

## INDIA

# Ten Tips for Performing Effective Anti-Corruption Investigations in India

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Doing business in India continues to present a compliance challenge for U.S. companies. Indeed, recently U.S. enforcement authorities announced three FCPA resolutions arising at least in part from conduct occurring in India:

- The Embraer resolution with the SEC and the DOJ arose, in part, from the company's payment of \$5.76 million to an agent, to illicitly secure the sale of three aircraft to the Indian Air Force.
- The AB InBev resolution arose out of payments made by an Indian affiliate of the company to third-party sales promoters who, in turn, were alleged to have made improper payments to Indian government officials, to obtain beer orders and to increase brewery hours.
- Cadbury/Mondolez resolved its FCPA matter with the SEC, which was based on the company allegedly paying \$100,000 to an agent, to assist in securing permits and approvals for its factory expansion in India.

Many companies have implemented strong compliance programs targeted at minimizing corruption risk so that they can avoid the troubles Embraer, AB InBev, Mondolez and other companies have faced. Even with strong preventative measures, bribery allegations still can and often do arise and need to be investigated in India.

Such investigations will involve facts and circumstances unique to the country's business environment and culture. While the basic approach to internal investigations remains the same across jurisdictions, we have found it useful to modify our investigation strategy to take into account India-specific considerations, and have compiled the following 10 tips for conducting those investigations.

### ***1) Don't Miss the Real Issue***

We find that Indian compliance-related internal investigations are often generated by complaints made by current and former employees. We have investigated several matters in which a serious compliance issue was buried in an assortment of management and personal criticisms. Pay close attention to anything resembling a "whistleblower" complaint, and be careful not to discount potentially serious compliance issues simply because such issues were raised alongside seemingly frivolous, ad hominem attacks on management or colleagues.

### ***2) Scope Carefully***

Given the often scattershot nature of employee complaints in India, it is worthwhile to invest time and energy at the front end of a compliance investigation to properly scope the work. We often find it helpful to arrange an early interview with the person making the report by Indian counsel, to fully understand the compliance issues raised and to separate the compliance "wheat" from what may be human resources "chaff."

### ***3) Consider Privilege Issues***

Keep in mind that there is no attorney-client privilege for in-house lawyers under Indian law. If privilege is important, retain outside counsel to lead the investigation.

See "*Foreign Attorneys Share Insight on Data Privacy and Privilege in Multinational Investigations*" (Jun. 29, 2016).

#### **4) Consider Local Counsel Within India**

India is a big, multicultural country with 22 official languages. While a sophisticated and experienced Indian lawyer (likely based in Delhi or Mumbai) is indispensable, you should consider whether local counsel also should be involved to access records and communicate effectively with the involved employees.

#### **5) Protect Reporter Identities**

It is prudent to take extra steps to avoid sharing the identity of the reporter with other employees of the Indian subsidiary. Even for companies with robust anti-retaliation policies, whistleblower retribution is unfortunately common in India and can obviously aggravate an already emotionally and legally precarious situation.

#### **6) Prepare for Law Enforcement Action During the Investigation**

Law enforcement in the United States and in India work on two different paradigms. The law-enforcement objective in India is focused on securing the conviction of individual wrongdoers. Bribery investigations can move quickly, resulting in arrests and media coverage. Such events obviously can change the fundamental calculus of the investigation, including the issue of self-disclosure in the U.S. Be prepared, and have a contingency plan in place.

#### **7) Be Wary of Recordings**

The smartphone has been heartily embraced in India and has found many creative uses, including the voice- and video-recording functions. Don't be surprised if employees reporting possible misconduct have made recordings of conversations that they claim show improper behavior. And don't be surprised if your interviews are recorded. To counter this, ensure one person never conducts interviews alone and that an accurate record of interviews is maintained. On the flip side, do not forget to ask the interviewee if he or she has a recording involving the allegation.

#### **8) Watch for Cash**

When conducting internal investigations in India, pay special attention to any cash expenditures, whether or not they are related to the transaction in question. Cash is often not as critical to the operation of the business as your Indian managers might claim, and cash expenditures can often signal potential bribery.

#### **9) Carefully Examine Third-Party Intermediary Expenditures**

As the three FCPA resolutions described above illustrate, improper payments in India are very often made through agents, consultants and other intermediaries. Any India-based investigation should examine carefully all relationships with, and payments to, such third parties.

See "*Rolls-Royce Settlement Offers Lessons on How to Pay Commissions Without Corruption*" (Feb. 15, 2017).

#### **10) Watch for Key "Red-Flag" Terms**

In reviewing documents or an Indian subsidiary's books and records, there are certain terms and phrases for which you should keep a lookout, as they might suggest improper payments.

Certain categories of fees and expenses should be closely scrutinized, such as:

- brokerage charges or fees;
- consultancy charges;
- covering charges;
- management fees;
- documentation charges;
- managing expenses;
- out-of-pocket expenses;
- protection fees; and
- special expenses.

Certain specific phrases on invoices are red flags as well, such as:

- “for obtaining license”;
- “liaisoning” or “government liaisoning”;
- “for clearances”;
- “for getting NOC”(notification of change);
- “for obtaining approvals”; and
- any other grammatically awkward or vague reference on invoices (for example, “motivation amount”).

Additionally, there are certain words from local languages that should be included in your search terms as they are red flags as well:

- rishwat (bribe in Hindi);
- baksheesh (euphemism for an offering and commonly used to demand/offer a bribe. The term is of Persian origin);
- ghos (euphemism for bribe in Hindi);
- hafta (a word of Persia origin that literally translates to week. The term however is typically used to denote payments demanded/paid on a weekly basis);
- chai-pani (a milder term to express the “common corruption” for routine payments. The terms literally means tea and water, therefore typically is smaller in value, as the objective is to act more as cost for refreshments or smaller denominations); and
- black money.

See “*Tailoring Compliance Efforts to Address Challenges in India*” (Feb. 1, 2017).

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