

**Prevention of Bribery in Private Sector Bill, 2011
(version 1.2)**

**Recommendations for further action
plan for stolen assets recovery
Floating Warrant Concept**

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Recommendations for further Action Plan on Stolen Assets Recovery

Based on the nature of the money, it can be classified under three categories and dealt with accordingly:

- 1) Corruption money
- 2) Illegal Money like drug trafficking/terrorism
- 3) Tax evasion

Strategy

- 1) To confiscate the money, which is generated through corrupt and illegal activities?
- 2) To collect due tax, interest and penalties on money generated through tax evasion.
- 3) To launch prosecution in both the cases mentioned above.

Process

In line with the strategy, the processes may be divided into two parts:

1. Identification, verification, collection of taxes, confiscation and return of stolen money/assets to India and prosecution of guilty.
2. Introduction of new legislation or amendment of current laws to prevent further accumulation of wealth outside India and to ensure continuous availability of information on that.

Steps under the Process

A. Ratification of UNCAC

For the ratification of UNCAC following steps are required:

- 1) Enactment of a new act for Bribery in the Private Sector (we are drafting this bill), incorporating:
 - Provisions for forfeiture of the illicit money
 - Strong penalties provisions to act as deterrent
 - Provisions relating to bribery to foreign nationals

- 2) Strengthening of protection mechanism for the witnesses by strengthening of The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill (Whistleblower Act)
- B. Introduce provisions to file FIR without identification of culprits on the lines of John Doe Summons.
 - C. After ratification of UNCAC, through the StAR (Stolen Asset Recovery) mechanism, we start the proceedings for obtaining information regarding ownership of illicit money in foreign countries and bring it back to the country.
 - D. Strengthening taxation laws for stopping further Tax Haven Abuse
 - Negotiating and signing Double Tax Avoidance Agreements with all tax havens
 - Strengthening FIUs based on FATF (Financial Action Task Force) recommendations
 - Control over transfer pricing through suspicious transaction reports (STR).

The Prevention of Bribery in Private Sector Bill, 2011(version 1.2)

An Act to establish bribery as criminal offence and to establish and promote effective practices to prevent bribery in private sector.

1. Short title, extent, application and commencement

- (a) This Act may be called 'the Prevention of Bribery in Private Sector Act, 2011.
- (b) It extends to the whole of India.
- (c) It shall come into force on such date as the Central government may, by notification, in the Official gazette, appoint.

2. Definitions

For the purpose of the Act:

- (a) "Bribe" shall include facilitation payments, directly or through third parties and gift, hospitality and expenses whenever they could or perceived to affect the outcome of business transactions and are not reasonable and bonafide.
- (b) "Commercial entity" means-
 - (i) A body which is incorporated under the law of India and which carries on a business (whether there or elsewhere),
 - (ii) Any other body corporate (wherever incorporated) which carries on a business, or part of a business, in India,
 - (iii) A partnership which is formed under the law in India and which carries on a business (whether there or elsewhere), or
 - (iv) Any other partnership (wherever formed) which carries on a business, or part of a business, in India,

For the purposes of this section, a trade or profession is a business.

- (c) 'Confiscation' shall include forfeiture and shall mean the permanent deprivation of property by order of a court or other competent authority.
- (d) The bribe becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the private actors involved, or he is forced to pay bribe to protect his right which are legally due to him, otherwise it takes the form of speed money, this is the bribe given for expediting approvals and for providing (or not withholding) services.
- (e) 'Foreign public official' means any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or

elected, whether permanent or temporary, whether paid or unpaid and a person who performs a public function or provide a public service for a foreign country.

- (f) 'Non- Governmental organisation' means a body which is incorporated under the laws in India or any other body corporate, wherever incorporated which carries on its charitable or religious activities in India, any society registered under the Societies Registration Act, a trust registered under the Public Trust Act or association of persons which is carrying on its charitable or religious activities in India. It shall include community based organisations and for this purpose 'charitable or religious activities' shall mean activities as defined in section 2(15) of the Income Tax Act, 1961.
- (g) 'Person' shall include-
 - (i) an individual,
 - (ii) a company
 - (iii) a firm
 - (iv) a society
 - (v) a trust
 - (vi) a HUF
 - (vii) an association of persons or a body of individuals, whether incorporated or not
 - (viii) Limited liability partnership
 - (ix) Every artificial juridical person not falling within any of the preceding sub-clauses and
 - (x) Any agency, office or branch owned or controlled by such person.
- (h) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly through the commission of offence.
- (i) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

3. Bribery in the private sector

- (a) A person shall be guilty of an offence of giving bribe, when committed intentionally in the course of economic, financial or commercial activities when it is established that there is a promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in

any capacity, for a commercial entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

- (b) A person shall be guilty of an offence of receiving bribe, when committed intentionally in the course of economic, financial or commercial activities when it is established that there is solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a commercial entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

4. Offence of Bribery of foreign public officials

A person shall be guilty of an offence of bribery of foreign public officials, when committed intentionally in the conduct of international business, when it is established that there is an offer, promise or giving any undue pecuniary or other advantage, whether directly or through an intermediary, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage. Offence of bribery of foreign public official shall include complicity in, incitement, aiding and abetting or authorisation of an act of bribery of a foreign public official. It shall also include attempt and conspiracy to bribe a foreign public official.

5. Participation or attempt to participate in act of bribery

- (a) Any person who participates in any capacity such as an accomplice, assistant or instigator in an offence under sections 3 or 4 shall also be considered as guilty of offence under that section.
- (b) Any person who makes an attempt to commit an offence under sections 3 or 4 shall be considered as guilty of offence under that section.

6. Failure of commercial entity to prevent bribery

- (a) A commercial entity shall be guilty of an offence under this section if a person is associated with it, bribes another person intending-
 - (i) to obtain or retain business for the commercial entity, or
 - (ii) to obtain or retain an advantage in the conduct of business for the commercial entity.
- (b) But it is a defence for the commercial entity to prove that it had in place adequate procedures, as may be prescribed, designed to prevent persons associated with it from undertaking such conduct.

7. Failure of non-governmental organisation to prevent bribery

- (a) A non-governmental organisation shall be guilty of an offence under this section if a person is associated with it, receives or give bribe to another person intending-
 - (i) to obtain or retain assets, grants for the non-governmental organisation or
 - (ii) to obtain or retain an advantage in the conduct of its charitable activities
- (b) But it is a defence for the non-governmental organisation to prove that it had in place adequate procedures, as may be prescribed, designed to prevent persons associated with it from undertaking such conduct.

8. Contravention by companies

- (1) Where a person committing an offence of any provisions of the Act, is a company, every person who, at the time the offence is committed, was in charge of or was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of offence and shall be liable to be proceeded against and punished accordingly, Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the offence took place without his knowledge or that he exercised due diligence to prevent such offence.
- (2) Notwithstanding any thing contained in sub-section (1), where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of committing offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purpose of this section 'company means any body corporate and includes a firm, society, trust, LLP or other association of persons and 'director' in relation to a firm means a partner of the firm and 'director' in relation to a trust means 'trustee of the trustee'.

9. Penalties

- (a) An individual guilty of an offence under section 3 or 4 is liable-
 - (i) on summary conviction, to imprisonment for a term not exceeding --- months, or to a fine not exceeding Rs. ----, or to both,
 - (ii) on conviction, on indictment, to imprisonment for a term not exceeding ---years, or to a fine not less than Rs. ---, or to both.

- (b) Any other person guilty of an offence under section 3 or 4 is liable-
 - (i) on summary conviction, to a fine not exceeding Rs. ---,
 - (ii) on conviction, on indictment, to a fine not less than Rs. ---.
- (c) A person guilty of an offence under section 5 is liable on conviction and on indictment to a fine not more than Rs. ---.

10. Confiscation of proceeds of crime

- (a) Proceeds of crime derived from or involved in offences under Section 3 or 4 or property the value of which corresponds to that of such proceeds shall be confiscated.
- (b) If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to be confiscated.
- (c) If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall be liable to confiscation up to the assessed value of the intermingled proceeds.
- (d) Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to be confiscated in the same manner and to the same extent as proceeds of crime.
- (e) For the purpose of this section, notwithstanding any rights or privilege provided through any other Act or by an agreement between the parties, the adjudicating authority shall have authority to order any bank, financial institution, financial intermediary or commercial entity to provide information, seize or produce records, freeze accounts and remit the proceeds of crime to the designated account.
- (f) The confiscated proceeds shall vest into the Central Government.

11. Law enforcement (Lok Pal may be appointed as the Nodal Institution for the Law enforcement)

- (a) The Central Government, may, by notification in the Official Gazette, appoint as many special judges as may be necessary to try the offences punishable under this Act.
- (b) A person shall not be qualified for appointment as a special judge under this Act unless he is or has been a Session Judge or an Additional Session Judge under the Code of Criminal Procedures, 1973.

- (c) A special judge shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 for the trial.
- (d) A special judge, while trying an offence punishable under this Act shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944

12. Appeal and revision

The high Court may exercise, so far as applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure 1973 on a high Court as if the court of special judge were a Court of Session trying cases within the local limits of the High Court.

13. Protection of witnesses and reporting persons

- (a) The Central Government shall take appropriate steps to provide effective protection from potential retaliation or intimidation for witnesses, reporting persons and experts who give testimony concerning offences established under the Act and to their relatives.
- (b) The Central government shall establish procedures for the physical protection of such witnesses and reporting persons and for non-disclosure or limitations on the disclosure of information concerning their identity and whereabouts.
- (c) The provisions of the section shall also apply to victims in so far as they are witnesses.
- (d) In cases of extortionist bribe if the bribe giver files a complaint, he will receive protection under this clause as a whistleblower. This protection will not be available in case of speed money

14. Prevention of bribery by commercial entity

A commercial entity shall make adequate procedures, as may be prescribed, designed to prevent persons associated with it from undertaking bribery.

These procedures shall provide for commercial entities to establish and ensure the effectiveness of internal controls, ethics and compliance measures for preventing and detecting bribery. The procedures shall, inter alia, include:

- (i) a clearly articulated and visible policy prohibiting bribery,
- (ii) instructions for strict compliance with the policy at all levels of the entity,
- (iii) appropriate disciplinary procedures to address violation of the procedures at all levels of the entity
- (iv) setting up independent monitoring body,

- (v) oversight of ethics and compliance measures and reporting to the independent monitoring body,
- (vi) ensuring applicability of the policy and procedures to third parties such as agents, intermediaries, consultants, representatives, distributors, partners, contractors, advisors, suppliers, associates, subsidiaries and joint venture partners and seeking commitment from such third parties to adhere to policy prohibiting bribery
- (vii) measure for periodic communication and training at all levels of the entity of laws against bribery and entity's policy against bribery,
- (viii) Putting in place an appropriate whistle blower mechanism including rewards for reporting and protection of the whistle blowers.

15. Prevention and detection of proceeds of crime

- (a) The banks and financial institutions and other financial intermediaries shall be required to take reasonable steps to determine the identity of beneficial owners of funds deposited into of such customers as may be prescribed.
- (b) The banks and financial institutions and other financial intermediaries shall be required to maintain such records and to provide such information, as may be prescribed, as and when required by the adjudication authorities.

16. Power to make rules

The Central Government shall, by notification, make rules to carry out the provisions of this Act.

17. Application of other laws not barred

The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

(bill drafted by Shri Anil Sharma and Shri Gopal K Agarwal)

Concept of John Doe Law suit in USA

A John Doe Summons is any summons where the name of the culprit under investigation is unknown and therefore not specifically identified. A John Doe summons can only be served after approval by a Federal court.

Restricted Authority to Issue John Doe Summonses

John Doe summonses can only be issued by high ranking executives who are specifically authorized to do so.

No Fishing Expeditions with John Doe Summons

The Service should no longer be in the information-gathering or research stage of a project when it decides to seek court authorization to serve a John Doe summons. The project research should be sufficiently developed to enable the Service to identify a specific tax compliance problem. The Service should be prepared to investigate the tax liabilities of specific taxpayers based on the information received from the John Doe summons. A John Doe summons cannot be used to conduct a "fishing expedition."

Necessary Purpose

The purpose of a John Doe summons is to investigate the tax liability of a specific unidentified taxpayer (or a group of such taxpayers), even if a secondary purpose is to gather information for research purposes.

Note

In some investigations, it may be possible for the Service to obtain the identities of taxpayers without issuing a John Doe summons. If the Service is conducting an investigation of a known taxpayer (such as a tax shelter promoter) who can identify an unknown taxpayer or class of taxpayers (such as the shelter investors) and the identities of the unknown taxpayers are relevant to the investigation of the known taxpayer, the Service can issue a standard, non-John Doe summons as part of the known taxpayer's investigation and can require the production of the unknown taxpayer's identities. This technique is only acceptable where discovering the identities of the unknown taxpayers is relevant to the investigation of the known taxpayer. This type of summons is referred to as a "dual purpose summons."

Statutory Requirements for a Valid John Doe Summons

District Court Approval Required Before Serving a John Doe Summons. Before a John Doe summons can be served, it must be approved for service by a district court in an ex parte proceeding.

Three Additional Requirements for Approval. A John Doe summons must meet the standard four-part test that applies to all other summonses. Three additional requirements that a John Doe summons must meet before it will qualify for district court approval are identified below and further analyzed in following subparagraphs.

- A. The summons must relate to the investigation of a particular person or ascertainable group or class of persons.
- B. The Service must have a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with the tax laws.
- C. The information and identities sought to be obtained from summoned records must not be readily available from other sources.