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AMENDMENTS TO THE PREVENTION OF CORRUPTION ACT, 1988

IMPLICATIONS FOR COMMERCIAL ORGANIZATIONS DOING BUSINESS IN INDIA

To Our Clients and Friends:

The Indian Parliament recently passed the Prevention of Corruption Act (Amendment) Act, 2018 (the "2018 Amendment"), amending the Prevention of Corruption Act, 1988 (the "PCA"). The PCA is the primary Indian legislation tackling corruption and bribery involving public officials in India. The 2018 Amendment has been in the works for several years and marks the most significant set of amendments made to the PCA since its inception. The 2018 Amendment—which came into force on July 26, 2018[1]--effects critical changes to the PCA, including direct liability for commercial organizations involved in bribery in India. This update provides an overview of the key changes effected by the 2018 Amendment and its impact on commercial organizations doing business in India.[1a]

A. Supply Side of Bribery

Prior to the 2018 Amendment, the primary focus of the PCA had been to deal with the demand side of corruption. The main charging sections of the PCA deal with the acceptance of bribes by public servants. Prior to the 2018 Amendment, Section 7 of the PCA penalized a public servant who accepted or obtained gratification other than legal remuneration in respect of an official act. Section 11 made it an offence for a public servant, among other things, to accept or obtain for himself or for any other person, "*any valuable thing without consideration or for a consideration which he knows to be inadequate*", from any person who may have an interest in a proceeding or business transacted by the public servant, or some connection with the official function of the public servant or his subordinates.

The PCA covered the supply side of bribery only indirectly. The abetment of an offence under Sections 7 or 11 of the historical PCA was punishable under Section 12. A person offering a bribe or giving a valuable item to a public servant could have been prosecuted for abetting an offence under Sections 7 or 11 of the PCA.

The 2018 Amendment overhauls these charging sections of the PCA and includes a distinct offence dealing with the supply side of bribery. Section 8 of the amended PCA prohibits the giving or promising to give an undue advantage (which includes any kind of gratification) other than legal remuneration to a public servant with the intention of inducing or rewarding a public servant for the improper performance of any public function. Whether the offer or promise is ultimately accepted by the public servant is immaterial. Punishment for the offence may include imprisonment for a period not exceeding seven years and/or a fine.

At this juncture, it is important to note the import of the term "public servant" under the PCA. The general understanding was that the term referred to employees of different branches of the state (executive, legislature, judiciary) or employees of public sector undertakings and institutions. As a result of the broad manner in which the term 'public servant' has been defined in the PCA, however, it is not just persons associated with an Indian governmental institution who come under PCA purview. For example, as the PCA's definition of the term 'public servant' includes any person who discharges a duty in "*which the State, the public or the community at large has an interest*"[2], the Supreme Court of India ruled in 2016 that the term also includes employees of private banks.[3]

B. Removal of Immunity to Bribe Giver

Under Section 24 of the PCA (in its unamended form), bribe givers received immunity from prosecution if they reported the acceptance of a bribe by a public servant or became a witness in the prosecution of a bribery offence. The 2018 Amendment significantly limits this protection for bribe givers, and instead increases the burden on bribe givers to report the occurrence of an offence. Those seeking immunity must now prove that they were "compelled" to provide an undue advantage (such as a bribe) to a public servant and must report the provision of the undue advantage to Indian enforcement or investigating agencies within a period of seven days.[4] It is currently unclear as to what evidence would be needed to establish that a person was compelled to provide a bribe by a public servant.

C. Bribery by Commercial Organizations

The 2018 Amendment has introduced provisions that will have a far-reaching impact on commercial organizations operating in India. While these amendments are intended to improve integrity levels within the Indian business community, they will also significantly increase the compliance burden for companies doing business in India.

Under Section 9 of the amended PCA, a commercial organization can be held liable "*if any person associated with the commercial organisation gives or promises to give any undue advantage to a public servant*" with an intent to obtain or retain business or any advantage for that commercial organizations. This provision covers all types of entities (including domestic companies, foreign companies and partnerships) doing business in India, but does not include charitable organizations. Commercial organizations operating in India will therefore be vicariously liable for any bribes provided to public servants by persons associated with such organizations. In order to cast a wide net on intermediaries who provide bribes on behalf of commercial organizations, the 2018 Amendment considers anyone "*who performs services for or on behalf of the commercial organisation*" to be a person associated with such organization. Consequently, commercial organizations can be held liable for the actions of their employees, agents, service providers and professional advisers. Further, a parent company (including a foreign parent company) can be held liable under the PCA for the actions of its Indian subsidiary.

Commercial organizations can avoid liability for a bribe provided by a person associated with them by demonstrating that the bribe was provided to the public servant despite the organization putting in place "*adequate procedures designed to prevent*" it. While the 2018 Amendment does not delineate what are considered to be "adequate procedures", it requires the Indian Government to prescribe guidelines in this regard.[5]

The requirement to install adequate safeguards is the latest in a legislative trend mandating robust compliance programs. For example, the [*Indian*] Companies Act, 2013 requires directors of Indian companies to annually certify that they have "*taken proper and sufficient care for the maintenance of adequate accounting records… for preventing and detecting fraud and other irregularities*".[6] More stringent obligations apply to companies that are listed on Indian stock exchanges.

Foreign parent companies should be mindful of the increased liability under the amended PCA. As parent entities may now be held liable in India for wrong-doing committed by their Indian subsidiaries, such parent companies should ensure that their Indian subsidiaries have adequate procedures to prevent bribe-giving to Indian public servants. Until such time as the Indian Government stipulates guidelines regarding the "adequate procedures", commercial organizations doing business in India would do well to adhere to established international standards for compliance programs, such as those expected under the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.K. Bribery Act ("UKBA").

D. Managerial Liability

In addition to imposing liability on individuals providing bribes to public servants and commercial organizations deriving business or an advantage from such bribes, the 2018 Amendment also imposes liability on directors, managers, secretaries and other officers of a commercial organization. Under Section 10 of the amended PCA, managerial personnel of a commercial organization will be liable if the prosecution is able to establish that such personnel consented to or connived with the person committing the offence under the PCA. Managerial personnel can face imprisonment for up to seven years and/or fines if found guilty.

Even though managers of commercial organizations will not be held liable for bribes that are provided without their knowledge or participation, it is more important than ever for management to set the right tone at the top of their organizations to avoid personal liability and ensure that their organizations do not fall afoul of the amended PCA.

E. Conclusion

The 2018 Amendment makes significant changes to a law that has been in place for over three decades and has seen uneven enforcement. The investigative and prosecutorial burden required to successfully enforce the provisions of the PCA against errant public servants appears to have increased[7] as a result of the 2018 Amendment. However, the new law also brings with it a promise of more speedy trials in bribery cases. Under the amended PCA, trials are required to be completed within two years from the date on which the case is filed. While this amendment does not address delays that generally plague the investigative process, it is expected to expedite cases once filed.[8]

For commercial organizations doing business in India, the 2018 Amendment is an opportunity to revisit their anti-bribery policies, compliance programmes, and processes, especially for frameworks that have been focused on ensuring compliance with legislation like the FCPA or the UKBA. With commercial organizations and managerial personnel now directly under scrutiny for violations of the PCA, multinational organizations need to ensure that their India operations rise up to the heightened compliance standards ushered in by the 2018 Amendment.

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[1] Gazette Notification No. S.O. 3664(E) dated 26 July 2018.

[1a] This update is based on the text of the 2018 Amendment as passed by the upper house of the Indian Parliament on the 19th of July, 2018.

[2] Section 2(c)(viii) of the PCA.

[3] See *Central Bureau of Investigation* v. *Ramesh Gelli and others*, Criminal Appeal Nos. 1077-1081 of 2013 and Writ Petition (Crl.) no. 167 of 2015. The Supreme Court of India came to include private bankers within the definition of a public servant also as a result of provisions of the [*Indian*] Banking Regulation Act, 1949.

[4] Parliament passes bill to punish bribe-givers, *Deccan Herald*, at: https://www.deccanherald.com/national/parliament-passes-bill-punish-683401.html (25 July 2018).

[5] The Institute of Company Secretaries of India (ICSI) formulated a Corporate Anti-Bribery Code in October 2017 that can be adopted by Indian commercial organizations on a voluntary basis. However, there is no statutory backing for this code and nothing to suggest that policies and stipulations contained therein would satisfy the requirements of the amended PCA.

[6] Section 134(5)(c) of the Companies Act, 2013.

[7] Section 17A is a new provision requiring the prior sanction of the relevant federal or state government with whom the public servant is employed.

[8] Under Section 4(5) of the amended PCA, the trial period can be extended until a maximum of four years from the date of filing of the case provided that the judge hearing the case records reasons for any extension beyond the initial two year period.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. We have more than 110 attorneys with FCPA experience, including a number of former federal prosecutors and SEC officials, spread throughout the firm's domestic and international offices. Please contact the Gibson Dunn attorney in the firm's FCPA group with whom you work, or the authors:

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