Canada Just Outlawed Facilitation Payments. Should You?

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On October 31, 2017, an amendment to the *Corruption of Foreign Public Officials Act* ("**CFPOA**"), Canada's analog to the U.S. *Foreign Corrupt Practices Act* ("**FCPA**"), made illegal defined 'facilitation payments.' The CFPOA now mirrors the U.K. *Bribery Act's* treatment of facilitation payments, leaving the FCPA as the only major anticorruption statute that permits, by an exception, such payments. Canada's action prompts the question: in building, reviewing or modifying a global anticorruption compliance program, should U.S. companies themselves prohibit facilitation payments?

A facilitation payment is a payment made to a foreign government official to facilitate routine governmental action, but not to influence a decision to award or continue business.[1] The FCPA excludes from its antibribery provisions payments the "purpose of which is to expedite or secure the performance of a routine governmental action."[2] The FCPA further provides that "routine governmental action" means:

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature[3]

The U.S. Department of Justice has prosecuted U.S. businesses for making purported facilitation payments, alleging that such payments violated the statute's anticorruption provisions. The vagueness of the FCPA's definitions in the facilitation payment exception augments that risk for U.S. companies. Further, the facilitation payments exception has been narrowly interpreted by U.S. courts. A leading Federal case on the subject, *United States v. Duperval*, No. 12-13009 at 5-6, 10 (11th Cir. Feb. 9, 2015) created some confusion as to the applicability of facilitation payment exception, further muddying the waters.

Allowing facilitation payments has also come under significant criticism, with the Organization for Economic Co-operation and Development ("**OECD**") stating that such payments have a corrosive effect on economies and are frequently illegal in the countries where they are made.[4] The OECD's best practices for anticorruption compliance specifically prohibit facilitation payments.

U.S. companies may be subject to one or more of the FCPA, CFPOA, and the U.K. *Bribery Act*, and therefore face the challenge of creating a harmonized compliance program across jurisdictions. For example, a U.S. business with affiliates in Canada and the U.K. could be directly or indirectly

1 The FCPA, at 15 U.S.C. § 78dd-2(h)(4)(B), specifically excludes from the definition of 'facilitation payment' any payment meant to "award new business to or to continue business with a particular party, or any action taken by a foreign government official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party."

2 15 U.S.C. § 78dd-2(B).

3 15 U.S.C. § 78dd-2(h)(4)(A).

4 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, OECD (Nov. 26, 2009), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

subject to all three statutes. As stated above, the U.K. *Bribery Act* does not contain a facilitation payments exception, and U.K. authorities have indicated that they will prosecute facilitation payments as bribes. The recent amendments to the CFPOA likewise make illegal defined 'facilitation payments.' The FCPA excepts facilitation payments from its antibribery provisions, creating the risk that a single business may have different standards as to facilitation payments in what should be a uniform compliance policy. Many U.S. businesses operating across the U.S., Canada, and the U.K. already prohibit facilitation payments in their anticorruption policies for the sake of a consistent approach on the issue, and given the narrowness and vagueness of the exception as discussed above.

AGG Observations

- U.S. businesses subject to the CFPOA should immediate review and updater their anticorruption compliance policy to reflect the October 31, 2017 changes to that statute.
- U.S. businesses should already be reviewing their anticorruption policy on an annual (or more frequent) basis. At the next review, businesses should consider whether to permit or prohibit facilitation payments. On balance, U.S. businesses should strongly consider prohibiting facilitation payments in their anticorruption policies.
- U.S. businesses should not expect any legislative changes to the FCPA, in the near term, to impact the facilitation payment exception.
- If a U.S. business elects to permit facilitation payments, it should require some form of pre-approval prior to such payments being offered or made. Payments should be restricted to low-level government officials for the purposes enumerated in the FCPA (and stated above). All such payments should be correctly recorded in the company's books and records.
- If in doubt about the language or scope of a compliance policy or the impact of the FCPA or other anticorruption statutes on business operations, U.S. businesses should consult counsel.

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