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PUBLICATION

The Application of United States Anti-Corruption Laws to Canadian Companies

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Introduction

Anti-corruption compliance is now considered a priority issue for many Canadian companies, especially those doing business in vulnerable industries such as mining, oil and gas, infrastructure, and health care. However, Canadian companies tend to focus exclusively on compliance under the *Corruption of Foreign Public Officials Act*[1] ("CFPOA"), Canada's anti-corruption law. While CFPOA compliance is crucial, some Canadian companies must also comply with the much stricter *Foreign Corrupt Practices Act of 1977*[2] (the "FCPA"), the equivalent anti-corruption statute in the United States.

Canadian Companies Subject to the FCPA

There are several instances in which Canadian companies may be directly liable under the FCPA or where, due to their relationship with U.S. entities, they may be contractually required to comply with the FCPA. These instances are described in greater detail below.

CANADIAN SUBSIDIARIES OF UNITED STATES COMPANIES

The FCPA does not specifically address foreign subsidiaries of U.S. companies and there has been no definitive decision concluding that foreign subsidiaries acting entirely on their own outside the jurisdiction of the United States are subject to the FCPA. However, the U.S. Department of Justice's *Lay Person's Guide to FCPA*[3] confirms that U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents who were employed by or acting on behalf of such foreign-incorporated subsidiaries. Therefore, Canadian subsidiaries of U.S. companies may be required to comply with the FCPA, at the insistence of their U.S. parent companies.

UNITED STATES SUBSIDIARIES OF CANADIAN COMPANIES

The FCPA applies to all "domestic concerns." A "domestic concern" is defined as any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, *or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States*.[4] Clearly, any legal entity organized under United States law, such as the U.S. subsidiary of a Canadian company, will be subject to the FCPA.

ISSUERS OF SECURITIES IN THE UNITED STATES

Companies (either U.S. or foreign) that are considered issuers of securities in the United States will be subject to the FCPA. An "issuer" is defined as a corporation, which has issued securities that have been registered in the United States or that is required to file periodic reports with the U.S. Securities and Exchange Commission.[5] Therefore, a Canadian company that trades its stocks, bonds, or American Depository receipts on a U.S. securities exchange will be considered an issuer and will be subject to the FCPA.

CANADIAN COMPANIES ACTING IN FURTHERANCE OF A CORRUPT PAYMENT IN THE UNITED STATES

A foreign company, whether or not it is an "issuer," is subject to the FCPA if it causes, directly or indirectly (through a director, employee, agent, or stockholder), an act in furtherance of a corrupt payment to take place within the territory of the United States.[6] Therefore, a Canadian company that would not otherwise be subject to the FCPA may be prosecuted if any act taken in furtherance of the illegal bribe took place in United States territory.

CANADIAN COMPANIES DOING BUSINESS WITH U.S. COMPANIES

Although Canadian companies (and individuals) doing business with U.S. companies are not automatically subject to the FCPA, the contracts that they sign with U.S. companies will often contain terms and conditions that impose a contractual obligation to comply with the FCPA. This is because it is unlawful for an entity subject to the FCPA to:

a) Authorize a third party to make an improper payment to a foreign official; or

b) Make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.[7]

According to the FCPA, a person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if:

a) Such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

b) Such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.[8]

When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[9] The *Lay Person's Guide to FCPA*[10] characterizes this knowledge element as including "conscious disregard and deliberate ignorance."

In order to avoid being held liable for corrupt third party payments, U.S. companies must exercise due diligence and take all necessary precautions to ensure that they have formed business relationships with reputable and qualified third parties that are acting in compliance with the FCPA. It is therefore typical for U.S. companies to include representations and warranties in their agreements, confirming third party compliance with the FCPA. Such agreements may also contain an obligation to provide annual certifications to the U.S. company, confirming its understanding of and compliance with the FCPA.

Ensuring Compliance with the FCPA

Any Canadian company that is required to comply with the FCPA (either by law or by contract) should consult with a lawyer who is familiar with both United States and Canadian anti-corruption laws.

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[1] S.C. 1998, c.34.
[2] 15 U.S.C. §§78dd-1, et seq.
[3] http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.
[4] 15 U.S.C. §78dd-2(h)(1).
[5] 15 U.S.C. §78dd-1(a).
[6] 15 U.S.C. §78dd-3(a).
[7] 15 U.S.C. §78dd-1(a); 15 U.S.C. §78dd-2(a); 15 U.S.C. §78dd-3(a).
[8] 15 U.S.C. §78dd-1(f)(2); 15 U.S.C. §78dd-2(h)(3); 15 U.S.C. §78dd-3(f)(3).
[9] Id.
[10] http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.