FCPA DECLINATION LETTERS AND CORPORATE CRIMINAL LIABILITY: WHAT CAN BE LEARNED FROM THE U.S. APPROACH

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The Acting Assistant Attorney General for the Criminal Division of the U.S. Department of Justice (the "**DOJ**"), Kenneth Blanco, recently announced[1] that the DOJ's FCPA[2] "Pilot Program"[3] introduced in 2016 would remain in effect after the expiry of its initial of period of one year period on April 5, 2017. At a White-Collar Crime conference organized by the American Bar Association's National Institute, Mr. Blanco stated that, upon expiration date, the DOJ would "begin the process of evaluating the utility and efficacy of the 'Pilot Program', whether to extend it, and what revisions, if any, [the DOJ] should make to it".[4] Mr. Blanco then indicated that the program will continue in force until the DOJ has arrived to a final decision on those issues.[5]

This bulletin aims to provide a brief overview of the distinctions between U.S. and Canadian policies with respect to the decision to prosecute and seek the conviction of organizations for foreign corruption and bribery practices perpetrated by their employees, officers or agents. In both the U.S. and in Canada, it is possible for the prosecution to bring charges against both individuals and organizations. However, in that respect, the Canadian approach differs from the U.S. in that there are no real alternatives to criminal prosecution, such as non- and deferred prosecution agreements (N/DPAs) or declination letters, which are often used in the U.S. in appropriate cases for dealing with corporate criminal liability.

The CFPOA

In Canada, the *Corruption of Foreign Public Officials Act*[6] ("CFPOA") has been in place since 1998 to prevent and combat the corruption and bribery of foreign public officials. The CFPOA has been amended twice, first in 2001 and more recently in 2013. The latest amendments notably broadened the scope of the CFPOA by expanding the jurisdiction of Canadian courts and toughened the applicable penalties in the event of a violation. Specifically, since the 2013 amendments, criminal proceedings can be brought against Canadian citizens who are permanently residing in Canada and against corporations organized in Canada, even if no portion of the activities constituting the offence took place in Canada, and the criminal offences carry a maximum penalty of 14 years of imprisonment for individuals.

The CFPOA creates two criminal offences for which an individual or organization can be found guilty: (i) the

bribing of a foreign public official to obtain an advantage[7] and (ii) the perpetration of accounting operations for that purpose or for purpose of hiding such bribery.[8]

Where an organization is found guilty of a CFPOA offence, the court can impose a fine in an amount of its discretion[9] and a probation order.[10] In imposing a fine to an organization, a series of mitigating and aggravating factors that are specific to organizations must be considered by the court, namely: (1) the advantage realized by the organization; (2) the complexity, duration and degree of planning of the offence; (3) the concealment and conversion of assets; (4) the economic viability of the organization and continued employment of its employees; (5) the costs of investigation and prosecution; (6) the concurrent imposition of regulatory penalties on the organization; (7) the prior conviction for a similar offence and the prior regulatory penalties for similar conduct; (8) the organization's imposition of penalties on its offending representatives; (9) the restitution or voluntary indemnification of victims; and (10) the measures taken to prevent recidivism.[11]

In Canada, voluntary self-disclosure and cooperation on the part of organization for CFPOA offences are currently only rewarded by a potentially lower fine and is not further encouraged by alternative resolution vehicles such as N/DPAs or declination letters. The only alternative to a criminal trial is entering into a plea agreement with Crown counsel, pursuant to which an organization could agree to plead guilty to a CFPOA offence in exchange for reduced charges and/or penalties. However, this alternative still results in a criminal conviction and its damaging direct and indirect negative impacts.

The FCPA "Pilot Program"

The Pilot Program was essentially designed to prompt organizations to (i) voluntarily self-disclose the occurrence of foreign corrupt practices committed by their employees, officers or agents to the FCPA Unit of the DOJ Fraud Section, (ii) fully cooperate with the DOJ in accordance with the Yates Memo[12] and the U.S. *Principles of Federal Prosecution of Business Organizations*,[13] and (iii) to remediate. Organizations are also required to disgorge any ill-gotten profits by paying such sums to the US treasury.

The three applicable standards of the Pilot Program can be summarized as follows:

1. First, an organization must first voluntary self-disclose the FCPA-related misconduct. This step permits the identification of organizations whose FCPA violations that may have fallen under the radar and allows the DOJ to save resources spent in the detection of such wrongdoing. A disclosure required by law or contract is not considered voluntary self-disclosure. The self-disclosure must take place before "an imminent threat of disclosure or government investigation", must be made "within a reasonably prompt time after becoming aware of the offense" and the organization must disclose all relevant facts regarding the FPCA violation, including those relating to individuals involved in the offences.
2. Second, the organization must fully and proactively cooperate with the DOJ, on a timely basis. This

cooperation includes, among other things, assisting the DOJ in prosecuting the individuals accountable for the FPCA violations,[14] disclosing "all relevant facts gathered during a company's independent investigation", "all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals" and "all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals."

3. Third, the organization must appropriately remediate. This includes, notably, the implementation of an effective compliance and ethics program and appropriate discipline of employees, including those involved in the FPCA violations.

In exchange for complying with such cooperation standards, the DOJ may consider reducing the fine imposed on the organization by up to 50% off the bottom end of the U.S. Sentencing Guidelines fine range (if a fine is sought) and deciding not to appoint an independent compliance monitor.[15] Moreover, when the organization has met the disclosure, cooperation and remediation standards of the Pilot Program, the DOJ will consider declining criminal prosecution against the organization pursuant to a "declination letter", provided that the organization has disgorged all profits from the FCPA violations.

The stated goals of the Pilot Program are to "further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and [...] increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove." It is worth noting that the Pilot Program does not supplant the *Principles of Federal Prosecution of Business Organizations* (USAM 9-28.000) (the "USAM Principles"), which are used by the DOJ prosecutors to determine whether an organization should be prosecuted.[16] The disclosure, cooperation and remediation standards outlined in the Pilot Program are more exacting than those set out under the USAM Principles and allow organizations to obtain additional credit for meeting such standards.

By making it possible for organizations to truly avoid criminal liability, there is no doubt that the Pilot Program has encouraged some organizations to adopt active measures to actively report FPCA violations to the DOJ in a timely manner and to prevent, detect and remediate such violations. Since the implementation of the Pilot Program in 2016, the DOJ has publicly released five declination letters pursuant to which the DOJ has closed its investigations and declined to bring criminal charges against five American corporations.[17]

For example, in the case of Nortek, Inc. ("**Nortek**"), Nortek discovered, during an internal routine audit, that its wholly owned subsidiary based in China had made or approved around 400 gifts to Chinese officials in exchange for preferential treatment.[18] Such briberies had taken place during at least five years prior to 2014 and were voluntarily reported to the U.S. Securities Exchange Commission ("**SEC**") in 2015. On June 3, 2016, the

DOJ issued a declination letter in favour of Nortek. This letter provided, notably:

I write regarding the investigation by the Department of Justice, Criminal Division, Fraud Section into your client Nortek, Inc. ("Nortek" or the "Company") concerning possible violations of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq. Based upon the information known to the Department at this time, we have closed our inquiry into this matter. Consistent with the FCPA Pilot Program, we have reached this conclusion despite the bribery by employees of the Company's subsidiary in China, based on a number of factors, including but not limited to the fact that Nortek's internal audit function identified the misconduct, Nortek's prompt voluntary self-disclosure, the thorough investigation undertaken by the Company, its fulsome cooperation in this matter (including by identifying all individuals involved in or responsible for the misconduct and by providing all facts relating to that misconduct to the Department) and its agreement to continue to cooperate in any ongoing investigations of individuals, the steps that the Company has taken to enhance its compliance program and its internal accounting controls, the Company's full remediation (including terminating the employment of all five individuals involved in the China misconduct, which included two high-level executives of the China subsidiary), and the fact that Nortek will be disgorging to the SEC the full amount of disgorgement as determined by the SEC. If additional information or evidence should be made available to us in the future, we may reopen our inquiry".[19]

It is worth noting that Nortek also entered into a non-prosecution agreement (NPA) with the SEC for the same misconduct.[20]

Discussion

It appears that the use of the Pilot Program can also present several advantages over a criminal trial in certain circumstances. Criminal trials can be very costly and time consuming to the state, and there is no guarantee that the prosecution will be able to meet the criminal burden of proof to obtain a conviction. Moreover, given the direct and indirect consequences of a conviction, indicted organizations are unlikely to fully cooperate with the DOJ, which might make it more difficult to obtain a conviction against them and their officers. Aside from substantial fines, a criminal conviction can notably result in a bar from governmental procurement contracts[21] and significant reputational damage for organizations, and publicly held corporations can see their stock price drop significantly.[22] Also, where an organization is convicted, uninvolved and innocent parties, such as shareholders and employees, are likely to suffer negative indirect impacts resulting from such conviction.[23]

The Pilot Program undoubtedly prevents or at least significantly mitigates such direct and collateral negative impacts. Currently, there is no Canadian equivalent to the declination letters that may be issued under the Pilot Program or to U.S. N/DPAs. Plea agreements may be entered into between Crown and defence counsel in

Canada, but these do not prevent the conviction of the organization and the negative consequences that derive from it, and do not present the enforcement advantages of declination letters, as organizations may be less inclined to voluntarily self-disclose the wrongdoing of their employees, officers and agents absent the possibility of fully avoiding criminal conviction.

Therefore, the Pilot Program appears to be efficient in that it enhances enforcement by encouraging organizations to disclose offences which might not otherwise have been detected and to cooperate fully with the DOJ. This disclosure and cooperation notably allow the DOJ to identify individuals who were actively involved in the perpetration of FPCA offences and to subsequently obtain convictions against them. The Pilot Program also provides a viable alternative to criminal trials and can serve to prevent or mitigate the negative impacts that stem from the criminal prosecution and conviction of organizations.

As observed Transparency International in 2013, [t]he CFPOA currently requires full-blown criminal investigation and prosecution, which entails substantial costs to both the government and targets of investigation" and "[t]his may not be required or appropriate in certain cases and an alternative non-criminal process would be beneficial."[24] Transparency International has criticized the fact that the CFPOA lacks a non-criminal, civil enforcement alternative to cumbersome criminal proceedings.[25] As of today, Canada remains in the "Moderate Enforcement" category for deterring foreign bribery according to Transparency International.[26]

In light of the foregoing, it seems unfortunate that the Public Prosecution Service of Canada (the "**PPSC**") has not introduced measures or policies similar to the Pilot Program implemented by the DOJ. In our view, Canada would greatly benefit from considering something similar to the U.S. approach in dealing with corporate criminal liability for CFPOA offences.

That being said, while to our knowledge, nothing akin to a "declination letter" has been issued so far in Canada and it is unlikely that such letters would be provided without a formal policy, there are certain circumstances where an organization that has allegedly participated in a CFPOA offence may avoid criminal prosecution and potential conviction. Pursuant to Canada's bifurcated criminal law system, the investigative and prosecutorial functions for CFPOA offences are divided between two governmental agencies, namely the Royal Canadian Mounted Police (the "RCMP") and the PPSC. The RCMP has exclusive jurisdiction to investigate alleged misconduct under the CFPOA and to enforce the provisions thereof,[27] while the PPSC is entrusted with the role of reviewing CFPOA cases referred to it by the RCMP and prosecuting individuals and organizations where the PPSC determines that there is a reasonable prospect of conviction and that it would in the public interest to lay charges.[28] Both agencies are independent in the exercise of their respective mandates. With respect to the RCMP, while there is no official policy to that effect, using its sole discretion to terminate an investigation or not to refer a case to the PPSC, the RCMP has, in some cases, issued non-action letters for less serious or minor

offences. As for the PPSC, it may, in certain circumstances, determine that a prosecution would not best serve the public interest.[29] Factors that the PPSC considers to determine whether a prosecution would be in the public interest include, *inter alia*, the nature of the alleged offence (including the seriousness of the offence and mitigating or aggravating circumstances), the nature of the harm caused by or the consequences of the alleged offence, the level of culpability and circumstances of the accused, the need to protect sources of information and confidence in the administration of justice (including "[w]hether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive").[30] Therefore, it appears that nothing would prevent the PPSC, in appropriate cases and provided that the public interest is protected, from declining prosecution against an organization for a CFPOA offence in exchange for voluntary self-disclosure, cooperation and remediation.

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[1] United States Department of Justice, "Acting Assistant Attorney General Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime", March 10 2017.
[2] *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. § 78dd-1, et seq. ("**FCPA**").
[3] United States Department of Justice, Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance", April 5, 2016.
[4] *Supra*, note 1.
[5] *Ibid*.
[6] SC 1998, c 34 ("**CFPOA**").
[7] CFPOA, s 3. It is worth noting that Courts have found that a conspiracy or agreement to commit such corruption or bribery are sufficient to make out the bribery offence under the CFPOA: *R v Karigar*, 2013 ONSC 5199.
[8] CFPOA, s 4.
[9] *Criminal Code*, RSC 1985 s 735(1).
[10] *Ibid*, s 732.1(3.1).
[11] *Ibid*, s 718.21.
[12] United States Department of Justice, Office of the Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing", September 9, 2015.
[13] 9-28.000.
[14] According to the Yates Memo, supra, note 9, to be considered as fully cooperating, a corporation has to provide all relevant facts to the DOJ about the individuals involved in the FCPA-related misconduct
[15] Where the organization has fully cooperated and timely remediated in accordance with the Pilot Program, but has not voluntarily self-disclosed, it may nonetheless receive a limited credit of up to 25% off the bottom of

the U.S. Sentencing Guidelines fine range.

[16] In the U.S., an organization may be held criminally liable where any individual, regardless of his or her rank, acting with the scope of his employment or authority, commits a crime with a view (at least in part) to benefit the organization. That being said, the DOJ has included, on its own volition, an internal standard of moral culpability under principle 9-28.500 of the *Principles of Federal Prosecution of Business Organizations, supra*, note 10, when deciding whether or not to press criminal charges against an organization.

[17] https://www.justice.gov/criminal-fraud/pilot-program/declinations.

[18] According to the Non-Prosecution Agreement entered into between Nortek and the SEC on June 7, 2016.

[19] U.S. Department of Justice, Nortek, Inc. (June 3, 2016). Emphasis added.

[20] *Supra*, note 15.

[21] Notably, under the Ineligibility and Suspension Policy of the Government of Canada's Integrity Regime, a contractor may be debarred from government procurement for 10-year period where such contractor is convicted of or pleads guilty to "integrity offences", which includes the offences under the CFPOA (however, in certain circumstances, a reduction of up to 5 years is possible). This very harsh sanction can arguably constitute the equivalent of "corporate death penalty" for certain organizations whose business mainly derives from government contracts. Also, in the Province of Quebec, the *Autorité des marchés financiers* ("**AMF**") can refuse to issue or renew or can revoke a prior authorization to participate in public contracts (which is required for certain types of public contracts and public contracts involving expenditures of a certain amount, see: https://lautorite.qc.ca/en/other-amf-mandates/public-contracts/about-public-contracts/) where an organization has been found guilty of having violated section 3 of the CFPOA.

[22] For instance, on the day of the announcement that criminal charges were being laid against SNC-Lavalin Group, the price of its shares decreased by 7%, and by almost 20% in the month that followed: Richard Dufour, La Presse, "La Caisse de dépôt augmente sa mise dans SNC-Lavalin".

[23] An often-used example is Arthur Andersen LLP's dismantlement following a conviction pursuant to a criminal trial as part of the Enron scandal, which was eventually overturned. As a result, tens of thousands of individuals lost their employment and competition in the accounting industry was negatively impacted, the "Big 5" becoming the "Big 4".

[24] Transparency International, "Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery", 2013, at p 27.

[25] *Ibid*.

[26] Transparency International, "Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery", 2013, at p 7.

[27] CFPOA, s 6.

[28] Public Prosecution Service of Canada, Public Prosecution Service of Canada Deskbook, 2.3 Decision to

Prosecute, Guideline of the Director Issued under Section 3(3)(c) of the *Director of Public Prosecutions Act*, March 1, 2014, s. 3.
[29] *Ibid*.
[30] *Ibid*.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.