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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, the editor, or the head of our Corporate/Commercial Group:

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"...changes to regulations governing anti-money laundering (AML) requirements are likely to increase the cost and burden of compliance..."

NEW ANTI-MONEY LAUNDERING RULES COME INTO EFFECT JANUARY 31: MAY INCREASE COMPLIANCE COSTS

Paul Pimentel and Diane Brooks

Recent changes to regulations governing anti-money laundering (AML) requirements are likely to increase the cost and burden of compliance for financial institutions, insurance companies, real estate developers, and many others subject to the AML regime.

The government published amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*[1] in the *Canada Gazette*[2] earlier this year. The amendments come into force on January 31, 2014,[3] giving those subject to the regulations just a few more months to update their AML processes to be in compliance with these new regulations. The amendments affect "reporting entities" identified in Section 5 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.[4] These include:

1) financial institutions;
2) life insurance companies, brokers and agents;
3) securities dealers;
4) money services businesses (including businesses involved in foreign exchange dealing, electronic funds transfer, and issuing and redeeming travellers' cheques;
5) agents of the Crown that sell money orders;
6) accountants and accounting firms;
7) real estate developers, brokers and sales representatives;
8) casinos, and
9) dealers in precious metals and stones.

The new regulations have the potential to increase the burden of compliance in several ways.

Ongoing Monitoring of Business Relationship

New sections have been added to the regulations which create a requirement for reporting entities to conduct ongoing monitoring of business relationships and to keep a record of:

a) the measures taken to monitor the business relationship, and
b) the information obtained through monitoring.[5]

[1] SOR/2002-184 <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-184/index.html>.
[2] "Regulations Amending the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*," SOR/2013-15, (2013) C Gaz II 345-355, <http://gazette.gc.ca/rp-pr/p2/2013/2013-02-13/html/sor-dors15-eng.html>.
[3] *Ibid* at 351.
[4] SC 2000, c. 17 <http://laws-lois.justice.gc.ca/eng/acts/P-24.501/page-2.html#docCont>.
[5] *Supra* note 2, ss. 54.3, 56.3, 57.2, 59.01, 59.11, 59.21, 59.31. 59.41, 59.51, 60.1, 61.1, at 347-350.

"These changes may be onerous and costly for reporting entities because they may not have been equipped to periodically collect the information now required by the revised regulations."

Paul Pimentel, who holds a degree in journalism from Carleton University, is entering third year at Osgoode Hall Law School. He has just completed a term as a summer student at Blaney McMurtry.

In some cases, the Act prescribes the monitoring measures to be taken and the types of information to be obtained; in others, not.

Section 1(2) of the Act has been amended to introduce a definition of "business relationship." A "business relationship" is any relationship with a client to conduct financial transactions or to provide services related to those transactions and:

a) if the client holds one or more accounts with the reporting entity, all transactions and activities relating to those accounts; or
b) if a client does not hold an account, only those transactions or activities in respect of which a reporting entity is required to ascertain the identity of a person or confirm the existence of an entity under the Regulations.[6]

Section 1(2) has also been amended to introduce a definition of "ongoing monitoring." This means periodic monitoring of an account or transactions based on the level of risk of money laundering or terrorist financing that a reporting entity attributes to that account or transaction. Ongoing monitoring also means periodic monitoring of the business relationship to:

a) detect transactions that must be reported to the Financial Transactions Reports Analysis Centre of Canada (FINTRAC);
b) keep beneficial ownership information up to date;
c) keep a record that sets out the purpose and nature of the business relationship;
d) reassess the level of risk associated with the client's transactions and activities; and
e) determine whether transactions and activities are consistent with information obtained about the client, including risk assessment.[7]

The combined effect of the new definitions and regulations above is to expand client identification and monitoring obligations for reporting entities. These changes may be onerous and costly for reporting entities because they may not have been equipped to periodically collect the information now required by the revised regulations.

Keep Up-to-Date Records of the Purpose and Intended Nature of Business Relationship

Section 52.1 has been added to the Regulations.[8] It requires that reporting entities that enter into business relationships keep a record that sets out the purpose and intended nature of the business relationship. The definition of "ongoing monitoring" in Section 1(2), as discussed above, requires that this record be kept up to date, but it is unclear exactly how often this record will have to be updated. Nevertheless, this increases the burden of compliance because reporting entities may not have been updating the purpose and intended nature of the business relationship with their clients regularly.

Beneficial Ownership Rules

The revisions amend the beneficial ownership rules in Section 11.1(1) such that any financial entity, securities dealer, life insurance company, broker or agent, or money services business that

[6] *Ibid* at 345.
[7] *Ibid* at 345.
[8] *Ibid* at 347.

"The new regulations create additional requirements for the businesses subject to them, and could affect each business in a differential manner."

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is required to ascertain identity under the regulations, must obtain:

a) in the case of a corporation, the names of all directors of the corporation and the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation;

b) in the case of a trust, the names and addresses of all trustees and all known beneficiaries and settlors of the trust;

c) in the case of an entity other than a corporation or trust, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity; and

d) in all cases, information establishing the ownership, control and structure of the entity.[9]

Moreover, the Section 1(2) definition of "ongoing monitoring" now requires reporting entities to keep this beneficial ownership information up to date. Previously, Section11.1(1) only required reporting entities to take "reasonable measures" to obtain beneficial ownership information.[10] The new requirements are absolute and therefore much more onerous.

Risk Assessment and Mitigation

Section 71.1 of the Regulations has been amended to require reporting entities to have written policies and procedures for taking enhanced measures to ascertain the identity of an individual or entity they determine to be at high risk for money laundering or terrorist financing.[11] The policies and procedures must also detail enhanced measures to mitigate risks in such high risk situations, including keeping information up to date and conducting ongoing monitoring of business relationships for detecting transactions that should be reported to FINTRAC.[12] Previously, the regulations only required written policies to contain "reasonable measures" for keeping client information up to date and ongoing monitoring in such situations.[13]

The Act and the regulations under it provide for a variety of penalties for contraventions. The stiffest penalties – up to $2 million and/or five years in jail – are applied to erroneous reporting.[14]

Conclusion

The new regulations create additional requirements for the businesses subject to them, and could affect each business in a differential manner. The federal government is set to publish additional guidance with respect to the implementation of the new regulations later this fall. For more information on how the new regulations may affect your business, please contact Blaney McMurtry LLP. ■

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[9] *Ibid* at 346.
[10] *Supra* note 1.
[11] *Supra* note 2 at 351.
[12] *Ibid.*
[13] *Supra* note 1, s. 71.1.
[14] *Ibid* at s. 75(1).

BLANEYS ON BUSINESS

"[New] legislation prohibits an individual or company from sending commercial electronic messages via e-mail, text message, or social media, without the prior explicit consent of the recipient..."

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BUSINESSES MUST PREPARE NOW FOR NEW RULES GOVERNING COMMUNICATIONS WITH CUSTOMERS

Danielle Stone

New federal laws setting strict rules – and huge penalties if they are broken – for businesses reaching out to customers through e-mail, text messages, social media, voicemail and other electronic means, will come in to force later this year or in 2014.

They will make it much more difficult for businesses to initiate electronic communications with their clients.

Companies that prepare now will save themselves a huge hassle when the new statute -- colloquially known as the *Canadian Anti-Spam Act* (CASA) – comes into force.

CASA is a long and complicated piece of legislation, but here's what you need to know: when it is proclaimed in force, it will impose new and more onerous obligations on individuals and businesses that use electronic messages to communicate.

CASA does not affect just those businesses and people who love to clog your inbox with "deal of the day" drug sales, or news that you've won $1,000,000. The legislation is broad enough to capture almost every message you send to a potential customer or business associate (with some enumerated exceptions).

The legislation prohibits an individual or company from sending commercial electronic messages via e-mail, text message, or social media, without the prior explicit consent of the recipient, unless there is a clear and defined pre-existing business relationship with the recipient, or the communication is clearly within one of the enumerated exceptions from CASA's consent requirements. The request for consent must be specific about the nature of the intended communication (e.g. information about new products from the company or affiliated businesses).

What's a commercial message? Broadly speaking, it is anything that could reasonably be interpreted to encourage participation in a commercial activity.

Once the Act takes effect, even an e-mail message that includes a request for consent to send subsequent messages will be considered a "commercial electronic message" that requires explicit prior consent.

That will make it even more difficult to obtain consent for future communications, and that is why getting consent before the law comes into force is so important.

Do yourself a favour and start planning now for the onerous obligations under CASA. Review your organization's privacy policies and procedures, determine how your organization relies on electronic messages to communicate with clients and potential clients and what sort of messages it sends, and start compiling a list of phone numbers and e-addresses that you use for these purposes. If you don't have written consent to use each of these numbers and e-addresses for your particular purpose, and if the purpose is not covered by one of the CASA exceptions, plan to get that consent now.

"The purpose of the [Corruption of Foreign Pubic Officials Act] is to discourage Canadian companies from utilizing corrupt practices abroad."

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Once the law has been proclaimed, every time you send a message without having the individual's explicit written consent to do so, you could be at risk of fines up to $1,000,000 for individuals and $10,000,000 for companies, per violation. There are statutory damages and private rights of action on top of those fines.

Canada's legislation is designed to be one of the toughest anti-spam laws in the world. Preparing for it, early and thoroughly, should minimize, to the greatest extent possible, its impact on your marketing and operations. ■

ANTI-CORRUPTION LAWS CLARIFIED, STRENGTHENED; AMENDMENTS REPRESENT SIGNIFICANT IMPROVEMENT

Henry J. Chang

Earlier this year, Blaney McMurtry partner Henry J. Chang briefed the readers of Blaneys on Business on the need for global Canadian corporations that interact with public officials in foreign jurisdictions to operate rigorous anti-corruption compliance programs under Canada's Corruption of Foreign Pubic Officials Act (the "CFPOA"). Earlier this summer, Parliament enacted new provisions to clarify and strengthen the CFPOA. In this article, Mr. Chang describes the new provisions and what they mean for Canadian businesses.

Background

As a member of the Organization for Economic Co-operation and Development ("OECD"), Canada signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention") on December 17, 1997. To satisfy its obligations under the OECD convention, the Government of Canada implemented the CFPOA, which came into force on February 14, 1999.[1] The purpose of the CFPOA is to discourage Canadian companies from utilizing corrupt practices abroad.

On March 18, 2011, the OECD Working Group on Bribery completed its report on Canada's enforcement of the OECD Convention (the "2011 OECD Report"). Although it acknowledged Canada's recent enforcement efforts, it stated that several recommendations contained in its June 2006 report had still not been implemented.

On February 5, 2013, the Government of Canada introduced Bill S-14, also known as the *Fighting Foreign Corruption Act* (the "Act"), in the Senate. It proposed several significant amendments to the CFPOA.

Bill S-14 was approved by both the Senate and the House of Commons without amendment. It became law upon receiving Royal Assent on June 19, 2013. A summary of the resulting amendments to the CFPOA, most of which are effective as of June 19, 2013, appears below.

Maximum Penalty Increased

The Act has increased the maximum penalty under the CFPOA to imprisonment for a term of up to fourteen years. Previously, the maximum penalty was five years.

[1] S.C. 1998, c. 34.

"The Canadian legal system applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place outside of Canada."

The Addition of Accounting Provisions

Unlike the U.S. *Foreign Corrupt Practices Act of 1977* (the "FCPA")[2], the CFPOA did not previously contain any provisions to prohibit off-the-books accounting practices. The Act has now created an offence under the CFPOA for any person who engages in improper accounting practices in order to commit an offence under the CFPOA or to conceal such a violation; this implements one of the recommendations described in the 2011 OECD Report.

The following accounting practices are now prohibited, if they are employed for the purposes of committing an offense under the CFPOA or concealing such a violation:

a) Establishing or maintaining accounts that do not appear in any required books and records;

b) Making transactions that are either not recorded in required books and records or are not adequately identified in those books or records;

c) Recording non-existence expenditures in required books and records;

d) Entering liabilities in required books and records bearing an incorrect identification of their object;

e) Knowingly using false documents, or

f) Intentionally destroying required books and records earlier than permitted by law.

The maximum penalty for this offence is imprisonment for a term of up to fourteen years.

Expansion of Jurisdiction to Include Offences Committed Outside Canada

The Canadian legal system applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place outside of Canada.[3] As violations of the CFPOA result in criminal penalties, it was previously necessary to demonstrate a real and substantial link between Canada and the act of bribing a foreign public official abroad. This requirement can make prosecutions under the CFPOA difficult.

In the United States, the FCPA applies both territorial-based and nationality-based jurisdiction. Under the FCPA, territorial jurisdiction involves the use of the mails or any means of instrumentality of interstate commerce in furtherance of an improper payment.[4] As a result, territorial jurisdiction only addresses improper payments that have some connection to United States territory. However, the FCPA also applies an alternate nationality-based jurisdiction that includes acts performed outside of the United States by a national of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States.[5]

Previously, the CFPOA did not apply nationality-based jurisdiction. However, as a result of the Act, an act or omission that would constitute an offence under the CFPOA is now deemed to have occurred in Canada if the person is:

[2] 15 U.S.C. §§78dd-1, et seq.
[3] See *R. v. Libman*, [1985] 2 S.C.R. 178.
[4] U.S.C. §78dd-1(a), -2(a), -3(a).

"The CFPOA prohibits the bribery of a foreign public official in order to obtain or retain an advantage in the course of business."

a) A Canadian citizen;

b) A permanent resident of Canada who, after the commission of the act or omission, is present in Canada; or

c) Any public body, corporation, society, company, firm, or partnership that is incorporated, formed, or otherwise organized under the laws of Canada or a province.

This amendment implements one of the recommendations described in the 2011 OECD Report.

Elimination of the Facilitation Payments Exception

Under the prior CFPOA, a facilitation payment is permitted if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including:

a) The issuance of a permit, licence, or other document to qualify a person to do business;

b) The processing of official documents, such as visas and work permits;

c) The provision of services normally offered to the public, such as mail pick-up and delivery, telecommunications services, and power and water supply; and

d) The provision of services normally provided as required, such as police protection, 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.

According to the former Subsection 3(5), 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 encouraging another person to make any such decision. The U.S. FCPA contains virtually identical language relating to permissible facilitation payments.

The Act will now delete the facilitation payments exception from the CFPOA "on a day to be fixed by order of the Governor in Council." In other words, the Government of Canada will delay the implementation of this particular amendment until a future date.

This delay acknowledges the competitive disadvantage that Canadian companies would currently face as a result of the amendment, since most other countries (including the United States) still recognize facilitation payments. However, the fact that the CFPOA now contains language formally repealing the facilitation payments exception also sends a message to Canadian companies that the Government of Canada considers facilitation payments to be bribes.

Elimination of the Requirement that Conduct be for Profit

The CFPOA prohibits the bribery of a foreign public official in order to obtain or retain an advantage in the course of business. The term "business" was previously defined in the CFPOA as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere for profit."

[5] U.S.C. §78dd-1(g), -2(i).

BLANEYS ON BUSINESS

"...a PBC [is] a for-profit corporation that is intended to produce a positive effect (or a reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders), and to operate in a responsible and sustainable manner."

Canada was the only party to the OECD Convention to have included a "for profit" requirement in its anti-corruption legislation. The Act has now deleted the reference to profit from the definition of "business," which clarifies that the CFPOA is intended to apply to the conduct of all business, not just business "for profit." This implements one of the recommendations described in the 2011 OECD Report.

Royal Canadian Mounted Police Given Exclusive Authority to Lay Charges

The Act now clarifies that criminal charges for a violation of the CFPOA may only be laid by an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the *Royal Canadian Mounted Police Act*.

Conclusion

The Act clearly improves the ability of the Royal Canadian Mounted Police to prosecute Canadian entities under the CFPOA. Although it did not address all of the outstanding recommendations contained in the 2011 OECD Report, the Act represents a significant step towards improving anti-corruption laws in Canada. ■

PUBLIC BENEFIT CORPORATIONS GAINING TRACTION IN U.S., CANADA

Dennis J. Tobin

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As business activity in the third quarter of 2013 starts to gain momentum, the volume on the quiet evolution of the business corporation as an explicit force for creating public benefits is ramping up as well.

On August 1, the U.S. State of Delaware brought into a force a new law that permits for-profit enterprises to set out, in their articles of incorporation, business purposes that seek to deliver outcomes that serve the public interest beyond financial profit for shareholders.

On that day, 17 companies filed articles to incorporate as "Public Benefit Corporations" (PBCs) under Delaware's General Corporation Law.

Eighteen other U.S. states have had public/community benefit/contribution/interest legislation on their books since before August 1, 2013. British Columbia added legislation effective July 31, 2013. Nova Scotia's *Community Interest Companies Act* received Royal Assent last December 6 but is not yet in force.

The Delaware legislation, however, is especially notable because Delaware has more active public companies registered under its jurisdiction than any other jurisdiction in the world. In other words, the big boys are getting into the act.

The Delaware statute describes a PBC as a for-profit corporation that is intended to produce a positive effect (or a reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders), and to operate in a responsible and sustainable manner.

It states that a PBC "*shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.*" In that certificate, the PBC "*shall (i) identify …one or more specific public*

benefits to be promoted by the corporation, and (ii) state within its heading that it is a public benefit corporation."

I advised Toronto-based Ian Martin Group on the August 1 creation of Ian Martin PBC (previously known as Ian Martin Inc, a Delaware company). The company is a human resources consultant in contract engineering, information technology and technical personnel. Its articles of incorporation, amended so it could become a PBC under Delaware law, now state that it "*shall have a specific public benefit purpose of creating a material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard from the business and operations of the corporation.*"

There are many for-profit companies that operate in a responsible and sustainable manner. There are many individuals who have made their fortunes in for-profit companies and who have become champions of linking business and doing good.

However, it is an ad hoc process and the benefit corporation proponents hope that such new corporate forms as PBCs will be an evolutionary step in enabling for-profit companies to embed corporate social responsibility and sustainability in their corporate DNA.

Please visit http://blny.ca/PublicBenefitCorps for a wide-ranging description and discussion of PBCs and the variety of other new hybrid corporate forms that focus more explicitly on the public interest, the forces that are giving rise to these corporations, and what the future may hold. ■

EXPECT THE BEST

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