

If you Think FCPA Compliance is Tough in Thailand, Just Consider what it will be like in Myanmar

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What we will discuss:

- The basic elements to a violation of the bribery prohibition of the U.S. Foreign Corrupt Practices Act (FCPA). And defenses and permitted payments – but only briefly. But not the accounting provisions.
- One element that is contentious, controversial and likely to be problematic in Myanmar. There will be compliance problems under other provisions of the FCPA, but this feature of the FCPA seems likely to be particularly problematic in Myanmar.

Refresher: Elements to a Violation of the Anti-Bribery Prohibition

- Payment, Offer, Authorization, etc. of a Payment...
- To a (i) Foreign Official, (ii) a Foreign Political Party, an (iii) Official of Public International Organization or (iv) any Other Person While ***Knowing*** that the Payment or Promise will be Passed on to Anyone Falling within (i) through (iii).

Refresher: Elements to a Violation of the Anti-Bribery Prohibition

- U.S. Nexus Requirement
- For a Corrupt Purpose: Influencing or Inducing an Official to Do or Fail to Do Something in Violation of a Lawful Duty, Securing an Improper Advantage, etc.
- To Assist Company in Obtaining or Retaining Business

Refresher: Affirmative Defenses and Permitted Payments

- Facilitation or “Grease Payments”.
- Permitted by the Written Laws of the Foreign Official’s or Candidate’s Country.
- Reasonable and Bona Fide Expenditures relating to Execution of a Contract.

These are problems in Thailand and they will be problems in Myanmar, but there is likely to be a bigger problem when doing business in Myanmar.

The Parable of Bourke and the “Pirate of Prague”

Setting the Stage - 1998:

- The Main Players:
 - Frederic Bourke – of the famous “Dooney & Bourke” handbag brand.
 - Victor Kozeny – dubbed the “Pirate of Prague” by Fortune Magazine.
- The Locale: Azerbaijan – a newly opening economy with lots of oil – sound familiar?
- The Deal: the Privatization of the State Oil Company of Azerbaijan Republic (SOCAR)

Parable: Early Days (Circa 2000)

Azerbaijan offers vouchers to its citizens to participate in privatization scheme.

The Pirate's Plan: Buy enough vouchers to control SOCAR, which is being sold for far less than its real value.

The Pirate Pitches the Plan:

Bourke Invests US\$ 8 Million

Wall Street, e.g., AIG, also invest

Plan seems to be too Good to be True, but Bourke and Wall Street overlook this because...

Parable - Continued

- The Return is Potentially Tremendous and They have a Pirate in their Corner with Great Connections.
- The Deal Goes South. Bourke Loses US\$8 million. Other investors lose more.
- The Investors Go After the Pirate. They Sue.
- The Pirate Strikes Back: “Who in their sound mind would otherwise fly \$200 million in cash to the world's third-most-corrupt country?”
- The Department of Justice Takes an Interest

Parable - Continued

Bourke charged with Conspiracy to Violate the FCPA

- Bourke claims he did Not Know About any Bribes
- No Evidence of Actual Knowledge, but the Jury Given a Conscious Disregard Jury Instruction.
- The Jury Decides Bourke Consciously Disregarded Evidence of Corruption: “How Could He Not Know?”
- The Judge: “It's not entirely clear to me whether Mr. Bourke was a victim, a crook, or a little bit of both.”
- Bourke Sentenced to One Year and One Day. Fined as well. And Remember He Lost his Entire Investment.

Parable Concludes

- Bourke Appeals to Second Circuit of Appeals. Loses Appeal: “[t]aken together, a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny [the Pirate] and his cohorts may be paying bribes,” and that “this same evidence may also be used to infer that Bourke actually knew about the crimes.”
- U.S. Supreme Court denies Certiorari.
- Bourke, age 67, Enters Englewood Camp to Serve his Sentence in May of 2013.

Lessons Learned

- The Obvious One: You Cannot Avoid FCPA Liability When There are Red Flags of Corruption even if there is No Evidence that you Actually Knew of Corruption.
- Be Careful of the Company You Keep.
- You Cannot Avoid FCPA Liability by Using Agents or Other Intermediaries and Disavowing Knowledge of Corruption When the Deal Does not Pass the “Smell Test”.

Use of Agents & Intermediaries

- Connections Can be a Liability. Do Background Checks.
- Is the Agent Legitimately Qualified to Provide the Services for Which the Agent is Retained?
- What is the Scope of the Agent's Work? Can you Articulate and Value it?
- Is the Amount the Agent will Earn for Such Work Commercially Reasonable?

Thank you

While reasonable efforts have been made to ensure the preceding slides are accurate, this presentation does not constitute legal advice.

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