



Tilleke & Gibbins

Anti-Corruption Compliance in Thailand

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Introduction

- ▶ What do we mean by Anti-Corruption Compliance?
- ▶ A program within an organization to ensure that the organization does not directly or indirectly engage in or facilitate bribery and corruption.
- ▶ To be effective, it means spending resources and time on the program.
- ▶ Why bother?

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Introduction

- ▶ Legal risks: Corruption is a crime
- ▶ Reputational risks: Who wants to do business with a criminal?
- ▶ Financial risks: Corruption means less profits
- ▶ Operational risks: Undermines business transactions

Topics

- ▶ Overview of international anti-corruption law
- ▶ Overview of Thai anti-corruption law
- ▶ NACC Guidelines on Appropriate Internal Control Measures for Juristic Persons to Prevent Bribery of State Officials, Foreign Public Officials and Agents of Public International Organizations (the "**Guidelines**")
- ▶ Case study

International Anti-Corruption Law: The FCPA

- ▶ How does a U.S. law apply to Thailand?
- ▶ Applies to “issuers” – companies traded on American stock exchanges
- ▶ Applies to “domestic concerns” – American nationals, residents, or legal entities organized in the U.S.
- ▶ Applies to foreign nationals or entities that engage in corruption while in U.S. territory



International Anti-Corruption Law: The FCPA

- ▶ Criminalizes bribing “foreign” (i.e. non-U.S.) government officials.
- ▶ Defenses:
 - Payment allowed under local law
 - Money was spent to legitimately demonstrate a product or perform a contractual obligations
- ▶ “Books and records” requirement

International Anti-Corruption Law: The FCPA

FCPA penalties show the severity and scope of the law

1. German life sciences company pays USD 231 million in fines (2019)
2. U.S. technology company pays USD 25 million in fines (2019)
3. Russian telecommunications company pays USD 850 million in fines (2019)
4. Swedish telecoms firm pays USD 965 million in fines (2017)
5. Brazilian aircraft manufacturer pays USD 205 million in fines (2016)
6. Israeli pharmaceutical company pays USD 519 million in fines (2016)

International Anti-Corruption Law: UK Bribery Act

- ▶ Like the FCPA, makes it a crime to bribe a foreign government officials – but stricter
- ▶ No defense for facilitation payments
- ▶ Criminalizes “commercial bribery”
- ▶ Essentially requires a company have an anti-corruption compliance program
- ▶ Applies to U.K. companies – but non-U.K. organizations can also be prosecuted

International Anti-Corruption Law: Other countries



JAPAN **FRANCE** **CANADA** **GERMANY** **THAILAND**

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International Anti-Corruption Law: Cases involving Thailand

- ▶ FCPA Bangkok Film Festival Case:
 - U.S. film producer and his wife gave bribes to win contracts to produce Bangkok International Film Festival
 - Sentenced to prison in U.S.
 - Ex-TAT official sentenced to 50 years in prison

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International Anti-Corruption Law: Cases involving Thailand

- ▶ Rolls Royce cases:
 - Rolls Royce paid US\$170 million in fines for bribes to win contracts with Thai state oil and companies
 - Rolls Royce agreed to pay UK government GBP 497 million for corrupt payments made in a variety of countries, including in Thailand, where RR made bribes to win contracts for the sale of jet engines.
- ▶ Mitsubishi Hitachi Power Systems Ltd: Guilty plea in Japan
- ▶ General Cable Corp.: US\$ 75.75 million for FCPA violations
- ▶ Bio-Rad: US\$ 55 million for FCPA violations

Thai Anti-Corruption Law: Anti-Corruption Act

- ▶ Key law: The Organic Act on Anti-Corruption B.E. 2561 (2018) ("Anti-Corruption Act")
- ▶ The Anti-Corruption Act largely reflect the United Nations Convention Against Corruption
- ▶ Punishes "bribe-giving", as well as "bribe-taking"

Thai Anti-Corruption Law: Anti-Corruption Act

Section 176:

Any person who gives, offers to give, or promises to give any property or benefit to a public official, foreign public official, official of a public international organization with an intent to induce such person to wrongfully perform, not perform or delay the performance of any duty in his or her office shall be liable to an imprisonment for a term of not exceeding five years or a fine of not exceeding one hundred thousand Baht or to both.

In case the offender under paragraph one is a person associated with any juristic person and the action was taken for the benefit of such juristic person, provided that such juristic person does not have in place appropriate internal control measures to prevent the commission of such offence, the juristic person shall be deemed to have committed the offence under this Section and shall be liable to a fine of one to two times of the damages caused or benefits received.

Thai Anti-Corruption Law: Anti-Corruption Act

- ▶ A juristic person (such as a corporate entity) is criminally liable when the bribe-giver is associated with the company, and the bribe is given for the company's benefit
- ▶ Company can be liable even if the offender acted without authorization
- ▶ Associated persons include employees, agents, subsidiaries, or any person acting for or on behalf of such legal entity
- ▶ Company directors can also be criminally liable if they approved the bribe

Thai Anti-Corruption Law: OACC

- ▶ Penalty: Fine of an amount equal to the amount of the actual damages or the benefits so obtained, or more, but not exceeding two times of the actual damages or the benefits received.
- ▶ Having “proper internal measures” to prevent bribery can reduce or eliminate liability

Thai Anti-Corruption Law: Submission of Bids Act

- ▶ Act on Offenses Relating to the Submission of Bids to State Agencies B.E.2542 (1999)
- ▶ Covers corrupt acts when bidding for a contract with a State agency
- ▶ Companies can be liable for the actions of their employees, agents, etc., with respect to an offense
- ▶ Penalty: Fine of 50% of the highest bid price submitted by the joint offenders, or of the value of the contract that has been entered into with the state agency, whichever is greater

Thai Anti-Corruption Law: Gift Notification

Notification of the N.C.C. Commission concerning the provisions of the acceptance of property or any other benefit on ethical basis by State officials B.E. 2543 (2000) – better known as the “Gift Notification”

Government officials can accept gifts if:

- The value of the gift does not exceed THB 3,000;
- The gift is given on a “customary occasion”; and
- The gift does not improperly influence the recipient’s execution of his or her duties.

Anti-Corruption Compliance Risks

- ▶ Gift-giving culture
- ▶ Prominent state-owned sector
- ▶ Significant government bureaucracy requiring extensive interaction
- ▶ Widespread use of facilitation payments



Anti-Corruption Compliance Risks

- ▶ Reliance on agents, consultants, joint venture partners, etc.
- ▶ Importance of “connections”
- ▶ Charitable giving
- ▶ Prominent risk of commercial bribery

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NACC Guidelines on Internal Controls

- ▶ Proper implementation can reduce or eliminate an organization’s liability
- ▶ Guidelines only apply to bribery offenses under the Anti-Corruption Act – not the Submission of Bids Act or any other anti-corruption law
- ▶ Just having a compliance program is not enough – it must be properly implemented

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The Guidelines

Principle 1: “Strong, visible policy and support from top-level management to fight bribery”

- ▶ Means “tone from the top”
- ▶ Zero tolerance policy against bribery
- ▶ Participation of top-level management in preparation and implementation of internal controls



The Guidelines

Principle 2: Risk assessment to effectively identify and evaluate exposure to bribery

- ▶ Risk assessment that identifies and evaluates bribery exposure
- ▶ Must be adequately financed, resourced
- ▶ NACC identifies the risk assessment as an important element to be considered by law enforcement when evaluating a juristic person’s internal controls

The Guidelines

Principle 3: Enhanced and detailed measures for high-risk and vulnerable areas

- ▶ Juristic person must know its high risk areas
- ▶ Internal written regulations and guidelines (i.e. policies and procedures) to govern conduct in those high risk areas
- ▶ Clearly communicated to personnel
- ▶ Clear and accurate records
- ▶ Prohibition on facilitation payments

The Guidelines

Principle 4: Application of anti-bribery measures to business partners

- ▶ Level of control is important
- ▶ Due diligence is a must
- ▶ Monitoring of third party
- ▶ Commitment on anti-bribery
- ▶ Incentives and penalties

The Guidelines

Principle 5: Accurate books and accounting records

- ▶ Prioritized at executive-level
- ▶ "Off-the-books" records are prohibited
- ▶ Independent audit system



The Guidelines

Principle 6: Human resource management policies complementary to anti-bribery measures

- ▶ Use of HR management to create and maintain an anti-bribery corporate culture
- ▶ Requirement of anti-bribery commitment by new hires
- ▶ Disciplinary procedures when anti-bribery policies are violated
- ▶ Training on the internal controls and policies and procedures

The Guidelines

Principle 7: Communication mechanisms that encourage reporting of suspicion of bribery

- ▶ Juristic persons must have a channel for reporting violations and suspicious cases.
- ▶ Implementation of protective measures and a non-retaliation policy
- ▶ Screening and fact-finding investigation to reduce the risk that reporting channel is abused

The Guidelines

Principle 8: Periodic review and evaluation of anti-bribery measures and their effectiveness

- ▶ Necessary to adapt to changes in risk, organization structure, business model, laws, etc.
- ▶ Audit should be implemented on the executive level

Case Study

The Thai subsidiary of a U.S. beverage company (BeverCoTH) bottles and exports sugarcane juice. A new CFO at BeverCoTH conducts a routine audit of the company's finances. He discovers expenses and payments by the company's Government Relations officer without any supporting documents. The CFO is suspicious and contacts a compliance officer in the U.S.

BeverCoTH applies a global anti-corruption policy issued by the parent company.

Case Study

The US headquarters initiates an investigation which reveals the following:

- ▶ Over a four-year period, the GR officer made numerous payments to different government officials to receive a variety of licenses and advantageous treatment.
- ▶ The payments were recorded as "catering expenses" in the company's records.
- ▶ The country manager knew about the payments but looked the other way.
- ▶ The GR officer did not think it was a big deal – he was just doing his job.

Case Study

How could following the Guidelines and having an effective compliance program have prevented this compliance breach?

- ▶ Proper tone from the top could have set a different corporate culture
- ▶ Local anti-corruption policy tailored to BeverCoTH's risks
- ▶ Requirement of accurate books and records
- ▶ Regular anti-bribery training

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