

Qualcomm Pays \$7.5 Million to Settle Allegations of FCPA Violations in China

高通支付 750 万美元就在华违反 FCPA 的指控达成和解

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Anti-Corruption 反腐败

On March 1, 2016, the Securities and Exchange Commission (the “SEC”) announced an agreement with Qualcomm Incorporated (“Qualcomm”), a San Diego-based wireless telecommunications company that trades on the Nasdaq Global Select Market, to settle charges that it violated the Foreign Corrupt Practices Act (“FCPA”) by hiring relatives of Chinese government officials to gain business advantages in the Chinese telecommunications market. The SEC also alleged that Qualcomm provided gifts, travels, and entertainment -- including hospitality at sporting events such as the Olympics -- to Chinese officials and their family members to try to influence these officials to adopt and retain its technologies. According to the SEC, Qualcomm misrepresented these improper benefits in its books and records as legitimate business expenses. Qualcomm agreed to pay a civil money penalty of \$7.5 million to the SEC without admitting or denying the SEC findings.

2016 年 3 月 1 日，美国证券交易委员会（“证交会”）宣布与高通公司（一家总部在圣迭戈、股票在纳斯达克全球精选市场上市的无线电信公司，下称“高通”）达成一项协议，就关于其聘用中国政府官员亲属以便在中国电信市场中获得业务优势、从而违反《美国反海外腐败法》（“FCPA”）的指控达成和解。证交会还指称，高通向中国官员及其家庭成员提供了礼品、旅行和招待（包括奥运会等体育赛事的招待），试图影响这些官员采用和保留该公司的技术。据证交会称，高通在其账簿和记录中将这些不当利益不实地陈述为正当业务费用。高通同意向证交会支付 750 万美元的民事罚金，但没有承认或否认证交会的指控。

Allegations 指控

The SEC alleged that from at least 2002 until 2012, Qualcomm provided things of value to government officials at two Chinese state-owned enterprises (“SOEs”) and an unnamed government agency (“Agency”) to try to influence these decision makers to adopt Qualcomm’s wireless communication technologies and make regulatory decisions that would expand the use of these technologies. Specifically, the SEC alleged that:

证交会指称，至少从2002年前直至2012年，高通向两家中国国有企业（“国企”）和一家未指名的政府机构（“机构”）的政府官员提供了有价之物，试图影响这些决策者采用高通的无线通信技术，并制订可扩大这些技术使用范围的法规。具体而言，证交会指称：

1. Qualcomm provided full-time employment and paid internships to family members and other referrals of foreign officials at the two SOEs and the Agency with the purpose of trying to influence these officials to take actions that would assist

Qualcomm in obtaining or retaining business in China. These referrals were often requested by the foreign officials, and Qualcomm internally referred some connected candidates as “must place” or “special” hires. Certain referrals of the foreign officials did not meet the company’s internal hiring standards, and some even had previously failed to obtain employment with Qualcomm through standard hiring process. Qualcomm nevertheless offered them a job, and in some cases, Qualcomm created new positions for these hires.

高通向两家国企和机构的外国官员的家庭成员及其他被指定人提供全职工作和付费实习工作，以试图影响这些官员采取行动，以帮助高通在中国获得或保留业务。这些被指定人通常是由上述外国官员安排的，高通在内部将一些关联候选人称为“必须聘用”或“特别聘用”人员。这些外国官员的某些被指定人不符合公司的内部聘用标准，有些之前甚至未能通过标准聘用程序被高通聘用。但高通仍然给他们提供了工作，且在某些情况下，高通为这些人员创造了新的岗位。

2. For example, Qualcomm provided an internship for the daughter of a deputy general manager of a subsidiary of an SOE after determining “that it would be important for us to support given our cooperation with [the subsidiary].”

例如，高通为某国企的一家子公司的副总经理的女儿提供了一个实习工作，因为其认为“鉴于我们与[该子公司]的合作关系，我们务必要给予支持。”

3. Qualcomm provided a \$75,000 research grant, internship, and subsequent permanent employment to the son of an executive responsible for network planning, construction, and maintenance at an SOE, despite the fact that the interviewers concluded that the son did not meet the company’s hiring standards for the permanent position. After the son joined, Qualcomm sent him on a business trip to China during which he visited his parents over the Chinese New Year holiday, even though his qualification for the assignment was questionable. The executive vice president and president of Qualcomm’s Global Business also personally provided the employee with a \$70,000 loan to buy a home.

高通向某国企一名负责网络规划、建设和维护的高管的儿子提供了 75,000 美元的研究经费、实习工作和之后的正式工作，尽管面试官认为该高管的儿子不符合公司正式员工的聘用标准。在该高管的儿子入职后，高通派他到中国出差，他在此次出差时于春节期间去看望了父母，但他参加此次出差的资格是有问题的。高通全球业务部执行副总裁和总裁还亲自给予该名员工 70,000 美元贷款用于买房。

4. In 2010, Qualcomm also hired an intern whom a human resources employee described as “a MUST PLACE” because he was referred by the director general of the Agency that had influence in China. When asked how critical is the hiring of this referral for Qualcomm’s business, a high-level executive replied that, “[Q]uite important from a customer relationship perspective.”

2010 年，高通还聘用了一名实习生，一名人力资源员工将其描述为“必须聘用”人员，因为他是由在中国有影响力的机构的总干事推荐的。在被问及聘用此人对于高通的业务有多重要时，一名高管回答道，“从客户关系的角度而言非常重要”。

5. In addition to hiring relatives of Chinese officials, the SEC alleged that Qualcomm provided frequent meals, gifts, and entertainment to the officials and their family members in order to influence them to adopt and retain Qualcomm-developed technologies. These include airplane tickets, event tickets, luxury goods, sightseeing tours, golf outings, and hospitality packages to “world class sporting events”, many of which did not have a valid business purpose (e.g., tickets for spouses and children) and did not go through any internal pre-approval process. These expenses were recorded in a generic and non-descript manner.

除聘用中国官员的亲属外，证交会还指称高通经常向这些官员及其家庭成员提供宴请、礼品和招待，以影响其采纳和保留高通开发的技术。这些包括机票、活动门票、

奢侈品、观光游、高尔夫游以及“世界级体育赛事”的招待礼包，其中许多没有有效的业务目的（如给配偶和子女的票）且未经过任何内部预审程序。这些费用按通用和无描述的方式记录。

6. In particular, the SEC alleged that Qualcomm offered at least 15 foreign officials lavish hospitality packages worth approximately \$95,000 per couple at the 2008 Beijing Olympics without any appropriate vetting procedures. The company did not identify any potential FCPA risks until July 2008, when a member of Qualcomm's finance department raised FCPA issues related to the Olympics with Qualcomm counsel. A few days before the Olympics began in August 2008, Qualcomm rescinded the five hospitality invitations that had been accepted due to FCPA-related concerns.

另外，证交会特别指称，高通未经任何适当的审批程序为至少 15 名外国官员提供了每对夫妇价值约 95,000 美元的 2008 年北京奥运会招待礼包，该公司直至 2008 年 7 月才认定有 FCPA 风险，当时高通财务部的一名工作人员向高通法律顾问提出与奥运会有关的 FCPA 问题。奥运会于 2008 年 8 月开幕前的几天，高通因 FCPA 相关顾虑取消了已批准的五项招待邀请。

Cooperation/Undertakings 合作/承诺

As part of the settlement, Qualcomm agreed to self-report to the SEC for the next two years with annual reports and certifications of its FCPA compliance. During the two-year term, Qualcomm will undertake periodic review and submit reports of its remediation and implementation of compliance measures to the SEC, including an initial report and at least two follow-up review reports.

作为和解的一项内容，高通同意在未来两年自行向证交会提交年度报告，并提交关于其遵守 FCPA 的证明。在此两年期间，高通将进行定期审查，并向证交会提交关于其补救和合规措施的执行情况，包括一份最初的报告和至少两份后续审查报告。

Key Observations 主要意见

We offer below certain observations and analysis.

我们在下文提供了某些意见和分析。

1. First, the anti-bribery charge appears to be based solely on the misconduct of hiring relatives of foreign officials to retain business, while the internal controls and books and records charges appear to be based on the provision of gifts, meals, and entertainment.
首先，反贿赂指控似乎仅基于以保留业务为目的聘用外国官员亲属的不当行为，但内部控制及账簿和记录指控似乎是基于礼品、餐饮和招待的提供。
2. Second, this settlement reinforces the position that the SEC adopted in its August 2015 settlement with BNY Mellon that providing a job for a relative of a foreign official can be considered a “thing of value” under the FCPA. Unlike BNY Mellon and several recent cases, Qualcomm was not ordered to disgorge any profits, even though the SEC found that the company obtained billions in revenue from the sale of chips and licenses to cellphone manufacturers. One possible explanation is that the SEC may not have had evidence of causation to support a disgorgement award on the type of corrupt market entry theory that was advanced in the February 2016 VimpelCom settlement.

其次，此项和解进一步证实了证交会在其 2015 年 8 月与纽约梅隆银行的和解中采纳的

观点：为外国官员的亲属提供工作可能被视为 FCPA 下的“有价之物”。与纽约梅隆银行和近期几个案件不同，高通未被命令上交任何利润，即便证交会认定该公司从芯片销售和手机制造商许可中获取了数十亿的收入。一个可能的原因是，证交会可能没有获得因果关系证据，以支持一项基于 2016 年 2 月 VimpelCom 和解中提出的一类腐败市场进入理论的上交非法所得判决。

3. Third, although connected hiring has been referenced as part of a broader range of misconduct in several China-related cases (such as Daimler, Paradigm, and UTStarcom), this is the first case in which the SEC specifically alleged that hiring relatives of Chinese officials violated the FCPA's anti-bribery provisions. In our experience, employees in China may not necessarily view connected hiring as improper. The Qualcomm settlement is a useful case study for educating China-based employees about the FCPA risks associated with hiring.

第三，尽管关联招聘在几起中国相关案件（如戴姆乐、Paradigm 和 UT 斯达康）中曾被作为较广义的不当行为提及，但证交会明确指称聘用中国官员亲属违反 FCPA 反贿赂规定还是头一次。根据我们的经验，中国员工可能不一定将关联招聘视为不当。对于教育中国员工与招聘有关的 FCPA 风险而言，高通和解是一个很好的案例。

4. Fourth, this settlement offers some insights for companies -- especially those currently under investigation by the SEC related to connecting hiring practices -- to understand how the SEC would scrutinize hiring practices under the FCPA. When examining Qualcomm's hiring practices, it appears that the SEC focused on the corrupt intent based on the employees' statements in a series of emails, quoting terms such as "MUST PLACE," "special" hire, "special favor," and "quite important from a customer relationship perspective." The SEC also concentrated on the departure from the normal hiring practice when the company hired connected candidates who lacked qualifications for the job or created new positions for some hires. Aside from the hiring process, the SEC may also look at any favorable treatment to that employee and his qualification for a specific work assignment once employed.

第四，该和解为企业（特别是哪些就关联招聘行为被证交会调查的企业）提供了一些可供借鉴之处，以便理解证交会如何根据 FCPA 审查招聘行为。在审查高通的招聘行为时，证交会似乎基于员工在一系列电邮中的陈述把关注焦点放在腐败意图上，引用了“必须聘用”、“特别”聘用、“特别优待”和“从客户关系角度非常重要”等词语。证交会还特别关注公司聘用缺乏工作所需资历的关联候选人或为某些受聘人员创造新岗位时偏离正常招聘行为的做法。除招聘过程外，证交会还会审查人员被聘用后享受的任何有利待遇以及其从事具体工作任务的资格。

5. Fifth, the order also reminds global companies the importance of extending an effective compliance program to their international operations. The SEC criticized Qualcomm's insufficient internal controls outside the United States despite that its extensive international operations accounted for more than 90% of Qualcomm's revenue. Among other things, the SEC criticized Qualcomm because:

第五，该命令还提醒跨国公司将有效的合规计划延伸至其国际业务的重要性。证交会批评高通在美国境外的内部控制不充分，而高通广泛的国际业务在其总收入中的占比超过 90%。证交会批评高通的主要原因有：

- it did not have a company-wide chief compliance officer or a compliance officer on the ground in China;
其没有委派公司的首席合规官，也没有委派中国本地的合规官；
- it failed to provide regular substantive training or information to employees of its Chinese subsidiaries;
其未向其中国子公司的员工提供定期、实质的培训或信息；

- it lacked processes for vetting hospitality event invitations and for determining whether events had an adequate business component;
其缺乏审查招待活动邀请和确定活动是否有充分业务需求的程序；
- FCPA compliance was not considered in Qualcomm's hiring process, and more broadly, several important business functions such as HR and hospitality planning "were not considered in Qualcomm's FCPA compliance program"; and 高通的招聘程序中没有考虑 FCPA 合规，更广义而言，人力资源和招待规划等重要的业务职能部门“未列入高通 FCPA 合规计划的考虑范畴”；和

gift log and expense report deficiencies -- including missing gifts, meals, and entertainment -- were repeatedly raised in internal audit reports.

在内审报告中多次提到礼品记录和费用报告缺失——包括缺失的礼品、餐饮和招待。

6. Finally, while it appears that the SEC advocates in the order that a company provide anti-corruption trainings to HR employees and employees involved in event planning, companies should be mindful to have a tailored training programs based on their risks. The importance of training HR employees on connected hiring issues may vary depending on the industry.

最后，虽然证交会似乎在命令中提倡，公司向人力资源员工和参与活动规划的员工提供反腐败培训，但企业应当基于其风险制订相应的培训计划。为人力资源员工提供关于关联招聘问题的培训的重要性，可能因行业而异。

If you have any questions concerning the material discussed in this client alert, please contact the following China-focused members of our [Global Anti-Corruption practice group](#):

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