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Miller & Chevalier's Tillen on Human Vice, FCPA, China, Bourke

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James Tillen has his multiple entry visas.

He has had all his shots.

And he's ready at a moment's notice to hop a cab to Washington's Dulles Airport.

And to fly to where the corruption is – Nigeria, China, Singapore, or Russia.

Tillen is a partner at Miller & Chevalier in Washington, D.C.

And he now is the coordinator of the firm's Foreign Corrupt Practices Act unit.

As a young lawyer, Tillen was drawn to the FCPA.

"I found that I was really interested in this area – and the ability to investigate human vice, to see the unseemly side of society, and read e-mails about suitcases full of cash being delivered to an official," Tillen told *Corporate Crime Reporter* in an interview last week. "It's just fascinating. And I love doing those investigations."

And given that corruption isn't going anywhere, FCPA practice might be recession proof.

"The practice is based on human vice," Tillen said. "It's very stable. And it will never go away."

Tillen's practice is 100 percent FCPA and almost 100 percent corporate clients.

"It's almost all corporate right now," Tillen said. "But I think representing individuals is a real growth area. The last couple of years, the Department of Justice and the SEC have gone after individuals. And those individuals are more likely to fight, because they are facing jail time. I would love to represent more individuals, have trials, generate decisions that provide greater clarity for the practice as a whole."

"Many of the corporate cases are brought right to the government on a silver platter as voluntary disclosures," Tillen said. "That allows them to save their resources. And these voluntary disclosures give them great clues on where to go next."

“The Department will tell you that the voluntary disclosures are a sizeable portion of their investigations – but not the majority. But judging by the resolutions, voluntary disclosures would appear to be the majority. I’m wondering how they generate their statistics. Look at a case like CCI – Control Components Inc. – that was a voluntary disclosure. The Department also went after eight of their executives. Are they counting those eight individuals as not voluntary disclosures? They only came to their attention because of the corporate voluntary disclosure.”

“So, it depends on how you cut the numbers. The Department is certainly doing a lot on its own. But much of what they do is the product of voluntary disclosures.”

Tillen said that there have been fourteen individual cases so far this year – six pleas with the Department, four settlements with the SEC – and four cases taken to trial – all resulting in guilty verdicts.

The most recent – and perhaps the most controversial – was a guilty verdict against handbag millionaire Frederic Bourke.

Tillen tells the story.

“Frederic Bourke was an investor. He joined up with Victor Kozeny, whose nickname was the Pirate of Prague. Kozeny had a plan to corner the market on the privatization of the Azerbaijan state owned oil company. Kozeny’s plan involved bribing Azeri officials in order for them to secure the oil company when it was privatized.”

“The oil company was never privatized. But Kozeny recruited a number of investors, including Mr. Bourke and institutional investors like AIG.”

“One of the issues at trial was whether Mr. Bourke knew that his investments were being used to pay bribes to Azeri officials. There was a jury trial and he was convicted of conspiracy to violate the FCPA by the jury despite a vigorous defense. He was recently sentenced to a year in jail.”

“This was a very interesting case. It delved into the knowledge standard of the FCPA. The statute has a definition of knowledge that captures willful blindness or conscious avoidance. If you are aware of a high probability of bribes, you can be deemed to have violated the statute. The question at trial was whether Bourke met this knowledge standard.”

“Ultimately, the jury convicted him. There were jury instructions from the judge that provided in interesting discussion of conscious avoidance in the context of the FCPA.”

“After the trial, the jury foreman told a reporter: ‘We thought he knew. And he definitely should have known. He was an investor. It’s his job to know.’”

“‘Should have known’ is not the standard. Should have known is less than willful blindness. It is a negligence standard that does not create criminal liability.”

“The judge at the time of sentencing – Judge Shira Scheindlin – said ‘after years of supervising this case, it is still not entirely clear to me whether Mr. Bourke is a victim, or a crook, or a little bit of both.’”

As for China and Russia, Tillen says China is getting better on cracking down on domestic corruption – while Russia is backsliding.

“China definitely presents challenges to our clients,” Tillen says. “However, it is improving slightly as the Chinese government itself has cracked down on domestic corruption. Things are getting a little better there. Russia is where things are getting worse.”

“While China is cracking down on domestic corruption, it’s not cracking down on its companies that are doing business overseas. What is frustrating to American companies who are subject to the FCPA is that they will walk away from an oil or mining deal in an African or other country because of red flags – and a Chinese company will take their place because they don’t have the same FCPA concerns.”

“China is a doing a decent job of prosecuting domestic corruption, but doing a bad job on prosecuting their companies who are bribing overseas.”

If you take a voluntary disclosure to the Department, how does the Department decide whether to slam you with a plea, or allow you sign on with a deferred prosecution agreement – or to drop the case altogether?

“It’s how high up the activity went – whether it involves senior management, whether it was isolated at a foreign subsidiary, the size of the bribes, the business won because of the bribes, how long the activity lasted, whether it was systemic or isolated, whether your compliance program caught it or not – was it dumb luck that you found it, or did your internal controls catch it,” Tillen says. “Was there a whistleblower involved? If you are rushing in to the agencies to beat a whistleblower to the door, I don’t think you’ll get a lot of credit for that.”

[For a complete transcript of the Interview with James Tillen, see 23 *Corporate Crime Reporter* 45(11), November 23, 2009, [print edition only](#).]