

# **INTEGRITY GUIDE**

**BY**



**AMERICAN CHAMBER OF COMMERCE IN INDIA**

**AND**



**HILL & ASSOCIATES (INDIA) PVT LTD.**

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## LEGAL DISCLAIMER

The content of this book/document is offered as guidance only to the members of the American Chamber of Commerce, India, and nothing in this book/document should be taken a legal opinion and no one should rely on this as legal advice. The companies are advised to consult a qualified legal practitioner.

## Foreword

Terms such as “Integrity”, “Transparency”, “Corporate Compliance” and “Business Ethics” have assumed great importance in today’s business vocabulary. Amcham has taken an initiative to address concerns emanating from these issues and provide a platform for discussing challenges while suggesting solutions. Compliance is an integral part of corporate management and its success depends largely on its recognition and implementation by senior management. Compliance officers armed with authority and resources must monitor their programs regularly in order to adhere to existing compliance laws in India and overseas.

The contents of this publication should assist managers in gaining an improved understanding of the subject under review. Coupled with workshops and conferences being organized by the Chamber this publication will address some of the ongoing concerns and answer queries which Indian and foreign corporates operating in India may have.

Compliance activities lead to increased costs for running successful business activities in the country. Both Indian and foreign owned companies will have to make these investments for operating in an increasingly globalized economic environment. We are confident that this initiative will lead to an improvement in relations between regulators, stakeholders and civil society organizations.

With advice from the Foreign Commercial Services’ Ms. Margaret Hanson-Muse, the Deputy Minister Counselor for Commercial Affairs in the US Embassy in India we plan to launch regular workshops leading to certification programs for FCPA and related compliance subjects. The excellent work done by Hill & Associates’ Ms. Shalini Chakravorty in bringing out this publication will surely lead to a better understanding of the subject. Mr. Anand Dayal, Chairman of Amcham’s FCPA and Compliance committee has kept this initiative alive and his JD from Cornell Law school as well as studies in Indian law have provided deep insights into this uniquely bilateral concern of FCPA and corporate compliance between India and the United States. Anupama Jha, Executive Director of Transparency International’s India Chapter has walked that extra mile to increase the trust between employer institutions and civil society bodies engaged in addressing the subject of anti-corruption, transparency and compliance.

We request companies to kindly send their feedback and suggestions to our initiatives and this document in particular to make this compendium serve as an effective guide for managers operating in today’s demanding business environment.

Ajay Singha  
Executive Director  
American Chamber of Commerce in India

October 2012, New Delhi

## Anti-Corruption Compliance Strategy

The basis of any FCPA compliance program must start with the “tone at the top”. Employee compliance can only be expected if the leadership, from the Board, CEO and most senior executives, demonstrate their own compliance and ethical behavior in the conduct of the business. Effective FCPA compliance program is based on two separate but complementary instruments: 1. a broad Code of Ethics and 2. FCPA - specific policies and procedures.

Compliance policy and procedures should outline expected ethical business behavior throughout the company rather than simply rules based compliance approach, particularly in 2 areas:

1. **The Code of Conduct** - Rather than simply setting a list of “do’s and don’ts”, a Code of Conduct should outline the company’s core ethical values that reflect the importance of the company’s values and ethical standards.
2. **Ethical Training**- Ethical training is not simply about educating people about rules and regulations, but it is about leadership and structure of the business. It is an ongoing process that begins with HR when the person is being hired and it continues during his association with the organization. It is also about penalizing those who breach ethical codes and rewarding employees in way of offering incentives and the like to those who conduct business ethically.

To create an effective **FCPA compliance framework**, it is necessary to conduct a risk assessment. The basics of any such risk assessment include:

- 1) **Understanding the Whole of Organization Risk** – Use of Enterprise-wide Risk Management (ERM) Framework methodologies will enable identification, analysis and response and help monitor FCPA compliance.
- 2) **Identifying Key Legal/Regulatory Risks** - To identify the key risks it is first necessary to “divide” the company into various “risk centers” and identify the “risk owners” within each risk center. This will enable an organization to get clarity and understanding of its various business processes facing potential FCPA risks. Subsequently it will help to identify “risk owners” and how compliance could be driven in the respective risk centers.
- 3) **Identifying Major Steps to develop/maintain FCPA compliance** - With each individual risk owner, it is possible to trace each step in the compliance process unique to that center. This enables the identification of each FCPA risk exposure in the business process. With this information it is possible to assess the response needed to be compliant.

Corruption and bribery usually occur where a weakness exists with the internal controls and where individual discretion is allowed to override policy without transparency and accountability. To create an effective FCPA compliance framework it is necessary to start with articulated ethical principles. This is done by:

- Ensuring financial and accounting procedures, make and maintain accurate books, records, and accounts combined with independent audits by outside auditors that are tasked to look for specific FCPA potential liability issues as part of their audit,
- A clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws;
- Issuing compliance standards and procedures that are to be followed by all, right from the top management down the line, including all those intermediaries involved in business transactions, representation, or business development or retention in India
- Appointing one or more senior executive management officers to report directly to a Compliance Committee set up under the Audit Committee of the Board, who will be responsible for the implementation and oversight of compliance with policies, standards, and procedures
- Communication to all (including shareholders) who are responsible for the oversight of the India company and to all management staff, external partners and intermediaries of the compliance policies and procedures regarding the FCPA
- Regular training in the requirements of the FCPA and applicable to Indian anti-corruption laws
- Creation of a reporting system, including a hotline (telephone or email) for reporting by anyone (internal or external)
- Clear and visible disciplinary procedures to address matters involving violations or suspected violations of the FCPA and Indian anti-corruption laws
- Clearly defining procedures and strictly following the risk management steps to ensure that when forming business relationships one is dealing with reputable and qualified business partners
- Pre and post relationship due diligence and oversight of all business partners, subordinate companies, agents and intermediaries;
- Clear operational procedures that clearly mention that discretionary authority is not delegated to individuals or organizations that have, or may have a propensity to engage in illegal or improper activities
- A senior management committee to review and to record actions relating to the retention of any agent or sub-agent and all contracts and payments relating to them
- Increasingly regulators are now looking to see in contracts and agreements representations by agents or business partners that affirm their compliance with FCPA and Indian anti-corruption and other relevant laws. Further an agent or business partner, to protect one's own business, will allow internal and independent audits of the books and records to ensure compliance with the FCPA & anti-corruption laws.
- Termination clauses should be clear and concise. That any breach of applicable anti-corruption laws, regulations or representations and undertakings will result in the termination of the contract or agreement and may lead to further regulatory or civil action.

In order that FCPA compliance frameworks do not become an obstacle to good business, the framework is structured to work within the existing operations. Senior management and legal counsel can achieve this by:

- **Setting limits of Discretion & Responsibility** – set rules regarding what expenditure (such as hotel, travel, or other promotional expenses) are *bona fide* and lawful under

local law. There must also be prior consideration of any facilitating payments as to their appropriateness and whether allowable under the FCPA and India laws and regulations.

- **Tailoring Compliance Program to the India operation** – a transplant of a policy from a parent company in the USA will not be effective. In India a bottom up approach by first identifying the FCPA risks that exist is a good starting point followed by the assessment of the personnel who will be responsible for decisions involving those risks. They are then able to be the first who are involved in the implementation of a compliance policy and can effectively integrate it in their daily operations.
- **Establishing Periodic reassessment** - particularly as the business grows. In order to evaluate whether existing controls are appropriate to the FCPA risks and to the Indian environment, regular reassessment is required. India, as its very nature suggests, is likely to create a number of corrupt risk events. Regular review and assessment of reports and records will help an organization adjust its compliance program accordingly.
- **Guidelines, Rules, and Examples** – effective compliance comes best through a clear and concise message. Guidelines should provide basic explanations of the standards for employee conduct, in all relevant languages of the local staff. The rules must be clear and unequivocal about strict compliance and the disciplinary action that will follow in case of a breach. Finally, examples should be apt for the staff to understand why compliance is necessary. Also, the examples must be relevant to the organization and should demonstrate how to apply the guidelines and rules to a specific work function.
- **Implementing Controls on the Method of Payment** - FCPA risks have a similar profile to those posed by money laundering. Adopting an AML typology makes it harder for employees/agents/others to divert apparently proper payments for corrupt payments. AML policies include requirements for receipts, payment in local currency, and payment to local bank accounts only in the name of the payee. In connection with travel, entertainment, and promotional expenses, some companies now insist on paying directly for travel and lodging, rather than paying travel stipends, or allowing guests to make their own arrangements and later seek reimbursement.
- **Training** - should be sensitive and appropriate to the level of the subject audience. Materials need to be both comprehensive and understandable. Training should be conducted in the local language of the audience and in a manner that keeps the interest and attention of the employees. Question and answer periods permit the trainer to assist the attendees with compliance, and also gives management insights into issues that may need to be addressed on the ground. Important questions raised in training sessions are often useful for formulating content for subsequent training materials and guidelines.

### Steps to Investigating an FCPA Breach

- **Identification** - The identification of a potential FCPA breach (either through review or by way of a report) can create a number of significant challenges for an organization. How the response is crafted and executed can mitigate some of the potential fallout from regulators, or exacerbate the company's and individual's liability.
- **Response** - The first step in any response must be an assessment of the issue. Advisably this should be done with expert legal and professional advice, but the following questions would facilitate any assessment:

- **Source of the allegation** – whilst never dismissing allegations based only on their source, the credibility of the source will help determine the next steps in any response.
- **Location** -Where was the payment made? India is a high risk country, and different types of business and business relationships have varying degrees of risk.
- **When did the payment occur?** Is this an on-going problem that must be immediately remediated or something that happened several years ago?
- **What were/are the controls and oversight of the business unit involved?** Does this business unit have a history of compliance problems, whether related to the FCPA or not?
- **Who is involved?** An allegation against management or senior employees increases the potential penalties assessed to the company as a whole and amplify the company's reputational risks from failing to investigate.
- **Does the allegation suggest that the problem is of a systemic or isolated nature?** Even if the problem appears to be isolated, how likely is it that a thorough investigation will reveal more widespread problems?
- **Is the conduct the subject of an already existing investigation or litigation either in the United States or elsewhere?** A company cannot assume that an allegedly improper payment is just a local issue — it could be indicative of a global enforcement problem.
- Having given preliminary assessment of the allegation and its credibility, the organization must then understand whether an investigation is necessary. The challenge posed by a full investigation includes the costs, legal fees, potential business disruption and an image and reputation impact on customers, staff, shareholders and the market. In most cases the benefits of an investigation greatly outweigh such costs.

### **Deciding Who Should Conduct the Investigation**

The choice usually falls into three categories:

1. Existing internal, non-legal personnel (such as internal auditors and/or compliance personnel)
2. In-house counsel or regular outside counsel; or
3. Independent outside consultant.

While internal staff personnel and in-house counsel are far less costly and disruptive to the company (not to mention significantly more familiar with the company's business model and relevant compliance practices), it is almost always advisable to retain experienced independent outside consultant to conduct investigations into FCPA violations. Primarily they offer a neutral and independent approach and are viewed without any bias by all who are subjects of the investigation. Moreover, the internal investigating personnel do not have to deal with awkwardness inherent in interviewing employees with whom they may have a working relationship. The outside consultants are also seen as not having any stake in the outcome and as such tend to foster greater cooperation from those interviewed or spoken to.

External consultant brings an objective view to consider the facts and usually have experience as regulators when viewing the circumstances. Outside counsel are better able to view facts objectively through the eyes of regulators. Outside counsel do not have a direct stake in the outcome of the investigation and, therefore, are not swayed by company allegiances.

Finally, before initiating any investigation, internal or external, it is necessary to understand all the implications of an allegation not only as a breach of the FCPA but to all relevant Indian anti-corruption laws, local criminal laws and regulations.

In addition, specific employee contact(s) should be appointed as the go to person for an investigation. This person(s) should have general knowledge of company practices and the means and authority to schedule interviews and assist investigators in collecting documents and electronic evidence. There is a risk of information leakage so in certain cases companies should consider developing internally (or with outside assistance) a strategy and a proper response to minimize any damage to listings, with regulators or customers from public disclosure.

#### 1. When Should a Voluntary Disclosure Be Considered?

SEC disclosure obligations aside, a company should seek immediate legal advice as to when it is obligated to report a potential FCPA violation.

*When considering business in India as part of a Merger & Acquisition (M&A) or Joint Venture (JV), FCPA liability can still occur even if the company is only a minority shareholder. In some instance a failure to do sufficient due diligence may see you buying in a corruption issue that you will be ultimately asked to pay for.*

*To mitigate that risk, prior to any agreement a detailed and thorough due diligence should be carried out on any JV partner that will include written assurances from the prospective business partner that it has not made, or been accused of making, a prohibited payment under the FCPA during the preceding years.*

### **FCPA Due Diligence**

FCPA due diligence should take into account the peculiarities and challenges that India presents when considering acquisition or partnership deals. Even companies that have existing relationships, perhaps long standing business involvement in India, should also consider conducting a specific FCPA due diligence.

In India the lack of computerized or central records and the size and diversity of the country must be taken into consideration when a due diligence is to be conducted. Discretion and sensitivity, the type of business involved, its history, its existing relationship and interactions with the various levels of government in India and perhaps its dependence on those relationships will be a significant part of determining the level of due diligence required to satisfactorily mitigate their FCPA risk.

A properly constructed due diligence will begin with obtaining public or open source information. In India this may require time and travel as records, such as business registration documents, in many locations are still in paper form and files must be manually searched. Even where computerized information is available it may not be accessible through public databases and can only be retrieved by visiting the relevant office.

FCPA due diligence is different from standard background checks in that for pre M&A or JV's, companies should consider conducting FCPA specific interviews and distribute questionnaires directed to relevant senior or high risk personnel, prior to the deal being completed. This

exercise will often identify significant information that might constitute a 'red flag'. Red flags can be significant in the context of business in India and if the target company has significant business with government, whether State or National. Typical FCPA due diligence can identify information such as:

- The level of government business;
- The number and nature of agents and consultants used and what they are paid;
- Locations in India where there are operations (within India some industry and locations pose a higher risk for corruption)
- The business reputation, not just what is published but what is known around the industry about the company or an individual – has it ever been the subject of a corruption allegation or investigation;
- Has it been involved in any lawsuits or enforcement action
- What level of contact the company or individual has with government or regulators (including what the business has by way of licenses, permits and whether they are subject to renewal etc);
- Any Politically exposed persons - (either as owners or directors or employees or relatives);
- The extent of the internal control process and what if any anti-corruption/anti-bribery policy and procedures are in place
- Whether there is an anti-corruption compliance program? If so, does this program include written policies and procedures and employee training
- Identify what if any sub-contractors, agents or vendors that are employed and their role.
- Wherever a red flag regarding any payment or transaction is identified that may create a liability under the FCPA it is recommended that legal advice be sought regarding whether the circumstances of that payment or transaction would violate the FCPA.

To further mitigate compliance risks, prior to a deal being concluded, representations and warranties concerning compliance with the FCPA and other laws and regulations should be included in contracts. The M&A target or JV must be required to maintain accurate books and records, and they should agree to regular access and audit. Whilst some of these provisions can seem intrusive, in a global context this is the way organizations are moving, and industries such as banking and finance have had such requirements for AML compliance for many years.

### FCPA Health Check

If dealing directly with a governmental official or department, have you done due diligence on the individual and department to ensure that they are not likely to ask for a bribe now or at some time in the future?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
If dealing with a consultant, joint venture, partner, distributor, subcontractor, supplier, etc., have you done due diligence on the individual or entity to ensure that they are not likely to give a bribe now or at some time in the future?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Is the country or region where you are doing business (or the place where your potential consultant, joint venture, partner, distributor, subcontractor, supplier, etc. will do business) known as a place where officials are likely to ask for or accept bribes?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Do you know all of the owners of the entity with which you are dealing? Are there any owners who have a connection to a governmental official?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Who recommended the individual or entity with which you are dealing? Was it a trust-worthy source? Was it a government official?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Has the individual or entity you are dealing with requested that payments be made in an unusual manner (i.e., in cash, in a third country)?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Does the individual or entity you are dealing with currently have the experience or capability to perform the task?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Does the agreement you are entering into with the individual or entity contain written representations that FCPA laws and regulations will not be violated?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Does the commission for the individual or entity exceed the normal rate for commissions?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Is the individual or entity you are dealing with in an industry where bribery is not uncommon	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
If you are relying on an exception to the FCPA (i.e., payments to government officials to urge them to do (or do more quickly) that which they are already obligated to do, such as providing police protection), have you contacted the Anti-corruption Department?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Has your company been subject of and an FCPA investigation, fine or settlement previously anywhere?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
Does your organization operate a fraud risk assessment framework or conduct regular fraud risk assessments	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA

## FCPA Overview

The Foreign Corrupt Practices Act (FCPA or Act) was enacted in 1977 as a statement of U.S. foreign policy demonstrating that the United States intended to target public corruption and fraud in the international marketplace. The FCPA creates a criminal offense for any U.S. person or listed US company, acting anywhere in the world, or any foreign person that acts in the United States, to make a corrupt payment to any foreign government official, directly or indirectly, to obtain or retain business. The FCPA also requires US listed companies to maintain accurate records and implement adequate internal controls. Although enacted before the U.S. Sentencing Guidelines and the Sarbanes-Oxley Act, the FCPA contains within it principles that have since been made law through these acts. The scope and applicability of the FCPA include:

- All U.S. nationals or U.S. companies that do any act outside the United States in furtherance of a bribe or corrupt payment
- Liability to foreign nationals and foreign businesses that do any act in furtherance of a prohibited payment while in U.S. territory;
- Criminal sanctions for FCPA violations for foreign nationals employed by, or acting as agents of U.S. businesses;
- A definition of foreign officials to whom payments are prohibited; and
- Prohibiting payments to foreign officials for the purpose of influencing a foreign official's acts or decisions, or
- Inducing a foreign official to act in violation of a lawful duty or order to obtain or retain business.

## FCPA Enforcement – Increasing Trend

FCPA enforcement in recent years has seen increased efforts by the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) to work cooperatively with law enforcement and regulatory agencies globally in an effort to stem corruption as emerging economies play greater part in the global economy. Treaties and legislation aimed at eliminating bribery and other forms of corruption are becoming more prevalent in global markets and many are expanding their jurisdictions extraterritorially in line with the FCPA. Mutual Legal Assistance Treaties have increased the ability of U.S. and foreign prosecutors to enforce U.S. criminal law and to exchange information freely. Similarly, information-sharing agreements or memoranda of understanding with foreign securities regulators greatly facilitate the investigation of FCPA violations that largely occur abroad. In general, the level of cooperation and information sharing between agencies in furtherance of international anti-bribery and corruption laws enforcement as well as the strengthening of securities law.

SEC and DOJ enforcement actions are on the rise. In 2004, the DOJ filed only two enforcement actions while the SEC filed three actions. Then, 2010 marked a historic peak in FCPA enforcement actions when the DOJ filed 48 and the SEC filed 26 enforcement actions. Last year, in 2011, the DOJ filed 23 and the SEC filed 25 enforcement actions.

## A Breakdown of the Act

The FCPA has seven specific elements:

- **An Act By a Covered Person** - the Act applies to U.S. and foreign issuers, domestic concerns, and foreign non-residents who meet the various jurisdictional requirements.
- **In Furtherance of an Offer, Payment, Promise to Pay, or Authorization of Payment**—prosecution does not rely on the actual bribe taking place. Evidence that an offer or authorization of a bribe has occurred is sufficient to create liability.
- **Anything of Value** - There is no minimum monetary value as such rather the local country environment and its interpretation of value may be taken into account. Value is not about the item or thing's monetary or objective worth, but what it is worth to the recipient. If the item is sufficient to incentivize a public official to misuse his or her office in expectation of receiving the item then the monetary value is irrelevant. Therefore, in theory, liability is created from the offer of an item of object, or payment of a single rupee in India. The definition of “value” is deliberately very broad. Investigations & prosecutions have commenced into the provision travel and entertainment, contributions (sometimes disguised) into political campaigns, education of children or the provision of high cost medical services.
- **Directly or Indirectly** - the FCPA prohibits doing indirectly what cannot legally be done directly. That is, using third parties to circumvent the Act, whether knowingly or by consciously disregarding the likelihood that a corrupt payment will be made, is specifically prohibited.
- **To a Foreign Official** -The definition of a “foreign official” goes beyond politicians and includes employee of a foreign government, including the departments, agencies and instrumentalities (state-owned or controlled commercial enterprises – can include listed companies with independent management but where the government is a significant

shareholder or stakeholder). It also includes party officials and members of public international organizations, political candidates, the police and the military, and employees of state-owned or state-controlled enterprises

- **Corruptly**—payments or other items of value intended to improperly influence a foreign official to misuse his position to provide an advantage back to the briber or for the benefit of a third party. The agreement need not be explicit, simply that the exchange is intended for the corrupt purpose.
- **For the Purpose of: Influencing Official Action or Decision, Inducing an Unlawful Act, Inducing Official Influence Over Government Action, or Securing Any Improper Advantage**—the intention is to acquire government decisions/action in order to obtain a business advantage, something to which the company or the individual might otherwise be entitled to obtain or retain.

## Primary Aspects of the Act

### *Anti-bribery Provision*

The FCPA anti-bribery provisions apply to any US listed company (i.e the issuers of U.S. securities and broadly to any U.S.-based company) and its officers, directors, employees, agents, and stockholders regardless of nationality or place of residence. Therefore the conduct of foreign non-residents who act outside the United States on behalf of a person covered by the FCPA can cause a company to be held criminally liable for the acts of that single individual, even if it's key officers did not know of the illegal payments.

The FCPA applies to a U.S. citizen or permanent resident and any foreign organization or individual with a jurisdictional connection with the United States. The anti-bribery provisions apply to these organizations or individuals globally, regardless of where outside the US a bribe takes place. In relation to foreign companies and individuals operating inside the US, the DoJ & SEC have enforced the FCPA against them for bribery found to be perpetrated in the United States (see “domestic concerns” below).

The anti-bribery provisions also include anyone who might be acting on behalf of an organization or an individual. Therefore using agents or other forms of intermediaries to pay a bribe will not protect an individual or organization from prosecution. Evidence from email and even text telecommunications can be recovered and used as evidence and therefore the actions of any intermediary, anywhere in the world, is covered by the FCPA when bribery is being investigated.

The anti-bribery provision prohibits a company or person from corruptly paying or offering to pay, money or “anything of value” to a “foreign official” in order to “obtain or retain business.”

The reference to *anything of value* is not limited to cash or cash equivalents. Instead, it can include discounts, gifts, use of materials, facilities, equipment, entertainment, drinks and meals, transportation, lodging, and so on. The Act does not specify a minimum amount that constitutes a bribe. Additionally, the phrase *foreign official* has been broadly interpreted to include employees of state-owned or state-controlled entities (SOEs), which are exceedingly common in parts of the world where the government owns or controls what would otherwise be private industries.

To *obtain or retain business* is not limited to procuring governing business or contracts, but can include bribes intended to secure preferential tax or customs treatment, government licenses or permits, or other competitive advantage. One notable exception to the anti-bribery provision is the so-called “facilitation payments” to expedite routine governmental action such as processing government paperwork or providing other government services. However, fraudulently reporting a bribe as a facilitation payment can start one down a slippery slope.

An “issuer” based out of the U.S. who uses emails or other forms of communication to give bribe can be prosecuted. The FCPA and other U.S. laws cover any communication that may promote or facilitate bribery. Mail or other methods such as a telephone call, e-mail, or wire transfer to facilitate or promote (even if the bribe is not actually carried out) the making a bribe does not require that the payment itself travel across US borders. If the communication passes through the U.S. in the furtherance of bribe then the U.S. Courts have empowered its law enforcement authorities to take necessary action .

The concept of “in furtherance” of a corrupt payment or bribe gives the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) an authority to aggressively investigate and prosecute actions off shore. This can also apply in situations where the DoJ may charge an individual for conspiracy to bribe a foreign official. The DoJ will seek to prosecute all those party to the conspiracy where an international phone call or e-mail has included some aspect of its transmission within the U.S. Those involved will be targeted even if none of them have any connections or business with the U.S. The FCPA does not require that each individual defendant to have personally used an interstate communication method or even authorized one to be used.

The FCPA also defines entities that are subject to FCPA as “domestic concerns” when they do not fall under the definition of an issuer. These are U.S. citizens, foreign residents of the U.S., business entities that are incorporated in the U.S. or business entities incorporated in other jurisdictions but maintain their principal place of business in the U.S., and their officers, directors, employees, agents and stockholders. The FCPA prohibits domestic concerns from using interstate commerce in furtherance of a bribe or corrupt payment to a foreign official. The reach of this definition means a bribe or corrupt payment by a U.S. business or citizen conducted completely beyond the borders of the U.S. without any communications passing within U.S. ‘in furtherance’. The example is where a U.S. citizen, working as an interpreter in Iraq, was prosecuted for offering a bribe to an Iraqi police official and nothing in the individual’s conduct involved actions or communications that crossed US borders.

### *Exception – Facilitating Payments*

The FCPA does not prevent facilitating payments which are seen as necessary to obtain certain routine governmental services performed by a foreign official. The definition of routine government services refers to only those services related to ordinary day to day business operations including:

Applying for and receiving permits or licenses that enable an individual to conduct business.  
Processing standard government papers, such as visas;

In some circumstances where it is necessary to secure the services of local law enforcement agencies to provide police protection, to ensure mail pick-up and delivery, or confirm certain

regulatory or customs inspections; and ensuring the provision of utility services, loading and unloading of cargo, or protecting perishable products from deterioration.

Where government ministers or senior bureaucrats are required to obtain government action, but that action does not involve the exercise of discretion (e.g. it will never apply to the award of a contract)

### *Accounting: the Books & Records Provision*

The accounting provisions require companies issuing U.S. registered stock exchange securities to maintain accurate books and records and proper systems of internal controls regarding all transactions and not just those that might violate the anti-bribery provisions. The accounting provisions apply only to “issuers” which means that the entire Act applies to any company subject to the registration or reporting requirements of the Securities Exchange Act of 1934 (“issuers”).

The books and records requirement applies broadly to all books, records, and accounts that “reflect the transactions and disposition of the assets of the issuer,” and any inaccurate or misleading entry (even those unconnected with foreign bribery) is prohibited. The internal controls provision requires issuers to devise and maintain a system of accounting controls to monitor the execution of company transactions to ensure that all such transactions are accurately recorded (see also the relevance of Sarbanes Oxley Act).

The accounting provisions also make issuers responsible for the books and records and, indirectly, the conduct of their subsidiaries and affiliates, wherever located. When an issuer controls more than 50 percent of the subsidiary’s stock, that subsidiary must comply with the FCPA record-keeping requirements in the same manner as the parent corporation. The Act also imposes liability for the inaccurate books and records of all majority-owned affiliates. Liability under the books and records provision allows the SEC to investigate extensively along the corporate chain and enforce improperly recorded payments to non-governmental entities. The SEC has pursued a U.S. company for the failure of a fifth-tier foreign subsidiary to record accurately payments made to Indian officials where the payments were made without knowledge or approval of the U.S. parent.

The books and records provision also provides penalties against issuers for purely foreign payments by foreign parties in circumstances where the U.S. prosecutors are not able to establish jurisdiction under the anti-bribery provisions. For example, employees of a U.S. chemical company’s Indian subsidiary made payments to key members of a federal regulatory committee in connection with the registration of the subsidiary’s agro-chemical products. In addition, the subsidiary bribed thousands of state licensing officers, typically in increments of less than USD100. The Indian subsidiary did not accurately record these payments in its books and records. The U.S. prosecutors also did not have the jurisdiction to pursue a criminal or civil anti-bribery claim because the payments were made by Indian employees of an Indian corporation outside of the U. S. and, based on the publicly available information, there was no use (via e-mail, telephone or otherwise) of the U.S. commerce system. However, the failure of the subsidiary to record the payments accurately (*i.e.*, bribes) made it possible to penalize the issuer for the underlying conduct of its subsidiary.

Where an issuer holds less than 50 percent of the voting power, the accounting provisions

require it to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls.” What is “reasonable under the circumstances” will vary depending on the degree of control, the relevance of global accounting standards and the laws and practices of the country in which the subsidiary or affiliate is located. It may not be feasible to impose global standard accounting principles on a minority-owned foreign affiliate, however issuers are expected to take prompt action upon discovery of corrupt payments. In other contexts, the SEC has taken the position that an ownership interest of less than 50 percent may nonetheless confer control, depending on the relative shares of ownership and minority shareholder rights, such as the ability to block or veto certain activities, to appoint senior management, or to block a quorum. The exercise of a *de facto* control will bring with it the same liability to the issuer as if they were a majority owner under the accounting provisions.

The accounting provisions also apply to individuals, including officers, directors, employees and shareholders of issuers, who cause the falsification of the issuer’s books and records or fail to implement or circumvent required internal accounting controls.

### *Accounting Issues*

The following issues are commonly observed with respect to accounting treatment of improper payments:

1. Incorrect invoicing of sales.
2. Creation of fictitious expenses/ incorrect booking of expenditure/ routing of payments through agents/consultants.
3. Improper accounting has a host of implications under Indian law, including:
  - a. There is an obligation under the Companies Act to state ‘true and fair accounts’, which could be violated in these cases, entailing personal criminal liability for officers of the company.
  - b. Payments with an illegal purpose cannot be deducted as expenses under Indian tax laws. Therefore, recording such payments as expenses, and recording fictitious expenses, could be construed as tax evasion.
  - c. Mitigation of the Risk

## Penalties for FCPA Violation

### *Penalties for Bribery*

A convicted breach of the FCPA can result in significant fines against companies and for their individual officers, directors, employees, and agents as well as losing any government related work and being prevented from such work in future. Individuals can, and are, subject to imprisonment, fines, and other reputation and future prospects impacts. The criminal penalties for violation of the anti-bribery provisions are:

- Up to a \$2 million fine per breach by companies;
- Up to a \$250,000 fine and five years in prison for individuals
- As well fines for corporate entities and individuals can be proportionate to the value of what was gained by the corrupt payment, or alternatively assessed against what the victim's loss was. The calculation, under the US Sentencing Guidelines, is equal to twice the amount of the total gain for the company or the loss to the victim.

NB - Each penalty can be applied to each single breach of the FCPA

### *Penalties for accounting breach*

Where a company or individual is found to have deliberately violated the books and records section, or has willfully and knowingly made a false or misleading statement in any application, report, or document required to be filed:

- For an individual, up to a \$5 million fine and 20 years in prison, or both;
- Up to a \$25 million fine for public companies; and  
as with bribery, an assessment of the gain for the individual/company or the loss to the victim equal to twice the amount of that total gain or loss as appropriate.

NB - These penalties can also be imposed for each individual breach of the FCPA, thus for multiple breaches can cumulatively be financially devastating for some organizations

### *Civil penalties*

- A civil penalty of up to \$10,000 can be applied to any firm or any of its officers, directors, employees, or agents found to have made a corrupt payment or bribe
- Civil penalties for a breach of the accounting provisions can range from \$5,000 to \$100,000 for individuals and \$50,000 to \$500,000 for companies.

## Other Considerations of the Act

### *Gifts and Entertainment*

The FCPA does not prohibit the giving of gifts and entertainment to foreign officials as long as the intention is not related or linked to the obtaining or retaining business. Gifts, entertainment, and travel for foreign officials are allowed provided they are permitted under local law and should be of value relevant to the circumstances – INDIA FESTIVAL GIFTS??

As a guide, any gifts travel, or entertainment to be provided to a foreign official should be on the basis:

- There is no pending business with that official
- The gift etc. is not excessive, assessed by the nature of the person receiving the gift etc or the cost of the travel or restaurant, event etc.
- The Gift should be limited to individual, not family, staff or guests;
- The gift etc. should be legal, consistent with your company policy and accepted generally within the industry or local cultural standards
- For accounting purposes any gift etc should be fully documented in the company's books and records, including the purpose of the gift, prior approval of the expenditure by the management and an explanation of the value of the gift etc.
- A sound mitigation strategy for arranging travel and hotel expenses for government officials is to make all the arrangements and pay hotel and travel expenses directly, rather than allowing the officials to pay their own way and to seek reimbursement.
- One of the best ways to avoid being in breach of the FCPA is to ensure all company policy and procedures relating to business dealings with foreign government officials ensure and encourage transparency by documenting communications and reasons behind the provision of the gift or entertainment, specifying what the expenditure will be.
- Request by Foreign Officials
- In some locations in India government officials responsible for fees and taxes, will solicit payments for processing or otherwise acting. The FCPA allows facilitation for non-discretionary government services but in relation to the payment of published government fees and taxes, such payments should be made directly to the government, not the individual. Further;
- They should pay only those charges officially or otherwise approved under legal advice
- Accurately document all taxes, fees, and fines to avoid duplicative payments and ensure transparency and any appearance of corruption.

## Enforcement of FCPA & Defenses

Important for companies operating in India is that both the anti-bribery and the accounting provisions apply to foreign subsidiaries and affiliates of issuers, and also make U.S. companies liable for acts taken outside the United States by those subsidiaries and affiliates. Penalties for violations of the FCPA include criminal charges carrying terms of imprisonment for individual officers, directors, or stockholders upon conviction, significant civil fines, and substantial loss of goodwill, and the potential loss of government licenses

Both the SEC and DOJ have jurisdiction to enforce the FCPA, although only DOJ can pursue criminal penalties. Compliance with the accounting provisions of the FCPA is equally as important as the anti-bribery provisions, as enforcement activity by the SEC can be equally as aggressive as the DoJ.

The FCPA does allow for two affirmative defenses:

1. That the payment was lawful under the written laws of the foreign country, or
2. That the payment was a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, and directly related to the demonstration or explanation of a product or service or performance of a contract with a government agency.

Additionally, the FCPA includes an exception allowing “facilitating” payments, which are payments made to expedite or secure performance of a routine, non-discretionary governmental action.

## United Kingdom Bribery Act

The UKBA came into force on 1 July 2011 with offences for individuals and corporate entities in both the public and private sectors. The offences under the UKBA apply not only to anyone in the UK (regardless of their nationality or where their company was incorporated), but also extraterritorially for any company with a "close connection" to the UK. The phrase "close connection" means that an individual holds UK citizenship or nationality or a company is incorporated in the UK. The UKBA will apply to any company that may only have small part of its business in the UK, such a representative office. Any business with any kind of business presence in the UK is bound by the UKBA, irrespective of where the primary business is conducted. As a result any person working for, or doing business on behalf of, the Company is bound by the UKBA even that person has no connection to the UK. Therefore Agents, Vendors, intermediaries and representatives working for other organizations can be bound by the UKBA when working for or on behalf of a UK connected organization

Responsibility for investigating and prosecuting breaches of the UKBA rests with the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP). The SFO is an independent Government department that investigates and prosecutes serious or complex fraud, and corruption. The DPP is part of the Crown Prosecution Service (CPS) which is responsible for the prosecution of criminal cases investigated by the police and the SFO.

When considering whether to prosecute a bribery case the two considerations are:

- Whether there is enough evidence to obtain a conviction
- Is a conviction in the public interest

The SFO and the DPP will work closely together in determining whether a prosecution will take place, but ultimately it is the decision of the DPP that determines what cases will be taken to trial.

There are 4 offences under the UKBA;

- Bribing or offering to bribe another person;
- Accepting or soliciting a bribe;
- Bribing or offering a bribe to a foreign public official (FPO); and
- Failing to prevent bribery – this offence applies to the corporate entity.

To substantiate an offence the bribe must obtain, or have been intended to obtain, some advantage by inducing or rewarding a person to perform their duties improperly in relation to their responsibilities, duties and obligations (“relevant activity”) relating to any job or business.

The bribe or attempted bribe may be direct or indirect. The advantage or benefit of the bribe does not have to be directed at the person who is performing their role improperly. For example, payment of education expenses for a family member will constitute a bribe if the intention of paying those expenses is to obtain an advantage. As well, the actions of third parties, agents and the like can also create liability for a UK connected company even if they were unaware of the actions of the third party but received an advantage from the third party bribing of someone to perform a relevant activity improperly.

The corporate penalty section of the UKBA create an offence if an individual or entity "associated" with them carry's out a bribes in order to obtain or retain business for the corporate entity. Therefore an individual who performs services for or on behalf of the company can create liability for the company. That person can be an individual or another corporate entity and therefore the application of the law is to branches, agents, service providers and employees. It also means that parent companies and other subsidiaries can become caught up in a bribe if they are performing normal business functions. For a company associated with an individual or other entity that has carried out a bribe:

1. It is irrelevant whether the individual or other entity is itself committing any offence if it is outside the UK and the laws of the country where it is does not ban the behavior, and
2. It is irrelevant whether the company is aware that the bribery is occurring, only whether it has procedures in place to prevent it

Under the UKBA a Foreign Public Official (FPO) includes anyone outside of the UK with a legislative, administrative or judicial function. The UKBA, unlike the FCPA does not allow for facilitation payments, nor is it limited in its application only to government officials and government agencies. The difference between this aspect and the FCPA has meant companies must consider when carefully their policies relating to gifts and hospitality:

- In determining what an acceptable level of hospitality might be, consideration must be given to the industry norms, the proportional value and the effective timing of hospitality or gift.
- Whilst facilitation payments are not allowed, the SFO has in various public forums announced it accepts they have been a part of business for many years in many locations, and will accept a commitment to transition to a zero tolerance approach over time.
- Where a bribe or facilitation payment is made in a situation where personal safety or well-being is involved, the matter is unlikely to be prosecuted.

The UKBA provides a defense for a corporation if they have adequate procedures in place to prevent bribery. The UK Ministry of Justice has published six main principles, which it considers

necessary for a company as adequate steps to prevent bribery from occurring:

- Top-level commitment – from the board level down
- Risk Assessment – to include an enterprise wide assessment of as well as business line assessment based on the area of operation, including but not limited to, the geographical location and the corruption and bribery risk and the value of the business relationships.
- Proportionality – the subjective assessment of existing policies and procedures and their effectiveness.
- Due diligence on those who perform services – this should be conducted on all associated persons, vendors, agents and their commercial entities. NB: Regular updated due diligence on each is recommended.
- Communicate policies to employees – this will normally take place through setting up employee training specific to particular roles either through actual or virtual classrooms,
- Monitoring, reviewing and updating – this should take place regularly to ensure policies do not become outdated or irrelevant.

### **Conclusion**

While the Act may change little from an individual's perspective, it puts significant pressure on corporates doing business in the UK to ensure that they have appropriate anti-corruption procedures in place before implementation of the Act.

## **Corruption, Bribery and Doing Business in India**

Despite the end of the License Raj, bureaucracy remains a key impediment to India's economic growth. The following are the primary reasons for a strong compliance (FPCA) regime in a developing economy like India

1. Substantial increase of foreign investment in India, especially, from US (United States)
2. For Indian companies to be listed on US stock exchanges
3. US subsidiaries looking to operating in India
4. For Indian companies doing business in US
5. Increased level of due diligence, including FCPA compliance assessments, in private equity, transactions, joint ventures and other business combinations

The following is the summary of *Doing Business 2012* data for India. The first table lists the overall "Ease of Doing Business" rank (out of 183 economies) and the rankings by each topic

REGION	<b>South Asia</b>	DOING BUSINESS 2012 RANK	DOING BUSINESS 2011 RANK	CHANGE IN RANK
INCOME CATEGORY	<b>Lower middle income</b>	132	139	<b>↑ 7</b>
POPULATION	<b>1,170,938,000</b>			
GNI PER CAPITA (US\$)	<b>1,340.00</b>			

  

TOPIC RANKINGS	DB 2012 Rank	DB 2011 Rank	Change in Rank
Starting a Business	166	166	No change
Dealing with Construction Permits	181	181	No change
Getting Electricity	98	109	<b>↑ 11</b>
Registering Property	97	96	<b>↓ -1</b>
Getting Credit	40	37	<b>↓ -3</b>
Protecting Investors	46	44	<b>↓ -2</b>
Paying Taxes	147	165	<b>↑ 18</b>
Trading Across Borders	109	107	<b>↓ -2</b>
Enforcing Contracts	182	182	No change
Resolving Insolvency	128	140	<b>↑ 12</b>

Source- World Bank

## Indian Anti-Corruption Legislation

### *Indian Penal Code*

In 1860, the Indian Penal Code was enacted, and incorporated corruption-related offences. The provisions under the Indian Penal Code made it an offence for a public servant to accept a bribe, as well as to offer a public servant a bribe.

In 1947, to supplement the provisions under the Indian Penal Code, the Prevention of Corruption Act was passed in order to tackle corruption in the post-war scenario. Corruption had increased during the war years due to scarcities and strict controls. The new offence of criminal misconduct was introduced. Later amendments introduced the offence of possession of assets beyond known sources of income.

In 1988, the present Prevention of Corruption Act was passed, replacing the earlier statute, subsequent amendments, as well as the sections of the Indian Penal Code which dealt with

corruption. This brought the anti-corruption laws within one statute, and provided for increased penalties, and also broadened the definition of 'public servant'.

Under the PCA, there are broadly three sets of offenders who are covered:

1. A bribe taker who is a public servant.
2. The giver of a bribe.
3. Any middlemen who influences a public servant (either by a payment or personal influence).

The definition of 'public servant' under the PCA is wide, and includes employees of government-owned and statutory corporations.

### *Penalties under PCA*

Punishment ranges between 6 months and 5 years along with a fine. In certain cases of habitual offenders imprisonment could be 7 years. There is no limit on the maximum fine payable. Liability could be attributed to a company, if an employee/agent acted within the scope of employment, to obtain benefit for the company.

### *Ingredients of Corruption under the PCA*

1. Any gratification to a public servant for doing or forbearing to do an official act or favour/ disfavour to any person.
2. Any gratification to any person for inducing any public servant by corrupt/ illegal or personal influence to do/ forbear from doing an official act or to show favour/ disfavour to any person.
3. Any valuable thing, without adequate payment for the same, to a public servant by a person who has or is likely to have official dealings with the public servant.

### *PCA vis a vis FCPA -*

1. Facilitation payments are illegal under the PCA, while the FCPA has a specific exemption for them.
2. Definition of "foreign official" is broader than "public servant", foreign official includes officers of public international organizations
3. The FCPA applies to payments made to political parties and candidates, while the PCA does not.

## Critical Issues with PCA

***Does anti-corruption law apply only to payments or also to gifts/ other forms of benefit?***

Indian law is extremely broad in scope. It covers any payment/ gift/ other benefit.

***Is it okay to make a payment/ gift/ other benefit for something that a public servant is supposed to do?***

No, Indian law prohibits a payment/ gift/ other benefit even if it is for a lawful object.

The concept of “speed money” for routine governmental action does not exist under Indian law.

***For an offence, is it necessary that a payment/ gift/ other benefit is actually given?***

No, mere offer of payment/ gift/ other benefit for a favour would also constitute an offence.

***For an offence, is it necessary that a favour should have actually been granted?***

No, if a payment/ gift/ other benefit is given or offered for any favour, and such favour is not eventually granted, an offence may still be constituted.

Grant of any valuable thing to a public servant with whom one has official dealings also qualifies as an offence.

***Is any value of payment/ gift permissible?***

There is no prescribed value up to which a payment/ gift is permissible under Indian law. Hence, any payment/ gift provided for obtaining any favour/ action by the public servant is prohibited.

Hospitality (not frequent or lavish) or gift items of nominal value, not intended to influence a public servant, may be permissible.

Gifts up to certain value are permissible under conduct rules of public officials. Conduct rules for civil servants govern their conduct as employees and are not directly related to the offences under PCA.

## *India Services Conduct Act*

All India Services Conduct Act 1968 section 11 states the following,

### 11. Gifts

11(1) A member of the service may accept gifts from his near relatives or from his personal friends having no official dealings with them, on occasions such as wedding, anniversaries, funerals and religious functions when the making of gifts is in conformity with the prevailing religious and social practice, but he shall make a report to the Government if the value of such gift exceeds INR 5,000.

Explanation—For the purposes of this rule “gift” includes free transport, free boarding, free lodging or any other service or pecuniary advantage when provided by a person other than a near relative or personal friend having no official dealings with the member of the Service but does not include a casual meal, casual lift or other social hospitality.

11(2) Save as otherwise provided in sub-rule (1), no member of the service shall accept any gift without the sanction of the Government if the value of gift exceeds Rs.1,000/—.

11(3) Member of the Service shall avoid accepting lavish hospitality or frequent hospitality from persons having official dealings with them or from industrial or commercial firms or other organizations.

## **Contract and Procurement Fraud**

### **Fraud Prevention in Contract and Procurement**

The first important step in deterring fraud in procurement and contracts is to have established a set of objective criteria to evaluate and record the rationale for choosing a particular vendor and/or contract. As well it is important to document all meetings and procedures during initial discussions and negotiation, and at the performance and administration phases.

The next crucial and most effective way to deter fraud in procurement and contract relationships is to have a well-written contract that contains specifications, standards, and statements of work which clearly reflect the pre contract discussions and expectations and details the rights and entitlements of both the parties. Carelessly written specifications, standards, and statements of work make it easier for a contractor to claim at a later time that he is entitled to more money than the buyer intended to pay.

Thirdly, to be able to effectively detect fraud in contract and procurement requires an understanding of Indian contracts law as well as various company or agency laws and regulations besides one's own industry standards and practices.

### **Anti-Bribery and Red Flags**

Fraud will be used to cover any corrupt payments in a contracting and procurement relationship. Whilst fraud takes many forms, organizations can strengthen their defense against bribery and corruption by strengthening their fraud risk management system.

When establishing a sound fraud risk management system it is important to firstly conduct a fraud risk assessment. That assessment is targeting the existing system and looking for red flags or weaknesses that might be exploited.

### **Vendor/Agent Selection and Contract wording**

As with all agreements the risk for organizations in the detail, or more importantly, lack of detail. A well-devised fraud that will be used to cover a bribe or corrupt payment will rely on variations from standard or accepted procedures and the absence of proper documentation as to how the relationship was established and should exist. The types of red flags to be on the alert for when in the setting out to select a vendor/agent are:

Poorly Written Specifications: In some instances, the fraud is committed solely by the contractor based on poorly written specifications. In the instance of poorly written specifications, it is easy for the contractor to deliver a product or service that is priced higher than what was ordered.

Vague Specifications: In other instances, vague specifications are deliberately written by the buyer in collusion with the contractor, so that more money can be claimed later.

Agreements to Amend Contracts: In situations where there is collusion between the buyer and supplier, there is sometimes an agreement to award the contract based on skimpy

specifications, and then increase the price later once the contract has been awarded through amendments to the contract.

Identifying fraud red flags:

- Look at communications with the contractor where information or advice has been passed on a preferential basis
- Examine statements of work, specifications or sole source justifications developed by, or in consultation with, a contractor who will be permitted to bid or continue to act as a consultant during the selection process
- Examine cost breakdowns to see if there is splitting of costs into separate categories to avoid review
- Examine closely all written specifications to identify those not consistent with past similar procurement

### **Competitive Bidding**

Fraud schemes that typically arise during a competitive bidding process typically involve collusion between the buyer and the contractors of the competing companies. The competitive bidding process has a number of risk stages:

#### **Bid Submission Schemes**

There are several schemes involving bid submissions that pose a risk. They potentially involve anyone in the contracting cycle such as a buyer or contracting official, engineer, technical representative, quality or product assurance representative, subcontractor liaison employee—anyone who can influence the awarding of a contract.

Examples of bid submission schemes are:

- Premature opening of bids
- Altering bids
- Unjustifiable extension of bid opening dates
- Controlled bid opening
- Falsifying bid logs and documents

To detect bid submission schemes the Companies should be aware of:

- Acceptance of late bid
- Falsification of documents or receipts to get a late bid accepted
- Change in bid after other bidders prices are known

- Change in bid dates
- Receipt of late bids
- Last bid usually receives the bid

### ***Bid-Rigging Schemes***

Most bid-rigging fraud schemes involve collusion between contractors of competing companies during the bidding process.

### ***Bid Rotation***

Collusive bidding occurs when a group of prospective vendors exchanges information on contract solicitations, taking turns at submitting the “low bid.”

### ***Bid Suppression***

In this type of scheme, one or more competitors agree with at least one other competitor to refrain from bidding or agree to withdraw a previously submitted bid so that a contractor’s bid will be accepted. Other forms of this activity involve agreements by competitors to fabricate bid protests or to coerce suppliers and subcontractors not to deal with non-conspirators who submit bids.

A variation of bid suppression occurs when competitors make arrangements to refrain from competing in a designated portion of a market. This might be accomplished based on customer or geographic area. The result of such a division is that competing firms will not bid or will submit only complementary bids (discussed below) when requests for bids are issued in the competitor’s unassigned area.

### ***Complimentary Bids***

Complimentary bidding, also known as “protective” or “shadow” bidding, occurs when competitors submit token bids that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such bids are not intended to secure the buyer’s acceptance, but are merely designed to give the appearance of genuine bidding.

### ***Phantom Bids***

Several companies have been caught creating dummy companies to submit a variety of bids on a single contract. That way, they give the appearance of vigorous competition while actually bidding against themselves.

To detect these types of fraud, the Company must be alert for:

- “Unsuccessful” bidders who later become subcontractors
- Wide disparity in bid prices
- Same contractors who bid on all projects with rotating low bidders
- Other qualified vendors who fail to submit bids
- Bid protests from losing, qualified bidders
- Splitting up requirements so contractors can each get a “fair share,” and can rotate bids
- A rotational pattern to winning bidders
- A geographical pattern to winning bidders
- Joint venture bids by firms who could have bid individually

### **Defective Pricing Schemes**

Defective pricing occurs during negotiations when contractors fail to disclose accurate cost or pricing data in their price proposals, resulting in an increased contract price.

Examples of defective pricing schemes generally involve the submission of inflated labor costs and inflated material/parts costs. Other schemes involve:

- The use of vendors other than the one proposed
- Not disclosing documents on vendor discounts
- Changing make or buy decisions
- Not disclosing residual material inventory
- Inflating costs by channeling work under contract through a dummy company
- Withholding information on batch purchases

To detect defective pricing schemes, the Companies should be alert for the following:

- Failure to update cost or pricing data even though it is known that past activity showed that costs or prices have decreased
- Failure to correct known system deficiencies which can lead to defective pricing
- Repeated denial by the contractor of the existence of historical records
- Delay in the release of data to the buyer to preclude possible price reductions
- Altered supporting data

### **Contract Performance and Management**

Contract performance activities include change orders; timely review of completed portions prior to sign-off and release of monies; and assessment of deliverables for compliance with the terms of the contract, including quality control. There are two basic fraud schemes perpetrated during the performance phase: product substitution and mischarges (accounting, material, and labor).

#### ***Product Substitution***

In order to increase profits, which will cover the cost of a bribe or corrupt payment, the contractor might employ a product substitution scheme, failing to meet the contract

specifications in the areas of either quantity or quality of products. Examples of schemes involving product substitutions include:

- Delivery of inferior/substandard material
- Delivery of materials that have not been tested
- Falsification of test results
- Delivery of used, surplus, or reworked parts
- Delivery of counterfeit products
- Submission of false certifications (Certifications are statements that parts or materials are new, domestically manufactured, and meet the contract specifications concerning quality and quantity or that the company is minority-owned.)
- Delivery of commercial equivalents hardware
- Passing off or specially creating samples for inspection
- Surreptitious movement of inspection tags to uninspected goods
- Substitution of look-alike goods

The following is a list of potential red flags for product substitution schemes:

- High percentage of product returns to vendor for noncompliance with specifications
- Product compliance certificate missing
- Compliance certificates signed by low-level employee with no quality assurance responsibilities
- Materials testing done by supplier, using his own personnel and facilities
- Laboratory test reports are identical as to sample descriptions and test results, varying only as to date and lot number tested
- Highest profit product lines have the highest number of material return authorizations or reshipments
- In order to detect these types of frauds, the fraud examiner should consider the following audit procedures:
  - Conduct both routine and unannounced inspections and testing
  - Carefully review the inspection and testing reports
  - Request assistance from outside technical personnel to conduct after-the-fact tests
  - Interview personnel and others for indications of noncompliance
  - Review correspondence and contract files for indications of noncompliance

## **FCPA Specific Books & Accounts - Mischarging**

### ***Accounting Mischarges***

Accounting mischarges are defined as knowingly charging unallowable costs to the buyer, concealing or misrepresenting them as allowable costs, or hiding them in accounts (such as office supplies) which are not usually audited closely. Another common variation involves charging types of costs or independent research and development to other cost categories.

### ***Material Mischarges***

Material mischarges are usually limited to raw materials that can be used on many different contract products or diverted for personal use. Numerous cases have been discovered where the buyer-owned material, which was used on a similar contract (for example, commercial), shows up on the accounting records as being used in the manufacturing process for the subject contract (for example, government).

Detection by auditors is done by examining closely costs relating to a contract or relationship with a vendor or agent. For material cost transfers these might include transfers:

- From government contracts to commercial
- Via any type of suspense or holding account
- From ongoing jobs to jobs not scheduled for delivery until far into the future
- From prior lot work orders to current or future work orders
- To inventory write-off accounts
- To scrap accounts
- Of materials ordered and charged in excess of contract requirements
- Of seemingly unrelated materials charged on routing slips
- In which material standards are not updated over periods of time when the contractor recognizes improvements in manufacturing technology or product design
- In which a significant variance exists between proposed versus negotiated vendor prices

### ***Labour Mischarges***

Labor costs are perhaps more susceptible to mischarging than are material costs, because employee labor can readily be charged to any contract. The only way to ensure that labor costs are charged to the correct account is to actually observe the work of each employee (to determine the contract on which he is working), then determine from the accounting records that the employee's cost is charged to the proper contract. There are several schemes involving mischarged labor costs. Some of the more prominent ones are:

- Transfer of labor costs
- Time and charges do not agree with contractor billing
- Fictitious time cards
- Changes made to individual time cards
- Time card charges by supervisors

Labor mischarges can sometimes be detected by examining the following:

- Distinctive labor-charging patterns on research and development
- Significant increases in charging to overhead accounts (for example, idle time, downtime, and non-applied time)
- Reclassification or reorganization of employees from indirect to direct charges
- Changes in the labor-charging relationships between certain tasks or types of labor
- Decrease in indirect expense pools

- Increased labor hours with no corresponding increases in materials used or units shipped
- Actual hours and dollars consistently at or near budgeted amounts

### **Computer Programs**

Generally, there are a number of programs commercially available or can be written in-house that will identify suspicious activity without having to manually review a voluminous amount of data. This does make detecting fraud a more efficient use of your internal controls and allows a more detailed examination of potential bribes or corrupt payments time. Computer programs can be written to identify the following:

- Vendors with post office box addresses
- Vendors with addresses in common with employee addresses
- Contractors who were unsuccessful bidders who are now subcontractors
- Payments to a particular vendor over a specified period of time
- Vendor payments that were initiated or paid outside the normal system (for example ,hand carried or approved)
- Employees who are assigned to more than one contract on any given day

## **Redressal Against Corruption in India**

### **Right to Information Act (RTI)**

#### **RTI Scope and Limitations**

Right to Information Act, 2005, confers on the Indian citizen the right to obtain information from a public authority. The Act has been enacted solely for the purpose of providing information. ***RTI Act, 2005 does not bestow on the citizen a right to have his/her grievance redressed by the public authority. The Appellate Authority or the Central Information Commission (CIC) has also not been given any mandate under the RTI Act, 2005 to deal with grievances. Also, CIC in its various decisions held that RTI is not a forum for redressal of grievances.***

However, prudent use of the Right to information can transform RTI platform into a grievance redressal mechanism. This would require the queries to be framed in such a manner that though one is eliciting information yet if the queries are answered, one's grievance also stands addressed and the public authority may have no option but to find a solution. (For instance, an RTI application filed by one Nannu, a daily wage labourer from East Delhi resulted in delivery at his house of a duplicate ration card which was earlier not issued for months despite repeated visits of Nannu to Food and Supply Office.)

Further, RTI may be used as an aid in expediting the redressal of grievance. For example, information can be sought in respect of a pending grievance petition such as, action taken on the grievance petition, status of the grievance petition, the person dealing with the grievance

etc. Also, the information gathered by an information seeker through the RTI route can be put to good use to substantiate his case so that he receives a favorable decision in the matter of his grievance.

## **RTI Ecosystem**

### **RTI work flow**

- An individual files an RTI with the central/ state public information officer (PIO) or a specific PIO. PIOs are often not trained, and rarely apply for the position, but are instead designated.
- Within five days the information is to be forwarded to the correct PIO.
- The PIO must open a file and dispose of the request within 30 days.
- If the PIO fails to reply to the applicant by either approving or denying a request, the PIO is liable to pay a fine of Rs. 250 for each day of delay.
- If information is electronically uploaded, it is stored in any format the officer chooses (jpeg, pdf, html, etc).
- Except for land records and staff records, files are retained for a maximum of one year.
- If the PIO does not dispose of the request, there is scope for an appeal within 30-45 days to the appellate authority.
- There is scope for a second appeal to the information commissioner if the authority does not respond within 90 days or the answer is found to be unsatisfactory.
- The final decision of the information commissioner is binding.

### **Filing an RTI request**

Though there is no specific format an individual must follow when submitting an RTI, when filing a request, individuals must include:

- His /her name and address.
- The name and address of the public information officer (PIO).
- The particulars of information/documents required (limited to 150 words and one subject matter).
- The time period of the information required.
- Proof of payment.
- Signature.
- Proof if the individual is a BPL holder.

### **Information that an individual can request under the RTI Act**

- Inspection of work, documents, and records
- Taking notes extracts or certified copies of documents or records.
- Taking certified samples of material.

- Obtaining of information in the form of diskettes, floppies, tapes, and video cassettes, or in any other electronic mode, or through printouts where such information is stored in a computer, or in any other device.
- Obtaining the status of an RTI request or complaint.

Note: If an individual is requesting third party information, the PIO must inform the third party and provide the individual the opportunity to state a reason for not disclosing the information.

### *Central Vigilance Commission (CVC)*

Central Vigilance Commission (CVC) is an apex Indian governmental body created in 1964 to address governmental corruption. It has the status of an autonomous body, free of control from any executive authority, charged with monitoring all vigilance activity under the Central Government of India, and advising various authorities in central Government organizations in planning, executing, reviewing and reforming their vigilance work.

The CVC is a statutory body that supervises corruption cases in government departments. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority.

As such the CVC is not an investigating agency, and works through either the CBI or through the Departmental Chief Vigilance Officers. The only investigation carried out by the CVC is that of examining Civil Works of the Government which is done through the Chief Technical Officer.

Through a Resolution dated 21 April, 2004, the Government has designated the Central Vigilance Commission as the agency to act on complaints from "whistleblowers" till such time as the Parliament passes a law on the subject. According to the Govt. of India Resolution on "Public Interest Disclosure and Protection of Informer", 2004, the Commission has been entrusted with the additional responsibility of keeping the identity of the complainant secret and the power to take action against complainants making motivated or vexatious complaints.

### **Power and limitations of CVC**

- CVC is only an advisory body. Central Government Departments are free to either accept or reject CVC's advice in corruption cases.
- CVC cannot direct CBI to initiate inquiries against any officer of the level of Joint Secretary and above on its own. Such a permission has to be obtained from the concerned department.
- CVC does not have powers to register criminal case. It deals only with vigilance or disciplinary cases.
- CVC has supervisory powers over CBI. However, CVC does not have the power to call for any file from CBI or to direct CBI to investigate any case in a particular manner. CBI is under administrative control of Department of Personnel and Training (DoPT). This means that the powers to appoint, transfer, suspend CBI officers lie with DoPT.
- CVC does not have adequate resources compared with the number of complaints that it receives. It is a very small set up with sanctioned staff strength of 299. Whereas, it is

supposed to check corruption in more than 1500 central government departments and ministries.

- Appointments to CVC are indirectly under the control of Govt of India, though the leader of the Opposition (in Lok Sabha) is a member of the Committee to select CVC and VCs. But the Committee considers candidates put up before it. These candidates are decided by the Government.

***To sum it up, although CVC is relatively independent in its functioning, it has neither resources nor powers to inquire and take action on complaints of corruption that may act as an effective deterrence against corruption.***

### *Anti-Corruption Bureau*

The Anti-Corruption Bureau is a specialized agency within a state, tackling the problem of corruption in various departments of the government against public servants and also private persons within a state. The Bureau registers cases under the provisions of the Prevention of Corruption Act, 1988. Besides this, the Bureau conducts enquiries basing on the information/petitions received from various agencies like Government, Vigilance Commission, Lokayukta etc, and also on the information/petitions received by the Bureau from the public containing specific and verifiable allegations of corruption against Public Servants.

The Bureau basically enforces the provisions of the Prevention of Corruption Act, 1988. The Bureau has suo-moto powers to collect information, conduct enquiries and register cases on Public Servants. The Bureau investigates Disproportionate Assets & Cases of Criminal Misconduct. Apart from that the Bureau also conducts enquiries in the form of regular enquiries, discreet enquiries and also conducts surprise checks in areas of rampant corruption.

After completion of investigation and enquiries, a final report is sent to Government through the Vigilance Commissioner who tenders his advice to the Government.

## Recent FCPA Enforcements

### Enforcements in India

**Diageo** – SEC charged one of the world’s largest producers of premium alcoholic beverages for making \$2.7 million in improper payments to government officials in India, Thailand, and South Korea to obtain lucrative sales and tax benefits. Diageo agreed to pay more than \$16 million to settle the case. (7/27/11)

**Xerox Corporation** – SEC charged Indian affiliate of the company : Xerox ModiCorp (now Xerox India) for making improper payments (related to sales to government customers of the company’s products) made by Xerox ModiCorp Ltd to Indian government officials. (2003)

### International Enforcements

**Tyco International** - SEC charged the Swiss-based global manufacturer with violating the FCPA when subsidiaries arranged illicit payments to foreign officials in more than a dozen countries. Tyco agreed to pay \$26 million to settle the SEC's charges and resolve a criminal matter with the Justice Department. (9/24/12)

**Pfizer** - SEC charged the pharmaceutical company for illegal payments made by its subsidiaries to foreign officials in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia, and Serbia to obtain regulatory approvals, sales, and increased prescriptions for its products. Pfizer and recently acquired Wyeth LLC - charged with its own FCPA violations - agreed to pay a combined \$45 million in their settlements. (8/7/12)

**Orthofix International** - SEC charged the Texas-based medical device company with violating the FCPA when a subsidiary paid routine bribes referred to as “chocolates” to Mexican officials in order to obtain lucrative sales contracts with government hospitals. (7/10/12)

**Former Morgan Stanley executive** - SEC charged Garth R. Peterson with secretly acquiring millions of dollars’ worth of real estate investments for himself and an influential Chinese official who in turn steered business to Morgan Stanley's funds. He agreed to a settlement in which he is permanently barred from the securities industry and must pay more than \$250,000 in disgorgement and relinquish his approximately \$3.4 million interest in Shanghai real estate acquired in his scheme. (4/25/12)

**Biomet** - SEC charged the Warsaw, Ind.-based medical device company with violating the FCPA when its subsidiaries and agents bribed public doctors in Argentina, Brazil, and China for nearly a decade to win business. (3/26/12)

**Noble Corporation executives** - SEC charged three oil services executives with bribing customs officials in Nigeria to obtain illicit permits for oil rigs in order to retain business under lucrative drilling contracts. (2/24/12)

**Smith & Nephew** - SEC charged the London-based medical device company with violating the FCPA when its U.S. and German subsidiaries bribed public doctors in Greece for more than a

decade to win business. The company and its U.S. subsidiary agreed to pay more than \$22 million to settle civil and criminal cases. (2/6/12)

## Case Studies

### Case Study 1 - Improper gifts to non-U.S. government officials

#### The facts:

A large company provides products and services in the U.S. and 18 countries. The company operates several European subsidiaries (collectively referred to as the “Group”). The Group focuses on the sale and export of products and equipment to hospitals and doctors. The hospitals are both government owned and private facilities. The Group made several payments to doctors employed by the non-U.S. hospitals for the purpose of retaining business. The payments, which totaled more than U.S. \$45,000.00, took a variety of forms, including computers, digital cameras, wines, watches and travel.

#### The result

The SEC found that the gifts given to the doctors were made in violation of the FCPA, which prohibits a U.S. company (even if made through its non-U.S. subsidiaries), from making illicit payments to non-U.S. government officials for the purpose of obtaining or retaining business or gaining any improper advantage. In this case, the doctors were considered non-U.S. government officials (they were employees of the government), and the hospitals were found to be instrumentalities of non-U.S. governments.

### Case Study 2 - Not properly recording payments

#### The facts

A U.S. company sold pesticides in India through a subsidiary. The subsidiary entered into agreements with contractors to “expedite the registration” of pesticides. The contractor over the years also added “fictitious charges” on bills paid by the subsidiary. Additionally, payments were made to government officials to distribute and sell products, to government sales and excise tax officials and to government customs officers. Also, there were gifts, travel and entertainment and other items provided to government officials. None of these payments were accurately recorded in the books and records of the U.S. company or its subsidiary.

#### The result

The U.S. SEC initiated an expensive and time consuming investigation that took several years to complete. Although this was the first FCPA related violation for the U.S. company and the company had taken significant steps to improve its FCPA compliance program, the company settled with the SEC. Under a “cease-and-desist order,” the company had to pay a several hundred thousand dollar fine.

### **Case Study 3 - Paying a commission to an agent under highly suspicious circumstances and failing to properly record commission payments**

#### **The facts**

A company made a direct sale to a government-owned airport in a non-U.S. country. The company does have an agent in that country that typically makes sales to the airport on the company's behalf. Soon after the sale, the agent requested a commission for the company's direct sale to the airport. The agent said that he was negotiating additional sales and could use the commission in connection with those negotiations to give cash or buy gifts for airport officials. The company paid the requested commission to the agent and recorded it as a "sales commission" in its books and records. The agent did not generate any further sales on the company's behalf.

#### **The result**

The U.S. SEC found that, under these circumstances, the company violated both the books and records and internal controls provisions of the FCPA. The SEC concluded that the company was aware with a high probability that the agent intended to use part of the supposed commission to provide something of value to non-U.S. government officials and improperly recorded the payment as a sales commission. Moreover, the agent performed no services for which he deserved a commission and only requested the commission after the direct sales transaction was already completed. Finally, it was determined that the company had knowledge that the agent intended to give cash and gifts to some airport officials.

### **Case Study 4 - FCPA violations result in stiff fines and possible imprisonment of individuals**

#### **The facts**

A company's non-U.S. subsidiary paid over \$2 million to support the presidential re-election campaign in a non-U.S. country through a third party, who was also a business advisor to the President of that country. In return, the company received a higher management fee for a contract that it had with a government-owned company. A senior U.S. officer of the company involved "authorized" making the payments and agreed that the payments could be made directly to the President's business advisor. The payments were recorded as "social payments" in the company's books and records.

#### **The result**

The company pled guilty to violating the anti-bribery provisions of the FCPA, falsifying its books and records, and aiding or assisting the filing of a false tax return. The fines assessed against the company were approximately \$28 million, including \$13 million in criminal penalties and \$15 million in disgorged profits. The company also agreed to retain an independent compliance

monitor for a period of three years. The company's regional manager who authorized the payment pled guilty to falsifying the company's books and records.

### **Case Study 5 - Payment of bribe to reduce tax liability**

#### **The facts**

The subsidiary of a U.S. company operating in a non-U.S. jurisdiction believed that it was owed a tax refund in the amount of U.S. \$1.8 million. To validate the claim, tax officials performed an audit and, instead of granting the refund, issued an assessment for an additional U.S. \$3 million of taxes. The company disputed the assessment. One of the tax officials introduced a proposed "settlement," which ultimately involved the engagement of a third party accounting firm to represent the company in the negotiations of the settlement. In exchange for a U.S. \$75,000.00 cash payment to the non-U.S. government official, the tax assessment imposed on the company was to be reduced to U.S. \$270,000. The company made a payment of U.S. \$145,000 to the accounting firm as a "success fee," a portion of which was intended for the non-U.S. government tax official. The payment to the accounting firm was recorded as payment for "professional fees/success fee."

#### **The result**

Although the payment was made to a third party representative, the SEC found a violation of the books and records provision of the FCPA and issued a cease-and-desist order. The company's managers and officers should have known that a portion of the payment would be passed to a non-U.S. government official for the purpose of influencing his decision to reduce the tax assessment

### **Case Study 6 - Settlement of customs disputes**

#### **The facts**

In 2003, an oil and gas services company contracted with some local customs brokers in a non-U.S. jurisdiction for the customs brokers to "intervene" and settle all customs disputes with the government customs authorities as they might arise in that country. The company agreed in all cases to pay 50% of any amounts in dispute with the non-U.S. government customs officials to its customs broker in exchange for the broker properly settling all such disputes with appropriate government customs authorities. Over the course of about four years, the company paid its customs brokers a total amount of approximately \$2.5 million in fees. The customs brokers did not provide good evidence to the company of how much money was actually paid to the non-U.S. government authorities to settle each of the customs matters.

#### **The result**

The company investigated all matters handled by these customs brokers and determined that while there was no clear evidence of any bribery on the part of the customs agents under the FCPA, the company's books and records did not accurately reflect the ultimate disposition of the

monies paid to the customs broker as required by the FCPA. As a result, the company admitted to a books and records violation under the FCPA.

### **Case Study 7 - Excessive travel & entertainment of a non-U.S. government official**

#### **The facts**

Prior to receiving a contract award in connection with a multi-phase project for the construction of a sewage facility in Egypt, a U.S. engineering firm paid for first class tickets for a non-U.S. government official, his wife and children to travel to the United States on two occasions. The official also received cash advances to cover trip related expenses and per diem payments in advance of the travel. The non-U.S. government official held a position on the committee responsible for the award of the contract and, therefore, had the ability to influence the awarding of the contract.

#### **The result**

The U.S. DOJ successfully asserted that the U.S. Company violated the FCPA because the cash advances, per diem amounts and travel expenses for family members were not bonafide expenses. The non-U.S. government official was in a position to influence the outcome of a contract. In addition to the tickets and reimbursing much of the non-U.S. government official's actual expenses, the company provided the official with several cash advances prior to the trip.

### **Case Study 8 - Reasonable and ordinary business practices allowed with non-U.S. government officials**

#### **The facts**

An American company provided samples of packaged beef products to non-U.S. government officials. The packages, valued at U.S. \$250 each, were distributed to non-U.S. government officials in their capacities as official representatives for the government.

#### **The result**

It was determined that the packaged beef was provided to make the non-U.S. government officials aware of the quality of the food product and for testing, sampling and inspection, and thus was a reasonable and bona fide expenditure. As a result, the DOJ declined to take action against the beef packing organization.

### **Case Study 9 - Last minute increase in commissions**

#### **The facts**

A company submitted a bid for a major engineering project in a non-U.S. country. The company had a good reputation and offered technical advantages and expertise over its competitors. After protracted negotiations, the company was informally notified that it would be awarded the work. However, just prior to the formal award, government officials suggested that the company engage a specific agent to assist in "dealings with" the government entity that was responsible

for the management of the project. The company complied and engaged the services of the agent. A commission fee was negotiated with the agent, and the company was awarded the contract.

### **The result**

The request to engage a specific agent, especially late in or toward the end of the process, raises serious FCPA issues. A comprehensive FCPA due diligence process must be completed prior to hiring any agent. These warning signs would always necessitate enhanced scrutiny of the agent and the transaction. Failure to conduct FCPA due diligence with respect to each agent hired, then the U.S. government may view the failure as “willful blindness,” and the Company could be exposed to serious potential liability.

## **Case Study 10 - Rumour regarding Agents**

### **The facts**

A company hired an agent, and a competitor of the agent reports to the company that the agent has been bribing a government official. The company decides that the information must be wrong and continues with its relationship with the agent.

### **The result**

If credible information suggesting facts of this nature is received, the company must investigate or risk the presumption that the company knew of the unlawful activity.

## **Possible scenarios**

1. Agents advise management that other companies are paying for lavish trips and entertainment for officials of national companies and SOE's. If your company doesn't do the same, the competitors will have an unfair advantage. Why follow the FCPA while others do not?

**Answer:** Regardless of others compliance or non-compliance, most significant competitors of US companies will be subject to the FCPA because they are U.S. companies or register their shares to trade on a U.S. securities exchange. Your actions should not be dictated by illegal actions of competitors.

2. Your employee is not a U.S. citizen and has never been to the U.S. You learn they have been recording small “gifts” to government officials on his expense reports as taxi fares. These payments allow the import/export side of the business in country to operate smoothly. Since your US parent doesn't know the details of the gift giving, and the employee is not a U.S. citizen, is there a violation of the FCPA?

**Answer:** Yes. Although your employee is not a citizen of the U.S., if your company is a U.S. company and as the employee is working for your company, the FCPA applies. Keeping your Parent company in the US in the dark does not negate your responsibility under the FCPA for the employees' actions. Whilst the payments may be considered in some circumstances as facilitation payments, the way they are recorded is in breach of the books and records provisions of the FCPA, which requires all accounts to be maintained in an accurate fashion. As well the fact the payments may breach local laws means these payments create serious potential liability you and your organization.

3. Paying a bribe to a government official will ensure an ability to meet project deadlines and save the company thousands of dollars of damages related to delays not authorized by the project contracts. Such a bribe must be ok to protect the Company from having to pay damages under the contract if the individual does not personally benefit?

**Answer:** No. Any payment of a bribe to a government official will violate the FCPA, and in all likelihood, local law. Such a payment could cost your company millions of dollars in fines, penalties, disgorgement of profits and legal fees. If caught making the bribe, which is very likely, the individual may be personally subject to stiff civil and criminal penalties (including imprisonment) imposed by the DOJ, U.S. SEC, and local authorities.

4. During negotiations for a substantial contract it would assist in the decision-making process to take a government official to visit your U.S. facilities. Since the contract is large, it is suggested first class tickets for the government official and his wife, a generous per diem amount, hotel and meal cost. Would this violate the FCPA?

**Answer:** Yes, the travel would violate the FCPA. First class tickets for a government official unless approved in advance by your CEO in consultation with legal counsel. Also paying for any travel or entertainment visits associated with a government official's spouse or family member should only be in exceptional cases, and never pay a per diem and also reimburse only actual travel costs. Also any side trip to Las Vegas or Disneyland is not a legitimate business purpose.

5. What if I arrived at an unfamiliar airport in India late at night? If it is known that the security of the road between the airport and the central city is questionable, and I am very concerned for my safety and security in getting into the city. May I request assistance from the local police to get me from the airport to the hotel and pay a "fee" for this service?

**Answer:** Yes, provided you are genuinely concerned for your personal safety and security and provided that such an established security service exists. The provision of the security service must be legal under local law. If possible, you should try to pay any fee that is paid for the service by check or credit card directly to an entity involved. If such a course of action is not possible, then at a minimum, a receipt should be obtained evidencing that the service was provided at an appropriate price. The payment must be reasonable for the service provided. Such payment will also have to be properly and timely recorded in the books and records of the Company.

6. A joint venture partner has suggested that we split a payment to a government official in connection with a bid that the joint venture has submitted. Simply ignoring the fact that this request has been made is the best approach?

**Answer:** No. To deliberately ignore the request of the joint venture partner to engage in illegal activity under the FCPA and failing to investigate whether the bribe has occurred or will occur, your company will be imputed with knowledge of any such illegal payment its joint venture partner makes and likely be liable under the FCPA.

7. If your Company owns less than 50% of a joint venture and does not have management control, are you likely to be liable under the FCPA for the actions of the joint venture?

**Answer:** Yes, it is possible. If Employees have knowledge of FCPA potential violations and do not report them or ignore warning signs, your company could be liable for FCPA violations of the joint venture. It is incumbent on your company to make all reasonable efforts to ensure that the joint venture maintains accurate accounts and records consistent with the requirements of the FCPA.

8. Are donations allowed to a government entity?

**Answer:** Seek advice from your Legal Department whenever a donation to a government entity has been requested or proposed. Any donation must be pre-approved by senior management and accurately reflected in the Company's books and records. A donation should never be given directly or indirectly to an individual government official. In addition, donations should not be given to a charity that is designated by a government official unless that charity is internationally recognized. The Red Cross is an example of an internationally recognized charitable organization.

### Remarks

To avoid censure from global regulators, companies contemplating doing business in India must ensure that they are complying with global anti – corruption acts such as Foreign Corrupt Practices Act (FCPA) & UK Bribery Act (UKBA). These acts prohibit companies from making any direct or indirect intentions of making, and offering to make, payments to foreign public officials, including members of political parties, to getting any undue advantage in business operations. Further, the acts require companies to maintaining clean financial and accounting practices while doing business in a particular geography. Therefore, in order to maintain clean and transparent image in the business world, companies need to adopt practices such as Conducting Due Diligence, Employee Training and Awareness Programs, Frequent Audits of Accounts & Operations, Surveillance and Vigilance so that any deviation from normal procedures is checked in time.

Rigorous internal controls:

- Regular training and reminders on FCPA policy and compliance
- Internal policies addressing the corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment, that were updated regularly to reflect regulatory developments and specific risks
- Compliance program monitoring and auditing
- Extensive pre-retention due diligence on business partners and stringent controls on payments to business partners

### Brief about AMCHAM

The American Chamber of Commerce in India (AMCHAM India) is an association of American business organizations operating in India. The incumbent U.S. Ambassador to India is the Honorary President and AMCHAM enjoys the support of the U.S. Embassy in fulfilling its objectives. CEO's of leading U.S. companies constitute the elected board of AMCHAM. The Chamber's mission is to assist its members succeed in India through advocacy, information, networking and business support services. AMCHAM, headquartered in New Delhi and having regional chapters at Bangalore, Chennai, Kolkata, Mumbai, Hyderabad and New Delhi, carries out the following key functions -

- Promotes activities that encourage and stimulate bilateral trade between India and the U.S
- Supports business operations of its members
- Provides a forum for U.S. based business organizations in India to discuss and identify common issues, economic and commercial interests in India and the U.S
- Institutes sectorial committees which provide a platform to its members for consensus building and networking
- Reviews policies and procedures in various sectors that affect its members and brings out position papers

AMCHAM is affiliated to –

- Chamber of Commerce of USA in Washington, D.C
- AMCHAM's in other countries
- Asia Pacific Council of American Chambers

## Brief about Hill & Associates

Founded in 1992 with headquarters in Hong Kong and Singapore, we are a risk mitigation consulting firm that helps clients to understand and manage operational risks in opaque, dangerous or unfamiliar markets.

We are a multidisciplinary organization; our staff of over 200 full time employees includes lawyers, accountants, bankers, military and law enforcement officers, certified fraud examiners, forensic accountants, intelligence officers, computer forensic specialists and corporate intelligence analysts, all with significant international experience. With an extensive on-the-ground research and investigative capabilities and understanding of local issues, Hill & Associates through a phased approach devises customized solutions with objective and pragmatic recommendations which can be crystallized into a plan-act-check format.

We operate to, internationally recognized professional standards and are committed to strict ethical and internal codes of conduct; our clients are assured of total confidentiality and discretion. Our clients include multinational companies, investment banks, law firms, private equity firms, hedge funds and major Asian companies.

We provide services based upon three major areas of core competence, each of which falls under a Service Line organization. Highly qualified and experienced professionals manage each Service Line to ensure consistency and quality of service delivery throughout the company as well as the ongoing development of new initiatives, concepts and services. Our Service Lines comprise:-

- Enterprise Risk Management Services
  - Travel & event risk management
  - Business operations risk management
  - Crisis management
- Business Intelligence & Integrity Risk Services
  - Due diligence (FCPA/ Anti-Bribery)
  - Fraud prevention & investigation
  - Brand & intellectual property protection
- Support Services
  - Information assurance
  - Risk intelligence
  - Training