

Introduction and Overview of the Anti-Corruption Landscape for Canadian Companies

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Introduction

- why does anti-corruption compliance matter?
- key elements of the *Corruption of Foreign Public Officials Act*
- current enforcement environment
- new Remediation Agreement Regime
- related regimes, including Integrity Regime and ESTMA
- application to officers, directors and other individuals
- other foreign bribery laws – US FCPA and UK Bribery Act
- implementation challenges

Why Does Anti-Corruption Compliance Matter?

- consequences of non-compliance with anti-bribery requirements
 - significant “hard costs” of non-compliance
 - criminal penalties
 - significant monetary fines (no upper limit)
 - forfeit proceeds
 - imprisonment of 14 years
 - operational costs
 - internal investigation
 - executive and employee resources
 - external legal counsel, forensic investigators and other experts
 - probation costs

Why Does Anti-Corruption Compliance Matter?

- ↪ hard costs can be eclipsed by
 - ↪ reputational costs
 - ↪ impact on share price (Niko Resources, SNC-Lavalin)
 - ↪ intrinsic value of company as M&A target
 - ↪ goodwill and reputation – attractiveness to potential business partners (Griffiths)
 - ↪ possible debarment – Public Works and Government Services Canada, Export Development Canada, World Bank, United Nations, Government of Quebec
 - ↪ multi-million dollar class actions and shareholder derivative claims
 - ↪ US experience now being followed in Canada

Why Does Anti-Corruption Compliance Matter?

- ↪ Public Services and Procurement Canada Integrity Regime (July 2015)
 - ↪ conviction under CFPOA results in automatic debarment of government supplier (can be reduced from 10 to 5 years)
 - ↪ public interest exception
 - ↪ charges alone result in suspension of 18 months or until resolved
 - ↪ conviction of subsidiaries or other affiliates – avoid debarment if no supplier participation
 - ↪ use of administrative agreements
 - ↪ reduction in debarment period, in lieu of suspension, PI exception, and continuing with existing contract
- ↪ April 4, 2016 revisions – bidder must provide complete list of all foreign criminal charges and convictions that may be similar to listed offences listed pertaining to itself, its affiliates and its proposed first tier subcontractors
- ↪ September 25, 2017 consultations launched on Integrity Regime and Deferred Prosecution Agreements
 - ↪ report issued on February 22, 2018

Corruption of Foreign Public Officials Act

- what is prohibited?
- the four key elements of section 3 of CFPOA:
 - direct or indirect giving or offering of a benefit of any kind,
 - to or for the benefit of a foreign public official,
 - as consideration for act or omission in connection with performance of the official's duties or functions or to induce the official to use his or her position to influence acts or decisions of the foreign state, and
 - in order to obtain or retain an advantage in the course of business

Corruption of Foreign Public Officials Act

- what is a “foreign public official”?
 - someone who holds a legislative, administrative or judicial position in a foreign state
 - someone who performs public duties or functions for a foreign state (including someone working for a board, commission, corporation or other body or authority that performs a duty or function on behalf of a state)
 - includes officers and employees of state-owned or controlled entities
 - an official or agent of a public international organization (formed by two or more states or governments or by two or more public international organizations)

Corruption of Foreign Public Officials Act

- what defences are available?
 - payments that are permitted or required under the law of the foreign state
 - payments for reasonable expenses incurred in good faith by or on behalf of the official directly related to
 - promotion, demonstration, or explanation of your products and services or
 - the execution or performance of a contract with the foreign state

Corruption of Foreign Public Officials Act

- ↪ so-called “facilitation payments” or “grease payments” exception is **no longer available** as of October 31, 2017
 - ↪ small payment made to expedite or secure the performance of an act of a routine nature that is part of the official’s duties or functions, including
 - ↪ issuing permits to do business
 - ↪ processing of official documents, e.g., visas
 - ↪ providing services normally offered to the public
 - ↪ providing services normally provided as required, such as police protection or loading and unloading of cargo
- ↪ these small payments are now illegal under the CFPOA (and were likely already prohibited under local laws)

Corruption of Foreign Public Officials Act

- new section 4 accounting offence where a person, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business **or for the purpose of hiding that bribery,**
 - establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards
 - makes transactions that are not recorded in those books and records or that are inadequately identified in them
 - records non-existent expenditures in those books and records
 - enters liabilities with incorrect identification of their object in those books and records
 - knowingly uses false documents
 - intentionally destroys accounting books and records earlier than permitted by law

The Canadian Anti-Corruption Enforcement Environment

- Canada's historically weak enforcement record
 - Hydro Kleen (United States) - guilty plea January 10, 2005
 - \$25,000 fine, less than the amount of the bribe
- pressure from OECD Working Group on Bribery, Transparency International and others – Canada last among the G7
- ratified the United Nations Convention Against Corruption on October 2, 2007
- RCMP international anti-corruption unit established in 2008 with offices in Calgary and Ottawa

The Canadian Anti-Corruption Enforcement Environment

- and now...
 - Niko Resources (Bangladesh) - guilty plea June 24, 2011
 - \$9.5 million fine plus three-year probation/monitoring
 - Griffiths Energy (Chad) – guilty plea January 25, 2013
 - \$10.35 million fine
 - Nazir Karigar (India) – convicted August 15, 2013
 - May 23, 2014 - sentenced to three years in jail
 - July 6, 2017 - appeal dismissed by Ontario Court of Appeal

The Canadian Anti-Corruption Enforcement Environment

- ↪ ongoing RCMP investigations of potential CFPOA violations and charges
 - ↪ Blackfire Exploration (Mexico) - RCMP raided Calgary offices July 20, 2011
 - ↪ SNC-Lavalin - RCMP raided offices September 4, 2011 and April 12, 2012 (activities in Bangladesh, Libya, Algeria)
 - ↪ CFPOA charges laid against seven individuals so far (five dropped)
 - ↪ February 19, 2015 charges laid against SNC-Lavalin for
 - ↪ bribe to Libyan officials of \$47.6 million in violation of CFPOA para 3(1)(b)
 - ↪ defrauding Libyan government of \$129.8 million in violation of Criminal Code section 380

The Canadian Anti-Corruption Enforcement Environment

- Nordion (Russia) – voluntary disclosure and “declination”
- other Canadian firms announcing internal investigations and declinations – e.g., MagIndustries (Congo)
- November 2016 - President of Canadian General Aircraft charged with conspiracy to bribe public officials in Thailand regarding a proposed deal for commercial passenger jet
 - charges stayed in December of 2017
- 2016 Report to Parliament on Canada’s Fight Against Foreign Corruption notes 10 ongoing investigations (2017 Report did not provide this data)

The Canadian Anti-Corruption Enforcement Environment - RARs

- March 27, 2018 proposed amendments to *Criminal Code* to create made-in-Canada deferred prosecution agreement regime - Remediation Agreement Regime
- agreement with prosecutor to avoid conviction under CFPOA and certain other economic crimes
- could still include imposition of financial penalties, forfeiture of property obtained by the commission of the offence, restitution to victims, and appointment of an independent monitor
- subject to approval of court at time of finalization of RA and at time of completion when the conditional stay of criminal proceedings becomes final

Lessons from Enforcement Experience to Date

- cost and exposure
 - penalty and probation
 - financial
 - Niko shares lost 4% of market value when plea announced
 - SNC-Lavalin
 - Griffiths terminated Initial Public Offering
 - operational – internal investigation, resources and other costs
 - Griffiths - \$5 million internal investigation costs alone
 - Nordion - in excess of \$20 million
 - impact on contract with foreign govt/SOE and broader debarment concerns (Integrity Regime)

Lessons from Enforcement Experience to Date

- “business as usual” or “that’s how it’s done here” are not acceptable excuses for the Courts
- Canadian authorities following U.S. precedent on sentencing, terms of probation, and required compliance measures
- benefits of voluntary disclosure (Griffiths) and cooperation with authorities (Griffiths and Niko)
- guidance on what Canadian companies are expected to have in compliance programs (Niko)

The Basic Components of an Anti-Bribery Compliance Program (Niko)

- Canadian companies are expected to have anti-bribery compliance programs in place that include
 - a compliance manual available to all employees that clearly articulates the necessary requirements and due diligence for compliance with anti-bribery laws
 - appointment of authoritative officers who are responsible and accountable for anti-bribery compliance

The Basic Components of an Anti-Bribery Compliance Program (Niko)

- regular education and training programs for employees and executives
- regular and comprehensive auditing to assess and confirm compliance levels
- processes for internal and external reporting of potential violations and protections against reprisals when employees raise concerns with potential non-compliance

The Basic Components of an Anti-Bribery Compliance Program (Niko)

- an anti-bribery risk review of projects or proposals involving business with other countries
- ongoing review of relationships, including governing legal agreements, with all agents and business partners to establish and document compliance with anti-bribery rules
- internal accounting controls that ensure accurate books and records practices

Exposure for Employees, Officers and Directors

- authorities recognizing importance of investigating and prosecuting individuals
- Hydro-Kleen Group – company fined \$25,000, charges against director and officer were stayed, but Court stated:
 - “It bothers the Court that these people are able to plea from a corporation to protect the operating minds of the company from the stigma attached to a criminal record. However, the Court does take into consideration that the operating minds of this corporation do not escape with their integrity intact.”

Exposure for Employees, Officers and Directors

- Niko Resources – no individuals charged
- Nazir Karigar (Cryptometrics) – sentenced to 3 years imprisonment
- RCMP laid charges against Cryptometrics officers – two U.S. nationals and one British national
- SNC-Lavalin – 7 individuals charged, all but two have been dropped
- US trend towards prosecution of officers and directors

US Approach to Prosecuting Individuals

- “we tried more individuals for FCPA violations than in any prior year. And we indicted more individuals than ever before. That is no accident. In fact, prosecution of individuals is a cornerstone of our enforcement strategy...**Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.**”

- Lanny Breuer, US Assistant Attorney General – US DOJ, Criminal Division, November 17, 2009

US Approach to Prosecuting Individuals

- US emphasis on providing information on individuals in order to obtain credit or a declination in enforcement action against company
 - 2015 Yates Memorandum
 - 2016 FCPA Pilot Program
 - 2017 FCPA Enforcement Policy
- new policy intended “reinforce the Department’s commitment to hold individuals accountable for criminal activity...[e]ffective deterrence of corporate corruption requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders.”
 - US Deputy Attorney General Rod Rosenstein, November 30, 2017

Application of Other Anti-Corruption Regimes to Canadians

- Canadian companies and their directors and officer are subject to enforcement actions in more aggressive anti-corruption regimes, including
 - United States – FCPA
 - United Kingdom – 2010 Bribery Act

Application of Other Anti-Corruption Regimes to Canadians

- US Foreign Corrupt Practices Act applies to
 - US companies and individuals (citizens and residents)
 - companies that have issued securities that have been registered in the United or who are required to file periodic reports with the SEC
 - non-US companies and individuals that cause, directly or through agents, acts in furtherance of the corrupt payment to take place within the territory of the United States
 - clearing US dollar transactions, communications through US servers, meeting in the United States

Application of Other Anti-Corruption Regimes to Canadians

- UK Bribery Act, 2010
 - UK companies and individuals (citizens and residents)
 - non-UK companies carrying on part of their business in UK
 - any person committing an act or omission forming part of a bribery offence which occurs in the UK, regardless of nationality
 - dealings with “associated persons” (performing services for or on behalf of a UK company)

Application of Other Anti-Corruption Regimes to Canadians

- what does this mean for your company?
 - CFPOA is not your only concern – you will be asked to or required to comply with foreign regimes, including those of host countries
 - as with your business, compliance strategies must be developed and implemented in the international marketplace
 - impacts enforcement and voluntary disclosure issues
 - monitor and consider incorporating rules and principles from other jurisdictions
 - conform to the highest standard required, not the lowest common denominator
 - for example, UK Bribery Act 2010 prohibits facilitation payments and non-government corruption

Extractive Sector Transparency Measures Act

- “publish what you pay” initiatives worldwide
- applies to Canadian-listed companies as well as private companies meeting certain size thresholds engaged in the commercial development of oil, gas or minerals in Canada or elsewhere
- applies to entities (eg, investment funds) that control others engaged in these activities
- public reporting of payments to government and SOEs on NRCan website
- includes payments to Aboriginal governments starting June 1, 2017
- severe penalties in the event of non-compliance (up to \$250,000 per day) but due diligence defence available

Challenges: Implementation

- RCMP, courts, regulators emphasizing importance of
 - having more than a paper policy
 - risk assessment
 - compliance policy
 - internal controls
 - transactional due diligence
 - evaluation and monitoring of third parties
 - documented evidence of implementation

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