

Focus BUSINESS LAW

Guide on U.S. Foreign Corrupt Practices Act a helpful tool

Resource provides practical information on impact statute has on Canadian businesses



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Recently, the U.S. Department of Justice and Securities and Exchange Commission jointly published a resource guide for the *U.S. Foreign Corrupt Practices Act*, outlining the agencies' priorities and approach to enforcement of this statute. For Canadian companies and individuals that fall within the purview of the FCPA, the guide is of particular significance.

The FCPA was enacted in 1977 to address international corruption. Its anti-bribery provisions prohibit U.S. and foreign public companies listed on U.S. stock exchanges or that are required to file periodic reports with the SEC (issuers), American persons and businesses, and foreign persons and businesses acting while in U.S. territory, from making corrupt payments to foreign officials to obtain or retain business. The FCPA's accounting provisions require issuers to keep accurate books and records and to devise and maintain an adequate system of internal accounting controls.

The DOJ and the SEC have

worked closely with their Canadian counterparts on foreign corruption matters. In recent years, FCPA enforcement actions have been increasing in frequency and financial impact to violators.

Canadian companies that are issuers are subject to the FCPA. An issuer registers securities under s. 12 of the *U.S. Securities Exchange Act* of 1934 or is obligated to file periodic and other reports under s. 15(d) of the act. Therefore, the FCPA applies to Canadian companies with a class of securities (or American depository receipts) listed on a U.S. national securities exchange, and to Canadian companies with securities quoted in the U.S. over-the-counter market and required to file periodic reports with the SEC.

The FCPA anti-bribery provisions prohibit "offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."

"A Resource Guide to the U.S. Foreign Corrupt Practices Act" provides real-life examples and hypothetical situations to highlight potential areas of liability. It describes prosecutable actions by issuers and U.S.

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domestic concerns in furtherance of a corrupt payment to a foreign official. These actions include using the U.S. mails, placing a telephone call or sending an e-mail, text message or fax from, to or through the U.S., sending a wire transfer from or to a U.S. bank (or otherwise using the U.S. banking system), or travelling across state borders or internationally to or from the U.S.

Additionally, a foreign non-issuer company or individual is subject to the FCPA if it causes, directly or through an agent, any

act in furtherance of a corrupt payment (or an offer, promise or authorization to pay) while in U.S. territory.

Therefore, a Canadian who attends a meeting in the U.S. that furthers a foreign bribery scheme may face prosecution, as may any co-conspirators who did not even attend the meeting.

Officers, directors, employees, agents and stockholders (whether U.S. or foreign) of an issuer, of a U.S. domestic concern or of a person committing a prohibited act within the U.S. may be subject to liability under the anti-bribery provisions of the FCPA.

Co-conspirators (whether U.S. or foreign) and those who aid or abet a wrongdoer may also face prosecution. Principles of general corporate liability, parent-sub-sidiary liability and successor liability also apply.

Finally, the resource guide illuminates the risks and responsibilities that come with acting through third-party agents.

The accounting provisions of the FCPA apply to issuers. As an issuer's books and records include those of its consolidated subsidiaries and affiliates (U.S. and foreign), the issuer must ensure those entities' compliance with the accounting provisions. The guide also discusses issuers' responsibility for affiliates (including joint ventures) in which they own 50

per cent or less. The guide details common mischaracterizations of bribes as legitimate payments in companies' books and records.

Criminal liability can be imposed for "willful" violations of the FCPA accounting provisions. As with the anti-bribery provisions, companies and individuals may be subject to criminal liability for breaches of the accounting provisions based on the aiding and abetting and the conspiracy theories of liability.

In describing enforcement principles, the guide underscores the following considerations: self-policing, self-reporting, remediation and co-operation with law enforcement. A strong corporate compliance program can mitigate liability risk. Some of the hallmarks of an effective compliance program are set out in the guide.

The guide provides welcome practical information for those that come within the ambit of the FCPA. Canadian businesses and individuals should be aware of the reach, scope and impact of this U.S. statute, and the guide is a helpful tool in this regard.

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Insurance: Vital for companies to capture all loss-related costs

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fee endorsement portion of the policy. External advisers are knowledgeable with how claims work and can accelerate the process, increase the recovery amount from the insurance company and relieve pressure on the company's staff.

Accounting for a claim

It is vital to capture all loss-related costs. The company should set up an insurance receivable account on its balance sheet, with sub-accounts to capture all the costs in the correct "buckets" in accordance with the insurance policy. These may include cleanup and debris removal, property repairs, etc.

It is important to have the costs categorized correctly to facilitate the payment of the insurance claim. If the costs incurred from the incident are not allocated to the correct categories, the insurer

may not pay for them. For example, costs related to the business interruption portion of the claim, such as loss of sales resulting from downtime, must be accounted for separately from property damage costs. Supporting documents should be included to provide backup for the costs, such as invoices, time sheets, cancelled cheques and correspondence.

Managing the relationship

In quantifying the claim, the company's methodology should be consistent with its insurance policy. One of the most widely used methods is known as the "three-column approach," which uses a modified income statement and presents the calculation in three columns. Column one itemizes results the company expected to achieve if not for the incident. Column two is the actual results achieved fol-

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The plan should also specify alternative production facilities, suppliers and warehouse space, with the goal being to keep the company operational and minimize losses.

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lowing the incident. The third column is the difference between the two, or the loss incurred. The company uses this method for its sales, cost of sales and extra expenses.

The company lead representative in charge of the claim should work closely and openly with the insurance company. This is not an adversarial relationship and should not be treated as such. The insurance broker should also be used as a resource to help coordinate the loss recovery. It is important to keep the insurer and adjusters advised of any changes that may affect the claim.

If after submitting its claim the company is not happy with the insurer's settlement offer, it should take steps to explain its position carefully. External experts experienced in dealing with the insurer can be of assistance during this process. Make sure that all the components of the claim have been set

out clearly and accurately with adequate supporting documentation.

As mentioned previously, the insurer requires documentation and will not just take your word for it. The company should present its claim in person to the insurer and may request that its broker be in attendance. Do not change the rationale or methodology of the claim once it has been submitted as this will damage the credibility of the claim.

By following the steps detailed in this article, a company can be better prepared to mitigate the losses from a loss incident.

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