

Brother Can You Swap a Car? FCPA and Bribery Act Implications in the Barter Economy

While the economy has improved from the depths of the Bush Recession of 2008, things are not back where most businesses and governments would like them to be. One of the more interesting responses to the continuing economic doldrums that I have read about is the age old art of bartering. According to the International Reciprocal Trade Association (IRTA), the ongoing economic slump has encouraged companies to offset shrinking orders and ongoing skimpy credit from financial institutions to put excess products to use by bartering them. A recent article in the Financial Times (FT) by reporter Alicia Clegg, entitled “*The art of good bartering*”, further piqued my interest.

In her article, Clegg quoted Brian Petro, who has a blog entitled “Barterfanatic.com”, who said that bartering allows him continue operating his business through the exchange of goods. Additionally bartering is a way to overcome liquidity problems or by-pass currency restrictions. The IRTA says that bartering has increased substantially over the past four years or so in some of the following countries: the United States, Britain, the Netherlands, France, Italy, Spain, Portugal and “parts of Asia”.

The bartering system, as envisioned by the IRTA and others, has become quite a sophisticated system. Typically a smaller company will “barter their unsold goods and services through a barter exchange, selling to another exchange member in return for trade credits which can be used to buy something from another exchange member.” Larger businesses typically use a different model where they will barter slow moving stock with a trade barter company, who pays the company back in trade credits which the original entity will then use to purchase goods and services. Clegg reported that the barter exchange “typically charges buyer and seller a cash transaction fee of 5-6 percent.”

While the IRTA does have a Code of Ethics and Conduct for its members, it does not speak to anti-corruption or anti-bribery. While most people think that the biggest issue around bartering is tax, because both buyers and sellers need to assign market values to what they buy and sell in the process, there is also a Foreign Corrupt Practices Act (FCPA) and UK Bribery Act compliance issue involved, which revolves around these exchanges or other intermediaries who facilitate barter deals by providing the credits for goods or services received.

What might the relationship of these intermediaries be under the FCPA or Bribery Act? Let’s take the Bribery Act since that law clearly bans all bribery and corruption between private entities not just with foreign government officials as set forth in the FCPA. Under the Bribery Act, a company can be liable if someone who performs services on their behalf, like an employee or agent, pays a bribe specifically to get business, keep business, or gain a business advantage for the entity. It is not limited to agents, distributors, sales representatives and the like. The term in the Ministry of Justice’s Six Principles of Adequate Procedures is “associated persons” and an intermediary, such as a barter exchange or other similar entity, may well qualify as an associated person.

What if a barter exchange is based in a well-known money-laundering location? Think that might move up its risk profile? While the IRTA has on its website, that it is in “strategic partnership with the IRS Partnership Outreach” as a “collaborative effort to work with a major government group to educate business owners on reciprocal trade”, it does not take too much insight to see that other laws and regulations might be involved.

What are some of the questions you need to be asking from the compliance perspective if your business is going to engage in bartering? First, and foremost, is to know who you are doing business with and how you are doing business with them. If you are bartering through an exchange, you should perform due diligence on them as they may well be your agent under the FCPA and most probably an “associated person” under the Bribery Act. What compliance protocols do they have in place? Do you have any agreement with them that has FCPA or Bribery anti-corruption/anti-bribery terms and conditions? What rights do you have to protect your product after it has been exchanged?

Consider this “creatively structured” deal that Clegg wrote about. The automotive maker Kia struck an exchange with the UK bartering company Miroma, where Kia swapped some of its auto fleet with a publisher “in return for poster, cinema and press slots for Kia.” From the description in the FT article, it certainly sounded like Miroma acted as the agent for Kia in the series of transactions.

Just as my colleague Aaron Murphy wrote in his book “*Foreign Corrupt Practices Act - a Practical Resource for Managers and Executives*” about the FCPA issues that many retailers might face, the issues which companies engaging in bartering are in plain sight as well. However, just as those in retailing may not have looked closely and are now paying a high price to look, those companies which engage in bartering and who fail to look at the FCPA and Bribery Act as potential sources of liability should do so sooner rather than later.

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