

FOREIGN CORRUPTION COMPLIANCE: SHOULD YOU HAVE AN ANTI-BRIBERY COMPLIANCE PROGRAM?

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After a quiet first decade, Canadian authorities are stepping up enforcement of Canada's *Corruption of Foreign Public Officials Act*.

The CFPOA makes it an offence for companies or individuals to give, offer (or agree to give or offer) a loan, reward, advantage or benefit of any kind to a foreign official in order to obtain or retain business or any other improper advantage. The offence covers bribes given directly or indirectly, including bribes that are given through a third party (e.g., agents). It also applies to aiding and abetting in committing these offences, an intention in common to commit them, and counseling others to commit these offences.

There are very limited exceptions or defences for payments or other benefits that are lawful. You may make "facilitation payments" to expedite or secure the performance by a foreign public official of any "act of a routine nature". Note that a decision to award or renew a contract, or a decision on the terms of a particular contract, are *not* routine acts. A full defense is available if the payment was lawful in the foreign state or public international organization for which the foreign public official performs duties or functions. Finally, in the same way that the US law prohibiting foreign corruption operates, you may give a loan, reward, advantage or benefit that was a reasonable expense, incurred in good faith, *directly related* to the promotion, demonstration or explanation of your 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 or functions. Your compliance program must be engineered to screen out the specific practices that do not fall within these narrow exceptions and defenses.

The maximum penalty for individuals is 5 years imprisonment per offence. Individuals and corporations may also be subject to a fine in the discretion of the court (with no maximum). These are the same potential penalties for bribery of domestic government officials under the *Criminal Code of Canada*.

Canada's CFPOA is part of a multilateral effort to reduce corruption and allow companies to compete for international business on a level playing field. The CFPOA was enacted in response to the *OECD Convention on Combating Bribery of Foreign Public Officials*. Canada is also a signatory to the *UN Convention Against Corruption* and the *Inter-American Convention Against Corruption*. The US and German authorities have been

particularly active in enforcing their anti-corruption laws, including December 2008 settlements with Siemens that involved total penalties of US\$1.6 billion. A lengthy investigation of British Aerospace also led to penalties of US\$400 million in the United States and US\$48 million in the UK, and was the catalyst for the development of the vigorous new *Bribery Act*, 2010 in the United Kingdom. This UK law is noteworthy as it is applicable to bribery of private company officials as well as government officials and applies to Canadian companies with UK affiliates or other connections doing business anywhere in the world.

In this context, the head of the anti-bribery unit in the RCMP (Canada's federal police force) has stated that Canada is serious about prosecuting foreign corruption offences. This follows a 2009 plea bargain with Niko Resources in which it agreed to pay a fine of \$9.5 million after giving a \$190,000 Land Cruiser to the Minister of Energy in the Bangladesh Government and paying \$5,000 in expenses related to his airfare and hotel room for personal travel from Bangladesh to Calgary and New York. A fine equivalent to 5,000% of the bribe represents an extremely high penalty, but was readily accepted by the sentencing judge who also considered decisions under the US *Foreign Corrupt Practices Act* when assessing the proposed sentence recommended by the prosecution and defence counsel.

Another case is in the prosecution stage. Nazim Karigar is scheduled to go to trial in September 2012 based on allegations that he gave \$250,000 to a political associate of the Indian Civil Aviation Minister to obtain a security equipment contract. Karigar has challenged the jurisdictional reach of the CFPOA on the basis that his case does not meet the requirement of a "real and substantial link" to Canada. However, the Canadian authorities and courts have tended to interpret this test broadly. Karigar, amongst all others, must also contend with the increasing level of communication amongst investigators internationally and the likelihood of prosecutions in multiple jurisdictions given the international nature of these crimes.

The RCMP stated that at the end of 2011 it had 22 current investigations underway, likely more at this juncture. It appears from media reports and limited public disclosures by SNC Lavalin that it may be the subject of one of the investigations. RCMP personnel have also indicated that they are prepared to enforce the CFPOA in the non-profit sector where facts warrant even though it is not clear whether the law applies to activities of not-for-profit organizations. A test case may follow in future.

The risk of investigation has never been greater and the reputational risk, given the current media interest in these sorts of scandals, will increasingly be a consideration for companies especially publicly traded ones or companies pursuing financing or other significant transactions. Companies must evaluate their risk and, where appropriate, ensure adequate compliance programs are in place.

Answering yes to any of the following questions indicate that you will need to address the gaps in your compliance program to address corruption:

- Do you sell to governments or deal routinely with public officials?
- Do you operate in countries or industries (Mining, Aerospace, Defense, Utilities, Construction, Telecommunications) with a high incidence of corruption?
- Do you retain agents, consultants, distributors or other third parties to help you to operate in foreign countries?
- Are you certain that the fees you are paying to third parties in foreign jurisdictions are market rates?
- Do you operate in the US or UK or have subsidiaries or affiliates that do?

Many Canadian companies and non-profits operating abroad do not yet have a CFPOA compliance program. In the current enforcement environment, a small investment in compliance can be significant. A basic program involves policies on appropriate conduct, a training program, due diligence processes on agents operating abroad, financial controls and record keeping on payments made and the implementation of language in contracts with third parties that addresses corruption. Given the absence of a limitation period under CFPOA, a confidential targeted compliance audit may also be warranted if an organization believes it may have prior problematic conduct.

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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.

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