

Foreign Corrupt Practices Act Practice

New Russian Anti-Corruption Guidance in Conflict with U.S. FCPA Requirements

Earlier this year, Russia's Supreme Court issued new anti-corruption guidance that could pose challenges for companies conducting business in that country. In particular, Russian authorities have drawn their definition of a bribe more narrowly than other anticorruption regimes, including under the U.S. Foreign Corrupt Practices Act (FCPA) and the U.K. Bribery Act, creating a gap between payments that may be tolerated in Russia and what is permissible under U.S. or U.K. law. Companies could thus find themselves in the awkward position of trying to balance the expectations of Russian officials with the requirements of the FCPA and the Bribery Act. Based on this tension, companies operating in Russia may want to make extra efforts to ensure local staff and agents recognize that they must stay within the boundaries of the FCPA and the Bribery Act regardless of what Russian law may allow.

On July 9, 2013, the Supreme Court of the Russian Federation issued Resolution No. 24 on Court Practice in Bribery Cases and Other Corruption Crimes.^[1] Among other things, the resolution defines bribery *to exclude* payments or benefits made to third parties, even when the payments were requested by a government official in return for official action.^[2] So long as Russian officials or their relatives will not directly benefit from the payment, officials are allowed to request and direct payment to third parties where, for example, they might work or whose activities they may favor. Based on the resolution, Russian officials may feel justified requesting donations to charitable organizations or other businesses in return for an official action that a company is seeking.

The FCPA does not entirely prohibit charitable donations, but guidance from the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) makes clear that companies must proceed with caution and cannot use such donations as a cover for otherwise improper payments.^[3] For example, in 2012 the SEC brought an FCPA enforcement action against Eli Lilly & Co., alleging that a subsidiary of the pharmaceutical company made \$39,000 in donations to a Polish charity. The SEC claimed the donation had been made at the request of a government official who had influence over pharmaceutical purchases in Poland.^[4] In 2004, the SEC brought a similar action against Schering-Plough Corp. involving donations of \$76,000 to the same Polish charity at the request of the same Polish government official.^[5] Likewise, guidance issued by the U.K. Ministry of Justice warns that charitable donations present enhanced risk under the Bribery Act, particularly when made at the request of a government official.^[6] Given these precedents, a situation in which, for example, a Russian official agreed to take favorable official action in exchange for a donation to a designated charity or a payment to a personal acquaintance's consulting firm would very likely run afoul of U.S. and U.K. law and draw the attention of law enforcement in those countries.

While the FCPA provides as an affirmative defense the making of payments that are lawful under a foreign country's laws,^[7] the defense is exceedingly narrow.^[8] The defense requires that a payment be expressly and affirmatively permitted under a foreign jurisdiction's laws. The defense has never been successfully raised. As for the situation in Russia, while the Russian Supreme Court's resolution suggests Russian courts would not treat charitable donations as bribes, that guidance may fall short of the affirmative approval required under the FCPA's local law defense.

Thus, companies operating in Russia should be aware that local expectations may be in conflict with the companies' obligations under U.S. and U.K. law. As a result, companies should consider enhanced monitoring of local Russian staff and third-party agents who may not recognize the tension between what they may be asked to do by Russian officials and its potential illegality under the FCPA or the Bribery Act. Companies should also make efforts to ensure that employees and business partners in Russia are aware of internal anti-corruption policies that may impose more stringent requirements than either local law or custom may allow.

[1] Russia joined the Organization for Economic Co-operation and Development's Anti-Bribery Convention in 2012 and has recently been updating its anti-corruption laws to bring them into accord with international standards. But as this situation makes clear, accepting the OECD principles does not guarantee consistency with other countries' laws, including the FCPA and Bribery Act.

[2] Resolution, Art. 23.

[3] Criminal Div., U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exchange Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 16-19 (Nov. 14, 2012) (hereinafter "Resource Guide").

[4] Complaint, *SEC v. Eli Lilly & Co.*, No. 1:12-cv-02045 (D.D.C. Dec. 20, 2012).

[5] Complaint, *SEC v. Schering-Plough Corp.*, No. 1:04-cv-00945 (D.D.C. June 4, 2004).

[6] U.K. Ministry of Justice, The Bribery Act 2010, at 40 (March 2011).

[7] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78-dd3(c)(1).

[8] See, e.g., Resource Guide at 23.

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