

## Beyond the FCPA: The UK Bribery Act

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In recent times, one of the most hotly debated provisions in agreements between Indian and US partners has been the “FCPA clause”. It is not unusual to see this innocuous boiler plate clause in US drafts bring negotiations to a halt due to the discomfort of Indian parties to contractually agree to the high standard set out under the US Foreign Corrupt Practices Act (FCPA).

With the enactment of the Bribery Act 2010 by the UK parliament, Indian parties can expect to see similar, if not more stringent, clauses in agreements entered into with parties with a presence in the UK. This article examines some of the key features of this legislation, differences with the more familiar FCPA, and its effect on India Inc.

### Higher standards

The Bribery Act, which will take effect from 1 April, seeks to revamp the UK’s laws on criminalizing corruption and sets a higher standard than that established under the FCPA and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997. While the FCPA limits its applicability only to persons giving a bribe, even receiving, requesting or agreeing to receive a bribe is deemed to be an offence under this new legislation. Further, the Bribery Act applies to cases of bribery of not just “foreign officials”, as is the case with the FCPA, but to any person in a commercial context. Further, unlike the FCPA, which exempts “facilitation payments” in certain circumstances, the Bribery Act provides no such exceptions.

The failure by a commercial organization to prevent bribery by an “associated person” is also recognized as an offence under the Bribery Act. The

term “associated person” is broadly defined to widen the ambit of applicability of the legislation. Thus, a company will be liable for acts of bribery committed by an associated person with the intent to obtain or retain any business or advantage.

The only defence available to a commercial organization (but not the person committing the offence) is to demonstrate that it had put in place “adequate procedures” designed to prevent such offence by associated persons. While the act does not define the term “adequate procedures”, the government is required to publish and update guidelines regarding the adequacy of such preventive measures. It is expected that there will be more clarity on the obligations of organizations under the Bribery Act once such guidelines are published.

The Bribery Act provides for a maximum penalty of 10 years imprisonment (as compared to seven years under the FCPA) and an unlimited fine or both. The discretion to determine an appropriate amount of fine for the breach of any of the provisions of this Bribery Act has been vested with the courts.

### Extraterritorial reach

Possibly the most notable feature of the Bribery Act is its broad extraterritorial applicability. Citizens and residents of the UK and companies incorporated in the UK can now be held criminally liable for acts of bribery, regardless of the place of occurrence, and non-UK companies or nationals will be subject to a similar liability for offences that occur, in whole or part, in the UK. The Bribery Act is applicable not only to businesses incorporated in the UK but also to any business, wherever incorporated, with a UK presence, in respect of its worldwide activities.

In an Indian context the following entities will fall within the ambit of the Bribery Act:

- (i) Any Indian subsidiary or business operations of a UK-based corporation;
- (ii) Any Indian company that has a business operation, subsidiary or, arguably, even a group company based in the UK; and
- (iii) Any employee of an Indian company who is a British citizen or resident.

### International act, Indian impact

While at first glance citing international legislation may seem out of place while discussing laws dealing with India, this could not be farther from the truth in the current global investment environment.

With the continued spike in foreign investment in India and the increased outbound M&A activity of Indian corporates, global legislation with extra territorial applicability on subjects affecting business, has gained unprecedented significance.

The increased international focus on the eradication of corruption and establishment of best practices is likely to mean that the Bribery Act is just one of the first in a series of such legislation around the world.

While foreign investors need to be aware of the systemic realities of doing business in India, strengthening efforts to establish adequate safeguards and procedures to battle this evil will be the need of the hour for Indian corporates.

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