



Passage to India

Ensuring “safe travels” in business

A publication of Nixon Peabody LLP

JANUARY 2009

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India is a country rich in opportunity. For centuries, adventurers and entrepreneurs have traveled to India in the hopes of reaping great rewards. In modern times, India has remained a profitable location for businesses to grow. The reasons to invest in India remain plentiful: (1) its large and varied economy; (2) its commitment to democracy; (3) its transparent foreign investment regime; (4) its established banking system; (5) its strong and independent judicial system; and (6) its high return on investment. The areas of investment are as diverse as India itself, including such industries as civil aerospace, automotive, agribusiness, biotechnology and pharmaceuticals, construction, engineering, oil and gas exploration and development, and telecommunications.

Corruption in India, however, remains a major impediment to its growth and vitality as a blossoming economy. In 2008, India ranked 85th, with a score of 3.4, in the Transparency Corruption Perceptions Index (CPI), which measures the perceived levels of corruption in various countries, using different expert and business surveys as its basis. The 2008 CPI ranked 180 countries on a scale of zero (highly corrupt) to 10 (highly clean). Compare India's score with Singapore at 9.2. On the opposite end of the scale, Somalia scored 1.0, followed closely by Iraq and Myanmar at 1.3 and Haiti at 1.4, respectively.

So, while doing business in India continues to have great potential, it is not without challenges. And, for any U.S. company or individual doing business in India, it is critical to remain aware of the risks involved. Those risks include the application of anti-corruption laws in both the United States and India. While legal compliance is frequently taken as a given, in reality, the obligations to comply with such laws can be challenging.

The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) is a U.S. law that has been in existence since the 1970s, when investigations by the Securities and Exchange Commission (SEC) showed U.S. companies engaged in illegal payments to foreign government officials. Such payments exceeded \$300 million; the passage of the FCPA was intended to stop these improper payments and to ensure a level playing field for overseas business dealings.

The FCPA's premise is simple: The FCPA makes it illegal for a U.S. company, U.S. individual, or foreign corporation that has a class of securities registered, or that is required to file reports under the Securities and Exchange Act of 1934, to make payments to a foreign official to obtain or retain business or to gain an improper business advantage. There is a further obligation on public companies to accurately and fairly reflect the transactions of a corporation on its books and records, and to maintain an adequate system of internal accounting controls. Failure to comply with the regulations can result in prison sentences and substantial fines. Under the anti-bribery provisions, individuals face imprisonment of up to five years and criminal fines of up to \$250,000, and companies may be fined up to \$2 million for each violation. Under the accounting provisions, individuals face imprisonment for up to 20 years and criminal fines of up to \$5 million, and companies may be fined up to \$25 million for each violation. Federal law allows for even higher fines, which may equal twice the gain to the defendant or the loss to the third party resulting from the violation. There are also civil fines that may be levied against both a company and individuals. In addition, a company's reputation is damaged when news of such activity is shared in the press and industry, and that may never be salvaged.

Passage to India!

Struggles of many a captain,
tales of many a sailor dead,
Over my mood stealing and
spreading they come, Like
clouds and cloudlets in the
unreach'd sky.

—Walt Whitman,
Leaves of Grass



In the United States, the Federal Bureau of Investigation has a dedicated team of special agents in Washington, D.C., who are now working all FCPA cases, alongside federal prosecutors from the Fraud Section of the United States Department of Justice (DOJ). This effort was undertaken to centralize and coordinate the investigation and prosecution of anti-bribery cases.

The Prevention of Corruption Act

India also has anti-bribery laws, designed to combat corruption in dealing with public officials. India's Prevention of Corruption Act (PCA, 1988) precludes a public servant from "taking gratification other than legal remuneration in respect of an official Act." Criminal penalties of up to five years in prison and fines may be imposed for violations of the law.

India's commitment to rooting out corruption is evidenced by the Central Vigilance Commission (CVC), which was set up by the Indian government in February 1964 on the recommendations of the Committee on Prevention of Corruption, to advise and guide central government agencies in the field of vigilance. One of the CVC's stated functions is to "undertake an inquiry or cause an inquiry or investigation to be made into any transaction in which a public servant working in any organization, to which the executive control of the Government of India extends, is suspected or alleged to have acted for an improper purpose or in a corrupt manner." The Central Bureau of Investigation is responsible for actually investigating and prosecuting these corruption cases.

In America, the focus is on the person who makes the bribe, while in India, the focus is on the recipient. However, both countries recognize that such improper payments, even though they may be generally accepted in a particular industry, are not permissible.

The Regulators

Separate from criminal prosecution, public companies doing business in India should be aware of not only regulation and enforcement actions by the SEC in the United States but also increased oversight by the Securities and Exchange Board of India (SEBI), which is the regulatory body for the investment market in India. Early in 2008, the SEC and SEBI announced terms for increased cooperation and collaboration. The areas that were identified for dialog between the two entities included:

- oversight of dually regulated entities
- regulatory and compliance issues relating to outsourcing
- accounting and auditing standards
- corporate governance standards and internal controls
- areas for continued capacity-building and technical cooperation
- cross-border cooperation and information-sharing in securities enforcement matters

Application of laws and regulations

One challenge, of course, comes in application of these laws and regulations. Another challenge is being compliant while remaining a competitor in the marketplace. Companies can meet these challenges by establishing policies and training programs to ensure compliance with U.S. and foreign laws. Such programs must include:

- a commitment from the "top down" that bribery in any fashion will not be tolerated
- designation of a Compliance Officer to address questions and oversee reviews and audits of company procedures
- targeted training for those who interact with public officials or their agents, managers and supervisors, and financial analysts
- a reporting mechanism for individuals to make confidential reports



- an established travel and gift policy, with set standards and oversight
- proper vetting of vendors and agents, to ensure compliance with anti-bribery laws
- appropriate warranties and representations in all business transactions
- regular internal audits of company books and records
- background checks of business partners to ensure legitimacy

Although these steps are not exhaustive, they serve as a reminder that compliance can be achieved once a commitment is made to abide by anti-bribery laws. The simple truth is that compliance is necessary to prevent unwanted inquiries from law enforcement authorities, either in the U.S. or abroad.

Why is there corruption in India?

There are many theories and explanations for why corruption remains such a pervasive part of Indian life, particularly in the public sector. Some point to the cumbersome bureaucracy of the Indian government or political patronage as the root cause. Others opine that the lack of punishment and the social environment are to blame for illicit payments as part of the culture of doing business in India. These factors may all play a part in the reasons why corruption still exists in the Indian marketplace; however, it does not excuse the conduct.

In February 2008, Westinghouse Air Brake Technologies Corporation (Wabtec) settled a criminal and civil case with the DOJ and SEC in connection with Foreign Corrupt Practices Act offenses committed by its Indian subsidiary, Pioneer Friction Limited. In total, Wabtec paid about \$675,000 in fines, disgorgement of profits, and interest, and entered into a deferred prosecution agreement with DOJ, which means that DOJ will not bring charges if Wabtec abides by the terms of the deferred prosecution agreement. Wabtec also was forced to retain an independent consultant to review and make

recommendations concerning its FCPA compliance policies and procedures.

In another recent case that concerned Indian business interests, in October 2007, York International Corporation (York), a global provider of heating, ventilation, air conditioning, and refrigeration products and services, agreed to pay approximately \$22 million in combined fines and penalties to settle DOJ and SEC enforcement actions. These charges and monetary penalties resulted from violations of the anti-bribery, books and records, and internal controls provisions of the FCPA, as well as improper payments made by various York subsidiaries to the Iraqi government under the United Nations Oil-for-Food Program (OFFP). As part of the charges brought by the SEC, York India was charged with illegally retaining an Indian agent who made improper payments (from his commission payments from York India) to Indian Navy officials to secure York India business. Under the terms of the settlement, DOJ agreed to defer prosecution of the charges against York and its subsidiaries for three years, in recognition of York's early discovery and reporting of the improper payments, York's implementation of enhanced compliance policies and procedures, and York's willingness to have its compliance program reviewed by an independent monitor for three years. DOJ will not bring charges if York abides by the terms of the deferred prosecution agreement.

Safe travels on your journey

Walt Whitman wrote in his poem "Passage to India" of the spirit and courage of those from the West who traveled to India. He wrote of that spirit in the 1800s. Now, more than 100 years later, that spirit of entrepreneurship and adventure remains. However, what is clear is that knowledge is key. And knowledge of and compliance with the FCPA and India's anti-corruption laws are critical to a successful journey across the ocean and a safe landing on foreign shores.

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