Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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A Comparative View of Anti-Corruption Laws of India

A Legal, Regulatory, Tax and Strategic Perspective

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Introduction

Behind every great fortune there is a crime[1]

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 76 out of 167 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 among 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 (**'POCA'**). Proposed amendments to POCA (**'Amendment Bill'**) which provides for supply-side prosecution was introduced in the upper house of Parliament in 2013.[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]

In India, apart from the risk of criminal prosecution under POCA, there is also the risk of being blacklisted[10] and subject to investigation for anti-competitive practices. As the law relating to public procurement is pending in Parliament, different Government departments have procurement rules, the contravention of which may result in prosecution. In relation to public procurement contracts, the Competition

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 http://www.transparency.org/cpi2015#results-table.
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. Prevention of Corruption Bill, 2013, status as available on PRS Legislative Research, http://www.prsindia.org/billtrack/the-prevention-of-corruption-amendment-bill-2013-2865/.
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
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.

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. 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.

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 bribes [11], 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 2011

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. Section 7, Section 8, Section 9, Section 10 and Section 11 criminalised various acts of public servants and middlemen seeking to influence public servants. Unlike corruption statutes in other countries, POCA prosecuted bribe-taking only by public servants.[14]

Although the application of the statute is 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.

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 other laws is set out in Chapter 11 at the end of this Paper.

The Amendment Bill is presently pending in Parliament. However, the Amendment Bill also falls short of international standards in respect of matters such as providing good corporate governance standards. 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.

As regards bribe-giving, POCA provides immunity to the bribe-giver.[16] Instances of prosecuting bribe givers is fairly limited and unless a bribe giver can be shown

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., Crl. App. 1077-1081 of 2013 decided on February 23, 2016.
16. Section 24. Statement by bribe giver not to subject him to prosecution.

as 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. However, the process of investigation and trial empowered the investigation agency, in appropriate cases, to attach tainted property. 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 does not stipulate a time limit for completion of trials relating to corruption. This was seen as a major deficiency of the law. 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.[19]

Prosecution of public servants under POCA requires prior sanction of a competent authority.[20] Obtaining such sanction itself 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* [21] 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'. The Standing Committee on Personnel, Public Grievances, Law and Justice in August 2013 (**'Standing Committee'**) that looked into a pending amendment bill has recommended that these key provisions should also be defined. 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'**).

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. Gian Singh v. State of Punjab (2012) 10 SCC 303.
20. Section 19 of POCA.
21. (2012) 3 SCC 64.

In August 2013, the Amendment Bill was introduced in Parliament which provides for substantial changes to POCA. These changes are discussed in the relevant section below.

A. 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'*.[22] 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 duties[23] or otherwise perform public duties[24], 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.[25] The definition of public duty and public servant was examined in *P.V. Narasimha Rao v. State.*[26] 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.

22. Section 2(b).
23. Section 2(c)(1) of POCA.
24. Section 2(c)(viii) of POCA.
25. Section 2 (c) of POCA. See also *Ram Gelli* case above.
26. (1998) 4 SCC 626.

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* [27] 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 officers [28] 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

Sections 7 to 11 of POCA provide for the instances of taking gratification, influencing public servants or accepting gifts. It is important to note that these sections are presently sought to be amended substantially keeping in mind India's obligations under the UNCAC. The provisions as they presently exist in POCA are discussed below.

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. Provisions in POCA respecting offending transactions contemplate necessarily 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.

Section 7 provides for public servants taking gratification other than legal remuneration in respect of an official act. The explanation to Section 7 provides that 'gratification' is not restricted to pecuniary gratifications or gratifications estimable in money.[29] However, 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, there may not be conviction under Section 7 of POCA.[30] It has also been held that an offence under Section 7 is an abuse of office[31] and that the acts of the concerned individuals have the colour of authority.

Section 8 provides for taking gratification by corrupt or illegal means to influence a public servant. The section uses the expression *'Whoever accepts or obtains, or agrees to accept, or attempts to obtain'* and this has been held to be applicable to public servants and persons who are not public servants.[32]

The only difference between Sections 8 and 9 is that while Section 8 contemplates use of *'personal influence'* for securing and favour or disfavour, Section 9 contemplates use of *'corrupt or illegal means'*. Although Section 8 uses the expression 'corrupt' – this is not defined in POCA. In *Parkash Singh Badal* case, Supreme Court held that if a public servant accepted gratification for inducing any public servant to do or to forbear to do any official act, then he would fall within the net cast by Sections 8 and 9. In the same case, examining the nature of the gratification obtained, Supreme Court held that for the purpose of Sections 8 and 9, the gratification could be of any kind and hence, its application was wide. The court in this case was examining the relation between Sections 8 and 9 on the one hand and offences under Section 13(1)(d)[33] on the other.

27. Crl. App. No. 124 of 2001, Delhi High Court, decided on March 25, 2011.
28. 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).
29. Parkash Singh Badal v. State of Punjab (2007)1 SCC 1.
30. P. Satyanarayana Murthy v. The District Inspector of Police (2015) 10 SCC 152.
31. *Parkash Singh Badal*, above.
32. *Parkash Singh Badal*, above.
33. (d) if he,- (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

Section 11 provides for the prosecution of a public servant who obtains a 'valuable thing' from a person who is concerned with any business or transaction relating to such public servant. The court interpreted the mechanism of this section to mean that a public servant must obtain a valuable thing while acting in his official capacity, and that these benefits are essentially for such public servant himself or for any other person.[34] Section 13 provides for the prosecution of a habitual offender and importantly, it criminalises a public servant who:

a. by corrupt or illegal means, obtains any valuable thing or pecuniary advantage,

b. obtains such thing by abusing his position as public servant, or,

c. while holding office as the public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.[35]

Like Section 7, Section 13(1)(d) has been subject matter of considerable litigation. Supreme Court has held that for convicting the person under Section 13(1)(d) there must be evidence on record that the person under investigation [36] *'obtained'* for himself or for any other person any valuable thing or pecuniary advantage by either corrupt or illegal means or by abusing his position as a public servant or he obtained for any person any valuable thing of pecuniary advantage without any public interest.[37]

As stated above, the Supreme Court has held that in respect of the demand and acceptance of a bribe and the burden of proof would lie with the prosecution to establish beyond reasonable doubt that the bribe was demanded or voluntarily paid.[38]

Mere possession and recovery of currency notes from a person under investigation without proof of demand would not establish an offence under Section 7 or Section 13(1)(d) of POCA. The Supreme Court has held that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to have been proved.[39]

iii. Presumption of taint and role of the bribe giver

Section 20 of POCA provides that in respect of any valuable thing or gratification that is found in the possession of a person under investigation there would be a presumption that such valuable thing or gratification was for the purposes in Section 7 of POCA. This is a rebuttable presumption and the burden of proof would be on the person under investigation to demonstrate that the valuable thing or gratification was not received in connection with an offence under POCA.[40] Therefore, where evidence is not led to dispel the presumption, a person under investigation would be convicted.

Section 24 of POCA provides immunity to the bribe giver and provides that the statement given by the bribe giver shall not subject him to any prosecution. As mentioned earlier, the immunity provided to bribe givers has been considered a major flaw in POCA and also considered to be inconsistent with international standards.

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

34. *Parkash Singh Badal*, above.

35. A Subair v. State of Kerala (2009) 6 SCC 587.

36. A person who is named as a suspect / accused in the criminal complaint filed with an investigating agency is referred to, under law, as an 'accused'.

37. Subash Parbat Sonvane v. State of Gujarat (2002) 5 SCC 86.

38. State of Andhra Pradesh v. Venkateswarulu (2015) 7 SCC 283.

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

40. M. Narsinga Rao v. State of Andhra Pradesh (2001) 1 SCC 691.

B. Prevention of Corruption (Amendment) Bill 2013 – 2011 to 2016

After India ratified the UNCAC, the Government of India initiated measures to amend POCA to bring it in line with international standards. Materially, these included –

a. Prosecuting private persons as well for offences,

b. Providing time-limits for completing trials,

c. Attachment of tainted property,

d. Prosecuting the act of offering a bribe

In 2013 the Amendment Bill was introduced in Parliament. The Amendment Bill was referred to the Standing Committee. The Standing Committee submitted its report in February 2014. Thereafter, based on the recommendations of the Standing Committee, the Amendment Bill was referred to the Law Commission of India (**'LCI'**). LCI submitted its report (Law Commission Report No. 254, February 2015, (**'Law Commission Report'**) in February 2015. Thereafter, in November 2015, further amendments to the Amendment Bill were circulated in Parliament.[41]

LCI has recommended substantial changes to the Amendment Bill including dropping certain amendments.[42]

C. Amendment Bill and Law Commission Report

The Amendment Bill has sought to adapt certain provisions of the UK Bribery Act, 2010 (**'UK Act'**) and has also incorporated provisions to criminalise bribe giving and prosecution of companies for offences under POCA. The Amendment Bill replaces Sections 7, 8 and 9 with new provisions. However, LCI has also recommended several changes to the proposed new sections.

The Amendment Bill uses the expression 'undue financial or other advantage' and LCI has recommended that this be deleted and instead, the Amendment Bill use the expression 'undue advantage'. This is because the expression 'undue financial or other advantage' can lead to ambiguity as there are no guidelines on what may be a due financial or other advantage. LCI has also reasoned that sexual gratifications may not be considered an 'other advantage' and hence, it is important to give a wider but clearer definition to illegal gratifications obtained under POCA.

The proposed Section 7 relates to offences committed by a public servant and provides for obtaining financial or other advantages in relation to a 'relevant public function'. LCI has criticised this definition since in the context of a public servant, all functions would essentially be public functions and hence, the expression 'relevant public function' is redundant.

LCI has recommended a cleaner and more succinct provision. The provision in the Amendment Bill is capable of creating ambiguity with respect to its application and interpretation. LCI's criticism of the Amendment Bill that there has been near adoption of provisions of UK Act without adapting them for POCA is justified and it is hoped that Parliament considers these recommendations of LCI.

The proposed Section 8 uses the expression 'improperly' in the context of performance of a public duty. As the Law Commission Report observes, this does not account for instances where illegal gratifications are offered to a public servants to perform routing functions 'properly'. LCI has also recommended that while illegal gratification for properly performing routine functions may be offered, immunity will be granted to the bribe giver only if the law enforcement authorities are given prior intimation.

41. For a brief description of the legislative history see - http://www.prsindia.org/billtrack/the-prevention-of-corruption-amendment-bill-2013-2865/. Law Commission Report, Standing Committee Report and Amendment Bill available at http://www.prsindia.org/billtrack/the-prevention-of-corruption-amendment-bill-2013-2865/.

42. Law Commission Report available at http://www.prsindia.org/uploads/media/Corruption/Law%20CommissionReport%20on%20Prevention%20of%20Corruption.pdf.

One of the most worrying aspects of the Amendment Bill and one of the most severe criticisms of LCI relates to the proposed Section 9 and Section 10. The Amendment Bill provides for the prosecution of 'commercial organisation' as well.

The proposed Section 9 provides that a commercial organisation shall be guilty of an offence *'if any person associated with the commercial organisation offers, promises or gives a financial or other advantage to a public servant…'*. However, it shall be a valid defence for the commercial organisation if it is able to prove that it had 'adequate procedures' in place.

As rightly noted by LCI, unlike in UK where Guidance has been published to determine the adequacy of 'procedures' the Amendment Bill has no such guidelines. Absence of guidelines would lead to considerable uncertainty in respect of what would be seen as 'adequate procedures' and also leads to considerable subjectivity in the enforcement of the statute.

Explanation 1 to the proposed Section 9 also provides that the capacity in which the person performs services for or on behalf of the commercial organisation shall not matter and even if such individual worked in the capacity of an agent, employee or subsidiary, the liability would follow. This places a commercial organisation at considerable risk since illegal acts by employees even at the entry level can expose the commercial organisation to prosecution. Similarly, a commercial organisation will also be exposed to any consequential prosecution stemming from the illegal activities of an agent.

The proposed Section 10 (1) provides that if a commercial organisation is found guilty of an offence under Section 9, every 'person in charge' of the commercial organisation will also be liable to prosecution. However, it shall be a defence if such person is able to prove that the offence was committed without his knowledge and that despite due diligence, such person was unable to prevent the offence. The proposed Section 10 (2) however provides that if an offence can be attributed to the *'consent or connivance of, or is attributable to, any neglect'* of any director, manager, secretary or other officer, then, notwithstanding Section 10(1), such director, manager, secretary or other office shall be liable to be prosecuted.

The denial of the benefit of due diligence appears harsh and the clubbing of neglect with connivance appears unreasonable. Such onerous provisions are capable of misuse and causing more harm than good to curtail corruption in India.

LCI has rightly highlighted these concerns and has suggested that the proposed Section 9 and 10 be kept in abeyance pending notification of 'adequate procedures'.

LCI has also made recommendations to amend the provisions relating to attachment proceedings under the Amendment Bill and has recommended that the attachment mechanism presently under the Prevention of Money Laundering Act, 2002 (**'PMLA'**), 1944 Ordinance or the Lokpal and Lokayukta Act, 2013 be adopted rather than have new attachment proceedings / mechanism under the Amendment Bill. As rightly pointed out by LCI, it is important to streamline such proceedings and avoid multiple enforcement mechanisms.

The Law Commission Report is currently pending in Parliament.

D. 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.[43] The Criminal Code provides for cases in respect of which compounding is possible.[44] 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:

43. Settlement or any form of plea bargaining.
44. Section 320 of Criminal Code.

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. [45]

E. 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.[46]

45. *Gian Singh*, above.

46. 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.[47]

Standards of integrity and right / ability of member of the Service [48] 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 family[49] accepting employment with an NGO or a private undertaking having official dealings with the Government.[50]

The Services Rules enjoins a member of the Service to ensure standards of integrity and duty in respect of his employment.[51] 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 gifts[52] (however, monetary limits are different for Government Servants at different grades) and general integrity.[53]

The Central Services Rules also have restrictions on a Government Servant's connections with press or media [54] 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.[55]

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 Statement Government owned entities.

47. All India Service includes services mentioned in Section 2 and Section 2A of the Services Act.
48. 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).*
49. Member of family is defined in Rule 2(b) of Services Rules.
50. Rule 4 (2)(b) Services Rules.
51. Rule 3 (2) Services Rules.
52. Rule 13 of Central Services Rules.
53. Rule 3(1) of Central Services Rules.
54. Rule 8 of Central Services Rules.
55. 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* controversy[56] 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.

56. 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.[57] 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.[58]

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.[59]

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.[60]

57. Website of Central Vigilance Commission, available at, http://cvc.gov.in/cvc_back.htm.
58. Vineet Narain & Ors. v. Union of India (1998) 1 SCC 226.
59. Section 3 of CVC Act.
60. http://cvc.nic.in/ar2014.pdf

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.[61]

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 NREGA [62] 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.* [63], reliance on the CAG report was contested 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.[64]

61. 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.

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

63. (2012) 3 SCC 104.

64. 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.[65]

The Competition Act prohibits anti-competitive behaviour including abuse of dominance by an entity that enjoys dominance in a relevant market.[66] Entities are also prohibited from imposing unfair and discriminatory terms of sale, purchase of goods or services.[67] 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.[68] 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.[69]

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.

65. Section 19(1) of Competition Act.
66. Section 4(1) of Competition Act.
67. Section 4(2) of Competition Act.
68. *Suo Moto* Case No. 4 of 2013.

69. 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. [70] 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.

70. 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 licences[71] and the subsequent challenge to allocation of coal blocks [72], 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.[73] 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.[74] 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.[75] 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.[76]

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,[77] the decision on an award of a public contract,[78] the exclusion of certain bids,[79] as well as pre-bid clarifications.[80] The list of registered bidders for a given subject-matter of procurement must also published on the Procurement Portal.[81]

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.[82] 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.[83] 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.[84]

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 Min-

71. Nishith Desai Associates Telecom Hotline, *Supreme Court cancels 122 telecom licences with good intentions*, February 2012.
72. Nishith Desai Associates Regulatory Hotline, *Coal allocations cancelled!*, October 2014.
73. 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.
74. S 5(1) of Procurement Bill.
75. S. 6 of Procurement Bill.
76. S. 17 of Procurement Bill.
77. S. 30 (5) of Procurement Bill.
78. S. 25 (3) of Procurement Bill.
79. S 22(4)(b) of Procurement Bill.
80. 18 (3) and 18(4) of Procurement Bill.
81. 14(5) of Procurement Bill.
82. S. 44 of Procurement Bill.
83. S. 45 of Procurement Bill.
84. S. 49 (1) of Procurement Bill.

istry 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.[85] 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.[86]

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.[87]

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.[88]

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.

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

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

87. *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.

88. 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.[89] The definition of public servant is the same as the definition provided under POCA.[90] 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.[91] The complainant may be any public servant, or any person, and may include an NGO. [92]

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.[93] 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. [94] The Whistleblowers Act also makes it mandatory for the disclosure to be accompanied by full particulars and supporting documents.[95]

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.[96]

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 imitation of proceedings or taking corrective measures against the public servant to the concerned public authority.[97] 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.[98] 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.[99] The penalty for revealing the identity of a complainant has been

89. Statement of objects and reasons.
90. Section 3(i) of Whistleblowers Act.
91. Section 3(c) of Whistleblowers Act.
92. Section 4(1) of Whistleblowers Act.
93. Section 4(6) of Whistleblowers Act.
94. Section 5(4) of Whistleblowers Act.
95. Section 4(4) of Whistleblowers Act.
96. Section 6 of Whistleblowers Act.
97. Section 3(h) of Whistleblowers Act defines public authority as any authority/body/institution falling within the jurisdiction of the Competent Authority.
98. Section 17 of Whistleblowers Act.
99. Section 15 (a) of Whistleblowers Act.

prescribed as imprisonment for a period of up to three years accompanied by a fine of INR 50,000[100] and knowingly providing false or incomplete information to a Competent Authority can sanction a penalty of INR 50,000.[101]

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.[102] 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.[103]

The Whistleblowers Protection (Amendment) Bill, 2012 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. [104]

100. Section 16 of Whistleblowers Act.

101. Section 15 (b) of Whistleblowers Act.

102. Section 11 of Whistleblowers Act.

103. Section 12 of Whistleblowers Act.

104. New clause 4.1.A

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 Amendment Bill do not. Further, despite the recommendation of the Standing Committee, there are no definitions even in the subsequent amendments of 2015. The Amendment Bill 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. As rightly noted by LCI, the absence of guidelines in respect of prosecution of commercial organisation and its officers under the Amendment Bill is a matter of concern. 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 Amendment Bill, 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 the Amendment Bill 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 Amendment Bill 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 [105],
- 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.

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

A. 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.

B. 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 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.[106]

For instance, the Competition Commission in a case[107] 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.

C. 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.

106. *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.

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

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.

D. Class Action Suit

The concept of Class Action Suit was recommended by J.J Irani Committee Report. The concept of Class Action Suit 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 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.

E. 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.

F. 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 distinct 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.

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

Provision	India	UK	USA	Singapore	European Union
Anti - Corruption Legislation/ Legal Framework	▪ Prevention of Corruption Act, 1988 (‘**POCA**’) ▪ 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 Lokyukta Acts	▪ Bribery Act, 2010 (‘**UK Act**’) ▪ Companies Act ▪ Common law offence of bribery	▪ U.S. Foreign Corrupt Practices Act, 1977 (‘**FCPA**’)	▪ 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	▪ 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. ▪ These are not provided in Indian law.

Scope of Legislation (see section on third parties and intermediaries)	■ Public servant under the IPC and POCA	■ Can be private citizen or public officer	■ Foreign official[108] (broader than 'public servant')	■ 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.	Criminal Law Convention on Corruption Implementation of Program of Action against Corruption
Important Definitions/ Interpretation	<u>Under POCA</u> ■ Gratification: means bribe, and is not limited to pecuniary gratification (s.7b) <u>Under FCRA</u> ■ *Foreign Contribution:* means, inter alia, any donation, delivery, or transfer made by any 'foreign source' of any article. ■ *Foreign source:* includes a foreign Government, foreign company or trust, as well as a citizen of a foreign country. ■ *Foreign company:* 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 ■ *Foreign hospitality:* An offer, not being casual, made in cash or kind ■ Relevant Person[109] - A candidate for election, a newspaper columnist,	■ *Improper Performance*- 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.[110] ■ 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)	■ Issuers- Publically traded companies that are registered under the 1934 Securities and Exchange Act ■ Corruptly- Must have a corrupt intent ■ Anything of value- interpreted broadly and can include payment of money, provision of gifts and entertainment, travel, jobs, internships, etc. ■ Foreign Official- broad interpretation. Any type of government official at any level ■ Obtain or retain business- also defined broadly. Anything that furthers a US person's interest, such as payments to gain a contract, secure lower cost of import, etc.	Under Singapore POCA ■ *Gratification:* 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.[111] ■ *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.	"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; the term "judge" referred to in sub-paragraph a above shall include prosecutors and holders of judicial offices;

108. I have defined Relevant Persons for ease of understanding the Key Offences under the FCRA. They are enumerated under s. 3 of FCRA.

109. https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

110. In *Public Prosecutor v Peter Benedict Lim Sin Land (2013)*, a sexual favour was covered under the definition of gratification

111. any officer or employee of a foreign government or any department, agency, or instrumentality thereof, chapter 2 The FCPA: Anti-Bribery Provisions 19 20 or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

	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				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; "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.
Key Offences	Offences under POCA: (predominantly demand side) *Accepting, obtaining, attempting to obtain, or agreeing to accept:*	Section 1- Active Corruption (bribing) Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or	Three categories of offenders: ▪ Issuers ▪ Domestic concerns	Section 5&6 of Singapore POCA- General prohibition on giving, promising or offering, soliciting,	Art. 2 and Art. 3 - Active and passive bribery of domestic officials.

	Section 7- gratification in respect of public act, other than legal remuneration Section 8 – gratification to influence public servant Section 9- gratification for exercise of personal influence with public servant Section 11- obtaining valuable thing without consideration <u>Offences under IPC (Chapter IX)</u> Offences by or related to Public Servants (similar to POCA offences) Offences relating to Elections- section 171B- defines briber as- Whoever gives a gratification to any person to induce or reward the "exercise of electoral rights[112]" <u>Offences under the FCRA (predominantly supply side)</u> *Prohibits certain categories of persons from receiving foreign contributions* Section 3 (1)- For Relevant Person to accept a Foreign Contribution Section 3(2) (a)- For Indian resident or Indian citizen outside India, <u>on behalf of any political party or a Relevant Person</u>, to accept a Foreign Contribution 3(2)(b)- See *Position on Intermediaries**	other advantage to another person in one of two cases: ▪ 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. ▪ Case 2 applies where P knows or believes that the acceptance of the advantage offered, promised or given *<u>in itself</u>* constitutes the improper performance of a relevant function or activity <u>Section 2- Passive Corruption (being bribed)</u> <u>Section 6- Active bribery of a foreign official</u> The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. 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. *However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.* <u>Section 7- Company failing to prevent bribery (corporate offense) (strict liability)</u> A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization <u>Common Law Offence</u>[113]	▪ Certain other persons that are not issuers/ domestic concerns that are acting[114] while in the US Bribery Offence Prohibits US companies and individuals, US issuers, and anyone acting in the US from: *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* FCPA also prohibits the payment of bribes indirectly through a third person The FCPA, unlike the Bribery Act, requires a 'corrupt intent' Accounting Offence 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.	accepting or agreeing to receive a gratification in either the public or private sector. <u>Under PC (s161- 165)</u> 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. <u>Parliament (Privileges, Immunities and Powers) Act</u> Prohibits Members of Parliament from benefiting from a debate in the House in which they have a pecuniary interest <u>Customs Act</u> 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 <u>Distinctive Features</u> ▪ <u>S 9 of Singapore POCA:</u> An accepter 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	Art.5 – Bribery of foreign public officials. Art. 7 and Art. 8 – Active and passive bribery in private sector. Art. 9 – bribery of officials in international organisations. Art. 10 – bribery of members of international parliamentary assemblies. Art. 11 – bribery of judges and officials of international courts. Art. 18 – provides for liability of companies as well.

112. 'Electoral rights' have been defined in section 171 A of the IPC as the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at any election.

113. http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/efae7aa0-f294-4801-b7e5-5ab4ed6b2675/Presentation/PublicationAttachment/9a8eda32-9471-412e-b1c8-32c27841fb3d/A%20guide%20to%20existing%20bribery%20and%20corruption%20offences%20in%20England%20and%20Wales_v2.pdf

114. Section 78dd-3 of the FCPA defines this third category of offenders as any officer, director, employee, or agent of issuers or domestic concerns or any stockholder of issuers or domestic concerns acting on behalf of such person, while in the territory of the United States.

		<u>No universal definition, agreed upon components include:</u> 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.		▪ <u>S 23 of Singapore POCA:</u> Expressly disallows admission of evidence to show that any alleged gratification is customary in any profession or trade ▪ <u>Section 24 Singapore POCA:</u> Allows pecuniary resources that can't be accounted for to be admissible as evidence in Court.	
Anti-Corruption Legislation relating to Public Office	<u>Under 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> ▪ 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. 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			<u>Political Donations Act</u> Requires candidates standing for political elections to declare the donations they receive	Apart from any measure of each Party, Art. 10 and Art. 11 also provide for bribing parliamentary assemblies and judges and officials of international courts.
Type of Benefit	Pecuniary/Non Pecuniary		Pecuniary/Non Pecuniary	Pecuniary/Non pecuniary [115]	Active and passive. Convention uses the expression 'undue advantage'

115. Inferred by the Explanation given in the Penal Code in which the gratification was described as a 'gift' indicating that gratification should not be restricted to pecuniary gratification

Whether success necessary	Section 9 of POCA even covers *attempts* to exercise personal influence on a public servant through third party agents, hence it is to be inferred that success is not necessary.		FCRA does not require that a corrupt act succeed in its purpose- it covers attempted bribery and conspiracy to bribe	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.	Convention does not contemplate success as a necessity.
Penalty	(under POCA) Imprisonment between 6 months and 5 years, and also may be liable to a fine, also applies to whoever abets the offenses described above.	■ 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.	For violating anti- bribery provision ■ FCPA provides that corporations and other business entities are subject to a fine of up to $2 million. ■ 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. For violating accounting provision[116] ■ FCPA provides that corporations and other business entities are subject to a fine of up to $25 million ■ Individuals are subject to a fine of up to $5 million and imprisonment for up to 20 years *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*	Under the Singapore POCA, any person found guilty of an offence shall be liable on conviction to a fine or to imprisonment, or both. Under s.13 Singapore POCA, the Court shall also order him to pay a penalty equivalent to the amount of bribes received. The Corruption, Drug Trafficking and Other Series Crimes (Confiscation of Benefits) 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	As per domestic law.

116. Section 78(b) of the FCPA contains certain accounting provisions that are applicable only to issuers. These require issuers to make and keep accurate books and accounts as well as certain internal controls. These accounting provi-

Enforcement Agencies	▪ Under the new Lokpal and Lokyukta 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 ▪ 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	▪ The Serious Fraud Office (SFO)	▪ The Department of Justice is responsible for FCPA violations ▪ The Securities and Exchange Commission	▪ The Corrupt Practices Investigation Bureau ("CPIB") (primary watchdog) ▪ Attorney-General's Chambers ("AGC"). ▪ Commercial Affairs Department ("CAD"). ▪ Monetary Authority of Singapore ("MAS"). ▪ The Singapore Exchange Limited ("SGX").	Parties (signatories to the Convention) are to adopt necessary measures in this regard. [Art. 20] Convention also provides for cooperation between two countries.
Territorial Application	India and to foreign payments from abroad in India.	Has widest extra – territorial reach. An offence may be prosecuted when any act or omission forming part of the offence: i. Takes place in the UK ii. Done by a person with a 'close connection' with the UK (s. 12)2)c)) *Close connection- place of incorporation, place of residence, citizenship* However, no requirement of a close connection with the UK for s. 7 offence.	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. 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.	Extra- territorial jurisdiction can be exercised against Singapore citizens committing corruption offences outside Singapore. 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.	Convention applies to members.
Private bribery	Under POCA: Apply predominantly to public servants, however, private persons can be covered under 'abetment' Under IPC: Covers private persons under criminal breach of trust provisions	Covers bribery on a private level	Does not cover bribery on a private level, although some articles suggest that it can be prosecuted / enforced under other US legislation	Singapore POCA applies to both the private and public sector under sections 5 and 6.	Art. 7 and Art. 8 provide for mandate for prosecution of offences in private sector.

sions are mirrored in section 13(b)(2) of the Securities and Exchange Commission Act, 1934.

Position on Facilitation payments	■ 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.	■ No exception provided under the Bribery Act (Some articles suggest that it depends on the facts and circumstances of the case)	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 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.	■ Not expressly permitted under Singapore POCA ■ Section 12(a)(ii) of the PCA prohibits the offer of any gratification to any member of a public body as an inducement or reward for the member's 'expediting' of any official act, among other prohibited acts.	No specific mention in the Convention. However, 'active' and 'passive' payments are provided for.
Position on Gifts/ Hospitality	On Gifts ■ 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). ■ For gifts received on other occasions/ not from close ones, threshold is Rs. 5000	■ 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 Bona fide hospitality and promotional expenditure is not caught by the Act.	On Hospitality 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 there is no corrupt intent. This applies for low cost hospitality (beverages, snacks, promotional items) as much as it applies for hospitality that has a more substantial cost. On Gifts 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 ■ be made openly and transparently ■ be properly recorded in a company's books and records	*Public Prosecutor v Soh Cham Hong* [2012] SGDC 42 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	While no special provision for gifts, same are mentioned as 'active' and 'passive' bribes.

	■ PCA bars public servants from obtaining valuables without consideration under s11. ■ Gift covered under Conduct Rules may be gratification under IPC. On Hospitality ■ 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 clearance 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		■ given only where appropriate under local law ■ customary where given ■ reasonable for the occasion		
Position on Intermediaries* and third parties	Under FCRA ■ 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.	■ 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	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. 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.	Section 5 of Singapore POCA expressly provides that the offence of bribery can be committed 'either by himself or in conjunction with any other person.'	No provision

	Thus, third party intermediaries resident in India are explicitly prohibited from giving or acting as intermediaries with respect to giving of such contributions. Under POCA POCA prohibits other persons from: ▪ taking gratification 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				
Accounting/ Books of Record Tax treatment	▪ 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. ▪ 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.	▪ Companies Act 2006 includes an offence of failing to keep adequate accounting records	FCPA provisions that apply only to issuers. The FCPA requires publically traded companies 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets to the issuer.	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.[117]	No special provision
Defences		Under section 7 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.	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		

117. http://www.nortonrosefulbright.com/knowledge/publications/113733/getting-the-deal-through-anti-corruption-regulation-in-singapore-2014

		<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.	(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)		
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 gratifi cation 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.	
Bills/ un notified Acts	▪ Public Procurement Bill[118] (lapsed) ▪ Amendment to POCA (pending)				
Position in CPI Index, 2015.	Rank 76	Rank 10	Rank 16	Rank 8	Germany- rank 10

118. However, most Government entities in India require the signing of a mandatory 'Pre Contract Integrity Pact' which imposes restrictions on both the company and the state from engaging in bribery during public procurement. The Integrity Pacts also mandate that companies disclose to the state any previous integrity transgressions by the company that occurred anywhere in the world.

12. Conclusion

India's law on corruption is a work-in-progress and as can be seen from international laws and standards, Indian law does not address all issues relating to corruption. This places the burden on companies and its stakeholders to be proactive and take necessary measures to ensure that a company, its officers and employees adhere to the highest standards of integrity. Unlike laws in developed foreign jurisdictions, laws in India do not provide for measures such as damages when a party suffers due to contracts vitiated by corrupt practices or comparable safeguards in the context of government contracts.

The Amendment Bill, while it is subject to debate in Parliament, does place the onus of responsible measures on companies. Therefore, companies and stakeholders would do well to develop standards of governance to address issues relating to corrupt and unethical practices that are in line with international standards. Thus, while India presents unmatched opportunities for business, elements of risk need to be well countered to mitigate or negate possibilities of prosecution or investigation in relation to corrupt practices.

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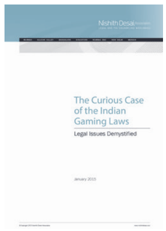

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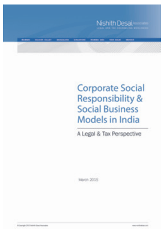

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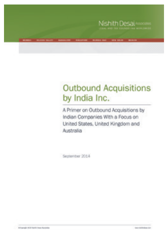

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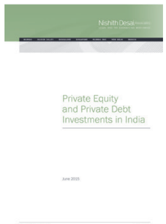

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