Canada Gets Tough on Corruption

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Introduction

In the wake of recent anti-corruption cases brought against two Canadian companies, the Government of Canada has signalled its continuing commitment to fight foreign corruption by proposing significant amendments to the *Corruption of Foreign Public Officials Act* (the "CFPOA"). These amendments address the OECD's criticism that Canada is not taking seriously its commitments under the OECD Convention on Combating Bribery of Foreign Public Officials (the "OECD Convention").

On February 5, 2013, the Minister of Foreign Affairs tabled Bill S-14, the *Fighting Foreign Corruption Act* (Bill S-14 or the "Act"), in the Senate. The Act proposes amendments that will expand the application of the CFPOA and strengthen Canada's ability to prosecute Canadian companies engaged in prohibited conduct. Canadian businesses, NGOs, individuals and other Canadian entities that operate beyond Canada's borders should prepare to amend their policies and procedures to ensure compliance with the anticipated CFPOA amendments.

The most notable amendments proposed by Bill S-14 are as follows:

Territorial Jurisdiction Expanded to Include Nationality

One of the most significant amendments proposed by Bill S-14 is that it empowers Canadian enforcers to prosecute extra-territorial CFPOA violations committed by Canadians whether or not the offending conduct has a "real and substantial link" to Canada. As a result, even violations that take place entirely outside of Canada will attract liability under the CFPOA if the violator has Canadian nationality. Expanding Canada's jurisdiction in this respect brings the CFPOA into line with the implementing legislation of other signatories of the OECD Convention, most notably the US and the UK.

Enforcement and Penalties

Reflecting the government's serious efforts to fight corruption, Bill S-14 would increase the maximum term for imprisonment for offences under the CFPOA from 5 years to 14 years. In addition, exclusive authority to lay charges under the CFPOA would rest with the RCMP which in 2008 established an International Anti-Corruption Unit focused on investigating cases of foreign bribery.

Books and Records Offences

The Bill S-14 amendments also introduce accounting-related prohibitions to the CFPOA. Falsifying, concealing, or destroying books and records for the purpose of bribing a foreign public official or for the purpose of hiding an act of bribery would constitute an offence under the CFPOA. Off-the-book accounts are also expressly prohibited. Again, these prohibitions accord with the OECD Convention and align the CFPOA with the US Foreign Corrupt Practices Act (the "FCPA").

It remains to be seen whether Canada will follow the lead of the US and adopt a zero-tolerance policy with respect to maintaining books and records. In the US a significant portion of the enforcement actions under the FCPA arise from the failure of public issuers to maintain proper books and records.

Canadian mining and energy companies that are subject to US resource extraction issuer disclosure obligations (such as the Dodd-Frank Act in the US) should consider the interplay between their US payment disclosure and the proposed CFPOA books and records obligations.

Facilitation Payments

Bill S-14 also provides for the eventual elimination of the current CFPOA exception for "facilitation payments", i.e., nominal payments made to expedite or secure the performance by a foreign official of any act of a routine nature that is part of the foreign public official's duties or functions, including the issuance of permits or licenses and the processing of official documents, such as visas and work permits. The elimination would become effective at a date to be set by Cabinet in order to give businesses time to amend their policies and procedures. In addition, it will provide the Government of Canada with an opportunity to encourage certain OECD members, for example, the US and Australia, to eliminate their exceptions for facilitation payments and thereby level the playing field for Canadian companies operating abroad.

Expanded Definition of "Business"

The CFPOA would apply to a broader range of Canadian entities as a result of an amendment to the definition of "business" in the CFPOA. The proposed amendment removes the "for profit" qualifying language from the definition of "business" under the CFPOA. NGOs, not-for-profit corporations and other entities that might otherwise have relied on the "for profit" requirement should be mindful of the CFPOA's expanded scope.

Conclusion

With the Conservative majority in the Senate, there is little doubt that Bill S-14, the *Fighting Foreign Corruption Act,* will come into effect to amend the CFPOA. Canadian businesses, NGOs, individuals and other entities that are currently captured within the scope of the CFPOA, or will become so through the amendments, should prepare to implement compliant policies and procedures.

Contact Us

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