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FCPA Conviction of Investor Frederic Bourke Highlights the Importance of Anti-Corruption Due Diligence

On July 10, 2009, a federal jury in New York convicted American investor Frederic Bourke of charges that he conspired to violate the Foreign Corrupt Practices Act and made false statements to federal law enforcement authorities during the course of the investigation of payments and other benefits provided to Azeri government officials. Mr. Bourke was acquitted of a charge that he was involved in a money laundering conspiracy in connection with those same events. The case was a rare international bribery trial that spotlighted what the United States Justice Department (DOJ) believed was inadequate due diligence by an investor in a corrupt scheme to privatize the State Oil Company of the Azerbaijan Republic (SOCAR). Mr. Bourke had invested $8 million in a consortium that was seeking to acquire state-issued vouchers and options in the privatization. At Mr. Bourke's trial, prosecutors sought to establish that the investment consortium provided gifts and payments to Azeri government officials in order to increase the likelihood of privatization, and that Mr. Bourke knew or should have known of the improper payments and benefits when he invested.

The DOJ's position at trial provides important cautionary warnings regarding appropriate due diligence of investments and acquisitions in emerging markets. In particular, a significant portion of the government's case was based on evidence that Mr. Bourke failed to conduct significant due diligence of the investment in Azerbaijan, failed to ask an experienced law firm to conduct any such due diligence for him and ignored red flags that would have alerted him to the corrupt nature of the investment. To illustrate the point, the Justice Department called two witnesses representing an unrelated potential investor in an effort to demonstrate that appropriate due diligence would have revealed the corrupt nature of the investment.

In addition to evidence that Mr. Bourke had actual knowledge of the corrupt scheme, the DOJ pursued a theory of willful blindness by Mr. Bourke — that is, that he consciously avoided learning the relevant facts and that as an experienced investor, he s*hould have known* of the corrupt scheme. The Justice Department used the absence of well-conceived due diligence as part of its evidence that Mr. Bourke had the knowledge of a corrupt scheme necessary to support a criminal charge and, ultimately, a conviction. The jury agreed.

In recent years, DOJ officials have emphasized the importance of anti-corruption due diligence in investments and transactions, and several DOJ FCPA Opinion Releases have provided guidance on this issue. The DOJ's theory in the Bourke case indicates a willingness to pursue criminal charges based at least in part on a failure to conduct appropriate diligence. This represents a danger not only to companies, but also to individuals involved in investment decisions, as senior officials in the DOJ have expressed their belief that prosecution of individuals is one of the key deterrents to foreign bribery.

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