

# How to Customize Your Compliance Program in Response to India's Updated Anti-Corruption Legislation

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While India remains at the forefront of the emerging markets in terms of attracting foreign direct investment, it continues to remain a high-risk country for doing business from a corruption standpoint. Even though successive Indian governments have launched high-profile campaigns against corruption, progress has been limited, as can be seen from India's low (though improved) ranking of 81 on Transparency International's corruption perception index.

Recent amendments to India's anti-corruption legislation have clarified the country's approach to corporate liability and have brought its laws more into line with global enforcement standards. This article provides a summary of some of the key provisions of the amendments and provides specific advice for how companies can structure their compliance programs to effectively mitigate risk in India and position them to qualify for India's new compliance defense should a corruption issue arise.

See "[Ten Tips for Performing Effective Anti-Corruption Investigations in India](#)" (May 24, 2017).

## ***The Latest Amendments to India's Anti-Corruption Legislation***

India's principal anti-corruption legislation – the Prevention of Corruption Act, 1988 (PCA) – was recently amended by the Prevention of Corruption (Amendment) Act, 2018 (Amendment Act). The Amendment Act came into effect on 26 July 2018.

With regard to corporate criminal liability and compliance obligations for companies and their officers, the Amendment Act includes the most substantial amendments to the PCA to date. The Act has not so much changed the practical implementation of the PCA as it has provided specificity and clarity on substantive corporate offences. Among the more interesting and potentially significant changes are the inclusion of a compliance defense for corporate bribe payers and a prosecution exemption for companies that promptly report any bribes paid to public officials to law enforcement.

The Amendment Act brings India's anti-bribery proscriptions more in harmony with principles found in the U.K. Bribery Act and the FCPA. This has been part of the larger effort by India to align itself with the United Nations Convention Against Corruption as well as what is now increasingly becoming a common pool of standards amongst global legislations focusing on bribery by companies.

## ***Bribery by Commercial Organizations***

The Amendment Act establishes a substantive offence of bribery by commercial organizations that give or promise to give an undue advantage to a public servant to "obtain or retain business" or "obtain or retain an advantage in the conduct of business."

The term "commercial organization" is broadly defined to include not only companies and partnership firms incorporated in India, but also an entity or partnership firm incorporated outside India but conducting business in the country.

While Indian law generally recognizes corporate criminal liability,<sup>[1]</sup> the Amendment Act has made this explicit and provides that a commercial organization convicted of an offence under the PCA shall be subject to fines.

The law also imposes liability on directors, managers and other company executives who consented to or conspired in the commission of an offence. Individuals can be sentenced to imprisonment for three to seven years.

## ***Compliance Defense***

The PCA now includes an affirmative compliance defense, similar to the defense provided for by the U.K. Bribery Act. The amendments provide that, if a commercial organization had adequate procedures in place to prevent its employees or persons associated with it from engaging in misconduct, the organization may have a complete defense to PCA liability. Even if a company has a compliance defense, however, managers and other employees are still subject to PCA prosecution.

Eligibility for the compliance defense is premised on the commercial organization's compliance program conforming to "guidelines" that will be prescribed under Section 9 of the PCA. To date, however, no such guidelines have been published. We discuss below our views of what these guidelines are likely to require of companies and how these compliance principles can be effectively applied in India operations.

### ***Third Parties***

The Amendment Act draws reference to "persons associated with third parties," thereby bringing in the liability for a commercial organization if the alleged misconduct was by a third party acting for or on behalf of the commercial organization. This new language brings the PCA more in line with the FCPA.

### ***Undue Advantage***

The Amendment Act has expanded the definition of what it means to pay a bribe. The term "undue advantage" is now defined broadly and, in addition to monetary benefits, includes providing "soft bribes" such as gifts, lavish corporate hospitality, or anything else of value to a public servant without adequate consideration. The Amendment Act further explains that the term "gratification" is not limited to gratifications that can be quantified in monetary terms.

### ***Prosecution Exemption for Prompt Reporting***

A prosecution exemption is provided in the Amendment Act for cases where a person or commercial organization was "compelled" to give an undue advantage to a public servant, provided that the person or company reports the matter to law enforcement authorities within seven days of having paid such a bribe. It remains to be seen how law enforcement and the Indian courts will interpret the concept of being "compelled" to pay a bribe.

However, this is an interesting twist that attempts to deal with the inherent problem of extortion that many companies face. The Amendment Act provides a creative solution to this problem, which U.S. and U.K. regulators have by and large dismissed.

### ***Time Frame for Trial***

The Amendment Act, for the first time, refers to a time frame for the conclusion of a PCA trial, albeit the time frame is discretionary. The Act directs that a Special Judge conducting

a PCA trial shall endeavor to complete the trial within two years. This period can be extended by six months at a time and up to a maximum of four years in aggregate, subject to the reasons for the extensions being recorded. This provision seems to recognize and attempts to respond to criticisms about India's notoriously slow court proceedings.

### ***Sanction: Permission to Investigate***

While we view most of the Amendment Act provisions as positive steps forward, the new requirement that prosecutors receive an official "sanction" prior to investigating public officials is a step back. The PCA has been criticized for this requirement.

Obtaining the required permission before prosecuting a public servant has been a challenge for prosecutors, and has resulted in delays in trials. While the objective of requiring the permission was to protect honest officers in the discharge of their duties from malicious prosecution, it has remained conceptually flawed in practice, particularly as applied to highly placed or politically connected public officials.

The Amendment Act not only failed to address this problem, it made it worse. Now, sanction is required not just to prosecute a public servant but to investigate him or her as well.

See "[Tailoring Compliance Efforts to Address Challenges in India](#)" (Feb. 1, 2017).

### ***Customizing the Company's Compliance Program***

While Indian authorities have not yet promulgated guidelines for what qualifies a company for the compliance defense to PCA liability, we are of the view that those guidelines will likely track the expectations of U.S. regulators with respect to what constitutes an effective anti-bribery compliance program. As noted above, a number of the Amendment Act concepts draw on the FCPA, and U.S. regulators have led the way in standard setting for corporate anti-bribery compliance. Those expectations, set forth in various SEC and DOJ statements – including, most pertinently, the 2012 FCPA Resource Guide, the 2017 Evaluation of Corporate Compliance Programs, and the 2018 FCPA Corporate Enforcement Policy – are by now familiar to readers of this publication. We share below our perspectives the application of several of those principles to the India business and legal environment.

### **Risk Assessment**

U.S. regulators have made it quite clear that effective anti-bribery programs must be tailored to the bribery risks faced by particular companies operating in particular industries. Assessment of those risks is the first step in developing an effective program. In India, it is critically important for companies to identify all contacts with government agencies and state-owned entities, known in India as Public Sector Undertakings or PSUs, particularly with respect to the extensive licenses, approvals and permissions often required to do business in India.

We recommend that companies start this process by building a simple spreadsheet, identifying every permission, license, utility connection, report, or other routine regulatory contact, then noting the due date, identifying the application or submission requirements and assigning responsibility. This process will identify key bribery risks, but it can also markedly mitigate those risks by reducing the opportunity for bribe solicitations generated by poor planning.

See [“A Conversation With Jeff Johnson of Cargill About Risk Assessments”](#) (Mar. 30, 2017).

### **Policies and Procedures**

Clear and direct policies are an important foundation for an effective program. For effective application in India, we recommend that company anti-bribery compliance policies include:

- language making it clear that the company’s anti-bribery proscriptions apply equally to off-premises activity and even if payments are made with employees’ personal funds;
- clear prohibitions on retaliation against whistleblowers or anyone who raises compliance or bribery concerns; and
- incorporation of India’s Public Servants’ Conduct Rules, which provide very specific limits on the value of gifts, meals or entertainment officials can accept, depending on rank and seniority. These limits can be as low as 500 INR – or around 8 USD – so policies that permit “reasonable” business hospitality expenditures can create problems.

### **Training and Communication**

U.S. regulators have emphasized the importance of effective communication of the company’s anti-bribery policies to employees through training and other methods. In our

opinion, off-the-shelf, online, “don’t-pay-bribes” training for all employees is unlikely to be effective in India. For one thing, training should focus on the subset of employees that are likely to interact with the government. Sales employees with government customers should get more extensive and sales-focused training. Administrative and management employees who deal with various regulators should receive more extensive training focused on those interactions.

To be effective in India, it is important that training and communication provide employees with practical guidance on how to manage bribery risk. A “just-say-no” approach is likely to be ineffective and is, frankly, unfair to employees. A better approach is to emphasize advance planning for permits, licenses and approvals (as noted above) to ensure that employees have the time and resources necessary to have applications and reports ready on time and complete, thereby avoiding the opportunity for a bribe request because, for instance, the application is due that day and they are missing a required form or signature or stamp.

Similarly, Indian employees should be educated on legal resources available to help them obtain information or action by government officials, including the Indian Right to Information Act and the Right to Public Services Legislation. In other words, make sure they have the tools necessary to effectively resist demands for bribes.

See [“Five Ways Compliance Communications Can Boost Engagement”](#) (Sep. 5, 2018).

### **Third-Party Intermediaries**

Using third-party intermediaries – consultants, agents, brokers, etc. – to interact with government officials in India is both common and risky. Indeed, the majority of FCPA enforcement actions arising out of India have involved bribes paid by third parties. An effective compliance program in India will take this into account and will include procedures to address this risk. Companies should:

- give thoughtful consideration when determining whether a third-party intermediary is even necessary for a government interaction;
- conduct India-effective pre-engagement due diligence, focused on the principals of the third party (not just the entity) and including, where appropriate, visits to local courthouses and police stations to find relevant information;

- carefully select third-party intermediaries that are experienced working with multinational companies, that have financial controls in place, and that keep auditable books and records;
- insist on detailed and specific agreements that spell out exactly what the intermediary will do and what and how it will be paid and that include appropriate anti-bribery representations and warranties and audit rights. Consider memorializing these agreements on non-judicial stamp paper and having them executed before a public notary, to establish record and enhance its admissibility as evidence; and
- require detailed invoices with sufficient back-up documentation as a condition of payment (and train your finance team not to pay higher-risk intermediaries without the detail and back-up).

Other hallmarks of effective anti-bribery compliance programs should be addressed as well and will undoubtedly be important in satisfying the PCA's requirements. A good tone at the top, sufficient compliance autonomy and adequate resources, effective oversight by the board or governing authority, effective response to and investigation of possible violations and appropriate employee incentives and discipline should also be a part of any effective program.

See The Anti-Corruption Report's three-part series on in-house perspectives on third-party due diligence; "[Right-Sizing and Risk Ranking](#)" (May 24, 2017); "[Information Gathering](#)" (Jun. 7, 2017); and "[Red Flags and Follow-Up](#)" (Jun. 21, 2017).

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[1] *Standard Chartered Bank and Ors v. Directorate of Enforcement*, A.I.R. 2005 S.C. 2622; *Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74