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NATIONAL INVESTMENT PROMOTION  
& FACILITATION AGENCY

## Ease of Doing Business Series

# WHY COMPLIANCE MATTERS

Recent trends and the impact of global anti bribery and sanctions framework in New India



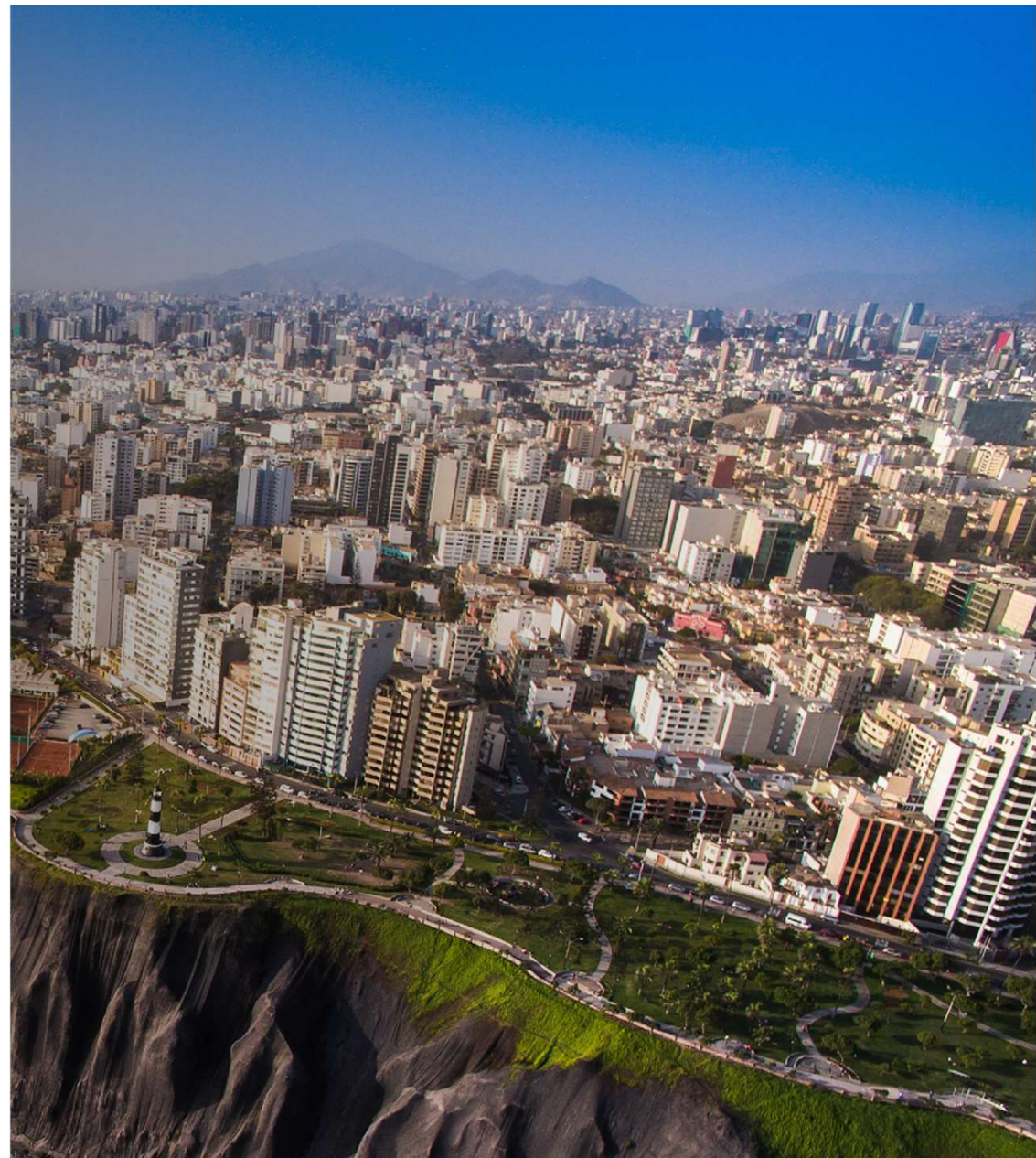
#DoingBusinessInIndia

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# **COMPLIANCE REGIME IN NEW INDIA**

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**LEGISLATIVE FRAMEWORK**



# **BROAD FRAMEWORK**

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*India has a federal form of government coupled with a strong emphasis on state-level governance and law enforcement. Unlike the USA or the UK, Indian statutes or regulators do not prescribe any compliance programs to be established by corporations. The multiplicity of laws, regulations and different enforcement agencies makes the compliance framework hard to navigate.*

*However, several recent amendments to the Prevention of Corruption Act, Prevention of Money Laundering Act, SEBI regulations etc., makes it extremely important for companies to ensure that they are compliant with the laws and regulations of the country.*

# MAJOR LEGISLATIONS

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## PREVENTION OF CORRUPTION ACT, 1988

*India's primary anti-corruption legislation is the Prevention of Corruption Act which was amended in 2018 to explicitly capture bribe-giving by companies or persons associated with them.*

- *Companies are liable if any person associated with them (for example, agents, employees, subsidiaries) bribes a public servant.*
- *If the offence is committed by a person who is associated with an organization, the capacity in which the person performs services for the organization is immaterial .*
- *There have been instances of bribery where law enforcement agencies have proceeded directly against multinational corporations, and not only their Indian subsidiaries.*
- *Commercial organizations can avoid liability for a bribe by demonstrating that the bribe was provided despite the organization putting in place "adequate procedures designed to prevent" it.*
- *While the 2018 Amendment does not delineate what are "adequate procedures", it requires the Indian Government to prescribe guidelines in this regard*

# MAJOR LEGISLATIONS

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## PREVENTION OF MONEY LAUNDERING ACT, 2002

- *The Act aims to prevent instances of 'money laundering' and prohibits use, concealment, etc. of the 'proceeds of crime' in India.*
- *'Proceeds of crime' entail any funds emanating (directly or indirectly) from the commission of a 'scheduled' or 'predicate' offence. The Act contains a wide list of offences that constitute scheduled offences – bribery under the Prevention of Corruption Act, fraud under the Companies Act, criminal conspiracy, narcotics-related offences, food adulteration-related offences, etc.*
- *There are multiple 'reporting entities' designated under the Act, which must carry out enhanced due diligence (including KYC) on their customers, maintain specific records, report suspicious transactions to the government, etc.*
- *These encompass sectors such as real estate, precious metals, financial institutions, cryptocurrency exchanges, etc.*
- *Various sectoral regulators have varying guidelines for AML compliance: for example, the Reserve Bank of India for financial institutions, the Securities and Exchange Board of India for securities market participants, the Central Board of Direct Taxes for real estate agents, etc.*

# MAJOR LEGISLATIONS

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## COMPANIES ACT, 2013 and SEBI FRAMEWORK

*The Companies Act, 2013 provides mechanisms for corporate governance and prevention of fraud in the corporate sector.*

- *While the Act does not explicitly require companies to report bribery and corruption, it requires auditors of a company to report 'fraud' by or upon the company to the central government if the fraud so detected is above certain monetary limits.*
- *The term 'fraud' is widely defined and is a criminal offence under the Companies Act – it encompasses any act, by any person, done to deceive to gain undue advantage, or injure the interests of, the company, its shareholders, creditors, or any other person.*
- *If a company is publicly listed on stock exchanges, fraud by the company, its directors, or Key Managerial Personnel is also mandatorily disclosable to the markets.*
- *In addition, the initiation, closure, and findings of any forensic audit at a listed company are mandatorily disclosable to the markets.*

# MAJOR LEGISLATIONS

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## INDIAN PENAL CODE, 1860

*The Indian Penal Code, 1860 sets out provisions which can be interpreted to cover bribery and fraud matters, including offences relating to criminal breach of trust and cheating.*

- *Companies routinely get charged under Section 120 A for criminal conspiracy. This offence involves two or more people agreeing to commit an illegal act or an act which is not illegal but with illegal means.*
- *Under Section 405, criminal breach of trust requires that the property entrusted has been converted for personal use by such person to whom such property was entrusted.*





# INVESTIGATING AGENCIES

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Central Bureau of Investigation

*The CBI is the premier investigating agency of the Central Government. It is the primary investigating agency for offences of corruption, and is typically involved in high-profile cases (whether involving central level government officials or state-level government officials).*



# INVESTIGATING AGENCIES

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## DIRECTORATE OF ENFORCEMENT (ED)

*The Directorate of Enforcement (ED) is a multi-disciplinary organization mandated with investigation of offence of money laundering and violations of foreign exchange laws.*

- *The ED has power to provisionally attach a property in terms of Section 5(1) of the PMLA if (apart from satisfaction of other conditions) a person is in possession of "proceeds of crime".*
- *Under Section 2(1)(u), "proceeds of crime" refers to the property derived directly or indirectly by any person, as a result of criminal activity relating to any of the "scheduled offences" covered under the PMLA.*
- *However, scheduled or predicate offences are investigated by agencies such as State Police, Customs, SEBI, NCB and CBI, etc. under their respective empowering legislations.*
- *If a predicate offence is made out, the investigating agency can notify the ED if there is apprehension of money laundering, and the ED is empowered to provisionally attach the properties.*
- *The ED also has the power of search and seizure provided under Section 17 of the Act to seize such proceeds of crime. In case it is not practicable to seize such record or property, ED may freeze such property.*

# INVESTIGATING AGENCIES

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## SERIOUS FRAUD INVESTIGATION OFFICE (SFIO)

*SFIO is an organisation established under the aegis of the Ministry of Corporate Affairs – for investigation and prosecution of white-collar crimes.*

- *Section 210(1) of the Companies Act states that where the Central Government is of the opinion that it is necessary to investigate into the affairs of a company it may order an investigation into the affairs of the company.*
- *Section 212(1) provides that the Central Government may, by order, assign the investigation of the said company to the SFIO.*
- *Section 212(8) read with the Companies (Arrests in Connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 confers the SFIO with the power to arrest if it has a 'reason to believe' that any person has been guilty of any offence punishable under the sections referred to in Section 212(6).*
- *SFIO works closely with the other law enforcement agencies such as the Economic Offences Wings of the State Police, the CBI, the Enforcement Directorate, Income Tax Department etc. for early detection and speedy investigation of corporate frauds.*

## **ISSUES IN COMPLIANCE**

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- *Patchwork of legislations, sectoral regulatory guidance and agencies – Following such a complex web of compliance in India requires the right expertise, technology and good knowledge of the processes.*
- *Lack of resources - Most companies do not have dedicated resources tasked with monitoring compliance issues. The focus often is on reactive elements, as opposed to proactive monitoring and due diligence.*
- *Lack of awareness - The top management is neither able to establish the right emphasis on ethical behaviour as the 'tone from the top' due to a lack of awareness of compliance obligations*
- *Excessive powers: PMLA's inclusion of "scheduled offences" from 30 different legislations has made the ambit of the law rather too wide and has diluted focus of the ED from investigating serious offences. Similarly, the powers of attachment of property, extra-territorial jurisdiction of various agencies can be considered excessive especially in lieu of ease of doing business.*

# Indian ESG framework and its importance



## **Introduction: Emergence of ESG**

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- *ESG's emergence from notions of Corporate Social Responsibility: Obligation to act in a manner that benefits the broader society, apart from shareholders. Indian Companies Act, 2013 requires contributing a minimum amount of money towards social activities. Dissatisfaction with the concept as it amounts to corporate philanthropy / tax like corporate spending mechanism.*
- *Increasing recognition of the significant economic and financial risks when not considering the impact of climate change and environmental, social and governance factors.*
- *Investors more likely to look at ESG factors in decision-making to eliminate risks.*

# ESG Reporting Framework in India: BRSR

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- *SEBI, having recognised the increasing want of investors to analyse ESG risks, has introduced sustainability reporting by corporates on par with financial reporting.*
- *From FY2022-23, SEBI mandated top 1,000 listed companies in India to furnish a Business Responsibility and Sustainability Report (BRSR) as a part of their annual reports, describing the initiatives taken by the company from an environmental, social and governance perspective.*
- *BRSR, a questionnaire-based report, requires companies to report basis the 9 National Guidelines on Responsible Business Conduct. This means that there are questions asked basis each principle.*

# ESG Reporting Framework in India: BRSR

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*Some of the key disclosures include:*

- *Environmental disclosures like resource usage (energy and water), air pollutant emissions, greenhouse (GHG) emissions, transitioning to a circular economy, waste generated and waste management practices, biodiversity.*
- *Social disclosures like gender and social diversity including measures for differently-abled employees, occupational health and safety, training of employees, Rehabilitation and Resettlement of any communities, consumer measures like product labelling, product recall, consumer complaints.*
- *Governance Disclosures like fines/penalties/regulatory actions/ complaints against company or its directors, details on conflict of interest, including any complaints made and processes to avoid conflict involving members of board.*



## **ESG Reporting Framework in India: BRSR Core**

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- *In its latest move, SEBI has approved the introduction of a fresh ESG reporting regime called the BRSR (Business Responsibility and Sustainability Report) Core.*
- *Beginning FY2023-24, BRSR Core shall be applicable to top 150 listed entities. It is expected to be extended to top 1000 listed entities by FY 2026-27.*
- *Principle: Under BRSR Core, listed companies need to obtain 'reasonable assurance' for a limited set of Key Performance Indicators (KPIs) and verification from an assurance provider. Target is to (a) bring credibility to the sustainability reporting; (b) make sustainability reporting more quantifiable/ data-driven.*
- *Elaborate regime on BRSR Core expected from SEBI soon. Meanwhile, Annexure 1 of Consultation Paper provides guidance on what KPIs will be required to be reasonably assured.*

## **KPIs Under BRSR Core: Environment**

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- *Change in GHG Footprint: Analysis of the GHG emissions using fossil fuels or power consumed, carbon captured.*
- *Change in Water Footprint: Analysis of water consumed and discharged and its quality.*
- *Investments in reduction of Environmental Footprint: R&D and capital expenditure on sustainability projects.*
- *Embracing Circularity: Details on waste management of all kinds of waste: plastic, e-waste, bio-medical, construction, battery, radioactive, hazardous.*

*Take Aways: 4/9 KPI's focus on Environment – Considerable Focus. Although exact details awaited, important for businesses to begin working on KPIs, especially ones like waste management which are expected by environmental laws of the country too.*

## KPIs under BRSR Core: Social

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- ***Enhancing Employee Well being and Safety: Securing insurance policies, policy on maternity and paternity benefits, disclosure of injuries and disabilities incidents at workplace.***
- ***Enabling Gender Diversity: Disclosure of wages paid to females as a % of males and disclosure of POSH complaints.***
- ***Enabling inclusive Development: Input material sourced from small producers and MSME, Job creation in smaller town.***
- ***Fairness in engaging with customers and suppliers: Negative media sentiment and number of days of accounts payable.***

***Take Aways: Some subjectivity involved in these (negative media). Focus of SEBI on 4th Point. SEBI is likely to introduce ESG disclosures and assurance (BRSR Core only) for supply chains for the top 250 Listed entities. To be implemented on a 'comply or explain' basis from the financial year 2024-25.***

## KPIs under BRSR Core: Governance

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- *Open-ness of Business: Concentration of purchases & sales done with trading houses, dealers, and related parties, Loans and advances & investments with related parties.*
- *Take aways: Several governance related aspects are covered by mandatory companies' law as well as SEBI regulations anyway, such as: 1/3rd of the board of a listed entity to be composed of independent directors; certain classes of companies to have a female director; every listed company and certain classes of public companies to constitute an audit committee and nomination and remuneration committee.*

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