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REPRINTED FROM:
RISK & COMPLIANCE MAGAZINE
JUL-SEP 2016 ISSUE



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PERSPECTIVES

DOING BUSINESS ETHICALLY IN INDIA: PRACTICAL TIPS FOR ANTI-CORRUPTION COMPLIANCE AND INVESTIGATIONS

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As the world's third-largest economy, with actual and projected growth rates of 7.5 percent in both 2015 and 2016, India remains a virtually impossible to ignore market for the global multinational. The economic opportunity reflected in these figures finds additional encouragement in the investor-friendly statements of India's Prime Minister, Narendra Modi, whose BJP party came to power in May 2014 promising reform, anti-corruption

measures and accelerated economic growth. New initiatives from the Modi government, such as the expansion of sectors open to foreign direct investment, further boosted investors.

Notwithstanding these developments, India remains a challenging market in which to do business. The World Bank's latest 'Ease of Doing Business Report' ranks India 130th out of 189 nations, and toward the bottom in several sub-



categories, including 183rd in dealing with construction permits and 178th in enforcing contracts. Complex laws, a byzantine bureaucracy, 'middle men' serving as fixers and facilitators, and an endemic expectation of corruption all underline the challenge of operating in compliance with local and international anticorruption standards. Global measures of corruption in India bear out these concerns.

The country stands 76th out of 168 countries ranked in Transparency International's 'Corruption Perceptions Index' for 2015. That same organisation's 'Global Corruption Barometer' for 2013 noted that 65 percent of respondents felt that public officials and civil servants in India were corrupt or extremely corrupt, while 86 percent said the same of political parties. Other Indian institutions did not fare much better: parliament (65 percent);

business (50 percent); the judiciary (45 percent); police (75 percent); and medical and health services (56 percent). Suffice it to say that, in India, corruption is a hard and persistent reality.

For multinationals operating in India, the risk of corruption takes on greater import given the ever-increasing enforcement of anti-corruption laws, including the US Foreign Corrupt Practices Act (FCPA). Briefly stated, the FCPA prohibits covered companies and their agents, officers and employees from offering or giving anything of value directly or indirectly to foreign government officials to secure business-related benefits. The FCPA also includes accounting standards and requirements for internal controls that broaden the compliance obligations on covered companies. Vigorous enforcement of the FCPA for conduct across the world has seen aggregate penalties upward of \$1.57bn in 2014 and then \$140m in 2015. The enactment of the UK Bribery Act in 2010, as well as the introduction or expansion of anticorruption laws and the increase

in enforcement in jurisdictions around the world, further underscore the need for compliance.

And the risk in India has not just been theoretical. A number of FCPA enforcement cases have related to business in India. Meanwhile, Indian enforcement agencies also have taken a greater interest in investigating conduct that potentially violates India's Prevention of Corruption Act (POCA) and other laws.

The combination of the importance of the market from a business standpoint and the risk presented from a compliance perspective requires that companies operating in India maintain a robust anticorruption compliance programme to prevent, detect, investigate and remediate improper conduct.

Compliance

As in other emerging markets, third-parties that deal with government officials on behalf of companies are the most significant source of corruption risk in India. Third-parties can appear in many roles, including as consultants, lawyers (advocates), architects, brokers and other service providers. While the safest course may be to avoid such third-parties if feasible, where their use is necessary, appropriate care should be taken in adhering to compliance procedures, particularly in

conducting due diligence as to prospective third-parties.

Such diligence can include public records searches, use of investigations firms and other appropriate measures. It is also important to obtain from third-parties an agreement – typically as a

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written certification – to comply with the company's ethics policy and with anticorruption laws, including the FCPA. The opacity of third-party dealings in India also might call for obtaining and more frequently exercising audit rights as to third-parties, in comparison to other jurisdictions.

Other key elements of India-specific compliance include: a clear articulation of a 'zero-tolerance' policy from headquarters and in-country leadership; localised training that includes specific examples of prohibited conduct (delivered in both English and Hindi and/or other Indian languages and dialects,

if necessary); a strong internal audit function that includes anticorruption; and periodic testing and review of compliance processes. Integration of business and compliance functions into the company's global structure is also more likely to prevent a drift from the company's standards.

Investigations

One of the important threshold considerations for any investigation being conducted in India (or anywhere else) is who should direct the investigation. In some circumstances, it may be appropriate for a company's internal resource, such as internal audit, to conduct an investigation. In most circumstances, however, an audit-led investigation will not be viewed as protected by the attorney-client privilege (at least in the United States), and therefore investigative information or communications may not be shielded from disclosure to litigants or other constituents.

For that reason, a company may want a lawyer – in-house and/or external counsel – to direct the investigation, so that any personnel involved in the investigation (e.g., from internal audit or otherwise) are acting at the direction of legal counsel. Doing so not only maximises the possibility that the investigation will be shielded by the attorney-client privilege, but it can help bolster the independence and objectivity of the investigation.

In many circumstances, particularly where substantial technical expertise is needed or where

the company wants to avoid the appearance of bias, the investigative team might include third-party forensic accounting support. For example and as noted above, the FCPA imposes liability on issuers for transactions that are inaccurately reflected in its books and records. To ensure that the analysis of the accuracy of those records is, and is perceived to be, independent and unbiased, employing a forensic accounting firm is often advisable. In our experience, the major forensic accounting firms in India are experienced in conducting internal investigations with multijurisdictional enforcement in mind, and can be valuable investigative team members and sources of local information.

Also, because an investigation conducted in India may raise a number of Indian legal issues – such as Indian privacy laws, employment rules and practices potentially affecting interviews and personnel action as to employees, or the potential consequences in India of corrupt conduct on the part of corporate personnel or agents – it may be prudent to engage Indian legal counsel to advise the investigative team.

Another preliminary consideration for the investigative team is the extent to which the allegations of misconduct involve management-level personnel within the Indian operation and/or in-house counsel in India. In some circumstances, such as where allegations implicate management or the legal department, it would be inappropriate to provide investigative information or otherwise involve those same persons. In other circumstances,

however, enlisting the assistance of local management, including an internal lawyer, can help streamline the investigation in many ways, such as helping to facilitate access to relevant documents or witnesses.

Further, the investigation may reveal compliance issues that need to be addressed by local management on a real-time basis, necessitating communication between the investigative team and those who can address and remediate the issues. In all events, the decision to provide investigative information to any of the local employees needs to be made carefully based on the facts and circumstances of each situation, and in such a way as to preserve the integrity of the investigation.

One final word of warning for US practitioners: Indian privilege rules can differ from those in the United States, particularly as to in-house lawyers, and communications with in-house lawyers that would be considered privileged under US law might not be under Indian law. Therefore, appropriate caution should be used in communicating with in-house counsel in India, and it may be prudent to obtain guidance from Indian counsel on the implications and manner of sharing information with such counsel in light of privilege considerations.

While the challenges of doing business in India are apparent, there also are positive indicators of improving conditions for business and government, including the groundswell of public protest against corrupt officials and institutions, the seeming political will to tackle the issue, and the new and sustained efforts to tamp opportunities for corruption (such as the increasing use of e-services). While these take effect, a watchful eye on compliance, with devotion of sufficient resources and direction from leadership, and effective identification and remediation of issues, should nevertheless help companies operate and even thrive in this important market. **RC**

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