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Is "Conscious Avoidance" Sufficient to Establish Knowledge Under the FCPA?

By Paul T. Friedman and Ruti Smithline

In 2011, the Department of Justice and the Securities and Exchange Commission continued their aggressive enforcement strategy to hold individuals accountable for Foreign Corrupt Practices Act (FCPA) violations. Facing the real possibility of jail time, individuals started fighting back in the courts rather than accepting settlements. As a result, now more than at any time since the FCPA was enacted in 1977, the contours of the government's expansive interpretation of the FCPA are being shaped by judicial decisions. This is not to say, however, that judicial analysis has been entirely consistent.

The Evolution of the Knowledge Requirement

The FCPA's anti-bribery provisions criminalize corruptly giving or offering to give anything of value to a foreign official in order to secure an improper advantage. The anti-bribery provision further prohibits an "issuer" or a "domestic concern"—i.e., a U.S. citizen—from giving 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. . . ."15 U.S.C. § 78dd-1, § 78dd-2, (emphasis added). But what does it mean to act "while knowing"?

The statue provides that a person's state of mind is "knowing" if the person: (1) is aware that such person is "engaging in such conduct, that such circumstances exists, or that such result is substantially certain to occur"; or (2) has a "firm belief that such circumstance exists or that such result is substantially certain to happen." The statute recognizes that the knowledge can be established if a person is aware of "a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."

The FCPA has not always included this knowledge standard. When first enacted in 1977, the anti-bribery provision had a broader standard and applied if a defendant engaged in prohibited conduct "while knowing *or having reason to know*." Critics strongly opposed the standard as being too vague. For example, the late Senator John Heinz, at the time one of the biggest proponents of amending the FCPA, commented that if the statute were to be enforced "in that way" with such a broad knowledge requirement, it would "totally cripple U.S. corporate activities in certain countries."

In 1988, in response to the sharp criticism, Congress overhauled various provisions of the FCPA, including omitting the "having reason to know" standard and replacing it with the "high probability" standard. The legislative history makes clear that while Congress meant to narrow the "knowing" requirement, the legislators did not intend to limit the requirement to actual knowledge. Rather, the bill as adopted encompassed the concepts of "conscious disregard" or "willful blindness." As explained in the conference report:

> The conferees intend that the requisite "state of mind" for this category of offense include a "conscious purpose to avoid learning the truth" Thus, the "knowing" standard adopted covers both prohibited actions that are take with "actual knowledge" of intended results as well as other actions that, while failing short of what the law terms "positive knowledge," nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the act.

Congress thus adopted a standard recognizing that actual knowledge may not be required. Nonetheless, arguably something pretty close to that is required: an awareness of a "high probability" that a corrupt payment could be made *and* a "deliberate" decision to avoid gaining information and consciously avoiding learning the truth.

Despite apparently clear legislative intent, there exists great uncertainty as to the level of knowledge required to establish an FCPA violation. In part, this is due to the fact that regulators have traditionally enjoyed the ability to bring enforcement actions based on broad interpretations of the elements of the FCPA without challenge. But, even now as more individuals are asking courts to limit the regulators'

expansive—and oftentimes statutorily unsupported—interpretations, legislative intent seems to have been forgotten and judicial guidance has proven to be inconsistent.

Reckless Disregard

In practice, aggressive regulators in enforcing the FCPA have consistently applied a far broader knowledge standard that more closely approximates the original FCPA statute than the current law. Regulators have moved toward equating the knowledge requirement to the civil "reckless disregard" or negligence standard rather than requiring affirmative, deliberate avoidance of the truth.

Back in 2009, Gerald and Patricia Green—a Hollywood movie producer husband-and-wife team—were convicted after a jury trial of bribing a Thai government official. Specifically, at trial, the government showed that the Greens paid $1.8 million in bribes to the governor of the Tourism Authority of Thailand and the president of the Bangkok International Film Festival in exchange for obtaining contracts worth approximately about $13.5 million to produce the film festival.

At the trial, the DOJ asked the judge to instruct the jury that the knowledge element would be satisfied if the jury found that defendants had "deliberately closed their eyes to what otherwise would have been obvious to them." *United States v. Green*, No. 2:08-cr-00059-GW (Aug. 18, 2009), proposed instruction 31. The government went one step further and asked that the jurors be instructed that: "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 then fails to take action to determine whether it is true or not."

By framing the requirement as "failing" to take action—as opposed to taking deliberate action— the DOJ's proposed jury instruction eviscerated the legislative intent of the 1988 amendments.

The jury instructions the court ultimately adopted did not incorporate the government's proposed instruction. Notably, the jury instructions also did not track the language of the statute nor evidence any appreciation for legislative intent. Instead, the court charged the jurors that an "act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake or accident. The Government is not required to prove that the Defendant knew that his or her acts or omissions were unlawful." Entirely missing form the *Green* jury instruction is any reference to conscious avoidance or willful blindness.

The *Bourke* Decision

At the end of 2011, the U.S. Court of Appeals for the Second Circuit affirmed Frederic Bourke's conviction arising from a scheme to bribe government officials in Azerbaijan in connection with the planned privatization of the state-owned oil company.

Bourke—co-founder of the luxury handbags line Dooney & Bourke—was indicted in 2005 for participating in a consortium of investors organized by Viktor Kozeny, an international businessman whose questionable reputation had earned him the nickname the "Pirate of Prague." The government alleged that Kozeny arranged for payments of tens of millions of dollars to various Azerbaijani officials that were intended to secure the privatization of the state-owned oil company. Ultimately, the company was not privatized, and Kozeny—along with the other investors, including Bourke—lost their entire investment in the venture.

In 2009, Bourke was convicted after a jury trial of conspiring to violate the FCPA. *United States v. Bourke*, No. 09-4704-cr(L) (2d Cir. Dec. 14, 2011). Throughout the trial, Bourke maintained that he had no knowledge of the bribery scheme. While the government's primary theory was that Bourke in fact did have actual knowledge of the bribery, the government asked the judge to instruct the jury that it could convict Bourke on a "conscious avoidance" theory. That is, the jury could find that Bourke had the requisite knowledge to be found guilty if he was aware of a "high probability" that bribes were being paid, but he "consciously and intentionally avoided confirming that fact." Likening the defendant to an ostrich placing its head in the sand, the court found that knowledge could be proven if the defendant "suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to able to deny knowledge." Finding that Bourke consciously avoided learning of the bribery scheme, the jury convicted Bourke, and he was sentenced to a year and a day in prison and fined $1 million.

Bourke appealed the conviction on several grounds, including that the trial court judge improperly instructed the jury on the issue of conscious avoidance. Bourke contended that the government failed to present evidence sufficient to establish such a theory. The Court of Appeals disagreed and cited the evidence at trial that Bourke was aware of the corruption in Azerbaijan and knew of Kozeny's poor reputation. The court also pointed to the fact that Bourke had voiced concerns (in a taped conversation) to another investor and his attorney that Kozeny may have been bribing government officials. The court relied on the fact that another investor declined to participate in the venture after his diligence left him uncomfortable about FCPA compliance. The court held that it was "entirely proper for the government to argue that Bourke refrained from asking his attorney to undertake the same due diligence done by [another investor] because Bourke was consciously avoiding learning about the bribes."

Following the Second Circuit's opinion affirming Bourke's conviction, the trial court denied Bourke's motion for a new trial. The court also initially ordered Bourke to report to prison within a few weeks. But then, the court reversed itself and ordered that Bourke be permitted to remain free on bail pending final resolution of his appeal, which his counsel is expected to take all the way up to the Supreme Court. Should the Supreme Court agree to hear the case, it will be the first time the Supreme Court will address the use of the "ostrich instruction" in a criminal case.

Although essentially following the legislative intent of the 1988 amend-

ments, neither the trial court nor the court of appeals cited to the statute's legislative history in support of its conscious avoidance jury instruction. If the Supreme Court hears the case, it will be interesting to see if the Court will rely on or even address Congressional intent. And, if it does, not only will Bourke likely have a higher hurdle to overcome, but there may finally be clear authority on the knowledge requirement under the FCPA.

The *Bourke* decision reaffirms the government's longstanding position that an individual may be prosecuted for a bribery offense even when there is no evidence that the individual had actual knowledge of the bribery scheme. It also emphasizes the importance of conducting FCPA due diligence prior to entering business ventures and highlights that failure to conduct due diligence offers no refuge from what could have been learned.

No Willful Blindness in *Lindsey*

In contrast to *Bourke*, in December of last year, the government suffered a setback when a federal district court judge vacated the conviction against Lindsey Manufacturers Co. and two of its executives on the basis of prosecutorial misconduct.

Declining to follow the jury instructions given in *Bourke*, the trial judge in *Lindsey* rejected the government's request to include either a "deliberate ignorance" or a "willful blindness" instruction. *United States v. Noriega, et al.*, No. 10-01031(A)-AHM (Dec. 1, 2011) at 21. Instead, Judge Matz instructed that for a defendant to have the requisite knowledge for purposes of the FCPA, the government had to establish actual knowledge or a "high probability of the existence of [] circumstance" of bribery.

Despite the court's refusal to permit the conscious avoidance instruction, during closing argument, the prosecutor started to explain that the rationale for the "high probability" instruction was because the law "is saying you can't turn a blind eye to what is . . . ." But, before the prosecutor could finish the sentence, the defense objected. The prosecutor apologized but went on to cover his eyes and tell the jury: "Defendants . . . cannot see all of this smoke and all of these red flags and then close their eyes."

In the order to vacate the conviction—which was entered days before the Second Circuit issued its ruling in *Bourke*—Judge Matz held the prosecution's implied equation of "knowledge" with "willful blindness" was a "misstatement" of the law. Again, markedly absent from the discussion was any mention of legislative intent of the FCPA. There was no recognition that Congress explicitly intended for conscious avoidance to be included within the knowledge requirement of the FCPA.

The court noted that whether defendants had the required culpable knowledge was one of the hardest-fought issues in the case. According to Judge Matz, permitting the jurors to find culpability based on willful blindness "undoubtedly resonated with at least some of the weary jurors," and warranted dismissal of the conviction.

Conclusion

In the limited but expanding world of FCPA jurisprudence, there now appears to be contradictory authority on the level of culpable knowledge required. Just how this will continue to evolve, and eventually be resolved, remains to be seen.

Further judicial challenges may help bring clarity to this issue in 2012 and beyond. Likewise, DOJ's promised guidance on the FCPA as well as the possibility for legislative reform may provide sharper contours to what seems at least for now—even despite clear legislative intent— to be a fairly unsettled area of the law.

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