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White-collar crime enforcement

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While 2018 may not have seen a significant uptick in "on the ground" securities and white-collar enforcement activity, it has included some momentous legislative and enforcement strategy changes on a number of fronts including anti-money laundering, deferred prosecution agreements, public bidding and capital markets enforcement.

Government of Canada's expanded toolkit to address corporate wrongdoing

In the fall of 2017, the Government of Canada held an extensive public consultation process to seek input on potential enhancements to the Integrity Regime and on a possible Canadian deferred prosecution agreement regime to improve Canada's enforcement toolkit for combating corporate wrongdoing. In 2018, Parliament introduced the legislation to bring about those enhancements.

Expansion of Integrity Regime In March 2018, the Government of Canada announced that enhancements to the Integrity Regime will come into effect January 1, 2019. The Integrity Regime refers to the rules governing the eligibility of parties to contract with the Canadian federal government. Domestic and foreign companies that conduct material business with the federal government are required to meet certain ethical standards that are set out in a formal Ineligibility and Suspension Policy administered by Public Services and Procurement Canada (PSPC).

Under the current policy, a party is automatically ineligible to enter into a contract or real property agreement with the federal government if that party has been convicted of a listed offence in the past three years. The list of offences is broad and includes fraud, money laundering, insider trading, foreign corrupt practices, falsification of documents, and specific offences under the *Competition Act* and *Income Tax Act*. In addition, PSPC has the discretion to make a finding of ineligibility in specific circumstances, such as when a party has been convicted of a foreign offence.

The Government of Canada has announced that the updated Integrity Regime is intended to:

- Introduce greater flexibility in debarment decisions precluding companies from bidding on public contracts;
- Increase the number of triggers that can lead to debarment, including additional federal offences, certain provincial offences, "foreign civil judgments for misconduct" and debarment decisions of provinces, foreign jurisdictions and international organizations;

- Explore alternative measures to further mitigate the risk of doing business with organized crime; and
- Expand the scope of business ethical concerns covered under the regime to include key areas such as combating human trafficking and the protection of labour rights and the environment. In addition, parties will be required to certify that they have taken reasonable steps to guard against the use of forced labour within their supply chain.

The revised Ineligibility and Suspension Policy has not yet been released. A public consultation is being held to seek comments on the application of the proposed draft policy.

DPAs introduced for white-collar crime in Canada On September 19, 2018, amendments to the *Criminal Code of Canada* came into force, establishing for the first time a deferred prosecution agreement (DPA) regime (referred to as "remediation agreements") for corporate wrongdoing in Canada. DPAs are commonly used in the United States and the U.K.

A DPA is an agreement entered into between a prosecutor and a company alleged to have engaged in financial wrongdoing. The agreement stays any proceedings against the organization with respect to offences subject to the agreement, while simultaneously establishing specified undertakings that the company must fulfil in order to avoid facing potential conviction. These undertakings can include fines, remediation measures and enhanced reporting requirements. They can also allow for independent third-party oversight of a company's compliance techniques. Once the accused company has fulfilled the terms of the DPA, the charges will be dropped.

The key features of the new regime include the following:

- Remediation agreements are only available for economic offences such as bribery or fraud. They are not available for crimes that result in death or bodily injury, crimes committed at the direction of or in association with a criminal organization or terrorist group, or for conduct that violates the *Competition Act*.
- In order for the prosecutor to enter into negotiations for a remediation agreement, there must be a reasonable prospect of conviction with respect to the offence; the agreement must be in the public interest and appropriate in the circumstances; and the Attorney General must consent to negotiation of the agreement.
- Prosecutors will consider a number of factors when deciding whether to negotiate a remediation agreement, including: the circumstances in which the offence was brought to the attention of authorities; the nature and gravity of the offence; the involvement of senior officers of the organization; any disciplinary action taken in connection with the alleged wrongdoing; reparations and remediation undertaken; any previous offences; and co-operation with enforcement authorities.

NO REMEDIATION AGREEMENT FOR SNC-LAVALIN

The introduction of remediation agreements was welcomed by many. However, early indications are that their use may be circumscribed. On October 10, 2018, SNC-Lavalin Group Inc. (SNC Lavalin) issued a press release advising that the Director of the Public Prosecution Service of Canada (DPPSC) would not be inviting SNC-Lavalin to negotiate a remediation agreement in order to resolve charges relating to alleged fraud and corruption perpetrated by the company in Libya.

In February 2015, SNC-Lavalin and two of its subsidiaries were charged with fraud and

corruption under the *Criminal Code* and the *Corruption of Foreign Public Officials Act* following an RCMP investigation. It is alleged that a former SNC-Lavalin executive paid more than $160 million in bribes to the son of former Libyan leader Moammar Gadhafi in exchange for engineering contracts. Separately, SNC-Lavalin has also faced corruption allegations relating to business activities in other jurisdictions including Bangladesh and Canada.

Prior to the introduction of the DPA regime, SNC-Lavalin had been a staunch advocate of its establishment in Canada – as were the majority of corporations that took part in the public consultations. SNC-Lavalin's recent press release emphasizes that it has developed a "world-class" ethics and compliance framework, undertaken various measures to establish a culture of compliance, and fully co-operated with regulatory and governmental authorities, all of which are factors to be considered by the DPPSC in determining whether to negotiate a remediation agreement. Now that the DPPSC has denied SNC-Lavalin the ability to resolve the allegations by way of a remediation agreement, it appears the case will proceed through the courts.

Amendments to anti-money laundering laws In June 2018, the Canadian Department of Finance published wide-ranging draft amendments to regulations made under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2018* (PCMLTFA) which would affect financial and non-financial entities that provide access to Canada's financial system, including the following:

- **Dealers in virtual currency:** Dealers in virtual currency (as defined in the legislation) that offer services to Canadian clients will generally be considered domestic money service businesses (MSBs) or foreign MSBs.
- **Foreign money services businesses:** Foreign MSBs will be required to register with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and be subject to the same compliance requirements as domestic MSBs, with slightly less onerous recordkeeping requirements.
- **Reporting deadline for suspicious transactions:** Reporting entities will be required to file a suspicious transaction report within three days after taking measures to establish if there are reasonable grounds to conclude a particular transaction is related to an offence under the legislation.
- **Prepaid payment products:** Prepaid credit cards and similar open-loop prepaid payment products must be treated as bank accounts.
- **Use of technologies:** The risk assessment criteria currently prescribed will be clarified to provide that risks associated with the use of new technologies prior to their launch must be considered in the assessment of products and delivery channels.
- **Customer due diligence:** Reporting entities will have flexibility when conducting customer due diligence, and new or enhanced customer due diligence requirements will be introduced.
- **Clarification of existing requirements:** Clarifications are provided with respect to: (i) transactions over $10,000 and the 24-hour rule (in which two or more cash amounts of less than $10,000 that total $10,000 or more are received from the same individual or entity within 24 hours); (ii) sources of wealth of politically exposed persons; (iii) wire transfer records; (iv) registration renewals by MSBs; (v) managing general agents; (vi) dealings in precious metals and stones; and (vii) accountants.

The final version of the amendments was expected to be published in the fall of 2018, with implementation in the fall of 2019; however, the final version was not published and the timeline for publication and implementation is now less clear.

In addition, in November 2018, the House of Commons Standing Committee on Finance published a report with the results of its five-year review of the PCMLTFA, which commenced in February 2018. The Standing Committee made 32 recommendations to the federal government, including: adoption of a pan-Canada beneficial ownership registry; inclusion of legal professionals, mortgage insurers, land registry and title insurance companies and cryptoasset exchanges in the AML/ATF regime; numerous recommendations relating to information sharing and co-operation among levels of government and regulatory agencies; amendments to the *Criminal Code* (Canada) and federal privacy laws to better facilitate money laundering investigations and prosecutions; and various other recommendations which would bring Canada's regime into closer alignment with international best practices. It remains to be seen whether the federal government will finalize and adopt the current amendments, or publish revised draft amendments which reflect some of the recommendations made by the Standing Committee.

Developments in capital markets regulatory enforcement

In 2018, the Canadian Securities Administrators (CSA) released its Enforcement Report which contains enforcement statistics for the 2017 calendar year. The data in this report, when compared to 2016 data, shows that CSA member enforcement efforts largely stagnated in 2017. In particular:

- CSA members concluded 111 total enforcement matters involving 259 respondents in 2017 – similar to 109 enforcement matters involving 262 respondents in 2016.
- CSA members imposed approximately $65 million in monetary penalties in 2017, an increase of $3 million when compared to $62 million in 2016. However, in 2017, CSA members secured only around $68 million in restitution for harmed investors, as compared to $349 million in 2016. (The disgorgement spike in 2016 was largely attributable to four no-contest settlements entered into by the Ontario Securities Commission (OSC)).
- CSA members commenced more proceedings in 2017 (66) than they did in 2016 (56).
- Prosecutors in CSA member jurisdictions commenced two fewer finance-related cases under the *Criminal Code* in 2017 (8) than in 2016 (10). The number of individuals convicted of finance-related criminal offences also decreased, dropping from 13 in 2016 to 10 in 2017. However, the number of individuals sentenced to prison terms for violations of provincial securities legislation increased from 15 in 2016 to 17 in 2017.

In 2018, several cases and settlements showed that regulators have been pursuing aggressive enforcement orders and increasingly large sanctions. These cases provide useful insight into the scope of regulators' enforcement powers.

1. North American Financial Group Inc. – The Ontario Divisional Court upheld the decision of an OSC Panel to levy substantial monetary sanctions against North American Financial Group Inc. and a number of related individuals in connection with a fraudulent investment scheme. Notably, the Divisional Court held that disgorgement amounts should be based on the amount of money lost by investors, rather than the amount received by the

perpetrators of the improper investment scheme. The sanctions included administrative penalties of $600,000 each for a total of $1.8 million, as well as an order for disgorgement of over $3 million.

2. Finkelstein – The Ontario Court of Appeal upheld an OSC Panel's finding of insider trading and tipping with respect to one "downstream" tippee and reinstated the OSC Panel's finding of liability against another downstream tippee. The Court of Appeal emphasized that deference is owed to securities commissions on appeal. It was reasonable for the OSC Panel to identify certain factors or "groups of circumstantial evidence" supporting inferences that a tippee knew or ought to have known that information he received came from an "insider." The Court of Appeal upheld the OSC's sanctions against one respondent, which included $450,000 in administrative penalties, and reinstated the OSC's sanctions against the other respondent, which included $200,000 in administrative penalties. This decision further demonstrates that tippees well downstream in a tipping chain can be held liable for insider trading and tipping notwithstanding a lack of subjective knowledge about the origins of that information.
3. Sino-Forest – A year after issuing its ruling on the merits of one of the "largest corporate frauds in Canadian history," an OSC Panel handed down its decision on punishments and sanctions for the former management team of Sino-Forest Corporation. The OSC announced millions of dollars in penalties against the former executives, together with various other penalties that include lifetime bans from participating in the Canadian capital markets. In its decision, the OSC Panel imposed some of the most severe penalties it has ever ordered, including over $11 million in administrative penalties and disgorgement of over $64 million.
4. Cohodes – The Alberta Securities Commission (ASC) set a high threshold for granting enforcement orders against individuals who make misleading statements about issuers in public or on social media. ASC Staff sought to temporarily ban trader Mark Cohodes from trading in shares of Badger Daylighting Ltd., an oilfield waste removal company. ASC Staff alleged that Cohodes took a short position in Badger and then subsequently made numerous public comments criticizing Badger in attempts to artificially lower the share price. Of particular concern to ASC Staff was Cohodes' June 2018 Twitter post in which he alleged that Badger was illegally dumping toxic waste. The ASC dismissed ASC Staff's application, in part, because the ASC was not convinced that Cohodes' public statements could influence a reasonable person's investment decisions about an issuer of Badger's size.
5. Forget – In a decision that brings further clarity to the scope of the market manipulation offence under section 195.2 of the Québec *Securities Act*, the Québec Court of Appeal upheld the acquittal of the respondent founder and CEO of Les Technologies Clémex. The respondent was charged by the Autorité des marchés financiers (AMF) in connection with trades he made in Clémex shortly before that company announced a private placement. The Court of Appeal ruled that a dishonest act and a dishonest intent are constituent elements of market manipulation. The Court of Appeal reasoned that if dishonesty was not required for a finding of market manipulation, many market transactions would be

unlawful simply because those transactions impacted the price of a security. The AMF's failure to prove that the respondent had subjective knowledge that he was committing a dishonest act was determinative of the appeal.

The status of tools: Whistleblower programs and no-contest settlement agreements

On May 4, 2018, the ASC announced that it had added provision for no-contest settlements to its *Credit For Exemplary Cooperation in Enforcement Matters* Policy (ASC Policy 15-601). The ASC now has discretion to enter into no-contest settlements (settlements that do not require an admission of wrongdoing) with respondents in certain circumstances, including when (i) conduct is self-reported; (ii) respondents co-operate with regulators; and (iii) respondents take financial responsibility for their actions. No-contest settlements will not be available to respondents who have engaged in abusive or fraudulent conduct. The ASC's addition of this enforcement tool brings it into line with other jurisdictions, including Ontario.

To date, there have been no payments made under the whistleblower program introduced by the OSC in 2016. According to a recent update published by the OSC, as at the end of June 2018: (i) the program had generated approximately 200 tips; (ii) 45 tips were under review; (iii) 19 tips were referred to the OSC's Enforcement Branch; (iv) seven tips were associated with active investigations; and (v) the OSC was in the process of sharing 68 tips with OSC operating branches other than Enforcement or other regulators for further action.

Other provinces such as Alberta and Québec have introduced variants of Ontario's whistleblower program, absent the "bounty."

IIROC gaining increased enforcement powers

The Investment Industry Regulatory Organization of Canada (IIROC) — the national self-regulatory organization that oversees all investment dealers and trading activity on debt and equity marketplaces in Canada — has gained expanded enforcement powers in seven provinces over the course of 2017 and 2018.

IIROC has historically relied on its contractual authority to enforce its rules, without the heft of legislative backing. After many years of IIROC advocating for legislative support, Alberta, Québec and Nova Scotia have enacted legislation to provide IIROC with a "full enforcement toolkit." This legislation includes the ability to enforce fine collection, the authority to collect and present evidence during investigations and at disciplinary hearings, and protection from malicious lawsuits. Manitoba and PEI, by contrast, have provided IIROC with "partial enforcement toolkits" which generally include two of the three aspects of the full toolkit. IIROC has also obtained the authority to collect fines through the courts in Alberta, British Columbia, Ontario and Québec. These legislative enhancements potentially change the character of the self-regulator's enforcement capabilities.

Federal prosecutors stay charges in high-profile money-laundering case

In November 2018, federal prosecutors announced that they were staying the charges laid in a highly publicized British Columbia money-laundering case. The case arose out of a 2015 RCMP investigation, titled Project E-Pirate, into an organized crime group which officials believed had set up a scheme to launder hundreds of millions of dollars through British

Columbia casinos. In 2017, the RCMP charged Silver International Investments Ltd. and its two principals, Caixuan Qin and Jain Jun Zhu, with several offences including laundering the proceeds of crime and failing to register a money services business. However, on November 27, 2018, the RCMP announced that it had made a joint decision with the DPPSC to stay the charges. Though prosecutors have yet to detail their reasons for doing so, on its face the decision hints at the substantial challenges that Canadian prosecutors face in prosecuting large-scale white-collar crime cases.

Conclusion

In the past year, legislators, regulators and prosecutors focused their attention on improving deterrence and enforcement in the white-collar context. Steps were taken towards enhancing Canada's federal public bidding regime, strengthening anti-money laundering regulation and providing prosecutors with new enforcement tools.

It remains to be seen whether the legislative and enforcement strategy changes that occurred in 2018 will result in significant improvements in capital markets and white-collar enforcement. What is clear from a review of white-collar enforcement in 2018 is that authorities are conscious of the prevalence and ever-changing nature of white-collar crime and are making concerted efforts to try to keep up.