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LAWYERS

CANADA'S CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT: MITIGATING OLD AND NEW RISKS

U.S.-based organizations with operations in Canada or employing Canadians abroad need to take notice as Canada tightens its belt on foreign corrupt practices. The country's first full trial, conviction and imposition of a jail sentence took place in August 2013 when Nazim Karigar was found to have played a leading role in a conspiracy to bribe officials of Air India and the Indian Minister of Civil Aviation in order to obtain a contract for Ottawa-based Cryptometrics Canada Limited. He was convicted under Canada's Corruption of Foreign Public Officials Act ("CFPOA") and sentenced to three years in prison. The court said that individuals engaged in foreign corruption, such as Karigar, "must appreciate that they will face a significant sentence of incarceration in a federal penitentiary." Karigar was charged prior to the 2013 amendments to the CFPOA, under which he would now face as many as 14 years in prison.

The 2013 amendments significantly strengthen the CFPOA and bring Canada's anti-corruption enforcement regime into better alignment with the Organization for Economic Co-operation and Development's Convention ("OECD") on Combating Bribery of Foreign Public Officials in International Business Transactions and the regimes already in place in many other jurisdictions. In addition to increasing the maximum length of imprisonment to 14 years for individuals, the amendments also include the prohibition of "off-book" accounting and false records, expansion of jurisdiction to cover the actions of Canadian companies, citizens and residents regardless of where they occur, elimination of the exception for "facilitation payments" and removal of the requirement that in order to be considered a violation, the conduct has to be "for profit."

The CFPOA now covers two primary offenses: bribery and books and records manipulation. Simply put, it is illegal to directly or indirectly bribe or offer or agree to give a bribe to a foreign public official, and it is also illegal to conceal bribery in the accounting records of the company. The CFPOA now has greater similarity to the U.S. Foreign Corrupt Practices Act ("FCPA") with one of the major exceptions being the elimination of the facilitation payment exemption. The FCPA continues to permit "facilitation payments," which are typically small payments made to government officials in order to expedite or secure "routine government action" that is part of an official's ordinary duties, such as visas and work permits, or the provision of services normally provided, such as police services.



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While many U.S. companies consider facilitation payments to be inconsistent with ethical conduct and the U.S. Department of Justice and the Securities and Exchange Commission narrowed their view of them in the resource guide they published together in 2012, they are still permitted under the FCPA. The 2013 amendments to the CFPOA, however, follow the global trend against facilitation payments and will eliminate them, likely with no further notice (although the date at which this provision will take effect has not yet been announced).

While the statutory penalties under the CFPOA—such as unlimited potential fines for organizations and lengthy imprisonment for individuals—are severe, the reputational damage and business disruption are often the most significantly damaging to an organization. A corruption investigation requires enormous resources and combined with negative publicity, damage to the company's image and resultant loss of business can create unbearable financial strain. Companies that do business with the government also face debarment from participating in the government contracts process and, likely, the damaging requirement to disclose the debarment when bidding for work in other jurisdictions, even ones where it has not been debarred.

With the peril so high, companies should consider and mitigate four key areas of potential risk in order to stay on the right side of the Canadian enforcement regime and similar regimes around the globe.

AGENTS AND INTERMEDIARIES

Anti-corruption investigations frequently revolve around the conduct of third parties, such as local agents, consultants and intermediaries. Companies may be held liable under the CFPOA (and the FCPA and other similar laws worldwide) for the actions of their agents, so it is critical to take steps to make sure that they too comply with global foreign corrupt practices regimes.

Companies should start by performing risk-based due diligence on potential agents (including local professional advisors) prior to engaging them in order to better assess their credibility, reputation and qualifications. Agents who are effective, while not seeming to be qualified or have any significant business operations, should certainly be questioned, as the reason for the effectiveness may

be bribery. It is also important to understand the agents' relationship with government officials. While close connections might be the rationale for engaging an agent in the first place, such relationships also create a higher risk of bribery. Companies should review the agent's own compliance regime as well.

While any agreement should include representations and warranties that the agent will abide by applicable anti-corruption laws and policies, including your company's anti-corruption policy, this will not be enough. In fact, having only such terms in an agreement, with nothing backing it up, may be riskier than having no terms at all. The agents' activities and compliance practices should be monitored and audited on an ongoing basis to ensure actual compliance rather than simply lip service by the agent. The agents should also be required to provide ongoing periodic certification of anti-corruption compliance. Depending on the circumstances, it may be sensible to put agents through the same training on compliance best practices as the company's employees.

GIFTS AND ENTERTAINMENT EXPENSES

The lack of clear guidelines in the CFPOA for gifts and entertainment expenses makes it difficult to ascertain the zone of permissible activity, as there is no one-size-fits-all approach. The circumstances surrounding the expense will often color the perception of its true nature and motivation. Token gifts are typically allowed and perceived as a true token of esteem or gratitude, which is important because in many cultures it is traditional to exchange gifts upon meeting for the first time or upon closure of a deal. It is important that gifts are not extravagant and cannot be construed as valuable enough to sway a deal or pending government approval. It also may be tempting to believe that the size of the gift may be relative to the magnitude, but this is not the case. A gift must remain a token; it is not appropriate to give a government official a luxury vehicle, even if it represents only a tiny fraction of a deal's value.

It may be wise to set a hard limit for gifts, as it can avoid the difficult gray areas. Understand that limits should be specific to each country. While \$25 may only buy a token gift in the United States or Canada, it can go a long way in some other markets.

Similarly, there is no statutory guideline for entertainment expenses. Again, the key is that the expense must not seem extravagant, and setting clear monetary limits on behalf of the corporation may be the simplest strategy for all, despite the lack of a statutory bright line. One strategy would be to set a limit similar to those imposed on executives who are dining alone. It can be difficult to claim that spending \$250 on a foreign official is not extravagant when the company has a \$35 limit in place for its own employees when they are not entertaining.

ACCOUNTING/BOOKS & RECORDS

The 2013 amendments to the CFPOA add a “books and records” offense for concealing bribery of a foreign official in the accounting records of the company. Some examples identified include keeping secret accounts, falsely recording or inadequately identifying transactions or liabilities, using false documents and destroying documents.

Payments for bribes are often recorded inaccurately either due to weak internal controls or in an overt attempt to conceal illegal activity. In either instance, the books and records offence under the CFPOA increases the risk of criminal exposure for a corporation, its directors

RED FLAGS

While performing both due diligence on potential agents and auditing their activities throughout the relationships, organizations should take note of—and act upon—any red flags, including:

- Close relationship with a foreign official
- Request for unusually large up-front payments
- Fees that are disproportionate to services rendered
- Lack of necessary qualifications
- Undisclosed affiliations and sub-agents
- No discernable business presence
- Lack of transparency or refusal to provide information
- Payments made to out-of-country bank accounts
- Payments made to undisclosed parties

and its senior officers. While there has not yet been any jurisprudence in Canada related to books and records, companies should assume that authorities will enforce the new provisions vigorously and that they will not consider weak internal controls to be a viable defense.

TRANSACTIONAL RISK

One area fraught with risk is mergers and acquisitions, as any problem incumbent with the target company can transfer to the acquirer. Of course, it is critical to perform due diligence of both the potential target and its compliance program, and it typically makes sense to conduct site visits and engage reputable local professional advisors to help. Should the due diligence not be robust enough, or turn up any red flags, the acquiring company must decide if the problems can be remedied or whether the problems (or lack of information) change the deal matrix enough to affect the price or scuttle the deal altogether.

While it might be tempting to try to find a deal structure to avoid or reduce the risk of the liability, it is likely not possible. Liability for foreign corrupt practices may be “acquired,” even if the transaction is an asset purchase. A better strategy may be to attempt to mitigate any liability for pre-acquisition conduct, by demonstrating rigorous, comprehensive due diligence and requiring the target to implement the acquiring company’s anti-corruption compliance policies, practices and training program pre-closing. Acquiring companies may also consider voluntarily reporting any discovered or suspected non-compliance or foreign corrupt practices by the target.

CAUGHT IN THE CROSSHAIRS: INTERNAL AND EXTERNAL INVESTIGATIONS

While companies are wise to take proactive measures to prevent and detect corrupt conduct throughout and around the organization, especially in the risk areas discussed above, such measures are not guaranteed to prevent or detect specific corrupt acts. Companies must continually review their compliance regimes in light of current best practices and to identify any structural risks and compliance weaknesses.



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If a company suspects a corruption or foreign bribery problem, immediate steps should be taken to mitigate the key legal, financial and reputational risks. Evidence should be retained and preserved. Management and the board of directors should then promptly consider whether an independent investigation is required and what its scope should be.

If the company chooses to conduct an internal investigation, the first question is determining who should lead it. Some larger companies have built this function in-house, but internal investigations are often handled by outside legal counsel to ensure the process is sufficiently thorough and independent and perceived as such. Investigations involving senior executives should almost always be conducted by the board of directors with the assistance of external legal counsel, and likely external legal counsel with whom the company has no ongoing business relationship.

One key issue to be considered is privilege protection for the “fruits of the investigation.” Given the risk of other civil, regulatory or criminal proceedings, it is prudent to conduct the investigation in a way that maximizes attorney-client privilege.

In some cases, however, it may make sense to waive privilege, often as part of the self-reporting calculus. Companies should consider carefully the implications and challenges of such waiver and seek appropriate professional advice prior to waiving. The key is to provide privilege protection to the extent possible for the investigation in order to have the opportunity to make a strategic decision about whether or not to waive it. Most important, however, is understanding that privilege is not a “magic wand” that hides bad facts. Just because something is uncovered during a privileged investigation will not shield the underlying corrupt conduct itself.

One of the most difficult decisions that must be made if problems are uncovered is whether or not to report them to regulators. There are a number of strategic considerations, and there is little guidance as to whether there is any actual advantage, even in jurisdictions that claim to give credit for cooperation. In many circumstances, the proactive implementation of necessary remedial steps, including changes to organization structure and improvements to current anti-corruption compliance policies and regimes, by the company will be seen favourably by the regulators and government

authorities. In any event, the self-reporting calculus is complicated and should not be attempted without the assistance of expert counsel.

External investigations are extremely tricky, with the government having most of the leverage most of the time. While it is critical to cooperate, it can be extremely difficult to determine exactly to what extent. For example, is there benefit in waiving attorney-client privilege in order to assist the government in its investigation? Regardless of the circumstances, almost all regulators give credit for having a documented, robust and active compliance program in place that is designed to get—and is effective in getting—company employees and agents to act legally and ethically.

CONCLUSION

The existence of a robust compliance program can assist the corporation and its employees and agents in complying with their anti-corruption laws and is necessary in order to serve as a defense and to mitigate potential liability under CFPOA and other foreign corrupt practices regimes. Elements of an effective compliance program include communication, policies and procedures, designation of responsible parties, regular training and annual certification, whistleblower provisions and regular monitoring and auditing. Perhaps most important is that senior management and the board of directors must set the right “tone from the top” in order to regularly demonstrate and communicate—both to employees and to regulators—the organization's commitment to anti-corruption compliance.

For more information, visit the Cassels Brock White Collar Crime & Regulatory Enforcement Group online at [casselsbrock.com](https://www.casselsbrock.com).

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