THE COST OF DOING BUSINESS?

LAWS AGAINST BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

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Introduction and Background

The United States was the first country to enact legislation against bribery of foreign officials with the implementation of the *Foreign Corrupt Practices Act* in 1977 ("**FCPA**"). As a result of investigations made by the Securities and Exchange Commission (the "**SEC**") in the United States in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ranged from bribery of high foreign officials to secure favourable action by a foreign government to facilitation payments that were allegedly made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to halt the bribery of foreign officials and restore public confidence in the integrity of the American business system[1].

However, on implementing the FCPA, the United States was placed at a competitive disadvantage with other international trading states in bidding for third party business, and American businesses complained that complying with the FCPA's strict provisions resulted in lost business opportunities[2]. As a result, the United States encouraged other states through the United Nations and other international bodies to also institute anti-corruption initiatives.

The impetus for the "Corruption of Foreign Public Officials Act" in Canada was the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (the "**Convention**") adopted by the negotiating conference of the Organization for Economic Co-operation and Development (the "**OECD**") in 1997 and brought into force in February 1999. Signatories to the Convention now include the 34 OECD members (including Canada, the United States and the United Kingdom[3]), as well as Argentina, Brazil, Bulgaria, and South Africa.

The Convention noted that it was addressing bribery because it "is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions". The Convention appears to have recognized the United States' experience that companies who refuse to bribe or to respond to solicitations of bribes when dealing with foreign public officials could put such companies at a competitive disadvantage if their competitors are willing to engage in such behaviour. It is also understood that perhaps the most effective way to combat bribery is not within the countries themselves that permit or acquiesce to a culture of bribery, but rather to criminalize such behaviour in those industrialized nations that deal with such foreign countries.

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[1] United States Department of Justice and the United States Department of Commerce, "Lay Person's Guide - Foreign Corrupt Practices Act Antibribery Provisions" (www.justice.gov/criminal/fraud/fcpa/) (hereinafter "**U.S. Guide**").

[2] Lori Ann Wanlin, "The Gap Between Promise and Practice in the Global Fight Against Corruption" (2006) Asper Rev. if Int'l Bus. and Trade Law 209-240.

[3] The members of the OECD are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

As the demand for commodities worldwide increases and the number of world-class deposits in developed nations decreases, resource companies have increasingly focused on exploration and mining in developing nations. Corruption and bribery are most severe in developing nations where economic and democratic advancement are hampered through decreased competition politically and economically[4]. Indeed, Transparency International's corruption index indicates the most corrupt nations tend to have developing and transitioning economies. This is particularly important for companies involved in the exploration and mining sectors, because those sectors tend to be highly regulated, necessitating frequent interactions with governments. As an increasing number of exploration and mining companies operate in developing nations, it will become important for such companies to understand and comply with applicable anti-bribery laws.

Corruption of Foreign Public Officials Act (Canada)

The *Corruption of Foreign Public Officials Act* ("**CFPOA**") entered into force on February 14, 1999, and was amended in 2001. The CFPOA makes it an offence to bribe a foreign public official.

The CFPOA does not deal with bribery of Canadian public officials. Instead, this is dealt with in the *Criminal Code* (Canada), which includes offences relating to the bribery of judicial officers, fraud on the Government, breach of trust by a public officer, municipal corruption, selling or purchasing an office and influencing or negotiating appointments or dealing with offices.

Section 3 of the CFPOA sets out the offence of bribery of a foreign public official as follows:

> 3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
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> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
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> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

"Every person" who is capable of committing the offence under subsection 3(1) includes not only individuals but also public bodies, corporations, firms, partnerships, trade unions, municipalities or other associations of persons.

A "foreign public official" is defined as

> (a) a person who holds a legislative, administrative or judicial position of a foreign state;

[4] Heather Manweiller & Bryan Schwartz, "A Proposal for an Anti-corruption Dimension to the FTAA" (2001) 1 Asper Rev. f Int'l Bus. and Trade Law 67-90.

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

A "foreign public official" would include, for example, an elected representative or a government official of a foreign state, as well as an official or agent of a public international organization, such as the United Nations. The official may work at any level or subdivision of government, from national to local.

To constitute an offence, a person must have offered a benefit to foreign public official "in order to obtain or retain an advantage in the course of business". This part prohibits payments made by a party that are intended to give an improper advantage in obtaining or retaining business to such party. The CFPOA defines "business" as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit". It is also worth noting that "in the course of business" applies to not only conduct internationally, but also to the bribing of foreign public officials within Canada (for example, bribing a foreign public official in Canada to obtain a construction contract to build or renovate an embassy in Canada).

No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common law principles of criminal culpability and the courts will be expected to read in the *mens rea* of intention and knowledge[5]. Under Canadian law, when a true crime, such as the bribery offence under the CFPOA, is silent as to the requisite *mens rea*, the courts will presume that subjective *mens rea* was intended by Parliament. Subjective *mens rea* is normally satisfied by proving the prohibited act was committed "intentionally or recklessly, with knowledge of the facts constituting the offence or with wilful blindness to them." [6] Proof of negligence is not sufficient for a conviction under the CFPOA.

Debate exists as to the extent the CFPOA applies to crimes that have taken place outside of Canadian borders. Notably, the CFPOA does not specifically apply to Canadian nationals operating abroad[7]. The Department of Justice, Canada produced the Canadian Guide, which states as follows:

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[5] Department of Justice Canada, "The Corruption of Foreign Public Officials Act – A Guide" (May 1999), at page 3 (hereinafter, the "**Canadian Guide**").

[6] *R. v. Sault Ste. Marie* (1998), 3 C.R. (3d)30, at 40 (S.C.C.).

[7] The OECD Working Group has recommended that "Canada urgently take such measures as may be necessary to prosecute its nationals for the bribery of foreign public officials committed abroad". See OECD Working Group on Bribery in International Business Transactions, "Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions" (March 18, 2011) at page 4.

> Canada has jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory. To be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting the offence must take place in Canada. There is a sufficient basis for jurisdiction where there is a real and substantial link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in those facts that offends international comity. (See *R. v. Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.)).

The extent to which Canadians working abroad, or citizens of other countries with ties to Canada may fall within the ambit of the CFPOA, will remain somewhat uncertain until the courts in Canada have a chance to rule further on such matters.

Exceptions

There are three exceptions to the bribery prohibitions under the CFPOA: (1) that the payment was technically lawful (as opposed to merely customary) under the laws of the foreign country for which the public official works, (2) that the payment constituted a "reasonable promotional expense", and (3) that the payment was a "facilitation payment".

Lawful under Local Law

Paragraph 3(3)(a) sets out a lawful exception that a person accused of bribing a foreign official could use as a defence, namely, that the payment was lawful in the foreign state or public international organization for which the foreign public official performs duties or functions. In Canada, the defence applies when the payment was either "permitted or required under the laws of the foreign state or public international organization for which the public official performs duties or functions." This means that, for example, a Canadian company can pay the expenses of a foreign public official to visit Canada so that the company can promote its products and services. Likewise, a Canadian company can pay the expenses of a foreign public official to visit Canada for the purpose of signing a contract. Such payments must be strictly legal and not merely tolerated or customary. In other words, even though small bribes are routinely requested, paid and tolerated by local law enforcement, they would not qualify for the local law exemption if they are technically unlawful.

Reasonable Promotional Expenses

The defence contained in paragraph 3(3)(b) of the CFPOA allows for reasonable expenditures to be made in order to develop a business relationship. To use this defence, the accused must show that the loan, reward, advantage, or benefit was:

- a reasonable expense,
- incurred in good faith,
- made by or on behalf of the foreign public official, and

- directly related to the promotion, demonstration or explanation of the person's products and services or to the execution or performance of a contract between the person and the foreign State for which the official performs duties of functions.[8]

Facilitation Payments

Subsections 3(4) and 3(5) of the CFPOA allow certain "facilitation payments", sometimes referred to as "grease payments", to be made which are exempt from the bribery prohibitions. Such facilitation payments are not considered bribes if they are made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of foreign public official's duties or functions, including:

- the issuance of a permit, license or other document to quality a person to do business;
- the processing of official documents, such as visas and work permits;
- the provisions of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- the provisions of services normally provided as required, such as police prosecution, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

Subsection 3(5) provides that, "for greater certainty, an 'act of a routine nature' does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encourage another person to make any such decision". This defence has not been advanced by any company and the courts have not commented on when this defence will be successful. Thus, until the courts have done so, there can be no certainty about when payments will be permitted facilitation payments and when they will be considered prohibited bribes.

Penalties

Pursuant to subsection 3(2) of the CFPOA, a person found guilty of contravening subsection 3(1) of the CFPOA is guilty of an indictable offence and liable for imprisonment for a term not exceeding five years. The penalty may also include a fine. A fine will be levied in the event a corporation or other non-natural person, which cannot be imprisoned, has been convicted of the offence. The amount of the fine is at the discretion of the judge, and there is no maximum. Note that no limitation period applies to indictable offences in Canada.

The penalties prescribed under the CFPOA may be only part of the potentially negative consequences that could impact a company or the individuals involved resulting from a charge of bribing a foreign public official under the CFPOA. Convictions or even charges under the CFPOA (of which there have been two convictions to date) are widely reported in the press and may damage a company's reputation. Public companies may suffer a reduction in its share price

[8] Canadian Guide, at page 8.

and the potential for action by disaffected shareholders. Dealing with a CFPOA investigation or charge can consume a great deal of management's time and attention and distract it from other business matters.

Furthermore, a charge of bribery may have reputational consequences for the individuals involved. In *R. v. Watts* (discussed below), Hydro Kleen Group Inc. ("**Hydo Kleen**") was charged with bribing a foreign public official. In a Victim Impact Statement, a competitor of Hydro Kleen, through its President Mr. Sullivan, made a statement to the effect that, as a result of the bribery "our own employees questioned the point of maintaining our own ethical values. 'What's the use' was the most asked question". To this statement Mr. Justice Sirrs responded as follows:

> Mr. Sullivan, you have indicated in your statement that your employees have asked themselves, What is the use of being honest, being proper, in your business activities? All I can say to you is, as a citizen, you have to appreciate there are many more important things than profit. Maybe there is no financial value, but I think our society still places a large value on the loss of one's soul, loss of one's integrity, a loss of one's good reputation, all for the sake of more profit.
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> I do not think your employees want to be seen as slippery, slimy snakes that slither on their bellies in order to win business advantage. That is, in my opinion, most people will conduct themselves in their business affairs in a high ethical standard because they want to be thought well of. And in many ways, that is the more important deterrent when people conduct their business practices.

Convictions under the CFPOA

To date, there have been two convictions under the CFPOA, and in both cases the companies that were charged pleaded guilty. In addition, there is currently one ongoing prosecution[9] and over 20 active investigations by the R.C.M.P. International Anti-Corruption Unit.

R. v. Watts

R. v. Watts[10] concerned bribes paid by a Canadian company to an American official. A U.S. immigration officer who worked at the Calgary International Airport pleaded guilty under the *Criminal Code* in July 2002 to accepting secret commissions from Hydro Kleen. The immigration officer received a six month sentence and was subsequently deported to the U.S. Hydro Kleen had bribed the immigration officer to facilitate the entry of its employees into the U.S. and to delay the entry of competitor's employees into the U.S. The immigration official was paid $2,000 per month for providing these "immigration consulting services". The company was charged under s. 3(1)(a) of the CFPOA, pleaded guilty and was ordered to pay a fine of $25,000, an amount recommended to the court by the prosecution and defence lawyers. Charges against Hydro Kleen's President and operations coordinator were stayed.

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[9] On May 28, 2010, the R.C.M.P. laid charges against Mr. Nazir Karigar under paragraph 2(1)(b) of the CFPOA for allegedly making a payment to an Indian government official to facilitate the execution of a multi-million dollar contract for the supply of a security system by Cryptometrics, a Canadian high-tech firm. The matter is currently before a Canadian court.

[10] [2005] A.J. No. 568.

R. v. Niko Resources Ltd.

In *R. v. Niko Resources Ltd.*[11], Niko Resources Ltd. ("**Niko**") was charged under the CFPOA for having bribed a foreign public official in Bangladesh in order to obtain or retain an advantage in the course of Niko's business. Niko is a TSX listed oil and natural gas exploration company with a head office in Calgary and business operations in several countries.

Niko had a subsidiary in Bangladesh that had entered into a joint venture with the Bangladesh Petroleum Exploration & Production Company Limited (BAPEX), which is a gas exploration and production company indirectly wholly owned by the Government of Bangladesh. The purpose of the joint venture was to develop two gas fields in Bangladesh. Such development was to be initially funded by Niko, and Niko was to recoup its investment from production of the gas fields once they were developed. However, Niko's Bangladeshi subsidiary had not yet finalized a gas purchase and sale agreement with the Bangladesh government, which subjected the company to significant risk. In addition, in January 2005 an explosion occurred on one of the joint venture's properties while an independent drilling contractor was drilling for gas, which damaged an adjacent village. In June 2005, a second explosion occurred while drilling a relief well to seal off the gas leak caused by the January blowout.

In May 2005, Niko's Bangladeshi subsidiary provided the use of a vehicle costing $190,984 (and funded by Niko) to the Bangladeshi State Minister of Energy and Mineral Resources, and in June 2005, Niko paid the Minister's travel and accommodation expenses of approximately $5,000 to Calgary to attend the Gas and Oil Exposition and onward to New York and Chicago to visit his family who lived there. It was alleged that the vehicle and payment of travel expenses were made to persuade the Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko and to ensure that Niko was dealt with fairly in relation to claims for compensation related to the blowouts, which represented potentially very large amounts of money.

The Bangladeshi press had become increasingly critical of Niko as a result of the two gas explosions, and on June 15, 2005, a Bangladeshi newspaper published an article entitled "Niko gifts minister luxurious car". As a result of the scandal, the Bangladeshi State Minister of Energy and Mineral Resources resigned and the Canadian government commenced an investigation of corruption against Niko.

On June 24, 2011, Niko pleaded guilty and agreed upon a fine of $8,260,000 plus a 15% Victim Fine Surcharge, totalling $9,499,000. In addition, Niko agreed to comply with a Probation Order for a period of three years and to pay all costs associated with complying with the Probation Order. The Probation Order was aimed at reducing the likelihood of Niko committing a subsequent related offence.

Both the Crown and the defence agreed that a fine of almost $10 million was reasonable, given several aggravating and mitigating factors, which included the following:

[11] Regina v. Niko Resources Ltd., Proceedings taken in the Court of Queen's Bench of Alberta, Judicial District of Calgary, on June 24, 2011.

- The fine should be large enough to send a message to Canadian business that the penalty for violating the CFPOA will be severe, so that bribery would be considered unjustifiable from a business decision-making perspective.
- Niko is a large company (relative to Hydro Kleen), with a market capitalization of approximately $3.3 billion and a nine-month net profit of approximately $118 million at the time of sentencing, so that the fine would be significant to Niko but would not cause it financial distress.
- There were two incidents of bribes admitted by Niko.
- The bribes were made to a high-level minister rather than to a less senior government official.
- Significant expenses were incurred in the R.C.M.P. investigation in an amount of almost $870,000 and the investigation involved the efforts of law enforcement agencies of several countries.
- The amount of the bribes totalled approximately $200,000 (considerably less than the amount of the fine) and there was no evidence that Niko benefitted from the bribes.

In addition, Niko had cooperated with the R.C.M.P. once Niko became aware of the investigation and once the company was charged Niko pleaded guilty without the need for a trial. The Crown suggested that it would have sought a more severe penalty had Niko not cooperated with the investigation or if it decided to plead guilty only after a trial was conducted.

Foreign Corrupt Practices Act (United States)

Like the CFPOA, the FCPA contains provisions prohibiting the payment of bribes to foreign public officials and includes exemptions for facilitation payments and reasonable marketing expenses.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. Certain amendments to the FCPA in 1998 have expanded the anti-bribery provisions to apply to foreign firms who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions, which include keeping records that accurately and fairly reflect the transactions of the company, and devise and maintain an adequate system for internal accounting controls.

The FCPA includes both criminal and civil penalties. Criminal penalties include fines for corporations or other business entities of up to $2,000,000 and officers, directors, stockholders, employees and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. These fines may be increased under the Alternative Fines Act to an amount equal to twice the benefit that the defendant sought to obtain by making the corrupt payment. The fines imposed on individuals may not be paid by their employer or principal. The Attorney General or the SEC may bring civil actions, penalties which include a fine of up to $10,000 against any firm as well as any officer, director, employee or agent of the firm, or stockholder acting on behalf of

the firm, for violations of the anti-bribery provisions. Additional fines may also be levied in particular circumstances. Finally, a person or firm found in violation of the FCPA may be barred from doing business with the U.S. government[12].

The U.S. Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to U.S. issuers.

From 1998 to September 16, 2010, 50 individuals and 28 companies were criminally convicted in the United States of foreign bribery, while 69 individuals and companies have been held civilly liable for foreign bribery. In addition, 26 companies have been sanctioned (without being convicted) for foreign bribery under non-prosecution agreements and deferred prosecution agreements. Sanctions have also been imposed for accounting misconduct and money laundering relating to foreign bribery.[13]

From 1998 to 2003, the maximum monetary sanctions levelled against a company in a FCPA case were US$2.5 million. Since then, 23 companies have received monetary sanctions in excess of US$10 million. In one case, monetary sanctions totalling US$800 million were ordered against a single company. In 2010, an 87-month sentence was imposed against an individual in an FCPA case. Since 2004, over US$1 billion in foreign bribery proceeds have been disgorged to the government.[14] The OECD Working Group on Bribery in International Business Transactions, when interviewing representatives of the public sector in the United States, found that the increasingly heavy sanctions combined with the increasing number of prosecutions have significantly raised the FCPA's profile, and may be "the main reason why many companies [in the United States] have taken steps to improve their anti-bribery measures, internal controls, books and records, and compliance systems." [15]

Bribery Act (United Kingdom)

The *Bribery Act* 2010 of the United Kingdom (the "**Bribery Act**") came into force on July 1, 2011. The Bribery Act sets out general bribery offences (one offence is of bribing another person and the other offence is of requesting, agreeing to accept or accepting a bribe), the offence of bribing a foreign public official and the offence of failure of commercial organisations to prevent bribery.

The provisions relating to bribing a foreign public official are substantially similar to the offence set forth in the CFPOA, except that the Bribery Act does not contain any exceptions for

[12] U.S. Guide; pages 5-6.

[13] OECD Working Group on Bribery in International Business Transactions, "United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions" (October 15, 2010) at page 10.

[14] *Ibid.* at pages 10-11.

[15] *Ibid.* at page 11.

facilitation payments or reasonable promotional expenses. Furthermore, the maximum punishment under the Bribery Act for such offence is 10 years imprisonment, a fine, or both.

The Bribery Act goes beyond the Canadian and American counterparts by including offences for bribing or receiving a bribe that is not limited to foreign officials but includes anyone who may offer, promise or give a financial or other advantage to another person to induce such other person to perform improperly a "relevant function", or to reward such other person for the improper performance of such a function. A "relevant function" is defined to be a function of a public nature, an activity connected to a business, an activity performed in the course of a person's employment, or an activity performed by or on behalf of a body of persons, where the person performing the relevant function is expected to perform it in good faith or impartially, or where the person performing the relevant function is in a position of trust by virtue of performing the function. In the case of a person who receives a bribe, it does not matter whether the person knows or believes that the performance of the function is improper.

The Bribery Act applies to UK citizens, residents and companies established under UK law. In addition, non-UK companies can be held liable for a failure to prevent bribery if they do business in the UK. Under the Bribery Act, a relevant person or company can be prosecuted for the above crimes if the crimes are committed abroad. Companies can be liable for bribery committed for their benefit by their employees or other associated persons.

In addition, a company or corporate entity (including a company that carries on business, or part of its business, in the United Kingdom, regardless of where such company is incorporated) is culpable for bribes given anywhere in the world to a third party with the intention of obtaining or retaining business for the organisation or obtaining or retaining an advantage useful to the conduct of the business by their employees and associated persons, even if the company had no knowledge of those actions. However, the Bribery Act contains a defence to such charge if the company had in place adequate procedures designed to prevent persons associated with the company from undertaking such conduct.

Corporate Responses

Companies that conduct business in other countries, especially developing countries, would be well advised to consider implementing anti-bribery policies and compliance programs to avoid violating applicable anti-bribery legislation. Although neither the CFPOA nor the FCPA explicitly offer defences against bribery charges to companies that institute adequate policies and procedures for preventing its employees, agents and other representatives from engaging in bribery, the Bribery Act does offer such a defence and it is likely that courts in Canada and the United States would favourably consider such policies and procedures when sentencing a company that is convicted under the CFPOA or the FCPA. Such policies and procedures offer tangible evidence that a company has taken steps to prohibit bribery in its dealings with international foreign officials. The extent of such policies and procedures will depend on a risk assessment addressing the individual circumstances of the company, in particular the risks of foreign bribery.

A company's anti-bribery policies and procedures may include the following:

- Written policies against bribery, whether contained in a self contained policy or within other policies, such as a Code of Ethics, which makes it clear that bribes will not be tolerated by the company.
- Clear guidelines for employees on how to handle gifts and expenses. A company may decide to prohibit the giving of gifts or the payment of expenses altogether. Alternatively, the organization may adopt a policy permitting gifts and/or payment of expenses, provided such gifts or payments are made in good faith and are "reasonable". It is important for each individual company to determine what it thinks is "reasonable", and provide guidance to employees and others that must comply with the policy.
- Whether or not the company will allow facilitation payments. Many companies make it a policy to do without facilitation payments altogether. If facilitation payments are permitted, use clear guidelines to indicate what type of payments are appropriate. Setting a monetary limit for field personnel that requires approval when it passes the threshold may be useful. If facilitation payments are permitted, make sure facilitation payments are properly recorded on the books of the company. Note, however, that if the Bribery Act applies to the company, facilitation payments should not be allowed because unlike the CFPOA and the FCPA, the Bribery Act does not exempt facilitation payments from the prohibition on bribing foreign officials.
- Contractually bind contractors to apply the same anti-bribery policies used by the company. Alternatively, if the company does not want to disclose its policies in their entirety, summarize the key points and make contractors agree in writing to abide by such summary.
- Clearly define the company's process to recruit, retain and manage agents. Have due diligence performed on such agents by independent and qualified individuals or organizations. Final hiring decisions should be made by independent committees consisting of some of the most senior people available in the company, relying on qualified legal advice. The hiring process should be documented in writing.
- Any political contributions should be approved at a senior level within the company.
- Establish a compliance program for the company, which may include:
    - educating relevant employees about bribery and the company's policies and procedures for avoiding it, and having employees certify in writing that they have been advised of the company's policies regarding corruption and that they will abide by those policies;
    - requiring due diligence (and establishing due diligence checklists) before entering into a relationship with a foreign representative or a foreign business partner, such as a potential joint venture partner;
    - establishing internal accounting controls and procedures to ensure accurate financial record-keeping and making sure facilitation payments, gifts and expenses, when they are permitted, are properly recorded;

- assigning responsibility to one or more senior executives for the implementation and oversight of the company's anti-corruption policies and procedures;
- instituting appropriate disciplinary procedures to address violations of the Company's anti-corruption policies and procedures;
- providing a mechanism for employees to report violations;
- monitoring high risk activity; and
- periodically monitoring the effectiveness of the compliance program and making changes when necessary.

Additional suggestions relating to internal controls, ethics and compliance programs relating to preventing and detecting bribery of foreign public officials can be found in "Good Practice Guidance on Internal Controls, Ethics, and Compliance" adopted February 18, 2010 by the OECD Council[16].

The Niko Probation Order

In the Niko case, Niko was ordered to strengthen its compliance, record keeping and internal control standards and procedures in accordance with the directions set out in Appendix A to the Probation Order. In addition, Niko was ordered to report periodically, at no less than 12-month intervals, to the Court, the R.C.M.P. and the R.C.M.P. Anti-Corruption Unit regarding remediation and implementation of the compliance program and internal controls, policies and procedures.

The Niko Probation Order was authored after consultation with the United States Department of Justice Fraud Section and reflects what the Crown Prosecutor referred to as "a Canadianized version of similar enforcement actions in the United States". The Crown suggested that its intention is to use the Probation Order as a template for future prosecutions under the CFPOA. Accordingly, Appendix A to the Probation Order is illustrative of what the Crown considers to be important in fashioning a system of internal controls, policies and procedures against bribery for companies that have been convicted of violating the CFPOA.

Appendix A to the Probation Order is as follows:

> 1. In order to address any deficiencies in its internal controls, policies and procedures regarding compliance with the *Corruption of Foreign Public Officials Act* [and] the *Criminal Code of Canada*, Niko and its subsidiaries (hereinafter referred to as "the company") agree to conduct, in a manner consistent with all of its obligations under this Order, appropriate reviews of its existing internal controls, policies and procedures.
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> 2. Where necessary and appropriate, the company agrees to adopt new or modified existing internal controls, policies and procedures in order to ensure that it maintains:

[16] http://www.oecd.org/dataoecd/5/51/44884389.pdf

a system of internal accounting controls designed to ensure that the company makes and keeps fair and accurate books, records and accounts;

a rigorous anti-corruption compliance code, standards and procedures designed to detect and deter violations of the CFPOA and other applicable anti-corruption laws. At a minimum this should include, but not be limited to, the following elements to the extent that they are not already part of the company's existing internal controls, policies and procedures:

the company will develop and promulgate a clearly articulated and visible corporate policy against violations of the CFPOA, including its anti-bribery and other foreign law counterparts (the anti-corruption laws) which policy shall be memorialized in written format;

the company will ensure that its senior management provides strong, explicit and visible support and commitment to its corporate policy against violations of anti-corruption laws and its compliance code;

the company will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and the company's compliance code, and the company will take appropriate measures to encourage and support the observance of ethics and compliance standards against bribery by personnel at all levels of the company. These anti-corruption standards and procedures shall apply to all directors, officers and employees and, where necessary and appropriate, outside parties acting on behalf of the company in Canada or elsewhere, including, but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors, suppliers, consortia, and joint venture partners (hereinafter all referred to as "agents and business partners") to the extent that business partners may be employed under the company's corporate policy. The company shall notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company. Such standards and procedures shall include policies governing: gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments and solicitation and extortion.

The company will develop these compliance standards and procedures, including internal controls, ethics and compliance programs, on the basis of a risk assessment addressing the individual circumstances of the company, in particular foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture agreements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.

The company shall review its anti-corruption compliance standards and procedures, including internal controls, ethics and compliance programs, no less than annually, and update them as appropriate, taking into account relevant developments in the field and evolving international and industry standards, and update and adapt them as necessary to ensure their continued effectiveness.

The company will assign responsibility to one or more senior corporate executives for the implementation and oversight of the company's anti-corruption policies, standards and procedures. In addition to any other direct reporting required by the company, such corporate official or officials shall have direct reporting obligations to independent monitoring bodies, including internal audit, the company's Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management, as well as sufficient resources and authority to maintain such autonomy.

The company shall ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records and accounts to ensure that they cannot be used for the purpose of bribery or concealing such bribery.

The company will implement mechanisms designed to ensure that its anti-corruption policies, standards and procedures are effectively communicated to all directors, officers and employees and, where appropriate, agents and business partners. These mechanisms shall include, but not be limited to:

periodic training for all directors, officers and employees and, where appropriate, agents and business partners; and

annual certifications by all such directors, officers and employees and, where appropriate, agents and business partners, certifying compliance with the training requirements.

The company will maintain or, where necessary, establish, an effective system for:

providing guidance and advice to directors, officers, employees and, where appropriate, agents and business partners, on complying with the company's anti-corruption policies, standards and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which the company operates;

internal and, where possible, confidential reporting by and protection against retaliation for directors, officers, employees and, where appropriate, agents or business partners, who make good faith reports of suspected wrongdoing within the company; and

responding to such requests and undertaking appropriate action in response to such reports.

The company will institute appropriate disciplinary procedures to address violations of the anti-corruption laws and the company's Code of Conduct, policies and procedures by the company's directors, officers and employees. The company shall implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent similar misconduct, including assessing the internal controls, ethics and compliance program, and making modifications necessary to ensure the program is effective.

To the extent that the use of agents and business partners is permitted at all by the company, it will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including:

properly documenting risk-based due diligence pertaining to the retention and appropriate and regular oversight of agents and business partners;

informing agents and business partners of the company's commitment to abiding by anti-corruption laws and of the company's ethics and compliance policies and standards; and

seeking a reciprocal compliance commitment from agents and business partners.

3. Where appropriate, the company will include standard provisions in agreements, contracts and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending on the circumstances, include:

anti-corruption representations and undertakings relating to compliance with anti-corruption laws;

rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and

rights to terminate an agent or business partner as a result of any breach of anti-corruption laws or the company's policies in that regard.

4. The company will conduct periodic review and testing of its anti-corruption compliance code, standards and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and the company's anti-corruption code, standards and procedures, taking into account relevant developments in the field and evolving international and industry standards.