Doing Business in India Without Going to Jail

Some Happy Facts: India is a big and entrepreneurial country of vast potential. In 2008 it imported products and services from the U.S. valued at over US $28.2 billion.* The nationwide governmental and commercial language of India is English, and the country is full of business consultants, sales agents and distributors for American products.

Some Unhappy Facts: India is, according to one well-respected ranking, the 96th most corrupt country in the world.** The funding of Indian political campaigns in 2010 is predicted to involve election and re-election expenditures of over US $53 billion by candidates for government office, some of whom hope (even expect) to become beneficiaries of those expenditures.*** Until recently, the U.S. Foreign Corrupt Practices Act (FCPA) and the Indian Prevention of Corruption Act (PCA) have done little to stop what has been a way of business life in India since at least the end of the Raj.

How Does this Affect You? If you are an officer, director, or manager of a U.S. company (or an overseas affiliate of a U.S. company) that does business **in or with** India, here's a **short quiz** you may find interesting.

FCPA Quiz

Background Facts: You're a senior person at company Alpha, let's say the President. Last year, Alpha came up with an advanced line of medical devices, and you found a distributor in India to try to sell those devices to hospitals throughout India. To encourage your distributor to work hard in creating a market for Alpha's new products, you agreed to a special price discount on all first year shipments. Your Indian distributor proceeded to take a part of those price savings to offer commissions to managers, doctors, and lab personnel at the hospitals, including some state-owned ones, in exchange for recommending Alpha's products over those of your competitors. Unfortunately, a terminated employee of the distributor, mad at being fired, went to the nearest U.S. Consulate and reported the commission payments. Then, to compound your problem, last week your VP of International Sales mentioned over lunch that your Indian distributor has asked for reimbursement of 20,000 Indian Rupees in facilitation payments it made to expedite customs clearance of your products into India. Today, your CFO has asked how to convert U.S. dollars into Indian Rupees so she can reimburse the distributor's facilitation payments.

Question: Are you in trouble, and if so, what can you do about it? **Do you know?**

Answer: Yes, you're in trouble, and your distributor is as well. And if you reimburse the distributor's facilitation payments, you will compound your trouble. Here's why:

1. The FCPA prohibits payments to foreign governmental officials to obtain business or secure an improper advantage in the market. Many hospitals and clinics in India are government funded and their managers are "government officials." Consequently the payments of commissions to those managers of government-owned hospitals were bribes and a violation of the FCPA.

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2. The U.S. Department of Justice (DOJ) administers the anti-bribery provisions of the FCPA and takes the position that your company's legal responsibilities extend beyond your own employees to include the conduct of certain *third parties*, such as your sales reps, subcontractors, joint venture partners - **and even distributors**. No U.S. company, no matter how small, can ignore signs that its business partners, agents or distributors may be violating the FCPA. In the eyes of the DOJ, your company cannot *put its head in the sand* when it comes to the activities of people (in this case, your distributor) who may seem far removed from your headquarters, but whom you have put in a position conducive to FCPA violations. An email to the DOJ from the U.S. Consulate in India where the ex-employee spilled the beans can start an investigation of your company that will seem never to end and that may lead to civil and criminal fines and jail terms for those who knew - or should have known - about the commission payments.

3. The reimbursement of your distributor's *facilitation payments* to Indian customs officials may fit under a narrow exception to the FCPA that allows for such payments to expedite routine governmental actions, but even if it does, it remains a clear violation of the PCA which prohibits "public servants" (the customs officials) from accepting a "gratification" as a motive or reward for performing an official act. The difference is that the FCPA focuses on *punishing the **payer** of a bribe*, while the PCA focuses on the *punishing the **receiver** of a bribe*, but **everybody** stands to lose in the scenario above, because your distributor who made the facilitation payment may well be charged with **abetting a bribe** under the PCA and also prosecuted.

4. With potential exposure under **both** the FCPA and the PCA, U.S. companies doing business *in or with* India, together with their *affiliates, third-party agents, contractors, partners and distributors* should not only know what the FCPA and the PCA **demand** of them, but also should take appropriate steps to educate their managers and employees about these two laws and what must be done *and not done* to avoid violating them. You too can stay out of jail if you know what you're doing.

For information about creating an effective **FCPA Compliance Program** for your company, please contact the authors of this e-Update at efoster@luce.com or jwbrooks@luce.com.

Sources.

* Office of U.S. Trade Representative.
** Transparency International 2009 - www.transparency.org.
*** Indian Business Standard, February 11, 2010.