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how does the US corruption legislation apply to you and your Canadian Company

Canadian companies doing business internationally usually understand that they need to comply with Canada's *Corruption of Foreign Public Officials Act* ("CFPOA"). The fact that the United States' Foreign Corrupt Practices Act ("FCPA") is often also applicable to them is less understood. This is problematic given the intensity of the FCPA enforcement activities and the very great costs involved where non-compliance is discovered. A prosecution under the FCPA, or Canada's anti-corruption legislation for that matter, is very costly. Violations to the CFPOA and FCPA can result in steep fines, imprisonment and regulatory sanctions for companies and their individual officers, directors, employees and agents. In addition, similar to the Canadian rule with the same effect, for companies doing business with the United States government, the relatively new Overseas Contractor Reform Act dictates that no government contract or grant will be awarded to companies who violate the FCPA.

does the FCPA apply to you or your company?

The FCPA's provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer.[1] Thus, if a Canadian company is considering listing on the SEC, it must consider how it will be compliant with the FCPA.

A 'domestic concern' is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States (and its officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies).[2] Thus if a Canadian company employs Americans, has U.S. affiliates or partners, these individuals are covered by the FCPA and those acting on their behalf are as well.

Most importantly for Canadian companies, the FCPA also applies to foreign nationals or entities that are not issuers or domestic concerns but are foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any act* in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.[3] Again, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities are also subject to the FCPA's anti-bribery prohibitions. Because "any act or furtherance" is identified as problematic, a very broad and varied number of activities are sufficient to create the nexus required for FCPA applicability.

For example, Canadian companies—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the U.S. postal services or any means or instrumentality

[1] 15 U.S.C. § 78l.

[2] 15 U.S.C. § 78dd-2.

[3] 15 U.S.C. § 78dd-3(a).

of interstate commerce in furtherance of a corrupt payment to a foreign official. The FCPA defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof …."[4] The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality.[5] This means that placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce. Notably, a Canadian company also engages the FCPA prohibitions if it sends a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.

In addition, a Canadian who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators in Canada, even if they did not themselves attend the meeting. A Canadian national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the Canadian national or company itself takes any action in the United States.[6]

A great proportion of Canadian companies employ U.S. agents and representatives or other channel partners to distribute and otherwise support their products, use American expedited parcel services or banking systems or American telecommunication pathways. Given these and many other such activities, the likelihood of applicability of the FCPA is high.

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[4] *See* 15 U.S.C. §§ 78dd-2(h)(5) (defining "interstate commerce"), 78dd- 3(f)(5) (same); *see also* 15 U.S.C. §78c(a)(17).

[5] 15 U.S.C. §§ 78dd-2(h)(5), 78dd-3(f)(5).

[6] Criminal Information, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), ECF No. 1, available at http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf; Criminal Information, United States v. Snamprogetti Netherlands B.V., No. 10-cr-460 (S.D. Tex. Jul. 7, 2010), ECF No. 1, available at http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf.

next steps

On November 14, 2012, the United States' Securities and Exchange Commission ("SEC") and the Department of Justice (USDOJ) released "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (found http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf). The 120-page guide provides an official analysis of the FCPA and sheds considerable light on FCPA enforcement considerations of the SEC and USDOJ.

The guide targets information and analysis for companies with U.S. connections, doing business abroad, no matter their size. Topics include the following and include liberal use of hypotheticals, examples and summaries of DOJ opinions and cases:

- who is covered by the FCPA's anti-bribery and accounting provisions;
- the definition of a "foreign official";
- what constitute proper and improper gifts, travel, and entertainment expenses;
- facilitating payments;
- how successor liability applies in the M&A context;
- what is an effective corporate compliance program; and
- civil and criminal resolutions available.

A comprehensive anti-corruption program has become an imperative for Canadian companies doing business outside of the nation's borders. In their quest to be compliant with the US FCPA and similar Canadian anti-corruption legislation, companies must consider these questions at a minimum:

- Is there an appropriate tone at the top and well communicated policies and procedures for personnel and partners?
- Is there an effective training program for employees, agents, and third party partners?

- Is it a requirement that personnel, including third parties and agents, certify that they understand the rules and have complied?
- Does the company vet its partners and test its compliance systems?
- Does the company analyze the risk of doing business in certain countries, with certain governments or with certain parties and address such risks appropriately?

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cautionary note