio, and his Senate colleagues introduced the bipartisan Safeguarding American Innovation Act in order "to help stop foreign governments, particularly China, from stealing American taxpayer-funded research and intellectual property developed at U.S. colleges and universities."[9]

Among other things, the investigations subcommittee has focused on compliance with Section 117 of the Higher Education Act, which requires universities to report foreign funding and gifts to the U.S. Department of Education.

Congressional committees likely will continue this trajectory of China-focused investigations, which create reputational issues and often result in referrals to law enforcement.

Following the subcommittee's hearings, the Department of Education launched multiple investigations into U.S. colleges and universities, and the DOJ brought multiple criminal cases against researchers, professors and Thousand Talents Program participants related to their alleged work on behalf of the Chinese government.[10]

Moving forward, we can expect additional supply-chain initiatives from the China Task Force, a GOP congressional body launched in May.[11]

***COVID-19 Vaccine Development***

There is intense competition to be the first country to develop and distribute a COVID-19 vaccine. U.S. pharmaceutical companies are competing with Chinese firms, including state-owned pharmaceutical company Sinopharm Group Co. Ltd. Both the executive and legislative branches are focused on this issue, with the DOJ issuing indictments of foreign hackers targeting innovation,[12] and Congress holding hearings on safeguarding vaccine production.[13]

**Impact of the 2020 U.S. Presidential Election**

Whether Trump or former Vice President Joe Biden wins the 2020 U.S. presidential election, the next administration will for political and policy reasons likely treat China as a strategic adversary, and will look to reduce U.S. supply chain dependence on China for strategically important goods, rebuild domestic production capability for critical goods and services, and restrict Chinese investment in the U.S.

Of course, while the two candidates' overall positions on China have many similarities, their styles and approaches are likely to be significantly different. These differences are consequential because the U.S. and China are the world's two largest economies and their bilateral relationship has fallen to depths not seen since the Tiananmen Square crisis.

We will discuss some of the policies, including with respect to supply chains — where the candidates agree — and highlight major policy differences.

If he is reelected, and even during a lame-duck period, Trump is likely to more aggressively pressure China to comply with its commitments under the U.S.-China Phase 1 trade agreement. In particular, he would be focused on China's purchases of U.S. agricultural products, which have not kept pace with China's commitments.

Trump also has discussed his interest in pursuing Phase 2 negotiations with China to address systemic issues such as the disproportionate role of state-owned enterprises in the Chinese economy, subsidies, data flows and steel overcapacity. It is expected that Trump's America-first efforts would expand beyond the administration's current focus on supply chains for medical supplies and extend to manufactured goods, critical minerals and other areas.

Trump would also continue to seek to undercut Chinese efforts to dominate high-tech manufacturing, including semiconductors and other telecommunications equipment. We expect new policies that would incentivize bringing home such key industries.

We should expect no moderation in the messaging, as indicated by, for example, Trump's expressed interest in a complete decoupling from China and his secretary of state's call for confrontation in place of engagement.

In a second term of the Trump administration, we would anticipate continued aversion to U.S. participation in multilateral organizations and sometimes fraught relations with friendly governments.

Biden is also likely to focus on bringing home more U.S. manufacturing. In his recently released "Plan to Rebuild U.S. Supply Chains," he outlined "fundamental reforms [to] shift production of a range of critical products back to U.S. soil, creating new jobs and protecting U.S. supply chains against national security threats."[14]

While he expectedly focused on medical equipment and pharmaceuticals, he also emphasized the importance of greater domestic resiliency for energy and grid technologies, semiconductors and key electronics, telecommunications infrastructure, and raw materials.

Biden promises that if elected, he will initiate immediately a 100-day review of "critical national security risks across America's international supply chain," while asking Congress to create a permanent, mandatory review process.

Biden would likely not pursue Phase 2 negotiations in the near term, if ever, as he has indicated that he wants to focus on domestic issues initially — much as former President Barack Obama did in his first term. He would likely seek to revive the WTO as a tool to resolve disputes with China.

While Trump has taken great pride in removing the U.S. from international organizations and agreements (World Health Organization, Paris Climate Agreement, Trans-Pacific Partnership) and threatening to leave others (NATO and WTO), Biden will aggressively work within such multilateral efforts. A Biden administration could be expected to take a multilateral approach to China, working with allies to address supply chain vulnerabilities.

Biden will likely seek to rebuild and strengthen alliances with European Union and Asia trading partners. It's plausible that some multilateral trading agreement based on the former Trans-Pacific Partnership will be created.

While China is accustomed to being scapegoated in U.S. election campaigns and appreciates that campaign rhetoric is not policy, the current rhetoric is of a different magnitude. Whoever wins the election will carry this baggage as they seek to steer the U.S.-China relationship onto steadier ground.

**Conclusion**

The Chinese-American relationship has entered a new era. The bipartisan, cross-functional move to decouple the world's largest economies is likely to continue as each nation competes for power, requiring businesses to approach shifting business, legal and political environments with care.

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