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## BRIBERY

Kobre & Kim LLP attorneys Vasu Muthyala and Nathaniel P. Barber discuss how with significant investment coming into and flowing out from India, it is likely that overseas law enforcement will continue to keep a close watch to ensure that companies are complying with all relevant laws. The authors caution that arming yourself with the right advisers will ensure that your house is in order when law enforcement comes knocking at your door.

### INSIGHT: From 'Fragile Five' to Global Powerhouse—Regulators Will Respond to the New Indian Economy



BY VASU MUTHYALA AND NATHANIEL P. BARBER

*“I do not want my house to be walled in on all sides and my windows to be stuffed. I want the culture of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any.”*

Delivering the keynote address at the World Economic Forum in January 2018, India’s Prime Minister Narendra Modi deployed the words of Mahatma Gandhi to explain the foundation of his government’s globalisation policy. But companies investing in India—and, increasingly, Indian companies outwardly investing in other jurisdictions—may wish for a few walls and a door when international law enforcement blow into their houses. Compliance with anti-bribery, corruption and anti-money laundering requirements—which increasingly have a global reach—should be a crucial concern for multi-national company compliance officers so that they can protect their company’s reputation and avoid the risk of serious financial penalties.

#### Heightened Risks of a Developing Economy

Economic conditions have improved rapidly in India. An unwilling member of the “Fragile Five” in 2013 (Membership of the Fragile Five—a term coined by analysts at Morgan Stanley—included India, Turkey, Brazil, South Africa, and Indonesia, and was used to describe emerging market economies that had become too dependent on inward foreign investment to finance their growth ambitions.), India’s government has worked hard to develop and refocus its economy. Merely five years later, India has the fastest-growing large economy in the world—attracting \$40 billion of foreign direct investment in 2017—and has a new focus upon modern industries, such as technology and financial services.

Inward investment to India has been booming, and the government has been keen to promote this growth through a number of initiatives.

**1. The demonitization drive.** In November 2016, the government announced that it would invalidate billions of 500 and 1,000 rupee banknotes, in a crackdown on “black money” (funds used for illegal activities such as tax dodging and funding terrorist activities). Although the consequences of this policy are still being debated, recent studies indicate that the demonitization policy pushed the general population to transition from being predominantly reliant upon cash payments, to being more digitally enabled and a cashless society. The corollary of this move will be greater scrutiny of payments

and greater ease for the relevant authorities to detect fraudulent transactions.

**2. The “goods and services tax” regime.** Coming into effect in 2017, the regime was promoted as having the aim of ‘One Nation One Tax’ and was intended to simplify the indirect tax structure of India and reduce the burden of taxes. In so doing, the government hoped that it would act as a catalyst for growth and formalization of the economy. (The impact of the regime, however, has yet to have the intended consequence.)

**3. The Insolvency and Bankruptcy Code 2016.** Implemented in 2016 to address the Indian economy’s difficulties with a mountain of non-performing assets (worth about Rs10 trillion / US\$153.5 billion) in the banking system, the Insolvency and Bankruptcy Code has been seen as a great success in revolutionising the Indian economy. The Code speeds up the time it takes to turn around bankrupt firms, and prevents debtors from using bankruptcy proceedings to stall recovery by lenders.

Outward investment by Indian companies has also been on the rise as companies have looked to extend their growth beyond Indian borders. This outward investment has been encouraged by the Reserve Bank of India, which has scrapped or liberalized some of the historic blockages for Indian companies wanting to invest abroad. As the amount of inward and outward investment has increased, so too have the regulatory risks from overseas regulators. U.S. government agencies, including the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC), and their U.K. equivalents, such as the U.K.’s Serious Fraud Office (SFO), continue to actively police anti-bribery and anti-corruption laws which are applicable in foreign jurisdictions.

## The Risk to Companies Investing in India

Although there has been a move towards more formal business expectations, there have still been some pockets where the old expectations remain. For example, there still persists instances of:

- government officials expecting payments to fulfil their duties or provide the necessary authorizations;
- middlemen serving as fixers;
- and facilitators who raise concerns for the most seasoned compliance officers in India.

The new world order has not quite permeated throughout the economy.

The government has attempted to curb the likelihood of this misconduct occurring with the passing of the Prevention of Corruption (Amendment) Act 2018. The act brings Indian legislation in line with the U.N. Convention Against Corruption, and involves several key changes. These changes include criminal penalties for those who offer to bribe public officials and extending liability to commercial organizations—including multi-national companies operating in India—who offer a bribe with the intention to obtain or retain business, or obtain or retain an advantage in the conduct of its business. In sum, the act is still in its early stages of implementation, and corresponding investigations, let alone charges, are still very far off in the distance.

Currently, incoming investors into India need to be certain that their Indian-based businesses are not going

to fall foul of overseas regulations, such as the U.S. Foreign Corrupt Practices Act (FCPA) or U.K. Bribery Act (UKBA).

## The FCPA

The FCPA is a key component of the U.S. law enforcement’s arsenal, prohibiting U.S. persons, entities, or any issuers of U.S. securities from making and offering to make payments to foreign government officials, in the hope that they would obtain or retain a business or business advantage. Penalties for violations of the FCPA include monetary fines and imprisonment.

Yet, despite a heightened awareness, companies are still getting caught up in FCPA investigations. In July 2018, a prominent Chicago-based spirits maker famous for Jim Beam bourbon paid \$8 million to resolve an investigation by the Securities and Exchange Commission into the company’s Indian subsidiary. According to the SEC’s administrative order, from 2006 to 2012, this Indian subsidiary “used third-party sales promoters and distributors to make illicit payments to government employees” in order to increase sales orders and generally “facilitate the distribution of Beam’s distilled spirit products.”

## UKBA

Although it has yet to garner the same notability as the FCPA, the UKBA increasingly needs to be a key consideration for multi-national companies. If a company carries on a business, or part of their business, in the U.K., then there is potential exposure to the UKBA, regardless of where the bribe takes place.

There are several differences between the two acts, including:

- (1) The UKBA covers both the giving and taking of bribes, whereas FCPA only addresses the giving of bribes;
- (2) The UKBA covers the bribery of private individuals as well as public individuals;
- (3) Unlike the FCPA, there is no exemption in the UKBA for facilitation payments, although this difference is becoming more illusory; and
- (4) Under the UKBA, if a company can demonstrate it had “adequate procedures” in place to prevent bribery, it may be able to defend an allegation of failing to prevent bribery. There is no similar defence to the FCPA.

Broadly speaking, companies prioritized FCPA compliance because of a perception that the U.S. authorities were more likely than their U.K. counterparts to enforce bribery statutes overseas. However, the sanctions against Rolls-Royce and recent decisions such as that in *KBR v SFO*, where an U.K. court found that the SFO has the power to compel the U.S. parent of a U.K. company under investigation to produce documents located overseas, demonstrate that these assumptions may no longer be accurate.

## The Risk for Indian Companies Investing Elsewhere

It’s not just investors in India which may be suffering a law-enforcement-induced hangover, but Indian companies must also be careful. India is increasingly be-

coming a global outward investor; it is now the third largest source of foreign direct investment in the U.K. The U.S. has also seen inward investment from India-based companies.

Investing in these jurisdictions will bring Indian companies under the purview of U.S. and U.K. law enforcement, and therefore Indian companies must take care that their operations do not leave them exposed. Investigators have been proactive in monitoring Indian companies for compliance. Demonstrating this point, in the U.K., the Financial Conduct Authority sent a warning to Indian banks that their anti-money laundering policies and procedures must be sufficient, fining Indian Government-owned Canara Bank's U.K. operations £896,100 (\$1.18 million) for failing to respond to several warnings that it needed to improve its anti-money laundering policies. Canara's failings "potentially undermine[d] the integrity of the UK financial system by significantly increasing the risk that Canara could be used for the purposes of domestic international money laundering, terrorist financing and those seeking to evade taxation or the implementation of sanction requirements." Clearly, the interest from foreign authorities—as well as the risks to companies doing business in India—is on the rise.

## Recent Changes to Policing

Changes have also come to the policing of international criminal law. In the U.S., the focus has been to motivate companies to voluntarily disclose violations that they uncover. In November 2017, the DOJ made permanent its pilot program that was launched in 2016—the FCPA Corporate Enforcement Policy. Under the program, voluntary disclosure and cooperation with an investigation can lead to significant reductions in penalties, and even a decision from the DOJ not to take any further action.

In July 2018, the DOJ confirmed that it was expanding the FCPA Corporate Enforcement Policy to companies that uncover wrongdoing as part of a mergers and acquisition process who would be able to take advantage of the self-reporting policy. If a successor company—at either the time of due diligence or which learn of misconduct subsequent to an acquisition—voluntarily discloses, cooperates with the investigation, and enacts measures to remedy the misconduct, then it will qualify for such reductions. Extending this policy to mergers and acquisitions will give some comfort to those companies investing in India.

## Responding to These Changes

There are several key ways that companies investing in India, as well as Indian companies investing in the

U.S. and the U.K., can minimise the risks involved in this new environment.

**1. Implementing a robust and strong compliance program to prevent bribery.** Law enforcement have identified that companies conducting staff training and implementing anti-corruption policies was the reason why fines had not been imposed. However, the SEC in the Beam Suntory order highlighted that Beam India failed to move sufficiently quickly when red flags were identified.

**2. Conducting due diligence when acquiring subsidiaries.** A cautionary tale highlighting this point involves the chocolatiers Cadbury Ltd and Mondelez International, and Cadbury's Indian subsidiary. To obtain the necessary licences in India, Cadbury India engaged a local agent, but Cadbury India failed to impose adequate control to prevent payments to the agent being used for improper purposes. When Mondelez International acquired Cadbury—including its Indian subsidiary—it was unable to complete pre-acquisition due diligence, and thus did not identify these failings until the post-acquisition stage. The SEC fined Mondelez International and Cadbury \$13 million for these failings.

**3. Developing an investigation strategy at an early stage.** If, despite a company's best efforts, allegations of corruption are uncovered, or a whistleblower escalates complaints, companies need to develop a clear and coherent strategy for taking the next steps. Key to preparing this strategy will be obtaining advice from those who can identify the scope of the investigation, are familiar with the expectations and workings of law enforcement, and who are equally familiar with the local landscape and environment.

## The Future

The Indian government has made recent efforts to improve its domestic legislation preventing bribery and corruption. In September 2018, a bill amending the Prevention of Corruption Act was passed by both houses of Parliament, which significantly tightens controls reducing corruption. However, the infrastructure to enforce these laws is still non-existent.

Meanwhile, with such significant investment coming into and flowing out from India, it is likely that overseas law enforcement will continue to keep a close watch to ensure that laws are being complied with. Arming yourself with the right advisers will ensure that your house is in order when law enforcement comes knocking at your door.

### India Related Actions Since 2010

Company	Industry	Year	Amount paid (US\$)
Beam Suntory	Distilled beverages	2018	8 million
Rolls-Royce	Engineering	2017	800 million
	*Global settlement with U.S., U.K., nd Brazil		
Alere	Healthcare diagnostics	2017	13 million

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Mondelçz International	Food processing	2017	13 million
CDM Smith	Engineering and construction *Pilot Program resolution	2017	4 million
Embraer	Aircraft manufacturing	2016	205 million
Anheuser-Busch InBev	Beer brewing & sales	2016	6 million
Louis Berger International	Construction management consulting	2015	17.1 million
Tyco International	Industrial component sales	2012	26.8 million
Oracle	IT services	2012	2 million
Diageo	Liquor sales	2011	16.3 million
Pride International	Oil & gas services	2010	56.1 million

### **Author Information**

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