

Canadian government eliminates facilitation payments exclusion in the Corruption of Foreign Public Officials Act

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As of October 31, 2017, facilitation payments will no longer be excluded from the bribery offence under Canada's *Corruption of Foreign Public Officials Act* (the CFPOA). This announcement, made on October 30, illustrates the federal government's continued effort to ensure Canadian businesses operating outside the country conduct business lawfully, with integrity and compete fairly.

When the CFPOA was first implemented in 1999, subsection 3(4) expressly excluded facilitation payments from the bribery offence found in subsection 3(1) of the CFPOA. Facilitation payments, sometimes referred to as "grease payments," are made 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, and therefore does not require exercise of discretion.^[1] Subsection 3(4) of the CFPOA sets out a non-exhaustive list of nominal amounts of facilitation payments (which as of October 31 are no longer excluded from the bribery offence), including:

- the issuance of a permit, licence or other document to qualify a person to do business;
- the processing of official documents, such as visas and work permits;
- the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and
- the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

On February 5, 2013, the federal government announced it was taking further steps to combat corruption and bribery and introduced Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act* (further information regarding Bill S-14 can be found in our [Update](#)). Bill S-14 received Royal Assent on June 19, 2013. At that time, the federal government gave notice that the facilitation payments exclusion was to be eliminated on a date in the future by an Order-in-Council.

The delayed implementation of this aspect of Bill S-14 relating to facilitation payments was intended to allow businesses adequate time to amend their practices and procedures. As of October 31, facilitation payments are not permitted under Canadian law, regardless of whether the payment occurred in Canada or abroad. Accordingly, Canadian businesses operating in Canada and elsewhere ought to ensure their business practices and compliance

programs reflect this latest development in anti-corruption enforcement in Canada.

This step further aligns Canadian legislation with that of other countries, including the UK *Bribery Act*. Indeed, the Organization for Economic Co-operation and Development in 2009 recommended that its member countries take steps to discourage businesses from making facilitating payments and periodically review their policies and approaches in order to combat these payments.^[21] While a facilitation payments exclusion is found in the U.S. *Foreign Corrupt Practices Act*, it has had a very narrow interpretation accorded to it by U.S. enforcement agencies, and for this reason most companies in the U.S. do not provide for this exclusion in their compliance programs.

^[11] See also, subsection 3(5) which provides that “for greater certainty, an ‘act of a routine nature’ does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.”

^[21] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Organization for Economic Co-operation and Development (Nov. 26, 2009), available at www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [PDF].