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FOREIGN OFFICIALS

Are Royals Foreign Officials Under the FCPA?

By Philip Urofsky and Oyinkan Muraina, *Shearman & Sterling*

Is the Prince of Wales a government official? Are his brothers? Are Saudi princes? Does it matter if the "royal" is in the line of succession (or for Saudi princes, amongst those eligible to ascend to the throne) and, if so, does it matter how far down the line?

Congress originally enacted the FCPA in 1977, prohibiting U.S. persons (and later other persons with a U.S. connection) from bribing foreign officials to obtain an improper business advantage. Since that time, businesses pursuing opportunities in countries with large royal families struggle with whether members of those royal families should be considered "foreign officials."

Despite the importance of this issue – and the time spent by compliance professionals analyzing it – there have been to date no cases and only partial guidance issued by the enforcement authorities. Thus, as in many areas in the FCPA, the burden remains on companies to carefully evaluate multiple non-binding and often non-determinative factors in deciding whether and how to proceed in doing business.

See the ACR's two-part series on managing corruption risk when hiring and training foreign officials and their relatives overseas: "Risks and Challenges" (Jul. 27, 2016) and "Practical Compliance Guidance" (Aug. 10, 2016).

Categorizing Royals

The FCPA defines "foreign official" broadly: "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." How does a "royal" fit within this definition?

Ultimately, this determination will be, of course, country-specific and fact-dependent requiring a close examination of that country's governance, constitutionally, legally and practically. There are very few countries today with true monarchies, in which a king or queen exercises direct power over the operations of the country's government. In such countries, certainly the monarch would seem to be a government official, but what of other royals? Even in countries in which the monarch acts as a largely ceremonial head of state, the monarch and some members of the royal family might still exercise significant behind-the-scenes influence.

The FCPA's definition of "foreign official" is autonomous, i.e., it does not depend on how a foreign country's own law defines the status of a member of the royal family. Nevertheless, foreign law is instructive. For instance, the United Kingdom has had an act of succession on its books since 1534, outlining the terms and

order of succession to the crown. However, Prince Andrew threw a wrench in the royal order when reports emerged that, during official trade missions, he allegedly exploited his taxpayer-funded role as the U.K.'s special trade envoy to plug a private Luxembourg based bank for the super-wealthy. Since then, the British have more strictly limited the ability of royals to engage in private enterprise while bearing the "HRH" title, as illustrated by the recent departure of the Duke and Duchess of Sussex from the ranks of the senior royal family.

By contrast, royal families in the Middle East, Asia and Africa are often far larger and more sinuous than their European counterparts. In addition, the role of a given royal family member in the government may be unclear, further obscured by custom and the exercise of behind-the-scenes influence.

For example, the United Arab Emirates consists of seven emirates and six royal families. The first President of the UAE, Sheikh Zayed bin Sultan Al Nahyan, the Emir of Abu Dhabi, had 19 principal sons who could have succeeded him, but most expected the Sheikh's third eldest son and deputy crown prince, Sheikh Mohammed, to ascend the throne when Sheikh Zayed died in 2004. However, to the surprise of most on-lookers, Zayed's eldest son, Sheikh Khalifa bin Zayed, was quietly proclaimed the new leader of Abu Dhabi. The six other hereditary rulers of the Emirates then unanimously decided to install Khalifa as the president of the UAE. From a due diligence perspective, what does this mean for companies doing business in the UAE generally and in Abu Dhabi particularly? Should a company planning to do business in the UAE have considered all 19 principal sons of Sheikh Zayed as government officials? Should they have anticipated the likelihood of someone other the crown prince and deputy crown prince being selected? What if they are wrong?

Saudi Arabia presents a similar conundrum with at least two generations of sons and grandsons of the founder, King Abdul Aziz ibn Saud, potentially eligible for the throne, some of whom hold official or unofficial roles in government while others have substantial private businesses.

See "What the Eleventh Circuit's 'Instrumentality' Decision Means for FCPA Practitioners" (May 28, 2014).

The DOJ's Position

Surprisingly, the issue of royals as government officials has never been addressed in any enforcement action brought by the DOJ or the SEC, although the DOJ came close in its action against BAE in 2010, in which it alleged payments to a "KSA Official" who may have also been a Saudi prince. Further, the issue does not appear to have been litigated in court,[1] nor was it addressed in the 2012 FCPA Guide published by the DOJ and the SEC. In 2012, however, the DOJ released FCPA Opinion Release 12-01 (Release), which shed some light on the factors the DOJ, at any rate, considers relevant to this determination.

In the Release, a U.S. lobbying firm sought guidance before hiring a consulting firm in which a member of a foreign country's royal family was one of three partners to assist in obtaining business representing the country's embassy and foreign ministry. If the firm was successful, it expected the consulting company to assist it in its dealings with foreign officials and businesses to identify further business opportunities in the foreign country.

In its response, the DOJ opined 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.'" Rather, whether a royal is a foreign official depends on a "fact-intensive, case-by-case determination." The DOJ concluded that that determination would turn on (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." Other factors to be considered when determining whether a royal is a foreign official 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;
- the mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, 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.

After applying these factors, the DOJ concluded the royal family member was not a foreign official. In reaching that conclusion, the DOJ favorably weighed the steps the lobbying firm and consulting company took to comply with the FCPA and other anti-bribery laws.

See "DOJ Issues Opinion Release Containing Guidelines on Whether a Royal Is a 'Foreign Official' Under the FCPA" (Oct. 17, 2012).

Practical Guidance

Although the DOJ's FCPA Opinion is not binding on the DOJ in future cases – nor is it binding on a court in criminal or civil litigation – it provides a useful checklist for companies performing due diligence before engaging in business with a member of a royal family.

If a company elects to go forward, it should carefully document the steps it took to determine whether the specific royal was not a government official. This may include, for example, an expert opinion by a reputable independent expert on the foreign country's laws and practices that addresses the factors set out in the Release.

In addition, the Release favorably referenced agreements between the lobbying firm and the consulting company that included representations that no other members or principals of the company were foreign officials and that the parties would abide by the FCPA and other relevant anti-bribery laws. The consulting company adopted the Good Practice Guidance on Internal Controls, Ethics and Compliance issued by the Organization for Economic Cooperation and Development, and vowed that its procedures would bind all of its partners and employees. The lobbying firm also committed to paying the local consultant within or below the "typical range at the going fair market rate" based on work performed.

Still, the Release raises as many questions as it answers. Indeed, the DOJ only addressed the consulting company's proposed lobbying activity for the foreign embassy and neglected

to comment on the firm's intention to use the consulting company to find additional business opportunities in the foreign country. Indeed, some of the factors are very fact intensive, such that the DOJ may have been comfortable that the royal was not in a position to use his royal status to influence the embassy, but was less confident – and thus less willing to commit in writing to a particular position – as to the implication of the royal's ability to influence other government entities.

Remaining Ambiguities in Defining "Foreign Officials"

The DOJ's fact-intensive approach to the question of royals under the FCPA mirrors its stance in previous litigation on the definition of an "instrumentality," which favors *ad hoc* reasoning as opposed to bright-line rules. However, this approach exposes companies to serious risk.

Returning to the UAE example, the Release indicates that the DOJ would likely consider both Sheikh Mohammed and Sheikh Khalifa "foreign officials," as both held governmental posts at the time of their father's passing, were eligible to succeed their father and had extensive connections to various arms of the Emirati government. In Saudi Arabia, it might be even more complicated, as some Saudi princes tend to operate on the margins of government, exercising influence without taking on a public role in government.

Moreover, it is not clear from the opinion whether a royal's potential status as a government official is static or fluid. For example, the opinion fails to clarify whether royals who might have been considered foreign officials at one time either by virtue of their closeness to succession to the throne or holding an official role in government, lose that status if they later appear to have withdrawn, permanently or temporarily, from their public roles or whose likelihood of succession to the throne recedes either through the birth of little princes or princesses or through machinations within the royal family.

It is also not clear how many of the factors listed in the Release have to be present before the DOJ would take enforcement action. Indeed, the DOJ has even declined to indicate which factors carry the most weight. It is difficult to imagine that a senior royal family member could completely lack "unofficial power…over any aspect of the government's decision-making process," but where is the tipping point? As these questions show, the DOJ's definition of a "foreign official" remains very broad.

See "Who Is a Foreign Official?" (Sep. 11, 2013).

Conclusion

There are no bright-line rules in determining whether a royal family member is a "foreign official" under the FCPA. Although the Release provides valuable guidance on how the DOJ would analyze whether a royal is a foreign official, it is merely a starting point. Companies should be vigilant and conduct due diligence before engaging in business with a member of a ruling family. The due diligence should be focused on collecting information that enables the company to (1) analyze the factors enumerated in the opinion, (2) weigh the risk of the DOJ finding the ruling family member a "foreign official," and (3) consider whether there are additional compliance measures that could minimize the risk of prosecution. When possible, companies should also consider using

the FCPA Opinion Release Procedure to avail themselves of advance notice of any problems related to a proposed transaction.

Philip Urofsky, a partner in the litigation group at Shearman & Sterling LLP, is a former federal prosecutor whose responsibilities encompassed investigating and prosecuting criminal and civil violations of the FCPA, as well as the money laundering and mail and wire fraud statutes and economic sanctions laws and regulations. He advises clients on conducting internal investigations, designing and implementing compliance programs, and responding to and defending against federal, state, and international criminal, civil, and administrative investigations, prosecutions, and trials on behalf of both business entities and Urofsky was a member of the United States' delegation to the OECD Working Group on Corruption. As a DOJ attorney, he was the primary drafter of the Department's Principles of Federal Prosecution of Corporations.

Oyinkan Muraina is an associate in the litigation practice at Shearman & Sterling LLP.

[1] The closest a court appears to have come was in *Angellino v. Royal Famil al-Saud*, in which the court explicitly refused to opine as to whether the Saudi royal family was equivalent to the state. 688 F.3d 771, 776 n. 7 (D.C. Cir. 2012).