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2013-01-31

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Delivery Details

Date: January 8, 2019 at 3:15 p.m.

Delivered By: VERN KRISHNA

Client File: GAAR

Vern Krishna discusses the bribing of domestic or foreign government officials which is often the cost of doing business in certain industries and locations. The 2012 version of Transparency International's Corruption Perceptions Index, reveals that 70 per cent of all countries are sufficiently corrupt to receive a failing grade. However, necessary or not, bribery is a criminal offence with severe financial costs.

Bribery Of Foreign Officials

Date: January 31, 2013

 [Fine Line Between Bribery and Facilitation](#)

Fine line between bribery and facilitation

Vern Krishna

Bribing domestic or foreign government officials is often the cost of doing business in certain industries and locations. According to the 2012 version of Transparency International's Corruption Perceptions Index, which measures the perceived levels of public sector corruption in 176 countries, 70 per cent of them are sufficiently corrupt to receive a failing grade. However, necessary or not, bribery is a criminal offence with severe financial costs.

There is no clear demarcation between illegal bribes and legal facilitation payments, and one must exercise judgement or risk prosecution. Under the *Corruption of Foreign Public Officials Act*, a bribe is a payment of value to a foreign official to obtain, directly or indirectly, a business advantage by inducing the official to use his or her position to render a favourable decision. Items of value may include cash, computer equipment, medical supplies and vehicles.

A "foreign public official" is a person who holds a legislative, administrative or judicial position of a foreign state, or who performs public duties or functions for the state. Thus, for example, foreign officials include military officers in charge of procurement and defence contracts.

The American equivalent (the *Foreign Corrupt Practices Act*) requires publicly traded companies to maintain proper books and records and have a system of internal controls that provide a reasonable assurance that transactions are properly executed and recorded in accordance with generally accepted accounting principles.

Bribery may be illegal, but not all grease payments are bribes. Public servants in many third-world countries control the issuance of licences to produce, manufacture or distribute products that can confer substantial economic benefits. Civil servants and their political masters who supervise the granting of such licences often top up their income with payments for their favours. Reasonable payments to foreign officials for promoting products or facilitating the performance of contracts between the payer and the foreign government are not illegal.

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Vern Krishna, CGA, lawyer

Similarly, facilitation payments to get officials to perform acts of a “routine nature” within the scope of their public duties are also not bribes under the statute. Thus, one can pay foreign officials to perform routine functions that they are supposed to be performing anyway as part of their job. For example, one can bribe a foreign official to obtain a visa or work permit or pay a harbourmaster to offload a ship’s cargo in a port since that is what he is supposed to do—which is why captains of cargo vessels carry a tin box with lots of small bills in various currencies.

The distinction between acceptable facilitation payments and criminal bribery is crucial for corporations. Although a criminal bribe carries a maximum term of imprisonment of only five years (about two years with parole), the judge has complete discretion over the amount of any accompanying fine. As the construction industry in Quebec will discover, bribery can be expensive since such payments must be made with after-tax dollars. Bribes are not deductible as expenses, even if they are necessary and essential for the purposes of conducting business and there is no alternative but to pay if one is to secure the contract. The recipient must also declare the bribe as income and pay tax thereon. There is no limitation period and the Canada Revenue Agency can assess both the payer and the payee at any time.

There is no bright-line test as to what is a bribe. Each business must make its own decisions based on their judgment in the context of the particular circumstances and local culture. For example, a dinner gift of a bottle of single malt Scotch whiskey costing \$300 may be entirely appropriate for a senior official; a collector bottle with a value of \$128,000 (as recently released in China) may raise eyebrows and prosecutorial interest. The CRA does not provide guidelines for what constitutes a “reasonable payment” and businesses must exercise judgment, preferably with the benefit of legal counsel.

In contrast, and in the finest American regulatory tradition, the Securities and Exchange Commission and the Department of Justice have issued 120 pages of guidelines that are intended to assist businesses in distinguishing between proper and improper gifts, travel and entertainment expenses, and facilitation payments. For example, the guidelines say that entertaining a foreign official at dinner might be entirely acceptable, whereas spending \$10,000 on dinners, drinks and entertainment would probably not pass the test. Similarly, a trip to Paris for a foreign government official and his spouse might cross the line if the trip consisted primarily of touring and social activities in a chauffeur-driven vehicle.

Corporations going abroad to do business should consider the implications of the anti-bribery laws. To be sure, there are many countries in the world where it is impossible to do business without paying a bribe. However, necessity does not whitewash the offence and is not a defence to criminal prosecution and tax sanctions.

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