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Hiring a Foreign Official's Family and Friends: The "Thing of Value" Under the FCPA

We previously have reported on a number of FCPA settlements involving banks that hired relatives and friends of public officials in Asia and the Middle East.[1] As in all FCPA cases, defendants in such matters must have offered or provided "anything

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1. *See* Paul R. Berger, Bruce E. Yannett, Sean Hecker, Philip Rohlik, and Steven S. Michaels, "Hiring Relatives of Foreign Officials: The DOJ's Guidance, Some Key Issues, and Potential Internal Controls Solutions to a Recurring Issue Under the FCPA," FCPA Update, Vol. 5, No. 1 (Aug. 2013), https://www.debevoise.com/insights/publications/2013/08/fcpa-update; Sean Hecker, Bruce E. Yannett, Philip Rohlik, and David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (Aug. 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015; Andrew Levine, Bruce E. Yannett, and Philip Rohlik, "SEC Expands Its Aggressive Approach to Connected Hires in Qualcomm Enforcement Action," FCPA Update, Vol. 7, No. 8 (Mar. 2016), http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016; Kara Brockmeyer, Andrew M. Levine, Philip Rohlik, and Jil Simon, "Rec ent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability," FCPA Update, Vol. 11, No. 2 (Sept. 2019), http://www.debevoise.com/insights/publications/2019/09/fcpa-update-september-2019.

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of value" to a foreign official.[2] In these hiring cases, the SEC and DOJ have long taken the position that providing a job or even an unpaid internship to a third-party – such as a relative or friend of a foreign official – in order to obtain business, constitutes providing a "thing of value" *to the official*.

This theory underlies each of the hiring practices settlements. But what is the "thing of value" that has been provided to the foreign official in such cases? Is it the third-party payment itself or a more nebulous, intangible benefit separate from that payment? As discussed below, the SEC and DOJ have suggested that the benefit is largely psychological.

The government's third-party benefits theory may be tested soon in court. As DOJ increasingly brings individual FCPA prosecutions, the body of FCPA case law – historically quite limited – is slowly growing. It likely is only a matter of time before a court squarely considers whether a defendant has provided a "thing of value" to a foreign official when providing pecuniary or other benefits only to a third-party.

This article focuses on the "thing of value" that was at issue in FCPA hiring cases, and it analyzes case law in the domestic bribery context to anticipate how courts may evaluate similar issues that arise in challenges to FCPA prosecutions. As discussed below, case law in the domestic bribery context suggests that key factors likely will include the nature of the official's relationship with the third-party, any evidence that the official subjectively attached a personal value to the third-party payment, and any evidence that the third-party payment alleviated actual or potential financial obligations of the official.

The FCPA Resource Guide

The SEC and DOJ provided guidance on the "thing of value" requirement in the first edition of their joint FCPA Resource Guide, issued in November 2012.[3] The Guide stated, with respect to third-party payments, that "[c]ompanies also may violate the FCPA if they give payments or gifts to third parties, like an official's family members, as an indirect way of corruptly influencing a foreign official."[4]

The Guide did not, however, spell out particular factors that would be used to determine whether a third-party payment constituted a "thing of value" to a foreign official. In support of the above assertion, the Guide cited an Eighth Circuit case, *United States v. Liebo*, noting that there, "[the] defendant paid personal bills and

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2. 15 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).
3. *See* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" at 14-16 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
4. *Id.* at 16.

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provided airline tickets to a cousin and close friend of the foreign official whose influence the defendant sought in obtaining contracts."[5] But it is difficult to discern from *Liebo* which factors were most salient because the defendant in that case did not actually challenge the government's proof of the "thing of value" requirement, and the court did not analyze that issue specifically.[6]

In July 2020, the SEC and DOJ issued an updated FCPA Resource Guide.[7] The revised Guide has the same assertion quoted above concerning a company's ability to violate the FCPA by paying a third-party.[8] Although it still does not specify particular factors that clarify when such liability may arise from a third-party payment, the Guide now cites one of the hiring practices settlements – the resolution with Credit Suisse – in addition to *Liebo*. Accordingly, it is useful to review the hiring practices settlements to assess the key factors that drove the agencies' determinations that a "thing of value" had been provided to foreign officials in those cases.

"It likely is only a matter of time before a court squarely considers whether a defendant has provided a 'thing of value' to a foreign official when providing pecuniary or other benefits only to a third-party."

The SEC and DOJ Hiring Practices Settlements

Since 2013, the SEC and DOJ have pursued companies for hiring relatives and friends of foreign officials in order to obtain business from those officials.[9] In August 2015, the Bank of New York Corporation ("BNYM") became the first bank to settle with the SEC over allegations related to its hiring practices in the Middle East.[10]

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5. *See id.* (citing *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991)).
6. *Liebo*, 923 F.2d at 1311-12. *Liebo* is also a complicated precedent because, as the court emphasized, there was significant evidence in the record concerning payments given for the foreign official's personal benefit: "There was testimony that [third-party] helped [defendant] establish a bank account with a fictitious name, that [third-party] used money from that account, and that [third-party] sent some of the money from that account to [the foreign official]." *Id.* at 1311.
7. *See* U.S. Dep't of Justice and U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download.
8. *Id.* at 16.
9. *See, e.g.*, Jessica Silver-Greenberg, Ben Protess, and David Barboza, "Hiring in China by JPMorgan Under Scrutiny," *New York Times* (Aug. 17, 2013), http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny.
10. SEC Exchange Act Release No. 75720, In the Matter of the Bank of New York Mellon Corporation (Aug. 18, 2015), https://www.sec.gov/litigation/admin/2015/34-75720.pdf (stating that "[t]he internships were valuable work experience, and the requesting officials derived significant personal value in being able to confer this benefit on their family members") (hereinafter "BNYM Order").

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In November 2016, JPMorgan Chase ("JPM") settled with both the SEC and DOJ, becoming the first bank to pay a criminal penalty for similar conduct in Hong Kong.[11] In a press release, DOJ referred to JPM's now notorious "Sons and Daughters" program as "nothing more than bribery by another name."[12]

Since then, other U.S.-based financial institutions have entered into corporate FCPA settlements regarding their hiring practices. We previously have reported on a number of these settlements.[13] Below, we highlight key factors in each case that appear to have driven the determination that a "thing of value" had been provided to a foreign official:

- At issue in the BNYM settlement was the bank's hiring of three interns related to two individuals employed by a Middle Eastern Sovereign Wealth Fund, a client of BNYM.[14] The SEC stated that "[t]he internships were valuable work experience, and the requesting officials derived significant personal value in being able to confer this benefit on their family members."[15] Several factors drove the thing-of-value analysis. One factor was the close familial relationship between the interns and the officials – a son and a nephew of one official ("Official X") and a son of another official ("Official Y").[16] Another was that the hirings followed a "personal and discreet request that BNY Mellon provide internships to two of [Official X's] relatives" and that Official X "persistently inquired of BNY Mellon employees concerning the status of his internship request, asking whether and when BNY Mellon would deliver the internships."[17] Like Official X, Official Y also initiated the request for the hiring of his son and had employees acting on his behalf who inquired repeatedly about the status and details of the internship.[18]

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11. *See* U.S. Dep't of Justice, "JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme" (Nov. 17, 2016), https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme. JPM also entered into a settlement with the SEC. *See* U.S. Sec. & Exch. Comm'n, "JPMorgan Chase Paying $264 Million to Settle FCPA Charges" (Nov. 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html. *See* SEC Exchange Act Release No. 79335, In the Matter of the Bank of J.P. Morgan Chase & Co., (Nov. 17, 2016), https://www.sec.gov/litigation/admin/2016/34-79335.pdf (hereinafter "JPM Order").
12. *Id.*
13. *See supra* n. 1.
14. BNYM Order at ¶ 2.
15. *Id.* ¶ 21.
16. *Id* ¶ 9.
17. *Id* ¶ 15.
18. *Id* ¶ 17.

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- In March 2016, Qualcomm entered into a Cease-and-Desist Order with the SEC regarding its hiring of relatives related to high-ranking employees of state owned enterprises ("SOEs").[19] The Qualcomm Order states that these hires were "often [made] at the request of these foreign officials," otherwise "did not satisfy Qualcomm's hiring standards," and were "important from a customer relationship perspective."[20] One such request was from the Deputy General Manager of a subsidiary of an SOE, who asked Qualcomm employees to find an internship for her daughter; another was at the request of a director general of a Chinese government agency.[21]
- The November 2016 JPM Order noted that officials made requests for certain individuals to be hired.[22] Oftentimes, in exchange for job placements, the officials ensured the bank received a financial benefit. For example, the "conversion of a deal with an SOE after referral of a candidate from a senior member of a foreign political party" and "conversion of a deal with an SOE after hiring the daughter of a 'Deputy Minister.'"[23]
- In July 2018, Credit Suisse settled with the SEC and DOJ regarding allegations that its Hong Kong subsidiary engaged in a systematic scheme to hire the relatives of high-ranking individuals at Chinese SOEs.[24] The Credit Suisse NPA stated that these "referral hires," as they were called, were specifically requested by officials, who stressed that the hires were important for Credit Suisse to win future business.[25] For example, one SOE executive told Credit Suisse that a specific hiring would "bring [Credit Suisse] the big surprise in the near future if you could coordinate with CS Asian team to arrange a position in CS team in Beijing"; in another instance a senior Credit Suisse banker explained that the referring SOE official "was focused on having us make a relationship hire and said it was very important for us to win future business with [the SOE]."[26] These referral hires included the daughter of a high-ranking SOE official, the daughter

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19. U.S. Sec. & Exch. Comm'n, "SEC: Qualcomm Hired Relatives of Chines Officials to Obtain Business" (Mar. 1, 2016), https://www.sec.gov/news/pressrelease/2016-36.html; SEC Exchange Act Release No. 7261, In the Matter of Qualcomm Inc. (Mar. 1, 2016), https://www.sec.gov/litigation/admin/2016/34-77261.pdf (hereinafter "Qualcomm Order").
20. *Id.* ¶¶ 20, 21, 26.
21. *Id.* ¶¶ 23, 26.
22. JPM Order ¶¶ 1, 13.
23. *Id.* ¶ 38.
24. SEC Exchange Act Release No. 83593, In the Matter of Credit Suisse Group AG, (July 5, 2018), https://www.sec.gov/litigation/admin/2018/34-83593.pdf (hereinafter "Credit Suisse Order"); Letter from Sandra L. Moser et al. to Herbert S. Washer et al. Re: Credit Suisse (Hong Kong) Limited Criminal Investigation (May 24, 2018), https://www.justice.gov/opa/press-release/file/1077881/download (hereinafter "Credit Suisse NPA").
25. Credit Suisse NPA at A-4.
26. *Id.*

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of a high-ranking agency official, and other candidates referred by high-ranking officials.[27] The facts also indicated that the subsidiary continued to provide referral hires with additional benefits and promotions, "including at the request of certain SOE or other government officials."[28]

- In August 2019, Deutsche Bank settled with the SEC regarding allegations related to hiring practices in China and Russia.[29] The Deutsche Bank Order states that the bank "provided valuable employment to the relatives of foreign government officials in various parts of the world *as a personal benefit to the officials* in order to improperly influence them to assist the bank in obtaining or retaining business or other benefits."[30] Offers for employment were often made following requests by the officials themselves.[31] Those offered positions included the daughter of the Chairman of a large Chinese SOE, the son of two SOE executives, the daughter of a Deputy Minister at a Russian government entity, and the son of a senior executive of a Russian SOE.[32]
- In September 2019, Barclays settled with the SEC for its practice of hiring relatives of public officials in Asia.[33] The Barclays Order states that "[a]t least some of the offers of employment were extended as a personal benefit to those officials and executives with the expectation that the bank would obtain or retain investment banking business."[34] In one case, a banker told senior bankers that if he could find a job for the daughter of a senior executive at a private Korean bank, "he would guarantee our next business"; the daughter was subsequently offered a position.[35] In another, an SOE executive requested Barclays hire the daughter of a close friend who was a government official at a regulatory agency overseeing the SOE, and "[t]he hire was made even though compliance knew the bank was competing for a $2 billion bond issuance"; Barclays was subsequently engaged by the SOE in the bond deal.[36]

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27. *Id.* A-6–A-19.
28. *Id.* at A-5.
29. *See* SEC Exchange Act Release No. 86740, In the Matter of Deutsche Bank AG (Aug. 22, 2019), https://www.sec.gov/litigation/admin/2019/34-86740.pdf (hereinafter "Deutsche Bank Order").
30. *Id.* ¶ 1 (emphasis added).
31. *Id.* ¶¶ 25, 32, 37.
32. *Id.* ¶¶ 19, 25, 32, 37.
33. *See* SEC Exchange Act Release No. 87132, In the Matter of Barclays PLC (Sept. 27, 2019), https://www.sec.gov/litigation/admin/2019/34-87132.pdf (hereinafter "Barclays Order").
34. *Id.* ¶ 2.
35. *Id.* ¶¶ 20-21.
36. *Id.* ¶ 22.

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In sum, in the hiring practices settlements, certain key factors appear to have driven the determination that the third-party payments constituted "things of value" to foreign officials, in particular: (1) the closeness of the relationships between the officials and the individuals offered employment; and (2) the initiation of the request from the officials themselves.

"Thing of Value" in Domestic Bribery Cases

Case law involving domestic bribery may provide some insight into how courts in an FCPA case may address the question of whether, and under what circumstances, a defendant has provided a "thing of value" to a foreign official when providing a benefit to a third-party in order to corruptly influence the official.[37]

"Key factors for consideration include the extent to which the evidence shows that the official subjectively valued the benefit that was paid to the third-party, how the payment in fact inured to the official's tangible or intangible benefit, and what relationship the official had with the third-party payee."

To begin with, courts have long held that, to be a "thing of value," a bribe need not have "commercial value." Rather, the key question is whether the official *subjectively* attaches value to the item.[38] Courts have also stressed that a "thing of value" can be an intangible, rather than tangible, benefit.[39]

Applying these principles, in *United States v. Sun-Diamond Growers of California*, a district court upheld the government's theory that a company provided a "thing of value" to an official, in violation of 18 U.S.C. § 201, by paying for the official's

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37. It is important to distinguish this issue from the separate issue of whether a defendant may violate the FCPA when he or she pays a third-party, understanding that the third-party will transmit some portion of the payment to the foreign official. The FCPA expressly covers such situations. *See* 15 U.S.C. § 78dd-2(a)(3) (prohibiting paying or offering anything of value to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official"); *see also United States v. Harder*, 168 F. Supp. 3d 732, 739 (E.D. Pa. 2016) (analyzing this element). Here, we are referring to a factual situation analogous to the hiring practices cases, where a defendant pays a third-party in order to corruptly influence an official, without expecting the official to receive any part of the payment.

38. *See United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983) ("The phrase 'anything of value' in bribery and related statutes has consistently been given a broad meaning . . . to carry out the congressional purpose of punishing misuse of public office. Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe.").

39. *See United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) ("[W]e are impressed by Congress' repeated use of the phrase 'thing of value' . . . These words are found in so many criminal statutes throughout the United States that they have in a sense become words of art. The word 'thing' notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles.").

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girlfriend to accompany him on an overseas flight to an event where the official would speak on behalf of the company.[40] Rejecting the defendant's argument that no "thing of value" was provided to the official, the court held that an "expansive construction of the term ['thing of value'] is necessary because monetary worth is not the sole measure of value." It held that the jury was entitled to find that the "companionship" of his girlfriend constituted a "thing of value" to the official.

This decision supports the SEC's and DOJ's theory in FCPA hiring practices cases because Section 201, like the FCPA, requires proof that "anything of value" was offered or paid to an official. The court held that "companionship" – conferred upon the official as a result of paying for his girlfriend's ticket – could qualify as a "thing of value." It is not hard to imagine an FCPA case in which a court engages in a similar analysis, evaluating whether a company, by hiring or providing some other benefit to an official's relative or friend, has thereby conferred an intangible benefit on the official herself.

That said, it is important to note that *Sun-Diamond* did not reflexively hold that the defendant provided a "thing of value" to the official merely because it provided a pecuniary benefit to the official's girlfriend. Rather, to reach that conclusion, the court analyzed the specific facts and evaluated whether the official in fact had received an intangible benefit.

Other courts have reached similar conclusions in cases arising under the honest services fraud statute, 18 U.S.C. § 1346. For instance, in *United States v. DeMizio*, the Second Circuit upheld the defendant's conviction for engaging in a kickback scheme in which payments were directed to his family members rather than himself.[41] The court cited cases showing that "payoff schemes have been viewed as involving kickbacks when the defendant has directed that the contracting party's profit be shared with family, friends, or others loyal to the defendant."[42]

That said, the honest services fraud statute – unlike Section 201 and the FCPA – does not require proof of a payment of a "thing of value" to an official. This statutory distinction limits, at least to an extent, the usefulness of honest services fraud cases as precedents for analyzing the "thing of value" requirement in FCPA cases.

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40. *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1262, 1269 (D.D.C. 1996).
41. *United States v. DeMizio*, 741 F.3d 373, 381–82 (2d Cir. 2014).
42. *Id.* at 382 (citing cases).

Similarly, another domestic bribery statute, 18 U.S.C. § 666, is explicitly broader than both Section 201 and the FCPA. Section 666 prohibits the payment of "anything of value" to "*any person*" when the payment is intended to influence or reward a state or local official. Thus, for example, in *United States v. Skelos*, a state senator was convicted of violating Section 666 (among other statutes) for trading votes on legislation and other official action in exchange for job opportunities and other payments to his son.[43] But again, as a precedent for FCPA cases, this decision is of somewhat limited usefulness because the defendant was not convicted under a statute that required proof of a "thing of value" being offered or paid to an official.

In sum, domestic bribery case law provides multiple examples of courts upholding prosecutions in which bribes or kickbacks were paid to third parties at the direction or request of a public official. Although there appear to be relatively few cases arising under a statute that requires proof of a "thing of value" being paid or offered to an official, *Sun-Diamond* is one such example. Nonetheless, it is significant that in that decision the court undertook a fact-intensive review of whether the defendant in fact provided a benefit of some intangible value to the public official when it paid for his girlfriend's flight.

Conclusion

FCPA cases are increasingly being challenged in court, particularly by individuals, and what constitutes a sufficient "thing of value" in hiring cases may be presented for review in the near future. Past decisions in the domestic bribery context may foreshadow how courts in the future approach the theory underlying the SEC's and DOJ's hiring practices cases. At the same time, one should not simply assume, without analysis, that a company has provided a "thing of value" to a foreign official when it has hired or provided some other benefit to the official's relatives or friends.

When a company hires a relative or friend of an official, the value paid to the hiree is not merely "imputed" to the official. That is, a $200,000 salary paid to an official's son does not necessarily constitute a $200,000 "thing of value" provided to the *official*. Rather, in any given case, the benefit to the official may be intangible – such as psychological satisfaction, pride, or enhanced social standing – or may be pecuniary – such as a reduced need to cover the expenses of his child – depending on the specific facts of the case.

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43. *United States v. Skelos*, 988 F.3d 645 (2d Cir. 2021).

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Key factors for consideration include the extent to which the evidence shows that the official subjectively valued the benefit that was paid to the third-party, how the payment in fact inured to the official's tangible or intangible benefit, and what relationship the official had with the third-party payee. And of course, as in every FCPA case, the payor's intentions and understanding will also be critical, including whether the payor expected the third-party payment to influence the official to misuse his position for the payor's benefit.

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Hong Kong Court Acquits Banker in Hiring Practices Case

As detailed elsewhere in this issue, hiring practices at banks, especially at the Hong Kong branches of major international banks, have been of interest to U.S. authorities for several years. While hundreds of millions of dollars have flowed to the United States Treasury, no individuals were tried in related proceedings.[1] In September 2020, however, a Hong Kong court held a trial for Catherine Leung, a former managing director of J. P. Morgan Securities (Asia Pacific) Limited (the "Bank"), who was tried on two counts of bribery related to the offer of employment to, and subsequent employment of, the son of the chairman of a logistics company (the "Leung Case").[2] On February 1, 2021, the Hong Kong District Court acquitted Ms. Leung. The Leung Case can be seen as demonstrating two difficulties inherent in bringing individual actions in the context of corporate enforcement. First, it is difficult to draw a line between alleged corruption and relationship building when put to a burden of proof. Second, proving corrupt intent is a challenge when an individual defendant was acting as a small part of a complex organization.

Hong Kong Law

Like the United States and the United Kingdom, Hong Kong is a common law system, requiring proof beyond a reasonable doubt for criminal convictions. Criminal trials in Hong Kong can be heard either by a Magistrate or a District Court Judge (i.e., in the lower-tier courts) without a jury, or by a High Court judge (i.e., in the higher-tier court) sitting together with a jury. The Leung Case was heard in the District Court without a jury.

Hong Kong's Prevention of Bribery Ordinance ("POBO") was enacted in the 1970s. It has been aggressively enforced in Hong Kong[3] by the Hong Kong Independent Commission Against Corruption ("ICAC") and criminalizes public and commercial

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1. In addition to Leung, the former Managing Director of J P Morgan Securities (Far East) Limited, Fang Fang, was briefly taken into custody by Hong Kong's Independent Commission Against Corruption in May 2014, after his resignation from the bank in March 2014. Fang was not subsequently charged. *See* Neil Gough and Michael Forsythe, "Former Chief of JP Morgan's Chan Unit is Arrested," New York Times (May 21, 2014), https://dealbook.nytimes.com/2014/05/21/former-top-china-jpmorgan-banker-said-to-be-arrested-in-hong-kong/?searchResultPosition=58).
2. *HKSAR v Leung Kar Cheung Catherine* [2021] HKDC 189 (available in Chinese only).
3. Section 4 of the POBO criminalizes bribery of Hong Kong public servants and has extraterritorial effect. The section contains express reference to the advantage being offered "*whether in Hong Kong or elsewhere*." Sections concerning other offences (including private sector bribery) do not include the words "*whether in Hong Kong or elsewhere*" that would give the extraterritorial effect. The POBO does not criminalize bribery for foreign officials unless the offer was made in Hong Kong. *See HKSAR v. Krieger & Anor.* (06/08/2014, FAMC1/2014); *see also* Philip Rohlik and Sebastian Ko, "Hong Kong Court Rules on Extraterritorial Limits to the Territory's Anti-Corruption Law," FCPA Professor (Aug. 13, 2014), https://fcpaprofessor.com/hong-kong-court-rules-on-extraterritorial-limits-to-the-territorys-anti-corruption-law/.

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bribery (both giving and receiving) as well as the possession of unexplained wealth by public servants.[4]

The defendant, Catherine Leung, a former vice-chair of Asian investment of the Bank, was charged on two counts of offering an advantage to an agent, contrary to Section 9(2)(b) of the POBO which provides that: "*Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's showing or for showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business, shall be guilty of an offence.*"

"Advantage" is defined broadly to include: "(a) any gift, loan, fee, reward or commission of money; (b) any office, employment or contract; … (d) any other service or favour … ; (f) any offer, undertaking or promise … of any advantage within the meaning of (a) to (e)."[5]

In the Leung Case, the judge held that extending a job offer to the son of the chairman of a logistics company,[6] and subsequently employing the son,[7] constituted an "*advantage*" to the chairman,[8] who was an "*agent*"[9] of the logistics company. The court did not discuss how an offer to a child was an advantage to the father as Leung did not dispute having offered an advantage.[10]

The Allegations

In 2005, the Bank began to hire relatives of clients or potential clients under the client referral program known as the "Sons and Daughters Program." Under this referral program, senior bankers could refer relatives of existing or potential clients for employment to establish good business ties. Following the referral, candidates would go through assessments and vetting before human resources would make them an employment offer.[11] The court found that this procedure was not followed in the Leung case, but that Leung was not responsible for that failure.[12] This referral

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4. Prevention of Bribery Ordinance (Cap. 201), https://www.elegislation.gov.hk/hk/cap201. In addition to its law enforcement duties, the ICAC provides anti-corruption resources to the community (including the production of TV dramas) and conducts training for foreign counterparts. https://www.icac.org.hk/en/about/history/index.html.
5. POBO §2(1).
6. The first charge alleges that, on January 19, 2010, Leung offered to the chairman of the logistics company an advantage, namely a contract of employment of the chairman's son with the Bank.
7. The second charge alleges that between June 28, 2010 and October 28, 2011, Leung offered to the chairman of the logistics company an advantage, namely the employment of the chairman's son with the Bank.
8. *Leung, supra* n. 2 at ¶ 222.
9. *Id.* at ¶ 5.
10. "Child" (along with "parents" and "spouse") is a defined term in the POBO which grants the authorities the rights to investigate the wealth and expenditure of relatives of persons suspected of violating the ordinance, See POBO §§ 2, 14.
11. *Leung, supra* n. 2 at ¶ 36.
12. *Id.* at ¶¶192, 193.

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program was also the basis of the enforcement actions by the U.S. Department of Justice and U.S. Securities and Exchange Commission against the Bank and its corporate parent in 2016, involving the payment of US$264 million in penalties.[13] The Bank was one of the many financial institutions that have been penalized for similar violations under the U.S. Foreign Corrupt Practices Act ("FCPA").

The prosecution alleged that Leung had a corrupt intent when she made the job offer, specifically to induce the logistics company to favor the Bank in the company's IPO. The prosecution also alleged that Leung distorted the Bank's standard hiring procedures in order to expedite the hiring. For example, the prosecution alleged that Leung contacted the relevant departments within the Bank to recommend the son to be part of the referral program, she made arrangements for an interview that were not in compliance with the standard procedures, the son's academic qualifications and work experience did not meet the Bank's requirements for the position offered, and Leung knew that the son's employment required approval from the Legal & Compliance department but such approval was not obtained.[14] Further, the prosecution alleged that Leung's criminal intent was evidenced in various internal emails that she sent pushing an employment offer to be made to the son.[15]

"The Leung Case is an example of many difficulties inherent in the hiring practices cases that were obscured by the all-encompassing corporate enforcement settlements entered into by banks with the SEC and DOJ."

The Judgment

The court considered the following key issues in deciding whether Leung was guilty of the two charges:

1. In relation to the job offer (count 1), what was Leung's intention when she offered this advantage to the chairman;
2. In relation to the contract of employment (count 2), whether Leung offered an advantage to the chairman;

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13. *See* Bruce E. Yannett, Andrew M. Levine, Philip Rohlik, "Beyond 'Sons and Daughters': JPMorgan Resolves Hiring Practices Probe," FCPA Update, Vol. 8, No. 4 (Nov. 2016), https://www.debevoise.com/insights/publications/2016/11/fcpa-update-november-2016.
14. *Leung, supra* n.2 at ¶197.
15. *Id.* at ¶¶157-167.

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3. If Leung did offer an advantage to the chairman in point (2), what was her intention in doing so;
4. Whether Leung's intention (*mens rea*) was consistent with the criminal intent requirement of the relevant charges (i.e., corrupt intent); and
5. If the prosecution is able to prove points (2) and (4), whether Leung has a reasonable excuse.[16]

As stated above, in its judgment, the court found that Leung offered an advantage to the chairman by making a job offer to his son.[17] As the offer to the son came from the Bank, Leung had argued that she was not involved in the process and therefore did not make the offer. The court found that Leung had sent emails directing other staff members to oversee the hiring process for the son and was therefore involved.[18]

However, the court found that the prosecution was not able to prove beyond reasonable doubt that Leung had a corrupt intent in making the offer. The court found that the prosecution had not proved that Leung made the offer for the purpose of inducing the chairman to use his influence to make the logistics company engage the Bank for the IPO. According to the court, the prosecution's case did not eliminate the possibility that Leung made the offer with the aim of maintaining a good client relationship, as Leung contended. The court did not consider maintaining a good client relationship to be an illicit purpose, and found that the possibility that Leung made the offer for that reason left reasonable doubt as to corrupt intent.

The court found further reasonable doubt regarding Leung's corrupt intent, because the prosecution did not prove that she caused the Bank to depart from its standard hiring procedures (or that the Bank had, in fact, so departed). Although the court found that Leung was keen to expedite the son's application, she followed the Bank's procedure in referring him to the Junior Resources Management team, which was responsible for obtaining approval from the Legal and Compliance department.[19] Moreover, the court noted that the Bank had made exceptions to its hiring requirements for academic qualifications and work experience on other occasions. It had previously made a job offer to a candidate with GPA below 3.0.[20]

In this regard, the court also did not fault Leung for making the job offer to the son before legal and compliance checks were complete. The court found that the

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16. In any proceedings under the POBO, the defendant can assert an affirmative defense (on the balance of probabilities) of "reasonable excuse," which essentially means a reasonable belief that the defendant had the right to offer the advantage.
17. *Leung, supra* n. 2 at ¶ 150.
18. *Id.* at ¶ 152.
19. *Id.* at ¶¶ 227-229.
20. *Id.* at ¶¶ 54.

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prosecution did not prove fault on the part of Leung, as she might not have been familiar with the hiring process. Junior Resources Management apparently informed Leung that the son's offer had been approved, but did not mention that approval from Legal and Compliance was still pending. The court considered that it was reasonable for Leung to assume that all approvals had been obtained.[21] Thus, the court found that, to the extent there was fault, it rested not with the defendant but with the Legal and Compliance department's failure to fulfill its gatekeeping duties in handling the son's application.[22] The court found that the prosecution failed to prove corrupt intent because Leung had followed the appropriate procedures, and any failures of those procedures were the fault of others at the Bank and not of Leung.

Conclusion

The Leung Case is an example of many difficulties inherent in the hiring practices cases that were obscured by the all-encompassing corporate enforcement settlements entered into by banks with the SEC and DOJ. Defining the line between alleged bribery and relationship building is a difficult task, especially when an individual facing potential imprisonment is willing to put the prosecution to its burden of proof. More fundamentally (and applicable beyond the context of hiring practices), corporations act in complex ways and many corporate actions often depend on the actions of several individuals, not necessarily acting in concert. Finding requisite intent on the part of an individual arguably entitled to rely on a company's internal controls can be difficult. The court in the Leung Case ultimately acquitted Leung while expressing displeasure at the Bank's processing of the son's application, highlighting once again the need for financial institutions to put in place sufficient internal controls to detect and prevent improper hiring practices.

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21. *Id.* at ¶ 190.

22. It remains unclear whether the Legal & Compliance Department eventually approved the son's application as there was no follow-up to the enquiries it made in March 2010, a month after the son signed an employment contract. There was no documentary evidence and the managing director of the Department at the relevant time was unable to recall the decision made in respect of the son's application.

Bribery: An American Story

Unlike the comprehensive prohibition of all types of bribery found in the UK Bribery Act and laws in many other countries, the Foreign Corrupt Practices Act ("FCPA") is a relatively narrow law. It criminalizes only bribery involving a foreign official, and only as it relates to the public sector. Moreover, it criminalizes only one side of the bribery transaction: the bribe giver. U.S. prosecutors use a variety of other laws, including domestic bribery, mail and wire fraud, and the uniquely-named "honest services" fraud to prosecute bribe takers.

On February 24, 2021, the U.S. Department of Justice announced that a former employee of one of the largest private companies in the United States had been indicted on charges of honest services fraud and conspiracy.[1] Prosecutors allege that Michael Kennedy, working with at least three co-conspirators, engaged in a seven-year scheme to conceal a supplier's overcharges in exchange for monetary bribes, kickbacks, and extravagant gifts and travel. The indictment serves as a reminder to companies that bribery schemes are similar across jurisdictions, and the same controls used to prevent the bribery of foreign officials can also help identify and prevent a company's own employees from taking kickbacks.

Development of the Alleged Conspiracy

According to the Bill of Indictment filed on February 16,[2] Kennedy was a senior employee in the strategic sourcing division of agricultural corporation Cargill, Inc. The strategic sourcing division oversaw procurement of packaging products and distribution services for Cargill and its affiliated companies, including the negotiation and management of vendor contracts.

From 2007 to 2016, Kennedy managed Cargill's relationship with Women's Distribution Services ("WDS"), which supplied Cargill with personal protective equipment and other goods and services. Cargill's agreements with WDS ("Select Supplier Agreements") specified, among other things, that WDS would provide warehouse and distribution services to Cargill for no more than a 10% mark-up on the original cost of the materials that WDS stored and distributed. By 2012, the Select Supplier Agreements also provided that WDS would give quarterly rebates to Cargill based on the overall volume of purchases Cargill made from WDS.

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1. U.S. Dep't of Justice, "Former Cargill Employee is Indicted for Extensive Bribery and Kickback Scheme," (Feb. 24, 2021), https://www.justice.gov/usao-wdnc/pr/former-cargill-employee-indicted-extensive-bribery-and-kickback-scheme (hereinafter "February 2021 Press Release").
2. Bill of Indictment, *United States v. Kennedy*, No. 3:21-cr-41-FDW (W.D.N.C. Feb. 16, 2021), https://www.law360.com/employment-authority/articles/1358626/attachments/0 (hereinafter "Indictment").

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Starting in approximately 2009, Kennedy allegedly conspired with WDS's principals to overcharge Cargill. Kennedy allegedly worked with WDS's co-owner, Brian Ewert, to compensate WDS at margins that exceeded those allowed under the Select Supplier Agreements. In addition to improperly approving pricing variances, Kennedy allegedly assisted WDS in expanding the scope and volume of its business with Cargill, concealing Ewert's interest in other companies that supplied Cargill, and obtaining confidential pricing data from Cargill regarding WDS's competitors.

In exchange for this assistance, Kennedy allegedly received bribes worth over $1 million in the form of travel, gifts, and "significant" cash payments. Ewert allegedly provided Kennedy with family trips to the Caribbean on Ewert's private jet, multiple luxury yacht rentals, trips to Disney World, and ski trips, among other things. Ewert also arranged to name Kennedy as a beneficiary in his will.

Over the course of Cargill's relationship with WDS, Cargill employees complained about WDS's prices to Kennedy's subordinate, Choung "Shawn" Nguyen. When Nguyen enquired with Ewert, Ewert informed him that Kennedy was aware of the issue. Nguyen, like Kennedy, allegedly agreed not to raise the pricing discrepancies in exchange for cash and gifts from Ewert. Over time, Ewert's bribes to Nguyen escalated from a few hundred dollars in value to larger amounts, in addition to gifted electronics and paid family vacations to Florida. In addition to those bribes, Ewert allegedly made several "very large cash payments" to Nguyen, representing kickbacks from Ewert's manufacturer rebates.

With Kennedy's alleged assistance, WDS dramatically increased its sales to Cargill over time and ultimately sold the company nearly $500 million in products. Kennedy also waived over $890,000 in rebate payments to Cargill that WDS owed under the Select Supplier Agreements.

Alleged Cover-Up

According to the indictment, by 2016, Cargill was applying stronger oversight to WDS's sales contracts. Due to a restructuring at Cargill in late 2015, Kennedy was removed from direct oversight of Cargill's relationship with WDS. Cargill then began an audit of WDS and its pricing information.

Unable to stop the planned audit, Kennedy allegedly alerted WDS and advised Ewert and WDS's co-owner, Jennifer Maier, on WDS's response. Kennedy's alleged efforts to obstruct the audit included drafting arguments for WDS to persuade Cargill to stop the audit, suggesting a gradual trickle of information to slow the audit process, and lobbying WDS's suppliers to refuse to provide pricing information to Cargill.

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WDS allegedly misled Cargill regarding WDS's confidentiality obligations to its suppliers, in the hopes of preventing Cargill from confirming WDS's product markups. When these efforts failed, WDS allegedly forged over 100 invoices that misrepresented the prices at which WDS purchased products from its suppliers.

Cargill initiated a deeper audit of WDS in April of 2016, and finally succeeded in obtaining pricing data from WDS's suppliers a month later. Upon identifying WDS's overcharges and misrepresentations, Cargill interviewed and then terminated Kennedy and Nguyen for their roles in the scheme.

Charges and Fallout

Kennedy was indicted by a North Carolina federal jury on charges of honest services wire fraud and conspiracy against Cargill, in violation of 18 U.S.C. §§ 1343, 1346, and 1349. Kennedy faces a potential $500,000 fine and 40-year prison sentence if convicted on both charges.[3]

"The indictment serves as a reminder to companies that bribery schemes are similar across jurisdictions, and the same controls used to prevent the bribery of foreign officials can also help identify and prevent a company's own employees from taking kickbacks."

Kennedy's indictment comes two years after Nguyen, Ewert, and Maier pled guilty to conspiring to defraud Cargill.[4] Ewert admitted to making cash payments and providing expensive gifts and entertainment to Kennedy and Ewert, and Maier admitted to creating false invoices to conceal more than $500,000 in overcharges.[5] In November of 2019, Nguyen, Ewert, and Maier were sentenced to jail terms of 41 months, 60 months, and 24 months, respectively.[6]

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3. February 2021 Press Release.
4. U.S. Attorney's Office for the Western District of North Carolina, "Owners of South Carolina Company Plead Guilty to Conspiring with Employees of One of the Nation's Largest Private Companies Relating to Extensive Bribery and Kickback Scheme" (Mar. 27, 2019), https://www.justice.gov/usao-wdnc/pr/owners-south-carolina-company-plead-guilty-conspiring-employees-one-nations-largest.
5. Joe Marusak, "SC businesswoman, 2 men plead guilty in $35 million scheme," Charlotte Observer (Mar. 27, 2019), https://www.charlotteobserver.com/news/local/crime/article228485969.html.
6. February 2021 Press Release.

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The events led Cargill to sue WDS, Maier, and Ewert for conversion, fraud, and conspiracy in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO").[7] A federal jury in North Carolina found in Cargill's favor, and the court awarded Cargill treble damages of $105.5 million in January 2018.

Lessons Going Forward

Kennedy's alleged conduct is outside the scope of the FCPA, but the indictment serves as a reminder of the significant legal, financial, and professional risks of offering and accepting bribes in domestic settings. Honest services fraud, charged in Kennedy's case, applies to bribery and kickback among bad actors seeking to deprive another party of honest services.[8] Although honest services fraud is often associated with public corruption, prosecutors can bring the charge when, as here, individuals breach legal duties owed to private entities.[9] It is noteworthy that the alleged bribery scheme described in the indictment (inflated invoices and variances), the alleged bribes (cash, but also travel and gifts), and the efforts to conceal the misconduct (in-person cash payments and communicating over private email addresses) would not be out of place in an FCPA enforcement action.

In particular, this indictment reinforces the importance of robust policies and procedures. The bill of indictment expressly cited Cargill's Code of Conduct, which prohibited Cargill employees from (1) accepting cash or cash equivalents, and (2) "directly or indirectly … solicit[ing] or accept[ing] any form of bribe, kickback or other corrupt payment" or "accept[ing] any gift or entertainment where it could cause – or give the appearance of causing – Cargill or Cargill employees to grant or receive any favor in return."[10] The indictment alleges that Kennedy signed annual certifications that he complied with the policy and had not accepted bribes or kickbacks, which the prosecutors cited as evidence that he owed, and breached, a fiduciary duty to Cargill.

Companies can reduce their risk by implementing, conducting training on, and requiring employees to certify their compliance with anti-bribery and corruption policies – both domestically and in foreign jurisdictions that have traditionally been considered high-risk. Those policies should be informed by risk assessments

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7. Rick Archer, "Cargill Wins $106M RICO Award Against Warehouse Co.," Law360 (Jan. 23, 2018), https://www.law360.com/articles/1004670.
8. *Skilling v. United States*, 561 U.S. 358 (2010).
9. In 2019, for example, federal prosecutors in Boston memorably charged a number of parents and university employees with honest services mail fraud in connection with the Varsity Blues college admissions scandal. *See, e.g.*, U.S. Attorney's Office for the District of Massachusetts, "14 Defendants in College Admissions Scandal to Plead Guilty" (Apr. 8, 2019). *See also* U.S. Attorney's Office for the Eastern District of Michigan "Former UAW Vice President Sentenced to 30 Months for Taking $250,000 in Bribes and Kickbacks" (Nov. 17, 2020), https://www.justice.gov/usao-edmi/pr/former-uaw-vice-president-sentenced-30-months-taking-250000-bribes-and-kickbacks.
10. Indictment at 2.

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and supplemented by effective controls to ensure accurate books and records. Such controls should include regular audits of transactions with third parties, which in this case led to Cargill's discovery of Kennedy's and Nguyen's misconduct.

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