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3 Lessons From Canada's First 'FCPA' Trial

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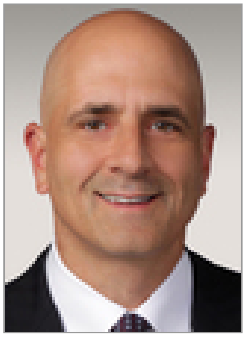

Steven Pelak

The frequency and scope of international law enforcement cooperation has increased markedly in recent years. Although such cooperation has slowly emerged for decades, the recent explosion of cooperation has been facilitated in large part by the expansion of instantaneous international communications, stationing abroad of FBI and other federal agents from various U.S. law enforcement agencies, and international consensus and cooperation in defining certain criminal conduct.

Now more than ever, if your company receives a knock on the door from U.S. investigators or regulators regarding alleged violations of the Foreign Corrupt Practices Act, the Arms Export Control Act, the International Emergency Economic Powers Act or another federal law touching on international sales, purchases or supplies, your company may also receive a visit from foreign investigators or regulators seeking to enforce their own anti-corruption, export control, trade sanctions, money laundering, environmental or other laws.

Such cross-border prosecutorial collaboration quietly surfaced during the Canadian government's recent prosecution of Nazir Karigar — the first individual ever convicted after trial under Canada's equivalent to the FCPA — the Corruption of Foreign Public Officials Act (CFPOA).

The Karigar case arose out of efforts by a U.S. high-tech security company's Canadian subsidiary (the "company") to secure a contract with Air India (a state-owned entity) for the supply of facial recognition software and related passenger security equipment. The company hired Karigar as its agent to guide it through Air India's government tender process, agreeing to pay him 30 percent of the contract's expected revenue stream.

Karigar allegedly orchestrated a conspiracy to offer a $200,000 bribe to an Air India executive and another $250,000 bribe to India's minister of civil aviation. Although Karigar apparently believed these bribes would give the company a leg up on the competition, the company's efforts to secure the Air India contract ultimately failed.

On Aug. 15, 2013, Ontario's Superior Court found after its first trial under the CFPOA that Karigar had conspired to offer bribes to foreign government officials in violation of the CFPOA and convicted him accordingly. Karigar now awaits sentencing and faces up to 14 years in prison.

Two items are of special note for any business with sales, suppliers, agents, distributors or representatives outside the United States: (1) how the matter came to light and (2) the role of international law enforcement cooperation in the matter.

Karigar's bribery scheme first came to light after the company's parent entity took legal action against Karigar in the United States to recover certain advanced funds. In an ill-conceived plan to retaliate, Karigar apparently sent an "anonymous" tip about the foreign bribery scheme to the U.S. Department of Justice's Fraud Section.

Using the alias of "Buddy," Karigar emailed the DOJ and asserted that he had information about U.S. citizens paying bribes to Air India officials. Upon receiving that tip, the U.S. law enforcement officials passed on the information to their Canadian counterparts. Unfortunately for Karigar, who apparently thought himself anonymous and free from the long arm of U.S. justice, Canadian prosecutors then charged and successfully prosecuted Karigar in Canada.

Among other instructive features of the Karigar case, three interrelated lessons are worth highlighting here:

- Secret wrongdoing among corporate actors is increasingly likely to see the light of day in the face of growing international cooperation among the world's law enforcement agencies. In the Karigar case, for example, U.S. prosecutors — without fanfare and without seeking "credit" — were more than happy to turn over information and evidence informally and rapidly to a trusted foreign nation. Companies should therefore presume that information or allegations learned by government investigators on one side of an international border — particularly the U.S.-Canadian border — will flow freely to the other side.

- The enforcement of anti-corruption laws is no longer just a "U.S. thing." For decades, the United States served as the world's lone ranger when it came to investigating and punishing the international bribery of foreign officials. Although Canada enacted the CFPOA in 1999, Canadian prosecutors pursued only one prosecution under that law prior to 2011. This lack of enforcement activity drew sharp criticism from the Organization for Economic Cooperation and Development, which issued a report expressing "significant concerns" over Canada's perceived lack of commitment to the OECD's anti-bribery convention. In response, Canada stepped up its enforcement efforts and enacted amendments that strengthened the CFPOA. The Karigar conviction is the most recent indication that Canada has joined the United States, Germany, the United Kingdom and other countries on the global anti-corruption enforcement bandwagon.

- Due to the growing number of government whistleblower phone numbers and email accounts around the globe, anonymous "tipsters" and "whistleblowers" can and do expose corporate wrongdoing across international borders. Accordingly, disgruntled former employees and third-party agents have more ways than ever to retaliate against companies by reporting alleged bribery to law enforcement authorities.

The commercially prudent bottom line for companies with any international business is clear. First, adopt and carry out a compliance program based on the principle of transparency — i.e., know your international partners, agents, major buyers and suppliers. Second, assume that information about international violations will find its way to regulators or law enforcement agencies whether in the United States or a foreign land.

As a result, unless compelling reasons to the contrary exist, prudent corporate actors generally should self-report voluntarily their actual or potential wrongdoing to regulatory and enforcement agencies before someone else decides to do so, or a bad actor seeks to use the information to leverage an advantage from the business.

U.S. regulatory and enforcement agencies have adopted policies lessening and occasionally foregoing entirely any ultimate penalty imposed on a party that self-reports violations. Those policies offering safe-harbor are commonly a business' best defense against "whistleblowers" such as Karigar.

--By Steven Pelak and Jason Prince, Holland & Hart LLP

Steven Pelak is a partner in Holland & Hart's Washington, D.C., office. Jason Prince is a partner in the firm's Boise, Idaho, office.