

FCPA Developments: BNY Mellon Agrees to Pay \$14.8 Million in SEC Settlement

On August 18, 2015, the Securities and Exchange Commission (“SEC”) announced that BNY Mellon, an American banking and financial services firm, agreed to pay \$14.8 million to settle charges that it violated the Foreign Corrupt Practices Act (“FCPA”) by providing student internships to family members of foreign officials affiliated with a Middle Eastern sovereign wealth fund. In a cease-and-desist order, the SEC accepted BNY’s settlement offer, without admitting or denying, to violations of both the anti-bribery and internal accounting controls provisions of the FCPA.¹

I. Background of SEC Inquiry

In January 2011, the Enforcement Division of the SEC informed BNY Mellon and several other financial institutions that it had commenced an inquiry into certain of their business practices and relationships with sovereign wealth fund clients.² A primary focus of the SEC’s inquiry was large investments made by sovereign wealth fund clients to American financial institutions, particularly during the financial crisis of 2008, and whether banks and private equity firms violated the FCPA in their efforts to secure these investments.³ In early 2015, BNY Mellon disclosed that the SEC issued Wells notices to BNY Mellon and certain of its current and former employees, informing them that the SEC “made a preliminary determination to recommend enforcement action” against them for alleged violations of the FCPA.⁴

II. BNY Mellon’s Relationship with the Middle Eastern Sovereign Wealth Fund⁵

The Middle Eastern Sovereign Wealth Fund (the “Fund”)⁶, a quasi-government body responsible for management and administration of assets of a Middle Eastern country, as entrusted to it by that country’s Minister of Finance, first became a client of BNY Mellon in 2000. Both BNY Mellon’s global asset servicing unit and asset and wealth management services group had relationships with the Fund.

The SEC alleged that in 2010 and 2011, BNY Mellon had attempted to modify securities lending guidelines so that it could grow its business with the Fund. While the total amount of the Fund’s assets under custody by BNY Mellon varied over time, during the relevant time period of the SEC’s inquiry, BNY Mellon held assets totaling approximately \$55 billion, including a 2009 investment management agreement between BNY Mellon and the Fund, designating BNY Mellon to manage assets worth approximately \$711 million.

¹ *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, The Bank of New York Mellon Corporation*, Release No. 75720 (S.E.C. Aug. 18, 2015), at 3 ¶¶ 6, 11, available at <http://www.sec.gov/litigation/admin/2015/34-75720.pdf> (the “Order”).

² BNY Mellon 8-K filed January 23, 2015 (“BNY Mellon 8-K”), available at <https://www.sec.gov/Archives/edgar/data/1390777/000162828015000217/a4q2014earnings8-kxxjan23.htm>.

³ Peter Lattman and Michael J. De La Merced, *S.E.C. Looking Into Deals With Sovereign Funds*, N.Y. TIMES, Jan. 13, 2011, available at http://dealbook.nytimes.com/2011/01/13/s-e-c-looking-into-deals-with-sovereign-funds/?_r=0.

⁴ BNY Mellon 8-K.

⁵ The summary of facts and allegations is derived from the Order.

⁶ The Middle Eastern country and fund in question were not disclosed in the SEC’s Cease-and-Desist Order.

During the relevant period of time of the SEC’s inquiry, two officials associated with the Fund (“Fund Officials”), one from the Fund’s main office and one from the Fund’s European office, requested that BNY Mellon provide certain family members postgraduate internships. The SEC alleged that BNY Mellon employees saw this as an opportunity to influence the government officials, particularly their investment decisions. Internal emails reportedly suggested that the Fund Officials pressured BNY Mellon employees to grant the internships and threatened to move their business elsewhere if this “personal” request was not granted. Certain BNY Mellon employees allegedly saw this was a real threat and that it would jeopardize BNY Mellon’s relationship with the Fund.

According to the SEC, BNY Mellon, with the knowledge and approval of senior management, hired three family members of the Fund Officials as interns. After this occurred, BNY Mellon retained its current business and gained new business with the Fund.

The SEC alleged that the three family members did not have the same academic and professional credentials that were expected for BNY Mellon internship candidates, and they were not expected to stay on as full-time employees at the conclusion of the internship. A BNY Mellon employee in an internal email suggested that hiring the interns was an “expensive favor” as BNY Mellon also paid for the visas to allow the interns to travel from the Middle East to their place of work in the United States or United Kingdom. The SEC further alleged that the interns were “less than exemplary” employees and were accommodated throughout their tenures.

III. BNY Mellon’s FCPA Compliance Program

During the relevant time of the SEC’s inquiry, BNY Mellon had an FCPA Compliance Policy and a Code of Conduct, and it provided training to its employees on the obligations under these policies. The SEC alleged that the policies did not adequately address the risks involved in hiring practices, and did not provide additional guidance to address a request for internships by officials from clients. According to the SEC, the human resources department was not properly trained to deal with these potentially problematic hires, and the sales staff and client managers were given wide latitude in hiring decisions. The SEC also alleged that BNY Mellon did not have adequate measures in place to determine whether employees were actually taking the training or understanding its policies.

IV. FCPA Violations and Resolution

According to the SEC, BNY Mellon violated Section 30A of the Securities Exchange Act of 1934 by corruptly providing valuable internships to relatives of the Fund Officials in order to assist BNY Mellon in retaining and obtaining business, and BNY Mellon violated Section 13(b)(2)(B) of the Exchange Act by failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that its employees were not bribing foreign officials. BNY Mellon agreed to settle the charges with neither admitting nor denying these allegations.

The SEC considered BNY Mellon’s cooperation and its remedial efforts when considering penalties for these violations. Specifically, the SEC stated that BNY Mellon had enhanced anticorruption policies and procedures to address the known deficiencies. The SEC accepted a sanctions offer of \$14.8 million – disgorgement of \$8.3 million, prejudgment interest of \$1.5 million and a civil money penalty in the amount of \$5 million.

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V. Analysis

This case marks the SEC's first settlement related to the government's recent interest in sovereign wealth funds, and it confirms the government's commitment to pursuing FCPA violations in the financial services industry. This case serves as a reminder of the importance of having company FCPA policies and procedures that are tailored to a company's business with effective internal controls and appropriate training in the implementation of those policies and procedures.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email David N. Kelley at 212.701.3050 or dkelley@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Kathy S. Strom at 202.862.8944 or kstrom@cahill.com; or Peter Mazzone at 212.701.3051 or pmazzone@cahill.com.