

Dispute Resolution Hotline

January 08, 2019

WHITE COLLAR AND INVESTIGATIONS: INDIA AND GLOBALLY

A ROUND-UP OF THE DEVELOPMENTS THIS YEAR

The year 2018 was both exciting and challenging for the white-collar industry. The government, enforcement agencies, regulators have introduced new laws and tightened the scrutiny and penalties in India ensuring compliance. The multi-national corporations have focused on them seriously and taken steps to streamline their processes and comply with the regulatory framework. India has been trying incessantly to purge its public institutions of systemic corruption. While corruption perception indices published by Transparency International rank India poorlyⁱ, India has made some strides last year in laying the ground work for a corruption-free society and economy.

THE PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018 ("ACT") – A SEA OF CHANGE

Last year, the Prevention of Corruption (Amendment) Bill of 2013 saw the light of day and was passed by both houses of Parliament and finally came into force on July 26, 2018. The Act is an attempt at making a conscious move towards a mature anti-corruption regime in consonance with the United Nations Convention Against Corruption and has introduced the following key changes to the Prevention of Corruption Act, 1988 ("PCA")ⁱⁱ:

1. Bribe giving is now an offenceⁱⁱⁱ

Unlike the PCA, the Act now extends its scope to those who give or promise to give undue advantage to a person with an intent to induce or reward a public servant to perform their '*public duty*' '*improperly*', punishable with maximum imprisonment of seven years and / or fine. It is significant to note that the Act makes no specific distinction between '*facilitation payments*' and other forms of bribery. Thus, any undue advantage including facilitation payments to public servants is prohibited.

The Act, however, grants immunity from prosecution in favour of those who are compelled to give such undue advantage provided such persons report the matter to the law enforcement authorities within seven (7) days from the date of giving the undue advantage.^{iv} The Act seeks to distinguish between those pressured by the system to offer bribes and those intentionally seeking to engage in corrupt practices. Explicit provision on this is aimed at creating an effective deterrent for private parties (including companies and their officers) engaging in corrupt practices.

2. Commercial Organizations now liable for Prosecution^v

The Act grants authorities the power to prosecute commercial organizations '*if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant...*'. If any director, manager, secretary or other officer of the concerned commercial organization is proven to have consented and / or connived to commit the said offence, such officer would be punishable with imprisonment for a term not less than three years and extendable to seven years and also liable to fine. '*Adequate procedures*' in commercial organisations would act as a valid defence.

The impact of these provisions would be far reaching considering directors / officers can be sued for acts of commercial organisations. India, unlike other jurisdictions, has faced severe criticism for abuse of process, therefore such provisions could lead to harassment of individuals within companies even if not responsible/involved in the illegal act and could potentially defeat the principle of '*corporate veil*'. It is imperative that safeguards be put in place before implementation of these provisions.

3. Prior Permission to be sought before Initiating Investigations^{vi}

Mindful of the sensitive nature of a public servant's role, the Act necessitates police officers seeking prior approval before conducting enquiry into any offence committed by incumbent and retired public servants. The approval would have to be sought from the relevant union or state government in whose employment the accused committed the offence. While the Act binds such approving authority to pass its decision within three months, further extendable by a month, this may dilute the power of investigating authorities from effectively prosecuting guilty officials. However, such prior sanction would not be required in cases of arrest of officials caught '*red-handed*' accepting or attempting to accept any undue advantage for himself or for any other person.

4. Attachment of Tainted Property^{vii}

The Act now grants power to attach property, confiscate money or property and administrate property tainted by corrupt activities. The provisions of the Criminal Law Amendment Ordinance, 1944 are now

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applicable to such attachment proceedings. Earlier, tainted property could be attached through measures under anti-money laundering laws.

5. Time Limit for Trial

The Act now requires trial of offences to be held on a day to day basis and endeavor to conclude it within two years.

Recent Criticisms of and Challenges to the Act

While ambitious, the Act has not been free from criticism. It has seemingly missed the bus on addressing few key issues which similar statutes under other matured jurisdictions provide for including – prosecution of corrupt practices among private entities, illegal gratifications paid to foreign officials, providing for guidelines for preventive anti-corruption policies and practices.

As recently as in November 2018, the Supreme Court issued notice to the Central Government seeking their reply in a petition challenging certain provisions of the Act, including specifically Section 17A (1) which mandates seeking prior permission before initiating investigations against public officials. It was argued that the said section is nothing but an attempt to bring back the struck-down Section 6A of the Delhi Special Police Establishment Act which mandated seeking prior permission before investigating certain categories of public officials. While it may take some time before this matter sees the light of day, challenges to the nascent law show that it is not free of loopholes and India's anti-corruption legislative landscape is still very much a work in progress.

The Act – What does it mean for you?

With Indian laws attempting to catch up with the rest of the world, corporate houses and directors with presence and ties with India are becoming increasingly aware of the need to have sound anti-corruption policies in place to adhere to clean corporate governance norms and bona fide commercial dealings. The Act recognizing this, grants immunity to commercial organizations which have '*adequate procedures*' in place. Even in the absence of guidelines prescribed by the government, it is imperative that commercial organizations introduce compliance programs, manuals and guidance notes to ensure that employees and consultants are adequately educated about obligations under the Act, as done in other developed jurisdictions. Failure to do so might exacerbate liabilities under the Act.

GROWTH OF INTERNAL INVESTIGATIONS:

Given the above background and march towards anti-corruption regime, the relevance of internal investigations in companies have also witnessed an analogous increase. These investigations aid in keeping a check on the affairs of the company and ward off unwarranted and embarrassing raids, and further actions by authorities. The laws and procedures governing privilege and related aspects in such internal investigations vary across jurisdictions. In India, owing to the highly subjective nature of such investigations, there is no set mechanism or strict procedure which needs to be adhered to, for conducting such investigations. Our detailed paper on conducting internal investigations in India is available [here](#).

With the rise of the #MeToo movement, companies have also fastened their norms for investigations in cases of complaints of sexual harassment. Recently, a senior Tata Motors official, accused of misconduct as part of the #MeToo movement, was relieved from services with immediate effect, on the basis of an internal company memo by an internal panel (i.e. Internal Complaints Committee).

Recent Examples in India:

1. ICICI Bank: ICICI Bank resorted to internal investigation amidst investigations by the Reserve Bank of India, Securities and Exchange Board of India and Central Bureau of Investigation pertaining to allegations of fraud against Chanda Kochhar, the erstwhile CEO of ICICI Bank for breach of provisions relating to the Code of Conduct and regulatory provisions relating to conflict of interest. ICICI Bank engaged retired Supreme Court Justice B. N. Srikrishna, to head an internal probe panel in the matter. Justice Srikrishna was assisted by a law firm and a forensic audit company.

In July 2018, ICICI Bank instituted yet another internal probe to examine the allegations of irregularities in 31 loan accounts as per reports from another whistle-blower. The bank hired a law firm to investigate these allegations of inflation of profits by \$1.3 billion over 8 years by delaying provisioning of the 31 Non- Performing Assets accounts.

2. Punjab National Bank ("PNB"): The Bank was faced with a USD 2 Billion fraud involving diamantaire Nirav Modi and Mehul Choksi. The fraudulent activities of Nirav Modi and Brady House Branch of PNB were revealed after complaints made to Central Bureau of Investigation by forex banks. An internal probe conducted by PNB suggested that officials from Brady House Branch of PNB had fraudulently issued undertakings to forex banks, from whom Nirav Modi had taken credit. This raised huge concerns about PNB's audits, compliance, vigilance systems and internal governance. PNB appointed a consultancy firm to undertake forensic audit of five group companies of Nirav Modi. The investigation revealed 54 officials of PNB ranging from clerks to senior managers were involved in the fraud. Based on the report, 21 officials were suspended by PNB. The internal report has been handed over to the police and relevant investigating authorities and is being used as part of evidence.

3. Flipkart: Pursuant to allegations raised against Flipkart co-founder and group chief executive Binny Bansal for serious misconduct, an independent investigation was done on behalf of Flipkart and Walmart. This led to subsequent resignation by the co-founder. There were reports that the allegations pertained to certain instances of sexual harassment in 2016, which were denied by Mr. Bansal.

4. Cognizant Technologies Solutions: Lifshitz & Miller announced investigation into possible securities laws violations and Foreign Corrupt Practices Act against officials of Cognizant Technologies Solutions relating to improper payments in facilities in India. The company reported the violations in their regulatory filing before the Securities Exchange Commission ("**SEC**") and US Department of Justice to ensure voluntary disclosures to reduce or limit the imposition of penalties.

5. HDFC Bank: An employment fraud by a consulting firm on HDFC Bank was recently unveiled pursuant to an internal investigation conducted by the Bank. The consultancy agency had pulled off the fraud by puffing up resumes of candidates through forged documents, along with falsified salary

GLOBAL DEVELOPMENTS IN ANTI-CORRUPTION LAW AND RISE OF INTERNAL INVESTIGATIONS

France

While significant changes were brought in this area of law with the enactment of “*Sapin II*” in 2016, 2018 saw a circular guideline coming into force which clarified how and when its leniency regulations (*Convention judiciaire d'intérêt public* or the CJIP) would be applicable on co-operating companies embroiled in anti-corruption investigations / proceedings. The circular guideline deals with the fines imposed, whether it requires reduction or increase based on the level of cooperation offered by a company under investigation. *Agence française anticorruption* or the Agency (established in 2017 as a body authorized to inspect a targeted entity and submit its report with its findings on the allegations of corruption) introduced an exhaustive list of questions it would seek responses to from a targeted entity.

Germany

Germany witnessed series of conclusion or initiation of major corruption investigations against corporates and public officials in 2018. In February of 2018, the aircraft manufacturer Airbus agreed to pay a fine of EUR 81.25 Million as a settlement under a 2003 investigation into payment made for ‘*unclear purposes*’ with respect to sale of fighter jets to Austria. In May of 2018, German prosecutors charged managers of the German Football Association with tax evasion pertaining to allegedly improper payment of EUR 6.7 Million to a German sportswear company back in 2005.

Japan

Nissan Motor, one of the biggest automobile companies conducted an internal investigation based on a whistleblowers report indicating violation of Japanese securities laws by its Chairman Carlos Ghosn and Director Greg Kelly done with the aid of auditors and forensic experts. The complaint/report revealed non-disclosure of Ghosn’s income in the Tokyo Stock Exchange Securities Report. Nissan clarified in a public statement that such misconducts constituted clear violation of the duty of care by Ghosn and Kelly and removed them from its Board. Following the investigation, Japanese authorities arrested Ghosn and Kelly based on suspicions regarding misconduct on their part. Nissan is co-operating with the authorities in their investigation.

Singapore

Singapore witnessed the conclusion of a highly publicized case involving misuse of church funds, round-tripping, falsification of accounts and criminal breach of trust by its founder and other members of the City Harvest Church in 2018. News reports point to the sum misused (approximately SGD 36 Million) being the highest ever amount of misused charity funds. Singapore’s highest court, the Court of Appeal, upheld the conviction of its founder but reduced the imprisonment term imposed on him for guilty of breach of trust *simpliciter* and not aggravated breach of trust.

United Kingdom

2018 witnessed some key provisions of the Criminal Finance Act, 2017 coming into force. Among these was the power to issue ‘*unexplained wealth orders*’ or UWOs which allows investigating authorities to require people connected with serious crimes to explain their interest in and source of obtaining specified properties. Such laws have been introduced to address growing concerns in the UK with corrupt foreign officials using improper proceeds to acquire British real estate and other assets.

The English courts have dealt extensively with the concept of litigation privilege in investigations. The English Court of Appeal recently ruled that:¹ Litigation privilege will apply to communications between clients and their attorneys if there is reasonable contemplation of criminal proceedings, and litigation must be the sole or dominant purpose of investigation. It further observed that documents prepared by the solicitors and forensic experts forming part of the investigation following formal instructions of the solicitors would be protected. A comprehensive overview and analysis of this has been covered [here](#). In a subsequent judgment², the English Court of Appeal placed fetters on the liberal interpretation of privileged documents. It held that - correspondence exchanged for the dominant purpose of obtaining advice or evidence in respect of litigation, would be protected by litigation privilege. Such purpose may not be construed in broad terms. Thus, correspondence exchanged among the Board members of company, prepared to discuss a commercial proposal for the settlement of a dispute, would not be covered by litigation privilege. A comprehensive overview and analysis of this has been covered [here](#).

United States of America

Balancing implementation of the strict provisions of anti-corruption legislations such as the Foreign Corrupt Practices Act and protecting institutions from persecution, the US Department of Justice introduced a policy against ‘*piling on*’ of penalties by different regulators for the same offence. The policy recommends coordinated effort by relevant departments to ensure speedy, efficient and justifiably reasonable penalties to be imposed on guilty commercial institutions.

Recent Examples:

1. AMAZON: Amazon initiated an internal investigation pursuant to allegations reported in the Wall Street Journal about their offering internal data, via intermediaries, to independent merchants selling their products on the site to help them increase their sales in return for payments. Pursuant to such investigation, several Amazon employees in USA and India were sacked. In response to such data breach, Amazon reported having taken up several preventive and remedial measures, including deletion of thousands of suspect reviews, restricted access of sellers to customer data on its website, etc.

2. GOOGLE: Andy Rubin, creator of Android operating system, was offered an exit package of \$90m post an internal investigation concluding on his sexual misconduct while being part of the organization. Information about any such internal investigation was kept hidden by Google for long before the protests by employees suggested other such instances.

3. **SYMANTEC:** An internal investigation was initiated by the Audit Committee, assisted by independent legal counsel and a forensic accounting firm with respect to certain filings made before the Securities Exchange Commission based on allegations of inconsistent behavior and violation of Code of Conduct and other related policies. Such investigations resulted in certain delays in filing of the annual report by the company. The Audit Committee also proposed certain recommendations which the Board of Directors subsequently adopted, including: appointment of a separate Chief Accounting Officer; a separate Chief Compliance Officer reporting to the Audit Committee; clarifying and enhancing the Code of Conduct and related policies; and adopting certain enhanced controls and policies related to the matters investigated. Symantec voluntarily contacted the SEC regarding the Audit Committee's investigation, followed by a formal investigation commenced by SEC.

LOOKING FORWARD

The Indian anti-corruption landscape has witnessed some key changes this year with the enactment of the Act. However, tackling the perennial issue of corruption in the country would require further revamping. Indian laws do not extend their scope to cover prosecution of corrupt practices among private entities or payment of bribes to foreign public officials.

However, 2019 promises to be nothing short of exciting at the moment. The realm of internal investigations has expanded beyond detecting financial disruptions in a company to matters concerning allegations of sexual harassment and anti-competitive behavior. Internal investigations would ensure that the companies detect frauds and mis-conducts, check on persons involved in wrongful acts and omissions, balance its reporting and disclosure obligations with its interest to avail minimal liability and preserve its goodwill. Recently the Companies Act, 2013 has been amended to state that it is mandatory for companies to include in the annual statement and board report a statement that they are in compliance of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This, along with the #metoo movement has provided significant impetus to internal probes in this respect.

The Competition Act, 2002 provides a provision for imposition of lesser penalty on persons who make full and true disclosure of vital information relating to cartels and other anti-competitive acts. This forms the basis of rigorous reliance placed by companies on internal investigations in cases of anti-competitive behaviour by employees, sellers, distributors that they associate with. While there have been cases of exposure of internal investigations affecting share values etc. of companies, investigations have contributed in reposing faith in them. This is well-perceived especially when the company opts for self-reporting or the accused personnel voluntarily step down.

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You can direct your queries or comments to the authors

¹ *Eurasian Natural Resources Corporation Limited v. The Director of the Serious Fraud Office* [2018] EWCA Civ 2006

² *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652

ⁱ India was ranked 81 out of 180 nations. Transparency International's Corruption Perception Index available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017

ⁱⁱ For a detailed analysis of the Act, please refer to our hotline - <http://www.nishithdesai.com/information/news-storage/news-details/article/parliament-tightens-the-noose-on-corruption.html>

ⁱⁱⁱ **Section 8.** (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention- (i) to induce a public servant to perform improperly a public duty; or (ii) to reward such public servant for the improper (ii) to reward such public servant for the improper performance of public duty; shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both: Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage: Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage: Provided also that when the offence under this section has been committed by commercial organization, such commercial organizations shall be punishable with fine. Illustration.—A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section. Explanation.—It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party. (2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the later.

^{iv} **Section 8 (1)** Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage: Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage:

^v **Section 10.** Where an offence under section 9 is committed by a commercial organization, and such offence is proved in the court to have been committed with the consent or connivance of any director, manager, secretary or other officer shall be of the commercial organization, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. Explanation—For the purposes of this section, "director", in relation to a firm means a partner in the firm."

^{vi} **Section 17A.** (1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval— (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government; (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government; (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed: Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person: Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

^{vii} **Section 4(4)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years: Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so: Provided further that the said period may be extended by such further period, for the reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period together with such extended period shall not exceed ordinarily four years in aggregate.

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