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Here Comes Canada: Corruption Prosecutions Likely To Increase Under The Amended CFPOA

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Discussions of anti-corruption and anti-bribery prevention and compliance often center on the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.K. Bribery Act, given the high-profile nature of those laws and the agencies that enforce them. But companies would be wise to familiarize themselves with Canada's Corruption of Public Officials Act ("CFPOA") and the recent cases that have been brought thereunder, given that investigations under the recently amended CFPOA appear to be on the rise.

The CFPOA was enacted in 1999 with Canada's ratification of the OECD Convention. However, there was virtually no enforcement of the CFPOA for the first 10 years of its existence, in part because the law contained major loopholes that prevented serious enforcement. Among those loopholes was the inability of Canadian authorities to prosecute its own citizens under the law if there was not a "real and substantial link" between the crime and Canadian territory.

In 2013, Canada amended the CFPOA in an effort to shed its image as the jurisdiction at the "back of the pack" of the G7 nations in terms of anti-corruption prosecution. Although the CFPOA had been around since 1999, Canada only brought three cases in 2012, in part because of several loopholes that restricted the ability of Canadian authorities to bring cases or impose serious penalties for violations of the CFPOA. The 2013 legislation, aptly entitled "The Fighting Corruption Act," clarified and strengthened the CFPOA by, among other things:

- Expanding the CFPOA's jurisdiction to include prosecution of Canadian individuals and companies, regardless of where the proscribed activity took place;
- Adding a books and records provision;

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- Increasing criminal penalties;
- Eliminating the facilitation payments exception;
- Removing the “for-profit” restriction; and
- Giving the Royal Canadian Mounted Police (“RCMP”) the exclusive right to charge violations of the CFPOA.

These amendments largely brought the CFPOA in line with the FCPA and the U.K. Bribery Act.

The amendment of the CFPOA coincided with an uptick in active investigations and prosecutions. It was reported in early 2013 that the International Anti-Corruption Unit (“IACU,” created by the RCMP with offices in Calgary and Ottawa) had 35 active investigations, despite having had only three corporate convictions and two pending cases to that point.

One of those active pending cases involves SNC-Lavalin, a Montreal-based engineering firm whose employees were accused of bribery in connection with a bridge-building contract in Bangladesh. The RCMP have also charged Bangladesh’s former state minister, Abul Hasan Chowdhury, with facilitating and benefiting from violations of the CFPOA. Earlier this month, his lawyers argued that Canada has no jurisdiction over Chowdhury, a foreign national who lives in Bangladesh. The RCMP prosecutors have argued in favor of an expansive jurisdictional reach, asserting that, under the CFPOA, Canada has jurisdiction over the offense and thus the parties to it.
In 2013, the RCMP achieved its first trial and conviction of an individual under the CFPOA (Nazir Karigar, charged with bribing Air India officials) and its largest fine for a CFPOA conviction to date ($10.35 million in the Griffiths Energy matter). It remains to be seen whether the amendments, will allow the RCMP to bring even more investigations and charges in 2014 and 2015, but it is clear that the tools are there. Companies operating in Canada or with a nexus to Canada should be careful to consider the amended CFPOA and its expanded scope when drafting and revising their anti-corruption compliance programs.