

An Overview of Anti-Corruption Laws in India

A Legal, Regulatory, Tax and Strategic Perspective

March, 2020

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Introduction

Behind every great fortune there is a crime¹

Corruption has been seen as an immoral and unethical practice since biblical times. But, while the Bible condemned corrupt practices,² Chanakya in his teachings considered corruption as a sign of positive ambition.³ Ironically, similar views are echoed by Mario Puzo in *The Godfather*⁴

Historical incidents of corrupt practices and modern theories of regulation of economic behaviour might evoke a sense of fascination, however, there can be no doubt that in modern business and commerce, corruption has a devastating and crippling effect. The annual Kroll Global Fraud Report notes that India has among the highest national incidences of corruption (25%). The same study also notes that India reports the highest proportion reporting procurement fraud (77%) as well as corruption and bribery (73%).⁵ According to the Transparency International Corruption Perception Index, India is ranked 78 out of 180 nations.⁶ These statistics do not help India's image as a destination for ease of doing business nor do they provide investors with an assurance of the sanctity of Government contracts.

In this decade, India has witnessed amongst the worst scandals relating to public procurement

resulting in unprecedented judicial orders cancelling procurement contracts.⁷ While these unprecedented judicial orders galvanised the Government toward framing the Public Procurement Bill, 2012, the same has since lapsed. The Finance Minister had mentioned a new public procurement bill in his Annual Budget Speech in 2015, however, this bill was not introduced.

In India, the law relating to corruption is broadly governed by the Indian Penal Code, 1860 ('IPC') and the Prevention of Corruption Act, 1988 (as amended from time to time) ('POCA'). The new amendments to POCA ('POCA Amendment Act') which provides for supply-side prosecution, among other key changes was passed by both houses of Parliament and received the assent of the President on July 26, 2018.⁸

In India, apart from the investigating agencies and the prosecution machinery, there is also the Comptroller and Auditor General ('CAG') and the Central Vigilance Commission ('CVC') which play an important role due to Public Interest Litigations ('PILs') in India. For instance, courts have directed that the CAG should audit public-private-partnership contracts in the infrastructure sector on the basis of allegations of revenue loss to the exchequer.⁹

Apart from the risk of criminal prosecution under POCA, there is also the risk of being

1. *The Godfather*, Mario Puzo, Signet, 1969.
2. Proverbs 29:4 – A just king gives stability to his nation, but one who demands bribes, destroys it.
3. Chanakya – His Teachings & Advice, Pundit Ashwani Sharma, Jaico Publishing House, 1998:
In the forest, only those trees with curved trunks escape the woodcutter's axe. The trees that stand straight and tall fall to the ground. This only illustrates that it is not too advisable to live in this world as an innocent, modest man.
4. Page 100, Mario Puzo, 1969 – *The breaking of such regulations was considered a sign of high-spiritedness, like that shown by a fine racing horse fighting the reins.*
5. Global Fraud Report – Vulnerabilities on the Rise, Kroll, 2015-2016, available at http://anticorruzione.eu/wp-content/uploads/2015/09/Kroll_Global_Fraud_Report_2015low-copia.pdf.
6. Transparency International's Corruption Perception Index available at https://www.transparency.org/news/feature/corruption_perceptions_index_2018..

7. Supreme Court of India cancelled 122 licences which resulted in prosecutions of various companies, politicians and bureaucrats [see *Timeline: 2G Scam*, Livemint, February 3, 2012, at <http://www.livemint.com/Home-Page/XI7sCDFXoT6KEXawTcPnuK/Timeline-2G-scam.html>] and *Indian Supreme Court cancels 214 coal scandal permits*, BBC, September 24, 2014, available at <http://www.bbc.com/news/world-asia-india-29339842>]
8. Nishith Desai Associates Hotline on the Amendment Act, <http://www.nishithdesai.com/information/news-storage/news-details/article/parliament-tightens-the-noose-on-corruption.html>.
9. Delhi High Court ruled that private electricity distribution companies could be subject to CAG Audit – see *Nishith Desai Associates Hotline, Direction for CAG audit of DISCOMs quashed private companies can be subject to CAG audit* and Nishith Desai Associates Hotline, Supreme Court Private telecom service providers under CAG scanner

blacklisted¹⁰ and subject to investigation for anti-competitive practices. Despite the lapsed Public Procurement Bill, 2012, different Government departments have procurement rules, the contravention of which may result in prosecution. In relation to public procurement contracts, the Competition Commission of India ('CCI' / '**Competition Commission**') has the power to examine information suo moto and take cognizance of cases even without a complainant before the CCI.

An issue of regulatory compliance that is often raised along with corrupt practices is one related to lobbying. As such, lobbying is not an institution in India like certain European countries or USA and it is not mandatory for Government agencies the executive to consider the viewpoints of various stakeholders and interested parties before formulating rules and regulations. Further, generally there is no law which provides for prior consultation with affected persons before rules and regulations are framed by administrative authorities. In certain circumstances, prior consultation may be seen as a mandatory requirement.

A bill was introduced by a Member of Parliament, *The Disclosures of Lobbying Activities Bill, 2013* in Lok Sabha in 2013 in the wake of the Nira Radia controversy but the same has since lapsed. This bill sought to regulate lobbying activities and the lobbyist itself. However, regulation of lobbying activities is envisaged only on the supply-side and such an approach may not satisfactorily address concerns of transparency and constitutional ethics.

This body of amorphous laws and regulations, coupled with high risk to directors makes compliance a matter of great significance. In this paper, we examine the regulatory framework and law in relation to anti-corruption laws and risks associated with non-compliance, in particular reference to possibility of a change in the anti-corruption landscape with the passing of the POCA Amendment Act. Additionally, we also address opportunities for companies to design preventive and compliance mechanisms. Litigation entails considerable risk and costs (financial and reputational) and hence, it is imperative that, in the absence of regulatory and legislative clarity, companies take proactive measures to address these risks.

10. See for instance, Nishith Desai Associates Hotline on blacklisting, <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/supreme-court-balances-power-to-blacklist-with-principles-of-reasonableness.html>.

1. Legislative and Regulatory Framework

I. The Indian Penal Code and the Prevention of Corruption Act (including the Amendment Act)

A. Background – 1860 to 1988

India's legislation relating to corruption and corrupt practices includes a web of legislations and Government regulations. The IPC criminalised various activities including taking bribes¹¹, influencing a public servant through corrupt and illegal means,¹² and public servants accepting valuables from accepting gifts.¹³ All these provisions (Section 161 of the IPC to Section 165A of the IPC) were repealed by the POCA.

A war-time ordinance called the Criminal Law (Amendment) Ordinance, 1944 (Ordinance No. XXXVIII of 1944) ('**1944 Ordinance**'), was enacted to prevent the disposal or concealment of property procured as a result of certain specified offences. Thereafter the Prevention of Corruption Act of 1947 was enacted immediately after independence.

B. POCA – 1988 till 2018

In 1988 POCA was enacted to consolidate all laws relating to offences by public servants. However, POCA prosecuted and criminalised only bribe-taking and not bribe-giving. The erstwhile Section 7, Section 8, Section 9, Section 10 and Section 11 of POCA criminalised various corrupt acts of public servants and middlemen seeking to influence public servants *per se* while excluding the bribe giver as well as private entities -taking bribes.¹⁴

Although the application of POCA was limited to public servants, courts have given an expansive interpretation to the expression 'public servant'. For instance, in *Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli & Ors.*¹⁵, the Supreme Court of India ('**Supreme Court**') held that the chairman and directors of a private bank would also be 'public servants' for the purpose of POCA.

The POCA Amendment Act has now extended the scope of POCA to prosecute bribe givers, commercial organizations and its officials. However, the POCA Amendment Act has failed to bring within its ambit, corrupt practices among private entities *inter se* and illegal gratification to foreign officials.

II. POCA – An International Perspective

POCA does not compare favourably in respect of standards of prosecution, guidelines or completeness, with corresponding laws in United States of America ('**USA**'). United Kingdom ('**UK**') or other international standards. A brief overview of how POCA compares with others laws is set out in Annexure 1 at the end of this Paper.

The POCA Amendment Act falls short of international standards in respect of failing to expand its scope to include corrupt practices amongst private entities, providing good corporate governance standards and guidelines and other failings which have been dealt with in greater depth in this Paper. It does not provide for prosecution of offences relating to international public officials or illegal gratification in transactions with private companies. A perspective of foreign law / international standards is also given in relevant sections below.

11. Section 161. Public Servant taking gratification other than legal remuneration in respect of an official act.

12. Section 162. Taking gratification in order by corrupt or illegal means to influence public servant.

13. Section 165. Public servant obtaining valuable thing without consideration from person concerned in proceeding or business transacted by such public servant.

14. Law Commission of India Report No. 254, February 2015, paras 1.6 to 1.9.

15. Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli & Ors., CrI. App. 1077-1081 of 2013 decided on February 23, 2016.

As regards bribe-giving, POCA Amendment Act has only now taken away the clear immunity given to the bribe-giver.¹⁶ Given the very limited scope of POCA until the enactment of the POCA Amendment Act, instances of prosecuting bribe givers has been fairly limited and unless a bribe giver was shown to be a co-conspirator, giving bribes in itself, has not been subjected to prosecution.¹⁷ While the 1944 Ordinance provided for attachment of tainted property, POCA itself made no provision for attachment of tainted property. While the POCA Amendment Act has only now granted the power to attach property, confiscate money or property and administrate property tainted by corrupt activities, the process of investigation and trial empowered the investigation agency, in appropriate cases, to attach tainted property, in the past as well. Another important aspect about POCA was that it prosecuted only offences related to corruption in public sector and involving public servants. Therefore, payments made beyond a contract, or payments made to fraudulently secure contracts in the private sector, were not covered by POCA. Such offences could be prosecuted only under IPC.¹⁸

Unlike laws in some other jurisdictions, POCA makes no distinction between an illegal gratification and a facilitation payment. A payment is legal or illegal. This treatment applies to other laws and regulations in India as well.

POCA Amendment Act now stipulates that trial of offences covered under POCA should take place on a day to day basis and that endeavour shall be made to conclude such trials within two years.¹⁹ POCA also does not provide compounding of an offence, however, courts have been

exercising discretion while passing sentence based on specific facts of each case.²⁰

Prosecution of public servants under POCA requires prior sanction of a competent authority.²¹ Obtaining such sanction itself in the past has been a hurdle to effective enforcement of the law. Supreme Court noted the submissions of the Attorney General in *Dr. Subramanian Swamy v. Dr. Manmohan Singh*²² that out of 319 requests, sanction was awaited in respect of 126.

POCA does not have extra-territorial operation unlike certain other laws and its application is restricted to the territory of India. Unlike anti-corruption laws in other jurisdictions, POCA does not recognise illegal gratification paid to foreign government officials or official of a public international organisation. Interestingly, POCA does not define the expressions 'bribe', 'corruption' or 'corrupt practices'. While the Standing Committee on Personnel, Public Grievances, Law and Justice in August 2013 ('**Standing Committee**') that looked into the pending amendment bill at the time had recommended that these key provisions be defined, POCA Amendment Act has left these terms undefined. The ambiguity brought about as a result of the absence of key definitions and expansive meanings given to certain expressions by courts is certainly contrary to India's commitment under the United Nations Convention against Corruption ('**UNCAC**').

In August 2013, the POCA Amendment Act was introduced in Parliament, thereafter passed by both houses of Parliament and assented to by the President in July, 2018 which provided for substantial changes to POCA. These changes are discussed in the relevant section below.

A. POCA Amendment Act

Since its introduction in Parliament on August 19, 2013, the POCA Bill underwent changes based on the Law Commission Report. After five long years since its introduction, the POCA

16. Before the POCA Amendment Act, Section 24 (Statement by bribe giver not to subject him to prosecution) of POCA granted immunity to the bribe-giver. The POCA Amendment Act has now omitted Section 24 and has inserted a new Section 8 which specifically prosecutes the bribe-giver.

17. Akilesh Kumar Vs. CBI & Anr. 2011 (4) KLJ 471 and Shashikant Sitaram Masdekar and Ors. Vs. The State of Maharashtra 2016 (1) BomCR (Cri) 421.

18. Section 420, IPC - Cheating and dishonestly inducing delivery of property.

19. Section 4(4)

20. Gian Singh v. State of Punjab (2012) 10 SCC 303.

21. Section 17A of POCA Amendment Act.

22. (2012) 3 SCC 64.

Bill was passed by the upper house on June 19, 2018, followed by the lower house on June 24, 2018. The POCA Bill finally received the assent of the President on July 26, 2018 and the POCA Amendment Act came to be enacted.

The following key changes have been introduced to POCA by way of the POCA Amendment Act:

i. Bribe-giver is liable to be prosecuted

Conceding to the recommendations of the LCI, the scope of POCA has now been extended to cover to those who give or promise to give 'undue advantage' to a person with an intent to induce or reward a public servant to perform their 'public duty' 'improperly', as per Section 8. The immunity granted in terms of the erstwhile section 24 has now been deleted. Such offence would be punishable with the maximum imprisonment for a period of seven years and / or fine.

An immunity from prosecution has also been granted in favour of those who are compelled to give such undue advantage provided such persons report the matter to law enforcement authorities within seven days from the date of giving the undue advantage.²³

In a departure from the recommendations of the LCI, the term 'improperly' is undefined, and no distinction has yet been made between facilitation payments and other forms of bribery. Supply side prosecution was imperative to bring our anti-corruption laws in consonance with international standards and act as a deterrent for private persons who bribed with impunity. However, the ambiguity on the aspect of 'improper discharge of public duty', could pose more concerns and abuse of the process and cause for concern leading to protracted litigation.

Given that recently the Supreme Court of India has expanded the scope of 'public official',²⁴ clarifications in respect of these

key expressions would have provided much needed certainty. This is particularly important considering non-compliance or a violation attracts criminal prosecution. Therefore, it is imperative to have objective standards for the expression 'improperly'. The expression 'public official', although defined in POCA, required clarification in light of Supreme Court's ruling and to negate possibility of expansion of private entities which are in collaborative projects with government / state owned enterprises.

ii. Commercial organizations liable to be prosecuted

The POCA Amendment Act has largely retained the edict of the POCA Bill and grants the power to prosecute commercial organizations, 'if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant...'²⁵. In addition, if any director, manager, secretary or other officer of the concerned commercial organization is proven to have consented and / or connived to commit the said offence, such officer would be punishable with imprisonment for a term not less than three years and extendable to seven years and also liable to fine. Same as the POCA Bill, the POCA Amendment Act too states that it would be a valid defense for the commercial organization to prove that it had 'adequate procedures' in place.

POCA Amendment Act failed to prescribe guidelines to determine what would be seen as 'adequate procedures', as was recommended by the LCI. India, unlike other jurisdictions has faced severe criticisms for abuse of process despite laws being in place, therefore such provisions could lead to harassment for individuals within companies even if not responsible/involved in the illegal act. It also potentially defeats the principle of 'corporate veil' and hence requires safeguards to be put in place before implementation of these provisions to avoid harassment of professionals. While the provision contemplates prosecution of an

23. Section 8

24. Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli & Ors., CrI. App. 1077-1081 of 2013 decided on February 23, 2016

25. Section 9

individual if the offence under the Bill is 'proved in the court to have been committed with the consent or connivance' of any director, as a matter of practice, investigating authorities ordinarily do not prosecute companies without making a director a party as well. Consequently, innocent directors / officers could be prosecuted and subject to investigation.

Companies need to introduce compliance programs, manuals and guidance notes to ensure that employees and consultants are adequately educated about obligations under POCA, as done in other developed jurisdictions. Failure to do so might exacerbate liabilities under POCA.

The UK Bribery Act's Six Principles provide an outline for an anti-corruption compliance system that establishes 'adequate procedures' to prevent a person from bribing on the company's behalf including: proportionality, tone at the top, risk assessment, due diligence, communication, monitoring and review, used as a valid defence. India needs to follow the path without any further delay and publish guidelines to determine the adequacy of 'procedures'.

iii. Prior permission to be sought before initiating investigation

Considering the sensitive nature of a public servant's role, POCA Amendment Act makes it mandatory for police officers to seek prior approval before conducting an enquiry into any offence committed by incumbent and retired public servants. The approval would have to be sought from the relevant union or state government in whose employment the accused 'public servant' committed the offence in discharge of his official functions and duties. The introduction of such provisions are in accordance with other jurisdictions which require prior sanction for all offences and for all persons.

While POCA Amendment Act binds such approving authority to pass its decision within three months, further extendable by a month, this may dilute the power of investigating authorities from effectively prosecuting guilty officials.

However, such prior sanction would not be required in the cases of arrest of officials caught 'red-handed' accepting or attempting to accept any undue advantage for himself or for any other person.

With a view to protect honest public servants, POCA Amendment Act has sought to restrict the scope of offences proposed to be covered under the POCA by identifying 'criminal misconduct'. This restricted definition no longer takes into account, previously covered grounds such as disregarding public interest, abusing his / her position, using illegal means, etc. The element of criminal intent is added to lend more objectivity to enforcement.

Requirement of prior sanction for retired public officials and change of scope of 'criminal misconduct' would encourage retiring bureaucrats to take faster decisions and the checks and balances introduced in the amendment should protect such public officials.

iv. Attachment of tainted property

POCA Amendment Act has added a new chapter - Chapter IV A to POCA, which grants the power to attach property, confiscate money or property and administrate property tainted by corrupt activities. Adhering in spirit to LCI's recommendations, the provisions of the Criminal Law Amendment Ordinance, 1944 is now applicable to such attachment proceedings. Earlier, tainted property could be attached through measures under anti-money laundering laws.

It was important to streamline proceedings and avoid multiple enforcement mechanisms. POCA Amendment Act has introduced the new chapter to help authorities recover proceeds of crime expeditiously. It may also be possible that victims of such crimes can seek restorative justice.

v. Time limit for trial

The Bill now requires trial of offences to be held on a day to day basis and endeavor to conclude it within two years.

A time bound trial would certainly help expedite the process of effective prosecution and would act as a powerful deterrent for habitual offenders.

B. Other Important Principles under POCA

i. Public duty and Public servant

Public duty is defined as ‘a duty in the discharge of which the State, the public or the community at large has an interest’.²⁶ The expression ‘state’ also has an inclusive definition. The significance of the definition accorded to ‘public duty’ is that persons who are remunerated by Government for public duties²⁷ or otherwise perform public duties,²⁸ may also be public servants for POCA.

POCA defines public servant in a wide and expansive manner. The expression is not restricted to instances set out in the definition clause and courts have also adopted an interpretation which enables more persons to be included within its ambit.²⁹ The definition of public duty and public servant was examined in *P.V. Narasimha Rao v. State*.³⁰ Although the case related to a Member of Parliament, the Supreme Court’s ruling made it clear that both public duty and public servant would be given a wide interpretation. Applying these principles in *Ram Gelli’s* case, even though the concerned individuals were not employees of State or its instrumentalities, in view of the public duty element and nature of work performed by bank managers, the Supreme Court came to the conclusion that for the purpose of POCA, such officers would be public servants..

In *Bhupinder Singh Sikka v. CBI*³¹ the Delhi High Court ruled that an employee of an insurance company that was created by an act of

Parliament was automatically a public servant and further, no evidence was required to be led in respect of the same.

The expansive definitions being adopted by Supreme Court can lead to a state of unpredictability and uncertainty in the law.

In *Ram Gelli’s* case, Section 46A of the Banking Regulation Act, 1949 (‘Banking Act’) that provided that certain officers³² would be deemed public servant for IPC, was held also applicable in respect of POCA. However, it leaves open the question of the role of directors and key managerial personnel in infrastructure projects and other projects of a public nature, or of national importance.

ii. Taking gratification, influencing public servant and acceptance of gifts

Section 7, Section 8, Section 9 and Section 11 of POCA, as substantially amended by way of the POCA Amendment Act, provide for instances of taking gratification, influencing public servants or accepting gifts. These sections are amended substantially keeping in mind India’s obligations under the UNCAC.

In respect of offences under Sections 7, 11 and 13, the court has held these to be an abuse of office by the relevant public servant. Transactions which contravene provisions of POCA necessarily contemplate a public servant and illegal gratification in connection with securing a favour from the public servant or as an incentive or reward to the public servant.

It is equally important that there should be a demand of such sum made by the public servant and the mere fact that the individual has a valuable thing, in the absence of proof of such demand, may not result in a conviction under

26. Section 2(b)

27. Section 2(c)(i) of POCA

28. Section 2(c)(viii) of POCA

29. Section 2 (c) of POCA. See also *Ram Gelli* case above.

30. (1998) 4 SCC 626.

31. CrI. App. No. 124 of 2001, Delhi High Court, decided on March 25, 2011.

32. S. 46A Banking Act - Every chairman who is appointed on a whole-time basis, managing director, director, auditor, liquidator, manager and any other employee of a banking company shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code (45 of 1860).

Section 7 of POCA.³³ It has also been held that an offence under Section 7 is an abuse of office³⁴ and that the acts of the concerned individuals have the colour of authority.

C. Investigation, trial and settlement

Investigation of offences under POCA takes place as per the procedure set out in the Code of Criminal Procedure, 1973 (**'Criminal Code'**). POCA does not provide for a settlement or compounding mechanism.³⁵ The Criminal Code provides for cases in respect of which compounding is possible.³⁶ However, even though offences under POCA are not mentioned in Section 320 of the Criminal Code, the Supreme Court has held that in certain cases which do not involve moral turpitude and are more commercial in nature, it would be permissible for parties to settle the dispute. Supreme Court has observed:

*In respect of serious offences, including those under IPC or offences of moral turpitude under special statutes, like POCA, offences committed by public servants while working in that capacity may not be sanctioned for settlement between offender and victim.*³⁷

D. Foreign Contribution Regulation Act

Foreign Contributions Regulation Act, 2010 (**'FCRA'**) regulates foreign contribution and acceptance of foreign contributions and foreign hospitality by certain specified persons. Section 3 of the FCRA prohibits certain categories of persons from accepting foreign contributions. These persons include, among others, candidates for election, judges, Government servants, employees of Government owned

or controlled bodies, members of Legislature, political parties or political organizations.

FCRA has defined 'foreign contribution' to include the donation, delivery or transfers of any currency or foreign security. Section 3(2) (a) of the FCRA extends this prohibition to persons in India and citizens of India residing outside India receiving foreign contributions on behalf of the aforementioned categories of persons.

Section 6 of the FCRA regulates the acceptance of foreign hospitality by a member of a Legislature or an office-bearer of a political party or Judge or Government servant or employee of any corporation or any other body owned or controlled by the Government. It mandates that these persons shall not accept any foreign hospitality while visiting any country outside India except with prior permission of the Central Government save for medical aid in the event of contracting sudden illness while abroad.

A proposed amendment to FCRA on the definition of 'foreign source' is pending in Parliament.³⁸

33. P. Satyanarayana Murthy v. The District Inspector of Police (2015) 10 SCC 152.

34. Parkash Singh Badal, above.

35. Settlement or any form of plea bargaining.

36. Section 320 of Criminal Code.

37. Gian Singh, above.

38. Cl. 233 of the Finance Act, 2016.

2. Civil Servants and Government Servants

I. Civil Servants

Civil Servants in the employment of Central Government are subject to the terms and conditions of the All India Services Act, 1951 (**'Services Act'**). The Services Act empowers the Central Government to make rules regarding terms of service of employees belonging to the All India Services.³⁹

Standards of integrity and right / ability of member of the Service⁴⁰ to participate in activities outside employment with the Central Government, including accepting gifts are provided for in the All India Services (Conduct) Rules, 1968 (**'Services Rules'**). Restrictions in the Services Rules includes restrictions of a member of family⁴¹ accepting employment with an NGO or a private undertaking having official dealings with the Government.⁴²

The Services Rules enjoins a member of the Service to ensure standards of integrity and duty in respect of his employment.⁴³ A member of the Service may accept gifts from a member of family, provided that a disclosure will have to be made to the Government if the value of 'such gift' exceeds Rs. 5,000. The Services Rules explains 'gift' to include transport, boarding, other service or pecuniary advantage when provided by a person other than '*a near relative or personal friend having no official dealing with the member of the Service but does not include a casual meal, casual lift or other social hospitality*'.

II. Government Servant

Central Civil Services (Conduct) Rules 1964 (**'Central Services Rules'**) are applicable to Government Servants, who are persons appointed by Government to '*any civil service or post in connection with the affairs of the Union and includes a civilian in a Defence Service*'. The Central Services Rules are therefore wider in its application but apply, substantially, the same definitions as the Services Rules. The Central Services Rules have the same standard in respect of gifts⁴⁴ (however, monetary limits are different for Government Servants at different grades) and general integrity.⁴⁵

The Central Services Rules also have restrictions on a Government Servant's connections with press or media⁴⁶ and prohibit a Government Servant from owning (whole or part) and being part of the management of a newspaper or other publication. Central Services Rules also have restrictions on Government Servants accepting gifts from foreign dignitaries. There are restrictions with respect to the monetary value of such gifts and these are regulated by the Government from time to time.⁴⁷

While the rules set out above apply in respect of employees of Central Government departments and undertakings, similar rules apply in respect of employees of State Governments and State Government owned entities.

39. All India Service includes services mentioned in Section 2 and Section 2A of the Services Act.

40. Member of the Service is defined in Rule 2(c) as a *member of an All India Service as defined in section 2 of the All India Services Act, 1951 (61 of 1951)*.

41. Member of family is defined in Rule 2(b) of Services Rules.

42. Rule 4 (2)(b) Services Rules.

43. Rule 3 (2) Services Rules.

44. Rule 13 of Central Services Rules.

45. Rule 3(1) of Central Services Rules.

46. Rule 8 of Central Services Rules.

47. Rule 12(4) and Rule 12(5) of Central Services Rules.

3. Lobbying

A private Member's bill, *The Disclosures of Lobbying Activities Bill*, 2013 was introduced in Lok Sabha in 2013 in the wake of the *Nira Radia* controversy⁴⁸ but the same lapsed.

The bill sought to regulate lobbying activities and the lobbyist itself. However, regulation of lobbying activities is envisaged only on the supply-side and such an approach may not satisfactorily address concerns of transparency and constitutional ethics.

As such, making representations to the Government or to Government agencies in respect of policies is not prohibited under Indian law. Stakeholders making representations about proposed regulations is not illegal or unethical provided that there is transparency in respect of the process and representations. Several laws provide for pre-consultation prior to enactment of delegated legislation. Section 23 of the

General Clauses Act, 1897, provides that where a law contemplates prior publication of rules / regulations, such rules / regulations shall first be published in a manner prescribed and that objections to the draft legislation shall also be invited. Several other laws such as the erstwhile Central Tea Board Act (since repealed), Section 30 (3) of the Chartered Accountants Act, Section 43 of Co-operative Societies Act contemplate prior publication.

However, it is possible that in the future, a law on lobbying is enacted by the Parliament.

48. R.N. Tata v. Union of India (2014) 1 SCC 93.

4. Central Vigilance Commission and Comptroller and Auditor General

I. Central Vigilance Commission

The CVC was set up in February 1964 on the recommendations of the Santhanam Committee on the prevention of corruption to advise and guide the Central Government agencies on the issue of vigilance.⁴⁹ On 25th August, 1998, it received statutory status by the promulgation of an Ordinance by the President. Perhaps not ironically, legislative actions were precipitated after a PIL was filed seeking the intervention of the Supreme Court due to inaction by the Central Bureau of Investigation ('CBI') in relation to certain corruption cases.⁵⁰

The CVC is only an investigating agency and does not have power to formulate or make policy.

The Central Vigilance Commission Bill was introduced in Parliament and was passed in 2003. The statement of objects and reasons in the Central Vigilance Commission Act, 2003 ('CVC Act') states that it is an act to inquire or cause inquiries to be conducted into offences alleged to have been committed under POCA by certain categories of public servants of the Central Government, corporations established under any Central Act, Government companies, as well as societies or local authorities owned or substantially controlled by the Government. Section 3(2) of the CVC Act lays out the constitution of the CVC as consisting of a Central Vigilance Commissioner who is the Chairperson, as well as two Vigilance Commissioners that act as Members. These three persons are appointed from persons who have either been in the All India Service or similar service with background on administration, including policy administration, banking, finance, law, vigilance and investigation.⁵¹

A Committee of the Prime Minister, the Home Minister, and the Leader of the Opposition are tasked with making appointments to the CVC under Section 4(1) of CVC Act. Section 8 of CVC Act lays out the powers and functions of the CVC which include exercising superintendence over the Delhi Special Police Establishment for the examination of offences under POCA, inquire or cause an investigation to be made on the recommendation of the Central Government for offences under POCA, review the progress of investigations conducted by the Delhi Special Police Establishment, etc. CVC will have the same powers as a civil court to summon and enforce attendance, receive evidence on affidavits, etc. Section 12 clarifies that the proceedings before the Commission are deemed to be judicial proceedings. At the close of the year 2014, a total of 13,659 complaints were pending with the Central Vigilance Officers concerned for investigation, out of which 6,499 complaints were pending beyond a period of six months.⁵²

II. Comptroller and Auditor General

A. Background

The CAG is a constitutional authority created under Article 148 of Constitution of India, 1950 ('**Constitution**'). The role of CAG has assumed a lot of significance in the past few years since CAG Reports have been subject matter of scrutiny by courts and have been at the heart of public interest litigations in relation to government contracts. The Delhi High Court and Supreme Court have held that even private companies may be subject to CAG audit in certain circumstances.⁵³

49. Website of Central Vigilance Commission, available at, http://cvc.gov.in/cvc_back.htm.

50. Vineet Narain & Ors. v. Union of India (1998) 1 SCC 226.

51. Section 3 of CVC Act.

52. <http://cvc.nic.in/ar2014.pdf>

53. See Nishith Desai Associates Regulatory Hotline, *Direction for CAG audit of DISCOMs quashed; private companies can be subject to CAG audit*, November 2015. See also Nishith Desai Associates Dispute Resolution Hotline, *Supreme Court: Private Telecom Service Providers under CAG Scanner*, April 2014.

As per Article 149 of the Constitution, CAG is to perform functions and duties as specified by Parliament and for this purpose, Parliament enacted the Comptroller Auditor-General's (Duties, Powers and Conditions of Services) Act, 1971 ('CAG Act'). Section 10 of the CAG Act provides that the CAG shall be responsible for compiling accounts and keeping accounts in relation to the Union and the States and that these accounts are to be tabled before the President or the Governor. Section 18 empowers CAG to make necessary enquiries in connection with such audits. These include powers of inspection of premises, questioning persons etc. CAG has the power and duty to carry out audits in respect of expenditure, transactions, trading, manufacturing, profit and loss account and balance sheet and subsidiary accounts maintained by departments of Union or of the State. CAG has similar duties with respect to public companies and bodies/authorities substantially financed by the Government. CAG also has the power to audit grants or loans given to authorities and bodies. As per Article 151 of the Constitution, such reports are to be tabled before each House of Parliament/ Legislature of State as the case may be.

Therefore, the powers of CAG with respect to audit of receipts, expenditure and transaction of Government Departments and bodies are fairly significant. Although the Constitution and CAG Act empower CAG to carry out transaction related audits, neither the Constitution nor CAG Act makes it mandatory for Parliament

to implement the recommendations or accept the recommendations of the CAG. Under the present law, no report of CAG can *per se* be enforced. Parliament cannot be compelled to act on the recommendations of CAG.

B. Enforceability of CAG Audit Reports and judicial scrutiny

A report of CAG is tabled before Parliament and proceedings before Parliament, including debates, are not open to judicial scrutiny. However, Supreme Court has often relied on CAG reports while issuing directions to Government Departments. In the case relating to implementation of NREGA⁵⁴ reliance was placed on a CAG reports to issue directions for investigation. In *Centre for Public Interest Litigation and Ors. v. Union of India and Ors.*⁵⁵ reliance on the CAG report was contested and Supreme Court did not look into the CAG report as the same was pending before a Joint Parliamentary Committee. Therefore, even though under law the CAG reports cannot be enforced, the same can be used in PILs while seeking relief and a court has power to appropriately mould relief in terms of the report of CAG.

It is interesting to note that the National Commission to Review the Working of the Constitution ('NCRWC') made recommendations to provide more teeth to CAG and that findings of CAG should be better enforceable.⁵⁶

54. Centre for Environment and Food Security vs. Union of India (UOI) and Ors.

55. (2012) 3 SCC 104.

56. Report of the National Commission to Review the Working of the Constitution, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch11.htm>.

5. Regulatory Concerns

I. Competition Act

Anti-competitive practices are prohibited under the Competition Act, 2002 (**'Competition Act'**) and the CCI has the power to take cognisance of cases *suo moto* and direct investigations in respect of matters which CCI concludes are *prima facie* anti-competitive.⁵⁷

The Competition Act prohibits anti-competitive behaviour including abuse of dominance by an entity that enjoys dominance in a relevant market.⁵⁸ Entities are also prohibited from imposing unfair and discriminatory terms of sale, purchase of goods or services.⁵⁹ There is fair degree of nexus between certain kinds of anti-competitive practices and possibilities of corrupt practices and there is precedence for at least one such instance when CCI took cognisance on the basis of reports of CAG.⁶⁰ In this particular case, CAG had prepared a report on procurement in defence contracts and CCI took cognisance on the ground that bidders were indulging in cartel-like behaviour. In this case, while CAG gave an adverse finding against some of the employees of certain Ordnance Factories, it is important to note that in certain scenarios, investigations by one agency can also lead to investigation by another.

Consequently, a company that is facing allegations relating to corrupt practices may also be investigated for anti-competitive behaviour such as abuse of dominance and cartel like behaviour.

II. Companies Act

Political contributions are not *per se* prohibited and may be made subject to fulfilment of certain conditions in the Companies Act, 2013 (**'Companies Act'**). The Companies Act also provides for a vigil mechanism and an audit

committee. Companies Act itself seeks to set higher standards of corporate governance for companies.

A. Political Contributions

Section 182(1) of Companies Act, 2013 (**'Companies Act'**) provides that neither government companies nor companies that have been in existence for less than three years are permitted to make political contributions. The Companies Act does not provide for a definition of what constitutes a 'contribution,' however Section 182 (2) specifies that a donation, subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which can reasonably be regarded as likely to affect public support for a political party shall also be considered a contribution. Additionally, the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication – *i.e.*, a souvenir, brochure, tract, pamphlet or the like – by, on the behalf or for the advantage of a political party shall also be considered as a contribution. Eligible companies may make a contribution in any financial year provided that such contribution shall not exceed 7.5% of its average net profits during the three immediately preceding financial years.⁶¹

Additionally, there must be a resolution passed at a Board of Directors meeting authorizing such contribution under Section 182 (1) of the Companies Act. Section 182 (3) prescribes that such contribution must be disclosed in the profit and loss account of the company with the amount and the name of the political party. The penalty for non-compliance with a provision of the section which could be 5 times the amount so contributed and each officer of the company would be punishable with imprisonment for a term of 6 months and a fine which could be 5 times the amount contributed.

57. Section 19(1) of Competition Act.

58. Section 4(1) of Competition Act.

59. Section 4(2) of Competition Act.

60. *Suo Moto* Case No. 4 of 2013.

61. Section 182 (1) of Companies Act.

B. Vigil Mechanism

Section 177(9) of the Companies Act provides for the establishment of a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed. Section 179(1) also provides that there shall be safeguards against victimisation of persons who use the vigil mechanism.

This whistle blowing mechanism applies to every listed company or such class or classes of companies, as may be prescribed. Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014, prescribes the classes of companies as listed companies, companies which accept deposits from the public, and Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees. Rule 7(4) provides additionally that the vigil mechanism shall provide for adequate safeguards against victimisation of employees and directors who avail of the vigil mechanism.

While Companies Act provides that certain class of companies should have a vigil mechanism, Companies Act does not provide for consequences if a vigil mechanism is in place. In any event, companies may adopt measures provided in international documents. It is important to note, however, that Independent Directors and the company have to abide by certain standards of integrity and ethical norms which are set out in Schedule IV of Companies Act. Schedule IV provides for both subjective and objective criteria for an Independent Director.

6. Income Tax Act

Income Tax Act, 1961 ('IT Act') provides for deductions in respect of items of expenditure incurred by a tax payer. IT Act also provides for contributions to political parties and deduction of such contributions from the total income of the tax payer. IT Act also provides for disallowance of any illegal payments made.

I. Political Contributions

Section 80 GGC and Section 80 GGB of the IT Act provides for deductions towards contributions made to political parties by eligible tax payers. Deduction will be allowed in respect of contributions which are made (non-cash) and eligible tax payers exclude local authority and artificial juridical persons wholly or partly funded by Government.

II. Illegal gratification

Unlike anti-corruption laws in other jurisdictions, all illegal payments will be disallowed and no deduction in respect of the same may be claimed by a tax payer.⁶² The explanation to Section 37 (1) of the IT Act provides that any expenditure incurred by a tax payer for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business and no deduction shall be made in respect of such expenditure.

62. *Maddi Venkatraman & Co. (P) Ltd. v. Commissioner of Income Tax* (1998) 2 SCC 95.

7. Public Procurement and Blacklisting

In the wake of the Supreme Court order cancelling 2G spectrum licences⁶³ and the subsequent challenge to allocation of coal blocks,⁶⁴ Government of India introduced the Public Procurement Bill, 2012 in Parliament (**'Procurement Bill'**). However the bill has since lapsed. In his Union Budget Speech for the year 2015-2016, the Finance Minister stated that a new public procurement bill consistent with UNCITRAL would be designed, however, Parliament would need to take a decision in respect of the same.⁶⁵ As on date, there is no new bill in respect of public procurement. The Government would do well to avoid multiple laws and superfluous layers of enforcement. However, most developed jurisdictions have a public procurement law and such a law engenders confidence in participants, ensures transparency, accountability and has a well-defined grievance redress mechanism.

I. Procurement Bill

The Procurement Bill lays out the responsibilities of the procuring entities for ensuring transparency and efficiency, fair and equitable treatment to bidders, promotion of competition, fixing reasonable prices consistent with quality required, as well as mechanisms to avert corrupt practices.⁶⁶ To this effect, the Central Government may prescribe a code of integrity for procuring entities and the bidders, containing provisions for prohibiting anti-competitive practices and bribery, among other things, as well as provisions on disclosures.⁶⁷ The Procurement Bill empowers the procuring entity to take appropriate measures against

the bidder for breach of the code of integrity such as exclusion from the procurement process, debarment from participation in future procurements, etc. In addition, the Central Government may notify an offsets policy which will be mandatory for procuring entities to implement during the procurement process.⁶⁸

In accordance with its object of improving transparency and efficacy in the procurement process, the Procurement Bill makes a provision for mandatory publication of certain information on a Central Public Procurement Portal. This information consists of invitations by procuring entity to invite bids in case of an open competitive bidding,⁶⁹ the decision on an award of a public contract,⁷⁰ the exclusion of certain bids,⁷¹ as well as pre-bid clarifications.⁷² The list of registered bidders for a given subject-matter of procurement must also be published on the Procurement Portal.⁷³

The Procurement Bill penalizes both the acceptance of a bribe as well as the offering of a bribe with imprisonment of not less than 6 months but which could extend to 5 years along with a fine.⁷⁴ It also penalizes a person who interferes with the procurement or influences the procuring entity that has made a wrongful gain or caused an unfair disadvantage with imprisonment of up to 5 years and a fine of up to 10% of the value of the procurement.⁷⁵ The Procurement Bill also vests with the Central Government the power to debar a bidder from public procurement for three years for breach of the POCA or IPC.⁷⁶

63. Nishith Desai Associates Telecom Hotline, *Supreme Court cancels 122 telecom licences with good intentions*, February 2012.

64. Nishith Desai Associates Regulatory Hotline, *Coal allocations cancelled!*, October 2014.

65. Budget Speech of the Union Finance Minister for the year 2015-2016, available at <http://www.thehindu.com/news/resources/full-text-of-budget-201516-speech/article6945026.ece>.

66. S 5(1) of Procurement Bill.

67. S. 6 of Procurement Bill.

68. S. 17 of Procurement Bill.

69. S. 30 (5) of Procurement Bill.

70. S. 25 (3) of Procurement Bill.

71. S 22(4)(b) of Procurement Bill.

72. 18 (3) and 18(4) of Procurement Bill.

73. 14(5) of Procurement Bill.

74. S. 44 of Procurement Bill.

75. S. 45 of Procurement Bill.

76. S. 49 (1) of Procurement Bill.

II. Blacklisting

There is no law on blacklisting in India. Government Departments and State Owned Enterprises ('SOEs') have their own public procurement code. The General Financial Rules ('GFR') developed by the Ministry of Finance establish principles and procedures for government procurement. All government purchases must follow the principles outlined in the GFRs. GFR and the regulations formulated by government departments and SOEs include powers to make inquiries and blacklisting suppliers.

The issue of blacklisting has been challenged before the Supreme Court several times, however, Supreme Court has upheld the practice of blacklisting.⁷⁷ Supreme Court has balanced the rights of suppliers to not be deprived of their livelihood and their right to participate in government contracts with the power to blacklist by SOEs and weed out corruption in its rulings.⁷⁸

In the absence of a comprehensive legal and regulatory framework, it is a moot debate to consider how effective practices such as blacklisting would be. Given the poor enforcement and conviction in cases relating to economic fraud and corruption, it might be more purposeful for the Government to think out-of-the-box in its approach to weeding out corruption.⁷⁹

III. Central Public Procurement Portal

The Central Public Procurement Portal ('Portal') consist of a National Portal as well as a 'Mission Mode Portal' which acts as a state portal. The Department of Expenditure, Government of

India, set up the Portal to act as a single access point for information related to procurements made by various Government ministries and departments. To this effect, the Portal carries out two primary functions- publishing of information relating to procurement as well as acting as a medium for the procurement process. It is mandatory for all ministries and departments of central and state governments as well as central public sector enterprises and autonomous statutory bodies to publish tender enquiries on the Portal.⁸⁰

The Portal puts in the public domain all Notices Inviting Tenders, details of archived tenders, bid award details and tender documents. User registration is not required to view all the information published on the Portal. The Portal aims to provide transparency to the procurement process as well initiate a move towards adopting 'electronic procurement solutions.' In addition, it seeks to be both cost and time effective, to reach a wide base of bidders, to minimize human discretion during the procurement cycle, as well as provide access to a complete audit and evidential data pertaining to the procurement process.

The Portal has links for active tenders where a search can be customized to be state wise, product category wise, and date wise. Tenders have tender ID's generated, and these ID's along with tender titles, the name of the organization, and descriptions of the tender can be used as keywords to further enhance the search facility on the Portal. The Portal also publishes a sector/ministry wise list of bidders along with the particulars of such bidders.

Since there is no law in force as regard public procurement, it is the GFR (as amended from time to time) which substantially applies to tenders.

77. Erusian Equipment and Chemicals Ltd. State of West Bengal & Anr. (1975) 1 SCC 70.

78. Kulja Industries Limited v. Chief General Manager W.T. Proj. BSNL & Ors. 2013 (12) SCALE 423.

79. *Anti-corruption laws – It's time to think out of the box*, Alipak Banerjee and M.S. Ananth, Business Standard, October 2, 2014, available at http://www.business-standard.com/article/opinion/alipak-banerjee-m-s-ananth-anti-corruption-laws-it-s-time-to-think-out-of-the-box-114100200851_1.html.

80. Portal available at <https://eprocure.gov.in/cppp/rulesandprocs>.

8. Whistle Blowers Protection Act

The Whistle Blowers Protection Act, 2014 (**'Whistleblowers Act'**) seeks to establish a mechanism to receive complaints relating to corruption or wilful misuse of power or discretion by public servants, to inquire into those complaints, and prevent the victimization of the complainants.⁸¹ The definition of public servant is the same as the definition provided under POCA.⁸² Disclosure has been defined under Whistleblowers Act as a complaint relating to an attempt/commission of an offence under POCA, the wilful misuse of power or discretion causing loss to the Government, or an attempt to commit, or a commission of, a criminal offence by a public servant, that made in writing or electronic mail against a public servant before a Competent Authority.⁸³ The complainant may be any public servant, or any person, and may include an NGO.⁸⁴

The Whistleblowers Act makes it mandatory for the identity of the complainant to be disclosed to the Competent Authority and stipulates that no action will be taken if the identity of the complainant proves to be false.⁸⁵ However, the Competent Authority shall conceal the identity of the complainant except in the narrow circumstance that disclosure to a Head of Department is necessary while making an inquiry. Even when this is so, written consent from the complainant is mandatory, and the Head of Department shall be directed not to disclose the identity of the complainant.⁸⁶

The Whistleblowers Act also makes it mandatory for the disclosure to be accompanied by full particulars and supporting documents.⁸⁷

The Whistleblowers Act provides for certain classes of complaints which the Competent Authority need not take cognizance of, since

another authority under law (a court or other authority) may be seized of the matter.⁸⁸

Upon receipt of a complaint, the Competent Authority will decide if the matter is one which needs investigation. If it determines it does, it shall conduct a discreet inquiry to ascertain if there is a basis to proceed. If this is so, it shall seek an explanation or a report from the concerned Head of Department. If, on receipt of the concerned Head of Department's comments, explanation, or inquiry, it finds that there has been a wilful misuse of power or discretion, or an act of corruption, it will recommend taking measures including, the imputation of proceedings or taking corrective measures against the public servant to the concerned public authority.⁸⁹ The public authority then takes a decision, within three months of receiving the recommendation, on whether a given course of action should be pursued. If it decides in the negative, it will record its reasons for electing not to take action.

To safeguard the inquiry process, Whistleblowers Act prescribes a host of penalties. Making mala fide or false disclosures can warrant imprisonment for up to two years and a fine of INR 30,000 under the Whistleblowers Act.⁹⁰ If reports are not furnished to the Competent Authority during an inquiry, the person may face a fine of INR 250/- per day till the reports are submitted, up to a sum of INR 50,000.⁹¹ The penalty for revealing the identity of a complainant has been prescribed as imprisonment for a period of up to three years accompanied by a fine of INR 50,000⁹² and knowingly providing false or incomplete information to a Competent Authority can sanction a penalty of INR 50,000.⁹³

81. Statement of objects and reasons.

82. Section 3(i) of Whistleblowers Act.

83. Section 3(c) of Whistleblowers Act.

84. Section 4(1) of Whistleblowers Act.

85. Section 4(6) of Whistleblowers Act.

86. Section 5(4) of Whistleblowers Act.

87. Section 4(4) of Whistleblowers Act.

88. Section 6 of Whistleblowers Act.

89. Section 3(h) of Whistleblowers Act defines public authority as any authority/body/institution falling within the jurisdiction of the Competent Authority.

90. Section 17 of Whistleblowers Act.

91. Section 15 (a) of Whistleblowers Act.

92. Section 16 of Whistleblowers Act.

93. Section 15 (b) of Whistleblowers Act.

The Whistleblowers Act also provides for safeguards against complainants making disclosures, as well as people making disclosures during the inquiry process. Section 11 provides that a person shall not be victimized or proceeded against merely on the ground that he has made a disclosure or rendered assistance to an inquiry. If a person is being victimized, he may make an application to the Competent Authority which will take action following a hearing with the public authority and the victim. This action can include restoring the victim to its original position, and imposing a fine of INR 30,000 in the event of non-compliance with any orders issued by the Competent Authority.⁹⁴ Moreover, if the Competent Authority is under the impression that the complainant needs to be protected, it may issue directions to the concerned government authorities to protect such persons.⁹⁵

The Whistleblowers Protection (Amendment) Bill, 2015 has seemingly diluted the Whistleblowers Act and has introduced ten categories of information in respect of which there is a prohibition on reporting or making disclosures. These are the sovereignty, strategic, scientific, or economic interests of India, records

of deliberations of the Council of Ministers, anything that is forbidden to be published by a court, anything relayed in a fiduciary capacity, personal or private matters, information received by a foreign government, breach of legislative privilege, anything that could impede an investigation, commercial confidence/trade secrets/intellectual property, as well as anything that could endanger a person's safety.⁹⁶ Further, with respect to the above-mentioned prohibited categories of information, any order passed by an authority of the state or central government in this respect would be binding. The proposed amendments include, inter alia, removing immunity given to the whistle-blowers from being prosecuted under the Official Secrets Act of 1923. Detailed analysis of the shortcomings of the amendment have been dealt with our article published with the Financial Express.⁹⁷

Despite the global move towards legislating for increased obstacles for a whistleblower citing national security reasons, countries, including India have seen an increase in whistleblowing reports particularly bringing to light corporate frauds.⁹⁸

94. Section 11 of Whistleblowers Act.

95. Section 12 of Whistleblowers Act.

96. New clause 4.1.A

97. http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/181127_A_Why-India-needs-to-strengthen-WBP-Act.pdf

98. Kroll Global Fraud and Risk Report 2019/2020 <https://www.kroll.com/en/insights/publications/global-fraud-and-risk-report-2019>

9. International Standards – How India’s Legal and Regulatory Framework Compares

I. United Nations Convention Against Corruption, UNCAC

The UNCAC is a comprehensive convention that provides for domestic rules and treatment of transactions with foreign officials as well. It provides for treatment of transactions of public sector, private sector, preventive action, attachment etc.

As mentioned above, while the UNCAC has defined certain key expressions, POCA and the POCA Amendment Act do not. Further, despite the recommendation of the Standing Committee, there were no definitions even in the subsequent amendments of 2015. The POCA Amendment Act also do not provide for prosecution of offences in the private sector even though a specific provision has been made in the UNCAC.

UNCAC provides for liability of legal persons. While LCI rightly noted that the absence of guidelines in respect of prosecution of commercial organisation and its officers under the POCA Bill was a matter of concern, the POCA Amendment Act failed to address this concern of the LCI. While commercial organisations and key officers should be prosecuted, there needs to be certainty and clarity in relation to the scope of such provisions.

As discussed in the sections above, UNCAC uses the expression ‘*undue advantage*’, which is also recommended by LCI. The usage of this expression is cleaner and capable of less ambiguity, whereas the expression ‘*financial or other advantage*’ used in the POCA Amendment Act, may have unintended consequences in its enforcement.

An important provision of UNCAC that is missing in India’s corruption laws is preventive anti-corruption policies and practices. Another important provision of UNCAC that is missing in all the laws mentioned above is the right of an aggrieved party to seek compensation / damages for loss caused due to corrupt practices. The

Government would do well to have a mechanism to ensure that no claims under bilateral investment treaties are made against India.

II. OECD Guidelines

OECD Guidelines for Multinationals, 2011 (‘**OECD Guidelines**’), provides for guidelines for enterprises to combat bribery, bribe solicitation and extortion. The measures provided in the OECD Guidelines relate to substantive provisions in an anti-bribery legislation and preventive measures to be adopted by a multinational enterprise. However it will be seen that while even the OECD Guidelines lay stress on preventive measures, in India there isn’t a unified code of conduct for companies (or commercial organisations) to comply with the best anti-corruption practices.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (‘**OECD Bribery Convention**’) mandates that every Party shall take measures in respect of criminalising offering of bribes to a foreign public official. As mentioned above, POCA and POCA Amendment Act do not provide for this provision at all. Interestingly, the OECD Bribery Convention uses the expression ‘*undue pecuniary or other advantage*’. However, the OECD Bribery Convention does define key provisions which are not defined in POCA.

Interestingly the OECD Bribery Convention and UNCAC provide that every Party shall take measures to disallow deductions in respect of illegal gratifications paid under the domestic taxation statute. This disallowance is there. India’s laws also have clear provisions in relation to contributions to political parties, disclosures and treatment.

However, as mentioned above, an area where there is a conspicuous gap in India’s legislative and regulatory framework, is in

relation to public procurement, prosecution of illegal gratifications in the private sector and satisfactory preventive measures.

III. International Chamber of Commerce, Rules on Combating Corruption

The International Chamber of Commerce ('ICC') published its Rules of Conduct to Combat Extortion and Bribery in 1977 ('ICC Rules'). ICC Rules have been revised from time to time and the latest are rules of 2011.

The 2011 ICC Rules have policies for compliance and these policies would go a long way in ensuring compliance with anti-corruption laws and ensuring preventive measures.

Apart from certain reporting obligations under auditing standards and Companies Act, there are no legally enforceable and binding standards of compliance. POCA, the POCA Amendment Act and the proposed amendments of 2015 and the Standing Committee unfortunately do not address this very crucial aspect.

10. Strategic Measures to Mitigate Risk of doing Business in India

I. Companies Act

Companies Act has placed a lot of emphasis on Corporate Governance. In the wake of certain scams related to mismanagement of a company, Government was keen to incorporate checks and balances in the Companies Act to protect shareholders and ensure compliance with laws.

Matters related to administration, management and functioning of a company is provided for in the Companies Act. The Companies Act also provides for rights, obligations and duties of directors. There are also checks and balances to ensure transparency in decision making process and accountability to the Board of Directors ('Board') in respect of decisions taken. Additionally, certain persons are also charged with responsibility for compliances under the Companies Act.

Companies Act provides for following measures to ensure compliance, transparency and accountability:

- Vigil Mechanism,
- Risk Management Policy,
- Serious Fraud Reporting Office,
- Class Action Suit,⁹⁹
- Reporting by Auditor(s), and,
- Independent Directors appointment.

Companies Act does not provide a Vigil Mechanism itself – companies are at liberty to draft a suitable policy depending on its needs.

II. Vigil Mechanism

Section 177 of Companies Act introduced '*Vigil Mechanism*' for every listed company and the

companies belonging to the following class or classes for their directors and employees to report their genuine concerns or grievances-

- the Companies which accept deposits from the public;
- the Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees;

The Board or Audit Committee, wherever applicable oversee the Vigil Mechanism.

The Vigil Mechanism also aims to provide adequate safeguards against victimization of employees and directors who avail of the Vigil Mechanism and also provide for direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee by the Board.

III. Risk Management Policy

Risk management is the process of making and carrying out the decisions that will minimize the adverse effects of the accidental losses of a company. The Companies Act is clear that the onus is on the Board to take responsibility to identify the elements of risks and that in the opinion of the Board such risk may or may not threaten the company.

Pursuant to Section 134(3) (n) of the Companies Act the Board's Report of an Indian company should contain a statement indicating development and implementation of a risk management policy for the Company including identification therein of element of risk, if any, which in the opinion of the Board may threaten the existence of the company.

Thus it is a mandatory requirement for the Board of Directors to comment on the risk management policy of the Company in their Report i.e. Board's Report and the Board should ensure that a risk management policy is in

99. The provisions relating to Class Action Suits have not yet been notified by Central Government. Therefore, as on date, these provisions are not enforceable.

place. For better corporate governance, Risk management policy should also be approved by the Board

The presence of a comprehensive policy may be seen to demonstrate *bona fides* of a company. In the event of any investigation or prosecution, a company may be able to demonstrate that it did what was reasonably possible by sensitising employees, having workshops and even a compliance audit to ensure that employees across the company, were aware of rights, obligations and duties under the law and in respect of business transactions. Such measures must however be aggressively and continuously monitored, updated and implemented.¹⁰⁰

For instance, the Competition Commission in a case¹⁰¹ directed a party (the Karnataka Film Chamber of Commerce and other respondents in the proceeding) to have a compliance manual in place and to ensure that its members were adequately educated about the law and their obligations under the Competition Act. Further, parties were also directed to file a compliance report within six months of the Competition Commission's order.

IV. Serious Fraud Investigation Office

Section 211 of the Companies Act empowers the Central Government to establish an office called Serious Fraud Investigation Office ('SFIO') to investigate frauds relating to companies. Until the above mentioned SFIO is in place, the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated the 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for this purpose.

Central Government may assign the investigation into affairs of a company to the SFIO:

- on receipt of a report of the Registrar or inspector,
- on intimation of a special resolution passed by a company that its affairs are required to be investigated,
- in the public interest, or,
- on request from any Department of the Central Government or a State Government.

No other investigating agency shall proceed with investigation in a case in respect of any offence under Companies Act, once the case has been assigned to SFIO. The SFIO has power to arrest individuals if it has reason to believe that he is guilty based on the material in possession. SFIO shall submit a report to the Central Government on conclusion of investigation.

V. Class Action Suit

The concept of Class Action Suit was recommended by J.J Irani Committee Report. The concept of Class Action is new in Indian context. Recently, class action suit were of relevance in the context of the allegations of fraud in Satyam in 2009. While investors in India could only take recourse under ordinary civil law, investors in foreign jurisdictions could claim compensations from the company through class action suits or a similar litigious remedy. Section 245 of Companies Act provides that certain members or depositors or any class of them are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors.

Unlike the provisions relating to prevention of oppression and mismanagement under Section 241 to 244, in a class action suit application can be filed against the company, its Officers, auditors, audit firm, any expert or advisor or consultant or any other person for any incorrect or misleading statement made to

100. *Comply or Suffer: CCI Highlights Importance of Compliance Manuals*, by Abigael Bosch, Payer Chatterjee, M.S. Ananth and Pratibha Jain, Nishith Desai Associates, International Financial Products & Services Committee, October 2015, Volume 4, Issue 3.

101. *Kannada Grahakara Koota & Anr. v. Karnataka Film Chamber of Commerce & Ors.* Case No. 58 of 2012, decided on July 7, 2015.

the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part.

Among all other matters, an application under Class Action Suit may also be filed to restrain company from committing any future action which is *ultra vires* the memorandum and articles of association of the company and to restrain the company from taking action contrary to any resolution passed by its members.

VI. Reporting of Frauds by Auditor

By introducing Section 143 of the Act, the Central Government requires the Auditor(s) of the Company to maintain transparency and as well as the interests of shareholders at large.

Section 143 (12) read with Section 143(15) of the Companies Act and its Rules require an auditor of a company including branch auditor, cost accountant and company secretary in practice to report immediately to the Central Government in the course of the performance of their respective duties has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company.

VII. Independent Director

Section 149 (6) of Companies Act makes a special provision for appointment of '*Independent Director*' to the following class of companies in addition to a company listed on a stock exchange:

- Public companies having paid up capital of rupees ten crore or more or
- Public companies having turnover of rupees one hundred crore or more or
- Public companies having in aggregate outstanding loans, debentures and deposits exceeding rupees fifty crore or more

Section 149 also provides that the Independent Directors should abide Code for Independent

Directors as specified in Schedule IV of Companies Act ('Code'). The Code states the duties and responsibilities of Independent Directors towards the company and shareholders and stakeholders. Among all corporate governance duties, an Independent Director is also required to report the concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. Additionally, the Code also requires the Independent Director to hold separate meeting at least once in every year to review the performance of non-independent directors and the Board as a whole.

The adherence to this Code by Independent Directors and the fulfilment of their responsibilities in a faithful manner is expected to promote the confidence of the investors, stakeholders, minority shareholders, regulators in the company.

It is to be noted that Companies Act places several obligations and duties on the Board and individual directors as well. These are designed to ensure maximum corporate governance, accountability and transparency. In respect of certain measures, such as transactions with related parties, apart from disclosures to the Board, disclosures are also to be made in annual accounts and to shareholders regarding direct and indirect interest of directors. Corrupt practices may manifest in opaque forms and indirectly. Indian law, including proposals to amend the law, do not provide for prosecuting private transactions are corrupt practices. Corrupt practices may manifest in opaque forms and in an indirect manner. Internationally, the line may blur between a corrupt practice and a commercial fraud, however, the two are quite in India due to the law in force in India.

Experience shows that brands and goodwill that are built over decades can be frittered away by careless employees and it is important to guard against such acts of indiscretion or other wilful lapses. Investors and directors would need to ensure that the company and other directors rigorously adhere to the highest standards of integrity and accountability.

Annexure I

Comparison of laws of US, UK, Singapore and European Union

Provision	India	UK	USA	Singapore	European Union
Anti – Corruption Legislation/ Legal Framework	<ul style="list-style-type: none"> Prevention of Corruption Act, 1988 ('POCA') (amended most recently by way of the Prevention of Corruption (Amendment) Act, 2018 ('Amendment')) Indian Penal Code, 1860 ('IPC') Foreign Contributions Regulation Act ('FCRA') Representation of People Act, 1951 ('RPA') All India Civil Service (Conduct) Rules & Central Civil Service (Conduct) Rules (collectively, "Conduct Rules") Benami Transactions (Prohibition) Act, 1988 Prevention of Money Laundering Act, 2002 Companies Act, 2013 Lokpal and Lokayukta Acts 	<ul style="list-style-type: none"> Bribery Act, 2010 ('UK Act') Companies Act, 2006 Common law offence of bribery 	<ul style="list-style-type: none"> US Foreign Corrupt Practices Act, 1977 ('FCCPA') 	<ul style="list-style-type: none"> Prevention of Corruption Act, 1960 ('Singapore POCA') The Penal Code ('PC') The Parliament (Privileges Immunities and Powers Act) The Political Donations Act The Customs Act 	<ul style="list-style-type: none"> German Criminal Code Council of Europe ('Convention') Criminal Law Convention on Corruption Civil Law Convention on Corruption Civil Law provides for compensation for loss suffered due to corrupt practices, state liability, liability of parties, validity of contracts affected by corruption, requirement of audit and accounts, protection of employees and interim measures.

<p>Scope of Legislation (see section on third parties and intermediaries)</p>	<p>Public servant under the IPC and POCA. The Amendment now extends the scope of POCA to cover natural persons and corporate entities engaging in providing bribes.</p>	<p>Can be private citizen or public officer</p>	<p>Foreign official (broader than 'public servant')</p>	<p>The Singapore POCA and the Penal Code do not specifically deal with the bribery of a 'foreign public official', the statutes do not define this term, but the statute refers to 'Member of Parliament' and 'Member of Public Body'.</p>	<p>Criminal Law Convention on Corruption Implementation of Action Program of Action against Corruption</p>
<p>Important Definitions / Interpretations</p>	<p><u>Under POCA</u></p> <ul style="list-style-type: none"> ■ <i>Gratification</i>: means bribe, and is not limited to pecuniary gratification or to gratifications estimable in money (s.7b read with Section 2) ■ <i>Undue advantage</i>: means any gratification whatever, other than legal remuneration (s. 2d) ■ <i>Commercial organization</i>: means: (a) a body which is incorporated in India and which carries on a business, whether in India or outside India; (b) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India; (c) a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or (d) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India (as defined in s. 9(3) and applicable to s. 9 and s. 8 of POCA. 	<p><i>Improper Performance</i>– Defined in sections 3, 4, and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust.</p> <p>To assess whether an act is improper, the test is of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. (Section 5(1) of the Bribery Act)</p>	<ul style="list-style-type: none"> ■ <i>Issuers</i> – Publicly traded companies that are registered under the 1934 Securities and Exchange Act ■ <i>Corruptly</i> – Must have a corrupt intent ■ <i>Anything of value</i> – interpreted broadly and can include payment of money, provision of gifts and entertainment, travel, jobs, internships, etc. 	<ul style="list-style-type: none"> ■ <i>Under Singapore POCA Gratification</i>: given a very broad definition to include money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property; any office, employment or contract; any part or full payment, release or discharge from any obligation or other liability; any other service, favour or advantage of any description whatsoever; and any offer, undertaking or promise of any such gratification. 	<p>"Public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law.</p> <p>The term "judge" referred to in subparagraph above shall include prosecutors and holders of judicial offices.</p> <p>In the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law.</p>

<p>Under FCRA</p> <ul style="list-style-type: none"> ■ <i>Foreign Contribution:</i> means, inter alia, any donation, delivery, or transfer made by any 'foreign source' of any article. ■ <i>Foreign source:</i> includes a foreign Government, foreign company or trust, as well as a citizen of a foreign country. ■ <i>Foreign company:</i> includes a foreign company under Companies Act, subsidiary of a foreign company, registered office/principle place of business of a foreign company, and an MNC ■ <i>Foreign hospitality:</i> An offer, not being casual, made in cash or kind ■ <i>Relevant Person:</i> A candidate for election, a newspaper columnist, government servant, member of legislature, political party/ its office bearer, company engaged in production or broadcast of audio news/ audio visual/electronic news, correspondent of company engaged in news 				<p>Foreign Official – broad interpretation. Any type of government official at any level</p> <ul style="list-style-type: none"> ■ <i>Obtain or retain business</i> – also defined broadly. Anything that furthers a US person's interest, such as payments to gain a contract, secure lower cost of import, etc. 	<ul style="list-style-type: none"> ■ Public body: defined broadly to include any corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health, or to undertakings or public utility, or otherwise to administer money levied or raised by rates or charges in pursuance of any written law. 	<p>“Legal person” shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.</p>
<p>Offences under POCA:</p> <p><i>Accepting, obtaining, attempting to obtain, or agreeing to accept:</i></p> <p>Section 7 – obtaining or attempting to obtain an undue advantage with an intent to perform a public duty improperly / dishonestly</p>	<p>Section 1 – Active Corruption (bribing)</p> <p>Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or other</p>	<p><u>Three categories of offenders:</u></p> <ul style="list-style-type: none"> ■ Issuers ■ Domestic concerns 	<p>Section 5&6 of Singapore POCA – General prohibition on giving, promising or offering, soliciting, accepting or agreeing to receive a gratification in either the public or private sector.</p> <p><i>Under PC (s161- 165)</i></p>	<p>Art. 2 and Art. 3 – Active and passive bribery of domestic officials.</p> <p>Art.5 – Bribery of foreign public officials.</p> <p>Art. 7 and Art. 8 – Active and passive bribery in private sector.</p>		

<p>Section 8 – giving or promising to give an undue advantage to another person to induce / reward a public servant to perform their public duty improperly</p> <p>Section 9 – commercial organizations shall be punishable with a fine, if persons associated with such organizations give or promise to give any undue advantage to a public servant</p> <p>Section 10 – directors, managers, secretaries or other officers of a commercial organization which have consented or connived to commit an offence under s. 9, will also be liable for punishment and fine</p> <p>Section 11 – obtaining undue advantage without consideration</p> <p>Section 12 – those who abet offences under POCA will also be liable for punishment and fine</p> <p>Section 17 – Prior approval of relevant body in whose employment said offence was committed, to be taken before commencing Inquiry / investigation</p> <p>Section 18A – attachment and forfeiture of tainted property</p> <p><u>Offences under IPC (Chapter IX)</u> Offences by or related to Public Servants (similar to POCA offences) Offences relating to Elections – section 17.1B defines briber as – Whoever gives a gratification to any person to induce or reward the “exercise of electoral rights”</p>	<p>advantage to another person in one of two cases:</p> <p>Case 1 applies where P intends the advantage to <u>bring about</u> the improper performance by another person of a relevant function or activity or to <u>reward</u> such improper performance.</p> <p>Case 2 applies where P knows or believes that the acceptance of the advantage offered, promised or given in <i>itself</i> constitutes the improper performance of a relevant function or activity</p> <p>Section 2 – <u>Passive Corruption (being bribed)</u></p> <p>Section 6 – <u>Active bribery of a foreign official</u></p> <p>The offence is committed where a person offers, promises or gives a financial or other advantage</p>	<p>Certain other persons that are not issuers/ domestic concerns that are acting while in the US</p> <p>Bribery Offence Prohibits US companies and individuals, US issuers, and anyone acting in the US from:</p> <p><i>Corruptly offering, promising, authorizing or paying, anything of value to any foreign official, to obtain and retain business, or to secure any other improper business advantage</i></p> <p>FCPA also prohibits the payment of bribes indirectly through a third person</p> <p>The FCPA, unlike the Bribery Act, requires a ‘corrupt intent’ Accounting Offence</p>	<p>Scenarios that are covered by the Penal Code include a public servant (including any person expecting to be a public servant) taking a gratification, other than legal remuneration, in respect of an official act; a person taking a gratification in order to influence a public servant by corrupt or illegal means; and a person taking a gratification for the exercise of personal influence with a public servant.</p> <p><i>Parliament (Privileges, Immunities and Powers) Act</i></p> <p>Prohibits Members of Parliament from benefiting from a debate in the House in which they have a pecuniary interest. (Section 32).</p> <p><i>Customs Act</i></p> <p><i>Customs Act</i> Specifically provides for penalties for receiving bribes, and presumes monies in the possession of a Customs officer which cannot be accounted for to be corruptly obtained. (Section 138).</p>	<p>Art. 9 – bribery of officials in International organisations.</p> <p>Art. 10 – Bribery of members of international parliamentary assemblies.</p> <p>Art. 11 – Bribery of judges and officials of international courts.</p> <p>Art. 18 – Provides for liability of companies as well.</p>
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<p><u>Offences under the FCRA (predominantly supply side)</u></p> <p><i>Prohibits certain categories of persons from receiving foreign contributions</i></p> <p>Section 3 (1) – For Relevant Person to accept a Foreign Contribution Section 3(2) (a) – For Indian resident or Indian citizen outside India, on behalf of any political party or a Relevant Person, to accept a Foreign Contribution 3(2)(b) – See <i>Position on Intermediaries*</i></p>	<p>to a foreign public official with the intention of influencing the official in the performance of his or her official functions.</p> <p>The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. <i>However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.</i></p>	<p>Section 78(b) (2) of the FCPA provides for an accounting obligation applicable to issuers. This provision requires issuers to both maintain books, records and accounts that are fair and accurate, as well as maintain a system of internal accounting controls.</p>	<p><i>Distinctive Features</i></p> <p>S 9 of Singapore POCA: An acceptor of gratification can be considered guilty even if he does not intend to, or does not in fact, return the favour, or if he doesn't have the power, right, or opportunity to return the favour</p> <p>S 23 of Singapore POCA: Expressly disallows admission of evidence to show that any alleged gratification is customary in any profession or trade</p> <p>Section 24 Singapore POCA: Allows pecuniary resources that can't be accounted for to be admissible as evidence in Court.</p>
<p>to a foreign public official with the intention of influencing the official in the performance of his or her official functions.</p> <p>The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. <i>However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.</i></p>	<p>Section 7 - Company failing to prevent bribery (corporate offense) (strict liability)</p> <p>A commercial organisation will be liable to prosecution if a person associated with it bribes</p>		

<p>Anti – Corruption Legislation relating to Public Office</p>	<p>Under <u>Representation of the People Act, 1951</u> Section 29B identifies conditions under which political parties are entitled to accept contributions both outside and during election cycles <u>Under FCRA – see above.</u> <u>Under the Companies Act 1956</u></p>	<p>another person intending to obtain or retain business or an advantage in the conduct of business for that organization <i>Common Law Offence</i> <i>No universal definition, agreed upon components include:</i> Offering, giving or receiving – Any undue reward – By or to any person whatsoever in a public office – In order to influence his behaviour in office and incline him to act contrary to the known rules of honesty and integrity.</p>			<p>Apart from any measure of each Party, Art. 10 and Art. 11 of Criminal Law Convention on Corruption also provide for bribing parliamentary assemblies and judges and officials of international courts.</p>
				<p><i>Political Donations Act-</i> Requires candidates standing for political elections to declare the donations they receive. Section 11(b) punishes bribery by Member of Parliament and Section 12(b) punishes Bribery by Member of Public Body.</p>	

<p>Type of Benefit</p>	<p>Government companies (more than 50% shareholding is Government of India), and companies that have been in existence for less than three years are not permitted to make political contributions. Total contribution by company should not exceed 7.5% of the company's average net profit during the three preceding financial years.</p> <p>Section 171 of IPC provides that whoever gives a gratification to any person to induce or reward the 'exercise of electoral right' commits the offence of bribery</p>	<p>Pecuniary/Non Pecuniary</p>	<p>Pecuniary/Non Pecuniary</p>	<p>Pecuniary/Non pecuniary</p>	<p>Active and passive. Criminal Law Corruption uses the expression 'undue advantage' under Articles 2, 3, 8 and 12.</p>
<p>Whether success necessary</p>	<p>Attempt to influence a public servant is also an offence under Section 9 of POCA.</p>	<p>Pecuniary/Non Pecuniary</p>	<p>FCRA does not require that a corrupt act succeed in its purpose – it covers attempted bribery and conspiracy to bribe</p>	<p>Under section 9 of Singapore POCA, an acceptor of gratification can be considered guilty even if he does not intend to, or does not in fact, return the favour, or even if he does not have the power, right or opportunity to return the favour.</p>	<p>Convention does not contemplate success as a necessity.</p>

<p>Penalty</p>	<p>Under POCA, imprisonment ranges from 3 to 7 years and also legislates for fine to be imposed</p>	<p><i>Under section 11, the maximum penalties that can be imposed on an individual convicted of an offence under section 1, 2 or 6 is an unlimited fine and imprisonment for up to 10 years.</i></p>	<ul style="list-style-type: none"> ■ <i>FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million.</i> ■ <i>Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to \$250,000 and imprisonment for up to five years.</i> <p><i>For violating accounting provision</i></p> <ul style="list-style-type: none"> ■ <i>FCPA provides that corporations and other business entities are subject to a fine of up to \$25 million</i> 	<p><i>Under the Singapore P.O.C.A., any person found guilty of an offence shall be liable to conviction to a fine or to imprisonment, or both.</i></p> <p><i>Under S.13 (1), Singapore P.O.C.A., the Court shall also order him to pay a penalty equivalent to the amount of bribes received.</i></p> <p><i>The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, under S.29 of the Act allows the Court to confiscate properties and pecuniary resources from corrupt offenders, if the said properties are found to be benefits of corruption offences.</i></p>	<p>As per domestic law.</p>
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<p>Enforcement Agencies</p>	<ul style="list-style-type: none"> Under the new Lokpal and Lokpykta Acts, a Lokpal, an ombudsman has been appointed at the central and state levels, respectively, to serve as a public watchdog at the Central and State Levels 	<p>The Serious Fraud Office (SFO)</p>	<ul style="list-style-type: none"> The Department of Justice is responsible for FCPA violations 	<ul style="list-style-type: none"> The Corrupt Practices Investigation Bureau (“CPIB”) (primary watchdog) Attorney-General’s Chambers (“AGC”). 	<p>Under Articles 20 and 21 of the Criminal Law Convention on Corruption.</p>
<ul style="list-style-type: none"> Individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years <p><i>Under the Alternative Fines Act, courts may impose significantly higher fines than those provided by the FCPA—up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding.</i></p>					

<ul style="list-style-type: none"> It has wide powers to prosecute all offending politicians, ministers, and senior civil servants, including the Prime Minister. The Central Vigilance Commission The Auditor and Comptroller General of India 	<p>India and to foreign payments from abroad in India.</p>	<ul style="list-style-type: none"> The Securities and Exchange Commission 	<ul style="list-style-type: none"> Commercial Affairs Department (“CAD”). Monetary Authority of Singapore (“MAS”). The Singapore Exchange Limited (“SGX”). 	<p>Applies to members under Article 34 of the Criminal Law Convention on Corruption.</p>
<p>Territorial Application</p>	<p>Has widest extra – territorial reach.</p> <p>An offence may be prosecuted when any act or omission forming part of the offence: Takes place in the UK Done by a person with a ‘close connection’ with the UK (s. 12(2)c)) Close connection- place of incorporation, place of residence,</p> <p>citizenship However, no requirement of a close connection with the UK for s. 7 offence.</p>	<p>The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. This may be either directly or through an agent that engages in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.</p> <p>Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA’s anti-bribery prohibitions.</p>	<p>Extra – territorial jurisdiction can be exercised against Singapore citizens committing corruption offences outside Singapore.</p> <p>Under s.37 of Singapore POCA, where any Singapore citizen commits a corruption offence outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.</p>	

<p>Private bribery</p>	<p>Under POCA: Both 'bribe-givers' and 'bribe takers' are liable for punishment and fine. Under IPC: Covers private persons under criminal breach of trust provisions</p>	<p>Covers bribery on a private level</p>	<p>Does not cover bribery on a private level, although some articles suggest that it can be prosecuted / enforced under other US legislation</p>	<p>Nowhere mentioned in the Prevention of Corruption Act that it applies to the Private Sector, but as per the information on the Government Website of Singapore, "The Corruption Practices Investigation Bureau (C.P.I.B.) is investigates all corruption cases, whether it involves <u>public or private sector</u> individuals or members of the public. Regardless of the person's rank, seniority and political affiliations, no one is exempted from the law".</p>	<p>Applies to members under Articles 7 & 8 of the Criminal Law Convention on Corruption.</p>
<p>Position on Facilitation payments</p>	<p>No exemption provided. Any payment made or benefit provided to a public servant to influence him or her in their official capacity or expedite an official process would amount to bribery under the POCA.</p>	<p>No exception provided under the Bribery Act (Some articles suggest that it depends on the facts and circumstances of the case)</p>	<p>The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that</p>	<p>S.12(a)(ii) of the Singapore POCA prohibits facilitation payments</p>	<p>Where mentioned, cannot be found.</p>

<p>Position on Gifts/Hospitality</p>	<p><u>On Gifts</u></p> <ul style="list-style-type: none"> ▪ Governed by the Conduct Rules which set specific guidelines on the value of gifts that may be accepted in furtherance of local or religious customs ▪ The Central Vigilance Commission also has its own gift policy ▪ Definition of gift provided under s.11 and s.13 of Conduct Rules ▪ Under Conduct Rules, gifts may be accepted by government servants from close ones with who the servant has no official dealings on special occasions (weddings, funerals) in accordance with prevailing practice ▪ However, report must be made if gift exceeds a certain amount (25,000 in case of servants covered by All India Service Rules). 	<ul style="list-style-type: none"> ▪ Can trigger the Section 6 & 7 offence by a business if not reasonable and proportionate to the norms of the industry ▪ Question of fact and circumstance <p>Bona fide hospitality and promotional expenditure is not caught by the Act.</p>	<p>involves non-discretionary acts. 160 Examples of “routine governmental action” include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water.</p> <p><u>On Hospitality</u></p> <p>The Department of Justice and Securities Exchange Commission Resource Guide to the FCPA (“Guide”) states that the FCPA does not penalize providing genuine hospitality if <u>there is no corrupt intent</u>.</p> <p>This applies for low cost hospitality (beverages, snacks, promotional items) as much as it applies for hospitality that has a more substantial cost.</p>	<p>Public Prosecutor v Soh Cham Hong [2012] SGDC 42</p> <p>The Singapore courts have held that questionable payments made pursuant to industry norms or business customs will not constitute a defence to any prosecution brought under Singapore POCA</p>	<p>The Criminal Law Convention in European Union discusses Active and Passive Bribery.</p>
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<ul style="list-style-type: none"> ■ For gifts received on other occasions/ not from close ones, threshold is Rs. 5000/-. ■ POCA bars public servants from obtaining valuables without consideration under s11. ■ Gift covered under Conduct Rules may be gratification under IPC. <p><u>On Hospitality</u></p> <ul style="list-style-type: none"> ■ Conduct Rules state that a member of the service shall avoid “accepting lavish hospitality or frequent hospitality from persons having official dealings with them or from industrial or commercial firms or other organizations” ■ India has “Guidelines regarding Foreign Travel of Ministers and State Government Officials” to address foreign travel of ministers and state government officials – prescribe cases in which clearance from Ministry of Home Affairs is needed ■ Section 6 of FCRA prescribes that no members of legislature, office bearer, judge, government servant, or any other govt. controlled body shall accept foreign hospitality when travelling abroad without prior permission 	<p><u>On Gifts</u></p> <p>On the subject of gifts, the Guide states that it is appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude. However, it is important that such gifts</p> <ul style="list-style-type: none"> ■ be made openly and transparently ■ be properly recorded in a company’s books and records ■ given only where appropriate under local law ■ customary where given ■ reasonable for the occasion 	
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<p>Position on Intermediaries* and third parties</p>	<p><u>Under FCRA</u></p> <ul style="list-style-type: none"> ■ Section 3(2)(b) – For any Indian resident (or any Indian citizen outside India) to deliver to any person any currency which has been accepted by a ‘foreign source’ if the resident/overseas citizen has reasonable cause to believe/knows that such other person intends to deliver the currency to a political party or Relevant Person. ■ Thus, third party intermediaries’ resident in India are explicitly prohibited from giving or acting as intermediaries with respect to giving of such contributions. <p><u>Under POCA</u></p> <ul style="list-style-type: none"> ■ POCA prohibits other persons from: ■ taking undue advantage by corrupt or illegal means to influence a public servant and ■ As a motive or reward for inducing, by exercise of personal influence, any public servant ■ Also, as stated above, the abetment of public servants is also an offence 	<p>Section 1(5) of the Bribery Act states that the section applies whether the advantage is offered, promised, or given directly or via a third party</p>	<p>The FCPA also prohibits the payment of bribes indirectly through a third person. For these payments, coverage arises where the payment is made while “knowing” that all or a part of the payment will be passed on to a foreign official.</p> <p>The Foley- MZM Guide states that use of third parties can present additional FCPA risks, as bribes made by third parties in India (agents, brokers, Consultants, sales reps, etc.) can cause the US company to be held liable if they are for the benefit of the company and its subsidiaries.</p>	<p>S.5 of Singapore POCA</p>	<p>As regards the position in European Union, the Criminal Law Convention on Corruption contains the following provision pertaining to intermediaries-</p> <ul style="list-style-type: none"> ■ 22. The European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Council Act of 26 May 1997) defines active corruption as “the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his f
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functions in breach of his official duties” (Article 3). Passive corruption is defined along the same lines.

- 23. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted within the OECD on 17 December 1997) defines, for its part, active corruption, as the act by any person of “intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”.

<p>42. "Receiving" may for example mean the actual taking the benefit, whether by the public official himself or by someone else (spouse, colleague, organisation, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Again, intermediaries can be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved.</p>				<p>There is an obligation under the Companies Act to state 'true and fair accounts', which could be violated in these cases, entailing personal criminal liability for officers of the company.</p>	<p>Accounting/ Books of Record</p>
<p>No specified legislation, but under Financial Reporting, the European Union has introduced rules to promote the convergence of accounting standards at global level and to</p>	<p>The Companies Act requires keeping of proper corporate books and records, maintaining of proper accounting records (including the profit and loss accounts and balance sheet of the company), appointment of external auditors, and filing of annual returns.</p>	<p>FCPA provisions that apply only to issuers. The FCPA requires publically traded companies 'make and keep books,</p>	<p>Companies Act 2006 includes an offence of failing to keep adequate accounting records</p>		

	<p>records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets to the issuer.</p>	<p>ensure consistent and comparable financial reporting across the EU.</p> <p>Under EU rules, listed companies (those whose securities are traded on a regulated market) must prepare their consolidated financial statements in accordance with a single set of international standards called IFRS (international financial reporting standards).</p> <p>Other requirements apply to non-listed companies and small businesses.</p> <p>Companies with limited liability doing business in the EU, whatever their size, have to prepare annual financial statements and file them with the relevant national business register.</p> <p>Groups have to prepare consolidated financial statements.</p>
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Financial statements have to include – as a minimum – the balance sheet, the profit and loss account and a certain number of notes to the financial statements. Large and medium-sized companies also have to publish management reports.

The rules companies have to follow when preparing financial statements are laid down in directive 2013/34/EU, known as the 'accounting directive'. The aim of this directive is to harmonise national requirements about

- Presentation and content of annual or consolidated financial statements
- Presentation and content of management reports
- The measurement basis companies use to prepare their financial statements

	<ul style="list-style-type: none"> ■ Audit of financial statements ■ Publication of financial statements ■ The responsibility of management with regards to all above <p>The accounting directive also aims at reducing the administrative burden for small companies. It allows a simplified reporting regime for small and medium-sized enterprises and a very light regime for micro-companies (those with less than 10 employees).</p> <p>The directive includes a definition of micro, small, medium and large companies based on thresholds concerning turnover, total assets and number of employees. These thresholds are periodically updated to keep pace with inflation. A further simplifies can also be found here on this link.</p>					
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Tax treatment

Payments with an illegal purpose cannot be deducted as expenses under Indian tax laws. Therefore, recording such payments as expenses, and recording fictitious expenses, could be construed as tax evasion.

Although, the European Union does not have a direct role in raising taxes or setting tax rates. The amount of tax you pay is decided by your government, not the EU.

The EU's role is to oversee national tax rules – to ensure they are consistent with certain EU policies, such as:

- Promoting economic growth and job creation
- Ensuring the free flow of goods, services and capital around the EU (in the single market)
- Making sure businesses in one country don't have an unfair advantage over competitors in another
- Ensuring taxes don't discriminate against consumers, workers or businesses from other EU countries.

Furthermore, EU decisions on tax matters require

<p>unanimous agreement by all member governments. This ensures that the interests of every single EU country are taken into account.</p>				
<p>Defences</p>	<p><u>Under section 7</u> There is a defence if the relevant commercial organization had in place adequate procedures designed to prevent persons associated with the commercial organization from undertaking such conduct.</p> <p><u>Under Section 13</u> (1) It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for— (a) the proper exercise of any function of an intelligence service, or (b) the proper exercise of any function of the armed forces when engaged on active service.</p>	<p>The FCPA's anti-bribery provisions contain two affirmative defenses: (1) that the payment was lawful under the written laws of the foreign country (the "local law" defense), and (2) that the money was spent as part of demonstrating a product or performing a contractual obligation (the "reasonable and bona fide business expenditure" defense). Because these are affirmative defenses, the defendant bears the burden of proving them (See facilitating payments for another defence)</p>		

Landmark cases/scandals

- • 2G Scam
- • Coal Allocation Scam

■ (Private citizen) Former National University of Singapore (NUS) law professor, Tey Tsun Hang (Tey) was first charged in July 2012 with six counts of corruptly obtaining gratification from his former student. These six charges consisted of receiving sexual favours and gifts, as an inducement for Tey to show favour in his assessment of his student's academic grades.

■ (Public officer) Peter Lim, the Chief of Singapore Civil Defence Force favoured IT related government tenders to certain companies in exchange for sexual favours.

The On-Going European Budget Fraud-EU budget fraud has historically taken a wide range of forms, from farmers seeking payments for climatically impossible sugar cane cultivation to the channelling of funds for immigration projects to what some have labelled terrorist groups.

All types of EU budget fraud probably stem from inadequate budgetary control measures. This partly comes from factors inherent in the EU's structure, such as the 'Own Resources' system for funding the EU and the decentralized implementation system which puts the bulk of the responsibility for collecting and distributing EU funds on the member states.

Despite much anti-fraud work and reinforced internal controls within the EU and the member states, successive

<p>scandals have surfaced that have led to an impression among the public that there is an unwillingness or inability to take action against malpractice, fraud and corruption, which undermines public support for the EU.</p>	<p>The 2011 Cash for Influence Scandal-The former Austrian MEP Ernst Strasser was convicted of attempting to change laws in the European Parliament on behalf of a business offering to pay him €100,000 a year. Strasser, a former minister who was said to have used his role as an MEP to work secretly as a lobbyist, was exposed during an undercover investigation by The Sunday Times three years ago.</p>

					<p>He was jailed for three years after being found guilty of corruption by a court in Vienna. It was the second time he had been convicted of the same offence. An earlier verdict had been overturned on appeal.</p>
<p>Bills/ un notified Acts</p>	<p>Public Procurement Bill (lapsed)</p>				
<p>Position in CPI Index, 2017.</p>	<p>Rank 81</p>	<p>Rank 10</p>	<p>Rank 16</p>	<p>7 (2015) & 6 (2017)</p>	<p>Germany- 11 (2015) & 12 (2017)</p>

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 <p>Private Equity and Private Debt Investments in India Strategic, Legal, Tax and Ethical Issues May 2019</p>	<p>Private Equity and Private Debt Investments in India</p> <p>May 2019</p>	 <p>International Commercial Arbitration Law and Recent Developments in India May 2019</p>	<p>International Commercial Arbitration: Law and Recent Developments in India</p> <p>May 2019</p>	 <p>Are we ready for Designer Babies? Analysis of law, policy and ethics surrounding genome editing June 2019</p>	<p>Are we ready for Designer Babies?</p> <p>June 2019</p>
 <p>India Opens Skies for Drones Strategic, Legal and Tax Analysis August 2019</p>	<p>India Opens Skies for Drones</p> <p>August 2019</p>	 <p>Digital Health in India Legal, Regulatory and Tax Overview November 2019</p>	<p>Digital Health in India</p> <p>November 2019</p>	 <p>Impact Investing Simplified A Guide to Making and Seeking Impact Investments in India July 2019</p>	<p>Impact Investing Simplified</p> <p>July 2019</p>
 <p>IP Centric Deals Key legal, tax and structuring considerations from Indian law perspective February 2019</p>	<p>IP Centric Deals: Key legal, tax and structuring considerations from Indian law perspective</p> <p>February 2019</p>	 <p>Fund Formation: Attracting Global Investors Global, Regulatory and Tax Environment impacting India based funds February 2019</p>	<p>Fund Formation: Attracting Global Investors</p> <p>February 2019</p>	 <p>Building a Successful Blockchain Ecosystem for India Regulatory Approaches to Crypto Assets December 2018</p>	<p>Building a Successful Blockchain Ecosystem for India</p> <p>December 2018</p>

NDA Insights

TITLE	TYPE	DATE
Delhi Tribunal: Hitachi Singapore’s Liaison Office in India is a Permanent Establishment, Scope of Exclusion Under Singapore Treaty Restrictive	Tax	November 2019
CBDT issues clarification around availment of additional depreciation and MAT credit for companies availing lower rate of tax	Tax	October 2019
Bombay High Court quashes 197 order rejecting Mauritius tax treaty benefits	Tax	May 2019
Investment Arbitration & India – 2019 Year in review	Dispute	January2020
Changing landscape of confidentiality in international arbitration	Dispute	January2020
The Arbitration and Conciliation Amendment Act, 2019 – A new dawn or sinking into a morass?	Dispute	January2020
Why, how, and to what extent AI could enter the decision-making boardroom?	TMT	January2020
Privacy in India - Wheels in motion for an epic 2020	TMT	December 2019
Court orders Global Take Down of Content Uploaded from India	TMT	November 2019
Graveyard Shift in India: Employers in Bangalore / Karnataka Permitted to Engage Women Employees at Night in Factories	HR	December 2019
India’s Provident Fund law: proposed amendments and new circular helps employers see light at the tunnel’s end	HR	August 2019
Crèche Facility By Employers in India: Rules Notified for Bangalore	HR	August 2019
Pharma Year-End Wrap: Signs of exciting times ahead?	Pharma	December 2019
Medical Device Revamp: Regulatory Pathway or Regulatory Maze?	Pharma	November 2019
Prohibition of E-Cigarettes: End of ENDS?	Pharma	September 2019

Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

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