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Russia Amends Anti-Corruption Law to Require Affirmative Anti-Corruption Compliance Measures

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On January 1, 2013, Russia implemented an amendment to its anti-corruption laws that appears to go beyond the reach of both the U.S. Foreign Corrupt Practices Act (“FCPA”) and the U.K. Bribery Act (“UKBA”) to the extent it requires all corporations organized in Russia to develop anti-corruption compliance measures.

Background: The Law and the Amendment

The new law, or Article 13.3, “The Obligation of Organizations to Undertake Anti-Corruption Measures” (“Article 13.3”), amends Russian Federal Law 273, “On Countering Corruption” (“FL 273”), which Russia enacted on January 10, 2009 in response to Russia’s ratification of the United Nations “Convention Against Corruption” and the Council of Europe’s “Criminal Law Convention on Corruption.” Until the passage of Article 13.3, FL 273 did not impose any affirmative obligation on companies doing business in Russia to implement anti-corruption compliance measures.¹ Now it does.

FL 273 defines corruption to include the following activities: abuse of office, bribery, acceptance of bribes, abuse of authority, commercial bribery, or other illegal use of office by an individual contrary to the interests of society and the state for the purpose of gaining profit (in the form of money, valuables, other property or services of a proprietary nature, other property rights either for oneself or for third parties, or the illegal provision of such benefits by other individuals), and the performance of such activities on behalf of, or in the interest of a legal entity. FL 273 applies to individuals and legal entities.

Article 13.3 contains only two clauses: 1) an introductory clause stating that organizations are obliged to affirmatively develop, implement and undertake anti-corruption measures; and 2) a list of six suggestions for what those anti-corruption measures may include:

- Identifying departments and officers who will be responsible for the company’s compliance;
- Cooperating with law enforcement agencies;
- Developing and implementing anti-corruption standards and procedures;
- Adopting a code of professional ethics and conduct;
- Preventing and resolving conflicts of interest; and
- Preventing the creation and use of false documents.

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Though neither Article 13.3 nor FL 273 provides a definition of the term “organization,” it likely applies to all companies operating in Russia, without any limitation. As such, it appears that all companies operating in Russia, including foreign entities, must adopt anti-corruption measures.

Notably, even though Article 13.3 creates an affirmative obligation, it lacks specifics, providing only suggested compliance measures that may or may not be sufficient depending on the circumstances. Indeed, Article 13.3 does not appear to require a written compliance policy or procedures. While the lack of specific guidance may create additional uncertainty for companies operating in Russia, it could also be read to provide flexibility for companies of various sizes, resources, and risk profiles. In any event, the sufficiency of an organization’s anti-corruption compliance measures will still require a case-by-case judicial determination.

Neither Article 13.3 nor FL 273 contains a penalty provision. If a violation of FL 273 is determined, the Court will also refer to Article 19.28 of the Code of Administrative Offenses, which provides administrative penalties for individuals and legal entities. Criminal violations are separately addressed in the Criminal Code for individuals, but not for legal entities.

Practical Effect of Article 13.3 Likely No Greater Than U.S. and U.K. Anti-Corruption Laws

As a practical matter, the effect of Article 13.3 may be no different than the impact of the FCPA or UKBA for companies operating in Russia, the U.S., and the U.K. While neither of the latter creates an affirmative obligation to establish a written compliance program, Section 8B.2.1 of the U.S. Sentencing Guidelines sets forth the elements of an effective ethics and compliance program. A program that satisfies these minimum standards may allow the company to benefit from a potential discount in settlement fines and penalties – as calculated under the Sentencing Guidelines – if a violation of the U.S. FCPA or other criminal violations are later discovered. This effectively creates a duty to have an effective compliance program. The recent DOJ/SEC FCPA Guidance (p. 56) also indicates that the enforcement agencies will “consider the adequacy of a company’s compliance program when deciding what, if any, action to take.” Similarly, the UKBA provides for a complete defense to a charge of corporate failure to prevent bribery (Section 7) if the company has implemented “adequate procedures” to prevent and detect corrupt misconduct. The U.K. Ministry of Justice has identified specific principles for bribery prevention necessary to establish such a complete defense.

Accordingly, although there may be differences in these respective statutes in the ways they encourage compliance and deter corruption, all three effectively create an obligation to develop compliance measures. With respect to Article 13.3, however, it is unclear whether implementation of the suggested compliance measures will prevent administrative liability for legal entities. It is also unclear whether a company’s failure to have compliance measures under Article 13.3 will be pursued as a stand-alone administrative offense. Indeed, Article 19.28 of the Code of Administrative Offenses does not expressly include an offense for failure to have a policy. Additionally, Article 13.3, as drafted, does not expressly require an underlying corruption-related violation, and it remains to be seen whether Russian authorities will attempt to enforce Article 13.3 without at least an underlying allegation of corruption.

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What Does This Mean for Your Company?

Russia lacks a history of meaningful and consistent enforcement of anti-corruption laws. Indeed, with a Corruption Perceptions Index ranking of 133 out of 176 and a score of 28 out of 100, public perception is that corruption in Russia is rampant, and Russia still has a long way to go toward convincing the world that it is serious about fighting corruption. The clearer standards set by the U.S. and U.K. are thus likely to continue to serve as the primary practical vehicles driving enforcement activity in Russia for some time, particularly for multinational corporations operating in all three jurisdictions. Nonetheless, Russia joined the OECD Anti-Bribery Convention in 2012, and as the host nation of the 2013 G20 summit, declared that fighting corruption is a top priority. Companies should therefore be proactive in their compliance with Article 13.3.

If your company is doing business in Russia, Article 13.3 likely will apply. Although not entirely clear, if your company already has a compliance program in place that meets the standards set forth in the guidance from the U.S. and U.K. authorities, it is unlikely that additional measures will be necessary to comply with Article 13.3 as long as the existing program is specifically applicable to your Russian operations. If your company is considering implementing an anti-corruption compliance program for the first time and/or tailoring an existing program to your new Russian operations, depending on the nature of your business, some or all of the following measures may be appropriate under Article 13.3:

- Creating a written anti-corruption policy, containing clear guidance to company personnel as to how to properly provide gifts, entertainment and charitable contributions;
- Designating responsible persons, under the oversight of a senior officer, for developing and monitoring a compliance program;
- Communicating the company's policy against bribery to all levels of management, the workforce and any relevant external actors;
- Creating a widely circulated code of conduct and ethics;
- Creating training materials and procedures to determine who should be trained, how they are trained, how often they are trained, and the substance of the trainings;
- Implementing robust risk assessment methodology and procedures, tailored to particular operations and areas of potential exposure;
- Developing robust procedures for periodic monitoring and testing, including financial monitoring procedures, internal audit procedures, and internal reporting mechanisms ("hotlines"); and
- Identifying and addressing risks of bribery in certain relationships, particularly those with its agents, joint ventures, intermediaries, and other third-party business partners.

It is important to note that compliance measures are never one-size-fits-all, but rather should be tailored to a particular operation and the scope and extent of known risk. Accordingly, a company doing business in Russia should consult with legal counsel specializing in anti-corruption compliance to assess existing compliance measures and/or advise with respect to the drafting and implementation of appropriately tailored policies and procedures.

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¹ The Russian Code of Administrative Offences, Article 2.1, includes a general provision that a legal entity shall be deemed liable for an administrative offence if it is determined that such entity had the ability to comply with the applicable laws but failed to take “all measures to comply” with such laws that were within the entity’s control. Neither the Russian Code of Administrative Offences nor FL 273, however, defines the scope or meaning of this standard, which therefore requires a case-by-case judicial determination. Article 13.3 may provide some additional guidance in this regard with respect to bribery offenses.