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White-collar defence: Increasing risks and enforcement activity

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For businesses, this year was marked by continued increases in compliance risks relating to the ongoing global COVID-19 pandemic. Businesses were faced with growing costs of compliance, as well as greater risks of exposure to potential liability linked to supply chain disruption. In addition, they increasingly felt the challenges associated with operating across jurisdictions.

Businesses also had to prepare for and adapt to regulatory change. There were significant updates to federal anti-money laundering (AML) legislation. Other regulatory initiatives include the proposal to implement a beneficial ownership registry for corporations in Canada. The work of the Cullen Commission is ongoing. There have also been significant updates to Canada's remediation agreements regime. Furthermore, as we wrote in our blog post, Global financial crime compliance costs are trending upwards. Is Canada catching up?, the average annual cost of financial crime compliance has increased significantly. All of these issues will have significant impacts on businesses in 2022 and beyond.

Ongoing risks related to the COVID-19 pandemic

As we wrote in our 2020 Legal Year in Review, the COVID-19 pandemic has increased compliance risks for businesses and these trends continued in 2021.

Supply chain due diligence

As we discussed in our blog post, Corruption risk and the COVID-19 pandemic: Ensuring compliance in the era of the "new normal," businesses continue to face material supply chain challenges as a result of the pandemic. While supply chain disruptions will likely continue for a while, their severity should diminish over time as the pandemic resolves.

Nonetheless, even beyond the pandemic, it is critical for businesses to adhere to best practices and maintain appropriate diligence and compliance measures to manage the ever-present and inherent risks – such as opportunities for corrupt or illegal activity – associated with global supply chains. The pressures created by supply chain disruption leave cross-border businesses particularly vulnerable to falling victim to fraud and other criminal activity. At the same time, businesses have been forced to adapt to the demands represented by additional regulatory compliance requirements. Further information regarding potential supply chain issues is included in our Supply chain disruption in the face of the COVID-19 pandemic.

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A number of key legal and regulatory developments continue to increase prospective liability for businesses, including in addressing supply chain compliance:

- In May 2021, Canada released its new model Foreign Investment Promotion and Protection Agreement (the 2021 Model FIPA). The 2021 Model FIPA expands on previous provisions regarding responsible business conduct (formerly called "corporate social responsibility") and includes the promotion of internationally recognized standards that investors are encouraged to incorporate into investment agreements. As we described in our blog post, New Canadian foreign investment promotion and protection model expands responsible business conduct provisions, although not obligated to do so, parties who adopt the model are encouraged to
  - reaffirm that investors and their investments must comply with domestic laws and regulations of the host state, including human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour
  - reaffirm the importance of internationally recognized standards of responsible business conduct, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights
  - encourage investors to voluntarily incorporate such standards into business practices and internal policies
  - encourage investors to undertake engagement and dialogue with Indigenous peoples and local communities
  - cooperate on and facilitate joint initiatives to promote responsible business conduct
- The Supreme Court of Canada held in a 2020 decision that Canadian companies may face civil liability in Canada for human rights abuses overseas, even by indirect operating subsidiaries (refer to our Osler Update on the decision).

This increased emphasis on human rights and ethical business obligations in Canada is consistent with global trends in support of internationally responsible business conduct. For example, in June 2021, Germany passed its *Supply Due Diligence Chain Act*. This legislation, which is expected to come into effect in January 2023, will require companies to report international human rights and certain environmental abuses along their supply chains.

The German enactment followed the March 2021 adoption by the European Parliament of a proposal for a mandatory due diligence directive aimed at incorporating sustainability into long-term business strategies, which is expected to come into force in late 2022 or early 2023. Among other things, it aims to address environment and labour abuses in corporate supply chains and includes new due diligence rules to oblige companies to integrate sustainability criteria into their decision making. These measures follow the December 2020 announcement by the European Union (EU) of the introduction of a new global sanctions regime, as we discussed in New Canadian foreign investment promotion and protection model expands responsible business conduct provisions. The new regime would allow the EU to target individuals, entities and bodies (both state and non-state actors) involved in serious human rights violations worldwide regardless of where they occurred.

As a result of heightened compliance risks created by supply chain disruption and an enhanced focus on human rights and ethical business obligations in Canada and overseas, it is crucial for businesses to complete comprehensive due diligence on their suppliers and contractors. Organizations must understand with whom they are doing business at all stages of the supply chain. Businesses are also well-advised to implement appropriate oversight mechanisms within existing supplier relationships.

Corporate liability for agents

The realities of the pandemic have meant that when suppliers are unable to secure inventories or complete their functions within the supply chain, they are engaging agents to assist across domestic or global operations. In this environment, it is crucial for businesses to understand that they can be held criminally liable not only for the acts of their employees, but also of their agents.

Businesses can be held criminally liable for the acts of contractors, suppliers, distributors or other counterparties under federal legislation such as the *Criminal Code* or the *Corruption of Foreign Public Officials Act*. Potential criminal liability can arise when senior corporate officers are aware of, or turn a blind eye toward, illegal acts committed by agents, employees or counterparties, including corruption, fraud, money laundering, sanctions violations and other economic crimes.

It is the responsibility of businesses to ensure that their agents are acting in compliance with applicable laws. Given the heightened risks arising from the impact of the COVID-19 pandemic on supply chains, it is more important than ever for management to take proactive steps to ensure that a commitment to compliance emanates throughout the organization – starting with the "tone at the top." This includes not only officers, directors and employees of the organization, but also all others acting on its behalf. Best practices include having adequate compliance policies and providing compliance training for

employees and agents alike. In addition, businesses are well-advised to obtain appropriate representations and warranties in agreements entered into with agents, suppliers and other counterparties.

Risks associated with operating across jurisdictions

Given the risks associated with shifting international operations during the pandemic and the new challenges presented by increasingly sophisticated sources of crime, it is important for businesses to recognize the unique risks associated with investigations in a cross-border context. Multijurisdictional investigations have become more common, making it essential for businesses who are the targets of such investigations to understand how to effectively deal with foreign regulators and other authorities.

Businesses facing multijurisdictional investigations should consider how best to engage with foreign authorities to protect their interests. For example, it may be necessary to consider whether a global resolution is possible, particularly where it is uncertain whether authorities will coordinate their efforts with their counterparts in other jurisdictions. Further, it is good practice to involve counsel with knowledge of the local culture and regulations in the jurisdiction involved, as cultural differences and language barriers can hinder the investigation process. It is critical for businesses involved in such investigations to consider whether the laws of multiple jurisdictions potentially apply and whether those laws may be inconsistent with or conflict with each other. In cases where a foreign regulatory authority issues a request for information from a business that is the target of an investigation, certain privacy and constitutional legal requirements could be at stake in more than one jurisdiction.

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Among other things, it may be critical to consider the application of data protection and privacy laws in respect of data sought by foreign authorities, both in the jurisdiction where the target is located and where the investigation is being conducted. Either may impose restrictions on the transfer of data across borders. For example, the EU's *General Data Protection Regulation* (GDPR) imposes certain limitations on the transfer and processing of data to a third country outside the EU for the purposes of disclosing materials to a foreign authority.

In addition, Canadian companies facing a subpoena or production order from a foreign state may not be able to rely on compulsion of law exemptions to privacy and confidentiality obligations to avoid liability for disclosure. In particular, if the instrument through which production is sought is not binding in Canada and no corresponding Canadian order is sought (for instance, U.S. securities regulators may seek production of information from a Canadian company whose securities are listed on U.S. exchanges), compulsion of law exemptions may not be available to the company. The risks associated with these types of requests have increased following amendments to the *Bank Secrecy Act* in the U.S. which granted increased powers to U.S. governmental agencies to subpoena information from foreign financial institutions if the foreign bank maintains a U.S. correspondent account. In such a case, the targeted business may find itself constrained in its ability to comply with disclosure requests from a foreign authority, while also trying to respect applicable data protection requirements in its home jurisdiction.

Anti-money laundering developments

As we wrote last year, public focus on white-collar issues in Canada has been significantly directed towards money laundering in recent years. There were noteworthy Canadian anti-money laundering developments in 2021.

Amendments to PCMLTFA

As we wrote in our blog post, Is Canada rising to the challenge? Responding to calls for more effective financial crime prevention and enforcement, significant amendments to the regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the Amendments) came into force on June 1, 2021. Taken together, these Amendments effect a sizeable overhaul of the anti-money laundering and terrorist financing regulatory landscape in Canada. These changes include, among other things, beneficial ownership reporting obligations, new virtual currency obligations, identification methods for KYC (know your client), and recordkeeping and reporting changes. Further information is available in our guide to the Amendments.

Beneficial ownership registry

As we wrote in our blog post, Canada's budget introduces long-awaited beneficial ownership registry to combat money laundering, and discuss in our A dynamic year for capital markets enforcement article, in its Annual Budget released April 19, 2021 (the Budget), the Government of Canada announced funding for the implementation of a beneficial ownership registry for corporations in Canada. The Budget proposed to provide $2.1 million over two years to Innovation, Science and Economic Development Canada to build and implement a publicly accessible corporate beneficial ownership registry by 2025. The purpose of the new registry was to better "catch those who attempt to launder money, evade taxes, or commit other complex financial crimes." Although the federal government was dissolved in the 2021 election, it is likely the newly elected government will enact similar measures.

The establishment of a beneficial ownership registry would represent a further step for Canada toward a risk-based approach to AML compliance consistent with the approach taken by several other jurisdictions, including the U.K. and the U.S.

Update on the Cullen Commission

The Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission), which was established in May 2019, continued its proceedings throughout 2021.

The Cullen Commission is led by B.C. Supreme Court Justice Allen Cullen and its mandate is to inquire into and report on money laundering in B.C. Specifically, the Cullen Commission is tasked with determining where and how money laundering is taking place and why it has been allowed to happen, as well as whether and how it can be prevented. The Cullen Commission's work remains ongoing and participants made closing submissions in October of this year. Recommendations from the Commission, likely to be released in 2022, are expected to have a significant impact on the regulatory approach to combating

money laundering in Canada in the future. Learn more about the Cullen Commission in our article in Osler's 2020 Legal Year in Review.

Enforcement and update on remediation agreements

Notably, a new potential remediation agreement was announced in 2021. On September 23, 2021, the RCMP announced charges of fraud against two divisions of SNC-Lavalin and two of its executives in connection with the Jacques Cartier Bridge project in Montréal. Simultaneously, the Québec Directeur des poursuites criminelles et pénales (DPCP) announced that SNC-Lavalin was invited to enter into negotiations with a view to entering into a remediation agreement.

Canada's deferred prosecution agreement (DPA) regime – referred to in Canada as remediation agreements – came into force on September 19, 2018. A DPA (or remediation agreement) is an agreement entered into between a prosecutor and a company alleged to have engaged in economic crimes. The effect of the DPA is to suspend the outstanding prosecution while simultaneously establishing specified undertakings that the organization must fulfill to avoid facing the potential criminal charges. These undertakings often include fines, remediation measures, enhanced reporting requirements, as well as allowing for independent third-party oversight of corporations' compliance techniques. Once the accused company has fulfilled the terms of the DPA, the charges will be dropped. This tool has been actively used to reduce corporate criminal behaviour in other jurisdictions such as the U.K. and U.S. For more information on remediation agreements, please see our blog posts on osler.com, World bank debars German company for thirteen months, Deferred Prosecution Agreements (DPAs) come into force in Canada and Canada's deferred prosecution agreements: Still waiting for takeoff.

To date there has been little use of this new tool. Negotiation of a remediation agreement represents a significant milestone for the regime, which is likely to become an important part of Canada's white-collar crime enforcement framework in the future.

As we head into 2022 and businesses continue to face the increased compliance risks associated with the pandemic, we anticipate a continuation of increased enforcement activity and regulatory initiatives to combat white-collar crimes. In this environment, it is crucial for businesses to maintain a demonstrated commitment to compliance.

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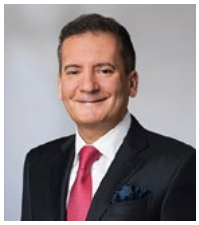

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