Assorted FCPA & Anti-Corruption Articles

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Global Investigations, Government Enforcement & Compliance Symposium:

By David Simon, John Turlais, Sherbir Panag, Giedrius Danelius, and Marko Kairjak

A U.S. company is conducting an internal investigation into allegationsthat employees of its foreign subsidiary paid bribes. The Company determines that Employee, an employee of the foreign subsidiary,likely paid a bribe to a government official. The Company believes that Employee should be terminated promptly. Before doing so, what should the company consider in your jurisdiction?

United States

If the Company decides to self-disclose the violation (or if U.S. regulators learn about the violation through other channels), the Company's decision to terminate Employee will likely be viewed favorably by U.S. regulators. It signals that the Company is taking anti-corruption compliance seriously and that unethical conduct by employees will not be tolerated. Moreover, the Company may receive some credit from U.S. regulators (in the form of a reduced penalty or a declination of prosecution) for identifying, investigating, and taking the first step in remediating the circumstances giving rise to the misconduct. Conversely, if the Company fails to terminate the Employee and keeps the Employee in a position where he or she could engage in or authorize further bribe payments, the DOJ and SEC will take a very dim view of the Company. Before terminating the Employee, however, the U.S. company should consult local counsel in the jurisdiction in which the Employee is located to understand the procedures and potential consequences – including, e.g., required severance payments or litigation – that might result from an immediate termination of the Employee. Depending on the circumstances, and to the extent possible, the Company should also consider requiring the Employee to cooperate in any investigation of the violation as a condition of a severance package or termination agreement. U.S. regulators often request that employees be made available for interviews, and having a cooperation clause provides a means by which U.S. regulators might be able to speak with the (now) former Employee.

Even if the Company is unable to obtain future cooperation from the Employee, the Company's attempt to do so demonstrates a commitment by the Company to cooperate with U.S. regulators, which, in turn, might also result in the Company receiving credit from U.S. regulators.

Lithuania

The termination of the Employee would not automatically eliminate liability for the Lithuanian subsidiary, but it does play an important role in developing the subsidiary's response to authorities. An employee who is suspected of committing a corrupt criminal offense can be suspended, transferred to another position (that does not present bribery risks), or, if necessary, fired. The terminated Employee would have very limited opportunities to challenge his dismissal. The risk of an individual lawsuit for unfair dismissal is minimal, and the labor unions in Lithuania are relatively weak (or, in many companies, non-existent). Upon termination, the subsidiary's best defense is to show that the Employee acted in his own interest and not in the interests of the subsidiary, and that the subsidiary did not benefit from the Employee's criminal conduct.

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Estonia

The Employee could be terminated under § 88(1)(3) under the Employment Contracts Act (ECA) due to breach of the Employee's duties. Specifically, under ECA § 15(1), § 15(2) (1) and (2)(9), an employee must perform his duties to his employer loyally, he must perform all agreed-upon work obligations, and he must refrain from actions which harm the reputation of the employer or cause distrust among the employer's clients or partners.

To be terminated, the Employee does not have to be found criminally liable of giving a bribe. However, the termination must follow the formal procedures for canceling the employment contract to avoid a potential wrongful termination lawsuit. The declaration of cancellation must be justified in writing, and the employer must follow the advance notice terms for cancellation.

India

As an initial matter, it is important to first establish whether the concerned Employee is either a managerial/administrative executive or a workman, as the legal position for these two categories varies distinctly.

The first category – managerial and administrative employees – would typically be subject to an employment contract (whether oral or, more commonly, written). The employment contract would stipulate the conditions for termination, whereby the company may terminate the employment by notice or for cause. In general, misconduct (such as bribery) is an accepted ground for termination by cause without the stipulated notice period. But if the evidence of wrongdoing is not overwhelming, the best practice is to afford the concerned employee with a show-cause notice and the opportunity of a natural justice hearing.

The second category – workmen – are covered by the Industrial Disputes Act, 1947 ("IDA"). A workman, as defined in the IDA, is "any person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward." Here again, the Company could terminate the workman on the basis of misconduct (i.e., the bribe). But the Company would need to proceed carefully to ensure that it is satisfying all the requirements for termination under the IDA, including clearly documenting the following: (i) issuance of a charge sheet; (ii) the conducting of a domestic enquiry; (iii) perusal of the enquiry officer's report; (iv) issuance of show-cause notice to the employee; and (v) issuance of an order of punishment.

Notwithstanding the termination procedures outlined above, the Company should also evaluate its disclosure obligations to statutory auditors who, in turn, have an obligation to report instances of fraud (which would include instances of bribery if the books and records of the Company are impacted). Similarly, the Company must also determine whether the Employee has made any false statement in any return, report, certificate, financial statement, prospectus, statement, or other document under the Companies Act, 2013 in connection with the bribery scheme (concealment or otherwise), which could also cast additional disclosure obligations on the Company.

A Focus On Indian Pre-Contract Integrity Pacts

By Sherbir Panag

FCPAProfessor.com

The Government of India unilaterally terminated a Euro 556 Million contract with the Anglo-Italian helicopter manufacturing company AgustaWestland on the 1st of January 2014 for breach of the pre-contract integrity pact on the basis of allegations of bribery.

Similarly in March 2012 the Ministry of Defence (which isincidentally the Ministry concerned in the AgustaWestland case as well) cashed a bank guarantee put forth by the Israeli Military Industries and blacklisted six companies amidst allegations of bribery and breach of the pre contract integrity pact. A similar blacklisting was also imposed by the Ministry of Agriculture for a period of 5 years on M/s Dow Agro Sciences India Pvt. Ltd in the year 2011. The operative term in the above cases is the 'allegation of bribery' or rather the assumption of bribery after which consequences have ensued.

What is a Pre-Contract Integrity Pact?

'Pre-Contract Integrity Pact' or 'Integrity Pact' is a tool that was developed by Transparency International to help governments, businesses and civil society fight corruption in the field of public contracting where the scope of abuse is immense owing to the large value of contracts. The 'Pre-Contract Integrity Pact' establishes binding obligations on both parties, those being the State or its instrumentalities and the commercial organisation.

As the name suggests these obligations become effective from the stage of bidding itself that is prior to the contract and remain in force thereafter as well. The Central Vigilance Commission of India in a document explaining the nature of 'Pre-Contract Integrity Pacts' states that failure to implement the Pre-Contract Integrity Pacts' , would result in public officials being subjected to penal action and bidders would face cancellation of contracts, forfeiture of bonds, liquidated damages and blacklisting. Such action does not require a criminal conviction but can be based on "no-contest" after the evidence is made available or there can be no material doubts. Pre-Contract Integrity Pacts are gradually being widely used by the State and its instrumentalities in all areas of public contracting.

The Ministry of Finance, Government of India in a circular titled 'Use of Integrity Pacts by Ministries / Departments – Implementation of Administrative Reforms Commission' provided a draft of a Pre Integrity Contract. A perusal of this draft puts forth the following salient points:

- Commitments to not engage in anyform of bribery either directly or through any agents or third parties on the part of the bidder
- Commitments to not accept any form of bribes or demand any bribes and to treat all bidders fairly by the Buyer (Government)
- A declaration by the bidder that no previous transgression occurred in the last three years before the signing of the Pact with any other company in any country with respect to corrupt practices.
- Clause 6 of the Pact lays down sanctions for violation which include cancellation of the contract if awarded, confiscation of the security deposit, debarment, recovery of sums so illegally paid, applicable damages with interest, so on and so forth.
- The Buyer (Government) will appoint Independent Monitors in consultation with the Central VigilanceCommission to have an objective review of the implementation of the Pact.

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- The Pact extends to a period of 5 years after complete execution of the contract.

Why should companies take Pre-Contract Integrity Pacts seriously?

The cases discussed above and a perusal of the text of the pact, puts forth a situation that companies must take stock of whereby companies have faced the consequences whether it be blacklisting or contract termination, without the investigation being completed or a trial commencing or an ensuing conviction from such trial. Why should companies engaging in public procurement with the Indian State be worried:

Allegation of bribery:

Firstly, as stated above the provisions of the pre-contract integrity pact become operative on the allegation of bribery. In AgustaWestland's case, India began investigating the matter after proceedings commenced in Italy which the Indian media reported. Thus, news travels and there is no caution that a media house has to exercise in reporting an allegation of bribery as it technically still remains an allegation.

Simple procedure:

No strict procedure per se is in place to invoke the provisions of the pre-contract integrity pact and nor is there any guidance in this regard as to what the State must follow. The procedure to be followed would merely be to ensure conformance with the principles of natural justice namely audi alteram partem i.e, to hear the other party, which in this case would take the form of a show cause notice. When the State considers the evidence is conclusive enough to invoke the provisions of the pre-contract integrity pact still remain unclear.

Time frame of action:

The time frame in which the action is taken against the company is considerably faster than the regular legal process in India. In AgustaWestland's case, the allegations came forward in early 2012 and in less than 2 years action was taken. In the case of the blacklisting by the Ministry of Defence, the allegations emerged in May 2009 and by March 2012 the blacklisting was effectuated. This as compared to the time frame of investigations and trials in India which can go into over 10-15 years is something to take note of. Companies' earlier taking advantage of the tortoise pace of the Indian legal system would come onto the receiving end of the same when they would challenge it in adverse action initiate against them in the courts.

Checks foreign bribery:

Through the Integrity Pact the State is also plugging the loophole of a prevention of a foreign bribery clause (Indian law does not prevent foreign bribery, though a bill is pending in Parliament) by stating that no transgression viz a viz corruption has taken place in any country for a stipulated period before the signing of the pact.

Plethora of remedies:

If the State terminates a contract in furtherance of the pre-contract integrity pact, it would in no way be precluded from concurrently blacklisting the company or forfeiting deposits or cashing bank guarantees or claiming damages. The use of one remedy would not prevent another from being put into motion.

Still open to criminal prosecution:

While remedies the State has for an act of bribery by a company under the Pre-Contract Integrity Pact remain essentially contractual and administrative in nature, an action or invocation of a clause from the pact (termination, penalty, blacklisting) would in no way preclude criminal prosecution for these offences. Such action would not constitute a plea bargain or settlement of any kind, but would be independent of the criminal law machinery of the Indian state.

Conclusion:

In light of recent actions in India, companies engaged in public procurement / public contracting need to take Pre-Contract Integrity Pacts more seriously and not view them as a mere procedural requirement before signing the contract. Further, companies should also consider the impact that proceedings / investigations / disclosure in one jurisdiction may have in another and should address the risks of the same. With public pressure against corruption mounting and proactive media houses in India reporting instances of corruption, companies need to do a major re-think on the economic viability of bribing in India and the consequences that may follow.

Where India's Companies Act Meets The FCPA

By David Simon, John Turlais, and Sherbir Panag

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Under Indian law, companies that meet certain size or financial activity thresholds are required to set aside a fixed percentage of their net profits toward corporate social responsibility (CSR) spending. While making CSR contributions, companies may find themselves exposed to bribery risks which, in turn, presents significant risk under the Foreign Corrupt Practices Act and Indian anti-bribery laws.

To avoid running afoul of the FCPA and Indian law, companies required to make CSR contributions should adhere to anticorruption and anti-bribery best practices applicable to charitable contributions more generally; that is, they should conduct appropriate due diligence on the charitable organizations, ensure proper transfer of CSR-designated funds, monitor use of charitable funds, and maintain complete and accurate documentation.

CSR Requirements Under India's Companies Act of 2013

India's Companies Act of 2013 requires that all companies with an annual turnover of approximately $150 million (INR 10 billion) or more, or a net worth of approximately $75 million (INR 5 billion) or more, or a net profit of approximately $750,000 (INR 0.05 billion) or more during any fiscal year must spend, on CSR activities, at least two percent (2 percent) of their average net profits made during the three immediately preceding financial years.

CSR activities are defined in Schedule VII of the act and include nearly anything philanthropic in nature. Among other things, CSR spending can be allocated to eradicating extreme hunger and poverty; promoting education; promoting gender equality; reducing child mortality and improving maternal health; combating HIV/AIDS, malaria and other diseases; ensuring environmental sustainability; enhancing employment and vocational skills; and funding social, welfare, or emergency relief projects. A company may undertake its CSR activities either directly or by making contributions to existing charitable organizations.

The act further requires companies to publish a clearly articulated CSR policy and to establish a CSR committee of the board of directors to oversee all CSR spending.

Charitable activities and the Opportunity for Bribery

Charitable contributions present a known opportunity for bribery. In the context of CSR activities, bribe requests typically arise in two circumstances:

1. In selecting which charitable or nongovernmental organizations to which the company should allocate its CSR spending; and 2. If a company decides to undertake CSR activities directly (as opposed to making charitable contributions) in obtaining the necessary permissions, approvals, and licenses to engage in/conduct/execute the CSR activities.

Although the U.S. Securities and Exchange Commission and the U.S. Department of Justice acknowledge that legitimate corporate charitable giving does not violate the FCPA (and, indeed, encourages corporate social responsibility), the agencies have warned against using the charitable contributions as a way to bribe

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foreign officials. The SEC's 2016 enforcement action against Nu Skin is illustrative of how charitable contributions, when given for improper reasons, can violate the FCPA. According to the SEC, Chinese officials uncovered evidence that Nu Skin's subsidiary in China violated local rules regulating direct selling and, in turn, threatened to impose a fine of 2.8 million RMB ($431,088). Managers at Nu Skin China asked a high-ranking party official to intervene in the dispute, offering in return that Nu Skin China would make a donation to a charity of the party official's choice. Nu Skin China subsequently made a 1 million RMB ($150,000) donation to a charity identified by the party official and, two days after the donation ceremony, Nu Skin China received notice that it would not be charged or fined for purportedly violating the direct-selling regulation.

According to the SEC, Nu Skin's charitable donation "was inaccurately and/or unfairly described as a donation rather than a payment to influence the Party Official to favorably impact the outcome of the AIC investigation." The SEC further noted that, "given the well-known corruption risks in China, Nu Skin U.S. did not ensure that adequate due diligence was conducted by Nu Skin China with respect to charitable donations to identify links to government or political party officials and to prevent payments intended to improperly influence such persons in violation of the company's anti-corruption policy and the FCPA." In settling the investigation with the SEC, Nu Skin paid over $750,000 in disgorgement, civil monetary penalties, and prejudgment interest.

Safeguarding Against FCPA Violations When Engaging in CSR Activities in India

Companies doing business in India and subject to the CSR regulations can take several steps to help mitigate risk under the FCPA:

Policy Framework

Companies should have a clearly articulated CSR policy and establish a CSR committee of the board of directors to oversee all CSR spending, as is required under Indian law. The CSR policy should, in turn, reference and incorporate the company's anti-bribery policies and must lay out the manner, form, and procedure for allocating CSR spending.

Due Diligence

Companies should conduct thorough due diligence on the charities to which they allocate CSR contributions. While India's anti-corruption enforcement efforts have improved, India still remains a challenging business environment. Transparency International's Corruption Perception Index (CPI) ranked India at 79 (out of 176 countries) in 2016, with a CPI Index of 40, based on an overall potential score of 100 (100 being the least corrupt).

Companies should select a trusted, established, or (at the very least) verifiable charity to fulfill their CSR spending obligations. The organization should be duly incorporated under the laws of India and have all applicable registrations and permissions, including the appropriate tax exemptions and the ability to accept foreign contributions. Companies should consider choosing recognized nongovernmental organizations, trusts or foundations that have proven track records, with good reputations for integrity and fund management, that have operated for at least three years in the proposed program or project.

In addition, companies have the ability under the act to pool charitable efforts with other companies. Pooling CSR spending is an attractive option for companies to consider, as it minimizes the possibility of one company directing CSR spending for the purpose of improperly influencing a public official to act on that company's behalf.

Once a charity has been selected, companies should determine whether the charity has any affiliation or connection with foreign officials (i.e., individuals who qualify as public servants under India law) with whom the company either conducts business or interacts with on regulatory matters. Even indirect connections to government officials, such as connections to family members, close advisors, or entities in which the foreign official has a financial interest, should be evaluated to ensure that the donation does not appear to have been directed to a particular charity as a benefit to a particular foreign official.

Finally, care should be taken to confirm that the contribution is not (and does give the appearance of being) conditioned either conducts business or interacts with on regulatory matters. Even indirect connections to government officials, such as connections to family members, close advisors, or entities in which the foreign official has a financial interest, should be evaluated to ensure that the donation does not appear to have been directed to a particular charity as a benefit to a particular foreign official.
Finally, care should be taken to confirm that the contribution is not (and does give the appearance of being) conditioned on the retention of business, the receipt of future business, or the receipt of some other benefit.

Transfer of Funds

Companies should ensure that funds are deposited directly into an authorized account of the designated charitable organization or foundation, and not to an individual recipient. Payment should be made via a verifiable source, such as check or wire transfer. Contributions should never be made in cash.

Independent Projects

Companies that elect to fulfill CSR requirements through internal initiatives (as opposed to making external contributions) should apply the same FCPA controls and procedures that the company would use in other commercial business activities. By way of example, a company that uses CSR funds to build community bathrooms should ensure that it has obtained all necessary permissions and approvals in a timely manner. The lack of proper documentation, even for a charitable project, significantly raises the potential for bribe requests.

Monitoring

Companies should monitor donations and projects undertaken to confirm that their contributions are being used for the stated purpose. To this end, companies should consider implementing control measures such as auditing, compliance certifications, anti-corruption provisions, and staggered release of contributions.

Documentation

Importantly, companies should maintain a due diligence file documenting each step taken by the company in selecting the charity. In the event that U.S. regulators question the propriety of CSR spending, the company's best defense will be complete and accurate documentation on how it allocated CSR funds.

Conclusion

The India Companies Act effectively mandates that companies of a prescribed size must engage in acts of corporate social responsibility in order to operate in India. In fulfilling their CSR obligations, however, companies must ensure that their charitable contributions are being used for the philanthropic purposes for which they were intended. Following the safeguards outlined above, as well as obtaining guidance from attorneys with FCPA experience, can mitigate the bribery risks posed by charitable contributions in India

Differences in the Application of the Attorney-Client Privilege in Different Jurisdictions and the Impact on Global Internal Investigations

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One of the critical issues we plan to discuss in our October 15 workshop, "Responding to Globalized Law Enforcement in Transnational Bribery: A German, Indian, and U.S. Perspective," is the application of the attorney-client privilege in different jurisdictions and how those differences can impact global internal investigations. Below we summarize the law of attorney-client privilege in the context of internal investigations in our respective countries: the U.S., India and Germany.

United States

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Under U.S. law, the attorney-client privilege applies equally to corporations and individuals. U.S. law also does not differentiate between legal advice provided by in-house counsel and by outside counsel – communications with both are protected under the attorney-client privilege. In the seminal case of *Upjohn Co. v. United States* and, more recently, in *In re: Kellogg Brown & Root, Inc.*, U.S. courts have confirmed that the attorney-client privilege protects fact-finding by attorneys and their delegates in the context of corporate internal investigations.

To maximize the likelihood that the privilege will apply to a corporate investigation under US law, we recommend the following:

- *Issue a delegation memorandum.* Before commencing an internal investigation, the corporate client should issue a delegation memorandum to the investigating attorneys. The purpose of a delegation memo is to memorialize that the corporate client is requesting the attorneys to conduct a privileged internal investigation to learn facts and to assess allegations for the purpose of providing legal guidance to the client. In particular, a delegation memo is recommended for investigations led by in-house counsel whose job responsibilities may include providing business advice (non-privileged) as well as legal guidance (privileged).
- *Give Upjohn Warnings.* Before each investigative interview, attorneys should give witnesses what is commonly known as an *Upjohn* An *Upjohn* warning informs the witness that: (*i*) the attorney represents the company and not the witness personally; (*ii*) the attorney is collecting facts for the purpose of providing legal advice to the company; (*iii*) the interview is protected by the attorney-client privilege, which belongs exclusively to the company and not the employee witness; (*iv*) the company may choose to waive the privilege and disclose the discussion to a third party; and (*v*) the discussion must be kept confidential and should not be disclosed to any third party other than the witness' personal counsel.

India

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The Indian Evidence Act, 1872, recognizes and affords privileged status to communications between attorneys (advocates) and their clients. A corresponding obligation is also cast

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on attorneys not to reveal privileged communications under the Bar Council of India rules.

It is important to highlight, however, that the Supreme Court of India has ruled that communications between company officers and in-house counsel are *not* protected by the attorney–client privilege, as in–house counsel cease to be practicing advocates (as envisaged under the Advocates Act, 1961) and are instead employees of the body corporate. Moreover, at present, foreign lawyers are not entitled to practice in India, and, accordingly, are not recognized as advocates subject to the privilege protections.

Thus, for an internal investigation to be covered by attorney–client privilege in India, it is imperative that any such investigation be conducted by, or under direction of, an advocate who is duly enrolled with the Bar Council of India. It is further advisable to put in place a formal engagement letter with the advocate and to specifically mark all communications and work product as "Privileged and Confidential/Advocate–Client Privilege," while also highlighting the same when conducting interviews.

Given that the Indian legal system does not recognize deferred prosecution agreements, non-prosecution agreements, or declinations and does not provide self-disclosure credit (all of which are regularly done in the U.S. legal system), the privilege becomes critically important in India. If an internal investigation was conducted solely by an in-house attorney, the findings and guidance could be sought by law enforcement and could even become prosecutable evidence.

Germany

David Rieks and Andreas Mueller, Roxin

The relationship between an accused client and its defense lawyer is under specific protection within the German criminal procedural law. Law enforcement authorities are generally not entitled to seize any documentation originating from this relation. Searches with the objective of seizing such documentation are therefore prohibited.

Even though this protection is a fundamental principle, the extent of its application to corporate clients remains unclear because German criminal law does not apply criminal liability to legal entities. This uncertainty has resulted in inconsistent approaches being taken by different authorities. While some prosecution offices are granting extensive protection – at least for external counsel for purposes of building a defense strategy – other offices have occasionally conducted searches at law firms to seize documentation on internal investigations.

Authorities taking a narrower view of the attorney/client protection contend that such searches of law firms are consistent with a traditional understanding of criminal defense. That is, an internal investigation is not considered a traditional element of the criminal defense process, and, therefore, should not be afforded protection.

A recent and prominent example of such a search is the dawn raid at Jones Day, initiated by the Munich Public Prosecutor. The objective of this search was to seize documentation relating to the "Diesel-gate" investigation involving Volkswagen. Volkswagen has appealed to the Federal Constitutional Court of Germany, and, by means of a temporary injunction, the Court suspended the evaluation of the seized documents until it could consider the legitimacy of the search. Although a final decision has yet to be issued, we interpret the intervention by the Court as possibly signaling a wider scope of protection for attorney-client communications.

For the time being, corporations should ensure that internal investigations in Germany are conducted by, or at least coordinated by, criminal defense lawyers. The combination of an internal investigation and a power-of-attorney including criminal defense increases the chances of protection under the criminal client-attorney-privilege.

Lessons to Draw From the Mondelez FCPA Settlement for Dealing with Permits, Approvals and Licenses in India

By David Simon and Sherbir Panag

The Compliance & Ethics Blog

The Securities Exchange Commission (SEC) recently announced a $13 million settlement with Mondelez arising out of payments made by its Cadbury operation in India.

For those of you who have heard us speak about bribery risks in India, the fact pattern will come as no surprise. Before its acquisition by Mondelez, Cadbury was in the process of expanding its manufacturing facility in Baddi, Himachal Pradesh, India. The SEC alleged that Cadbury determined that the expansion would require more than 30 different licenses and approvals from various government agencies in India. As many non-Indian companies do, Cadbury hired an agent (helpfully identified by the SEC as "Agent No. 1"), according to the SEC, without conducting any due diligence on the company or its principals and without entering into a written contract, to assist in obtaining the required regulatory approvals. The SEC claimed that it paid the agent something in the range of USD 100,000 for the work.

According to the SEC, the agent withdrew (in cash) most or all of the funds paid in by Cadbury. According to Indian press reports, the payments made by Cadbury appeared to correspond in time with the dates crucial approvals came through. And, says the SEC, the agent did not even prepare the approval applications — Cadbury employees did that work. Moreover, the agent did not provide documentary support for the services it was paid to provide, other than invoices listing the licenses and approvals obtained.

The SEC found that these facts added up to an FCPA books and records and internal controls violation —having "created the risk that funds paid to Agent No. 1 could be used for improper or unauthorized purposes." How the SEC arrived at the $13 million USD penalty amount is not disclosed.

We have tabulated for you some of the points we discussed in our India compliance sessions, along with the best practices to be employed to tackle some of these risks.

Challenge

Permissions, approvals and licenses create high risks for bribery on account of there being interaction between the company and government authorities.

Permissions, approvals and licenses can be obtained in India without paying bribes. Do not fall into "bribery panic" on account of the enormity of the task ahead.

The bribery risk manifests itself further on account of:

1.Poor knowledge on what permissions, approvals or licences a company must obtain.

2.Not preparing for the bureaucratic hurdles and the time involved in overcoming them.

3.Having someone from the organisation with limited or no experience in this area oversee the process.

Best Practices

1.Don't panic –Determine the permissions, approvals and licenses that the company needs. If you do not have the capacity to do so in-house, consider engaging legal counsel for this purpose.

The bureaucracy notwithstanding, there is always a stipulated procedure (however difficult to find) and the compliance requirements must be determined in advance. Remember, you can't be asked for "magical documents".

2.Plan ahead – Work backwards from

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the date / event before which the concerned permission, approval or license is due, to prevent a last minute rush that would expose the company to a greater bribery risk.

Factor in a buffer time for contingencies such as organising documents, board resolutions with foreign directors, documents needed to be notarised in the United States for use in India etc. Over and above this, build in time to handle objections/ questions/queries/show causes from the concerned government authority.

In short, don't cut it too fine.

3.Right person for the right job: Oversight of the permissions, approvals and licenses must rest with a person from the organisation who has the ability and capacity to oversee the process. For example, having the head of human resources overseeing approval of a factory plan isn't the best idea.

In the event, that the company does not have such a resource, consider legal counsel or qualified project consultants.

4.Get organised: Make your compliance task simpler by listing out:

- The concerned permission/approval/ license
- When its due
- Who is responsible
- When does work on obtaining the same start.

Engaging agents and consultants involves risk, where such third parties may be trading on connections and relationships and could well be making improper payments (with or without your knowledge), exposing you to serious FCPA risk.

If you do use third-party intermediaries in India to obtain permissions, approvals and licenses, take great care to:

1.Conduct appropriate due diligence to ensure they are qualified, competent, and do not have a reputation for a lack of integrity.

Due diligence in India can be complex and needs careful review. To learn more, you might reference our prior blog post on this issue: click here.

2.Enter into a written agreement that specifically identifies the work to be performed and the compensation to be provided and includes appropriate anti-bribery language.

Additionally, consider entering into a business partner integrity pledge which is a document in the form of an affidavit by the third party specifying his / her adherence to anti-bribery laws.

3.Make sure the compensation is reasonable, customary, and appropriate for the work performed.

4.Insist on complete documentation of the services before you pay invoices — if the agent is standing in line for three hours at a municipal office, the invoice should include that detail.

As a standard practice do not process invoices which include expenses incurred by a third party without adequate supporting documents being presented.

Ten Tips for Performing Effective Anti-Corruption Investigations in India

By: David Simon and Sherbir Panag

Doing business in India continues to present a compliance challenge for U.S. companies. Indeed, recently U.S. enforcement authorities announced three FCPA resolutions arising at least in part from conduct occurring in India:

- The Embraer resolution with the SEC and the DOJ arose, in part, from the company's payment of $5.76 million to an agent, to illicitly secure the sale of three aircraft to the Indian Air Force.
- The AB InBev resolution arose out of payments made by an Indian affiliate of the company to third-party sales promoters who, in turn, were alleged to have made improper payments to Indian government officials, to obtain beer orders and to increase brewery hours.
- Cadbury/Mondolez resolved its FCPA matter with the SEC, which was based on the company allegedly paying $100,000 to an agent, to assist in securing permits and approvals for its factory expansion in India.

Many companies have implemented strong compliance programs targeted at minimizing corruption risk so that they can avoid the troubles Embraer, AB InBev, Mondolez and other companies have faced. Even with strong preventative measures, bribery allegations still can and often do arise and need to be investigated in India.

Such investigations will involve facts and circumstances unique to the country's business environment and culture. While the basic approach to internal investigations remains the same across jurisdictions, we have found it useful to modify our investigation strategy to take into account India-specific considerations, and have compiled the following 10 tips for conducting those investigations.

1) Don't Miss the Real Issue

We find that Indian compliance-realted internal investigations are often generated by complaints made by current and former employees. We have investigated several matters in which a serious compliance issue was buried in an assortment of management and personal criticisms. Pay close attention to anything resembling a "whistleblower" complaint, and be careful not to discount potentially serious compliance issues simply because such issues were raised alongside seemingly frivolous, ad hominem attacks on management or colleagues.

2) Scope Carefully

Given the often scattershot nature of employee complaints in India, it is worthwhile to invest time and energy at the front end of a compliance investigation to properly scope the work. We often find it helpful to arrange an early interview with the person making the report by Indian counsel, to fully understand the compliance issues raised and to separate the compliance "wheat" from what may be human resources "chaff."

3) Consider Privilege Issues

Keep in mind that there is no attorney-client privilege for in-house lawyers under Indian law. If privilege is important, retain outside counsel to lead the investigation.

4) Consider Local Counsel Within India

India is a big, multicultural country with 22 official languages. While a sophisticated and experienced Indian lawyer (likely based in Delhi or Mumbai) is indispensible, you should consider whether local counsel also should be involved to access records and communicate effectively with the involved employees.

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5) Protect Reporter Identities

It is prudent to take extra steps to avoid sharing the identity of the reporter with other employees of the Indian subsidiary. Even for companies with robust anti-retaliation policies, whistleblower retribution is unfortunately common in India and can obviously aggravate an already emotionally and legally precarious situation.

6) Prepare for Law Enforecement Action During the Investigation

Law enforcement in the United States and in India work on two different paradigms. The law-enforcement objective in India is focused on securing the conviction of individual wrongdoers. Bribery investigations can move quickly, resulting in arrests and media coverage. Such events obviously can change the fundamental calculus of the investigation, including the issue of self-disclosure in the U.S. Be prepared, and have a contingency plan in place.

7) Be Wary of Recordings

The smartphone has been heartily embraced in India and has found many creative uses, including the voice- and video-recording functions. Don't be surprised if employees reporting possible misconduct have made recordings of conversations that they claim show improper behavior. And don't be surprised if your interviews are recorded. To counter this, ensure one person never conducts interviews alone and that an accurate record of interviews is maintained. On the flip side, do not forget to ask the interviewee if he or she has a recording involving the allegation.

8) Watch for Cash

When conducting internal investigations in India, pay special attention to any cash expenditures, whether or not they are related to the transaction in question. Cash is often not as critical to the operation of the business as your Indian managers might claim, and cash expenditures can often signal potential bribery.

9) Carefully Examine Third-Party Intermediary Expenditures

As the three FCPA resolutions described above illustrate, improper payments in India are very often made through agents, consultants and otherintermediaries. Any India-based investigation should examine carefully all relationships with, and payments to, such third parties.

10) Watch for Key "Red-Flag" Terms

In reviewing documents or an Indian subsidiary's books and records, there are certain terms and phrases for which you should keep a lookout, as they might suggest improper payments. Certain categories of fees and expenses should be closely scrutinized, such as:

- brokerage charges or fees;
- consultancy charges;
- covering charges;
- management fees;
- documentation charges;
- managing expenses;
- out-of-pocket expenses;
- protection fees; and
- special expenses.

Certain specific phrases on invoices are red flags as well, such as:

- "for obtaining license";
- "liaisoning" or "government liaisoning";
- "for clearances";
- "for getting NOC"(notification of change);
- "for obtaining approvals"; and
- any other grammatically awkward or vague reference on invoices (for example, "motivation amount").

Additionally, there are certain words from local languages that should be included in your search terms as they are red flags as well:

- rishwat (bribe in Hindi);
- baksheesh (euphemism for an offering and commonly used to demand/offer a bribe. The term is of Persian origin);
- ghoos (euphemism for bribe in Hindi);
- hafta (a word of Persia origin that literally translates to week. The term howeveris typically used to denote payments demanded/paid on a weekly basis);
- chai-pani (a milder term to express the "common corruption" for routine payments. The terms literally means tea and water, therefore typically is smaller in value, as the objective is to act more as cost for refreshments or smaller denominations); and
- black money.

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Diwali: An Opportune Time for an Anti-Corruption Compliance Reminder

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This year, India celebrates Diwali on October 19, 2017. "The Festival of Lights," as Diwali (or Deepavli) is commonly called, is celebrated across India with great aplomb, joy and, of course, delicious sweets. Diwali signifies the victory of light over darkness and, traditionally, family, friends and business acquaintances will often exchange gifts as part of the festivities. Apart from the Diwali cheer, however, the provision of gifts to Indian public servants can also present risk under the U.S. Foreign Corrupt Practices Act (FCPA) of 1977 and Indian law.

Diwali conveniently provides a fitting opportunity to review the legal framework and best practices surrounding the provision of gifts under U.S. and Indian law. The hope is that, with this guidance, your company can focus more on celebrating Diwali than worrying about compliance risks.

What's the Risk?

The exchange of business courtesies, such as providing gifts, meals, entertainment and travel, can help strengthen existing relationships, foster new opportunities and express respect and appreciation for business partners. However, companies run the risk of triggering the FCPA and Indian anti-corruption laws if their provision of business courtesies to Indian public servants crosses a line into conduct that could be characterized as bribery, or if it lends to the appearance of attempting to induce a breach of trust or impartiality on the part of the public servant.

While the U.S. Department of Justice (DOJ) and Securities Exchange Commission (SEC) have recognized that a "small gift or token of esteem is often an appropriate way for business people to display respect for each other" and "[i]tems of nominal value ... are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC," companies continue to find themselves in the FCPA-enforcement crosshairs for inappropriate or excessive gift-giving.1 Indeed, many recent FCPA enforcement actions have involved excessive gift-giving, travel accommodations and entertainment to foreign officials.2

Likewise, India's Prevention of Corruption Act (PCA) of 1988 regulates the provision of gifts or other things of value to Indian public servants. As detailed below, public servants in India are further subject to Conduct Rules established by their respective services or organizations, which set specific threshold limits as the value of business courtesies that they may accept.

Who Qualifies as a Public Servant under Indian Law?

Section 2(c) of the PCA has a fairly exhaustive definition of a public servant. A public servant includes all government officials, local authorities, judicial officers, any holder of office to performa public duty and – worth highlighting – all employees of government-owned or government-controlled entities.

The PCA's definition of "public servant" overlaps with the FCPA's definition of a "foreign official." Thus, for compliance purposes, companies should assume public servants under Indian law would be deemed foreign officials under the FCPA.

What Regulations Govern Gift-Gifting to Indian Public Servants?

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The FCPA does not set any fixed values or limits on permissible gift giving to foreign officials. Rather, in the FCPA Guide, the DOJ and SEC identify some hallmarks of appropriate gift-giving. Specifically, gifts must be of "modest value" and may be provided "when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law."3

Under Indian law, the PCA prohibits "any gratification whatsoever, other than legal remuneration" when such gratification is given with the intention to (i) motivate, influence or reward a public servant to perform or forbear performance of an official act; (ii) show favor or disfavor to any persons; or (iii) render, or attempt to render, any service or disservice to a public servant. The provision of gifts or hospitality to public servants, in any amount, may thus qualify as a bribe under Indian law if provided with the intent to influence a public servant into performing (or not performing) his or her public duties. To this extent, the PCA's prohibition against giving gifts for improper purposes aligns with the FCPA's restrictions on gift-giving.

In India, every public servant is also governed by the Conduct Rules of his or her service or organization. And, in contrast to the FCPA, the Conduct Rules do establish specific threshold limits on the value of business courtesies that can be accepted by the public servant and the circumstances under which he or she can accept them. For example, the All India Services (Conduct) Rules, 1968, cover public servants in the Indian Administrative Services and the Indian Police Service; employees of the state-owned Oil and Natural Gas Corporation (ONGC) are governed by the ONGC Conduct, Discipline, and Appeal Rules, 1994 (Amended 2011); and government ministers of both the Union and the States are governed by the Code of Conduct for Ministers. These threshold values vary among the different services and organizations, based on the class and seniority of the recipient public servants, and can range broadly between 500 – 25,000 Rupees (approximately $8 – $375 U.S. dollars).

Gift-Giving Best Practices for India

When providing Diwali gifts or other business courtesies to public servants in India, companies should read the Conduct Rules alongside the applicable provisions and objectives of the PCA and the FCPA. The following bullet points offer some best practices to consider when developing gift-giving policies and procedures for companies (or subsidiaries) operating in India:

- Companies should review the Conduct Rules applicable to the public servants who may receive gifts or other business courtesies from the company and maintain a system of tracking and communicating to employees the specific threshold limits of allowable gift-giving to these public servants
- Company executives and employees should receive periodic training on business courtesies/gifts and entertainment policies, and should be instructed to confirm the threshold values for each class of public servant before giving a gift or extending hospitality to him or her.
- Threshold values of allowable gift-giving should be communicated in Indian Rupees, to ensure clarity and to avoid potential misunderstandings due to fluctuating foreign exchange rates
- Gifts should never be given with the expectation of, or as a reward for, the public servant taking a favorable official action that benefits the company
- Gifts should be of modest value (subject to the threshold limits noted above). Gifts of cash or cash equivalents (e.g., gift cards, shopping cards) should not be provided
- Gifts should not be provided by non-Indian companies, contracting with the Indian government, to public servants who are involved with official dealings relating to those contracts
- Employees should consult with legal counsel before providing gifts to public servants with whom the company has official dealings or to public servants with regulatory oversight of the company
- Employees should not provide gifts that have been specifically requested by public servants and should notify their supervisors of any such requests
- Gifts should be accurately documented and reported in the company's books and records, including identifying recipients who qualify as public servants (and, accordingly, foreign officials under the FCPA) in order to satisfy the FCPA's books and records and internal controls provisions.
- Gifts should be accurately documented and reported in the company's books and records, including identifying recipients who qualify as public servants (and, accordingly, foreign officials under the FCPA) in order to satisfy the FCPA's books and records and internal controls provisions.
- U.S.-based compliance officers with responsibility for India should mark their calendars and follow up with their Indian counterparts on compliance procedures and process at least four-to-six weeks in advance of Diwali..

For additional guidance and best practices, please refer to our Anti-Bribery and Foreign Corrupt Practices Act Compliance Guide for U.S. Companies Doing Business in India.