

# Valuable Nepotism?: The FCPA and Hiring Risks in China

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*The Foreign Corrupt Practices Act of 1977 (FCPA) was enacted to prohibit the bribery of foreign officials and mandate the keeping of accurate books and records for the purpose of transparency. This Note focuses on the anti-bribery component, analyzing its operation with an eye towards doing business in China, where the line between relationship-building and bribery is described by some as blurry at best. Using the so-called “Sons and Daughters” program in the financial industry as an example, the Note aims to develop some clarity with regards to the unique FCPA risks a company faces while conducting business in China. Specifically, the Note analyzes these risks with respect to the Sons and Daughters program, a fast-track hiring initiative allegedly created by J.P. Morgan to hire descendants of prominent Chinese officials and executives, many of whom work at state-owned enterprises in China. Considering whether the program violates the anti-bribery component of the FCPA entails determining the answers to the following questions: whether executives from state-owned enterprises can be considered “foreign officials,” whether the hiring of the descendants of these executives can be considered a “thing of value” conveyed to these executives, and whether the job offer was given to these descendants “corruptly.” This Note hopes to provide guidance to companies to look back and examine whether they may have run afoul of the FCPA with their previous hires as well as look forward to develop effective compliance programs that help avert such hiring risks in the future.*

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## I. INTRODUCTION

In the mid-1970s, investigations by the Securities and Exchange Commission (SEC) revealed that American corporations were making widespread illegal payments to government officials abroad.<sup>1</sup> These investigations by the SEC revealed that over 300 U.S. companies made corrupt foreign payments involving hundreds of millions of dollars.<sup>2</sup> These payments to foreign officials were primarily intended to help corporations gain business.<sup>3</sup> To rein in these illegal payments and to restore public confidence in the integrity of the American business system, legislators argued for more detailed corporate record-keeping as well as more direct prohibitions on bribery of foreign officials.<sup>4</sup> In 1977, Congress passed the Foreign Corrupt Practices Act of 1977 (FCPA), which has both an accounting and an anti-bribery component.<sup>5</sup> This Note focuses on the anti-bribery component of the FCPA and examines the particular impact of the FCPA on American business practice in China. In discussing the risks of running afoul of the FCPA when doing business in China, the Note considers whether and how the FCPA applies to the Sons and Daughters (SND) programs that have entangled numerous banks with American prosecutors and regulators in the last two years.

This Note begins by documenting the passage of the FCPA as well as the relevant requirements, exceptions, and amendments to the statute. Part III of the Note then turns to the recent enforcement trends by the Department of Justice (DOJ) and the SEC, with summary discussions on enforcements in 2013, 2014, and 2015. Part IV of the Note provides a high-level look at the unique challenges multinational corporations face in complying with the FCPA while accommodating particular political and cultural norms in China. With that foundation, part V of the Note then offers a more in-depth discussion of the relevant FCPA questions multinational corporations face, using the SND program as an instructive and illustrative example. Part VI of the Note looks at two hypothetical hires and outlines a series of factors and

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1. See S. Rep. No. 95-114, at 3 (1977).

2. *Id.*

3. *Id.* at 4.

4. *Id.* at 7–8, 10.

5. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S. Code).

questions that may help stakeholders decide when the line between relationship-building and bribery has been crossed. Finally, the Note makes a few suggestions on how best to avoid potential FCPA violations in light of these discussions.

## II. BACKGROUND AND REQUIREMENTS OF THE FCPA

Reports by the SEC in the mid-1970s showed that more than 300 U.S. companies had paid out hundreds of millions of dollars in bribes to foreign government officials to secure business overseas.<sup>6</sup> Congress enacted the FCPA in 1977 after revelations of this rampant global corruption that included some of the largest and most widely held companies in the United States.<sup>7</sup> The purpose of the FCPA was to effectively deter the corporate bribery of foreign officials.<sup>8</sup>

The FCPA has two basic provisions that help achieve this goal. First, the FCPA amended the Securities Exchange Act of 1934 to require “issuers” — in effect nearly all major American companies — to keep detailed records and accounts which reflect corporate payments and transactions, regardless of its relationship to bribery issues.<sup>9</sup> Second, the FCPA directly prohibited bribery of foreign officials.<sup>10</sup> These two provisions apply to three groups of persons: U.S. “issuers,”<sup>11</sup> “domestic concerns,”<sup>12</sup> and “any person

6. See S. Rep. No. 95-114, *supra* note 1, at 3; H.R. Rep. No. 95-640, at 4 (1977).

7. See, e.g., A. Carl Kotchian, *The Payoff: Lockheed's 70-Day Mission to Tokyo*, SATURDAY REV., Jul. 9, 1977, at 7, (Appearing before a Senate subcommittee in 1976, Mr. Kotchian testified that Lockheed had paid \$12.6 million in bribes to Japanese government officials in its efforts to sell planes to Japan. Mr. Kotchian also testified Lockheed paid \$1.1 million to a Dutch official in the early 1960s. The Dutch official was later identified as Prince Bernhard, the Dutch armed forces' inspector general and the husband of Queen Juliana of the Netherlands. The prince resigned his positions in August 1976 and Kakuei Tanaka, the prime minister from 1972–74, was arrested in 1976 and charged with accepting bribes from Lockheed. The Lockheed investigation likely contributed to Congress's resolve to pass the FCPA in 1977.).

8. S. Rep. No. 95-114, *supra* note 1, at 3.

9. 15 U.S.C. §§ 78m(b)(2).

10. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012).

11. 15 U.S.C. § 78dd-1 (2012). This category includes “any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title. . . .” 15 U.S.C. § 78dd-1(f) (2012).

12. 15 U.S.C. § 78dd-2 (2012). The term “domestic concern” encompasses “any individual who is a citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd-2(h) (2012).

other than an issuer . . . or a domestic concern” who acts corruptly “while in the territory of the United States.”<sup>13</sup> Because corporate bribery had often been covered up by the distortion of corporate books and records, drafters of the FCPA hoped that taken together, prohibition of bribery combined with the accounting requirements would effectively deter bribery of foreign government officials.<sup>14</sup>

#### A. MANDATES OF THE FCPA

The FCPA prohibits corporations and individuals from bribing a foreign official.<sup>15</sup> Specifically, the FCPA prohibits individuals and companies from exchanging anything of value with foreign officials to corruptly influence their actions for any improper advantage.<sup>16</sup> The FCPA also forbids companies from knowingly engaging in such conduct through a third party, such as a law firm, consultant, contractor, or other business affiliates.<sup>17</sup> Therefore, an individual or corporation under the coverage of the FCPA cannot use third parties to indirectly bribe foreign officials. Congress further provided that unless a covered subject actually believed that corrupt payments were not being made, awareness of a “high probability” that payments were being made would also be sufficient to meet the knowledge element.<sup>18</sup> Congress specifically included this broad definition of knowledge to combat the “head in the sand” defense, where corporations would avoid finding out for

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13. 15 U.S.C. § 78dd-3 (2012). The term “person,” includes “any natural person other than a national of the United States (as defined in [8 U.S.C. § 1101]) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.” 15 U.S.C. § 78dd-3(f) (2012).

14. See S. Rep. No. 95-114, *supra* note 1, at 3.

15. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

16. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

17. 15 U.S.C. §§ 78dd-1a(3) (2012); see H.R. Rep. No. 100-576, at 919 (1988) (“In provisions concerned with the requisite states of mind applicable to offenses known as ‘third party bribery’ (the furnishing of money or any other ‘thing of value’ by an agent for the purpose of bribing foreign officials). . . . [t]he [House and Senate] compromise bill adopts a modified version of the House bill regarding these provisions and encompasses the concepts of ‘conscious disregard’ or ‘willful blindness.’ The Conferees intend that the requisite ‘state of mind’ for this category of offense include a ‘conscious purpose to avoid learning the truth.’”) (internal citations omitted).

18. See U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & SEC. AND EXCH. COMM’N, ENF’T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 22 (Nov. 14, 2012), <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [<https://perma.cc/WW3W-AYXA>] [hereinafter FCPA RESOURCE GUIDE].

sure whether corruption was occurring in order provide a defense if the payments were discovered.<sup>19</sup> Under the FCPA, subjects are liable for their willful blindness towards corrupt payments.<sup>20</sup>

## B. AMENDMENTS AND EXCEPTIONS

Since the passage of the FCPA, there has been criticism by some U.S. businesses that instead of rooting out corruption, the FCPA has placed U.S. businesses at a distinct comparative disadvantage in the global marketplace.<sup>21</sup> Even in the 1980s, just a short time after the passage of the law, members of the business community testified at congressional hearings that the FCPA's standards were hurting American businesses abroad.<sup>22</sup> Some U.S. businesses have questioned whether the FCPA is an effective bribery deterrent in a world where many countries treat giving bribes as a widely-accepted behavior.<sup>23</sup> Some have asserted that what constitutes a bribe depends on the country and context, and for the U.S. government to attempt to apply America's definition of what constitutes acceptable business behavior makes little sense in the world where no single standard effectively applies.<sup>24</sup>

Congress amended the FCPA in 1988 to respond to some of these criticisms. For example, the amendments added an affirmative defense if a payment to a foreign official was lawful under the laws and regulations of that foreign official's country.<sup>25</sup> Another added an affirmative defense if a payment was made as

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19. *Id.*

20. *Id.*

21. Daniel Wagner & Dante Disparte, *Walmart, the FCPA, and America's Ability to Compete*, HUFFINGTON POST (Apr. 29, 2012), [http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer\\_b\\_1463292.html](http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer_b_1463292.html) [https://perma.cc/4ZBB-9YTT] ("While the act has been successful in helping to curb corruption and bribery, it has also served to place many U.S. businesses at a distinct comparative disadvantage in the global marketplace: the FCPA can make it more difficult for U.S. companies and individuals to be competitive internationally.").

22. See, e.g., *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the S. Comm. on Banking, Housing, & Urban Affairs*, 99th Cong. 1 (1986) (statement of Chairman John Heinz) ("Complaints from the American business community about the vague and confusing definitions and enforcement provisions in the FCPA have continued unabated since the FCPA became law in 1977. Billions of dollars of sales have been lost and continue to be lost because American businessmen have been convinced by their own Government that they should not aggressively pursue sales opportunities abroad.").

23. Wagner & Disparte, *supra* note 21.

24. *Id.*

25. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2012).

part of a bona fide business expenditure to a foreign official directly related to the promotion, demonstration, or explanation of products or services or performing a contractual obligation.<sup>26</sup> The statute and congressional documents also clarified that the FCPA was not intended to cover “facilitating” or “expediting” payments, such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.<sup>27</sup> As such, payments to those employees of a foreign government whose duties are merely “ministerial” or “clerical” were explicitly excluded from the FCPA.<sup>28</sup>

To help combat uncertainty in the application of the FCPA, which previously required covered subjects to make a difficult choice between either scaling back their operations abroad or running the risk of being held to have violated the FCPA, the amendments added a procedure to allow “issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective . . . conduct conforms with the Department’s present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act.”<sup>29</sup> Under the current formulation of the law, the DOJ must respond within thirty days as to whether the relevant conduct would violate the FCPA, and companies can rely on a written FCPA Opinion letter if it is signed by the Attorney General or his or her designee.<sup>30</sup>

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26. *Id.*

27. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2012).

28. FCPA Resource Guide, *supra* note 18, 111, n.159; *see also* United States v. Kay, 359 F.3d 738, 750–51 (5th Cir. 2004) (internal citations omitted) (“Routine governmental action, for instance, includes ‘obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country,’ and ‘scheduling inspections associated with contract performance or inspections related to transit of goods across country.’ Therefore, routine governmental action . . . [includes only] very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”).

29. *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.1, 80.9 (2015).

30. *Id.* § 80.8.

## III. RECENT TRENDS IN ENFORCEMENT

While the FCPA was passed in 1977 and amended in 1988, the DOJ and SEC combined brought just a few cases per year from 1977 until the early 2000s.<sup>31</sup> Over the past decade, however, the DOJ and SEC have become increasingly active in enforcing the FCPA.<sup>32</sup> There have been several theories as to why this increase in enforcement occurred. A cynical view postures that the government discovered revenue-generating streams in the form of fines, penalties, and profit disgorgement from FCPA criminal and civil enforcement actions.<sup>33</sup> Another theory notes that it was the events of 9/11 that changed the government's perception of corruption.<sup>34</sup> Specifically, commentaries suggest that Richard Casin, author of an FCPA blog, posits that the increase in FCPA enforcement had to do with the events of 9/11, namely how investigations pertaining to 9/11 demonstrated that corruption can "lead to leaky borders, problems with passport control, immigration issues and corrupt influences which allow foreign governments to release information that it would normally keep reserved."<sup>35</sup> These and other factors could have prompted then President George W. Bush to "ramp up enforcement efforts against corruption based on national security concerns" that have

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31. See Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) ("Between 1978 and 2000, the SEC and the DOJ together averaged only about three FCPA-related prosecutions a year.").

32. See, e.g., Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/business/25bae.html> [<https://perma.cc/63YK-8VTV>] ("Passed by Congress three decades ago in the wake of Watergate, it is only in the last five years that the F.C.P.A. has become a powerful tool for prosecuting domestic and overseas companies suspected of bribing foreign officials to secure business."); Linda Chatman Thomsen, Dir., Div. of Enft, U.S. Sec. & Exch. Comm'n, Remarks Before the Minority Corporate Counsel at the 2008 CLE Expo (Mar. 27, 2008), <http://www.sec.gov/news/speech/2008/spch032708lct.htm> [<https://perma.cc/VPL5-WA7C>] ("Since January 2006, the Commission has filed more than 30 FCPA actions, which is more than were filed during the prior 28 years combined."); see Lanny Breuer, Ass't Atty Gen., Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html> [<https://perma.cc/R3X5-5LGT>] ("FCPA enforcement is stronger than it's ever been — and getting stronger.").

33. Thomas R. Fox, *FCPA Enforcement: Why the Increase between the First 25 Years and the Last 5?* FCPA COMPLIANCE & ETHICS (Mar. 11, 2011), <http://fcpacompliancereport.com/2011/03/fcpa-enforcement-why-the-increase-between-the-first-25-years-and-the-last-5> [<https://perma.cc/P2E6-LWT9>].

34. *Id.*

35. *Id.*

continued through today.<sup>36</sup> Regardless of the potential reasons, as then Assistant Attorney General Lanny Breuer said at the 24th National Conference on the Foreign Corrupt Practice Act in 2010, one thing is for certain: with a new era of FCPA enforcement and an increase in the number of prosecutors in DOJ's FCPA Unit, aggressive FCPA enforcement is here to stay.<sup>37</sup>

#### A. FROM DORMANT TO AGGRESSIVE ENFORCEMENT OF THE FCPA

The DOJ and SEC are jointly responsible for enforcing the FCPA.<sup>38</sup> Since 2007, the U.S. government, through the DOJ and the SEC, has commenced a total of almost 300 enforcement actions with 74 FCPA investigations commenced in 2010 alone.<sup>39</sup> Along with the active enforcement of the FCPA, the size of the penalties imposed on responsible parties has tended to increase as well.<sup>40</sup>

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36. *Id.*

37. See Breuer, *supra* note 32 (“As our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we are here to stay.”).

38. U.S. SEC. AND EXCH. COMM'N, SPOTLIGHT ON THE FOREIGN CORRUPT PRACTICE ACT (2014), <https://www.sec.gov/spotlight/fcpa.shtml> [<https://perma.cc/YG4H-EXNT>].

39. GIBSON, DUNN & CRUTCHER LLP, 2014 MID-YEAR FCPA UPDATE 2 (July 7, 2014), <http://www.gibsondunn.com/publications/Pages/2014-Mid-Year-FCPA-Update.aspx> [<https://perma.cc/GMB3-UTGA>].

40. Richard Cassin, *The 2015 FCPA Enforcement Index*, FCPA BLOG (Jan. 4, 2016, 7:28 AM), <http://www.fcpablog.com/blog/2016/1/4/the-2015-fcpa-enforcement-index.html> [<https://perma.cc/NN8Y-KNUN>]. For general guidance on fines related to corporate conduct, see U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. Sentencing Comm'n 2015), <http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8> [<https://perma.cc/YA84-ACW4>] (“Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”).



FCPA Penalties By Year <sup>41</sup>		
Year	Number of Companies Fined	Total Penalties
2009	11	\$644 million
2010	23	\$1.8 billion
2011	15	\$508.6 million
2012	12	\$259.4 million
2013	12	\$731.1 million
2014	10	\$1.56 billion
2015	11	\$133 million

For each violation of the anti-bribery provisions, the FCPA provides that corporations are subject to a fine of up to two million dollars, while individuals are subject to a fine of up to \$100,000 and imprisonment for up to five years.<sup>42</sup> For each violation of the accounting provisions, the FCPA provides that corporations are subject to a fine of up to twenty-five million dollars, and individuals are subject to a fine of up to five million dollars and imprisonment for up to twenty years.<sup>43</sup> The larger fines in the history of FCPA enforcement were all assessed since 2008 with the largest fine topping \$800 million in total.<sup>44</sup> DOJ officials in 2009 claimed that the enforcement of FCPA is second only to fighting terrorism in its priorities.<sup>45</sup> Indeed, there has emerged a global consensus on the importance of combating corruption that has spearheaded the exponential increase in the number of FCPA enforcement actions in the last decade.<sup>46</sup>

41. Cassin, *supra* note 40.

42. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c) (2012).

43. 15 U.S.C. § 78ff(a) (2012).

44. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Jan. 6, 2014), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> [<http://perma.cc/PPU4-AXY4>].

45. Don Lee, *Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China*, L.A. TIMES (Jan. 12, 2009), <http://articles.latimes.com/2009/jan/12/world/fg-avery12> [<https://perma.cc/XSL4-4FGE>] (“Justice Department officials say enforcement of the FCPA is second only to fighting terrorism in terms of priority.”).

46. Barack Obama, President of the U.S., Remarks at the Millennium Development Goals Summit (Sept. 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york> [<https://perma.cc/GA2Q-JZBU>] (“[W]e are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights.”).

## B. THE LAST THREE YEARS (2013, 2014, 2015) IN REVIEW

In 2013, there were significant developments in the enforcement of the FCPA. Just to name a few, Walmart was under investigation for allegedly paying bribes in Mexico, Brazil, India, and China for covering up prior allegations of corrupt activity.<sup>47</sup> Avon Products, the cosmetic company, negotiated a settlement with U.S. authorities over its marketing practices in China.<sup>48</sup> Several Hollywood studios' interactions with Chinese filmmaking and distribution agencies controlled by the Chinese government were under SEC investigation.<sup>49</sup> The U.S. government collected roughly \$720 million in FCPA penalties from corporations in 2013.<sup>50</sup> This equates to an average of \$80 million per corporation, with an exceptionally large spectrum of fines ranging from \$1.6 million (Ralph Lauren Corporation) to \$152.79 million (Weatherford) to \$398.2 million (Total S.A.).<sup>51</sup>

In 2014, the government collected the second largest fine total on record — \$1.566 billion dollars from ten corporate enforcement actions.<sup>52</sup> The average corporate fine and penalty was \$156.6 million. By all measures, this was the highest average in history. The year 2014 saw an emphasis on prosecuting individuals for FCPA liability with fourteen such individuals charged in the year.<sup>53</sup> FCPA enforcement also saw significant increase in cross-border engagement between regulators from the United States and foreign regulatory bodies. Former Acting Assistant Attorney General Mythili Raman stated that U.S. regulators are cooperat-

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47. Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q) 15 (Sept. 5, 2013), <http://www.sec.gov/Archives/edgar/data/104169/000010416913000037/wmt7311310-q.htm> [<https://perma.cc/5JGC-3Z32>].

48. Richard L. Cassin, *Avon, Plaintiffs Ask Court to Approve \$62 million Civil Settlement*, FCPA BLOG (Aug. 19, 2015), <http://www.fcpablog.com/blog/2015/8/19/avon-plaintiffs-ask-court-to-approve-62-million-civil-settle.html> [<https://perma.cc/BR3U-SMBB>].

49. Michael Cieply, *Inquiry into China Film Trade Unnerves Hollywood*, N.Y. TIMES (Feb. 17, 2013), <http://www.nytimes.com/2013/02/18/business/sec-inquiry-into-china-film-trade-unnerves-hollywood.html?pagewanted=all&r=0> [<https://perma.cc/3WGC-CJXH>].

50. SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2 (Jan. 2014), <http://www.shearman.com/~media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf> [<https://perma.cc/4U5S-6CCY>].

51. *Id.* at 3.

52. SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 1 (Jan. 2015), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf> [<https://perma.cc/MU22-ZAWQ>].

53. *Id.*

ing with foreign law enforcement on foreign bribery cases closely.<sup>54</sup>

In 2015, eleven corporate enforcement actions with total sanctions of around \$133 million reflected a slowdown in corporate enforcement activity by the DOJ and SEC but increased enforcement against individual defendants.<sup>55</sup> Specifically, the \$133 million in corporate sanctions came from PBSJ Corp (\$3.4 million),<sup>56</sup> Goodyear Tire & Rubber Co. (\$16 million),<sup>57</sup> BHP Billiton (\$25 million),<sup>58</sup> IAP Worldwide Services (\$7.1 million),<sup>59</sup> Louis Berger International Inc. (\$17.1 million),<sup>60</sup> Mead Johnson (\$12 million),<sup>61</sup> BNY Mellon (\$14.8 million),<sup>62</sup> Hitachi Ltd. (\$19 million),<sup>63</sup> Hyperdynamics Corporation (\$75,000),<sup>64</sup> Bristol-Myers Squibb (\$14 million),<sup>65</sup> and ICBC Standard Bank (\$4.2 million).<sup>66</sup> The DOJ

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54. Acting Assistant Att’y Gen. Mythili Raman, Remarks at the Global Anti-Corruption Compliance Congress (Mar. 20, 2014), <http://www.justice.gov/opa/speech/acting-assistant-attorney-general-mythili-raman-speaks-global-anti-corruption-compliance> [<https://perma.cc/SG86-X4Z8>].

55. See Cassin, *supra* note 40.

56. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations (Jan. 22, 2015), <https://www.sec.gov/news/pressrelease/2015-13.html> [<http://perma.cc/S75G-RKTZ>].

57. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Goodyear With FCPA Violations (Feb. 24, 2015), <https://www.sec.gov/news/pressrelease/2015-38.html> [<https://perma.cc/35JU-9BMR>].

58. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges BHP Billiton With Violating FCPA at Olympic Games (May 20, 2015), <https://www.sec.gov/news/pressrelease/2015-93.html> [<https://perma.cc/5EFJ-34ZV>].

59. Press Release, Dep’t of Justice, IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation (June 16, 2015), <http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation> [<https://perma.cc/F5R8-8PQ7>].

60. Press Release, Dep’t of Justice, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), <http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges> [<https://perma.cc/4M9Z-XXBC>].

61. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Mead Johnson Nutrition With FCPA Violations (July 28, 2015), <https://www.sec.gov/news/pressrelease/2015-154.html> [<http://perma.cc/2SEQ-YMUT>].

62. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges BNY Mellon With FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html> [<http://perma.cc/J66M-92GR>].

63. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Hitachi With FCPA Violations (Sept. 28, 2015), <https://www.sec.gov/news/pressrelease/2015-212.html> [<https://perma.cc/ZW3Q-3MU2>].

64. Hyperdynamics Corp., Exchange Act Release No. 76006, File No. 3-16843, at 4 (Sept. 29, 2015), <https://www.sec.gov/litigation/admin/2015/34-76006.pdf> [<https://perma.cc/W92H-6NT2>].

65. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Bristol-Myers Squibb With FCPA Violations (Oct. 5, 2015), <https://www.sec.gov/news/pressrelease/2015-229.html> [<https://perma.cc/EH9X-PLXQ>].

took a backseat in its enforcement actions when compared with the SEC, indicating a greater interest in pursuing individual enforcement actions and apparently conserving its resources to focus on a set of large ongoing investigations.<sup>67</sup> On September 9, 2015, U.S. Deputy Attorney General Sally Yates issued a memorandum to all federal prosecutors announcing the importance of holding individual corporate officers accountable in investigations of corporate misconduct.<sup>68</sup> By requiring companies to provide the DOJ with all relevant facts relating to individuals involved in the corporate conduct and by concentrating criminal and civil investigations on individuals from the outset, the “Yates Memorandum,” as it has become known, demonstrated DOJ’s renewed focus on the pursuit of individual wrongdoers.<sup>69</sup>

Another interesting development in the DOJ’s FCPA enforcement has been the series of recent declinations by the Department. Declination refers to DOJ’s decision not to prosecute both individual and corporate entities based on the particular facts and circumstances of an investigation.<sup>70</sup> Most significant among these has been the DOJ’s public declination of the British Virgin Island oil and gas company, PetroTiger Ltd.<sup>71</sup> The DOJ’s declination of PetroTiger marks only the second time the government has publicly announced its decision not to prosecute a company for FCPA violations (the first being Morgan Stanley in 2012 after

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66. Press Release, U.S. Sec. & Exch. Comm’n, Standard Bank to Pay \$4.2 Million to Settle SEC Charges (Nov. 30, 2015), <https://www.sec.gov/news/pressrelease/2015-268.html> [<https://perma.cc/P6XQ-LKFB>].

67. Andrew Weissmann, Chief of DOJ’s Fraud Section, stated that “1 year isn’t long enough to tell the whole story” and that if “we just wait three months, it might be a very different picture.” In addition, Weissmann stated that the decline in corporate enforcement is also because DOJ is “prosecuting more individuals” and the “focus on individuals adds a lot of complexity to our investigations” and “on top of that, we have a very high number of open investigations.” *Weissmann on 2015 Slow-Down in DOJ FCPA Prosecutions: “Just Wait Three Months, It Might be a Very Different Picture,”* FCPA PROFESSOR (Jan. 28, 2016), <http://fcpaprofessor.com/weissmann-on-2015-slow-down-in-doj-fcpa-prosecutions-just-wait-three-months-it-might-be-a-very-different-picture/> [<https://perma.cc/E67Z-QQTF>].

68. Memorandum from Sally Quillian Yates on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download> [<https://perma.cc/WK52-Q4P9>] [hereinafter Yates Memo].

69. *Id.*

70. See FCPA RESOURCE GUIDE, *supra* note 18, at 77.

71. Richard Cassin, *PetroTiger joins Morgan Stanley with rare DOJ public declination*, FCPA BLOG (Jun. 16, 2015, 10:03 AM), <http://www.fcablog.com/blog/2015/6/16/petrotiger-joins-morgan-stanley-with-rare-doj-public-declina.html> [<https://perma.cc/DLF9-9AL8>].

the bank's former employee, Garth Peterson, pleaded guilty to violating the FCPA).<sup>72</sup>

### C. ASIA-PACIFIC ENFORCEMENT ACTIONS IN 2015

It is important to note that FCPA enforcement actions frequently have an Asia-Pacific connection. Take the most recent year for example: out of the corporate actions resolved in 2015, almost half had a significant Asia-Pacific connection.<sup>73</sup> For example, on May 20, 2015, Australia-based global resources companies BHP Billiton agreed to a cease and desist order with the SEC and paid a \$25 million settlement.<sup>74</sup> The settlement was based on charges that BHP invited 176 government officials, primarily from countries in Africa and Asia, to attend the 2008 Olympic Games, ultimately providing event tickets, luxury hotel accommodation, meals, offers of business-class airfare and other hospitality worth \$12,000–\$16,000 per package to 60 such officials and their guests.<sup>75</sup> On July 17, 2015, Louis Berger International Inc., a New Jersey-based construction management company, entered into a deferred prosecution agreement (DPA) with the DOJ under which it admitted to FCPA violations and agreed to a \$17.1 million criminal penalty.<sup>76</sup> The agreement resolved charges that Louis Berger paid \$3.9 million in bribes to foreign government officials in India, Indonesia, Vietnam and Kuwait to secure government construction management contracts between 1998 and 2010. On October 5, 2015, the SEC announced a \$14 million settlement with the New York-based pharmaceutical company Bristol-Myers Squibb.<sup>77</sup> The agreement charged that a Bristol-Myers Squibb joint venture in China had provided cash, jewelry, other gifts, meals, travel, entertainment and sponsorship

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72. *Id.*

73. Wendy Wysong, *The Top 10 Asia-Pacific FCPA Enforcement Actions of 2015*, CORP. COMPLIANCE INSIGHTS (Jan. 15, 2016), <http://corporatecomplianceinsights.com/the-top-10-asia-pacific-fcpa-enforcement-actions-of-2015> [<https://perma.cc/9Q7C-QLHW>].

74. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BHP Billiton With Violating FCPA at Olympic Games, *supra* note 58.

75. *Id.*

76. Press Release, Dep't of Justice, Louis Berger International Resolves Foreign Bribery Charges, *supra* note 60.

77. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bristol-Myers Squibb With FCPA Violations, *supra* note 65.

to state health care providers from 2009 to 2014 and inaccurately recorded the spending as legitimate business expenses.<sup>78</sup>

#### IV. THE FCPA AND THE CULTURAL IMPLICATIONS OF DOING BUSINESS IN CHINA

Given the importance of the Asia-Pacific connection to the various recent FCPA enforcement actions, this Part now focuses on the People's Republic of China (China), the world's most populous country with over 1.37 billion people.<sup>79</sup> China has emerged as a major global economic power and its rapid economic growth has led to a substantial increase in commercial ties with the United States.<sup>80</sup> A report from the Congressional Research Service noted that "total trade between the two countries grew from \$5 billion in 1980 to \$592 billion in 2014 and China is currently the United States' second-largest trading partner, its third-largest export market, and its largest source of imports."<sup>81</sup>

##### A. THE ECONOMIC BOOM, PRIVATIZATION, AND CULTURE OF GIFT-GIVING

With the economic rise of China, many U.S. companies have set up extensive business operations in China to take advantage of the booming Chinese market.<sup>82</sup> However, the influx of multinational companies and subsidiaries in China has posed a host of challenges and risks specific to the political and cultural norms of doing business in China. All Chinese companies were entirely owned by the government until 1949; China has subsequently allowed the proliferation of government-owned but quasi-private business entities called state-owned enterprises (SOEs) that continue to occupy a central role in the Chinese economy.<sup>83</sup> As multinational companies rush in to take advantage of China's eco-

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78. *Id.*

79. U.S. DEP'T OF COMMERCE, U.S. & WORLD POPULATION CLOCK, <http://www.census.gov/popclock> [<https://perma.cc/665E-DT9D>].

80. WAYNE M. MORRISON, CONG. RES. INITIATIVE, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 1 (Oct. 21, 2015), <https://www.fas.org/sgp/crs/row/RL33534.pdf> [<https://perma.cc/2JML-BE8A>].

81. *Id.*

82. *Id.*

83. Daniel Chow, *China under the Foreign Corrupt Practices Act*, 12 WIS. L. REV. 573, 580 (2012), <http://wisconsinlawreview.org/wp-content/uploads/2012/04/12-Chow.pdf> [<https://perma.cc/8MZU-NZDD>].

conomic growth, it is important to note that there is nothing inherently illegal in doing business with the Chinese government as long as one does not make corrupt payments to a Chinese government official. However, while in certain countries it would be easy for a company to determine whether a payment was made to a foreign government official or not, the analysis is more difficult in China. The proliferation of SOEs necessitates that the relevant inquiry entail whether SOEs can be considered as a part of the Chinese government.

China's special gift-giving culture also complicates the FCPA analysis. Indeed, China possesses an ancient culture steeped in Confucianism that places a premium on respect, relationships, and rituals, the purpose of which is to maintain harmony within one's family, friends, colleagues, and society at large.<sup>84</sup> Gifts play a key role in this as they show the demonstration of respect and commitment to relationships. Relationship in Chinese is translated as *guanxi*, and *guanxi* reflects both self-identity and social-identity.<sup>85</sup> There is no precise word in the English language that reflects the deeper and broader notion of relationship that *guanxi* connotes. Indeed, *guanxi* as a concept includes not only social interconnectedness of individuals and groups, but also other concepts like *bao* (报, reciprocal exchange), *renqing* (人情, human and emotional debt), and *mianzi* (面子, face).<sup>86</sup> The concept of *guanxi* a Chinese term for interpersonal relationships, is built upon the concept of favors and is frequently employed to circumvent the standard governmental processes to obtain quicker and more efficient results. Indeed, red packets of money are commonly given to officials in return for promises of superior treatment.<sup>87</sup> Unfortunately, while not every gift is a bribe, China's culture of gift-giving also paves the way for convenient occasions for bribery. As such, FCPA takes on an additional importance in China because of the sensitivity of allegations of government-related bribery and corruption.

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84. Sean Upton-Mclaughlin, *The Art of Giving Gifts in China*, CHINA CULTURE CORNER (Oct. 30, 2013), <http://chinaculturecorner.com/2013/10/30/giving-gifts-in-china> [https://perma.cc/P29W-YL3A].

85. Joel Lee & Teh Hwee Hwee, *An Asian Perspective on Mediation* 173 (2009).

86. *Id.* at 173–74.

87. Didi Kirsten Tatlow, *An Investor's Guide to Buying Influence in China*, N.Y. TIMES (Aug. 24, 2011), <http://www.nytimes.com/2011/08/25/world/asia/25iht-letter25.html> [https://perma.cc/7DG9-4LSH].

## B. FCPA ENFORCEMENTS IN CHINA

Recent FCPA enforcement efforts have focused on the conduct of multinational companies that conduct businesses in China. In 2010, the SEC filed a complaint against RAE Systems Inc. alleging that two joint venture entities in China violated the FCPA by furnishing luxury gifts such as jade jewelry, fur coats, and high-priced liquor to government officials in order to obtain or retain business.<sup>88</sup> In December 2014, Avon paid \$135 million to resolve FCPA charges alleging that its China subsidiary made \$8 million worth of payments in cash, gifts, travel, and entertainment to various Chinese officials in exchange for direct selling licenses in China.<sup>89</sup> In July 2015, Mead Johnson paid \$12 million to settle FCPA-related charges that its China unit paid \$2 million in bribes to healthcare professionals at state-owned hospitals.<sup>90</sup> These are just a few examples and, as of September 2015, China leads the countries report in that 29 ongoing and unresolved FCPA-related investigations involve conduct in China.<sup>91</sup> Given the high amount of FCPA-related activities in China, some have said that “China presently stands out as the most important and active jurisdiction” among the anti-corruption developments in Asia.<sup>92</sup>

## C. THE SONS AND DAUGHTERS (SND) PROGRAM

Among one of the most active FCPA matters investigated by U.S. federal prosecutors, the J.P. Morgan (JPM) investigation has looked to whether JPM has hired children of Chinese officials and executives in violation of the FCPA. Specifically, the DOJ and the SEC opened a bribery investigation into JPM’s hiring practic-

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88. Complaint at 8, *SEC v. Rae Systems Inc.*, No. 1:10-cv-02093 (D.D.C. Dec. 10, 2010), <https://www.sec.gov/litigation/complaints/2010/comp21770.pdf> [<https://perma.cc/6GSP-BN3R>].

89. Information at 8, *United States v. Avon Products, Inc.*, No. 14-cr-828 (S.D.N.Y. Dec. 17, 2014), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/12/30/avon-information-file-stamped.pdf> [<https://perma.cc/H796-DTPM>].

90. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Mead Johnson Nutrition With FCPA Violations, *supra* note 61.

91. Richard Cassin, *Country Count for the Corporate Investigations List*, FCPA BLOG (Oct. 7, 2015, 9:18 AM), <http://www.fcpablog.com/blog/2015/10/7/country-count-for-the-corporate-investigations-list-october.html> [<https://perma.cc/3TFV-G8LK>].

92. Yin Wilczek, *Anti-Bribery Trends in 2015 to Include Continuing SEC Aggressiveness*, *Panelists Say*, BLOOMBERG BNA (Jan. 15, 2015), <http://www.bna.com/2015-antibribery-trends-n17179922157> [<https://perma.cc/7VAF-VLAB>].



es in China where the bank allegedly gave jobs to the children of Chinese officials and executives in return for profitable investment-banking assignments the Chinese government officials could offer to the bank.<sup>93</sup> Such recruitment of the children of powerful Chinese officials and executives was allegedly linked to winning initial-public-offering mandates, a particularly lucrative investment banking activity.<sup>94</sup> Under the SND program, which allegedly ran from 2004 to 2013, JPM took referrals from a broad spectrum of China's business and political elite, including senior executives of major SOEs who then allegedly awarded public offering assignments to the bank.<sup>95</sup> The investigative focus on JPM's hiring practices was catalyzed by reports of hires that could have helped JPM win investment-banking deals with state-controlled financial firm China Everbright Group and state-controlled China Railway Group.<sup>96</sup>

As discussed in Part II, the FCPA prohibits individuals and companies from (i) offering a corrupt payment or committing any act in furtherance of a corrupt payment to (ii) a foreign government official, political party, or candidate, (iii) to influence their official actions or to induce such officials to use their influences to help the company maintain or obtain business.<sup>97</sup> Hiring sons and daughters of Chinese officials presents a particular risk to U.S. businesses under the FCPA. While these descendants of prominent Chinese executives are not generally foreign officials as that term is defined in the FCPA, doing business with these sons and daughters could lead to FCPA violations because of the relationship between the descendants and their families.<sup>98</sup> The Note ex-

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93. See Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES (Aug. 18, 2013), <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny> [<http://perma.cc/3LN9-ZKSF>].

94. Emily Glazer, Michael Rothfeld, & Christopher Matthew, *Two J.P. Morgan Executives Connected to Asia Hiring Probe Pushed Out*, WALL ST. J. (Feb. 12, 2015), <http://www.wsj.com/articles/two-j-p-morgan-executives-connected-to-asia-hiring-probe-pushed-out-1423788737> [<https://perma.cc/7ZH4-TC2G>].

95. Ned Levin, *J.P. Morgan Hired Friends, Family of Leaders at 75% of Major Chinese Firms It Took Public in Hong Kong*, WALL ST. J. (Nov. 30, 2015), <http://www.wsj.com/articles/j-p-morgan-hires-were-referred-by-china-ipo-clients-1448910715> [<https://perma.cc/QF9W-DA5A>].

96. Cynthia Koons, *J.P. Morgan Looks into Its Hiring Practices in Asia*, WALL ST. J. (Aug. 29, 2013), <http://www.wsj.com/news/articles/SB10001424127887324009304579042432300112344> [<https://perma.cc/2LP9-AF2T>].

97. See 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012).

98. Patience Wheatcroft, *Firms Must Watch for Pitfalls in China*, WALL ST. J. (Nov. 9, 2010), <http://www.wsj.com/articles/SB10001424052748703514904575602302759967126> [<http://perma.cc/T35R-949D>].

amines in turn three relevant questions related to SND program in the FCPA context.

## V. FCPA ISSUES AND THE SND

The three relevant questions with regards to the FCPA as applied to SND programs under the statutory language are: whether executives from state-owned enterprises can be considered “foreign officials,” whether the hiring of the descendants of these executives can be considered a “thing of value” conveyed to these executives, and whether the job offer was given to these descendants “corruptly.”

### A. FOREIGN OFFICIALS

#### 1. *Definitions*

The FCPA defines “foreign official” as:

Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>99</sup>

Much of the dispute centers on the relationship between SOEs and the Chinese government. The definition of the foreign official covers an individual of a “foreign government or . . . instrumentality thereof.”<sup>100</sup> Specifically, the key issue in China revolves around whether SOEs can be considered instrumentalities of the Chinese government, therefore making employees of SOEs foreign officials when FCPA enforcement is implicated.

#### 2. *Significance of SOEs and the FCPA in China*

China has a long tradition of creating SOEs that compete with foreign multinational companies and have thus dominated core sectors of the economy, such as oil and gas, banking and finance,

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99. 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2) (2012).

100. *Id.*

and telecommunications.<sup>101</sup> The Communist Party has pledged to strengthen the vitality of the SOEs at recent political events and gatherings, including the Third Plenum, a meeting of the Communist Party's Central Committee members in November of 2013.<sup>102</sup> With 145,000 SOEs making up a significant portion of China's economy, there often is a blurred line between public and private interests and domains.<sup>103</sup>

As such, the application of the "foreign official" element of the FCPA is more complicated due to the prominence of SOEs.<sup>104</sup> The inquiry into whether someone is a foreign official or not in China is more complicated because Chinese businesses are so intertwined with the Chinese government through the existence of SOEs. These SOEs are steeped deep in the Chinese economy and cover industries from mining, petroleum, medicine, transportation equipment, and manufacturing of food and beverages as well as the productions of textile, just to name a few.<sup>105</sup> There is no FCPA violation if no foreign officials are involved, but because of the pervasiveness of the SOEs, Chinese "foreign officials" are sometimes not individuals from the official Chinese government branches, but officials and executives at the SOEs. The DOJ has indicated that it believes that Chinese SOEs qualify as an instrumentality of the government and that employees of an SOE qualify as government officials.<sup>106</sup> Namely, the FCPA Resource Guide promulgated by the DOJ stated that the term "instrumentality" is broad and can include state-owned or state-controlled

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101. Chow, *supra* note 83, 581.

102. See Bob Davis & Brian Spegele, *State Companies Emerge as Winners Following Top China Meeting*, WALL ST. J. (Nov. 13, 2013), <http://www.wsj.com/articles/SB10001424052702303559504579195551704526972> [<https://perma.cc/9CQW-Q93P>]; see Mamta Badkar, *Here's Why Everyone Cares About China's '3rd Plenum' Meeting*, *Business Insider* (Nov. 6, 2013), <http://www.businessinsider.com/qa-what-is-chinas-3rd-plenum-2013-11> [<https://perma.cc/5ZWW-5VDA>] ("Third Plenums are seen as important because the First Plenum introduces the new leadership, the Second Plenum tends to be personnel- and Party construction-focused, while the third one is usually seen as the first plenary session at which the new leadership has basically consolidated power and can introduce a broader economic and political blueprint.")

103. Laurie Pearcey, *Long March to Reform: China's State-Owned Enterprises and the Leadership Transition*, CONVERSATION (Nov. 14, 2012), <http://theconversation.com/long-march-to-reform-chinas-state-owned-enterprises-and-the-leadership-transition-10669> [<https://perma.cc/DVW2-EM2C>].

104. See *State-Owned Enterprises in China: Reviewing the Evidence 5-6* (OECD Working Grp. on Privatization & Corporate Governance of State Owned Assets) (Jan. 26, 2009), <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/42095493.pdf> [<https://perma.cc/76CY-RGJ9>].

105. *Id.* at 13-14.

106. FCPA RESOURCE GUIDE, *supra* note 18.

entities as many governments “operate through state-owned and state-controlled entities,” particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.<sup>107</sup> Recent caselaw confirms the DOJ’s position.

*a. United States v. Esquenazi: Clarifications on the Meaning of “Foreign Official”*

The Eleventh Circuit recently set forth in *United States v. Esquenazi* a test for evaluating when the executives and employees of a company owned or otherwise controlled by a government constitute “foreign officials” under the FCPA.<sup>108</sup> The defendants in *Esquenazi* were co-owners of Terra Telecommunications Corp., an American corporation, which purchased phone time from Telecommunications D’Haiti, S.A.M (Teleco), the monopoly phone company in Haiti, to resell to customers in the United States. The defendants arranged to make “side payments” to Teleco executives in order to reduce debts that Terra owed to Teleco. The United States alleged that Teleco was an instrumentality of the Haitian government, and therefore its executives were “foreign officials” as defined in the FCPA.

The court determined that whether a SOE can be considered an instrumentality of a foreign government needs to be answered on a case-by-case basis and the court developed the control and function tests that are intended to serve as “helpful” and “non-exhaustive” guidelines.<sup>109</sup> The two-prong control and function inquiry asks whether the entity was controlled by a foreign government and whether the entity performed a function the controlling government treats as its own.<sup>110</sup> Under the first prong, the court articulated that control is evaluated by considering (1) whether the entity has been formally designated as government-controlled; (2) whether the government has a majority ownership stake in the entity; (3) whether the government has the ability to select management; and (4) whether the government retains prof-

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107. *Id.* at 20.

108. *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 293 (2014).

109. *Id.* at 929 n.9.

110. *Id.* at 925.

its and covers shortfalls.<sup>111</sup> To determine whether a state-owned entity performs a function the controlling government treats as its own under the second prong, the court set forth a list of factors, including whether (1) the entity has a monopoly; (2) the government subsidizes the entity's operations; (3) services are provided by the entity to the public in the country of ownership; and (4) the public and the government of that foreign country generally perceive the entity to be performing a governmental function.<sup>112</sup>

On the facts of *Esquenazi*, the court held that Teleco was a government entity because the Haitian government owned majority interest of the company, provided the company with extensive tax advantages, appointed its Director General, and essentially gave Teleco monopoly power over telecommunication services.<sup>113</sup> Based on these facts, the Eleventh Circuit held that Teleco was an instrumentality controlled by the Haitian government, and therefore employees of Haiti Telco are "foreign officials" under the FCPA, and that the defendant's improper payments to Haiti Telco employees violated the FCPA.<sup>114</sup>

The *Esquenazi* court's interpretation of the FCPA suggests that business opportunities in countries with high government control like China and in sectors with substantial government involvement such as infrastructure, health care, telecommunication, transportation, and defense could create FCPA problems. Of course, not all SOEs are the same. Some SOEs in China have failed to comply with the central government's order to focus on what are deemed to be strategic sectors such as aviation, power and telecommunications and instead, have focused on running hotels, restaurants, and shopping malls — projects that have little to do with the country's economic or political priorities.<sup>115</sup> With these SOEs, the United States government would bear a greater burden to show that a particular entity is actually a Chinese instrumentality because of the potential difficulty of proving

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111. *Id.*

112. *Id.* at 926.

113. Stacey P. Slaughter & Jennifer Ciresi, *What is a Foreign Government Instrumentality? After the Esquenazi Decision?*, INSIDE COUNSEL (Sept. 22, 2014), <http://www.insidecounsel.com/2014/09/22/what-is-a-foreign-government-instrumentality-after> [https://perma.cc/GYU4-AQQR].

114. *Id.* at 932.

115. *Fixing China Inc.*, ECONOMIST (Aug. 30, 2014), <http://www.economist.com/news/china/21614240-reform-state-companies-back-agenda-fixing-china-inc> [https://perma.cc/CY6B-2VDD].

that the Chinese government controlled the SOE. However, given China's long tradition of creating SOEs that have dominated the core sectors of the economy, if the Chinese government has a majority ownership stake in the SOE and appoints some of the officials of the SOEs, it seems clearer that employees of that those SOEs would come under the purview of *Esquenazi*. Indeed, as the DOJ and the SEC stated in their FCPA Resource Guide, as a practical matter an entity is likely to qualify as an instrumentality of a government if the government owns or controls a majority of its shares.<sup>116</sup>

## B. ANYTHING OF VALUE

### 1. *Definitions*

The FCPA only prohibits U.S. companies from bribing foreign officials with “anything of value” for the purpose of obtaining or retaining business. “Anything of value” is not defined in the FCPA and, for this reason, liability could theoretically stem from the exchange of a single dollar.<sup>117</sup> In addition, the term “anything of value” has been broadly construed to include not only monetary payments but also gifts, entertainment, meals, transportation lodging, and a promise of future employment.<sup>118</sup> SEC Enforcement Director Andrew Ceresney has showcased the many forms that bribery can take by citing successful FCPA actions involving donating to charities headed by foreign officials, providing jobs to foreign officials' family members, and paying for the honeymoon of a foreign official's daughter.<sup>119</sup>

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116. FCPA RESOURCE GUIDE, *supra* note 18, at 21.

117. *See* SEC v. Dow Chemical Co., No. 3-12567, at 4 (D.D.C. 2007) (the government pursued Dow Chemical where many of the individual payments amounted to less than \$100 each).

118. *See, e.g.*, United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991) (regarding airline tickets); Opinion Procedure Release on the FCPA (Mar. 29, 2000), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0001.pdf> [<https://perma.cc/NEY2-EQDP>] (regarding insurance benefits and promise of future employment).

119. Yin Wilczek, *SEC Probing Less Traditional Forms of Bribery*, BLOOMBERG BNA (Dec. 1, 2014), <http://www.bna.com/sec-probing-less-n17179917708> [<https://perma.cc/3QEM-S3LZ>].

## 2. *Enforcement Actions with Regards to Things of Value*

### a. *Enforcement Actions Related to Donations to Charitable Foundations*

As far back as 2004, government lawyers espoused a broad interpretation of “anything of value” in their enforcement of the FCPA. In a case against Schering-Plough Corporation, the SEC alleged that Schering-Plough’s Polish subsidiary improperly paid out donations to a Polish charitable foundation to restore historical sites in Poland.<sup>120</sup> The founder of the charitable organization was also the director of a government health fund which provided money for the purchase of pharmaceutical products by hospitals.<sup>121</sup> The SEC found that Schering-Plough’s subsidiary’s payments to the charity coincided with the company’s sale of two oncology products within the director’s region.<sup>122</sup> In addition, Schering-Plough’s sales in the region rose at an uncommon rate as their donations to the charity increased.<sup>123</sup> The company eventually settled with the SEC, and the case is important because there was no indication that any tangible monetary benefits were exchanged between the company and the Polish foreign official.<sup>124</sup> As far as the SEC’s interpretation goes, donations to a charity that provided the foreign official with an intangible benefit were now included in the scope of “anything of value.”

### b. *Enforcement Actions Related to Sham Jobs*

The DOJ and SEC have also stated that the offering of fake employment opportunities to relatives of foreign officials is considered passing along “things of value” to foreign officials.<sup>125</sup> In *United States v. DaimlerChrysler China, Ltd.*, DaimlerChrysler China Ltd. (Daimler) employed relatives of Chinese government

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120. *Id.*

121. *See* Schering-Plough Corp., Exchange Act Release No. 49,838 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm> [<https://perma.cc/WXC2-4Z3>] (explaining that while the Schering-Plough matter involved violations of the FCPA’s Books and Records and Internal Control provisions only, it is commonly viewed as broadening the “anything of value” element of an FCDA Anti-Bribery violation).

122. *Id.*

123. *Id.*

124. *A Double Standard Part III*, FCPA PROFESSOR (Sept. 30, 2010), <http://www.fcpaprofessor.com/category/schering-plough> [<https://perma.cc/7AB4-JBVL>].

125. SHEARMAN & STERLING, LLP, *supra* note 52, at xv.

officials in order to secure business from state-owned companies.<sup>126</sup> In that case, Daimler made total commission payments for market research to the German bank account of the son of an official at the SOE and paid the wife of a Chinese government official employed at another state-owned company for her sham consulting services.<sup>127</sup> Daimler eventually paid \$185 million in penalties to settle the allegations that it employed relatives of Chinese government officials and made sham commissions to these relatives of SOE executives.<sup>128</sup>

In *United States v. Siemens Bangladesh Ltd.*, the charges likewise contained allegations of illicit payments to the relatives of foreign officials based on sham employment positions.<sup>129</sup> Specifically, Siemens made several bids for a contract that was part of a project being undertaken by the Bangladesh Telegraph Telephone Board (BTTB), a government-owned telecommunications regulatory entity. Around April 2003, when the contract still had not been awarded, Siemens seemingly employed the daughter of a BTTB official and paid her \$5000 to work as an engineer, irrespective of the fact that the project did not call for an engineer and that Siemens did not have the budget for the position.<sup>130</sup>

In *SEC v. Tyson Foods, Inc.*, the SEC alleged that the defendant's Mexican subsidiary made improper payments to two Mexican government veterinarians who were responsible for certifying Tyson Food's chicken products for export.<sup>131</sup> The Mexican subsidiary initially concealed those payments by putting the wives of the veterinarians on its payroll, individuals who performed no services whatsoever for the company. The positions in these cases were phony, no work was ever performed, and the illicit purposes of the employment relationships were transparent.

More critically, in November 2013, Weatherford International agreed to pay \$152.6 million to the DOJ and the SEC for FCPA offenses in the Middle East and Africa and violation of the Iraq oil-for-food program occurring from 2000 to 2011.<sup>132</sup> The SEC

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126. Joel M. Cohen & Matthew W. Knox, *Friendly Relations? When Nepotism May Violate the FCPA*, 1 FCPA REPORT 10 (Oct. 17, 2012), <http://www.gibsondunn.com/publications/Documents/CohenKnox-Nepotism.pdf> [<https://perma.cc/9TK6-GQTU>].

127. *Id.*

128. Cohen & Knox, *supra* note 126.

129. *Id.*

130. *Id.*

131. *Id.*

132. Press Release, U.S. Dep't of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26,



and DOJ charged that Weatherford International provided improper travel and entertainment to officials of Sonatrach, an Algerian state-owned company, that were not justified by a legitimate business purpose. Importantly, the improper payments included covering the expenses of a July 2006 honeymoon trip of the daughter of a Sonatrach official.<sup>133</sup> The inclusion of this honeymoon trip as a part of the corrupt payment scheme is important because payment was for the benefit of the official's relative as opposed to the official directly.

The cases described above are instructive in showing that the government can use allegations concerning sham positions, consulting agreements, and benefits to the relatives of an official to support a FCPA enforcement action. Given these prior cases, one can argue that JPM, by offering jobs to descendants of influential officials and executives in China through the SND program, provided things of value to the official. However, while sham jobs can serve as the basis of a FCPA enforcement action, what happens when a real job is involved and a person is hired to do a particular job but does not do the actual work efficiently? One can argue that hiring the sons and daughters of Chinese executives was a business judgment independent from the descendants' relationships with their parents. Indeed, hiring of the sons and daughters of Chinese executives becomes an even thornier problem when the descendant is well-educated and qualified for the job.

### C. CORRUPT INTENT

#### 1. *General Landscape*

Based on the current caselaw, an executive of a SOE is considered a government official if the SOE is controlled by a foreign government and performs a function the controlling government treats as its own.<sup>134</sup> Past enforcement actions and settlements

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2013), <http://www.justice.gov/opa/pr/three-subsiaries-weatherford-international-limited-agree-plead-guilty-fcpa-and-export> [<https://perma.cc/4AMP-EYNA>].

133. Sean Hecker, Andrew Levine, & Philip Rohlik, *Weatherford International Enters the FCPA Top Ten List With \$152.5 Million in Fines and Penalties*, LEXOLOGY (Dec. 18, 2013), <http://www.lexology.com/library/detail.aspx?g=39948872-130c-4cb1-a56b-b32bc576bfdd> [<https://perma.cc/YKX3-YL4U>].

134. *See supra* Part V.A.

suggest that sham jobs can be the basis for FCPA prosecutions.<sup>135</sup> However, given that SND offered paid jobs to descendants of executives of SOEs, the critical distinction between an illegal and legal hire seems to be whether the jobs were offered with a corrupt intent. News reports have stated that U.S. government officials, presumably the federal prosecutors, have told JPM and other banks under investigation for these questionable hires that hiring someone with the intent of winning business is a legal violation even without an explicit quid pro quo.<sup>136</sup> Banks under investigation, which now include Citigroup Inc., Credit Suisse Group AG, Deutsche Bank AG, Goldman Sachs Group Inc., Morgan Stanley, and UBS AG, dispute this and say that FCPA only prohibits the hiring of descendants where the hiring was done solely to win specific deals from the companies these descendants' parents' control.<sup>137</sup> If the banks are correct, government officials would have to point to deals that were directly linked to the hires.

## 2. *What is Corrupt Intent?*

The element of “corrupt” intent requires the government to prove that the defendant intended “to induce the [foreign official] recipient to misuse his official position; for example, wrongfully to direct business . . . , or to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.”<sup>138</sup> There are three possible interpretations of corrupt intent that then follow. The strictest would find corrupt intent only with a very specific kind of quid pro quo relationship where hires are directly linked to a particular contract. The most expansive would allow a finding of corrupt intent whenever a company makes a hire that could implicate the influence of those officials in the future as those opportunities arise. The middle ground would be that corrupt intent is found when a hire was made with a specific intent to influence an official in their official

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135. See *supra* Part V.B.

136. Jean Eaglesham, Emily Glazer, & Ned Levin, *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 19, 2015), <http://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863?mobile=y#livefyre-comment> [https://perma.cc/U6FC-L3XW].

137. Enda Curran & Jean Eaglesham, *Regulators Step Up Probe Into Bank Hiring Overseas*, WALL ST. J. (May 6, 2014), <http://www.wsj.com/news/articles/SB10001424052702303417104579546190553220338> [http://perma.cc/L3KG-N38E].

138. S. REP. NO. 95-114, *supra* note 1, at 10 (1977).

capacity, even without any specific contracts in mind at the moment of the hire.<sup>139</sup>

There is no direct caselaw on what factors courts should look to when deciding whether a hire is corrupt or not. However, a decade ago, the Supreme Court in *United States v. Sun-Diamond Growers of California* set out some guidance on the difference between relationship-building and corrupt intent. While *Sun-Diamond* involved an interpretation of the domestic anti-gratuity statute, it is nevertheless instructive in the FCPA context.<sup>140</sup> In *Sun-Diamond*, the Court held that, to prove a violation of the federal anti-gratuity statute, the government need not prove quid pro quo bribery but must prove more than that the defendant intended “to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.”<sup>141</sup> As such, it seems that some sort of quid pro quo arrangement — a quid pro quo lite arrangement where specific intent to give or receive something of value in exchange for an official act — must be proved before an individual can be convicted of bribery.<sup>142</sup>

### 3. *BNYM Settlement with Regards to Hiring Practices*

Perhaps the most telling example of how the DOJ and the banks will resolve the ongoing investigation of the SND program in China is the very recent Bank of New York Mellon (BNYM) consent to an SEC Order.<sup>143</sup> The SEC Order required BNYM to pay \$14.8 million to settle charges that it violated the FCPA by

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139. *Id.*

140. The gratuity statute in question provided: “Whoever otherwise than as provided by law for the proper discharge of official duty directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.” 18 U.S.C. § 201(c)(1)(A) (2012) (emphasis added).

141. *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398, 405–07, 414 (1998).

142. *Sun-Diamond Growers of California*, 526 U.S. at 404–05. A more detailed recitation of the quid pro quo lite doctrine is discussed in Bruce E. Yannett, Sean Hecker, Steven S. Michaels, & Noelle Duarte Grohmann, *Corrupt Intent, Relationship Building, and Quid Pro Quo Bribery: Recent Domestic Bribery Cases*, FCPA UPDATE (Sept. 2011), [http://www.debevoise.com/~media/files/insights/publications/2011/09/fcpa%20update/files/view%20the%20update/fileattachment/fcpa\\_update\\_sept\\_2011.pdf](http://www.debevoise.com/~media/files/insights/publications/2011/09/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_sept_2011.pdf) [https://perma.cc/5565-CBER].

143. Press Release, SEC Charges BNY Mellon With FCPA Violations (Aug. 28, 2015), <http://www.sec.gov/news/pressrelease/2015-170.html> [https://perma.cc/SDN2-YPT5].

providing student internships to family members of foreign government officials affiliated with a Middle Eastern Sovereign Wealth Fund (SWF).<sup>144</sup> Specifically, the internships were offered despite the fact that the interns did not meet the rigorous selection criteria usually applied by BNYM, did not go through the standard recruitment process before being awarded the internships, and were offered internships positions more valuable than those offered to the regular applicants involving business rotation opportunities denied to regular interns. Also important to this FCPA enforcement action was that the sovereign wealth fund officials made numerous follow-up requests about the status, timing, and other details of the internships for their relatives.<sup>145</sup> Last but not least, BNYM employees viewed the internships as important to keeping the sovereign wealth fund's business.<sup>146</sup>

## VI. IMPLICATIONS FOR SND

### A. LESSONS DRAWN FROM BNYM INVESTIGATION

The key lesson from the BNYM investigation and settlement in 2015 is that the combination of a bank hiring an unsuitable employee with that same bank winning a contract of other new business could provide the element of quid pro quo that the government would need to prove an FCPA violation took place. The circumstances in the BNYM case may be a good example of how the DOJ may approach its analysis with regards to the SND program.

The critical element that differentiates a legitimate hire not in violation of the FCPA from one that violates the statute seems to be the existence of corrupt intent. Perhaps the best guidance the DOJ has yet offered on this question is found in a Sept. 18, 2012, "Opinion Release" concerning the hiring of a member of a royal family as a consultant to a U.S. company doing business in that country.<sup>147</sup> The royal family member was hired to introduce the U.S. company to the foreign country's embassy, consult the company on cultural awareness issues in dealing with the country's

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144. *Id.*

145. *Id.*

146. *Id.*

147. Opinion Procedure Release on the FCPA (Sept. 18, 2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/09/27/1201.pdf> [https://perma.cc/7P4C-TY7C].

officials and businesses, and identify business opportunities in the country.<sup>148</sup>

The DOJ opined that “a person’s mere membership in the royal family of the foreign country, by itself, does not automatically qualify that person as a foreign official” but rather, the answer lies in a case-by-case determination that turns on a list of factors.<sup>149</sup> Combining the factors found in that opinion release with the recent BNYM settlement, the following is a list of six non-exhaustive factors that could be useful in distinguishing between relationship hires and corrupt hires:

1. An official family’s current and historical legal status and powers within a country’s government.
2. The individual’s position within the official’s family.
3. The mechanisms and the likelihood that the individual would come to hold or influence a government authority.
4. The vacancy of the position that the hire filled.
5. The selection criteria and standard recruitment process that were used for the hires.
6. The qualification of the hire for that position and the hire’s performance of the duties of the position for which he or she is hired.<sup>150</sup>

The first three factors focus on the probability and therefore the potential benefit of hiring a family member in helping a company gain business with a foreign official. As discussed previously, given China’s long tradition of creating SOEs that have dominated the core sectors of the economy, it is more often than not the case that the hire involving children of Chinese executives who hold sway of Chinese SOEs could come to influence govern-

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148. *Id.*

149. *Id.*

150. The DOJ opinion stated that “the Royal Family Member does not qualify as a foreign official . . . so long as the Royal Family Member does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family.” More importantly, DOJ stated that “a person’s mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a ‘foreign official.’” Rather, the answer lies in a case by case determination that turns on a list of factors. Opinion Procedure Release on the FCPA, *supra* note 147. See also Marcus Funk & Barak Cohen, *Clearing up the Murky Waters Surrounding Whether (and When) Aboriginal Community and Other Tribal Leaders Can Create FCPA Liability*, BLOOMBERG BNA (Nov. 14, 2014), <https://www.perkinscoie.com/images/content/1/1/v2/112861/BNAinsights.FunkCohen.pdf> [<https://perma.cc/4K87-YFZ4>].

mental relations. However, it is also just as likely to say that an individual, even proximate to the source of official governmental power through his or her affiliation, may not carry the interest, ambition, power, prestige, or authority to come to hold influence with that government executive or official.

The last three factors examine the hire through an objective point of view. Judging from the facts that the SEC cited to justify its enforcement action against BNYM, it would help if a bank under investigation can show that the hiring process of the son and daughter was within the normal Human Resources pathway that applied to all other hires. It would also help the bank if it can show that family members of officials were hired and evaluated using the same standards that would apply to other candidates. When presented with pressure from the government officials to hire their children, it would help if the bank can inform the regulators that the bank told the officials that such discussions were out of bounds. In short, facts that would help the bank would include proof that there was a vacant position to start with (as opposed to the company having created a new position for the official's relative), that the relative was qualified to fill it, and that the relative performed the duties of the position satisfactorily.<sup>151</sup> In short, this would present proof that the hires went through the standard recruitment process, met the rigorous selection criteria usually applied by BNYM, and were offered jobs no more valuable than those offered to other applicants.

#### B. A CASE STUDY INTO THE CORRUPT INTENT IN THE SND PROGRAM CONTEXT

While public information related to the JPM investigation is sparse, one may find the comparison between the example hires of Mr. X and Mr. Y instructive.<sup>152</sup> Suppose Mr. X is the son of one

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151. Joe Palazzolo, Christopher Matthew, & Serena Ng, *Nepotism: Is It a Crime?*, WALL ST. J. (Aug. 19, 2013), <http://www.wsj.com/news/articles/SB10001424127887323423804579023273864417160> [<https://perma.cc/28A2-BK8N>].

152. The fact patterns involving Mr. X and Mr. Y are based on the Wall Street Journal's reports of individuals who may be implicated in the investigation into the SND program at J.P. Morgan. For Mr. X or Mr. Gao, consult: Ned Levin, Emily Glazer, & Christopher M. Matthews, *In J.P. Morgan Emails, a Tale of China and Connections*, WALL ST. J. (Feb. 6, 2015), <http://www.wsj.com/articles/in-j-p-morgan-emails-a-tale-of-china-and-connections-1423241289> [<http://perma.cc/Y62T-69XU>]. For Mr. Y or Edmund Lee, see Dan Fitzpatrick, Enda Curran, & Justin Bae, *J.P. Morgan Emails Note Hire's Family Ties*,

of China's cabinet-level ministers. Mr. X went to an average university in the United States, did poorly on his job interviews at JPM, but was offered a position anyway.<sup>153</sup> During his tenure at JPM, Mr. X created numerous problems at work: he created an immigration problem with his work visa, accidentally sent a sexually explicit email to HR employees, and was often described by supervisors as immature, irresponsible and unreliable.<sup>154</sup> Yet, Mr. X was allowed to remain in employment. JPM not only hired him and retained him during a series of layoffs, but also offered him another position in the future. A manager from JPM accepted a meeting with Mr. X's father where the father, the minister, said he would be willing to go extra miles for the bank if it kept Mr. X on its payroll.<sup>155</sup>

Compare Mr. X's hire with JPM's hire of Mr. Y. Mr. Y was hired at a similar time as Mr. X, but at a more senior position when the former employee left for another job. Mr. Y is related to Singapore's current Prime Minister as well as the founding Prime Minister.<sup>156</sup> Before working for JPM, Mr. Y spent years as chief executive of a brokerage arm and part of Mr. Y's job at JPM involves management of JPM's relations with business, government and regulators in Singapore. While one may have doubts about Mr. X, Mr. Y's experience is likely to raise far fewer doubts from others about the propriety of his hire.

While these two examples are rather extreme, public information regarding ongoing investigations of JPM and other banks is hard to come by. There is a lot of grey area between these two extremes and a singular focus on the financial experience of the candidate may not be sufficient. More often than not, the scope of an investigation may focus on otherwise well-qualified individuals with less experience than Mr. Y but who perform the job more aptly than Mr. X. This is where banks ought to be most sensitive to potential FCPA violations. Frankly, it would be naïve to suggest that hiring a well-connected individual is not ever undertaken, at least in part, for the purpose of gaining access and hopefully business as a result of the connections the employee can bring

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WALL ST. J. (Dec. 8, 2013), <http://www.wsj.com/news/articles/SB10001424052702303560204579246674206332380> [<https://perma.cc/Z24Q-7Z77>].

153. Levin, Glazer, & Matthews, *supra* note 152.

154. *Id.*

155. *Id.*

156. Fitzpatrick, Curran, & Bae, *supra* note 152.

to the table. However, a simple illustration of the factors listed above demonstrates the importance of a bank's ability to explain its employment decision on objective factors, such as the relative's qualifications, experience, and past performance. Where a bank is capable of doing so, the government may decline to bring an enforcement action, because the requisite corrupt scienter for a violation of the FCPA would not be present.<sup>157</sup>

### C. FUTURE GUIDANCE FROM THE DOJ AND SEC AND COMPLIANCE MEASURES

The DOJ and the SEC would better serve their goals of prohibiting foreign bribery if they provided more explicit guidance on the specific factors they use to determine the scope of the FCPA when it applies to hiring practices. One possible explanation for why there is so much uncertainty in the enforcement of FCPA is that the ambiguity perhaps serves the purpose of aggressive enforcement by the government. This ambiguity gives the government the flexibility to launch investigations even where the circumstances and evidence in a situation do not exactly align with previous caselaw and enforcement patterns. There is, however, hope for clarification. Andrew Weismann, the Chief of the DOJ's Fraud Section, recently mentioned that regulators are looking into updating the existing FCPA guidance in order to outline new issues that federal prosecutors have encountered in the last few years.<sup>158</sup>

Until the DOJ and SEC provide more specific guidance, companies should exercise a high degree of diligence so as not to involve themselves in an FCPA investigation. *It helps to have* specific policies and procedures in place that cover the hiring of customers and relatives of customers, including foreign officials. Human resources personnel and others should be trained to spot and flag potentially problematic hires. It is also important that lawyers and compliance officers not be left out, as was the case when BNYM awarded internships to the children of government officials. It is critical to have the company's anti-bribery compliance personnel review the file of the potential hire to determine

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157. Cohen & Knox, *supra* note 126.

158. Enforcement Agency Speeches, FCPA PROFESSOR (Jan. 28, 2016), <http://www.fcpaprofessor.com/category/enforcement-agency-speeches> [<http://perma.cc/AGT2-6BAV>].



whether the hire appears justifiable or appears to be a quid pro quo that would cause concerns down the road. If possible, before the hiring offer is final, the company ought to obtain in writing a comprehensive FCPA representation from the potential hire that discloses his or her relationship to foreign officials and disavow any future payment of anything of value on behalf of the company to any foreign officials in that foreign country for the purpose of influencing the official's actions.<sup>159</sup> Indeed, robust FCPA compliance programs that help detect potential problems at multinational banks that conduct business in China will take on added importance given the unique FCPA challenges of doing business in that country.

## VII. CONCLUSION

The FCPA prohibits covered entities from providing, with corrupt intent, anything of value to a foreign official to obtain or retain a business advantage. FCPA compliance in China is a challenge for companies not only because of the high number of individuals in China who could be considered foreign officials, but also because companies can trigger FCPA liability by offering anything of value such as gifts, scholarships, or employment to people affiliated with those who are foreign officials.

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159. DOJ opinion releases shed some light on the steps a domestic concern should take if it wishes to employ the relative of a foreign official. DOJ Opinion Procedure Release No. 84-01 is particularly instructive in this context. There, an American firm sought to engage as its marketing representative in a foreign country an entity whose principals were related to that country's head of state. Central to DOJ's decision to not prosecute appears to have been several representations the requesting firm and the in-country marketing representative made with respect to their employment relationship. These representations were part of the contract between the parties and included, among others, representations that: the marketing representative would not pay or agree to pay, directly or indirectly anything of value, on behalf of the American firm, to any public official in the foreign country for the purpose of influencing the official's official acts, or to induce the official to use his influence to the marketing representative's benefit; no owner, partner, officer, director, or employee was or would become an official of the foreign government during the term of the agreement; the marketing representative would be solely responsible for all of its costs and expenses incurred in connection with its representation of the American firm; the marketing representative would have no right to assign any portion of its rights under the agreement to any third party without the prior written consent of the American firm; and the marketing representative would make, when required, full disclosure of its identity to the United States government and the foreign government and the amount of commission applicable to a specific contract. Opinion Procedure Release on the FCPA (Aug. 16, 1984), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/r8401.pdf> [<https://perma.cc/2QSC-ZTV2>].

The current investigation into the SND hiring program presents a grey area that does not fit neatly with the traditional enforcement of the FCPA. As mentioned above, the government should tread carefully the prosecution of hiring programs without sufficient and plausible evidence of corrupt intent. On one hand, there is the need to go after a wide range of corrupt conduct beyond simply the handing over a bundle of cash in red envelopes. On the other hand, an overreach approach that criminalizes relationship hires without regard for criminal intent would redefine bribery law by punishing firms for hiring qualified but well-connected people who are later linked to certain deals.

The FCPA language continues to raise tensions between U.S. prosecutors and multinational banks that conduct business in China.<sup>160</sup> Everyone can agree that corruption is a major problem that has devastating financial and human costs. Corruption undermines the global economy, threatens national security, and destroys livelihoods.<sup>161</sup> What is disputed however is the DOJ's aggressive enforcement of the FCPA around the world. In fact, because of the intense debate between the banks and the government regulators and prosecutors, JPM is preparing a white paper that sets out the bank's concerns about the government's aggressive approach.<sup>162</sup>

Increased FPCA enforcement should not have a chilling effect that discourages U.S. businesses from investing in foreign markets. Yet an overreach by the DOJ and SEC may produce just that unwanted adverse effect on U.S. relations overseas.<sup>163</sup> In-

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160. David Barboza & Sharon LaFraniere, *Princelings in China Use Family Ties to Gain Riches*, N.Y. TIMES (May 17, 2012), <http://www.nytimes.com/2012/05/18/world/asia/china-princelings-using-family-ties-to-gain-riches.html?pagewanted=all> [<http://perma.cc/XV6M-RSVA>].

161. The World Bank estimates that about \$1 trillion is paid every year in bribes. Robert Palmer, *Lowering the Bar*, GLOBAL WITNESS (Feb. 1, 2016), <https://www.globalwitness.org/en/reports/loweringthebar> [<https://perma.cc/6HY9-YFQU>].

162. Jean Eaglesham, Emily Glazer, & Ned Levin, *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 29, 2015), <http://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863> [<https://perma.cc/4ZBS-G6E3>].

163. On February 21, 2012, the U.S. Chamber of Commerce published a letter that it sent along with thirty-three other business organizations to the DOJ, arguing that the result of the FCPA's current enforcement regime has "been a chilling effect on legitimate business activity (as companies perceive a real risk of prosecution even in scenarios involving only the most remote and attenuated connection to foreign governments) and a costly misallocation of compliance resources." Letter from U.S. Chamber of Commerce et al. to Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, and Robert Khuzami, Dir. of Enforcement, U.S. Sec. & Exch. Comm'n 2 (Feb. 21, 2012); see also Paul J. Beck, Michael W. Maher, & Adrian E. Tschoegl, *The Impact of the Foreign*

deed, fighting corruption is good, unless enforcement becomes so expansive as to impair or limit the ability of American businesses to compete overseas. For better or worse, some of the most educated and most qualified potential hires in many countries are the children of government officials — individuals who benefited from their parents' privileges and had the opportunity to attend prestigious schools, learn foreign languages, etc. In the absence of direct evidence of criminal intent, such as damaging emails, spreadsheets, or recordings, the government ought to work hard to find the presence of criminal intent before prosecuting or risk taking an approach that may lead to the criminalization of innocuous activities designed to help expand the U.S. economy.

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*Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON 295 (1991) (discussing a survey of American diplomatic posts in which twenty-one claimed that the FCPA acted as an “export disincentive” in their countries). N.Y.C. BAR ASSOCIATION, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS (Dec. 2011), <http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf> [https://perma.cc/2MSJ-V58B] (“[T]he current anti-bribery regime — which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a ‘lighter touch’ — is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets.”).