

## A Renewed Focus On Anti-Corruption Enforcement In India

*Law360, New York (January 27, 2014, 12:18 PM ET)* -- On Jan. 1, 2014, President Pranab Mukherjee signed into law the Lokpal and Lokayuktas Bill, 2013, paving the way for the creation of an anti-corruption agency tasked with investigating corruption by Indian public officials. The Lokpal Bill has been the subject of close scrutiny and debate in India, both inside and outside Parliament, since it was introduced in December 2011. Of particular note, Parliament rejected amendments proposing to bring private business entities and nongovernmental organizations within the scope of the Lokpal Bill, which, as enacted, applies only to Indian “public servants.”

The Lokpal Bill adds to robust anti-corruption laws already on India’s statute book and arrives at a time when there are calls from prominent political figures in India for ever more stringent anti-corruption laws. Indeed, Senior Congress Party leader Rahul Gandhi recently stated “I believe it is our responsibility to complete our unfinished work in our fight against corruption.”

Parliament has been urged to review and ratify a number of pending anti-corruption related bills that seek to expand the scope of existing legislation to, amongst other things, prohibit bribery of foreign public officials and officials of public international organizations conducting business in India or with Indian companies, introduce sanctions for bribe givers, and provide protections for whistle-blowers. The success or failure of this latest phase in India’s long-standing battle against corruption, however, ultimately will be determined, not by the volume of legislation on the statute book, but by the resources and commitment that the government elects to devote to the new enforcement framework that has been established.

The recent developments discussed in this article and the political focus on and trend toward implementing and enforcing ever more comprehensive anti-corruption legislation, mean that businesses operating in India should continue to evaluate the bribery risks affecting their business operations, and ensure that they have in place tailored and appropriate policies and controls aimed at preventing bribery.

### The Lokpal Bill’s Context

The Lokpal Bill’s passage follows decades of debate over how to curb corruption within India and growing public animosity toward corruption. The earliest version of this type of anti-corruption legislation was introduced in Parliament in 1968, though no such Lokpal Bills have been signed into law until now.

Approval of the Lokpal Bill may have been spurred, at least in part, by recent corruption scandals that have plagued the ruling Congress Party and the recent electoral defeats it suffered at the hands of the

main opposition Bharatiya Janata Party and the Aam Aadmi Party, whose primary agenda is to end corruption in India. The Lokpal Bill was championed by the group India Against Corruption and others, including the prominent anti-corruption activist Anna Hazare, who ended the most recent of his several hunger strikes in support of the Lokpal Bill when it was approved by Parliament. Websites such as "ipaidabribe.com" have also played and continue to play their part in acting as a highly visible outlet for ordinary citizens to express their frustration at routine demands for bribes from certain government departments.

### **The Provisions of the Lokpal Bill**

The Lokpal Bill creates a new anti-corruption agency called the "Lokpal," which has the authority to investigate and prosecute complaints of corruption against public servants in the central government. It also requires India's states to establish within one year state-level versions of the Lokpal that will be called "Lokayukta" and operate according to the same model as the Lokpal. The Lokpal Bill, however, leaves open the date by which the provisions relating to the Lokpal must be implemented, stating: "It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint."

The Lokpal will consist of nine members: a chairperson who is a current or former justice of the Supreme Court, or a person with "special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy, public administration, vigilance, finance, including insurance and banking, law and management;" four judicial members who are current or former judges of the Supreme Court or chief justices of a high court; and four members with not less than 25 years of experience in relevant matters as set forth above for the chairperson.

No member of the Lokpal may be a current member of Parliament or a member of the Legislature of any state or central government territory. Additionally, members may not be "affiliated with any political party or carry on any business or practice any profession" while a member of the Lokpal.

The members of the Lokpal will be appointed by the president after obtaining recommendations of a selection committee consisting of: the prime minister, the speaker of the lower house of Parliament, the leader of the opposition party, the chief justice of the Supreme Court or a Supreme Court judge nominated by the chief justice, and one "eminent jurist" recommended by the other members of the selection committee and nominated by the president.

The involvement of senior political figures in appointing the members of the Lokpal has been the subject of stern criticism from anti-corruption campaigners, who have questioned how this will affect the independence of the Lokpal, and its willingness to tackle corruption at a high level within government.

The provisions of the Lokpal Bill permit the Lokpal to take one of three actions when it receives a complaint: (1) it may elect not to proceed with further investigation of the complaint; (2) it may conduct a preliminary inquiry itself or order any agency, including the Delhi Special Police Establishment, to conduct a preliminary inquiry to determine whether a prima facie case exists for proceeding with the matter; or (3) if it determines that a prima facie case exists, it may order any agency to conduct a full investigation.

The Lokpal is empowered to summon witnesses and require discovery and the production of documents. To the extent the Lokpal elects to conduct, or orders an agency to conduct, a preliminary investigation, such investigation must be complete within 90 days. The Lokpal's determination of

whether to proceed from a preliminary investigation to a full investigation must be made on the basis of information and documents collected by Lokpal or agency investigators, and also on testimony from the public servant against whom allegations have been made.

If the Lokpal determines that a full investigation is merited, the agency ordered to complete the investigation must do so within six months of the order. The Lokpal Bill allows for extensions of 90 days and six months to the deadlines for the preliminary and full investigations, respectively, if the reasons for such extensions are documented in writing.

Upon completion of the full investigation, the Lokpal may then prosecute the public servant or direct a different authority to initiate proceedings or other appropriate action against the public servant. Prosecutions initiated by the Lokpal will be held before special courts established by the Lokpal Bill. The Lokpal Bill requires the special courts to complete all trials within a period of one year from the date of filing the case, or a maximum of two years from the date of filing if the special court documents its reasons for the delay in writing.

The Lokpal Bill further provides that, in certain circumstances, the proceeds from a corruption offense may be provisionally seized during the course of an investigation, and confiscated at the time of conviction. To the extent the special court determines that the loss to the public caused by the corruption was pursuant to a conspiracy, the Lokpal Bill provides that “such loss may, if assessed and quantifiable ... also be recovered from such beneficiary or beneficiaries proportionately.” Because the Lokpal Bill does not provide the special courts with jurisdiction over private companies or their employees, however, it is unclear that the prosecutors would be able to use this provision to seek recovery from co-conspirators who are not also public servants.

The Lokpal Bill increases the custodial sentences available for public servants found guilty of corrupt conduct. Whereas previously the penalties ranged from six months to seven years in jail, the Lokpal Bill lengthens the potential imprisonment to no less than two years and up to 10 years.

Additionally, the Lokpal Bill requires public servants to make detailed declarations of the assets to which they and their families are owners or beneficiaries, as well as their liabilities and those of their families. Such declarations must be made within 30 days of when a public servant takes an oath of office, and for all public servants by July 31 of every year. The Lokpal Bill defines “public servants,” to include: the prime minister, Ministers of the Union, members of Parliament, central government employees, employees of local authorities serving in connection with the affairs of the central government, and employees of companies that are established by an act of Parliament or financed by the central government.

### **Concluding Remarks**

The Lokpal Bill does not introduce provisions directly aimed at companies operating in India, but it does appear to signal a renewed focus on tackling corruption in India. It is clear that if the Lokpal is successful in its aim of tackling corrupt public servants, there will be repercussions — whether inside or outside India — for those individuals and companies that are found to be the payers of the bribes to those corrupt officials.

While the Lokpal is not mandated to share information of suspected corrupt activity by international companies operating in India with foreign anti-corruption enforcement agencies, there is no provision in the Lokpal Bill that prohibits such sharing of information. Both Indian and international companies

operating in India must therefore ensure that they have assessed the risks of bribery facing their business in India, and take appropriate steps to guard against those risks by putting in place an effective compliance program aimed at preventing bribery.

Companies that have been successful in building effective compliance programs have paid close attention to guidance that has been issued by respected anti-corruption focused organizations such as Transparency International, and by various prosecutors and regulators including the U.S. Department of Justice and the U.K. Ministry of Justice.

The DOJ's recently published resource guide sets out the "Hallmarks of an Effective Compliance Program," which encapsulates succinctly the substance of the various guidance that have been published. Although the DOJ stresses that each compliance program will need to be tailored to the specific risks facing the business, it does set out the following key components that enforcement bodies would expect to see in a compliance program:

- A commitment from senior management and clearly articulated corporate policy against corruption;
- A code of conduct and compliance policies and procedures addressing the areas of risk facing the company;
- Autonomy and resources provided to one or more identified senior executives vested with responsibility for the oversight and management of the compliance program;
- Evidence that the company has conducted a risk assessment in order to develop a compliance program that focuses compliance resources on areas of highest risk;
- Training and continuous advice to employees, directors, officers and, in appropriate circumstances, agents and partners;
- Incentives and disciplinary measures that reinforce the importance of compliance;
- Risk-based, third-party due diligence and monitoring of third-party payments and relationships;
- A mechanism for confidential reporting and a properly funded, efficient process for investigating allegations raised;
- Periodic testing and review in order to continuously improve the compliance program; and
- Pre-acquisition due diligence and post-acquisition integration in the context of mergers and acquisitions.

Companies operating in India that have not taken steps to assess their risks and put in place an effective compliance program should consider starting that process immediately.

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