LEGAL UPDATE

FOREIGN CORRUPTION RISK MITIGATION: THE IMPORTANCE OF RECENT US FCPA GUIDANCE TO CANADIAN COMPANIES

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Over the last year and a half, Canadian corporate culture has been undergoing significant change in response to new and vigorous enforcement of the *Corruption of Foreign Public Officials Act* (CFPOA) by the Royal Canadian Mounted Police (RCMP) and Crown prosecutors. The widely publicized guilty plea of Niko Resources Ltd. in June of last year and ongoing RCMP investigations into the activities of a number of other Canadian companies serve as stark warnings of the costs of non-compliance. With an additional 30 or so RCMP investigations underway, Canadian companies are moving quickly to implement and enforce specially designed anti-corruption policies and procedures as well as transactional risk-mitigation strategies.

On November 14, 2012, these efforts received welcome assistance through the publication by the United States Department of Justice (DOJ) and the Securities Exchange Commission (SEC) of the 'Resources Guide to the Foreign Corrupt Practices Act'[1] (the Guide). At 120 pages, the Guide is a comprehensive collection of DOJ and SEC precedent and policy in respect of the Foreign Corrupt Practice Act (FCPA), complimented by hypothetical case studies as well as summaries of U.S. FCPA jurisprudence.

Although the Guide does not contain any surprises, it is a very helpful tool for Canadian companies with overseas operations. While they are different statutes that are enforced by different national regulators, in many respects the CFPOA and the FCPA mirror each other closely in substance. There has also to date been every indication, including numerous elements of the order issued by the Court reviewing the Niko Resources guilty plea (the Niko Order), that Canadian and US authorities work together closely in their anti-corruption enforcement efforts. For a further review of the Niko case and its implications for Canadian companies, see ***A Deeper Dive Into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd.*** at http://www.mccarthy.ca/article_detail.aspx?id=5640.

Notably, in the Niko case US precedents were referred to in determining appropriate penalties and the probation order very closely matched those used by US authorities in deferred prosecution and non-prosecution agreements under the FCPA. Accordingly, US developments can be an important consideration for Canadian companies trying to understand or anticipate developments under the CFPOA here in Canada. Of course, Canadian companies may also be directly subject to broad FCPA jurisdiction, including where they are listed in the United States or carry on certain business or transactions in or through the United States.

Towards this end, we note that the Guide addresses the following issues of particular relevance to Canadian companies with overseas operations:

[1] For a copy of the Guide, please visit http://www.justice.gov/criminal/fraud/fcpa/guidance/ or http://www.sec.gov/spotlight/fcpa.shtml.

1. **Effective Anti-Corruption Policies and Procedures:** The Niko Order made clear that Canadian regulators expect anti-corruption policies and procedures to be the product of company-specific risk assessments, i.e. that they be customized to a company's particular circumstances and corruption risk exposure rather than generic models. In this regard, the Guide serves as a useful compliment to the Niko Order, further elaborating on various components essential to effective anti-corruption policies and procedures. This includes, amongst other things, reassurance that appropriately designed policies and procedures will in part depend on the size and nature of the business. For further discussion of anti-corruption risk assessment, please see ***Anti-Corruption Compliance Message Received? Risk Assessment Is Your Next Step*** at http://www.mccarthy.ca/article_detail.aspx?id=5985.

2. **Corruption Due Diligence in M&A Transactions:** The risk of acquiring corruption liability through the acquisition of an entity with overseas operations has become a fundamental concern for companies considering expanding their operations through M&A activity. While the Guide reiterates that merger or acquisition does not purge anti-corruption liability, it also clarifies (i) that the DOJ and SEC will not have jurisdiction to prosecute pre-acquisition corrupt practices of a target where the target only became subject to the FCPA upon being acquired (i.e. that the acquisition of a target will not create liability where such liability did not previously exist), and (ii) that the DOJ and the SEC are unlikely to prosecute an acquirer for the pre-acquisition liability of a target where the acquirer made good faith, best efforts to diligence the target for corruption liability, even if ultimately unsuccessfully. For further discussion of anti-corruption due diligence in international acquisitions and financings, please see ***Overseas Financing and Acquisitions: The Increasing Importance of Anti-Corruption Due Diligence*** at http://www.mccarthy.ca/article_detail.aspx?id=5919.

3. **The Scope of Affirmative Defences:** the CFPOA and the FCPA share three identical or near identical affirmative defences. These are (i) where a payment is permitted or required under local law, (ii) where a payment relates to reasonable and *bona fide* business development expenditures, and (iii) facilitation payments for routine and non-discretionary government action. The Guide provides a number of valuable insights regarding the scope of these defences, including (i) that the local law defence will arise infrequently in practice as local laws rarely (if ever) permit corrupt payments, (ii) that trips that are primarily for personal entertainment purposes will typically not qualify as reasonable and *bona fide* business development expenses, and (iii) that the size of a purported facilitation payment will be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action.

4. **Gift Giving and Hospitality:** A common area of concern for companies operating in foreign countries and amidst foreign cultures and customs is the line between proper and improper gift giving and hospitality under applicable anti-corruption legislation. Helpfully, the Guide states that the DOJ and the SEC recognize that a small gift or token of gratitude is often an appropriate way for business people to display respect for each other, and that the hallmarks of appropriate gift-giving include (i) giving the gift openly and transparently, (ii) properly recording the gift in the giver's books and records, and (iii) giving the gift only to reflect esteem or gratitude. On the other hand, the Guide cautions that the larger or more extravagant the gift, the more likely it was given with an improper purpose.

5. **Extorted Payments:** One of the most difficult predicaments encountered by companies operating overseas occurs where a corrupt foreign official attempts to extort payments by threatening the company's operations or personnel. The Guide expresses sympathy for companies subject to such extortive efforts, stating that situations involving extortion or duress will not give rise to FCPA liability because a payment made in response to true extortionate demands cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business. That said, the DOJ and the SEC limit this exception to extortionate demands made under threat of physical harm and exclude demands merely involving economic coercion.

6. **When DOJ and SEC Decline to Enforce:** Deferred prosecution and non-prosecution agreements negotiated with DOJ and SEC typically involve significant compliance and remediation commitments and payment of monetary fines by individuals and companies in return for the DOJ and SEC agreeing to forgo further enforcement action. However, US authorities may also decline to bring any enforcement action without any commitments being undertaken by the subject individuals and companies. These declinations are not typically publicized but can provide useful insight to how regulators view potential violations of anti-corruption laws. The Guide provides a no-names summary of the factors taken into consideration in six cases where the SEC and DOJ declined to pursue any enforcement action against the companies involved.

Overall, the Guide will undoubtedly serve as a useful resource for both U.S. and Canadian companies grappling with the complexities of foreign corruption risk. As highlighted by the U.S. Chamber of Commerce in a letter to the DOJ and the SEC in anticipation of the Guide,[2] since anti-corruption compliance can unfortunately be a costly matter, any clarification of the scope and substance of anti-corruption law is appreciated insight.

That said, Canadian companies need to keep in mind that even though the CFPOA and the FCPA closely mirror one another in many respects, important differences between the statutes do exist and can significantly affect how potential non-compliance is addressed in each country. Furthermore, Canadian companies should note that the CFPOA is not enforced in a vacuum, and that various principles of related Canadian legal disciplines, including corporate law, criminal law, securities law and jurisdictional law, will also need to be taken into consideration when judging the full scope of the statute's application.

McCarthy Tétrault's International Trade & Investment Law Group specializes in compliance and enforcement matters related to anti-corruption laws and policies, economic sanctions and export controls and other laws governing the cross-border trade in goods, services and technology and foreign investment.

[2] Letter of the United States Chamber of Commerce to the U.S. Department of Justice and the U.S. Securities and Exchange Commission dated February 21, 2012.