

FCPA, POCA , FEO, FR Assessment- Detection Cases (Unit 14,17,21 – Module 1)

DFA

March 28, 2022

Arijit Chakraborty

Transparency International Reports

- ◆ *“Money lost to **foreign bribery** wastes millions of **dollars** that could **otherwise go to lifesaving services like health care**. Too many governments choose to **turn a blind eye when their companies use bribery to win business in foreign markets**. G20 countries and other major economies have a responsibility to enforce the rules.”*
- ◆ *“**People's indifference is the best breeding ground for corruption to grow**. Only by working together can we hope to end impunity for corruption and the corrupt.”*
- ◆ ----- **Delia Ferreira Rubio**
- ◆ *Chair of Transparency International*

India – CPI Ranking, post PNB & other fraud cases

- ◆ India = ranked at **78 place out of 180** countries in 'Corruption Perception Index' (CPI) released by Transparency International in 2018 against 2017's 81 , where it had slid from **79 in 2016**. (perceived levels of corruption)
- ◆ Corruption scale : India scored 41 on 100 , Rank : 80 (2019)
- ◆ Same score : China, Ghana, Morocco
- ◆ It uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean.
Corruption scale : **India scored 41 on 100**
- ◆ India : **CPI 2021** : Score= 40, Rank : 85

Overview of the FCPA

Enacted in 1977 as an “anti-bribery” law – but both broader and narrower

- Applies to activities outside US or using “interstate commerce”
 - Cannot give or offer to give “anything of value”, even indirectly
 - to a foreign official, a candidate for office or a political party;
 - for “corrupt purpose” of causing a person to act or not act or to otherwise secure an improper advantage;
 - to obtain or retain business or direct it to particular persons
- Both accounting & anti-bribery components
 - Accounting rules designed to identify bribery / concealment / mischaracterization

The anti-bribery provision:

- U.S. persons and businesses are prohibited from offering, promising, authorizing or making corrupt payments to :
- foreign officials to improperly obtain or retain business or obtain an improper business advantage.

The “books and records” provision:

- Requires accurate reporting and recording of all transactions.
- Covers all payments to non-U.S. government officials, regardless of why the payments were made.

Foreign Official -

- ◆ Any officer or employee of a foreign government or any department, agency, or instrumentality of a foreign government.
- ◆ Any officer or employee of a public international organization such as the World Bank or the African Union.
- ◆ Any person acting in an official capacity for any foreign-government agency, department or instrumentality, or for a public international organization (even though not directly employed by the foreign government)
- ◆ Officers and employees of foreign state-owned companies.
- ◆ Uncompensated honorary officials if such officials can influence the awarding of business to a foreign official.
- ◆ An entity hired to review bids on behalf of a government agency.
- ◆ Members of royal families who have proprietary or managerial interests in industries and companies owned or controlled by the government.

Scope of the FCPA

Expanding in scope & application: significant enforcement since 2007

- 1998 amendments: incorporated OECD Anti-Bribery Convention
Extended to foreign citizens/businesses “while in territory of the US”
- Payments must have a “corrupt purpose”
 - “Corrupt purpose” not defined in law: broadly defined by courts
 - Mere PROMISE of benefits enough
- “Foreign official” broadly interpreted: wider than OECD Convention
 - “any officer or employee of a foreign government, or any department, agency or instrumentality thereof”

Accounting rules apply to US public companies only = Sarbanes-Oxley Act of 2002 raised level of accounting controls

- Bribery / “corrupt practices” prohibitions apply to
 - any issuer with stock traded on US exchange
 - U.S. citizens & residents
 - all businesses located in US or organized under US law
 - all persons within the territory of the US (since 1998)

FCPA: Two Primary Components

1) Anti-bribery Provisions:

Prohibit most bribery and non-routine payments to foreign government officials;

2) Financial Record Keeping & Internal Control Provisions:

Require specific records and financial internal controls to be maintained to provide reasonable assurance of accuracy of financial records and to demonstrate compliance.

The Prevention of Corruption Act, 1988 (POCA)

Points to keep in mind:

- Where a company pays or receives a bribe, the senior officers of that company will also personally commit an offence, including that of criminal conspiracy.
- The definition of 'public servant' under the Act is very wide to ensure maximum coverage of this Act.
- Gratification = a wide term and includes money and non-cash benefits as well.
- The potential penalties are severe and there maybe implications of blacklisting, cancellation of contracts and damages claims by the government department.
- A company is liable for a fine if convicted under the POCA.
- An individual can be fined and subjected to an imprisonment of 10 years.
- Liability could be attributed to a company, if an employee/agent acted within the scope of employment, to obtain benefit for the company.

FEO 2018

THE FUGITIVE ECONOMIC OFFENDERS ACT, 2018

ARRANGEMENT OF SECTIONS

CHAPTER I

PRELIMINARY

SECTIONS

1. Short title, extent and commencement.
2. Definitions.
3. Application of Act.

CHAPTER II

DECLARATION OF FUGITIVE ECONOMIC OFFENDERS AND CONFISCATION OF PROPERTY

4. Application for declaration of fugitive economic offender and procedure therefor.
5. Attachment of property.
6. Powers of Director and other officers.
7. Power of survey.
8. Search and seizure.
9. Search of persons.
10. Notice.
11. Procedure for hearing application.
12. Declaration of fugitive economic offender.
13. Supplementary application.
14. Power to disallow civil claims.
15. Management of properties confiscated under this Act.

CHAPTER III

MISCELLANEOUS

16. Rules of evidence.
17. Appeal.
18. Bar of jurisdiction.
19. Protection of action taken in good faith.
20. Power of Central Government to amend Schedule.
21. Overriding effect.
22. Application of other laws not barred.
23. Power to make rules.
24. Laying of rules before Parliament.
25. Power to remove difficulties.
26. Repeal and saving.

THE SCHEDULE.