

De Jure

February 11, 2022

GIFTS WITH NO STRINGS ATTACHED (PART I)



Quick Bites

"There is a list of statutes which deal with the menace of corruption and bribery in the Indian Companies and the Governmental Authorities"

Bribery and corruption are the sensitive concerns for any organization doing business locally or globally. In India, there is a list of statutes which deal with the menace of corruption and bribery in the Indian Companies and the Governmental Authorities, at different levels. The same is in the nature of regulatory, prohibitory, guidelines based and penalised measures.

Essentially, the instances of bribery and corruption acts are dealt with and governed by the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988 (*as amended*) (**POCA**). Some other statutes and regulations which deal with corruption are (i) the Prevention of Money Laundering Act, 2002 (*aiming to prevent instances of money laundering and prohibit use of the "proceeds of crime"*), (ii) The Companies Act, 2013 (**Companies Act**) (*providing for corporate governance and prevention of corruption and fraud in the corporate sector*), (iii) The Foreign Contribution (Regulation) Act, 2010 (*regulating the acceptance and use of foreign contributions and hospitality by individuals and corporations*), (iv) the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 (*as amended from time to time*) (*requiring the listed companies to make suitable disclosures for fraud and defaults committed by the company (including its promoter, KMP and/or employees, as the case maybe)*) and (v) The Lokpal and Lokayukta Act, 2013 (*providing for an establishment of bodies which are required to act independently from the government and have been empowered to investigate allegations of corruption against public servants, including the prime minister*).



Quick Bites

"POCA is the legislation enacted to consolidate all laws, relating to offences of bribes by public servants"

Although receiving and giving gifts is a common phenomenon, it could be a clear overstepping, if certain checks and balances are not put in place by the company in this regard. Such instances could then be construed as an act of bribery on their part (*and their directors and employees*), inviting serious prosecution and penalties for them under POCA.

Quick Bites

"Exchange of favour would imply gift given to obtain or retain business or to have undue competitive edge over their competitors or influencing the decision of the public officers in a wrong way"

If the gift is merely a token of gratitude or goodwill, with no strings attached, it will not be any violation of laws. However, gifting done, for exchange of favours, the same will then trigger potential liabilities and dire consequences (*besides loss of reputation and goodwill for the involved party*). In this context, we are briefly decoding the principal legislation and the applicability of the provisions of the international legislations to regulate giving of gifts by the Indian companies.

POCA expressly criminalizes receipt of any undue advantage by public servants from the private sectors, whether directly (*through its employees or directors*) or indirectly (*through agents and intermediaries*). However, the prosecution of public servants requires prior sanction of the concerned authority. Obtaining the approvals has its own challenges. The public servant here is a wide term to include any person who is in the service or pay of the Government or remunerated by the Government for the performance of a public duty.

Quick Bites

"Mens rea more than a quantum which will be considered to punish the guilty"

Again, there is not a blanket ban on the public servant to receive gifts. Under the Central Civil Services (Conduct) Rules, 1964 (*last amended in 2019*), there is a provision for accepting gifts by public servant, which is of nominal pecuniary value.

Quick Bites

"An undue advantage would mean any gratification other than the legal remuneration which a public servant is permitted to receive either from the Government or any other organization served by such public servant"

A word of caution however is while the public servant may accept gifts, meals or hospitality within the threshold limits, there should be no ulterior intention (*mens rea*), which would eventually result into violation of POCA.

It is important to note that prior to 2018, only bribe taking by public servants was a criminal act. However, with the subsequent amendments, now, even the private entities giving bribes to the public servants shall be considered as a criminal act. As a result of these significant amendments, the Indian commercial organizations (*including companies*) and its employees who may be involved in giving bribes to public servant can also be prosecuted under POCA.

Quick Bites

"With the subsequent amendments, now, even private entities giving bribes shall be considered as a criminal act"

While private parties are included, the prosecution of a foreign individual paying bribes to public servants or prosecution of a foreign individual having any nexus to India and indulging in bribery overseas is still outside the ambit of POCA. However, they may then be prosecuted by the applicable local statute of the overseas jurisdiction and/or the provisions of UK and USA anti-bribery laws.

Keeping in mind the stringent provisions of the domestic and international laws, it will be important for the commercial organizations, directors and employees to be aware of the regulatory framework and potential risks and liabilities associated with non-compliances.

In our endeavour, as a part of 3-series article, we will continue to discuss (i) more on the applicability of international anti-bribery laws to the Indian companies, (ii) opportunities for companies to design proactive, preventive and compliance measures (*including the checks and balances to avoid potential liabilities*), (iii) certain exceptions where private companies may be exonerated, (iv) risks associated with non compliance, and



(v) key points that should be taken into consideration, while advising clients on regulatory, legal forensic audit, compliance matters and drafting and negotiating private equity and M&A transaction documents.

CONTRIBUTED BY:

Amish Shroff, Partner: amish@rajaniassociates.net

Ruchi Sethna, Associate: rsethna@rajaniassociates.net

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Contact US



Rajani Associates

simple solutions

Address: Krishna Chambers
59 New Marine Lines
Churchgate
Mumbai 400020
Maharashtra, India
Telephone: (+91-22) 40961000
Facsimile: (+91-22) 40961010
Email: dejure@rajaniassociates.net
Website: www.rajaniassociates.net
