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Table of Contents

Faculty and Author Biographies

Search

Copyright

Preface

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Who Is a Foreign Official? The Individual Element of the Definition and the Significance of the Business Context

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Interpreting the scope of the term "foreign official" under the Foreign Corrupt Practices Act ("FCPA") can be a challenge for practitioners advising clients on the FCPA implications of potential business arrangements. Commentators, recent litigation, and the *Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*FCPA Resource Guide*") have focused on only part of the term's definition. But practitioners analyzing the second part of the definition can find guidance in less-publicized sources.

The FCPA, of course, 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).[2] In relevant part, 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.[3] In the most basic terms, the statute's definition of a foreign official requires an assessment two elements:

> (1) whether the particular entity in question is itself the "foreign government" or an "agency, department, or instrumentality" thereof (what we call the "**entity element**"); and
>
> (2) whether the individual in question can be said to be an employee or officer of the alleged foreign government or agency, department, or instrumentality thereof, or can be said to be "acting in an official capacity on . . . behalf of" the alleged foreign government or agency, department or instrumentality thereof (what we call the "**individual element**").

The entity element has recently received a great deal of attention. But the individual element is also critical. It is usually not difficult to determine whether an individual is an "employee" or "officer" of a government or one of its agencies, departments, or instrumentalities once an entity has been so identified. But whether an individual can be said to be "acting . . . on behalf of" such an entity is often less clear. This question can arise, for example, when businesses wish to engage foreign consultants or other third-party agents who are not formally employees or officers of a foreign government instrumentality, but who, because of family ties, friendships, or other connections, the Department of Justice ("DOJ") or the Securities and Exchange Commission ("SEC") could conceivably deem to be foreign officials on the theory that they can act on behalf of such an entity. Likewise, the issue can arise when businesses wish to engage representatives (such as lobbyists) to help obtain business in a foreign country and those representatives have actually have done work for some part of that country's government, or even currently do work for the government.

After briefly reviewing the recent attention the entity element of the foreign official definition has received, this article focuses on the individual element. It highlights the importance of understanding a potential representative's individual characteristics as well as the business context for particular payments a company is considering when attempting to determine whether the DOJ or the SEC will consider such payments as

compensation of a "foreign official" prohibited by the FCPA. The article concludes with recommendations for ameliorating the risk that the DOJ or the SEC will deem a particular individual to be acting on behalf of a foreign government or one of its instrumentalities.

Neither Recent Litigation nor the FCPA Resource Guide Address What it Means for a Person to Act "On Behalf of" a Foreign Government

The entity element of the "foreign official" definition has been the focus of recent FCPA litigation. Specifically, the DOJ and defendants have debated the scope of the word "instrumentality" in the definition. The DOJ has argued and (so far) district courts have agreed that, at least in some circumstances, state-owned or state-controlled entities can be "instrumentalities."[4] The Eleventh Circuit Court of Appeals will soon address the issue when it reviews the defendants' appeal of their FCPA convictions in *United States v. Esquenazi, et al.*, Appeal Number 11-15331.

The DOJ and the SEC also addressed the entity element recently in the eagerly-awaited *FCPA Resource Guide*.[5] The DOJ and the SEC intended for the *FCPA Resource Guide* to "provid[]e insight into DOJ and SEC enforcement practices . . ."[6] Consistent with this goal, the agencies devoted two pages of the *FCPA Resource Guide* to the enforcement agencies' interpretation of the entity element, particularly the scope of "instrumentality," and state-owned or state-controlled entities in particular.[7] The agencies recite factors district courts have deemed relevant and state that they "have long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government."[8] They include examples of past enforcement actions stemming from payments directed to executives or other employees of state-controlled entities.[9]

Because the purported officials in question have all indisputably been officers or employees of the state-owned entities the government claimed to be foreign government "instrumentalities," recent litigation has not focused on the individual element of the foreign official definition. The *FCPA Resource Guide*, unfortunately, does not detail the agencies' interpretation of the individual element, saying only that:

> [T]he FCPA broadly applies to "any" officer or employee of a foreign government and to those acting on the foreign government's behalf. The FCPA thus covers corrupt payments to low-ranking employees and high-ranking officials alike.[10]

While this broad statement offers no guidance on who might be deemed to be acting "on behalf of" a foreign government,[11] recent DOJ FCPA Opinions offer insight into the scope of the individual element of the foreign official definition.

FCPA Opinions Contain DOJ's Latest Formal Pronouncements on What it Means for an Individual to "Act On Behalf of" a Foreign Government

The FCPA mandates that the DOJ permit anyone subject to the FCPA to seek an opinion regarding whether certain prospective conduct conforms to the statute.[12] Although the resulting DOJ opinions have no binding application on any party that did not submit the request,[13] the opinions provide insight into DOJ's approach to questions of interpretation. FCPA Opinion Releases 12-01 and 10-03 ("Opinion 12-01" and "Opinion 10-03," respectively)[14]provide insight into how DOJ interprets the individual element of the "foreign official" definition.

The Importance of the Individual Representative's Characteristics

In February 2012, a U.S. lobbying firm ("Requestor"), submitted a request to the DOJ for an opinion 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 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 Opinion 12-01, DOJ addressed 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 the first question, 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.'"[15] Instead, the DOJ concluded that the question of whether a royal family member is a "foreign official" turns on a fact-intensive analysis of non-dispositive factors such as

- how much control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like;
- whether a foreign government characterizes an individual or entity as having governmental power; and
- whether and under what circumstances an individual (or entity) may act on behalf of, or bind a government.[16]
- The DOJ also listed facts relevant to these considerations, including:
- 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.[17]

The DOJ stated that all of these factual considerations were relevant to the foreign official determination. But the DOJ did not discuss the first two factors, that is, "the structure and distribution of power within a country's government," and the "royal family's current and historical legal status and powers." The DOJ found that the Royal Family Member was not a foreign official based solely on examination of the last four factors. Specifically, the DOJ noted that he:

- 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.[18]

The DOJ determined that, in light of these facts and circumstances, and "so long as he does not directly or indirectly represent that he is acting on behalf of the Royal Family or in his capacity as a member of the Royal Family," the Royal Family Member was not a "foreign official" for purposes of FCPA enforcement.[19]

The facts the DOJ identified as relevant in Opinion 12-01 seem to blend the entity and

individual elements of the "foreign official" definition. The first two factors – the "structure and distribution of power within a country's government," and the "royal family's current and historical and legal status and powers," – address the royal family entity, not the characteristics of the individual family member in question, and thus appear to be focused whether the royal family in question is a "government" or an "instrumentality thereof." The other fact questions focus on the individual Royal Family Member himself (*e.g.*, "the individual's position within the royal family"). These fact questions focus on whether he could be said to be acting or on behalf of the royal family (the individual element). Although the DOJ never specifically tied its conclusions to the "entity" or "individual" part of the definition of the foreign official, its focus suggests that it was addressing only on the latter, that is, whether this Royal Family Member could be said to be acting "on behalf of" the foreign government or an instrumentality thereof.

There could be a number of reasons for DOJ's decision to focus only on the individual and not the entity in this case. Perhaps DOJ ignored the first two factors because it just took for granted that the royal family was an instrumentality of the government in question.[20] A more likely reason is that DOJ concluded that the Royal Family Member was not acting in an official capacity on behalf of the royal family, so it did not *need* to address the perhaps more difficult question of whether the royal family in question was either the government or an instrumentality thereof.[21] In any case, the end result is that although DOJ hinted that it would consider "the structure and distribution of power within a country's government" and "the royal family's current and historical legal status and powers" relevant to the question of whether a royal family member could be deemed a foreign official in a future case, it offered no insight into how those entity element factors will be interpreted in practice in a given case. Opinion 12-01 does, however, offer some greater window into how the DOJ will approach the question of whether a person is acting "on . . . behalf of" a foreign government.

DOJ's long listing of facts showing that the Royal Family Member in that case was not a "foreign official" can serve as a checklist of qualities to look for in the ideal royal family member as business partner. However, because the DOJ's list of the Royal Family Member's characteristics is long and DOJ insisted that no one factor is ever dispositive, it is impossible to tell whether changing any one fact would change the DOJ's view. For example, the DOJ noted that the Royal Family Member "had no official or unofficial title or role in the Foreign Country's government."[22] There is no hint whether DOJ's opinion would have been different if he had had such a title. Likewise, the DOJ noted that the Royal Family Member "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 governmental decision-making process, executive function, administration, [or] finances[.]"[23] It is impossible to tell from this Opinion whether the DOJ would have deemed him a foreign official if he had no direct or indirect power to award the business the Requestor sought but did have some power over some other aspect of government decision-making within the government.

One over-arching lesson can be drawn from Opinion 12-01. The bottom line appears to be whether the individual in question "has the power to affect the Foreign Country government's award of the engagement the Requestor seeks," or "the provision of benefits" to the individual "would corruptly influence other [employees, officials, or individuals acting on behalf of the government] to award business to the Requestor improperly."[24]

The Significance of the Business Context

Opinion 12-01 also teaches that the particular business context within which a company engages a foreign individual may impact the determination of whether that individual is a "foreign official." In addition to seeking the services of the Royal Family Member to facilitate its potential lobbying representation of a Foreign Country in the United States, the Requestor also noted that it planned to engage the Royal Family Member to assist it in "identify[ing] additional business opportunities for the Requestor in the Foreign Country." Notably, the DOJ's Opinion addressed only the proposed engagement of the Consulting Company to assist in the *lobbying* efforts; the DOJ "[did not] opine about any other aspect of the engagement[.]"[25] And the

DOJ was clear that its opinion was only that "*in this context, and at this time*, the Royal Family Member is not a foreign official for purposes of the FCPA."[26] These statements highlight the common-sense point that an individual's "power to affect the Foreign Country government's award of the engagement" and the potential for the "provision of benefits" to that individual to "corruptly influence" other foreign officials to award business to the Requestor improperly, is *engagement-specific*. In other words, the assessment of whether an individual will be deemed a foreign official should depend, at least in part, on the business context of the particular engagement a company is pursuing.

An earlier FCPA Opinion, numbered 10-03, also illustrates the importance of attention to the business context. In that case, the Requestor was a U.S. limited partnership "engaged in development of natural resources trading and infrastructure."[27] It was "pursuing an initiative with a foreign government regarding a novel approach to particular natural resource infrastructure development" and sought to engage Consultant to help it enter discussions with the foreign government.[28] There was no question that the Consultant was an "agent" of the foreign government – it had performed marketing for the Ministry of Finance and lobbying for the government as a whole.[29] Indeed, it was registered in the U.S. as a foreign agent of the government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611, et seq.[30]

In light of the Consultant's role as an agent of the foreign government, the DOJ noted that "there are situations in which the Consultant has and will act *on behalf of* the foreign government . . ."[31] In light of the definition of "foreign official" and the DOJ's usually very broad approach, one might have expected that to be the end of the discussion. Nevertheless, the DOJ decided that the Consultant was not a "foreign official as defined by the FCPA."[32] In doing so, it emphasized that context is key.

The DOJ's decision hinged on the circumstances of the Requestor's arrangement with the Consultant. In particular, the DOJ noted the steps the Requestor and Consultant had taken to ensure that the Consultant [would] not be acting on behalf of the foreign government *in performing the consulting contract with the Requestor*."[33] Later, in Opinion 12-01, the DOJ said that the key to this earlier opinion had been that the consultant "was 'not acting on behalf of the foreign government' *in its work for the domestic concern*."[34]

The focus on the particular business context for the payment makes sense in light of the text of the foreign official definition as well as the FCPA as a whole. An individual is not a foreign official simply because he *acts* in an official capacity or on behalf of the foreign government in some circumstances. He is a foreign official only if, in the case at hand, he is "act*ing* in an official capacity for or on behalf of" a foreign government."[35] And as the DOJ noted in Opinion 10-03,

> the FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials. In such cases [where a business engages an individual who acts on behalf of the foreign government], the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to *prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal*.[36]

In short, the context for a payment to an individual who sometimes acts for the government is everything. To gauge whether a particular individual has actual and relevant influence with the foreign government, so that paying him could violate the FCPA, counsel has to understand what business exactly the company is seeking, what part of the government may have a say in it, and whether the company's potential partner – even if he is in some way connected to the government – is actually capable of exerting influence over the relevant part of the government. Counsel must also consider whether there are steps the company can take to diminish the risk presented by its partner's government connections.

Minimizing Risk

Together, Opinions 12-01 and 10-03 also provide guidance on ways to ameliorate the risk that a company's representative in a foreign country will be considered a foreign official, even if that representative has some connection to a royal family, tribal body, or other entity that could be deemed an instrumentality of the government, or even if that representative acts as an agent for the foreign government in other contexts.

In Opinion 12-01, the DOJ noted that the "steps the Requestor and the Consulting Company [had] taken . . . to comply with the FCPA and other anti-bribery laws" also influenced its determination that it would not take enforcement action on the basis of the Consulting Company's connection to the royal family. The Opinion highlighted the following:

- ***Due Diligence:*** 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 the DOJ was able to point to detailed information about him and his background;
- ***Contract Provisions:*** The parties' agreements included representations that none of the Consulting Company's members or principals were 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 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 the DOJ not to initiate an FCPA enforcement action.

Appropriate measures can also be critical to convincing the enforcement agencies that a representative who is actually an agent of the foreign government for some purposes – like the Consultant in Opinion 10-03 – is not "acting on behalf of" a company in a particular business context and thus not a "foreign official." In that case, the DOJ found significant the safeguards the company "put in place to ensure that no conflict of interest would arise between the Consultant's representation of the Requestor and the Consultant's separate and unrelated representation of the foreign government." The opinion highlighted the following:

- ***Due diligence:*** The Requestor had determined that as "a matter of local law, the Consultant and its employees [were] not employees or otherwise officials of the foreign government," and had "secured a local law opinion that it is permissible for the Consultant to represent both the foreign government and the Requestor at the same time";
- ***Contract Provisions:*** The parties' agreement included representations that "none of [the Consultant's] employees or other individuals affiliated with the Consultant are foreign officials" or would become foreign officials during the term of the engagement;
- ***Segregation of Roles:*** The owner of the Consultant also agreed to cease to lobby on behalf of the foreign government, and agreed that employees who would continue to lobby on behalf of the foreign government would be walled off from the representation of the Requestor;

- ***Transparency:*** The Requestor committed that its engagement of the Consultant would be disclosed to the ministry for which the Consultant would continue to do work;
- ***Supervision****:* The Consultant promised to "secure the Requestor's written advance approval to contact or take other material action with respect to the foreign government's officials'; and
- ***Containment of Risk*****:** The Consultant and its owner "committed that they [would] not represent or have any other business relationship with the foreign government in connection with the project."

Conclusion

When a company is considering engaging foreign consultants or other third-party agents to help obtain or retain business, the company must consider more than whether the would-be representatives are employees or officers of the foreign government. The individual's family ties, friendships, other work, or other connections can create risk that the DOJ or the SEC will consider the person a foreign government official. Counsel seeking to determine whether an individual is a foreign official because he is connected to a royal family, is friends with government employees, or has done work for an entity that could be considered an instrumentality of the foreign government must consider whether the pertinent family, tribe, or other entity is an instrumentality of the foreign government. But counsel must not neglect to also consider the individual's particular characteristics relative to that entity, as well as how the entity and the individual relate to the company's particular business goals. These questions could be dispositive of the "foreign official" question, notwithstanding whether a particular entity could fairly be called an "instrumentality" of the foreign government. These latter issues have received less attention lately, but guidance for evaluating them and diminishing the risk they present can be found in DOJ Opinions 12-01 and 10-03.

Endnotes

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[2] 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 territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1). 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).

[3] 15 U.S.C. § 78dd-2(h)(2)(A).

[4] The DOJ 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. *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."); Government's Opposition to Defendants' Amended 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 12 (stating that "what makes up an

instrumentality is a factual question"); Government's Response in Opposition to Defendants' Corrected and Amended Motion to Dismiss Indictment 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 the United States 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.").

The DOJ acknowledges virtually no limit to what qualifies as a government function; its position is 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. *See, e.g.,* Brief for the United States at 47, *United States v. Esquenazi*, No. 11-15331 (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 12-01 at 6 (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)).

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

[6] *FCPA Resource Guide*, Foreword.

[7] *FCPA Resource Guide* at 20-21 ("Department, Agency, or Instrumentality of a Foreign Government").

[8] *Id.* at 20.

[9] *Id.* at 20-21.

[10] *Id.* at 20.

[11] In a note to this text, the DOJ and SEC hint at further guidance, suggesting that readers "see also" FCPA Opinion Release No. 10-03 at 2 (Sept. 1, 2010), which "list[s] safeguards to ensure that consultant was not acting on behalf of a foreign government." *Id.* at 20, 109 n.113. We discuss this Opinion below. Curiously, the DOJ and SEC did not direct readers to FCPA Opinion Release No. 12-01 (Sept. 18, 2012), which we also discuss below.

[12] 15 U.S.C. § 78dd-1(e)(1).

[13] 28 C.F.R. Part 80.5.

[14] U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE No. 12-01 (September 18, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf ("Opinion 12-01"); U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE No. 10-03 (September 1, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf ("Opinion 10-03").

[15] Opinion 12-01 at 5.

[16] *Id.* at 6-7. The DOJ noted that it derived these factors from district court decisions addressing whether a state-owned entity may be an "instrumentality" of a foreign government. *See id.* (discussing order denying motion to dismiss in *United States v. Carson*, No. 09-CR-00077-JVS (C.D. Cal. Apr. 18, 2011)). The DOJ also cited Opinion 10-03.

[17] *Id.* at 5.

[18] *Id.* at 7.

[19] *Id.*

[20] Even if the DOJ did, practitioners should not take for granted that a royal family is an "instrumentality" of a foreign government. While some royal families actually rule their countries, some royal families play merely nominal or historic roles, and many fall in between those extremes. The FCPA should not treat them equally. Whether a royal family is an instrumentality should depend on the particular characteristics of the royal family entity. The same should be the same for tribal families. That the DOJ included a family's "current and historical legal status and powers" and "the structure and distribution of power with a country's government" as factors to be considered in determining whether a royal family member is a

foreign official is consistent with this conclusion. *See* Opinion 12-01 at 5.

[21] Another possibility is that DOJ considered these factors relevant to the individual element. However, given that the DOJ ignored these factors after naming them, it seems more likely that the DOJ considered them relevant only to the entity element, on which it chose not to opine.

[22] *Id.* at 7.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 5 (emphasis added).

[27] Opinion 10-03 at 1.

[28] *Id*.

[29] *See id.* at 1, 4.

[30] *Id.* at 1.

[31] *Id.* at 4.

[32] *Id.*

[33] *Id.* (emphasis added).

[34] Opinion 12-01 at 6 (emphasis added).

Note that, in Opinion 10-03, the DOJ also described four earlier occasions on which the DOJ had issued favorable opinions despite the fact that the Requestor sought to engage someone who also was an employee of or political candidate for a role in the foreign government. In each of these cases, the individual whose services the Requestor sought was or could be disconnected from the particular business the Requestor sought to promote with the employee's help. Opinion 10-03 at 3 (summarizing FCPA OP. RELEASE No. 80-02 (Oct. 29, 1980); FCPA OP. RELEASE No. 82-02 (Feb. 18, 1982); FCPA OP. RELEASE No. 86-01 (July 18, 1986); and FCPA OP. RELEASE No. 94-01 (May 13, 1994)).

[35] 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added).

[36] Opinion 10-03 at 3 (emphasis added).