

# 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 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.

### **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
Diageo	Subsidiary made payments to government official responsible for the purchase/authorization of Diageo's products in India	\$16.4 million
Textron	Subsidiaries paid foreign officials to secure contracts; characterized as commission and consulting fees	\$5.05 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



# India's Anti-Corruption Laws and Regulations

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.

Bribery under the PCA includes any “gratification” that a public servant receives other than his/her legal remuneration. Gratification constituting a bribe would include anything intended to motivate, influence, or reward a public servant for performing (or forbearing performance of) an official act, or for showing “favour or disfavour” to any person, or for rendering any service or disservice to a public servant. To this end, several additional observations are worth noting:

- » Gratification is interpreted 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 prohibits a public servant from accepting gratification from any person who is likely to be engaged in business before him/her
- » The PCA covers attempts to exercise personal influence on a public servant, mandating that companies that use lobbyists or other third-party agents may not use such third parties with the intent of benefitting from the influence that the third party might hold over the public servant

- » Gratification 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 gratification to a public servant is a violation
- » 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 six months 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 – 7,500 Rupees (approximately \$8 – \$120 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 Act<sup>1</sup> generally prescribes that non-governmental companies in existence for more than three years may make political contributions of up to 7.5 percent of the average net profits for the three preceding financial years. 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 bona fide charitable and other funds. If the contribution exceeds five 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.

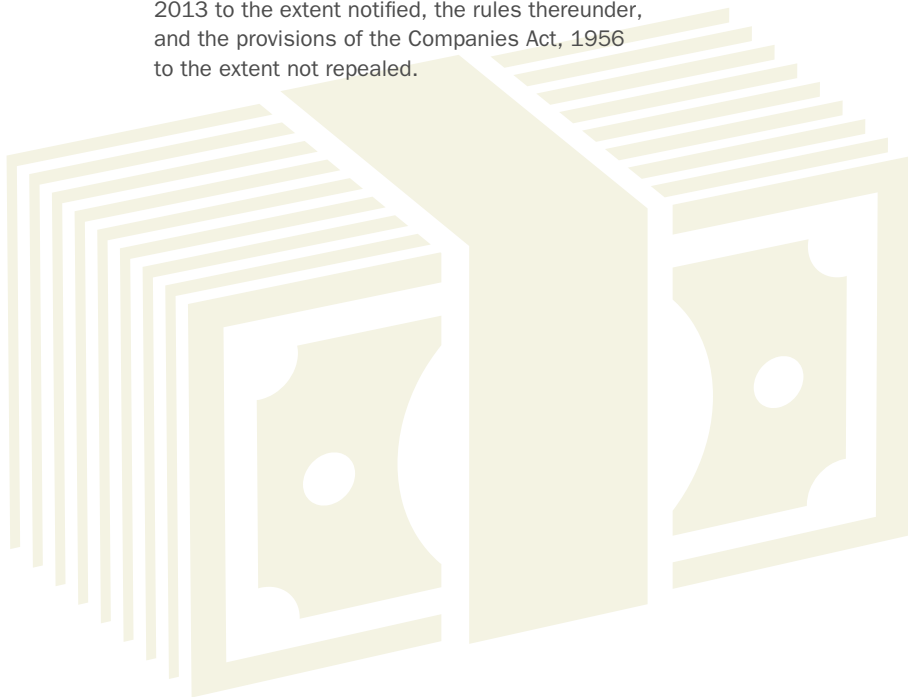
### **ADMINISTRATIVE REGULATION**

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.

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<sup>1</sup> 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 lends 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.

### **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

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.

### **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 Flags

- » 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 bona fide 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.

Such a 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).



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