

De Jure

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GIFTS WITH NO STRINGS ATTACHED (PART II)



Bribery and corruption can take many shapes and forms in an organization. This list can be really (but not surprisingly) long. It need not be typical doling out of cash but could be in the nature of under or over-invoicing, facilitation payments, inflated commission payments, unauthorized rebates. It could also be non-monetary favors like giving gifts to an individual or his family members, free transport, holiday packages, discounts, employment opportunities, offering directorships, arranging boarding, extending hospitality, undertaking transactions at non-arms length. The more structured form could also be in the nature of kickbacks, political contribution, or for that matter CSR compliance adherence, spending on social causes, and giving charitable donations.



Any or all of the above things are done by the organization with the convoluted intention (*for lobbying or to directly or indirectly influence the decisions of a public officer or other third parties*) for reciprocal undue advantages and benefits. Again, not an exhaustive list, but such benefits would include business opportunities, favorable bidding, contractual terms and conditions, speedy moving of files in the departments, securing or speeding-up routine actions, obtaining consent and approvals, awarding of tender, contracts, undue competitive edge, avenues for higher revenue, and profits.

While there are domestic laws to tackle and punish the offender for the act of bribery and corruption, the companies, in certain cases, are also required to adhere to the international anti-corruption laws, most commonly, Foreign Corrupt Practice Act, 1977 of the United States of America (as amended in 1998) (**FCPA**) and the Bribery Act, 2010 of the United Kingdom (**UKBA**). For more about the domestic laws relating to Indian corporations, see our previous Article, [**Gifts With No Strings Attached \(Part I\)**](#).

Both, FCPA and UKBA, prohibit the organization and individuals to engage in corrupt practices, irrespective of their place of incorporation. Within their ambit, they essentially cover the scope of what constitutes a bribe, maintenance of books and records, the jurisdiction of applicability, and penalties. As far as the applicability aspect is concerned, in case of the foreign companies having business interest in India or conversely, Indian companies having business connections in the overseas jurisdictions, these entities will be required to adhere to the provisions of the UKBA and FCPA. Any non-compliance with the provisions of these statutes will trigger fraud investigations and other dire consequences for the organization.

Quick Bites

"Considering that the existing Indian anti-corruption and bribery laws only take into account corruption in relation to public services and not private and commercial transactions; it may so happen that the Indian companies, while they may escape the local laws, may end up attracting the provisions of the UKBA and/ or the FCPA."

In order to mitigate potential liabilities for the breach of anti-bribery and anti-corruption laws (**ABAC**), it is imperative for the companies to adopt and lay down clear and comprehensible policy and a code of conduct. ABAC Policy should set out the standards to which the company expects any person or entity that performs services on behalf of the company to adhere to when acting on the company's behalf. Typically, it should cover the guidelines for (i) interacting and dealing with public officials, (ii) gifts, meals, and entertainment, (ii) political contributions and lobbying, and (iii) charitable donations. Further, it should lay down the guidelines for preapprovals to execute certain activities (especially, where the employee is not clear and having any doubts), for record-keeping to avoid concealing of bribes and to discourage fraudulent practices. Also, mechanism for proactive reporting, and lastly, setting out disciplinary actions that will be imposed on individuals and organizations found to have

Quick Bites

"As to what will constitute corrupt practice, the broad contours remain the same under FCPA and UKBA. Essentially, it would include (a) offering or accepting any kind of benefits or advantage with the objective to improperly perform an activity or reward an improper performance or (b) bribing a foreign public official by promising or offering any financial or any other advantage, to influence them in the performance of their official duty".

breached the guidelines should be covered under the ABAC Policy.

Also, just having the policy may not suffice. While drafting a policy will have its own challenges, its implementation is another important aspect. For effective implementation, the company should conduct a training program and workshop for its directors, officers, and employees to create awareness amongst them on the expectations, rights, obligations, and duties under the policy framed by the company. There should also be a process for continuous monitoring, improvisation, and measures to check illegal acts by the concerned person who is acting on behalf of the company. Equally reassurance factor should be to have an environment to encourage reporting of wrongdoing acts (*including anonymous reporting for suspected violations*). Also, if there are any doubts among the employees and the personnel on the policy, they should be able to consult an internal council or the Human Resources Head or such other designated person appointed by the company.

Although several organizations, including multinational companies, demonstrate awareness of the risk involved and have intensified their anti-corruption initiatives, there is much that can be done to tighten the loose ends. More so, keeping in mind the extraterritorial applicability of the foreign laws. In order to avoid or mitigate the potential liabilities and fall-out consequences for non-compliance, it is advisable that the companies have a zero-tolerance approach against bribery and corruption, adopt precautionary measures, and have a robust internal mechanism. This can be achieved by having a well-drafted, strong, and effective policy and implementation program, clearly outlining the scope, its applicability, what will constitute bribery, prohibitory list of activities, and consequences of non-adherence.

Quick Bites

"While drafting a policy it is necessary to understand if the company needs to comply with certain extra-territorial ABAC laws".



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