INVESTOR CONVICTED ON FCPA-RELATED CHARGES

On July 10, 2009, Frederic Bourke, an American investor and co-founder of handbag maker Dooney & Bourke, was convicted of conspiring to violate the Foreign Corrupt Practices Act ("FCPA") and the Travel Act in connection with a failed investment in Azerbaijan. In convicting Bourke on conspiracy charges, the jury also found him guilty of making false statements to the FBI, but acquitted him of a related money laundering conspiracy charge.

Bourke's conviction stemmed from an investment venture in Azerbaijan. As the indictment indicates, Azerbaijan, like other former Soviet Republics, began privatizing its state-owned enterprises in the 1990s. Under the country's State Privatization Program, the Azeri government was considering privatizing its valuable state-owned oil company, the State Oil Company of the Azerbaijan Republic ("SOCAR"). In 1997, Viktor Kozeny, a Czech national, formed two companies with the aim of purchasing a privatized SOCAR: Oily Rock Group Ltd. ("Oily Rock") and Minaret Group Ltd. ("Minaret"). By 1998, Kozeny had succeeded in attracting multiple prominent investors to the venture. Bourke invested approximately $8 million in Oily Rock through an investment vehicle called Blueport International Limited.

Despite attracting millions of dollars in investment funds, Kozeny failed to make any progress on SOCAR's privatization. According to press accounts, Azeri officials constantly pushed the expected privatization date back—from April 1998 to June 1998, and then to late summer 1998. In the fall of 1998, investors were told that privatization would occur in October 1998, following the Azeri presidential elections. After the presidential elections, however, the hoped-for privatization did not occur.

According to the indictment, investors became increasingly concerned and pessimistic about the prospects for the privatization deal. They also allegedly became aware of financial discrepancies in the venture's operations and allegations that Kozeny had been bribing Azeri officials in an attempt to facilitate SOCAR's privatization. According to the indictment, Kozeny had agreed to transfer two-thirds of Oily Rock's assets and future profits to Azeri officials in exchange for a controlling interest in SOCAR. From May 1998 to June 1998, Kozeny also allegedly paid bribes totaling $11 million to Azeri officials. The bribes allegedly included cash, jewelry, travel expenses, medical expenses, designer clothing, and various other luxury items.

The government charged that Bourke participated in the venture "while knowing" that investment funds had been transferred, and would be transferred, to Azeri officials. 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 Kozeny, whose background included multiple red flags relating to his activities in privatization efforts in the Czech Republic. Bourke also allegedly failed to heed multiple red flags that arose as the relationship with Kozeny continued. It appears that jurors

carefully considered whether Bourke consciously disregarded these red flags. According to press reports, during their deliberations, jurors drew up a detailed chart listing all the "flags." One juror reportedly said that she did not remember how many red flags were on the list, but that she had counted over six. The ultimate basis for the jury's decision that the FCPA's knowledge standard was satisfied—actual knowledge or willful blindness—cannot be divined from the general guilty verdict.

Bourke's conviction illustrates the expansive scope of the FCPA and its potential to reach investors. Congress drafted the FCPA's "knowledge" standard broadly to include not only actual knowledge, but also instances in which a person or entity shows a "conscious disregard," "willful blindness," or "deliberate ignorance" to corrupt activities. Indeed, the government's argument that Bourke had his head in the sand echoes the language in the FCPA's legislative history, which discusses how the FCPA's knowledge standard is drafted broadly to address "the 'head-in-the-sand' problem."[1]

Bourke's conviction also demonstrates the importance of conducting adequate due diligence on investments and recognizing—and resolving—apparent FCPA red flags. U.S. regulators have taken the view that a public company's failure to conduct due diligence, at least in the context of mergers and acquisitions or third-party agents, may constitute a failure of internal controls giving rise to liability under the FCPA. Similarly, as the Bourke case illustrates, an investor's failure to conduct adequate due diligence in the face of FCPA red flags could be viewed as willful blindness such that the FCPA's knowledge element may be satisfied. Investors could potentially find themselves facing FCPA liability if others involved in the investment make improper payments and if U.S. regulators consider the investors to have been insufficiently attentive to FCPA red flags.

The government's prosecution of Bourke demonstrates the increasing importance for investors and investment companies to assure that appropriate FCPA compliance safeguards are in place, particularly for investment transactions and ventures involving countries with a high degree of corruption risk. Compliance measures should include ensuring that investment targets have implemented FCPA policies, conducting adequate due diligence on investment targets, recognizing FCPA risks and red flags, and properly addressing red flags when they arise.

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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 Clark (202-303-1139, jdclark@willkie.com), or the attorney with whom you regularly work.

[1] House Conference Report No. 100-576, at 920 (1988).

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