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Strengthening Canada's Fight Against Foreign Bribery: A Warning to Canadian Companies

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Background

Over the last 15 years, governments around the world have indicated their willingness to implement laws prohibiting the bribery of foreign public officials (a "Foreign Official") in connection with attempting to secure a business advantage. While Canada has had anti-corruption legislation in place since 1998 in the form of the *Corruption of Foreign Public Officials Act (Canada)*¹ (the "CFPOA"), it has been limited in scope and minimally enforced by Canadian authorities. However, recent developments have clearly illustrated that this area of the law is changing, both from a legislative and enforcement standpoint. On June 19, 2013, the Canadian government enacted amendments to the CFPOA (the "Amended CFPOA"), implementing a variety of changes aimed at strengthening both the scope and application of the legislation. This initiative appears to be consistent with the increased vigour that Canadian enforcement authorities have shown in the last two years towards anti-corruption related matters, which have included two significant convictions resulting in penalties in the range of \$10 million for each company as well as the first conviction of an individual under the CFPOA. Canadian companies should revisit the legislation and ensure that they understand the implications of the Amended CFPOA to avoid encountering compliance-related issues.

Key Changes to the Corruption of Foreign Public Officials Act (Canada)

Jurisdiction and Application

The Amended CFPOA now grants Canadian authorities the jurisdiction to pursue acts of bribery committed by any Canadian citizen, permanent resident or entity incorporated or formed in Canada, no matter where in the world the act is alleged to have occurred and regardless of whether it has any other connection to Canada.² Prior to the amendments passed in June 2013, the jurisdiction of Canadian authorities was confined to situations where a real and substantial link could be established between the offence and Canada.

Additionally, the Amended CFPOA now applies to both for-profit businesses and not-for-profit organizations.³ Previously, the scope of the CFPOA was limited to for-profit businesses only, a feature of the legislation for which Canada had historically been criticized by the international anti-corruption



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¹ *Corruption of Foreign Public Officials Act*, SC 1998, c. 34 ("CFPOA").

² See Section 5, CFPOA.

³ See definition of "business" under Section 2, CFPOA.



community. This change may be of particular interest to Canadian companies that use a not-for-profit organization to contribute funding to local governments in the countries which they conduct their operations.

New Books and Records Offence

In addition to the broad general offence of bribing a Foreign Official for the purposes of retaining or obtaining a business advantage, as already stipulated under the CFPOA, the Amended CFPOA has introduced a series of new offences focused on books and records. These offences criminalize a variety of activities in connection with falsifying books and records for the purpose of bribing a Foreign Official or of hiding bribery, including: (i) establishing or maintaining accounts which do not appear in any of the books and records that are required to be kept in accordance with applicable accounting and auditing standards; (ii) making transactions that are not recorded in those books and records or that are inadequately identified in them; (iii) recording non-existent expenditures in those books and records; (iv) entering liabilities with incorrect identification of their object in those books and records; (v) knowingly using false documents; and (vi) intentionally destroying accounting books and records earlier than permitted by law.⁴ This list of prohibited conduct essentially includes the various ways that one might attempt to conceal bribery in the accounting records of a business.

Some of the new offences may be of particular concern for a Chief Financial Officer (“CFO”) or such other individuals who are ultimately responsible for maintaining a company’s books and records. An example of a situation of concern is where a CFO discovers that an individual in the company has established an account which does not appear in the company’s books in order to conceal bribery. Given that the prohibited conduct also includes *maintaining* off-books accounts, it is unclear whether a CFO who fails to rectify the company’s books in these circumstances is guilty of *maintaining* the off-books accounts. This example illustrates the new considerations that companies should be mindful of in this aspect of their business and underscores the importance of having effective accounting controls in place to ensure that such activity is detected.

Elimination of Facilitation Payments Exception

The Amended CFPOA includes a provision that has not yet been implemented which would eliminate the current exception found in the CFPOA for “facilitation payments”.⁵ The eventual elimination of this exception will officially signal Canada’s abandonment of conformity with the American *Foreign Corrupt Practices Act*⁶ in this regard (which allows for facilitation payments) and its decision to follow the approach adopted in the U.K. *Bribery Act*⁷ (which does not allow for facilitation payments). Facilitation payments are payments made to Foreign Officials for non-discretionary decisions that cover acts of a routine nature. Such routine acts do not include decisions to award new business or to continue business with a particular party. Examples include voluntary payments to facilitate the processing of visas or work permits, the issuing of licenses or business permits, or the provision of public services such as telecommunication service. Once this amendment is implemented, such payments may be considered to be bribery.⁸ Canadian companies that have operations in countries where facilitation payments are commonly used to expedite various administrative processes should consider implementing a strategy to adjust their conduct accordingly.

Increased Enforcement

Under the amendments passed in June 2013, exclusive authority over the enforcement of the CFPOA has been granted to the Royal Canadian Mounted Police (the “RCMP”). The RCMP has established two International Anti-Corruption Units, based in Ottawa and Calgary, and has partnered with the Federal Bureau of Investigation

⁴ See Section 4, CFPOA.

⁵ See Section 3(4) and (5), CFPOA. The implementation of the amendment repealing these provisions has been deferred in order to allow companies a transition period to adjust to the legislative change.

⁶ *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. § 78dd-1, et seq. (1998).

⁷ *Bribery Act 2010* (U.K.), 2010, c. 23.

⁸ Individuals may be excused from making facilitation payments in cases of duress involving threats to life or bodily harm, as Section 17 of the *Criminal Code*, RSC 1985, c. C-46 provides for a defence where a person is threatened with immediate death or bodily harm. The defence of duress is not available for economic threats.

in the United States, the Australian Federal Police, and the City of London Police to establish the International Foreign Bribery Taskforce. The RCMP has indicated that it has over 30 ongoing investigations. To date, three Canadian companies have been convicted under the CFPOA, two of which have taken place since 2011 and have resulted in fines in the range of \$10 million for each company.⁹ A summary of these two convictions is provided below:

- Griffiths Energy International Inc.: Griffiths Energy International Inc. (“Griffiths”), based in Calgary Alberta, pleaded guilty on January 22, 2013, to a charge under the CFPOA related to securing a contract for oil exploration blocks in the Republic of Chad. The bribe was paid in the form of consulting contracts between Griffiths and a company owned by the Chadian ambassador’s wife. Griffiths is required to pay a total penalty of \$10.35 million.
- Niko Resources Ltd.: Niko Resources Ltd. (“Niko”) is a publicly traded company based in Calgary, Alberta. On June 24, 2011, the company entered a guilty plea for one count of bribery. The company admitted that, through its subsidiary Niko Bangladesh, it provided the Energy and Mineral Resources Minister of Bangladesh with a \$190,000 vehicle for personal use as well as with trips to Calgary and New York, in order to influence the minister in his dealings with Niko Bangladesh. As a result of the conviction, Niko was fined \$9.5 million and placed under a probation order, which puts the company under the court’s supervision for three years to ensure that audits are completed to examine Niko’s compliance with the CFPOA. The Canadian Trade Commissioner Service has placed a hold on providing services to Niko during the period of court supervision.

In addition, in August 2013, the Ontario Superior Court convicted Nazir Karigar, an agent of Cryptometrics Canada, for agreeing to bribe a Foreign Official in connection with attempts to secure a contract for the supply of a particular technology for Air India’s passenger security system. In addition to being the first conviction of an individual under the CFPOA, the decision in *R. v. Karigar*¹⁰ is also significant because it provides Canadian companies with various insights about the application of the CFPOA. Among other things, the Court held that the reach of the bribery offence under Section 3(1) of the CFPOA extends to a conspiracy to offer a bribe to a Foreign Official. This can be triggered where an individual agrees to offer a bribe, irrespective of whether the bribe is actually transferred or paid. In addition, the Court found that the definition of “foreign public official” under the CFPOA is broad in scope and does not only encompass employees of government departments, but may also include employees of state owned enterprises, as was the case with the Air India officials implicated in the bribery conspiracy. The decision in *R. v. Karigar* is also an important reminder to companies of the risks associated with using local agents, particularly in countries where corruption is prevalent. Companies are well-advised to conduct comprehensive due diligence of agents that are acting on their behalf in these countries.

Under the Amended CFPOA, the maximum sentence of imprisonment for an individual convicted of a foreign bribery offence has been increased from five years to 14 years, in addition to unlimited fines.¹¹

Steps Canadian Companies Can Take Moving Forward

Canadian companies with overseas operations should consider undertaking a review of their anti-corruption practices to ensure that they comply with the Amended CFPOA. At a minimum, Canadian companies should review their anti-corruption policy and practices and integrate sufficiently robust accounting procedures and controls in order to reduce the risk of violating the new books and records offences. In addition, companies should consider providing compliance training to their accounting and in-country personnel on the Amended CFPOA as well as the way in which the changes will practically impact the company’s current practices and operations. Lastly, in anticipation of the eventual removal of the current exception for facilitation payments

⁹ The third company convicted under the CFPOA was Hydro-Kleen Group Inc. in 2005, resulting in a fine to the company of \$25,000.

¹⁰ *R. v. Karigar*, 2013 ONSC 5199. Note that at the time this article was written, the sentencing hearing of Nazir Karigar had not yet taken place.

¹¹ See Section 3(2), CFPOA.



provided under the CFPOA, companies should put in place a strategy at each of its operations to eliminate the practice of making such payments.

If the company does not presently have an anti-corruption policy, implementing such a framework will be important to providing guidance for full compliance by the company and its personnel with the legislation.

For more information on anti-corruption compliance, as well as any other related matters, please contact David Snarch at dsnarch@lawsonlundell.com or by phone at 604.631.9216.

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