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Alert Memo

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New FCPA Guidelines on When Foreign Royalty is Considered a "Foreign Official" Under the U.S. Foreign Corrupt Practices Act

The U.S. Department of Justice (the "DOJ") recently issued its first Foreign Corrupt Practices Act ("FCPA") Opinion Procedure Release of 2012.[1] The Release lists various factors that may be used to assess whether members of a royal family may be "foreign officials" (i.e., non-U.S. government officials) under the FCPA. The FCPA anti-bribery provisions prohibit making or offering improper payments to "foreign officials" in order to secure business or for some other improper purpose.[2]

In the past few years, there has been considerable debate and litigation regarding the scope of the term "foreign official," including whether employees of state-owned entities are considered "foreign officials" (generally, it is the DOJ's position that they are, although there is a case currently pending in the U.S. Court of Appeals for the Eleventh Circuit in which that position has been challenged).[3] This Release further refines the DOJ's view of the term "foreign official." While the Release does not clearly define which royalty would be deemed "foreign officials," it helps clarify the issues one may usefully consider when engaging in business with members of royal families. These guidelines are particularly relevant for parties soliciting business from sovereign wealth funds controlled by royalty and others having business relations with governments influenced by royal families.

Background on the Release

FCPA Opinion Releases are statements by the DOJ concerning the possibility of FCPA enforcement given particular, prospective transactions or situations. A Release acknowledging that the DOJ will not bring an enforcement action creates a rebuttable

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1 The Release is dated September 18, 2012, but apparently was only released by the DOJ a few days ago. *See* DOJ FCPA Opinion Procedures Release No. 12-01 (Sept. 18, 2012).

2 The FCPA accounting provisions also apply to companies with securities that trade on U.S. exchanges or that are required to file reports under Section 78o(d) of the Securities & Exchange Act of 1934. For these companies, there may be liability for bribes improperly recorded on the companies' books regardless of the recipient of the bribe. As a practical matter, even when applying the accounting provisions, U.S. authorities are likely to focus on cases involving payments to "foreign officials."

3 *See United States v. Joel Esquenazi and Carlos Rodriguez*, No. 11-15331-C.

presumption that the conduct described in the Release is FCPA compliant. Although their legal authority is limited to the party obtaining the Release, Releases are made public and are widely used as a guide for those seeking to avoid FCPA liability. In this sense, the Releases are akin to U.S. Securities and Exchange Commission "no action letters," which provide "safe harbours" by describing activity that does not violate the U.S. securities laws.

The new Release involves a U.S. lobbying firm that wishes to represent a non-U.S. embassy and its foreign ministry in their lobbying activities in the United States. The U.S. firm seeks to hire a consulting company to introduce the U.S. firm to the embassy, advise the firm on "cultural awareness" issues, act as the firm's sponsor in the country represented by the embassy, help the firm establish an office in that country, and identify additional business in the country. One of the partners in the consulting company is a member of the country's royal family. The U.S. lobbying firm would pay the consulting company a percentage of what it receives from the embassy, and the consulting company would then split any payment received equally among its three partners, one of whom is the royal family member.

DOJ factors in assessing royalty as a "foreign official"

The Release evaluates whether this royal family member is a "foreign official" under the FCPA. If he is not, payments to him could not run afoul of the FCPA anti-bribery provisions. The FCPA defines a "foreign official," in relevant part, as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. . . ."[4]

The DOJ concluded that a person's mere membership in a royal family, by itself, does not automatically qualify that person as a "foreign official." Factors to be considered in evaluating whether royalty fall under the definition of "foreign official" include:

- the structure and distribution of power within the government;
- a royal family's current and historical legal status and powers;
- the person's position within the royal family;
- the royal family member's present and past positions within the government;
- the means by which a royal family member could obtain governmental authority (e.g., royal succession);
- the likelihood that an individual would come to hold such a position of authority; and
- the royal family member's ability, directly or indirectly, to affect governmental decision-making.

[4] 15 U.S.C. § 78dd-2(h)(2)(A).

Applying these factors, the DOJ concluded that the member of royalty who was the subject of the Release was not an FCPA "foreign official." The DOJ based its analysis in part on a 2010 Release[5] and a 2011 U.S. district court decision.[6] In the 2010 Release, the DOJ permitted retention of a consultant who worked for the government because the consultant did not have the authority to control government decisions concerning the company hiring the consultant. In the 2011 ruling, the court determined that a state-owned enterprise was an "instrumentality" of government, making its employees "foreign officials." The 2010 Release and the court decision support the view that whether a person is a "foreign official" turns on whether the person has effective power over certain government decisions and whether, in turn, the person is serving in an organization carrying out government activity. Relying on this authority, the current Release determined that whether a royal family member is a "foreign official" is based on such considerations as (i) how much control or influence the individual has over the levers of governmental power; (ii) whether a government characterizes an individual as having governmental power; and (iii) whether and under what circumstances an individual may act on behalf of, or bind, a government.

Applying the factors

Given these considerations, the DOJ determined that under the circumstances, the particular royal family member at issue did not qualify as a "foreign official" under the FCPA as long as he did not represent that he is acting for the royal family or in his capacity as a royal family member. The facts presented by the U.S. lobbying firm indicated that the royal family member has no authority over the government, and there was no sign that he carries out government duties:

- The royal family member holds no title or position in the government and, but for a brief stint in the late 1990s overseeing a government construction project, has never had governmental duties or responsibilities, and, in

[5] *See* DOJ FCPA Opinion Procedure Release No. 10-03, 4 (Sept. 1, 2010). In this Release, the DOJ stated its lack of enforcement intent against a domestic concern that wished to hire a consultant to assist in proposing a novel natural resource infrastructure development to a foreign government because (i) the consultant agreed to put in place a number of procedural safeguards; (ii) the consultant had no decision-making authority on behalf of the foreign government; (iii) the domestic concern agreed to disclose its arrangement with the consultant to the foreign government; and (iv) the consultant was "not acting on behalf of the foreign government."

[6] *See United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011) (applying a fact-based analysis that focused on several factors: (i) the foreign state's characterization of the entity and its employees; (ii) the foreign state's degree of control over the entity; (iii) the purpose of the entity's activities; (iv) the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions; (v) the circumstances surrounding the entity's creation; and (vi) the foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g. subsidies, special tax treatment, and loans)).

particular, has no power to award the business sought by the U.S. firm seeking to hire him and his consulting firm.

- The royal family member obtained his royal status through custom and tradition rather than blood relation. His position in the royal family does not put him in line to ascend to any governmental position and it provides him with no benefits or privileges.
- The royal family member has not had any contact with any member of the embassy and foreign ministry, or any other governmental agency, regarding the proposed engagement between his consulting company and the U.S. firm.
- Further, the royal family member has no relationship—personal, professional, or familial—with the decision-makers in the foreign country's government who will decide whether to award the business sought by the lobbying firm.

The impact of anticorruption compliance

Interestingly, the DOJ said that it "also considered" the compliance measures taken by the U.S. lobbying firm and the consulting company with the royal family member as a partner. The consulting company pledged that its principals and members will be bound by the procedures covered in the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance. The U.S. lobbying company will disclose the royal family member's role to all relevant parties in the United States and the foreign country, and the proposed agreement between the U.S. lobbying firm and the consulting company includes anticorruption contract terms. The lobbying firm anticipates paying to the consulting company fees that it claims are at or below fair market value.

It is unclear how these compliance considerations could have (or should have) influenced the DOJ's opinion in the Release, which is strictly limited to whether the royal family member is a "foreign official." Other than its determination that he is not, the Release offers no protection for any conduct by the U.S. lobbying firm and specifically highlights that any payments to the royal family member that are passed along as bribes to members of the government can still create FCPA liability for the lobbying firm.

The impact of the Release

According to the information presented in the Release, this member of a royal family had no government authority and did no work for the government. Presumably, under these circumstances the DOJ's decision that the royalty involved here did not constitute a "foreign official" was not a close call. However, many other members of the royalty in certain countries serve in positions that might involve some government functions and the relationship of these individuals to other royal family members or government officials might be more opaque. This Release likely will not definitively resolve whether the family members in those more difficult cases are "foreign officials," but by looking at the factors presented in this Release, one now at least has a framework for conducting the analysis.

As a final note, the DOJ has indicated that it will be providing written guidance regarding the FCPA in the coming days. This guidance may shed more light on its view of who is a "foreign official" under the FCPA, as well as on other matters relating to FCPA enforcement.

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If you have any questions concerning this memorandum, please feel free to contact any of our partners and counsel listed under "White-Collar Defense, Securities Enforcement and Internal Investigations" under the "Practices/Areas of Law" section of our website at www.cgsh.com, or any of your regular contacts at the firm.

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