

## Corporate Crime, Fraud and Investigations: India

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A Q&A guide to corporate crime, fraud and investigations in India.

The Q&A gives a high level overview of matters relating to corporate fraud, bribery and corruption, insider dealing and market abuse, money laundering and terrorist financing, financial record keeping, due diligence, corporate liability, immunity and leniency, and whistleblowing.

For a full list of recommended corporate crime, fraud and investigations law firms and lawyers, please visit *PLC Which lawyer?*

To compare answers across multiple jurisdictions, visit the Corporate Crime, Fraud and Investigations *Country Q&A tool*.

This Q&A is part of the PLC multi-jurisdictional guide to corporate crime, fraud and investigations law. For a full list of jurisdictional Q&As visit [www.practicallaw.com/corporatecrime-mjg](http://www.practicallaw.com/corporatecrime-mjg).

*Ashok Sagar and Sumeet Kachwaha, Kachwaha & Partners*

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### Contents

- ▣ **Fraud**
  - ▣ Regulatory provisions and authorities
  - ▣ Offences
  - ▣ Enforcement
  - ▣ Sanctions
- ▣ **Bribery and corruption**
  - ▣ Regulatory provisions and authorities
  - ▣ Offences
  - ▣ Defences
  - ▣ Enforcement
  - ▣ Sanctions
  - ▣ Tax treatment
- ▣ **Insider dealing and market abuse**
  - ▣ Regulatory provisions and authorities
  - ▣ Offences
  - ▣ Defences
  - ▣ Enforcement
  - ▣ Sanctions
- ▣ **Money laundering and terrorist financing**
  - ▣ Regulatory provisions and authorities
  - ▣ Offences

- ▣ Defences
- ▣ Enforcement
- ▣ Sanctions
- ▣ **Financial record keeping**
- ▣ **Due diligence**
- ▣ **Corporate liability**
- ▣ **Immunity and leniency**
- ▣ **Cross-border co-operation**
- ▣ **Whistleblowing**
- ▣ **Reform**
- ▣ **Market practice**
- ▣ **The regulatory authorities**
  - ▣ Central Bureau of Investigation (CBI)
  - ▣ Serious Fraud Investigation Office
  - ▣ Central Vigilance Commission
  - ▣ Central Economic Intelligence Bureau
  - ▣ Directorate of Enforcement (DOE)
  - ▣ Economic Intelligence Council (EIC)
- ▣ **Contributor details**
  - ▣ Ashok Sagar
  - ▣ Sumeet Kachwaha

## Fraud

### Regulatory provisions and authorities

#### 1. What are the main regulatory provisions and authorities responsible for investigating corporate or business fraud?

India has a quasi-federal political structure comprising of 28 states and seven centrally administered union territories. It has a democratically elected central union government (central government) and each state has its own democratically elected state government. Each state establishes and maintains its own police force. Investigations are normally handled by the police force of the state where the crime was committed.

The central government has established a central investigative agency called the Central Bureau of Investigation (CBI). Typically, the CBI investigates and prosecutes cases of serious fraud or cheating that may have ramifications in more than one state. Where needed, the CBI can be assisted by specialised wings of the central government especially in economic or cross-border crimes. It also gets involved in serious crimes where it is necessary to use an agency that is independent of local political influence.

The Serious Fraud Investigation Office is a multi-disciplinary organisation under the Ministry of Corporate Affairs, consisting of experts in the field of accountancy, forensic auditing, law,

information technology, investigation, company law, capital market and taxation. It detects, prosecutes or recommends for prosecution of white-collar crimes/frauds.

In addition, the central government under the Department of Revenue has set up various agencies to fight economic crimes. Some of the significant ones are:

Central Economic Intelligence Bureau (for economic offences and implementation of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)).

Directorate of Enforcement (for foreign exchange and money laundering offences).

Central Bureau of Narcotics (for drug related offences).

Directorate General of Anti-evasion (central excise related offences).

Directorate General of Revenue Intelligence (customs, excise and service tax related offences).

The Securities and Exchange Board of India (SEBI). This was established on 12 April 1992 under the Securities and Exchange Board of India Act 1992 (SEBI Act). SEBI deals with securities fraud (*see Questions 13 to 17*) and aims to, among other things:

protect the interests of investors in securities;

promote the development of the securities market;

regulate the securities market.

India has a unified (all India) legislation under the Indian Penal Code 1860 (Penal Code) and the Code of Criminal Procedure 1973 for substantive and procedural laws relating to crime.

For more information on the regulatory authorities, see *box: The regulatory authorities*.

## Offences

### 2. What are the specific offences relevant to corporate or business fraud?

Specific offences relating to business or corporate fraud include insider trading, money laundering, fraud and misrepresentation related with sale of securities, forgery, falsification of accounts, dishonest misappropriation of property, criminal breach of trust, cheating and tax crimes.

**Fraud and misrepresentation related with sale of securities.** This includes offences such as buying, selling and dealing in securities fraudulently, or manipulation or deception. These are covered under the:

SEBI Act.

Securities and Exchange Board of India Rules 1993 (SEBI Rules).

Regulation 3 and 4 of The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations 2003 lay down the list of prohibited acts as follows:

The prohibitions on dealings in securities include:

buying, selling or dealing in securities in a fraudulent manner;

using or employing, in connection with the issue, purchase or sale of any security listed or proposed to be listed in a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the Act or its rules and regulations;

employing any device, scheme or artifice to defraud in connection with dealing in or issue of securities that are listed or proposed to be listed on a recognised stock exchange;

engaging in any act, practice or course of business that operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities that are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of the SEBI Act or the SEBI Rules.

Manipulative, fraudulent and unfair trade practices are prohibited. Dealing in securities is a fraudulent or an unfair trade practice if it involves fraud. This may include all or any of the following:

indulging in an act that creates a false or misleading appearance of trading in the securities market;

dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss;

advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;

paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;

any act or omission amounting to manipulation of the price of a security;

publishing or causing to publish or reporting or causing to report by a person dealing in securities any information that is not true or that he does not believe to be true prior to or in the course of dealing in securities;

entering into a transaction in securities without intention of performing it or without intention of change of ownership of such security;

an intermediary reporting trading transactions to his clients entered into on their behalf in an inflated manner in order to increase his commission and brokerage;

an intermediary not disclosing to his client transactions entered into on his behalf including taking an option position;

circular transactions in respect of a security entered into between intermediaries in order to increase commission to provide a false appearance of trading in such security or to inflate, depress or cause fluctuations in the price of such security;

encouraging the clients by an intermediary to deal in securities solely with the object of enhancing his brokerage or commission;

an intermediary buying or selling securities in advance of a substantial client order or whereby a futures or option position is taken about an impending transaction in the same or related futures or options contract;

planting false or misleading news that may induce sale or purchase of securities.

For insider trading see also *Questions 13 to 17*.

**Forgery (section 463, Penal Code).** Forgery is defined under the Penal Code as making any false documents or false electronic record or part of a document or electronic record, with the intention to either:

Cause damage or injury, to the public or to any person.

Support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, with intent to commit fraud.

**Falsification of accounts (section 477A, Penal Code).** An employee is guilty of falsification of accounts if he wilfully and with an intention to defraud either:

Destroys or falsifies any book, electronic record, paper, writing, valuable security or account that belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer.

Wilfully, and with intent to defraud, makes or facilitates the making of any false entry in, or omits or alters or facilitates the omission or alteration of, any material particular from or in, any such document.

**Dishonest misappropriation of property (section 403, Penal Code).** A person commits the offence of dishonest misappropriation of property if he dishonestly misappropriates or converts to his own use any movable property.

**Criminal breach of trust (section 405, Penal Code).** Criminal breach of trust is when a person who is entrusted with property or any dominion over property is dishonestly misappropriating,

converting the property to his own use, or dishonestly using or disposing of that property in violation of any direction of law or legal contract.

**Cheating (section 415, Penal Code).** This offence consists of deceiving any person and either:

Fraudulently or dishonestly inducing the deceived person to deliver property to a person or allow a person to retain property.

Intentionally inducing the deceived person to do or omit to do anything that he would not do or omit if he were not so deceived, and that causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

**Tax crimes.** Various tax crimes (such as tax evasion, smuggling, customs duty evasion, valued added tax evasion, and tax fraud) can be prosecuted under the:

Income Tax Act 1961.

Customs Act 1962.

Central Sales Tax Act 1956.

Central Excise Act 1944.

These offences require a deliberate act by the accused rather than an act of negligence.

Managers, officers and directors may have personal liability for aiding, abetting, counselling or procuring the commission of an offence. Typically, most statutes have a section titled "Offences by Companies", which contains a template provision making any person who, at the time the offence was committed, was directly in charge of and responsible to the company for the conduct of its business, guilty of an offence committed by the company, unless either:

The offence was committed without his knowledge.

He exercised all due diligence to prevent the commission of the offence.

For more information on directors and managers' duties and liabilities see: *PLC Corporate Governance and Directors' Duties Multi-jurisdictional guide*.

## Enforcement

### 3. What are the regulator's powers of investigation, enforcement and prosecution in cases of corporate or business fraud?

The CBI derives its legal powers of investigation from the Delhi Special Police Establishment Act 1946 (DSPE). They enjoy the same investigation powers as the Police and also have the power to launch prosecutions under a separate wing.

Under the Companies Act 1956 the central government can inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions for any offence.

SEBI has the powers of a civil court, such as ordering discovery and production of books of account, summoning and enforcing the attendance of persons and examining the inspection of books, registers and other documents and issuing commissions for the examination of witnesses or documents.

## Sanctions

### 4. What are the potential sanctions or liabilities for participating in corporate or business fraud?

The prescribed sanctions are as follows:

**Fraudulent and unfair trade practices relating to securities.** The higher of either:

a fine of INR250 million (as at 1 August 2012, US\$1 was about INR55);

three times the amount of profits made out of such practices.

**Forgery.** Two years' imprisonment and/or a fine.

**Falsification of accounts.** Seven years' imprisonment and/or fine.

**Dishonest misappropriation of property.** Two years' imprisonment and/or fine.

**Criminal breach of trust.** Three years' imprisonment and a fine.

**Cheating.** Simple cases of cheating are punishable with one year's imprisonment and a fine. Cheating accompanied with delivery of property or destruction of any valuable security is punishable by seven years' imprisonment.

## Bribery and corruption

### Regulatory provisions and authorities

#### 5. What are the main regulatory provisions and authorities responsible for investigating bribery and corruption?

The following regulations govern bribery and corruption in India:

**The Prevention of Corruption Act 1988.** This is a central government law enacted by Parliament to combat corruption and bribery among public servants. Under this Act there is a presumption that a public servant or a person expecting to be a public servant, who accepts or obtains or agrees or attempts to obtain from any person any recompense as a motive or reward for doing or forbearing to do any official act, or for showing favour or disfavour, is guilty of the crime of taking a bribe.

**Public service rules.** These are applicable to various categories of public servants. They prescribe a code of conduct to be observed by public servants and outline the rules pertaining to, among other things, accepting gifts and hospitality.

**Penal Code.** Sections 171B and 171E penalise bribery in relation to the exercise of any electoral right. Section 169 pertains to a public servant unlawfully buying or bidding for property, rendering him liable for imprisonment and/or a fine. If the property is purchased, it will be confiscated.

**The Benami Transactions (Prohibition) Act 1988.** A "benami" transaction is a transaction under a false name or identity. The Act prohibits any benami transaction except when a person purchases property in his wife's or unmarried daughter's name. (This Act was necessary as benami real estate purchases were historically part of the law in India).

Other legislation that is proposed and pending before Parliament includes:

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill (2011).

The Citizen's Ombudsman Bill 2011 (*Lokpal* and *Lokayukta* Bill).

The three main regulators responsible for inquiring, investigating and prosecuting corruption cases are the:

Central Vigilance Commission.

CBI.

Anti-Corruption Bureau of each state.

The CBI and the Anti-Corruption Bureaus of each state investigate cases related to corruption while the Central Vigilance Commission is a statutory body that supervises corruption cases in governmental departments. It has supervisory powers over the CBI but does not have authority to prosecute individuals.

Similarly, the state ombudsman (*Lok Ayuktas*) advises state government departments on actions against offending government officials. They are fully empowered to initiate investigations against public functionaries in corruption cases and can recommend punishments.

In addition, the Prevention of Corruption Act provides for various classes of police officers who are eligible to investigate offences under the Act.

For more information on the regulatory authorities, see box: *The regulatory authorities*.

## 6. What international anti-corruption conventions apply in your jurisdiction?

India is an active participant in the cross-border fight against corruption and has signed and ratified the UN Convention against Corruption. The purpose of the Convention includes:



Promoting and strengthening measures to prevent and combat corruption efficiently and effectively.

Strengthening internal co-operation and technical assistance to check and fight corruption and promote the integrity, accountability and proper management of public affairs and property.

A trilateral India-Brazil-South Africa co-operation agreement has been established for the purpose of covering various public-policy sectors, including ethics and combating corruption, and social responsibility and transparency.

India is an executive member of International Association of Anti-Corruption Authorities. It is also actively involved with the Organisation for Economic Co-operation and Development in its Anti-Corruption Initiative for Asia-Pacific.

## Offences

### **7. What are the specific bribery and corruption offences in your jurisdiction?**

Bribery involves any public servant (person in pay or service of the government):

Receiving illegal recompense in relation to an official act.

Receiving illegal recompense by corrupt or illegal means for influencing a public servant.

Receiving illegal recompense for the exercise of personal influence over a public servant.

Obtaining a valuable thing free of charge from any person concerned in a proceeding or business transacted by the public servant.

The acceptance or agreement to accept or attempt to obtain such recompense is enough to constitute an offence. Under the Prevention of Corruption Act, a public servant or a person expecting to be a public servant, who accepts or obtains or agrees or attempts to obtain from any person any recompense as a motive or reward for doing or forbearing to do any official act, or for showing favour or disfavour, is guilty of the crime of taking a bribe.

A public servant commits the offence of criminal misconduct if he:

Habitually accepts, or obtains or agrees or attempts to obtain from any person or for any other person any recompense other than legal remuneration as a motive or reward.

Habitually accepts or obtains or agrees or attempts to obtain any valuable thing without consideration, or for consideration that he knows to be inadequate, from any person concerned with an official act.

Dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so.

Obtains for any person or for himself, any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant.

Obtains (or any person obtains) any valuable thing or pecuniary advantage while holding office as a public servant, if he or any person on his behalf has at any time during the period of his office pecuniary resources or property disproportionate to his known sources of income and for which he cannot satisfactorily account.

The Penal Code also defines offences of bribery/corruption in relation to elections.

At present there are no regulations relating to private business/commercial bribery. However, there are ongoing efforts to combat bribery in the private sector. The emerging trend is to make the sector transparent, accountable and at par with the mechanisms that are in place for the public sector.

## **Defences**

### **8. What defences, safe harbours or exemptions are available and who can qualify?**

Diplomats enjoy immunity under the Vienna Convention on Diplomatic Relations 1961. The Prevention of Corruption Act applies to only public servants and does not cover the private sector.

"Grease" or facilitating payments amount to bribery under the Act.

### **9. Can associated persons and agents be liable for these offences and in what circumstances?**

Any person who facilitates bribery whether or not an offence is committed in consequence of that abetment is liable to be punished under the Prevention of Corruption Act.

## **Enforcement**

### **10. What are the regulator's powers of investigation, enforcement and prosecution in cases of bribery and corruption?**

In order to detect corrupt or improper practices the central vigilance commissioner and the state vigilance commissions have, among other things, the power to:

Summon and enforce the attendance of any person.

Examine on oath.

Order discovery and production of documents.

Receive evidence on affidavit.

Requisition public records.

Issue commissions.

Conduct surprise inspections.

The CBI and police officers have the power to arrest persons if they reasonably suspect that a person is guilty of an offence under the Prevention of Corruption Act. In addition, the officers of the anti-corruption bureau of each state have the powers of a police officer and therefore the power to arrest.

On conviction, the Prevention of Corruption Act allows for the confiscation of the assets of a public servant that are in excess of his known sources of income. Additionally, a police officer can investigate offences under the Act and can, in the course of investigation, seize or prohibit the operation of a bank account if the funds therein have a direct link with the commission of an offence under investigation.

The Prevention of Corruption Act applies to all citizens of India, whether residing in India or abroad. The provisions of the Penal Code apply to any offence committed by any citizen of India outside of India and any person on any ship or aircraft registered in India wherever it may be.

## Sanctions

### **11. What are the potential sanctions for participating in bribery and corruption?**

Special judges are appointed to try offences of bribery/corruption committed under the Prevention of Corruption Act. Facilitating the offence is also punishable. The prescribed punishment is imprisonment of between six months and five years along with fine. This penalty applies to all offences, other than habitual offenders for whom an enhanced punishment applies of imprisonment for between two and seven years, and a fine to be decided by the court.

## Tax treatment

### **12. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?**

Any expenditure incurred for any purpose that is an offence or that is prohibited by law is not deemed to have been incurred for the purpose of business or profession and no deduction or allowance can be made in respect of such an expenditure (*section 37 (1), Indian Income Tax Act 1961*). Therefore, blackmail, ransom or bribe payments are not allowed as a tax deductions.

## Insider dealing and market abuse

## Regulatory provisions and authorities

### **13. What are the main regulatory provisions and authorities responsible for investigating insider dealing and market abuse?**

SEBI prohibits insider trading. "Insiders" must not (directly or indirectly) deal in securities of a listed company when in possession of unpublished price-sensitive information. An "insider" is any person who is connected with the company and expected to have access to unpublished price-sensitive information in relation to the company's securities. An insider also cannot communicate, counsel or procure unpublished price sensitive information to or for any person. Prosecutions for insider trading in securities are launched by SEBI.

The SEBI (Prohibition of Insider Trading) Regulations 1992 (Insider Trading Regulations) have been framed under Section 30 of the SEBI Act and are intended to prevent and curb insider trading in securities.

The Share Dealing Code is a procedure adopted by companies in furtherance to the Insider Trading Regulations and aims to prevent insider trading activity. It restricts the directors of a company and other specified employees from dealing in securities of the company on the basis of any unpublished price-sensitive information that is available to them by virtue of their position in the company.

SEBI is responsible for dealing with insider trading and market abuse in accordance with the provisions of the SEBI Act.

For more information on SEBI see box: *The regulatory authorities*.

## **Offences**

### **14. What are the specific insider dealing and market abuse offences?**

Insider trading can be committed in three ways (*Regulation 3, Insider Trading Regulations*):

Dealing in securities the price of which will be affected by the inside information that is in that person's possession.

Encouraging another person to deal in such securities.

Disclosing the inside information to another person.

However, these restrictions are not applicable to any communication required in the ordinary course of business or profession, or employment or under any law.

Regulation 3A prohibits any company from dealing in the securities of another company or associate of that other company while in possession of any unpublished price-sensitive information. Therefore, misuse of information, making misleading statements and encouraging market abuse all fall under the ambit of insider trading.

The Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, prohibit manipulative, fraudulent and unfair trade practices. Dealing in securities is a fraudulent or an unfair trade practice if it involves fraud. This may include any act or omission amounting to manipulation of the price of a security, see *Questions 2 to 4*.

For information on Competition offences see: *PLC Competition and Leniency Multi-jurisdictional guide*.

## Defences

### **15. What defences, safe harbours or exemptions are available and who can qualify?**

A defence is available to a company dealing in the securities of another company while in possession of any unpublished price sensitive information if cumulatively (*Regulation 3B, Insider Trading Regulations*):

The decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee who was in possession of the information.

The company has put in place such systems and procedures that demarcate the activities of the company in such a way that the person who enters into a transaction in securities on behalf of the company cannot have access to information that is in possession of other officers or employees of the company.

The company had in operation at that time, arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transactions or agreement was given to that person or any of those persons by that officer or employee.

The information was not communicated and no relevant advice was given.

That acquisition of shares of a listed company is as per the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (Takeover code 1997). The Takeover code, among other things, governs the acquisition of shares and voting rights in public listed companies.

SEBI has recently published the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (Takeover code 2011), which has been in effect from 22 October 2011.

This exemption is only available for companies.

Section 24B of the SEBI Act empowers the central government to grant immunity from prosecution to any person who is alleged to have violated the provisions of the Act but who has made a full and true disclosure in respect of the alleged violation, subject to certain conditions as it may deem fit.

This immunity can be taken away by the central government if the person has given false information or failed to abide by the imposed conditions.

## Enforcement

### **16. What are the regulator's powers of investigation, enforcement and prosecution?**

SEBI has the powers of a civil court, such as ordering discovery and production of books of account, summoning and enforcing the attendance of persons and examining the inspection of books, registers and other documents and issuing commissions for the examination of witnesses or documents.

SEBI can also, either during or after completion of the investigation/inquiry, in the interest of the investors or securities market:

Suspend the trading of any security in a recognised stock exchange.

Restrain persons from accessing the securities market and prohibit any person associated with the securities market from buying, selling or dealing in securities.

Suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position.

Impound and retain the proceeds or securities in respect of any transaction that is under investigation.

Direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction that is under investigation.

Appoint one or more officers to inspect the books and records of insider(s) or any other persons.

Appoint a qualified auditor to investigate into the books of account or the affairs of an insider.

## **Sanctions**

### **17. What are the potential sanctions for participating in insider dealing and market abuse?**

Insiders who violate the SEBI Regulations are liable to a penalty of up to INR250 million or three times the amount of profits made out of insider trading, whichever is higher.

SEBI may, in addition to the above, pass directions to the defaulting insider not to deal in the concerned shares in any particular manner and/or prohibit him from disposing of the concerned shares and/or declaring the concerned transactions as null and void, and so on.

In addition, any person indulging in fraud and unfair trade practices relating to securities (see *Question 2*), is liable to a penalty of INR250 million or three times the amount of profit made out of these practices, whichever is higher.

## **Money laundering and terrorist financing**

### **Regulatory provisions and authorities**

### **18. What are the main regulatory provisions and authorities responsible for investigating money laundering and/or terrorist financing?**

Money laundering is dealt with under the Prevention of Money Laundering Act 2002. The Act is an endorsement of various international conventions to which India is a party and seeks to declare laundering of monies through specified crimes as a criminal offence.

The Prevention of Money-laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules 2005 impose an obligation on banking companies, financial institutions and intermediaries to verify the identity of investors and maintain records of transactions with each investor.

The Unlawful Activities (Prevention) Act deals with terrorism and combating terrorist funding.

The Reserve Bank of India (RBI) issued Know-Your-Customers (KYC) Guidelines Anti-Money Laundering Standards on 16 August 2005, under which Banks are advised to follow certain customer identification procedures for opening of accounts and monitoring transactions of a suspicious nature and reporting it to the appropriate authority.

In addition, the Indian Government has established a central national agency called the Financial Intelligence Unit (FIU-IND) responsible for receiving, processing, analysing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for co-ordinating and strengthening national and international intelligence, investigation and enforcement agencies in pursuing global efforts against money laundering and related crimes. FIU-IND is an independent body, which reports directly to the Economic Intelligence Council (EIC) headed by the Finance Minister of India.

In 2010, India became the 34th member of Financial Action Task Force and is also a member of the Asia/Pacific Group on Money Laundering. In December 2010, India joined the Eurasian Group on Combating Money Laundering and Terrorist Financing as a member state. India ratified the UN Convention against Transnational Organised Crime in May 2011.

For more information on the regulatory authorities, see box: *The regulatory authorities*.

## **Offences**

### **19. What are the specific money laundering and terrorist financing offences?**

Money laundering consists of (directly or indirectly) knowingly assisting, being a party to or actually involved in any process or activity connected with the proceeds of crime and the presentation of it as legally obtained property (*section 3, Prevention of Money Laundering Act*). The Prevention of Money Laundering Act details 156 offences under 28 statutes as scheduled offences. Money laundering is an offence only if it is related to an activity connected with the proceeds of a crime specified as a scheduled offence.

The Unlawful Activities (Prevention) Act deals with terrorism and terrorist funding. It also covers terrorist offences such as conspiracy and commission of a terrorist act, and harbouring a person who is a terrorist. The Unlawful Activities (Prevention) Amendment Bill 2011 was introduced in the Parliament on 29 December 2011 to amend the Unlawful Activities (Prevention) Act and make it more effective in preventing terrorist and other unlawful activities. The bill increases the period for

which an association can be declared as unlawful from two years to five years. It also expands the definition of "terrorist act" to include acts that threaten the economic security of India through the production, smuggling or circulation of "high quality" counterfeit currency.

The offences of money laundering and terrorist financing are strict liability offences. The offence need not necessarily have been committed and even an attempt to commit a crime would constitute a punishable offence.

## **Defences**

### **20. What defences, safe harbours or exemptions are available and who can qualify?**

There are no exemptions or qualifications applicable to such offences.

## **Enforcement**

### **21. What are the regulator's powers of investigation, enforcement and prosecution?**

Investigation can be initiated only by authorities designated by the central government such as the Directorate of Enforcement. These authorities can carry out interim measures such as the survey, search, seizure and arrest of the accused. The Prevention of Money Laundering Act gives the requirements for:

Financial institutions' disclosure requirements in relation to reportable transactions.

Confiscation of the proceeds of the crime.

Declaring money laundering as an extraditable offence.

Promoting international co-operation in investigation of money laundering.

Section 13 of Prevention of Money Laundering Act confers powers on the Director (appointed by the Central Government and entrusted with powers of a civil court) to ensure compliance and to call for records and make appropriate inquiries where necessary. It also prescribes a list of officers (such as officers of the Customs and Central Excise Department, police officers, officers of the RBI, and so on) who are expressly required to assist the authorities in enforcing of the Act. The enforcement agency has extensive powers to discharge its duties under the Act. The adjudicating authority for the purposes of the Act is vested with powers of a civil court.

Under the Unlawful Activity (Prevention) Act, the central government has the power to prohibit any person from using the funds of an unlawful association. These prohibitory orders normally entail an arrest warrant/summons. The designated authority, in addition to having the powers of a civil court, can also arrest persons or search any building, conveyance or place. The officers competent to investigate such offences are the Delhi Special Police Establishment not below the rank of a



Deputy Superintendent of Police (or not below the rank of an Assistant Commissioner of Police in the metropolitan areas).

The courts/regulators do not have extra-territorial jurisdiction to try these offences.

## Sanctions

### **22. What are the sanctions for participating in money laundering or terrorist financing offences?**

The punishment for money-laundering is imprisonment for between three and seven years and a fine of up to INR500,000 (*section 4, Prevention of Money Laundering Act*). For offences specified under paragraph 2 of Part A of the Schedule (Offences under the Narcotic Drugs and Psychotropic Substances Act 1985) the punishment is up to ten years.

Chapter IV of the Unlawful Activity (Prevention) Act provides for the following sanctions:

**Unlawful activities.** Individuals who take part, commit or abet the commission of an unlawful activity face imprisonment for up to seven years and a fine. In addition, individuals who assist in any unlawful activity face imprisonment of up to five years and/or a fine.

**Terrorist activities.** The sanctions applicable are:

**Terrorist acts.** Acts that result in death are punishable with death or life imprisonment. Other cases range from five years to life imprisonment;

**Raising funds for terrorist activity and conspiracy.** Imprisonment from five years to life and a fine;

**Harbouring terrorists.** Imprisonment from three years to life;

**Membership of a terrorist organisation.** Life imprisonment and a fine;

**Holding proceeds of terrorism.** Life imprisonment and a fine.

These sanctions apply to both individuals and corporate bodies.

## Financial record keeping

### **23. What are the general requirements for financial record keeping and disclosure?**

Banks, financial institutions and intermediaries must (*section 12 (1), Prevention of Money Laundering Act*):

Maintain records detailing the nature and value of prescribed transactions.

Furnish information on prescribed transactions under the Prevention of Money Laundering Act.

Verify and maintain the records of the identity of all its clients.

Records must be maintained for ten years after the transaction concludes. Banking companies, financial institutions and intermediaries must also furnish information to FIU-IND when required to do so (*section 12 (2) Prevention of Money Laundering Act*).

The maintenance and disclosure of records is specifically provided for in the Prevention of Money-Laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules 2005.

Rule 3 provides that every banking company or financial institution or intermediary must maintain a record of:

Cash transactions of more than INR1 million or its equivalent in foreign currency.

Series of cash transactions integrally connected to each other that have been valued below INR1 million or its equivalent in foreign currency where such series of transactions have taken place within a month.

Cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine and where any forgery of a valuable security has taken place.

Suspicious transactions whether or not made in cash.

Rule 10 provides that banking companies, financial institutions or intermediaries must maintain records of the identity of its clients in hard and soft copies. The records must be maintained for a period of ten years from the end date of the transaction between the client and the banking company or financial institution or intermediary.

#### **24. What are the sanctions for failure to keep or disclose accurate financial records?**

To ensure compliance the Director has powers to (*section 13, Prevention of Money Laundering Act*):

Call for records and make appropriate inquiries.

Levy fines of between INR10,000 and INR100,000 on a banking company, financial institution or intermediary that fails to comply with any provisions of section 12 of the Act.

#### **25. Are the financial record keeping rules used to prosecute white-collar crimes?**

The financial record keeping rules are used to prosecute white-collar crimes. Violations of the rules may be used as evidence and trigger the prosecution of other crimes, such as bribery and/or tax evasion.

## Due diligence

### **26. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?**

Banks are required to undertake customer due diligence (CDD) measures depending on the type of customer, business relationship or transaction. CDD measures typically comprise the following:

Obtaining sufficient information in order to identify persons who beneficially own or control a securities account.

Verifying the customer's identity using reliable, independent source documents, data or information.

Identifying beneficial ownership and control. That is, determining which individual(s) ultimately own(s) or control(s) the customer and/or the person on whose behalf a transaction is being conducted.

Verifying the identity of the beneficial owner of the customer and/or the person on whose behalf a transaction is being conducted, corroborating the other information.

Conducting ongoing due diligence and scrutiny. That is, performing ongoing scrutiny of the transactions and account throughout the business relationship to ensure that the transactions being conducted are consistent with the registered intermediary's knowledge of the customer, its business and risk profile, taking into account, where necessary, the customer's source of funds.

## Corporate liability

### **27. Under what circumstances can a corporate body itself be subject to criminal liability?**

Various judicial decisions have made clear that a company/legal entity is broadly in the same position as any individual and may be convicted of breach of statutory offences including those requiring mens rea (a guilty mind).

However, there is no law specifically governing corporate manslaughter in India

## Immunity and leniency

**28. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?**

The power to grant a pardon can be exercised by a magistrate during the investigation of an offence. The provision for pardon applies only to cases triable by the Sessions Court, that is, where the offence would attract a punishment of imprisonment of seven years or more.

A pardon may be granted in order to obtain evidence from any person supposed to have been directly or indirectly concerned with or privy to an offence. A condition for the grant of a pardon is that the person makes a full and true disclosure of all facts within his knowledge. Any person who accepts an offer of a pardon would be examined as a witness in the trial.

Where a person has accepted an offer of a pardon but it is alleged by the public prosecutor that he has wrongfully concealed an essential fact or given false evidence, or not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was offered or for any other offence for which he appears to have been guilty and also for the offence of giving false evidence.

The concept of plea-bargaining is recognised in India by a 2005 amendment to the Code of Criminal Procedure. Plea-bargaining is available only for offences that are punishable by imprisonment of under seven years.

**Cross-border co-operation****29. What international agreements and legal instruments are available for local authorities?****Obtaining evidence**

The formal mechanisms for co-operating with foreign prosecutors are given under section 166A of the Code of Criminal Procedure. One such mechanism is through a letter rogatory or formal letter of request.

During the course of an investigation into an offence, an application can be made by an investigating officer that evidence is available in a country or place outside India. The court may then issue a letter of request to a court or authority outside India to:

Examine any person acquainted with the facts and circumstances of the case and record his statement.

Require such person or any other person to produce any document or thing that may be in his possession pertaining to the case.

Forward all the evidence to the court issuing the letter.

The CBI serves as the national central bureau for the purpose of correspondence with ICPO-INTERPOL (an international police organisation to extend co-operation between member countries and their police forces, which may furnish or request information or services for combating

international crime) to co-operate and co-ordinate with each other in relation to collection of information, location of fugitives and so on.

India has negotiated double tax avoidance agreements and finalised tax information exchange agreements with various countries to strengthen exchange of information relating to tax evasion, money laundering and so on.

In addition, mutual legal assistance treaties facilitate co-operation in matters relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or execution of search warrants under section 105 of the Code of Criminal Procedure.

India has adopted the Convention on Mutual Legal Assistance in Criminal Matters and has operational agreements with 31 countries. The Ministry of Home Affairs carries out these agreements.

## Whistleblowing

### 30. Are whistleblowers given statutory protection?

The law relating to whistleblowers is fairly recent. The Parliament (*Lok Sabha*) passed the Public Interest Disclosure and Protection to Persons Making the Disclosures Bill 2010 on 27 December 2011. The Bill is pending before the Upper House (*Rajya Sabha*). The Bill aims to set up a regular mechanism to encourage persons to disclose information on corruption or wilful misuse of power by public servants, including ministers. It also aims at providing adequate protection to persons reporting corruption or wilful misuse of discretion that causes demonstrable loss to the government, or commission of a criminal offence by a public servant.

In the interim, the government has issued recommendations to safeguard the interests of whistleblowers and the Central Vigilance Commissioner has been designated as the agency to act on complaints from whistleblowers until the Parliament passes appropriate legislation.

## Reform

### 31. Are there any impending developments or proposals for reform?

The Companies Bill 2011 is pending before Parliament. Among other things, the Bill will provide for self-regulatory mechanisms to combat corruption. It also provides for stringent compliance provisions.

## Market practice

### 32. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

Many companies have become far more mindful of the need to combat corruption and ensure that there are no rogue elements within their ranks that could disrupt the company and drag it into controversy. Companies have started voluntarily complying with the Code of Conduct mooted by the Government for private entities (though this has not yet come into force). The Code covers best

practices such as whistleblower protection, empowering shareholders' committees, using remuneration committees and so on.

## The regulatory authorities

### Central Bureau of Investigation (CBI)

**W** [www.cbi.nic.in](http://www.cbi.nic.in)

**Status.** Governmental organisation.

**Principal responsibilities.** The CBI normally investigates and prosecutes cases of serious fraud or cheating that may have ramifications in more than one state. It also investigates corruption cases.

### Serious Fraud Investigation Office

**W** [www.sfo.nic.in](http://www.sfo.nic.in)

**Status.** Governmental organisation.

**Principal responsibilities.** A multi-disciplinary organisation under the Ministry of Corporate Affairs, it detects and prosecutes or recommends for prosecution of white-collar crimes/frauds.

### Central Vigilance Commission

**W** [www.cvc.nic.in](http://www.cvc.nic.in)

**Status.** Statutory body.

**Principal responsibilities.** The Central Vigilance Commission supervises corruption cases in governmental departments. It has supervisory powers over the CBI but does not have authority to prosecute individuals.

### Central Economic Intelligence Bureau

**W** [www.ceib.nic.in](http://www.ceib.nic.in)

**Status.** Governmental organisation.

**Principal responsibilities.** The Central Economic Intelligence Bureau monitors economic offences and co-ordinates co-operation with international agencies in relation to economic offences.

### Directorate of Enforcement (DOE)

**W** [www.directorateofenforcement.gov.in](http://www.directorateofenforcement.gov.in)

**Status.** Governmental organisation.

**Principal responsibilities.** Enforcement of Foreign Exchange Management Act 1999 and the Prevention of Money Laundering Act 2002. The organisation falls under the Ministry of Finance and is headquartered in New Delhi.

### **Economic Intelligence Council (EIC)**

**W** [www.ceib.nic.in/eic.htm#eic\\_role](http://www.ceib.nic.in/eic.htm#eic_role)

**Status.** Governmental organisation.

**Principal responsibilities.** Established under the Ministry of Finance to facilitate co-ordination among the enforcement agencies dealing with economic offences.

### **Contributor details**

**Ashok Sagar**

**Kachwaha & Partners**



**T** +91 11 4166 1333

**F** +91 11 2411 0763

**E** [ashoksagar@kaplegal.com](mailto:ashoksagar@kaplegal.com)

**W** [www.kaplegal.com](http://www.kaplegal.com)

**Qualified.** India

**Areas of practice.** Business crimes; tax; competition; litigation.

#### **Recent transactions**

Representing a major Korean construction company in relation to a bridge collapse which led to a loss of 48 lives.

Representing a UK-based university in a criminal complaint by its erstwhile partner.

**Sumeet Kachwaha**

**Kachwaha & Partners**



**T** +91 11 4166 1333

**F** +91 11 2411 0763

**E** [skachwaha@kaplegal.com](mailto:skachwaha@kaplegal.com)

**W** [www.kaplegal.com](http://www.kaplegal.com)

**Qualified.** India

**Areas of practice.** Corporate commercial; dispute resolution; infrastructure; construction.

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