

COMPLIANCE MATTERS

HANDBOOK ON COMPLIANCE

A guide for businesses operating in India



The Alliance for Integrity is a global initiative bringing together all relevant stakeholders in the field of corruption prevention in the private sector. Our main goal is to raise business integrity and compliance capacities.

www.allianceforintegrity.org

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We are optimistic that the handbook will serve as a useful document and a ready guide for compliance practitioners and officers to address the issue of business integrity and implement compliance programmes in the organisation.

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A guide for businesses operating in India

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INTRODUCTION



We live in a world of global networks, where production takes place in one market and the produce is sold into another market, while the capital/investment comes from an entirely different market. In an enmeshed world economy with value chains spanning across geographies and having a multitude of “impact points”, the risk to a business is that much higher today. Hence, businesses are perforce required to take cognizance and action to ensure greater accountability and transparency as part of compliance mechanisms. Today much of the compliance is geared towards mitigating, if not stamping out “corruption”, which is viewed as an antithesis to a “free and fair market”, “efficiency and effectiveness” and consequently “sustainable growth”.

In this changing scenario where businesses alongwith the government and civil society will play a pivotal role in charting the growth story, creating a business environment that fosters business integrity will be imperative. Emerging economies today understand this to be the cornerstone of economic growth that is equitable and sustainable. In India, much thrust is being placed on the topic, this is evident from the recent legislation coming into effect, namely “Goods & Services Tax”. While headway has been made in dealing with corruption, infusing it with greater transparency, much remains desired to

be done. A substantial part of it may be attributed to knowledge gaps, superficial understanding of the long-term risks and incentives to the businesses.

It is here that Alliance for Integrity, a business-driven, multi-stakeholder initiative seeking to promote transparency and integrity in the economic system, finds a role. It is an international network consisting of committed organizations and individuals that work together to mainstream the agenda of responsible business conduct through peer to peer exchange, knowledge creation, dissemination and capacity building. The Alliance fosters collective action of all relevant actors from the private sector, the public sector and civil society.

The Handbook is a fruit of labour of several industry champions, practitioners and thought leaders coming together to contribute towards it’s content creation. A rigorous process was undertaken to develop the handbook for businesses to develop keener insights into anti-corruption compliance with respect to legal frameworks, good practice examples, practical approaches to tackling ethical dilemmas and most importantly setting compliance programmes within their organisations.

Nandini Sharma
Network Manager India
Alliance for Integrity

CORPORATE SCAMS AND
GLOBAL COMPLIANCE
ENFORCEMENT
CHALLENGES HAVE
MADE BUILDING A
ROBUST COMPLIANCE
FRAMEWORK A
PREREQUISITE FOR
BUSINESSES



LARGE
ENTERPRISES
WITH OVERSEAS
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OR FOREIGN
SUBSIDIARIES
NEED TO BE WELL-
VERSED WITH THE
LOCAL LAWS



I. Compliance environment for companies doing business in India

1 OVERVIEW OF THE HANDBOOK AND THE EXISTING COMPLIANCE SCENARIO

Corporate scams and global compliance enforcement challenges have made building a robust compliance framework a prerequisite for businesses, especially in emerging markets where business environment is complex. Over the recent years, the extent and frequency of reported risks as well as cases of prosecution by regulators has witnessed a sharp increase globally.

In India, specifically, the existing domestic environment poses unique compliance risks. Key corruption issues faced by large organisations in their day-to-day operations include dealing with third party intermediaries, facilitation payments, kickbacks and speedy money, and balancing local customs and norms, which constitutes the gifting and enter-

tainment gambit. The challenges therefore associated with the existing legal framework in India – sporadic and inconsistent enforcement, complexities of doing business, anti-corruption regulations – need to be addressed judiciously.

Furthermore, large enterprises with overseas investments or foreign subsidiaries need to be well-versed with the local laws of the countries they operate in. This is especially critical as the regulatory practices, customs, culture, business conduct and norms vary across countries and especially in emerging markets. Simultaneously, there is an increased pressure exerted by international agencies for organisations to be compliance-driven. Through International instruments like OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption (UNCAC), the fight against corruption has gone global and organisations have realised the need to significantly step up their anti-corruption efforts.

The above factors have moved compliance up the Boardroom agenda and created an urgent need for organisations to take a step back and review their compliance framework. The CEO, senior management and the key management personnel in an organisation are the guardians of establishing and uphold-

India ranks

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ing the tenets of business integrity and therefore need to evaluate and monitor their compliance programme for its efficacy and relevance.

This handbook serves as a ready reference for compliance officials, business heads and the senior management to better understand the compliance landscape in India. A practical guide on managing compliance needs, the handbook highlights the challenges faced at the ground level and puts forward the necessary recommendations thereof. The content has been compiled after extensive research and inputs received from practitioners, experts and compliance champions who participated at the round table conferences organised by the Alliance for Integrity. The handbook

is further enriched by technical and substantial inputs provided by the Advisory Group members of the Alliance for Integrity.

The handbook provides an overview of the compliance requirements specific to India, addresses the common corruption issues faced by organisations and the requirements of the Indian legal framework as well as global anti-corruption laws. It addresses key questions pertaining to what constitutes corruption, offences as per global anti-corruption regulations and instances of implications on well established companies. Finally, it serves as a ready reference for compliance officers to design an effective compliance programme.

2 COMPLIANCE ENVIRONMENT AND CHALLENGES UNIQUE TO INDIA

Though the World Bank's 'Ease of Doing Business' index in 2016 suggests that India has moved 12 ranks to 130 in 2016, converting the building blocks of compliance into sustainable action plans continues to remain one of the biggest challenges. At a broad level, nuances with respect to some of the challenges faced by organisations are listed below.

First comes the difficulty in defining and determining third parties as the nature, extent and range of intermediaries used in India is complex and vast. Such intermediaries or third parties could range from vendors, agents, liaison agents, resellers, distributors, selling agents, clearing and forwarding agents to contractors and processors. Stemming from it is also the challenge of ensuring and maintaining good third party relationships.

According to World Bank's Doing Business 2016 data, India's rank

155/2016

164/2015



Clear & Consistent Communication (tone at the top & compliance culture) is often underplayed. Also, as different business lines and functions exist in large businesses, the issue tends to remain confined to a specific department or relegated to mere tick-box activity. In addition, existing cross-border regulations need to be understood and dealt with by third parties. More than often, organisations fail to get the dialogue started on the issue and, when they do, the damage has already been done.

With regard to facilitation payments, such payment is legal only if the law permits it and these are recorded appropriately in the books. If it is illegal, no matter what an organisation's business model is, it will remain illegal.

The scale and size of an organisation are seen as a roadblock in the crusade against corruption and bribery. Large organisations might have the wherewithal to put in place all necessary measures, turn things around and resist "pressures". This may be difficult for mid and small size organisations. It is here that "collective action" is seen to play an even more important role. However, taking a conscious call on an aspect as sensitive as facilitation payments is critical for all businesses and more so for mid-size organisations.



Corporate cost, effort and time entailed towards gifting (especially during festivals like Diwali) in India is significant and the need to observe the customary traditions made this aspect particularly challenging to deal with.

Some regulatory concerns which need to be dealt with by organisations to smooth sail in India include:

- Taxation regime
- Form of business entity in question
- Interaction with government bodies

Currently the taxation regime incorporates a gamut of taxes ranging from direct to indirect levies on transactions. However, the Goods and Service Tax (GST) aims to simplify the current taxation regime and augment transparency. It will replace multiple types of

indirect taxes w.e.f. 1st of July, 2017. An extensive set of rules have been formulated to rollout GST. Enumerating them is beyond the mandate and scope of this handbook. However they can be accessed from the Central Board of Excise and Customs (CBEC) website¹. Procedures that need to be followed by companies operating in India with respect to tax reporting are periodic and these could range from being quarterly to semi-annual. Further, tax norms and regulatory requirements vary depending upon the industry in question. Specific government bodies and nodal agencies govern the regulatory landscape, explicit to the operating industry. For instance: the Telecom Regulatory Authority of India (TRAI) and the Insurance Regulatory and Development Authority (IRDA) are few such regulatory bodies in India.

COMPLIANCE CHALLENGE: THE CASE OF THE PHARMACEUTICAL INDUSTRY

Laws governing the Pharmaceutical industry are centred on the regulation of manufacture, import, distribution of drugs, prices of controlled bulk drugs, protecting the trademarks etc.

Amidst these regulations, picture a scenario where your consignment of life-saving drugs is awaiting approvals at the Mumbai port. In that moment, a slight delay of minutes could be detrimental to your organisation as the drugs need to be meticulously preserved in medically controlled environment and optimum temperatures and the Mumbai heat could damage the entire consignment worth several million dollars. This pendency owing to a piece of documentation not approved by the authorities unless you submit to pay some “speedy money” puts you in a fix.

¹ <http://www.cbec.gov.in>

3 REQUIREMENTS OF INDIAN LAW

Companies must follow certain regulations while conducting business in India. There are several legislations with complex rules, regulated and enforced by a byzantine government bureaucracy. India has an extensive legislative history and rules and several regulations have been amended or revised en masse in the last few years. Some of the certain overarching omnibus laws are outlined in this section

A. COMPANIES ACT, 2013

The first regulation that companies have to mandatorily comply with is the Companies Act 2013. The 2013 Act has replaced the erstwhile Companies Act of 1956.

The new Act enacts a standalone offence for commission of "fraud" in relation to the affairs of a company or a body corporate.

For the first time ever, the Act defines fraud as "*Fraud in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or*

any other person, whether or not there is any wrongful gain or wrongful loss."²

The above definition of fraud is wide ranging both in terms of the nature or activities covered and those who undertake such activities. Under this definition, fraud could possibly include corrupt practices, deceit, conflicts of interest and bribery. Further, fraud is not only limited to officers, employees or board members of the company but also covers third parties who provide services to the company as long as other elements of the definition are met. Any such fraudulent acts can lead to both civil and criminal liability on the fraudster. The Act also imposes stringent obligations on Board of Directors and requires directors to report if they have established internal financial controls and whether there are proper systems to ensure compliance with the provisions of 'all' applicable laws and if such controls and systems are adequate and have been operating effectively. Further, the definition of "officer in default" has been widened to include directors including independent directors.

Finally, all frauds must be reported to the audit committee/board immediately and no later than two days of auditors' knowledge of the fraud. Fraud involving or expected to involve an amount of INR

² Section 447 of the Companies Act 2013 notified on December 14, 2015

one crore or more must be reported to the central government. In summary, the Companies Act 2013 imposes significant compliance responsibilities on members of the board, audit committees and auditors.

B. PREVENTION OF CORRUPTION ACT, 1988

The second and perhaps the most important anti-corruption legislation in India is the Prevention of Corruption Act, 1988 (POCA). POCA prohibits the taking of a bribe or other gratification by a “public servant”.

The Central Bureau of Investigation (CBI) and Anti-Corruption Bureaus (ACB) of respective states are primarily charged with inquiring into and investigating offenses under the Prevention of Corruption Act, however, prosecution requires prior government approval. The Central Vigilance Commission (CVC) merely has a review and supervisory role to play.

The definition of a public servant is expansive. For a detailed description of the definition, please see the reference source.³ Recently, Supreme Court of India further expanded the definition of public servant by including private bankers under the definition of public servant. Despite the expansive definition



Prevention of Corruption Act, 1988 (POCA) prohibits the taking of a bribe or other gratification by a “public servant”

of public servant, POCA penalises the bribe taker and does not specifically cover either the offence of giving bribes or the bribe giver, however, this does not mean that giving bribes or the bribe giver are exempt, the bribe giver comes under the ambit of the law by way of abetting this offence (Section 12 – Punishment for abetment of offences defined in section 7 or 11 of POCA). Thus, the punishment for bribe giving is attune to that which a public servant convicted of accepting bribes would receive, which is imprisonment for a minimum term of 6 months extending to five years and would also be liable to pay a fine . The Prevention of Corruption (Amendment) Bill, 2013 (pending before Upper House of Parliament) is set to change this disparity and contains specific provisions that prohibits or criminalises giving a bribe to a public servant and giving a bribe by commercial organisations.

³ Public servant as defined under Prevention Of Corruption Act (POCA)

C. CENTRAL CIVIL SERVICES RULES (CONDUCT RULES), 1964

Companies in India focus an inordinate amount of their time and effort on ensuring that their gifts and entertainment policy balances both local customs and anti-corruption rules. It should be noted that in this instance, government servants are governed by the rule 13 of Central Civil Services Conduct Rules of 1964 that prohibits government servants to accept, or permit any member of his family or any other person acting on his behalf from accepting lavish hospitality or frequent hospitality from any individual, industrial or commercial firms, organisations etc., having official dealings. Further, the rules also prescribe a monetary limit, pre-approval and reporting of gifts if these gifts exceed certain monetary limits based on their level and official dealings. Under these rules, "gift" shall include free transport, boarding, lodging or other service or any other pecuniary advantage when provided by any person other than a near relative or personal friend having no official dealings with the government servant. However, a casual meal or other social hospitality shall not be counted as a gift.⁴

D. PUBLIC SERVANTS (MINISTERS) GOVERNED BY THE "CODE OF CONDUCT FOR MINISTERS" BY THE MINISTRY OF HOME AFFAIRS

The Code of Conduct for Ministers lays down that Ministers of both the Union and the State should not accept valuable gifts except from close relatives, and members of their families should not accept any gifts at all from any person with whom such Minister may have official dealings.

As an illustrative example when Indian Ministers are travelling abroad they are entitled to receive symbolic gifts and gifts beyond INR 5000 (USD 75) may not be retained by the Minister. The reader is requested to refer the relevant rules as applicable in detail before extending any gifts to Ministers and/ or Government servants

⁴ Rule 13 of The Central Civil Services (Conduct) Rules, 1964

4 BASIC COMPLIANCE REQUIREMENTS FOR COMPANIES SETTING UP BUSINESSES AND OPERATING IN INDIA



The compliance requirements as applicable to a company when it sets up in India and further advances its operations, is discussed in the section below.

Besides the compliance requirements that need to be taken care of, a significant challenge that arises is the role of states in the legal and compliance requirements. Various states in India have their own regulations which multiplies the level of government interaction. The regulatory environment varies in each state including labour laws, land acquisition etc. Not only this, even while a company sells in different states, packaging norms might vary. This multi-layered interaction as far as the local and municipality level is a significant roadblock for companies operating in India. The fundamental compliance requirements applicable to a company include:

A. FORMATION AND REGISTRATION

Companies in India must register with the Registrar of Companies (RoC) located in each state. The location of RoC is determined based on the address of the registered office of the company. Every company is regulated by Ministry of Corporate Affairs and must meet the requirements laid down by the Companies Act 2013 along with its various rules that require regular filing of returns.

In addition to compliance with Companies Act, the listed public companies are also regulated by the Securities and Exchange Board of India (SEBI).

B. ACCOUNTING AND PAYROLL

Companies are required to maintain books and records as per the accounting standards (AS) issued by the Institute of Chartered Accountants of India (ICAI) and for a period specified under the Companies Act. They are subject to annual audits by chartered accountants (CA) and filing of annual reports. With regard to the payroll, management of payroll in India involves issues such as withholding certain percentage of the salary to cover income tax i.e., tax deducted at source (TDS), medical insurance, provident fund (PF) and registration of permanent account number (PAN).

C. TAX COMPLIANCE

The tax regime is a complicated subject in India and multinationals need to be watchful of implementing and continually monitoring the tax requirements. Some of the key taxes and duties include direct tax, excise duty, customs, service tax, central sales tax (CST) and value-added tax (VAT).

D. SECRETARIAL COMPLIANCE

Listed public companies are subject to secretarial audit for the purpose of reconciliation of the total admitted capital with the depositories and total issued and listed capital. Quarterly reports are to be filed with the stock exchanges. As a best practice, subsidiaries and group companies of established public companies and multinationals undertake secretarial audit.

E. LABOUR LAWS

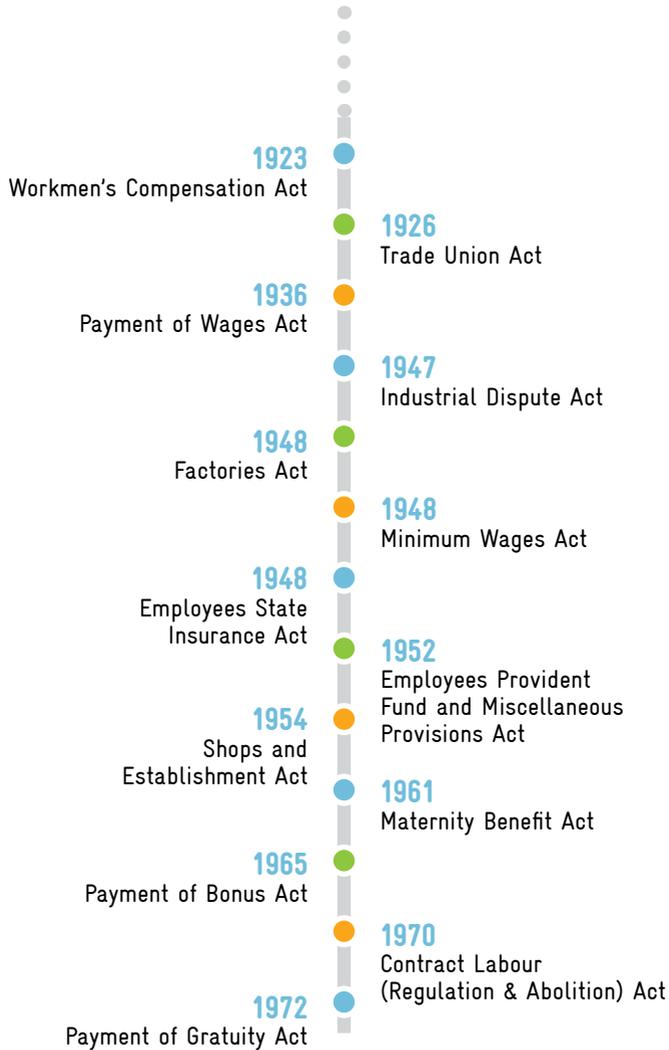
India is a member of the International Labour Organisation (ILO) and strives to provide a conducive environment for its human labour by requiring compliance with the following laws:

- Industrial Dispute Act, 1947
- Trade Union Act, 1926
- Payment of Bonus Act, 1965
- Payment of Gratuity Act, 1972
- Factories Act, 1948
- Shops and Establishment Act, 1954
- Workmen's Compensation Act, 1923
- Minimum Wages Act, 1948
- Payment of Wages Act, 1936
- Employees Provident Fund and Miscellaneous Provisions Act, 1952
- Maternity Benefit Act, 1961
- Employees State Insurance Act, 1948

- Contract Labour (Regulation & Abolition) Act, 1970

F. OTHER COMPLIANCE REQUIREMENTS

1. **Anti-money laundering and foreign exchange**
 - **Foreign Exchange Management Act (FEMA):** Foreign companies which invest or undertake businesses in India are required to comply with various Indian laws such as FEMA, which is a regulatory mechanism that enables Reserve Bank of India (RBI) and the central government to pass appropriate regulations and rules related to foreign exchange. This Act controls receipt and payment to and from outside of India. It requires permissions or pre-approval for various activities of both individuals and corporates. FEMA is periodically amended and notifications issued in line with foreign trade practices in India.
 - **Prevention of Money Laundering Act, 2002:** This Act was enacted to prevent money laundering and provide powers to confiscate assets derived from money laundering. It has been periodically amended over the last few years. Primary objective of



the Act is to prevent and control money laundering and confiscate and seize the properties which are the proceeds of crime. The Financial Intelligence Unit – India (FIN-India) was set up by the government in furtherance of the Act in 2004 for receiving, processing and analysing information related to suspicious transactions as part of the regulatory mechanism under this Act.

2. Environmental Laws

With a growing importance placed on sustainable environment and to prevent indiscriminate exploitation of natural resources, any industry which causes damage to the environment is subject to criminal liability when mandatory requirements of the below mentioned laws are violated:

- Environment (Protection) Act
- Water (Prevention and Control of Pollution) Act
- Air (Prevention and Control of Pollution) Act
- Land Acquisition Act

3. Cybercrime and electronic commerce

Information Technology Act, 2000: The Act serves as the primary law related to cybercrime and electronic commerce. Provisions govern the social media activities of corporates and individuals. Sending offensive messages, interception or monitoring, etc., are all governed by this Act. To make compliant with the technology, this Act superseded and provided for amendment in the Indian Evidence Act, Indian Penal Code, Reserve Bank of India Act, etc. and a Cyber Appellate Tribunal was established as part of the provisions of this Act.

4. Intellectual Property Rights

Intellectual Property Rights in India deal with copyrights, trademarks, patents, geographical indicators and industrial designs. All the acts are amended to keep pace with the changing requirements and to meet global standards. Further, India is a signatory to international agreements in this space including GATT (General Agreement on Tariffs and Trade) and TRIPS (Trade-Related Aspects of Intellectual Property Rights).



5. Anti-trust Regulation:

To avoid collusion among firms in an industry and to curb unfair and monopolistic trade practices, companies are required to comply with regulatory frameworks such as the Competition Act, 2002 and Consumer Protection Act, 1986. The objectives of the Competition Act are set out to be achieved through the Competition Commission of India (CCI). The Indian government has set up the Competition Appellate Tribunal to hear and settle disputes on orders passed by CCI.

In addition to the above detailed compliance requirements applicable to companies from their inception and continuing through their lifecycle, there are governing bodies such as the Central Drug Standard Control Organisation and Drug Price Control Order for Pharma Industry, Petroleum and Natural Gas Regulatory Board for Oil and Gas etc., which list industry specific requirements for businesses operating in India.

IN ORDER TO MINIMISE
THE RISKS IMPOSED
BY CORRUPTION
AND BRIBERY,
ORGANISATIONS MUST
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OF THE GLOBAL
ANTI-CORRUPTION
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II. Anti-corruption Acts and grey areas

OVERVIEW

5 GLOBAL ANTI-CORRUPTION LEGISLATIONS AND REQUIREMENTS

In the wake of stringent global anti-corruption legislations, organisations cannot afford to underestimate these requirements. Owing to the rising enforcement penalties and the real and present danger to an organisation's reputation, confronting corruption dominates the board agenda. CEOs and compliance champions of organisations need to take a step back and ponder on what can be done immediately to mitigate their risks of being exposed to corruption. Being watchful is even more crucial for multinationals as their subsidiaries operate across the globe and are subject to varying regimes with respect to corruption.

In order to minimise the risks imposed by corruption and bribery, organisations must be well aware of the global anti-corruption requirements, the primary ones being the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act.

UNITED STATES: THE FOREIGN CORRUPT PRACTICES ACT (FCPA), 1977

An overview

The FCPA, was enacted in 1977 to prohibit bribery and corruption of foreign officials. It also requires a company to maintain accurate books and records, as well as establish and maintain adequate internal controls. Furthermore, the controls must be able to provide judicious assurance that management instructions are duly executed and inconsistencies, if any, detected and remediated.

The biggest challenge that surmounts organisations is that wrongdoing by one employee can put the entire organisations' reputation at stake. Over the recent years, well-established and some of the largest MNCs in the world have been hard hit as they have failed to assess their corruption risks and be FCPA compliant.

Key Provisions

FCPA's two primary provisions include anti-bribery and accounting:

- The anti-bribery provisions prohibit US persons and businesses (domestic concerns), US and foreign public companies listed on stock exchanges in the US or which are required to file periodic reports with the Securities and Exchange Commission

UNDERSTANDING CORRUPTION

As per Transparency International, "Corruption is the abuse of entrusted power for private gain. It can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs"



(issuers), certain foreign persons and businesses acting while in the territory of the US (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business.

- The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls⁵.

Penalties for violations are intense and these range from multi-million dollar fines to jail sentences for company officials convicted under the decree. Owing to the complex bureaucracy and high levels of corruption prevailing in the country, US companies operating in India have been at the receiving end of the regulators enforcing FCPA.

UK BRIBERY ACT

An overview

The UK Bribery Act 2010 ('Bribery Act' or 'Act') came into force on July 1, 2011 and was introduced at a time when the

BRIBERY AS DEFINED BY THE UK BRIBERY ACT 2010

Broadly, the Act defines bribery as giving or receiving a financial or other advantage in connection with the "improper performance" of a position of trust, or a function that is expected to be performed impartially or in good faith

UK was facing increased criticism as it failed to address effectively the threat of bribery and corruption. It is considered one of the biggest reforms as it simplified the deep-rooted legal structure and modernised the law of bribery. One of the salient features of the Act is that it not only addresses public bribery but also private bribery.

Scope of The UK Bribery Act 2010

The geographical reach of UKBA is expansive. The offences of giving and receiving bribes applies to:

- UK corporate entities, even if they are foreign owned
- British citizens
- Individuals ordinarily residing in the UK, regardless of where the relevant act occurs
- Non-UK nationals and entities, if an act or omission forming part of the offence takes place within the UK

5 Department of Justice

This implies that any company with a footprint in the UK would need to safeguard being compliant with the provisions of the Bribery Act. This can have an extensive reach where a business operates in the UK, but a bribe occurs elsewhere in the world and is not necessarily connected with the British operations nor committed by the British company's employees, having significant implications for MNCs.⁶

Key Provisions

The foundation of the UK Bribery Act is built on four main bribery offences

- Offering or giving a bribe;
- Accepting a bribe;
- Bribing a foreign public official; and
- Failing to prevent bribery

The last offence in particular must be paid due consideration ("corporate" offence of failing to prevent bribery) as businesses could face serious repercussions if they fail to prevent their associated persons from engaging in acts of bribery on their behalf. The only defence for businesses is if they are able to demonstrate the existence of "adequate procedures" that were in place to prevent bribery.

The procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles which include:

- Proportionate Procedures
- Top-level commitment
- Risk Assessment
- Due Diligence
- Communication (including training)
- Monitoring and Review⁷

Prevention of Corruption Act (POCA)

The global anti-corruption requirements outlined above have huge implications for organisation's today which operate across geographies. Within the Indian landscape, the most important anti-corruption legislation in India is the Prevention of Corruption Act, 1988 (POCA). As pointed out within the legal requirements of India, this law prohibits the taking of a bribe or other gratification by a "public servant" and the agency charged with inquiring into and investigating offences within the purview of the law is the CBI and ACB of respective states while the Central Vigilance Commission (CVC) merely has a review and supervisory role to play.

6 UK's Bribery Act 2010: immediate action needed, Osborne Clark

7 The Bribery Act 2010 Guidance, Ministry of Justice



Non-compliance attracts criminal liability from the Indian Penal Code (IPC), 1860. IPC is a comprehensive code that covers all substantive acts of criminal law. It provides for the punishment and also the general exceptions including right of private defence. Among others, IPC also includes offences related to documents and marks, offences against property, criminal breach of trust and criminal breach of contract. In addition

non-compliance to POCA also attracts civil liability to offender.

Comparing the UK Bribery Act, Foreign Corrupt Practices Act (FCPA) and the Prevention of Corruption Act (POCA)

A comparison of the UK Bribery Act, the FCPA and the Prevention of Corruption Act is as under to give an overview of all the Acts:

Key issue	FCPA	UK Bribery Act	POCA
Applicability	Any US person, US company (only public), or anyone acting on their behalf. Any foreign company required to file periodic returns with SEC	Any UK person, UK company (both public and private), or anyone acting on their behalf. Any overseas entity that carries on a business or part of its business in the UK	Any person who gives any bribe or illegal gratification to a public servant. A company can be held liable for actions of its employees
Facilitation payments	Narrow exception provided	Not permitted (criminal)	Not permitted (criminal)
Coverage	Covers only active bribery	Covers both active and passive bribery	Covers both active and passive bribery
Nature of offence – bribery	Paid to foreign officials	Paid to any person	Paid to only a public servant

Key issue	FCPA	UK Bribery Act	POCA
Individual liability	FCPA enforcement agencies extend criminal liability to individuals and enforcement action is not brought against the company prohibiting and addressing effectively bribery and corruption risks	For certain offences, individuals can be prosecuted and liable for imprisonment up to 10 years and/ or fine	Individual liability exists, further, attracts IPC and civil and criminal liability (fine and imprisonment or both)
Payment to political parties	Considered as an offence if the motive is to promote corruption with the objective of retaining or obtaining business	Not an offence	Not an offence under POCA but an individual/ and or company can be tried under Representation of People Act
Penalty	Imprisonment: Can extend to 5 years Fines: Maximum limit defined	Imprisonment: Can extend to 10 years Fines: Unlimited fine	Imprisonment: Can extend to 5 years Fines: Unlimited fine
Investigation agency	Securities & Exchange Commission (SEC); and Department of Justice (DOJ)	Serious Fraud Office (SFO)	Central Bureau of Investigation (CBI) and respective state bureaus

To summarise, confronting corruption is fundamental to the existence of businesses, especially as implications of

regulations like FCPA, UK Bribery Act are far-reaching and enforcement has become a global affair.

6 COMMON CORRUPTION ISSUES: "GREY AREAS"

Corruption continues to pose a significant challenge to large businesses operating in India. The 2016 Transparency International Corruption Perceptions Index ranked India 79 (out of 176). From an MNC setting up in India to running its day-to-day operations, corruption issues continue to worry CEOs and compliance officers alike. Some of the principal issues in this regard are discussed as below.

A. THIRD PARTY INTERMEDIARIES

There are several issues which need to be addressed when one refers to third party intermediaries. Dealing within the boundaries of compliance with the entire gamut of suppliers, vendors, agents etc. was identified as a daunting challenge by our participants.

Some of the associated risks and unlawful actions facilitated by third parties which companies need to be watchful of include:

- Lack of a rigorous business case to retain or engage third parties
- Third parties with dodgy relationships, uneven track record and history of violations and infractions
- Inconsistency in signed agreements with third parties vis-à-vis the actual implementation
- Lack of proper due diligence on third parties to determine their awareness and ability to comply with and adhere to compliance requirements both in letter and spirit
- Potential risk of payment of bribes through third parties in the form of commission, travel and expenses, additional processing fees, false invoices, fictitious expenses
- Ethical misconduct in doing business due to the cultural tradition of gift-giving and entertainment deep-rooted in the modus operandi of third parties
- Government touch points and risk matrices in terms of obtaining contracts, secure payment for services rendered or products delivered, renewal of licenses and permits, clearance of goods at customs, ongoing and routing compliance requirements etc.

India ranks
79/176
in Transparency
International Corruption
Perceptions Index 2016

Many organisations still believe that corrupt practices committed by third party intermediaries would not adversely affect them. It is high time for this

slack approach to be replaced with the thought that this imposes a serious risk to the organisation's reputation and its very existence as there have been cases of global companies in the recent years being prosecuted and heavily fined for malpractices adopted by third parties.

Identifying red flags with respect to third parties therefore is absolutely critical. Compliance officers need to be watchful of the below occurrences:

THIRD PARTY INTERMEDIARIES, WHAT COMPLIANCE OFFICERS HAD TO SAY

- Difficult to define third parties as it could include someone facilitating payment or a vendor assisting in securing business.
- The biggest challenge remains that as organisations, we deny the existence of facilitation payments.
- Compliance is treated as a cost centre and owing to this belief, often the required support from all facets of the organisation, especially the top management goes for a toss.

Third party red flags to watch out for

Excessive commissions to third party agents or consultants

Unreasonably large discounts to third party distributors

Third party is related to or closely associated with the foreign official

The third party consultant is in a different line of business than that for which she or he has been engaged

Third party "consulting agreements" that include only vaguely described services

The third party became part of the transaction at the express request or insistence of the foreign official

The third party is merely a shell company incorporated in an offshore jurisdiction

The third party requests payment to offshore bank accounts¹⁹

An otherwise unlawful conduct is acceptable by the third party as it is the culture in a particular country

Payment requests to another intermediary

Statements like payment needed to seal the deal

Your agent affirms that he has connections in a high profile ministry and winning the contract would be a cakewalk



B. GIFTS, TRAVEL AND ENTERTAINMENT⁸

In our conversations with compliance champions, it was observed that the line between gifts and bribe is very thin, making this subject in particular, a delicate one. For instance, giving mooncakes in China as a part of the Chinese mid-autumn festival or exchanging gifts at the time of Diwali in India is customary, but a participant emphasised that even a small meal hosted by the client with whom a potential contract is being drawn out can be perceived to be a risky affair. Client relationship may demand business courtesies like travel and meals but it does not take long for a gift to be interpreted as a bribe undertaken to influence a policy maker, or gain undue competitive advantage in a pending tax matter for instance. One of the respondents aptly suggested that if an organisation and its representatives say NO the very first time and make it a standard practice, the clients will eventually realise it and in all probability not even offer a quick grab when they meet next. It is important for organisations to have a robust framework in place when it comes to treating the gifting and entertainment gambit.

There are facts which can be documented which establish that the company acted without corrupt intent. One of the

practical solutions could be documenting the facts which establish the company's act was not corrupt while conducting a specific transaction. The gifting and entertainment policy must therefore be clearly documented and shared with employees while acquainting them with the code of business conduct.

C. FACILITATION PAYMENTS/CHAI PANI

Grease payments or 'chai pani' in colloquial terms is the Achilles heel in the fight against corruption in India. The almost constant need and demand for small bribes (often de minimis amounts) to 'move' a file through the clogs of bureaucracy, to issue a receipt for tax paid, to expedite processing of returns or release of goods docked at a port are not uncommon across India.

Such small payments may range from demands of tax inspectors and handling agents, officials processing licence applications, customs officers offering to expedite the clearance of goods through customs, and police officers threatening bogus fines. The burgeoning concern remains that these payments often carry

On the issue of facilitation payments, "first time is the best time to say no"

– Compliance Champion

WOULD YOU GIVE SPEEDY MONEY?

You have just learned you must meet a customer in Pune, so you rush to Sakinaka station to find that all seats on trains have been already booked.

As you contemplate your next steps, the ticket seller tells you that if you quietly give him the equivalent of five dollars, he will bump another passenger and put you on the train.

You have been working on this account for nearly a year, and you know that if you fail to make the meeting, you will estrange your client, anger your boss and perhaps lose the account.

Would you pay the quick money and make it to the customer meeting?

the implicit threat that non-payment may result in glitches for the business. Moreover, absence of the right tone at the top makes matters worse.

Pressure by higher ups to meet the targets puts the sales team for instance in a tough spot and they find it challenging to do away without paying speed money. It is noteworthy that international anti-corruption regulations like the UK Bribery Act prohibit facilitation payments and so does India's POCA.

The US FCPA also prohibits such payments, although, many erroneously believe that the US FCPA provides an exemption in the form of facilitation payments. However, it should be noted that the exemption, if any, is only available if all of these conditions are met:

- The payment must be to "facilitate" or "expedite" a "routine governmental action"
- A routine governmental action is only an action that is "ordinarily" and "commonly" performed by a government official
- Payment should normally be small (with a proper receipt) and paid by many others too
- Action must be something to which payer is already entitled (e.g., to be inspected versus "passing" inspection)
- Payment must be accurately booked (e.g., "facilitating payment") in the books and records



As rightly pointed out by the participants, facilitation payment is one of the most perplexing issues to be dealt with. Further, organisations fail to get the dialogue started on the issue; and when they do, the damage has been done.

D. GOVERNMENT PROCUREMENT

Public procurement is rather vulnerable to corruption and therefore compliance on this aspect becomes tricky. Inappropriate payments made for procuring basic goods or public utility services such as, water, electricity etc. are common. The chief procurement officer of any organisation is often fraught with the challenge of a valuable contracted supplier being ignored over one who fails to add considerable value to the organisation. Specifically in industries like Defence, Aviation, Oil and Gas etc. procurement is responsible for heavy expenditures and therefore is a soft target for corrupt practices. Third party contractors add to the challenge here and so does working in far-flung territories where monitoring and implementing controls becomes a daunting task.

E. TAX AND STATUTORY COMPLIANCE

Businesses operating in India need to comply with the taxation and statutory requirements which span from periodic tax reviews, tax filings, the entire uni-

verse of sales tax, service tax, customs, excise etc. and compliance to the legal structure being adopted. Moreover, they need to keep pace with any reforms in the direction that are announced from time to time. The requirements of SEBI, RBI norms and regulations by other industry bodies also need to be adhered to in addition to meeting the requirements of formation and registration. Complexities and time entailed with property registration, construction permits etc. are some of the aspects that make being fully compliant a challenge for organisations setting up their presence in the country.

Some of the associated concerns include appointment of agents to comply with statutory and tax requirements relating to:

- Employee insurance, provident fund etc.
- Industrial and labour laws
- Companies Act
- Securities and Exchange Board of India (SEBI) compliances
- Attending to assessment proceedings and meetings with tax officials
- Obtaining refunds and claims
- Environment/pollution control regulations etc
- Inappropriate payments offered to customs and sales or service tax authorities

- Classification of goods or services for the purpose of levy duties and taxes
- Assessment of value of goods or services any tax liability thereon
- Agents appoint sub agents for direct dealings, customs or tax authorities
- Unsupported expenses claimed by agent

The whole exercise of enforcing permits, lags in enforcing contracts, tax reporting assessments coupled with bureaucracy and a complex regime, makes it a challenge for businesses to navigate the landscape and at the same time ensuring compliance.

F. LICENSES AND PERMITS

As per World Bank's Doing Business 2016 data, India's rank on starting a business improved to 155 from 164 in 2015. Similarly, the number of days to get electricity significantly improved to 70 (from that of 99 in the previous year). However, domains such as enforcing contracts, registration of property etc. observed no change from before⁹

Expediting the processing of permits or licensing by way of paying government officials is common in India. These are issued at all levels of government and such touch points become opportunities for

corruption to proliferate. The complexity increases further for companies in the manufacturing sector as they require approvals to initiate production until the goods can be delivered to the final consumer. Further, the number of licenses required by government for multinational corporations to operate are plentiful, which has accelerated unlawful practices.

Some of the associated concerns include:

- Obtaining various licenses from government bodies or regulatory authorities necessary to enable the company to establish certain businesses
- Shops and establishments license
- Industry specific licenses like drug license (for pharmaceutical companies) and telecom license etc. (for telecom operators)

In addition to the above, registrations with government interfaces often accompanies inappropriate payment for:

- Registering documents/property with government departments.
- Registering the company with various tax authorities and government bodies/entities such as sales tax registrations, customs registrations, etc.

⁹ World Bank: Doing Business Rankings



The challenge continues when organisations need to renew their licenses and permits on a regular basis. Such low-level transactions may appear miniscule but these often result in violation of anti-corruption regulations. As rightly

pointed out by the participants, facilitation payment is one of the most perplexing issues to be dealt with. Further, organisations fail to get the dialogue started on the issue; and when they do, the damage has been done.



ORGANISATIONS
MUST MONITOR AND
REVIEW PROCEDURES
DESIGNED TO
PREVENT BRIBERY BY
PERSONS ASSOCIATED
WITH IT AND MAKE
IMPROVEMENTS WHERE
NECESSARY



ARTICULATING A
CLEAR AND A VISIBLE
SET OF COMPLIANCE
PROCEDURES AND
STANDARDS IS
FUNDAMENTAL
TO AN EFFECTIVE
COMPLIANCE
PROGRAMME



III. Effective compliance programme and risk management practices

OVERVIEW

7 DESIGNING EFFECTIVE COMPLIANCE PROGRAMME AND RISK MANAGEMENT PRACTICES

Establishing and maintaining a robust compliance framework requires businesses to invest time and effort. A one-size-fits-all approach is not deemed suitable and a compliance programme must be designed keeping in mind the industry, markets, business model and cultural issues that surround the business environment. The foundation of an effective compliance programme must stand on controls and guidelines that meet international standards.

In addition to the key elements discussed further in the section below, a compliance programme must include the following:

- Clearly articulated anti-corruption policy. The anti-bribery policies must also be integrated with a code of conduct and ethics such that the anti-bribery policy becomes an inseparable, indistinguishable and integral part of the company's ethical framework.
- Augmented role of senior management in operating and overseeing the compliance programme
- CEO must be an integral part of the compliance programme; effective and continuous communication with the CEO is critical
- Disciplinary procedures which are appropriate and consistent

- The concept of "SPEAKUP" is a must for anyone to report a breach of conduct. It must be made available through a confidential "Hotline" in various languages. The code of conduct and email communication should ensure that awareness is spread on the availability of such avenues.

At a broader level, as suggested in the UK Bribery Act Guidance as well, organisations must monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary. This could include internal and external reviews, internal financial controls and formal periodic reviews for top level management.

The elements of an effective compliance programme are detailed below:

A. KEY ELEMENTS OF A COMPLIANCE PROGRAMME TO ADDRESS INDIA SPECIFIC RISKS

i. Formulating the right code of conduct

Articulating a clear and a visible set of compliance procedures and standards is fundamental to an effective compliance programme. The ethics and compliance risks that a company seeks to inhibit, detect and mitigate, in case of a violation



lay the foundation for an effective code of conduct. It seeks to maintain the standards and business conduct of the organisation and its subsidiaries. It is a good practice to make available and share the code of conduct with other stakeholders, specifically with employees and business partners (third party intermediaries).

Businesses must bear in mind the following while designing and implementing their code of conduct:

- The code of conduct must emphasise compliance with all applicable laws and regulations, irrespective of the geography where business is conducted
- Documentation is crucial and therefore the code of conduct must be disclosed on the company's website. This information should also be presented in the annual financial

statements or corporate responsibility reports by several businesses

- The organisation must ensure all employees read and understand its code of conduct and an avenue is made available to address any related queries or guidance required
- The code of conduct must be reviewed on a periodic basis to raise any associated concerns and keep pace with the international regulations and changing dynamics of the compliance space

ii. **Setting the correct tone at the top**

Setting the tone at the top is identified as a critical element in determining the efficacy of a compliance programme. This should come across through senior management involvement right from the conceptualisation to the execution stage. Simply put, if the Board of Directors and

ELEMENTS OF AN EFFECTIVE CODE OF CONDUCT

- Message from CEO
- Synopsis of corporate culture
- Scope: Must apply to directors, officers, employees and third parties
- Compliance with law
- Company property
- Employee practices
- Accuracy & transparency in books & records
- Dealings with third parties (customers, suppliers, intermediaries)
- Reporting violations
- Disciplinary procedures

the CEO promote a culture of zero tolerance, it certainly percolates to the very bottom of the pyramid. If the tone set by the higher ups creates a socio-cultural environment which strives to maintain ethical conduct and upholds ethics and integrity, employees will follow suit.

The UK Bribery Act Guidance confirms the need for the Board of Directors and executive management to communicate the agenda of effective compliance in the organisation as “top-level commitment. It reaffirms that setting the right tone at the top is important and therefore the top management must foster a culture wherein bribery is never considered acceptable”.

In practice, an effective tone at the top reflects the following:

- The organisation rewards integrity and punishes unethical practices
- It discloses both the good and the bad in business that is likely to impact its shareholders, investors and employees
- It safeguards employee interests in incident reporting (for instance, in its whistleblower policy)
- It conducts adequate background checks while recruiting employees including top management

“CEO and not the compliance officer is the ultimate torchbearer of compliance in the organisation”

– Compliance Champion

Irrespective of the size, structure or market of a commercial organisation, top level management commitment to bribery prevention is likely to include:

- Communication of the organisation’s anti-bribery stance;
- An appropriate degree of involvement in developing bribery prevention procedures

To summarise, effective tone at the top drives the company’s compliance and risk management agenda. C-suite and company boards must be ready to watch out for any potential warning signs and distance themselves from imposing inappropriate performance pressures or developing a myopic view to drive the organisation forward.

iii. Designing and conducting a localised training programme

Lack of training is usually the weak link in an organisation’s compliance programme. To mitigate the risk of internal compliance breaches, training programmes in an organisation must be designed keeping in mind the organisational needs, industry, business en-



environment, skills of the employees and inclusion of other relevant stakeholders like third parties in its programme. Training third parties and keeping them abreast of the organisation's compliance programme is essential as pointed out at the compliance forum by most participants.

Merely designing and conducting training does not suffice and measuring its effectiveness is imperative. Evaluation is equally important and organisations must measure frequency of the training, who administers it and must follow-up with the trainees along with regular reminders on the lessons learnt. OECD recommends measures designed to ensure periodic communication, and documented training for all levels of the company, which include the company's

ethics and compliance programme or measures regarding foreign bribery, and where appropriate, for subsidiaries.

The UK Bribery Act Guidance reaffirms the notion. It advises that "Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise". The guidance also suggests the following with respect to training:

- Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk
- Training may take the form of education and awareness raising about the threats posed by bribery in gen-

SETTING EFFECTIVE TONE AT THE TOP

- Talk the talk: Your CEO must infuse your company's ethical standards day-in and day out. These should not merely be a part of employee orientation, but must be continually echoed at the annual address to its employees and other company events.
- Walk the talk: Lead by action, let your C-suite drive the tone till the bottom of the organisation.
- Set the correct "mood in the middle": Employees follow suit of the local management and at an operational level approach the mid-level managers to raise any concerns. Embed your compliance culture in the organisation by setting the right mood in the middle.
- To meet the above objective, facilitate or operationalise effective compliance at the local level

LESSONS FROM MORGAN STANLEY: THE CASE OF EFFECTIVE COMPLIANCE TRAINING

An American citizen living in Singapore for working in a renowned real estate company in China pleaded guilty to one-count criminal information charging him with conspiring to evade internal accounting controls that company was required to maintain under the Foreign Corrupt Practices Act (FCPA). Company official was sentenced to nine months in jail and ordered to pay at least \$241,589 and forfeit his real estate interests.

The DoJ did not bring any enforcement action against the company related to official's conduct, a decision much lauded at the time. The reasons included:

- The company maintained a system of internal controls to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials.
- Internal policies were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks.
- The company frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws.
 - Between 2002 and 2008, company trained various groups of Asia-based personnel on anti-corruption policies 54 times.
 - During the same period, company trained this officer on the FCPA seven times and reminded him to comply with the FCPA at least 35 times.
 - Trainings provided to company official were a combination of live teleconferences or web based training; Conducted, in one instance, by the company's Global Head of Litigation and Global Head of the company's Anti-Corruption Group and distributed through written materials specifically addressing the FCPA were provided to this officer.
- The company's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, company conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.



eral and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed

- Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries
- Irrespective of the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them¹⁰

Elements of an effective training programme include:

1. **Determining the scope of training:** While designing a compliance training, an organisation must take into account several factors including the training objective, time involved, cost and the target audience.
2. **Training Content:** Training materials must be localised with real-life examples and case studies so that employees can understand and apply anti-corruption policies in the ordinary course of business in their respective locations or businesses.
3. **Periodicity:** Regularly refreshing training is important. It must be conducted at frequent intervals and refresher training must be provided near high risk events such as major sporting events (e.g., Commonwealth Games, Formula 1, Indian Premier League etc.)
4. **Mode of training:** It is not a critical factor and companies can choose to deliver such training either in person, via web, video or teleconference. Though multiple training delivery methodologies can be adopted, generally, it is considered good practice to have at least one face-to-face training in a year.
5. **Documenting and feedback:** Tracking the success of training is equally important. Reporting and analysis ensure that the effectiveness of the training programme is tracked. Companies can use sophisticated systems to identify systemic issues in the organisation or across particular divisions, locations or language groups. In addition to training records, it is important to evaluate and conduct surprise checks to ensure the training is an ongoing element of the compliance programme and not a one-time effort.

¹⁰ The UK Bribery Act Guidance 2010

iv. Setting up internal control and monitoring mechanisms

A robust set of internal controls is a must especially where risks owing to

corruption and bribery are reasonably high, such as in emerging countries. Internal controls promote efficiency and reduce an organisation's vulnerability to being non-compliant. Frequently over-

Elements of internal control: The Committee of Sponsoring Organisations of the Treadway Commission (COSO)

Control environment	Provides discipline and structure, factors include the integrity, ethical values and competence of the entity's people; management's philosophy and operating style; the way management assigns authority and responsibility, and organises and develops its people; and the attention and direction provided by the board of directors.
Risk Assessment	Involves the identification and analysis of relevant risks to achievement of the objectives, forming a basis for determining how the risks should be managed. As economic, industry, regulatory and operating conditions will continue to change, mechanisms are needed to identify and deal with the special risks associated with change.
Control Activities	Include a range of activities as diverse as approvals, authorisations, verifications, reconciliations, reviews of operating performance, security of assets and segregation of duties. These are the policies and procedures that help ensure management directives are carried out.
Information and Communication	Pertinent information must be identified, captured and communicated in a form and timeframe that enable people to carry out their responsibilities. Information systems produce reports, containing operational, financial and compliance-related information, that make it possible to run and control the business. They deal not only with internally generated data, but also information about external events, activities and conditions necessary for informed business decision-making and external reporting.
Monitoring	Internal control systems need to be monitored through ongoing monitoring activities, separate evaluations or a combination of the two. Internal control deficiencies should be reported upstream, with serious matters reported to top management and the board. ²⁴



looked and precariously ignored, the accounting provisions of FCPA require publicly-held companies to maintain records that accurately reflect transactions and dispositions of assets, and to maintain systems of internal accounting controls.

The Committee of Sponsoring Organisations of the Treadway Commission (COSO) in 2013; published an update to its Internal Control-Integrated Framework. The revision broadened the application of internal control in addressing operations and reporting objectives, and clarify the requirements for determining what constitutes effective internal control. It was also accompanied by Illustrative Tools for Assessing Effectiveness of a System of Internal Control and the Internal Control over External Financial Reporting (ICEFR)¹¹

In a nutshell, internal controls must be built on certain pre-requisites for these to succeed. These must be implemented specifically with respect to payments to third parties, entertainment, gifts and transactions with government officials and similar high risk payments. These controls must cover accounting controls, payment approvals, authorisation limits etc. and must be updated for change in business environment, acquisitions, joint ventures etc. Further, periodic assessment of the design and operative effec-

tiveness of such controls must be tested and deficiencies must be remediated.¹²

v. Managing third party risks

Outsourcing to third parties is convenient and certainly cost effective, but it also brings with it the worry of managing the associated risks. Moreover, with contractors, suppliers and other agents running in thousands for larger organisations and usually with a high attrition, it is a challenge to manage the associated risks. Actions or omissions of the third parties can hold the company liable and this is evident from recent prosecutions by regulators in the space, as highlighted in the previous sections. Particularly, companies must be persistently aware of markets in such high risk areas and their susceptibility to corruption and therefore be watchful of agents or third parties.

OECD analysed 427 cases since 1999 in its 2013 Foreign Bribery Report which revealed the involvement of intermediaries in 41 per cent of the cases.

This included distributors, brokers and sales and marketing agents¹³. It cannot be denied that non-compliance not only has serious implications for the organisation, but also if a contractor or supplier fails to provide products and ser-

11 COSO website

12 Internal Control - Integrated Framework, COSO

13 OECD Foreign Bribery Report

Magnitude of third party risks

Financial	Foreign exchange, currency risk, tariffs, taxes, product price, markup, and rebates
Information	Accuracy, timeliness, relevance, and security of data shared by multiple parties
Integrity	Fraud, regulatory compliance, conflicts of interest, brand, and reputation
Operational	Cost, efficiency, contract concerns, business disruption, and supply chain concerns
Strategic	Larger issues including social responsibility, environmental conscience, and economic impact of third parties.
Technological	Computers, data-storage devices, networks, and emerging technologies ²⁷

vices per designated standards, it harms the reputation of the firm. Given the expansive magnitude of associated risks, as highlighted in the table below, treating third party relationships judiciously is something an organisation cannot afford to ignore.

Moreover, the UK Bribery Act Guidance also echoes the thought that a commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it and such assessment is periodic, informed and documented. It also signifies the adoption of risk assessment procedures proportionate to the organisation's size, structure, nature, scale and location of its activities¹⁴

Mitigating third party risks¹⁵

Mitigating third party risks is not a checklist that a business can strike off its agenda. It is an ongoing activity that requires supervision and monitoring. Some steps that businesses can take to mitigate third party risks include:

- Conduct and maintain a portfolio of third party activities classified by risk factors, including contract value, potential corruption risk, financial risk etc.
- Assign a suitable process to manage such third party risk/relationship
- Conduct random internal audits

14 The UK Bribery Act Guidance 2010

15 The Institute of Internal Auditors



- Communicate code of conduct and reporting policies to third parties through trainings
- Regularly renew vendor or supplier contracts
- Establish a hotline for employees to report third party violations
- Establish an integrated process for reporting non-compliance and violation
- Conduct thorough due diligence on third parties
- Monitor controls through on-site reviews and training
- Utilise tools to address various aspects of third party risk including risk assessment, due diligence, approvals and document retention.

In addition to the above highlighted measures to mitigate risks resulting from third party involvement, due diligence is one of the most significant remedial measures in this context.

Taking a step back: Does your due diligence address the following?

- Interactions with government officials are at various levels in the Indian set-up and this aspect must be incorporated at the very core of any anti-corruption compliance. Does your due diligence address the critical aspects including background, expertise and anti-corruption sensitivity when third parties interact with government officials?
- Do you check for any potential “red flags” before hiring the third party?
- Is your contractual services agreement executed before commencing relationship (after the completion of due diligence)?

The criticality of due diligence procedures is cited in the Guiding Principles laid out in the UK Bribery Act. It specifies that due diligence must be firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. It encourages commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them for bribing on their behalf.¹⁶

vi. Roles and responsibilities of a compliance officer

The role of a compliance officer has become pivotal and more strategic in the past years owing to the complexities of the compliance environment faced by businesses today. As opposed to the traditional role of being the torchbearer of a company’s internal policies and processes and keeping pace with global

¹⁶ The UK Bribery Act Guidance 2010

Despite a vendor being connected to your organisation for as long as 25 years, conducting due diligence on the vendor as a part of an effective compliance strategy is vital. The standard protocol must apply to one and all.

– Compliance Champion

ROLE OF YOUR INTERNAL AUDIT TO MITIGATE THIRD PARTY RISK

- Recognise, quantify and evaluate risks to the business stemming from third parties
- Recognise or assess management's understanding of third party risks and organisation's approach to enterprise risk management
- Evaluate the existing risk management programme and its maturity to handle advanced risk exposures
- Endorse service-level agreements being met
- Recognise and implement process improvements for third parties

regulations, the chief compliance officer (CCO) today works closely with other business functions and has the obligation to keep pace with progressing mitigation strategies in the organisation.

Over the years, the position was constrained by lack of funding or in most cases inadequate support from the C-suite. However, with the challenges of the dynamic regulatory environment and compliance gaining high priority at the top level, CCOs today have gained access to CEOs and the board, elevating them from their earlier role of a compliance or a legal liaison. Owing to these changes, the required skillset of a CCO has also expanded as he deals with not only the impact of new laws, but also

with data privacy issues, crisis management and technology failures.

The regulatory enforcements and rising corporate frauds in India have also certainly put compliance risk at the top of board and management agenda. The CCO has undoubtedly come into the spotlight and assumes the responsibility of running the compliance show. Measures like building a robust compliance team with a variety of skillsets to reduce dependence on other business functions, effective reporting to measure the business impact of compliance and most importantly harnessing support of the CEO can reshape the role to yield greater value in the long run.

17 Source: Chief Compliance Officer

B. ADDRESSING THE CULTURAL ISSUES ON COMPLIANCE

The force of cultural norms, customs and practices is especially dominant in developing countries. Social norms are so ingrained in the system that if ignored, it could have serious repercussions on the company's relationship and trust with its clients or business partners. Absolute ignorance on this aspect may also portray the image of the organisation being "naïve" in its approach.

While it is important for businesses to appreciate in its global compliance programme the cultural differences that exist across geographies, the concern remains as to how organisations continue to function within the boundaries of being compliant in the process. Moreover, the expanse of cultural barriers is not only confined to local traditions, or cus-

toms, but also goes as far as the simple semantic differences and prevailing etiquette norms. Failing to acknowledge these aspects may render a company's compliance programme irrelevant or offensive as per the local norms.

Some of the steps that organisations can ensure to incorporate cultural differences within the purview of its compliance programme include:

- While drafting its compliance policy, corporate compliance must collaborate with the local employees to understand the customs of the host country. The underlying benefit is that high-risk and low-risk gifting and entertainment practices can be clearly known. At the same time, there may be certain aspects which corporate compliance may not be otherwise aware of.

INTERNATIONAL REGULATIONS BRING THE CHIEF COMPLIANCE OFFICER (CCO) TO THE CENTRE STAGE

- Foreign Corrupt Practices Act of 1977
- The Sarbanes-Oxley Act of 2002
- United States Sentencing Guidelines (2010)
- OECD guidance on internal controls

CCOS: TOUGH TIMES

- Lack of resources
- Undetermined role structure: Standalone vs. a combined General Counsel/CCO
- Lack of support from the business functions or mid-level where compliance agenda is operationalised

ROLE AND RESPONSIBILITIES OF A COMPLIANCE OFFICER

- Monitor compliance: Evaluate and measure the state of compliance in the organisation
- Conduct investigations: Authority to manage investigations into any illegal conduct, vulnerabilities or any violations of regulatory or legal requirements
- Liaison with internal audit and other business functions to ensure that the company's compliance programme is implemented in spirit
- Prevent fraud by:
 - Encouraging the use of internal controls to monitor adherence to relevant regulations
 - Effecting change as necessary in the organisation to achieve regulatory compliance
 - Compliance training
 - Implementing a hotline to report any unethical practices
- Maintain awareness of compliance issues
- Provide guidance to the senior management, staff and employees on compliance²⁹
- Collaborate with other business units to drive compliance
- Review existing protocols and training requirements

- The key to resolving cultural issues in compliance is to adopt a customised approach per the host country and understand that a one-size-fits-all approach is not beneficial in all jurisdictions. For instance: in Japan or China, where a moderately priced gift such as a \$250-smartphone may not be considered a bribe. Policies need to be clear yet extensive to accommodate different cultural norms.
- Organisations must develop policies and educate partners and employ-

ees to recognise cultural differences and mitigate risk.

- Compliance outlook and agenda must be deliberated and discussed and should be an essential part of managing partner relationships for steering clear of the cultural pressures.¹⁸

Creating an environment which appreciates cultural differences can harness mutual trust and transparency. Compli-

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ance officers and C-level suite must provide such a platform within the organisation.

C. THINGS TO WATCH OUT FOR IN THE FUTURE

i. Lokpal and Lokayuktas

In India, the Jan Lokpal Bill, also referred to as the Citizen's Ombudsman Bill, is an anti-corruption bill that seeks to appoint an independent body (Jan Lokpal) to investigate corruption cases. This bill, once notified, will strengthen enforcement against corruption in India and it is seen as a pioneering legislation to fight corruption and graft in India. There are significant penal and civil penalties and the bill requires that investigations must be completed in a timely manner and within six months. Further, this bill mandates states to set up Lokayuktas within 365 days. However, states have the freedom to determine the nature and type of Lokayukta.

ii. Legislatives changes in India

The Prevention of Corruption (Amendment) Bill, 2013¹⁹ (pending before upper house of Parliament) will penalise bribe payers in addition to bribe recipients. In addition, the bill contains specific provisions related to giving a bribe to a

public servant and giving a bribe by a commercial organisation. Provisions that cover bribe giving by commercial organisations also includes third parties and intermediaries. This change is consistent with and harmonises anti-corruption regulations in India with international standards.

Further, the definition of a commercial organisation is all comprehensive and includes:

- a) A body incorporated in India and which carries out business operations in India or outside of India
- b) Any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India
- c) A partnership firm or any association of persons formed in India and which carries on a business (whether in India or outside India)
- d) Or any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India.

The Whistle Blowers Protection (Amendment) Bill, 2015²⁰ provides a mechanism for receiving and inquiring into public interest disclosures against acts of cor-

19 The Prevention of Corruption (Amendment) Bill, 2013

20 The Whistle blower Protection (Amendment) Bill, 2015 as introduced in the Lok Sabha, PRSIndia

ruption, wilful misuse of power or discretion, or criminal offences by public servants. The bill prohibits reporting under certain specified categories of information such as information that would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of India. In addition, the Companies Act 2013 and the revised Corporate Governance norms of SEBI has made the existence of the whistle-blower mechanism mandatory for listed companies. Companies are required to establish an effective whistle-blower mechanism which enables all stakeholders (internal or external) to report their concerns.

iii. Global and Indian enforcement trends

Enforcement of anti-corruption regulations continues to increase and there is every indication that regulators, especially, in the US and UK, will continue to focus their prosecutorial prowess against companies that violate anti-corruption regulations. In fact, the trend of prosecuting individuals for specific acts of bribery will only increase in the years to come as companies devote ever increasing resources towards strengthening compliance measures and specific incidents of potential violations

in far-flung subsidiaries will be blamed on rogue individuals. In addition, internal control and accounting provisions of anti-corruption regulations will receive greater scrutiny as attention of regulators shifts towards payment mechanisms towards retention and payment to third parties, expenses incurred on gifts and hospitality. Finally, one can expect regulators to sharpen their focus on the compliance framework and programme in companies, especially, the presence or lack of local (and competent) compliance personnel in high-risk jurisdictions, the nature, extent and frequency of customised training and measures to address the risk of third party intermediaries.

In India, although there are extensive legislations regarding anti-corruption, enforcement has been weak, sporadic and lackadaisical and unfortunately, one can only hope for stronger and effective enforcement of the 2013 and 2015 amendments to POCA and Whistle Blower provisions respectively. However, it is clear that companies will be on their guard given the significant changes in the Companies Act 2013 and government departments will be equally cautious given the increased use of Integrity Pacts in government procurement.



FAQS FOR COMPLIANCE OFFICERS AND SENIOR MANAGEMENT AS A READY REFERENCE RELATING TO ANTI-CORRUPTION AND ANTI-BRIBERY



IV. Six Common Questions and their Answers

This section outlines a set of FAQs for compliance officers and senior management as a ready reference relating to anti-corruption and anti-bribery.

1. Who is responsible for Compliance in my organisation?

The CEO is the true champion of compliance along with the senior management, key management personnel and the chief compliance officer.

2. Are facilitation payments exempt as per FCPA?

FCPA prohibits facilitation payments, though there are certain exceptions to the same, only available if all of these conditions are met:

- The payment must be to “facilitate” or “expedite” a “routine governmental action”
- A routine governmental action is only an action that is “ordinarily” and “commonly” performed by a government official
- Payment should normally be small (with a proper receipt) and paid by many others too
- Action must be something to which the payer is already entitled (e.g., to be inspected versus “passing” inspection)

- Payment must be accurately booked (e.g., “facilitating payment”) in the books and records

3. Is individual liability applicable as per global anti-corruption requirements like FCPA and UKBA?

Yes, individuals are liable to criminal proceedings and/or fine if found guilty as per FCPA and the UK Bribery Act. The sentencing of Garth Peterson by DOJ in 2002 is a landmark case in this aspect, also detailed in the handbook.

4. How do employees determine the value of gifts exchanged?

Besides taking a judgement call, it is suggested that company's gifting, travel and entertainment policy clearly lay out the inclusions in this regard, acceptable value and what is prohibited.

5. How do I safeguard against vulnerabilities to the compliance programme by third party intermediaries?

Identifying appropriate third parties, conducting due diligence, sharing and revisiting the code of conduct for your third parties are some of the steps that must be taken to ensure compliance with anti-bribery and corruption laws.



6. **What are the implications of the provision of “failure to prevent bribery” as per the UK Bribery Act?**

The “corporate” offence of failing to prevent bribery has serious implications where businesses could face serious repercussions if they

fail to prevent their associated persons from engaging in acts of bribery on their behalf. The only defence for businesses is if they are able to demonstrate the existence of “adequate procedures” that were in place to prevent bribery.

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