Anti-bribery compliance in India: Both sword and shield

Dechert LLP

In recent years, both the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have stepped up their enforcement of the Foreign Corrupt Practices Act (FCPA), including to address violations in India. While it remains to be seen whether this increased enforcement by U.S. regulators will be accompanied by a concerted and sustained anti-corruption push on the part of Indian enforcement authorities, there has been an uptick in anti-corruption efforts in India in the last five years.

It is therefore essential for Indian corporations and for multinationals conducting business in India to develop and implement robust anti-corruption/anti-bribery plans. Such compliance plans can provide a good defense should enforcement actions arise notwithstanding best efforts at compliance. At the same time, multinational corporations consider the risks associated with acquiring, investing in, entering into a joint venture or otherwise partnering with an Indian corporation that does not have a robust compliance program to be quite high, perhaps unacceptably so. Seen in this light, Indian companies that take a proactive approach to compliance also will enjoy a competitive advantage over peer companies that do not.

FCPA actions arising from conduct in India 2001-present

Since 2001, the DOJ and SEC have brought FCPA enforcement actions against more than a dozen individuals and entities whose conduct in India violated the FCPA's anti-bribery and/or books and records provisions. As shown in **Table 1**, both the DOJ and the SEC have targeted misconduct in India across a wide range of industries from manufacturing and construction to oil and information technology.

A more in-depth look at the recent actions brought against two companies – one Brazilian, one Belgian – illustrates the depth and breadth of U.S. regulators' reach under the FCPA and the types of conduct that companies must avoid in India to limit their FCPA risks.

Embraer S.A.

On 24 October 2016, Brazilian jet maker Embraer S.A., whose American Depository Receipts ("ADRs") are traded on the New York Stock Exchange, agreed to pay approximately $205 million in fines and penalties to settle charges from the SEC and DOJ that it violated the FCPA in connection with activities in India and other countries.[1]

According to settlement documents, in July 2008, Embraer engaged a third-party Indian commercial agent to assist it in securing a contract with the Indian Air Force. However, since such arrangements were not allowed under Indian law, Embraer and its Swiss subsidiary entered into sham consulting agreements with shell companies domiciled in the United Kingdom and Singapore that were affiliated with the Indian commercial agent in order to make payments to the agent related to the Indian Air Force contract.

Both the SEC and the DOJ brought actions against Embraer alleging that this conduct violated the FCPA's requirements to implement effective internal controls and to maintain accurate books and records. Notably, neither the DOJ nor the SEC explicitly alleged that the agent bribed any Air Force officials in order to secure the business, and the conduct in India was not alleged to have violated the FCPA's anti-bribery provisions (though conduct in other countries did result in charges related to those provisions).

Anheuser-Busch InBev SA/NV

On 28 September 2016, Anheuser-Busch InBev SA/NV (AB InBev), the largest brewer in the world (based in Belgium, but with ADRs traded on the New York Stock Exchange), agreed to pay fines and penalties totaling approximately $6 million to settle SEC charges that it violated the FCPA's internal accounting controls and books and records provisions, as well as the Dodd-Frank Act's whistleblower protections, through conduct in India.

According to the settlement documents, between 2009 and 2012, AB InBev had a 49% stake in an Indian joint venture called InBev India International Private Limited (IIIPL) which managed the distribution of AB InBev's wholly-owned Indian subsidiary Crown Beers Private Limited (Crown). IIIPL used third-party promoters to make improper payments to Indian government officials in order to extend brewery hours and to increase its market share. IIIPL disguised these improper payments by paying excessive commissions and reimbursements to the promoters and then seeking reimbursement from Crown, which recorded the payments as legitimate promotional expenses. IIIPL did not conduct any diligence on the promoters, either before or after retaining them. The SEC also alleged that AB InBev failed to take steps to prevent IIIPL from destroying documents related to these activities upon becoming aware of the SEC's investigation. These actions led to charges that AB InBev had violated the FCPA's requirements to implement effective internal controls and maintain accurate books and records (though again, no anti-bribery violations were alleged).

In 2010 and 2011, a Crown employee informed AB InBev personnel that IIIPL may have been making improper payments to Indian government officials through promoters and recommended performing due diligence on such third parties. The employee was fired in 2012, and Crown included a provision in the separation agreement with the employee prohibiting him from disclosing any non-public information related to

1 The company can, however, receive up to $20 million in credit for disgorgement payments made to Brazilian authorities.

Crown's activities, except as may be required for accounting or tax purposes or otherwise required by law. The former employee, who had been communicating with the SEC, stopped doing so because he feared that continuing the communication might trigger the agreement's liquidated damages provision that would require the employee to pay up to $250,000 to Crown. The SEC charged that these actions violated requirements in the Securities and Exchange Act of 1934 (as implemented by the Dodd-Frank Act) prohibiting companies from taking any action to impede a whistleblower's ability to communicate with the SEC.

Takeaways

Corporations that operate in India should draw the following lessons from these enforcement actions (and others like them):

- Ensure that employees (and employees of subsidiaries) comply with local Indian laws and regulations.
- Ensure that employees (and employees of subsidiaries) abide by the company's internal code of ethics and other compliance policies.
- Conduct due diligence on third parties prior to entering into a relationship.
- Execute formal written contracts when engaging third parties.
- Monitor performance of third parties once they have been retained and are acting on behalf of the company.
- Take immediate action on any compliance-related deficiencies that are identified through internal audits or employee complaints.
- Ensure that employees (and employees of subsidiaries) do not destroy documents related to ongoing investigations.
- For U.S. issuers, ensure that activities in India are not misrepresented in internal records and that confidentiality and termination agreements do not contain language violating whistleblower protection obligations.

The unique compliance risks of doing business in India

Although India is the world's largest democracy, public sector corruption and the perception thereof have been a problem for decades. This environment poses a unique risk for multinational corporations seeking to conduct business in India.

India scores poorly across Transparency International's (TI) indices of corruption. India ranked 78 out of 168 on TI's Corruption Perceptions Index of 2015, which measures the extent to which a country's public sector is perceived to be corrupt. Likewise, India had a percentile rank of 36% on TI's Control of Corruption metric, which measures "the extent to which public power is exercised for private gain."

Moreover, the results of TI's Global Corruption Barometer 2013 (a survey of approximately 1,000 Indians) suggests that public sector corruption is almost expected. Specifically, it found that:

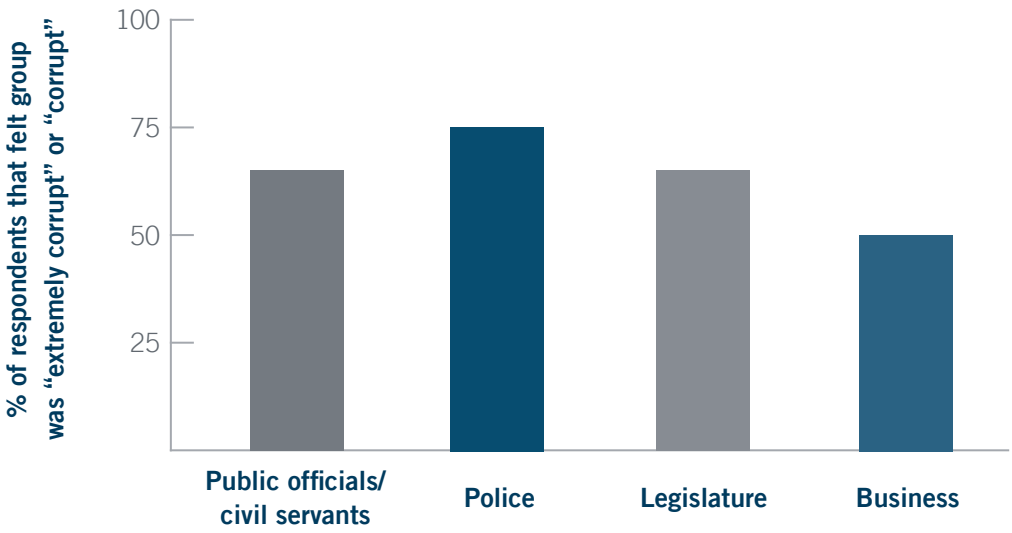
- 47% of respondents felt that public sector corruption is "a serious problem."
- 65% of respondents felt that public officials/civil servants were "extremely corrupt" or "corrupt."

– 75% of respondents felt that the police was "extremely corrupt" or "corrupt."
– 65% of respondents felt that the legislature was "extremely corrupt" or "corrupt."
– 50% of respondents felt that business was "extremely corrupt" or "corrupt."

Compounding this risk is the Indian government's outsized presence in the day-to-day activities of corporations. This constant presence creates both more opportunities and more incentives to bribe public officials. For example, India's complex bureaucracy administers an extensive permitting and licensing system; any given corporation may have to secure dozens of permits from different levels of India's bureaucracy just to set up shop. Unfortunately, many of the bureaucrats who issue these permits are both overworked and underpaid, which may lead to their willingness to demand, expect, and accept bribes. Likewise, many enterprises that are privately-owned in other countries (such as banks) are government-owned in India, again increasing interactions between business and the government.

Prime Minister Modi has promised to take a number of measures to fight corruption, including the recent demonetization of 500 rupee and 1,000 rupee notes and the recent push – under the newly amended Benami Transactions (Prohibition) Act – to crack down on illegal "benami properties," i.e., property bought in the name of someone other than the person who paid for it. It is still too early to determine the effects that these measures will have on reducing corruption in India.

Transparency International's Global Corruption Barometer 2013 (approximately 1,000 citizens surveyed)



Potential for exposure to Indian regulators

Historically, Indian enforcement authorities have not been aggressive in pursuing anti-corruption/anti-bribery cases even when the SEC and/or DOJ brought enforcement actions based on activities arising out of India. Indeed, TI's Global Corruption Barometer 2013 found that almost 70% of respondents thought the government's anticorruption efforts were either "ineffective" or "very ineffective."

In the past five years, however, Indian regulators appear to be more focused on combatting corruption and bribery. In May 2011, India ratified the United Nations Convention against Corruption, affirming India's commitment to implementing mechanisms to combat bribery of foreign officials in a manner consistent with international standards. India's parliament has been considering a bill similar to the FCPA that would implement the Convention's prohibitions on bribing

foreign officials (the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill). Although the Law Commission of India released its analysis of the bill on 27 August 2015, it appears that the bill remains stuck in the legislative process. (A 2011 attempt to pass a similar bill failed.) The bill not only would establish a substantive offense for bribery of foreign officials by a corporation, but also would provide that persons responsible for overseeing the corporation can be held guilty of an offense.

The primary anti-corruption law in effect in India is the Prevention of Corruption Act of 1988. There have been multiple attempts in recent years to amend the Act. As it currently stands, however, the Act is focused on prosecuting recipients of bribes rather than on prosecuting givers of bribes. Specifically, Section 7 of the Act prohibits public servants and those "expecting to be public servants" from accepting or attempting to accept any "gratification" other than "legal remuneration" in exchange for doing/failing to do an official act and/or for showing favor or disfavor towards a person. Section 11 prohibits public servants from accepting anything in exchange for insufficient consideration "from whom [s/] he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant." Likewise, Sections 8 and 9 prohibit individuals from accepting "gratification" in exchange for exercising their influence over public officials and/or individuals "expecting to be public officials." Section 14 imposes a separate punishment for individuals who "habitually" violate Section 8 and/or Section 9. Individuals who give bribes can only be charged under Section 12 with "abetting" violations of Section 7 and/or Section 11 and under Section 14 for "habitually" violating Section 12.

Prosecutions under the Prevention of Corruption Act have increased in recent years. For example, Former Coal Secretary HC Gupta is currently on trial for corruption related to allocations of coal blocks between 2006 and 2009. As of October 2016, the Supreme Court of India had issued 26 opinions during 2016 that touch on the Prevention of Corruption Act.

Of particular significance, Indian regulators appear to be paying more attention to SEC and/or DOJ actions. Indeed, the Indian Central Intelligence Bureau has been investigating Embraer's sale of aircraft to the Indian Air Force. Specifically, based on a tip from the Defence Research & Development Organisation (DRDO) of the Ministry of Defence, the Central Bureau of Investigation registered a Preliminary Enquiry into the employment of the Indian commercial agent for facilitating a procurement contract. It also registered a case against DRDO officials, Embraer and some of its officials, and others based on documents obtained through raids of the Indian agent's premises and other locations. The Defence Minister has promised that the CBI's investigation will continue notwithstanding the SEC and DOJ settlements. The Indian Enforcement Directorate (which is part of the Ministry of Finance) has also been investigating the Embraer matter pursuant to its authority under the Prevention of Money Laundering Act of 2002.

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Likewise, in March 2016, in response to a request from enforcement authorities in the United States, the CBI began investigating allegations that Mondelez India had bribed Indian government officials to reduce its tax burden. A month earlier, the SEC reportedly had sent Mondelez International, Inc. a letter informing the corporation that the SEC staff intended to recommend that an FCPA enforcement action be brought against it for tax evasion in India. Similarly, the Indian Central Vigilance Commission (an independent body, which per the Central Vigilance Commission Act of 2003, is charged with supervising corruption cases in other government bodies, including the Central Bureau of Investigation) has been investigating allegations that Walmart – which also is under investigation by the SEC and DOJ for FCPA violations in India – bribed officials in order to secure permits and custom clearances.

Finally, it appears that the SEC and DOJ increasingly are working with Indian regulators (among others). In its April 2016 "Foreign Corrupt Practices Act Enforcement Plan and Guidance," the DOJ's Fraud Section noted that an international approach is being taken to combat an international criminal problem, and that they and international law enforcement counterparts are sharing leads. For example, the Securities and Exchange Board of India assisted the SEC in its recent investigation of AB InBev (described above).

Importance of anti-bribery and anti-corruption compliance plans

In light of the widespread nature of public sector corruption and the perception thereof in India coupled with an increasing global enforcement regime, robust anti-corruption/anti-bribery compliance plans are crucial. Such compliance plans are the best way to prevent violations. They are also the strongest defense for a corporation that ends up in front of regulators should violations happen notwithstanding the corporation's best efforts.

For example, in 2012, Morgan Stanley's robust compliance program saved it from a DOJ enforcement action when one of its managing directors transferred a multi-million dollar real estate interest to a Chinese public official and to himself. The DOJ declined to prosecute Morgan Stanley notwithstanding the fact that the managing director had circumvented the corporation's internal controls because the company's compliance program included:

- Compliance policies that were updated regularly.
- Regular compliance trainings for employees (seven of which the managing director had attended).
- Regular monitoring, auditing, and testing of transactions and payments.
- Extensive due diligence on all new business partners.
- Stringent controls on payments to business partners.

As then-U.S. Attorney Loretta Lynch noted, "[the managing director] used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption. Despite years of training, he circumvented those controls for personal enrichment."

Compliance plans are also essential to participating in global commerce. Indeed, they are standard practice for most multinational corporations contemplating investments, joint ventures, and/or partnerships in India. For an Indian corporation, a robust compliance program should be viewed as an essential prerequisite for consideration for such opportunities as well as a source of competitive advantage over peer companies competing for the same business. It is reasonable to assume, for example, that U.S. defense companies currently contemplating Indian partnerships (as has been reported) are examining both the existence and the quality of their potential Indian partners' compliance programs. Those potential partners that do not have robust compliance programs likely are at a significant disadvantage relative to those that do, regardless of their commercial and/or manufacturing capabilities.

How Dechert can assist

Dechert has significant expertise in helping clients comply with applicable anti-corruption laws in a manner tailored to be proportionate to their level of risk and which minimize the impact on their business.

We benefit from a global network of top-ranked lawyers and former senior government officials with practical experience designing and implementing the regulations. Our extensive experience advising clients on anti-corruption compliance includes assisting Indian clients as well as multinational corporations with respect to their interests in India in:

- The design, development, and implementation of compliance programs.
- Compliance-related due diligence in the context of acquisitions, investments, securities offerings, and other transactions.
- Compliance program "health checks."
- Internal investigations in the face of government inquiries.

Table 1: FCPA enforcement actions for conduct in India (2001-present)

Date filed	Industry	Company/ Individuals	DOJ (Y/N)	SEC (Y/N)	Allegations/findings	Total monetary penalty (USD)
24-Oct-2016	Aviation	Embraer, S.A.	Y	Y	DOJ: Failed to correctly report transactions SEC: Failed to maintain proper books/ records and failed to maintain adequate internal accounting controls	$205,533,381 (For conduct in 4 countries, including for conduct in India)
28-Sep-2016	Beverage	Anheuser-Busch InBev SA/NV	N	Y	Improper payments to government officials in order to increase market share; failed to maintain proper books/ records; and failed to maintain adequate internal accounting controls	$6,008,291
17-Jul-2015	Construction	Louis Berger International, Inc .	Y	N	Bribed foreign government officials to secure contracts	$17,100,000 (For conduct in 4 countries, including for conduct in India)
17-Jul-2015	Construction	James McClung	Y	N	Involvement in bribes paid by Louis Berger International, Inc. to foreign government officials to secure contracts	No monetary penalty, but sentenced to a year and a day imprisonment
24-Sep-2012	Manufacturing	Tyco International LTD.	Y	Y	DOJ: Falsified books, records, and accounts and made payments to employees of government customers SEC: Paid or promised to pay third parties to secure contracts and/or to avoid paying fines; failed to keep proper books/records; and failed to maintain proper internal accounting controls	$26,811,509 (For conduct in 21 countries, including for conduct in India)
12-Aug-2012	Information Technology	Oracle Corporation	N	Y	Failed to keep proper books/records and failed to maintain adequate internal accounting controls	$2,000,000
27-Jul-2011	Beverage	Diageo plc	N	Y	Illicit payments to government officials to authorize sales and purchases; failed to record payments properly; and failed to maintain adequate internal accounting controls	$16,373,820 (For conduct in 3 countries, including for conduct in India)
4-Nov-2010	Offshore drilling	Pride Forasol S.A.S./Pride International Inc.	Y	Y	DOJ: Bribed an administrative judge and falsified books and records to cover up the bribe SEC: Bribed to secure improper influence; failed to maintain accurate books/records; and failed to maintain proper internal controls	$56,154,718 (For conduct in 7 countries, including for conduct in India)

Date filed	Industry	Company/ Individuals	DOJ (Y/N)	SEC (Y/N)	Allegations/findings	Total monetary penalty (USD)
17-Dec-2008	Manufacturing	Control Components, Inc.	Y	N	Corrupt payments to government officials to obtain/retain business	$18,200,000 (For conduct in 6 countries, including for conduct in India)
14-Feb-2008	Manufacturing	Wabtech - Westinghouse Air Brake Technologies Corporation	Y	Y	DOJ: Payments to government officials to gain obtain/retain business and other advantages SEC: Failed to maintain proper books; failed to maintain sufficient internal controls; and corruptly paid foreign officials to obtain influence	$675,351
1-Oct-07	Manufacturing	York International Corporation	Y	Y	DOJ: Kickbacks and bribes to get contracts on government projects; improperly recorded bribes in the boo ks SEC: Induced foreign officials to secure an improper advantage; failed to maintain proper books; and failed to maintain adequate internal controls	$22,032,880
25-Sep-2007	Management consulting	Chandramowli Srinivasan	N	Y	Bribed foreign government officials to secure improper advantage; failed to implement adequate internal controls; and falsified books/records	$70,000
23-Aug-2007	Oil	Textron	Y	Y	DOJ: Improper payment to “a non-government customer” SEC: Failed to maintain adequate internal controls	$4,685,040.70 (For conduct in 6 countries, including for conduct in India)
13-Feb-2007	Chemicals (pesticides)	Dow Chemical	N	Y	Failed to maintain sufficient internal controls and improperly recorded payments to foreign officials.	$325,000
12-Sep-2001	Oil	Baker Hughes, Inc.	N	Y	Improperly recorded a payment to a foreign official by (i) failing to determine the recipient and the purpose of the payment and (ii) inaccurately describing the payment	None

Contact us

Jeremy B. Zucker
Partner
+1 202 261 3322
jeremy.zucker@dechert.com

Darshak S. Dholakia
Associate
+1 202 261 3467
darshak.dholakia@dechert.com

Hrishikesh N. Hari
Associate
+1 202 261 3347
hrishikesh.hari@dechert.com

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