

Government Contracts Blog

Posted at 11:04 AM on August 11, 2009 by Sheppard Mullin

FCPA Conviction Provides Cautionary Warning Regarding Anti-Corruption Due Diligence

On July 10, 2009 a federal jury in New York convicted Frederic Bourke, co-founder of handbag maker Dooney & Bourke, of conspiring to violate the Foreign Corrupt Practices Act ("FCPA"). The conviction is significant for the two FCPA enforcement trends it highlights. First, the prosecution of Mr. Bourke demonstrates that both the U.S. Department of Justice and the U.S. Securities and Exchange Commission are focused on investigating and charging *individuals* for violating the FCPA. In the first half of 2009 alone, the Department of Justice indicted eight people on charges of violating the FCPA, illustrating that no longer will companies alone be the subject of FCPA prosecutions.

The second lesson of Bourke's conviction relates to the FCPA's definition of a "knowing" violation. The government charged that Bourke invested \$8 million in an investment consortium whose goal was to privatize the State Oil Company of the Azerbaijan Republic ("SOCAR"). Bourke allegedly made the investment "while knowing" that investment funds had been transferred, and would be transferred, to Azeri officials in order to increase the likelihood of privatization. The government argued to the jury both that Bourke had actual knowledge of the bribes and that he "stuck his head in the sand," *i.e.*, was willfully blind to possible bribery.

In support of its willful blindness theory, the government argued that Bourke failed to conduct adequate due diligence on the investment or on Viktor Kozeny, a Czech national who formed the two companies in which Bourke invested. The government presented evidence at trial suggesting that Kozeny's background included multiple red flags relating to his activities in privatization efforts in the Czech Republic. In further support of its willful blindness theory, the government presented evidence that Mr. Bourke failed to ask an experienced law firm to conduct any due diligence relating to the investment, and argued that appropriate due diligence would have revealed the corrupt nature of the investment.

Although the ultimate basis for the jury's decision that the FCPA's knowledge standard was satisfied – actual knowledge or willful blindness – will likely remain unknown, the government's approach to the prosecution demonstrates the need for anti-corruption due diligence in investments and transactions, particularly when a company is operating in countries or industries where corruption red flags exist. The government's prosecution of Bourke also demonstrates the importance for investors and companies to ensure that appropriate FCPA compliance programs

exist, including FCPA policies, training, risk assessments, and certifications from both employees and third-parties with whom the company is doing business.

Sentencing is scheduled for October 13, 2009. Mr. Bourke faces a maximum penalty of five years in prison and a maximum fine of \$250,000 or twice the gross gain or loss resulting from the alleged violations on each of the two counts on which he was convicted.

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