FOREIGN CORRUPTION: THE U.S. DEPARTMENT OF JUSTICE COMMENCES ITS LARGEST PROSECUTION TO DATE

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In January, twenty-two executives and employees from a number of American companies were indicted for offences contrary to the U.S. *Foreign Corrupt Practices Act* (the "*FCPA*"). The accused had allegedly conspired to pay bribes through an agent to the Minister of Defence of an unnamed African state in return for the Minister's agreement to contract with the companies for the purchase of military and law enforcement equipment. In reality, this was an "undercover" operation with the involvement of the Minister fabricated and the middleman a disguised Federal Bureau of Investigations (FBI) agent.

What is interesting about the investigation is the huge commitment of law enforcement resources when the intended bribes were relatively small – 20 *per cent* of contracts totalling $15 (U.S.) million. For the first time, U.S. law enforcement employed sophisticated undercover techniques to *detect* and *investigate* the violations. Over 120 FBI agents were on the case, executing fourteen search warrants. Another seven warrants were executed by British police.

The FCPA is the U.S. legislative response to its treaty obligations under the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the *UN Convention Against Corruption*. Each breach of the *FCPA* is subject to a maximum prison sentence of 5 years. The Canadian equivalent, the *Corruption of Foreign Officials Act* ("*CFOA*") (described in our May 2008 newsletter) contains comparable provisions prohibiting Canadian business organizations and their employees, agents and consultants, from offering a benefit to a foreign public official if the purpose is to obtain or retain for the organization a business advantage. These are serious offences, providing for 5-year maximum jail terms for individuals and unlimited fines for both individuals and their employers.

Unlike the U.S., historically Canada has not committed large resources to the enforcement of the *CFOA*, although two seven-officer RCMP teams were organized in 2008 to give the legislation some teeth. However, Canadian executives would be mistaken to conclude that their Canadian residency may protect them from U.S. indictments for violations of the *FCPA*. The Act is intended to apply to foreign employees and agents of U.S. publicly held companies or companies headquartered in the U.S. Foreign nationals resident outside the U.S. have been successfully prosecuted for FCPA violations.

The tenacity of U.S. law enforcement coupled with the likelihood of greater Canadian enforcement highlights the *CFOA* and *FCPA* as areas of ongoing risk for companies operating abroad. Corporate leaders should ensure they are knowledgeable about the legislative requirements and be satisfied that they have taken the necessary steps to ensure employees involved in international transactions are properly trained and have ready access to corporate resources to assist them in ensuring their involvement with foreign officials does not offend anti-corruption legislation.

Bruce McMeekin is a partner in the Markham office and represents companies and individuals under investigation and/or charged with regulatory and white collar criminal offences.