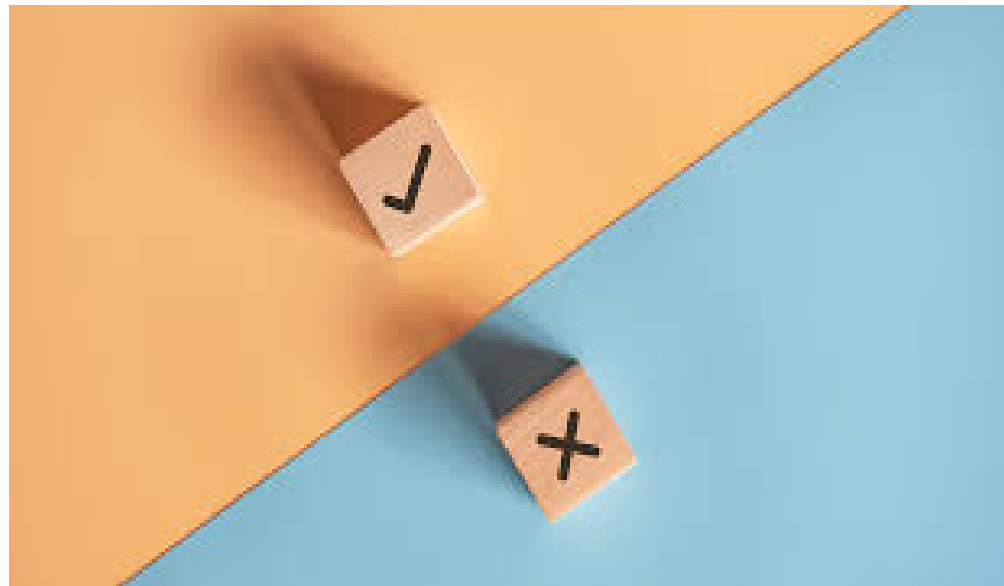


De Jure

May 7, 2022

Gifts with No Strings Attached (Part III)



KEY DEVELOPMENTS CONCERNING ANTI-CORRUPTION LAWS

The white-collar and anti-graft regulatory and enforcement regimes have evolved significantly over the last few years in India.

In order to crackdown on corruption, the key developments include amendments and the enactment of new legislation from time to time.

While the Prevention of Corruption Act was significantly amended to punish even the bribe giver, the enactment of the Prevention of Money Laundering Act, the Black Money Act, and the Fugitive Economic Offenders Act aim to tackle serious acts of corruption. Another significant development in recent times was the enactment of the Real Estate (Regulation and Development) Act which aim to tackle and monitor the corrupt practices of builders, besides addressing the issue of exploitation of consumers.

Quick Bites

"Some other key developments to tackle corruption include the adoption of integrity pacts by organizations in major procurements, e-tendering for public procurements, e-governance, and faceless assessment under the Income Tax Act, Goods and Services Tax."

Further, India is also a signatory to and has rectified the United Nations Conventions against Corruption and the United Nations Convention against Transnational Organised Crime which has helped the country to deal with the problem of black money and corruption at different levels. On the international front, with the increasing extra-territorial reach of the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (*UKBA*), there is more accountability and awareness for the activities undertaken by the companies, putting them under more scrutiny.

Any non-compliance with the anti-corruption laws (*domestic and/or international*) will have its own risk, implications, and consequences of varying degrees, depending upon the nature of contravention and gravity of offence.

In this concluding part of the 3-series article, we continue to discuss the measures that can be considered to ensure compliance and address the issue of anti-corruption within the organization. We have also briefly discussed the risk associated with non-compliance, and the penalties for non-compliance.

PRE-EMPTIVE AND CORRECTIVE MEASURES FOR ORGANIZATIONS

In any funding and investment transactions, it is usual for the investor and the lenders to include detailed representations and warranties (*in the definitive agreements*) on compliance with the anti-corruption laws by the company, its promoters, and directors. This is coupled with general and specific indemnifications taken by the investors. Where the investor is a non-resident, any dilution or carve-outs is almost a non-negotiable and a deal-breaker point. Hence, the promoters and companies either have to agree to the provisions in their current form or let go of the deal.

Where the company is seeking or expecting funding and even otherwise, including where the company may be subjected to forensic and regulatory audit, the effective way to address the situation is to keep, have or get the house in order.

In the form of pre-emptive and corrective measures, it is advisable to implement a robust policy that includes acts of gifting, business courtesies, hospitality, and a whistle-blower protection mechanism. After the policy is implemented, it is also important to periodically revise and update the policies so that they are in conformity with the changing laws and situations encountered in the organization (*this is over and above conducting training programs and taking such other measures as we have discussed in our previous article of this series*).

The company should also consider conducting vendor diligence (*sell-side diligence*) for identifying the concern areas in the company. In recent years, this approach has gained popularity, since it helps the companies to learn a lot about their own company and identify any red flags before they are brought to the notice of the company or issues snowballs into a bigger problem. Even due diligence in relation to third-party dealing with advisors, consultants, and sub-contractors should be considered. In any such dealing with the third parties, it is highly advisable to have written agreements with them, covering appropriate provisions on anti-corruption compliance.

PENALTIES AND CONSEQUENCES

The anti-corruption laws prescribe various penalties for an organization as well as its director, manager, secretary, or other key managerial personnel and officers.

The commission of offence may result in civil and criminal consequences.

In case any offence is committed by an organization in connivance of directors and officers of an organization, then such individuals will be subject to fine and/or imprisonment upto 7 years under POCA. The organization shall be punishable with a fine. Where any person who was previously convicted under the POCA and subsequently commits an offence under this act, then such a person will be subject to a prison term of upto 10 years as well as a fine.

Under the Prevention of Money Laundering Act, the offence of money laundering can attract a rigorous prison term of between 3 and 7 years and a fine.

Again, the commission of fraud under the Companies Act can attract a prison term between six months and 10 years and/or a fine of upto three times the amount involved in the offence.

Further, under the Representation of the People Act, the convicted person will also be disqualified from contesting elections and/or holding an office of MP or MLA or Legislative Council of the State.

Depending upon the nature of offence, the person may also be subject to simultaneous interrogation from different authorities like SFIO, CID, ED, and EOW.

Quick Bites

"Besides fines and imprisonment, the statutes also provide a right of confiscation or attachment of the property of the person who has committed the offence, or debarment or blacklisting from dealing with government authorities. A person may also be declared as fugitive if the amount involved exceeds the prescribed threshold."

CONCLUSION

While there could be issues and challenges to deal with the instances of corruption, it is imperative that the companies take proactive steps to address the risk, otherwise litigation and consequential actions may result in financial and notional losses (*including loss of business, investment opportunities, and reputational loss*) for the companies, directors (*including ex-directors*) and their officers.

CONTRIBUTED BY:

Amish Shroff, Partner: amish@rajaniassociates.net

Ruchi Sethna, Associate: rsethna@rajaniassociates.net

DISCLAIMER:

This Article is meant for information purposes only and does not constitute any legal advice by Rajani Associates or by the authors to the article. The contents of the Article cannot be intended to be comprehensive legal advice and would require re-evaluation based on the facts and circumstances. We cannot assume any legal liability for any errors or omissions. Should you have any queries on any aspect contained in this article, you may contact the author by way of an e-mail or write to us at editorial@rajaniassociates.net

AREAS OF PRACTICE

| Capital Markets | Private Equity | Mergers and Acquisitions | Corporate Litigation & Arbitration | Projects & Project Finance |
| Real Estate & Trust | Corporate & Commercial | Banking & Finance | Structuring | TMT | IPR | Employment

DISCLAIMER

This update only contains a summary/ limited description of the topic dealt with hereinabove for general information purposes and should not be construed as a legal opinion or be relied upon in absence of specific legal advice. For further information or legal advice please feel free to contact us.

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
