FCPA GUIDANCE FOR CANADIAN COMPANIES WHO ARE U.S. ISSUERS

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As U.S. issuers, many Canadian companies fall within the ambit of the anti-bribery provisions and the accounting provisions of the U.S. Foreign Corrupt Practices Act (FCPA), the breach of which can result in criminal and civil penalties. A company is an "issuer" if it registers securities under Section 12 of the U.S. Securities Exchange Act of 1934 or is obligated to file periodic and other reports under Section 15(d) of the Exchange Act. Therefore, the FCPA applies to Canadian companies with a class of securities (or American depository receipts) listed on a U.S. national securities exchange and to Canadian companies with securities quoted in the U.S. OTC market that are required to file periodic reports with the SEC.

The net of the FCPA is large. The list of people that could be subject to liability under the FCPA includes officers, directors, employees, agents, and stockholders of an issuer. In addition, co-conspirators (whether U.S. or foreign) and those who aid or abet a wrongdoer may also face prosecution. Furthermore, principles of general corporate liability, parent-subsidiary liability, and successor liability apply.

Given how amorphous the FCPA's anti-bribery provisions are, the recently published *A Resource Guide to the U.S. Foreign Corrupt Practices Act* provides some welcome practical guidance. It delivers insight on the agencies' priorities and their approach to enforcement of this statute. And it includes real-life examples and hypothetical situations that clarify the meanings of such key terms as "corruptly," "willfully," and "anything of value." It also provides guidance on what is considered an action "taken to obtain or retain business" and who is a "foreign official." Moreover, the guide elaborates on the two affirmative defenses to the anti-bribery provisions, the local law defense and the reasonable and bona fide expenditures defense.

The guide also provides insight on the accounting provisions of the FCPA, which include the books and records provision and the internal controls provision. It provides examples of common mischaracterizations of bribes as legitimate payments in companies' books and records, and it describes some of the hallmarks of an effective compliance program.

With the recent uptick in enforcement actions and financial awards and the unlikelihood of any significant decrease in either in the near future, the FCPA will be a focus for companies that are subject to its provisions for some time. For more information, view our latest alert, "New FCPA Guidance for Canadian Businesses."