BNY MELLON AND *QUALCOMM*: A RECENT FOCUS ON IMPROPER HIRING PRACTICES IN VIOLATION OF THE FOREIGN CORRUPT PRACTICES ACT

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I. INTRODUCTION

In 2015 and 2016, two major cases were brought involving improper-hiring practices in violation of the Foreign Corrupt Practices Act (FCPA).[1] In August 2015, the U.S. Securities and Exchange Commission (SEC) brought *In re Bank of New York Mellon Corp.* (*BNY Mellon*), which involved a financial-services firm providing improper internships to family members of foreign government officials in the Middle East.[2] This case was the first FCPA action against a financial-services firm and the first FCPA action based entirely on improper hiring and internship practices.[3] In March 2016, the SEC then brought *In re*

1. *See* Qualcomm Inc., Exchange Act Release No. 77261, 2016 WL 792232, at *2 (Mar. 1, 2016) [hereinafter Qualcomm]; Bank of N.Y. Mellon Corp., Exchange Act Release No. 75720, 2015 WL 4911514, at *1 (Aug. 18, 2015) [hereinafter BNY Mellon]; *see also* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, -2, 78ff (2009)).

2. *See* BNY Mellon, 2015 WL 4911514, at *1; *see also* Michael J. de la Merced, *Bank of New York Mellon Settles Bribery Case over Interns*, N.Y. TIMES (Aug. 18, 2015) (citations omitted), www.nytimes.com/2015/08/19/business/dealbook/bank-of-new-york-mellon-settles-bribery-case-over-interns.html?_r=0 ("[T]hree interns at [BNY] Mellon who joined the firm in the summer of 2010 seemed unusual choices on paper. None met the financial giant's rigorous criteria, and none were hired through the usual internship programs. They gained their positions a different way, according to government regulators: Their relatives were high-ranking officials at a Middle Eastern sovereign wealth fund that was a client of the firm . . . . Handing out the three internships—to the son and the nephew of one official at the sovereign fund, and to the son of another official—to keep a hefty client mandate violated the [FCPA], according to the [SEC]."); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), http://www.sec.gov/news/pressrelease/2015-170.html ("BNY Mellon has agreed to pay $14.8 million to settle charges that it violated the [FCPA] . . . .").

3. *See* Daniel Huang & Emily Glazer, *Are Wall Street Interns the Latest Regulatory Target?* WALL ST. J. (Aug. 18, 2015, 4:15 PM), http://www.wsj.com/articles/bank-of-ny-mellon-to-pay-14-8-million-to-settle-fcpa-probe-1439915579 ("[BNY Mellon] agreed . . . to settle civil charges that it violated foreign-bribery laws . . . . The pact, in which the firm didn't admit or deny wrongdoing, is one of the first enforcement actions brought by the [SEC] against a financial institution under

Qualcomm Inc. (*Qualcomm*), which involved a company providing improper employment and internships to family members of foreign-government officials in China.[4] *BNY Mellon* and *Qualcomm* demonstrate how companies can run afoul of the FCPA when they hire relatives of foreign officials for the corrupt purposes of obtaining or retaining business.[5] These cases, and the public commentary they have generated, appear to signify continued involvement by regulators in pursuing violations under the FCPA for improper hiring practices.

The *BNY Mellon* and *Qualcomm* cases illustrate how company hiring practices can run afoul of the FCPA when hiring is done to influence foreign officials into helping companies obtain or retain business.[6] In light of these cases, it is the author's personal view that companies should re-examine their hiring policies and procedures and internal controls to ensure that their compliance programs have the necessary mechanisms in place to address associated corruption risks. It is also the author's view that companies should include their human resources departments in the FCPA-compliance process.

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the [FCPA]."); Kevin McCoy, *Bank of New York Mellon Pays $14.8M to Settle Internship Probe,* USA TODAY (Aug. 18, 2015, 4:21 PM) (quoting Andrew Ceresney, the SEC's Enforcement Director), http://www.usatoday.com/story/money/2015/08/18/bank-new-york-mellon-pay-14m-settlement/31912815/ ("The settlement, the SEC's first under the anti-corruption law and first involving internships, emerged from an SEC review of sovereign wealth funds, entities responsible for management and administration of countries' assets, said Ceresney.").

4. *See* Qualcomm, 2016 WL 792232, at *4; *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business (Mar. 1, 2016), https://www.sec.gov/news/pressrelease/2016-36.html ("Qualcomm Inc[.] has agreed to pay $7.5 million to settle charges that it violated the [FCPA] by hiring relatives of Chinese government officials deciding whether to select the company's mobile technology products amid increasing competition in the international telecommunications market."); Aaron Tilley, *Qualcomm Settles SEC Charges that it Repeatedly Bribed Chinese Officials to Gain an Edge*, FORBES (Mar. 1, 2016, 4:52 PM), http://www.forbes.com/sites/aarontilley/2016/03/01/qualcomm-settles-sec-charges-that-it-repeatedly-bribed-chinese-officials-to-gain-an-edge/#5ed92f92764d ("For at least a decade, Qualcomm has bribed government officials in China, hiring their relatives, offering them gifts, travel and entertainment, all to curry favor with those in a position to influence contracts with government-controlled telecommunications companies, according to the [SEC]. The agency also said Qualcomm misrepresented in its books the value of the things provided to Chinese officials as legitimate business expenses.").

5. *See, e.g.*, Qualcomm, 2016 WL 792232, at *8; BNY Mellon, 2015 WL 4911514, at *8.

6. *See, e.g.*, Qualcomm, 2016 WL 792232, at *8; BNY Mellon, 2015 WL 4911514, at *8.

This Article begins with an outline of the FCPA, focusing on the "anything of value" component of the statute. The next section explores past FCPA-enforcement actions involving hiring issues. Then, Section Four discusses the recent *BNY Mellon* and *Qualcomm* FCPA hiring-practices cases. In the final section, this author provides what he believes to be compliance best practices that should be taken away from the recent hiring-practices cases.

II. THE FCPA

The FCPA establishes civil and criminal liability for the bribery of foreign-government officials in order to obtain or retain business.[7] The anti-bribery law can be divided into accounting and anti-bribery prohibitions.[8]

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7. *See, e.g.*, 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2009); *see also* 15 U.S.C. § 78ff(a) (2009) ("Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is . . . [not] a natural person, a fine not exceeding $25,000,000 may be imposed . . . ."). The FCPA was enacted in 1977, in response to a 1976 report issued by the SEC that found that many public companies had not only engaged in questionable payments overseas, but had also falsified their accounting with respect to such payments. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, secs. 102–04, §§ 13(b), 30, 32(a), 91 Stat. 1494, 1494–98 (codified as amended at 15 U.S.C. §§ 78m(b)(2)(A)–(B), (3), 78dd-1(a), (f)(1)(A), 78dd-2(a), (d)(1), (g), (h)(1), (2)(A), (5), 78ff(a), (c)(1)(A), (2)(A), (3) (2009)); *see also* STAFF OF S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, 94TH CONG., REP. OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES pt. I, at 1–3 (Comm. Print 1976), *as reprinted in* 353 Sec. Reg. & L. Rep. (BNA) 1, 2 (Special Supp. May 19, 1976) ("The Commission's staff . . . has analyzed the public disclosures filed with it by 89 corporations . . . that refer to questionable or illegal foreign or domestic payments and practices . . . . The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret 'slush funds' disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including, in some instances, questionable or illegal foreign payments."). The FCPA is both a civil and criminal statute. The U.S. Department of Justice (DOJ) is responsible for criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions against non-issuers, while the SEC is responsible for civil enforcement of the accounting provisions to issuers and non-issuers, and the anti-bribery provisions with respect to issuers. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 395–96 (2010) (citations omitted).

8. *See* BNY Mellon, 2015 WL 4911514, at *1 ("This matter concerns violations of the anti-bribery and internal accounting control provisions of the . . . [FCPA] by BNY Mellon."); *see also* 15 U.S.C. §§ 78m(b)(2), 78dd-1(a), -2(a), -3(a). The FCPA was amended in 1988 to revise and clarify several of its provisions in response to criticisms of the original statute. *See* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, sec. 5003(c), § 104, 102 Stat. 1415, 1419–24 (codified as amended at 15 U.S.C. § 78dd-2). In 1998, the statute was amended again to conform

A. GENERAL STATUTE

The accounting provisions require that issuers—companies that have a class of securities registered with the SEC or that are required to file reports with the SEC—maintain certain recordkeeping standards and internal-accounting controls.[9] The recordkeeping standard requires that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[10] The internal-controls provision requires that issuers create a system of internal-accounting controls that provide "reasonable assurances" that transactions

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its provisions to "The Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)." *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, secs. 3–4, § 104, 112 Stat. 3302, 3304–09 (codified as amended at 15 U.S.C. §§ 78dd-2(a)(1)(A), (b)–(c), (d)(1), (g)(1), (h)(2), (i), 78dd-3); United States v. Esquenazi, 752 F.3d 912, 923 (11th Cir. 2014) (citations omitted) ("Congress's 1998 amendment of the FCPA [was] enacted to ensure the [U.S.] was in compliance with its treaty obligations . . . [under the OECD Convention]."), *cert. denied*, 135 S. Ct. 293, *superseded by statute on other grounds*, Fraud Enforcement and Regulatory Act of 2009, Pub. L. No. 111-21, § 2(f)(1), 123 Stat. 1617, 1618 (codified as amended at 18 U.S.C. § 1956(c)(8)–(9) (2015)), *as recognized in* United States v. Gross, No. 15-11780, 2016 WL 5929206, at *11 (11th Cir. Oct. 12, 2016) (per curiam) (citations omitted).

9. 15 U.S.C. § 78m(b)(2). The FCPA applies to any issuer that has a class of securities registered under § 12(g) of the Securities Exchange Act of 1934 (Exchange Act) or which is required to file reports under § 15(d), as well as to any officer, director, employee, or agent of such an issuer or any stockholder acting on behalf of such issuer. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 102, 103(a), 91 Stat. 1494, 1494–95 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78dd-1(a)). This would include certain foreign companies that list stock on a U.S. securities exchange and their relevant personnel. *See* 15 U.S.C. § 78m(a) ("Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange."). The relevant accounting provisions can be found in § 13(b)(2) of the Exchange Act, which specifically requires issuers to keep accurate books and records, and to establish a system of internal accounting controls. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, sec. 102, § 13(b), 91 Stat. 1494, 1494 (codified as amended at 15 U.S.C. §§ 78m(b)(2)(A)–(B)). In addition, the SEC has adopted two rules related to the accounting provisions. First, rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)" of the Exchange Act. 17 C.F.R. § 240.13b2-1 (2014). Then, rule 13b2-2 prohibits a "director or officer of an issuer" from "mak[ing] or caus[ing] to be made a[ny] materially false or misleading statement" or omission in connection with any "audit, review, or examination of the financial statements of the issuer." 17 C.F.R. § 240.13b2-2(a)(1)–(2)(i) (2014).

10. 15 U.S.C. § 78m(b)(2)(A). The statute defines "reasonable detail" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78(m)(b)(7).

are executed in "accordance with management's general or specific authorization."[11]

The FCPA anti-bribery provisions prohibit the bribing of foreign-government officials for the purpose of obtaining or retaining business, directing business to other persons, or securing any improper advantage.[12] More specifically, the FCPA anti-bribery provisions prohibit: (1) any issuer, domestic concern, or any person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing; (2) from using any means or instrumentality of U.S. commerce "corruptly" in furtherance of; (3) an offer, payment, or promise to pay, or authorization of the payment of anything of value; (4) to (a) any "foreign official," (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person while "knowing" that the payment or promise to pay will be given to any of the foregoing; (5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining business, or directing business to any person.[13] The anti-bribery provisions

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11. 15 U.S.C. § 78m(b)(2)(B)(i). The provision further requires that the issuer's established system of internal-accounting controls also:

> [P]rovide reasonable assurances that: . . . ; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . .

§ 78m(b)(2)(B)(ii)–(iv).

12. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

13. *Id.* There is both criminal and civil liability for violations of the anti-bribery provisions, which have been incorporated into federal securities laws as § 30A of the Exchange Act. *See* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, sec. 5003(a)–(b), §§ 30A, 32(c), 102 Stat. 1415, 1415–19 (codified as amended at 15 U.S.C. §§ 78dd-1(a), 78ff(c) (2009)); *see also* 15 U.S.C. §§ 78dd-2(g)(1)–(2), -3(e)(1)–(2) (2009). Issuers subject to the anti-bribery provisions are the same as those subject to the accounting provisions. *See* 15 U.S.C. § 78c(a)(8) (2009); *see also* discussion, *supra* note 9. The provisions further define a "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person

apply to any issuer and "domestic concern," which is defined as any U.S. citizen, national, or resident, and any corporation, partnership, or association which has its principal place of business in the U.S. or that is incorporated in the U.S.[14]

There are two affirmative defenses to the FCPA anti-bribery provisions.[15] The first applies when the payment at issue is lawful under the written laws of a relevant foreign official's country.[16] The second allows for payments that are considered "reasonable and bona fide" expenditures, "such as travel and lodging expenses," incurred by foreign officials directly related to either "the promotion, demonstration, or explanation of products or services," or "the execution or performance of a contract with a foreign government or agency."[17] There is also a facilitation-payments exception to the anti-bribery provisions, which allows for so-called "facilitation" or "grease payments"[18] to foreign

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> 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.

15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2009). It is worth noting that on May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit—in *United States v. Esquenazi*—was the first appellate court to define an "instrumentality" of a foreign government as the term is used to define a "foreign official" under the FCPA. *See* 752 F.3d at 924–25 (citing 15 U.S.C. § 78dd-2(h)(2)(A)), *cert. denied*, 135 S. Ct. 293 (2014), *superseded by statute on other grounds*, § 2(f)(1), 123 Stat. at 1618, *as recognized in Gross*, 2016 WL 5929206, at *11. The decision further outlined a two-part test, each part with its own respective list of factors, for determining what constitutes an "instrumentality" of a foreign government under the FCPA. *See id.* at 925–26 ("[First, the court must] decide if the [foreign] government 'controls' [the] entity[, and, if not, then the court must] decid[e] if the entity performs a function the government treats as its own."). The decision also affirmed an interpretation by the DOJ and SEC that state-owned and state-controlled entities could be considered "instrumentalities" of a foreign government subject to the FCPA. *See id.* at 927–28 (citations omitted); *see also* U.S. DEP'T OF JUSTICE: CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N: ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20–21 (2012) [hereinafter FCPA RESOURCE GUIDE] (citations omitted), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf. For further analysis of the *Esquenazi* decision, see generally Jon Jordan, U.S. v. Esquenazi: *U.S. Appellate Court Defines "Instrumentality" Under the Foreign Corrupt Practices Act for the First Time*, 6 WM. & MARY BUS. L. REV. 663 (2015).

14. *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -2(h)(1), -3(a) (2009).

15. *See* 15 U.S.C. §§ 78dd-1(c)(1)–(2), -2(c)(1)–(2), -3(c)(1)–(2) (2009).

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

17. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

18. The facilitation-payments exception is an exception only to the FCPA's anti-bribery provisions and is not an exception to the accounting provisions. *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 718–25 (2008). Issuers that make facilitation payments, and do not properly record such payments in their books and

officials for the purposes of expediting or securing the performance of "routine government action[s]," such as the processing of immigration visas.[19]

B. "ANYTHING OF VALUE"

The anti-bribery provisions generally prohibit issuers and domestic concerns from paying bribes, including "anything of value" to foreign officials in order to obtain or retain business.[20] More specifically, the FCPA prohibits the corrupt: "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of *anything of value* to" a foreign official.[21]

But what does "anything of value" mean? Cash is obviously something of value. But what about other things of potential "value" offered to foreign officials besides cash? Such as a nice vacation or exorbitant gift?

While the FCPA itself does not define "anything of value," the SEC and the Department of Justice (DOJ) have provided some guidance on what they consider to be "anything of value" in a "Resource Guide" to the FCPA (FCPA Resource Guide or Guide)

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records, may be liable under the accounting provisions. *See* Low et al., *supra* note 18, at 727–29; *see also* 15 U.S.C. § 78m(b)(2), (5) (2009) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).").

19. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2009). The term "routine government action" means any action that is ordinarily performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services. *See* 15 U.S.C. §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A) (2009). Specifically, the FCPA defines "routine government action" as:

> [A]n action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing government papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Id. Thus, payments made to expedite any of the services listed above, or those "of a similar nature," are not considered payments prohibited by the FCPA. *See* §§ 78dd-1(b), (f)(3)(A)(v), -2(b), (h)(4)(A)(v), -3(b), (f)(4)(A)(v).

20. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2009). In this respect the FCPA Resource Guide notes that "[i]n enacting the FCPA, Congress recognized that bribes can come in many shapes and sizes." FCPA RESOURCE GUIDE, *supra* note 13, at 14 (citations omitted).

21. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (emphasis added); FCPA RESOURCE GUIDE, *supra* note 13, at 14 (citations omitted) ("Where corrupt intent is present, the FCPA prohibits paying, offering, or promising to pay money or anything of value . . . .").

that they published in November 2012.[22] The FCPA Resource Guide states that "[a]n improper benefit can take many forms" and notes that, while FCPA actions often involve payments of cash, some cases have involved other things of value such as travel and expensive gifts.[23] The Guide then notes that, regardless of the size of the thing of value, "for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official."[24] The Guide then provides several examples of things that could be considered "anything of value" besides cash, and notes that certain gifts, travel, and entertainment may be prohibited things of value when given for an improper and corrupt purpose.[25]

III. FCPA HIRING PRACTICES ENFORCEMENT ACTIONS PRIOR TO *BNY MELLON* AND *QUALCOMM*

While the FCPA Resource Guide provided examples of things that could be considered things of value prohibited under the statute when given corruptly, the Guide itself did not appear to directly address if or when the hiring of foreign officials, or family members of foreign officials, could be considered or interpreted as things of value. Indeed, before *BNY Mellon*, there was little authority on the issue of hiring practices as it related to potential violations of the FCPA. There were a few FCPA cases that

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22. *See* FCPA RESOURCE GUIDE, *supra* note 13, at 14–19 (2012) (citations omitted).

23. *Id.* at 14–15. The Guide notes that the "FCPA does not contain a minimum threshold amount for corrupt gifts or payments." *Id.* at 15 (citations omitted). In this regard, the Guide further states that "what might be considered a modest payment in the United States" could be considered a significant amount in a foreign country. *Id.*

24. *Id.* at 15. In addition, the Guide states that this "corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions." *Id.*

25. *See id.* at 15–19 (citations omitted). For further analysis on when gifts, travel, and entertainment may be prohibited things of value under the FCPA, see generally Jon Jordan, *World Tours and the Summer Olympics: Recent Pitfalls Under the Foreign Corrupt Practices Act in the Areas of Gifts, Entertainment, and Travel*, 21 FORDHAM J. CORP. & FIN. L. 295 (2016). Furthermore, the Guide stated that charitable contributions, while allowed under the FCPA, may be prohibited when companies use the pretense of such charitable contributions as a means to pay bribes to foreign officials. FCPA RESOURCE GUIDE, *supra* note 13, at 16–17, 19 & n.102 (citing Complaint, Sec. & Exch. Comm'n v. Schering–Plough Corp., No. 04-cv-945 (D.D.C. Jun. 9, 2004); Schering–Plough Corp., Exchange Act Release No. 49838, 2004 WL 1267922 (June 9, 2004)).

focused on, among other things, the supposed hiring of family members as part of an overall-wrongful scheme.[26] However, these cases mainly focused on sham or "no show" employment arrangements where family members were never really hired nor expected to show up for employment.[27]

An example of such an FCPA hiring-practices case involving a sham-hiring arrangement is *SEC v. UTStarcom, Inc.*[28] There, the SEC alleged, among other things, that a company made full-time offers of employment to family members of government officials in China and Thailand.[29] The SEC further alleged that the offers of employment were made for the purpose of obtaining or retaining business from the relevant government officials.[30] The company paid and provided benefits to certain family members as if they were true employees, but the relevant individuals never actually worked for the company.[31]

Another example of a hiring-practices case, part of which involved a sham-hiring arrangement, is *United States vs. DaimlerChrysler China, Ltd.*[32] There, the DOJ alleged that Daimler employed the son of a Chinese government official in order to secure business from a division of a Chinese state-owned oil company.[33] Daimler also allegedly made a payment to the wife of a Chinese government official employed at a Chinese state-

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26. *See* Shinjini Chatterjee, Comment, *Dangerous Liaisons: Criminalization of "Relationship Hires" Under the Foreign Corrupt Practices Act*, 163 U. PA. L. REV. 1771, 1793–94 (2015) (citations omitted), https://www.pennlawreview.com/print/163-U-Pa-L-Rev-1771.pdf; *see also* Joel M. Cohen & Mathew W. Knox, *Friendly Relations? When Nepotism May Violate the FCPA*, FCPA REP. (Oct. 17, 2012), http://www.gibsondunn.com/publications/Documents/CohenKnox-Nepotism.pdf ("Several recent enforcement actions brought by the DOJ and SEC illustrate situations where the government is likely to regard the employment of a foreign official's relative as a violation of the FCPA.").

27. *See* Chatterjee, *supra* note 26 (citations omitted).

28. *See* Complaint at 4, Sec. & Exch. Comm'n v. UTStarcom, Inc., No. CV-09-6094 (N.D. Cal. Dec. 31, 2009) [hereinafter UTStarcom].

29. *Id.*

30. *Id.* at 4, 6.

31. *See id.* at 4. Fake annual performance reviews had been placed in the personnel files for the relevant individuals and the company had improperly accounted for the payments to these individuals as compensation for employment. *See id.* at 4–5.

32. *See* Information at 10, United States v. DaimlerChrysler China Ltd., No. 10-cr-00066-RJL (D.D.C. Mar. 22, 2010) [hereinafter DaimlerChrysler China].

33. *See id*. at 10, 12. The relevant Chinese, state-owned oil company was the China National Petroleum Corporation and the relevant division was the Bureau of Geophysical Prospecting. *See id.* at 2.

owned energy company.[34] In order to hide the nature of the payment it was alleged that company employees entered into a fake consulting agreement with the official's wife, but that no actual services were ever performed.[35] The company also allegedly provided an internship to the same son of a Chinese government official who was responsible for making purchasing decisions at the Chinese state-owned oil company.[36] The company was further charged with providing payments and "things of value" to the family members of the relevant foreign-government officials.[37]

IV. RECENT FCPA HIRING PRACTICES CASES

In 2015 and 2016 two important cases came out that principally concerned FCPA violations involving improper hiring practices. *BNY Mellon* involved a company providing valuable

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34. *See* DaimlerChrysler China, *supra* note 32, at 10. The relevant Chinese, state-owned energy company was Sinopec Corporation. *See id.* at 2.

35. *See id.* at 10.

36. *See id.* ("[A]nd his girlfriend . . . .").

37. *Id.* at 11–12. It is worthwhile to point out that *DaimlerChryslar China* is similar to *UTStarcom* in that the wife of the government official in *DaimlerChrysler China* never did any real work much like the relevant family members in *UTStarcom*. *See id.* at 10; UTStarcom, *supra* note 28. However, *DaimlerChrysler China* is also distinct from *UTStarcom* in that the relevant son of the government official in *DaimlerChrysler China* was provided an internship and short-term employment with the company. *See* DaimlerChrysler China, *supra* note 32; *see also* Paul Sumilas, *Hiring a Problem: Avoiding the Pitfalls of Employing Relatives of Government Officials*, NORTON ROSE FULBRIGHT (Sept. 19, 2013), http://www.nortonrosefulbright.com/knowledge/publications/104411/hiring-a-problem-avoiding-the-pitfalls-of-employing-relatives-of-government-officials ("While sham positions provided to relatives are clearly suspect, the DOJ's settlement with Daimler Chrysler also listed internships for a Chinese government official's son and the son's girlfriend as one of several improper benefits provided to that government official."). There are a couple of other cases that also involved unnecessary or sham-employment positions. For example, in *United States v. Siemens Bangladesh Ltd.*, a company paid $5000 to the daughter of a foreign official to work as an engineer on a government project, even though the company did not need, or have the budget for, such a position. *See* Information at 12, United States v. Siemens Bangladesh Ltd., No. 08-CR-369-RJL (D.D.C. Dec. 12, 2008). The company also hired the nephew of a foreign official and "began paying him approximately $1000 per month for at least one month." *Id.* Then, in *Securities & Exchange Commission v. Tyson Foods, Inc.*, the SEC alleged that improper payments made to a couple of Mexican government veterinarians "responsible for certifying its chicken products for export sales" were initially concealed as "salaries" paid to the veterinarians' wives, even though the wives provided no services for the company. *See* Complaint at 5, Sec. & Exch. Comm'n v. Tyson Foods, Inc., No. 1:11-CV-00350 (D.D.C. Feb 10, 2011); U.S. Sec. & Exchange Comm'n, *Litigation Release No. 21851*, Securities and Exchange Commission v. Tyson Foods, Inc., *Civ. No. 1:11-CV00350* (*D.D.C.*) (Feb. 10, 2011), https://www.sec.gov/litigation/litreleases/2011/lr21851.htm.

student internships to family members of foreign-government officials in the Middle East, and *Qualcomm* involved a company providing full-time employment and internships to family members of foreign-government officials in China.[38]

A. *BNY MELLON* AND THE PROVIDING OF VALUABLE STUDENT INTERNSHIPS TO FAMILY MEMBERS OF FOREIGN GOVERNMENT OFFICIALS IN THE MIDDLE EAST

On August 18, 2015, the SEC issued a settled Administrative Order against The Bank of New York Mellon Corporation (BNY Mellon) for violating the FCPA.[39] The SEC charged the company with violating the FCPA by providing "valuable student internships" to certain family members of foreign-government officials "affiliated" with a Middle East sovereign wealth fund (sovereign wealth fund).[40] According to the SEC Order, the violations occurred in 2010 and 2011 when BNY Mellon employees "sought to corruptly influence foreign officials in order to retain and win business" relating to managing the assets of the sovereign wealth fund.[41] As part of settling the case the company agreed, among other things, to pay a total of $14.8 million to settle the charges, comprised of $8.3 million in disgorgement, $1.5 million in prejudgment interest, and a $5 million civil-money penalty.[42]

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38. *See* BNY Mellon, 2015 WL 4911514, at *1; *see also* Qualcomm, 2016 WL 792232, at *4 ("Qualcomm provided or offered full-time employment and paid internships to family members of [Chinese] foreign officials . . . often at the[ir] request . . . . despite concerns, in some cases, that the individuals did not satisfy Qualcomm's hiring standards . . . . [and] with the purpose of trying to influence those officials to take actions that would assist Qualcomm in obtaining or retaining business in China.").

39. *See* BNY Mellon, 2015 WL 4911514, at *9 ("[T]he Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer."); Press Release, *supra* note 2; *see also* Laura Noonan et al., *BNY Mellon Agrees to Pay $15M to Settle SEC Internships Case*, FIN. TIMES (Aug. 18, 2015), http://www.ft.com/cms/s/0/5cbf3306-45c4-11e5-af2f-4d6e0e5eda22.html#axzz40YsCMANG. BNY Mellon is a worldwide financial services firm started by Alexander Hamilton in 1784. *See Alexander Hamilton*, *Pioneering Progress*, BNY MELLON, https://www.bnymellon.com/us/en/who-we-are/hamilton.jsp (last visited Mar. 12, 2017).

40. BNY Mellon, 2015 WL 4911514, at *1; Press Release, *supra* note 2.

41. BNY Mellon, 2015 WL 4911514, at *1.

42. *See id*. at *9; Press Release, *supra* note 2.

1. THE *BNY MELLON* CASE

a. Business with the Sovereign Wealth Fund

The SEC's Order alleged that during the time of the relevant conduct, BNY Mellon collected fees related to services provided to the sovereign wealth fund.[43] The fees resulted from government contracts awarded to BNY Mellon "through a process requiring approval from certain foreign government officials" and from assets allocated to the firm under "existing contracts at the discretion of certain foreign government officials."[44] The sovereign wealth fund became a client of BNY Mellon in 2000, when the European office of the sovereign wealth fund (European office) awarded the company custody of certain assets.[45] Since that time, the company earned regular fees for the administration of sovereign wealth fund assets, and the total amount of assets under custody of BNY Mellon totaled approximately $55 billion.[46]

b. Internships

Relevant to *BNY Mellon* was that it involved two key government officials affiliated with the sovereign wealth fund.[47] One of these individuals was a senior official with the fund (sovereign-wealth-fund official) and the other individual was a senior official at the European office (European-office official).[48] According to the SEC Order, both the sovereign-wealth-fund official and the European-office official requested that the company provide their family members with internships.[49] These government officials also made multiple follow-up requests on the status, timing, and details of the internships, and the providing of the internships was viewed by certain BNY Mellon employees as a means to "influence" these officials' decisions.[50]

With respect to the sovereign-wealth-fund official, the SEC Order stated that in February 2010 the official requested that BNY Mellon provide internships to his son and nephew.[51] This

43. *See* BNY Mellon, 2015 WL 4911514, at *2.
44. *Id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See* BNY Mellon, 2015 WL 4911514, at *2.
49. *See id.* at *3.
50. *Id.*
51. *Id.*

official was a department head with the sovereign wealth fund, had authority over the allocation of new assets to company managers, and was viewed within the company as a "key decision maker" at the fund.[52] As a result, BNY Mellon granted the internships sought by the sovereign-wealth-fund official in order to assist it in obtaining or retaining business.[53] After granting the official's request, BNY Mellon retained certain business with the sovereign wealth fund, and further assets were transferred to BNY Mellon by the official's department.[54]

In February 2010, the European-office official also asked, through a subordinate employee, that BNY Mellon provide an internship to his son.[55] Like the sovereign-wealth-fund official, the European-office official had the authority to make decisions directly impacting BNY Mellon's business.[56] The relevant BNY Mellon employee with responsibility for managing the relationship with the European office viewed the official's internship request as "important" to assist BNY Mellon in obtaining or retaining business.[57] As a result, BNY Mellon granted the official's request, and after granting the official's request the company retained its existing business with the European office.[58]

c. Internship Program

The SEC's Order noted that BNY Mellon had a summer-internship program for undergraduates and a separate summer program for postgraduates pursuing a Master of Business Administration or similar degree.[59] Admission to the postgraduate-internship program was considered competitive and involved "stringent hiring standards."[60] To recruit postgraduates,

52. BNY Mellon, 2015 WL 4911514, at *3. The SEC Order noted that the sovereign wealth fund official persistently inquired about the status of his internship requests, conveyed that the request represented an "opportunity" for BNY, and warned that he could secure internships with a competitor of BNY Mellon if BNY Mellon could not satisfy his request. *Id.*

53. *See id.* at *4.

54. *Id.*

55. *Id.*

56. *See* BNY Mellon, 2015 WL 4911514, at *4. Internal BNY Mellon documents noted that this official was viewed as "crucial to both retaining and obtaining new business" for the company. *Id.*

57. *Id.* at *5.

58. *See id.*

59. *See id.*

60. *Id.*

the company sought candidates from some of the most highly selective schools, and successful applicants were required to have a minimum grade point average, advance through multiple rounds of interviews, and have relevant work and leadership experience as well as an interest in doing financial-services work.[61]

The Order stated that the relevant interns hired did not meet these demanding criteria and that BNY Mellon did not evaluate or hire the interns through either of its established internship programs.[62] For example, the interns were not enrolled in any degree program, which was a basic entrance standard for an internship.[63] In addition, while one of the goals of the program was to convert interns to full-time hires, the relevant interns "were to return to the Middle East at the conclusion of their internships and there were no plans to hire them as full-time employees."[64] The interns also did not have the required academic and professional credentials needed to get into either of the programs.[65]

The Order further stated that, although the interns did not meet the requisite criteria to get into the internship programs, the company hired the interns anyway.[66] The Order noted that the company decided to hire the interns "before even meeting or interviewing them."[67] In addition, the relevant interns were given specialized internships that were different from the internships provided under the established intern programs.[68] The Order noted that unique "work experiences" were sought by the relevant government officials for their family members and, as a result, the interns were provided with "customized" training programs.[69] As such, the Order labeled the internships as

61. BNY Mellon, 2015 WL 4911514, at *5.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* BNY Mellon, 2015 WL 4911514, at *6.

67. *See id.*

68. *See id.*

69. *Id.* The Order noted that as requested by the relevant government officials, BNY Mellon designed "customized work experiences" for the interns. *Id.* The internships provided were "rotational in nature" and the relevant interns got to work in a "number of different" company business units, thereby "enhancing the value of the work experience beyond that normally provided" to the company's interns. *Id.* The internships also went on for approximately six months which was longer than the duration of the normal summer internship program. *See id.* ("Interns A and B

"valuable work experience," and stated that the government officials requesting the customized internships "derived significant personal value in being able to confer this benefit on their family members."[70]

d. BNY Mellon's FCPA Policies and Training and Internal Controls

The SEC Order noted that the company had a code of conduct and a policy that prohibited employees from violating the FCPA, but that employees were provided with little additional guidance tailored to the FCPA-risks associated with hiring.[71] The Order also stated that BNY Mellon provided training to employees on their obligations under the FCPA and its policies concerning the FCPA, "but did not ensure that all employees took the training or understood the relevant policies."[72] In addition, the Order noted that BNY Mellon had few controls concerning the hiring of customers, "including foreign government officials," or their relatives.[73] In this regard, the Order stated that employees were allowed "wide discretion" in making hiring decisions and that the human-resources department was not trained to flag potentially-problematic hires.[74] Senior managers were also "able to approve hires requested by foreign officials with no mechanism to ensure" that these decisions were reviewed by someone with a legal or compliance background.[75] The Order thus found the company's internal-accounting controls to be "insufficiently tailored to the corruption risks inherent" in its hiring practices.[76]

The SEC's Order stated that BNY Mellon violated the anti-bribery provision of the FCPA "by corruptly providing valuable

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were placed in Boston . . . and were employed . . . from August 6, 2010 through February 25, 2011. Intern C was . . . placed in London . . . and interned . . . from July 4, 2010 through December 17, 2010 . . . significantly longer than the work experiences typically afforded to [normal] BNY Mellon interns . . . .").

70. BNY Mellon, 2015 WL 4911514, at *6. The SEC Order also noted that the internships were "neither inexpensive nor easy for BNY Mellon to structure." *Id.* Among other things, BNY Mellon had to coordinate obtaining visas for all three of the interns to travel from the Middle East and work in the relevant destinations and the company paid the legal fees and filing costs associated with obtaining such visas. *Id.*

71. *See id.* at *7.

72. *See id.*

73. *See id.*

74. *Id.*

75. *See* BNY Mellon, 2015 WL 4911514, at *7.

76. *Id.*

internships to relatives of foreign officials" from the sovereign wealth fund in order to assist the company in retaining or obtaining business.[77] The Order also found that BNY Mellon violated the internal-controls provision of the FCPA.[78] BNY Mellon was ordered to: (1) cease and desist from committing or causing any violations of the FCPA's anti-bribery and internal-controls provisions; (2) pay disgorgement plus prejudgment interest of approximately $9.8 million; and (3) pay a civil-money penalty of $5 million.[79]

In bringing the case, the SEC in a press release highlighted the possible dangers involved in providing internships to relatives of foreign officials in certain circumstances with respect to FCPA compliance.[80] Andrew Ceresney, Director of the SEC's Division of Enforcement, stated that the "FCPA prohibits companies from improperly influencing foreign officials with 'anything of value,' and therefore cash payments, gifts, internships, or anything else used in corrupt attempts to win business can expose companies to an SEC enforcement action."[81] To that end Ceresney said, "BNY Mellon deserved significant sanction for providing valuable student internships to family members of foreign officials to influence

77. BNY Mellon, 2015 WL 4911514, at *8; *see* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103(a), 91 Stat. 1494, 1495–96 (codified as amended at 15 U.S.C. § 78dd-1(a) (2009)).

78. *See* BNY Mellon, 2015 WL 4911514, at *8; *see also* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, sec. 102, § 13(b), 91 Stat. 1494, 1494 (codified as amended at 15 U.S.C. § 78m(b)(2)(B) (2009)). The Order stated that BNY Mellon violated the internal controls provision of the FCPA "by failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that its employees were not bribing foreign officials." BNY Mellon, 2015 WL 4911514, at *8.

79. *See* BNY Mellon, 2015 WL 4911514, at *9. It should be noted that in determining to accept the company's offer of settlement, the SEC considered cooperation that the company provided to the SEC and remedial acts it had undertaken before the SEC's investigation. *Id.* at *8. In this regard the Order specifically noted that the company had enhanced its anti-bribery compliance program which included: (1) "making changes to the Anti-Corruption Policy to explicitly address the hiring of government officials' relatives;" (2) "requiring that every application for a full-time hire or an internship be routed through a centralized HR application process;" (3) enhancing its Code of Conduct to require that every year each employee certifies that he or she is not responsible for hiring through a non-centralized channel;" and (4) "requiring as part of a centralized application process that each applicant indicate whether she or a close personal associate is or has recently been a government official, and, if so, additional review by BNY Mellon's anti-corruption office is mandated." *Id.*

80. *See generally* Press Release, *supra* note 2.

81. *Id.* (quoting Andrew Ceresney).

their actions."[82] Kara Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, stated that "[f]inancial services providers face unique corruption risks when seeking to win business in international markets," and added that the Division of Enforcement would "continue to scrutinize industries that have not been vigilant about complying with the FCPA."[83]

2. COMMENTARY ON *BNY MELLON*

BNY Mellon represented a novel FCPA-enforcement action in many ways, and there was a lot of commentary by FCPA practitioners and the media about the case. Commenters noted that *BNY Mellon* represented the first FCPA-enforcement action based entirely on hiring and internship practices.[84] In this respect they noted that, while there had previously been FCPA-enforcement actions that included allegations of improper hiring, *BNY Mellon* was the first enforcement action "based *exclusively* on such a theory."[85] Commenters also noted that *BNY Mellon* was the first FCPA-enforcement action brought against a financial-services institution.[86] Financial-services institutions, until the time of *BNY Mellon*, had escaped FCPA-enforcement actions.[87] In addition, at least one commenter noted that *BNY*

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82. Press Release, *supra* note 2 (quoting Andrew Ceresney).

83. *Id.* (quoting SEC FCPA Unit Chief Kara Brockmeyer).

84. *See* Lucinda Low & Kaitlin Cassel, *The Internships that Backfired: BNY Mellon Settles FCPA Investigation over Intern Hiring Practices*, STEPTOE (Aug. 25, 2015), http://www.steptoe.com/publications-10689.html; Nate Raymond & Sarah N. Lynch, *BNY Mellon to pay $14.8 Million to Settle Intern Bribery Probe, Business News*, REUTERS (Aug. 18, 2015, 2:53 PM) (quoting Andrew Ceresney), http://www.reuters.com/article/us-bny-mellon-sec-corruption-idUSKCN0QN1PJ20150818 ("The BNY Mellon case is . . . the first foreign bribery enforcement action in which internships, as opposed to cash, constituted the alleged bribe . . . ."); John S. West et al., *Financial Institution Hiring Practice Triggers FCPA Exposure, Resulting in the Bank of New York Mellon Paying $14.8M to the SEC*, *News & Knowledge*, TROUTMAN SANDERS (Aug. 31, 2015), http://www.troutmansanders.com/financial-institution-hiring-practice-triggers-fcpa-exposure-resulting-in-the-bank-of-new-york-mellon-paying-148m-to-the-sec-08-31-2015/.

85. *See* Mike Koehler, *BNY Mellon Becomes the First—Of What is Expected to be Several Financial Services Companies—To Pony Up Millions Based on Its Internship Practices,* FCPA PROFESSOR (Aug. 19, 2015, 12:03 AM) (emphasis in original), http://www.fcpaprofessor.com/bny-mellon-becomes-the-first-of-what-is-expected-to-be-several-financial-services-companies-to-pony-up-millions-based-on-its-internship-practices.

86. *See* West et al., *supra* note 84; *see also* Huang & Glazer, *supra* note 3; Raymond & Lynch, *supra* note 84 ("[BNY Mellon's] settlement [with] the [SEC] marked the first time regulators had charged a bank for violating the [FCPA] . . . .").

87. *See* Huang & Glazer, *supra* note 3. Some commenters noted that many financial institutions "were caught off-guard" that their hiring practices could subject

Mellon was the first FCPA-enforcement action that involved alleged violations of the FCPA's anti-bribery provisions and internal-controls provisions, without also alleging violations of the books-and-records provision.[88]

Some FCPA practitioners felt that the *BNY Mellon* action suggested that the SEC would increase its focus on company hiring and internship practices.[89] Such commenters noted that there had previously been news articles reporting that other financial institutions were also being investigated for their hiring practices, similar to the action involving BNY Mellon.[90] Accordingly, commenters felt that more FCPA actions were likely to come concerning hiring-practices violations in the future.[91] Some commenters also viewed *BNY Mellon* as indicative of future SEC-enforcement efforts concerning financial institutions' business dealings with sovereign wealth funds.[92]

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them to an FCPA investigation. *See* Huang & Glazer, *supra* note 3.

88. *See* Mike Koehler, *Issues to Consider from the BNY Mellon Enforcement Action,* FCPA PROFESSOR (Aug. 20, 2015), http://www.fcpaprofessor.com/issues-to-consider-from-the-bny-mellon-enforcement-action.

89. *See* Low & Cassel, *supra* note 84.

90. *See, e.g.*, Richard L. Cassin, *BNY Mellon pays $15 Million in FCPA Settlement for Internship Hiring Practices*, BUREAU VAN DIJK: FCPA BLOG (Aug. 18, 2015, 12:38 PM), http://www.fcpablog.com/blog/2015/8/18/bny-mellon-pays-15-million-in-fcpa-settlement-for-internship.html; *see also* DAVID N. KELLEY ET AL., CAHILL GORDON & REINDEL, LLP, FCPA DEVELOPMENTS: BNY MELLON AGREES TO PAY $14.8 MILLION IN SEC SETTLEMENT 1 & n.2 (2015) (citing Bank of N.Y. Mellon, Current Report (Form 8-K) (Jan. 23, 2015), https://www.sec.gov/Archives/edgar/data/1390777/000162828015000217/a4q2014earnings8-kxxjan23.htm), https://www.cahill.com/publications/firm-memoranda/10130385 (follow "CGR MEMO—FCPA Developments—BNY Mellon Agrees to Pay 14.8 Million in SEC Settlement.pdf" hyperlink); Low & Cassel, *supra* note 84 (citing Enda Curran & Jean Eaglesham, Regulators Step Up Probe into Bank Hiring Overseas, WALL ST. J. (May 6, 2014), http://www.wsj.com/articles/SB10001424052702303417104579546190553220338 (describing SEC inquiries into hiring practices at several financial services firms)).

91. *See* Low & Cassel, *supra* note 84. Some commenters even felt that regulators would likely be aggressive in this area, including possibly seeking higher penalties against wrongdoers. *See* Henry Klehm III et al., *SEC Brings Hiring Practices into FCPA Focus*, JONES DAY (Sep. 2015), http://www.jonesday.com/sec-brings-hiring-practices-into-fcpa-focus/; West et al., *supra* note 84.

92. *See* KELLEY ET AL., *supra* note 90, at 1 n.3 (citing Peter Lattman and Michael J. de la Merced, *S.E.C. Looking into Deals with Sovereign Funds*, N.Y. TIMES (Jan. 13, 2011, 8:37 PM), http://dealbook.nytimes.com/2011/01/13/s-e-c-looking-into-deals-with-sovereign-funds/?_r=0). Getting more into the elements of the FCPA violations in *BNY Mellon*, some commenters noted that the Order emphasized the "value" of the internships in determining that the foreign officials "derived significant personal value" in being able to provide this benefit to their family members. Low & Cassel, *supra* note 84 (internal quotations omitted). As such, these commenters viewed *BNY Mellon* as establishing student internships as "anything of value" under the FCPA.

B. *QUALCOMM* AND THE PROVIDING OF FULL-TIME EMPLOYMENT AND INTERNSHIPS TO FAMILY MEMBERS OF FOREIGN GOVERNMENT OFFICIALS IN CHINA

On March 1, 2016, the SEC issued a settled Administrative Order against Qualcomm for violating the FCPA.[93] The SEC charged the company with violating the FCPA by hiring relatives of Chinese government officials and providing gifts, travel, and entertainment to the officials in order to influence such officials into helping the company obtain or retain business.[94] More specifically, the SEC Order alleged that from 2002 through 2012, Qualcomm provided "things of value" to Chinese foreign officials, including high-ranking employees of state-owned entities and government ministers, to try and influence these officials, promote company technology, and provide Qualcomm with a business advantage.[95] As part of the settlement, the company

See Low & Cassel, *supra* note 84 (containing the subheading "'Anything of Value' Includes Internships for Family Members"). Some commenters also noted that, when news organizations started reporting on investigations regarding certain financial institutions' hiring practices, the "announcements set off a heated debate in the legal community about whether such allegations could form the basis for enforcement actions under the FCPA," and "whether providing a job to an official's relative . . . could constitute providing a 'thing of value' to the official" himself. Sean Hecker et al., *The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials*, 7 FCPA UPDATE: A GLOBAL ANTI-CORRUPTION NEWSL. (Debevoise & Plimpton, N.Y.C., N.Y.), Aug. 2015, at 1, http://www.debevoise.com/~/media/files/insights/publications/2015/08/fcpa_update_august_2015.pdf. In this regard, at least one commenter noted that several major banks under investigation had "launched an aggressive defense," arguing that "such intern programs were 'customary' in the industry," or that, at the very least, did not involve "provid[ing] anything of value or act[ing] with corrupt intent." Michael Volkov, *SEC Unveils First FCPA Enforcement Action Focused on Hiring Practices: BNY Mellon*, JDSUPRA BUS. ADVISOR: CORRUPTION, CRIME & COMPLIANCE (Aug. 24, 2015), http://www.jdsupra.com/legalnews/sec-unveils-first-fcpa-enforcement-60874/ (finding, however, that "[t]he BNY Mellon case reflects the SEC's rejection of those claims and theory").

93. *See* Qualcomm, 2016 WL 792232, at *1 ("In anticipation of the institution of these proceedings, Qualcomm has submitted an Offer of Settlement . . . which the Commission has determined to accept."); Press Release, *supra* note 4; Samuel Rubenfeld, *Qualcomm Settles FCPA Probe Over China Hiring*, WALL ST. J. (Mar. 1, 2016, 2:13 PM), http://blogs.wsj.com/riskandcompliance/2016/03/01/qualcomm-settles-fcpa-probe-over-china-hiring/. Qualcomm is a corporation headquartered in San Diego, California, that makes and sells wireless telecommunications products. Qualcomm, 2016 WL 792232, at *2 ("The company also earns royalties by licensing its patented technologies.").

94. *See* Qualcomm, 2016 WL 792232, at *1–2, *4–6; Press Release, *supra* note 4.

95. Qualcomm, 2016 WL 792232, at *4 ("In one case, the Deputy General Manager of a [Chinese, state-owned] subsidiary . . . asked Qualcomm employees in 2010 to find an internship . . . for her daughter.").

agreed, among other things, to pay a $7.5 million civil penalty.[96]

1. THE *QUALCOMM* CASE

a. Business in China

According to the SEC Order, in 2002 the wireless market in China "represented a significant growth opportunity for Qualcomm."[97] From 2002–2008 the company was not sure which Chinese state-owned telecommunications entity would be granted licenses to adopt and deploy technology relevant to the company's business in China.[98] Accordingly, "Qualcomm sought to persuade executives at two" such entities to adopt its developed technology should they be granted a relevant license.[99]

In 2008, China restructured its telecommunications industry, and created three state-owned telecommunications companies; in 2009, different technology licenses were issued to two of them.[100] Two of the telecommunications companies then started operations involving Qualcomm's technology.[101] Customers using the relevant telecommunications networks thereafter began using mobile devices with company technology, which resulted in the company making billions of dollars in revenue "from the sale of [its] chips and licenses to cell phone manufacturers."[102]

b. Hiring Relatives of Chinese Officials

The SEC Order alleged that, "from at least 2002 until 2012," the company "provided things of value" to try and influence Chinese-government officials into "mak[ing] regulatory decisions that would expand the use" of company-developed technology in China.[103] The Order next alleged that the company also provided "things of value" to try and influence Chinese state-owned telecommunications-company executives into adopting company-developed technology and expediting the deployment of networks using such technology.[104] Of relevance to this Article is that one

96. *See* Qualcomm, 2016 WL 792232, at *8–10; Press Release, *supra* note 4.
97. Qualcomm, 2016 WL 792232, at *3.
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.*
102. *See* Qualcomm, 2016 WL 792232, at *3–4.
103. *Id.* at *4.
104. *Id.*

of the ways that the company sought to influence the relevant foreign officials was through the hiring of their relatives.[105] The Order stated that the company offered or provided full-time employment and paid internships to family members of foreign officials at the relevant Chinese government agency and state-owned telecommunications companies, oftentimes at the request of those officials.[106] Qualcomm sometimes referred to these individuals during the hiring process as "must place" or "special" hires.[107]

The SEC Order stated that Qualcomm offered employment to foreign officials' family members "despite concerns . . . that those individuals did not satisfy Qualcomm's hiring standards."[108] Some of the hires had "previously failed to obtain employment" with the company through its standard-hiring process, and "in some cases, new positions were created" for the relevant hires.[109] The Order stated that the company "provided or offered full-time employment and paid internships" to family members of the relevant foreign officials "with the purpose of trying to influence those officials" into taking actions that would help the company obtain and retain business.[110]

The Order noted that FCPA compliance "was not considered in Qualcomm's hiring process," and that most employees who worked in the human-resources department did not receive FCPA training.[111] Therefore, when the company offered internships or employment to family members of the relevant foreign officials, the human-resources department failed to "evaluate or attempt to mitigate the potential FCPA risks associated with such hires."[112] In addition to the improper-hiring-practices conduct, the SEC Order also alleged that the company provided gifts, meals, and entertainment to foreign officials and their family members in order to obtain or retain business.[113]

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105. *See* Qualcomm, 2016 WL 792232, at *4.

106. *See id.*

107. *Id.*

108. *See id.*

109. *See id.*

110. Qualcomm, 2016 WL 792232, at *4.

111. *Id.* at *5.

112. *Id.*

113. *See id.* at *6. The Order noted that many of the relevant gifts, such as airplane tickets for children of government officials and event tickets for spouses of foreign officials, had no valid business purpose. *See id.*

C. QUALCOMM'S INTERNAL CONTROLS

The SEC Order alleged that the company failed to devise and maintain adequate internal controls.[114] It stated that the internal control failures were "widespread" and involved the company's headquarters and international subsidiaries.[115] It also stated that the company's internal-controls weaknesses were intensified by the absence of a full-time company-wide chief-compliance officer and FCPA-compliance officer in China.[116] Furthermore, the Order noted that the company failed to provide regular training or guidance to its subsidiaries' employees on the FCPA's requirements.[117] The Order also stated that the human-resources function was not considered in the company's FCPA-compliance program.[118]

The SEC Order stated that Qualcomm violated the anti-bribery, books-and-records, and internal-controls provisions of the FCPA. [119] The Order specified that Qualcomm violated the anti-bribery provision of the FCPA "by providing employment and internships to relatives of foreign officials in order to assist Qualcomm in retaining and obtaining business."[120] The Order also stated that Qualcomm violated the books-and-records and internal-controls provisions of the FCPA concerning the proper recording of "things of value" given to foreign officials.[121] Qualcomm was ordered to: (1) "cease and desist from committing or causing any violations" of the governing provisions of the FCPA"; (2) "pay a civil money penalty" of $7.5 million; and (3)

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114. *See* Qualcomm, 2016 WL 792232, at *6.

115. *Id.*

116. *Id.*

117. *See id.* at *7.

118. *See id.*

119. *See* Qualcomm, 2016 WL 792232, at *8.

120. *See id.*; *see also* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103(a), 91 Stat. 1494, 1495–96 (codified as amended at 15 U.S.C. § 78dd-1(a) (2009)).

121. *See* Qualcomm, 2016 WL 792232, at *8. The Order stated that Qualcomm also violated the internal-controls provision of the FCPA "by failing to devise and maintain a sufficient system of internal accounting controls to prevent the provision of travel, gifts, and entertainment to foreign officials without prior pre-approval and to ensure all things of value given to foreign officials were properly recorded." *Id.*; *see* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, sec. 102, § 13(b), 91 Stat. 1494, 1494 (codified as amended at 15 U.S.C. § 78m(b)(2)(B) (2009)). The Order then stated that "[a]s a result of this same conduct, Qualcomm" violated the FCPA's books-and-records provision. Qualcomm, 2016 WL 792232, at *8; *see* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, sec. 102, § 13(b), 91 Stat. 1494, 1494 (codified as amended at 15 U.S.C. § 78m(b)(2)(A) (2009)).

"self-report to the SEC at no less than nine-month intervals during the two-year term . . . . of its remediation and implementation" of FCPA-compliance measures.[122]

There was little commentary on *Qualcomm* compared to *BNY Mellon*. In the author's personal view this is probably because *BNY Mellon* represented more of a ground-breaking case given the novel issues involved at the time that case was brought. At least one commenter noted that *Qualcomm* was only the second FCPA-enforcement action, besides *BNY Mellon*, that was based "principally" on hiring-practices allegations.[123] Moreover, other commenters noted that *Qualcomm* was further evidence of the SEC's continued crackdown on wrongful hiring practices in violation of the FCPA.[124]

V. THE AUTHOR'S VIEW OF BEST PRACTICES IN LIGHT OF *BNY MELLON* AND *QUALCOMM*

In this author's opinion, there are several best practices that companies should consider undertaking in light of the *BNY Mellon* and *Qualcomm* FCPA cases. First of all, companies should generally re-examine their hiring policies and procedures in light of these cases and ensure that their compliance programs have the necessary procedures in place to address the corruption risks associated with their hiring practices. Companies should also generally update their internal controls concerning hiring, especially where they involve the hiring of relatives of foreign officials. The internal controls should include proper oversight, training, and implementation, and include training on appropriate-hiring practices and on spotting red flags associated with potentially-problematic hires.

In my view, another best practice would be to make sure that the human-resources department is included in the FCPA-compliance process. As *BNY Mellon* and *Qualcomm* illustrate, FCPA compliance is also a human-resources function. And while the human-resources department does not normally interact with

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122. *See* Qualcomm, 2016 WL 792232, at *8–9.

123. *See Issues to Consider from the BNY Mellon Enforcement Action,* FCPA PROFESSOR (Aug. 20, 2015), http://www.fcpaprofessor.com/issues-to-consider-from-the-bny-mellon-enforcement-action.

124. *See* Mark A. Srere & Kristin Robinson, *SEC Settlement Sends a Strong Message to Companies: Treat Princelings and Commoners Alike, or Pay Dearly*, BRYAN CAVE (Mar. 2, 2016), https://www.bryancave.com/en/thought-leadership/sec-settlement-sends-a-strong-message-to-companies-treat.html.

foreign officials or current or potential customers, it is still important that the department be as diligent about FCPA compliance as the other departments within a company. Consequently, an FCPA-compliance program needs to include the human-resources department. This would include auditing and evaluating the human-resources department for compliance with the FCPA policies and procedures, and providing necessary FCPA-compliance training to employees within the department.

As far as internal controls and training targeted to the FCPA risks involved in hiring practices, there are, in my view, several best practices concerning such controls that companies should consider adopting. Companies should design controls that will enable it to identify employment candidates that are or were related to foreign officials. And while the hiring of a relative of a foreign official is not, in and of itself, a per se violation of the FCPA, policies and procedures should be established to ensure that such a hiring is not being done with corrupt intent. Companies can do this by ensuring that internal employees with hiring authority are trained on the FCPA so that they can identify and mitigate the risks involved with making potentially-problematic hires. Companies should also put all job applicants through the same hiring process, and every candidate should be evaluated objectively according to the abilities, knowledge, and skill sets required to perform a relevant job. At the end of the process, companies should be able to demonstrate that any relevant new hire, whether related to a foreign official or not, was a qualified applicant for the relevant position, and that the position itself was posted because of a genuine need for the company, as opposed to a manufactured one. Finally, it would be a good practice to make sure that the hiring of a particular candidate could not be perceived in any way as being connected to obtaining or retaining business.

In addition, in this author's view, it would be helpful for companies to look at and consider incorporating some of the specific FCPA-hiring practices, policies, and procedures that BNY Mellon undertook as part of its remedial efforts that were considered by the Commission, as noted in the *BNY Mellon* Order. These procedures, which were part of BNY Mellon enhancing its anti-corruption-compliance program, included: (1) changing its anti-corruption policy "to explicitly address the hiring of government officials' relatives"; (2) mandating that "every application for a full-time hire or an internship be routed through a centralized" human-resources application process; (3)

enhancing its Code of Conduct to require annual certifications by its employees "that he or she is not responsible for hiring through a non-centralized channel"; and (4) mandating that applicants indicate whether they, or a close personal associate, "is or has recently been a government official," and, if so, requiring the relevant applicant to undergo additional review by the company's anti-corruption office.[125] These procedures were detailed in the Order and noted as remedial efforts undertaken by the company that the SEC considered in determining whether to accept its settlement offer.[126]

VI. CONCLUSION

The *BNY Mellon* and *Qualcomm* cases demonstrate how companies can run afoul of the FCPA when hiring relatives of foreign officials to corruptly influence foreign officials in obtaining or retaining business. In light of these cases, companies should re-examine and update their compliance programs to ensure there are mechanisms in place to address the corruption risks associated with hiring practices. Companies should also include their human-resources departments in the FCPA-compliance process. As *BNY Mellon* and *Qualcomm* illustrate, FCPA compliance is not just a legal or accounting function—it is also a human-resources function.

In my personal view, the recent hiring-practices cases suggest that regulators are likely to continue to investigate and bring actions concerning improper-hiring practices in violation of the FCPA in the future. Therefore, companies operating on an international basis need to be diligent about compliance with the FCPA in this area. Staying diligent will help companies avoid running afoul of the FCPA when it comes to their hiring practices in a challenging anti-bribery environment.

125. BNY Mellon, 2015 WL 4911514, at *8.

126. *See id.* Indeed, several commenters have recommended that these procedures be considered in preventing FCPA-risks associated with hiring practices. *See, e.g.*, Hecker et al., *supra* note 92, at 7; Low & Cassel, *supra* note 84.