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Overview
Anticorruption Regulation

Russia and the other CIS countries present significant opportunities for investment, but it is also a market in which many investors are faced with perceived and actual bribery or corruption issues. While the U.S. Foreign Corrupt Practices Act (FCPA) may be the most well known anti-bribery legislation, the FCPA together with the UK Bribery Act as well as Russian anticorruption legislation, collectively create a complicated regulatory framework for companies conducting business in Russia and the CIS. The scope and intensity of enforcement activity, particularly with respect to the FCPA, continues to expand, and so do the implications of failing to keep up with evolving enforcement trends and compliance expectations.

King & Spalding works with our clients on anticorruption issues across a number of disciplines. In this regard, we assist our clients on developing anticorruption policies and procedures and compliance programs, conducting due diligence exercises for acquisitions, joint ventures and consultants/agents/distributors, and conducting internal investigations.

The good news is that it is possible for companies to come to grips with their legal obligations under applicable anticorruption legislation. The first step is to understand what legislation is applicable and then develop and implement policies and procedures to ensure compliance.

U.S. Foreign Corrupt Practices Act

The FCPA is extremely difficult to navigate. There are few court opinions, and U.S. authorities have provided only limited public guidance regarding application of the statute. Moreover, the enforcement community has pointedly refused to establish any "safe harbors" or otherwise identify a simple course of conduct that, if followed, would allow companies and individuals to avoid or remedy FCPA violations. Given the sea change in FCPA enforcement activities and compliance expectations over the past five years, as well as the dramatic increase in sanctions associated with FCPA cases, the importance of keeping abreast of FCPA developments cannot be overstated. Accordingly, practitioners in this area must interact regularly with enforcement officials to elicit practical guidance about evolving enforcement trends.

FCPA, enacted in 1977, contains two substantive provisions: (1) a prohibition on bribery of foreign officials, political parties or candidates; and (2) requirements that companies

with registered securities and companies required to file reports with the Securities and Exchange Commission (SEC) establish and maintain accurate books and records and sufficient controls. The FCPA is enforced by both the Department of Justice (DOJ) and the SEC. The DOJ is responsible for the criminal and civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals, while the SEC is responsible for civil enforcement of the anti-bribery and accounting provisions with respect to issuers.

The FCPA's anti-bribery provisions prohibit (1) an issuer, domestic concern or foreign national or business (including in the case of a corporation, its officers, directors, employees, agents and stockholders acting on its behalf) (2) from making use of the means or instrumentality of interstate commerce, or any issuer or domestic concern committing an act outside of the United States, (3) corruptly, (4) in furtherance of an offer, payment or promise to pay anything of value, (6) directly or indirectly, to a foreign official, political party, party official or candidate (7) for purposes of influencing official action or inaction (8) in order to obtain or retain business or direct business to any person. There are two affirmative defenses and one limited exception to these provisions. It is an affirmative defense if (1) the payment was lawful under the written laws and regulations of the country, or (2) the payment was a "reasonable and bona fide expenditure." Additionally, the FCPA includes a limited exception for the payment of insubstantial facilitation or "grease" payments made to expedite or secure performance of a "routine government action" by a foreign official.

The FCPA's accounting provisions require "issuers" to maintain reasonably detailed, accurate and GAAP compliant books and records and to devise a "sufficient" system of internal accounting controls to satisfy FCPA requirements. Additionally, parent companies owning more than fifty percent of a domestic or foreign subsidiary's securities are strictly liable for their books and records; therefore, under the FCPA accounting provisions, parent companies must ensure that subsidiaries maintain accurate books and records and a sufficient system of internal accounting controls. Criminal liability may also be imposed on an issuer that "knowingly" circumvents or fails to implement a system of internal accounting controls or falsifies books and records.

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The UK Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011. It sets out two general offences of bribing someone and being bribed, which are committed when someone:

- offers, promises or gives another person a bribe;
- requests, agrees to receive or accepts a bribe; or
- gives a financial or other advantage in connection with a person performing a function "improperly".

The improper performance of a function is one that breaches an expectation that the function will be performed in good faith, impartially or as a result of a position of trust.

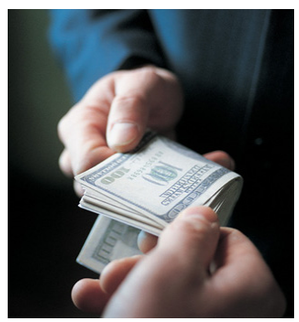
In addition, bribing a foreign official is an offence regardless of where the bribe is committed, if performed by a UK national or resident. This offence is committed when a person bribes a foreign public official or offers an advantage to such an official:

- with the intention of influencing the foreign public official in his capacity as such an official;
- to obtain or retain business or an advantage in the conduct of business; and
- when the official is not permitted or required by local law to be influenced by this business or advantage.

Finally, there is a new corporate offence of failing to prevent bribery. An organisation will be liable if:

- a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for the organisation; and
- there are no "adequate procedures" in place designed to prevent bribery.

It is subject to an adequate procedures defence and reflects the UK government's emphasis on corporate culture and the need for everyone within the organisation to be committed to preventing bribery. Organisations subject to this provision in the Bribery Act include UK companies, UK partnerships and non-UK companies and partnerships that do business in the UK. The Bribery Act, therefore, covers companies with only a limited connection with the UK. Third parties that could potentially trigger a liability for the organisation under the



Bribery Act ("associated persons") include any person who performs services for or on behalf of the organisation. It may include, for example, the company's employee, agent, subsidiary, consultant or joint venture partner.

It is a defence to the corporate offence of failing to prevent bribery that the organisation had "adequate procedures" in place designed to prevent persons "associated" with the organisation from committing bribery offences. "Adequate procedures" are not defined in the Act. The government has published its guidance to organisations on how the defence can be established. The guidance is not prescriptive and it is not binding. The guidance focuses on six key principles: (i) proportionate procedures, (ii) top-level commitment, (iii) risk assessment, (iv) due diligence, (v) communication and training, and (vi) monitoring and review.

The penalties for breaching the provisions of the Bribery Act are severe, with conviction carrying unlimited fines for businesses and up to ten years' imprisonment and/or an unlimited fine. The potential damage to an organisation's reputation, however, cannot be quantified. Businesses also risk being excluded from bidding on public or utilities contracts if they have been convicted of a bribery offence (under mandatory exclusion rules in Europe), and they are also likely to incur negative publicity and damage to their reputations.

If any of the offences of bribing another person, being bribed or bribing a foreign public official are committed by an organisation, any "senior officer" is guilty of the same offence if he or she has "consented" to or "connived" in the commission of the offence provided that, if the offence is committed outside the UK, he or she has a close connection to the UK. This provision places an obligation on senior officers to ensure that they are not deemed to have consented (explicitly or implicitly) to bribery committed by others. The provision reiterates the need for an organisation's anticorruption culture to be led from the top (as envisaged in the UK government's guidance). "Senior officer" is widely defined to include a director, manager, secretary or similar officer. A close connection will be established if the officer is a British citizen, a British national (overseas) or an individual ordinarily resident in the UK.

Russian Anticorruption Legislation

While it may be a surprise to many international companies operating in Russia, the Russian Federation has a fairly robust set of anticorruption laws. The Russian anticorruption legislation is more fragmented than the U.S. and UK legislation, and mainly comprises the following legislative acts (Anticorruption Laws):

- Law on Counteracting Corruption: which provides the legal definition of corruption and sets forward main principles and system for counteracting it.
- Public Service Law: which sets forth general standards of public servants' conduct (e.g., an obligation to disclose any personal interest in particular affair/state function).
- Anticorruption Expert Review Law: which establishes a procedure for review of legislative acts and their drafts for potential corruption.
- Administrative Offences Code and Criminal Code: set forth the liability (administrative or criminal) for violation of the Anticorruption Laws.
- Various orders and resolutions of state bodies and authorities: establish detailed regulations of particular issues raised in other Anticorruption Laws.

In general, corruption under Russian law comprises a wide range of acts that are committed or attempted (i) in abuse of official position/powers and (ii) in exchange of material values (transferred in money or otherwise) (Corruption Offences).

Under Article 1 of the Law on Counteracting Corruption, the following acts may constitute Corruption Offences: (i) abuse of official position or powers, (ii) giving or taking a bribe, or (iii) corrupt business practices. In addition, other acts relating to the Corruption Offenses can amount to a criminal or administrative offence while not being part of the legal definition of corruption. For example, acting as an intermediary with respect to giving or taking a bribe amounts to a criminal offence or a state official combining his office with employment in a commercial organisation constitutes an administrative offence.

A person who has given a bribe may establish a defense to criminal liability if he (a) provides significant assistance to the state authorities in the course of investigations, (b) voluntarily reports about giving a bribe immediately after giving it, or (c) proves that he gave the bribe under pressure from the officer that took it (i.e., solicitation of the bribe took place).

Potential Liability

Russian law sets forth two types of liability that can be imposed for the Corruption Offences (excluding bribe giving or bribe receiving): (i) administrative liability and (ii) criminal liability. The two types of liability cannot be imposed concurrently (i.e., each Corruption Offence can lead to imposition of either administrative or criminal liability depending on (i) the type of offence and/or (ii) amount of material values received/given in exchange as part of the Corruption Offence).

"The Russian anticorruption legislation is more fragmented than the U.S. and UK legislation."

Administrative Liability

- Types of Corruption Offences: administrative liability can be imposed for a limited number of Corruption Offences, for example, for unlawful employment of a public officer or unlawful remuneration given to a public officer on behalf of a legal entity.
- Statute of limitations: six years from the date when the administrative offence was committed.
- Punishment: by means of imposition of a fine in the amount up to 100 times the unlawful remuneration plus in certain cases a confiscation of material values provided as such unlawful remuneration.

Criminal Liability

- Types of Corruption Offences: criminal liability is imposed for most of the Corruption Offences.
- Statute of Limitations: from two to 15 years from the date when the Corruption Offence was committed.
- Punishment: by means of (i) imposition of a fine, (ii) suspension of a right to hold office, and/or (iii) imprisonment from three to 15 years.

Fines

- A fine can be imposed in the amount up to 100 times the amount of the bribe (depending on the amount of the bribe, on whether it was given to promote a lawful act or to motivate commitment of an unlawful (or even criminal) act, etc.).
- In most cases the amount of the fine cannot be less than RUB 25,000 (about USD 830) or greater than RUB 500 million (about USD 16.7 million).

Under Russian law, bribe-giving and bribe-taking are crimes (as opposed to administrative offences) regardless of the amount and the factual form of the bribe (i.e., whether the bribe consisted of money/property or acts/services/provision of rights

that have value). The type and amount of liability for a bribe depend on (i) the amount of the bribe, (ii) whether it was given in exchange of generally legal or illegal acts, and (iii) other circumstances of a case. The liability for bribe-taking is usually stricter than that for giving a bribe.

Liability for Taking a Bribe

- Minimum: taking a bribe in a small amount in exchange of legal acts that fall within competence of the officer (including a foreign public officer) or in exchange of general "patronage" in a particular matter, can involve the following liability:
  - (i) a fine in the amount of 20 - 50 times the amount of the bribe and suspension of a right to hold office for up to three years, or
  - (ii) imprisonment for up to three years and a fine in the amount of 20 times the amount of the bribe.
- Maximum: taking a bribe in the amount more than RUB 1 million (approximately USD 35,000), which is considered under Russian law as a bribe of a large amount, can involve the following liability:
  - (i) a fine in the amount of 80 - 100 times the amount of the bribe and suspension of a right to hold office for up to three years, or
  - (ii) imprisonment from eight to 15 years and a fine in the amount up to 70 times the amount of the bribe.

Liability for Giving a Bribe

- Minimum: giving a bribe (provided there are no aggravating circumstances, such as the bribe being for a significant amount or giving a bribe in exchange of illegal acts) can involve imposition of the following liability:
  - (i) a fine in the amount of 15 - 30 times the amount of the bribe, or
  - (ii) imprisonment for up to two years and a fine in the amount of 10 times the bribe.
- Maximum: giving a bribe in a large amount (i.e., more than RUB 1 million, as discussed above) can involve imposition of the following liability:
  - (i) a fine in the amount of 70 - 90 times the amount of the bribe, or
  - (ii) imprisonment from seven to 12 years and a fine in the amount of 70 times the bribe.

Russian Legislative Developments

In 2011 a number of important amendments to the Anticorruption Laws were made. The amendments to the Anticorruption Laws introduced in May 2011 include:

- implementation of a system of fines that depend on the amount of a bribe as an alternative to the other types of liability, and
- an increase of the statute of limitations for administrative liability for violation of the Anticorruption Laws up to six years from the date when the violation took place.

The logic of the amendments was that a system of severe fines can be more effective than "purely" criminal punishments (such as imprisonment) that are not often imposed in practice.

Another important set of amendments was published in November 2011, which relate, among other things, to the following:

- Disclosure of Tax or Bank Secrecy - simplification of access to information about income/property: at the request of state authorities, the tax authorities and banking institutions have to disclose the information (including confidential information) with respect to the income of persons that are under control with respect to compliance with the Anticorruption Laws. Such persons can include (i) candidates for a position of a public office (including a position of judge), and (ii) public officials who have an obligation to disclose information about their income if such disclosure becomes subject to a state inspection.
- Obligation to Inform about a Proposed Corruption Offence - a public officer who has been proposed a Corruption Offence has to inform the respective state authorities (at the place of his employment or the state prosecution authorities). Any violation of such obligation may lead to dismissal of the public official from his office or imposition of liability otherwise.

"The logic of the amendments was that a system of severe fines can be more effective than 'purely' criminal punishments ... that are not often imposed in practice."

- Obligation to Eliminate any Conflict of Interests - a public official who becomes personally interested in the results of his work/functions or who otherwise becomes involved in a conflict of interests with respect to performance of his employment duties has to take all necessary measures in order to eliminate such conflict, including to inform his supervisor. The failure of the state official to

take measures in order to eliminate the conflict of interests, as well as the failure to do so by his supervisor, may lead to dismissal of the state officer and/or his supervisor or to imposition of liability upon them otherwise.

- Employment upon Termination of State Public Function - within two years of the termination of employment as a public official, most of the public officials may be employed with a commercial or non-commercial organisation only upon approval of a special state commission. Such former public officials will have to disclose to their new employers the fact that they used to be at the state service as well as inform the state authorities at the place of their public service about their new employment.

Alleviate Anticorruption Legislation Risks with King & Spalding

Companies operating in Russia and the CIS need lawyers with experience in order to alleviate risks associated with the global anticorruption legislation. Our first-class team of lawyers focusing on anticorruption legislation includes former senior government officials from the U.S. Department of Justice and the SEC. It is led by the former Assistant Attorney General in charge of the Criminal Division of the Department of Justice. Handling significant corruption matters from both sides of the table has given our team a strong and current command of how anticorruption legislation is being enforced in today's global business environment.

Combining our lawyers in the U.S., Europe and Russia, we know what the enforcement authorities expect in conducting internal investigations, taking remedial actions, designing compliance programs, etc.; we have sufficient depth to handle numerous, simultaneous investigations around the world; we have the experience to recognize where investigative lines may be appropriately drawn; and we have a high level of credibility with the enforcement authorities, which allows them to be confident regarding our findings and representations.

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