

Echoing the Anti-Corruption Wave in India

The applicability of the Foreign Corrupt Practices Act in India -- a country that features prominently on the world map, both in terms of economic growth and increasing international regulatory oversight.

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The Indian economy is the seventh largest economy in the world by nominal GDP, and ranks third in terms of purchasing power parity according to the International Monetary Fund. With its low labor and sourcing costs, and a growing consumer base, India continues to be a valuable destination for international investment, and for multinational corporations to find growth. With many Indian entities expanding into international markets, India now features prominently on the world map, both in terms of economic growth, and increasing international regulatory oversight.

The Corruption Perceptions Index, released by Transparency International, ranks India as 79th of 176 countries based on the perception of India's public sector, which makes India feature prominently on the watch-list for law enforcement agencies globally.

Over the last few years, the Indian government has been working to promote entrepreneurship in India as well as improve the ease of doing business. With initiatives like the recent demonetization drive to curtail the shadow economy, corruption and black money, the public sentiment toward investing and setting up business operations in India has been increasingly positive. However, due to confusing business practices and lack of systematic procedure, together with conflicting cultural norms and bureaucratic control over business, transacting in India remains as challenging as before. These lacunas in procedural aspects of conducting business, constantly changing economic policies and growing interaction with the government are continually exploited by illicit means.

To combat corruption and curb bribery, India had enacted the Prevention of Corruption Act in 1988 (PCA). While the PCA aims to curb corruption among and through public officials, it remains legislation without teeth. This lack of effective legislation against the practice of bribery has allowed a culture of bribery to seep into business practices, and requires international business entities and investors to therefore tread with caution. While most investors and business entities remain oblivious to flouting Indian laws, many ignore the applicability of the U.S. Foreign Corrupt Practices Act of 1977 (FCPA) to their activities in and with India.

Challenges of Complying with FCPA in India

Continual systemic, cultural and political challenges contribute to India being viewed as a country devoid of anti-corruption laws and mechanisms, thereby making the U.S. Department of

Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) wary of business practices in India.

While petty bribes, kickbacks, unrecorded transactions, and customary payments and gifts on festivals and celebratory occasions are rampant in India, many business entities and individuals view such practices, albeit illegal, as being culturally relevant and customary, and hence permissible. However, the FCPA clearly identifies any form of cash, gifts, travel, meals and entertainment to be prohibited under the act, and does not prescribe any allowable cash limit for such actions, customary or otherwise, unless it falls under the purview of the exceptions provided therein.

In India, FCPA's definition of foreign official would bring all persons under the payroll of the government, both state and central, including government officials of all cadres, all law enforcement officials, as well as government-owned and controlled businesses and enterprises within its ambit. Indian corporations that are issuers of any type of security in the United States would also be within scope. In addition, domestic operations that are subsidiaries of corporations incorporated under the laws of the United States, as well as any individual holding U.S. citizenship would fall under the purview of the FCPA. Further, any company or individual conducting business while in the territory of the United States is also governed by the FCPA. As noted by an analysis by *The Hindu* newspaper, while India has over 3 million employees at the Central Government level, 59.69 percent of these public officials belong to the "Group C" category, and 29.37 percent to "Group D," which are the two lowest paid groups of public officials in India. With inflation on the rise, bureaucratic control, and the absence of transparency and accountability, these employees facilitate a breeding ground of corruption and bribery, which, of any kind and form, is punishable under the FCPA.

Moreover, the United States law enforcement agencies have in the past, as in its case against Siemens, taken the stand that a payment made in a wholly foreign transaction, if in U.S. dollars, may come under the purview of the FCPA since it goes through a banking channel in the United States, thereby extending the scope of the FCPA.

Applying the FCPA in India

In their aim to control corruption and payment of bribes, and to strengthen the enforcement of the FCPA globally, the DOJ and SEC have increasingly been bringing legal action against business entities and individuals in India. For instance, Oracle, a large multinational software corporation was charged with violating the FCPA because its Indian subsidiary secretly set aside money, off the company's books, to make unauthorized payments to vendors.

In another case, the SEC charged Diageo, a large corporation in the liquor industry, with making illicit payments to government officials through its Indian subsidiaries to obtain favorable sales and tax benefits.

Mondelez International, the parent company of Cadbury India (now Mondelez India Foods), agreed to pay \$13 million in civil penalties to the SEC to settle charges related to internal controls and books-and-records provisions of the FCPA.

Many business entities enter into joint ventures with Indian counterparts, or hire consultants and independent contractors to work as intermediaries to circumvent the administrative challenges that working in India might present. The FCPA makes such business entities liable for the acts performed by these intermediaries or third parties. For example, in 2016, Anheuser-Busch InBev paid \$6 million to the SEC because the third-party sales promoters used by its Indian minority-owned joint venture made improper payments to government officials in India to increase sales and production. Further, the FCPA attributes personal liability to senior management for violations committed under the act, particularly with respect to lack of adequate record keeping, and the company not adhering to compliance requirements of the FCPA. Therefore, acts performed by low level management or people on the ground, who may think it appropriate to indulge in petty bribery to get work done, place liability on the company and bring it under the FCPA radar for corrupt practices.

When India's Reforms Meet FCPA

The FCPA contains an exception for “facilitation” or “grease” payments that may be made to expedite or secure the performance of a routine governmental action. Routine governmental action is defined as “only an action which is ordinarily and commonly performed by a foreign official, political party, or party official” and can include obtaining permits and licenses, processing government papers, and matters relating to police protection, customs clearance, scheduling inspections and providing utility services etc. However, under the PCA, no payments outside the ordinary course of business are permitted, and the PCA maintains a strict “no facilitation payment” policy, thereby making these payments, which may be legal under the FCPA, illegal under Indian law. Undertaking these facilitation payments exposes corporations to serious risk since the FCPA requires such payments be adequately disclosed, creating a trail of payments, which may be punishable under Indian law.

The PCA defines “public servant” as any person in the service, pay or remunerated in any way by the government, local authority, corporation established by or under a central or state law, including judicial officers, persons employed by state universities, arbitrators, etc. While the PCA makes every public servant that accepts any form of gratification other than legal remuneration; middlemen who take any form of gratification to influence public servants or to exercise personal influence on a public servant; and persons abetting such exchange of gratification, liable, the PCA is only applicable to individuals and is rarely implemented. On the other hand, the DOJ and SEC have been increasingly prosecuting, and bringing under investigation many multi-national corporations who have business interests in India. Therefore it is essential that business entities have an astute understanding of Indian business practices, and how businesses and individuals can flout the requirements of the FCPA.

Further, the FCPA, in principle, makes public its prosecutions, ongoing investigations and any settlements between the business entity and the DOJ and/or SEC. With the increasing jurisdictional scope of the FCPA, business entities that were spared the prosecution and public backlash owing to rarely enforced Indian laws, including lack of anti-corruption legislation governing private corporations, now face potential public scrutiny.

The Way Forward

In India, it is largely believed that every act of procedural misconduct or illicitly circumventing bureaucratic red-tape can be covered up by a quick bribe at lower levels. However, with the increasing relevance of the FCPA, businesses not only need to take future compliance into account but also make sure that prior conduct does not flout the FCPA. While Indian lawmakers are making significant forays to combat issues of corruption and bribery by passing the Lokpal and Lokayuktas Act, 2013, and introducing the Prevention of Corruption (Amendment) Bill, 2013, which looks to amend the PCA and bring commercial organizations within its purview, the road to compliance with international standards is a long and winding one.

The Indian government has been increasingly cooperative with its U.S. counterparts in the investigation of claims of bribery and corruption, further bolstering the applicability of the FCPA in India. While the PCA is tougher on individuals, the FCPA is wider in scope, making it important for business entities and individuals to stay on the right side of both these laws. This also increases the relevance of compliance as a day-to-day business function. As good business practice, business entities and individuals practicing or intending to carry out business in India should:

1. Undertake risk assessments in accordance with their line of business to ensure that their organization is at no point, and at no level, flouting any legal requirements, either under the FCPA or under applicable Indian law;
2. Understand the background of the industry, and the local practices of that industry in India to tailor operations to be both conducive to business activity, and compliant with anti-corruption laws;
3. Have an anti-bribery compliance policy and a comprehensive ethics code which cover, in detail, the dos and don'ts, across all applicable jurisdictions;
4. Vet contracts to make sure that the employees of the company, and any third parties entering into contracts with the company adhere to the relevant anti-corruption laws; and
5. Preserve and maintain, in a manner laid out under the FCPA and the Indian Companies Act, 2013, the accounts and books of record of every transaction.

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