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“No Saint’s Day” for Bourke

In the mid 1990’s, Azerbaijan (one of my most favorite places to visit) began privatizing its state-owned enterprises. A Czechoslovakian entrepreneur, Viktor Kozeny, launched an effort to acquire the state-owned oil company, through a privatization auction. Frederick Bourke (as in the “Dooney and Bourke-makes fabulously expensive purses” Bourke) was one of many investors who it appears was swindled by the clever Czech. Determined to regain some of his money, Mr. Bourke triggered an investigation that in all respects appears to have backfired on him, as he is now facing jail time for what the jury believed he “knew” about improper payments made to Azeri government officials to secure the state owned Oil Company. In the eyes of the jury Bourke was clearly no saint.

The practical pointer for today’s blog is straightforward - A person or company may be guilty under the FCPA not only if they fail to act upon actual knowledge of a bribe, but “knowledge” also covers the concept of “conscious avoidance” or “deliberate ignorance”. It is imperative that companies implement a process which assists employees in identifying “red flags” and allows suspicious actions to be reported so that the company can investigate and not be found guilty of placing their head in the sand.

The anti-bribery provision of the FCPA specifically addresses the issue of vicarious liability for acts of third parties. The act prohibits “an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to...any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of...”. Obviously the key question is “what constitutes “knowing”?

The Jury charge in *United States vs. Kozeny et al*, No. 05 Cr.518 (S.D.N.Y. 2008) contained the following statements:

“The FCPA provides that a person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if: (i). such person is **aware** that such person is engaging in such conduct, that such circumstance exists, or that such result is **substantially certain** to occur; or (ii). such person has a **firm belief** that such circumstance exists or that such result is substantially certain to occur.

When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is **aware of a high probability of its existence and consciously and intentionally avoided confirming that fact**. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.

On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.

It also bears noting that while a finding that the person was aware of the high probability of the existence of a fact is enough to prove that this person possessed knowledge, it is not sufficient in order to determine that the person acted “willfully” or “corruptly,” which is a separate and distinct element of the offense.”

At the end of the trial, the Jury convicted Bourke after apparently concluding that Bourke “**consciously avoided**” finding out whether the deal involved paying bribes to Azerbaijan officials. Just what were the “suspicious actions” or “red flags” that the government believed was sufficient to impart “knowledge” on Mr. Bourke? First, the court noted that Mr. Bourke was keenly aware of how pervasive corruption was in Azerbaijan generally. Second, Bourke had knowledge of both Kozeny’s questionable business reputation, and his insidious nickname, “The Pirate of Prague.” Third, Bourke purposefully established an investment company, instead of joining “Oily Rock’s” board directly, in an attempt to shield himself from FCPA liability for potential bribes made by “Oily Rock.” The fourth, last and most substantial factor in establishing that Mr. Bourke “consciously avoided” discovering evidence of bribery in Azerbaijan came from a recorded phone conference in which Mr. Bourke made statements such as: “I’m just saying to you in general...do you think business is done at arm’s length in this part of the world.” To be fair to all parties, Mr. Bourke is currently appealing the court’s findings.

It is obviously important to consider “red flags” that are evident in the due diligence process. However, it is also important to have your employees look out for “red flags” that might appear on invoices or other correspondence. Consider the following language for your FCPA Policy:

The description of a fee listed on an invoice or payment request is not fully understandable or suggests that it may be intended to disguise the actual purpose of the fee. Here are some examples of cost descriptions that in other cases were used to disguise improper payments:

- Local/Special/Customs Processing Fee
- Interventions (Special Intervention or Customs Intervention)
- Expediting Fee (including Expedited Release)
- Express Fee (including Express Clearance)
- Local Government Agency Charge
- Foreign Charge
- Special Handling Fee
- Special Operation
- Urgent Dispatch or Processing Fee
- Additional or Special Assessment
- Additional or Special Transit Fee
- Customs Overtime
- Government or Other Outlay
- Fine or Penalty
- Maritime Fee
- Impound Charge
- Customs Evacuation
- Preclearance Fee
- Temporary Extension
- Emergency Release Fee or Payment
- Safe Passage Fee
- Community Fee
- Operation Fee

All invoices and payment requests from an Agent or Partner should be reviewed for potential “red flag” issues and any concerns regarding these issues should be reported to the Company Compliance Officer or his or her designee for further review and investigation, if appropriate. All investigations conducted by the Company Compliance Officer or his or her designee should be carefully documented and relevant documents, such as the invoice or payment record, relevant contract, and receipts or other supporting documentation should be maintained by the Company Compliance Officer or his or her designee.

Tomorrow is November 2nd. In 1973 on this day the Watergate Investigation began. Stay tuned to see what else was uncovered besides a little wiretapping.

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