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COMMENTARY

A look at Canada's strengthened foreign anti-corruption law

On June 19, 2013, Canada's *Corruption of Foreign Public Officials Act* (CFPOA) was amended. New provisions significantly increase penalties for and the scope of individual and corporate liability for bribery of foreign public officials, and so Canadian companies must ensure they do not run afoul of its provisions.

The CFPOA amendments will make it easier for authorities to investigate and prosecute anti-bribery offences.

The amended CFPOA now grants nationality jurisdiction over bribery offences, bringing Canada in line with the practice of most other countries. Until now, Canadian prosecutors in bribery cases have had to establish that an alleged offence had a "real and substantial connection" to Canada, a significant barrier in many prosecutions. Pursuant to the amendments Canadian citizens, permanent residents and companies organized in Canada may be prosecuted regardless of where the act of bribery occurred or the degree to which the act was connected to Canada.

The amended CFPOA introduces a form of "books and records" offence in relation to falsifying books and records for the purpose of bribing a foreign public official. While not as far-reaching as U.S. provisions in this regard, which extend to maintenance of accurate books and records and prescribed systems of internal accounting controls, individuals may now face up to 14 years imprisonment if they are found to be engaging in a wide range of accounting practices aimed at the payment or concealment of bribery payments.



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Whereas "facilitation payments" were permitted under the previous law, this exception is now subject to elimination by an Order of Cabinet to be made at a future date to be determined. Facilitation payments are payments made to expedite or secure performance by a foreign public official of an act of a routine nature, such as issuing a permit, processing official documents or provisioning public services, such as power supply or police protection.

While the U.S. still permits facilitation payments, the U.K. does not. The delay in implementing the facilitation payment prohibition, according to proponents of the legislation, is intended to allow companies time to adjust their policies and procedures.

The maximum prison sentence for engaging in bribery of foreign officials has been increased from a maximum of five to a maximum of 14 years. The amendment reflects a global trend toward strengthening enforcement of anti-bribery and corruption legislation, though the new law is still less harsh than that in the U.S., which provides for up to 20 years in prison.

The amendments provide that a defendant, who has already been tried and dealt with for a bribery offence outside Canada, may in most circumstances raise this as a defence if prosecuted on the same facts in Canada. This represents an improvement from the current situation of potential double jeopardy for the same acts in multiple jurisdictions.

Context of amendments

The CFPOA amendments represent a larger trend toward increased international and domestic Canadian scrutiny of foreign corporate activity for reasons of transparency. Canada has been criticized in recent years by the Organisation for Economic Co-operation and Development for both the inadequate scope and lax enforcement of its existing foreign anti-bribery laws. The amendments constitute a relatively comprehensive response to OECD and non-governmental organization criticisms, and bring Canada's legislation closer to similar laws in the U.S. and U.K.

While Canada's CFPOA has been on the books since 1998, it wasn't until 2008 that two dedicated RCMP International Anti-Corruption Units were created to proactively enforce the law. The RCMP is now reportedly pursuing over 35 anti-bribery investigations.

The Canadian government also announced on June 12, 2013, that Canada will be establishing new mandatory reporting standards for Canadian extractive companies with a view to enhancing transparency on the payments they make to governments. The related proposed

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legislation has yet to be tabled, but such a bill will allow greater scrutiny of payments for foreign governments, as well as increased compliance costs.

The new amendments to the CFPOA increase the risk of bribery-related liability for Canadian companies. Given that new powers will be given to prosecute Canadian individuals and companies for their activities anywhere in the world, the range of activities that can lead to fines and severe prison sentences has been considerably increased.

Companies will want to ensure that they have anti-bribery compliance programs in place to avoid running afoul of the new provisions. Those with existing anti-bribery programs will need to make changes to their policies and procedures to ensure compliance with the new requirements.

A comprehensive anti-bribery compliance program would include:

1. *Tone from the top* — An unequivocal commitment to anti-corruption at the highest levels of the company.
2. *Anti-bribery policy* — Companies should develop a visible anti-bribery policy that is clearly communicated to all affected persons. We recommend a clearly worded policy that defines and prohibits bribery and corruption, requiring the keeping of accurate books

and records; providing examples and guidance in areas such as gifts and hospitality, facilitation payments and travel expenses; and company support for public infrastructure, political and charitable contributions. The policy should be drafted taking into consideration the anti-bribery laws and case-law of any country whose jurisdiction impacts the company's operations.

3. *Risk assessment* — Conducting a risk assessment of company operations considering various risk factors, a few examples of which include: areas of operation and local customs; dependence on issuance of particular licenses and other government permits; identification of areas of company operations that are likely to engage in interaction with public officials or their agents, such as procurement, government relations including permitting issues and import/export operations; determination of areas in which there is time pressure to accomplish a certain task, i.e., obtaining licenses; and use of third-party agents.

4. *Implementing anti-bribery strategies* — An anti-bribery policy by itself may have little impact on a company's actual operations. An anti-bribery program should be developed to implement the policy, taking into consideration identified risk factors.

Some examples of needed steps include: training directors, employees, managers and agents both in Canada and abroad, as well as key high-risk third parties including contractors and suppliers; establishing due diligence procedures in relation to agents and third parties, such as background checks and inserting anti-bribery terms into all third-party contracts; and working with advisors to ensure that any bribery "red flag" behaviour will be highlighted so that an investigation can take place and illegal practices halted.

5. *Post-implementation assessment and follow-up* — Any anti-bribery program must be monitored to ensure that it is being carried out properly.

Examples of steps which should be taken to do so include: regular review and audit of company financials, operations and risk factors to identify and address areas in which anti-bribery policies are not being followed; and reviewing incidents of non-compliance with a view to introducing remedial measures.

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