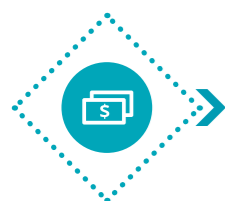


BRIBERY AND CORRUPTION remain a significant fraud risk for businesses across the world. About two-thirds of all frauds reported in India tend to have a corruption angle to them. Yet regulators across the world are trying to set comprehensive guidelines backed by stringent enforcement action to help organisations reduce instances of bribery and corruption.

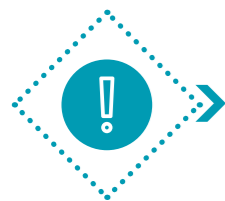


Recent developments in the anti-bribery and corruption regulatory space include the following:



In 2019, companies with operations in the US paid/or agreed to pay settlements collectively amounting to more than US\$ 1 billion to the Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) for their involvement in corruption cases¹ in other countries, such as Russia, India, China, Mexico, and Brazil.²

More enforcement agencies are cooperating with their counterparts in other jurisdictions to facilitate cross-border enforcements and using technology to uncover instances of corporate bribery.



The SEC has received about 200 whistleblower allegations in 2019 for Foreign Corrupt Practices Act-related matters.

India has recently amended its anti-bribery and corruption law, Prevention of Corruption (Amendment) Act 2018, in line with practices laid down by the United Nations Convention against Corruption. The act distinguishes between coercive bribe givers and collusive bribe givers.



These developments point to the need for organisations to relook at their anti-bribery and corruption compliance (ABC) programmes. ABC programmes need to be comprehensive, practical, and effective in curbing bribery and corruption. Lack of such programmes can be viewed as a violation of the applicable legislation(s).

GUIDANCE ON EVALUATION OF CORPORATE COMPLIANCE PROGRAMMES

The US DOJ issued a guidance note to help prosecutors and organisations understand what can be considered an effective ABC compliance programme. Organisations³ that can demonstrate the effectiveness of their ABC compliance programmes, may receive lenient treatment from regulators in cases of bribery and corruption.

This guidance is intended to be a checklist for organisations to consider when designing an ABC compliance programme. It relies on three fundamental questions, i.e., designing, implementation, and monitoring.

01

Is the corporation's compliance programme well designed?

02

Is the corporation's compliance programme being implemented effectively?

03

Does the corporation's compliance programme work in practice?

¹ <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>
² <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

³ The guidance is applicable to SEC-listed entities, companies whose securities are listed in the US (such as ADRs), and companies whose parent entities are operational in the US.



IS THE CORPORATION'S COMPLIANCE PROGRAMME WELL DESIGNED?



Most ABC compliance programmes tend to use 'one size fits all' templates that do not reflect the risks organisations face at the ground level. In line with that, the DOJ guidance note suggests that organisations look at different aspects while designing an ABC compliance programme.

COMPLIANCE

POLICIES AND PROCEDURES



The mere presence of policies can be inadequate in curbing bribery and corruption. Organisations need to ascertain if the following aspects are included in policies:

- Design inputs from business units
- Comprehensiveness
- Accessibility
- Responsibility for operational integration

Organisations need to take measures to ascertain if the ABC programme is appropriately designed to detect the types of misconduct that are most likely to occur in their business and regulatory environments. These measures may include reviewing the current risk management process and risk-tailored resource allocation (i.e., putting enough time in high-risk and low-risk areas); sharing necessary updates; and making revisions.

RISK ASSESSMENT



Organisations need to check whether policies and procedures have been integrated through periodic training and certifications. Training and other activities include the following:

- Risk-based training – Tailored for specific risks for different departments in an organisation
- Form/content/effectiveness of training
- Regular communication about organisations' position on addressing misconduct, including sharing of potential scenarios observed in the company/ industry, wherever deemed fit
- Availability of guidance relating to compliance policies

TRAINING AND COMMUNICATIONS

CONFIDENTIAL REPORTING STRUCTURE AND INVESTIGATION PROCESS

Organisations first need to put in place an efficient mechanism where employees can anonymously/confidentially report actual/potential breaches. This includes ascertaining the reporting mechanism's effectiveness, adequately scoping investigations (by professionals), putting in place a process for monitoring investigation outputs, and conducting a periodic analysis of investigation findings to find out compliance weakness. Availability of guidance relating to compliance policies



Corruption risk posed by third parties remains high. Hence, organisations may need to apply risk-based due diligence to third-party relations that includes the following:

- Ongoing monitoring
- Risk-based and integrated processes
- Appropriate controls
- Relationship management
- Maintaining a depository of red flags noted during third party due diligence and how these red flags were resolved, if any of such third parties were on boarded

THIRD-PARTY MANAGEMENT

MERGERS AND ACQUISITIONS (M&A)

Many strategic associations have failed because of allegations of bribery and corruption. Therefore, organisations must ensure that their compliance programmes include a comprehensive due diligence process for any acquisition target (to identify the target's corrupt practices or misconduct). This would include focus on the following:

- Well-written and comprehensive due diligence policy/Integration of compliance function in the M&A process
- Process of remediating misconduct risks identified during due diligence



IS THE CORPORATION'S COMPLIANCE PROGRAMME BEING IMPLEMENTED EFFECTIVELY?

In India, most organisations tend to have strong processes and programmes on paper but fall short on certain implementation aspects. If a programme is running well, there is little incentive to review it regularly. The DOJ's guidance note urges organisations to ascertain whether the programme is static or dynamic (that is regularly reviewed and revised). Some of the below-mentioned aspects may help distinguish between a static programme and a dynamic programme.

COMMITMENT BY SENIOR AND MIDDLE MANAGEMENT

If the senior management is committed to fostering a culture of compliance from the top, and demonstrates the following:

- Zero tolerance for bribery and compliance issues
- Shared commitment through their actions
- Complete oversight of ABC compliance programmes

AUTONOMY AND RESOURCES

If the management gives sufficient autonomy and resources to run the ABC compliance programme in terms of the following:

- The structure, seniority, and stature of the compliance function compared with other strategic functions
- Experience and qualification of resources (including management) running the compliance function and the funding available for it
- Accountability and reporting to the board/audit committee or the similar designated bodies within a company

INCENTIVES AND DISCIPLINARY MEASURES

If the programme includes incentives for compliance, and penalties and deterrents for non-compliance, and the following:

- The human resources process defining the authority and process flow for each instance of misconduct
- Consistent application of disciplinary actions and incentives across organisation
- Well-defined incentive system



DOES THE CORPORATION'S COMPLIANCE PROGRAMME WORK IN PRACTICE?



CONTINUOUS IMPROVEMENT, PERIODIC TESTING, AND REVIEW

Organisations need to decide whether they have made efforts to review their compliance programme, and ensure that it is current. To do this task, they can adopt approaches, including undertaking regular internal audits and controls testing; and sharing updates on the evolving business and risk landscape with stakeholders.



MISCONDUCT INVESTIGATION

Organisations need to consider whether a well-functioning and appropriately funded mechanism is in place for the timely and thorough investigations of any allegations/suspicions of misconduct by the company, its employees, or agents. This may include the ability to employ qualified professionals to scope out investigations and ensure that a structure is followed as part of the response.



ANALYSIS AND REMEDIATION OF ANY UNDERLYING MISCONDUCT

Organisations need to decide whether they can conduct a thorough root cause analysis of misconduct and address the issue. While doing the analysis they should consider:

- Were the controls effective when misconduct took place?
- How the misconduct in question was funded?
- Who were the vendors involved and how were they on-boarded?
- Were any red flags noted before the misconduct and how were those dealt with?
- What was the remediation plan to ensure that the similar misconduct will not take place in the future?
- Were any disciplinary actions taken?

To ensure that the compliance programme works in practice, organisations need to determine whether the programme was adequate and effective at the time of the offense in addressing existing and changing compliance risks. They also need to undertake a thorough analysis to understand what went wrong and the remediation needed to prevent similar events in the future.



The DOJ's guidance note is a reminder that bribery and corruption continues to pose a challenge to ethical business conduct. Regulators across the world are taking stringent actions against misconduct. Organisations are expected to build robust ABC compliance programmes that demonstrate better assurance towards compliance. This guidance will likely assess Indian companies with operations in the US in the future. These companies must take efforts to align their operations with the guidance.

KEY CONTACTS

NIKHIL BEDI

Partner and Leader
Forensic – Financial Advisory
Deloitte India
nikhilbedi@deloitte.com

AMIT SHARMA

Director
Forensic – Financial Advisory
Deloitte India
amitshar@deloitte.com

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