



## THE INVESTMENT BANKS' HIRING PRACTICES IN CHINA: ON OR OFF THE RADAR OF THE FOREIGN CORRUPT PRACTICES ACT?

GUEST PAPER

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### ABSTRACT

**Objective:** This study examines the hiring practices of foreign investment banks in China, particularly focusing on JPMorgan's "Sons and Daughters Programme" (S&DP). It investigates whether these practices constitute a violation of the Foreign Corrupt Practices Act (FCPA) by analyzing the implications of hiring relatives of Chinese officials to secure business opportunities.

**Method:** The research employs a comprehensive literature review and case study analysis. Comparative analysis is utilized to juxtapose the S&DP with *guanxi* (Chinese networking) and Western networking practices. The study also explores theoretical perspectives, including Kantian ethics, utilitarianism, and ethical relativism, to evaluate the moral hazards of such hiring practices. Legal analysis focuses on the FCPA's definitions and the *mens rea* (criminal intent) requirement, assessing whether the hiring practices meet the threshold of bribery.

**Results:** The findings reveal that JPMorgan systematically employed relatives of Chinese officials through the S&DP, securing multiple lucrative deals as a result. The SEC and DoJ broadened their interpretation of the FCPA to include non-monetary benefits, such as employment opportunities, as potential bribes. Ethical analysis indicates that these hiring practices undermine meritocracy, perpetuate nepotism, and violate ethical standards. Legal scrutiny confirms that offering jobs to officials' relatives can be considered "anything of value," thus constituting a bribe under the FCPA.

**Conclusions:** The study concludes that JPMorgan's hiring practices via the S&DP violate the FCPA, highlighting the need for stricter enforcement and comprehensive compliance programs to prevent similar violations. It recommends robust anti-bribery measures, ethical hiring practices, and enhanced corporate governance to ensure fair competition and uphold the integrity of financial markets. Further research is suggested to explore global anti-bribery enforcement amidst diverse cultural and regulatory landscapes.

### Keywords:

Foreign Corrupt Practices Act, FCPA, investment banks, hiring practices, China, JPMorgan, corporate governance, ethics, compliance

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## Introduction

Bribery undermines public confidence in the integrity of the free-market system and pressures ethical firms to either compromise their standards or risk losing business.<sup>2</sup> It distorts fair competition by seeking business advantages through bribing foreign officials. The OECD Convention on Combating Bribery of Foreign Public Officials reflects a growing international consensus on the detrimental impact of corruption on economic development.<sup>3</sup> As China's economy has surged, state-owned enterprises (SOEs) have increasingly turned to foreign banks to raise capital through stock offerings. Financial service providers face unique corruption risks in China's capital markets. A contentious issue underlying the *JPMorgan* case is the bank's "Sons and Daughters Programme (S&DP)."<sup>4</sup> The investment bank has employed relatives of Chinese officials in exchange for lucrative business opportunities.<sup>5</sup> The U.S. Securities and Exchange Commission (SEC) charged JPMorgan with violations of the antibribery and internal accounting controls provisions of the FCPA.<sup>6</sup> Following JPMorgan's scandal, Credit Suisse<sup>7</sup> and Deutsche Bank have settled with government agencies on similar grounds, challenging the limits of FCPA enforcement.<sup>8</sup>

Penalties have not resulted in the expected deterrence of unlawful hiring practices, leading to continued enforcement actions in the financial services industry. In combating bribery in the capital market, addressing the global challenge requires a multipronged approach, outlined in the following five parts of this study. Part I delves into systematic bribery through the "Son and Daughter Programme" in the capital market, comparing it with *guanxi* and Western networking. Part II explores the concept of "anything of value" and *quid pro quo* in bribery, examining whether hiring Chinese princelings constitutes a transfer of value to officials, potentially violating the FCPA. Part III analyses the S&DP from theoretical perspectives such as Kantian theory, utilitarianism, and ethical relativism, discussing morally hazardous behavior associated with the programme. Part IV examines *mens rea* and burden of proof to determine the legality of hiring practices, arguing that JPMorgan's scheme crossed the line into bribery. Part V proposes multipronged measures to level the playing field, examining precedents to clarify circumstances constituting an FCPA violation and suggesting proactive responses to address the challenge. The paper concludes with a final remark. A combination of methods offers a comprehensive understanding of the complexities surrounding bribery in China's capital markets and proposes practical solutions to enhance anti-bribery enforcement.

### A. The "Son and Daughter Programme (S&DP)": A New Game of Capital via-a-vis Power?

China operates extensively through SOEs to raise billions of dollars in stock exchanges, providing global investment banks with particularly important growth opportunities. Financial

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<sup>2</sup> H.R. REP. NO. 95-640, at 4-5 (1977)

<sup>3</sup> OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Signed on 17 December 1997 and effective on 15 February 1999)

<sup>4</sup> Accounting and Auditing Enforcement Rel. No. 3824, Admin. Proc. File No. 3-17684 (Nov. 17, 2016)

<sup>5</sup> Press Release 2016-241, JPMorgan Chase Paying \$264 million to settle FCPA Charges (17 November 2016) <<https://www.sec.gov/news/pressrelease/2016-241.html>>

<sup>6</sup> Section 13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B))

<sup>7</sup> Accounting and Auditing Enforcement Rel. No. 3948, Admin. Proc. File No. 3-18571 (July 5, 2018)

<sup>8</sup> Accounting and Auditing Enforcement Rel. No. 4065, Admin. Proc. File No. 3-19373 (Aug. 22, 2019)



service providers have been competing for the most politically connected graduates, as nurturing ties with China's political elite can help open up lucrative markets. In order to secure a competitive advantage, investment banks compete to hire privileged Chinese princelings.<sup>9</sup> Comparative analysis is used to compare the "Sons and Daughters Programme" with guanxi and Western networking practices, highlighting the similarities and differences in how nepotism and bribery operate across various cultural and economic contexts.

## 1. The Conversion between Power and Benefit in Capital Market

The presence of politically connected individuals in China inherently correlates with business success.<sup>10</sup> Stock exchanges double as vehicles for converting family political capital into wealth, which can then be reinvested to maintain or increase political power.<sup>11</sup> Foreign investment banks have played a complicit role in perpetuating this systematic conversion of interests.<sup>12</sup> Many of China's large SOEs maintain strong government ties and may fall within JPMorgan's scope. They can award significant contracts to prestigious foreign investment banks in exchange for preferential treatment.<sup>13</sup> The "Son and Daughter Programme" enabled JPMorgan to establish a direct link to business opportunities.

Chinese SOEs dominate the economy, and its strategic sectors are state-controlled and highly regulated. JPMorgan utilised the S&DP to recruit referred candidates specifically to influence foreign government officials for business purposes. Competitive pressures partly motivated the bank to expand the hiring programme.<sup>14</sup> The bank offered prestigious employment opportunities to the children of powerful Chinese officials, both in the government and at SOEs, in exchange for business favours. The S&DP operated between 2006 and 2013, routinely hiring hundreds of young associates from well-connected Chinese families who ultimately brought business to the bank.<sup>15</sup> The S&DP fast-tracked applications from well-connected candidates.<sup>16</sup> Solid evidence linked JPMorgan's business opportunities to these hires. For example, Xiaoning Tang, son of Shuangning Tang, chairman of the state-controlled financial conglomerate China Everbright Group, secured multiple lucrative deals for JPMorgan after his recruitment.<sup>17</sup> Similarly, Ms. Zhang, presumably related to JPMorgan through her father's company, the state-controlled China Railway Group (CRG), facilitated JPMorgan's consultancy on a \$5 billion initial public offering (IPO) after joining the bank.<sup>18</sup> These hiring practices raised questions about potential bribery that did not neatly align with the FCPA's traditional enforcement.<sup>19</sup> However, the SEC and Department of Justice (DoJ) examined

9 David Barboza and Sharon LaFraniere, 'China "Princelings" Using Family Ties to Gain Riches' New York Times (18 May 2012)

10 Feng Liu, Hui Lin and Huiying Wu, 'Political Connections and Firm Value in China: An Event Study' (2018) 152 (2) Journal of Business Ethics 551, 571

11 John Garnaut, 'A Family Affair' Foreign Affairs (30 May 2012)

12 Minxin Pei, 'In Hot Pursuit of China's Princelings' South China Morning Post (14 October 2013)

13 John Garnaut, 'In thrall of the empire of the sons' Sydney Morning Herald (26 May 2012)

14 Beverley Earle and Anita Cava, 'The "Princelings" and the Banks: When Does a Legitimate Business Practice Become Criminal Corruption in Violation of the Foreign Corrupt Practices Act?' (2016) 37 Northwestern Journal of International Law & Business 107, 116

15 Ned Levin, 'How a Chinese Company Pressed JP Morgan to Make Hires' Wall Street Journal (18 November 2016)

16 Jessica Silver-Greenberg and Ben Protess, 'For China Elite, JPMorgan Jobs on Easy Track' New York Times (30 August 2013)

17 Jessica Silver-Greenberg and Ben Protess, 'JPMorgan Tracked Business Linked to China Hiring' New York Times (7 December 2013)

18 Sundeep Tucker, Patti Waldmeir and Peter Shadbolt, 'China eyes \$5bn railway IPO' Financial Times (2 July 2009)

19 Charles Smith and Brittany Parling, "'American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA' (2012) 1 University of Chicago Legal Forum 237, 249



corruption more broadly, including non-monetary benefits or favours.<sup>20</sup> It is worth investigating whether the bank acted unethically or even unlawfully in this regard.

## 2. The “Sons and Daughters” Programme (S&DP) Under China’s Cultural and Political Settings

The *quid pro quo* deals are tempting for global banks operating in China. Hiring practices became so widespread that banks competed for the most politically connected graduates.<sup>21</sup> Initially, JPMorgan found itself “stuck between a rock and a hard place in China” because “[t]he country has created a hereditary political aristocracy well-versed in the art of turning power into personal profits.”<sup>22</sup> Lagging behind other banks in competition, JPMorgan attributed its failure to secure lucrative projects to its lack of deep governmental connections. As a result, it initiated the “Son and Daughter Programme” (S&DP) to recruit the children of well-connected officials in China in exchange for promising business opportunities. The creation and maintenance of *guanxi* is a paramount feature of Chinese culture; however, it also contributes to bribery. The cultural pervasiveness of *guanxi* nurtures prevalent rent-seeking, particularly within large SOEs.<sup>23</sup> Identifying China as a top market for high-end network-building, JPMorgan views the hiring of children of SOE executives as a valuable investment. China’s princelings have been valuable assets for Western investment banks seeking to capitalise on their *guanxi* to secure multibillion-dollar transactions. The hiring of relatives of prominent individuals appears to be an established customary practice and societal norm. Princelings typically serve as middlemen to a host of investment banks keen to do business in China.<sup>24</sup>

Nearly every firm has been seeking to hire the best-connected candidates in China, who are normally the offspring of the ruling elite.<sup>25</sup> The long-standing *guanxi* tolerates corruption and bribery, including “favours given in order to build a relationship in furtherance of securing a business advantage.”<sup>26</sup> JPMorgan has systematised the reciprocal favours in China to compete for contracts.<sup>27</sup> This practice of giving and receiving favours could tacitly slide towards more nefarious bribes.<sup>28</sup> For the sake of using back-door connections to gain profits,<sup>29</sup> they are eager to establish closer connections to potential clients in China, the world's second-largest economy.

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20 DoJ & SEC, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) <<https://www.justice.gov/sites/default/files/crimin-al-fraud/legacy/2015/01/16/guide.pdf>> 108

21 Shinjini Chatterjee, ‘Dangerous Liaisons: Criminalization of “Relationship Hires” under the Foreign Corrupt Practices Act’ (2015) 163 University of Pennsylvania Law Review 1771, 1804

22 Minxin Pei, ‘J.P. Morgan and the Pitfalls of Hiring China’s Elite Offspring’ Fortune (19 August 2013)

23 Curtis J. Milhaupt and Wentong Zheng, ‘Beyond Ownership: State Capitalism and the Chinese Firm’ (2015) 103 Georgetown Law Journal 665, 722

24 Ben Protess and Jessica Silver-Greenberg, ‘On Defensive, Bank Hired China’s Elite’ New York Times (30 December 2013)

25 Andrew Ross Sorkin, ‘Hiring the Well-Connected Isn’t Always a Scandal’ New York Times (19 August 2013);

26 Poonam Puri and Andrew Nichol, ‘The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices’ (2015) 53 (1) Osgoode Hall Law Journal 164, 230

27 Beverley Earle and Anita Cava, ‘The “Princelings” and the Banks: When Does a Legitimate Business Practice Become Criminal Corruption in Violation of the Foreign Corrupt Practices Act?’ (2016) 37 Northwestern Journal of International Law & Business 107, 116,

28 Cecily Rose, ‘The Limitations of a Human Rights Approach to Corruption’ (2016) 65 (2) International & Comparative Law Quarterly 405, 438

29 John Osburg, ‘Making Business Personal: Corruption, Anticorruption, and Elite Networks in Post-Mao China’ (2018) 59 Current Anthropology 149, 159



Nevertheless, China's cultural tolerance of bribery challenges the prevailing U.S. anticorruption regime.<sup>30</sup> The S&DP demonstrates the extent to which this culture is deeply rooted in China. In order to level the playing field on the side of bribery, it is significant to avoid a race to the bottom and instead promote a race to the top. *Guanxi* plays a subtle but important role in conducting business in China. There is evidence of deep-seated cultural and ethical failures at JPMorgan.<sup>31</sup> It is a cultural norm to assist one another as part of relationship building. The S&DP epitomises a common gesture, such as referring potential job opportunities within their network, even if they are not qualified for the positions, as a repayment or reward for bringing in deals and business.

## B. Jurisdiction *in rem*-Intangible Benefits Sufficient to Constitute "Anything of Value"

The FCPA forbids firms exchanging anything of value for a business advantage. This prompts a conceptual inquiry into whether a job or internship for the officials' relatives would fall within the legislative radar. Clarifying the term is key to determining the lawfulness or unlawfulness of the S&DP. The crucial issue at stake depends on whether "anything of value" should be interpreted to encompass offers of employment to relatives of Chinese executives. Conceptual analysis is used to explore the legal definitions and implications of "anything of value" and *quid pro quo* in bribery. It examines whether hiring Chinese princelings constitutes a transfer of value to officials, potentially violating the FCPA.

### 1. FCPA Provision of "Anything of Value"

The purpose of the FCPA is to prevent entities from distorting decision-making by foreign officials through improper inducements.<sup>32</sup> The 2012 *Amendments* significantly broadened its scope, particularly regarding extraterritorial jurisdiction.<sup>33</sup> The provision of jurisdictional extraterritoriality allows the government to prosecute as well as proceed civilly against companies that bribe foreign officials.<sup>34</sup> Conferring a benefit to a third party that counts as offering "anything of value" to a foreign official is consistent with the language and purpose of the statute.<sup>35</sup> It is illegal to give anything of value to foreign officials, including employees of SOEs, with the intent to improperly influence their discretion.<sup>36</sup> SOE executives with discretionary power over contracts qualify as government officials.<sup>37</sup> A foreign official is

30 Gerry Ferguson, 'China's Deliberate Non-Enforcement of Foreign Corruption' (2017) 50 (3) *The International Lawyer* 503, 528

31 William Dudley, 'Remarks at the Global Economic Policy Forum' (New York: Ending too Big to Fail, 7 November 2013) <<http://www.newyorkfed.org/newsevents/speeches/2013/dud131107.html>>; 'The Role of Culture and Ethics in Global Finance' in Ross P. Buckley, Emilios Avgouleas and Douglas W. Arner (eds.) *Reconceptualising Global Finance and its Regulation* (Cambridge, Cambridge University Press, 2016) 355-454

32 Daniel J. Grimm, 'Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act' (2014) 9 (1) *Virginia Law & Business Review* 91, 151

33 15 U.S.C. § 78dd-2(i) (2012)

34 Lauren Ann Ross, 'Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act' (2012) 62 *Duke Law Journal* 445, 485

35 DoJ & SEC, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012) <<https://www.justice.gov/sites/default/files/criminalfraud/legacy/2015/01/16/guide.pdf>> 21-22

36 Juscelino Colares, 'The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer' (2006) 5 (1) *Washington University Global Studies Law Review* 1, 30

37 *United States v. Esquenazi* 752 F.3d 912 (11th Cir. 2014); *United States v. Esquenazi*: Eleventh Circuit Defines "Government Instrumentality" under the FCPA (2015) 128 *Harvard Law Review* 1500, 1507



defined under the FCPA as

- “(1) an employee of a government or instrumentality thereof; and
- (2) any person acting in an official capacity on behalf of a foreign government.”<sup>38</sup>

The Eleventh Circuit defined “instrumentality” as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”<sup>39</sup> The expansive definitions of SOEs as instrumentalities of the state and employees of such entities as foreign officials create significant risks for the investment bank under the FCPA.<sup>40</sup>

Apart from high government positions and wealth, the career development of government officials' children has become a precious resource, particularly in those world-renowned financial institutions and investment banks. Such prestige is commonly considered the most valuable asset in China, which squarely constitutes a *quid pro quo* in the context of the FCPA. The S&DP has emerged, giving priority to the children of top executives of SOEs. The FCPA criminalises bribing foreign officials by offering them “anything of value” to assist in “obtaining or retaining business.”<sup>41</sup> The conceptual prong is broad, encompassing both tangible and intangible objects and services, as well as other non-cash benefits.<sup>42</sup> The phrase includes giving, regardless of whether it is direct or through intermediaries. The hiring of a relative of foreign officials can be considered a “thing of value” in order to influence their discretion for improper advantage.

## 2. Hiring Practice under the FCPA Radar-Expansive Interpretation of “Anything of Value”

It is an FCPA violation to hire the children of government officials in order to obtain investment banking business. The FCPA’s anti-bribery provision serves as the statutory basis for the SEC and DOJ to investigate the hiring practices of JPMorgan.<sup>43</sup> The law does not specifically use the word “bribe”. Instead, it prohibits companies from improperly influencing foreign officials with anything of value. Neither does it expressly define what it means to pay “anything of value”. Arguably, offering of jobs to the relatives of foreign officials could constitute “anything of value” under the FCPA.

### (a) Conceptual Interpretation

“Anything of value” is a broad term, which includes less traditional items of value that have been given in order to influence foreign officials. Congress intentionally chose to prohibit exchanges involving “anything of value,” instead of mere financial payments.<sup>44</sup> A job or internship can be something of value as a matter of law. The hiring is a form of untoward

38 15 U.S.C. §78dd-1(f)

39 United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014)

40 Kevin Wang, ‘Valuable Nepotism?: The FCPA and Hiring Risks in China’ (2016) 49 (3) Columbia Journal of Law and Social Problems 459, 493

41 15 U.S.C. § 78dd-1(a) (2012)

42 Joseph W. Yockey, ‘Solicitation, Extortion, and the FCPA’ (2011) 87 (2) Notre Dame Law Review 781, 839

43 Beverley Earle and Anita Cava, ‘Examining the JPMorgan “Princeling” Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement’ (2018) 17 (2) Washington University Global Studies Law Review 365, 410

44 Shinjini Chatterjee, ‘Dangerous Liaisons: Criminalization of “Relationship Hires” under the Foreign Corrupt Practices Act’ (2015) 163 University of Pennsylvania Law Review 1771, 1804 at 1778





influence, akin to bribing foreign officials to win business.<sup>45</sup> Hiring officials' relatives in order to win business can be considered bribery, given the FCPA bars giving anything of value to foreign government officials for a business advantage.<sup>46</sup> It is unlawful without regard to the bribe takers' evaluation of a *quid pro quo*. Hiring relatives of foreign officials explicitly intended to either obtain or retain business will be considered violations of the FCPA. The rationale is that the foreign official benefits psychologically from prestige stemming from the hiring. Both the SEC and the DOJ have construed the key term "anything of value" broadly, which encompasses intangible values, such as reputational prestige and networking opportunities.<sup>47</sup> The thing of value constitutes the intangible benefit of enhanced reputation or prestige, which fell within the FCPA's reach.<sup>48</sup> It can be interpreted to include employment offers, which are inherently valuable. The internship, training contract, or work experience at the investment banks are undoubtedly something of prestige in people's career ladder. Even an unpaid internship at a prestigious firm has genuine value for the recipient.

(b) *Sons & Daughters Programme: On the Radar of FCPA*

FCPA prohibits the corrupt "offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift promise to give, or authorisation of the giving of anything of value to" a foreign official".<sup>49</sup> The second-edition *FCPA Guide* relegates the hiring practices cases to an example of "gifts".<sup>50</sup> Companies may violate the statute if they give gifts to third parties, such as an official's family members, as an indirect way of corruptly influencing a foreign official.<sup>51</sup> There would be no difficulty in applying the FCPA where an employment relationship served simply as a sham based on illicit reasons.<sup>52</sup>

The S&DP has violated the FCPA's anti-bribery provisions, because JPMorgan's hiring was found to help win lucrative business.<sup>53</sup> The illicit purposes of the employment relationships were transparent. Using its princeling hires as leverage, JPMorgan has obtained the best *quid pro quo* benefits from Chinese SOEs. As Joel Cohen and Matthew Knox observed:

"it is easy for regulators to determine that the actual benefit will accrue later – i.e., an improper *quid pro quo*—as the company does not gain anything from the actual hiring of the employee."<sup>54</sup>

The hiring practice could thus trigger liability under the FCPA, especially where there is a *quid pro quo*, i.e., obtaining business in return for a non-monetary favour given to a Chinese

45 Arthur Levitt, 'Influence Peddling' Makes the World Go Round' Wall Street Journal (25 December 2013)

46 Rebecca Perlman and Alan Sykes, 'The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis' (2017) 9 (2) Journal of Legal Analysis 153, 182

47 Leah Trzcinski, 'The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World' (2013) 45 (4) New York University Journal of International Law and Politics 1201, 1286

48 DOJ & SEC, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012) <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> 108; Arthur Mathews, 'Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements' (1997) 18 (2) Northwestern Journal of International Law & Business 303, 456

49 Section 30A(a), 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), 78dd-3(a)

50 SEC & DOJ, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (Washington DC, SEC and DOJ 2nd ed., 2020) 14-18

51 SEC & DOJ, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (Washington DC, SEC and DOJ 2nd ed., 2020) 16

52 Kevin Wang, 'Valuable Nepotism?: The FCPA and Hiring Risks in China' (2016) 49 (3) Columbia Journal of Law and Social Problems 459, 493

53 Jessica Silver-Greenberg, Ben Protess and David Barboza, 'Hiring in China by JPMorgan under Scrutiny' New York Times (17 August 2013)

54 'Friendly Relations? When Nepotism May Violate the FCPA' (2012) 1 (10) The FCPA Report (17 October 2012)?





official. The S&DP was nothing more than bribery by another name. JPMorgan merely used it as a means to gain business with China. Evidently, something of intangible value was passed to foreign officials, allegedly used to influence their decisions. In this regard, the hiring of officials' relatives suffices as a transfer of something of value, even an offer of employment should be adequate to satisfy the value requirement. The future employment promised is something of value for an FCPA purpose.<sup>55</sup> The experience even serves as an indispensable springboard for securing a permanent job in a world-renowned investment bank, as well as other prestigious financial institutions. A solid causal link thus exists between the hiring and the business. Internships used with corrupt mind to win business can subject investment banks to enforcement action.<sup>56</sup>

### C. Is the Sons & Daughters Programme Ethical and Moral?

Foreign companies operating in China encounter an ethics and compliance minefield, with bribery and corruption impeding successful business operations.<sup>57</sup> The FCPA sets an ethical standard to level the playing field.<sup>58</sup> China embraces deep-rooted traditions, some of which test the boundaries of the Western world's moral and ethical principles. The legal and ethical situation is complicated since the hiring of relatives of prominent people can be a regular practice and societal norm in China.<sup>59</sup> Theoretical analysis, including Kantian ethics, utilitarianism, and ethical relativism, is used to examine the moral implications of the S&DP. This approach evaluates the ethical considerations and morally hazardous behaviour associated with the programme.

#### 1. Ethical Challenges

Three ethical theories to be addressed are Ethical Relativism, Utilitarianism, and Kantian Theory. The prevalent hiring practice of this nature may not necessarily be right according to the ethical theory of moral relativism. As Stempel said, "Referral hires" were less qualified than other job candidates who lacked the desired ties."<sup>60</sup> The S&DP would not be deemed moral according to Ethical Relativism, largely because it is viewed as a sham for illicit gains. It is common to give officials' relatives preferential treatment in China. Though it could be argued that bribery is embedded in Chinese business culture, undoubtedly, such behaviour is a wrongful attempt to induce an official to abuse his position. Salbu once argued that bribery transactions represent routine ways of conducting business in some countries.<sup>61</sup> Nevertheless, it is no defence to refer to a proverbial situation of "When in Rome, do as the Romans do."

55 United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986)

56 SEC, 'SEC Charges BNY Mellon With FCPA Violations' (Washington D.C., 18 August 2015)

<<https://www.sec.gov/news/pressrelease/2015-170.html>>

57 Jason Subler, 'For Businesses in China, A Minefield of Bribery Risks' Reuters (30 April 2012)

58 Rachel Brewster, 'Enforcing the FCPA: International Resonance and Domestic Strategy' (2017) 103 (8) Virginia Law Review 1611, 1684

59 Frank Cavico, 'JP Morgan Recruitment Practices in China and the Foreign Corrupt Practices Act: Legal Networking or Illegal Bribery?' (2015) 1 Open Ethics and Law Journal 30, 37

60 Jonathan Stempel, 'Credit Suisse Pays U.S. \$77 Million to Settle Asia Hiring Corruption Probes' Reuters (5 July 2018)

61 Steven Salbu, 'Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village' (1999) 24 Yale Journal of International Law 223, 226







JPMorgan should be aware of China's unique cultural and legal settings that shape business transactions while simultaneously avoiding running afoul of the FCPA.<sup>62</sup>

When an institution is perceived to be corrupt, the damage is already done, regardless of whether the guilt is manifest.<sup>63</sup> Kant focuses on an action *per se*. Morally, JPMorgan should have based its offer on objective factors in a moral way. However, it is unfair to fail qualified but not well-connected applicants just because their parents do not happen to be high officials. In this vein, the recruitment is immoral. JPMorgan engaged in a systematic bribery scheme by hiring those privileged children who were typically unqualified for the positions on their own merit.<sup>64</sup> It was corruption *per se*, given some hires did not even meet minimum qualifications. They were chosen solely because of the connections to their highly-placed relatives. Those without links to Chinese elites have been deprived of their fair employment opportunities, and they have felt unfairly treated in the hiring process. Furthermore, the S&DP has caused injustice to JPMorgan's competitors.

Utilitarianism can be interchangeably used as a consequentialist ethical theory, whereby morality is determined by a preponderance of good results.<sup>65</sup> In a cross-cultural context, the utilitarian analysis of the morality of bribery helps to gain an in-depth understanding of the issue.<sup>66</sup> Utilitarians base predictions on reasonably foreseeable consequences. The S&DP could be moral if the good outweighs the bad. Promoting meritocracy in systems is a good thing, particularly where opportunities for advancement rely primarily upon personal social connections.<sup>67</sup> Differing from the Kantian theory, it is not the hiring practice *per se*, but the consequences that determine whether the S&DP is moral or not. The Programme jeopardises the integrity of employment markets and harms equality. It had an adverse effect on qualified but unconnected young people in society. Social justice has been compromised in view of reasonably foreseeable consequences.<sup>68</sup> It involved hiring relatives who were under-qualified apart from express *quid pro quos*. Encouraging meritocratic hiring is critical to tackle the entrenchment of privilege.<sup>69</sup> The approach is conducive to promoting an equitable hiring practice that emphasises capabilities instead of background.

62 Kevin Wang, 'Valuable Nepotism?: The FCPA and Hiring Risks in China' (2016) 49 (3) Columbia Journal of Law and Social Problems 459, 493

63 Gareth Sweeney, Krina Despota and Samira Lindner (eds.), Global Corruption Report: Education (Routledge, 2013) 106

64 Securities and Exchange Commission, 'JPMorgan Chase Paying \$264 Million to Settle FCPA Charges' (Washington DC, SEC 2016-241, 17 November 2016) <<https://www.sec.gov/news/press-release/2016-241>>

65 Paul Kelly, 'Utilitarian Strategies in Bentham and John Stuart Mill' (1990) 2 (2) Utilitas 245, 266

66 Bill Shaw, 'Foreign Corrupt Practices Act: A Legal and Moral Analysis' (1988) 7 (10) Journal of Business Ethics 789, 796

67 Michael J. Sandel, 'How Meritocracy Fuels Inequality-Part I The Tyranny of Merit: An Overview' (2021) 1 American Journal of Law and Equality 4, 14

68 Department of Justice, 'JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China' (Washington DC, DOJ, 17 November 2016) <<https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>>

69 Matthew Stephenson, 'It's Official: Hiring a Foreign Official's Relative in Exchange for Business Violates the FCPA' The Global Anticorruption Blog (8 March 2016) <<https://globalanticorruptionblog.com/2016/03/08/its-official-hiring-a-foreign-officials-relative-in-exchange-for-business-violates-the-fcpa/>>





## 2. Morally Hazardous Behaviour

The deep-rooted traditions in China test the boundaries of the Western world's moral and ethical principles.<sup>70</sup> Moral standards are determined by societal values, customs, and mores.<sup>71</sup> The 2023 Transparency International Corruption Perceptions Index (CPI) gave China a score of 42 out of 100,<sup>72</sup> which epitomises that corruption continues to be endemic within the country. The tolerance of bribery would create a plausible perception that the conduct is morally acceptable practices in the Chinese society. However, morality is not a defence to legal liability pursuant to the FCPA.<sup>73</sup> Actually, FCPA compliance does not necessarily prohibit hiring individuals who are connected with foreign officials, but it requires firms to assess whether their hire would violate the law outright.<sup>74</sup> Hiring politically well-connected candidates is allowed by U.S. law, while taking on relatives of the Chinese SOEs with the purpose of gaining underwriting business can be classified as bribery under the FCPA.<sup>75</sup> Job offers or internships should not be used as bargaining chips with foreign government officials.

Though the hiring of relatives is typically called nepotism, hiring Chinese princelings in the S&DP is not the moral equivalent of American-style nepotism,<sup>76</sup> which likely forms the basis for an FCPA violation. The core objective of the Western least governmental interventionism is to maintain a healthy free market. The U.S. governmental intervention is not the same as the version as what Smith and Parling considered the intervention as a contemporary form of moralising and "American imperialism."<sup>77</sup> In this regard, it is not necessary to limit the FCPA's scope to avoid regulating practices that are "normal and accepted" in China.<sup>78</sup> There is a clear line between lawfulness and unlawfulness.

### D. *Mens rea* in the S&DP: Cross the Line from Nepotism to Bribery?

Nepotism and preferential hiring for officials' relatives represent a widespread standard business practice in China. The tactics that JPMorgan has used to gain leverage have come under special scrutiny, which must be made corruptly to trigger FCPA liability. It is worth exploring whether JPMorgan's hiring practice meets the FCPA's scienter requirement, that is, that the provision of the thing of value be made corruptly. This part explicates several key requirements of the FCPA in the context of the JPMorgan situation in China. The crux is whether the hiring is construed as providing anything of value to an official and whether JPMorgan had the requisite knowledge or corrupt intent in this regard. The burden of proof is

70 Cheng Li, 'Bringing Ethics Back into Chinese Discourse' in Huaihong He (ed.), *Social Ethics in a Changing China: Moral Decay or Ethical Awakening?* (Brookings Institution Press, 2015) xv-xi

71 Felix Cohen, 'The Ethical Bases of Legal Criticism' (1931) 41 (2) *Yale Law Journal* 201, 220

72 Transparency International, 'Corruption Perceptions Index' (CPI, Berlin, 2023)

<<https://www.transparency.org/en/cpi/2023/index/chn>>

73 James Weber and Kathleen Getz, 'Buy Bribes or Bye-Bye Bribes: The Future Status of Bribery in International Commerce' (2004) 14 (4) *Business Ethics Quarterly* 695, 711

74 Yockey, 'Solicitation, Extortion, and the FCPA' (2011) 87 (2) *Notre Dame Law Review* 781, 839

75 Ben Dattner, Tomas Chamorro-Premuzic, et al., 'The Legal and Ethical Implications of Using AI in Hiring' *Harvard Business Review* (25 April 2019)

76 Kevin Wang, 'Valuable Nepotism?: The FCPA and Hiring Risks in China' (2016) 49 (3) *Columbia Journal of Law and Social Problems* 459, 493

77 Charles Smith and Brittany Parling, "'American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA' 2012 (1) *University of Chicago Legal Forum* 237, 249

78 Shinjini Chatterjee, 'Dangerous Liaisons: Criminalization of "Relationship Hires" Under the Foreign Corrupt Practices Act' (2015) 163 (6) *University of Pennsylvania Law Review* 1771, 1804



on enforcement agencies for each of these elements of the offense. Legal analysis focuses on principles such as mens rea and the burden of proof in bribery cases. It argues that JPMorgan's scheme crossed the line into bribery, applying legal standards to the case's facts.

## 1. *Mens Rea* in the Sons & Daughters Programme

Enforcement authorities would decline to initiate an action unless the requisite scienter for a violation of the FCPA were present. JPMorgan would have violated the FCPA if it had acted with “corrupt” intent. A key issue hinges on the essential finding of corrupt intent, which determines whether the hiring could be construed as a bribe pursuant to the FCPA. The corrupt intent requirement forms the heart of the statute, that is, “the dominant *quid pro quo* definition of bribery is intuitively over-inclusive.”<sup>79</sup> Pursuant to the *FCPA Resource Guide*:

“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.”<sup>80</sup>

JPMorgan responsible for engaging in the hiring must possess a sufficiently culpable state-of-mind,<sup>81</sup> which refers to the “intent or desire wrongfully to influence the recipient”.<sup>82</sup> Arguably, neither has case law shed much light on the bounds of this state-of-mind requirement.<sup>83</sup>

The *FCPA Resource Guide* provides that an offer is made “corruptly” when it is “intended to induce the recipient to misuse his official position”.<sup>84</sup> In the second *Guide*, the DOJ and SEC appear to be interpreting more broadly who may be liable under the accounting provisions.<sup>85</sup>

The term of corruptly is not clearly defined under FCPA. The propriety of hiring a foreign official’s relative is a fact-intensive inquiry.<sup>86</sup> The legality of S&DP under the FCPA depends upon whether hires were made to improperly influence officials to abuse their positions.<sup>87</sup> It is imperative to ascertain circumstances in which the Programme was launched. The relationship hires have helped JPMorgan gain competitively advantage over its competitors. Some evidence showed that the value had been transferred to those SOE executives. Firms may adopt a head-in-the-sands approach to avoid culpability. The knowledge requirement is to prevent the firm from claiming ignorance of improper payments. A *quid pro quo* existed, i.e. the obtaining of business in return for a non-monetary favour given to a

79 Jed Lewinsohn, ‘Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration’ (2020) 129 (3) Yale Law Journal 690, 772

80 DOJ & SEC, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> 15

81 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012)

82 H.R. REP. NO. 95-640, at 8 (1977)

83 Shinjini Chatterjee, ‘Dangerous Liaisons: Criminalization of “Relationship Hires” under the Foreign Corrupt Practices Act’ (2015) 163 University of Pennsylvania Law Review 1771, 1804 at 1797

84 DOJ & SEC, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> 14

85 SEC & DOJ, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (Washington DC, SEC and DOJ 2nd ed., 2020) 42-46

86 Heather Timmons, ‘JP Morgan Chase Should Watch Its back in Reviewing its Own Hiring Practices in China’ Quartz (26 August 2013)

87 Ned Levin, ‘Charles Li Involved in Controversial China Hiring While at J.P. Morgan’ The Wall Street Journal (21 September 2015)



Chinese official. It means that the offers have been provided “corruptly”, which was intentionally wrongful.

## 2. Burden of Proof: Evidence of *Mens Rea*

In a criminal case, the evidentiary standard is “proof beyond a reasonable doubt”, as opposed to a “preponderance of the evidence standard for a civil case”.<sup>88</sup> In order to establish a violation of the FCPA’s anti-bribery provisions, the agency must prove, among other elements, that the defendant provided “anything of value” to a foreign government official “corruptly,” that is, with “an intent to wrongfully influence the recipient.”<sup>89</sup> A critical and specific requisite is the bank’s intent to give something of value in exchange for an official act.”<sup>90</sup> JPMorgan identified job applicants and recorded its “track record” for winning business from companies tied to the group. A key question arises as to whether there is an adequate causal link between JPMorgan’s recruitment practices and its growth in business in China.<sup>91</sup>

### (a) *The Requisite Mens Rea*

Government agencies must prove that the thing of value was given as part of a *quid pro quo* to demonstrate corrupt intent. Given accounting provisions under the FCPA is strict liability, the government does not need to prove intent to establish a violation.<sup>92</sup> The SEC examined whether the bank improperly won those deals by trading job offers for business with the Chinese SOEs. The key legal issue emerging from the investigation lies in the presence of corrupt intent in the bank’s recruitment practices. There must be evidence of the classic *quid pro quo*, the critical link between the conduct and the benefit, which is more complex than conventional straightforward exchange in the S&DP.<sup>93</sup> Given the opacity surrounding the most competitive hiring, it is more complicated to prove an unlawful *quid pro quo* when the benefit does not take the form of a material payment to officials themselves. Hiring someone with the intent of winning business could itself be illegal. The distinction between hiring a relative of a foreign official who may be well connected and offering employment to such a person in the express hope of winning specific business is key to proving an FCPA violation.<sup>94</sup> Within such a sensitive ambit, FCPA violations occur even if the employee is otherwise qualified for the job.<sup>95</sup> At the core of the investigation is to find evidence showing that JPMorgan offered jobs to relatives of Chinese officials in exchange for lucrative business deals in China.<sup>96</sup>

88 Stephen Saltzburg, ‘Standards of Proof and Preliminary Questions of Fact’ (1975) 27 (2) Stanford Law Review 271, 305

89 H.R. Rep. 640, 95th Cong., 1st Sess. 7-8 (Sept. 28, 1977); S. Rep. No. 114, 95th Cong., 1st Sess. 10 (2 May 1977).

90 United States v. Sun-Diamond Growers, 526 U.S. 398, 404-06, 119 S. Ct. 1402, 143 L. Ed. 2d 57 (1999)

91 Jessica Silver-Greenberg and Ben Protess, ‘On Defensive, JPMorgan Hired China’s Elite’ New York Times (29 December 2013)

92 15. U.S.C. § 78m of the FCPA

93 Beverley Earle and Anita Cava, ‘Examining the JPMorgan “Princeling” Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement’ (2018) 17 (2) Washington University Global Studies Law Review 365, 410

94 SEC, SEC Enforcement Actions: FCPA Cases (9 October 2019) <<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>

95 Lawrence White, Michael Flaherty, JPMorgan China Probe Sends Chill through Investment Banks’ Reuters (19 August 2013)

96 Shinjini Chatterjee, ‘Dangerous Liaisons: Criminalization of “Relationship Hires” under the Foreign Corrupt Practices Act’ (2015) 163 University of Pennsylvania Law Review 1771, 1804 at 1778





(b) *Track Record: A Sophisticatedly-Designed Systematic Scheme*

At stake is the critical link between the conduct and the benefit, which must be supported by evidence of the classic *quid pro quo*.<sup>97</sup> The smoking gun was JPMorgan's spreadsheet created to track the return on investment between particular hires and the resulting business.<sup>98</sup> The lists illuminated how the bank had created the S&DP as a gateway to doing business with Chinese SOEs. The bank hired approximately 200 interns and full-time employees and won more than \$100 million in business in China from entities connected to these hires between 2006 and 2013.<sup>99</sup> JPMorgan executives tracked the well-connected hires and the revenue attributable to those hires, allocating the cost of the hires as a marketing expense. It added scores of well-connected employees and tracked how those hires translated into business deals with the SOEs.<sup>100</sup> The evidence is circumstantially inductive of systematic corrupt intent, which falls squarely within the FCPA arena. This is explicitly acknowledged by the *FCPA Guide 2020*.<sup>101</sup> It is a clear violation of FCPA, which imposes obligations on investment banks to maintain accurate books and records.<sup>102</sup>

(c) *Nepotism vis-à-vis Bribery: Little Room for JP Morgan's Defence*

Nepotism can be demonstrated through trading scarce resources, such as jobs or internships, for unqualified individuals in exchange for business opportunities. Both SEC and DoJ emphasise the FCPA's prohibition of the exchange of "anything of value" for improper business advantages.<sup>103</sup> JPMorgan settled and signed a non-prosecution agreement (NPA) in which they agreed to pay over \$264 million to the agencies.<sup>104</sup> It sought out referral candidates with a "directly attributable linkage to business opportunity" and hired referred candidates who were less qualified than the regular pool of candidates hired through JPMorgan's standard hiring process.<sup>105</sup> The enforcement authorities focused on alleged hiring practices which failed to disclose the intended purpose. A defence makes little sense by referring to a fact that the practice of hiring well-connected children is commonplace in China.<sup>106</sup> It is not tenable for JPMorgan to attenuate the chain of causation by relying upon China's prevalence of such kind

<sup>97</sup> Christopher Robertson, Alex Winkelman, et al., 'The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation' (2016) 8 (2) *Journal of Legal Analysis* 375, 438

<sup>98</sup> Beverley Earle and Anita Cava, 'Examining the JPMorgan "Princeling" Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement' (2018) 17 (2) *Washington University Global Studies Law Review* 365, 410

<sup>99</sup> AP File No. 3-17684, Order Instituting Proceedings ("JPMorgan Order") (17 November 2016) <<https://www.sec.gov/litigation/admin/2016/34-79335.pdf>>; Antoine Gara, 'JPMorgan Agrees to Pay \$264 Million Fine For 'Sons and Daughters' Hiring Program in China' *Forbes* (17 November 2016)

<sup>100</sup> Ben Protess and Jessica Silver-Greenberg, 'On Defensive, JPMorgan Hired China's Elite' *The New York Times* (29 December 2013)

<sup>101</sup> DoJ and SEC, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (Washington DC, 2<sup>nd</sup> ed., Criminal Division of the DoJ and the Enforcement Division of the SEC, July 2020) <<https://www.justice.gov/criminal-fraud/fcpa-resource-guide>> 16

<sup>102</sup> 15 U.S.C. § 78ff (2012)

<sup>103</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2012)

<sup>104</sup> Dominic Rushe, 'JP Morgan Chase to pay \$264m over Chinese 'Princelings' Bribery Scheme' *Guardian* (17 November 2016)

<sup>105</sup> SEC, 'JP Morgan Chase & Co' (Release No. 79335 / November 17, 2016) <<https://www.sec.gov/litigation/admin/2016/34-79335.pdf>>

<sup>106</sup> Ben Protess and Jessica Silver-Greenberg, 'On Defensive, Bank Hired China's Elite' *New York Times* (30 December 2013)



of hiring practice. To create an affirmative defense, a defendant must show the conduct was legal under the express written laws of China.<sup>107</sup> One should not argue either that the host state's anti-bribery laws are not objectively and consistently enforced.<sup>108</sup> Acting in conformity with "When in Rome, do as the Romans" is not justified under the FCPA, as one can be said to be acting morally, but not necessarily legally.<sup>109</sup>

JPMorgan could withstand SEC and DoJ's investigative scrutiny, had it been able to show that its hiring based upon robust and legitimate considerations. The SEC's investigation of JPMorgan in terms of the bank's hiring practices demonstrates FCPA-nepotism risks. The circumstantial evidence of corrupt intent demonstrates the nuanced FCPA compliance risks presented by hiring relatives of foreign government officials.<sup>110</sup> It would have mitigated FCPA risks if JPMorgan had incorporated a broad set of adequate compliance representations in a written contract.<sup>111</sup> DoJ and the SEC have examined the circumstances of the engagement and determined that the purpose of the relative's hiring was to improperly influence the Chinese official. In this sense, public scrutiny helps to check nepotism's most blatant manifestations. The democratic process, particularly the role played by a free press, constrains rent-seeking by children of government officials.<sup>112</sup>

### 3. Cross-the Line: Employment as Sham for Illicit Advantages

The FCPA prohibits providing anything of value to third parties who are not themselves a foreign official as an indirect means to corruptly influence a foreign official.<sup>113</sup> As analyses above, SEC and DoJ have generally relied on a broad interpretation of "anything of value," to justify the criminalisation of a variety of foreign corporate transactions.<sup>114</sup> Hiring an official's relative can count as providing something of value to the official, particularly when the job is in exchange for the official using his power to benefit the firm. Despite that such a hiring practice appears to be a legitimate way to build goodwill, the direct exchange for a particular business benefit can count as an unlawful bribe. The rationale behind the offer is to receive a business advantage.

<sup>107</sup> Section 30A(c) (1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

Referring to the local law defence, a defendant must establish that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country."

<sup>108</sup> Daniel Chow, 'The Interplay between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act' (2012) 73 Ohio State Law Journal 1015, 1037

<sup>109</sup> Frank Cavico, 'JP Morgan Recruitment Practices in China and the Foreign Corrupt Practices Act: Legal Networking or Illegal Bribery?' (2015) 1 Open Ethics and Law Journal 30, 37

<sup>110</sup> Shinjini Chatterjee, 'Dangerous Liaisons: Criminalization of "Relationship Hires" under the Foreign Corrupt Practices Act' (2015) 163 University of Pennsylvania Law Review 1771, 1804

<sup>111</sup> Joel Cohen and Matthew Knox, 'Friendly Relations? When Nepotism May Violate the FCPA' (2012) 1 (10) *The FCPA Repot* (17 October 2012)

<sup>112</sup> Michael Johnston and Yan Sun, 'Does Democracy Check Corruption? Insights from China and India' (2009) 42 (1) *Comparative Politics* 1, 19

<sup>113</sup> *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991); DOJ Op. P. Rel. No. 12-01 (Sept.18, 2012)

<sup>114</sup> *SEC v. BAE Sys. Inc.*, No. 10-2093 (D.D.C. Dec. 10, 2010); *SEC v. Lucent Techs. Inc.*, No. 07-2301 (D.D.C. Dec. 21, 2007)



(a) Consistent Sanctions against the Hiring

The SEC has been increasing its focus on companies' hiring and internship practices.<sup>115</sup> The term, "anything of value", has been broadly construed by the court as well as the SEC and DoJ. For instance, a promise to reinstate an employee is a thing of value in the context of 18 U.S.C. § 641.<sup>116</sup> In *United States v. DaimlerChrysler China*, Daimler provided a thing of value to a Chinese official responsible for making purchasing decisions in which Daimler had an interest by providing his son and his son's girlfriend with internships at Daimler.<sup>117</sup> Daimler was accused of employing the relatives of Chinese government officials in an effort to obtain contracts from SOEs. This hiring purpose was to secure business from Sinopec, a state-owned energy company. It has been explicitly held in *BNY Mellon* that providing a job, even an unpaid internship, to a relative of a government official amounts to giving a "thing of value" to the official.<sup>118</sup> Bank of New York Mellon (BNY Mellon) provided to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund (SWF).<sup>119</sup> BNY Mellon allegedly granted these internships to the relatives of these officials with the approval of its senior executives. In the *BNY Mellon* settlement, it is explicitly stated that:

"the firm's decision to provide internships to foreign officials' relatives counted as providing 'anything of value' because "[t]he internships were valuable work experience, and the requesting family members derived significant personal value in being able to confer this benefit on their family members."<sup>120</sup>

The settlement represents the first enforcement action in which internships for relatives of alleged "foreign officials," as opposed to money payments, constituted a bribe.<sup>121</sup> Granting the internships was indispensable to retain or grow business with the SWF. BNY Mellon has thus violated both the FCPA's anti-bribery and internal controls provisions.

Another case outside investment banking is also illustrative, the SEC reached a settlement with Qualcomm, which focused substantially on Qualcomm's practice of hiring the relatives of Chinese officials in exchange for favourable treatment, even when these candidates would not meet Qualcomm's normal hiring standards. Qualcomm gave internships to the relatives of China's foreign officials from 2002 to 2012, so as to increase the chances of being selected as a mobile technology provider.<sup>122</sup> As a result, Qualcomm caved by agreeing to pay a \$7.5 million civil penalty via an SEC administrative order in which the company neither admitted nor denied the SEC's findings.<sup>123</sup> The *Qualcomm* case has wider ramifications on the

<sup>115</sup> Chad Bray, 'HSBC Posts 4th-Quarter Loss and Comes Under S.E.C. Scrutiny' *New York Times* (22 February 2016); Enda Curran and Jean Eaglesham, 'Regulators Step Up Probe into Bank Hiring Overseas' *The Wall Street Journal* (6 May 2014)

<sup>116</sup> *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979)

<sup>117</sup> *United States v. DaimlerChrysler China, Ltd.*, No. 10-cr-00066-RJL (D.D.C. Mar. 22, 2010)

<sup>118</sup> *The Bank of New York Mellon Corporation*, Exchange Act Release No. 75720 (18 August 2015)

<sup>119</sup> SEC, 'SEC Charges BNY Mellon with FCPA Violations' (18 August 2015)

<<http://www.sec.gov/news/pressrelease/2015-170.html>>

<sup>120</sup> SEC, 'SEC Charges BNY Mellon With FCPA Violations' (18 August 2015)

<<https://www.sec.gov/news/pressrelease/2015-170.html>>

<sup>121</sup> Kevin Wang, 'Valuable Nepotism?: The FCPA and Hiring Risks in China' (2016) 49 (3) *Columbia Journal of Law and Social Problems* 459, 493

<sup>122</sup> SEC, 'Qualcomm Hired Relatives of Chinese Officials to Obtain Business' (1 March 2016)

<<https://www.sec.gov/news/pressrelease/2016-36.html>>

<sup>123</sup> Mike Koehler, 'The FCPA's Record-Breaking Year' (2018) 50 (1) *Connecticut Law Review* 91, 160





SEC's investigation of JPMorgan concerning alleged hiring practices in China. Most banks have neither admitted nor denied wrongdoing as part of the above settled agreements. Given the above settlement involving "princeling" hiring programmes,<sup>124</sup> it is indicated that the firms have failed to sufficiently tailor their system of internal accounting controls to the bribery risks, neither have they had an adequate governance in place to prevent its employees from taking such a systematic approach.

(b) *Settlement between SEC, DoJ and JPMorgan*

The SEC initiated an FCPA investigation into JPMorgan for allegedly hiring the children of prominent Chinese officials in order to strengthen relationships for business.<sup>125</sup> An NPA involved criminal, civil, and regulatory sanctions totalling more than \$264 million, and an aggregate discount of 25% off of the bottom of the U.S. Sentencing Guidelines fine range.<sup>126</sup> A criminal penalty of \$72 million was paid to the DoJ.<sup>127</sup> The SEC filed a cease and desist order against JPMorgan, whereby the firm agreed to pay \$130.5 million in disgorgement to the SEC, including prejudgment interest,<sup>128</sup> and further committed to reform its hiring practices. The enforcement action underscores the aggressive posture that U.S. regulators have taken regarding the hiring of relatives of foreign government officials.<sup>129</sup> The SEC's investigation rests on an expansive understanding of the FCPA, which targets not only full-time employees, but also interns.<sup>130</sup> The *JPMorgan* case indicates that FCPA prohibits companies from improperly influencing foreign officials with "anything of value," including internships. This case demonstrates a continued focus on FCPA enforcement in the financial services industry, as well as an aggressive interpretation of the FCPA's "anything of value" and *mens rea* elements.

### E. Mitigate Antibribery Risks in Hiring: Multipronged Approaches

Some foreign multinational corporations (MNCs) may find themselves thrust into a legal and ethical morass amid increasingly fierce competition for business in China.<sup>131</sup> Hypothetically, an unlevelled playing field is closely related to asymmetrical market opportunities, which might disadvantage U.S. firms' competitiveness in China.<sup>132</sup> Robust and

<sup>124</sup> Beverley Earle and Anita Cava, 'The "Princelings" and the Banks: When Does a Legitimate Business Practice Become Criminal Corruption in Violation of the Foreign Corrupt Practices Act?' (2016) 37 *Northwestern Journal of International Law & Business* 107, 116

<sup>125</sup> Emily Glazer, 'JP Morgan Discussed Pitfalls to 'Princeling' China Hiring in 2006' *Wall Street Journal* (23 October 2014)

<sup>126</sup> Minxin Pei, 'Alibaba, Qualcomm, JPMorgan: China is No Country for the Fainthearted Business' *Fortune* (20 February 2015)

<sup>127</sup> DoJ, 'JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China' (17 November 2016) <<https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>>

<sup>128</sup> *SEC v JP Morgan Chase & Co* (Release No. 79335 / 17 November 2016) <<https://www.sec.gov/litigation/admin/2016/34-79335.pdf>>

<sup>129</sup> Shinjini Chatterjee, 'Dangerous Liaisons: Criminalization of "Relationship Hires" under the Foreign Corrupt Practices Act' (2015) 163 *University of Pennsylvania Law Review* 1771, 1804

<sup>130</sup> Ben Protess and Jessica Silver-Greenberg, 'JPMorgan Tracked Business Linked to China Hiring' *New York Times* (7 December 2013)

<sup>131</sup> Seth D. Kaplan, 'How to Navigate the Ethical Risks of Doing Business in China' *Harvard Business Review* (26 January 2022)

<sup>132</sup> Shinjini Chatterjee, 'Dangerous Liaisons: Criminalization of "Relationship Hires" under the Foreign Corrupt Practices Act' (2015) 163 *University of Pennsylvania Law Review* 1771, 1804 at 1800







appropriate hiring institutions are required to monitor and audit referral hiring. It is essential to nurture a corporate culture of ethics and integrity.<sup>133</sup> The *JPMorgan* case underscores the importance of having specific controls on risky activities. Instead of asserting that the enforcement authorities are criminalising their hiring practices, the banks need to demonstrate that their conduct is not a “bribe” intended to obtain business. Through policy analysis and examination of precedents, this section reviews existing legal precedents and suggests measures to clarify and strengthen FCPA enforcement. It evaluates past cases to outline circumstances that constitute an FCPA violation and proposes proactive measures to address the issue.

### 1. Reassess the Proverbial Situation of Too Big to Fail/Too Big to Jail? Show Teeth to Deter Repeats of Unlawful Hiring Practices

After JPMorgan’s scandal, quite a few global banks have been scrutinised for hiring the relatives of senior foreign officials, such as Barclays and Deutsche Bank.<sup>134</sup> In August 2019, Deutsche Bank paid US\$16 million to the SEC for the hiring of relatives of Russian and Chinese public officials in order to win business between 2006 and 2014.<sup>135</sup> On the one hand, this demonstrates that the banks have failed to maintain a system of internal controls around hiring. On the other hand, it reflects that the previous penalties against prior violators have not led to adequate deterrence. This JPMorgan settlement has been criticised as overly lenient because it fails to provide the deterrence needed to discourage corporate malfeasance.<sup>136</sup> Undeniably, a harsher penalty might cause a chilling effect that disrupts those foreign firms’ legitimate businesses in China.<sup>137</sup> More severe penalties are likely to make the bank to change how it tracks and reports its hiring decisions. It would rely on selective disclosure rather than frank dialogue, largely because voluntary disclosure does not necessarily yield substantial sentencing leniency.<sup>138</sup> On the other hand, more credible threats will entail the banks investing more in their compliance programmes. Prevention is always better than cure, which is conducive to creating an even playing field in financial services sector. Senior executives of JPMorgan made decisions to recommend hiring referrals based on the prospect of business from referring SOEs rather than the merit of the prospective employee. The Corporate Executive Accountability Act builds on the Ending Too Big to Jail Act.<sup>139</sup> It requires executives of banks with more than \$10 billion in assets to certify each year that they have conducted due diligence and found no

<sup>133</sup> DoJ & SEC, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012)

<<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> 40

<sup>134</sup> Olaf Storbeck, Stephen Morris and Arash Massoudi, ‘Deutsche Bank Payments to Saudi Royal Adviser Probed’ *The Wall Street Journal* (16 January 2020)

<sup>135</sup> SEC, ‘SEC Charges Deutsche Bank with FCPA Violations Related to Its Hiring Practices’ (22 August 2019)

<<https://www.sec.gov/enforce/34-86740-s>>

<sup>136</sup> Beverley Earle and Anita Cava, ‘Examining the JPMorgan “Princeling” Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement’ (2018) 17 (2) *Washington University Global Studies Law Review* 365, 410

<sup>137</sup> Peter Jeydel, ‘Yoking the Bull: How to Make the FCPA Work for U.S. Business’ (2012) 43 *Georgetown Journal of International Law* 523, 529

<sup>138</sup> Bruce Klaw, ‘A New Strategy for Preventing Bribery and Extortion in International Business Transactions’ (2012) 49 (2) *Harvard Journal on Legislation* 303, 339; Brandon Garrett, ‘Globalized Corporate Prosecutions’ (2011) 97 (8) *Virginia Law Review* 1775, 1833

<sup>139</sup> The 16<sup>th</sup> Congress 1<sup>st</sup> Session S1005: “To stop financial institution crime, require certain officers of companies to certify that they have conducted due diligence relating to criminal conduct or civil fraud, create accountability in deferred prosecution agreements, and for other purposes.”



fraudulent or criminal conduct at the institutions they oversee.<sup>140</sup> Enforcement authorities normally lack the resources to thoroughly investigate complex corporate and executive conduct, and this approach would help to narrow the gap.

## 2. Create a Level Playing Field

The sanctions against JPMorgan seem to place significant costs on companies subject to the FCPA compared to their competitors that are not. Such an asymmetry in regulation and enforcement would, *prime facie*, put American companies at a disadvantage. Nevertheless, the U.S. is not pursuing a stand-alone approach to deterring foreign corruption. The significant increase of cross-border enforcements triggered by the UK Bribery Act (BA 2010) prompts a global shift toward more symmetry. The S&DP would be more than capable of giving rise to criminal liability under the BA 2010. The tough antibribery law defines bribery as including where a person “offers, promises or gives a financial or other advantage to another person”, with the intention of inducing a person to perform improperly a relevant function or activity...<sup>141</sup>A job offer would fall squarely within the concept of an “other advantage”. As such, the UK follows a more restrictive theory of corporate criminal liability than the U.S. However, the BA 2010 has created an offence where the entity has failed to put in place adequate procedures to prevent bribery.<sup>142</sup>Furthermore, the BA 2010 has extraterritorial effect, which means that a company may be prosecuted for the section 7 offence before a UK court.<sup>143</sup> An attempt to use subsidiary companies as a legal firewall would be in vain, even if the conduct took place abroad. After all, China has been implementing market-oriented reforms for over forty years. Healthy economic growth would justify the Chinese Communist Party (CCP)'s legitimacy in power.<sup>144</sup> Meanwhile, the strong performance of Chinese markets would be conducive to consolidating its long-term political survival.

## 3. Proactive and Risk-Based Compliance Approaches

Global financial institutions face escalating FCPA-related investigation risks when they neglect established internal control mechanisms, particularly in jurisdictions known for pervasive corruption, where extending robust compliance practices proves challenging. Notably, robust FCPA compliance programmes help detect potential problems at global banks.<sup>145</sup> Rigorous hiring and anti-bribery policies in place help to prohibit referral hires. The investment banks must efficiently enforce these policies and implement adequate measures to mitigate identified risks.

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<sup>140</sup> Lev L. Dassin, Jennifer Kennedy Park, and David E. Wagner, ‘Bill Proposal-Corporate Executives Criminally Accountable for Negligent Conduct’ *Harvard Law School Forum on Corporate Governance* (18 April 2019)

<sup>141</sup> BA 2010 s1 (2) (a)

<sup>142</sup> BA 2010 s7

<sup>143</sup> BA 2010 s12

<sup>144</sup> Rana Mitter and Elsbeth Johnson, ‘What the West Gets Wrong about China’ (2021) 99 (3) *Harvard Business Review* 42, 48

<sup>145</sup> Kevin Wang, ‘Valuable Nepotism?: The FCPA and Hiring Risks in China’ (2016) 49 (3) *Columbia Journal of Law and Social Problems* 459, 493



(a) *Regulatory Framework: Benchmark*

It is essential to create an effective code of conduct (CoC) that can bring about real change of firms' ethics and integrity. A gift should be properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.<sup>146</sup> Failing to keep clear records of a decision to hire an individual in the circumstances described above could constitute a separate violation of the FCPA. In terms of hiring practices, the CoC will enable the bank to justify its offers based on merits, and to check whether there are concerns about a politically exposed person (PEP).<sup>147</sup> They need to be more rigorous in vetting potential China hires as a result of increased regulatory scrutiny.<sup>148</sup> More significantly, the banks should refer to ethics laws, such as Standards of Ethical Conduct and Conflicts of Interest,<sup>149</sup> while designing a compliance programme more pertinently.

(b) *Proactive Steps*

The S&DP highlights the need for the banks to take a proactive and risk-based approach to address bribery. A significant step is that the banks should review antibribery policies and hiring procedures to ensure legal and ethical practices. It is crucial that they develop compliance programmes that account for the possibility of FCPA violations associated with the hiring processes. The *JPMorgan* case serves as a wake-up call for the investment bank to scrutinise how they document their hiring decisions. JPMorgan needs to ensure their compliance programmes have robust procedures in place to address the specific corruption risks. Objective standards and due diligence must be adequately tailored to prevent the corruption risks inherent in hiring practices, which should also be upgraded into its internal compliance procedures and controls. Doing so would avoid FCPA liability if JPMorgan could have documented that the new hire is "legitimately qualified, whether standing alone or compared to others under consideration for the same position."<sup>150</sup> The investment bank is supposed to put in place safeguards, which not only include extensive measures to enhance internal accounting controls but also effective remedial measures to improve the bank's hiring practices. Proactive steps help to assure that the organisation as a whole is well informed of FCPA-related risks. It is at stake whether internal policies for screening candidates for links to SOEs can be sensibly implemented.

It seems that there have not been any notably new cases specifically referred to as the S&DP involving major financial institutions similar to the *JPMorgan* case. However, it's important to note that investigations and cases related to improper hiring practices, potential violations of anticorruption laws like the BA 2010 and FCPA, and issues of compliance in high-risk jurisdictions continue to be topics of interest and concern for regulatory bodies as well as MNCs.

<sup>146</sup> SEC & DoJ, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (Washington DC, SEC and DoJ, 2<sup>nd</sup> ed., 2020) 14

<sup>147</sup> Lawrence White, 'SEC's JPMorgan Probe Threatens Cosy Tradition of 'Client hires'' *Reuters* (21 August 2013)

<sup>148</sup> Mike Koehler, 'Has the FCPA Been Successful in Achieving Its Objectives?' (2019) 4 *University of Illinois Law Review* 1267, 1319

<sup>149</sup> 5 C.F.R. Part 2635; 48 C.F.R. § 3.101 (Standards of Ethical Conduct); 18 U.S.C. §§ 202-209 (Conflicts of Interest)

<sup>150</sup> Rebecca Hughes Parker and Nicole Di Schino, 'SEC Investigation of JPMorgan Hiring Practices Demonstrates FCPA Nepotism Risks' (2013) 2 (17) *The FCPA Repot* (21 August 2013)





## Conclusion

This study examines the highly publicised investigation into JPMorgan's 'sons and daughters' programme in China, where authorities applied a broad interpretation of "anything of value." The hiring of Chinese princelings was scrutinised as potentially offering improper benefits, possibly violating the FCPA if jobs were offered to secure business. This case underscores that in high-risk jurisdictions, inadequate focus on firms' human resource compliance policies can lead to criminal liabilities. Compliance officers must carefully review hiring practices to prevent prestigious internships from becoming bargaining tools with public officials. Foreign investment banks should heed FCPA compliance risks in China to ensure fair competition among law-abiding firms. Further research is essential to tackle global challenges in enforcing anti-bribery laws amidst diverse cultural norms, business practices, and regulatory requirements. This inquiry could illuminate effective strategies for navigating varied regulatory landscapes. Additionally, exploring how corporate governance practices and transparency measures mitigate corruption risks linked to hiring practices is crucial. Insights into board oversight, executive accountability, and fostering a compliance-centric culture can enhance governance frameworks and promote ethical business conduct on a global scale.