



Corruption of Foreign Public Officials Act FAQ

Q | What is the Corruption of Foreign Public Officials Act?

A | The *Corruption of Foreign Public Officials Act* (“CFPOA”) is a Canadian anti-corruption law aimed at preventing the bribery by Canadian businesses of public officials outside of Canada, thus contributing towards the fight against global corruption. It is often touted as the Canadian equivalent to the United States’ *Foreign Corrupt Practices Act* (“FCPA”) which was enacted about twenty years prior to the CFPOA. The CFPOA came into force in 1999 and brought Canada into compliance with the 1997 OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. It makes attempts by Canadians to bribe foreign public officials a criminal offence under Canadian law.

Q | To Whom Does the CFPOA Apply?

A | Like the FCPA in the United States, the CFPOA applies to both individuals and corporations irrespective of nationality. Unlike the FCPA, however, the jurisdictional scope of the CFPOA is more limited and the case law has determined that Canadian courts will only try criminal cases involving a “real and substantial” connection to Canada. With this in mind, it should be emphasized that an individual or corporation need not be Canadian in order for the CFPOA to apply. While the “real and substantial connection” test has not been litigated vis à vis the CFPOA, case law pertaining to other criminal statutes suggests that the involvement in a bribery scheme of a Canadian-incorporated company or a wholly-owned subsidiary of such a company may be sufficient to trigger the application of the CFPOA. A Canadian business may also be found liable for the acts of its agents or contractors if those agents or contractors are involved in the management of the company’s affairs, or if an officer of the company knows about the agent or contractor’s conduct (or absent willful blindness ought to know) and does not take reasonable measures to stop them.

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Q | What constitutes an offence under the CFPOA?

A | Section 3 of the CFPOA establishes the broad general offence of bribing a foreign public official. It prohibits, directly or indirectly, giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind to of a foreign public official (or to someone else for the benefit of the official), either as consideration for an act or omission on the part of the official in connection with the performance of his or her duties, or to induce the official to use his influence to affect any acts or decisions of his government or employer. The CFPOA does not require that the bribery be direct and thus contemplate the possibility that bribes are conveyed through an agent or benefit someone other than the official if the ultimate intent is to influence a public official by conferring a benefit. Unlike the FCPA in the United States, the Canadian statute is only enforceable under the criminal law – civil prosecution is not available under the CFPOA.

Q | Are there any defenses available to individuals or corporations accused of contravening the CFPOA?

A | There are essentially two statutory defenses available under the CFPOA:

1. payments made to a public official that are permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions
2. reimbursement for reasonable expenditures made in good faith that are directly related to either:
 - a) demonstrating, promoting or explaining products or services; or
 - b) executing or performing obligations under a contract formed with the foreign government

Q | Is there an exception for “facilitation payments”?

A | No. The exception for facilitations payments was removed from the CPFOA in late 2017. “Facilitation payments” are typically small payments that in some countries are often used to facilitate or expedite the performance of routine

governmental actions that are unrelated to the awarding of business (anything from processing a visa application to providing a connection to a power or water supply). The CFPOA formerly contained an exemption for such payments, but this was repealed as of October 31, 2017. The elimination of the facilitation payment exemption raises compliance issues for Canadian companies operating in foreign jurisdictions and creates an inconsistency between the CFPOA and the U.S. Foreign Corrupt Practices Act (which still has an exemption of this type). Canadian companies and Canadian nationals operating abroad need to be aware of this difference and should ensure that their compliance policies and training materials reflect the fact that this exemption has been repealed.

Q | What are some examples of corruption that would contravene the CFPOA?

A | Corruption under the CFPOA includes paying cash to a public official in order to induce the official to use his or her position to influence the acts or decisions of the foreign official; giving a public official extravagant gifts for the same purposes; paying a business development agent large sums of money, disproportionate to typical agency fees, for which the agent is not required to account and that end up in the pocket of a government official that is awarding new business; hiring the official’s unqualified family member; paying for a vacation for the official in connection with an otherwise legitimate fact-finding mission to Canada.

Q | What are the penalties that may be imposed under the CFPOA?

A | CFPOA violation is an indictable criminal offence and can result in imprisonment for up to five years and/or a fine in the discretion of the court. Both corporations and individuals involved, including officers and directors, can be charged.

Q | What kinds of fines have been imposed by Canadian courts in the past for breach of the CFPOA?

A | Enforcement under the CFPOA has ramped up in recent years, with Niko Resources Ltd., a

Calgary-based oil and gas exploration company, pleading guilty under the Act in June, 2011 and agreeing to pay a Cdn. \$9.5 million fine. This fine was reduced, according to the RCMP, in recognition of Niko's cooperation in the investigation of the case.

Q | Are there any corporate governance measures that companies with foreign operations can adopt to ensure compliance with the CFPOA?

A | Yes. The development of a corporate compliance program, including top-level commitment to ensure transparency in the procurement or business development process is important both to help prevent violations, and in some circumstances can help to protect senior

management and directors from liability should a violation occur. Measures to improve compliance include an assessment of risk in 'danger zones' (business dealings in countries with a high level of corruption should be approached with particular care) and in respect of certain types of business transaction (e.g., hospitality and promotional expenses, the expenses of agents or contractors that may be stationed in foreign countries and who conduct business with local officials on behalf of the company, joint ventures involving foreign private or public sector organizations, acquisitions of companies with operations in corruption "hot spots"); accounting protocols aimed at ensuring transparency and accountability for corporate personnel and agents operating abroad; proper communication – which includes training in CFPOA compliance for key corporate personnel and agents, and the use of proper procedures streamlined for application internationally.

For further information, please contact your Stikeman Elliott representative, any of our lawyers listed at www.stikeman.com or the following author:



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