

## Feature

### KEY POINTS

- Cross-compliance approaches that leverage compliance knowledge in related areas and permit information sharing across functional lines reflect the intersecting dynamics of today's legal and compliance landscape and may enhance overall compliance effectiveness.
- Pending anti-corruption investigations of JPMorgan and others' hiring and business practices in Asia highlight anti-corruption-AML policy and definitional links.
- The rationale underlying the treatment of foreign officials' relatives and associates as PEPs in the AML context should be incorporated in anti-corruption compliance programs.
- Reliance only on annual or other periodic compilations of corruption perceptions will likely be insufficient; such publications may not adequately capture interim developments, track events on the ground, or reflect local knowledge.

Author Hdeed Abdelhady

# Cross-Compliance for Financial Institutions: The Anti-Corruption-AML Nexus

Enforcement authorities in the US and Asia reportedly are investigating JPMorgan and other financial institutions for potentially corrupt employment and business relationships with family members of government officials. The investigations underscore policy links between anti-corruption and anti-money laundering regimes where dealings with Politically Exposed Persons (PEPs) are involved. This article briefly discusses the pending investigations and the anti-corruption-AML policy nexus, and suggests, with respect to PEPs and more generally, that financial institutions facilitate fluidity in their compliance programs to allow for the sharing of information and adaptation of compliance protocols across (sometimes impermeable) internal functional and disciplinary lines.

(Note: The terms "investigation", "inquiry", and "probe" are used interchangeably to describe the JPMorgan and related developments and have their ordinary meanings – no indication of legal status of developments is intended. For additional background about the investigations discussed, see the compilation of select source and other links provided as a companion to this article, at <http://masspointpllc.com/anti-corruption-aml-cross-compliance#>).

### JPMORGAN INQUIRIES

In August 2013, the US Department of Justice (DOJ) warned "anyone in the financial services industry who thinks bribery is the way to get ahead . . . [that it] would not stand by while brokers or others try [to] rig the system to line their pockets, and [would] continue to vigorously enforce the [US Foreign Corrupt Practices Act] and money laundering statutes across all industries". (Press Release: *Two US Broker-Dealer Employees And Venezuelan Government Official Charged In Manhattan Federal Court For Massive International Bribery Scheme*, US Department of Justice, 7 May 2013). The warning – included in an announcement of criminal charges against former employees of a US broker-dealer and a Venezuelan state bank official for bribery, money laundering, and related

offences – highlighted a clear link between corruption and money laundering: the former is an antecedent and legal predicate of the latter.

Also in August, JPMorgan disclosed that it had received from the US Securities and Exchange Commission (SEC) a request for "information and documents relating to . . . the Firm's employment of certain former employees in Hong Kong and its business relationships with certain clients". (*JPMorgan Chase & Co. Quarterly Report (Form 10-Q)*, Aug 7, 2013). Subsequent disclosures and news reports revealed that enforcement authorities – the DOJ and foreign enforcement authorities also initiated inquiries – were interested in whether JPMorgan offered or extended employment or business to the children

of Chinese government officials to obtain business advantage. (See, for example, *JPMorgan Chase & Co Quarterly Reports (Forms 10-Q)* filed 1 Nov 2013 and 2 May 2014 and *Annual Report (Form 10-K)* filed 20 Feb 2014); Jessica Silver-Greenberg and Ben Protess, "US Broadens Investigation of JPMorgan's Hiring in Asia", *NY Times*, 1 Nov 2013; "JPMorgan's Fruitful Ties to a Member of China's Elite", *NY Times*, 13 Nov 2013).

From the standpoint of US authorities, such employment and business – if furnished with corrupt intent, ie to obtain business benefit from a foreign official – might constitute violations of the US Foreign Corrupt Practices Act (FCPA), a federal anti-bribery law that prohibits *inter alia* the direct or indirect offering, promising, or giving of "anything of value" to a "foreign official" for the corrupt purpose of obtaining business advantage. (Foreign Corrupt Practices Act of 1977, as amended, 15 USC §§ 78dd-1, et seq). Outside of the US, enforcement authorities are reportedly examining potential violations of local anti-corruption laws; eg a related investigation by Hong Kong's Independent Commission Against Corruption recently led to the arrest of JPMorgan's former vice chairman of investment banking for Asia. (See, for example, "Jerin Matthew, Ex-Head of JPMorgan China Investment Banking Arrested by Hong Kong Anti-Graft Agency", *International Business*

*Times*, 21 May 2014).

## FINANCIAL SERVICES INDUSTRY REPERCUSSIONS; ADDITIONAL PROBES

News of the inquiries into JPMorgan's employment relationships with the children of Chinese officials reportedly has sent "shudders through Wall Street...Virtually every [financial] firm has sought to hire the best-connected executives in China . . . [who] more often than not . . . are . . . 'princelings,' the offspring of the ruling elite". (Andrew Ross Sorkin, "Hiring the Well-Connected Isn't Always a Scandal", *NY Times*, 19 Aug 2013; see also Enoch Yiu and George Chen, "Banks will not end connected hiring; Financial institutions say employing the children of government officials or important people happens all over the world", *South China Morning Post (Hong Kong)*, 16 Sept 2013).

Given the apparent prevalence in the financial services industry of connected hiring and US enforcement authorities' record of conducting "industry sweeps" in the context of FCPA enforcement, it comes as no surprise that at least five other US and non-US-based financial institutions – Goldman Sachs Group Inc, Morgan Stanley, Citigroup Inc, Credit Suisse Group AG and UBS AG – reportedly have been contacted by the SEC about their hiring practices. (See, for example, "US SEC expands probe into top banks' hiring in Asia", *Reuters, WSJ*, 16 May 2014).

## THE ANTI-CORRUPTION-AML POLICY NEXUS: POLITICALLY EXPOSED PERSONS

The JPMorgan and similar inquiries conjure anti-corruption-AML policy and definitional links that are perhaps less obvious than the factual and rule-based associations immediately apparent in standard cases involving bribery as a predicate offence to money laundering.

In the case of the FCPA and similarly aimed anti-corruption laws, a party's

### SNAPSHOT: US FOREIGN CORRUPT PRACTICES ACT Core Provisions: Anti-Bribery and Record-Keeping

The FCPA polices bribery in two ways, through: (1) anti-bribery provisions that prohibit the offering, promising, or giving of "anything of value" to a "foreign official" with the corrupt intent of obtaining or retaining business advantage; and, (2) "books and records" provisions that: (i) require Issuers to record and disclose transactions in and dispositions of assets (including corrupt transactions and dispositions) and (ii) punish the omission or concealment of transactions in or dispositions of assets.

#### "Foreign Official"

"[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such government or department, or agency, or instrumentality, of for or on behalf of any such public international organization."

#### Applicability to US and non-US Parties

The FCPA applies to: "Domestic Concerns" that are natural US persons who are US citizens, nationals, or residents of the United States; (2) "Issuers" that are foreign and domestic issuers of securities (including shares represented by American Depository Receipts) traded on a US exchange or quoted over-the-counter in the United States; (3) other "Domestic Concerns" that are incorporated or unincorporated business or other organisations or associations that have their principal place of business in, or are organised under the laws of, the United States or any of its subdivisions; and (4) the officers, directors, employees, or agents of Issuers or Domestic Concerns, and their stockholders or others acting on their behalf.

#### Geographical Reach; Extraterritoriality

The FCPA applies to prohibited acts committed anywhere in the world, when committed by "Issuers" or "Domestic Concerns". In the case of non-Issuers or Domestic Concerns, the law applies to acts (bribery and acts in furtherance of bribery) committed within United States territory or by means of the "instrumentalities" of US interstate or foreign commerce.

status as a "foreign official" or equivalent triggers bribery prohibitions. In the AML context, government officials and their close family members are, by definition and effectively, the same; they are, for example, defined as Senior Foreign Political Figures (SFPFs) under US law and are treated as Politically Exposed Persons (PEPs) under international standards. In banking transactions their status, without more, triggers enhanced due diligence and other obligations for financial institutions. (See, for example, *Financial Action Task Force, Guidance, Politically Exposed Persons (Recommendations 12 and 22)*, June 2013 (discussing, *inter alia*, treatment of PEPs and close family members) (*FATF Guidance*); *Special Due Diligence for Correspondent Accounts and Private Banking*

*Accounts, Definitions*, 31 C.F.R. 1010.605 (2013) (US)).

While financial institutions subject to the FCPA or other anti-corruption mandates are not forbidden by those laws from hiring or transacting business with foreign officials' family members, their dealings with them should be approached with special caution, in light of AML rules classifying the same persons as high risk. As the Financial Action Task Force has explained: "family members and close associates of PEPs should be determined to be PEPs because of the potential for abuse of the relationship for the purpose of moving the proceeds of crime [including corruption], or facilitating their placement and disguise, as well as for terrorist financing purposes." (See *FATF Guidance*).

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### DEFINITIONS: PEPS (INTERNATIONAL), SENIOR FOREIGN POLITICAL FIGURES (US LAW), FOREIGN OFFICIALS (FCPA)

Senior Foreign Political Figure <i>Special Due Diligence or Correspondent and Private Banking Accounts (31 C.F.R. 1010.605) (2014)</i>	Foreign Politically Exposed Person <i>FATF Recommendations (2012)</i>	Foreign Official <i>Foreign Corrupt Practices Act (15 USC. § 78dd-2)</i>
<p>(i) A current or former: (A) Senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not); (B) Senior official of a major foreign political party; or (C) Senior executive of a foreign government-owned commercial enterprise . . . (iii) An immediate family member of any such individual; and (iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to be a close associate of such individual.</p> <p>(2) For purposes of this definition:</p> <p>(i) Senior official or executive means an individual with substantial authority over policy, operations, or the use of government-owned resources; and</p> <p>(ii) Immediate family member means spouses, parents, siblings, children and a spouse's parents and siblings.</p>	<p>Individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.</p> <p>(*Where a family member acts on behalf of a PEP in a banking transaction, that person is treated as a PEP).</p>	<p>The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation.</p> <p>(*Bribery of a foreign political party or party officer(s) is also prohibited).</p>

The rationale articulated by the FATF – that familial relationships are susceptible to abuse – should inform (but not necessarily foreclose) financial institution relationships with foreign officials' family members, close associates, or other relations to heighten internal awareness of potential corruption across functional lines and potentially enhance compliance outcomes. Practically, this would require the adoption of frameworks that are responsive not only to the letter of the law (which is common), but also the policy bases and objectives advanced by related laws or regulations.

Of course, the content and implementation of any compliance program must be tailored for, *inter alia*, entity size, organisational structure, jurisdiction(s) of operation, lines of business, counterparty profiles, and internal or external resources available to effectively implement compliance programs. However, strong

compliance programs should include – *in addition* to standard training, reporting, auditing, etc – mechanisms that permit the tracking of legal and policy nexuses, predictive identification of problem areas, and leveraging of compliance resources across functions.

#### CROSS-COMPLIANCE STEPS: PEPS AND GENERAL

Some steps for the practical implementation of PEP-related anti-corruption-AML policy links and cross-compliance more generally might include the following, which are consistent with AML and FCPA risk-based approaches and facilitate more comprehensive, localised, and fluid compliance practice.

#### Cross-Fertilisation

Applying proven AML policies and procedures, such as know-your-customer

(KYC) vetting, to non-banking transaction scenarios may improve compliance vigilance and outcomes. KYC investigative techniques may, for example, yield valuable information in jurisdictions in which true ownership may be difficult to ascertain or aliases/name variations are frequently used. With respect to government officials, status-based risk considerations, eg based on a PEP's level of seniority, should inform dealings with them and their family members, close associates, and other relations.

#### Think like regulators, and courts

Compared to highly specialised corporate legal and compliance practitioners, regulators and courts might be less inclined to take compartmentalised, and sometimes exclusive, approaches to legal interpretation and enforcement. Their views of laws' scope, applicability, and interrelationships, as illustrated by pronouncements of US

enforcement authorities and courts in the FCPA context, may be more expansive than standard compliance programs suggest.

For example, in discussing the meaning of “anything of value” under the FCPA, the DOJ and SEC pointed to court decisions broadly defining “the identical phrase under the domestic bribery statute”, implying their endorsement of or amenability to inter-statutory interpretation. (DOJ and SEC, *A Resource Guide to the US Foreign Corrupt Practices Act*, November 2012, 14 & n. 86). In a 2011 decision testing the meaning of “instrumentality” under the FCPA, a federal district court declined to interpret the term narrowly to exclude state-owned enterprises (SOEs) from its definition (and thereby exclude from the definition of “foreign official” employees of SOEs). (*US v Carson*, No. SACR 09-00077-JVS, 2011 US Dist. Lexis 88853 (C.D. Cal. May 18, 2011) Taking a teleological approach, the *Carson* Court observed that a constrictive interpretation would “work a[n] . . . impermissible narrowing of . . . [the FCPA,] a statute intended to mount a broad attack on government corruption”. (*Id.* at \*20) (emphasis added). The court also reasoned that Congress’s inclusion of SOEs in the definition of instrumentality in a separate statute, the Foreign Sovereign Immunities Act [FSIA], “ultimately support[ed] the . . . conclusion that an ‘instrumentality’ could include . . . [SOEs] under the FCPA”. (*Id.* at 26). (Non-US practitioners might find it useful to know that the FCPA and the FSIA appear under separate and thematically unrelated titles of the US Code (the official compilation and codification of US statutes (federal, not state); the FCPA under Title 15 (Commerce and Trade) and the FSIA under Title 28 (Judiciary and Judicial Procedure)).

The fluid, policy-aware interpretive methods illustrated above should inform both compliance habits (away from rigid, rules only, reactive approaches) and specific policies. (For example, in compliance programs, definitions of “things of value” should reflect potentially relevant interpretations; awareness of laws or legal areas dealing with seemingly unrelated legal issues, such as the treatment of SOEs

as sovereigns (or not) for jurisdictional purposes, should inform understandings of the potential scope of compliance obligations).

### Verify and Document

Verify the qualifications of prospective employees, consultants, or others and document the verification process to demonstrate that hiring and business decisions were without corrupt intent, even where being well connected and presumably able to develop business is a primary merit possessed. Arguably, there is an appreciable difference between hiring the well connected to aid business development generally and hiring a specific well connected person for the specific purpose of obtaining or retaining business from that person’s “foreign official” family member, close associate, or other relation.

‘Where foreign operations are concerned, information about local corruption perceptions and anti-corruption initiatives should be followed closely’

### Erect Firewalls

Where a prospective or current employee, consultant, or other party is a PEP, steps should be taken, preferably in accordance with established procedure, to ensure that individual does not participate in, be positioned to influence, or have access to information or transactions/dealings involving persons or entities of concern for anti-corruption compliance purposes. Documenting the existence of a policy-based firewall – in employment or business contracts and/or regularly disseminated and updated policies, etc – would likely bolster the credibility of a compliance program (assuming such documentation does more than create a paper trail solely for future defence purposes, a quality usually perceptible to enforcement authorities).

### Information Sources and Awareness; Local Knowledge

Effective compliance and risk mitigation require that information be collected in a

timely manner, substantively integrated (ie, connect the dots), and disseminated in a way that resonates with different internal constituencies. In collecting information, firms should not rely only on legal information; news, outside advisers, business and local grapevines, and other sources (properly screened) can also be informative for compliance purposes.

Moreover, relying only on annual or other periodic compilations of corruption perceptions will likely be insufficient; such publications may not adequately capture interim developments, track events on the ground, or reflect local knowledge. (The value of local knowledge is acknowledged in the AML context – for example, the FATF Guidance does not fix the range of persons that constitute family members deserving high risk treatment; the Guidance suggests

(in relation to Additional Measures for Specific Customers and Activities) that definitions be tailored for local cultural and socio-economic factors)).

### Monitor, Internally Report Local (Anti-) Corruption Developments

Where foreign operations are concerned, information about local corruption perceptions and anti-corruption initiatives should be followed closely. For example, when a government announces an anti-corruption initiative, as recently happened in China when “President Xi Jinping launched a high-profile anti-corruption campaign, vowing to catch both tigers and flies – big and small corrupt officials” – such a development could influence local decisions to pursue, independently or in response to enforcement by foreign authorities, action against private parties (local and foreign) and corrupt officials (with whom a firm might be doing business). (See, for example, *Lijia*

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### Biog box

Hdeel Abdelhady is a Washington DC-based lawyer and founder and principal of MassPoint Legal and Strategy Advisory PLLC, a boutique law and strategy firm. She has served as secondment counsel (on transactional and compliance matters) to banks in Washington DC and in Dubai, and has cross-practice experience in banking and finance (conventional and Islamic), regulatory compliance and investment. Hdeel is an advocate of holistic, cross-disciplinary risk management and compliance approaches that reflect the complexity of today's operating environment. Hdeel's bio is at [www.masspointpllc.com](http://www.masspointpllc.com). Email: [habelhady@law.gwu.edu](mailto:habelhady@law.gwu.edu)

Zhang: "In China, everyone is guilty of corruption", *CNN.com*, 23 Oct 2013).

Importantly, information about local anti-corruption initiatives should be analysed not only from the financial institution's perspective, but also from the perspective of other relevant parties (such as foreign law enforcement). A local government's announcement of an anti-corruption initiative might encourage foreign authorities to initiate enforcement actions involving that country's officials, for various reasons. Local anti-corruption efforts might yield actionable information for foreign authorities. Negative diplomatic consequences may be diminished when foreign authorities act, or are perceived to act, consistently with local policy or political will. Alternatively, to incentivise local authorities to address corruption or for other reasons, foreign authorities might be interested in highlighting corruption in a specific jurisdiction or industry, regardless of local policy or diplomatic consequences.

for example, Lucy Hornby: "China corruption probe reaches western breakfast tables", *Financial Times*, 30 July 2014; "No ordinary Zhou", *The Economist*, 2 Aug 2014). (Notably, JPMorgan's business dealings involving Chinese government officials' relatives and associates reportedly involved the bank in the roles of underwriter, partner, and investor. China's "tigers and flies" campaign would be of interest to JPMorgan or other financial institutions having direct or indirect financial or legal exposure to SOEs or PEP-related firms. (See "JPMorgan and the Wen Family", *NY Times*, 13 Nov 2013).

### Disseminate Information Across Functions; Compliance Liaisons

Facilitate information flow across functions and locations, taking care to avoid unnecessary containment or filtering. Where functional lines are rigid, key parties are likely to process information in a way that is limited to their own expertise

(often to comply with common training mandates of compliance programs). Cross-functional training should be reciprocal: to enhance business knowledge among legal and compliance personnel; enable quick connections between legal, regulatory and business dots; and, potentially, facilitate productive relationships between legal and compliance and business functions (these relationships too often are limited, reactive, or unnecessarily antagonistic).

### THE BIG TAKEAWAY

As financial institutions continue to cross business and geographical borders, they will have to continually review and revise – preferably proactively – compliance protocols to reflect and manage the manifold laws and regulations applicable to their operations, including anti-corruption mandates. The reality is unavoidable in today's environment, in which: domestic anti-corruption laws are being adopted with greater frequency; enforcement authorities (led by US authorities) are enforcing anti-corruption and related laws with vigor (and building a template for foreign authorities in the process); coordinated enforcement among national enforcement authorities increases the risk of multiple enforcement actions in response to a single pattern of conduct or violation; and, soaring monetary penalties recently levied for violations (by US authorities specifically) compel a rethink of firms' willingness to regard legal penalties as another "cost of doing business".

No compliance program will guarantee success in all cases. However, adherence to formulaic approaches that have been consistently tried but inconsistently true is a path unlikely to yield optimal results. Cross-compliance approaches that leverage compliance knowledge in related areas and permit information sharing across functional lines reflect the intersecting dynamics of today's legal and compliance landscape and may enhance overall compliance effectiveness ■

"Where functional lines are rigid, key parties are likely to process information in a way that is limited to their own expertise or function"

In addition, foreign political or policy developments might foreshadow changes in local law or business conditions, and corresponding risk. For example, in furtherance of political or policy developments, a type of payment to a foreign official that is permitted under local law might become outlawed, thereby creating new legal risk under local law and under the FCPA, under which the legality of a payment under local law is an affirmative defence to bribery. On the business side, local anti-corruption moves may adversely affect business relationships involving foreign officials, as illustrated by recent developments in China where SOE and other officials who had championed investments and joint ventures with foreign firms are under investigation for corruption. (See,

or function, resulting in blockage of information flow. If relevance is defined too narrowly, parties best positioned to process information for compliance purposes might never receive it, or receive it too late. To efficiently manage and disseminate information (particularly in larger organisations), firms should appoint internal compliance liaisons to serve as dot connectors who collect and process compliance-relevant news and information and disseminate it to internal constituencies in a way that resonates with different internal audiences.

### Provide Business Training for Legal and Compliance Personnel

Financial institutions and other entities typically provide legal and compliance training to business professionals