

## foreign corrupt practices act lawflash

February 8, 2013

### Canadian Government Announces Proposed Amendments to Anticorruption Law

*Amendments aim to improve enforcement of Canadian foreign corruption law by expanding jurisdiction, creating a books and records offense, eliminating the facilitation payments exception, redefining “business” and enforcement authority, and increasing the maximum imprisonment penalty.*

On February 5, Canadian Foreign Affairs Minister John Baird announced the introduction of amendments to the Corruption of Foreign Public Officials Act (CFPOA or the Act), Canada's equivalent of the U.S. Foreign Corrupt Practices Act (FCPA). The new amendments are designed to strengthen enforcement efforts under the law and further deter and prevent foreign corruption by Canadian companies.<sup>1</sup>

The proposed amendments, which were introduced in the Canadian Senate as Bill S-14, “Fighting Foreign Corruption Act,”<sup>2</sup> are expected to be enacted by Parliament soon, with support across all parties. The amendments' key elements include the following:

- Establishment of nationality jurisdiction for bribery offenses, which would permit prosecution of all persons and companies having Canadian nationality, regardless of where the alleged conduct occurred
- Eventual elimination of the facilitation payments exception
- Creation of a books and records offense related to the bribery of foreign officials
- Clarification of the definition of “business” contained in the Act to include transactions that may not generate profit
- Establishment of exclusive enforcement authority with the Royal Canadian Mounted Police (RCMP)
- Increase in the maximum penalty for individuals to 14 years' imprisonment<sup>3</sup>

#### The CFPOA as Currently Drafted

Enacted in 1999 following Canada's ratification of the Organisation for Economic Co-operation and Development's (OECD's) “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (OECD Convention),<sup>4</sup> the CFPOA, as currently drafted, is similar in many respects to the antibribery provisions of the FCPA.

The CFPOA specifically prohibits direct and indirect bribery of foreign public officials—including officials of boards, commissions, and corporations who perform duties and functions on behalf of a foreign state—in order to gain an advantage in “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in

1. Press Release, Dep't of Foreign Affairs & Int'l Trade Can., Strengthening Canada's Fight Against Foreign Bribery (Feb. 5, 2013), available at <http://www.international.gc.ca/media/aff/news-communications/2013/02/05b.aspx?lang=eng&view=d>.

2. View the complete text of the proposed amendments at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5960861&File=4>.

3. See Dep't of Foreign Affairs and Int'l Trade Canada, *supra* note 1.

4. See *id.*

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Canada or elsewhere for profit.”<sup>5</sup>

Like the FCPA, the CFPOA currently includes an exception for facilitation payments that are 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 official’s duties or functions.<sup>6</sup> Additionally, the CFPOA includes defenses for payments that are lawful under the laws of the foreign state or that are made in good faith to pay the reasonable expenses incurred on behalf of a foreign government official if they are “directly related” to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.<sup>7</sup>

## Impact of the New Amendments

### Establishment of Nationality Jurisdiction

Under the current version of the CFPOA, Canada has jurisdiction over bribery offenses when the conduct has some territorial nexus to Canada. In order to be subject to the jurisdiction of Canadian courts, there must exist some “real and substantial” link between the offense and Canada. In making this determination, courts typically consider all the relevant facts occurring in Canada that may give Canada a legitimate interest in prosecuting the case.<sup>8</sup>

The proposed amendments would abandon the territorial nexus approach in favor of a nationality test. Individuals and companies would be subject to prosecution under the CFPOA regardless of where the conduct occurred if they are Canadian nationals,<sup>9</sup> such as Canadian citizens, permanent residents of Canada present in Canada after the occurrence of the offense, or firms and businesses incorporated under the laws of Canada.<sup>10</sup>

The revised jurisdiction requirement is expected to make investigations and prosecutions under the CFPOA easier, eliminating a significant burden on the government to establish a “real and substantial” connection between the offense and Canada, while also expanding the reach of the law to include violations of the law committed by wholly foreign subsidiaries of Canadian companies.

### Elimination of Facilitation Payments

The CFPOA currently includes an exception for facilitation payments made to “expedite or secure” the performance by a foreign official of any “act of a routine nature” that is part of the official’s duties or functions, including the following:

- The issuance of a permit, license, or other document to qualify a person to do business
- The processing of official documents, such as visas and work permits
- The provision of services normally offered to the public, such as mail pickup and delivery, telecommunications services, and power and water supply
- 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<sup>11</sup>

The proposed amendments call for the eventual repeal of the facilitation payments exception, at a time to be set

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5. See Dep’t of Justice Can., *The Corruption of Foreign Public Officials Act: A Guide* (May 1999), <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html>.

6. *Id.*

7. *Id.*

8. See *id.*; see also *R. v. Libman*, [1985] 2 S.C.R. 178 (Can.).

9. See Dep’t of Foreign Affairs and Int’l Trade Canada, *supra* note 1.

10. See Bill S-14, Fighting Foreign Corruption Act, *supra* note 2.

11. See Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34 (Can.).

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by the cabinet.<sup>12</sup> By eliminating the facilitation payments exception, the CFPOA would part ways with the FCPA, which continues to permit such an exception for payments made to expedite routine, nondiscretionary governmental action, while aligning itself with antibribery laws in other OECD countries, such as the UK Bribery Act, which does not include exceptions for such payments.<sup>13</sup>

## Creation of a Books and Records Offense

The amendments also include a new criminal books and records offense related to bribes made to foreign officials for the purpose of hiding payments made in connection to such conduct. Specific violations of this new provision include establishing off-book accounts, failing to record or adequately identify transactions, recording nonexistent expenditures, misidentifying liabilities, knowingly using false documents, or intentionally destroying records earlier than permitted by law.<sup>14</sup>

Unlike the books and records and internal control provisions contained within the FCPA, which are civil offenses applicable to only issuers of U.S. securities,<sup>15</sup> violators of the CFPOA's books and records offense—which would potentially include any Canadian national under the amendments' expanded jurisdiction—would face criminal liability and a maximum prison term of 14 years.

## Clarification of the Definition of "Business"

The CFPOA currently prohibits the payment of bribes in order to obtain or retain an advantage in the course of "business," which is defined by the Act to be any "business . . . or undertaking of any kind carried on in Canada or elsewhere *for profit*."<sup>16</sup>

In order to clarify that the advantage gained does not have to actually result in a profit for the business or entity offering the bribe, and to respond to criticism voiced in the OECD Working Group on Bribery's 2011 report on Canada's compliance with the OECD Convention,<sup>17</sup> the new amendments remove "for profit" from the definition of "business" for the purposes of the CFPOA.

## Establishment of Exclusive RCMP Enforcement Authority

Currently, overlapping jurisdiction allows CFPOA charges to be filed by any federal, provincial, or municipal police forces in Canada, including the RCMP. Similarly, prosecutions are permitted by both provincial and federal Crown Prosecutors. The proposed amendments would streamline the enforcement structure by conferring exclusive enforcement authority with the RCMP.<sup>18</sup>

## Increase in Enforcement Penalties

The proposed amendments would increase the statutory maximum for individual offenders from five years to 14 years' imprisonment.<sup>19</sup> Fines imposed under the Act do not have a statutory maximum and instead are left to the discretion of sentencing judges.<sup>20</sup>

The increased penalties are likely intended to place greater personal liability on corporate directors, officers, and

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12. See Dep't of Foreign Affairs and Int'l Trade Canada, *supra* note 1.

13. For more information on the UK Bribery Act, see our March 31, 2011, LawFlash, "The UK Bribery Act: Long-Awaited Guidance Issued," available at <https://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/43639aa2-ca10-471c-a5da-faba7cc62437>.

14. Bill S-14, Fighting Foreign Corruption Act, *supra* note 2.

15. 15 U.S.C. § 78m(b).

16. Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34 (Can.) (emphasis added).

17. See Org. for Econ. Co-operation & Dev., Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada 11 (Mar. 2011), available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/Canadaphase3reportEN.pdf>.

18. See Dep't of Foreign Affairs and Int'l Trade Canada, *supra* note 1.

19. *Id.*

20. See *The Corruption of Foreign Public Officials Act: A Guide*, *supra* note 5.

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employees in an effort to strengthen the deterrent effect of the law and encourage implementation of robust corporate compliance programs.

## Enforcement Efforts and Implications

Since the CFPOA's enactment in 1999, there have been the following three convictions under the law, all involving corporate defendants:

- **Griffiths Energy International Inc.:** On January 22, 2013, Griffiths Energy International Inc., an upstream oil and gas company based in Alberta, Canada, pled guilty to a charge under the CFPOA of paying a bribe to the wife of Chad's ambassador to Canada in order to secure exclusive mineral rights in two regions. Griffiths admitted to paying \$2 million in cash as well as shares and to ultimately providing the government of Chad with a \$40 million signing bonus. Griffiths agreed to a total penalty of \$10.35 million.
- **Niko Resources Ltd.:** On June 24, 2011, Niko Resources Ltd., an upstream oil and gas company based in Alberta, pled guilty to providing travel and the use of a vehicle (valued at approximately \$190,000) to the Bangladeshi State Minister for Energy and Mineral Resources in order to influence his dealings with Niko's Bangladeshi subsidiary. Niko agreed to a fine of \$9.5 million and court supervised monitoring of its CFPOA compliance for a three-year period.
- **Hydro-Kleen Group Inc.:** In January 2005, Hydro-Kleen Group Inc., an oil field services company based in Alberta, pled guilty to one count of bribery for payments made to a U.S. immigration officer working at Calgary International Airport. Additional charges against the company's president and an employee were stayed. Hydro-Kleen agreed to a \$25,000 fine.<sup>21</sup>

Two additional CFPOA cases are currently pending, and there are 35 ongoing investigations. With the new amendments' broadened jurisdictional requirements and scope and additional books and records offense, as well as Prime Minister Stephen Harper's government's stated commitment to combating foreign corruption, it is likely that CFPOA actions will become more frequent in the coming years. Such heightened enforcement efforts serve an important reminder of the need for Canadian companies conducting business overseas—and U.S. companies operating businesses in Canada—to take seriously their commitments to full compliance with all applicable anticorruption laws.

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- Environmental
- False Claims Act
- FCPA
- Financial fraud
- Healthcare fraud
- Industrial accidents and workplace safety
- Import/export regulations
- Money laundering
- Qui tam
- Securities fraud/SEC enforcement
- Tax

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21. See Press Release, Dep't of Foreign Affairs and Int'l Trade Canada, *supra* note 1.

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