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REGIONAL RISK SPOTLIGHT

WPP's SEC Settlement Highlights Five Common Mistakes Companies Make When Entering the Indian Market

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In just the third FCPA corporate resolution of 2021, the world's largest advertising group, WPP, agreed in late September to pay more than $19 million to the SEC to settle bribery allegations. In its cease-and-desist order (SEC Order) the SEC alleged that, as a result of an aggressive growth strategy, WPP acquired a controlling interest in a local advertising agency in India without taking proper precautions against corruption. Indeed, WPP appears to have made five of the most common mistakes global firms make in expanding into and operating in India:

1. failing to conduct adequate pre-acquisition due diligence in launching its India business via acquisition;
2. failing to set an appropriate tone from the top;
3. failing to integrate its India operation into its compliance environment and failing to implement an effective compliance program in India;
4. failing to have in place an appropriate third-party due diligence and monitoring framework; and
5. failing to respond adequately to several anonymous allegations of bribery it received.

In this article, we take a close look at the mistakes WPP made in India to help other companies avoid the same fate.

See the Anti-Corruption Report's two-part series on navigating India's evolving corruption risk landscape: "FCPA Actions" (Oct. 27, 2021); and "The Local Landscape" (Nov. 10, 2021).

The Alleged Bribery Scheme

WPP acquired its Indian subsidiary in 2011. Between 2015 and 2017, the subsidiary earned half of its revenue through contracts with the Departments of Information and Public Relations (DIPR) of two Indian states, Telangana and Andhra Pradesh.

WPP received seven anonymous reports during this period alleging bribery schemes connected to DIPR contracts. The SEC alleged that WPP did not take meaningful action in response until mid-2017, at which time it uncovered the full extent of the bribery schemes.

The SEC Order alleged two separate India bribery schemes.

Overpaying for Ad Space

The first bribery scheme involved use of a third-party agency to effectively overpay for ad space in newspapers and then kick back the surplus to government officials at DIPR. According to the SEC, (1) DIPR awarded WPP India a contract under which WPP India created an advertisement and purchased space in newspapers to display it; (2) DIPR paid a set publicly available fee for purchasing advertisement space (the "card rate"); (3) the CEO of WPP India was able to negotiate rates with the newspapers that were significantly lower than DIPR's card rate; (4) to utilize the delta between DIPR's card rate and the actual price paid to the newspapers for bribes to DIPR officials, WPP India entered into the agreement with the third-party agency to purchase the advertising space on DIPR's behalf; and (5) after paying the newspapers and taking its cut of the scheme, the third party agency facilitated payments to DIPR officials (and to the CEO of WPP India).

A Fictitious Ad Campaign

The second alleged bribery scheme was more brazen and involved payments to WPP India for an entirely fictitious advertising campaign. Specifically, the SEC alleged that DIPR paid WPP India $1,588,480 to supposedly execute a campaign related to the celebration of the anniversary of the formation of the Indian state of Telangana. No such campaign actually occurred. Instead, the WPP India CFO requested that a WPP India vendor falsify documents indicating that it provided services for the supposed campaign. Based on these false invoices, WPP India paid the majority of the money it received from DIPR to the vendor. The vendor then paid over $1,000,000 to yet another third-party intermediary, who paid kickbacks to the DIPR officials. The remaining funds were paid to the WPP India CEO and to WPP India.

For a fuller discussion of the facts underlying the settlement, see "Advertising Giant WPP's Aggressive Growth Strategy Leads to SEC Settlement" (Oct. 13, 2021).

Mistake #1: Pre-Acquisition Due Diligence

The SEC Order states that WPP had no compliance department when it acquired its Indian subsidiary, and it is unclear whether WPP conducted adequate due diligence prior to acquiring the subsidiary. It is reasonable to conclude that it did not, as it is highly likely that the corrupt activities by the Indian agency that led to the SEC resolution – or similar corrupt practices – pre-dated the WPP acquisition.

It is by now well known that pre-acquisition due diligence focused on bribery and corruption risks reduces the risk of a company unknowingly continuing to violate applicable laws and regulations after the deal closes. DOJ and SEC have made it abundantly clear that this sort of due diligence should be a part of any effective anti-bribery compliance program. Any company considering acquiring an Indian company should review the following aspects of the target:

- ownership structure of the target, including whether any individual who may be deemed a "foreign official" under the FCPA is involved directly or indirectly in the operation of the business;
- due diligence on the target's principals, key managerial personnel and heads and key deputies of critical control functions,

including their exposure to government officials, market reputation and qualifications;
- the structure of the target's operation, including its customer base;
- the key customers of the target, with detailed walk-throughs on customer acquisition, details of goods/services provided, use of third parties to facilitate and support the customer account, end recipient of goods/services;
- dealings between the target and state-owned or controlled customers;
- a detailed assessment of government touchpoints, including how and when the target is interacting with the government from sales to permits, approvals and licenses;
- the target's relationships with and reliance on third parties, including subcontractors relied upon by third parties that interface with government officials on behalf of the target;
- the target's and its principals' political and charitable activities;
- any existing compliance measures in place at the target, including policies regarding accounting records and controls;
- internal investigations of potential acts of bribery, fraud, tax evasion, misconduct by senior management or key employees in critical functions;
- law enforcement or government investigations regarding potential criminal misconduct by the target, its principals or key managerial personnel;
- details of ongoing litigation or disputes with government agencies regarding noncompliance with the law;
- assessments of the target's internal control framework regarding segregation of duties, appointment of third parties, processing of payments and reliance on enterprise resource planning software, including risk-based spot checks to ascertain if the target's books and records are reflected in the ERP as opposed to their being multiple or alternate bookkeeping structures;
- assessments of the target's compliance with local laws in terms of permits, approvals, licenses, annual compliance declarations and returns;
- assessment of the target's relationship with its statutory auditor; and
- interviews with the target principals, key managerial personnel and heads and key deputies of critical control functions.

The acquiring company should fully document these actions and its decision-making process in the event that it must later justify its decisions relating to due diligence. These diligence recommendations are size agnostic and should be followed no matter how big or small the acquisition target.

In the absence of due diligence, an acquiring company can find itself in a precarious position similar to that of WPP. In all likelihood, WPP's Indian subsidiary was engaged in the alleged bribery schemes long before the acquisition. If true, such misconduct occurring post-acquisition may have been avoided, or its consequences mitigated, had there been more effective and comprehensive pre-acquisition due diligence as part of a comprehensive compliance program. Most obviously, WPP might not have retained local management or structured the acquisition to include earn-outs – facts the SEC criticized in the Order – had it been aware of past corrupt activities by the targets.

Mistake #2: Tone From the top

One of the more surprising allegations of the SEC Order was that WPP "had no compliance department during the relevant period." An effective compliance environment always starts at the most senior levels of company management. Without a real and visible commitment to compliance, no amount of policies, procedures and controls will prevent misconduct. A global acquisition plan that refuses to acknowledge geographical risk or ignores such risk on the premise that business is done "differently" is likely to create the kinds of problems we see in the WPP enforcement action. Cultural differences in conduct of business can be no justification for condoning patently illegal conduct or turning a blind eye to it.

In a nutshell, the standard for assessing how business would be done in the United States should be the same as that applied when doing business in India. Any exceptions should be assessed through the prism of U.S. enforcement expectations (which would also be Indian enforcement expectations) and should be viewed as red flags rather than brushed under the carpet on the pretext of "different" business practices. The tone from the top must clearly establish this, including all functions such as legal, finance, and internal audit that have insight into overseas business operations.

Mistake #3: Post-Acquisition Compliance Integration

It appears from the SEC Order that WPP failed to integrate WPP India into its compliance environment post-acquisition. WPP placed its international subsidiaries into a "WPP Network" and in theory required all the subsidiaries to follow WPP's global policies, but there was a lack of centralized control and little oversight of the entities, according to the Order. This meant that there was no meaningful implementation of the compliance program and, in turn, coordination between WPP's legal department, audit department, and management of its international subsidiaries. WPP India was left to operate largely on its own, with its pre-WPP management in control and without much oversight from corporate headquarters.

Full integration into an effective anti-bribery compliance program is critically important, particularly for India operations. A company must have clear anti-bribery policies and controls that are commensurate to the risk environment in which the company operates. The parent must train the India subsidiary's directors, officers, and employees on the policies and procedures, ideally in person, in local languages, and through tailored material that addresses actual bribery risks and resonates culturally. Perhaps most important and critically missing here is appropriate monitoring to identify potential bribery red flags and risks such as the significant revenue of WPP India emanating from government contracts. Periodic risk assessments of third parties and deploying audit rights could have resulted in early detection of some of these alleged instances and could have enabled mitigation by preventing ongoing misconduct.

To put it simply, if a legal, compliance or internal audit professional at WPP headquarters had reviewed the documentation around the DIPR agreements, the misconduct that led to this enforcement action might have been identified and remediated much earlier.

See "How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation" (Nov. 14, 2018).

Mistake #4: Third-Party Management

The SEC Order comes on the heels of several India-focused FCPA resolutions (Embraer, AB InBev, Cognizant and Cadbury/Mondēlez, to name a few) involving bribes paid through third-party intermediaries. The risks that third-party intermediaries pose are not new and ignorance or downplaying of such risks is now done "at your peril."

If it had been serious about preventing bribery in India, as a first step, WPP should have evaluated the need for third-party intermediaries to engage with government officials at all. Such evaluation should most importantly challenge the notion that the need for third parties is the norm and come to a reasoned conclusion.

If the evaluation determined that there was a sound justification to engage third parties that would interact with government officials, WPP should then have established a framework where those third parties provide to the company detailed talking points in advance of their meetings with government officials to be approved by the company in advance of such meetings). Then, the third parties should provide memoranda discussing the meetings conducted as well as complete correspondence, whether written or oral, with the government officials. Third parties must be impressed upon to set up meetings through formal channels, the records of which should be shared with the company, and any deviations should be viewed as serious red flags.

Employees overseeing third parties must regularly receive reminders of the risks associated with third parties and what they should watch out for. Control functions should carefully review third-party invoices, especially in establishing proof of performance on the legitimacy of expenses claimed. Subject to risk assessments, it would also be helpful to have global control functions review high-risk third parties from time to time to ensure the process is not in any way compromised by the control functions of the local subsidiary.

Additionally, WPP should have:

- conducted risk-based pre-engagement due diligence on third parties, including on their principals and sub-contractors;
- conducted risk-based quarterly, annual or biennial review of third-party engagements and subjected high-risk third parties to renewed diligence and certification;
- selected third parties based on their experience in working with multinational companies, qualifications and capacity to act, as well as the sophistication of their financial controls;
- insisted on formal agreements, detailing the scope of work to be performed, including express anti-bribery representations, warranties and audit rights, and, based on the risk profile, WPP might have considered obtaining notarized affidavits from the third parties attesting to their adherence to anti-bribery laws; and
- insisted on regular process walk-throughs by the third party on how it intends to engage with government authorities on behalf of the company.

Finally, there is no such thing as "too much compliance" on the basis that it may be offensive to employees or third parties, therefore WPP should have emphasized repeatedly, monitored carefully and audited regularly.

Mistake #5: Botched Investigation

Perhaps the most noteworthy aspect of the WPP resolution was the fact that WPP received *seven* anonymous complaints about the DIPR bribery schemes and did not uncover the bribery schemes until more than two years after the first complaint. According to the SEC Order, following the receipt of the original complaint in July 2015, which identified the WPP India CEO as the architect of the scheme, WPP directed its India Financial Director to oversee a review of the allegations. The WPP India Financial Director retained an international accounting firm ostensibly to investigate the allegations. The accounting firm appears to have relied solely on information provided by the WPP India CEO and CFO – despite the fact that the CEO was named in the complaint – and did not include an email review or seek information from implicated third parties.

In the spring of 2016, WPP received three additional anonymous complaints related to the bribery schemes. These complaints again specifically identify the WPP India CEO as the architect of the scheme and described documents the WPP India CFO falsified to facilitate the scheme. WPP again asked the accounting firm to investigate. This time, the investigators did seek information from the implicated vendor, but the vendor refused to provide the requested documents.

WPP terminated its relationship with the vendor (while still authorizing WPP India to pay for past media purchases) but did nothing more to get to the bottom of the bribery scheme and WPP India's CEO's alleged involvement in it.

It was not until 2017, after receiving additional highly specific complaints about the bribery scheme, that WPP involved its legal team and conducted a thorough and complete investigation. WPP conducted due diligence on the WPP India CEO, an involved DIPR official, and the vendor agency, and it finally conducted an email review. The due diligence report revealed a close relationship between the CEO and the DIPR official and that the DIPR official had a reputation for demanding kickbacks for contracts awarded under his supervision. Additionally, WPP identified email communication dating back to 2015 that supported the bribery allegations. Eventually, the CEO and CFO admitted in interviews the essence of the bribery allegations.

WPP's investigation failures were significant and legion including that it failed to:

- take the anonymous whistleblower allegations seriously;
- establish an investigation "clean team" to provide access to relevant documents and instead relied on implicated India management to provide information for the investigation;
- scope the investigation properly, relying heavily on internal sources, and it failed to look behind the transactional documents to get to the bottom of the allegations;
- conduct an email, text message or WhatsApp search at the beginning of the investigation;

- appreciate the significance of the vendor agency's refusal to provide critical requested documents and did not appropriately revisit the scope of the investigation in light of this glaring red flag;
- keep India management at arm's length from the internal investigation process, thereby impacting the investigation integrity; and
- take interim steps or impose interim controls during the course of the investigation that could have potentially arrested continuing misconduct.

For ideas on how to better perform an investigation in India, see our article "Ten Tips for Performing Effective Anti-Corruption Investigations in India" (May 24, 2017).

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