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Nepotism

Friendly Relations? When Nepotism May Violate the FCPA

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The U.S. Foreign Corrupt Practices Act (FCPA) prohibits covered entities from providing, with corrupt intent, anything of value to a foreign official to obtain or retain a business advantage. The "anything of value" prong of the FCPA is quite broad, encompassing non-cash benefits. But what about helping someone close to a foreign official get a job or internship? Is that too prohibited by the FPCA?

As usual with the FCPA, the answer is maybe. Enforcement actions brought under the FCPA by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) demonstrate that hiring the relative of a foreign official can be regarded as providing something of value to the foreign official himself for the purposes of the statute and can underlie a violation.[1] This is an easier case when the job offered is a sham or a "no-show" position. In such cases, it is easy for regulators to determine that the actual benefit will accrue later – i.e., in an improper quid pro quo – as the company does not gain anything from the actual hiring of the employee.

But what about a situation where the relative of a foreign official is legitimately (and perhaps singularly) qualified to hold the position in question and actually does the work required by it? Guidance from the regulators suggests that the U.S. government may believe that under certain circumstances, employing the relative of a foreign official does not in itself constitute a violation. In particular, where a company (1) obtains, in writing, comprehensive FCPA representations from the relative of the foreign official concerning the employment engagement and (2) bases its employment decision on objective factors, such as the relative's qualifications, experience, and past performance, the government may decline to bring an enforcement action because the requisite scienter for a violation of the FCPA would not be present. The propriety of hiring a foreign official's relative – even a qualified one – is and will continue to be a fact-intensive inquiry. Indeed, DOJ and the SEC will examine the circumstances of the engagement to determine whether the purpose of the relative's hiring is to improperly influence the foreign official. If that is the case, regardless of the relative-employee's bona fides, the arrangement likely will be perceived by the regulators to raise FCPA red flags.

In order to understand the form a proper employee relationship between a domestic concern and the relative of a foreign official may take, we review recent FCPA cases that included allegations of nepotism and then consider DOJ opinion releases that outline the broad contours of a defensible employment relationship between a domestic concern and the relative of a foreign official. From these cases and releases, there are practical considerations that should bear on the decision to employ otherwise qualified relatives of foreign officials.

A Friend In Need . . .

Several recent enforcement actions brought by the DOJ and SEC illustrate situations where the government is likely to regard the employment of a foreign official's relative as a

violation of the FCPA. What these cases have in common is not only the employment of a foreign official's relative, but also (at least according to the government's allegations) the indication that the purpose behind the offer of employment was to receive a business advantage that otherwise might not have been forthcoming.

For example, in *SEC v. UTStarcom, Inc.*, the SEC alleged that, on at least ten occasions between 2001 and 2005, UTStarcom, Inc. (UTS), a telecommunications company based in California, made offers of full-time employment, in the United States, to employees of government customers or their family members in China and Thailand.[2] The SEC alleged that the offers of employment were made for the specific purpose of obtaining or retaining business from the customers.[3]

Indeed, UTS actually paid a salary and provided benefits to some of the individuals to whom it made those offers "as if they were real employees, even though they never worked for [UTS] in any capacity."[4] In order to document the employment of these individuals, UTS created fake annual performance reviews and included them in the individuals' putative personnel files, while also improperly accounting for the payments to those individuals as employee compensation in its books and records.[5]

Similarly, in *United States v. DaimlerChrysler China, Ltd.*, Daimler employed relatives of Chinese government officials in order to secure business from the state-owned Bureau of Geophysical Processing (BGP) and Sinopec, a state-owned energy company.[6] There, Daimler made total commission payments of approximately €30,000 for "market research" to the German bank account of the son of a BGP official and paid the wife of a Chinese government official employed at Sinopec approximately €57,000.[7] To cover up the reason for the payment to the official's wife, Daimler later entered into a sham consulting agreement with her, pursuant to which no services were ever performed.[8] Furthermore, Daimler provided things of value to the son of a Chinese government official with responsibility for making purchasing decisions for BGP, including an internship at Daimler for the son and his girlfriend and later employment at Daimler for the son with a monthly salary of €600.[9]

United States v. Siemens Bangladesh Ltd. likewise contained allegations of illicit payments to the relatives of foreign officials based on sham employment positions.[10] In that case, Siemens made several bids for a contract that was part of a project being undertaken by the Bangladesh Telegraph Telephone Board (BTTB), a government-owned telecommunications regulatory entity.[11] Around April 2003 (when the contract still had not been awarded), Siemens paid $5,000 to the daughter of a BTTB official at the suggestion of a senior official of the committee charged with evaluating the bids for the BTTB contract.[12] Siemens seemingly employed the daughter to work as an engineer, irrespective of the fact that the project did not call for an engineer and that Siemens did not have the budget for the position.[13] Around December 2003, Siemens also hired the nephew of an official of The Ministry of Posts and Telecommunications, a Bangladeshi government ministry that was involved in the awarding of the BTTB project contract.[14]

Finally, in *SEC v. Tyson Foods, Inc.*, the SEC alleged that the defendant's Mexican subsidiary made improper payments to two Mexican government veterinarians who were responsible for certifying Tyson's chicken products for export.[15] The

Mexican subsidiary initially concealed those payments by putting the wives of the veterinarians on its payroll – who performed no services whatsoever for the company.[16]

These cases present paradigmatic examples of employment arrangements between domestic concerns and the relatives of foreign officials that will likely continue to draw scrutiny from enforcement authorities. The positions in these cases were phony, no work was ever performed, and the illicit purposes of the employment relationships were transparent. It is clear from the cases described above that the government can use allegations concerning such sham positions to support an FCPA enforcement action. It thus goes without saying that such arrangements should be avoided.

However, if a domestic concern can demonstrate that the employment relationship between it and the relative of a foreign official is backed by robust FCPA compliance undertakings and based on legitimate considerations other than obtaining or retaining business through undue influence, it may withstand investigative scrutiny.

. . . And a Friend Indeed

DOJ opinion releases shed some light on the steps a domestic concern should take if it wishes to employ the relative of a foreign official. The domestic concern should (1) obtain, in writing, robust FCPA compliance representations from the relative of the foreign official and (2) be able to explain the factors that influenced its decision to employ the foreign official's relative. Though circumstances will vary on a case-by-case basis, this DOJ guidance suggests that, at a minimum, each of these steps should be followed to avoid running afoul of the FCPA.

DOJ Review Procedure Release No. 84-01 is particularly instructive in this context.[17] There, an American firm sought to engage as its marketing representative in a foreign country an entity whose principals were related to that country's head of state. Moreover, one of the marketing representative's principals personally managed a portion of the head of state's private business affairs and investments. Nonetheless, DOJ indicated that it did not intend to take any enforcement action based on the facts presented to it.

Central to DOJ's decision appears to have been several representations the requesting firm and the in-country marketing representative made with respect to their employment relationship. These representations were part of the contract between the parties and included, among others, representations that:

- the marketing representative would not pay or agree to pay, directly or indirectly anything of value, on behalf of the American firm, to any public official in the foreign country for the purpose of influencing the official's official acts, or to induce the official to use his influence to the marketing representative's benefit;
- no owner, partner, officer, director, or employee was or would become an official of the foreign government during the term of the agreement;
- if the marketing representative directly or indirectly paid or offered to pay anything of value to any government or public official for the purpose of influencing any act or decision of such official in his official capacity, or inducing him to use his influence with the foreign government to influence the government's decision concerning retention of the American firm, the agreement would automatically be rendered void *ab initio* and the marketing representative would

automatically surrender any claim for any payment under the agreement, even for sales previously concluded or sales previously rendered;
- the agreement was governed by the law of the state in which the American firm had its principal place of business;
- the marketing representative would be solely responsible for all of its costs and expenses incurred in connection with its representation of the American firm;
- the American firm would pay commissions only in U.S. dollars and only in the foreign country in which the marketing representative had its principal place of business;
- the marketing representative would have no right to assign any portion of its rights under the agreement to any third party without the prior written consent of the American firm; and
- the marketing representative would make, when required, full disclosure of its identity to the United States government and the foreign government and the amount of commission applicable to a specific contract.[18]

This list of representations can serve as a starting point for the FCPA compliance undertakings that will become a part of the contract between the domestic concern and the relative of the foreign official that it wishes to hire. The circumstances of each employer-employee relationship may dictate the inclusion of more or different representations in the agreement between the parties. But, notwithstanding any particular set of facts, it is clear that DOJ will scrutinize the FCPA representations of the parties that are included in the written agreement.

The importance of including FCPA representations in the agreement between the domestic concern and the foreign official's relative has been highlighted even in a case where the domestic concern inadvertently engaged the services of a foreign official's relative. In Review Procedure Release No. 82-04, the DOJ declined to take an enforcement action against an American firm that, unbeknownst to it, had hired as its agent for a transaction with a foreign government the brother of a government official.[19] There, despite its lack of knowledge as to the agent's true identity, the contract between the domestic concern and the agent nevertheless prohibited the agent from paying any commission or finder's fee to any third party. After it had learned of just who its agent was related to, the domestic concern obtained affidavits from the agent and his brother swearing adherence to the anti-bribery provisions of the FCPA.

Moreover, any domestic concern considering the employment of a foreign official's relative should carefully consider and be prepared to explain the factors that influenced its decision to hire that person.

For instance, in Release No. 84-01, discussed above, the American firm made representations to the DOJ concerning several of the factors it considered in selecting the marketing representative in question, including:
- the number of years the marketing representative had been in operation;
- the marketing representative's successful representation of other large U.S. and foreign corporations;
- the qualifications of the marketing representative's principals; and
- the marketing representative's reputation among businessmen and bankers in the U.S. and elsewhere.[20]

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While most hiring decisions will inevitably be influenced by subjective considerations, Release No. 84-01 emphasizes factors that are relatively objective, such as the experience level of the foreign official's relative and that person's history (or lack) of professional achievement. In this context, a domestic concern's decision-making should be concentrated on factors that, like these, establish the relative as legitimately qualified, whether standing alone or compared to others under consideration for the same position.[21]

If a domestic concern takes both of these steps – incorporating a broad set of FCPA compliance representations into its written contract with the foreign official's relative and documenting the legitimate factors that influenced its decision to hire the relative – it may be able to have friendly relations with both that relative and American government regulators.

Some Friendly Advice

While recent DOJ and SEC enforcement actions demonstrate that employing the relative of a foreign official can satisfy the "thing of value" element of the FCPA, it is not as clear that such an arrangement will inevitably satisfy the FCPA's scienter requirement – i.e., that the provision of the thing of value be made "corruptly." Indeed, DOJ opinion releases point to a narrow set of circumstances under which offers of employment to a foreign official's relative may lack the scienter required under the FCPA. At the outset, a domestic concern interested in employing the relative of a foreign official should obtain a comprehensive set of FCPA compliance representations, in writing, from the relative and be able to point to a number of legitimate factors (such as experience, qualifications, professional reputation, and past performance) that justify its employment decision. As noted above, in this context, each hiring decision will present its own unique set of circumstances and considerations. Nonetheless, by following the guidance provide by DOJ, domestic concerns subject to the FCPA may be able to employ the best qualified individuals – including the relatives of foreign officials – so that they improve their bottom line through impressive results, not corruption.

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[1] *See, e.g.,* Information at 10, *United States v. DaimlerChrysler China, Ltd.*, No. 10-cr-00066-RJL (D.D.C. Mar. 22, 2010) (alleging that Daimler provided a thing of value to a Chinese official responsible for making purchasing decisions in which Daimler had an interest by providing his son and his son's girlfriend with internships at Daimler); Information at 12, *United States v. Siemens Bangladesh Ltd.*, No. 08-cr-00369-RJL (D.D.C. Dec. 12, 2008) (alleging that defendant "paid $5,000 to the daughter of a [government] official ostensibly to work as an 'engineer'

on the . . . project, despite the fact that Siemens Bangladesh did not need such an engineer and did not have the budget for the position."); *see also* DOJ Op. P. Rel. No. 12-01 (Sept. 18, 2012) ("[W]e note that the FCPA prohibits providing anything of value to third parties who are not themselves a foreign official as an indirect means to corruptly influence a foreign official.") (citing *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991)).

[2] Complaint at 4, *SEC v. UTStarcom, Inc.*, No. 09-cv-06094-TEH (N.D. Cal. Dec. 31, 2009) (noting that those offers of employment included salaries and other benefits).

[3] *Id*.

[4] *Id.*

[5] *Id*. at 4-5.

[6] *See generally* Information at 9-10, *United States v. Daimler Chrysler China Ltd.,* No. 10-cr-00066-RJL (D.D.C. Mar. 22, 2012).

[7] *Id*. at 10; *see also In the Matter of Avery Dennison Corp.*, Exchange Act Release No. 34-60393, 2009 WL 2243826, at *2 (July 28, 2009) (alleging that Avery's Chinese subsidiary hired a former official of a Chinese government agency as a sales manager because his wife, who was still an official of that agency, was in charge of two projects Avery was interested in pursuing).

[8] *Supra* n. 6 at 10.

[9] *Id*.

[10] *See generally* Information at 12, *United States v. Siemens Bangladesh Ltd.*, No. 08-cr-000369-RJL (D.D.C. Dec. 12, 2008).

[11] *See id*. at 5.

[12] *Id*. at 12.

[13] *Id*.

[14] *Id*. at 3, 12.

[15] SEC Litig. Rel. 21851.

[16] *Id*.

[17] DOJ Review P. Rel. No. 84-01 (Aug. 16, 1984).

[18] *Id*.

[19] DOJ Review P. Rel. No. 82-04 (Nov. 11, 1982).

[20] *Supra* n. 17.

[21] In addition to considering the experience, track record, qualifications, and reputation of the foreign official's relative, a domestic concern that has hired the relative of a foreign official might also wish to actively monitor the performance of the relative to ensure not only that he shows up for work and performs the tasks assigned to him, but also that his performance is up to par and that he does not receive any favorable treatment by virtue of his family connection.