Crossing the Line When Crossing the Border:  
*The Canadian and US Approaches to Combating Foreign Corruption*

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I. Introduction

In recent years, both the U.S. and Canadian governments have increased criminal enforcement actions under the U.S. Foreign Corrupt Practices Act, 15 USC §78dd-1, et seq. (“FCPA”) and the Canadian Corruption of Foreign Public Officials Act, SC 1998, c 34 (“CFPOA”), resulting in significant fines and sanctions for companies and their employees. With the globalization of the economy, an ever-increasing number of firms are expanding their activities abroad. In this context and given the hefty fines, negative reputational impact and collateral consequences that can result from a criminal conviction, it is critical for organizations conducting business in foreign states to be aware of the behaviour of their employees, agents and officers that may trigger their criminal liability in both their home country and abroad. In particular, North-American companies doing business in both the U.S. and Canada should be cognizant of the type of activities that are susceptible to be considered criminal offences under both the FCPA and CFPOA, the risk of corporate criminal liability being triggered and the consequences that may ensue.

In light of recent developments, this paper:

• discusses the impact of the recent amendments to the Canadian Criminal Code, RSC 1985, c C-46 and the CFPOA;
• summarizes the foreign corrupt practices and bribery regimes under both the FCPA and CFPOA;
• explains the key differences between the U.S. and Canadian corporate criminal liability regimes for foreign corruption offences; and
• outlines steps to implement a credible and effective compliance program to prevent foreign corruption offences.

II. Canada

A. The CFPOA

In order to combat foreign bribery, Canada ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”) in 1998. The same year, the Canadian government enacted the Corruption of Foreign Public Officials Act (the “CFPOA”) to meet its obligations under the OECD Convention. Since then, the CFPOA has been amended twice, first in 2001 and more recently in 2013.

Bill S-14, which came into effect on June 19, 2013, amended the provisions of the CFPOA to broaden its scope by expanding the jurisdiction of Canadian courts and toughen the penalties in an attempt to further deter the corruption of foreign public officials by Canadian individuals and legal entities. The Foreign Affairs Minister at the time, Minister John Baird, explained the rationale for the amendments by stating that they were intended to “further deter and prevent Canadian companies from bribing foreign public officials [...] and help ensure that Canadian companies continue to act in good faith in the pursuit of freer markets and expanded global trade.” (Government of Canada, Foreign Affairs, Trade and Development Canada, “Strengthening Canada’s Fight Against Foreign Bribery”, February 5, 2013 <http://www.international.gc.ca/media/aff/news-communications/2013/02/05b.aspx?lang=eng>).

B. CFPOA Offences

The CFPOA creates two criminal offences relating to the corruption of foreign officials, namely the bribing of a foreign public official to obtain an advantage and the perpetration of accounting operations for that purpose or for purpose of hiding such bribery:

3. (1) Every 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
   (a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or
   (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.
   […]

4. (1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,
   (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;
   (b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;
   (c) records non-existent expenditures in those books and records;
   (d) enters liabilities with incorrect identification of their object in those books and records;
   (e) knowingly uses false documents; or
   (f) intentionally destroys accounting books and records earlier than permitted by law.
   […]

In 2013, the Ontario Superior Court convicted and subsequently sentenced an individual for the corruption of a foreign public official under s. 3(1)(b) of the CFPOA. In R v. Karigar, 2013 ONSC 5199 (“Karigar”), Hackland J. rejected the defence’s submission that the offence under s. 3(1) requires proof that the bribe was effectively offered or given to a foreign public official. This case involved the bribing of Air India officials
and an Indian Cabinet Minister by Mr. Nazir Karigar, an agent acting for an Ottawa-based technology company in the context of an RFP issued by Air India, in a failed attempt to win a $100-million contract. Hackland J. found that if such interpretation were to be accepted, the Crown would have to adduce evidence from the foreign jurisdiction, which would risk putting foreign nationals at risk and “make the legislation difficult if not impossible to enforce and possibly offend international comity.” In other words, “conspiracy or agreement to bribe foreign public officials is a violation of the Act.” It is worth nothing that the offence in this case was committed prior to the coming into effect of the 2013 amendments.

Canadian courts have yet to apply the amended provisions of the CFPOA and considering that they are not retroactive, it will likely take some time. Only offences committed after June 19, 2013 will be captured by the amended CFPOA.

C. Sentencing of Individuals

Since the 2013 amendments, each offence carries a maximum penalty of 14 years of imprisonment. With the coming into force of the Safe Streets and Communities Act (Bill C-10) in 2012, this effectively means that individuals convicted under the CFPOA are no longer eligible to be imposed a conditional sentence (serving the sentence in the community) as an alternative to imprisonment (Criminal Code, RSC 1985 s. 742.1(c)). It is also worth nothing that the Royal Canadian Mounted Police (RCMP) is now the only competent authority to bring charges under the CFPOA and non-profit organizations are henceforth subject to the CFPOA and may be convicted for bribery of foreign officials. Since 2008, the RCMP has an International Anti-Corruption Unit in place dedicated to investigating foreign corruption cases. In 2013, there were more than 35 ongoing investigations under the CFPOA.

The sentencing decision in Karigar was rendered several months later in R. v. Karigar, 2014 ONSC 3093. Hackland J. sentenced the convicted offender to a 3-year prison term, thereby sending the clear message that Canadian courts take foreign corruption of public officials seriously. The Superior Court declared that “[a] ny person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.”

The Superior Court considered the degree of sophistication and planning of the offence, other circumstances of dishonesty (sham bid submission, use of insider information), the sense of entitlement of the accused and his personal conception and orchestration of the bribery to be aggravating factors:

(a) This was a sophisticated and carefully planned bribery scheme intended to involve senior public officials at Air India and an Indian Cabinet Minister. If successful, it would have involved the payment of millions of dollars in bribes and stock benefits, over time. The sum of $450,000 was advanced for the purpose of bribery while Mr. Karigar remained involved with this scheme.

(b) In addition to the contemplated bribes, the accused’s participation in the bidding process involved other circumstances of dishonesty such as the entry of a fake competitive bid to create the illusion of a competitive bidding process and the receipt and use of confidential insider information in the bid preparation.

(c) The accused behaved throughout with a complete sense of entitlement, candidly relating to a Canadian trade commissioner that bribes had been paid and then urging the Canadian Government’s assistance in closing the transaction.
(d) Mr. Karigan personally conceived of and orchestrated the bribery proposal including providing the identity of the officials to be bribed and the amounts proposed to be paid as reflected in financial spreadsheets he helped to prepare.

Conversely, Hackland J. held as mitigating factors the facts that the accused cooperated with the authorities, that he had been a respectful business man before committing the indicted offence and that his bribing scheme had failed miserably:

(a) There was a high level of co-operation on the accused’s part concerning the conduct of this prosecution. Indeed he exposed the bribery scheme to the authorities following a falling out with his co-conspirators. He unsuccessfully sought an immunity agreement. A great deal of trial time was avoided as a result of the accused’s extensive admissions concerning the documentary evidence.

(b) Mr. Karigar appears to have been a respectable business man all of his working life, prior to his involvement in this matter. He has no prior criminal involvements. He is also in his late 60’s and not in the best of health.

(c) Of considerable importance is the fact that the entire bribery scheme was a complete failure. The accused and his co-conspirators failed to obtain the sought after contract with Air India, or any other benefits. The harm resulting from this scheme was likely restricted to the promotion of corruption among a limited group of foreign public officials.

In another recent decision, *R. v. Griffiths Energy International*, [2013] A.J. No. 412 (Alta. Q.B.) (“Griffiths”), the accused corporation pleaded guilty to charges of indirectly offering bribes to the Chadian Ambassador to Canada contrary to s. 3 of the CFPOA. The Court of Queen’s Bench of Alberta approved a $10.35 million fine recommended by the Crown. In considering the seriousness of the offence, the judge noted the fact that “the bribe is to an official of a developing nation”, and that such bribe “undermines the bureaucratic or governmental infrastructure for which the bribed officials works.” The size of the bribe was the “major aggravating factor”. On the other hand, the Court found that the fact that the company lacked a criminal record, quickly self-reported its behaviour to authorities, pleaded guilty before charges were formally laid down and cooperated with authorities constituted mitigating factors.

**D. Jurisdiction over Offences Committed Abroad and Foreign Nationals**

Under the amended *CFPOA*, the Crown may lay criminal charges against any Canadian citizen, permanent resident in Canada and any organization incorporated, formed or otherwise organized in Canada that commits one of the offences set out under ss. 3 and 4 of the Act, even where such offences are committed outside of Canada (*CFPOA*, s. 5). Before the 2013 amendments, the demonstration of a “real and substantial link” between the offense and Canada or that “a significant portion of the activities constituting that offence took place in Canada” was required for one to be convicted under the *CFPOA* (*Libman v. The Queen*, [1985] 2 SCR 178 at para 74). Canadian courts now also have jurisdiction based on the nationality of the offender, no matter where the *CFPOA* offence is committed. This new approach is consistent with s. 4.2 of the *OECD Convention*, which requires parties to “[have] jurisdiction to prosecute [their] nationals for offences committed abroad shall take such measures as may be necessary to establish [their] jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.”

In *Chowdhury v. H.M.Q.*, 2014 ONSC 2635 (“Chowdhury”), the Ontario Superior Court held that Canada’s jurisdiction does not extend to foreign nationals for the purposes of charging them with an offence under the *CFPOA*. The applicant in that decision, Mr. Chowdhury was one of five individuals jointly charged
with having offered or given bribes to foreign public officials of the Republic of Bangladesh for the alleged purpose of allowing engineering firm SNC Lavalin to obtain a consultancy services contract for the building bridge across the Padma River. Mr. Chowdury is a citizen and resident of Bangladesh and formerly held the position of Interior Minister of Bangladesh as well as Minister of State. Nordheimer J. observed that there was no evidence that the accused had ever been a Canadian citizen or resident, or that he had ever even travelled to Canada.

The Superior Court considered the new language in s. 5 of the CFPOA brought by the 2013 amendments, which grants Canadian courts jurisdiction based on nationality for CFPOA offences, and concluded that such language “presents a strong argument against the contention that s. 3 impliedly captures the actions of persons who are both outside of Canada themselves and whose actions occur outside of Canada.” Nordheimer J. further held that the principle of international comity, which provides that states have exclusive sovereignty over persons located in its territory, opposes the extraterritorial application of the CFPOA to foreign nationals.

It is worth noting that the Superior Court did not “quarrel with the Crown's contention that Canada has jurisdiction over the offence”; indeed, it made a distinction between jurisdiction over the person and jurisdiction over the offence. The mere fact that Canada has jurisdiction over a CFPOA offence, such as was the case in this decision, does not mean that all parties to that offence are captured under its jurisdiction. Nordheimer J. found that the appropriate course of action here was to stay the criminal proceedings against the accused, “unless and until the applicant either physically attends in Canada or Bangladesh offers to surrender him to Canada.” That said, given that there is no extradition treaty between the Republic of Bangladesh and Canada, it will be difficult for the Canadian government to lay hands on the accused and charge him under the CFPOA unless he is subject to an Interpol “Red Notice” and is arrested in a foreign jurisdiction that has an extradition treaty with Canada.

Therefore, under the amended CFPOA, two different regimes apply under the CFPOA depending on the nationality/residency of the accused:

1. Canadian courts have jurisdiction over Canadian nationals, permanent residents and organizations having given or offered bribes to foreign officials or conducted illegal accounting operations contrary to the CFPOA; they are captured under s. 5(1) of the CFPOA on the mere basis of their nationality; and

2. For a Canadian court to have jurisdiction over foreign nationals under the CFPOA, it must have jurisdiction over both the offence (via a substantial link to Canada) and the person (by such person being physically present in Canada).

In June 2014, following its success in convicting and sentencing a Canadian businessman and Toronto resident to a 3-year prison term in Karigar, the RCMP announced the charging of two American businessmen and one British businessman for foreign corruption offences under the CFPOA in connection with the same case. The RCMP’s decision to file charges against foreign nationals can appear surprising given its defeat in Chowdhury. However, since Canada is party to extradition treaties with the U.S. and the U.K., the Crown may be able to establish jurisdiction on the person should the accused be successfully extradited or voluntarily surrender to Canada.

E. Still Waiting for the Ban on Facilitation Payments

The most significant amendment proposed under Bill S-14 is likely the removal of the “facilitation payments” exemption under s. 3(4) of the CFPOA. However, unlike the rest of the bill, this amendment has
yet to come into force. It is to do so by order of the Governor in Council at a later date that has yet to be determined. If and when this amendment comes into force, giving or offering payments and other benefits to “expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions” (e.g. payments to a foreign politician or public servant to accelerate the issuance of a governmental permit or authorization) will now constitute illegal bribing and trigger the application s. 3(1).

It is worth noting that in the U.S., such facilitating payments or “grease payments” are also still excepted under the FCPA and do not constitute an offence. The U.S. position contrasts with the U.K. approach, which eliminated the exception of facilitating payments under the Bribery Act 2010. Perhaps the Canadian government is concerned about giving US companies a competitive advantage over Canadian companies in that respect, or wants to give more time to Canadian firms to change their policies in advance of the ban on facilitation payments.

F. Criminal Liability of Organizations for CFPOA Offences

1. Senior Officers

With respect to organizations, it is not sufficient for the Crown to demonstrate beyond a reasonable doubt that an offence under the CFPOA was committed by one of its employees or agents. Since organizations have no mens rea to speak of, additional elements must be proven by the prosecution to establish their guilt for criminal offences requiring proof of intent such as those set out in ss. 3 and 4 of the CFPOA.

Following the U.K. approach and in the contrast with the U.S. regime (which uses a vicarious liability approach), for offences committed prior to 2004, Canadian courts must apply the “identification doctrine” whereby only the “controlling mind”, “vital organ” or alter ego of the corporation can engage the criminal liability of the corporation for mens rea offences. Courts developed this theory in order to establish corporate criminal liability through a sufficiently rational connection between the organization and the offence committed by a natural person.

In 2004, An Act to Amend the Criminal Code (Criminal Liability of Organizations) (Bill C-45) came into effect, replacing the common law identification theory with new statutory provisions under the Criminal Code. Bill C-45 was intended to broaden the criminal liability of organizations and, for that purpose, amended the Criminal Code, rendering organizations accountable for certain acts and omissions of their “senior officers”, that is a representative who (i) plays an important role in the establishment of the organization’s policies, (ii) is responsible for managing an important aspect of the organization’s activities, or (iii) in the case of a corporation, its director, CEO or CFO (Criminal Code, s. 2).

In a manner similar to the identification rule, the amended Criminal Code provides that a person who plays an important role in the establishment of an organization’s policies may expose the organization to criminal liability. Thus, the conviction of a directing mind of an organization, as defined by case law prior to the 2004 amendments, may still lead to a conviction of the organization. However, the definition in the Criminal Code is broader than the concept of “directing mind” as understood by the case law: instead of the “capacity to exercise decision-making authority” in formulating policies, s. 2 of the Criminal Code provides that it is sufficient for a representative to play an “important role” in establishing policies for this representative to be considered a “directing mind”.

The second definition of “senior officer” is the one that most expanded the scope of corporate criminal liability in Canada. Where a representative “is responsible for managing an important aspect of the organization’s activities”, even if his/her duties are limited to the implementation or enforcement of policies rather
than their formation, the criminal liability of the organization may be incurred where such representative is
party to an offence, directs an employee to commit an offence or does not take all reasonable steps to prevent
or put an end to the commission of an offence. The regime found under the Criminal Code thus departs from
the rational connection that the courts had attempted to establish through the rule of identification.

The third signification of "senior officer" is rather straightforward: the director, chief executive officer
and chief financial officer of a body corporate are senior officers. That said, courts should not automatically
assume that merely because a public register or a corporation’s books name someone as a director, CFO or
CEO, he was empowered with the directing, finance management or executive management of the corpora-
tion. Whether a representative of a body corporate assumes the role of director, CEO or CFO should be deter-
dined based on the actual tasks, duties and responsibilities performed by such representative.

2. Behaviour Triggering Corporate Criminal Liability

An organization will be found guilty of a criminal offence where such offence has been committed
(1) at least in part for its benefit and (2) where a senior officer, “(a) acting within the scope of their authority,
is a party to the offence; (b) having the mental state required to be a party to the offence and acting within the
scope of their authority, directs the work of other representatives of the organization so that they do the act
or make the omission specified in the offence; or (c) knowing that a representative of the organization is or is
about to be a party to the offence, does not take all reasonable measures to stop them from being a party to
the offence.”

Despite the changes brought in 2004, the Canadian approach still cannot be qualified as a vicarious
liability model, pursuant to which any employee or agent of an organization can engage its criminal liability.
It is also worth noting that the term “organization” encompasses not only bodies corporate, but also persons
who do not possess separate legal personalities. The definition is quite extensive and includes “a public body,
body corporate, society, company, firm, partnership, trade union or municipality.”

3. Defences Available

Generally, an accused organization can try to raise a reasonable doubt with respect to one of the ele-
ments of the offence. For example, an organization may argue that an offence was not committed for its ben-
etit, or that the offending employee was not a “senior officer” within the meaning of the Criminal Code or was
acting outside of the scope of his/her authority. This last defence would, however, only apply with respect to
subparagraphs (a) and (b) of s. 22.2 of the Criminal Code, as subparagraph (c) does not contain the necessity
that the senior officer was acting within the scope of his/her authority.

Pursuant to section 22.2(c) of the Criminal Code, the organization may also contend that it exer-
cised due diligence, i.e. that it took all “reasonable measures” to prevent a representative from being part of
the offence. Of course, the establishment of a policy generally forbidding crime within the organization is no
defence; the organization must take active steps stop any offence discovered or prevent one that is imminent,
e.g. by applying and enforcing a compliance program in due time. The organization’s careful selection and
careful supervision of its employees are also not enough to avoid criminal liability, although they may consti-
tute mitigating factors for the determination of the fine.

4. Decision to Prosecute

Organizations doing business in the U.S., Canada and other countries party to the OECD Convention
should be cognizant of the fact that s. 5 of the convention sets out that the decision to prosecute in matters of
corruption of foreign public officials should not be influenced by national economic interest considerations.
This section reads as follows:
Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. (emphasis added)

This section can be roughly construed as meaning that in determining whether to lay criminal charges against an organization for the perpetration of CFPOA offences by one of its agents, OECD member states should ignore the negative collateral impacts to their economy that can ensue as a result of the conviction of an organization. Perhaps this can partly explain the recent decision of the PPSC to commence criminal proceedings against SNC-Lavalin for the alleged involvement in bribing Libya public officials for sums exceeding 47 million dollars and the defrauding of the Libyan Government for more than 129 million dollars (Government of Canada, RCMP, “RCMP Charges SNC-Lavalin”, February 19, 2015, <http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm>), despite the collateral consequences and risks for the Canadian economy and the fact that as part of its decision to prosecute, the PPSC considers “the consequences of a prosecution or conviction would be disproportionately harsh or oppressive” (Considered as part of the “public interest” factor: Government of Canada, PPSC, Public Prosecution Service of Canada Deskbook, Part II, Section 2.3, “Decision to Prosecute”, Subsection 3.2(6)(d)).

Since the offences are alleged to have occurred between 2001 and 2011, the pre-amended version of the CFPOA will apply, therefore requiring the Crown to establish a substantial link between the foreign corruption offence and Canada. Moreover, any offence committed before 2004 will be subject to the identification doctrine. For such offences, the prosecution will need to demonstrate that the offence was perpetrated by a “controlling mind” of SNC-Lavalin, or that the governing executive authority, namely the power to establish policies within the organization, was delegated to the offending individual, who acted within the scope of his/her authority in the perpetration of the offence, the whole with a view to benefit the organization (Canadian Dredge & Dock Co. v. The Queen, [1985] 1 SCR 662).

To date, only three corporations have been convicted under the CFPOA, but in each case, the organization pleaded guilty to the charges brought against them. Since SNC-Lavalin has declared that it would “vigorously defend itself” against the charges, the resulting court decision may be the first case in which a court will analyze and interpret the pre-amended CFPOA provisions with respect to an organization, using both the identification theory and the “senior officer” regime under the Criminal Code.

G. Sentencing of Organizations and Collateral Consequences

When found guilty, an organization may be sentenced to pay a fine (Criminal Code, s 735(1)), which be accompanied by a probation order (Criminal Code, s. 732.1(3.1). In determining that fine, the court must consider, in addition to general sentencing factors applicable to individuals (Criminal Code, ss. 718-718.2), the ten mitigating and aggravating factors set out under s. 718.21, namely: (1) the advantage realized by the organization; (2) the complexity, duration and degree of planning of the offence; (3) the concealment and conversion of assets; (4) the economic viability of the organization and continued employment of its employees; (5) the costs of investigation and prosecution; (6) the concurrent imposition of regulatory penalties on the organization; (7) the prior conviction for a similar offence and the prior regulatory penalties for similar conduct; (8) the organization’s imposition of penalties on its offending representatives; (9) the restitution or voluntary indemnification of victims; and (10) the measures taken to prevent recidivism. Regarding that last factor, the court will consider the implementation of an effective and credible compliance program as mitigating. While judges are given a broad discretion in determining an adequate fine pursuant to these factors, the overarching and fundamental sentencing principle of proportionality remains applicable. The fine imposed on the organi-
zation must be proportionate to the gravity of the offence and degree of responsibility of the offender (Criminal Code, s. 718.21).

That said, the imposition of a fine may only be the tip of the iceberg for convicted organizations. Indeed, the conviction of an organization entails other damaging consequences for the organization as well as innocent individuals and entities, such as its shareholders, employees, service providers, suppliers and lenders.

Notably, under PWGSC’s Integrity Framework, a contractor may be debarred from government procurements for 10-year period where such contractor is convicted of or pleads guilty to “integrity offences”, which includes the offences under the CFPOA (Government of Canada, Public Works and Government Services Canada, PWGSC’s Integrity Framework, <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>). This very harsh sanction can constitute the equivalent of “corporate death penalty” for certain organizations whose business mainly comes from government contracts. There is, however, a “Public Interest Exception”, which applies in certain circumstances such as where there is no other supplier capable of performing the contract, in case of an emergency, where national security health and safety commands it and in cases of economic harm.

The mere filing of criminal charges may in itself have serious consequences for the organization, especially where its shares are publicly traded on the stock market. For instance, on the day of the announcement that criminal charges were being laid against SNC-Lavalin Group, the price of its shares decreased by 7 percent, and by almost 20 percent in the month that followed.

In that respect, deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) offer an interesting alternative to criminal proceedings, as they may avoid or significantly reduce the negative impacts on the economy and on innocent individuals. These types of agreements are discussed further below.

III. U.S.

A. The FCPA

The FCPA is a U.S. federal law enacted in 1977 to combat the bribery of foreign (or non-U.S.) government officials. The FCPA is divided into two parts: the anti-bribery provisions and the accounting provisions. Under the anti-bribery provisions, it is unlawful to make a corrupt payment to a foreign (non-U.S.) official for the purpose of obtaining or retaining business or securing an improper advantage. The U.S. Department of Justice (DOJ) is generally responsible for criminal and civil enforcement of the anti-bribery provisions. The accounting provisions apply only to “issuers,” which generally includes companies that trade stock on a U.S. stock exchange or are required to file periodic reports with the SEC. The accounting provisions require that issuers make and keep books and records that accurately and fairly reflect the company’s transactions and that they maintain an adequate system of internal accounting controls. The accounting provisions are generally enforced by the U.S. Securities and Exchange Commission (SEC).

B. The FCPA Anti-Bribery Provisions

1. Covered Entities and Persons

The FCPA’s anti-bribery provisions make it illegal to corruptly offer, provide, promise, or authorize the provision of money or anything of value to officers or employees of foreign (non-U.S.) governments and public international organizations, foreign political parties, foreign party officials, and candidates for foreign political office, with the intent to obtain or retain business. The anti-bribery provisions apply to “issuers,” “domestic concerns,” and any other person who violates the FCPA while in the territory of the U.S. (in addition to any officer, director, employee, agent, or stockholder acting on behalf of a covered person or entity).
The term “issuer” includes any business entity that is registered under 15 U.S.C. §78l or that is required to file periodic reports with the SEC under 15 U.S.C. §78o(d). In this context, issuers include non-U.S. companies that list on U.S. stock exchanges using American Depository Receipts. An issuer can also be held liable for the acts of its U.S. and non-U.S. subsidiaries if the issuer authorizes or ratifies a subsidiary’s improper conduct.

The term “domestic concern” is defined broadly to include any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the U.S.

2. Offering, Promising, or Paying “Anything of Value”

The FCPA prohibits any offer, payment, promise to pay, gift, promise to give, or authorization to pay, offer, or give anything of value to a foreign (non-U.S.) official. “Anything of value” is interpreted liberally and may include, but is not limited to, tax benefits, information, promises of future employment, scholarships, discounts, entertainment and travel expenses, and insurance benefits.

3. Foreign Officials

The term “foreign official” includes: (1) any officer or employee of a non-U.S. government or a public international organization; (2) any department, agency, or “instrumentality” of a non-U.S. government or public international organization; (3) any person acting in an official capacity on behalf of any department, agency, or instrumentality of a non-U.S. government or public international organization; and (4) any member of a non-U.S. political party, non-U.S. political party official, or candidate for non-U.S. political office. Therefore, a “foreign official” could be an officer or employee of a state-owned or state-controlled enterprise, an official of a quasi-governmental entity, a candidate for non-U.S. office, an executive branch employee, or an elected legislator or parliamentarian.

Importantly, the FCPA does not differentiate between state-owned or state-controlled enterprises (SOE) and their government owners or controllers. In United States v. Esquenazi, a U.S. Court of Appeal articulated a test for determining when a SOE qualifies as a “government instrumentality” and thus a “foreign official” under the FCPA. According to the Esquenazi decision, a SOE will be treated like a “government instrumentality” when the SOE is “controlled by the government of a [non-U.S.] country” and “performs a function the controlling [non-U.S.] government treats as its own.” United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014). The Esquenazi court explained that “what constitutes control and what constitutes a function the government treats as its own are fact-bound questions.” Ibid. Additionally, any employee of a SOE can also qualify as a “foreign official” under the FCPA.

4. Business Purpose

The FCPA prohibits the payment of bribes to obtain, retain, or direct business to any person or business entity or to secure an improper advantage. The U.S. government interprets this element of the FCPA broadly. It covers more than just the award or renewal of a contract, and the business obtained, retained, or directed need not be with a non-U.S. government. Moreover, the beneficiary of the business obtained, retained, or directed may be any person or business.

C. The FCPA Accounting Provisions

The accounting provisions of the FCPA are divided into two primary parts. First, under the “books and records provisions,” issuers must “make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” Second, under the
internal controls provisions, issuers must “devise and maintain a system of internal accounting controls suf-
ficient” to assure management’s authority and control over the issuer’s assets. Specifically, the internal controls
must reasonably assure that: “(i) transactions are executed in accordance with management’s general or spe-
cific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements
in conformity with generally accepted accounting principles . . . and (II) to maintain accountability for assets;
(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and
(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and
appropriate action is taken with respect to any differences . . . ”

1. The FCPA Books and Records Provision

According to the legislative history, the U.S. Congress adopted the “in reasonable detail” language
“in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and preci-
sion which is unrealistic.” H.R. Rep. No. 94-83, at 1 (1977). The statute defines the term “reasonable detail” as
the level of detail that would “satisfy prudent officials in the conduct of their own affairs.” The DOJ’s Resource
Guide, however, provides: “Although the standard is one of reasonable detail, it is never appropriate to mis-
characterize transactions in a company’s books and records.” DOJ and SEC, A Resource Guide to the U.S.
Foreign Corrupt Practices Act 39 (2012). The legislative history makes clear that one goal of the books and
records provision is to “assure, among other things, that the assets of the issuer are used for proper corporate
purpose[s],” S. Rep. No. 95-114, at 7 (1977). Even though the books and records provision was enacted as part
of the FCPA, it does not apply only to conduct involving bribery of non-U.S. officials, and does not apply only
to bribery. The SEC has included violations of the books and records provision along with violations of other
securities laws in many fraud and disclosure cases. In other words, the provision is intended to ensure accu-
rade recordkeeping and to deter the use of corporate assets for corrupt or improper purposes, not just bribery
of foreign officials.

2. The FCPA Internal Controls Provision

Internal controls “are the processes used by companies to provide reasonable assurances regarding
the reliability of financial reporting and the preparation of financial statements.” DOJ and SEC, A Resource
Guide to the U.S. Foreign Corrupt Practices Act 40 (2012). The FCPA defines “reasonable assurances” as “such
level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”
H.R. Rep. No. 94-831, at 10 (1977). The internal controls provision does not provide specifics on the set of
controls companies are required to implement. Instead, the provision allows companies to devise controls
based on their needs and particular circumstances.

D. Recent Developments

1. More Efficient Enforcement

The DOJ and the SEC brought slightly fewer enforcement actions in 2014 as compared to 2013 but
the average resolution value of FCPA enforcement actions almost doubled within the same time period. For
instance, in 2013, the average resolution amount for an FCPA enforcement action was $80,070,000 USD as
compared to $156,610,000 USD in 2014.

The 2014 FCPA statistics indicate that the DOJ and SEC have become more efficient in their enforce-
ment actions, levying greater fines in fewer actions. Some of the most recent and largest FCPA resolutions
were reached with Alstom S.A., Avon Products, and Alcoa, Inc.
a. Alstom S.A.

On December 22, 2014, Alstom S.A. (Alstom) pleaded guilty to a two-count criminal information charging the French power and transportation company with violating the FCPA by falsifying its books and records and failing to implement adequate internal controls. As part of Alstom's plea agreement, the company agreed to pay a record $772,290,000 USD criminal fine to resolve charges related to a widespread scheme involving more than $75 million USD in bribes paid around the world, including in Indonesia, Saudi Arabia, Egypt, the Bahamas, and Taiwan.

Additionally, Alstom Network Schweiz AG, formally Alstom Prom, Alstom's Swiss subsidiary, pleaded guilty to a criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA. Alstom Power Inc. and Alstom Grid Inc., two U.S. subsidiaries headquartered in Connecticut and New Jersey respectively, both entered into deferred prosecution agreements, admitting that they also conspired to violate the anti-bribery provisions of the FCPA in connection with Alstom's 2000-2011 bribery scheme.

According to the companies' admissions, Alstom and its subsidiaries paid bribes to government officials and falsified books and records in connection with power, grid, and transportation projects for SOEs around the world. In total, Alstom paid more than $75 million USD to secure $4 billion USD in projects, realizing a profit of approximately $300 million USD for the company.

The DOJ also charged five former Alstom corporate executives for their alleged conduct in Alstom's bribery scheme. Four of the five former executives have already pleaded guilty and one is heading to trial in June 2015.

The $772, 290,000 USD criminal fine that Alstom agreed to pay is the largest criminal fine ever levied for violating the FCPA and the second largest FCPA enforcement action overall. In announcing the record fine, Deputy Attorney General James M. Cole said, “Alstom’s corruption scheme was sustained over more than a decade and across several continents. It is astounding in its breadth, its brazenness and its worldwide consequences.” (Remarks for Deputy Attorney General James M. Cole Press Conference Regarding Alstom Bribery Plea, DOJ Press Release, Dec. 22, 2014, online: http://www.justice.gov/opa/speech/remarks-deputy-attorney-general-james-m-cole-press-conference-regarding-alstom-bribery).

For years, Alstom refused to fully cooperate with the DOJ in its investigation into its and its subsidiaries’ conduct. It was not until the DOJ charged Alstom executives that the company began to cooperate.

However, this did not deter the DOJ from persisting with its investigation. “[W]e will not wait for companies to act responsibly. With cooperation or without it, the department will identify criminal activity at corporations and investigate the conduct ourselves, using all of our resources, employing every law enforcement tool, and considering all possible actions, including charges against both corporations and individuals,” stated Assistant Attorney General Leslie R. Caldwell. (Remarks for Assistant Attorney General Leslie R. Caldwell Press Conference Regarding Alstom Bribery Plea, DOJ Press Release, Dec. 22, 2014, online: http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-leslie-r-caldwell-press-conference-regarding-alstom).

b. Avon Products

On December 17, 2014, the DOJ and SEC announced another resolution of FCPA charges against New York-based cosmetics company Avon Products (Avon). According to the charging documents, between 2004 and 2008, Avon’s Chinese subsidiary provided more than $8 million USD in cash, gifts, and improper travel and entertainment benefits to secure various benefits from Chinese government officials. In the early 2000s, China announced plans to lift its ban on direct sales to consumers, provided that companies first
obtain a license from the Chinese State by demonstrating and thereafter maintaining “a good business reputation.” The U.S. government alleged that employees of Avon’s Chinese subsidiary aggressively courted various decision-makers in the regulatory process, providing them with cash and other items of value, such as all-expenses paid trips within China and to Europe and North America, tickets to sporting events, and Avon products. After receiving the first direct selling licenses ever issued by China, in 2005 and 2006, the U.S. government alleged that employees of Avon’s Chinese subsidiary continued to confer improper benefits upon Chinese officials to avoid regulatory fines and negative publicity that could have harmed the company’s public image and thereby endanger its license.

The charging documents explain in detail how Avon’s Internal Audit and Legal departments flagged FCPA concerns in 2005 but did not ensure that the recommended remedial actions were carried out. The matter then resurfaced in 2006 without effective remedial action being taken. Finally, after Avon’s CEO received a letter from a whistleblower in 2008, the matter was referred to Avon’s Board of Directors and a full investigation and disclosure to the DOJ and SEC followed.

Avon entered into a deferred prosecution agreement to resolve the books-and-records conspiracy charge against it and an internal controls violation. Avon’s Chinese subsidiary pleaded guilty to a criminal charge of conspiring to violate the books-and-records provision. Together the companies paid criminal fines of $67.65 million USD. To resolve the SEC’s charges, Avon consented to the filing of a settled civil complaint in the U.S. District Court for the Southern District of New York that also charged violations of the FCPA’s accounting provisions, and agreed to pay $67.37 million USD in disgorgement plus prejudgment interest. Avon also is required to retain an independent compliance monitor for at least the first 18 months of the three-year term of its deferred prosecution agreement.

The Avon resolutions took over six years. Since first disclosing its misconduct to the DOJ and SEC, Avon has lost a CEO, dealt with multiple shareholder suits, and reportedly spent more than $344 million USD on internal investigation costs alone—not including the settlement. In the words of Assistant Attorney General Leslie R. Caldwell, “[p]ublic companies that discover bribes paid to foreign officials, fail to stop them, and cover them up do so at their own peril.” (Avon China Pleads Guilty to Violating the FCPA by Concealing More Than $8 Million in Gifts to Chinese Officials, DOJ Press Release, Dec. 17, 2014, online: <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-FCPA-concealing-more-8-million-gifts-chinese-officials>.)

c. Alcoa

On January 9, 2014, Alcoa Inc. (Alcoa) and one of its U.S.-based subsidiaries, Alcoa World Alumina LLC (Alcoa World) settled FCPA charges with the DOJ and SEC. The charges against Alcoa and Alcoa World stem from a 2004 agreement to supply alumina between Alcoa World and the Kingdom of Bahrain’s majority-owned aluminum company, Aluminum Bahrain (Alba). According to the charging documents, in the late 1980s certain members of the Bahraini Royal Family with influence over Alba’s procurement processes requested that another Alcoa subsidiary, Alcoa of Australia, insert an “international middleman” into the contractual relationship between the two entities. While this “middleman” is not identified in the court documents, press reports identify him as Victor Dahdaleh, the billionaire whose prosecution in the United Kingdom collapsed in 2013 due to a lack of evidence against Dahdaleh.

According to the charging documents, for nearly 20 years, Alcoa World and Alcoa of Australia supplied alumina to Alba through contracts with various shell companies owned by Dahdaleh, enabling significant pricing markups that allegedly created margin used to pay bribes to Bahraini Royal Family members. With respect to the supply agreement that was the subject of the charges, Alcoa World allegedly caused Dahdaleh to receive in excess of $188 million USD, from which amount tens of millions of dollars in bribes were allegedly paid.
To resolve the charges, Alcoa World pleaded guilty to one count of violating the FCPA’s anti-bribery provisions and agreed to pay $223 million USD, consisting of a $209 million USD criminal fine and $14 million USD in administrative forfeiture. Alcoa, in turn, consented to the filing of a settled administrative proceeding charging FCPA bribery, books-and-records, and internal controls violations and imposing $161 million USD in disgorgement. Alcoa’s combined $384 million USD settlement is the fifth-largest FCPA settlement of all time.

3. A Move Towards Administrative Proceedings

Enforcement actions in 2014 suggest that the SEC will continue to rely on the use of in-house administrative proceedings rather than civil complaints filed in federal district court to effectuate its enforcement mandate. SEC FCPA Unit Chief Kara Brockmeyer recently remarked that the SEC’s use of the more streamlined administrative proceeding process should be “the new normal” in FCPA enforcement actions. This trend is plainly evidenced by a comparison of 2012 to 2014 SEC FCPA enforcement actions. For example, in 2012, the SEC filed 11 civil complaints and one administrative proceeding. In contrast, the SEC’s administrative proceedings in 2014 outnumbered civil complaints eight-to-one.

The chief advantage to the SEC in using administrative proceedings instead of filing civil complaints is that administrative settlements are not subject to judicial review and approval. Thus, by using administrative proceedings, the SEC can avoid the risk that a federal judge will reject a settlement.

However, administrative proceedings present potential benefits for companies as well. An administrative proceeding may reduce the downstream risk of contempt that comes along with federal court injunctions. In addition, administrative proceedings may appear to the public as a less severe sanction than a settlement of a complaint in federal court.

4. Parent/Subsidiary Liability

Over the past several years the SEC has engaged in the practice of charging parent companies with FCPA anti-bribery violations based on the corrupt payments of their subsidiaries. In short, the SEC has adopted the position that corporate parents are subject to strict liability not only for books and records violations but also for the corrupt conduct of their subsidiaries regardless of whether the parent had any involvement or knowledge of the subsidiaries’ improper conduct.

The SEC took this approach in its investigation of Alcoa and Bio-Rad Laboratories. According to the charging documents, officials at two Alcoa subsidiaries arranged for various bribe payments to be made to Bahraini officials through the use of a consultant. While the SEC acknowledged that there were “no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme,” it still charged the parent company with anti-bribery violations on the grounds that the subsidiary responsible for the bribery scheme was an agent of Alcoa at the time. Interestingly, in the DOJ’s parallel criminal action, the DOJ chose to directly charge Alcoa’s subsidiary with violations of the FCPA’s anti-bribery provisions instead of Alcoa, Inc.

Likewise, in the case against Bio-Rad Laboratories (Bio-Rad), a California-based life science company, the SEC’s cease-and-desist order alleged that the corporate parent was liable for violations of the FCPA’s anti-bribery provisions committed by the company’s corporate subsidiary in Russia, Vietnam, and Thailand. In order to attribute the alleged wrongful conduct upon the corporate parent, the SEC relied heavily upon corporate officials’ willful blindness to a number of red flags arising from the alleged schemes in Russia, Vietnam, and Thailand.

Thus, based upon the SEC’s willingness to hold parent companies liable for the conduct of their subsidiaries, companies can anticipate seeing a greater number of SEC investigations stemming from their subsidiaries’ conduct regardless of the parent company’s actions.
5. Increased Cooperation with International Anti-Corruption Authorities

Although cooperation with foreign authorities has always played a role in FCPA enforcement and investigations, the 2014 cases illustrate the degree to which U.S. authorities are working alongside their foreign counterparts to prosecute companies and individuals for acts of bribery.

For example, in the case against ZAO Hewlett-Packard A.O. (HP Russia), U.S. authorities only began their investigation into HP Russia’s conduct after German investigators discovered the alleged bribery scheme in 2012. Since that time, the proceedings in Germany have continued. Of note, when deciding whether to award HP Russia a discount, the plea agreement reached with the company specifically took into consideration amounts that the company would pay to German authorities.

Similarly, the cases against Alcoa and Alstom included a multi-jurisdictional component as the United Kingdom’s Serious Fraud Office cooperated extensively with the DOJ and SEC during the course of the U.S. government’s investigations of the two companies.

Thus, based upon the increasing activity of foreign regulators, companies can anticipate seeing a greater number of DOJ and SEC investigations stemming from investigations or charges abroad.

E. Corporate Criminal Liability and N/DPAs

In the U.S., a corporation may be held criminally liable where an individual holding any position within the organization, insofar as he/she is acting within the scope of his employment or authority, commits a crime with a view (at least in part) to benefit the corporation. That said, under principle 9-28.500 of the Principles of Federal Prosecution of Business Organizations, the DOJ applies an internal standard of moral culpability when deciding whether or not to prosecute an organization. As an example, where an offence has been committed by a rogue employee, the DOJ may be less inclined to commence criminal proceedings against the organization.

As an alternative to criminal prosecutions, the DOJ often enters into DPAs and NPAs with organizations for FCPA offences in exchange for cooperation. N/DPAs are a discretionary tool available for prosecutors allowing a person or an organization suspected of having committed a criminal offence to avoid a conviction as well as the direct and collateral consequences that can result from it. In return, N/DPAs allow the government to ensure that the offender will be sanctioned less costly and more expeditiously, in addition to obtaining the cooperation of the offender in the investigations conducted by regulatory authorities. Furthermore, when the offender is an organization, such agreements allow for the imposition of corrective and compliance measures to prevent future reprehensible behaviour.

Under an N/DPA, the prosecutor undertakes not to pursue criminal proceedings or suspend them in exchange for the offender agreeing to stop his unlawful conduct and subject himself to cooperation, collaboration and compliance obligations under a written agreement. Furthermore, N/DPAs include, in the majority of cases, an obligation on the part of the offender to pay a fine and an admission of guilt. In certain circumstances, they also provide for the appointment of an independent monitor to monitor the implementation and application of a compliance program. The conditions of N/DPAs are generally public and provide that the offender cannot publicly contradict its terms, failing which he could be considered in breach of the agreement. N/DPAs provide that in case of a breach, the government can lay charges or resume the criminal proceedings against the offender and, if there are admissions of guilt under the agreement, use such admissions in the prosecution to obtain a quick conviction.

The number of N/DPAs entered into with organizations in the U.S has exponentially increased since the early 1990s (Wulf A. Kaal and Timothy A. Lacine, “The Effect of Deferred and Non-Prosecution Agree-

During the 2015 White Collar Crime conference held by the American Bar Association, the Assistant General Attorney of the American Department of Justice, Criminal Division, Leslie Caldwell, indicated that following the dismissal by a judge of the U.S. District Court for the District of Columbia of a 10.5 millions of dollars DPA concluded with Fokker Services B.V., the prosecutors would use NPAs over DPAs to avoid an unfavorable judicial review (Nate Raymond, “U.S. may settle with corporations without going to court: official”, Reuters, March 6, 2015, online: <http://www.reuters.com/article/2015/03/06/usa-crime-deferredprosecution-idUSL1N0W81XO20150306>). Ms. Caldwell added that the DOJ is of the opinion that the courts do not have jurisdiction to approve such agreements with the Crown and to revise their conditions, since it is an area that falls within the discretion of the prosecution. In short, it appears that more NPAs than DPAs will be concluded by the DOJ in the upcoming years, and that more cases of criminal liability of organizations will go to trial.

In Canada, the Public Prosecution Service of Canada (SPPC) has not established any guidelines or policies with respect to N/DPAs, and has yet to enter into any such agreements. While no N/DPA has been concluded so far in Canada, nothing would prevent the SPPC, in appropriate cases, from entering into a NPA with an organization in exchange for cooperation.

IV. Compliance Programs to Prevent Foreign Corruption Offences and Other Offences

Section 718.21(j) of the Criminal Code provides that a court may consider as a mitigating factor that the organization has adopted measures to prevent recidivism after the perpetration of the offence. With respect to criminal offences under the Competition Act, RSC 1985, c C-34 committed by organizations, courts have recognized that a credible and effective compliance program constitutes a mitigating factor in case of a contravention and may affect the Commissioner of Competition’s recommendation of the adequate sentence to the Crown Attorney.

To minimize the risks of criminal offences being committed under the CFPOA and other statutes such as the Criminal Code and the Competition Act and to reduce the fine in the event of a conviction, a diligent organization should take steps to prevent the perpetration of such offences by implementing a credible and effective compliance program. With respect to anticompetitive offences, courts have recognized that a credible and effective compliance program, such as that recommended by the Competition Bureau, consti-
tutes a mitigating factor in the event of a conviction. Courts have also found that such compliance programs can constitute a mitigating factor for CFPOA offences.

With a view to encourage organizations to adopt measures to prevent competition law violations by their representatives, the Competition Bureau provides guidelines to help businesses to develop compliance programs. In addition to reducing economic risks inherent to the discovery of offences by the authorities (e.g. loss of reputation, legal costs, fines, prohibition to participate in requests for proposals), an organization that has set up a credible and effective compliance program which is actively promoted and applied may see its fine reduced (Government of Canada, Competition Bureau, Corporate Compliance Programs (Ottawa, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html>, at p 7; the Competition Bureau published a draft update of its bulletin on September 18, 2014: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03778.html>). While these guidelines were mainly designed for anticompetitive offences, with some adaptations, they can equally apply to CFPOA offences.

In its bulletin, the Competition Bureau suggests five “essential components” of an effective compliance program the organization should take into account:

• First, senior management must truly support the program, thus setting an example for the rest of the organization. In addition to complying with the policies, it must take them seriously. The board should also be involved, namely in the appointment of a compliance officer and by monitoring senior management to prevent a situation where the latter could be involved in illegal activity.

• Second, to be effectively applied, compliance policies must be easily understood by employees. To this end, the organization must summarize the highlights of the policy in a publication kept up-to-date that reflects major changes to the company, to the statutes or the Competition Bureau’s policies. The policy should provide specific examples of common situations that employees are likely to face and not just principles with respect to ethics. The organization may also require that employees sign a certification letter stating that they have read and understood the compliance program.

• Third, the organization must provide adequate training to its employees in order for them to easily recognize illegal acts and increase awareness of their consequences. A more rigorous training must be provided to employees who are more likely to deal with competition law issues. The Bureau recommends that the training be offered by experts (e.g. lawyers or compliance officers) and be evaluated from time to time. It is crucial that the organization keep records of the date of training and the names of the participants to provide evidence of same in the event of proceedings.

• Fourth, it is essential that the company establish monitoring, auditing and reporting mechanisms in order to “prevent and detect misconduct, educate staff, provide both employees and managers with the knowledge that they are subject to oversight and determine the program’s overall efficacy”.

• Fifth, the organization must ensure that it has consistent disciplinary procedures in place with respect to dismissal, demotion, suspension and even legal action against employees who do not comply with compliance policies. The company should obviously keep documental proof of disciplinary measures that were taken following a breach of its compliance program in order to be able to provide evidence of the due application of such disciplinary measures for sentencing (it is a mitigating factor pursuant to section 718.21(h) Cr.C.).

On June 23, 2011, Calgary-based oil and gas exploration and production company, Niko Resources Ltd. (“Niko”) was sentenced to a fine of $9.5 million and a three-year probation order under the CFPOA
which required Niko to implement a detailed compliance program subject to review by an independent auditor. In imposing this sentence, the Court considered the following mitigating factors amongst others (R v. Niko Resources Ltd (June 23, 2011), Calgary E-File No. CCQ 11 (Agreed Statement of Facts) (Alta QB) at paras 61-66):

- Steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence;
- Niko cooperated with the investigation when it became aware that it was the subject of an RCMP investigation, and by virtue of the Probation Order will continue to be cooperative with any further aspects of the prosecution or investigation;
- The Probation Order put Niko under the Court's supervision for the following three years to ensure audits were done to examine Niko's compliance with the CFPOA.

The Court specifically acknowledged Niko's cooperation and efforts to implement an internal anti-corruption compliance program in its sentencing decision.

In Griffiths (supra, 2013), Griffiths Energy International Inc. (“Griffiths”) became subject to the CFPOA and also entered a guilty plea. Similarly to Niko, the Court considered the following mitigating factors in its decision to impose a fine of $10.35 million.

- The steps already taken by Griffiths to reduce the likelihood of it committing a subsequent related offence;
- The robust anti-corruption compliance program implemented by Griffiths to strengthen its existing internal controls, many of which steps were already initiated by Griffiths' new management and were well underway at the time the bribes were discovered by Griffiths;
- The full and extensive cooperation shown by Griffiths in bringing the matter to the attention of the authorities and disclosing the detailed findings of its comprehensive internal investigation.

V. Conclusion

Bribing foreign public officials to obtain an advantage in the course of international business may lead to severe consequences for both organizations and individuals. In the U.S. and Canada and in other countries having ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, foreign corruption and bribery may result in criminal charges being brought against both individuals and corporations under anti-corruption laws. Significant fines and prison terms can ensue, as well as other indirect consequences. A criminal conviction can result in an organizations being barred from further participating in governmental RFPs and see their reputation being negatively impacted. Publicly traded companies can see their share price drop significantly. For organizations, a criminal conviction for foreign corruption of public officials almost inevitably leads to collateral consequences for those uninvolved in the criminal behaviour, such as innocent shareholders and employees.

Prudent organizations doing business in Canada and the U.S. can reduce the risk of having their criminal liability engaged under the FCPA and CFPOA by being aware of what type of behaviour may constitute an offence and, accordingly, implementing adequate measures and policies to prevent such behaviour. In Canada, the implementation of an efficient and proactively applied compliance program is considered a mitigating factor in the event of a conviction and in the U.S., organizations having implemented compliance measures are more likely to be able to avoid criminal charges being laid against them and convince the DOJ that an N/DPA may be a better course of action. U.S. and Canadian firms should ensure that their compliance programs are up to date and effective to prevent and detect illegal activities such as bribery of foreign public officials.