

# NEW FCPA GUIDANCE FOR CANADIAN BUSINESSES

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The Criminal Division of the U.S. Department of Justice (DOJ) and the Enforcement Division of the U.S. Securities and Exchange Commission (SEC) recently published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, which provides valuable practical guidance on the agencies' priorities and approach to enforcement of this statute. For Canadian companies and individuals that fall within the purview of the U.S. Foreign Corrupt Practices Act (FCPA), the guide is of particular significance.

By way of background, the U.S. Congress enacted the FCPA in 1977 to address international corruption through anti-bribery provisions and accounting provisions. The anti-bribery provisions prohibit U.S. and foreign public companies listed on stock exchanges in the United States or that are required to file periodic reports with the SEC ("issuers"), U.S. 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 accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls.

Enforcement authority over the FCPA is shared by the DOJ (for criminal enforcement) and the SEC (for civil enforcement). These agencies have worked closely with their Canadian counterparts on foreign corruption matters. In recent years, enforcement actions have been increasing in frequency and financial impact to violators. Total annual sanctions, not including disgorgement, have surpassed one billion U.S. dollars.

As U.S. issuers, many Canadian companies are subject to the anti-bribery provisions and the accounting provisions of the FCPA. A company is an "issuer" if it registers securities under Section 12 of the U.S. Securities Exchange Act of 1934 (Exchange Act) or is obligated to file periodic and other reports under Section 15(d) of the Exchange Act. Therefore, the FCPA applies to Canadian companies with a class of securities (or American Depositary Receipts) listed on a U.S. national securities exchange, and to Canadian companies with securities quoted in the U.S. OTC market that are required to file periodic reports with the SEC.

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Officers, directors, employees, agents, and stockholders of an issuer 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. In addition, principles of general corporate liability, parent-subsidiary liability, and successor liability apply.

The FCPA's 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." The guide includes real-life examples and hypothetical situations that clarify the meanings of such terms as "corruptly," "willfully" and "anything of value." It provides guidance on what is considered an action "taken to obtain or retain business" and who is a "foreign official."

The guide also elaborates on the two affirmative defenses to the anti-bribery provisions: 1) the local law defense (which is frequently unavailable as it requires a local law to sanction corrupt payments) and 2) the reasonable and bona fide expenditures defense. With respect to the latter, a compilation of safeguards for expenditures, taken from several DOJ releases, is given. Finally, the guide explains when certain types of payments are considered to be non-discretionary acts in furtherance of routine government action, thus falling under the "facilitating or expediting payments" exception to the FCPA bribery prohibition.

Issuers are also subject to the accounting provisions of the FCPA, which include the books and records provision and the internal controls provision noted above. The guide provides examples of common mischaracterizations of bribes as legitimate payments in companies' books and records. The guide stresses the importance of effective compliance programs as part of an issuer's internal controls.

Notably, 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 emphasizes the following considerations: self-policing, self-reporting, remediation, and cooperation with law enforcement. A strong corporate compliance program can mitigate a company's exposure to liability. The guide describes the following hallmarks of an effective compliance program:

- Commitment from senior management and a clearly articulated policy against corruption
- Code of conduct and compliance policies and procedures that are clear, concise, accessible, current, and effective
- Adequate authority, autonomy, and resources for those charged with oversight and implementation of the program
- Risk assessment (including due diligence and periodic internal audits) to ensure proper risk allocation tailored to the particular business
- Training and continuing advice for directors, officers, relevant employees, and, where appropriate, agents and business partners

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- Appropriate, clear, and consistently applied incentives and disciplinary measures for everyone in the organization
- Risk-based due diligence of third parties (including agents, consultants, and distributors)
- Confidential reporting and internal investigation
- Continuous improvement by periodic testing and review

In the context of mergers and acquisitions, the guide also advises buyers on best practices to limit possible exposure to FCPA liability. Acquirers are encouraged to conduct FCPA due diligence prior to closing. Swift post-closing incorporation of the target into the acquirer's internal controls, including its compliance program, is also recommended. In this regard, acquirers should train their new employees, audit their new business units, and ensure third parties comply with company standards.

The guide is a useful resource for individuals and entities that are subject to the FCPA. This alert is intended to provide a brief overview of certain portions of the guide that may be of interest to Canadian businesses. For answers to specific questions about this alert or the guide, please do not hesitate to contact your Hodgson Russ attorney or one of the alert's authors:

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