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ISO 37001 (Anti-bribery management systems)

Implications of the Standard in India

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The International Organization for Standardization (ISO) recently issued its Standard 37001:2016 for anti-bribery management systems. The standard specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system (ABMS). This is an important move considering the continued prevalence of bribery and corruption in the world, particularly in developing countries like India. It is widely understood that legislation alone cannot curb bribery and corruption, unless accompanied by other measures such as framework, policies and guidelines.

The Indian government too has taken additional steps in the last few years to deter bribery. Some of these include instituting a national anti-corruption strategy through the Central Vigilance Commission, introduction of Aadhaar, instituting the Digital India programme for transfer of subsidies into beneficiary accounts, e-auctions for government procurement, and selective demonetization of large value currency notes. These measures have contributed to greater ease in doing business and India has improved its ranking on the World Bank's Doing Business report 2016. In this context, the ISO certification standard 37001 (the standard) may provide the much needed fillip for organizations to adopt and improve their anti-bribery and corruption (ABC) frameworks, while also resulting in improved business prospects.

Conformity to International standards have its fair share of benefits including helping facilitate international trade, improving the environment, reassuring consumers etc. In the UK, for example, standards[1] account for an $8.2bn annual growth in GDP, while in Canada, the use of standards has injected over $91bn into the economy since 1981[2].

[1]This does not refer to the ISO 37001 standard but the prevalence of other standards in general
[2]Source: http://pib.nic.in/newsite/PrintRelease.aspx?relid=155887

Distinguishing features of the ISO 37001

While the clauses of the standard can be broadly termed to be consistent with the requirements of the US Foreign Corrupt Practices Act (FCPA) and UK Bribery Act (UKBA); a comparison of some of the requirements of the FCPA, UKBA and Prevention of Corruption Act, 1988 (PCA) with the clauses of the ISO 37001 is provided below.

Table I: Comparison of requirements laid out in the ISO 37001:2016 with select contemporary anti-bribery legislations

	UKBA	FCPA	PCA[3]	ISO 37001
Meaning of bribery	Financial or any other advantage	Financial or any other advantage	Financial or any other advantage	While the standard provides a generic definition for bribery[4] – it further states that bribery would be defined by the bribery law applicable to the organization and by the ABMS designed by the organization
Definition of public official	Any individual who holds a legislative, administrative or judicial position of any kind; or exercises a public function; or is an official or agent of a public international organization	Any individual in the service or pay of the Government/Local authority/Central or State corporations; or is an employee of a Public international organization; or is a member of the political party or a candidate for a political office	Any individual in the service or pay of the government/Local authority/Central or State corporations; or is an employee of a undertaking, body, organization or corporation, owned or controlled or aided by state/central government	Any person holding a legislative, administrative or judicial office, whether by appointment, election or succession, or any person exercising a public function, including for a public agency or public enterprise, or any official or agent of a public domestic or international organization, or any candidate for public office
Applicability	• Any UK person, UK company (both public and private), or anyone acting on their behalf • Any overseas entity that carries on a business or part of its business in the UK	• Any US person, US company (only public), or anyone acting on their behalf • Any foreign company required to file periodic returns with SEC	• Any person who gives any bribe or illegal gratification to a public servant • A company can be held liable for actions of its employees	Unlike a legislation, the ISO 37001 can be applicable across all jurisdictions. Accordingly, the requirements of this document are intentionally generic and are intended to be applicable to all organizations (or parts of an organization), regardless of type, size and nature of activity, and whether in the public, private or not-for-profit sector
Coverage	Covers both active and passive bribery	Covers both active and passive bribery	Covers both active and passive bribery	Covers both active and passive bribery
Nature of offence - bribery	Paid to any person	Paid to only a public servant	Paid to only a public servant	Paid to any person

[3]including provisions suggested in the Bill presented in the parliament in 2013

[4]Section 3.1 - offering, promising, giving, accepting or soliciting of an undue advantage of any value (which could be financial or non-financial), directly or indirectly, and irrespective of location(s), in violation of applicable law, as an inducement or reward for a person acting or refraining from acting in relation to the performance (3.16) of that person's duties


ISO 37001

By expanding its scope, in terms of persons covered and applicability, the standard gently pushes the envelope for Indian organizations who otherwise tend to have ABC programs closely aligned with local standards–whether effective or not. It also caps the need for frequent changes in the ABC program, should Indian organizations seek to do business in other geographies.

Further, by focusing on bribery by the organization as well organization's business associates acting on the organization's behalf or for its benefit, the standard ensures that both direct and indirect bribery (e.g., a bribe offered or accepted through or by a third party) are addressed equally by the organization.

Some of the key clauses proposed in the standard are provided in Image I. Notable among these are the following:

01. Bribery risk assessment - In our experience, Indian organizations, irrespective of the nature of business, tend to undertake risk assessment irregularly. For instance, only 39 percent of respondents to the Deloitte India Fraud Survey report, released in 2016, said they had a continuous monitoring mechanism for reviewing fraud risk management and related controls. Often fraud risk management is undertaken as part of the overall risk management framework of the organization, and this makes it difficult for issues such as bribery and corruption to be called out and emphasized. That most organizations also tend to assume bribery as a cost for doing business, means these issues may not even be identified as risks. By adopting the standard, organizations will now need to pay specific attention to bribery as a risk.

02. Whistleblowing mechanism - Currently, Indian legislation does not mandate all companies to have a vigilance mechanism[5], which means the majority of companies tend not to have a whistleblowing program, preferring instead to empower certain senior management personnel to address any complaints received – whether they pertain to fraud, misconduct, noncompliance, or other areas of business. By adopting the standard, these companies may be encouraged to look at a formal whistleblowing program.

03. Independent investigations of the ABMS - In our experience, Indian organizations tend to rely on Internal Audit teams or internal fraud risk management teams to conduct evaluations of anti-fraud policies, as well as investigate any suspicious activity. It is unclear if this will change when organizations implement the standard. Ideally, it is considered a good practice to hire third party experts to evaluate existing policies and investigate into suspicious cases, enabling the organization to bring appropriate closure to such cases.

04. Charitable donations – Charitable donations form a large portion of diverted funds in India and such funds tend to be recorded poorly/ irregularly by organizations, often under euphemisms. By specifically calling this out, the standard emphasizes on the need to maintain clear records and label genuine donations from spurious ones.

05. Cash control - In our experience, most organizations in India continue to work with cash, despite having fairly robust automated enterprise resource planning (ERP) systems. This means, fraud around petty cash and cash management remains fairly common. By emphasizing on cash control, the standard may help organizations move towards a fully digital transaction system that provides better transaction monitoring ability.

[5]The Companies Act, 2013, mandates only listed companies to have a vigilance mechanism. There is a proposal to extend this to companies which accept deposits from the public, and companies who have borrowed over INR 50 Crore from banks and public financial institutions.

Image I: Key components proposed in the Anti-Bribery Management System

Anti-Bribery Policy

Key component of the ABMS which provides the framework for setting Anti-bribery objectives

Bribery Risk Assessment

Essential to form a solid foundation before developing the system to focus on risk-mitigation

Pre-employment diligence

Due diligence procedures to be carried out by organizations to protect against bribery risks by/on-behalf of the organization

Third party due diligence

Whistle blowing mechanism

Developing an anonymous whistle-blower largely helps organizations react quickly to bribery and corruption risks

Segregation of duties

Controls to ensure that a single person cannot both initiate and approve a payment

Tendering Process of awarding contracts

Developing a transparent and competitive tender process, where possible and reasonable

Anti-Bribery Compliance Function

Standard requires the appointment of an anti-bribery compliance function with appropriate competence, authority and independence

Ongoing training campaigns

Organizations to have provision of training and coaching of personnel as well as business associates towards ABMS awareness

Rotation of auditors

Rotation of auditors and conducting independent investigations is key for organizations to continuously evaluate and strengthen the ABMS

Independent Investigations

Gifts Policy

Implement procedures designed to prevent the offering/provision of gifts and benefits where it could be perceived as bribery

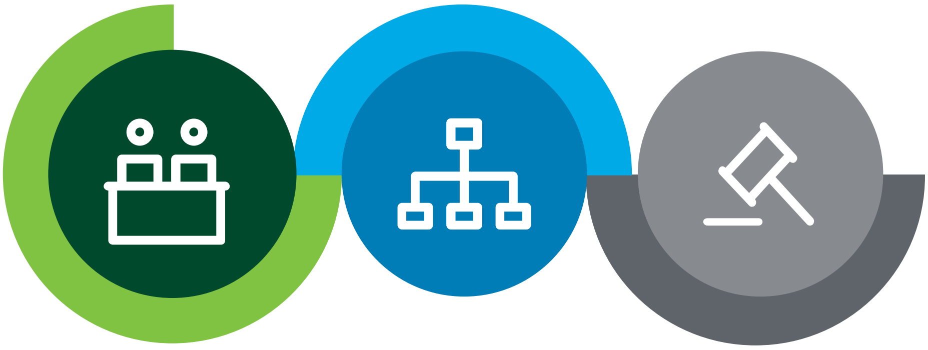
Political and charitable donations

Political and charitable donations to be monitored specifically, including carrying out appropriate due diligence and public disclosure of payment

Restrictive use of cash

ISO 37001:2016 discourages the use of cash and requires organizations to implement effective cash control methods

To ensure effective functioning of the ABMS, the standard explicitly assigns roles to the Board of Directors, top management, and Compliance Function as follows:



The Board of Directors is responsible for oversight of the system including approving anti-bribery policy and receiving and reviewing information about its operation.

The management of the company is responsible for implementation, communication of the policy as well as integration of the system in the organization's processes and deployment of adequate resources including establishment of the anti-bribery compliance function.

Anti-bribery compliance function is responsible to oversee the design and implementation of the ABMS and provide advice and feedback to the Board and top management about its functioning.

Today organizations which are able to demonstrate ethical behavior are preferred by customers. ISO 37001 certification presents an opportunity to the Indian industry to establish the strength of their internal mechanisms and checks to counter bribery and corruption. Deloitte supports the introduction of the ISO 37001 and believes that this in addition to the amended Prevention of Corruption Act (awaiting Parliamentary approval) would help in setting up the right benchmark for running ethical business in India. It would also assist in improving our rank on the Corruption Perception Index by Transparency International as well as in World Bank's report on ease of doing business.

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Implementing the ISO 37001 standard

To implement the ABMS, organizations need to determine external and internal issues that are relevant to their purpose and that affect their ability to achieve the objectives of their anti-bribery management systems; as well as determine the stakeholders that are relevant to the anti-bribery management system and their requirements. The organization needs to establish, document, implement, maintain, and continually review and, where necessary, improve their anti-bribery management system, including the processes needed and their interactions, in accordance with the requirements of this standard.

Potential benefits of organizations compliant with ISO 37001

Compliance with ISO 37001 would benefit an organization by:

- Making them eligible to obtain ISO 37001 certification which will distinguish them against their competition;
- Demonstrate compliance with the requirements and supporting guidance for implementing an anti-bribery management system consistently across the organization;
- Assure management, investors, employees, customers, and other stakeholders that the organization is taking steps to prevent bribery risk;
- Evidence that an organization has taken reasonable steps to prevent bribery (especially in cases where regulators need to be convinced on compliance with regulatory obligation including anti-bribery measures taken by the organization);
- Promote ethical business culture and protect the company, assets, shareholders and directors from bribery risks.

Potential limitations of the standard

While the benefits of implementing the ISO 37001 appear to be in the interest of the global economy in the long run, there are certain limitations which are intrinsic to the design of the standard which may possibly result in reducing its impact. Some of these potential limitations are listed below:

- Obtaining a certification should not be interpreted or perceived as a guarantee of zero bribery risk (whether in the present or the future) for the organization;
- Organizations which are required to be compliant with more stringent local/global legislations would be recommended to look at entities for such certification prudently;
- While large sized enterprises may not consider cost as an element for obtaining certification, small to medium sized entities may or may not be able to visualize immediate returns from such certification;
- The standard has been designed as a set of guidelines on minimum requirements to prevent/detect bribery, thereby giving enough flexibility of implementation to organizations;
- ABMS must be aligned to the large fraud risk management system within the organization, ABMS by itself may not be able to operate as effectively.

Contacts

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