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CLIENT ALERT

Are Members of Royalty "Foreign Officials" Under the FCPA? Not Always, But Tread Carefully in the Arabian Gulf States

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Businesses seeking to capitalize on increasing commercial opportunities in the Arabian Gulf (including Saudi Arabia, Kuwait, Bahrain, Oman, Qatar and the United Arab Emirates) know that it is difficult to do so without the assistance of local third party agents and other local business partners. Indeed, many Arabian Gulf countries require foreign companies to partner with a local company in order to do business. Given how numerous and pervasive royal families are in the Gulf, companies may also struggle to gain access to business opportunities without working with individuals or companies that are in some way connected to a royal family. For example, in Saudi Arabia, it is estimated that there are over 5,000 members of the royal family. At the same time, companies doing business in the Gulf are rightly concerned about running afoul of the Foreign Corrupt Practices Act ("FCPA"), which prohibits making corrupt payments to "foreign officials" to obtain or retain business. U.S. authorities interpret the term "foreign official" very broadly, as the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") recently affirmed in their November 14, 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("the *FCPA Guide*").[1] Accordingly, companies need to navigate carefully any business relationships involving members of the region's royal families so that compensation or other benefits conveyed do not run afoul of the FCPA.

A recent Opinion Release from DOJ confirms that compensating a royal family member as part of a business transaction does not always violate the FCPA.[2] Nevertheless, companies planning to partner with royal family members must still tread very carefully, mindful of both the lessons and limitations of Opinion Release 12-01. Opinion Release 12-01 also highlights the kind of rigorous due diligence a company must perform in relation to its local partners and agents, and the importance of implementing appropriate anti-corruption compliance measures.

"Foreign Official"

The FCPA prohibits individuals and companies within its purview from "corruptly" offering or giving anything of value to any "foreign official" for the purpose of: (1) influencing an official act of the foreign official; (2) inducing the official to act or omit to do an act in violation of his duty; or (3) inducing the official to use his influence with the government or an instrumentality of the government "in order to assist such [company] in obtaining or retaining business for or with, or directing business to, any person . . . ." 15 U.S.C. 78dd-2(a)(1).[3] As a result, whether the U.S. government would consider a royal family member to be a "foreign official" has significant implications for those operating in the Arabian Gulf.

The FCPA defines a "foreign official" as any officer or employee of, or "any person acting in an official capacity for or on behalf of[,]. . .[a] foreign government or any department, agency, or instrumentality thereof . . . ."[4] DOJ has an expansive view of the term "foreign official." For example, it has argued that a company can be an "instrumentality" – such that all of its employees, officers, and agents can be deemed "foreign officials" – if a foreign government owns a stake in the company and carries out an "end or purpose" or "one of its objectives or functions" through that company.[5] DOJ acknowledges virtually no limit to what qualifies as a government function and has long argued that whether a company is an instrumentality of a foreign government is

a question of fact for a jury, dependent on a number of factors.[6] This view was reaffirmed in the recently-issued *FCPA Guide*.[7] Accordingly, businesses should assume that DOJ will consider employees of any state-owned or state-controlled enterprises, ranging from oil companies and utilities to hospitals and universities, to be "foreign officials" under the FCPA, and should carefully analyze all of these factors.[8]

The issue of whether and under what circumstances a member of a royal family will be deemed a foreign official under the FCPA has not been litigated. Nor was it directly addressed in the *FCPA Guide*. However, DOJ Opinion Release 12-01 provides insight into how DOJ would interpret that issue in deciding whether to initiate an enforcement action.

The DOJ Opinion Procedure and Opinion Release 12-01

DOJ regulations permit anyone subject to the FCPA to seek an opinion regarding whether certain prospective conduct conforms to the statute. The resulting DOJ opinions have no binding application to any party that did not submit the request.[9] Nevertheless, the opinions offer insight into DOJ's approach to questions of interpretation.

In February 2012, a U.S. lobbying firm ("Requestor"), submitted a request for an opinion from DOJ regarding its plan to seek business representing the embassy to the United States of an unnamed foreign country ("Foreign Country") in lobbying efforts in the United States. To facilitate winning the lobbying engagement from the foreign embassy, the Requestor proposed to contract with a third-party consulting company ("Consulting Company"). One of the three partners of the Consulting Company was a member of the Foreign Country's royal family (the "Royal Family Member"). The Requestor expected the Consulting Company – including the Royal Family Member – to aid in securing the lobbying engagement from the Foreign Country's embassy by acting as the Requestor's sponsor in the Foreign Country and advising the Requestor on cultural awareness issues in dealing with the embassy. Ultimately, if the Requestor won this business from the embassy, it hoped the Consulting Company would assist in dealing with foreign officials and businesses to help identify additional business opportunities in the Foreign Country for the Requestor.

The Requestor sought an opinion from DOJ about whether the engagement of the Consulting Company, and this Royal Family Member in particular, to help it win the lobbying engagement would conform to DOJ's policy regarding the anti-bribery provisions of the FCPA. In the Opinion Release, DOJ framed its response as addressing two issues: (1) whether the Royal Family Member was a "foreign official" under the FCPA; and (2) whether an enforcement action would result if the Requestor entered the proposed engagement.

In analyzing whether the Royal Family Member at issue was a foreign official under the FCPA, the DOJ stated that a "person's mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a 'foreign official.'"[10] Instead, DOJ concluded, the question requires a fact-intensive, case-by-case determination.[11] In Opinion Release 12-01, DOJ enumerated a number of factors it considered, all of which were aimed at determining two fundamental questions: (1) whether the Royal Family Member had "power to affect the Foreign Country government's award of the engagement the Requestor seeks;" and (2) whether compensating the Royal Family Member "would corruptly influence other members of the Foreign Country's royal family, or officials of the Foreign Country, to award business to the Requestor improperly."[12] Companies facing similar circumstances in the Gulf should weigh the factors DOJ described as relevant to those questions. The factors include:

- the structure and distribution of power within a country's government;

- a royal family's current and historical legal status and powers;
- the individual's position within the royal family;
- an individual's present and past positions within the government and the mechanisms by which that individual could come to hold a position with governmental authority or responsibilities (for example, royal succession);
- the likelihood that an individual would come to hold such a position; and
- an individual's ability, directly or indirectly, to affect governmental decision-making.[13]

Applying these factors, DOJ concluded in Opinion Release 12-01 that the Royal Family Member did not qualify as a foreign official because the Royal Family Member:

- had no official or unofficial title or role in the Foreign Country's government;
- had no direct or indirect power to award the business the Requestor sought, or any official or unofficial power over any aspect whatsoever of the government, including its decision-making process, executive function, administration, or finances;
- would not be able to ascend to a governmental position by virtue of his membership in the Royal Family;
- enjoyed no benefits or privileges because of his status as a Royal Family Member;
- had no relationship with the decision-makers in the Foreign Country's Embassy or in the Foreign Country's government who would decide whether to award the business the Requestor sought; and
- did not directly or indirectly represent that he was acting or would act on behalf of the Royal Family or in his capacity as a member of the Royal Family.[14]

DOJ determined that, under all the facts and circumstances presented, the Royal Family Member had "no power to affect" the foreign government's determination of whether to award business to the Requestor, and the circumstances did not suggest that compensating the Royal Family Member under the engagement would "corruptly influence" other royals or government officials in the Foreign Country to improperly award business to the Requestor.[15]

Companies considering working with a royal family member may use Opinion Release 12-01 as a guide to their own due diligence, but it is only a starting point. Each case must be weighed on its own facts, and certain factors – including some DOJ did not list in this Opinion Release – could weigh more heavily in certain circumstances.[16] For example, Opinion Release 12-01 expressly addressed only that part of the engagement dealing with the Consulting Company's proposed lobbying services for the Foreign Embassy. It did not address the Requestor's plan to use the Consulting Company to "identify additional business opportunities."[17] Given DOJ's fact-specific approach to the "foreign official" definition, a royal family member's position could present greater risk in a different business context.

The FCPA Guide Provides Little Guidance On A Key Element Of The "Foreign Official" Definition

Opinion Release 12-01 notes that the "steps the Requestor and the Consulting Company [had] taken here to comply with the FCPA and other anti-bribery laws" also influenced DOJ's determination that it would not take enforcement action. Although compliance measures are not a statutory defense to FCPA violations,[18] companies should be aware that Opinion Release 12-01 illustrates that rigorous due diligence and compliance efforts can make a significant difference to DOJ in determining how to resolve FCPA investigations if misconduct occurs and comes to light. Evidence that a company has conducted careful due

diligence of its business partners, incorporated FCPA and other anti-corruption compliance provisions into agreements, structured deals in ways that reward the performance of its agents rather than their status, evaluated the market value of their agents' services, and implemented prophylactic compliance measures can give DOJ good reason to credit a company's assertions and good faith in the event improper conduct occurs despite the company's vigilance. DOJ and SEC also emphasized this point in the *FCPA Guide*.[19]

It is apparent from Opinion Release 12-01 that the Requestor in that case had engaged in extensive due diligence regarding the Royal Family Member, because DOJ was able to point to detailed information about him and his background. DOJ also noted the following facts as part of its rationale for not pursuing an enforcement action:

- ***Contract Provisions:*** The parties' agreements included representations that none of the Consulting Company's members or principals are foreign officials and that its principals and members were familiar with and agreed to abide by the FCPA and all relevant anti-bribery and anti-corruption laws;
- ***Compliance Standards:*** The Consulting Company had adopted the Good Practice Guidance on Internal Controls, Ethics and Compliance issued by the Organization for Economic Cooperation and Development, and pledged that all partners and employees would be bound by those procedures;
- ***Transparency:*** The Requestor committed to fully disclosing its relationship with the Consulting Company and the Royal Family Member to all relevant parties in both the United States and the Foreign Country;
- ***Compensation for Real Work:*** The Requestor planned to pay the Consultant a retainer and monthly fees that would be determined based on work performed, and any commission payments would also depend on how much work the Consultant performed; and
- ***Compensation at or Below Market***:the Requestor had and would continue to ensure that these payments to the local Consultant were consistent with or below the "typical range at the going fair market rate."[20]

As Opinion Release 12-01 confirms, these and other measures, including a robust system for documenting due diligence and compliance efforts, can make all the difference in influencing DOJ not to initiate an FCPA enforcement action.

Conclusion

DOJ's decision that royal family members are not *per se* "foreign officials" is welcome. Still, companies seeking to do business in the Gulf should be aware of the limitations and lessons of Opinion Release 12-01. First, DOJ's interpretation of who is a foreign official under the FCPA remains very broad. Second, companies seeking to compensate or provide other benefits to a royal family member as part of business transactions in the Gulf (and elsewhere) must take care to evaluate the particular circumstances of the royal family, the royal family member in question, and the transaction in question in evaluating whether U.S. enforcement authorities may determine that the royal family member is a foreign official. Third, companies must undertake this inquiry with the benefit of rigorous due diligence. Finally, any company working with a royal family member (or any potential foreign official) must structure its arrangements and put in place compliance measures to limit the potential for corruption and to be able to demonstrate the company's good faith.

[1] *Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012) 19-20, *available at* http://www.crowell.com/files/DOJ-SEC-FCPA-Guide.pdf.

[2] FCPA Opinion Release 12-01 (Sept. 18, 2012) ("Opinion Release 12-01").

[3] The FCPA regulates "domestic concerns" and "issuer[s] which ha[ve] a class of securities registered pursuant to section 78l of [title 15] or which is required to file reports under section 78o (d) of [title 15]." 15 U.S.C. § 78dd-2(a); 15 U.S.C. § 78dd-1(a). "Domestic concern" is defined as "(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1).

[4] 15 U.S.C. § 78dd-2(h)(2)(A). In addition to the anti-bribery provisions in the Act, the FCPA also includes provisions requiring issuers to maintain accurate books and records and to design a system of internal controls reasonably calculated to ensure that financial statements are fairly and accurately stated. 15 U.S.C. § 78m(2).

[5] *See, e.g.*, Opposition to Defendants' Motion to Dismiss the First Superseding Indictment at 11, *United States v. Aguilar, et al.*, No.10-CR-01031-AHM (C.D. Ca. Mar. 10, 2011), ECF No. 250 ("[A] government instrumentality is an entity through which a government achieves an end or purpose. And government purposes can be myriad."); Opposition to Defendants' Motion to Dismiss at 16, *United States v. Carson*, No. 09-CR-00077-JVS (C.D. Cal. Apr. 18, 2011), ECF 332 (same); *id.* at 13 (stating that "what makes up an instrumentality is a factual question"); Opposition to Defendants' Motion to Dismiss at 9-10, *United States v. Esquenazi, et al*., 09-CR-21010-JEM (S.D. Fl. Nov. 17, 2010), ECF 294 (arguing that whether company is an instrumentality is a question of fact more appropriate for jury instruction and/or motion for judgment of acquittal argument, but declining to brief the meaning of the term without court order for "supplemental" briefing); Brief for Appellee at 29, *United States v. Esquenazi, et al.*, No. 11-15331 (11th Cir. Aug. 21, 2012) ("[A]n instrumentality . . . is an entity through which the foreign government carries out one of its objectives or functions.").

[6] *See, e.g.,* Brief for Appellee at 47, *United States v. Esquenazi*,No. 11-15331 (11th Cir. Aug. 21, 2012) (arguing that district court appropriately instructed jury that whether the company in question was an instrumentality depended on a list of "several relevant but nonexclusive factors"). *Cf.* Opinion Release 12-01 (citing with approval factors district court listed in order denying motion to dismiss in *United States v. Carson*, No. 09-CR-00077-JVS, 3732011 WL 5101701, at *3-4 (C.D. Cal. May 18, 2011)). *See also FCPA Guide* at 20 (reasserting that "instrumentality" is a fact-specific question and noting various factors courts have employed in jury instructions). The Eleventh Circuit Court of Appeals will soon weigh in on the issue when it reviews the defendants' appeal of their FCPA convictions in *United States v. Esquenazi, et al.*, Appeal Number 11-15331.

[7] *See FCPA Guide* at 19-21.

[8] *See FCPA Guide* at 20 (noting various factors courts have employed in jury instructions).

[9] 28 C.F.R. Part 80.

[10] Opinion Release 12-01 at 5.

[11] *Id.*

[12] Opinion Release 12-01 at 7.

[13] Opinion Release 12-01 at 5 (noting that "numerous other factors" could be relevant).

[14] Opinion Release 12-01 at 7.

[15] *Id.*

[16] See note 13 and accompanying text.

[17] Opinion Release 12-01 at 7. DOJ might have addressed this factor in more detail if the objective had been to obtain rather than simply identify additional business opportunities.

[18] By contrast, under the UK Bribery Act, a company faces strict liability for failing to prevent bribery, but can assert an affirmative defense by demonstrating that it had "adequate procedures" in place to prevent bribery. *See* "UK Bribery Act: Ready Or Not, Here It Comes" (June 30, 2011), *available at* http://www.crowell.com/NewsEvents/AlertsNewsletters/White-Collar-Alert/UK-Bribery-Act-Ready-or-Not-Here-It; "UK Bribery Act – Guidance Issued" (April 4, 2011), *available at* http://www.crowell.com/NewsEvents/AlertsNewsletters/White-Collar-Alert/UK-Bribery-Act-Guidance.

[19] *FCPA Guide* at 52-66.

[20] Opinion Release 12-01 at 3-4.

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