

Won't Get Fooled Again: An Atypical Exploration under Opinion Release 12-01

As many readers of this blog know, I am an avid cyclist. I enjoy riding with rock and roll music blasting away in my ears. I even have lists on my iPod with such titles as 20 mile ride and 40 mile ride. Yesterday I decided to take pot luck and put it on 'Shuffle' and one of the songs selected for me was The Who classic "*Won't Get Fooled Again*" from the timeless album *Who's Next*. The ending line has stuck with me since I initially heard it back in the '70s: "*Meet the new boss, same as the old boss*" which then follows with an ending crescendo of Keith Moon's pounding drums, John Entwistle's sonic bass and Pete Townsend's crashing electric guitar.

In a peculiar way that signature line crystalized my thinking about the latest Foreign Corrupt Practices Act (FCPA) Opinion Release from the Department of Justice (DOJ); that being Opinion Release 12-01 (12-01). As first noted by the FCPA Professor, in his post entitled "*DOJ's Recent Opinion Procedure Release Creates Additional "Foreign Official" Confusion*", 12-01 is dated September 18, 2012, but was apparently only publicly released last week. Pedaling away and listening to The Who it made me think of the evolving nature of not only *best practices* under the FCPA but also the DOJ's thinking on the subject. So while the song's ending line speaks of nothing changing, I realized the nature of FCPA analysis is and can be changing. So rather than being confused, I think that the DOJ has underlined again the fact intensive nature of the analysis required under the FCPA and how companies, if they used a reasoned approach for a specific FCPA issue or problem, can go a long way towards protecting themselves from potential FCPA liability or exposure.

I. The Underlying Representations

12-01 notes that a US lobbying firm, the Requestor desired to contract with a third party, the Consulting Company, which has, as one of its principals, a member of the Royal Family in a country where royalty exists. However, the country in question is not a monarchy and the Royal Family Member in question has only held one governmental position in the country's government, in the late 1990's. The work in question for which the Consulting Company would be hired is to lobby the country's Foreign Embassy here in the US to represent the home country here in the US. The specific services that the Consulting Company would perform were stated as "strategic advice and counsel on public policy and business development issues of interest to the [Foreign Country Embassy], as well as make selected liaisons with U.S. and [Foreign Country] interlocutors on behalf of the [Foreign Country Embassy]."

- A. Consulting Company Representations. 12-01 had three significant representations made by the Consulting Company. First, the Consulting Company represented that "none of its members, or principals are 'foreign officials' as that term is defined in the FCPA." Second, the Consulting Company represented that it "principals and members are familiar with, and agree to abide by, the FCPA and all U.S. and [Foreign Country] anti-bribery and anticorruption laws." Third, the Consulting Company has represented that it has

“adopted the Good Practice Guidance on Internal Controls, Ethics and Compliance issued by the Organization for Economic Cooperation and Development (OECD) and have pledged that all partners and employees would be bound by the procedures covered in the Good Practices Guide.”

- B. Transparency. Here the Requestor represented that there would be full transparency in not only the home country of the Consulting Company but in the US as well. This would be accomplished through publishing not only the names of the parties to any contract, but the actual contract that the principals of the Consulting Company would sign individually.
- C. Compensation. Here there were some interesting provisions listed in 12-01 which provided a level of detail not usually seen in previous Opinion Releases regarding the issue of compensation. First, the parties would agree “in advance on the scope of the Consulting Company’s work” for any set of services the Consulting Company provided. Additionally, any fee would be “at or below the amount charged by other entities...for such services.”

Thereafter, the Requestor anticipated “paying to the Consulting Company twenty percent of what it receives from the Foreign Country Embassy, so long as that percentage accurately reflects the amount of work provided.” The Requestor even went so far as to list the amount of money it is expecting to pay each principal of the Consulting Company on a monthly basis; that being \$2,000 per month to each principal. Taking the 20% figure noted above the fee would work out to be \$6,000 per month, to the Consulting Company, which equates to a fee of \$30,000 per month for lobby services that the Requestor would bill the Foreign Embassy.

- D. Contract Review. In a footnote, 12-01 states that “The proposed agreement also provides that “[b]oth [the Requestor] and [the Consulting Company] agree that [the Requestor] will submit this proposed contract to the United States Department of Justice (‘DOJ’) for review under its Foreign Corrupt Practices Act (‘FCPA’) Opinion Procedure and that this agreement will not become effective until such approval is received.””

II. DOJ Analysis

After initially noting 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” the DOJ goes on to reiterate its long held position that each question must turn on a “fact-intensive, case-by-case analysis” for resolution. The DOJ follows with a list of factors which should be considered. They include:

1. The structure and distribution of power within a country's government;
2. A royal family's current and historical legal status and powers;
3. The individual's position within the royal family; an individual's present and past positions within the government;
4. The mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, for example, royal succession);
5. The likelihood that an individual would come to hold such a position;
6. An individual's ability, directly or indirectly, to affect governmental decision-making; and the (ubiquitous)
7. Numerous other factors.

In addition to the above, the DOJ also relied upon the factors from District Courts, such as those expressed in *United States v. Carson*:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- 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;
- The circumstances surrounding the entity's creation; and
- 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).

Finally, the DOJ also reviewed the factors that it set forth in its prior Opinion Release 10-03 for the following factors of whether a Royal Family Member is a foreign governmental official. These 10-03 factors are: "(i) how much control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (ii) whether a foreign government characterizes an individual or entity as having governmental power; and (iii) whether and under what circumstances an individual (or entity) may act on behalf of, or bind, a government."

Based upon its analysis, the DOJ concluded, "The Department concludes that the Royal Family Member does not presently qualify as a foreign official" for the purposes of the FCPA.

III. Discussion

So how does all of the above relate to The Who and "*Won't Get Fooled Again*"? I believe that 12-01 emphasizes that there is no 'one-size-fits-all' analysis under the FCPA. While I probably never would have made the determination that a Royal Family Member is not a foreign governmental official under the FCPA, 12-01 makes clear that every analysis stands on its own facts and circumstances. The reason I would not have ever opined that a Royal Family Member was not a foreign governmental official, is that I have only used the "*status analysis*" that was used by the *Carson* court

The FCPA Professor correctly points out that the DOJ has introduced a “*duties analysis*” into the mix. Where I disagree with him, is that I do not believe that the duties analysis is elevated above the status analysis from the *Carson* case, which focuses on the status of the entity within the foreign country itself. I think that both analyses were used by the DOJ in 12-01 and both analyses can be used going forward. So under the status analysis, the DOJ stated that “The Royal Family Member also cannot, by virtue of his membership in the royal family, ascend to a governmental position and has no benefits or privileges because of his status as a Royal Family Member.” But 12-01 goes onto incorporate a duties analysis as well when it stated “the Royal Family Member has no power to affect the Foreign Country government’s award of the engagement the Requestor seeks.”

One of the primary jobs of a lawyer is to take precedent from case law and apply them to the facts of a specific situation. In the FCPA arena there is a dearth of case law precedent but in most cases the DOJ has used two types of analysis of who is a foreign governmental official. It is not clear from 12-01 if the Requestor or the DOJ analyzed the facts as presented using both of these tests but, whether they were lawyers representing the Requestor or DOJ lawyers, kudos for coming up with a new legal argument to make by combining both the status analysis and the duties analysis.

But equally importantly to the novel argument made, is the use of the Opinion Release procedure itself. Recognizing that it took some seven months to obtain the formal Opinion Release does not take away from the power of the procedure. A lawyer was faced with what I would have termed an intractable problem; that being a Royal Family Member and the issue of a foreign governmental official. With some creativity in the legal argument and the use of the Opinion Release procedure, the Requestor was able to obtain a way forward which accomplished both its business goals and the goals of doing business in compliance with the FCPA.

I believe the ultimate takeaway from 12-01 is that the DOJ not only listens but it considers all the facts. In other words, not only does the analysis change as facts evolve but the final answer may change as well and it does not necessarily mean that the new boss will be the same as the old boss or you ‘won’t get fooled again’ into thinking there is absolutely, positively no way to manage a potential FCPA issue. One of your jobs as a lawyer is to be creative and Opinion Release 12-01 shows you that there is a way to do so.

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