

## Canadian plans to ban facilitation payments could up FCPA risk for US firms

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Plans to outlaw so-called “facilitation payments” as Canada amends its Corruption of Foreign Public Officials Act (CFPOA) may force US corporations to amend their compliance programs given the close economic links between the countries, according to a number of sources.

As PaRR previously reported, the bill, S-14, would outlaw payments made to further routine governmental action that involves non-discretionary acts such as issuing entry or exit visas, payments which are permitted under the US Foreign Corrupt Practices Act (FCPA).

With different laws on either side of the border, companies with a cross-border presence could choose to apply different anti-corruption standards accordingly.

But for US companies with close links to their operations in Canada, it is not a good idea to have different anti-corruption compliance regimes, according to Mara Senn, a partner with Arnold & Porter in Washington, DC.

“Take the strictest a standard you have and apply it across the board,” Senn advised, adding that even in the US, where facilitation payments are legal, judicial attitudes toward such payments are becoming less tolerant.

### **Dying a slow death**

Senn cited an ongoing Securities Exchange Commission (SEC) case in the US involving three executives working for the oil services company Noble Corporation, in which the agency is arguing that payments to acquire false paperwork went beyond the scope of acceptable facilitation payments.

“Noble’s subsidiary in Nigeria, bribed customs officials to process false paperwork purporting to show the export and re-import of oil rigs, when in fact the rigs never moved. The scheme was designed to save Noble Corporation from losing business and incurring significant costs associated with exporting rigs from Nigeria and then re-importing them under new permits,” an SEC report said.

In 2010, the company paid more than USD 8m to settle civil and criminal charges that arose from the case.

The long-awaited FCPA guidance issued by the Department of Justice (DoJ) and the SEC last year provided several examples of facilitation payments, including the processing of visas, providing police protection and supplying utility service. The FCPA specifically prohibits acts “to obtain or retain business”.

But the SEC is arguing that Noble got an advantage over its competitors by making these payments and thus violated the FCPA, Senn said.

Even before this proposed change in the Canadian law (and before passage of the UK Bribery Act 2010, which also outlawed facilitation payments), Senn said she had counseled clients to eliminate facilitation payments, as they were “all liability, no benefit”.

The perceived wisdom was that by allowing such payments with pre-clearance and mandatory reporting, compliance officers within corporations would have a better understanding of the environment faced by employees overseas. But in practice, employees rarely informed superiors about such payments, Senn said.

“Over time, through all these settlements, the facilitation payment has been dying a slow death,” Senn said, adding, “more and more [companies] are eliminating it.”

As such, a company is much better off if it can draft a compliance program that does not allow for facilitation payments, Matthew Feeley, an FCPA practitioner with Buchanan Ingersoll & Rooney, told PaRR.

Feeley pointed to the recent FCPA guidance as another example highlighting the narrowing definition of facilitation payments. He said the guidance goes to great pains to draw a distinction between “extortion” payments and those made to gain an economic advantage.

Anything done under duress will not be a violation of the FCPA as there is no corrupt intent, Feeley added.

## O Canada

The proposed law also suggests new books and records provision similar to those overseen by the SEC, as well as increased penalties such as raising the maximum prison sentence to 14 years from the current five.

But the planned facilitation payment phase-out will be the most important change, according to John Boscaroli, leader of the International Trade and Investment Law Trade Group at McCarthy Tetrault in Toronto.

“That’s going to have the greatest impact. The facilitation payment [provision] ...will be a tough pill to swallow.”

“There are some jurisdictions where you can’t do business without making facilitation payments,” he added.

Boscaroli said the Canadian proposal does not provide a date on which the facilitation payment prohibition becomes effective. Instead, it would give the government the flexibility to set a date. “I would be surprised if we banned it before the FCPA is changed.”

However, Canadian multinationals listed on US and UK exchanges and thus subject to the FCPA and the UK Bribery Act are already conscious of corruption issues, and thus companies listed only in Canada could be impacted the most by the new law.

“The ones that are really affected the most ... are the ... Canada-traded companies,” Senn said, adding there are “a lot of huge companies that are solely listed on the Toronto exchange”.

by Raymond Barrett and David Baumann in Washington DC

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