



# Focus on India, Part I: Bribery and Sanctions

William J. Stellmach | Kunal Gupta | John Joy

February 13, 2020

# Speakers

- **Bill Stellmach, Willkie**

- Co-Chair, White Collar Defense Group

Email: [Wstellmach@Willkie.com](mailto:Wstellmach@Willkie.com)

Phone: 202-303-1130



- **Kunal Gupta, Trilegal**

- Partner, White Collar Crime Investigation

Email: [kunal.Gupta@trilegal.com](mailto:kunal.Gupta@trilegal.com)

Phone: +91-11-41639393



- **John Joy, Willkie**

- Senior Associate, Compliance & Litigation

Email: [JJoy@Willkie.com](mailto:JJoy@Willkie.com)

Phone: 212-728-8713



# Agenda

1. **Basics of FCPA and Jurisdiction**
2. **Overview of Sanctions and Jurisdiction**
3. **US Enforcement Activity**
4. **India Prevention of Corruption Act**
5. **Indian Regulatory Issues**
6. **Practical Considerations**

# Part One

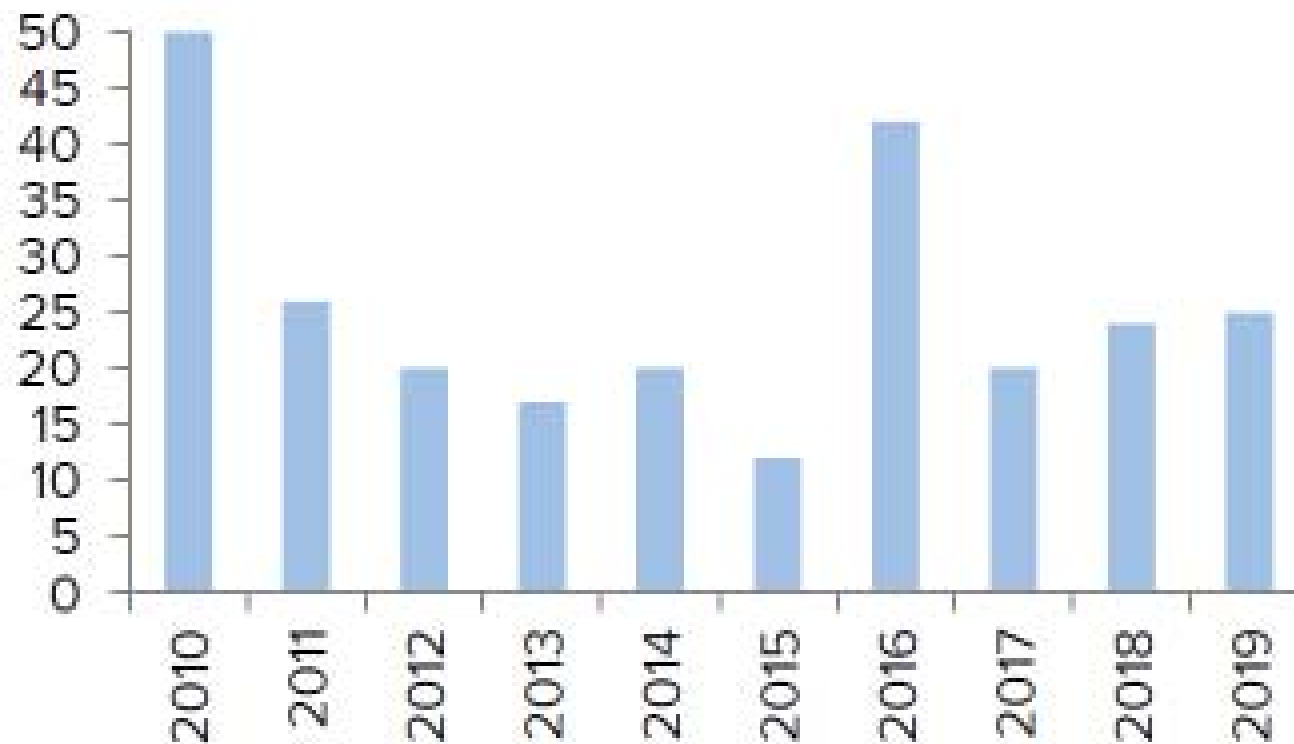
1. **Basics of FCPA and Jurisdiction**
2. Overview of Sanctions and Jurisdiction
3. US Enforcement Activity
4. India Prevention of Corruption Act
5. Indian Regulatory Issues
6. Practical Considerations

# Introduction to FCPA

## The FCPA

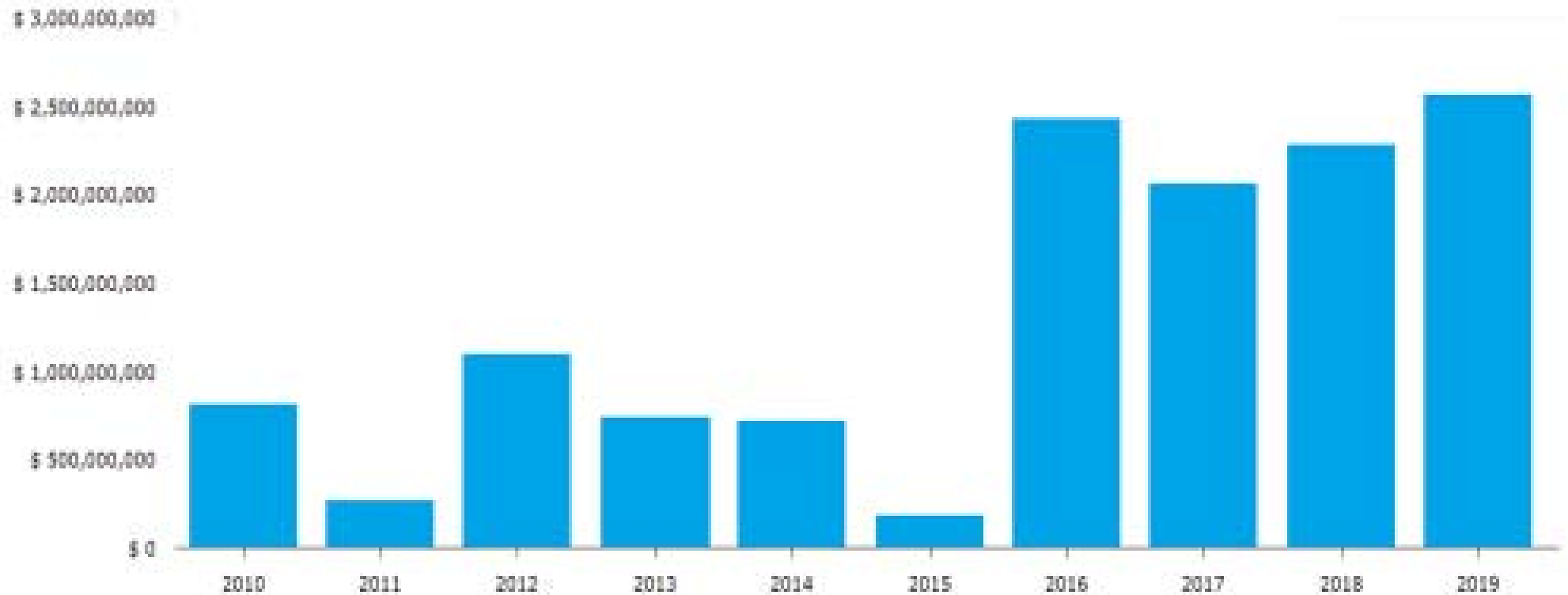
- U.S. Federal Law, two key provisions:
  - **Anti-Bribery:** Prohibits payments of bribes to foreign government officials
  - **Books and Records:** Requires companies to maintain a system of internal controls
- Enforced Aggressively by SEC and DOJ, "highlights" of 2019 include:
  - **25** Corporate enforcement actions
  - **\$2.9** billion in fines
  - **\$25** million fine for Cognizant Technology Solutions
  - **26** Individuals charged

# FCPA Corporate Cases



WILLKIE FARR & GALLAGHER LLP

# FCPA Fines by Dollar Amount



WILLKIE FARR & GALLAGHER LLP

# FCPA – Anti-Bribery Provisions

- Prohibits giving anything of value to a foreign official in order to “obtain or retain business.”
- **Key elements:**
  - 1. What is giving
    - Gift, offer, promise or authorization to give
  - 2. What is “anything of value”
    - Can include, cars, jewelry, travel and entertainment expenses, promises of future employment
  - 3. Who is a foreign official
    - Can include employees of state owned enterprises



# FCPA – Accounting Provisions

- Books and Records provisions require that companies maintain a system of internal controls to provide reasonable assurance that transactions are executed in accordance with management's authorization, company policies, and are recorded correctly in the company's books.

- Common examples of violations include mischaracterizations of bribes on a company's books and records
- Typically, if there is a violation of the anti-bribery provisions, there will also be liability under the B&R provisions

# Global Reach of FCPA

- Applies to foreign entities who trade U.S. securities when:
  - “use . . . the mails or any means or instrumentality of interstate commerce” “in furtherance of” a foreign bribery offense. 15 U.S.C. § § 78dd-1(a), 78dd-2(a).
- Applies to foreign entities who:
  - “corruptly . . . make use of the mails or any means or instrumentality of interstate commerce,” **or** if they “commit any other act in furtherance of” a corrupt payment, “while in the territory of the United States.” Id. § 78dd-3(a).
- **Examples:**
  - Fresenius case
  - JGC Corp case

# Reach of FCPA

- Fresenius Case

- *German based medical care provider*
- *Bribes paid in Africa and Middle East*
- *Jurisdiction based on U.S. hosted email servers*

- JGC Corp.

- *Japanese Engineering firm*
- *Bribes allegedly paid in Nigeria*
- *Jurisdiction based on wire transfers through U.S.*

# Part Two

1. Basics of FCPA and Jurisdiction
2. **Overview of Sanctions and Jurisdiction**
3. US Enforcement Activity
4. India Prevention of Corruption Act
5. Indian Regulatory Issues
6. Practical Considerations

# Sanctions

- **What are Sanctions?**

- Series of laws that target foreign nationals and organizations
- Administered by the Office of Foreign Asset Control (OFAC)

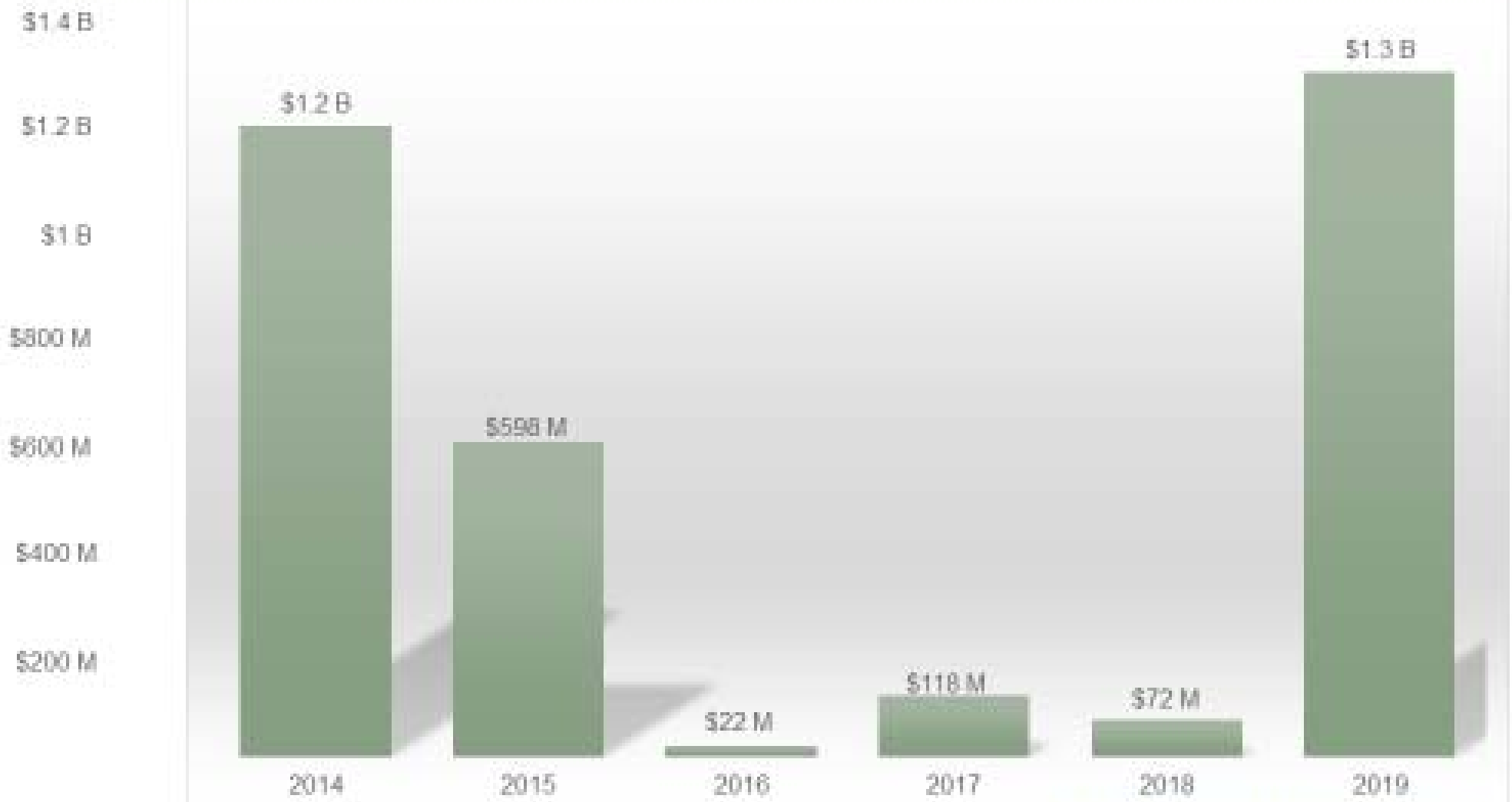
- **What do they do?**

- Prevent trade and transactions with specific individuals, entities, countries or regions

- **Who do they apply to?**

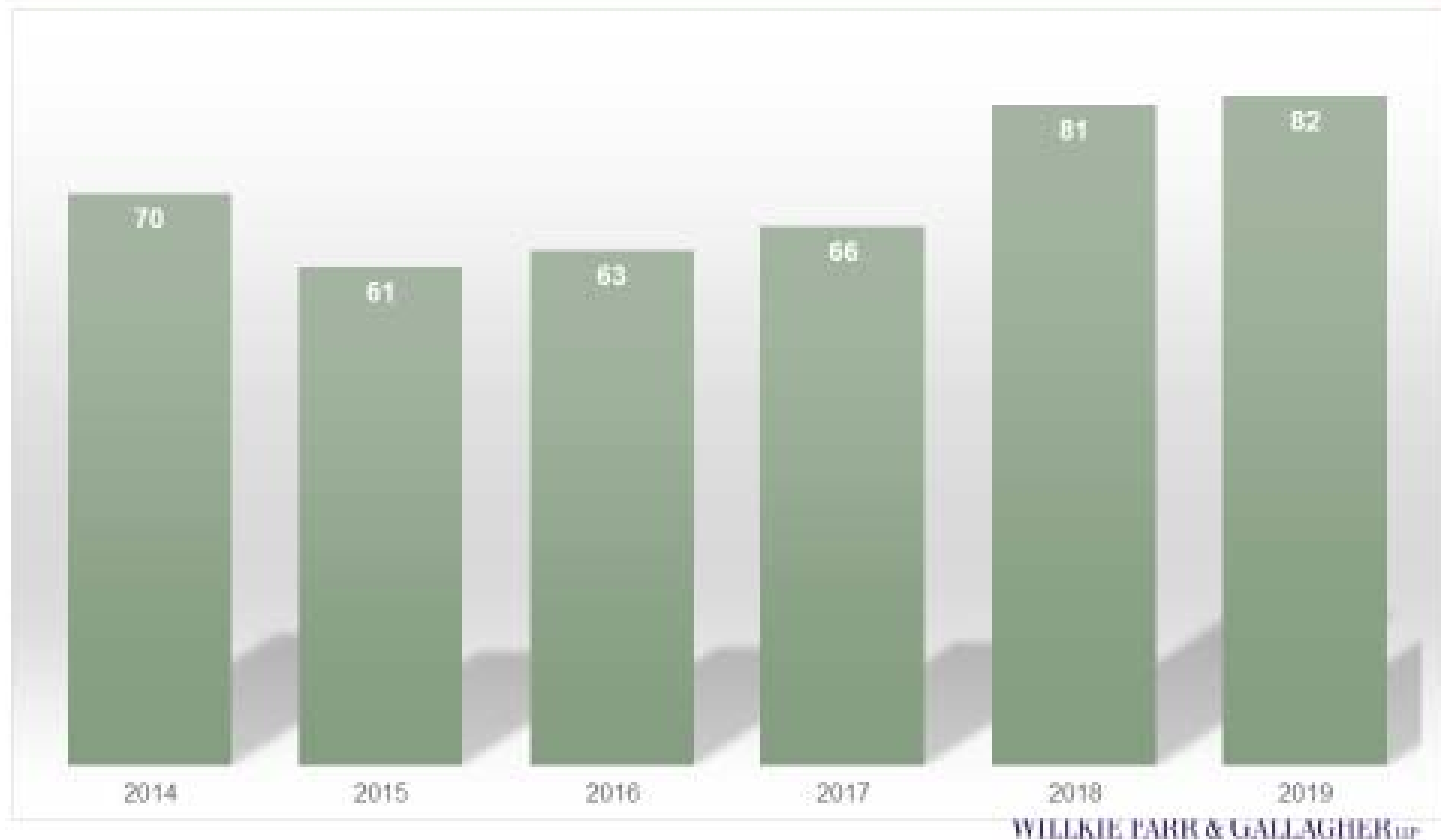
- Apply to all U.S. persons and entities
- Also apply to foreign companies and individuals

# OFAC Civil Enforcement Penalties



WILLKIE FARR & GALLAGHER LLP

# Actions Announced by OFAC



# Global Reach of Sanctions

- 1. Contacts with the US
  - *Can include the use of US dollars*
- 2. Direct Designations
  - *Party can be added for FCPA violations*
- 3. Secondary Sanctions
  - *Designed to pressure foreign corporations*
- 4. Assisting / causing violations
  - *TransTel example*



# Part Three

1. Basics of FCPA and Jurisdiction
2. Overview of Sanctions and Jurisdiction
3. **US Enforcement Activity**
4. India Prevention of Corruption Act
5. Indian Regulatory Issues
6. Practical Considerations

# U.S. Enforcement Activity

- Cognizant Technology Solutions
  - Allegations relate to \$2 million bribe in Tamil Nadu
  - February 2019 - Charges were settled with company for \$25 million
  - Federal charges brought against Gordon Coburn, former president of Cognizant, and Steven Schwartz, former chief legal officer of Cognizant
  - September 2019 - Sridhar Thiruvengadam settles with SEC for \$50,000

# Cognizant Cont'd

- Cognizant Technology Solutions – *Key Takeaways*
  - Jurisdiction over company not an issue given conduct in the U.S.
  - Similarly, jurisdiction over individuals likely to be established given alleged conduct occurring in the U.S.
  - Cognizant likely to have cooperated in order to mitigate fine
  - Settlement with Thiruvengadam indicates that more Indian nationals may be targeted

# Infosys

- **2014**

- *Whistleblower Jack Palmer receives up to \$8 million for exposing visa fraud*
- *SEC rules provide for 10-30% of recovery amount, provided violation is over \$1 million*

- **2019**

- *Anonymous letter claims “disturbing unethical practices” regarding cost recognition and accounting*

# Infosys Cont'd

- Infosys – Key Takeaways

- Allegations speak to FCPA books and records provisions, as well as Securities Laws
- Publicly traded stock could indicate that previous whistleblower success may have played a motivating role in exposing allegations
- SEC opened an investigation just days after receiving the letter

# Sanctions

## 1. Expiry of Iran Oil Trade Mechanism

- India previously had a waiver for purchasing Iranian oil
- Waiver expired on May 2, 2019
- Indian companies who continue to trade
- Trump Administration exerting maximum pressure on foreign companies

### ***Recall Transtel example:***

- Companies outside U.S. can be liable for causing or assisting violations despite no U.S. contact

# Other Enforcement Updates

1. Record number of individuals prosecuted
2. Three prosecutions originating from India
3. Increased confluence of sanctions and DOJ activity
4. DOJ updated Corporate Enforcement Policy
5. Only one declination issued in 2019

# Part Four

1. Basics of FCPA and Jurisdiction
2. Overview of Sanctions and Jurisdiction
3. US Enforcement Activity
- 4. India Prevention of Corruption Act**
5. Indian Regulatory Issues
6. Practical Considerations



## 4. Indian Prevention of Corruption Act

### The Indian Prevention of Corruption Act, 1988 (PCA)

- No extra-territorial jurisdiction
- Very less enforcement in past
- Amended in 2018 to introduce:
  - bring giving as an offense
  - corporate criminal liability
  - defenses to bribe giving and corporate criminal liability
- Not applicable for corruption cases in private companies

# PCA – Offense of Bribe Giving

- The amended PCA has extended its scope to those who give or even promise to give “undue advantage” to a “public servant” with an intent of inducing a public servant to perform the public duty improperly.
  - ‘**Undue advantage**’ given to a public servant includes any gratification whatsoever other than legal remuneration.
  - The scope of public servant is very broad. The Supreme Court of India held that the chairman and directors of a private bank would also be ‘**public servants**’ for the purpose of PCA.
  - Use of intermediaries is also prohibited for bribe giving.
  - Bribing a public servant is punishable with maximum imprisonment of seven years and fine.
  - Unlike FCPA, PCA makes no specific distinction between ‘facilitation payments’ and other forms of bribery. Thus, any undue advantage including facilitation payments to public servants is prohibited.

# PCA – Corporate Criminal Liability

- Newly amended PCA now grants authorities the power to prosecute commercial organizations if any person associated with such commercial organizations gives or even promises to give any undue advantage to a public servant.

- Offense is punishable with imprisonment for a term not less than three years and extendable to seven years and also liable to fine.
- The impact of this provisions would be far reaching considering directors/officers can be sued for acts of commercial organisations.

# Defences

- For bribe giving: PCA grants immunity to those who are compelled to give undue advantage provided such persons report the matter to the law enforcement authorities within seven days from the date of giving the undue advantage.
- For Corporate Criminal Liability: 'Adequate Procedures' in commercial organisations would act as a valid defence.
  - Defense has borrowed from the UK. However, there is no clarification as to what would constitute 'adequate procedures'.
  - It would be expected from companies to introduce compliance programs, review of bribery policies, training as per international standards and the principles laid down in UK's Bribery Act, 2010 such as proportionate procedures, top-level commitment, risk assessment, due diligence, communication and monitoring and review, as not doing so might attract more liabilities.

# PCA – Judicial Pronouncements and Enforcement Actions

- Lack of judicial pronouncement on the newly incorporated provisions of bribe giving, corporate criminal liability and adequate procedures.
- However, the enforcement agencies have started booking individuals and corporations under newly incorporated provisions of PCA.
- Examples:
  - Adani Enterprises
  - Rolls Royce
  - INX Media
  - Kwality Pharmaceuticals
  - Sanghvi Cylinders

# Part Five

1. Basics of FCPA and Jurisdiction
2. Overview of Sanctions and Jurisdiction
3. US Enforcement Activity
4. India Prevention of Corruption Act
- 5. Indian Regulatory Issues**
6. Practical Considerations

# 5. Indian Regulatory Issues

- Stressed Banking Sector
- Regulatory Scrutiny
- Appointment of first ever banking ombudsman (Lokpal)
- Law of Privilege
- Plea Deals

# Stressed Banking Sector

- In 2019, most number of forensic investigations were conducted in the banking sector.
- As per the Indian banking regulator, bank frauds have massively risen 74% to USD 10 billion (app.) in 2019 as compared to last year.
- India's leading lender, Punjab National Bank has been hit by fraud 3 times since 2018, accumulating the losses to be more than USD 2 billion.

*Modus operandi* of the corrupt practices in the banking sector:

- Management sanctioning loans to undeserving borrowers after pocketing a small portion of the loan amount.
- Pressure on giving loans without proper risk assessment mounts on senior executives ahead of their promotions
- Considerations behind the alliances for selling non-banking products.
- Gifts and considerations made to bank officials for sanctioning of loans.



# Regulatory Scrutiny

- No single regulator responsible to scrutinize anti-bribery and anti-corruption regime. Said task has been undertaken by a mix of market specific regulators and governmental ministries.
- Examples of recent regulatory action:
  - Reserve Bank's circular dated June 7, 2019 in relation to the resolution of high non-performing assets in the banking sector
  - SEBI's investigation and enforcement in NSE's co-location scam
  - SEBI's enforcement and NSE's investigation in Karvy's broking scandal
  - Striking of shell companies by the Ministry of Corporate Affairs
  - Reporting obligations on the auditors to report fraud, as mandated by the Ministry of Corporate Affairs

# Appointment of first ever banking ombudsman (Lokpal)

- India's first 'Lokpal' (anti-corruption ombudsman) was appointed in 2019 under the Lokpal and Lokayuktas Act, 2013 to look into cases of corruption against certain categories of public servants.
- A former Supreme Court of India judge Justice Pinaki Chandra Ghose has been appointed as the India's first Lokpal.
- The Lokpal act mandates
  - an 'Inquiry Wing', for the purpose of conducting preliminary inquiry against public servant for the offenses punishable under the PCA
  - a 'Prosecution Wing' for the purpose of prosecution of public servants in relation to any complaint received by the Lokpal
- The Lokpal Act is still a toothless tiger as the investigation and prosecution wings are yet to be formed

# Law of Privilege

- India follows strict approach on privileged professional communication between clients and legal advisors.
- Ascertaining the creation of attorney-client relationship is not easy. It may be by way of signing of an engagement letter or even an oral agreement.
- There is no statutory privilege accorded to the communication between in-house lawyers and their employers.
- No concept of partial waiver.

# Plea Deals

- Unlike the US, the concept of plea deals is not common in India.
- Though, as per the India laws, plea bargaining is allowed
  - for offences with imprisonment less than or equal to a term seven years
  - provided that offence does not affects the socio-economic condition of the country.
  - In addition, the central government has provided a list of offenses that affects the socio-economic condition of the country.
- The list provided by the central government in relation to the offenses that affect the socio-economic condition of the country does not include the offenses under the PCA. So technically, plea bargaining is possible for the offenses under PCA.
- Interesting to see if any plea deal is being done in future in relation to the newly added offenses under the PCA.

# Part Six

1. Basics of FCPA and Jurisdiction
2. Overview of Sanctions and Jurisdiction
3. US Enforcement Activity
4. India Prevention of Corruption Act
5. Indian Regulatory Issues
- 6. Practical Considerations**

# U.S. Practical Considerations

- **1. Internal reporting** – *Who needs to know about an investigation?*
  - Preserve evidence
  - Do not allow potential witnesses to coordinate
  - Keep insurers informed
- **2. External reporting** – *What do we need to consider?*
  - Keep timing in mind – whistleblowers may act quickly
  - Review DOJ corporate enforcement policy
  - Strategize which regulator to approach first
- **3. Individuals** – *How should they be treated?*
  - Watch out for indemnification obligations
  - Consider pool counsel as opposed to individual lawyers

# Practical Considerations: Indian Perspective

- **Best practices for US companies doing business in India (including deal side implications)**
  - Lack of compliance program;
  - Tradition of gifts;
  - Hospitality for visiting officials;
  - Excessive use of consultants and sub-contractors; and
  - Past issues .
- **Dealing with Indian regulators**

# Best practices for US companies doing business in India

- A lot of global companies have recently acquired major stakes in Indian conglomerates and the legal fraternity of India was quite busy advising these companies on both fronts, i.e., **investor and investee**.
- Generally, the legal side advisory is limited to general corporate, employment and regulatory affairs. However, we have seen a lot of action taking place on **anti-bribery anti-corruption** and compliance side of the deal. In fact, in some of the deals that we witnessed, the absence or inadequacy of ethics & compliance framework was a major roadblock to get the deal through.
- The motivation for a compliance due diligence arises from the provisions of **successor liability** in FCPA, which envisages that an asset sale is not a guarantee of avoiding successor liability.



# Lack of compliance program

- In Indian laws, there is no specific or particular requirement to have a compliance program. The PCA speaks of having adequate procedures, but it does not define those, and Indian corporates derive those from UKBA. But the compliance procedures are only a mitigating factor and not a compulsion.

- The corporates have compliance policies, but they are only on papers and employees are not made aware about those.
- It comes out during discussions that even employees in middle management position do not know about existence of a compliance hotline.
- Companies are not mandated to have a compliance or ethics committee and there is no supervision of laid out compliance program.

# Tradition of gifts

- India is a country of festivals and therefore, it is customary to give gifts to “everyone” whether it is a customer or a public official. Welcome to India – where bribery may be wrapped as a gift!
- Due to customs and traditions, Indian corporates provide gifts to their employees, customers, vendors, auditors, consultants, officials of Income Tax department, excise officials, police officers etc.
  - Generally, the gifts are in the nature of sweet boxes which range from INR 500-INR 2000
  - But a lot of cases have been seen where lavish gifts such as gold or silver coins, mobile phones, home appliances and suit material (ranging INR 5,000 to INR 50,000) were provided to public officials.
  - During deal transactions, we come across many such instances where the transactions are clearly identifiable in the books of companies with clear narrations but sometimes, these transactions are hidden behind dubious narrations.

# Hospitality for visiting officials

- It is a very prominent feature in India that officers of a statutory department such as excise, sales tax, service tax, provident fund officers or officers in-charge of providing any licenses visit the premises of the companies for inspection.
- A lot of expenditure is incurred upon hospitality of these visiting officials in the form of spends of accommodation in a good property, organizing a city tour for visiting officials and their family members in a company arranged vehicle, organizing booze parties and lavish dinners for these officials and providing them gifts at the time of their return.
  - We have seen cases where the public officials and their family members were provided fully-paid tickets to a lavish amusement park in Delhi.
  - The intention behind such gestures is generally to influence them in making a favorable decision. These are red-flags in any deal transaction as such hospitality is done way above the hospitality standards set for other non-public officials.

# Excessive use of consultants and sub-contractors

- Because of lot of recent enforcements and awareness among companies, the companies keep their books and records clean and show no tainted amounts.
- A trend which has gained momentum during recent years across all enforcement actions is the use of consultants and sub-contractors.
  - The bribes or any illicit payments are covered under the contract of consultants.
  - However, the contract with these consultants is designed on a lump-sum cost (which hides in the quantum, the amount supposed to be illegal gratification to obtain the required licenses).
  - Since there is no benchmark to the cost of services, these schemes are generally hard to find out.
  - A little more aware corporates keep a separate kitty of funds generated using companies' resources and the same is not easily detectable. These are also called off the books' funds or two sets of records.

# Excessive use of consultants and sub-contractors

- During any due diligence, we lay special focus on identifying the role of sub-contractors and consultants.
- The agreements with them are reviewed to understand the nature of services and we test out transactions related to them.
- These schemes though are generally uncovered using secondary evidences, such as communication records, but sometimes, these may also be deciphered on a detailed review of design of invoices and contracts.

## Past issues

- During the diligence procedures, we come across issues which were noted in the past such as an internal investigation, or investigation by a regulator in relation to bribery, fraud or corruption. These issues become important to address because an open issue may induce successor liability on the investor.
- We have seen cases where due to the past issues and no absolving of the same caused the deal to hang in between for very long periods.
  - One such issue was noted in a diligence for a private equity bank investing into a travel services company. The company had conducted an investigation in past into the allegations of misappropriation of funds and bribery of officials against one of its senior management personnel, but the appropriate action was not taken against him. The employee continued to be on the pay-register of the company. However, since the investor was US based, the provisions of successor liability warranted appropriate action as conditions precedent before the deal went through.

# Reporting of corporate bribery

- In India, due to not so stringent regulations till date, corporate bribery is still not an interesting area for press coverage.
- The cases involving high profile personalities and businessman sure come into the notice of regulators, but the other small corporate cases are not even investigated.
- Corporates comply with their responsibility by producing an information report to police, which is not even looked at by them.
- Due to these loopholes and relaxations in the regulatory system, there is absolutely no motivation for corporates to self-improve their processes and make ethics & compliance a top priority.
- However, there have been a lot of good examples that we have experienced where the compliance program is considered as a benchmark for other industry players. The systems and practices noted in these companies were top notch. And these were small private companies.

# Dealing with Indian regulators

- The regulatory regime in India is not a definitive one but very complex. There are so many regulatory authorities and regulations in India which deals with the same offences.
  - Statutory Auditors
  - Ministry of Corporate Affairs or Central Government
  - Local Police, local magistrates
  - Economic Offences Wing
  - Central Bureau of Investigation
  - Serious Fraud Investigation Office
  - Enforcement Directorate
  - SEBI (equivalent to SEC)
  - Treasury Departments, CCI
  - Lokayukta (Public Ombudsman)



# Dealing with Indian regulators

- One of the most important aspect of Indian regulators is that an action by one regulator does not prevent any other regulator to knock on the doors of a company.
  - We have seen a lot of cases where the CBI, ED, SFIO and Income Tax department were all on the floor of a company investigating into different issues rooting from same offence.
  - In India, you cannot expect easy relief. The period of limitation is a long one and don't expect if you are clear from one agency, you won't be called by another.
  - The Indian regulators take cues from foreign enforcements as well. In the Cognizant case, after enforcement by SEC, Income Tax department also approached the company for seeking answers on tax implications of illicit payments. It is no doubt if CBI also comes knocking on the doors. A petition has already been filed in a Madras High Court.

# Dealing with Indian regulators

- There is a corollary to this as well. In one of the cases, an Indian construction company was raided by ED for possible use of a diplomat to secure contracts. Taking the cue, the multi-lateral development banks also approached the company to seek investigations into projects financed by them.
- The legal counsels play an important role in strategizing these for companies but the provisions are getting stricter. The recent actions by the Central Government on statutory auditors and legal counsels in relation to IL&FS scam opened the boundaries of the extent to which regulators can approach.

# Questions



# Focus on India, Part I: Bribery and Sanctions

William J. Stellmach | Kunal Gupta | John Joy

February 13, 2020