

FCPA SERIES: DOING BUSINESS ABROAD

Part I: Corruption Risks In India

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MODERATOR



**Glenn Pomerantz,
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Select Experience

- 25 years of forensic accounting, auditing and consulting experience. Co-chairs the firm's US Anti-Corruption Compliance and Investigations practice. Certified Public Accountant and Certified Fraud Examiner.
- Conducts multi-national fraud investigations pertaining to allegations of corruption, embezzlement, theft and financial reporting fraud.
- Designs, implements and monitors anti-corruption compliance programs.
- Conducts FCPA and other regulatory transaction advisory due diligence.

Education

M.B.A., Finance, Baruch College - City University of New York
B.S., Accounting, State University of New York at Buffalo

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Richard Grime, JD

Partner

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Select Experience

- Richard is a Partner in O'Melveny & Myer's Washington, DC office and a member of the White Collar Defense and Corporate Investigations Practice. He represents clients in internal investigations and on a full range of securities enforcement, regulatory, and compliance matters.
- He routinely represents companies and individuals in investigations before FINRA, the Securities and Exchange Commission and other government agencies.
- Recent FCPA investigations and counseling have covered activities in many countries including Australia, Cameroon, Canada, China, Democratic Republic of the Congo, France, India, Korea, Namibia, Nigeria, Russia, Saudi Arabia, and Turkey.
- He is a longstanding and frequent speaker at conferences and seminars covering the FCPA and securities enforcement and is frequently quoted in news publications. He also counsels clients in establishing FCPA compliance programs, and advises on complex FCPA issues.

Education

J.D., College of Law (Guildford), Law Society Final Examinations

B.A., University of Oxford, First Class Honors

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Select Experience

- Huzeifa is the National Practice Leader of Risk Advisory Services at BDO India, with over 14 years of experience servicing clients in the areas of internal audit, IT advisory, enterprise-wide risk management, fraud investigations and business continuity.
- A Chartered Accountant, Certified Information Systems Auditor and ISO 27001 Lead implementer, Huzeifa has led several international engagements pertaining to fraud and corruption investigations, IT advisory, internal audits and SOX compliances.
- He specializes in the banking and financial services sector and has handled several large fraud investigations including investigations on behalf of the Regulators.
- BDO USA's representative FCPA Practice leader in India.

PRESENTER



Brian Mich, JD

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Select Experience

- 25 years of experience as a consultant and prosecutor, investigating complex financial and white-collar crimes including FCPA violations, fraud, embezzlement, money laundering and tax violations. He co-chairs the firm's US Anti-Corruption Compliance & Investigations Practice.
- Develops and implements anti-corruption compliance programs including the development of training programs. Assists counsel with internal investigations, including those in response to inquiries by the DOJ and SEC. Conducts FCPA Transaction Advisory Due Diligence.
- Prior to BDO, served as Senior Counsel to the Independent Inquiry Committee into the United Nations Oil-For-Food Programme in Iraq, where he conducted investigations of alleged corruption and mismanagement, interviewed witnesses, conducted financial analysis and documented recovery and review.
- Assistant District Attorney for the Queens County District Attorney's Office in the Economic and Environmental Crimes Bureau, Organized Crime and Rackets Bureau and Narcotics Investigations Bureau.

Education

J.D., Villanova University School of Law
B.A., Colgate University



AGENDA

- I. Foreign Corrupt Practices Act
- II. Risk Factors of Doing Business in India
- III. Anti-Corruption & Enforcement Efforts - Legal Framework in India
- IV. Assessing & Managing Risk
- V. Conclusion
- VI. Questions & Answers

FOREIGN CORRUPT PRACTICES ACT

Overview

- FCPA is a US federal law enforced by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ)
- Enacted in 1977 by US Congress in response to SEC investigations in the 1970s
- FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or retaining business
 - Anti-bribery
 - Books and records



FOREIGN CORRUPT PRACTICES ACT

Anti-Bribery Provision

- Prohibits corrupt offers or payments to foreign government officials, political parties, political party officials or candidates, or to any person in order to gain an improper advantage
- The elements of this provision are:
 - Issuers, domestic concerns, and any person;
 - Making use of interstate commerce;
 - Corruptly;
 - In furtherance of an offer or payment of anything of value;
 - To a foreign official, political party, or candidate for political office;
 - For the purpose of influencing an official act of that foreign official in violation of the duty of that official or to secure any improper advantage in order to *obtain or retain business*.

FOREIGN CORRUPT PRACTICES ACT

Books & Records

- Books and Records provision has two parts requiring that:
 - Books and records are kept in reasonable detail to accurately reflect transactions and dispositions of assets
 - A system of internal accounting controls is devised

“Issuer must make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets.”

FOREIGN CORRUPT PRACTICES ACT

Liability

- Prosecution does not have to prove actual knowledge
- Company will be liable if it had reason to know that a corrupt payment has been made
- Companies are responsible for actions of their employees and intermediaries when engaged in company business
 - Comply with applicable laws
 - Adhere to standards of business conduct consistent with company's conduct guidelines
- Intermediaries include:
 - Agents
 - Consultants (including marketing/business development)
 - Distributors
 - Joint venture partners
 - Other parties doing business on a company's behalf

FOREIGN CORRUPT PRACTICES ACT

Significant Penalties for Individuals & Companies

Individuals

- Up to \$5 million per record-keeping violation + up to 20 years in prison (applies to accounting/finance professionals)
- Up to \$250,000 per anti-bribery violation + up to 5 years in prison per violation (applies to business developers /marketing professionals)
- Company is prohibited from paying employee fines

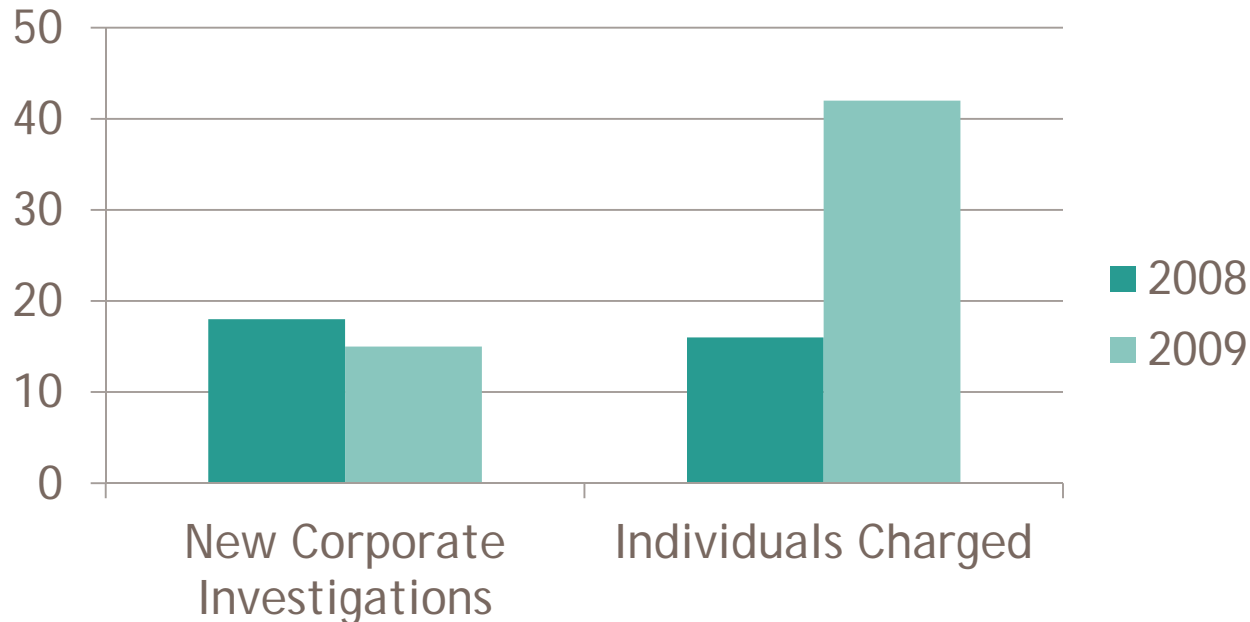
Companies

- Up to \$25 million per record-keeping violation
- Up to \$2 million per anti-bribery violation
- Twice the pecuniary gain (or losses) from illegal activities
- Disgorgement of gross profits obtained from tainted business
- Post-enforcement monitoring
- Loss of State Department export licenses
- Disbarment from government contracts
- Disbarment from World bank, OPIC and the CFTC

FOREIGN CORRUPT PRACTICES ACT

Significant Penalties for Individuals & Companies

- FCPA has been in effect for more than 30 years, but only the last 5-10 years have brought significant enforcement activities





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RISK FACTORS OF DOING BUSINESS IN INDIA

Indian Business Environment

India in Brief

- 28 states and 7 union territories
- Legal system - based on English common law; limited judicial review of legislative acts; accepts compulsory ICJ jurisdiction, with reservations
- Economy 4th largest in PPP terms.
- Total population - 1.2 billion
- 85% of this bracket are literate
- English is the most important language for national, political, and commercial communication
- 30% live below the poverty line.
- High rate of unemployment at 11% (approx)

RISK FACTORS OF DOING BUSINESS IN INDIA

Indian Business Environment (cont.)

Typical Cultural Issues

- Hard coded religious, caste and belief systems at play across 28 states and 7 union territories
- Linguistic and traditional practices related to marriage, life style and rituals such as dowry system
- Young productive age profile leading to tendencies of becoming a millionaire overnight
- Favour and lobbying culture for jobs, admissions, approvals, etc. Corruption is part of social psyche and has come to be accepted as a given in business dealings to avoid administrative bottlenecks
- Low salary and wages in government departments encourage public servants to accept bribes for quick favours or ignoring wrong doings

RISK FACTORS OF DOING BUSINESS IN INDIA

Regulatory Compliance Landscape

1

Administrative delays

2

Government taking upon themselves more than what they can manage by way of regulatory functions

3

Scope for personal discretion in the exercise of powers vested in different categories of government servants

4

Cumbersome procedures of dealing with various matters which are of importance to citizens in their day to day affairs

Source - The Sanatham Committee issued its report in 1964; its recommendations led to amendment of the Prevention of Corruption Act, 1947.

RISK FACTORS OF DOING BUSINESS IN INDIA

Multinational Companies

Country Level Risk

- ▶ Delay in Receiving Approvals From Government Authorities
- ▶ Interference of Local/State Political Parties
- ▶ Inadequate Data Privacy Laws
- ▶ Complexity of Local/State Legislations, etc.
- ▶ Language Constraints
- ▶ Dealings in Cash/Black Economy in Few States
- ▶ Piracy & Duplicate Goods

Legal Risk

- ▶ Trade Union - Employee Disputes
- ▶ Intellectual Property - Ownership Disputes

Business Risk

- ▶ Strategic
- ▶ Operations
- ▶ Legal & Compliance
- ▶ Finance & Credit
- ▶ Reputational
- ▶ Project
- ▶ Employee Antecedents

Third Party or Counter Party Risk

- ▶ Background, Integrity & Track record
- ▶ Legal and Contractual Risks in Absence of Defined SLAs
- ▶ Lack of Counter Party Adoption/Acceptance Norms May Lead to Business Setbacks and Financial Losses
- ▶ Execution Risk (Accountability, Performance & Timeliness)
- ▶ Credit Risk

RISK FACTORS OF DOING BUSINESS IN INDIA

Corruption Trends & Recent Scams

“In cases of bribery demands in India over a **16 month** period reveals that more than half of the reported bribe demands were for **US\$100** or less, and approximately **84%** of the reported demands were for **US\$5000** or less.”

Source - BribeLine, India Report, 2009 (10 January 2009).

RISK FACTORS OF DOING BUSINESS IN INDIA

Corruption Trends & Recent Scams (cont.)

Recent High-Profile Scams

- 2 G Telecom license auction
- Adarsh Housing
- Common wealth games
- Bribe for loan



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ANTI-CORRUPTION & ENFORCEMENT EFFORTS

India Anti-Corruption Legal Framework

National Indian Anti-Corruption Agencies

Central Vigilance Commission (CVC) <http://www.cvc.nic.in>

- The CVC's role is "to advise and guide central governmental agencies in the field of vigilance"
 - Receives complaints of corruption from government departments
 - Jurisdiction over central government ministries and departments
 - No jurisdiction over individuals or state governments but can refer cases to CBI
 - Major weakness is its advisory role

Central Bureau of Investigation (CBI) <http://www.cbi.gov.in/default.php>

- The CBI is an investigative police agency that handles interstate and international crimes
- Anti-Corruption Division and Special Crimes Division, the latter dealing with cases of conventional crime, besides economic offenses

State Police

- Charges against individuals under Prevention of Corruption Act

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Overview of Indian Anti-Corruption Law

- Key law is Prevention of Corruption Act (PCA), 1988
- Three categories of offences:
 - Bribe taker provided he/she is public servant
 - Bribe giver
 - Intermediary who influences the public servant

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Prevention of Corruption Act - Bribe Taker

Multiple offences

- Section 7
 - Recipient must be a public servant
 - Gratification must be motive for doing or forbearing an official act
 - Public servant need not grant favor
- Section 11
 - Prohibits public servant from accepting something of value without consideration from any person who is likely to be concerned with any proceeding or business before the public servant

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Prevention of Corruption Act - Bribe Giver and Intermediary

- Section 12
 - Prohibits abetment of offences under Sections 7 and 11
- Section 8
 - Recipient need not be a public servant
 - Recipient must agree to accept, or agree/attempt to obtain, any gratification
 - Such gratification must be a motive or reward for inducing by corrupt or illegal means any public servant to do/ forbear from doing an official act or to show favor/ disfavor or render any service to any person
- Section 9
 - Prohibits acceptance of gratification as a motive or reward for inducing exercise of personal influence of public servant reward
- Section 10
 - Prohibits abetment of Sections 8 and 9 by the public servant

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Comparison of FCPA and Indian Anti-Corruption Laws

- Generally FCPA focuses on giver of the bribe and the PCA focuses on the bribe taker
- Public servant is narrower than “foreign official.” No employees of state owned enterprises covered
- No business nexus requirement under PCA
- No exception for facilitation payments under PCA
- No affirmative defense for bona fide hospitality payments
- FCPA applies to payments to political parties and party officials

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

FCPA Enforcement Involving Indian Officials

Year	Case Name	Foreign Official/Agency Involved
2007	Dow Chemical	Central Insecticides Board, State Agriculture Officials, Sales Tax Officials, Excise Tax Officials and Custom Officials
2007	Textron	Unidentified employee of non-governmental customer
2007	Electronic Data Systems	Executives of partially government owned energy companies
2007	York International	Indian Navy Officials
2008	Westinghouse Air Brake Technologies	Indian Railway Board
2008	Mr. Covino	Officials of Maharashtra State Electricity Board
2010	Pride International	CEGAT administrative judge

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Anti-Corruption Trends by Indian Government

- Increased public awareness of rights
 - Right to Information Act 2005
- Some strengthening of vigilance agencies
 - e.g., Karnataka Lokayukta and Andhra Pradesh Vigilance Commission
- Increased use of technology in dealing with government (e-governance)
 - Lessens opportunity for bribery

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Anti-Corruption Trends by Indian Government (cont.)

- April 21, 2010 statement in Indian Parliament
 - CBI has 2,439 cases under investigation in past three years
 - 732 convictions
 - Gradually rising trend of cases in past three years
- But
 - Inconsistent enforcement especially involving high level officials
 - India has score of 3.3 on corruption perceptions index
 - PCA, Section 19 - no prosecution against a public servant absent government approval
 - “Take corruption out of the morning papers and we will have nothing to read,” said Bijoy Venugopal on the IPaidABribe. Take it out of prime-time television and our anchors will have nothing to scream about, take it out of our sports and we will have nothing to play for, take it out of politics and we will have anarchy.” Global Post, Nov. 22, 2010



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ASSESSING & MANAGING RISK

Risk Assessment

- Assessing country, industry, people and relationship risks
- Using knowledge of local culture and local business environment
- Recognizing that inherent risk cannot be eliminated
- Mitigating inherent risk and cost benefit analyses



ASSESSING & MANAGING RISK

Corruption Risks

- Entity-wide:
 - Poor tone from the top
 - Lack of employee training and FCPA compliance awareness
 - Lack of testing and monitoring
 - Weak policies, procedures and other internal controls
 - Lack of procedures for reporting and investigating violations

ASSESSING & MANAGING RISK

Corruption Risks (cont.)

- Transactional:
 - Cash transactions
 - Hospitality, travel and entertainment, gifts for government officials, pricing discounts
 - Charitable and political contributions
 - Overpayments and other unusual payments
 - Third-party transactions



ASSESSING & MANAGING RISK

Risk Mitigation

- Risk rankings
- Control mapping
- Suggested remediation
- Testing and monitoring



ASSESSING & MANAGING RISK

Anti-Corruption Tools/Procedures

- Investigative due diligence
- Third-party certifications of FCPA compliance
- Third-party audit rights
- Hotlines
- Data analytics
- E-mail monitoring
- Substantive transaction testing
- Interviews



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CONCLUSION

- Prior to doing business in India, perform corruption-related risk assessment
- Rely upon experts who understand Indian culture and the industry in which you are operating
- Pay particularly close attention to the incentives and pressures inherent to Indian employees and the higher corruption risks associated with the use of outside contractors and intermediaries.



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Q & A

ABOUT BDO CONSULTING

BDO Consulting, a division of BDO USA, LLP, provides risk advisory, investigative and litigation support services to the legal and business communities. Our highly experienced and well-credentialed professionals draw upon a range of industry knowledge and completed consulting engagements throughout the United States and internationally to provide clients with unparalleled service. BDO Consulting leverages the global industry and accounting knowledge of the BDO International network, providing rapid, strategic advice to assist our clients.

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ABOUT O'MELVENY & MYERS LLP

With approximately 900 lawyers in 14 offices worldwide, O'Melveny & Myers LLP helps industry leaders across a broad array of sectors manage the complex challenges of succeeding in the global economy. We are a values-driven law firm, guided by the principles of excellence, leadership, and citizenship. Our commitment to these values is reflected in our dedication to improving access to justice through pro bono work and championing initiatives that increase the diversity of the legal profession. For more information, please visit www.omm.com.