

Canadian Foreign Anti-Bribery Law



Canada, like other jurisdictions, has had in place for several years anti-bribery and corruption legislation – the *Corruption of Foreign Public Officials Act* (the “**CFPOA**”) – that prohibits payments made (or offered to be made) to foreign officials for the purposes of obtaining a commercial advantage.

While Canadian authorities have been less active than those in the United States and the United Kingdom in the enforcement of foreign anti-bribery legislation, high profile guilty pleas, the highly publicized laying of CFPOA charges against a prominent Canadian engineering company earlier this year and the more than 30 potential CFPOA violations the Royal Canadian Mounted Police (the “**RCMP**”) is reportedly investigating suggest that this may be changing.

The summary below provides an overview of some of the key legal considerations relevant to Canada’s foreign anti-bribery law and the Canadian federal government’s “Integrity Framework”, which precludes those convicted of CFPOA offences (or offences under equivalent legislation in other countries) from bidding on contracts with the Canadian federal government.

The CFPOA At-a-Glance

General

The CFPOA:

- Establishes criminal offences relating to the bribery of foreign public officials in business transactions.
- Applies to all Canadian citizens, permanent residents and entities organized in Canada, regardless of where the alleged offence is committed and regardless of whether there is a real or substantial connection to Canada.
- Applies to other individuals and entities regardless of their nationality if there is a real and substantial connection to Canada.

The offences under the CFPOA are similar – although not identical – to those under the *Foreign Corrupt Practices Act* (the “**US FCPA**”) in the United States and the *Bribery Act* (the “**UK Bribery Act**”) in the United Kingdom. Accordingly, conduct that is an offence under the CFPOA may also be an offence under the US FCPA and the UK Bribery Act to the extent such conduct falls within their jurisdiction, which may have extraterritorial application.

Offences under the CFPOA

Bribery

- The CFPOA makes bribery an offence by generally prohibiting the direct or indirect giving or offering of a benefit to a “foreign public official” as consideration for an act or omission by that official to

obtain or retain an advantage in the course of business. Recent Canadian case law has made clear that merely offering a bribe is sufficient to establish an offence and that a payment does not have to be made for a violation to occur.

- While the CFPOA currently contains an exception that permits “facilitation payments” – which are payments made to a foreign public official to expedite or secure the performance of any routine act that was part of the official’s duties or functions (e.g., in connection with the issuance of a permit or processing of official documents) – the Canadian federal government has passed an amendment to the CFPOA that will result in the removal of this exception once the removal is proclaimed into force. If this exception is removed, payments that may be permitted under the US FCPA would be prohibited under Canadian law, as they are under the UK Bribery Act.
- Under the CFPOA, a “foreign public official” is defined as:
 - a person who holds a legislative, administrative or judicial position of a foreign state;
 - a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
 - an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

- The CFPOA does not provide guidance on the potentially broad definition of “foreign public official” and it remains unclear what form of control a government must exercise over an organization for employees of that organization to possibly be considered foreign public officials.

Books and Records Offence

- The CFPOA also creates an offence pertaining to the books and records of an organization where, for the purpose of bribing a foreign public official or hiding that bribery, the organization engages in any of the following:
 - establishing or maintaining an account that does not appear in the books and records;
 - transactions that are not recorded in those books and records or that are inadequately identified;
 - recording non-existent expenditures;
 - entering liabilities with incorrect identification of their object;
 - knowingly using false documents; or
 - intentionally destroying accounting books and records earlier than permitted by law.

Potential Penalties

- Significant criminal penalties may be imposed for violations under the CFPOA for both organizations and individuals, including:
 - up to 14 years imprisonment for individuals;
 - unlimited fines; and
 - probation orders with significant conditions for organizations, including regular and comprehensive reporting and audit requirements.
- There are no materiality standards or limitation periods for offences under the CFPOA.
- Violations (and alleged violations) of the CFPOA, as well as the related investigation, prosecution and press coverage, can result in significant damage to the reputation of the organization and its employees, disruption of the organization’s operations and significant cost.
- While the CFPOA does not expressly establish personal liability for directors or officers where an organization has committed an offence, directors and officers of an organization can be held personally liable under the Canadian *Criminal Code* for criminal acts of the organization if they do or omit to do anything for the purpose of aiding someone to commit the offence or intentionally encourage another to commit the offence.

Cases, Penalties and Charges to Date

- In the first 12 years following its introduction in 1999, there was only one conviction under the CFPOA. This conviction resulted in a relatively small fine of \$25,000.¹
- However, in the last four years: (i) two Canadian corporations have each been levied fines of approximately \$10 million as a result of convictions under the CFPOA entered as part of guilty pleas; (ii) an individual was sentenced to three years’ imprisonment following his conviction under the CFPOA; and (iii) a prominent Canadian engineering company was recently charged under the CFPOA following a highly publicized investigation that included a police raid on the company’s offices.
 - In 2011, Niko Resources Ltd. was fined \$9.5 million (and placed on three years’ probation) for providing a sports utility vehicle, along with trips to Calgary and New York, with an aggregate value of less than \$200,000, to the energy minister of Bangladesh. Niko’s probation order required the company to, among other things, complete independent third party audits and to submit annual reports regarding its CFPOA compliance to the RCMP and the court.
 - In 2013, Griffiths Energy International Inc. was required to pay a total penalty of \$10.35 million comprised of a \$9 million fine and a \$1.35 million victim fine surcharge for paying a \$2 million bribe and offering shares to Chad’s ambassador to Canada, his wife and others in an effort to obtain drilling rights to land in Chad.
 - In February 2015, charges under the CFPOA were laid against SNC-Lavalin Group Inc., a Canadian engineering firm. These charges followed a highly publicized investigation that included a raid by the RCMP on the company’s offices and were laid despite the fact that the company had been reported to have been co-operating with authorities, had fired the senior executives implicated or alleged to be responsible for the alleged misconduct and adopted a number of remedial measures. The company has stated that it intends to fight the charges vigorously and that it may need to restructure itself to deal with the potential ramifications that may result from the charges and potential conviction, including as a result of the Canadian federal government’s “Integrity Framework” (see “Revised “Integrity Framework” At-a-Glance”).

¹ In 2005, Hydro Kleen Systems Inc. was the first corporation charged and convicted under the CFPOA. Hydro Kleen was fined \$25,000 for making payments to an American immigration officer to gain an advantage for its business.

- Over the past two years, Canadian law enforcement authorities appear to have been increasing their resources related to investigation and enforcement of CFPOA matters. The RCMP has established a new National Division focused on high-risk investigations of corruption and criminality in Canada and abroad to protect against threats to Canada's political, economic and social integrity. In addition, the RCMP has signed a new trans-border Memorandum of Understanding to combat foreign bribery with law enforcement agencies in the United States, the United Kingdom and Australia to create an International Foreign Bribery Taskforce in order to strengthen cooperation in foreign bribery investigations.

Revised “Integrity Framework” At-a-Glance

- Under the revised “Integrity Framework” introduced by Public Works and Government Services Canada in March 2014, any organization seeking to bid on a contract with the Canadian federal government is required to certify that none of the organization, any members of its board of directors or any of its affiliates has been convicted in the last 10 years of any of a lengthy list of offences (including bribery and fraud) anywhere in the world.
- The impact of the revised Integrity Framework is that an organization that has been convicted or has plead guilty to a CFPOA offence (or to similar offences in other countries) will be precluded from bidding on contracts with the Canadian federal government for a period of 10 years.
- This prohibition applies to all contracts regardless of size and to any person who directly or indirectly, legally or *de facto*, controls the restricted organization.
- The revised “Integrity Framework” permits the Canadian government to contract with an organization that is otherwise restricted under the Framework only if the government determines there (i) are no other available suppliers of the particular product or service, or (ii) is a compelling national interest to award the contract to that organization. Unlike similar regimes in the United States and certain European countries, the Canadian rules do not provide the organization with an opportunity to seek reinstatement following the implementation of remedial measures, nor do they provide any consideration or discretion for leniency for organizations that self-report or cooperate with authorities.
- The revised “Integrity Framework” has been severely criticized by affected organizations, business groups and legal experts as being more stringent in its approach than the approach taken in other jurisdictions. It remains to be seen to what extent, if any, the Canadian government will moderate the potential impact of the “Integrity Framework”, which is reported to have caused SNC-Lavalin Group Inc. to consider a restructuring.

Steps to Minimize Risk and Protect Against Violations

While there is no “one-size-fits all” compliance program, Canadian companies conducting business abroad should consider taking the following steps to minimize the risks and protect against violations of the CFPOA, other applicable anti-bribery legislation and the related consequences:

- *Risk Assessment*: Identify and assess the corruption and bribery risks applicable to the company, including a comprehensive review of relationships, practices and operations in countries in which the company operates.
- *Internal Anti-Corruption Policy and Compliance Program*: Establish and enforce internal anti-corruption policies and ethics and compliance programs, including a process for the reporting of potential violations of the CFPOA, regular monitoring of the company's CFPOA compliance by the board and senior management, an ongoing compliance training program for directors, officers and employees, with particular emphasis on accounting personnel and employees located in countries considered high-risk for corrupt activity and a process and strategies for responding to potential CFPOA incidents (see “Conducting an Internal Investigation” below).
- *Internal Controls*: Establish and enforce a system of financial and accounting procedures, to ensure the maintenance of accurate books and records and prevent a books and records offence. Proper controls also can help detect activities that might constitute or lead to an offence under the CFPOA so that remedial actions can be taken before a significant issue arises. To the extent a public company experiences any CFPOA-related issues regarding its books and records, management and the board of directors will also need to consider whether there are any deficiencies in the company's internal controls over financial reporting that render such controls ineffective and preclude the company's certifying officers from disclosing in the company's annual and interim filings a conclusion that the company's controls are effective.
- *Due Diligence for International Business Transactions*: Identify and assess the risk of potential CFPOA violations in the context of potential international business transactions through due diligence. In connection with an acquiror's due diligence for a potential acquisition, this would include review and assessment of any agents acting on the target company's behalf in other countries and the target company's anti-bribery and corruption policies and programs, and a risk assessment on the target company similar to the risk assessment the acquiror would apply to itself as described above under “Risk Assessment”.

New employees joining the company as a result of an acquisition should receive compliance training as quickly as possible and the organization should implement any changes or updates to anti-bribery and corruption policies and programs identified as part of its transactional due diligence.

Conducting an Internal Investigation

- When evidence or suspicion of a potential CFPOA violation emerges, the organization should at the outset carefully assess whether it should conduct an independent internal investigation. Among other things, an internal investigation may serve as a means for the organization to respond quickly and adequately to any allegations that may arise (including any suggestion that the directors and officers have failed to meet their fiduciary duty to the organization in the circumstances) and may assist in identifying what has occurred and to ensure that any unlawful conduct is ceased and appropriate remedial steps are taken.
- The key element of any internal investigation is that it is, and is seen to be, independent. Regardless of the outcome, management and the board of directors should be able to state that they had instituted an appropriate process to properly investigate the matter.
- If an internal investigation is determined to be an appropriate course of action, a number of decisions must be made quickly, including what experts are required, who will conduct the investigation, to whom the investigators will report, how to secure and protect potentially relevant documents and evidence (in particular, electronic documents) and how many documents should be reviewed before conducting any interviews.
- Since materials related to the investigation may later be disclosed in legal proceedings, steps should be taken to protect any privilege and confidentiality to the extent possible.
- Internal investigations into potential CFPOA offences often give rise to a number of challenges as a result of the international and

multi-jurisdictional nature of the potential offences. The fact that the conduct likely takes place in multiple jurisdictions under different legal regimes complicates the analysis of how the investigation should be structured and executed.

- Retaining external advisors, including legal counsel, with the appropriate expertise to assist in developing and executing an internal investigation is critical and will provide a number of benefits to the organization, its senior management and its board of directors, including early preparation for any litigation, greater assurance that no one is either unfairly or inappropriately targeted or excluded from any investigation and early preparation for crisis management and investor, public and government relations efforts that may become crucial if the matter becomes public.
- Once there is an understanding of the nature and scope of any misconduct, consideration should be given to voluntary disclosure and cooperation with authorities since it may be possible to obtain some form of leniency or immunity (although there is presently no formal leniency or immunity programs for CFPOA offences).

About Goodmans

Goodmans LLP is internationally recognized as one of Canada's pre-eminent business law firms offering market-leading expertise: to advise on bribery and corruption prevention matters (including on the development, design and implementation of policies, procedures and internal controls), to conduct transactional due diligence and advise on deal structure related to bribery and corruption matters, and to lead and conduct investigations and provide advice relating to allegations of fraud, corruption and bribery, anti-trust matters under such legislation as the *Competition Act*, the CFPOA and the *Income Tax Act*. The Goodmans White Collar Risk Management and Investigations team leads clients through all phases of domestic and international investigations and criminal and civil enforcement proceedings. Clients include public and private entities, boards of directors, audit and special committees and legal and compliance departments.

Goodmans^{LLP}

Barristers & Solicitors / goodmans.ca