A Primer for In-House Counsel

Corporate and Financial Crimes

Part 3 of 6

BRIBERY & CORRUPTION OFFENCES

Blakes

Introduction

In this six-part series on corporate and financial crimes, the Blakes Business Crimes, Investigations & Compliance group outlines basic principles of criminal and quasi-criminal law that may arise in the running of a business. Armed with insights from years of multidisciplinary knowledge and experience, our lawyers provide brief answers to questions that in-house counsel routinely ask relating to these issues.

If you would like more information or to discuss a specific issue, please contact any member of our Business Crimes, Investigations & Compliance group.

SERIES ON CORPORATE AND FINANCIAL CRIMES

1. Criminal Law 101

2. Criminal Fraud

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Preface

Corruption continues to be a significant risk for Canadian businesses with operations in Canada and abroad. This risk is amplified due to vigilant enforcement by Canadian authorities and recent legislative developments, both proposed and in force, that build on existing offences and seek to address previous difficulties associated with Canada's anti-corruption regime. Canada's efforts to fight domestic and foreign corruption are in step with other jurisdictions, including the United States and United Kingdom, which vigorously enforce their own anti-corruption laws on a global scale.

In consideration of the foregoing, the objectives of this Part are to provide an understanding of:

1. the law associated with bribery and corruption offences in Canada;
2. global enforcement trends;
3. compliance program requirements; and
4. the importance of anti-corruption due diligence in transactions.

To begin, it's important to understand the dichotomy of corruption legislation in Canada. Domestic bribery and corruption offences in Canada are set out in the *Criminal Code*,[1] while foreign bribery is regulated by the *Corruption of Foreign Public Officials Act*.[2] Companies with global operations may also be subject to a vast array of anti-bribery legislation, including the United Kingdom's *Bribery Act, 2010*[3],the American *Foreign Corrupt Practices Act*[4], and local laws under which they operate. Also, many Canadian companies that conduct business in the extractive industry must comply with additional reporting requirements set out in the *Extractive Sector Transparency Measures Act*.[5]

Penalties for conviction under any of the offences set out in this Part are significant and include possible jail time and substantial fines. In addition, penalties imposed by a judge are typically the "tip of the iceberg." Challenges faced by companies caught up in a corruption or bribery scandal include, but are not limited to: share price decreases, shareholder class actions, debarment, significant legal costs, loss of key personnel, and reputational damage.

Because of the global focus on preventing bribery and corruption domestically and abroad, it is crucial in-house counsel are familiar with bribery and corruption offences, how they can be prevented, and what resources are available to companies to ensure compliance.

1 RSC 1985, c C-46.
2 SC 1998, c 34 ("***CFPOA***").
3 2010 c 23 ("***Bribery Act***").
4 As amended, 15 USC §§ 78dd-1 ("***FCPA***").
5 SC 2014, c 39, s 376 ("***ESTMA***").

What Bribery and Corruption Offences Relate to Canadian Officials?

The *Criminal Code* contains a number of offences that criminalize the provision of benefits to Canadian government officials or employees by those who conduct business with the government. These offences, set out in sections 121 through 123 of the *Criminal Code*, are drafted broadly and catch the following types of misconduct related to improper payments to Canadian government officials:

- section 121(a) prohibits offering, giving, or receiving a benefit to or by a Federal or Provincial government official or employee that creates a *quid pro quo* arrangement;
- section 121(b) and (c) prohibit providing or receiving a benefit to or by a Federal or Provincial government official or employee, regardless of any *quid pro quo* arrangement;
- section 122 prohibits a "breach of trust" by a public official, which is defined much more broadly than a government official for the purpose of section 121; and
- section 123 functions the same way as section 121, but applies to municipal government officials rather than Federal or Provincial government officials.

WHAT CONSTITUTES A BENEFIT?

The *Criminal Code* provisions related to bribery and corruption apply to more than just cash payments. Sections 121 and 123 each prohibit the payment or receipt of a "loan, commission, reward, advantage, or benefit of any kind." What constitutes a benefit for the purposes of these offences has been the subject of significant discussion in the case law.

In *R v Hinchey*,[6] the Supreme Court of Canada held that a benefit must constitute a "material or tangible gain." In that case, the Supreme Court of Canada set out what factors courts should consider when determining if something constitutes a material or tangible gain:

1. The relationship between the parties;
2. The history of reciprocal arrangements; and
3. The size or scope of the benefit.

6 [1996] 3 SCR 1128.

In *R v Pilarinos*,[7] the British Columbia Supreme Court expanded on the factors set out in *R v Hinchey*:

a) The relationship between the parties:

   i. are they friends or business acquaintances;

   ii. is there a history of reciprocal arrangements, such as buying each other lunch or dinner; or

   iii. was the gift in the context of an on-going friendship, such as a birthday gift;

b) The size or scope of the benefit:

   i. is it a cup of coffee or a car;

c) The manner in which the gift was bestowed:

   i. was it done in secret or in the open;

d) The official or employees' function in government;

e) The nature of the giver's dealings with the government;

f) The connection, if any, with the giver's dealings and the official or employee's job; and

g) The state of mind of the receiver and the giver (as it relates to the actus reus).[8]

The factors set out in *R v Pilarinos* are more detailed and are arguably more subjective than those in *R v Hinchey*. Accordingly, when in doubt, consider consulting external counsel with expertise in these matters prior to offering, providing, or receiving a benefit to or from a government official.

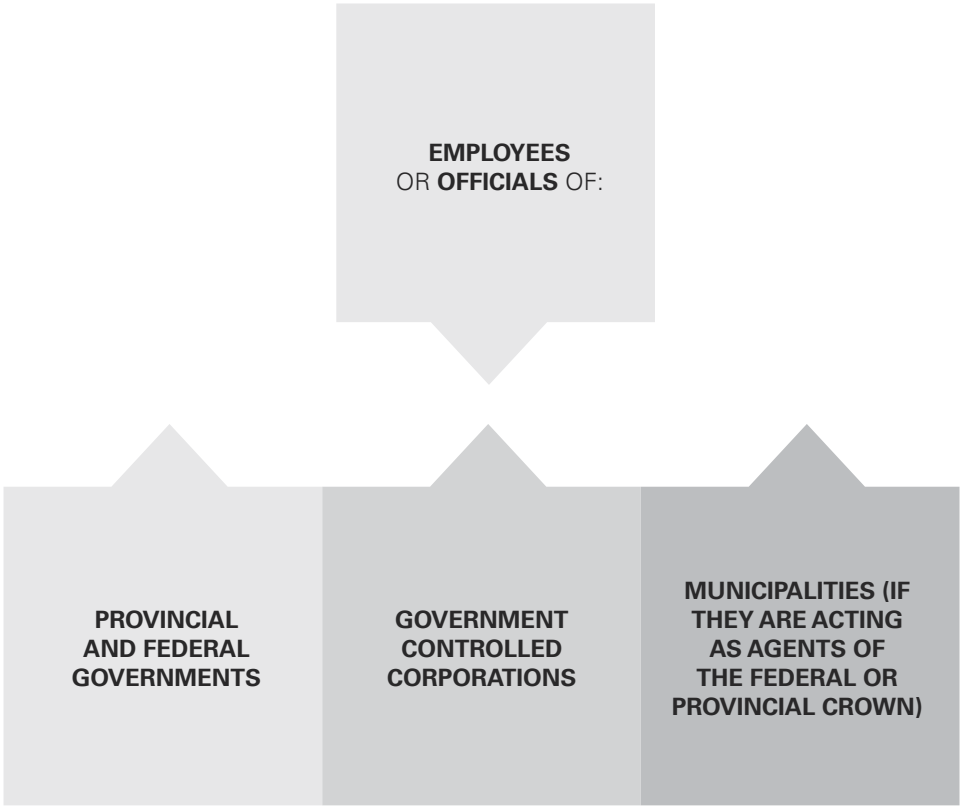
Case law does not expressly address a particular dollar threshold for a benefit to be categorized as "extravagant," but it has identified the following as examples of items that likely would and would not constitute "material or tangible gains":

MATERIAL OR TANGIBLE GAIN	NOT A MATERIAL OR TANGIBLE GAIN
Hockey tickets[9]	Infrequent, moderately priced meals
Extravagant meals	Coffee
$500 gift card	Logoed and low value promotional items (such as a mug or golf shirt)
Payment for travel	
Purchasing cable TV service	

7 2002 BCSC 1267.
8 *Ibid* at para 203.
9 In *R v ACS Public Sector Solutions Inc.*, 2007 ABPC 315, Allen J. noted that hockey tickets with a face value in excess of $100 could be considered a "material and tangible gain" for the purposes of the *Criminal Code*.

WHO ARE OFFICIALS UNDER THE *CRIMINAL CODE*?

Section 121 of the *Criminal Code* requires the recipient of a benefit be a Federal or Provincial official. "Officials" include:



Under section 122 of the *Criminal Code*, the term "official" is not confined to Federal or Provincial governments and may include any person in a position of duty, trust, or authority; especially in the public service or in a corporation, society, or the like. This has been held to extend to officials and employees of First Nations bands.[10]

Section 123 of the *Criminal Code* applies to municipal officials. A municipal official is defined as a member of a municipal council or a person who holds an office under a municipal government.

SECTIONS 121(1)(a) AND 123: NO PAY-TO-PLAY

Section 121(1)(a) of the *Criminal Code* prohibits offering or giving a benefit to a Federal or Provincial government official, or any member of his or her family, as consideration for cooperation, assistance, exercise of influence, or an act or omission in connection with the transaction of business with, or any matter of business relating to, government. Section 121(1)(a) also criminalizes the act of an official accepting a benefit. Section 123 of the *Criminal Code* criminalizes municipal corruption and is otherwise substantially the same as section 121(1)(a).

The purpose of section 121(1)(a) is to fight overt forms of corruption. Case law from the Supreme Court of Canada has confirmed that this offence is designed to prevent the provision of benefits in exchange for influence or an advantage in the transaction of business with the government. For example, it is a violation of section 121(1)(a) for an entity to employ a Crown corporation employee with the express or implied understanding that the employee will avoid providing government contracts to the entity's competitor.

10 *R v Yellow Old Woman,* 2003 ABCA 342 ("***R v Yellow Old Woman***").

SECTIONS 121(1)(b) AND (c): PRESERVING THE APPEARANCE OF INTEGRITY

Section 121(1)(b) of the *Criminal Code* criminalizes the provision of an award, advantage, or benefit to a government official, while section 121(1)(c) criminalizes the receipt of said benefit. These sections do not require a *quid pro quo* arrangement and seek to preserve the appearance of integrity, rather than integrity itself. These provisions therefore penalize the simple provision or receipt of a benefit to a government employee or official, with no strings attached, though that benefit must be conferred in respect of business dealings the accused had with the government. It is not an offence under sections 121(b) or (c) if a benefit was pre-approved, in writing, by the head of the branch of government dealing with an accused.

SECTION 122: BREACH OF TRUST BY A PUBLIC OFFICER

Section 122 of the *Criminal Code* seeks to prohibit the corruption of any official in a position of trust. Section 122 applies to breaches of the public trust by a public official and requires proof that an official, acting in connection with the duties of his or her office, breached the standard of responsibility and conduct demanded of him or her by the nature of that office. Misconduct must represent a serious and marked departure from the standards expected of an individual in the accused's position of public trust, and the accused must have acted with the intention to use his or her office for a purpose other than the public good, such as a dishonest, partial, corrupt, or oppressive purpose.

The facts in *R v Yellow Old Woman* provide an illustrative example of what constitutes an offence under section 122. In that case, a Health Director for the Siksika First Nation hired a consultant to prepare numerous reports for the First Nation. Each time the consultant was paid for her services, she would remit half of the payment back the Health Director personally. In that case, the Health Director was convicted of violating section 122.

Although section 122 requires that an accused is a "public official," private actors can be criminally liable under this section if they are a party to the offence. Pursuant to section 21 of the *Criminal Code*, an individual or entity is a party to an offence if they:

For example, the consultant in *R v Yellow Old Woman* could have been charged as a party to breach of trust by a public official if the consultant knowingly assisted or encouraged the Health Director's illegal actions.[11]

11 For more information about parties to offences, see "How is the Criminal Liability of an Organization Determined," set out in Part 1 of this Primer.

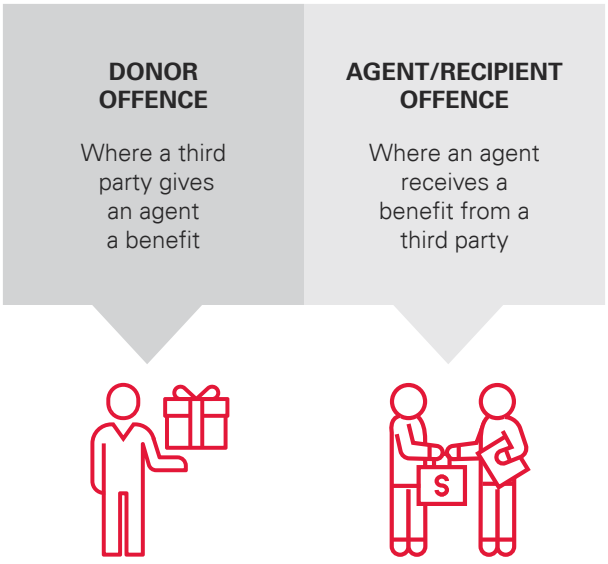
What Bribery and Corruption Offences Relate to Private Bribery in Canada?

INTRODUCTION: SECRET COMMISSIONS

Section 426 of the *Criminal Code* prohibits the **secret** provision or receipt of improper payments or benefits to or by an agent (including an employee) as consideration for actions related to the affairs or business of an agent's principal (including an employer). Under section 426, the provider of a bribe and its recipient can both be criminally liable for their actions. Like sections 121 through 123, a "bribe" for the purpose of this section is defined as a reward, advantage, or benefit of any kind and includes anything that is a "material and tangible gain" (see "What Constitutes a Benefit?" above). Accordingly, individuals and companies may be held criminally liable for receiving or causing to be transferred certain benefits, even when a government official is not involved.

ELEMENTS OF THE OFFENCE

Section 426(1) contains two separate offences:



These offences may be committed independently of each other. The Donor and Agent/Recipient are not required to be acting in concert.

The elements of the *Agent/Recipient Offence* were set out by the Supreme Court of Canada in *R v Kelly*, and include:[12]

a) the existence of an agency relationship;

b) the accepting by an agent of a benefit[13] as consideration for doing, or forbearing to do, any act in relation to the affairs of the agent's principal;

c) failure by the agent to make adequate and timely disclosure of the source, amount, and nature of the benefit;

d) the accused must be aware of the agency relationship;

e) the accused must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and

f) the accused must be aware of the extent of the disclosure to the principal, or lack thereof.

The elements of the *Donor Offence* have not been settled by an appellate court; however, they can be distilled from the case law and are substantively similar to the elements of the *Agent/Recipient Offence* set out in *R v Kelly*.

Agency has been interpreted broadly for the purposes of section 426 and can include individuals who are in a general position of authority or trust in relation to the principal company. Agents also include employees for the purposes of this section.[14] An independent contractor is probably not considered an agent for the purpose of section 426.

12 [1992] 2 SCR 170.
13 See discussion in "What Constitutes a Benefit?" above for a determination of what constitutes a "benefit" under the *Criminal Code*.
14 *Criminal Code*, s 426(4).

What Offences Relate to Bribery of Foreign Public Officials?

The *CFPOA* and its U.S. and U.K. equivalents, the *FCPA* and *Bribery Act*, respectively, criminalize the provision of benefits by a person or his or her agents to a foreign government official in consideration for any act (or omission, in the case of the *CFPOA*) to be undertaken by that official. While there are nuanced differences in the application of these regimes, the purpose of each piece of legislation is to criminalize bribery of foreign government officials.

Enforcement of anti-bribery legislation has significantly increased over the past 10 years. The U.S. has been extremely aggressive in enforcing the *FCPA*, assessing billions of dollars in penalties. In 2016 and 2017 alone, the U.S. Department of Justice ("**DOJ**") and U.S. Securities and Exchange Commission ("**SEC**") filed 42 new enforcement actions and imposed more than $3 billion in fines.

While Canada has been more restrained with respect to its enforcement of the *CFPOA*, it is an area of focus and the subject of several Canadian enforcement actions. Since 2011, there have been several convictions under the *CFPOA* leading to prison terms and millions of dollars in fines. These cases are set out in further detail in "Consequences of Conviction and Enforcement Trends" below.

ELEMENTS OF FOREIGN BRIBERY OFFENCES

The following table is intended to be a summary of the elements of foreign bribery offences under the *CFPOA*, *FCPA*, and *Bribery Act*, and therefore should be treated as a guide rather than a complete representation of the legislation. Please refer to each act for more fulsome information.

OFFENCES	*CFPOA*	*FCPA*	*BRIBERY ACT*
Offering or making a bribe to a foreign official	It is an offence under the *CFPOA* to offer a benefit of any kind to a foreign public official as consideration for, or to induce, an act or omission by the official in connection with the official's duties.	The *FCPA* prohibits corruptly paying, promising to pay, or authorizing the payment of anything of value to a foreign official in order to influence any act or decision of that official in his or her capacity as an official, or to secure any other improper advantage, or to obtain or retain business.	The *Bribery Act* criminalizes offering, or promising to offer, a financial or other advantage to a foreign public official in the performance of his or her official functions to retain a business advantage.
Accepting a bribe	It is not an offence to accept a bribe under the *CFPOA*. Sections 121 through 123 of the *Criminal Code* prohibit the receipt of bribes by various Canadian officials. (see "What Bribery and Corruption Offences Relate to Canadian Officials?" above).	Like the *CFPOA*, it is not an offence to accept a bribe under the *FCPA*.	It is an offence under the *Bribery Act* for any person to request, agree to receive, or receive an advantage to improperly perform a relevant function or activity, regardless of whether the improper activity was actually performed.

OFFENCES	*CFPOA*	*FCPA*	*BRIBERY ACT*
Private bribery	Private bribery is not considered by the *CFPOA*, but is prohibited by section 426 of the *Criminal Code* (see "What Bribery and Corruption Offences Relate to Private Bribery in Canada?" above).	Like the *CFPOA*, private bribery is not considered by the *FCPA*. The DOJ has relied on, among other legislation, state laws, wire fraud statutes, and the *Travel Act* to prosecute private bribery.	It is a separate offence under the *Bribery Act* for **any person** to offer, promise, or give an advantage to another person if they intend to bring about the improper performance of a relevant function or activity. Similarly, the *Bribery Act* prohibits the receipt of the same type of advantage set out above, regardless of whether the recipient is an official or private actor.
Foreign government official	A foreign government official under the *CFPOA* is a person who holds a legislative, administrative, or judicial position of a foreign state, as well as any person who performs a public duty or function for a foreign state, including a person employed by a board or commission established to perform a duty or function on behalf of a foreign state. Employees of state owned or controlled companies are also likely considered foreign government officials by the *CFPOA*.	Under the *FCPA*, a foreign official includes: (i) any foreign official; (ii) any foreign political party or official thereof; or (iii) any candidate for foreign political office. The *FCPA* considers employees of government owned or controlled companies and public international organizations to be foreign officials.	The *Bribery Act* considers all officials who hold a legislative, administrative, or judicial position of any kind outside the U.K. to be foreign public officials. This includes any person who performs a public function in any branch of a national, local, or municipal government, international organization, or a government owned or controlled entity, and includes employees of these entities.
Third-party bribery	Bribes provided through a third-party representative or received by a party other than a foreign government official are still prohibited by the *CFPOA*, *FCPA*, and *Bribery Act* if the ultimate goal is to influence an official by conferring a benefit.		

OFFENCES	*CFPOA*	*FCPA*	*BRIBERY ACT*
Corporate failure to prevent bribery by an associated person	Failure to prevent bribery is not a separate offence under the *CFPOA*.[15]	Failure to prevent bribery is not a separate offence under the *FCPA*.	In addition to conviction for bribery under the *Bribery Act*, corporate entities can also be convicted of a separate offence if they fail to prevent bribery by an associated person. This offence is made out if a person that provides services for an entity, including an employee, provides or attempts to provide a bribe in an effort to benefit the entity, if the entity cannot establish on a balance of probabilities that it had adequate procedures in place to prevent the illegal activity. Conviction for the underlying bribe is not required to obtain conviction for this offence. It is sufficient if the underlying offence "would" have been made out.
Books and records offences	It is an offence under the *CFPOA* to keep secret accounts, falsely record transactions, not record transactions, inadequately identify transactions, enter liabilities with incorrect identification of their object, use false documents, or destroy accounting books and records earlier than permitted by law for the purpose of concealing bribery of a foreign public official.	The *FCPA* requires U.S. issuers to create and maintain books, records, and accounts that accurately and fairly reflect the entity's transactions and dispositions in reasonable detail. An underlying *FCPA* conviction is not required to be convicted under the books and records offence.	The *Bribery Act* does not require companies to maintain adequate books and records. This requirement is enumerated in other U.K. legislation (such as the *Companies Act* and tax laws).

15 See "How is the Criminal Liability of an Organization Determined" and "Can Directors, Officers or Employees of an Organization be Held Personally Liable for Criminal Offences of the Organization," set out in Part 1 of this Primer.

OFFENCES	*CFPOA*	*FCPA*	*BRIBERY ACT*
Requirement for internal controls	The *CFPOA* does not impose a separate offence for failing to implement internal controls.	The *FCPA* requires U.S. issuers to devise and maintain a system of internal accounting controls that provide reasonable assurances that management has control, authority, and responsibility over its assets. Failure to implement adequate controls is a separate offence under the *FCPA*, regardless of whether bribery is made out.	The *Bribery Act* does not impose a separate offence for failing to implement internal controls, although it does contain a strict liability offence for failing to prevent bribery, see above.
Facilitation payments	As of October 31, 2017, facilitation payments are no longer permissible under the *CFPOA*.	Facilitation payments are permissible under the *FCPA*.	Facilitation payments are not permissible under the *Bribery Act*.
Enforcement	The *CFPOA* is enforced by the Royal Canadian Mounted Police ("**RCMP**") and prosecuted by the Public Prosecution Service of Canada ("**PPSC**"). The Federal Government of Canada has recently tabled legislation that would provide for the implementation of a Deferred Prosecution Agreement ("**DPA**") regime. DPAs are agreements between an accused and the prosecutor, whereby the prosecutor agrees to suspend or defer prosecution in exchange for cooperation and compliance with certain conditions. DPAs and Bill C-74 are discussed further below (see "Canada's Proposed Resolution Regime").	The DOJ and the SEC share enforcement and prosecutorial authority for the *FCPA*. The DOJ is responsible for criminal prosecutions and the SEC is responsible for civil enforcement. DPAs are available to resolve *FCPA* allegations.	The Serious Fraud Office ("**SFO**") is responsible for enforcement and prosecution of the *Bribery Act*. DPAs are available to resolve *Bribery Act* allegations.

JURISDICTION

In 2013, the Federal Government of Canada passed significant amendments to the *CFPOA* (the "**2013 Amendments**"). Prior to the 2013 Amendments, the *CFPOA* only applied to misconduct with a "real and substantial" connection to Canada. This significantly limited Canada's ability to enforce the *CFPOA*, as it required some portion of the formulation, initiation, or commission of a bribe to take place within Canada.

The 2013 Amendments closed this loophole by deeming all acts of Canadian citizens, permanent residents, corporations, societies, firms, or partnerships to be acts within Canada for the purpose of the *CFPOA*. The practical result of the 2013 Amendments is that Canadian citizens and companies are subject to worldwide regulation under the *CFPOA*, regardless of where the misconduct occurred.

Whether Canadian authorities can extra-jurisdictionally enforce violations of the *CFPOA* committed by a foreign citizen or non-Canadian entity turns on whether Canadian courts have jurisdiction over both the offence and the accused.

To have jurisdiction over an offence committed outside of Canada by a foreign accused, a court must be satisfied that the offence has a "real and substantial" link to Canada.[16] Canadian courts have jurisdiction over accused individuals or companies that Canadian authorities are able to "lay hands" on.[17] Canadian authorities gain jurisdiction over an accused non-Canadian individual if the accused is subject to extradition or enters Canada. Canadian authorities can "lay hands" on a non-Canadian entity if it has a Canadian director or if a non-Canadian director enters Canada.

DEFENCES

Section 3(3) of the *CFPOA* sets out two defences for bribing a public official:

1. if the benefit provided is permitted or required under the laws of the foreign state or organization for which the official acts; or

2. if the benefit was provided to pay reasonable expenses incurred in good faith by or on behalf of a foreign public official and the expenses were incurred related to promotion of the accused's products and services or the execution or performance of a contract between the accused and the official.

Section 3(3) provides an affirmative defence designed to permit corporations to pay "reasonable expenses incurred in good faith" that are directly related to the performance of a contract with a foreign government. Permissible expenses incurred include those for the purpose of demonstrating, promoting or explaining products, or executing or performing obligations of a contract formed with a foreign government, but may not include entertainment or other, softer, expenses. To use this defence, an accused must show that the loan, reward, advantage, or benefit was a reasonable expense incurred in good faith.

16 *R v Libman*, [1985] 2 SCR 178. As set out above, this test applied to all *CFPOA* violations prior to the 2013 Amendment.
17 *Chowdhury v Canada*, 2009 ONCJ 478.

POSSIBLE BENEFITS FOR SELF-REPORTING

There are currently no fixed guidelines or guaranteed benefits for self-reporting corporate crimes in Canada. In addition, until Canada's proposed DPA regime comes into force, Canada currently does not offer any civil resolution or alternative non-criminal resolution opportunities. Current resolution options in Canada are:

1. to convince the authorities not to proceed with criminal charges;
2. plead guilty to a criminal offence; or
3. fight the matter at trial.

Unlike the U.S., there are no guidelines that set out what credit may be earned for self-reporting to, and cooperating with, authorities in Canada. While credit, such as a reduced fine or decision not to require a third-party compliance monitor, is more likely if an organization enters a guilty plea, the precise amount of credit is uncertain and at the discretion of the prosecutor and judge.

Case law suggests self-reporting can militate in favour of a more lenient sentence. In *R v Niko Resources Ltd.*[18] the court imposed a $9.5-million fine and onerous probationary conditions for an improper payment of $200,000 in violation of the *CFPOA*. In contrast, in *R v Griffiths Energy International*[19] the court solely imposed a $10.35-million fine without probation for an improper payment in violation of the *CFPOA* in excess of $2 million. A distinguishing feature of these cases was that Niko Resources did not self-disclose and provided limited cooperation with authorities, whereas Griffiths Energy self-reported its *CFPOA* violation and fully cooperated with authorities. Accordingly, while there are no fixed guidelines in Canada for self-disclosure and cooperation, it will likely be a material factor for the sentence of a corporate accused. Notwithstanding the potential benefits derived from self-reporting, there are substantial risks involved. Weighing these benefits and risks can be a complex endeavor, which should only be undertaken by individuals with experience in these matters.

CANADA'S PROPOSED RESOLUTION REGIME

On February 22, 2018, following a consultation period on corporate wrongdoing, Public Services and Procurement Canada announced pending legislative changes that would allow for and govern DPAs in Canada. This proposed legislation recently arrived in the form of Bill C-74 (the implementation legislation for the 2018 Federal budget), which received first reading on March 27, 2018. The relevant part of Bill C-74 will amend the *Criminal Code* to establish a "remediation agreement regime" (i.e. a DPA regime) in respect of certain offences, including but not limited to, sections 121, 123, and 426 of the *Criminal Code* and all CFPOA offences. Of particular note, the new regime will apply to offences alleged to have been committed prior to the legislation coming into force.

Under the proposed regime, a prosecutor may enter into negotiations for a remediation agreement if, among other things, he or she is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances. The prosecutor must consider a variety of factors for the purposes of this determination, including the circumstances in which the alleged offence was brought to the attention of authorities, and whether the company has taken any disciplinary or remedial action.

18 Unreported.
19 Unreported.

The proposed legislation stipulates that final remediation agreements must contain a number of mandatory items, including:

- a statement of facts;
- an admission of responsibility;
- an obligation to cooperate in identifying individuals involved in, or wrongdoing related to, the relevant conduct;
- an obligation to cooperate in any resulting investigation or prosecution resulting from the relevant conduct, including providing information or testimony;
- an obligation to forfeit or otherwise deal with (as directed by the prosecutor) any property, benefit, or advantage obtained or derived from the relevant conduct;
- an obligation to make reparations (where appropriate in the circumstances); and
- an obligation to pay a victim surcharge for each non-CFPOA offence.

Remediation agreements may also include certain optional content, such as an obligation to establish, implement, or enhance compliance measures or the appointment of an independent compliance monitor. Agreements will be subject to court approval and will be published by the court, except in limited circumstances (such as where it is necessary to protect the identities of victims). Admissions made by a company as a result of a remediation agreement, or during negotiations, will not be admissible as evidence in any civil or criminal proceedings related to the relevant conduct, except for the statement of facts and admission of responsibility in a court-approved agreement.

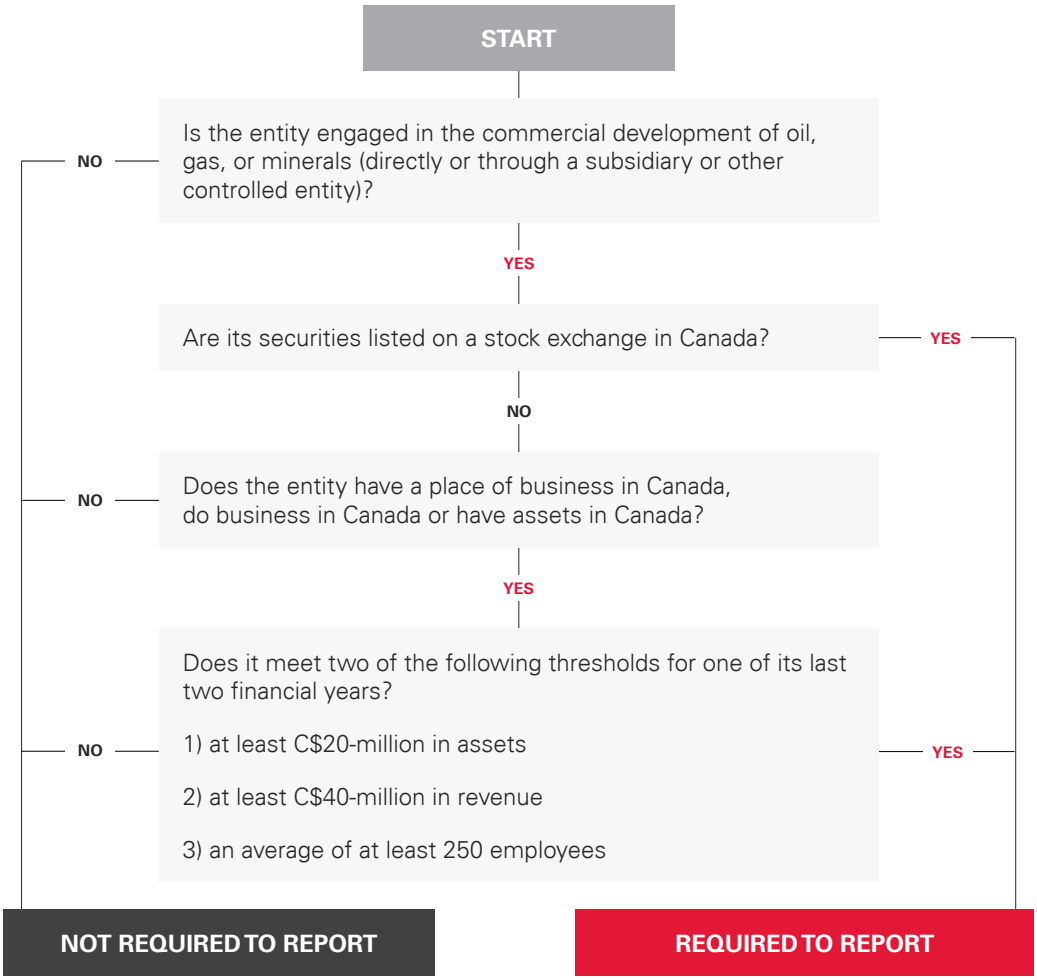
The content of Bill C-74 will likely evolve as it proceeds through second and third readings. The amendments discussed above will come into force 90 days after Bill C-74 receives Royal Assent.

Additional Anti-Bribery Requirements for Companies in the Extraction Industry

ESTMA, which came into force on June 1, 2015, is designed to enhance Canada's fight against corruption by imposing additional reporting obligations for payments made by mining, oil, and gas companies to foreign and domestic governments (and government officials), including indigenous governments.

ESTMA applies to companies that are engaged in the commercial development of oil, gas or minerals in Canada or abroad that are either (i) are listed on a stock exchange in Canada or (ii) have a place of business in Canada, do business in Canada, or have assets in Canada and meet at least two of the following size thresholds:

1. C$20 million in assets;
2. C$40 million in revenue; or
3. employ an average of at least 250 employees.



ESTMA requires entities to report payments made to governments, government owned or controlled corporations, quasi-government entities that exercise a government function, and employees or officials that belong to these organizations. As of June 1, 2017, *ESTMA* also applies to payments made to Indigenous governments in Canada. This may include, but is not limited to, any Indigenous group or organization, that exercises or performs a power, duty, or function of government, independently or in concert with other groups, such as a band council, chief, treaty association, tribal council, or Chief's council. A director, officer, independent auditor, or accountant must attest that the information contained in an *ESTMA* report is **true**, **accurate**, and **complete**.

Non-compliance with *ESTMA* is an offence under the Act. Additionally, *ESTMA* contains an anti-avoidance provision that makes it an offence to structure any payment, or other financial obligation or gift, to avoid reporting requirements. Entities and directors guilty of an offence under *ESTMA* can avoid conviction by establishing that all reasonably prudent measures were implemented to ensure the offence was not committed.[20]

20 See Blakes ESTMA White Paper for a nuanced discussion about compliance with ESTMA.

Consequences of Conviction and Enforcement Trends

POSSIBLE SENTENCES

Perhaps the most important consideration for Canadian in-house counsel is the significant punishment for bribery and corruption offences under the *Criminal Code*, *CFPOA*, and *ESTMA*:

a) conviction of an offence under sections 121, 122, 123, and 426 of the *Criminal Code* is punishable by up to five years in prison and unlimited fines for corporate entities;

b) conviction of bribery or an accounting offence under the *CFPOA* is punishable by up to 14 years in prison and unlimited fines for corporate entities. In addition, courts can impose onerous probationary terms on convicted companies, including a compliance monitor; and

c) conviction of failure to adhere to *ESTMA* is punishable by a fine of $250,000 for each day that an entity is non-compliant with *ESTMA*. This penalty can be imposed on an entity or any officer, director, or agent who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, even if the entity has not been prosecuted or convicted.

There are no limitation periods for indictable offences in Canada[21] and an accused can be charged for numerous offences related to a single act. In addition to these offences, the *Criminal Code* prohibits the retention of proceeds of crime and a convicted company may also be ordered to forfeit all proceeds – not just profits – obtained in relation to a conviction.

ADDITIONAL CONSEQUENCES

As many in-house counsel understand, punishments imposed by authorities are the tip of the iceberg. Any association between an entity and corruption can cause significant reputational damage to the company. Reputational damage is often accompanied by a corresponding loss of share value, especially if an entity loses economic opportunities as a result of corruption. Sharp decreases in value can trigger class action lawsuits, derivative actions, oppression claims, and takeover bids.

In addition to imprisonment, fines, and reputational damage, entities accused or convicted of bribery and corruption offences can be debarred from contracting with the Federal government. In 2015, Canada introduced a new Integrity Regime that penalizes entities associated with corruption-related offences, including five to ten-year debarment periods for entities convicted or discharged (or with a board member that has been convicted or discharged) of a number of corruption offences, including sections 121 and 426 of the *Criminal Code* and any offence under the *CFPOA*.[22] Under the Integrity Regime, simply being charged with a corruption-related offence may lead to an 18-month debarment from contracting with the government of Canada. Other governments and public international organizations, such as the World Bank, have similar debarment consequences for engaging in bribery and corruption.

21 Sections 121, 122, 123, and 426 of the *Criminal Code*, as well as *CFPOA* offences, are indictable offences.
22 "*Ineligibility and Suspension Policy*," Government of Canada and "Guide to the *Ineligibility and Suspension Policy*," Government of Canada.

ENFORCEMENT TRENDS FOR DOMESTIC BRIBERY AND CORRUPTION

Recently, Canadian authorities have increased enforcement of *Criminal Code* offences related to bribery and corruption, especially crimes committed by domestic government officials, for example:

- In January 2014, Jeffery Granger was sentenced to three years' imprisonment after pleading guilty to violating sections 122 and 426 of the *Criminal Code*, as well as defrauding the Government of Canada contrary to section 380 of the *Criminal Code*, in connection to his position as an Audit Team Leader with the Canadian Revenue Agency (the "**CRA**"). Mr. Granger abused his position with the CRA by illegally accessing tax records, generating a false audit, reporting false information to police, facilitating an improper audit, and receiving $1,109,518 in secret commissions.
- In April 2016, Senator Michael Duffy was acquitted of a number of *Criminal Code* charges, including charges under sections 121(1)(c) and 122, related to fraud, bribery, and breach of trust related to his expense accounts as a Senator of the Federal Government. Although Mr. Duffy was acquitted of all charges, he endured a damaging and expensive investigation and trial, and resigned from the Conservative Party of Canada.
- In November 2016, Jacques Corriveau was convicted of an offence under section 121(3), as well as forgery and laundering proceeds of a crime, in connection with receiving $7 million in kickbacks associated with the Liberal Sponsorship Scandal.
- In February 2017, Bruce Carson was convicted of violating section 121(1)(d) for his conduct with respect to negotiating a contract for water treatment systems while serving as a senior advisor in the Prime Minister's Office. Mr. Carson admitted that he was motivated to promote the company that was awarded the contract to obtain a benefit by receiving a share of the profits through his then-girlfriend. The matter has been remitted back to trial for sentencing.
- In March 2017, interim mayor of Montréal, Michael Applebaum, was convicted of violating several *Criminal Code* sections, including sections 121(1)(a), 122, and 123, for accepting payments from real estate developers and engineering firms in return for political influence and favours while borough mayor of Côte-des-Neiges–Notre-Dame-de-Grâce, Montréal. He was sentenced to one year in jail and two years' probation.

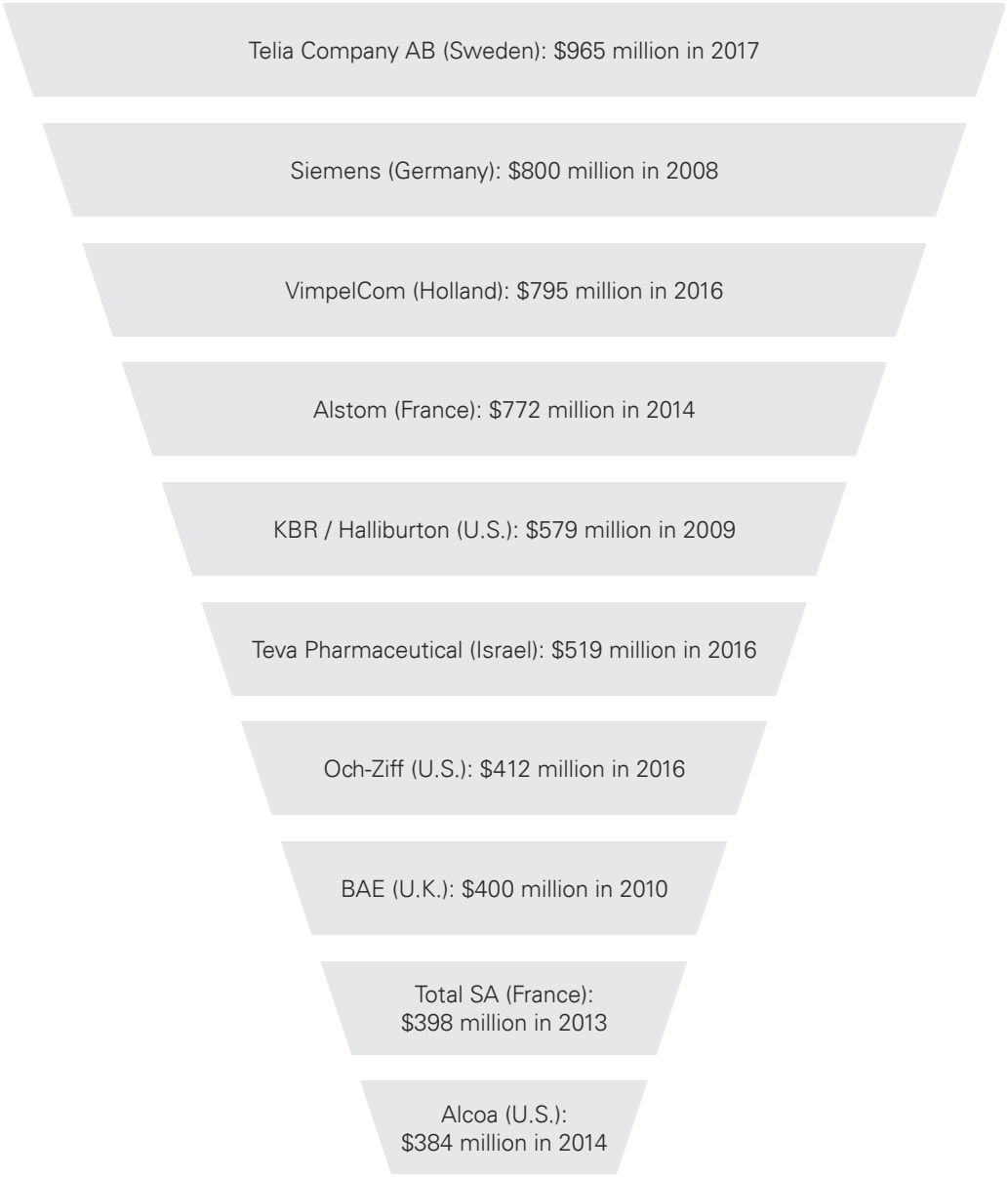
ENFORCEMENT TRENDS FOR FOREIGN BRIBERY AND CORRUPTION

To date, there have been several significant prosecutions under the *CFPOA*, for example:

- In 2011, a Calgary-based oil and gas exploration company was fined $9.5 million for providing a government official with a $190,000 vehicle for his use, as well as extravagant vacations to the U.S. In addition to the fine, onerous monitoring conditions were imposed on Niko Resources.
- In 2013, another Calgary-based oil and gas company was fined $10.35 million for entering into consulting agreements to pay $2 million to entities owned and controlled by Chad's ambassador to Canada. Griffiths Energy self-reported this matter to the authorities, which likely reduced its penalty.
- Also in 2013, the first executive was convicted of an offence under the *CFPOA*. Nazir Karigar was sentenced to three years' imprisonment for bribing officials of a government owned company, Air India, in an effort to secure contracts. Karigar's most recent appeal was dismissed in 2017; and

- In 2015, a Montréal-based engineering firm was charged under the *CFPOA* in connection to senior executives allegedly offering more than $47 million in bribes to Libyan officials in an effort to secure contracts. The RCMP alleges that the company committed fraud worth $130 million with respect to its dealings in Libya. These corporate charges are in addition to various charges against the company's executives.

In addition to these *CFPOA* developments, U.S. authorities continue to vigorously enforce the *FCPA*. In 2017, 11 companies paid just more than $1.92 billion to resolve *FCPA* cases and in 2016, 27 companies paid $2.48 billion. The 10 largest *FCPA* settlements to date are:



Six of the 10 largest *FCPA* settlements have occurred in the last three years. Notably, U.S. authorities have frequently targeted non-U.S.-based companies for enforcement actions. In addition, U.S. authorities have followed a strategy of pursuing not just companies, but individuals as well.

Practical Tips for Compliance

Although a compliance program should be unique to each specific entity, there are certain elements of an effective compliance program that apply to all companies and industries. The U.S. and U.K. have issued guidance documents[23] for an effective compliance program that mitigates bribery and corruption risks. Allocating adequate resources to mitigation can potentially reduce or prevent the debilitating costs associated with bribery and corruption.

CHECKLIST FOR EFFECTIVE COMPLIANCE PROGRAMS

- ❒ Conduct a risk assessment
- ❒ Implement and maintain an anti-bribery policy
- ❒ Train, enforce, and endorse your anti-corruption policy
- ❒ Develop a system of internal controls aimed at preventing corruption

⚠ Exercise caution when engaging third parties. See our Best Practices on page 23.

CONDUCT A RISK ASSESSMENT

The first step in establishing a comprehensive compliance program is to conduct a risk assessment and identify corruption risks faced by a company. The rationale for conducting a risk assessment is to tailor a company's policies and procedures to its unique characteristics. A one-size-fits-all approach is ineffective, and will lead to inefficient resource allocation. A risk assessment should, among other things:

1. identify anti-corruption risks through, among other things, identifying and reviewing touch points with government officials, both directly and through third-party intermediaries or joint ventures;
2. examine the effectiveness of existing anti-corruption compliance controls at combating those risks;
3. identify gaps between identified risks and controls; and
4. provide recommendations to address identified gaps.

23 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division of the DOJ and the Enforcement Division of the SEC (2012) (the "**FCPA Guidance**") and *Bribery Act: Guidance on adequate procedures facilitation payments and business expenditure*, the SFO (2012) (the "**Bribery Act Guidance**").

Common departments or functional areas that include government touch points and circumstances that can lead to bribery include, but are not limited to:

a) permits and licensing;

b) environmental compliance;

c) government inspections;

d) government relations;

e) community relations;

f) political donations;

g) import/export;

h) immigration; and

i) tax.

Other factors to consider when conducting a risk assessment include the size of the company, involvement of top-level management, complexity and jurisdiction of operations, type and nature of persons associated with the company, and level of financial controls in place. As a company evolves in response to a constantly changing business environment, so will the bribery-related risks it faces. Accordingly, compliance programs must evolve with a company. This is particularly true for companies expanding into new jurisdictions, in which case country-specific risk assessments are advisable. Other methods of identifying this information can include employee surveys and compliance audits.

Risk assessments are an important factor considered by the RCMP, PPSC, DOJ, SEC, and SFO when assessing a company's anti-corruption compliance program. For instance, according to the Bribery Act Guidance, risk assessments are one of "six principals" considered by the SFO when determining if a company's corruption prevention procedures are both adequate and proportionate to the risks it faces. The FCPA Guidance also states, "Assessment of risk is fundamental to developing a strong compliance program, and is another factor the DOJ and SEC evaluate when assessing a company's compliance program."

IMPLEMENT AND MAINTAIN AN ANTI-BRIBERY POLICY

An anti-bribery policy and ancillary compliance procedures serve as the foundation of a robust compliance program. Important components of an anti-bribery policy include, but are not limited to:

a) an absolute prohibition on bribery and corruption;

b) a plain-language explanation of what constitutes bribery and corruption, as well as who (or what) is defined as a government official;

c) guidance on:

   1) gifts and hospitality, especially when it involves government officials;

   2) charitable and political donations; and

   3) facilitation payments;

d) initial and ongoing due diligence requirements for third parties that interact with government officials on a company's behalf;

e) an absolute prohibition on false or inaccurate accounting entries;

f) a system for reporting violations, including anonymous reporting channels; and

g) a statement of the consequences of breaching the policy.

In addition, it is common for companies to develop specific procedures and guidelines regarding training, periodic compliance reviews, and anti-bribery and corruption due diligence for transactions.

In order to maximize the effectiveness of compliance resources, companies should tailor compliance policies, procedures, and messaging to their intended audiences. Policies should be translated into applicable local languages and address local or cultural considerations. Policies should also be easy to access for all employees, including posting to a company intranet site and providing paper and digital copies to newly on-boarded and existing employees.

TRAIN, ENFORCE, AND ENDORSE YOUR ANTI-CORRUPTION POLICY

An anti-corruption policy is only as effective as its implementation, enforcement, and endorsement. Even the most sophisticated compliance program requires ongoing training. At minimum, customized and risk-based training should be provided to:

a) personnel who interact with government officials, and personnel who manage these individuals;

b) personnel responsible for third parties that interact with government officials on behalf of the company;

c) accounting personnel responsible for payments that involve a risk of bribery or corruption; and

d) management, senior officers, and directors.

It may also be appropriate to provide some type of compliance training to all personnel and third parties, depending on the history, size, and operations of an entity. Be sure to document all training. In addition, employees should have access to support, advice, and anonymous reporting mechanisms when confronted with situations involving potential risk.

Another important aspect to a strong compliance program is independent oversight by dedicated compliance resources. It is important that someone with authority oversees compliance to ensure compliance is respected and remains a priority. It is also important that oversight of the compliance program is autonomous from the business concerns of an entity, including the resources and reporting structures associated with the compliance program.

Employees should also receive periodic compliance training and regular compliance messages or "tone from the top" on anti-corruption laws and a company's anti-corruption policy. "Tone from the top" can be disseminated in several ways, including a clearly articulated policy against corruption (discussed above), e-mails, company publications, and town hall meetings with personnel to reinforce the importance of ethical and legally compliant business practices. Messaging should communicate that compliance is not optional and violation of the company's policies will have serious consequences, for all levels of personnel. Management should be required to attend any anti-bribery training sessions to reinforce that compliance is a priority for everyone. Ideally, management's statements and conduct will have a cascading effect and embed a strong culture of business ethics in the company.

In addition to "tone from the top," a strong compliance culture includes "message from the middle" and "buzz at the bottom." Because most employees do not directly interact with upper management, middle management must reinforce compliance-related messaging. Effective mid-level messaging can be observed if a company has "buzz at the bottom." "Buzz at the bottom" is generated when low-level employees value management's compliance efforts and understand how to respond to the company's policies and training.

INTERNAL CONTROLS

Another component of an effective compliance program is a system of internal controls aimed at preventing corruption. The goal is to develop and implement internal audit mechanisms and accounting practices that identify and correct issues as they arise. The following is a non-exhaustive list of internal controls:

a) carefully scrutinizing large or unusual payments, and payments in high-risk jurisdictions;

b) conducting periodic surveys and/or audits of foreign operations, especially in high-risk jurisdictions;

c) conducting adequate due diligence that identifies potential successor liability during a merger or acquisition; and

d) periodic reporting to the board of directors.

BEST PRACTICES FOR DEALING WITH THIRD PARTIES

Certain characteristics of a third party should cause prudent companies to exercise caution when forming or renewing a business relationship. These "red flag" factors may include, but are not limited to, the following situations:

a) the third party has a history of violating anti-bribery laws or unethical conduct;

b) the third party will operate on behalf of the company in a country with a reputation for corrupt practices;

c) the third party is recommended by a local public official;

d) the third party requests cash payments to "bearer," or to accounts located outside the country in which the company is operating (i.e. safe-haven countries);

e) unusual practices or procedures that lack transparency (e.g. unusual expense reports);

f) the third party lacks experience or qualifications; or

g) the third party requests unusually large commission payments.

Best practice is to only engage a foreign third party, including agents and joint venture partners, where absolutely necessary. Third parties in high-risk jurisdictions should only be engaged with pre-approval from whoever oversees the company's compliance program. Risk-based due diligence should be conducted and documented prior to engaging any third party to act on behalf of the company to ensure it is reputable, properly qualified, and does not employ foreign public officials.

Why is Anti-Corruption Due Diligence Important for International Transactions?

As noted by the Assistant Attorney General Alice Fisher in an address to the American Bar Association:

> Transitional due diligence in the FCPA context is good for business. We saw this in the case of GE's merger with InVision. In that case, investigations by the DOJ and the SEC revealed that InVision paid bribes in the Far East in connection with sales of its airport security machines. InVision ultimately accepted a deferred prosecution agreement and paid an $800,000 fine.
>
> But because the conduct was discovered before the transaction was completed, GE avoided having to potentially accept successor liability for InVision's conduct. Although GE entered into a separate agreement with the Department to ensure InVision's compliance with the DPA, think of the potential consequences to GE if they had not performed thorough due diligence in that case.
>
> Again, the point here is that transactional due diligence is good for business and I strongly encourage you and your clients to do thorough *FCPA* due diligence in transactions involving overseas companies.

Two other examples illustrate the importance of conducting anti-corruption due diligence in the context of mergers and acquisitions. In the course of its due diligence for a proposed merger with Titan Corporation, Lockheed Martin uncovered evidence of *FCPA* violations by Titan. Lockheed Martin used this information to negotiate a reduction in the acquisition price of $200 million. In addition, Lockheed Martin sought to broker a deal with the DOJ in advance of completion of the merger in order to have Titan plead before the deal closed. When the proposed resolution with the DOJ fell through, Lockheed Martin walked away from the deal and Titan was subsequently assessed a fine and penalty of $28 million by the DOJ.

In 1998, Halliburton acquired Kellogg, amalgamating it with a subsidiary to form KBR. Halliburton's pre-acquisition due diligence failed to identify a scheme concealing bribes to Nigerian officials and the bribes continued undiscovered until 2004. Following investigation, Halliburton and KBR were sentenced to $579 million in fines. Additionally KBR's ex-CEO pled guilty to *FCPA* charges and ultimately received a sentence of 2.5 years imprisonment and was ordered to pay more than $8 million in disgorgement.

DISCHARGING OBLIGATIONS

Enforcement authorities in the U.S. have made their expectation clear that acquirers and investors should conduct anti-corruption due diligence on transactions presenting corruption risk.

In circumstances where a business opportunity involves assets in a high risk jurisdiction, anti-corruption due diligence is likely required. By conducting and properly documenting anti-corruption due diligence, companies can obtain the information they need to ensure that their business judgment is informed and exercised with care, both at the time of the business decision and moving forward.

PROTECTING INVESTMENT CAPITAL

Corruption issues can have a devastating impact on the value of a business opportunity. For example, in 2007, eLandia International Inc. acquired Latin Node Inc. for $26.8 million only to discover $2.2 million in bribes to Honduran and Yemeni officials that were not uncovered prior to the transaction. eLandia self-reported to the authorities and received fines of $2 million. The true value of the purchased assets decreased 77% as a result of this bribery scheme. The loss of value combined with the fine paid by eLandia represents almost a total loss of the original investment.

PROTECTING REPUTATION

As discussed above in "Consequences of Conviction and Enforcement Trends: Additional Consequences," serious reputational harm typically arises from corruption scandals. Corruption issues or allegations can also have a negative effect on investor confidence in an entity, and consequently the entity's value.

AVOIDING SUCCESSOR LIABILITY

The potential for successor liability also arises from transactions involving the acquisition of significant ownership positions. Notably, according to the FCPA Guidance, meaningful credit, including potentially a decision not to prosecute, will be given to companies that, among other things, perform thorough pre-acquisition due diligence and disclose any identified corrupt payments to the DOJ and SEC.

Understanding that there are limitations on pre-closing due diligence, regulators have exercised lenience towards acquiring companies that follow up on pre-closing due diligence with more substantive post-closing due diligence. The DOJ has reflected this sentiment in the FCPA Guidance, wherein it indicated that lenience will be shown to acquiring companies when they are able to quickly identify and remedy illegal conduct post-closing.

Conclusion

As jurisdictions around the globe continue to increase legislative and enforcement activity related to bribery and corruption, it is paramount for in-house counsel to be cognisant of the relationship between the associated risks of this increased activity and their company's anti-corruption compliance control programs. Authorities remain committed to vigilant enforcement and consequences for domestic or foreign bribery can be severe. To minimize the impact of these issues, and add significant value for their clients, in-house counsel can adopt a proactive attitude toward compliance. This can include conducting risk assessments; implementing and maintaining a stand-alone anti-corruption policy; training, enforcing, and endorsing a compliance program; and, implementing internal accounting and third-party controls. In light of these concerns, it also is crucial to conduct anti-corruption due diligence for all transactions in order to discharge director obligations and minimize or avoid successor liability.

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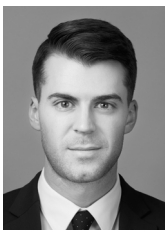

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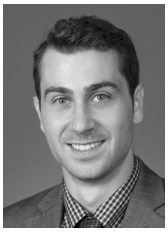

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