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PUBLICATION

Anti-Corruption Laws Clarified, Strengthened; Amendments Represent Significant Improvement

Date: August 30, 2013

Original Newsletter(s) this article was published in: Blaneys on Business: September 2013

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.

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:

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."

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.

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1 S.C. 1998, c. 34.
2 15 U.S.C. §§78dd-1, et seq.
3 See *R. v. Libman*, [1985] 2 S.C.R. 178.
4 15 U.S.C. §78dd-1(a), -2(a), -3(a).
5 15 U.S.C. §78dd-1(g), -2(i).