

FCPA & UKBA – A word of caution for the Indian Companies

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INTRODUCTION

- Corruption is a growing menace and of concern not only for the common man but also for businesses in all sectors and jurisdictions, although certain sectors are predominantly at greater risk than others.
- This decade has seen a multitude of multi-billion corruption cases across the globe. In India, the 2G spectrum scam, Commonwealth Games scam, the coal mining controversy, Wakf Board Land Scam and more recently Agusta Westland chopper deal scam has made news. The magnitude of these corruption cases and the blatant disregard for the legal procedure has created demands for greater transparency and accountability from the politicians, the bureaucrats and the corporate houses.
- In wake of big corporate houses getting charged with corruption, the focus is on the ways to tackle this menace by the Indian companies.

ANTI-BRIBERY AND CORRUPTION (ABC) LAWS INDIA

- The Indian laws, be it civil or criminal laws, are modelled around the English law as a result of our colonial legacy. In fact, there is no comprehensive statute, which deals with anti-corruption and bribery laws in India and the relevant provisions are dealt with under the Prevention of Corruption Act, 1988, the Indian Penal Code, 1860, the Prevention of Money Laundering Act, 2002, the Right to Information Act, 2005, Benami Transactions (Prohibition) Act, 1988, the Lokpal and Lokayukt as Act, 2013. . Right to Information Act, 2005 identifies its central purpose as the reduction of corruption through increased transparency and accountability. Besides these Acts, the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, the provisions of Serious Fraud Investigation Office and Fraud in the Companies Act, 2013, though very specific in nature also deal with fraud.
- With a slew of cross border mergers, acquisitions and various corporate operating internationally, the Indian companies have long become conscious about the implication of not only the various Indian laws, but also foreign laws and especially the anti-bribery and corruption laws on their business. While there are other foreign laws with extraterritorial reach, the two important and by far stringent anti-bribery and corruption laws are the Foreign Corrupt Practices Act, 1998 of United States of America (**FCPA**) and the Bribery Act, 2010 of United Kingdom (**UKBA**).

WHAT IS FCPA?

- The FCPA was originally enacted in 1977 to restore public confidence at a time when corruption was rampant in the American business system. The Act was later amended in 1998.
- The FCPA makes it unlawful for persons and businesses, foreign issuers of securities, to make a payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. The Department of Justice (**DOJ**) is the enforcement agency, while the coordinating role is played by the Securities and Exchange Commission (**SEC**).
- The DOJ is responsible for criminal and civil enforcement of the provisions of the FCPA in relation to both domestic and foreign companies and nationals, while the SEC is responsible for the civil enforcement of the provisions of the FCPA in relation to the issuers.



PROHIBITIONS UNDER FCPA

- The FCPA prohibits any payment, offer, promise to payment or authorisation to pay or offer money or anything of value to a foreign official. The definition of the term "foreign official" is exceedingly broad and covers any officer, employee of a foreign government, a public international organisation, department or agency or any person acting in official capacity irrespective of the rank or position.
 - The payment can be anything beyond monetary payments, like gifts, loans, employment, payment made to third parties or such other improper payments can constitute bribe. The ambit of bribe, therefore, is very broad, considering it also includes any kind of improper cash or cash equivalent payments. In fact, mere offer of a bribe alone can constitute a violation of the FCPA.
 - Here it is pertinent to note that if the intent of the payment is to induce the foreign official to misuse his official position to provide an improper advantage, the payment become prohibited payment under the FCPA. Also, the intent can be inferred from the evidence and may not be directly proven.
 - The FCPA prohibits third party payments to or through its distributors, contractors, joint venture partner, foreign subsidiary, etc.
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APPLICABILITY OF FCPA

- The FCPA covers under its ambit (i) the issuer and (ii) domestic concerns. The issuer means issuer of securities registered in the US and entities which are required to file periodic reports with the SEC. The term domestic concern has a very wide connotation and also means any individual who is a citizen, national or resident of US besides including any corporation (incorporated or otherwise), joint venture, etc. with the place of business in US.
- In fact, the parent company in US can be held liable for the acts of foreign subsidiaries irrespective of whether the action has taken place in US or not.

PENALTY UNDER FCPA

- The FCPA provides for both civil and criminal penalties. Further, the quantum of punishment also becomes stringent if it is for wilful violation.
- An individual may be imprisoned for 5 years for each violation while for wilful violation the punishment is upto 25 years. For business entities, the fine can be anywhere from USD 2 million to a maximum of USD 25 million. In case of individuals the fine can range from USD 1 million to USD 5 million in certain case of wilful violation.

WHAT IS UKBA?

- The UK Bribery Act (**UKBA**) was passed on April 8, 2010, but it came into effect only on July 1, 2011 to replace the Public Bodies Corrupt Practices Act and the Prevention of Corruption Act. While the term bribery is not defined under the UKBA, it lays down detailed offences which may be considered as bribery.
 - The UKBA contains active bribery offences which relates to offering or promising and giving of a bribe, while there are certain passive bribery offences like requesting, agreeing to receive or accepting a bribe. The offence under the UKBA deals with both the demand and the supply side of the offence. Besides these offences, the UKBA also has two other offences of (i) bribery to foreign public officials, and (ii) failure to prevent bribery on behalf of an organisation.
 - The offence in relation to foreign public official is far more stringent. The mere offer or promise is enough evidence and does not require any proof of inducement or improper exercise by the foreign public official
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PROHIBITIONS UNDER UKBA

- The UKBA prohibits (i) offering, promising or giving any financial or other advantage to another person in order to improperly perform or reward an improper performance of a function or activity; (ii) accepting financial or other benefit in order to improperly perform a function or activity; (iii) bribing a foreign public official by offering, promising or giving any financial or other advantage to foreign public official in order to influence the official in performance of their official duty

APPLICABILITY OF UKBA

- The UKBA applies not only to companies, but also to individuals with some kind of connection with the UK. It not only covers domestic and foreign companies but also covers under its ambit bribes made or received by and in relation to any business, commercial, government or regulatory context. An Indian company which carries out a part of its business in the UK or the UK Company doing business in India may be prosecuted, if it fails to prevent bribery even though the act of bribery may have taken place outside the UK. Any person, who offers, accepts or facilitates offer and acceptance of bribe comes under the purview of the UKBA. So, an Indian distributor of UK Company even if it pays bribe to a company in India or in any other country to retain business for the UK Company, will be liable under the UKBA.
- Liability is also imposed even if an associated person is an employee, subsidiary or distributor of the company that attempts to bribe someone on behalf of or in relation to the business of the company.
- An Indian company with business connection with the UK should, therefore, be aware of the provisions and liability under the UKBA. In fact, organisations are encouraged to adopt adequate procedure to combat bribery. Since failure of a corporate to prevent bribery is also an offence.

PENALTY UNDER UKBA

- Under the UKBA, the punishment for individuals can be imprisonment for up to 10 years for each count, while individuals and businesses can be liable for unlimited fines. Further, businesses can be ordered to pay compensation or be disqualified from participation in public contracts and directors can be disqualified from holding directorships.
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MAJOR DIFFERENCES BETWEEN FCPA AND UKBA

- While both the FCAP and the UKBA have extraterritorial reach, the UKBA is considered to impose more stringent requirements on companies than the FCPA. The UKBA, unlike the FCPA covers bribery of private individuals and companies as well as foreign public officials, and does not permit an exception to facilitation payments from its definition of the offence of bribery. Further, under the FCPA, failure of a company to keep accurate books and records is covered, while under the UKBA this is covered under a separate legislation.

OUR VIEW

Indian businesses with substantial US and UK presence should ideally to be cautious and well versed with the provisions and extraterritorial reach of these stringent laws. The acts triggering offences in each country are different and the penalties vary dramatically from one country to another. An act in one jurisdiction may carry administrative rather than criminal sanction while in another jurisdiction the same act may lead to imprisonment and/ or fine or both. Considering that the existing Indian anti-corruption and bribery laws only takes into account corruption in relation to public services and not private and commercial transactions; it may so happen that the Indian companies, while they may escape the local laws, may fall in the trap of the UKBA and/ or the FCPA

Considering the lack of one comprehensive Indian law to tackle corruption, the Indian Companies with presence in international market have to be conscious and cautious not only of the relevant local anti-corruption laws but also other applicable foreign laws like the FCPA and the UKBA

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