

August 21, 2018

Key Amendment to India's Anti-Corruption Legislation Has Significant Implications for Multinationals Doing Business in India

In late July 2018, India's parliament passed an amendment to the Prevention of Corruption Act 1988 (the "PCA"), India's principal legislation for combating bribery and corruption involving public officials. The Prevention of Corruption (Amendment) Act, 2018 (the "Amendment") introduces changes that have considerable significance for multinational corporations ("MNCs") doing business in India. In this summary, we discuss the Amendment's key provisions and impact on MNCs.

Attorneys
[Geoffrey M. Atkins](#)
[Andrew J. Dale](#)
[Karen Oddo](#)
[Ryan Rohlfen](#)

Targeting Bribe-Payers

Prior to the Amendment, the primary anti-bribery provisions of the PCA in Sections 7 and 11 dealt with the acceptance of bribes by public servants. Section 12 of the unamended PCA allowed for the prosecution of bribe-payers indirectly through the law's abetting provisions. However, Indian prosecutors used the abetting provisions sparingly against private individuals and entities.

The Amendment indicates a potential shift. The new PCA Section 8 establishes a separate offense for giving or offering an "undue advantage" to another person with the intention of inducing or rewarding a public servant¹ to improperly perform a public function. Whether the public servant accepts the offer is of no consequence. The form of gratification is likewise immaterial; the law prohibits any gratification other than legal remuneration. If convicted under the Section 8, bribe-payers face potential fines and/or imprisonment of up to seven years.

The Amendment also places limits on the immunity previously afforded bribe-payers. The unamended PCA provided bribe-givers with immunity if they reported a public servant's having accepted a bribe or turned witness for the prosecution. The Amendment limits this protection to instances where the bribe-payer is "compelled" to provide the "undue advantage," or bribe, and requires reporting to law enforcement within seven days. However, the Amendment offers little in the way of clarity as to what is required to demonstrate that a bribe-payer was so "compelled."

Third Party Risk

Third party intermediaries are among MNCs' greatest corruption risks. Globally, the majority of prosecutions and regulatory settlements arise out of payments to agents, brokers, distributors, and other third parties.

The Amendment erases any doubt that individuals and companies can be liable under the PCA for bribes paid or offered by third parties on their behalf. In particular, the Amendment clarifies that whether a person gives or promises an undue advantage directly to a public servant or through a third party is "immaterial" under Section 8.

¹ The definition of "Public Servant" under the PCA is expansive. The law includes individuals required to perform duties in which "the State, the public, or the community has an interest," which the Indian Supreme Court has ruled includes private bank officers.

For MNCs doing business in India, the change highlights the continued importance of an anti-corruption compliance program that accounts for third parties, and of ensuring that local partners appreciate the risk that violations by intermediaries pose to your organization.

Liability for Commercial Organizations

The Amendment portends a potential increase in corporate prosecutions by creating a distinct offense for commercial organizations. Under the new Section 9, a commercial organization may be liable “if any person associated with the commercial organization gives or promises to give any undue advantage to a public servant” with an intent to obtain or retain business or any advantage on behalf of that commercial organization. Those “associated with” the commercial organization may include any person who “perform[s] services for or on behalf of the commercial organization.” As a result, MNCs face potential liability for the actions not only of their employees in India, but of external agents, contractors, consultants, subsidiaries, and other intermediaries.

New Risks for Managers

Section 10 of the amended PCA imposes liability on directors, managers, and other officers of a commercial organization who consent to or conspire with an individual who commits a primary violation of the PCA. Managerial violations entail punishment of up to seven years in prison.

The additional oversight burden aligns with other legislative actions taken by the Indian government that make compliance the responsibility of management. The Indian Companies Act, 2013, requires directors of Indian companies to annually certify to the sufficiency and accuracy of accounting records in order to prevent fraud.

Policies & Procedures

The Amendment further underscores the importance of a sophisticated anti-corruption compliance program. In particular, the Amendment introduces an affirmative defense to Section 9 charges for commercial organizations that have in place “adequate procedures designed to prevent” violations of the PCA. As to the meaning of “adequate procedures,” the Amendment is silent – for now. The Amendment contains a requirement that the Indian government prescribe the components of a compliance program designed to meet the new standards.

Takeaways

The Amendment places MNCs, their officers, and directors squarely within the crosshairs of the PCA. While the Amendment affords MNCs the opportunity to mitigate their potential exposure by adopting a robust anti-corruption compliance program, the dearth of PCA enforcement against private companies leaves significant ambiguity as to how Indian prosecutors will evaluate compliance programs. MNCs with direct operations, subsidiaries, and investments in India would be wise to ensure that their anti-corruption compliance programs adhere to global standards, such as those contemplated under the FCPA and UK Bribery Act.

We will continue to monitor further developments in this area. If you have any questions about this Alert, please contact your usual Ropes & Gray attorney.

Ropes & Gray attorneys are not practicing as Indian lawyers, and do not provide direct assistance with litigation matters in the courts of India nor appear before any government agencies or other regulatory bodies in India.