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Recent FCPA Developments Highlight Risk of Individual Liability

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Two recent developments underscore the extensive reach of the U.S. Foreign Corrupt Practices Act, which can extend criminal liability to U.S. and non-U.S. citizens alike and to circumstances where an individual does not have actual knowledge that a bribe was paid. The authors of this article describe these developments.

Two recent developments bring the potential for individual criminal liability under the U.S. Foreign Corrupt Practices Act ("FCPA") back into the spotlight. These developments underscore the extensive reach of the FCPA, which can extend criminal liability to U.S. and non-U.S. citizens alike and to circumstances where an individual does not have actual knowledge that a bribe was paid.

- In *United States v. Kozeny*,[1] the U.S. Court of Appeals for the Second Circuit last December affirmed the FCPA conviction of Frederic Bourke based on his participation as an investor in a bribery scheme involving a privatization venture in Azerbaijan. Of particular importance is the court's ruling that Bourke could properly have been convicted on a theory that he "consciously avoided" knowing that bribes

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were being paid, even if he lacked actual knowledge of the bribery scheme. The court's ruling highlights the importance of conducting due diligence — and, if necessary, declining to participate in a transaction — if and when there are red flags indicating that a bribery scheme may be afoot.

- Also in December 2011, the U.S. Department of Justice ("DOJ") indicted several former executives and agents of Siemens AG and its subsidiaries.[2] Even though none of the defendants is a U.S. citizen, and even though the alleged bribery scheme related to efforts by the Argentine subsidiary of a German company to win a contract with the Argentine government, the defendants now find themselves accused of violating U.S. law and facing the prospect of extradition, prosecution and possible imprisonment in the United States. This case thus illustrates the long jurisdictional reach of the FCPA.

UNITED STATES v. KOZENY: THE IMPORTANCE OF DUE DILIGENCE ON FOREIGN INVESTMENTS

The Bourke prosecution arises from an alleged scheme to bribe senior government officials in Azerbaijan in the 1990s in connection with the planned privatization of the state-owned oil company, SOCAR. The alleged architect of the bribery scheme was Viktor Kozeny, an international businessman whose involvement in prior shady dealings had earned him the nickname the "Pirate of Prague." Kozeny organized an investment consortium — which included Bourke, the co-founder of the handbag maker Dooney & Bourke — that invested hundreds of millions of dollars to purchase vouchers issued by the Azerbaijani government that could be used to bid at auction for shares of SOCAR and other state-owned companies. Kozeny allegedly engineered the payment of tens of millions of dollars and vouchers to various Azerbaijani officials, including the president, that were intended to encourage the president to approve SOCAR's privatization. Nevertheless, SOCAR was not privatized, and by the end of 1998 Kozeny lost all hope in the venture, resulting in large losses to the investors.

The government indicted Bourke in 2005 for participating in Kozeny's scheme to bribe Azerbaijani officials. Following a trial, Bourke was

convicted in 2009 of conspiring to violate the FCPA, despite his assertion that he lacked knowledge of the bribery scheme, and was sentenced to one year in prison. Although the government's primary theory at trial was that Bourke had actual knowledge of the bribery scheme, the jury was also instructed that it could convict Bourke on a "conscious avoidance" theory. In other words, the jury was allowed to find that Bourke possessed the requisite guilty knowledge if he was aware of a "high probability" that bribes were being paid to Azerbaijani officials but "consciously and intentionally avoided confirming that fact."[3]

On appeal, Bourke argued, among other things, that the conscious avoidance instruction was improper because there was no factual predicate for such a theory in the evidence at trial. The Court of Appeals rejected that argument, citing the following evidence to support the conscious avoidance charge:

- Bourke was aware of pervasive corruption in Azerbaijan;
- Bourke knew of Kozeny's reputation as the "Pirate of Prague;"
- Bourke created corporations to shield himself and other American investors from potential liability from payments made in violation of the FCPA, and joined the boards of the American companies instead of the main company;
- Bourke, in a taped conference call with a fellow investor and attorneys, voiced concerns that Kozeny and his associates were bribing officials;
- Bourke's attorney advised him that if he thought there might be bribes paid, he could not look the other way.

Viewing this evidence in its totality, the court found that a "rational juror could conclude Bourke deliberately avoided confirming his suspicions that Kozeny and his cohorts may be paying bribes."[4]

The court also rejected Bourke's argument that the conscious avoidance charge improperly allowed the jury to convict him based on mere negligence. The court pointed to evidence that other prospective investors "with access to the same sources of information available to Bourke

were able to figure out Kozeny's scheme and avoid participating." Specifically, another prospective investor's representatives, after conducting due diligence on the transaction and Kozeny's past reputation, had advised their client not to invest because there could be an FCPA issue. The court held that "[i]t was entirely proper for the government to argue that Bourke refrained from asking his attorneys to undertake the same due diligence done by [the representatives of the other investor] because Bourke was consciously avoiding learning about the bribes."[5]

The *Kozeny* ruling thus highlights the importance of conducting FCPA due diligence, particularly in transactions in high-risk jurisdictions. Bourke's failure to conduct due diligence, in the face of highly suspicious circumstances suggesting that Kozeny was involved in a corrupt scheme, was viewed by the court as affirmative evidence of Bourke's guilty knowledge. While each case will depend on its own facts and circumstances (and while there was additional evidence introduced at Bourke's trial suggesting that he had actual knowledge of Kozeny's scheme), the message of the *Kozeny* decision seems clear. Conducting appropriate due diligence is an essential risk mitigation strategy for both companies and individuals to avoid potentially crushing liability, including criminal penalties, under the FCPA.

THE SIEMENS INDICTMENT: THE LONG ARM OF THE FCPA

In December 2008, Siemens AG and three of its subsidiaries, including its Argentine subsidiary, pled guilty to criminal violations of the FCPA as well as civil charges brought by the Securities and Exchange Commission ("SEC"). Siemens paid a record-breaking $800 million in criminal fines and civil penalties to the DOJ and SEC, on top of an additional $800 million to settle charges brought by Munich prosecutors.[6] Yet, as the December 2011 indictment shows, the Siemens corporate settlement does not mean the case is over as far as individual Siemens employees are concerned.

A total of eight individuals, including six former Siemens employees and two alleged former agents, were named in the indictment, which was filed in federal district court in Manhattan.[7] All of the defendants are citizens of Germany, Israel, or Argentina. The scheme detailed in the indictment involved paying Argentine government officials $60 million in

bribes to win a $1 billion contract to produce Argentine national identity cards. The defendants allegedly disguised the various bribes given to Argentine government officials to secure the project by entering into consulting "contracts" with at least 17 conduit entities controlled by intermediaries and Argentine government officials. These entities were located in off-shore locations, such as the Bahamas; the British Virgin Islands; Guernsey in the Channel Islands; the Cayman Islands; Panama; Switzerland; and Uruguay. While these entities appeared to provide legitimate business consulting services, in reality they provided no such services.[8]

According to the indictment, when the project stalled in 2001, the defendants continued to pay additional bribes in an attempt to kick-start it, using the bribes to secure additional favor with Argentine officials for future projects. When it became evident that the project would not be restarted, the defendants allegedly commenced a fraudulent arbitration proceeding in Washington, D.C. demanding nearly $500 million from the Argentine government, all the while concealing the fraudulent activity in connection with the project. In 2007, Siemens was awarded $218 million in the arbitration.[9]

The defendants are alleged to have utilized various methods to promote or conceal the conspiracy, which included:

- Using cash and withdrawals of funds from general purpose accounts to make bribe payments;
- Using deceptive accounting maneuvers to conceal the bribes;
- Characterizing bribes in corporate books and records as "consulting fees;"
- Using off-books accounts and transferring funds through accounts held by conduit entities, as well as U.S. bank accounts, to conceal corrupt payments;
- Using accounts controlled by Siemens AG business divisions and subsidiaries having no connection to the identity card project as a way to conceal the payments;
- Issuing false invoices to Siemens that requested payment for services and authorizing reimbursement for those services;

- Circumventing Siemens AG's compliance and ethics program, including internal and external audits aimed at detecting criminal conduct;
- Disguising bribe payments as funds used to settle an arbitration proceeding;
- Paying off witnesses.[10]

The jurisdictional basis for the FCPA anti-bribery charges is two-fold. First, the indictment relies on the part of the FCPA that applies to U.S. issuers.[11] The indictment alleges that the defendants were "officers, directors, employees and agents of an issuer," namely, Siemens AG, whose ADRs began trading on the New York Stock Exchange in 2001, and hence fall within the scope of the statute.[12] Yet it appears from the indictment that, with the exception of one defendant, who was a director of Siemens AG, the defendants were officers, directors, employees, or agents of Siemens' Argentine subsidiary or another Siemens subsidiary, not of Siemens AG. The government's theory may be that, even though not directly employed by an issuer, the defendants nevertheless should be viewed as agents of an issuer for purposes of the FCPA.

Second, the indictment relies on the prong of the FCPA that applies to non-U.S. persons,[13] alleging that the defendants fall within the scope of this provision because they agreed to commit acts in furtherance of the bribery scheme "while in the territory of the United States."[14] While the vast majority of the alleged wrongful conduct took place in Argentina and Germany, certain acts are alleged to have occurred in the United States, including the use of U.S. bank accounts to funnel at least $25 million of the bribe payments to Argentine officials. The indictment also alleges that a meeting in New York between two of the defendants, and the fraudulent arbitration proceedings in Washington, were additional acts in furtherance of the conspiracy that took place in the United States.[15]

As the indictment against these individuals reflects, U.S. officials take a very broad view of the jurisdictional reach of the FCPA. There is a dearth of judicial decisions on the subject. Corporations that have been the subject of FCPA investigations generally have chosen to enter into settlements with the DOJ and have not contested the DOJ's assertion of jurisdiction. Now that the DOJ has been more actively pursuing prosecutions of indi-

viduals, we may see more litigation and more court rulings clarifying just how far the territorial reach of the FCPA does extend.

CONCLUSION

In recent years, DOJ officials have emphasized the importance of criminal prosecution of individuals who violate the FCPA, describing it as a "critical part" and a "cornerstone" of their FCPA enforcement strategy. Warning that the DOJ "vigorously prosecut[es] individual defendants who violate the FCPA," these officials have added that "we do not hesitate to seek jail terms for these offenders when appropriate."[16] The Bourke and Siemens prosecutions illustrate that policy and highlight the critical importance of conducting effective due diligence whenever an investment or transaction involves a risk of bribery of foreign officials.

NOTES

[1] *United States v. Kozeny*, No. 09-4704-cr(L), 2011 WL 6184494 (2d Cir. Dec. 14, 2011).

[2] Indictment, *United States v. Uriel Sharef, et al.*, No. 11 Cr. 1056 (DLC) (S.D.N.Y. Dec. 12, 2011).

[3] *Kozeny*, 2011 WL 6184494, at *6-7.

[4] *Id.* at *7-8.

[5] *Id.* at *9.

[6] DOJ Press Release, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) *(available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html).

[7] The following day, the SEC filed a related civil complaint against six of the same defendants and another formers Siemens executive, charging them with FCPA violations. Complaint, *SEC v. Uriel Sharef, et al.*, No. 11 Civ. 9073 (SAS) (S.D.N.Y. Dec. 13, 2011).

[8] Indictment, *United States v. Uriel Sharef, et al.*, ¶¶ 18-21; Edward Wyatt, *Former Siemens Executives Are Charged With Bribery*, N.Y. Times, Dec. 13, 2011.

[9] Indictment, *Uriel Sharef, et al.*, No. 11 Cr. 1056, ¶¶ 19, 49-52.

[10] *Id.* ¶ 21.
[11] 15 U.S.C. § 78dd-1.
[12] Indictment, *Uriel Sharef, et al.*, No. 11 Cr. 1056, ¶¶ 10-11, 54.
[13] 15 U.S.C. § 78dd-3.
[14] Indictment, *Uriel Sharef, et al.*, No. 11 Cr. 1056, ¶ 55.
[15] *Id.* ¶¶ 38, 41, 49, 59.
[16] DOJ News, Statement of Acting Deputy Assistant Attorney General Greg Andres Before Senate Judiciary Subcommittee on Crime and Drugs, Nov. 30, 2010 (*available at* http://www.justice.gov/criminal/pr/testimony/2010/crm-testimony-101130.html); DOJ Press Release, Remarks by Lanny A. Breuer, Assistant Attorney General for the Criminal Division, at the American Bar Association National Institute on White Collar Crime, (Feb. 25, 2010) (*available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf).