

FCPA Prosecutions: Lessons Learned from *U.S. v. Green*

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United States v. Gerald and Patricia Green

The recent conviction of two prominent Hollywood film producers highlights the aggressive nature of the Department of Justice's recent prosecutorial tactics. On September 11, 2009, Gerald and Patricia Green were convicted at trial on charges of bribery and money laundering in furtherance of winning various contracts with the Tourism Authority of Thailand (TAT). The Greens, owners of Film Festival Management, Inc., a film company based in Los Angeles, were found to have developed a sophisticated bribery scheme in which they arranged payments to the then-head of the TAT, Juthamas Siriwan, in exchange for contracts to manage and operate Thailand's annual "Bangkok International Film Festival," along with three other tourism-related contracts.

The Greens were charged with conspiring to violate the Foreign Corrupt Practices Act (FCPA), violating the FCPA, and violating the money laundering laws of the United States. Gerald Green was individually charged with obstruction of justice, and Patricia Green was individually charged with filing a false federal income tax return. According to the indictment, the Greens paid approximately \$1.8 million to Siriwan between 2002 and 2006 in exchange for more than \$14 million worth of contracts.

Trial evidence revealed that the Greens used various business entities, some with fake names, to conceal their profits. The evidence also showed that the Greens disguised the bribes as "sales commissions" in their books and records, and obscured the payment of the bribes by sending them through bank accounts held by both Siriwan's daughter and friend. Following the Greens' convictions, the Government sought a life sentence for Gerald Green in a pre-sentence filing submitted to the court on December 14, 2009.¹ Sentencing is currently scheduled for January 21, 2010.

FCPA Enforcement Trends

Though this case was the first of its kind in the entertainment industry, it represents an important bellwether in FCPA prosecutions generally. For one, it is yet another instance of the Government's targeting of individuals, as opposed to corporations, for FCPA prosecutions. Recent examples of this trend include the August 2009 conviction of former Louisiana Congressman William Jefferson for conspiracy to solicit bribes and the July 2009 conviction of handbag manufacturer Frederic Bourke for conspiracy to violate the FCPA and the Travel Act. Further, in April 2009, in the biggest multi-party indictment of individuals yet under the FCPA, six former executives of Control Components Inc., a California-based valve company, were charged in connection with a conspiracy to secure contracts by paying bribes to

foreign officials and employees. The majority of the alleged bribes were made to officials of China, Korea, Malaysia, and the United Arab Emirates.

The Greens' case also exemplifies the Government's continued use of vigorous investigative and prosecutorial techniques in building its FCPA cases. As Jenner & Block noted last year, enforcement officials have stated publicly that they are taking more affirmative steps than ever to identify and prosecute FCPA cases without relying solely on voluntary disclosures.² The Greens' case confirms that the Department of Justice will investigate FCPA cases aggressively. For example, court filings reveal that the Greens' bribery scheme came to the attention of the Government by way of an unidentified source. Based on the information provided, the Government not only spent months reviewing the Greens' financial records and business dealings, but also solicited the Greens' bookkeeper to act as an informant. The bookkeeper provided the Government with key statements and documents that were admitted against the Greens at trial. These tactics signal the Department of Justice's strong commitment to FCPA investigations.

Similar prosecutorial diligence was evident in the trial of Frederic Bourke last summer. Bourke had been involved in a business venture with financier Viktor A. Kozeny, which was designed to induce the government of Azerbaijan to privatize its state-owned oil company, SOCAR. According to the Department of Justice, Bourke invested \$8 million of his own money with Kozeny, who allegedly then paid several hundred million dollars in stock, cash, and gifts to various Azeri government officials, including the president of Azerbaijan, Heydar Aliyev.³ Although it acknowledged that Bourke did not personally make the illegal bribe payments, the Government claimed that Bourke met the FCPA's "knowledge" requirement because he was aware of the "high probability of the existence" of wrongdoing. Bourke's case represented the first time the Government relied at trial on this so-called "willful blindness" theory,⁴ under which a defendant's deliberate ignorance of illegal activity satisfies the FCPA's *mens rea* element. Bourke's case, much like the Greens', makes clear that the Department of Justice is paying increased attention to the prosecution of FCPA cases and deploying greater resources, as well as aggressive legal theories, as part of that effort.

Another important aspect of the Greens' case involves the international collaboration of law enforcement agencies. In making its case, the Government utilized evidence that was gathered by Thailand's Department of Special Investigation. Similarly, just last year, the Government worked with German authorities to collect a \$1.6 billion settlement from Siemens AG.⁵ Thus, those doing business overseas must be aware that the Department of Justice's investigative reach is increasingly broad.

Finally, as mentioned above, Gerald Green was individually charged with obstruction of justice. Though the jury deadlocked on this count, the Government recently has included various non-FCPA charges, of which obstruction of justice is a leading example, in its FCPA prosecutions. Other common non-FCPA charges include false statements, as in the Bourke case.⁶ These supplemental charges can be particularly worrisome for defendants because the penalties often exceed the five-year maximum for an FCPA violation. The statutory maximum penalty for obstruction of justice, for example, is twenty years imprisonment.⁷ The Government also charged one of the

defendants in the Control Components' case, Rose Carson, with obstruction of justice for destroying documents in connection with the company's 2007 internal investigation. Supplemental charges of this nature, which may present the possibility of lengthy prison terms, indicate the degree to which the government is serious about combating the bribery of foreign officials. Given the current prosecutorial climate, the importance of establishing an effective FCPA compliance program has never been greater.

FCPA Compliance

Basic elements of an effective FCPA compliance program include: 1) a written FCPA corporate policy; training and annual certifications of compliance by relevant personnel; 2) diligent and accurate recordkeeping; 3) ongoing monitoring of compliance, including internal audits and at times independent evaluations; 4) careful screening of any third-party agents or others that deal with foreign governments or their officials on the company's behalf; 5) internal investigatory work where there is evidence that a violation may have occurred; and 6) rigorous remediation in the event of any actual violations. Of course, where the lead members of a small business are themselves leading the illicit conduct, as in the case of the Greens, any protections of a compliance program are by definition overridden. In other situations, however, including larger and more complex companies, having a rigorous compliance program is critical to preventing, detecting, and correcting this type of conduct, regardless of the level of personnel that might be involved.

Though the mere establishment of an FCPA compliance program does not immunize a company from liability, it has been shown that those with a strong program in place typically are dealt less severe penalties. By establishing a compliance program, a company not only shields itself from the harshest penalties, but it also protects itself by mitigating the illegal actions of those who are working on the company's behalf. In today's global business climate, it is exceedingly difficult to monitor the actions of every officer, subsidiary, and employee. A thorough compliance program not only helps cultivate a corporate culture where bribery is visibly discouraged, it also provides a "rapid-response" mechanism when wrongdoing takes place.

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¹ See Government's Resp. and Objections to Pre-Sentencing Report as to Defendant Gerald Green 6 (Dec. 14, 2009).

² Joseph P. Covington of Jenner & Block et al., *Doing Business Under the FCPA*, March 2009 at 2.

³ Jenner & Block, Client Advisory: *U.S. v. Bourke FCPA Prosecution Highlights Dangers of Turning a Blind Eye to Red Flags*, July 17, 2009 at 1.

⁴ *Id.* at 2.

⁵ Department of Justice Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, Dec. 15, 2008.

⁶ In addition to the FCPA charges, Bourke was convicted of making false statements to the FBI. See Jenner & Block, Client Advisory: *U.S. v. Bourke FCPA Prosecution Highlights Dangers of Turning a Blind Eye to Red Flags*, July 17, 2009, at 1.

⁷ 18 U.S.C. § 1519.