

JUST ANTI-CORRUPTION

SBM Offshore CEO's admission of 'willful blindness' unusual, lawyers say

Kelly Swanson, 21 November 2017



A former SBM Offshore CEO, Anthony Mace, has admitted to deliberately turning a blind eye to possible bribe payments he authorised. Defence lawyers say that admission is unusual and noteworthy.

Mace, a UK citizen who headed the Netherlands-based offshore oil and gas services conglomerate from 2008 to 2011, pleaded guilty in federal court in Houston on 9 November to conspiring to violate the Foreign Corrupt Practices Act. According to the plea agreement, Mace admits he “joined the conspiracy by continuing to make payments that furthered the bribery scheme and deliberately avoided learning that certain payments, including payments [he] authorized and approved, were in fact bribes paid to foreign officials.”

The bribes were paid to officials at Brazil's state-controlled oil company, *Petróleo Brasileiro SA (Petrobras)*; Angola's state-owned oil company, *Sociedade Nacional de Combustíveis de Angola (Sonangol)*; and Equatorial Guinea's state-owned oil company, *Petroléos de Guinea Ecuatorial (GEPetrol)*. According to the plea agreement, SBM Offshore arranged to pay these bribes before Mace was appointed CEO, but Mace purposefully avoided learning to whom the payments were going.

Lawyers say Mace's plea deal is novel. “The Anthony Mace settlement is unusual in that it alleges the willful blindness standard in the plea agreement,” said John Chesley, a partner with *Gibson Dunn & Crutcher*. “Usually, it is used by the prosecution as an alternate theory only in cases that go to a jury.”

The willful blindness standard means that individuals can be found liable for violating the FCPA even if they do not have direct knowledge of a bribe. The government can establish liability if an individual is aware of a high probability of a bribe and makes a deliberate decision to avoid learning the nature of the payment.

“In Anthony Mace's case, he admitted to deliberately avoiding learning the truth about certain bribes and their recipients,” former DOJ FCPA unit prosecutor Jason Jones at *King & Spalding* said. “While proving the facts necessary to establish deliberate ignorance can be challenging at trial, the defendant here admitted to those facts under oath and before a federal judge.”

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Lawyers told GIR Just Anti-Corruption that the only other foreign bribery prosecution they are aware of that used the willful blindness standard was against Frederic Bourke, co-founder of luxury handbag-maker Dooney & Bourke.

After a federal jury trial in 2009, Bourke was found guilty of violating the FCPA for his participation in a scheme to bribe Azerbaijani officials through an intermediary, Viktor Kozeny, who is known as the “pirate of Prague” for his controversial purchases of privatisation vouchers for state-owned companies in Czechoslovakia following the fall of the Soviet Union. Prosecutors said that Bourke should have known the payments were potentially bribes because of past allegations against Kozeny for fraud.

Kozeny has denied wrongdoing, and in 2012 the Privy Council in London denied a US bid to extradite him to face FCPA charges in New York.

Bourke appealed his conviction in 2010, arguing the court improperly instructed the jury to consider the “deliberate avoidance” or “willful blindness” standard.

Notably, Judge Shira Scheindlin said during Bourke’s sentencing, “After years of supervising this case, it’s still not entirely clear to me whether Mr Bourke is a victim or a crook or a little bit of both.”

Bourke lost his appeal and a subsequent request for a new trial.

The Mace settlement shows that executives cannot avoid FCPA prosecution by closing their eyes to evidence of criminal bribery within their companies, lawyers say.

“It is a stark example that intentionally ignoring red flags is an FCPA violation. You cannot bury your head in the sand. If facts are put before you that strongly suggest a bribe is being paid, you can’t ignore them,” said Laura Perkins, a partner at Hughes Hubbard & Reed and a former assistant chief supervising the FCPA unit in the criminal division’s fraud section.

The DOJ has ramped up its efforts to prosecute individuals after receiving criticism for settling with companies over large sums of money and then denying to prosecute the individuals involved.

Alongside Mace, another SBM Offshore executive, Robert Zubiate, pleaded guilty to FCPA violations in Brazil. Meanwhile, The DOJ obtained guilty pleas from four individuals related to the Rolls-Royce bribery scheme.

Perkins said she does not believe the DOJ’s recent prosecutions of individuals demonstrates any signs of internal change within the department. Rather, she said these prosecutions may be a result of increased international cooperation.

“The increase in charges against individuals may be a factor of increased international cooperation, which makes it easier to get the evidence DOJ needs to prosecute individuals. For example, bank records are especially helpful in proving FCPA violations and without international cooperation, it can be extremely slow, or even impossible, to get those records,” Perkins said.