

'Foreign Official' Under FCPA: Regal May Be Legal

Law360, New York (October 23, 2012, 12:32 PM ET) -- The U.S. Department of Justice recently provided valuable guidance regarding whether members of royal families qualify as “foreign officials” under the U.S. Foreign Corrupt Practices Act. In its first FCPA advisory opinion issued in 2012, the DOJ concluded that the royal family member described in the request for opinion “does not presently qualify as a foreign official.” See Opinion Procedure Release 12-01 (Sept. 18, 2012).[1]

The DOJ’s decision here is somewhat surprising in light of the DOJ’s consistent attempts in recent years to broaden the scope of who is a “foreign official” under the FCPA. For example, the DOJ issued a 2010 advisory opinion that expanded the definition of “foreign official” to potentially include even private individuals who act on behalf of foreign governments. In stark contrast, the DOJ stated in its most recent opinion that a “person’s mere membership in the royal family ... by itself, does not automatically qualify that person as a ‘foreign official.’” The DOJ was quick to point out, however, that the analysis “requires a fact-intensive, case-by-case determination” based on several different factors.

Companies operating in countries with large ruling families, for example in the Middle East or Asia, have long grappled with the question of whether members of those ruling families would be considered “foreign officials” under the FCPA, resulting in increased compliance risk for companies that do business with them. The DOJ’s most recent opinion, though made with the heavy caveat that it is based on only the specific facts and circumstances presented by the requestor, demonstrates that the DOJ does not consider every royal family member as a foreign official and provides much-needed guidance for companies about doing business with members of ruling families.

The opinion was requested by a lobbying firm that intended to hire a consulting company to assist the firm in obtaining business from a foreign country’s embassy to the United States. One of the three partners of the consulting company was a member of the royal family of the country that the embassy represents. The DOJ concluded that the member of the royal family was not a foreign official principally because he would not directly or indirectly represent that he was acting on behalf of the royal family or in his capacity as a member of the royal family. In addition, the royal family member:

- had no official or unofficial title in the foreign country;
- had no official or unofficial power over any aspect of the foreign country’s government, including the direct or indirect power to award business from the embassy to the lobbying firm;
- could not, by virtue of membership in the royal family, ascend to a governmental position;
- had no benefits or privileges from his status in the royal family; and
- had no relationship with the person in the foreign country’s government that would make the decision of whether to award the lobbying firm the embassy’s business.

The DOJ went a step further, and offered a nonexhaustive list of factors to consider when determining whether a royal family member is a foreign official, 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;
- 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.

Although the opinion makes clear that not all royal family members are foreign officials under the FCPA, it also makes clear that royal family members can be foreign officials depending on factors such as their status and relationship with a foreign government and the representations they make regarding that status.

The DOJ's opinion underscores the importance for companies to conduct due diligence before engaging in business with a member of a ruling family. The due diligence should be focused on collecting information so the company can (1) analyze the factors enumerated in the opinion and weigh the risk of whether the ruling family member may be considered a "foreign official" and (2) consider whether there are additional compliance measures that can be instituted to minimize the risk.

--By Jeffrey Johnston, Tirzah Lollar and Kevin Davis, Vinson & Elkins LLP

Jeff Johnston is a partner in Vinson & Elkins' Houston office. Tirzah Lollar and Kevin Davis are associates in the firm's Washington, D.C., office.

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[1] 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." 15 U.S.C. § 78dd-2(h)(2)(A).

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