



HR as Gatekeeper Protecting Against FCPA Risk in Hiring Decisions

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Often overlooked by compliance programs and committees is the critical role that Human Resources (“HR”) plays in protecting the company from risks under the Foreign Corrupt Practices Act (“FCPA”) and other applicable anti-bribery/anti-corruption (“ABAC”) laws. HR Departments need to understand their role in protecting against ABAC risks by ensuring clear and consistent hiring decisions are based on established and objective criteria for every position, regardless of whether it is an intern, part-time or full-time employee, or senior executive.

As further outlined below, companies should take steps to ensure they are properly vetting their new hires and addressing any risks that come to their attention during the evaluation and on-boarding process, particularly when operating in high-risk markets, including those with a large public sector and state-owned enterprises (“SOEs”). This article seeks to outline steps companies may consider to avoid these risks.

Background

The FCPA prohibits the transfer of anything of value to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do something in violation of his or her duty, or to secure any improper advantage in order to assist in obtaining or retaining business. The FCPA does not require a transfer of cash; it simply requires a transfer of value. Employment for a friend or family member of a government official can constitute something “of value” to that official.

If a potential employee has a conflict of interest, such as a relationship with a government official, certain steps should be taken to mitigate FCPA risks from the relationship and otherwise ensure the company meets general ethics obligations. These steps apply regardless of whether the company is approached by a government official to give a friend or family member a job, or if the company seeks on its own to employ a friend or family member of a government official. While the risk is heightened with government affiliations, given the risk of commercial bribery claims, these hiring practices should apply across the board.

Transparency Solves All (Well, Most) Things

There are basic steps companies can take to protect themselves, many of which take advantage of a company’s pre-existing hiring processes and infrastructure. In some cases, more substantial changes in approach may be necessary. Of course, each of these steps must also be considered in the context of local laws, in particular those addressing labor, employment, and privacy.



Before They Walk In the Door

The Role of HR – Fundamentally, HR needs to understand that it stands in a pivotal gatekeeper position for the company's potential liability under the FCPA (and other ABAC laws applicable to its operations). When devising a company's compliance committee, the key functions should include HR to ensure their regular participation in discussions of ABAC risks.

Identifying the Risk – It can be difficult to identify whether a prospective employee was a government official or associated with a government official. As part of the application process, the company should ask how the candidate heard of the position and whether it was a referral, public job posting, or recruitment effort by management.

In addition to determining how the applicant came to the company, the company should explore known associations. Therefore, the application process should request information as to associations with government officials, officials at SOEs, if applicable, and with executives or employees at the company. The application should clearly state the importance of full disclosure, and caution that any omission or misrepresentation will disqualify the candidate and could form the basis of disciplinary action if the applicant is hired and then such an omission/misrepresentation is discovered.

If it is determined that an applicant has an association with a government official, the company should assess several factors to determine the risk associated with hiring the individual, including the type and closeness of the relationship between the applicant and the foreign official (familial, former colleague, acquaintance), the seniority of the foreign official, and the role of the official in key decisions affecting the company or its operations, including whether the official makes regulatory or purchasing related decisions that could affect the company (in particular, major procurements or tenders). Importantly, HR should identify the departments and/or employees involved with the particular agency or SOE and ensure that they have no role in the review and consideration of the applicant for the position.

Communicate the Risk – The company, through the HR department, should inform the applicant that the company needs to take certain precautionary measures, which may include contacting the government agency or SOE to ensure there is no conflict of interest. The company should make sure there is no decision pending before the government agency affiliated with the applicant, which could create a serious appearance of impropriety and would generally disqualify the applicant at least for consideration until that conflict has been resolved. Finally, the company should ensure there are no restrictions at the government agency or SOE regarding employing government officials or their family members.

Follow Established Hiring Best Practices – The company should not circumvent any standard processes or checks during the hiring process. The position should be posted according to the company's established hiring practices, policies, and procedures, which should include the description of the position and the minimum qualifications for candidates. The position and qualifications should be posted publicly and the hiring process followed and documented.

The company should thoroughly vet the potential employee's qualifications. The potential hire should be clearly qualified for the position he/she is seeking. As noted above, any company executive with ties to the government official, agency, or SOE should not be involved in any discussions or decisions regarding hiring the applicant. The company should satisfy itself that the applicant's qualifications stand up to independent and objective scrutiny, as well as government scrutiny. As noted, transparency is key to providing comfort around any hiring decision.



Once You've Chosen a Candidate

Equal Treatment – Once the company documents that the applicant objectively meets all hiring criteria, and the company has determined that there is no appearance of impropriety or decision pending before the government agency or SOE, then the company must ensure that the applicant is treated like any other employee of similar experience, grade, and seniority. This includes compensation and benefits and expectations for promotion.

Share and Communicate Expectations – The new employee should be trained as to all company policies and procedures. Most notably, the new employee should be trained on those policies relating to applicable ABAC laws and the risks to the company, to him or her individually, and potentially to the government official with whom he or she has a connection if he/she were to breach those rules.

Implement Necessary Controls – Further, the company should implement a firewall between the new employee and the government agency or SOE in question. The new employee should not work in any position in the company which brings him or her into contact with the government agency or SOE with which the employee has a connection. If it is necessary for the employee to come into contact with the agency, any contact should receive strict scrutiny and supervision. Even if not legally required, depending upon the seniority and role of the government official with whom the new employee has a relationship or the closeness of the relationship of the new employee to the government official, the government agency may need to be notified and informed of the new hire.

Be Aware of Local Legal Considerations – As noted above, local laws and regulations, including those related to labor and privacy, may limit or require a company to take certain steps. Considerations of conflicts of interest and the FCPA should be addressed in conjunction with other legal issues.

Risks and Oversight – The company needs to understand that, if it decides to hire the applicant as an employee, it will need to ensure that there is independent oversight of such employee to prevent the possibility of favoritism in assignments, reviews, promotions and compensation, including awards, recognitions, bonuses, and increases. Fundamentally, the company should consider whether they are willing to take the risk of alienating the government agency or SOE if the employee does not work out and the company needs to terminate the employee.

These steps will not guarantee issues won't arise, but these actions will help a company demonstrate to regulators that they have taken significant, concrete steps to assess and address potential ABAC-related risk in their hiring practices.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Washington, D.C. lawyer:

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