

**COURT DECISION LIMITS “LOCAL LAW DEFENSE”
UNDER THE FOREIGN CORRUPT PRACTICES ACT**

A recent decision of the United States District Court for the Southern District of New York has narrowed the already rarely invoked “local law defense” of the U.S. Foreign Corrupt Practices Act. *United States v. Kozeny*, 05 Cr. 518 (SAS) (S.D.N.Y. Oct. 21, 2008) (“Opinion”).

The Foreign Corrupt Practices Act (“FCPA”) prohibits covered persons, such as issuers and other entities and individuals, from making corrupt payments to foreign officials in connection with international business transactions. The statute includes an affirmative defense for payments to foreign officials that are “lawful under the written laws and regulations” of the foreign country. *See* 15 U.S.C. § 78dd-2(c)(1). This “local law defense,” which was added to the FCPA by Congress in 1988, has largely been untested in courts and is rarely applicable for the obvious reason that governments generally do not expressly permit bribery in their “written laws and regulations.” The *Kozeny* decision has further narrowed the scope of this potential defense.

In *Kozeny*, the defendant, Frederic Bourke, Jr., was accused of bribing officials in Azerbaijan in order to facilitate an alleged scheme with codefendant Viktor Kozeny—the “Pirate of Prague,” who is currently fighting extradition from the Bahamas—to secure interests in the privatization of Azerbaijan’s state-owned oil company. Under Azeri law, a bribe payer is not subject to criminal liability if the bribe was the product of extortion or the payer reported the bribe to the Azeri government. Bourke argued that both applied in his case and that, as a result, he was entitled to assert the local law defense under the FCPA because he could not be prosecuted for bribery under Azeri law.

The district court disagreed, ruling that a local law of a foreign country that relieves a defendant of criminal liability in that country does not necessarily relieve the defendant of liability under the FCPA. The court reasoned that although Azeri law may relieve the defendant of liability for the payments, the payments themselves were still unlawful. *Opinion* at 8. The fact that the payments may have been the product of extortion or were reported to the Azeri government did not render the payments lawful; rather, it meant only that Bourke could not be prosecuted for the payments under Azeri law. *Id.* at 9-10. The distinction was a critical one, because under the FCPA’s local law defense, “the focus is on the *payment*, not the *payer*.” *Id.* (emphasis in original). Even though a *payer* may escape liability under local Azeri law on the grounds Bourke asserted, the *payment* itself may still be considered illegal and thus subject the payer to criminal liability under the FCPA. *Id.* The court’s decision left open, however, the possibility that Bourke may still argue that he did not have the requisite criminal intent to violate the FCPA if, in fact, he is found to have been the victim of “true extortion”—extortion that effectively takes away the payer’s “conscious decision,” or choice, to make the payment, such as a threat to health and safety. *See id.* at 10-12.

The district court's rejection of the defense in this case cautions against reliance on the local law defense in FCPA cases in all but the most straightforward instances of written local law permitting the relevant conduct.

* * * * *

If you have any questions concerning the foregoing or would like additional information, please contact Martin J. Weinstein (202-303-1122, mweinstein@willkie.com), Robert J. Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey D. Clark (202-303-1139, jdclark@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

October 28, 2008

Copyright © 2008 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.