Facilitation or Grease Payments Now Illegal Under Canadian Anti-Corruption Law

November 02, 2017

Facilitation or "grease" payments are essentially payments or small bribes paid to a foreign public official in order to expedite or secure performance by that official of any act of a routine nature that is already part of that official's duties or functions. Examples can include payments to secure the issuance of a permit or licence, processing of official documents such as visas and work permits, provision of services such as mail delivery and utilities and provision of services normally provided where required, such as police protection, unloading cargo, protection of perishable products from deterioration and inspection of goods.

Until this week, an exception had been carved out in the *Corruption of Foreign Public Officials Act* (the "*CFPOA*") such that payments in the nature of a facilitation payment, did not constitute a bribery offence.

The repeal of the exception for facilitation payments was first announced in 2013 through the landmark Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act, which was introduced in response to what was Canada's international reputation for having a somewhat lackadaisical approach to corruption, and which marked an unprecedented fortification of Canada's anti-bribery and anti-corruption regime. The Bill made substantive amendments to the *CFPOA* introducing nationality jurisdiction, a books and records offence and threat of up to 14 years imprisonment for offences in addition to repeal of the facilitation payments amendment. At the time, however, it was announced that the facilitation payments exception would remain in place, with the repeal taking effect at some point in the future, the idea being that the intervening time would give Canadian individuals and entities acting abroad the opportunity to adjust their policies and practices in advance of a total phase out of the facilitation payments exception.

The end of the facilitation payments exception has significant implications for Canadian individuals and entities acting abroad. It is important to understand that the bribery offence as set out in the *CFPOA*, which now includes facilitation payments as bribes, is extremely broad in its language and there is not, as yet, any judicial direction as to a *de minimus* threshold for its application. That is, "[e]very person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official" in order to induce that official to commit and act or omission or to influence his or her decisions. Companies would be wise to ensure their anti-bribery and anti-corruption policies are up to date in that they include a total prohibition on facilitation payments.

The repeal of the facilitation payments exception brings Canada's anti-bribery anti-corruption regime more in line with the UK's *Bribery Act* which has long included such a prohibition. The United States' *Foreign Corrupt Practices Act* maintains an exception to the bribery offence for facilitation payments.

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