

Anti-Bribery and Foreign Corrupt Practices Act Compliance Guide for U.S. Companies Doing Business in India





The U.S. Foreign Corrupt Practices Act of 1977 (FCPA) presents significant liability, risks, and compliance challenges for U.S. firms pursuing business opportunities in India.

U.S. regulators have brought numerous FCPA enforcement actions based on business activities in India, including actions against companies such as Anheuser-Busch InBev, Mondelez/Cadbury, Oracle, Tyco International, Dow Chemical Company, Pride International, Textron, and Diageo.

In general, the FCPA makes it a federal crime to promise, offer, or make a bribe, directly or indirectly, to a foreign official to retain business or to secure an improper business advantage. The FCPA also requires companies that are traded on a U.S. stock exchange to maintain accurate books and records, and to use an adequate system of internal financial and accounting controls.

Likewise, India's growing commitment to anti-corruption efforts has resulted in an increase in enforcement actions by Indian authorities. India's principal anti-corruption legislation is the Prevention of Corruption Act, 1988 (PCA), which criminalizes the bribery of public servants. The PCA operates in conjunction with numerous other anti-corruption regulations and rules applicable to corporate entities operating in India, including but not limited to the various Conduct Rules for Public Servants, provisions of Indian Company law, administrative regulations, and binding integrity pacts for public procurement.

What Is the FCPA?

ANTI-BRIBERY PROVISIONS

The anti-bribery provisions of the FCPA prohibit the bribery of foreign government officials, candidates for office, political party representatives, certain public organizations, and employees of state-owned enterprises.

Specifically, the FCPA anti-bribery provisions prohibit U.S. companies and individuals, U.S. issuers, and anyone acting in the United States from:

(1) corruptly (2) offering, promising, authorizing, or paying (3) anything of value, (4) to any foreign official, (5) to obtain or retain business, or to secure any other improper business advantage.

The FCPA also prohibits the payment of bribes indirectly through a third person. For these payments, coverage arises where the payment is made while “knowing” that all or a part of the payment will be passed on to a foreign official.

The elements of the FCPA are applied as follows:

CORRUPTLY

The person making or authorizing the payment to a foreign official must have a “corrupt” intent. In general terms, any payment made to a foreign official for the purpose of securing some type of favorable treatment likely satisfies this element.

OFFER, PROMISE, OR PAYMENT

Evidence of a bribe is not necessarily under the FCPA. Even offering, promising, or authorizing a bribe is sufficient to violate the statute.

ANYTHING OF VALUE

“Anything of value” is interpreted broadly and can include the payment of money, the provision of gifts and entertainment (such as drinks, meals, and event tickets), travel, jobs, or internships for family members, or even charitable contributions made at the direction of a foreign official.

FOREIGN OFFICIAL

The term “foreign official” is also defined broadly to include any type of government official at any level. The FCPA applies to any public official, regardless of rank or position, including those who work for regional and local governments. Moreover, the U.S. government interprets the term “foreign official” to apply also to employees of state-owned or state-controlled entities (SOEs), even if such entities function in a purely commercial capacity.

OBTAIN OR RETAIN BUSINESS

The term to “obtain or retain business” is also defined broadly. Anything that furthers a U.S. person’s interests is covered, such as payments to gain a contract, to secure a lower cost for an import, or to obtain a higher price for sales. The term “obtain or retain business” also encompasses any attempts to avoid a tax burden (such as by securing a lower tax rate), avoiding the payment of customs duties, securing future or existing business opportunities, obtaining confidential information, or obtaining government licenses. In short, any payment made to gain any type of business advantage, to increase a firm’s profits, to decrease its costs, or to otherwise advance its interests is, in all likelihood, covered.

The FCPA does not require that a corrupt act succeed in its purpose; the offer or promise of a corrupt payment can constitute a violation of the FCPA. The FCPA includes concepts of attempted bribery and conspiracy to bribe, which means that merely taking concrete steps to set a bribery scheme into motion can lead to FCPA violations, even if the scheme is not completed.

INTERNAL CONTROLS AND BOOKS AND RECORDS PROVISIONS

There are additional FCPA provisions that apply only to issuers — publicly traded companies that are registered under the 1934 Securities and Exchange Act (including foreign companies that trade on the basis of American Depositary Receipts). The FCPA requires that publicly traded companies “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” Accordingly, an issuer must be able to determine, with reasonable precision, that disbursements are made in accordance with the books and records.

As demonstrated in the accompanying chart, penalties imposed by U.S. regulators for FCPA violations can be significant.

FCPA Enforcement Actions – India

Company	Description	Disposition (In USD)
Pride International	Payment made for favorable administrative judicial decision regarding customs issues	\$56.1 million
Tyco International	German subsidiary paid third parties to secure contracts; payments recorded as commissions	\$26 million
Louis Berger International	Payments made to win contracts for water development projects; characterized as payments to vendors	\$17.1 million
Diageo	Subsidiary made payments to government official responsible for the purchase/authorization of Diageo's products in India	\$16.4 million
Mondelez International/Cadbury Limited	Failure to maintain books and records regarding payments made to local agent to deal with Indian government officials to obtain licenses and approvals	\$13 million
Beam Suntory	Payments made to obtain license and registration approvals, better shelf positioning of products, and enhanced distribution rights	\$8 million
Anheuser-Busch InBev	India minority-owned joint venture used third-party sales promoters to make improper payments to government officials in India to increase sales and production	\$6 million
Textron	Subsidiaries paid foreign officials to secure contracts; characterized as commission and consulting fees	\$5.05 million
CDM Smith	Payments made to officials in the National Highways Authority of India in exchange for highway construction supervision and design contracts and a water project contract	\$4 million
Oracle Corporation	Oracle distributor allegedly created "slush" fund to pay third parties	\$2 million
Dow Chemical Company	Payments made to India Central Insecticides Board to expedite registration of products	\$325,000

U.S. Department of Justice’s FCPA Enforcement Paradigm

FCPA Corporate Enforcement Policy

On November 29, 2017, the U.S. Department of Justice (DOJ) issued a new enforcement policy covering its enforcement of the FCPA. The new FCPA Corporate Enforcement Policy formalizes prior internal guidance and makes permanent aspects of the DOJ’s 2016 “pilot program” for corporate cases involving potential violations of the foreign bribery and anti-corruption law. The policy encourages companies to voluntarily self-disclose foreign bribery to enforcement authorities by creating more certainty about the potential outcomes of FCPA investigations and enforcement actions.

Specifically, the policy creates a rebuttable presumption that DOJ will decline to prosecute companies that voluntarily self-disclose potential violations of the FCPA, “fully” cooperate with the DOJ investigation, and “timely and appropriately” remediate. The policy defines each of those elements, detailing DOJ’s expectations for cooperation and remediation.

Prosecutors nevertheless retain discretion in how to evaluate a company’s cooperation and remediation, and other “aggravating factors” described in the policy could still take declinations off the table in certain cases. However, the policy states that prosecutors will be required to agree to a 50-percent reduction to the minimum fines required in such cases.

The “No Piling-on” Policy

The DOJ “Policy on Coordination of Corporate Resolution Penalties,” announced in 2018, instructs prosecutors to “consider the totality of fines, penalties, and/or forfeiture imposed by all [DOJ] components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result.”

The policy, commonly referred to as the “No Piling-On Policy,” encourages cooperation between the criminal and civil components of DOJ, as well as between DOJ and other U.S. regulatory agencies. It has four principal features:

- Criminal enforcement authority should not be used “unfairly to extract, or attempt to extract, additional civil or administrative monetary payments.”
- It directs DOJ components (criminal and civil) to coordinate with one another and to focus on reaching an equitable result.
- It enshrines the practice of encouraging enforcement authorities to engage in global coordinated resolutions by encouraging DOJ attorneys to coordinate with other federal, state, local, and foreign enforcement authorities as they investigate and resolve a case with a company for the same misconduct.
- It identifies factors that DOJ attorneys may use to evaluate whether multiple penalties serve the interests of justice: the “egregiousness of the wrongdoing;” (2) whether there are “statutory mandates regarding penalties;” (3) the “risk of delay in finalizing a resolution;” and (4) the “adequacy and timeliness of a company’s disclosures and cooperation” with DOJ. These factors are intended to allow prosecutors to balance the desire for “reasonable” penalties with concerns regarding holding culpable corporations and individuals fully accountable, leaving DOJ with a potential ability to avoid a coordinated resolution if the circumstances warrant (particularly if doing so would unduly prolong a domestic investigation).

India's Anti-Corruption Laws and Regulation

Various anti-corruption legislation and regulations form the legal framework addressing bribery and corruption issues in India.

BRIBERY

The principal anti-corruption legislation in India is the Prevention of Corruption Act, 1988 (PCA), which focuses on bribery of public servants. Similar to the definition of “foreign official” under the FCPA, the definition of “public servant” under the PCA is extremely broad and includes government officials at all levels, local authorities, judicial officers, and employees of government-owned or government-controlled entities.

On July 26, 2018, an amendment to the PCA went into effect, providing additional clarity about the application of the PCA to companies.

Bribery under the PCA includes the acceptance of an “undue advantage” by a public servant in lieu of performance of a public duty. The term “undue advantage” refers to the receipt of any “gratification” other than the public servant’s entitled legal remuneration. To this end, several additional observations are worth noting:

- The term “undue advantage” is 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 PCA’s July 2018 amendment further explains that the term “gratification” is not limited to gratifications that can be quantified in monetary terms.
- The PCA prohibits a public servant from accepting gratification from any person who is likely to be engaged in business before him/her.
- Gratification in addition to the public servant’s legal remuneration is illegal whether the underlying action performed by the public servant is lawful or unlawful. Under Indian law, there is no exception for so-called facilitation or “grease” payments — i.e., payments to prompt a public servant to take official action that he or she is required to perform. All such payments constitute a bribe.
- The fact that a public servant did not provide (or was unable to provide) the intended benefit is irrelevant under Indian law; the mere offer of an undue advantage to a public servant is a violation.
- A prosecution exemption is provided for cases where a person/company was compelled to give an undue advantage to a public servant; provided that the person/company reports the matter to law enforcement authorities within 7 days of having paid such bribe.
- The PCA includes a substantive offence of bribery by companies 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.”
- Similar to the UK Bribery Act, 2010; the PCA recognizes an affirmative compliance defense – that is, the company had in place adequate procedures to prevent its employees or persons associated with it from undertaking in misconduct. The eligibility of the compliance defence is premised on the company’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.
- Companies convicted of an offence under the PCA are subject to fines. However, the law also imposes liability on directors, managers, and other executives of the company who *consented to or conspired in* the commission of an offence, with potential imprisonment of three to seven years.
- Payment of bribes through third parties is treated on par with having directly paid a bribe. Therefore, it is “immaterial” from a liability standpoint under the PCA whether the bribe was paid by directly by a company employee or indirectly through a third party.
- The PCA’s July 2018 amendment, for the first time, refers to a time frame for the conclusion of a trial, albeit such time frame is not mandatory but rather discretionary. The Special Judge conducting a PCA trial shall *endeavour* to complete the trial within 2 (two) years. This period can be extended by 6 (six) months at

a time and up to a maximum of 4 (four) years in aggregate, subject to the reasons for the extensions being recorded.

- The PCA does not include a provision for resolving an enforcement action or prosecution with law enforcement authorities through a settlement.

Violations of the PCA may result in imprisonment for a term ranging from three to seven years, as well as a fine.



GIFTS AND CORPORATE HOSPITALITY

In addition to the PCA, the receipt of gifts or corporate hospitality by public servants is also governed by specific public servants' Conduct Rules, which set specific guidelines on the value of gifts that may be accepted in furtherance of local or religious customs (where no reciprocal action is expected and where the public servant has no current or expected future official dealings with the gift giver). The guidelines for permissible gifts are based on the public servant's rank and service classification and broadly range between 500 – 25,000 Rupees (approximately \$8 – \$375 U.S. dollars). By way of example, ministers are governed by the Code of Conduct for Ministers, while certain classes of civil servants are governed by the All India Services (Conduct) Rules, 1968. These Rules should be consulted before providing any gift or hospitality to a public servant.



POLITICAL CONTRIBUTIONS

The Companies Act¹ generally prescribes that non-governmental companies in existence for more than three years may make political contributions of any amount, whether directly or indirectly. Previously, a cap of 7.5 percent of the average net profits for the three preceding financial years was prescribed by the Companies Act, which has since been amended to eliminate the cap. Further, the Finance Act, 2017 has also removed a requirement that made it obligatory for a company to disclose in its profit and loss statement the details of the political party to which the donation was made.

A violation of the Companies Act may result in a fine to the company and a prison sentence and/or fine to the responsible company officers.

CHARITABLE CONTRIBUTIONS

The Companies Act allows public companies and their subsidiaries to contribute to bonafide charitable and other funds. If the contribution exceeds 5 percent of the company's average net profits for the three financial years preceding the date of the contribution, permission of the company would need to be received at a general meeting.

ADMINISTRATIVE REGULATION

Companies are required to maintain a heightened degree of compliance in matters of public procurement. Most government entities require the signing of a mandatory "Pre-Contract Integrity Pact," which imposes restrictions on both the company and the state from engaging in bribery during public procurement. The Integrity Pacts also mandate that companies disclose to the state any previous integrity transgressions by the company that occurred anywhere in the world.

Failure to comply with the Integrity Pacts could result in contract termination, forfeiture of bid amounts, encashing of bank guarantees, and blacklisting. Dow Agro Sciences India Pvt. Ltd was blacklisted by the Ministry of Agriculture in India for five years in 2011, and in 2012, four foreign companies were blacklisted by the Ministry of Defense for 10 years.

¹ The "Companies Act" means the Companies Act, 2013 to the extent notified, the rules thereunder, and the provisions of the Companies Act, 1956 to the extent not repealed.

Typical Bribery Risks of Doing Business in India

While India presents a wealth of business opportunities, it also presents a number of anti-corruption compliance challenges for U.S. companies.

India has developed a reputation for corruption, scoring relatively poorly in the Transparency International's Corruption Perceptions Index. Moreover, doing business in India also requires U.S. companies to navigate its complex administrative and bureaucratic environment. The World Bank currently ranks India 134th among all countries in its "Ease of Doing Business" Index.

The challenges of doing business in India, however, can be managed by understanding where bribery and corruption risks are likely to arise and by implementing appropriate procedures to manage anti-corruption risk. Business activities that typically present heightened risk under the FCPA, PCA, and India's anti-corruption laws are as follows.

LOW-LEVEL PAYMENTS FOR PERMITS, LICENSES, AND OTHER REGULATORY APPROVALS

As with other countries, a host of regulatory hurdles exists in India, including the need to obtain permits, licenses, and other regulatory approvals and to pay various application and registration fees. These types of low-level transactions provide opportunities for bribery. Payments made in such transactions — whether in cash or gifts — may appear minimal (by U.S. standards) and may seem harmless, but they can nonetheless result in violations of U.S. and/or India law.

To be sure, the FCPA includes a narrow exception for "facilitating payments" — that is, payments made to expedite routine functions or processes (such as permit applications) that an official is already required to provide by law. Beyond the fact that this exception is very narrowly interpreted and difficult to apply in practice under the FCPA, such "facilitating payments" are expressly prohibited under India law. Accordingly, facilitation payments should not be made when conducting business in India.

Examples of Potentially Problematic Conduct

- 1 Paying (or providing some other benefit to) a customs official to bypass inspection or overlook incorrect or incomplete paperwork
- 2 Paying a local tax regulator to overlook errors or inconsistencies in filings
- 3 Paying an official to expedite the processing of a permit or license
- 4 Paying a utilities provider to reduce billings
- 5 Paying a local health and safety regulator to overlook code violations

TIPS ON DEALING WITH LOW-LEVEL PAYMENTS

Low-level bribery is often seen as "just part of doing business" and can be difficult to combat, particularly given that small bribes have been used historically to navigate through India's bureaucratic environment. However, companies can take steps to help mitigate the risks associated with small bribes:

- Adopt a policy prohibiting the payment of bribes, regardless of the amount, and effectively communicate these anti-bribery policies to employees.
- Conduct a risk assessment to identify high-risk situations (e.g., employees regularly interacting with government officials) in which company employees might be requested to pay bribes.
- Train employees on how to respond to demands for bribes (e.g., reciting company policies, requesting official documents validating the payment, involving multiple persons in the discussions, reporting an incident to the company).
- Take appropriate disciplinary and corrective actions if payment of low-level bribes is detected.
- Utilize resources and information available under the Indian Right to Information Act, 2005 for obtaining information from government authorities and the Right to Public Services Legislation (state-level legislation), which mandates that certain services be provided within defined time periods.

GIFTS, MEALS, ENTERTAINMENT, AND TRAVEL

The exchange of business courtesies, such as providing gifts, meals, entertainment, and travel, can help strengthen existing relationships, foster new opportunities, and convey respect and appreciation for business partners. However, companies run the risk of triggering the FCPA and other anti-corruption laws if their marketing and entertainment expenditures cross a line into conduct that could be characterized as bribery or leads to the appearance of attempting to induce a breach of trust or impartiality on the part of the recipient. Indeed, many recent FCPA enforcement actions have focused on excessive gift giving, travel accommodations, and entertainment involving foreign officials.

Business courtesies are generally acceptable provided that they are of modest value, reasonable in scope, and not given or received in expectation of, or as an award for, obtaining or retaining business. However, as noted above, the various conduct rules for public servants in India establish specific guidelines for accepting gifts and hospitality, and, for some public servants, the maximum permissible gift value may be as low as 500 rupees (\$8 U.S. dollars). Companies operating in India should thus familiarize themselves with these guidelines before providing even what may seem to be a modest gift or hospitality.

Business courtesies should be accurately reported in the company's books and records.

Examples of Potentially Problematic Conduct

- 1 Paying for extravagant meals, drinks, and entertainment in connection with a visit by a foreign official
- 2 Paying for "side trips" so that foreign officials can visit tourist attractions (e.g., Walt Disney World, Las Vegas) while in the United States
- 3 Providing per-diems or "pocket money" for foreign officials to use during a visit
- 4 Paying for a foreign official's spouse or family to accompany the foreign official on a trip
- 5 Providing foreign officials with excessive gifts for birthdays, weddings, holidays, or other events

TIPS ON DEALING WITH GIFTS, MEALS, ENTERTAINMENT, AND TRAVEL ISSUES

Below are several best practices that companies should consider when providing gifts, meals, entertainment, and travel to clients or prospective clients who might arguably constitute foreign officials:

- Conduct a risk assessment of the company's practices and procedures relating to the provision of business courtesies.
- Consult the various conduct rules for public servants in India to determine the gift-giving and hospitality guidelines for specific classes of public servants.
- Develop clear policies and directives for employees as to gifts, meals, entertainment, and travel relating to clients and prospective clients.
- Do not provide cash or cash equivalents.
- Branded corporate paraphernalia (e.g., t-shirts, golf balls, mugs) pose a substantially lower risk than specialty items (e.g., designer clothes, golf clubs).
- Properly document any gifts, meals, entertainment, travel, or other expenses provided to foreign officials.

USE OF AGENTS, BROKERS, CONSULTANTS, AND OTHER INTERMEDIARIES

Navigating India's extensive regulations and bureaucracy often requires U.S. companies to rely on third parties, such as agents, brokers, consultants, sales representatives, distributors, and other business partners. Yet the use of third parties can present additional FCPA risk, as U.S. companies can be held liable for bribes made by these third parties for the benefit the company or its subsidiaries. The PCA similarly criminalizes bribery through third parties as a direct violation by the third party and as an abetment violation by the company on whose behalf the bribe is being made.

Third parties should thus be subject to anti-corruption due diligence in the engagement process and be adequately monitored throughout the business relationship.

IDENTIFYING THIRD-PARTY RED FLAGS

The presence of a red flag does not necessarily mean that illegal conduct has occurred or that a company has legal exposure if it proceeds to engage a particular third party. Rather, red flags indicate that the company should take a closer look at the issue to determine whether there is anything truly suspicious or whether instead an acceptable risk is presented in the context of a particular third-party relationship.



Examples of Third-Party Red Flag

- A third party is listed in databases reporting known corruption risks (e.g., World Bank List of Debarred Firms) or has been previously investigated for, charged with, or convicted of corruption or other ethics violations.
- A foreign official has specifically requested that a certain third party be involved in the company's transaction or business.
- An agent or consultant holds himself out as someone with close connections to an important minister or minister's aide.
- A third party does not appear to have sufficient resources, real estate/infrastructure, or experience to perform the requested tasks.
- A third party asks the company to provide it with unreasonably large discounts, excessive commissions, reimbursements, or contingency fees.
- A third party requests payment in an irregular or convoluted manner (e.g., cash, offshore bank account, payments to another company, over/under invoicing).



TIPS ON HANDLING THIRD PARTIES

The following steps are recommended in developing third-party business relationships in India:

- Conduct adequate due diligence before engaging third parties, including establishing that the third parties are legitimate businesses providing bonafide services to the company for a price that is reasonable and customary.
- Ensure that due diligence processes consider local business practices and socio-cultural nuances.
- Determine if there are any red flags that need to be addressed before entering into the business relationship.
- Memorialize third party engagements in writing, being sure to include appropriate anti-bribery language in contracts.
- Monitor third parties to ensure that they have and will continue to abide by the company's FCPA/anti-corruption policies.
- Maintain due diligence files on third-party relationships, including efforts to identify and investigate any bribery risks and post-engagement monitoring.

Effectively Managing Bribery Risk in India

In addition to being prepared to deal with these common scenarios, the best way for U.S. companies to minimize FCPA and Indian anti-corruption law risk is (1) to develop and implement an effective anti-corruption compliance program, and (2) to document anti-bribery compliance efforts.

An effective anti-corruption compliance program should include the following components:

STANDARDS AND PROCEDURES

At a minimum, a corporate anti-corruption compliance program should include standards and procedures — translated into the local languages — that clearly prohibit bribery and address the following areas:

- Transactions involving “things of value” given or promised, directly or indirectly, to “foreign officials,” including employees of state-owned or controlled enterprises
- Commercial bribery and “pay-to-play”
- Promotional or marketing expenses involving foreign officials, including policies addressing expenditures for gifts, meals, travel, and entertainment
- Political contributions to foreign candidates, parties, or other political activity
- Donations, scholarships, internships, sponsorships, or other charitable contributions
- Transactions indirectly involving foreign officials through third parties and intermediaries, including pre-transactional due diligence, representations, warranties, contractual clauses, and defined red flags
- Investments in international joint ventures, international mergers/acquisitions, or other international investments

The company should also have a system of financial and accounting procedures, including a system of internal accounting controls, designed to ensure the maintenance of fair and accurate books, records, and accounts, which is commensurate to the size of the company.

TRAINING

Training is an essential part of any compliance program, and should be provided based upon risk-based groupings, with persons at higher risk — such as employees who have frequent dealings with foreign officials or employees of state-owned companies, or employees who frequently operate abroad — given more detailed training.

CERTIFICATIONS

The anti-corruption policies, standards, and procedures should apply to all directors, officers, and employees, and certain business partners in foreign jurisdictions such as agents, consultants, representatives, distributors, and joint venture partners. Directors, officers, employees, and third parties should be required to certify annually and in writing that they are and will remain in compliance with the company’s anti-corruption policies and procedures.

OVERSIGHT/AUTONOMY/RESOURCES

Although the structure, size, and complexity of the compliance program will vary by company, those in charge of overseeing compliance must have autonomy, sufficient resources to effectively implement, update, and oversee the compliance program, and direct access to the governing body of the company.

COMMUNICATIONS

Mechanisms should be designed to ensure that the policies, standards, and procedures are effectively communicated across all levels of the company.

REPORTING PROCEDURES AND INVESTIGATION

The program should include an effective system for confidential reporting (both directly and anonymously) of suspected or actual violations of the anti-corruption compliance policies. Once an allegation surfaces, the company should investigate, document its response, and implement necessary disciplinary or remedial measures.

RESPONDING TO POSSIBLE VIOLATIONS

U.S. enforcement agencies have asserted that the key components driving decisions to decline FCPA prosecutions include: diligent discovery by the company, swift and decisive action (including investigating internally and terminating or disciplining any individuals or third parties involved), self-reporting and cooperation with any agency investigations (including disclosure of the results of the company’s internal investigation), and a strong compliance program with robust internal controls and corrective measures (including re-training, additional new training programs, instituting new or enhanced compliance programs and internal controls, hiring new compliance officers, or restructuring existing compliance departments).

Ten Tips for Performing Effective Anti-Corruption Investigations in India²

1. Don't Miss the Real Issue

Indian compliance-related internal investigations are often generated by complaints made by current and former employees. We have investigated several matters in which a serious compliance issue was buried in an assortment of management and personal criticisms. Pay close attention to anything resembling a “whistleblower” complaint, and be careful not to discount potentially serious compliance issues simply because such issues were raised alongside seemingly frivolous, ad hominem attacks on management or colleagues.

2. Scope Carefully

Given the often scattershot nature of employee complaints in India, invest time and energy at the front end of a compliance investigation to properly scope the work. Arrange an early interview with the person making the report by Indian counsel, to fully understand the compliance issues raised, and to separate the compliance “wheat” from what may be human resources “chaff.”

3. Consider Privilege Issues

Keep in mind that there is no attorney-client privilege for in-house lawyers under Indian law. If privilege is important, retain outside counsel to lead the investigation.

4. Consider Local Counsel Within India

India is a big, multicultural country with 22 local languages. While a sophisticated and experienced Indian lawyer (likely based in Delhi or Mumbai) is indispensable, you should consider whether local counsel also should be involved to access records and communicate effectively with the involved employees.

5. Protect Reporter Identities

It is prudent to take extra steps to avoid sharing the identity of the reporter with other employees of the Indian subsidiary. Even for companies with robust anti-retaliation policies, whistleblower retribution is unfortunately common in India and can obviously aggravate an already emotionally and legally precarious situation.

6. Prepare for Law Enforcement Action During the Investigation

Law enforcement in the United States and in India work on two different paradigms. The law-enforcement objective in India is focused on securing the conviction of individual wrongdoers. Bribery investigations can move quickly, resulting in arrests and media coverage. Such events obviously can change the fundamental calculus of the investigation, including the issue of self-disclosure in the U.S. Be prepared, and have a contingency plan in place.

7. Be Wary of Recordings

Don't be surprised if employees reporting possible misconduct have made recordings of conversations that they claim show improper behavior. And don't be surprised if your interviews are recorded. To counter this, ensure one person never conducts interviews alone and that an accurate record of interviews is maintained. On the flip side, do not forget to ask the interviewee if he or she has a recording involving the allegation.

8. Watch for Cash

When conducting internal investigations in India, pay special attention to any cash expenditures, whether or not they are related to the transaction in question. Cash is often not as critical to the operation of the business as your Indian managers might claim, and cash expenditures can often signal potential bribery.

9. Carefully Examine Third-Party Intermediary Expenditures

Improper payments in India are very often made through agents, consultants and other intermediaries. Any India-based investigation should examine carefully all relationships with, and payments to, such third parties.

10. Watch for Key “Red-Flag” Terms

In reviewing documents or an Indian subsidiary's books and records, there are certain terms and phrases for which you should keep a lookout, as they might suggest improper payments.

² Excerpted from the article, “Ten Tips for Performing Effective Anti-Corruption Investigations in India,” published in *The FCPA Report*, Volume 6, Number 10, on May 24, 2017.

Certain categories of fees and expenses should be closely scrutinized, such as:

- brokerage charges or fees
- consultancy charges
- covering charges
- management fees
- documentation charges
- managing expenses
- out-of-pocket expenses
- protection fees
- special expenses

Certain specific phrases on invoices are red flags as well, such as:

- “for obtaining license”
- “liaisoning” or “government liaisoning”
- “for clearances”
- “for getting NOC”(notification of change)
- “for obtaining approvals”
- any other grammatically awkward or vague reference on invoices (for example, “motivation amount”)

Additionally, there are certain words from local languages that should be included in your search terms as they are red flags as well:

- rishwat (bribe in Hindi)
- baksheesh (euphemism for an offering and commonly used to demand/offer a bribe. The term is of Persian origin)
- ghoos (euphemism for bribe in Hindi)
- hafta (a word of Persian origin that literally translates to “week.” The term however is typically used to denote payments demanded/paid on a weekly basis)
- chai-pani (a milder term to express the “common corruption” for routine payments. The terms literally means tea and water, therefore typically is smaller in value, as the objective is to act more as cost for refreshments or smaller denominations)
- black money

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