

*Nexen/Transparency International  
Senior Management & Board Level  
Oversight of Anti-Corruption Governance Seminar*

# Why the Wise are Wary:

An Overview of Canadian, US and UK Legislation

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# Introduction

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- “Calgary Company to pay \$9.5 million bribery fine” (CBC News, June 24, 2011)
- “Company’s shares fall after firm agrees to Bangladesh bribery plea” (Globe and Mail, June 24, 2011)
- “Mounties raid SNC-Lavalin in corruption probe” (Wall Street Journal, September 2, 2011)
- “RCMP raid Calgary miner over Bribery Allegations” (National Post, August 29, 2011)
- “Telecom Exec Sentenced to Record Breaking FCPA Prison Term: 15 Years” (Reuters, October 26, 2011)

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# Introduction

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This session will address:

1. An overview of Canadian, US and UK anti-corruption legislation
2. Recent enforcement trends in Canada and abroad

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# Anti-Corruption Legislation

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1. *Corruption of Foreign Public Officials Act (CFPOA)*
  - Canadian Legislation
  - Dedicated RCMP units
  - Recent charges, raids, and several investigations pending
2. *Foreign Corrupt Practices Act (FCPA)*
  - US Legislation
  - Very active enforcement by SEC and DOJ
3. *Dodd-Frank Act*
  - Cash rewards for whistleblowers
4. *Bribery Act 2010 (Bribery Act)*
  - UK Legislation
  - Very broad application
  - Strict liability
5. *Criminal Code*
  - Domestic legislation
  - Prohibits provision of benefits to Canadian government officials
  - More stringent than CFPOA/FCPA

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# CFPOA

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- Prohibits bribery of foreign public officials by criminal sanction
- Penalties for breach include:
  - Imprisonment for up to 5 years for individuals
  - Unlimited fines
  - Probation for corporations, including monitoring and compliance conditions
  - Forfeiture of all proceeds – not just profits – of any property, benefit or advantage obtained by corruption
  - Significant reputational and business losses
- No limitation period
- Currently applies to any conduct where there is a “nexus” or “real and substantial” connection to Canada

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# The CFPOA Bribery Offence

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**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.

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# The CFPOA Bribery Offence

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- “Every person”
  - Includes corporations
  - Corporations can be held vicariously responsible for the acts of their employees, agents or contractors if:
    - The employee, agent or contractor manages an important aspect of the company’s business, and they
      - contravene the CFPOA;
      - direct, assist or encourage another person to contravene the CFPOA; or
      - know (or is willfully blind) that another lower level employee, agent or contractor is going to contravene the CFPOA and does not take all reasonable steps to stop them

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# The CFPOA Bribery Offence

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- “in order to obtain or retain an advantage in the course of business”
  - Covers bribes to secure business, or obtain or retain a business advantage
  - Bribes paid solely for personal health or safety reasons are likely not offside the CFPOA
- “directly or indirectly gives, offers or agrees to give”
  - Covers bribes that are given directly or indirectly
  - Includes bribes given by agents, joint venture partners and other third parties
  - Need not actually give the bribe, the offer or promise of a bribe is offside

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# The CFPOA Bribery Offence

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- “a loan, reward, advantage or benefit of any kind”
  - The bribe does not need to be cash, it can be anything of value
  - If it constitutes a “material or tangible gain” to the foreign official, it is a benefit
  - What constitutes a “material or tangible gain” may be different in Canada than for a foreign official earning US\$200/month
  - For example gifts, extravagant hospitality, travel, accommodations, tickets to sporting events, use of company property or services, jobs, education or favors for family members, could be considered benefits

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# The CFPOA Bribery Offence

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- “to a foreign public official or to any person for the benefit of a foreign public official”
  - Includes any person who holds a legislative, judicial or administrative position in any level of government (national to local)
  - Also includes employees of state owned or controlled corporations and international organizations

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# The CFPOA Bribery Offence

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- “as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions...or...to induce the official to use his or her position to influence any acts or decisions of the foreign state”
  - Essence is a *quid pro quo* arrangement or the purchase of influence
  - The object of the bribe need not actually be obtained in order for an offence to have occurred

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# CFPOA: 3 Exceptions

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There are 3 exceptions to the CFPOA Bribery Offence:

1. Payments permitted under the laws of the foreign state
  - Payments must actually be legal under the foreign state's laws
  - Payments that are merely customary or tolerated but still technically illegal are not permitted
  - Prudent to obtain local legal advice prior to making such payments

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# CFPOA: 3 Exceptions

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## 2. Reasonable expenses incurred by or on behalf of the foreign public official

- To meet this exception the expenses must be:
  - reasonable;
  - incurred in good faith; and
  - directly related to:
    - » the promotion, demonstration or explanation of your products or services, or
    - » the execution or performance of a contract with the foreign official's state
- For example, paying for an official's travel to your facility may be legitimate, but an all expenses paid side trip to Banff would not
- Generous per diems, lavish meals and tickets to sporting events may make otherwise legal expenditures illegal

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# CFPOA: 3 Exceptions

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## 3. Facilitation payments

- Small payments to low-level officials
- Made to secure or expedite performance of “acts of a routine nature”
- “acts of a routine nature” generally:
  - do not involve discretion on the part of the official; and
  - are acts that the company is entitled to as of right
- “acts of a routine nature” do not include a decision to award new business or continue existing business
  - Any payment for this purpose, no matter how small, is not a facilitation payment

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# CFPOA: 3 Exceptions

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- Examples of Facilitation Payments include:
  - the issuance of a permit or license 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, telecommunications, power and water
  - the provision of services normally provided as required, such as police protection, loading and unloading of cargo, or inspections related to contract performance or transit of goods
- The purpose, recipient and amount of the Facilitation Payment should be clearly documented
- Even if permitted under CFPOA, Facilitation Payments are not permitted by the UK Bribery Act and may still be illegal under local laws

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# FCPA

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- Enacted in 1977 in response to the Watergate scandal and revelations that U.S. businesses frequently bribed foreign public officials
- The FCPA applies to:
  - U.S. Issuers
  - Domestic Concerns
    - An individual who is a citizen, national or resident of the U.S.
    - A corporation, partnership or business trust organized pursuant to the laws of the U.S., or that has its principal place of business in the U.S.
    - Includes officers, directors and agents
  - Foreign Nationals or Businesses that take any action in furtherance of a corrupt payment in the U.S.
    - DOJ position: only tenuous U.S. connection required

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# FCPA

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- Similar to CFPOA, though 2 key differences:
  - books, records, and internal control requirements for issuers
  - option for civil enforcement through SEC
- FCPA anti-bribery provisions prohibit:
  - corruptly offering anything of value
  - to any foreign official
  - for the purpose of influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business, or gaining an improper advantage
- Similar exceptions to CFPOA

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# FCPA

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- Liability for Third Parties:
  - A company may be liable for a payment by an agent or third party if: (a) the company authorized such payment; or (b) if it “knew” the improper payment would be made
  - A company is deemed to have knowledge of a payment if it is aware of a high probability that such an offer, promise, or payment will be made
- Many companies regularly contract with third parties, such as sales or marketing agents, consultants and joint venture partners
- These relationships can greatly increase corruption risks in one of two ways:
  - a third party makes improper payments to government officials, or
  - a third party is owned by or affiliated with a government official

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# FCPA

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- **Books and Records Requirements:**
  - Rationale is to prohibit companies from concealing bribes in accounting records
  - FCPA imposes certain record-keeping requirements on issuers
  - Requires every issuer to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets”
  - Applies to subsidiaries
- **Issuers must also maintain a system of internal accounting controls to provide reasonable assurances that:**
  - transactions and access to assets occurs in accordance with management’s directions
  - transactions are recorded in such a manner to permit preparation of proper financial statements and maintain accountability for assets
- **Also requires periodic review to confirm the foregoing**

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# Dodd-Frank Act

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- Substantial cash rewards for whistleblowers (10-30% of monetary sanctions over \$1M)
- Whistleblower may submit information anonymously through counsel
- 334 Whistleblower tips between August 12 and September 30, 2011, 13 of which were FCPA related

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# UK Bribery Act

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- Came into force July 1, 2011
- Applies to public and private bribery
- Penalties include:
  - 10 year imprisonment
  - Unlimited fines
- Senior officers (including directors) can be personally liable if with their "consent or connivance" a bribery offence was carried out by the company
  - Result is that directors and officers have an individual incentive to be committed to ensuring that their company has effective bribery law compliance programs
- First Conviction on November 18, 2011
  - London court clerk
  - More than 50 bribes of £500 to delete details of traffic summons from court database
  - Three years imprisonment for Bribery Act offence

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# UK Bribery Act

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- New corporate offence of failing to prevent bribery
  - Strict liability offence: knowledge or intent to bribe on the part of the organization is not required
  - Liability for failing to stop a bribe by an “associated person” – defined broadly as a person who performs services on behalf of the organization
    - Could include agents, JV partners, suppliers, subsidiaries, etc.
- This provision applies to any company that carries on business or part of a business in the UK, regardless of where in the world the relevant conduct takes place
  - Potentially very broad
  - Could apply to any company or individual that has even a small subsidiary, affiliate, office or other minor presence in the UK
- No part of the offence need take place in the UK

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# UK Bribery Act

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- The main defense for commercial organizations is to demonstrate that they have “adequate procedures” in place
  - Ministry of Justice Bribery Act Guidance provides six principles that should inform procedures put in place by corporations to prevent corruption:
    - proportionate procedures
    - top-level commitment
    - risk assessment
    - due diligence
    - communication (including training)
    - monitoring and review
  - The Guidance makes clear that due diligence procedures are necessary to inform a company about business relationships that pose a corruption risk
  - Very important to have an anti-corruption compliance program

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# UK Bribery Act

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- Also offences for:
  - Offering, promising, or giving a bribe
  - Requesting, agreeing to receive, or accepting a bribe
  - Bribing a foreign public official to obtain or retain business
- Geographical reach for these offences is more circumscribed
  - Applies to worldwide conduct of British citizens, individuals ordinarily resident in the UK, and companies incorporated under UK laws
  - Also applies if part of the offence takes place in the UK
- Facilitation payments are not permitted
- Ministry of Justice Bribery Act Guidance: reasonable hospitality for relationship building is not prohibited, but lavish hospitality not permitted

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# Canadian Domestic Anti-Corruption Laws

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- Aside from compliance with international anti-corruption legislation, companies with operations in Canada need to ensure compliance with Canadian domestic anti-corruption legislation
- The Canadian *Criminal Code* contains provisions which go beyond the FCPA, CFPOA or Bribery Act
- The *Criminal Code* (s.121(1)(b)) makes it an offence to provide a benefit to a government official with which a company (or individual) has business dealings
  - No requirement that the benefit be provided in exchange for anything

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# Canadian Domestic Anti-Corruption Laws

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- Test for a benefit is the same as the CFPOA, that being a “material or tangible gain”
- Benefits sufficient to trigger application of the government corruption offences include:
  - provision of tickets to sporting events;
  - a one-sided pattern of paying for meals (or even one lavish meal); and
  - payment for travel.
- While it is an area of the law rife with “grey areas”, any benefit above and beyond the proverbial cup of coffee gives rise to a risk of the application of the government corruption offences

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# Canadian Domestic Anti-Corruption Laws

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- The *Criminal Code* also contains offence provisions which penalize:
  - the provision of benefits to a government official in exchange for favourable treatment;
  - aiding or abetting a “public official” (a term which is broadly defined to go beyond government officials to include, for instance, aboriginal band officials) in committing a breach of trust; and
  - payment of a “secret commission” to an agent in exchange for the agent acting in respect of the affairs of its principal (an offence which applies equally to public and private industry)

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# Recent CFPOA Enforcement Trends in Canada

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## Niko Resources

- Niko was charged under s. 3(1)(b) of the CFPOA, the culmination of a six-year investigation
- Niko pled guilty and put forward a joint submission for a fine of C\$8,200,000, plus a 15% victim surcharge, for a total penalty of C\$9,499,000
- Niko's sentence also provided for three years' probation with extensive monitoring conditions:
  - Broad document disclosure to RCMP
  - Requirement to establish a detailed compliance, record-keeping and monitoring program subject to review by an independent auditor

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# Recent CFPOA Enforcement Actions in Canada

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## Niko Resources

- The sentence imposed dwarfed the only prior conviction under the CFPOA, a C\$25,000 fine paid by Hydro Kleen in 2005
- Sentencing precedents submitted by the prosecutor were U.S. FCPA cases
- The Probation Order was also copied from U.S. precedents
- The court's willingness to accept these precedents and impose a fine of this amount likely sets a benchmark for CFPOA fines in Canada

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# Recent CFPOA Enforcement Actions in Canada

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## Niko Resources

- Features of the Niko Probation Order included:
  - broad document disclosure obligations to the RCMP;
  - A proactive obligation to self report any further criminal conduct it became aware of to the RCMP;
  - To adopt extensive anti-corruption internal controls, policies and procedures, and to report annually to the Court and the RCMP with respect to the implementation of its compliance program; and
  - To retain an independent auditor to prepare a total of 3 written reports to the Court and the RCMP detailing Niko's anti-corruption compliance plan and progress in implementing the plan

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# Ongoing CFPOA Investigations

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In 2010, the RCMP announced it had 23 open investigations. The details of only three have been released:

- Nazir Karigar
  - Former employee of Cryptometrics, a company developing facial recognition software for airports and governments
  - Charges laid against him individually
  - Allegations of corruption relating to bribes paid to Indian officials concerning a security system contract
- Blackfire Exploration Ltd.
  - Criminal investigation underway
  - RCMP executed a search warrant and raided the Calgary offices
  - Stemming from 14 payments made by the company to the Mayor of Chicomuselo, Mexico for protection from anti-mining protests
- SNC Lavalin Group
  - In September 2011, the RCMP raided its Toronto offices
  - Allegations of corruption in the bid process of the World Bank-funded Padma Bridge Project in Bangladesh

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# U.S. Enforcement Trends

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- **Massive Penalties:** Under the FCPA, the U.S. government has assessed over US\$3.4-billion in penalties since December 2008
- U.S. Enforcement Agencies continue to enforce the FCPA aggressively. There were 39 resolved actions in 2011
- 10 Largest FCPA Settlements:
  - Siemens (Germany): \$800 million in 2008
  - KBR / Halliburton (U.S.): \$579 million in 2009
  - BAE (U.K.): \$400 million in 2010
  - Snamprogetti Netherlands B.V. / ENI S.p.A. (Holland/Italy): \$365 million in 2010
  - Technip S.A. (France): \$338 million in 2010
  - JGC Corporation (Japan): \$218.8 million in 2011
  - Daimler AG (Germany): \$185 million in 2010
  - Jeffrey Tesler (United Kingdom): \$149 million in 2011
  - Alcatel-Lucent (France): \$137 million in 2010
  - Magyar Telekom/Deutsche Telekom (Hungary, Germany): \$95.1 million in 2011

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# U.S. Enforcement Trends

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- Eight of the top 10 largest FCPA settlements occurred in 2010 or 2011
- Virtually all FCPA proceedings against companies result in settlements. However, the first ever jury conviction of a company was recently vacated on the basis of prosecutorial misconduct (U.S.A. v. Aquilar)

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# U.S. Enforcement Trends

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- Pursuance of personal criminal liability for directors and officers is a significant aspect of the strategy of U.S. enforcement authorities
  - “Let me be clear, prosecuting individuals is a cornerstone of our enforcement strategy.... the risk of heading to prison for bribery is real, from the boardroom to the warehouse.” – U.S. Attorney General, Eric Holder (Paris, May 26, 2010)
  - In 2009, U.S. enforcement authorities charged 42 individuals, significantly more than 2008 (16), 2007 (17), and 2006 (9) combined
  - The trend of targeting and prosecuting individuals continued into 2010 where 17 people were charged
  - In January 2010, the DOJ arrested and indicted 22 individual defendants as a result of a wide-ranging sting operation in the SHOT show case (although after unsuccessfully attempting to prosecute the first two trials, and amidst allegations of prosecutorial misconduct, the DOJ has recently announced it will be withdrawing charges against the remaining SHOT show defendants)

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# U.S. Enforcement Trends

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- In 2011, Jeffrey Tesler, a U.K. lawyer and former agent of the TSKJ consortium, pleaded guilty to offences carrying a maximum sentence of 10 years and agreed to forfeit \$149-million held in his company's Swiss bank accounts to the U.S. government
- On October 26, 2011, Joel Esquenazi, former president of Terra Telecommunications, received a 15-year sentence relating to a scheme to bribe officials of Haiti Teleco. It is the longest term ever handed down under the FCPA. He joins two other Terra employees who have received a combined sentence of nine years for their part in the bribery scheme. A Haitian official has also recently been convicted by a U.S. court for his role in accepting bribes.

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# Conclusion

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- The proliferation of anti-corruption laws around the world requires companies to be diligent
- An ounce of prevention can save potential significant expense and business costs associated with a prosecution under anti-corruption legislation
- Questions?

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