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Recent Opinion Sheds Light on the Relevance Of Due Diligence to the FCPA's "Knowledge" Requirement

BY KENNETH WINER AND GREGORY HUSISIAN

Although the Foreign Corrupt Practices Act (the "FCPA") was enacted more than thirty years ago, there is little case law addressing many of the FCPA's most important elements. The U.S. District Court for the Southern District of New York recently issued an opinion that sheds important light on one of those elements – the "knowledge" requirement.[1] The case underscores that while a failure to perform due diligence when entering into an arrangement with an intermediary (such as a consultant, joint venture partner, or distributor) may expose a company or individual to substantial reputational and legal risks, the FCPA does not require such due diligence.

[1] *United States v. Kozeny and Bourke*, 2009 U.S. Dist. LEXIS 95,233 (S.D.N.Y. Oct. 13, 2009).

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I. The Recent Opinion Correctly Interprets the FCPA's Knowledge Requirement

A. The Knowledge Requirement.

The definition of "knowledge" for the purpose of the anti-bribery provisions of the FCPA has taken on increasing importance as the Government has brought more cases under the Foreign Corrupt Practices Act that involve payments to intermediaries. Many companies encounter difficulties performing due diligence on and monitoring intermediaries.[2] As one prominent commentator has observed: "Most Foreign Corrupt Practices Act offenses involve intermediaries."[3]

Whether the intermediary is a consultant, joint venture partner, or distributor, the FCPA's knowledge requirement comes into play. In general, the FCPA prohibits:

[2] *See* KPMG Forensic, Overseas Bribery and Corruption Survey 2009 at 10, *available at* http://www.kpmg.co.th/Publications/advisory/FOR/OverseasBribery_aug09.pdf.

[3] *See* Doug Cornelius, "Sounding Off About Third Party Compliance," *available at* http://fcpablog.blogspot.com/2009/03/sounding-off-about-third-party.html.

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- any issuer (*i.e.*, any company that has securities registered with the SEC), or any officer, director, employee or agent of an issuer, or any stockholder thereof acting on behalf of an issuer;
- from making use of the U.S. mails or any means or instrumentality of interstate commerce;
- corruptly (or corruptly doing any act outside the United States);
- in furtherance of an offer, payment, promise to pay, or authorization of payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any person;
- while ''knowing'' that all or a portion of such money or thing of value will be offered, given or promised, to any foreign official for a purpose prohibited by the FCPA.[4]

B. The Bourke Court's Application of the FCPA's Knowledge Requirements.

A recurring issue in cases involving payments to intermediaries is whether the defendant (or prospective defendant) paid money to the intermediary ''while knowing that all or a portion of such money or thing of value will be'' used or offered for a prohibited purpose.[5] As explored in detail below, the SEC, DOJ, and many commentators appear to believe that a defendant who does not have actual knowledge that the intermediary will make an improper payment to a government official can be held liable under the anti-bribery provisions of the FCPA if the defendant is aware of red flags indicating that such payments are a possibility and nevertheless fails to perform adequate due diligence into the possibility. The common view is that the failure to perform adequate due diligence can, in and of itself, constitute culpable knowledge, even if the decision not to perform adequate due diligence was made due to the cost, delay, disruption, or likely futility involved in attempting to determine the truth, and not due to a conscious effort to avoid knowledge.

The U.S. District Court for the Southern District of New York addressed this issue front and center in an opinion denying a motion for acquittal or new trial filed by Frederic Bourke. Bourke, a successful businessman and celebrity designer of handbags, had invested $8 million in a business venture (formed by Czech expatriate Victor Kozeny) that intended to buy an oil company owned by the Azerbaijani government. Kozeny allegedly paid bribes to Azerbaijani government officials in an unsuccessful effort to purchase the state-owned company. A jury convicted Bourke on July 10, 2009 of, among other things, conspiring to violate the anti-bribery provisions of the FCPA.

The prosecution introduced evidence that Bourke was told of the bribes and therefore had actual knowledge of them. Because Bourke disputed this evidence, the prosecution also introduced evidence to support an argument that even if Bourke was not told of the bribes, the knowledge requirement was satisfied because he was aware of a high probability that there were bribes and had consciously avoided learning of them. Bourke argued throughout the case that the Government's evidence, at most, established that he was negligent in not looking more carefully into suspicious circumstances that surrounded the transaction. In the end, Bourke contended that he was erroneously convicted because there was a ''strong possibility'' that the ''conscious avoidance charge misled the jury into improperly believing that it could convict him on the basis that he had 'not tried hard enough to learn the truth.' ''[6]

In its briefs to the court, the Government argued that Bourke's failure to conduct due diligence, coupled with his awareness of a high probability that there were bribes, were sufficient to support a knowledge finding. The Government argued that the jury instructions in the case were appropriate because ''a reasonable juror could conclude that, although Bourke had an opportunity to conduct due diligence and discover the corruption, he chose not to, because he sought to consciously avoid learning the truth.''[7] The Government argued that a decision not to conduct due diligence supported a finding of conscious disregard because Bourke refrained from assigning his attorneys to conduct due diligence because he did not want his attorneys to learn of the bribery:

Bourke claims that the evidence reflecting the fact that Bourke failed to conduct due diligence was ''at most, evidence of negligence,'' showing that Bourke ''should have tried harder to learn the truth,'' rather than consciously avoided learning it. (Def. Mem. 12). This is . . . a complaint, first, that this is what the Government argued and, second, that the testimony from Bourke's lawyers invited this conclusion. In fact, the Government's argument was a different one: not that Bourke was negligent for failing to assign his lawyers with the task of due diligence but that he refrained from doing so, when he certainly had the wherewithal to do so, because he did not want them to learn the true facts of his corrupt investment.[8]

The Government concluded that Bourke was culpable because he ''at a minimum consciously and deliberately avoided confirming these facts [indicating corrupt payments were being made] by declining to have his attorneys conduct any due diligence.''[9]

In its opinion, the *Bourke* court made clear that the knowledge requirement cannot be satisfied merely by a failure to perform adequate due diligence. Rather, the court emphasized that Bourke could be found to have consciously avoided obtaining knowledge only because of evidence that ''he took steps to ensure that he did not acquire knowledge of'' the bribes.

The court quoted a passage from a Seventh Circuit opinion by Judge Posner rejecting a challenge to a so-called ''ostrich'' instruction, in a case involving a charge of aiding and abetting:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow the jury to convict upon a finding of negligence for crimes that require intent . . . . The criticism can be deflected by thinking carefully about just what it is that real ostriches do . . . . They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear things. They de-

[4] Section 30A(a)(3) of the Exchange Act. Similar requirements apply to other covered entities, such as U.S. citizens.

[5] *Id.*

[6] *Bourke*, 2009 U.S. Dist. LEXIS 95,223 at *40.

[7] Government's Memorandum of Law in Opposition to Defendant's Motion for a Judgment of Acquittal or a New Trial, *United States of America v. Bourke*, S2 05 CR.518 (SAS) at 39.

[8] *Id.* at 37 (footnote omitted).

[9] *Id.* at 36; *accord id.* at 38 n.4 (stating that Bourke was culpable because he ''didn't even hire a lawyer at that point or send anybody to Switzerland to do any kind of due diligence'').

  CARE ISSN 1542-9563

liberately avoid acquiring unpleasant knowledge. *The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.*[10]

The *Bourke* court then observed that the Seventh Circuit's description was wholly consistent with the case against Bourke:

> As discussed, there is plenty of evidence that Bourke – rather than merely failing to conduct due diligence – had serious concerns that Kozeny was engaging in questionable practices but nevertheless *took steps to avoid learning about those practices* by declining to join the board of Oily Rock.[11]

Most tellingly, the court noted that instead of joining the board of Oily Rock (a company that Bourke very likely at least suspected was paying bribes), Bourke joined the boards of other, affiliated companies ''to enable [him] to participate in the venture without having direct access to knowledge about Oily Rock's transactions and without the possibility of being held civilly or criminally accountable should any . . . suspicions . . . turn out to be true.''[12] The *Bourke* court thus concluded that there was sufficient evidence for a jury to conclude that ''he knew of the high probability that the bribes were being paid *and* that he took steps to ensure that he did not acquire knowledge of that fact.''[13]

The *Bourke* court noted that there was no reason to believe that the jury improperly returned a guilty verdict on the basis of Bourke's negligence. The court explained that with regard to conscious avoidance, Bourke's jury instructions were that

> knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, *but* refrained from obtaining the final confirmation because he wanted to be able to deny knowledge. On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.[14]

The *Bourke* court explained that the prosecutors' evidence that other potential investors – who were exposed to the same sources of information as Bourke – conducted due diligence was relevant because it showed that these other sources were able to confirm their suspicions regarding the illegitimacy of the venture ''while Bourke willfully shielded himself from learning all the facts.''[15] This explanation further demonstrates that the court did not accept that Bourke's decision not to engage in due diligence, even in the face of suspicious circumstances, constituted conscious avoidance. Rather, it was the taking of affirmative steps to avoid knowledge that supported a finding of culpability.

As set forth below, the *Bourke* court's interpretation of ''conscious avoidance'' is supported by the text and legislative history of the FCPA. Mere failure to conduct appropriate due diligence does not satisfy the knowledge requirement.[16]

II. The Statutory Definition of ''Knowledge''

A. The Language of the Statute.

To evaluate the correctness of the *Bourke* court's analysis, it is necessary to go back to the language of the statute and its legislative history. For purposes of the anti-bribery provisions of the FCPA, the statute defines ''knowledge'' as:

> A. A person's state of mind is ''knowing'' with respect to conduct, a circumstance, or a result if –
>
> i. such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> ii. such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> B. When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[17]

B. The Legislative History.

This statutory definition of ''knowledge'' differs from that in the version enacted in 1977. The ''knowledge'' requirement in the 1977 Act was satisfied if the defendant engaged in the prohibited conduct while '' 'knowing or having reason to know' that all or a portion of the money or thing of value would be offered, given, or promised, directly or indirectly, to any foreign official'' for a prohibited purpose.

This ''reason to know'' requirement was viewed by many in the business community as so vague as to force companies to turn down legitimate business opportunities. Senator John Heinz (R-Pa.) expressed concern that the antibribery provisions created ''assertions of breadth of coverage which themselves are breathtaking and which would totally cripple U.S. corporate activities in certain countries, were the law aggressively enforced in that way.''[18]

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[10] *Bourke*, 2009 U.S. Dist. LEXIS 95,233 at *49-50 (S.D.N.Y. Oct. 13, 2009), *quoting United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (emphasis added). The Seventh Circuit noted that the ''ostrich'' instruction challenged in that case was based on *Jewel*, a case that is prominently cited in the FCPA's legislative history and that is discussed later in this article.

[11] *Id.* at *50-51(emphasis added).

[12] *Id.* at *46.

[13] *Id.* (emphasis in original).

[14] *Id.* at *52 (emphasis in original).

[15] *Id.* at *51.

[16] In its brief opposing Bourke's motion, the Government stated that the instructions on conscious avoidance ''accurately reflected the language of the FCPA itself.'' Government's Memorandum of Law in Opposition to Defendant's Motion for a Judgment of Acquittal or a New Trial at 32, *United States v. Bourke*, S2 05 518 (SAS) (S.D.N.Y. Aug. 31, 2009). As set forth in this article, the Government nonetheless improperly supported its argument by arguing that this language was proper because failure to conduct due diligence or any other inquiry was sufficient, in and of itself, to satisfy the knowledge requirement.

[17] Section 30A(f)(2) of the Exchange Act (issuers); *see also* 15 U.S.C. § 78dd-2(h)(3) (domestic concerns) and 15 U.S.C. § 78dd-3(f)(3) (persons other than issuers and domestic concerns).

[18] Sen. Heinz Reintroduces Proposal to Amend Foreign Corrupt Practices Act [Jan.-June] Sec. Reg. & L. Rep. (BNA) No. 7, at 318 (Feb. 15, 1985). The controversy over the knowledge standard is laid out in detail in Jeffrey P. Bialos and Gre-

In 1988, the House and the Senate passed bills that would addressed this concern by narrowing the basis of liability from the original ''reason to know'' standard. The Senate's bill proposed making it unlawful ''corruptly to direct or authorize, expressly or by a course of conduct'' a third party to make such payments. The Senate's bill did not define the meaning of ''course of conduct,'' but the proposal clearly was intended to narrow the potential scope of liability:

> *Modification of the ''Reason to Know'' Standard.* – The FCPA currently prohibits corporate payments to agents when a company knows or has ''reason to know'' that all or a portion of the payment will be passed on to a foreign government official. Secretary of Commerce Baldrige testified on June 10, 1986 that this provision causes real concern among corporate officials because ''they have no idea when they might be found to have 'reason to know' about a bribe paid by an agent without their authorization.'' Calman Cohen, vice president of the Emergency Committee for American Trade (ECAT), also testified that ''no provision of the FCPA has caused American business greater problems * * *'' because ''responsibility attaches under the 'reason to know' provision regardless of whether the U.S. business intends to have the third person make an improper payment.'' At that same June 10 hearing, Allen B. Green, representing the Public Contract Law Section of the American Bar Association, stated that
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> The ''effect of the uncertainty in application of the ''reason to know'' standard is that we of the Section cannot advise our clients that (inadvertent) conduct will be treated any less harshly than intentional bribery, which has the natural effect of discouraging international transactions.[19]

The Senate's Report favorably noted that Deputy Assistant Attorney General John Keeny of the Justice Department had stated at a June 10, 1986, hearing that ''the policy of the Department has been to prosecute only those cases where the evidence of awareness – whether direct or circumstantial – was so clear as to constitute actual knowledge of the bribe scheme.''[20] The Senate Report also noted that there was no evidence that the DOJ ever had prosecuted someone for an inadvertent violation. The Report states that the purpose of the change in law was to enshrine the actual enforcement policy of the DOJ into the statute itself by ''abolishing the 'reason to know' standard in favor of a more objective standard [that] would improve the clarity of the Act.''[21]

The Senate's Report contained fact patterns that shed light on the conduct that the Senate contemplated would satisfy the proposed statutory standard:

> The Committee intends that the term ''course of conduct'' used with the term ''authorize'' in section 104(b) should refer to those situations where a company, or any officer, director, employee or shareholder thereof, through its words or course of conduct, has directed or authorized that a corrupt payment be made. For example, a company's refusal or failure to respond to an agent's suggestion or request that a corrupt payment be made would violate this section, as would a company's continuing employment of an agent known to the company to have made corrupt payments in the preceding two years in violation of applicable U.S. laws or those of the country in question.
>
> On the other hand, the mere fact of doing business in a county where corrupt payments are common, or the employment of an agent with personol [sic] relationships with government officials in the country where the company seeks to do business, would not establish such a course of conduct. Similarly, the payment of a commission that is higher than customary would not by itself violate this section without other evidence that the increased amount of commission is to permit a corrupt payment to be made.[22]

The House took a somewhat different approach. In the bill proposed by the House, civil liability for bribery through an intermediary was premised on the defendant ''knowing or recklessly disregarding'' that all or a portion of the money paid to the intermediary would be made for a statutorily barred purpose:

> (2) a person meets the ''knowing'' standard for purposes of subsection (a)(3) if –
>
> (A) that person is aware or substantially certain, or
>
> (B) that person is aware of a high probability, which he or she consciously disregards in order to avoid awareness or substantial certainty, and does not have an actual belief to the contrary,
>
> that a third party will offer, pay, promise, or give anything of value to a foreign official, foreign political party or official thereof, or candidate for political office for purposes prohibited by subsection (a)(3);
>
> (3) a person meets the ''recklessly disregarding'' standard of subsection (a)(3) if that person is aware of a substantial risk that a third party will offer, pay, promise, or give anything of value to a foreign official, foreign political party or official thereof, or candidate for political office for purposes prohibited by subsection (a)(3), but disregards that risk; and (4) the term ''substantial risk'' means a risk that is of such a nature and degree that to disregard it constitutes a substantial deviation from the standard of care that a reasonable person would exercise in such a situation.[23]

In the end, Congress adopted a modified version of the House bill in conference that retained the ''knowing'' requirement, adopted the current FCPA's knowledge definition, and deleted any indication that liability could be based on mere negligence or even recklessness. The Conference Report states the following reasons for the changes and final language:

> The compromise bill adopts a modified version of the House bill regarding these provisions and encompasses the concepts of ''conscious disregard'' or ''willful blindness.'' See generally United States v. Bright, 517 F.2d 584 (2d Cir. 1975); H. Rept. No. 96-1396, 96th Cong., 1st Sess., 35 (1980). The Conferees intend that the requisite ''state of mind'' for this category of offense include a ''conscious purpose to avoid learning the truth.'' United States v. Jacobs, 475 F.2d 270, 277-88 (2d Cir. 1973). Thus, the ''knowing'' standard adopted covers both prohibited actions that are taken with ''actual knowledge'' of intended results as well as other actions that, while falling short of what the law terms ''positive knowledge,'' nevertheless evidence a con-

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gory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (1997) at 37-40.

[19] Report of the Committee on Banking, Housing and Urban Affairs, U.S. Senate, to accompany S. 1409, 100th Cong., 1st Sess., at 51-52 (1987).

[20] Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. On International Finance and Monetary Policy and the Subcomm. On Securities of the Senate Comm. On Banking Comm. Housing Affairs Comm., 99th Cong., 2d Sess. at 65 (1986).

[21] Report of the Committee on Banking, Housing and Urban Affairs, U.S. Senate, to accompany S. 1409, 100th Cong., 1st Sess., at 51-52 (1987).

[22] *Id.* at 52.

[23] Report Accompanying H.R. 3, House Committee on Energy and Commerce, 100th Cong., 1st Sess. at 16 (1987).

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scious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.

In clarifying the existing foreign anti-bribery standard of liability under the Act as passed in 1977, the Conferees agreed that ''simple negligence'' or ''mere foolishness'' should not be the basis for liability. However, the Conferees also agreed that the so-called ''head-in-the-sand'' problem – variously described in the pertinent authorities as ''conscious disregard,'' ''willful blindness'' or ''deliberate ignorance'' – should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other ''signaling device'' that should reasonably alert them of the ''high probability'' of an FCPA violation.[24]

Based upon the language of the law and its legislative history, the intent of Congress is:

- Actual knowledge satisfies the requirements of the act, no matter how the defendant obtained that knowledge.
- In the absence of actual knowledge, knowledge of a ''high probability'' of a payment made for corrupt purposes can still suffice, *but only if*:
- The defendant took steps to ''avoid awareness or substantial certainty'' *of finding out about a potential corrupt payment*; and the defendant did not have an actual belief to the contrary.
- A negligent failure to gain actual knowledge does not suffice, as shown by excerpt from the Conference Report quoted above.
- Merely having ''reason to know'' of the bribery does not suffice, as demonstrated by Congress's deliberate repeal of this requirement when arriving at the current language.
- A reckless failure to obtain actual knowledge does not suffice, as shown by the deletion of the ''reckless disregard'' standard from the bill proposed by the House.
- An awareness of a high probability of bribery, even if it is so obvious that it could be characterized as rising to the level of a ''substantial certainty,'' does not suffice unless the defendant ''deliberately'' ignores the information with a ''conscious purpose to avoid learning the truth,'' as shown by discussion in the Conference Report.
- Whether the defendant ignored the information with a ''conscious purpose to avoid learning the truth'' is not to be determined by what a ''reasonable'' person would have done, as shown by the rejection of the House's proposal that a knowledge could be found where a person engaged in ''a substantial deviation from the standard of care that a reasonable person would exercise in such a situation.'' Rather, the determination should be based upon the actual reason why the person avoided the knowledge.

In short, while Congress adopted language covering situations that fall short of actual knowledge, Congress did so only in the limited circumstances where the party had something very close to actual knowledge – *i.e.*, *both* awareness of a ''high probability'' that a corrupt payment would be made *and* a ''deliberate'' decision to avoid gaining information in a conscious effort to avoid learning the truth. Neither negligence nor recklessness (even if accompanied by substantial certainty) satisfies this standard. Only deliberate effort *designed to avoid finding out about the likelihood of a corrupt payment* satisfies the standard.

C. Case Law Cited In Legislative History.

1. Legislative History Case Law. This statement of congressional intent is deliberate and supported by three cases that the conferees deliberately singled out in the legislative history as the basis for the conscious avoidance standard. As the Conference Report states:

Federal case law has discussed the carefully-drawn elements that comprise the ''head-in-the-sand'' state of mind in other contexts. The Conferees agree with the reasoning found in such decisions as *United States v. Jewell*, 475 F.2d 287 (2d Cir. 532 F.2d 679 (9th Cir. 1976): *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); *United States v. Jacobs*, 470 F.2d 270, 287 n.37 (2d Cir.), *cert. denied sub nom.* Lavelle *v. United States*, 414 U.S. 821 (1973). See also H. Rept. No. 96-1396, 96th Cong., 1st Sess. 35 (1980). The knowledge requirement is not equivalent to ''recklessness.'' It requires an awareness of a high probability of the existence of the circumstance. As the court stated in the *Jacobs* case:

''Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise have been obvious to him.

''Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed they were not stolen.... 475 F.2d 287 n.37 (emphasis added [by Congress]).[25]

This interpretation is also supported by the Conference Report's summary of the existing law:

Accordingly, the Conferees intend that the knowledge requirement reflect existing law, including provision for cases of deliberate ignorance. In such cases, knowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief. The inference cannot be overcome by the defendant's ''deliberate avoidance of knowledge'' .... As such, it covers any instance where ''any reasonable person would have realized'' the existence of the circumstances or result and the defendant has ''consciously chose[n] not to ask about what he had 'reason to believe' he would discover.''[26]

In short, absent actual knowledge, a defendant can be treated as having ''knowledge'' of a circumstance only if the defendant is aware of a high probability of the circumstance and has ''a conscious purpose to avoid learning the truth.'' Emphasizing this key point, the conferees employed italics to underscore that the defendant must have a subjective desire ''to avoid learning the truth.''

The opinion in *United States v. Jacobs*, which is prominently cited in the legislative history of the 1988 amendments, supports this reading. In *Jacobs*, the government had charged defendants with, among other things, knowingly dealing in stolen securities. The jury

[24] H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. H2115, at 919-20 (1988), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf.

[25] *Id.* at 920.

[26] *Id.* at 921 (citations omitted).

convicted the defendants based on the following instructions:

> Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant. However, it is not necessary that the government prove to a certainty that a defendant knew the bills were stolen. Such knowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant actually believed that the bills were not stolen.
>
> Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him.
>
> Thus if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen.[27]

The defendants objected to the last sentence of the first paragraph. The court of appeals noted that this sentence was ''a good definition'' that was based on the American Law Institute's Model Penal Code, yet still found that the sentence was not appropriate language for a charge. As the court noted, this instruction was intended ''to reach situations where the actor consciously shuts his eyes to avoid knowing whether or not he is committing unlawful acts.''[28] The court noted that it would be ''more useful'' for a jury instruction to reflect the intent behind the Model Penal Code.[29] The court of appeals only upheld the charge because the lower court had ''emphasized the elements of deliberate closing of the eyes to what otherwise would have been obvious'' and the requirement of a ''conscious purpose to avoid learning the truth.''[30] Thus, the instructions only could be upheld because the lower court had instructed the jury to take into account the reason why the defendant had failed to inquire.

Additional support is provided by the opinion in *United States v. Jewell*, also prominently cited in the legislative history. *Jewell* involved the knowing possession of a controlled substance. In addition to repeating the articulation of the willful blindness standard set forth in *Jacobs* (which *Jewell* approvingly quotes) and noting that the standard is both ''essential'' and ''found throughout the criminal law *Jewell* also sets forth a history of the willful blindness standard.''[31] The court quotes Professor Glanville Williams, whom it characterizes as a ''leading commentator,'' in providing the following summary of the standard:

> The rule that [willful] blindness is equivalent to knowledge is essential, and is found throughout the criminal law. . . . A court can properly find [willful] blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he [realized] its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is [willful] blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of [willful] blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.[32]

Finally, *United States v. Bright*, the third case prominently discussed in the Conference Report, reinforces the same points by highlighting the intended distinction between not knowing a fact and a reckless failure to know a fact. The issue of knowledge in Bright's appeal of his conviction of the knowing possession of stolen mail was whether the jury was properly charged when given the following instruction:

> You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen, but with a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the fact which would establish the stolen character of the checks.[33]

The court of appeals observed that the challenged charge ''was in no way balanced by an instruction that if the jury nevertheless found that the 'defendant actually believed that the bills were not stolen' they should acquit.''[34] Amplifying the problem was the revised instruction that the district court gave when the jury sought clarification. In the revised instruction, the jury was charged that:

> You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen *or* were [sic] a *conscious effort to avoid learning the truth*, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks.''[35]

This revised instruction improperly summarized the knowledge requirement. As the court of appeals noted, the rephrased jury instruction stated that *either* ''reckless disregard'' *or* a conscious effort to avoid learning the truth would be enough.[36] The court of appeals stated that ''the use of 'and' rather than 'or' in future charges on this issue''[37] was needed because it is not enough just to show carelessness in checking out the facts. As the court noted, to find knowledge, ''reckless disregard *must be coupled with* a conscious purpose to avoid learning the truth,''[38] because a ''negligent or a foolish person is not a criminal when criminal intent is an ingredient.''[39]

This reversal demonstrates the important distinction between recklessness and willful blindness. Recklessness is not enough, in and of itself; if it were, the court of appeals could have sustained the jury charge. Only the combination of recklessness and ''a conscious effort to avoid learning the truth'' satisfies the knowledge requirement.

2. Import of the Cases Cited in the Legislative History. The key point of the three opinions is that reckless disregard of the facts is insufficient to support a finding of knowledge. As the *Jacobs* court noted, there must be

[27] 475 F.2d at 287 n.37.
[28] *Id.* at 287.
[29] *Id.*
[30] *Id.*
[31] 532 F.2d. 697, 700 (9th Cir. 1976) (*en banc*).
[32] *Id.*
[33] 517 F.2d at 588.
[34] *Id.*
[35] *Id.* (emphasis added).
[36] *Id.*
[37] 517 at 588 n.2.
[38] *Id.* at 587 (emphasis added). The Conference Report refers to other cases, although less prominently than *Jacobs*, *Jewell*, and *Bright*. These other cases are consistent with the analysis of *Jacobs, Jewell,* and *Bright. See* Conf. Report, *supra* note 25, at 920-21.
[39] *Id.* at 587.

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more than ''recklessness''; knowledge also requires ''conscious'' disregard with the aim of avoiding the truth. Moreover, as the *Jewell* court observed, both prongs are necessary, for otherwise the ''doctrine of willful blindness [is] indistinguishable from the civil doctrine of negligence in not obtaining knowledge.''

The conferees' citation to these cases is no accident. The entire reason why Congress was looking at this issue, after all, was to address concerns with the ''reason to know'' standard set forth in the version of the FCPA enacted in 1977. That inadvertent culpability existed under the ''reason to know'' standard. By prominently citing these three cases in the Conference Report, Congress emphasized that knowledge should be found in the absence of actual knowledge only if the defendant made a conscious effort to avoid learning the truth.

III. Enforcement of the Knowledge Standard

A. The Enforcement Mentality.

As set forth above, the Government argued in its briefs to the *Bourke* court that, coupled with Bourke's awareness of a high probability that there was bribery, the simple failure to conduct due diligence, without more, was sufficient to support a knowledge finding. This argument is consistent with the position that the Government has taken elsewhere. The DOJ also laid out a similar view of the statute in *United States v. Green*, where it proposed that the court issue the following instructions:

> The element of knowledge may also be satisfied if you find that the defendants deliberately closed their eyes to what otherwise would have been obvious to them. When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and then fails to take action to determine whether it is true or not.[40]

The formulation at the end of the proposed instruction is key. The proposed instruction ignores the distinction, so critical to the court cases cited by Congress, between taking steps to avoid learning information and not taking steps that might have resulted in the defendant learning the information.

This requested jury instruction does not appear to have been an aberration. DOJ officials have stated, for at least twenty years, that the DOJ was not even paying lip service to the 1988 amendment eliminating the ''reason to know'' provision. For example, in 1999 the DOJ issued a brochure that recited the willful blindness standard without any mention of the requirement that the person have avoided inquiring into the facts for the purpose of avoiding knowledge of the corrupt payment.[41]

The instruction that DOJ proposed in *Green* appears to be consistent with the SEC's view of the statute as well. For example, in its 2007 complaint charging Baker Hughes Inc. with violations of Section 30(A) of the FCPA, the SEC repeatedly relied on a theory that the ''knowledge'' requirement was satisfied where the ''company failed to adequately assure itself that such payments were not being passed on'' to a foreign official,[42] a view that appears to be shared by many FCPA commentators as well.[43]

None of these formulations of the law can be squared with the *Bourke* court's treatment of the issue. The *Bourke* court did not adopt the claims of the Government that Bourke's conscious avoidance of knowledge could be supported by evidence indicating that Bourke ''decline[ed] to have his attorneys conduct any due diligence.'' The court instead concluded that conviction was proper because ''there is plenty of evidence that Bourke – *rather than merely failing to conduct due diligence* – had serious concerns that Kozeny was engaging in questionable practices but nevertheless took steps to avoid learning about those practice, such as by declining to join the board of Oily Rock'' and instead forming and joining the boards of affiliated companies.[44]

The plain language of the law, its legislative history, the court cases approvingly cited therein, and post-FCPA jurisprudence show that knowledge cannot exist based upon mere failure to conduct due diligence.

The *Bourke* court, in short, rejected the efforts of the DOJ and the SEC to bring the FCPA back to its original ''reason to know'' standard through claims that failure to conduct adequate due diligence or to conduct sufficient inquiry can support a knowledge finding. Bourke's conduct satisfied the knowledge standard not because he had failed to conduct adequate due diligence, but rather because he had taken *active steps* to avoid the acquisition of knowledge.

[40] *United States v. Green*, CR No. 08-59(B)-GW (for trial, Aug. 18, 2009), Proposed Instruction 31.

[41] *See* Departments of Justice and Commerce: ''Foreign Corrupt Practices Act Antibribery Provisions'' § 15:5 (1999 update), *reprinted in* Thomson West, 1 FCPA Reporter ch. 15 (2007).

[42] *SEC v. Baker Hughes Inc. and Roy Fearnley*, Complaint H-07-1408 (Apr. 26, 2007) at ¶ 7. This formulation was repeated numerous times. *See, e.g., id.* ¶ 6 (alleging a section 30(A) violation for an Angolan official where the company ''failed to make an adequate inquiry''); *id.* (same for Nigeria, where ''the company failed to adequately assure itself that such payments were not being passed on, in part, to Nigerian Customs officials); *id.* (same for agents who worked in Kazakhstan, Russia, and Uzbekistan ''under circumstances in which the company failed to determine whether such payments were, in part, to be funneled to government officials in violation of the FCPA'').

[43] The view that failure to conduct sufficient inquiry, for any reason, is enough to give knowledge appears not only to be the assumption of the DOJ and the SEC, but also of most commentators on the Act. Most writers recite the ''willful blindness'' or ''head in the sand'' language of the FCPA, provide a list of red flags, and imply – or actually state – that failure to follow up on red flags will be treated as knowledge, regardless of the reason why the person did not inquire. *See, e.g.*, Lillian V. Blageff, Guide to the Foreign Corrupt Practices Act at § 1:12 (stating that ''constructive knowledge will be imputed where there is evidence of 'willful ignorance' or 'conscious disregard,' '' regardless of the reason why the person failed to inquire), *reprinted in* Thomson West, 1 FCPA Reporter ch. 1 (2007); Zarin, *supra* note 42, at 4-32 (same).

[44] 2009 U.S. Dist. LEXIS 95,233 at *50 (emphasis added).

The view that knowledge exists when there are red flags plus the failure of the company to ''adequately assure itself'' is conceptually no different from saying that the company failed to take action where there was ''reason to know'' that a corrupt payment would occur. The *Bourke* court confirms that this view, consistently expressed by the DOJ and the SEC, is not the law.

IV. Conclusion

The plain language of the law, its legislative history, the court cases approvingly cited therein, and post-FCPA jurisprudence show that knowledge cannot exist based upon mere failure to conduct due diligence. Instead, there has to be culpability based on both indifference to a high probability of a payment occurring and a conscious decision to avoid inquiry for the express purpose of finding out information showing that a corrupt payment would be made. There is ample support for the *Bourke* court's instruction to the jury that, absent actual knowledge of bribes to government officials, Bourke could be liable for conspiring to violate the anti-bribery provisions of the FCPA only if he refrained from obtaining final confirmation for the reason that he wanted to be able to deny knowledge. Insufficient – or even nonexistent – due diligence alone does not meet this test.

Of course, a strong argument can be made that the practice of performing due diligence on prospective intermediaries is a prudent business practice. Failure to conduct such due diligence can undermine a company's compliance culture and pose substantial business, reputational, and legal risks. After the *Bourke* jury convicted Bourke, the jury foreman explained: ''It was Kozeny, it was Azerbaijan, it was a foreign country. We thought he definitely knew and definitely could have known. He's an investor. It's his job to know.''[45] But the court did not charge the jury that it was Bourke's job to know whether Kozeny was paying (or planned to pay) bribes. As explained above, the court charged the jury only that it was Bourke's duty not to take steps to avoid learning of bribes. The apparent failure of the jury foreman to appreciate this distinction is powerful evidence of the legal and reputational risks associated with not conducting due diligence.

Simply because performing due diligence on intermediaries will usually be prudent does not mean that the due diligence is required by the FCPA. As the *Bourke* court correctly charged the jury, an awareness of a high probability that an intermediary is paying bribes can support a finding of ''knowledge'' only if the defendant took affirmative steps in order not to learn of the bribes.

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[45] D. Glovin, ''Bourke convicted of Bribery in Kozeny's Azerbaijan Oil Deal'' (Bloomberg July 11, 2009), *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aXO.vHLdvbcM.

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