



Tilleke & Gibbins

# ANTI-CORRUPTION LAW IN THAILAND

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*A Practical Guide for Investors*



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# EXECUTIVE SUMMARY

This Guide provides a practical overview of Thailand's anti-corruption laws as they pertain to the private sector, and particularly, to foreign investors. Thai anti-corruption law has traditionally focused on the recipients of bribes, such as government officials. But with the 2015 amendments to the Organic Act on Counter Corruption (OACC), attention is shifting toward bribe-givers—including private corporations and individuals. Since this Guide is aimed at investors, it does not address how the laws affect politicians and other government officials. Instead, the Guide discusses the myriad of anti-corruption requirements and penalties of which investors should be aware.

## Overview of Corruption in Thailand

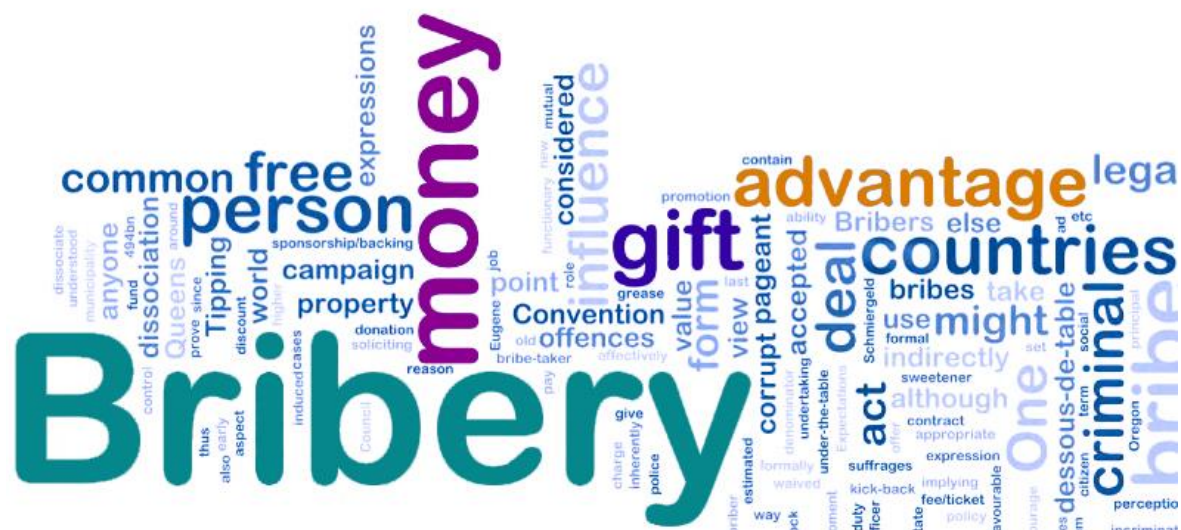
Corruption exists in Thailand in many forms. In a 2014 report, Transparency International, an NGO that measures corruption levels, gave Thailand a score of “38” with 0 being the most corrupt, and 100 being the least corrupt. For comparison, Singapore had a score of 84 (one of the highest in the world), and Malaysia, a score of 50. Cambodia and Myanmar scored lowest in Southeast Asia with 21. While Thailand is certainly not the most corrupt country in the ASEAN region, the problem is common enough for it to be a real threat to companies doing business in the Kingdom.

Thailand has sought to strengthen its anti-corruption policies, legislation, and enforcement in recent years. Indeed, anti-corruption has been a core policy focus of Thailand's current military-led government, the National Council for Peace and Order (NCPO). Under the NCPO, the OACC, Thailand's primary anti-corruption legislation, has recently been amended. The amendments bring Thailand closer to its international obligations under the U.N. Convention against Corruption (UNCAC), which Thailand ratified in 2011. Additionally, the Anti-Money Laundering Act was amended, and a new law requiring increased transparency in licensing was issued.

Historically, foreign investors have faced little risk of prosecution for corrupt activities in Thailand. Companies and individuals which fall under the jurisdiction of the U.S. Foreign Corrupt Practices Act (FCPA), the UK Bribery Act, and the OECD Convention Against the Bribery of Foreign Government Officials are at much greater risk for their activities in Thailand. There are numerous FCPA-related cases involving bribery in Thailand. However, the number of Thai-led prosecutions is minimal.

There are many reasons why such few prosecutions have taken place, but one factor has been the lack of clear legislative authority. For example, while the Penal Code criminalizes the giving of bribes, it makes no mention about corporate liability. As a result, while the actual bribe-giver can be prosecuted under the Penal Code, the company that benefitted from the bribe would get away scot-free. And while the laws on government procurement do proscribe corporate bribery, they apply only in limited circumstances.

However, with the 2015 OACC amendments, the legal landscape with regard to anti-corruption compliance has changed significantly for the private sector. Unlike the Penal Code and previous incarnations of the OACC, the new law expressly provides for corporate criminal liability. In other words, companies—and not just their employees or agents—can be punished for violating the anti-corruption laws. This includes foreign-invested entities as well as domestic concerns. Investors doing business in Thailand should therefore be aware of the risks and their responsibility to comply with Thai anti-corruption law.



# ANTI-CORRUPTION IN THAILAND

## What is considered “corruption” in Thailand?

Thai law criminalizes a variety of activities that are considered “corrupt.” Under the Penal Code and the OACC, corruption is the act of giving or promising to give a benefit to a government official in return for something. The benefit given can include anything from money to jewels to entertainment. The benefit received can be an action taken by a government official, such as awarding a contract or official license; or a purposeful failure to act, such as refraining from pressing criminal charges. Bribery is criminalized in the Penal Code, the OACC, and the Act on Offenses relating to the Submission of Bids to State Agencies (the Submission of Bids Act) among other laws.

## Who is a government official?

The definition of “government official” is broad under Thai law. Generally, government official means anyone holding a political position (e.g., members of the legislature and cabinet); civil servants (e.g., a land officer, licensing official); and employees of state-owned enterprises or agencies. Government officials can be defined as those who receive salaries from public funds.

The OACC also criminalizes paying bribes to foreign government officials and international organization officials (e.g. employees of the World Bank, the U.N., Asian Development Bank). Foreign government officials are defined as any person holding a legislative, executive, administrative, or judicial office of a foreign state or any person performing public functions for a foreign state. The definition expressly includes foreign state enterprises as falling under the law.

## **Is private commercial bribery criminalized under Thai law?**

No. Thai law does not criminalize private commercial bribery. An example of private commercial bribery is when an employee of one company pays a bribe to an employee of another company to win a contract. State-owned or partially state-owned companies are not considered private entities.

## **Can private companies be criminally liable for corruption?**

Yes. Under the 2015 amendments to the OACC, a legal entity, such as a company, can be criminally liable for corruption. A company is liable for the corrupt act if the actual bribe-giver is associated with the organization, committed the offense for the company's benefit, and the company failed to implement "proper internal measures" to prevent the bribe. Importantly, the company risks criminal liability even if the offender acted without the company's authorization. The law does not state what internal measures would be acceptable to limit or exclude liability, although it is presumed that a robust compliance initiative would reduce the likelihood of liability.

A company can also be liable for corruption under the Submission of Bids Act which deals with government procurement. The law states that a private entity is criminally liable when it gains an advantage in a bid with a state agency through instigation, collusion, or coercion.

## **Can a company be criminally liable for the actions of an employee, agent, "facilitator," consultant, or other third party?**

Yes. A company is criminally liable for the corrupt activities of any "associated person". Associated persons include employees, agents, consultants, subsidiaries, and any other party acting for the company. What is more, the organization can be guilty even if the associated person gave the bribe without the management's authorization. So if a rogue employee takes it upon himself or herself to pay a bribe, the company is liable (as well as the employee).

## What about liability in government contracting?

The Submission of Bids Act covers criminal liability in government contracting. There are four main types of corruption when bidding for a contract with a state agency:

- Colluding with others for the benefit of one party in a bid with a state agency.
- The offer of a benefit to induce a third party to confer a benefit on another bidder in relation to a contract with a state agency, such as requesting that a bidder withdraw its bid.
- The coercion of a person to participate or not participate in a bid.
- The deception or misleading of a bidder in order to gain advantage.

The term “bid” refers to the submission of a proposal with the object of acquiring the right to enter into a contract with a state agency. Under the Submission of Bids Act, the term “state agency” is broad and covers all entities which are linked to the government and exercising functions of the state under the law and receiving contributions or investment properties from the state. Employees of a state agency (such as employees of state-owned enterprises) are considered civil officials. They do not include the Prime Minister, Ministers, members of the House of Representatives, Senators, and other political officials.



## Is giving gifts, travel, and entertainment considered bribery?

It depends on the nature, amount, and occasion for the gift. Offering gifts to government officials is customary in Thailand. Thai law allows the giving of business courtesies to a government official on a traditional, customary, or cultural occasion or on an occasion in which a societal norm requires giving. The law sets a threshold of THB 3,000 per occasion, for the value of property/benefits, which can be given by one person. Offering a gift at a value lower than THB 3,000 is acceptable on multiple occasions if provided to the same person with a different reason for each occasion. The law states that a “benefit” could be anything that has value, including a discount, entertainment, service, training, meals, etc.

If a gift exceeds the threshold and is considered wrongful (i.e., that it was intended to induce an official to act or refrain from acting), it can be considered a bribe under the Penal Code and OACC. As such, the gift-giver can be penalized.



## Can a company be liable for the corrupt activities of a company it acquired (i.e., successor liability)?

Yes. A company's criminal liability would remain with the company, regardless of who the owners are. Shareholder or director and officer liability would not pass to the new owners, but the company's liability would.

## Are facilitation payments allowed?



The OACC prohibits state officials from receiving *any* type of payments, which would include facilitation payments. As such, it is illegal for officials to demand or receive facilitation payments. However, there are limited circumstances when giving a facilitation payment appears to be permitted. Under the 2015 OACC amendments, giving any type of payment to an official is prohibited when such payment is to “do or not to do any act, or to delay any act, which is contrary to his/her functions”. If the

payment is made only for the official to do his or her normal job function, the payer would likely not be prosecuted, but the receiver can be. However, giving other “types” of facilitation payments would be criminalized. Therefore, as a general rule, facilitation payments should be avoided.

## What defenses are available to charges of corruption?

For corporate defendants, the best defense would be to show the existence of a robust compliance program. Under the OACC, a company's liability is tied to whether the company implemented “proper internal measures” to prevent the corrupt activity. The law does not state what those measures are, but it is safe to assume a robust compliance program would qualify.

## **What are the punishments for bribery in Thailand?**

A legal entity can be punished with a maximum fine of twice the actual damages or the benefits obtained through the corrupt activity. For example, if a company wins a contract worth THB 100 million because of a bribe, the company can face a maximum fine of THB 200 million. Additionally, at the discretion of a court, a company must disgorge the money or benefits it obtained from the offense.

The actual giver of the bribe can also be punished. Under the law, a bribe-giver can be punished with a maximum prison term of five years, a THB 100,000 fine, or both.

The Submission of Bids Act also contains specific penalties for violations of that law. A person who corruptly seeks to win a bid can be imprisoned from one to five years and receive a fine of 50 percent of the highest bid price submitted or of the value of the contract that has been entered into with the state agency, whichever is greater.

## **What is the statute of limitations for bribery?**

For individual bribe givers, the statute of limitations (or “prescription period”) is ten years from when the offense is committed. However, under the OACC, when someone accused of violating the anti-corruption law leaves Thailand or goes into hiding, the prescription period will automatically be abated, or in layman’s terms, be put on hold. The period stops for the amount of time that the alleged offender is outside of Thailand and resumes when the person returns. With this revision, people accused of corruption-related offenses cannot simply “wait out” the prescription period by going abroad or hiding, and then either re-entering Thailand or appearing in public again.

## **What is the process for whistleblowing and reporting corruption?**

Under Thai law, complaints of corruption can be filed with the police, the National Anti-Corruption Commission, the Public Sector on Anti-Corruption, or the Office of the Attorney General. These bodies are all authorized to investigate, and, if appropriate, seek prosecution.

Thailand does not have any specific legislation to protect or incentivize whistleblowers for reporting corruption. However, under the 2003 Witness Protection in Criminal Case Act, witnesses are eligible for “special protection” measures in anti-corruption cases.


# CONTACT INFORMATION

If you have questions or comments or need additional information on local law requirements, please contact John Frangos ([john.fr@tilleke.com](mailto:john.fr@tilleke.com)) or Michael Ramirez ([michael.r@tilleke.com](mailto:michael.r@tilleke.com)) of our Anti-Corruption team.

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