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DOJ Terminates Proceedings in *O'Shea* and the SHOT Show Cases

Introduction

Capping a string of trial losses and hung juries, the Department of Justice ("DOJ") this month brought an end to two highly-watched FCPA-related prosecutions of individuals: the FCPA prosecution of former ABB manager John Joseph O'Shea in the United States District Court for the Southern District of Texas and the so-called SHOT Show sting cases in the United States District Court for the District of Columbia.[1]

After the grant of O'Shea's motion for judgment of acquittal following the close of the government's case on January 16, 2012 – a disposition that left DOJ with no route of appeal in light of the mandate of the Double Jeopardy Clause of the Fifth Amendment – the DOJ on February 9, 2012 requested the dismissal with prejudice of all remaining counts against O'Shea, including federal criminal money laundering and false statement charges.

Less than two weeks later, on February 21, 2012, the DOJ moved to dismiss with prejudice all indictments against the remaining defendants in the so-called SHOT Show cases. There, a series of hung juries, adverse rulings, and acquittals, including a federal jury's acquittal in late January 2012 of two defendants and deadlock on three other defendants, led to the collapse of an ambitious strategy to use in FCPA prosecutions many of the law enforcement tools available to the DOJ, including wire taps, informants, sting operations, and search warrants.

The DOJ's dramatic reversals in *O'Shea* and the SHOT Show cases come on the heels of the vacatur of three FCPA-related convictions in *Lindsey* by a federal district court in California in December 2011 on the grounds of repeated prosecutorial misconduct.[2] These events will provide food for thought for future defendants and their counsel faced with the option, on the one hand, of pleading guilty and cooperating, or, on the other hand, of putting the government fully to its burden in connection with FCPA investigations and charges. Although even within groups of defendants in a single case

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1. For the background on these cases, see P. Berger, B. Yannett, S. Hecker, D. Fuhr and N. Grohmann, "The FCPA in 2011: The Year of the Trial Shapes FCPA Enforcement," *FCPA Update*, Vol. 3, No. 6 (Jan. 2012).
2. *See* "With 'Deep Regret,' Lindsey Judge Issues Final Order," *FCPA Blog* (Dec. 2, 2011), http://www.fcpablog.com/blog/2011/12/2/with-deep-regret-lindsey-judge-issues-final-order.html.

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the decision to plead and cooperate is and will remain highly individualized, the three defendants who pleaded guilty and cooperated in the SHOT Show cases, and their attorneys, will have much to think about as they prepare for sentencing.[3]

Although dramatic, the DOJ's recent travails do not necessarily foreshadow a decline of individual prosecutions under the FCPA, which reached an all-time high in 2011. Nevertheless, it appears likely that these defeats will inform the DOJ's future prosecutorial strategy. Recurring attacks by the defense bar on the government's broad interpretation of key statutory provisions of the FCPA and increasing scrutiny by courts of the government's application of the law are sure to place additional pressure on the DOJ to consider carefully the merits of bringing an individual prosecution.

Acquittal in *O'Shea*

In *United States v. O'Shea*, a federal district court in Houston in January 2012 dismissed at the close of the government's evidence twelve FCPA counts and one conspiracy count against the defendant, a former general manager of a Texas-based subsidiary of Swiss engineering giant ABB Ltd.[4] The government had arrested O'Shea in November 2009 and charged him with authorizing corrupt payments to Mexico's state-owned electric utility company Comisión Federal de Electricidad (CFE) in return for the award of an upgrade and maintenance contract for Mexico's electricity network to ABB.[5] The indictment alleged that O'Shea and a Mexican intermediary, Fernando Basurto, agreed to pay bribes to officials of the utility company and to falsify invoices.[6]

After the conclusion of the government's case, O'Shea filed a motion for judgment of acquittal.[7] The district court dismissed the substantive FCPA counts against the defendant and criticized the government for failing to produce evidence that O'Shea intended to pay bribes. Commenting on the credibility and sufficiency of the testimony of the government's principal witness, Basurto, the district court noted that he "kn[ew] almost nothing" and "[h]is answers were abstract and vague, generally relating gossip."[8]

Shortly after the court's entry of a judgment of acquittal on the substantive anti-bribery counts, prosecutors filed a motion to dismiss the remaining counts in the indictment (consisting of money laundering and false statements counts) against O'Shea

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3. *See United States v. Alvirez*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Mar. 1, 2011); *United States v. Spiller*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Mar. 29, 2011); *United States v. Geri*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Apr. 28, 2011).

4. "O'Shea Acquitted on All Counts," *FCPA Blog* (Jan. 17, 2012), http://www.fcpablog.com/blog/2012/1/17/oshea-acquitted-on-all-counts.html.

5. *United States v. O'Shea*, No. 09-cr-629, Indictment (S.D. Tex. Nov. 16, 2009), http://www.justice.gov/criminal/pr/documents/11-16oshea-indict.pdf.

6. *Id.* at ¶¶ 8, 15-16, 18. Basurto pleaded guilty in November 2009 to conspiracy to violate the FCPA, money laundering and falsification of records. *See United States v. Basurto*, No. 09-cr-325, Plea Agreement ¶ 1 (S.D. Tex. Nov. 23, 2009), http://www.justice.gov/criminal/fraud/fcpa/cases/basurto/11-23-09basurto-plea-agree.pdf.

7. *See* "O'Shea Acquitted on All Counts," *FCPA Blog* (Jan. 17, 2012), http://www.fcpablog.com/blog/2012/1/17/oshea-acquitted-on-all-counts.html.

8. "Judge to DOJ: Your Principal Witness Knows Almost Nothing," *FCPA Blog* (Jan. 19, 2012), http://www.fcpablog.com/blog/2012/1/19/judge-to-doj-your-principal-witness-knows-almost-nothing.html.

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with prejudice pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure.[9]

SHOT Show Cases

Almost simultaneous to the acquittal and dismissal in the action against O'Shea, the government experienced substantial setbacks in its long-running prosecutions of military equipment managers. Following a two-and-a-half-year sting operation into purported military equipment deals with Gabon's Ministry of Defense, FBI agents in January 2010 arrested all but one of the originally 22 defendants at the annual SHOT trade show in Las Vegas. The DOJ heralded the indictment at the time as a "turning point" in individual FCPA prosecutions and featured the use of law enforcement tools known from other areas of criminal law, such as wire taps and undercover agents.[10]

The government enjoyed initial success in the SHOT Show prosecutions. Three defendants quickly pleaded guilty in the spring of 2011.[11] But problems arose once the DOJ began to litigate its cases against the remaining defendants, who had been divided by the district court into four groups. Proceedings against the next four defendants resulted in the dismissal of several counts in the indictment and, after a six week trial, ended in jury deadlock in July 2011.[12] The prosecution of the next six defendants produced the dismissal of all conspiracy counts in December 2011, which effected a full acquittal of one defendant.[13] The jury subsequently acquitted two of the remaining five defendants of the residual charges but was unable to reach a verdict on the three other defendants.[14]

"The government enjoyed initial success in the SHOT Show prosecutions. Three defendants quickly pleaded guilty in the spring of 2011. But problems arose once the DOJ began to litigate its cases against the remaining defendants."

After initially indicating an intent to retry the defendants on whom the jury failed to deliver a verdict, on February 21, 2012, the government entirely abandoned the remaining prosecutions. In filing its Rule 48(a) motion, it concluded that a combination of (1) the outcomes of the first two trials, (2) the impact of certain evidentiary and legal rulings, and (3) the cost of additional government, judicial, defense and jury resources counseled against continued prosecution.[15]

Multiple factors contributed to the government's failure to obtain convictions after trial against any of the SHOT Show defendants. The wisdom of the prosecution's heavy reliance on Richard Bistrong, who had previously pleaded guilty to separate FCPA charges in 2010 and, notwithstanding his dubious past played a major role in orchestrating the SHOT Show sting action, has been questioned.[16] Moreover, the length of the proceedings, the fictitious nature of the bribery arrangements and jurisdictional problems[17] plagued the government's efforts.[18]

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9. *See United States v. O'Shea*, No. 4:09-cr-629, Motion to Dismiss Remaining Counts of Indictment (S.D. Tex. Feb. 9, 2012).
10. *See* DOJ Press Rel. 10-048, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.
11. *See* note 3, *supra*.
12. *See* "Retrial In Africa Sting Case Set for May 2012," *FCPA Blog* (Jan. 6, 2012), http://www.fcpablog.com/blog/2012/1/6/retrial-in-africa-sting-case-set-for-may-2012.html.
13. *See* C.M. Matthews, "Judge Tosses Conspiracy Charges In Landmark Bribery Case," *Dow Jones Newswires* (Dec. 22, 2011), http://online.wsj.com/article/BT-CO-20111222-712797.html.
14. *See* "Second Mistrial in Africa Sting Prosecution," *FCPA Blog* (Jan. 31, 2012), http://www.fcpablog.com/blog/2012/1/31/second-mistrial-in-africa-sting-prosecution.html.
15. *See United States v. Goncalves, et al.*, No. 09-335 (RJL), Government's Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a) (D.D.C. Feb. 21, 2012).
16. *See, e.g.* "Feds Should Forget the Shot Show Defendants," *FCPA Blog* (July 10, 2011), http://www.fcpablog.com/blog/2011/7/10/feds-should-forget-the-shot-show-defendants.html.
17. "Significant dd-3 Development in Africa Sting Case," *FCPA Professor* (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.
18. *See, e.g.*, *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Crime and Drugs Subcomm. of the S. Judiciary Comm.*, 111th Cong. 71 (2010) (prepared statement of Mike Koehler, Assistant Professor of Business Law, Butler University) ("Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a 'cornerstone' of the DOJ's FCPA enforcement program. However, the answer is not to manufacture cases or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery."), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf; "Second Thoughts About the Second Sting Trial," *FCPA Blog* (Sept. 29, 2011), http://www.fcpablog.com/blog/2011/9/29/second-thoughts-about-the-second-sting-trial.html.

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Outlook

It is a hallmark of a functioning legal system that the government does not always prevail in criminal prosecutions. In that sense, there is nothing inherently unusual about the government's recent setbacks in the FCPA arena. In 2011 and before, the DOJ litigated FCPA prosecutions successfully against other defendants.[19] It would thus be foolish to conclude that the acquittals and dismissals in *O'Shea* and the SHOT Show cases, along with the vacatur in *Lindsey*, will cause the government to abandon its often articulated goal of holding individuals accountable for FCPA violations.

O'Shea also highlights the inherently different postures and outcomes between individual trials and negotiated corporate settlements. ABB Ltd. and two of its subsidiaries, including O'Shea's employer ABB, Inc., had settled enforcement actions by the DOJ and the SEC in September 2010 for alleged violations of the FCPA, paying combined criminal and civil penalties of $58 million.[20] While the conduct at issue in the *O'Shea* prosecution was identical to that alleged in the enforcement action against ABB, Inc., the DOJ obtained an admission of misconduct from ABB Inc., yet it subsequently failed to establish liability in the prosecution of O'Shea. Regardless of any attendant implications about the ability of the DOJ to litigate FCPA cases, the costs and risks inherent in litigation will continue to pressure companies accused of FCPA violations to settle FCPA enforcement actions rather than to force the government to litigate the charges in court. As indicated by the guilty pleas in the SHOT Show cases, those factors will continue, for better or worse, to operate in regard to plea decisions by individual defendants, as well.

Finally, the DOJ is facing a particularly challenging moment because its recent setbacks in individual prosecutions coincide with a larger examination of FCPA enforcement. In the face of calls for reform from Congress and business groups, Assistant Attorney General Lanny A. Breuer in November 2011 announced that the DOJ for the first time would formulate and issue guidance in 2012 setting forth its views on FCPA enforcement. A recent letter from U.S. Senators Christopher Coons (D-DE) and Amy Klobuchar (D-MN) to Attorney General Eric H. Holder, Jr. calls for a list of specific clarifications that the upcoming guidance should feature, including certain statutory definitional clarifications and the DOJ's expectations of corporate compliance programs and the proper scope of internal investigations.[21] To what extent the upcoming guidance will address the requests contained in the Senators' letter remains to be seen. What is clear already, however, is that both companies and individuals will observe with keen interest whether the guidance and recent defeats of the DOJ in individual prosecutions produce a different approach to FCPA enforcement.

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19. In the Haiti Teleco case, defendants Joel Esquenazi and Carlos Rodriguez were found guilty in 2011 after a jury trial of FCPA-related and money laundering charges and sentenced to prison terms of 15 years and seven years, respectively. These sentences constitute the longest and third-longest FCPA-related sentences to date. *See* DOJ Press Rel. 11-1407, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html.

20. *See* DOJ Press Rel. 10-1096, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html; *United States v. ABB, Inc.*, No. 10-cr-664, Plea Agreement (S.D. Tex. Sept. 29, 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbinc-plea.pdf; *SEC v. ABB, Ltd*, 10-cv-1648, Complaint (Sept. 29, 2010), http://www.sec.gov/litigation/complaints/2010/comp-pr2010-175.pdf.

21. Letter from Sens. Christopher Coons and Amy Klobuchar to the Hon. Eric Holder, Attorney General (Feb. 15, 2012) (on file with author); *see also* C.M. Matthews, "Coons, Klobuchar Press Holder on FCPA Guidance," *WSJ Corruption Currents Blog* (Feb. 16, 2012), http://blogs.wsj.com/corruption-currents/2012/02/16/coons-klobuchar-press-holder-on-fcpa-guidance/.

NEWS FROM THE BRICs

Russia's Turn Toward Anti-Corruption Enforcement?

Two recent developments in Russia suggest that the country is entering a new phase in its efforts to modernize its business environment and anti-corruption laws. First, on February 1, 2012, Russian President Dmitry Medvedev signed into law Russia's accession to the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention").[1] The OECD Convention, which currently has 38 signatory countries,[2] including every major exporting nation except China and India,[3] requires member states to criminalize the payment of bribes abroad, and encourages countries to pursue vigorous enforcement of anti-corruption laws.[4]

The second development was the Russian Presidential Administration's draft National Anti-Corruption Plan for 2012-2013 (the "Draft Plan").[5] The Draft Plan updates the Russian government's anti-bribery and anti-corruption priorities – set out previously in the National Anti-Corruption Strategy and National Anti-Corruption Plan for 2010-2011[6] – with a particular focus on bolstering enforcement efforts.

These developments supplement actions Russia has taken over the past several years to align its anti-corruption enforcement with prevailing international standards. Highlights of its recent efforts include ratifying the U.N. Convention Against Corruption ("UNCAC") in 2006, joining the Group of States Against Corruption in 2007, implementing the National Anti-Corruption Strategy (the "Strategy") and National Anti-Corruption Plan (the "Plan") of 2010-2011, and adopting several federal laws aimed at counteracting corruption. The most notable new laws were Federal Law No. 329-FZ, restricting the business activities of and requiring financial disclosure by Russian federal and regional legislators; and Federal Law No. 97-FZ, outlawing bribery of both foreign (*i.e.*, non-Russian) and Russian officials by Russian individuals and Russian companies, and increasing substantially the fines applicable to bribery violations.[7] Giving prosecutors the ability to target would-be violators' pocketbooks constituted a potentially important deterrent.[8]

The Draft Plan Focuses on Transparency and Enforcement

The new Draft Plan – expected to be adopted in March 2012 – appears aimed at shifting Russia's corruption efforts away from new laws that criminalize corrupt activities and toward efforts to improve anti-corruption enforcement.[9] Key provisions of the Draft Plan are:

- Specific actions that civil servants and judges are required to undertake as part of anti-corruption enforcement;
- Increased public involvement in counteracting corruption through feedback mechanisms designed to report corrupt actors to anti-corruption authorities;

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1. Gillian Dell, "Russia Confirms Plans to Join the OECD Convention Against Bribery," *Transparency International Blog* (Feb. 6, 2012), http://blog.transparency.org/2012/02/06/russia-confirms-plans-to-join-the-oecd-convention-against-bribery/.
2. Organisation for Economic Co-operation and Development, Anti-Bribery Convention, "About," http://www.oecd.org/about/0,3347,en_2649_34859_1_1_1_1_1,00.html (last visited Feb. 22, 2012) (hereinafter, "OECD").
3. Dell, note 1, *supra*.
4. OECD, note 2, *supra*.
5. "The Kremlin has decided to fight against corruption in the world" (Feb. 3, 2012), http://top.rbc.ru/politics/03/02/2012/636104.shtml, [Russian]; Петр Netpe, "The tool of corruption found where lost" (Feb. 2, 2012), http://www.kommersant.ru/doc/1864231/print, [Russian].
6. The Strategy and the Plan were adopted by Presidential Order No. 460 on April 13, 2010. Ministry of Economic Development of the Russian Federation, "Anti-Corruption Policy," http://www.economy.gov.ru/wps/wcm/connect/economylib4/en/home/activity/sections/anticorruption/index (last visited Feb. 22, 2012).
7. For a detailed discussion of Federal Law 97-FZ, which paved the way for Russia's adoption of the OECD Convention and marked the start of its formal accession as a member of the OECD, expected sometime in mid-2012, *see* S. Hecker, B. Yannett, A. Dulova, A. Tidman, and A. Konolov, "News from the BRICS: Developments in Russian Anti-Corruption Laws," *FCPA Update*, Vol. 2, No. 10 (May 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=064c31c9-70b6-4a0a-b4e1-370afcc230a3.
8. *Id.* at 12.
9. *Id.*; Dell, note 1, *supra*; Alexey Eremenko, "Russia Bans Paying Bribes Abroad," *RIA Novosti* (Feb. 1, 2012), http://en.ria.ru/world/20120201/171069402.html.

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- Tightened enforcement of disclosure requirements for civil servants' potential conflicts of interest; and
- Expanded reach of anti-bribery and anti-corruption laws to persons in positions at government-created entities.

The Draft Plan also instructs the Russian Ministry of Justice to conduct a study on whether and how to implement a regime to regulate government lobbying activities by private companies and persons. Currently, Russia has no laws governing lobbying activities, *i.e*, laws pursuant to which persons who advocate before government entities on behalf of private interests must publicly disclose the identity of the interests they represent, or are certified as a person allowed to participate in meetings of government authorities.

In conjunction with the Draft Plan, President Medvedev announced in his annual message to the Russian Federation Council that the government would begin to implement more robust financial disclosure obligations for federal government officials. President Medvedev discussed the need for officials to report not only their income, but to account for their purchases of securities, real property, and vehicles.[10] Medvedev's speech was shortly followed by Bill 2832-6, which, if enacted, would require civil servants, government officials, military personnel, and their families to disclose annually information concerning expenditures that exceed the amount of their declared annual government income.[11]

> "The Draft Plan also instructs the Russian Ministry of Justice to conduct a study on whether and how to implement a regime to regulate government lobbying activities by private companies and persons."

If enacted, this latter initiative likely would be welcomed by the international community, particularly given that Russia ratified the UNCAC without one of its key provisions – Article 20, which criminalizes illicit enrichment, defined as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to her lawful income."[12] Although Bill 2832-6 would not go as far as the UNCAC, it would add transparency to government employees' income and expenditures, which may disincentivize dishonest payments (or, at least, make them more difficult to hide).

Decreasing the Overall Risk of Doing Business in Russia

These recent developments may turn out to be important steps toward reducing the corruption risk of doing business in Russia.[13] Opportunities in BRIC countries are increasingly important to businesses, and, yet, the current perception of company executives is that Russia is a place where corruption is commonplace.

In a recent survey of business executives conducted by Deloitte, 43% of executives were extremely concerned about the potential impact on their business of corruption in Russia. Moreover, 38% of executives responded that they were more concerned about corruption risk in Russia today than three years ago.[14] In a similar survey conducted by Ernst & Young, 39% of businesses responded that cash payments to win or retain business were "commonplace" in Russia.[15]

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10. President Dmitry Medvedev, "Address to the Federal Assembly" (Dec. 22, 2011), http://eng.kremlin.ru/transcripts/3268.
11. Bill No. 2832-6, Amendment of Certain Legislative Acts of the Russian Federation in Connection with Improvement of State Anti-Corruption Administration, http://asozd2.duma.gov.ru/main.nsf/(printzp)?OpenAgent&RN=2832-6&123 (last visited Feb. 22, 2012) [Russian].
12. *See* United Nations Convention against Corruption, http://www.unodc.org/unodc/en/treaties/CAC/ (last visited Feb. 22, 2012).
13. Deloitte, *Anti-Corruption Practices Survey 2011: Cloudy with a Chance of Prosecution?* at 18 (2011), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_dfc_fcpa%20compliance%20survey%20report_090711.pdf [hereinafter "Deloitte Survey"]. For a detailed discussion of the Deloitte Survey *see* P. Berger and M. Leigh, "Deloitte Anti-Corruption Practices Survey Highlights Challenges Facing Companies," *FCPA Update*, Vol. 3, No. 3, at 6 (Oct. 2011), http://www.debevoise.com/files/Publication/64730281-500e-48e2-85ca-630f30a991ee/Presentation/PublicationAttachment/4d840f5d-2260-4af4-9852-950dc5af8a1c/fcpaupdateoct2011.pdf.
14. Deloitte Survey at 19, note 13, *supra*.
15. Ernst & Young, *European Fraud Survey 2011: Recovery, Regulation and Integrity* at 8 (2011), http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity. For a detailed discussion of the Ernst & Young survey, *see* P. Berger, S. Hecker and J. Shvets, "E&Y and KPMG Surveys Shed Light on Anti-Corruption Trends," *FCPA Update*, Vol. 2, No. 11, at 4 (June 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=027aee9f-9006-4037-8195-6da0c6a55c00.

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In addition, Russia ranks poorly in two annual metrics compiled by Transparency International ("TI"). Russia ranked 28th of 28 countries in the TI Bribe Payers Index of 2011, and 143rd of 183 countries in the TI Corruption Perceptions Index of 2011.[16] Though Russia's 2011 position in the Corruption Perceptions Index is an improvement over its 2010 position – 154th of 178 countries[17] – that improvement may be attributed to increased optimism over the recent efforts and anticipated additional positive changes, rather than a reflection of the existing situation.[18]

> "Optimism could easily be dashed if Russia's aggressive effort at reforming its laws is not coupled with more serious efforts to bolster and speed enforcement."

Such optimism could easily be dashed if Russia's aggressive effort at reforming its laws is not coupled with more serious efforts to bolster and speed enforcement of the law. Companies doing business in Russia also remain concerned that enforcement of laws unrelated to anti-corruption not conflict with companies' efforts at achieving compliance with international anti-corruption standards, including the FCPA and the U.K. Bribery Act.

For example, and as discussed in the July 2011 *FCPA Update*, last year's decision by Russia's Federal Anti-Monopoly Service ("FAS"), holding that OOO Novo Nordisk could not refuse to contract with distributors that failed anti-corruption screening by the company based on company-mandated compliance standards, raises questions about the degree to which the anti-corruption priority has permeated all levels and all entities in Russian government.[19] Although the company subsequently settled on more favorable terms, and FAS allowed some additional leeway to private company efforts to discriminate among potential vendors based on internal company compliance standards, the FAS's final directive leaves unanswered whether companies' obligations to contract under Russian anti-monopoly law are too broad for U.S. and U.K. anti-corruption authorities.[20] Recent dialogue about the interplay of Russian anti-monopoly law and international anti-corruption law between FAS representatives and U.S. government legal and business representatives may be a sign that Russian authorities understand business' need for greater flexibility in this area.[21]

Other Russian government actions illustrate the constraints on anti-corruption enforcement in Russia. In the case involving government officials who may have received bribes from Daimler AG, the U.S. Department of Justice in April 2010 concluded a years-long investigation, first announced in the fall 2004, into bribes paid by Daimler AG to government officials in multiple countries, including Russia, for the purpose of securing government contracts for the purchase of Daimler vehicles.[22] As part of that settlement, Daimler's Russian subsidiary – DaimlerChrysler Automotive Russia SAO (DCAR), now known as Mercedes-Benz Russia SAO –

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16. Transparency International, *Bribe Payers Index Report 2011* at 5 (2011), http://bpi.transparency.org/results/; Transparency International, *Corruption Perceptions Index 2011* (2011), http://cpi.transparency.org/cpi2011/results/#CountryResults.

17. Transparency International, *Corruption Perceptions Index 2010* (2010), http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

18. Transparency International's index rankings are only two data points in evaluating corruption risk, and there are inherent limitations involved in year-to-year comparisons of the rankings. For example, a drop – or, as here, a gain – in a country's rank in the Corruption Perceptions Index can be attributable, at least in part, to the impact of a factor that may or may not affect the actual risk of corruption (*e.g.*, violent conflict within the country), or to the fact that conditions are becoming worse in other countries. Regardless, Transparency International's index rankings remain critical and trusted benchmarks used to allocate scarce compliance, prosecutorial, and regulatory resources.

19. FAS Press Rel., FAS Russia Fined "Novo Nordisk" Over 85 Million Rubles for Unlawfully Evading Contracts for Supplies of Medicines (Jan. 24, 2011), http://en.fas.gov.ru/news/news_31180.html. For the full text of the Sept. 23, 2010 decision in Russian see http://www.fas.gov.ru/solutions/solutions_31980.html?isNaked=1. *See also* B. Yannett, S. Hecker, A. Kucher, J. Amler, J. Shvets and A. Maximenko, "Anti-Bribery Compliance in Russia: One Step Forward, Two Steps Back?," *FCPA Update*, Vol. 2, No. 12, at 1 (July 2011), http://www.debevoise.com/files/Publication/b088cc4d-0970-4cbb-881d-4a75d186f5f1/Presentation/PublicationAttachment/4f73fef6-ca4e-44c6-8551-68605df0007e/FCPAUpdateJuly2011.pdf.

20. B. Yannet, S. Hecker, J. Shvets and A. Maximenko, "Novo Nordisk Settles with Russia's Anti-monopoly Service," *FCPA Update*, Vol. 3, No. 1, at 8 (Aug. 2011), http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf.

21. FAS Press Rel., Russia and the USA Discussed the Issues of Antimonopoly and Anticorruption Policy (Feb. 9, 2012), http://en.fas.gov.ru/news/news_32023.html.

22. DOJ Press Rel. 10-360, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html.

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agreed to a guilty plea and criminal fines of $27.26 million.[23] In September 2010, after the U.S. investigation had long been pending and a corporate resolution had been achieved, the Russian Ministry of Internal Affairs (the "MVD") opened an investigation into whether bribes had been paid by Daimler AG to Russian government officials.[24] After 16 months of investigating, the MVD announced just last month that it had identified and questioned suspects in its investigation.[25]

Ratifying the OECD Convention may speed up enforcement in that it subjects Russia to peer review by other signatories of its anti-bribery and anti-corruption efforts. In light of the competition for business in the current global economic recession, Russia will be closely monitored by its competitor countries among the OECD signatories, who will be ready to cry foul if Russia is perceived as not doing all it can to clean up corruption.

OECD peer review and the apparent push toward improved anti-corruption enforcement may provide a needed shot in the arm for Russia's anti-corruption efforts. Although Russia still has a way to go in rooting out historical levels of corruption and improving its global image, these two recent developments – especially when combined with the past year's flurry of national anti-corruption legislation – are surely positive steps toward reducing the overall corruption risk to companies doing business in Russia.

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23. *Id.*; *United States v. DaimlerChrysler Automotive Russia SAO*, No. 10-CR-064, Plea Agreement (D.D.C. 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerrussia-plea.pdf.
24. "Daimler Suspects Questioned," *The Moscow Times* (Jan. 13, 2012), http://www.themoscowtimes.com/business/article/daimler-suspects-questioned/451015.html.
25. *Id.*

The Bourke Conviction and Willful Blindness: Did the Second Circuit Get it Right?

The December 14, 2011 decision by the United States Court of Appeals for the Second Circuit affirming Frederick Bourke's conviction for conspiracy to violate the FCPA stands as an important warning to companies and individuals alike who participate in investment opportunities in high-risk jurisdictions.[1] Bourke, however, recently filed a new challenge to the decision, arguing in a petition for rehearing that the U.S. Supreme Court's intervening decision on May 31, 2011 in *Global-Tech Appliances, Inc. v. SEB S.A.*[2] provides a basis for overturning Bourke's convictions for conspiring to violate the FCPA as well as for making false statements to federal investigators.

In *Global Tech*, the Court clarified what is generally required when the government seeks to use "willful blindness" as a proxy for actual knowledge. As will be seen below, whether the Second Circuit got it right in upholding Bourke's conviction and sentence turns on a complex set of questions relating to the substantive law underlying the willful blindness doctrine, and an equally difficult set of issues relating to federal criminal trial and appellate practice.

The Second Circuit's December 14, 2011 Decision

Convicted by a federal jury in 2009 after lengthy pre-trial and trial proceedings for his role as an investor in a scheme to acquire the state oil company of Azerbaijan, Bourke was sentenced to a year in prison following the jury's assessment of a host of evidence that the government contended proved beyond a reasonable doubt that Bourke was a member of a conspiracy to violate the FCPA and then lied to federal investigators about his knowledge of the misconduct. As the Second Circuit stated in reciting the evidence adduced at trial, Bourke was aware that the leader of the investment consortium, Viktor Kozeny, bore the moniker the "Pirate of Prague" as a result of his "shady dealings" in state privatizations,[3] and that Bourke traveled to Baku, Azerbaijan where he was allegedly told by Kozeny's attorney, Hans Bodmer, of a pre-existing bribery scheme hatched by Kozeny as well as "the corporate structures created to carry it out."[4] Furthermore, the court observed, Bourke thereafter set up a separate investment company of his own to provide the vehicle for the transfer of his investment funds.[5]

As the court of appeals stated further about the record:

> ... [After twice traveling to Azerbaijan,] Bourke made another trip to Baku shortly after the Minaret office opening [Minaret being the investment bank set up by Kozeny]. When he returned home, Bourke contacted his attorneys to discuss ways to limit his potential FCPA liability. During the call, Bourke raised the issue of bribe payments and investor liability. Bourke's attorneys advised him that being linked to corrupt practices could expose the investors to FCPA liability. Bourke and fellow Oily Rock investor Richard Friedman agreed to form a separate company affiliated with Oily Rock [Oily Rock being another Kozeny vehicle that had been set up to purchase the shares in the Azeri oil company] and Minaret. This separate company would shield U.S. investors from liability for any corrupt payments made by the companies and Kozeny. To that end, Oily Rock U.S. Advisors and Minaret U.S. Advisors were formed, and Bourke joined the boards of both on July 1, 1998. Directors of the advisory companies each received one percent of Oily Rock for their participation.
>
> In mid-1998, Kozeny and Bodmer told Bourke that an additional 300,000,000 shares of Oily Rock would be authorized and transferred to the Azeri officials. Bourke told a Minaret employee, Amir Farman-Farma, that "Kozeny had claimed that the dilution was a necessary cost of doing business and that he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success."
>
> Bodmer set up a Swiss bank account for several Azeri officials-including Nuriyev, his son and another relative, as well as President Aliyev's daughter. From May to September 1998, nearly $7 million in intended

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1. *United States v. Kozeny*, No. 09-4704, 2011 WL 6184494 (Dec. 14, 2011), *pet. for reh'g pending*, (2d Cir. filed Jan. 27, 2012) (Frederic Bourke was one of multiple defendants in the case).
2. 131 S. Ct. 2060 (2011).
3. *Kozeny*, 2011 WL 6184494, at *1.
4. *Id.* at *2.
5. *Id.* at *3.

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bribe payments was wired to these accounts. In addition to the evidence of cash bribes, the government adduced evidence that Bourke and other conspirators arranged and paid for medical care, travel and lodging in the United States for both Nuriyev and his son.

By the end of 1998, Kozeny had abandoned all hope of SOCAR's privatization, and began winding down the investment scheme. The Minaret Group fired most of its employees by the end of January 1999, and drastically reduced the pay of the few who remained. Kozeny told the investors that the vouchers [to be used to buy the shares of the state oil company] were worthless, good only for "wallpaper." Around the same time, Bourke resigned from the advisory company boards. As time went on, the privatization scheme became an issue in civil litigation by investors in the United Kingdom. Kozeny's attorneys contacted the U.S. Attorney's office in late 2000, and Bourke was subsequently advised he was the subject of an investigation. Bourke entered into a proffer agreement on April 26, 2002. Bourke also waived attorney-client privilege and instructed his attorneys to answer questions from investigators. During his proffer sessions, Bourke was asked specifically about whether Kozeny made corrupt payments, transfers and gifts to Azeri officials, and Bourke denied any such knowledge.[6]

> "Given the nature of Bodmer's testimony, which, if believed, could be argued to have put Bourke on notice early on of a bribery scheme, a major focus of Bourke's efforts at trial and on appeal rested on challenging . . . the government's request for a 'willful blindness' jury instruction."

Given the nature of Bodmer's testimony, which, if believed, could be argued to have put Bourke on notice early on of a bribery scheme, a major focus of Bourke's efforts at trial and on appeal rested on challenging Bodmer's credibility (and legal issues surrounding the same) as well as the government's request for a "willful blindness" jury instruction.

As to the latter issue, the Second Circuit affirmed both the district court's giving of such an instruction and the form in which the instruction was given, holding that a jury may be given such an instruction if, but only if: "'(1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists, i.e., the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'"[7]

Rejecting Bourke's challenge to the "factual predicate" for the instruction, the court of appeals noted that "[t]he testimony at trial demonstrated that Bourke was aware of how pervasive corruption was in Azerbaijan generally," and "knew of Kozeny's reputation as the 'Pirate of Prague.'"[8] Further, "Bourke created the American advisory companies 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 joining the Oily Rock board. In so doing, Bourke enabled himself to participate in the investment without acquiring actual knowledge of Oily Rock's undertakings."[9]

In addition to remarking that "Bourke's attorney testified that he advised Bourke that if Bourke thought there might be bribes paid, Bourke could not just look the other way," the court of appeals also quoted a transcript of a May 18, 1999 tape-recorded phone conference Bourke had with a co-investor and their attorneys, in which Bourke in several instances asked the call's participants "[w]hat are you going to do with that information" if it turned out that they learned that bribes were being paid, or words to that effect.[10]

This evidence, as well as other evidence demonstrating that other potential investors conducted more rigorous due diligence than did Bourke and walked away from the deal, led the Second Circuit to find that "the evidence adduced by the government at trial suffice[d] to support the giving of a

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6. *Id.*.
7. *Id.* at *7 (quoting *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)).
8. *Id.*
9. *Id.*
10. *Id.* at *8.

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conscious avoidance charge."[11] Responding specifically to Bourke's challenge at trial and on appeal that the charge given allowed the jury to convict on the basis of mere negligence, the court of appeals stated that "the district court specifically charged the jury not to convict based on negligence."[12]

Bourke's Petition for Rehearing, or, Alternatively, for Rehearing *En Banc*

In his petition for rehearing, or, alternatively, for rehearing *en banc,* filed January 27, 2012, Bourke asserted that the Second Circuit's decision, and, indeed, much of circuit case law addressing the issue of conscious avoidance instructions, conflicts with the Supreme Court's decision in *Global-Tech*. Bourke's petition began by noting that Justice Alito's opinion for the 8-1 majority in *Global-Tech* – a patent case that nevertheless turned on the willful blindness doctrine – requires, for willful blindness to be found: "'(1) [that] the defendant must subjectively believe that there is a high probability that a fact exists and (2) [that] the defendant must take deliberate *actions* to avoid learning of that fact.'"[13] Bourke then contended that the panel's focus on Bourke's failures to probe more thoroughly than did others (and then potential failure to follow counsel's advice) ignores the Supreme Court's requirement of "deliberate actions," and conflicts with the Seventh Circuit's decision in *United States v. Giovannetti*.[14] Bourke noted that establishing separate U.S. corporations to take the benefits of American law was not the kind of deliberate affirmative step that the Supreme Court intended when it defined the contours of willful blindness in *Global-Tech*, and, otherwise, that Bourke's only failings were in *omitting* to act to learn more about the deals.

> "In his petition for rehearing, . . . Bourke asserted that the Second Circuit's decision, and, indeed, much of circuit case law addressing the issue of conscious avoidance instructions, conflicts with the Supreme Court's decision in *Global-Tech*."

In addition, Bourke argued a second conflict between the jury instructions that were given in his trial with the Court's analysis in *Global-Tech* on the ground that the instruction given in the trial court was flawed because it did not contain an admonition that the jury may not find that Bourke was willfully blind merely because Bourke was reckless.[15]

Bourke's petition for rehearing raises substantial questions of criminal law that would benefit from clarification. A potentially key distinction between *Bourke* and *Global-Tech*, for example, is the fact that Bourke apparently had discussions with his counsel and alerted them to his concerns about potential misconduct. In contrast, the defendant in Global-Tech actively hid important information from patent counsel tasked with researching whether the product at issue would run afoul of Global-Tech's patent for "cool-touch" fryers.[16]

But given the broad range of evidence at trial and Bourke's failure to raise the *Global-Tech* decision for nearly eight months after it was handed down, there is a risk that the panel will reject the petition and simply await further guidance from the Supreme Court, should that court determine to grant review.[17] Nevertheless, even if the Second Circuit were to view its task of assessing whether to grant a petition for rehearing on these facts as discretionary only, justice would certainly be served by additional guidance given the importance and recurring nature of willful blindness

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11. *Id.* at *9.
12. *Id.* at *10.
13. Kozeny, Pet. for Reh'g. at 3, No. 09-4704 (2d Cir. filed Jan. 27, 2012) (emphasis by Bourke).
14. 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.).
15. *Kozeny*, Pet. for Reh'g. at 4.
16. *Compare Kozeny*, 2011 WL 6184494, at *8, *with Global-Tech*, 131 S. Ct. at 2071.
17. As the Second Circuit's decision suggested in holding that Bourke's jury instruction challenges failed whether under a "plain error" or "de novo" standard of review, *see Kozeny*, 2011 WL 6184494, at *10, the government will no doubt argue that Bourke did not sufficiently preserve the challenges to the jury instructions raised in the petition for rehearing. *See, e.g., Jones v. United States*, 527 U.S. 373, 387 (1999) ("A party generally may not assign error to a jury instruction if he fails to object before the jury retires or to 'stat[e] distinctly the matter to which that party objects and the grounds of the objection.'") (*citing* Fed. R. Crim. P. 30). *See also United States v. Park*, 421 U.S. 658, 674 (1975) ("'[A] single instruction to a jury may not be judged in artificial isolation.'") (citations omitted). Notwithstanding, the Supreme Court may address an issue of law "passed upon" by a court of appeals, and Bourke could well seek to position a petition for certiorari on the ground that the Second Circuit assumed that all relevant challenges to the jury instructions had been made. *See, e.g., Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (describing the "pressed or passed upon below" rule that governs questions that the Supreme Court may review). *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988) (noting the "mere enlargement" doctrine under which an error may be submitted to the Supreme Court if the question presented is a "mere enlargement" of a ground of error raised below).

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issues in criminal matters, and in the area of bribery prosecutions in general.

Beyond whether Bourke's arguments based on *Global-Tech* receive a further hearing, the Bourke conviction and the Second Circuit's initial decision on Bourke's appeal are two of the more critical data points for in-house counsel and compliance personnel faced with the ever-pressing demands of cross-border due diligence in high risk transactions. Although the chapter on Bourke's case is not closed and there may be further judicial decisions in the matter,[18] it is instructive for companies. The government has shown a strong willingness to pursue a "willful blindness" prosecution and companies must ensure that its personnel are well trained and sensitive to red flags that can be ignored only at one's peril.

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18. Bourke's post-trial Federal Rule of Criminal Procedure 33 motion asserting that the government presented knowingly false testimony was rejected on December 15, 2011, and is now on appeal. *See United States v. Bourke*, No. S2 05 CR 518(SAS), 2011 WL 6376711 (S.D.N.Y. Dec. 15, 2011), *notice of appeal filed*, No. 11-5390 (2d Cir. Dec. 27, 2011).

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