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Anti-Corruption Compliance: How well are your overseas agents behaving?

By Conor Cronin

On August 15, 2013, Nazir Karigar was convicted of bribing an Indian official in order to facilitate the execution of a multi-million dollar contract under *Corruption of Foreign Public Officials Act* (CFPOA). He wasn't convicted in India, where the crime took place, but in Canada under Canadian law. Karigar acted as an agent for Crypto Metric, a Canadian company dealing with security technology. Karigar is scheduled to be sentenced in April.

Any Canadian company doing business overseas or even planning to do business overseas must be aware of the CFPOA and its provisions. Any person who bribes a public official, directly or indirectly in order to obtain an "advantage in the course of business" is guilty of an offence under the CFPOA. This means that even if an agent pays a bribe, the company can be charged for indirectly attempting to unlawfully influence a foreign public official.

The penalties for violating the CFPOA are severe and there is no limitation period. The maximum sentence is 14 years in prison. Any Canadian citizen, permanent resident, or corporation incorporated in Canada could be prosecuted regardless of where the act of corruption occurred and regardless of whether the act had any connection to Canada. Corruption perpetrated by a Canadian entity for whatever reason, wherever in the world can be prosecuted under the CFPOA.

There are several actions companies and their leaders can take to minimize risk and best ensure compliance with the CFPOA:

1.   Enact governance policies which discourage corruption, and make every agent, employee, contractor, and sub-contractor aware of these policies. Someone in a leadership role in your company should take ownership of your compliance program to show your employees, customers, and the public that you are serious about compliance.

2.   Include mechanisms for reporting corruption and encourage whistle blowing. Employees who witness or become aware of corruption in your company's practices should feel as though they can report straight to the President or CEO.

3.   In any agreement involving foreign entities or agents, carefully consider the language of clauses regarding non-tolerance for corruption and include covenants that specifically forbid a contractor from making unlawful payments or performing other corrupt acts.

4.   As part of any due diligence with a foreign entity, consider including a corruption risk assessment. Also, identify where your company is at risk of violating the CFPOA and evaluate whether bribery may be a matter of course/ordinary

business in the places you currently do business. Involve counsel to help ensure communications remain privileged.

Few cases have been tried under the CFPOA, but with the Karigar conviction and several guilty pleas by Canadian companies, obtained by the RCMP and crown prosecutors and over 30 open investigations, that trend is changing.

Still permitted is something called "facilitation payments". These are payments to officials that are customary in the country in which the payment is made. However, under Bill S-13, on a date to be fixed, this provision will be removed and any so-called "facilitation payments" will constitute a violation of the CFPOA.

Businesses must foster a culture whereby corruption of any kind is not tolerated. Employees, contractors and agents should be aware of specific company policies related to corruption, bribery, and the CFPOA. They should be encouraged to report any corruption they witness or become aware of. The CEO and board of directors should lead by example.

Note as well that many countries have their own anti-corruption laws. Canadian companies doing business in the US or the United Kingdom must comply with the *Foreign Corrupt Practices Act* and the *Bribery Act, 2010* as well as the CFPOA.

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