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Digging into Facilitation Payments

By Danielle Royal and Jay C. Kellerman on October 30th, 2013

Background

The ***Corruption of Foreign Public Officials Act*** (CFPOA), Canada's equivalent of the U.S. ***Foreign Corrupt Practices Act*** (FCPA), prohibits Canadian companies and individuals from giving or offering a benefit of any kind to a foreign public official with the ultimate purpose of obtaining or retaining a business advantage. While the CFPOA has been in effect since 1999, a recent set of amendments designed to strengthen the legislation should be on the radar screen of all Canadian companies and Canadian nationals that do business abroad. Canadian mining companies that do business in countries with less developed economies and legal systems, and who interact with foreign public officials in such countries on a regular basis, are particularly likely to be affected.

The recent amendments were in part a **response to criticism** from the OECD's Working Group on Bribery that Canada's enforcement efforts under the CFPOA have been inadequate. The amendments include the following:

- Introducing a nationality jurisdictional test that deems a bribe paid by Canadian nationals or Canadian corporations outside Canada to have been paid within Canada (making it easier for prosecutors to lay charges and prosecute cases in Canadian courts);
- Creating a new books and record offence which prohibits certain bookkeeping practices and harmonizes the CFPOA with the FCPA;
- Expanding the application of the CFPOA to not-for-profit companies;
- Increasing the maximum terms of imprisonment for violations from 5 to 14 years and providing for unlimited fines;
- Granting exclusive jurisdiction to the Royal Canadian Mounted Police ("RCMP") to bring forward charges under the CFPOA; and
- Eventual elimination of the facilitation payment exception.

While certain of these amendments – notably the new jurisdictional provision, the addition of a "books and records" offence and increased penalties – bring the CFPOA more closely into line with the FCPA, the repeal of the facilitation payment exception (which repeal is to come into force at an unspecified date in the future to enable companies to adjust their internal controls and business activities) creates inconsistency between the CFPOA and the FCPA and raises real compliance risks for Canadian companies and Canadian nationals operating abroad. In particular, Canadian companies or Canadian nationals that have traditionally taken comfort in the fact that certain types of payments to foreign public officials are exempt from prosecution as "facilitation" or "facilitating" payments need to closely examine their activities overseas, as well as their compliance policies and training, in order to ensure that they do not run afoul of this new amendment when it comes into force. If they do not, given the increased penalties and clear intention of the RCMP to increase investigation and enforcement efforts, the consequences could be severe.

While, as just noted, the amendment that would repeal the facilitation payment exception has not yet come into

force, for the reasons outlined below its consequences for Canadians and Canadian companies operating abroad are potentially serious and should be considered carefully even before a date for implementation of the amendment has been announced. This update will focus on the facilitation payment issue, although each of the amendments listed above will have direct consequences for many Canadian companies.

What is a Facilitation Payment?

Since the CFPOA's enactment in 1999, the facilitation payment exception has provided a safe harbour for certain types of payment made to foreign public officials to expedite or secure performance of an act of a routine nature that is part of the foreign public official's duties or function. Included in these acts of routine nature are such things as payments for the issuing of permits or licenses, processing visas and work permits, providing public utility services such as mail delivery, power and water supply. The facilitation payment exception explicitly does not apply to any discretionary decision by a foreign official to award new business or to continue business with a party.

This is the status quo that Canadian companies have been accustomed to since 1999. It will change once the amendment eliminating facilitation payments is brought into force. As noted above, the context for this change is an international trend toward tougher sanctions against bribery. From a business perspective, Canadian companies with global operations need to understand how their compliance requirements differ from those to which their competitors may be subject under the corresponding laws in countries such as the U.S. and U.K.

U.S. Approach: Retaining the Facilitation Payment Exception

A facilitation payment exception was included in the FCPA when it was enacted in 1977. The legislative history of the FCPA reveals that the exception was intended to draw a line between payments designed to induce a foreign official to improperly use their discretionary authority and payments that merely moved a matter toward its eventual conclusion and which did not involve any discretion on the part of the public official. Congress recognized that "while payments made to assure or to speed up the performance of a foreign official's duties may be reprehensible in the United States, they are not necessarily so viewed elsewhere in the world and it is not feasible for the United States to attempt unilaterally to eradicate all such payments." Although the United States currently encourages companies to prohibit or discourage facilitating payments, true facilitation payments remain permissible under the FCPA. Indeed, the **Resource Guide to the U.S. Foreign Corrupt Practices Act** issued by the Criminal Division of the U.S. Department of Justice provides guidance and sample factual scenarios to assist companies in identifying what is a legitimate facilitation payment as compared to a corrupt practice subject to prosecution under the FCPA.

U.K. Approach: Eliminating the Facilitation Payment Exception

In contrast to the FCPA, the United Kingdom's ***Bribery Act 2010***, which came into force in 2011, does not contain a facilitation payment exception. The **Serious Fraud Office** in the U.K., which is responsible for enforcing the new Act, has stated its view very clearly: "a facilitation payment is a type of bribe and should be seen as such" and "individuals and companies that use facilitation payments in the course of their business are at risk of criminal prosecution in the U.K.". The U.K. Serious Fraud Office has issued guidance on the factors likely to influence the decision to prosecute companies or individuals who make facilitation payments. These factors include the size and frequency of the payments, whether the payments were part of a standard way of conducting business, whether the payments were self-reported, whether there was a policy in place setting out the procedures to follow if a facilitation payment was requested and whether the payer was in a vulnerable position when the payment was demanded.

Canadian Approach: Eliminating the Exception, But Not Quite Yet

In what some may view as a classic Canadian compromise to the divergent approaches taken by the U.S. and U.K. to facilitation payments, Parliament's recent amendments to the CFPOA eliminate the facilitation payment exception while postponing the coming into force of the provision repealing the exception until an unspecified future date. In the meantime, Canadian companies should be using the interval before this amendment comes

into force – however long it turns out to be – to ensure that their internal controls, compliance policies and compliance training efforts reflect what, on the coming into force of the amendment, will be a new business reality.

Impact on Canadian Mining Businesses

Canadian mining companies, like other businesses operating overseas, know that the inability to ensure timely routine government action can seriously and deleteriously affect the success and viability of their operations. For smaller companies with less capacity to "weather a storm", even a temporary delay in government action may have serious consequences. One oft-cited scenario is a company that faces operational shutdown because a critical and time-sensitive piece of replacement equipment is delayed at customs pending the execution of necessary clearance papers. Processing the paperwork for the equipment might be expedited by payment of a small amount to the public official responsible for the clearance, failing which it may languish indefinitely as officials deal with more urgent priorities. Such scenarios are far from uncommon.

In **submissions** from the Australia Africa Mining Industry Group ("AAMIG") to Australia's Attorney General on Australia's proposal to eliminate the facilitation payment defence from its legislation, AAMIG identified numerous scenarios where transparent and properly recorded facilitation payments enabled government officials to perform official duties that they would not otherwise have been able to provide. Examples included providing the Mines Department of an African country with a scanner and computer so that a company could send mining plans electronically, and providing a mine inspector with fuel, meals and a place to work on site so that the inspector, who had his own vehicle but was not provided any money for fuel, could drive the 50 km to the mining site to perform the necessary inspection.

It is no doubt possible to argue that notwithstanding the amendments, these and other types of facilitating payments or benefits to foreign public officials are not made to obtain an advantage in the course of business. However, Parliament's decision to remove the facilitation payment exception from the CFPOA creates significant uncertainty as to whether such conduct will result in potential criminal liability.

Because only one case (which did not address facilitation payments) has gone to trial under the CFPOA to date, there is no existing body of jurisprudence to look to for clarity or guidance. There is of course some possibility that, notwithstanding the amendments, the **Public Prosecution Service** may elect on public policy grounds to not prosecute individuals or companies who make these types of facilitation payments or that investigative resources will be directed toward more serious allegations. Even so, reliance on untested defences or prosecutorial discretion to avoid potential criminal liability is gamble that many companies may not be willing to take, particularly in the face of increased criminal penalties including unlimited fines for companies and maximum jail terms for individuals of 14 years (which, given the recent enactment of the ***Safe Streets and Communities Act***, means that any individual who is convicted of such an offence will not be permitted to serve his or her sentence in the community), as well as the potential for debarment from government contracts.

The Canadian senator who sponsored the amendments to the CFPOA was of the view that "the elimination of the facilitation payments defence will not create a competitive disadvantage for Canadian companies in international markets". Whether that prediction is realistic remains to be seen. It is entirely possible that the inability to rely on the facilitation payment exception to pay foreign public officials for routine government services will in fact put some Canadian companies at a disadvantage as compared to U.S. and other non-Canadian companies that are permitted to make such payments without the risk of criminal prosecution. Avoiding the potential of an uneven playing field for Canadian companies is perhaps a further reason that Parliament has not yet brought the amendment into force.

Conclusion

Canadian mining companies and Canadian nationals doing business abroad need to be alert to the fact that vigorous enforcement of anti-corruption legislation is the new reality. The eventual repeal of the facilitation payment exception stands to create significant risks and uncertainty for Canadian companies interacting with foreign public officials overseas. Implementing changes to internal company controls, and ensuring not only that

compliance programs and policies reflect these changes, but also that active steps are taken to educate employees and third party agents and intermediaries acting on behalf of the Canadian company overseas about this new environment should be a business imperative. The hefty fines that have been obtained in recent Canadian settlements, the clear intention to prosecute individuals, as well as the fact that the RCMP has in the range of 60 ongoing investigations, are intended to send a strong message that these matters will be taken seriously by enforcement authorities. Those Canadian companies that fail to act in the face of these warnings do so at their peril.

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