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LEGAL OPINION

ON

**BENAMI TRANSACTIONS (PROHIBITION) ACT,
1988 AS AMENDED BY THE BENAMI
TRANSACTIONS (PROHIBITION) AMENDMENT
ACT, 2016**

LEGAL

STRATEGY

PUBLIC POLICY

REGULATION

A. Query:

- I. The relevancy and applicability of Benami Transactions (Prohibition) Act, 1988 as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (“the Act”) on the lending practices of a particular Bank; and
- II. The liability, if any, of the Bank for financing any arrangement which falls under the scope and ambit of Benami transaction in terms of the provisions of the Act.

B. Opinion:

The Querist is in the practice of including all owners and/or borrowers as co-borrowers to the loan and making all co-borrowers jointly and severally liable for repayment of loan, thus mitigating the risk of any third-party intervention. This means that all the co-borrowers to a loan are deemed to have availed the loan and the liability to repay the loan is on each one of them. Considering that the seller(s), the buyer(s) and the borrower(s), all are in the knowledge of the Bank and KYC norms are followed by the Bank while sanctioning any loan, there does not seem to be an attempt by the borrower(s) (who is/are paying consideration by virtue of the loan) to hide their identity, which is the one of the most important elements of a Benami transaction. Thus, the transactions of the nature for which the Bank provides loans should not be construed as Benami transactions.

In addition, the owner of the property executes a mortgage of the property (which is the subject matter of loan) in favour of the Bank as security for the loan taken by him. The Bank also takes a third-party guarantee for repayment of loan. Therefore, even if a transaction is declared Benami, the Bank will have multiple recourse available with it for stepping into the shoes of the borrower and enforcing the securities in its hand to recover the loan. The Bank shall also be construed as an interested party where it has sanctioned loan for a transaction which may fall under the scope and ambit of Benami transaction in terms of the Act and accordingly, the Bank shall have the right to furnish such documents, particulars or evidence as is considered necessary to protect its interest. In case any transaction, in respect of which the Bank has provided loan, is challenged/declared to be a Benami transaction, the Bank shall have the right to be impleaded as a party/prefer an appeal, as the case may be to seek refund of

the amount of loan outstanding and payable to the Bank in respect of such transaction.

However, as discussed above, the Bank shall have to ensure compliance with the KYC Norms. Also, as per the provisions of PMLA and the rules thereunder, the Bank shall have to report any “suspicious transaction” to the authorities mentioned under the said Act.

Conclusion:

It is pertinent to mention that the intention/ motive of the parties involved in the transaction shall be of utmost importance to determine whether the transaction is Benami or not after analyzing the cases at hand. Also, the Act applies to the transactions of sale and purchase of the property and thus not merely to the lending activities.