Lobbying, Facilitating Payments and Bribery; Foreign Corrupt Practices Act an India Inc. Perspective

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Purpose and Need:

The purpose of the paper is to provide an understanding about how the legislature of the country could participate in building a law, deterrent to the corrupt practices of obtaining or retaining a business or directing a business to any person. The author has tried to bring out the comparison between the anti-corruption laws of the United States and that of India, barring the current scenario of increasing potential of the Indian market, cost competitiveness, its large talent pool and recent economic initiatives taken by the Indian Government, like Startups and Make in India vis-à-vis increase in level of scams, cases of graft, endemic corruption, enforcement and whistle-blowers, as reported in the media, all over the world. It has become of the immense importance to gain knowledge about overseas legislation as far as it is relevant to the respective concern, so that it helps in dealing with the concerns of its counterpart.

Introduction:

Government of India is taking numerous steps to improve the business environment in the country however, the private sector also has significant role to play. Although many organizations demonstrate their awareness of the risks involved and have intensified their anti-corruption compliance initiatives, the results of this research indicate that there is still much to be done. Companies will have to ensure a high level of transparency in their business conduct and take a steadfast long-term decision to resist any pressure or temptation to pay bribes. This leads us to believe that it has become inevitable for India Inc. to design such code of conduct and policies so that it complies with the foreign laws as far as it is applicable to it.

One of such law is The Foreign Corrupt Practices Act of 1977 (FCPA), which is the federal law of the United States, known primarily for two of its main provisions, one that addresses accounting transparency requirements under the Securities Exchange Act of 1934 and another concerning bribery of foreign officials. Highest level of integrity, sound business practices and strong code of ethics within the business system should be the priority of any country for the development of the economy and also to gain public confidence at large. This was one of the foremost reasons for the enforcement of the FCPA in the United States. The Securities and Exchange Commission (SEC) and the Department of Justice (DoJ) of the United States, both play a major role in enforcing the FCPA.

FCPA makes it unlawful for certain classes of persons and entities to make payments to foreign officials to assist in obtaining or retaining business. The anti-bribery provisions of the FCPA prohibits any offer, payment, promise to pay, or authorization of the payment of money or anything of a value to any person to influence the foreign official in his or her official capacity or to induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.[1]

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with

the anti-bribery provisions of the FCPA, require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.[1]

However, the paper also throws light on the aspects of lobbying and facilitating payments and tries to bring out the results, whether any of it amounts to bribery or not. A comparison is also made to find out whether any of it is a legitimate payment in the either country or not. Corporations and government departments needs to work hand-in-hand. Lobbying, facilitating payments and bribery are the act committed either to speed up the administrative process of the government officials, or having being done any legitimate work through illegitimate means or illegitimate work through legitimate means. Per say an act for the sack of ease of doing business.

Lobbying, Facilitating Payments and Bribery

The dictionary meaning of 'Lobbying' (also 'lobby') is a form of advocacy with the intention of influencing decisions made by the government, by individuals or more usually by lobby groups; it includes all attempts to influence legislators and officials, whether by other legislators, constituents, or organized groups.[2] Thus, we can say that it is an act of attempting to influence the actions, policies, or decisions of officials in a government, most often legislators or members of regulatory agencies. Example, a medical association may lobby a legislature about increasing the restrictions in smoking prevention laws, and tobacco companies lobby to reduce them: the first regarding smoking as injurious to health and the second arguing it is part of the freedom of choice. However, it is not necessary that the act of Lobbying includes monetary forms or anything of a value.

"Facilitating Payments" also known as "Grease Payments" or "Expediting Payments", as defined by the FCPA is a payment to a foreign official, political party or party official for "routine governmental action", such as processing papers, issuing permits, and other actions of an official, in order to expedite performance of duties of non-discretionary nature, i.e., which they are already bound to perform. The payment is not intended to influence the outcome of the official's action, only its timing.

Without any need to define the word "Bribery" is an act of dishonestly persuading (someone) to act in one's favor by a gift of money or other inducement. Thus, it is an act of giving money, goods or other forms of recompense to a recipient in exchange for an alteration of their behavior (to the benefit/interest of the giver) that the recipient would otherwise not alter. Bribery is defined by Black's Law Dictionary as the offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty.

Scope of Foreign Corrupt Practices Act and India's Prevention of Corruption Act, 1988

Foreign Corrupt Practices Act (FCPA)

A violation of the FCPA consists of five "elements." That is, a person or organization is guilty of violating the law if the government can prove the existence of:

1) a payment, offer, authorization, or promise to pay money or anything of value
2) to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official
3) with a corrupt motive

4) for the purpose of (a) influencing any act or decision of that person, (b) inducing such person to do or omit any action in violation of his lawful duty, (c) securing an improper advantage, or (d) inducing such person to use his influence to affect an official act or decision
5) in order to assist in obtaining or retaining business for or with, or directing any business to, any person.[4]

Further, the provisions of the FCPA are based on three prominent principles of nationality, protection and territory through which it prohibits, individual who is a citizen, national, or resident of the United States and any corporation or business entity incorporated in U.S., or any foreign corporation having its place of business in the United States, or having its class of securities registered under the Securities and Exchange Act of 1934, from making payments to foreign government officials to assist in obtaining or retaining business.

1. **Nationality Principle**
   If a country asserts jurisdiction over the conduct of its citizens, notwithstanding with the fact that where he is physically present is referred to as the nationality principle. Hence the Act applies to any act by U.S. businesses, American nationals, citizens and residents acting in furtherance of a foreign corrupt practice whether or not they are physically present in the United States.
2. **Protective Principle**
   If a country asserts jurisdiction over issues that affect its interests, such as conspiracies to overthrow its government, or resources critical to its economy it is referred to as the protective principle. Hence in the case of a foreign natural or legal person, the Act covers their deeds if they are in the United States at the time of the corrupt conduct.
3. **Territorial Principle**
   If a country asserts jurisdiction over people, property and events taking place in its own territory it is referred to as principle of territoriality. Hence, the Act governs not only payments to foreign officials, candidates, and parties, but any other recipient if part of the bribe is ultimately attributable to a foreign official, candidate, or party.

- **Exceptions and Defenses to FCPA's Anti-Bribery Provision**
  a) Exception for Facilitating Payments
     The FCPA's bribery prohibition contains a narrow exception for "Facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts. Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.[1]

  b) Defense of Lawfulness under Local Law
     The FCPA provides a defense to liability where the payment is lawful under the written laws and regulations of the foreign official's country. The written law requirement prevents reliance

on prevailing business customs and practices, or even rules of a local business association, as a defense.[3]

c) Defense of Promotional Expenditure
The Act carves out a defense for the payment of "reasonable and bona fide" expenses of a foreign official, such as for travel or lodging, "directly related" to the promotion, demonstration, or explanation of products or services.

d) Absence of Necessary element of an FCPA Violation
In addition to the above mentioned carve outs, the absence of one of the five elements of an FCPA violation also precludes the liability. For example, payments made without a "corrupt" intent or to someone who does not satisfy the definition of a "foreign official," retaining agents with close ties to government decision-makers, do not contravene the Act.
Hence, we could say that an act of lobbying does not violate the provisions of FCPA as it is not at all necessary that lobbying includes any monetary forms or anything of a value. Further, Lobbying is regulated under the Lobbying Disclosure Act of 1995 and Honest Leadership and Open Government Act of 2007 which provide for mandatory public disclosure of activities and put limits on gifts to elected public officials among other stringent measures.[6] In short, the act of Lobbying is a legal activity which requires compliance of the stringent regulations.

India's Prevention of Corruption Act, 1988

Following are the offences under PCA

- Taking gratification other than legal remuneration in respect of an official act, and if the public servant is found guilty shall be punishable with imprisonment which shall be not less than 6 months but which may extend to five years and shall also be liable to fine. (Sec.7)
- Taking gratification in order to influence public servant, by corrupt or illegal means, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. (Sec. 8)
- Taking gratification, for exercise of personal influence with public servant shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. (Sec.9)
- Abetment by public servant of offences defined in Section 8 or 9, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.
- Public servant obtaining valuable thing without consideration from person concerned in proceeding or business transacted by such public servant, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. (Sec. 11)
- Punishment for abetment of offences defined in Section 7 or 11 shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.
- Habitual committing of offence under Section 8, 9 and 12 shall be punishable with imprisonment for a term which shall be not less than two years but which may extend to seven years and shall also be liable to fine.
- If any of the offences as stated is attracted, it would be treated as criminal breach of trust by the public servant and hence liable to the punitive actions under Sec. 409 of the Indian Penal Code, 1806.

However, the Act does not deal with the corruption of the foreign officials or officials of the International Organizations. Further, facilitating payments are considered as bribery and hence falls within the ambit of the offences stated in the Act and further to compare there is no law regulating the act of lobbying in India and it is also often misinterpreted as bribery.

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 (India's equivalent FCPA)

India had signed the United Nations Convention against Corruption (UNCAC) on December 9, 2005. Hence, The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 was introduced in the Lower House on March 25, 2011. The Bill is necessary for the ratification of the Convention. It provides a mechanism to deal with bribery among foreign public officials (FPO) and officials of public international organisations (OPIO). The Bill is equivalent to FCPA as it criminalizes the following act:

1) Acceptance or solicitation of bribes by FPO and OPIO for acts or omissions in their official capacity;
2) Offering or promising to offer a bribe to any FPO and OPIO for obtaining or retaining business;
3) Abetment or attempting either of the above acts.

However, the current status of the Bill is lapsed.

Accounting Provisions under FCPA and Indian Law

[The "*books and records*" provisions under the Securities Exchange Act of 1934, requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuers." The term "reasonable detail" is defined in the statute as the level of detail that would "satisfy prudent officials in the conduct of their own affairs". The addition of this phrase was intended to make clear "that the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes." Bribes are often concealed under the guise of legitimate payments, such as commissions or consulting fees. Consistent with the FCPA's approach to prohibiting payments of any value that are made with a corrupt purpose, there is no materiality threshold under the books and records provision. In combination with the internal controls provision, the requirement that issuers maintain books and records that accurately and fairly reflect the corporation's transactions "assure(s), among other things, that the assets of the issuer are used for proper corporate purpose(s)."

The "internal controls" provisions, requires issuers to, devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

The Act does not specify a particular set of controls that companies are required to implement. Rather, the internal controls provision gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.

The issuers also have reporting obligations which requires issuers to file an annual report that contains comprehensive information about the issuer.

Under Section 10A of the Exchange Act, independent auditors who discover an illegal act, such as the payment of bribes to domestic or foreign government officials, have certain obligations in connection with their audits of public companies. Generally, Section 10A requires auditors who become aware of illegal acts to report such acts to appropriate levels within the company and, if the company fails to take appropriate action, to notify SEC.][1]

Unlike FCPA, "Accounting Provisions" under Indian Law relating to maintenance of books and records and its submission to authorities are governed by the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and clauses of Listing Agreement.

Section 128(1) of the Companies Act, 2013 requires that, "Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and explain the transactions effected both at the registered office and its branches…"

The provision contained in Section 134(5)(e) requires the directors of the listed companies to state that the "internal financial controls" to be followed by the company had been laid down and that such controls were adequate and operating effectively during the financial year. Thus, it is mandated by the provision to frame and implement the effective internal financial controls and assure that such controls are in operation during the financial year. By the virtue of Section 143(3)(i) the legislature imposes the responsibility upon the Auditors of the company to state, whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls.

Under Section 143(12) of the Companies Act, 2013, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

With respect to reporting under Section 143(12), consequent to corruption, bribery, money laundering and other international non-compliance with other laws and regulations, the auditor should consider, for the purpose of reporting, whether such acts have been carried out by officers or employees of the company for the purpose of reporting and also take into account the requirements of SA 250, particularly paragraph 28 of SA 250 read with paragraphs A19 and A20 thereof.[8]

Global Anti-Corruption Efforts

In order to curb corruption internationally, efforts are being made by the United Nations and Organisation for Economic Co-Operation and Development and different conventions have been engaged for the implementation of anti-corruption measures. Except UNCAC, other major anti-corruption conventions, such as the Inter-American Convention against Corruption, the OECD Anti-Bribery Convention, the African Union Convention on Preventing and Combating Corruption, The European Union Convention on the Fight Against Corruption, and Council on Europe Convention on Corruption are restricted to either certain region of the world or certain manifestations of corruption.

- **UNCAC**

The United Nations Convention against Corruption (UNCAC) is a multilateral convention negotiated by members of the United Nations. It is the first global legally binding international anti-corruption instrument. UNCAC requires that States Parties implement several anti-corruption measures which may affect their laws, institutions and practices. The purposes of this Convention are: (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property.[9] Both United States and India have ratified the convention.

- **OECD**

[The OECD is a group of thirty-four nations, plus a number of non-member observer countries, whose purpose is to stimulate economic progress and world trade. The OECD Convention requires signatories to enact legislation that makes it a criminal offense “intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official” in order to induce that official to act or to refrain from acting with respect to the award or renewal of business. It also prohibits making or offering payments to obtain “improper advantage” from foreign public officials in the conduct of international business.

One of the commentary provisions exempts “small facilitation payments” from the ambit of the convention. The somewhat opaque OECD comment on this issue states that criminalizing such payments did not seem to the membership to be a “practical or effective complementary action”. This approach is consistent with the FCPA, which also exempts from its coverage small payments to government officials that are made to facilitate or expedite routine actions.][3]

[Further, in view of the corrosive effect of small facilitation payments, the OECD recommends that the countries should:

(i) Undertake a periodical review of their policies and approach on small facilitation payments to combat the phenomenon effectively.

(ii) Encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programs or measures, recognizing that such payments are generally illegal in the countries in which they are made and must, in all cases, be accurately accounted for in companies’ books and financial records.

Furthermore, the OECD urges all countries to raise the awareness of their public officials on their domestic bribery and solicitation laws with a view to stop solicitation and acceptance of small facilitation payments.][10]

- **Inter-American Convention Against Corruption**

In March 1996, the Organization of American States (“OAS”) approved the Inter-American Convention Against Corruption (“Inter-American Convention”). The Inter-American Convention, the first international agreement to address corruption, entered into force on March 6, 1997, and thirty-three of the OAS’s thirty-four members (including the United States) have ratified it.

In pursuit of its goal to “prevent, detect, punish and eradicate corruption in the performance of the public functions,” the Inter-American Convention promotes anti-corruption institutions at the member-state level and cooperation among states parties with the intent of improving the effectiveness and enforceability of national anti-corruption legislation. The Convention requires signatories to criminalize specified corrupt acts; to develop anti-corruption institutions; to offer mutual legal assistance and technical assistance; and to seize assets that result from corrupt dealings.

- **Bilateral Agreements**

The SEC is increasingly relying on bilateral agreements to assist it in investigating extraterritorial violations of U.S. securities laws, including the FCPA. To date, the SEC has entered into information-sharing agreements, or MOUs, with at least thirty-six foreign securities regulators. India is one of such thirty-six foreign securities regulators with whom the SEC has entered into the agreement or MOU.

Amongst the above, individual International Institutions such as, World Bank, International Monetary Fund, The Asian Development Bank, World Trade Organization, G20, Transparency International and other Non-Governmental Organizations and Institutions are also putting efforts with the same objective of curbing corruption.

Concerns about the corporations in both the countries

- Despite the fact that the Prevention of Corruption Act, 1988 has established a legal framework to punish the corruption of public servants with fines and up to five-seven years in prison, actual punishment for these offences rarely occurs.[5] Unless the anti-graft laws are strengthened it is quite challenging for the corporations abroad and in India to comply with the provisions of FCPA.
- Under the FCPA, mergers and acquisitions and other similar transactions may not give rise to liability for the past unlawful conduct of an acquired company.[11] However, neglecting to perform thorough FCPA due diligence or to respond to any red flags exposes U.S. companies and companies with securities trading on U.S. exchanges (including ADRs for which the company must make periodic filings with the SEC) to potential successor liability, which can result in substantial penalties and fines from the U.S. authorities and which may be imposed months or even years after a deal has closed.[12] Furthermore, a buyer that fails to conduct adequate FCPA due diligence may find after closing that it has purchased interests that will not be as productive or profitable without bribery or other corrupt practices. Such a scenario poses not only significant civil or criminal liability risks, but also significantly jeopardizes a buyer's reputation and profitability.
  A buyer can be held liable for the violations of the FCPA by the acquired company if such violations were relatively evident and the buyer did not undertake an investigation that would establish facts to the contrary. The possibility of a government enforcement action premised on successor liability highlights the importance of pre-acquisition FCPA due diligence. The extent of this due diligence should be determined by identifying risk factors that may suggest past or ongoing FCPA violations. Among these risk factors are past FCPA violations, unusually high compensation or political contributions, reliance on shell companies, lack of written compliance policies, a large volume of cash payments made to a third party or to accounts in an unrelated jurisdiction, and the failure of the target company to cooperate in due diligence or audit processes.[12]

Consequences of FPCA Violation

The FCPA can result in criminal and civil liability for companies, and for their individual officers, directors, employees, and agents. Companies face fines and collateral consequences such as debarment from government business, while individuals risk imprisonment, fines, and other potential collateral consequences. Criminal sanctions can arise either from violations of the anti-bribery provisions or the accounting standards designed to reveal such illegal payments.

The criminal penalties for violation of the anti-bribery provisions are:

- Up to a $2 million fine for public companies and domestic concerns;

- Up to a $250,000 fine and five years in prison for individuals pursuant to the enhanced penalties in 18 U.S.C. § 3571(b); and
- Alternative fines for corporate entities and individuals where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss pursuant to 18 U.S.C. § 3571(d).

The criminal penalties for willful violation of the books and records provision or willfully and knowingly making, or causing to be made, a false or misleading statement in any application, report, or document required to be filed are even more severe:

- For a natural person, up to a $5 million fine and 20 years in prison, or both;
- Up to a $25 million fine for public companies; and
- Alternative fines for corporate entities and individuals where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss pursuant to 18 U.S.C. § 3571(d).

These penalties can be imposed for each violation of the FCPA.

The FCPA also allows a civil penalty of up to $16,000 against a corporation or any of its officers, directors, employees, or agents violating the anti-bribery provisions of the FCPA. Civil penalties for violations of the accounting provisions can range from $7,500 to $150,000 for individuals, and $75,000 to $725,000 for corporations.

Compliance Programs under FCPA a Deterrent Tool

Effective Compliance programs works as a deterrence tool in protecting a company's reputation and helps prevent, detect, remediate, and report misconduct, including FCPA violations. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA)[13] or non-prosecution agreement (NPA)[13], as well as the appropriate length of any DPA or NPA, or the term of corporate probation.[1]

DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:

- Is the company's compliance program well designed?
- Is it being applied in good faith?
- Does it work?

Commitment from senior management and a clearly articulated policy against corruption formulated within the code of conduct of the company works as the foundation for effective implementation of the compliance programs. However, such policy should be communicated properly within the hierarchy of the organisation and should be properly evaluated periodically to ensure that such policy "does works".

- DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.
- DOJ and SEC will review whether the company has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.
- In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

- Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company's compliance program.
- DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners.
- DOJ and SEC will consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation.
- DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.
- Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program.
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

  The most concise statement regarding the U.S. Authorities' views of the adequacy of an acquirer's response to FCPA red flags in an acquisition target is found in their comprehensive Resource Guide. The Resource Guide outlines concrete steps that a company subject to the FCPA should take upon considering a merger or acquisition:

  1) Conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions;
  2) Ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities;
  3) Train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;
  4) Conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and
  5) Disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

  The U.S. Authorities will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, the U.S. Authorities may consequently decline to bring enforcement actions.[1]

Case Studies

Wal-Mart Lobbying in India?[7]

In 2012, as part of a routine disclosure under U.S. law, Wal-Mart revealed it had spent $25 million since 2008 on lobbying to "enhance market access for investment in India." This disclosure, which came weeks after the Indian government made a controversial decision to permit FDI in the country's multi-brand retail sector, created uproar in India. Lobbying by multinationals drew strong emotions in India, evoking images of the millions spent by Enron in the 1990s to "educate Indians" - a suspected euphemism for bribery. Opposition political parties accused Wal-Mart of bribing the Indian government, which, on the eve of a general election, appointed a judicial commission to investigate Wal-Mart. Already under pressure from allegations of bribery in Mexico, Wal-Mart risked becoming

embroiled in another embarrassing scandal. How had the company landed in its current situation and how could it respond to the investigation into its India-related lobbying?

Oracle Corporation's Secret Side Funds in India[14]

The Securities and Exchange Commission charged Oracle Corporation with violating the Foreign Corrupt Practices Act (FCPA) by failing to prevent a subsidiary from secretly setting aside money off the company's books that was eventually used to make unauthorized payments to phony vendors in India.

The SEC alleges that certain employees of the India subsidiary of the Redwood Shores, Calif.-based enterprise systems firm structured transactions with India's government on more than a dozen occasions in a way that enabled Oracle India's distributors to hold approximately $2.2 million of the proceeds in unauthorized side funds. Those Oracle India employees then directed the distributors to make payments out of these side funds to purported local vendors, several of which were merely storefronts that did not provide any services to Oracle. Oracle's subsidiary documented certain payments with fake invoices.

Oracle agreed to pay a $2 million penalty to settle the SEC's charges.

Anheuser-Busch InBev Violating FCPA and Whistle-blower Protection Laws[15]

The Securities and Exchange Commission announced that Anheuser-Busch InBev has agreed to pay $6 million to settle charges that it violated the Foreign Corrupt Practices Act (FCPA) and chilled a whistleblower who reported the misconduct.

An SEC investigation found that the company used third-party sales promoters to make improper payments to government officials in India to increase the sales and production of Anheuser-Busch InBev products in that country. Despite repeated complaints from employees, Anheuser-Busch InBev had inadequate internal accounting controls to detect and prevent the improper payments, and the company failed to ensure that transactions involving the promoters were recorded properly in its books and records.

The SEC's order further finds that Anheuser-Busch InBev entered into a separation agreement that stopped an employee from continuing to voluntarily communicate with the SEC about potential FCPA violations due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms.

"Anheuser-Busch InBev recorded improper payments by its sales promoters in India as legitimate expenses in its financial accounting, and then exacerbated the problem by including language in a separation agreement that chilled an employee from communicating with the SEC," said Kara Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit.

"Threat of financial punishment for whistleblowing is unacceptable," added Jane Norberg, Acting Chief of the SEC's Office of the Whistleblower. "We will continue to take a hard look at these types of provisions and fact patterns."

The SEC's order finds that Anheuser-Busch InBev, which is headquartered in Leuven, Belgium, violated the books and records provisions and the internal controls provisions of the federal securities laws as well as Securities Exchange Act Rule 21F-17(a). Anheuser-Busch InBev agreed to pay $2,712,955 in disgorgement plus interest of $292,381 and a penalty of $3,002,955. For a two-year period, the company must cooperate with the SEC and report its FCPA compliance efforts while making reasonable efforts to notify certain former employees that Anheuser-Busch InBev does not prohibit employees from contacting the SEC about possible law violations.

Cadbury Limited and Mondelēz International, Inc. Violating the Internal Accounting Controls and Books and Records Provisions of the FCPA[16]

The Securities and Exchange Commission announced that Cadbury Limited (Cadbury) and Mondelēz International, Inc. (Mondelēz) have agreed to pay $13 million to settle charges of violating the internal controls and books-and-records provisions of the Foreign Corrupt Practices Act (FCPA). According to the SEC Order, the FCPA violations arose from payments their subsidiary in India made to a consultant to obtain government licenses and approvals for a chocolate factory in Baddi, India.

An SEC investigation found that in February 2010, Mondelēz, formerly known as Kraft Foods, Inc., acquired Cadbury and its subsidiaries, including Cadbury India Limited, which manufactures and sells chocolate products in India. In 2010, Cadbury India retained and made payments to an agent to interact with Indian government officials to obtain licenses and approvals for a chocolate factory in Baddi, India. Cadbury India failed to conduct appropriate due diligence on, and monitor the activities of, the agent. From February 2010 to July 2010, the agent submitted five invoices to Cadbury India for, among other things, preparing license applications. Cadbury India employees at Baddi, not the agent, prepared these license applications. Cadbury India paid the agent a total of $90,666 (after withholding tax) upon receipt of the invoices. After receiving each payment, the agent withdrew from its bank account most of the funds in cash. During this time period, Cadbury India obtained some of the licenses and approvals.

Cadbury India's books and records, which were consolidated into the books and records of Cadbury and Mondelēz, did not accurately and fairly reflect the nature of the services rendered by the agent. Cadbury did not implement adequate FCPA compliance controls at its Cadbury India subsidiary, which created the risk that funds paid the agent could be used for improper or unauthorized purposes.

The SEC's order finds that Cadbury violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934, by failing to keep accurate books, records, and accounts and failing to devise and maintain adequate internal accounting controls. The order also finds that Mondelēz, as the acquirer of Cadbury, is also responsible for Cadbury's violations. Solely for the purpose of these proceedings, and without admitting or denying the findings, Cadbury and Mondelēz agreed to a cease-and-desist order and payment of a $13 million civil penalty. In determining to accept the offer, the SEC considered Mondelēz's cooperation and remedial actions.

In 2008, Siemens AG paid a $ 450 million fine for violating the FCPA. This is one of the largest penalties ever collected by the DOJ for an FCPA case.

Conclusion

1) In order to stand among the developed countries round the globe and to build trust among the foreign investors and the public at large in the business system of India, there is a dire need of the amendments in the Indian legislature with respect to corrupt practices in the country. The legislation should implement the law which takes care of the issues of the corrupt practices with the foreign public officials and officials of public international organisations. Further, the current anti-corruption law of India which deals with the local corruption issues, requires amendments to stringent the provisions contained within the Act so that it enables the system to implement a law deterrent to corruption.
2) If the act of Lobbying and Facilitating payments are not reasonable it may be construed as bribery. However, what amounts to reasonable is a subjective matter and thus it should be overserved thoroughly, depending upon the practical aspect of the country, in order to frame the rules and regulation with respect to such acts. As far as facilitating payments are concerned, it is the age old custom of India to give it to the public officials. For example, one of such customs is giving "Bakshish" to the local sweeper, who is actually a government official. There is a requirement of the legislature to frame proper regulations to legitimize such facilitating payments so that it fits within the culture and mindsets of the country. Even if on the practical grounds, it is not possible to legitimize such acts, a law dealing with the issues of Lobbying and Facilitating Payments is required to be implemented.

3) It is not just about India and the United States, rather the corporations all over the world should be more careful and vigilant regarding the risks of doing business with the foreign countries. Due diligence and risk assessments helps corporations across the globe to do business carefully in the respective segment within the given geographical area.

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1. A Resource Guide to the U.S. Foreign Corrupt Practices Act: By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.
2. Merriam-Webster Dictionary.Com
3. O'Melveny Handbook on Foreign Corrupt Practices Act.
4. 15 U.S.C. §§78dd-1(a), 78dd-2(a), 78dd-3(a).
5. UICIFD Briefing Paper No.7, The Current State of India's Anti-Corruption Reforms: The RTI and PC (2010)
6. The Hindu, May 30, 2013.
7. Harvard Business School: Discipline of Business & Government Relations; "Wal-Mart Lobbying in India?" (Abstract), By Karthik Ramanna and Vidya Muthuram
8. Guidance note on Reporting on Fraud issued by the Institute of Chartered Accountants of India
9. Article 1 to the United Nations Convention Against Corruption
10. "Bribery and Corruption: ground reality in India" A survey by EY's Fraud Investigation & Dispute Services Practice.
11. Department of Justice Foreign Corrupt Practices Act Opinion Procedure Release No. 03-01 (Jan. 15, 2003).
12. A Primer on FCPA Due Diligence in Cross-Border M&A Transactions: Avoiding Legal and Business Risks by, Maria Luisa Cánovas and Nicholas E. Rodriguez
13. A Deferred Prosecution Agreement ("DPA") allows the DOJ to file criminal charges against a company— typically through a criminal information—but then defer the actual prosecution of the case for a period of time that typically ranges from two to four years. During the period in which prosecution is deferred, the company is prohibited from engaging in further wrongdoing and usually must implement policies and procedures designed to prevent future violations of the law. If the company complies with the terms of the DPA, at the completion of the period of deferred prosecution, the DOJ dismisses the charges. The end result to the company is no guilty plea, no criminal record, and fewer collateral consequences than those associated with a guilty plea or a conviction and the resulting criminal record. Similar to a DPA, a Non Prosecution Agreement ("NPA") is a written agreement between the DOJ and a company pursuant to which the DOJ agrees not to file criminal charges against the company for a set period of time—like a DPA, the period is typically two to four years—and the company agrees to comply with certain terms and conditions over that period of time.[12]
14. U.S. Securities and Exchange Commission Press Releases Dated August 16, 2012.
15. U.S. Securities and Exchange Commission Press Releases Dated September 28, 2016.
16. U.S. Securities and Exchange Commission Administrative Proceeding File No. 3-17759 Dated January 6, 2017.

Disclaimer: The information in this paper is intended only to provide a general outline of the subject covered. It should neither be regarded as comprehensive nor sufficient of making decisions, nor should it be used in place of professional advice.