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The Foreign Corrupt Practices Act In India

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Conducting Business In India

- India and the U.S. have much in common
  - English-speaking work force
  - Democratic governments
  - Common law legal system
- Nevertheless, operating or investing in India differs markedly from doing the same in the U.S.

Conducting Business In India
(cont'd)

- License Raj
  - Planned economic system
  - Required parties to obtain a license prior to setting up a business
  - Led to extensive regulations and red tape
  - Existed from independence until 1991
  - Hindered economic development
  - Created environment where corruption was prevalent

Conducting Business In India
(cont'd)

- License Raj (cont'd)
  - Dismantled in 1991
  - Economic reforms have cut down on much of the regulation and red tape and have led to unprecedented economic growth
  - *However*, much red tape still exists; *more importantly*, the culture of corruption that grew out of the license raj, while improved, still exists

Conducting Business In India

(cont'd)

- Incidents of corruption are commonplace
  - India ranked #72 on 2007 Transparency International Corruption Perceptions Index
  - Tied with China and Mexico
  - Central Vigilance Commission is attempting to turn the tide, but it is in a tough fight
- Most U.S. businesses operating in India face corruption-related issues on a regular basis

Increased Enforcement Activity

- DOJ and SEC enforcement actions have nearly doubled since 2000
- Companies are paying significant fines
- Individuals are going to jail
- Companies operating in India have been, and will continue to be, impacted
- An understanding of the FCPA is critical

FCPA Basics: Two Types Of Provisions

- Anti-bribery provision
  - Prohibit giving or offering anything of value to foreign government, political party or international organization official for the purpose of influencing the official to assist in obtaining business
- Books and records provisions
  - Require accurate and honest record keeping and effective internal controls, including records that would reveal, and controls that would prevent, bribery

Defining A Bribe

- The FCPA prohibits a “corrupt” payment or offer of money or anything of value to any foreign government official in order to obtain or retain business
  - A payment is corrupt if it is made with intent to induce a foreign official to violate his or her lawful duty or to secure an improper advantage
  - Need not be to obtain a specific contract
- Payment need not be made; liability exists even if offered, promised or authorized

Defining A Bribe: Value

- Anything of value can be a bribe
  - Cash or cash equivalents
  - Tangible and intangible property
  - Promise of future payment or employment
  - Training or education
  - Entertainment
- The amount involved is irrelevant
- If a payment is requested by a foreign official it likely has value to the official; thus, a charitable contribution or a “good works” contribution purported to be for the benefit of the community may constitute a bribe if requested by a government official and made with corrupt intent

Defining A Bribe: Whom Is It Illegal To Bribe?

- Government employees
  - Includes employees of any department or agency of the government
    - Example: tax collectors/revenue agents/customs officials
  - Includes employees of government-sponsored commercial ventures and other government-owned business
    - Example: national telecom carriers such as BSNL or MTNL
- Political party employees and candidates for political office
- Public international organization employees
- Rank, level, or title is irrelevant

Defining A Bribe: Exception For Facilitating Payments

- There is no violation of the FCPA if a payment is within the statutory exception for facilitating payments
  - Applies to expediting payments to low-level government officials
  - Payment must be to secure a “routine governmental action”
- “Routine governmental action” includes action which is ordinarily and commonly performed by a foreign official in:
  - Obtaining permits or licenses, processing governmental papers, providing police protection, etc.
- If official exercises discretion or payment results in new business it will not fall within the exception

Defining A Bribe: Exception For Facilitating Payments (cont'd)

- Demands for facilitating payments are common in India
  - Occur at all levels of government
  - Commonly referred to as "speed" payments
- Facilitating payments must be accurately recorded as such in the company's books and records

Defining A Bribe: India's Prevention Of Corruption Act

- Central Indian legislation on corrupt practices
- Punishes "public servants" who accept or agree to accept "any gratification" as a reward for doing or forbearing to do any official act
  - "Public servant" is broadly defined; includes employees of government-owned or government-controlled entity
  - "Gratification" is not restricted to pecuniary benefits
- Punishes abettors of the offense
- No exception for facilitating payments

Liability For Acts Of Third Parties

- The FCPA prohibits direct payments to foreign officials, as well as payments to a third-party while “knowing” that a portion of the payment will be passed on to a foreign official
- A person’s state of mind is “knowing” if he or she has a firm belief that circumstances exist or that a result is substantially certain to occur
- Taking a “head in the sand” approach will result in a violation

Liability For Acts Of Third Parties (cont'd)

- In India, it is common for U.S. companies to conduct business with and through local agents, consultants, partners or other intermediaries. Doing this requires extreme caution
- Companies must conduct due diligence to ensure that third parties will not make payments in violation of the FCPA
- If an issue arises, government may contend that absence of due diligence demonstrates that company put its "head in the sand"

Reach Of The FCPA In India: Who Is Subject To The Act?

- U.S. issuers
  - Issuers are companies whose securities are registered in the U.S. or are required to file periodic reports with the SEC
- Domestic concerns
  - U.S. citizens
  - Business entities having their principal place of business in the U.S. or organized under the laws of any state

Reach Of The FCPA In India: Who Is Subject To The Act?

(cont'd)

- Employees and agents of issuers and domestic concerns
  - If employee or agent is a foreign national acting outside the U.S., they must use some means or instrumentality of interstate commerce in furtherance of the bribe
  - U.S. persons are subject to the FCPA regardless of whether they use some means or instrumentality of interstate commerce in furtherance of the bribe
- Any person or entity, regardless of nationality, who commits an act in furtherance of a bribe while in U.S. territory

Working With The Indian Government: Licenses, Permits and Registration

- Obtaining government approvals
  - Remnants of license raj/red tape
- *Dow Chemical* (2007)
  - $200,000 in improper payments and gifts by fifth-tier Indian subsidiary
  - Payments made through consultants and unrelated companies in order to obtain registration of several products
  - Settled books and records and internal control violations; no anti-bribery violations
  - $325,000 civil penalty
  - Extensive remedial measures

Working With The Indian Government: Public Procurement Contracts

- No central act regulating public procurement
- Federal ministries and agencies authorized to devise own procurement rules, subject to General Financial Rules
- Generally, open tenders when value of contract exceeds specified amount, e.g., Rs. 1 lakh ($25,000)
- Open tender is a process that reduces corruption, but does not eliminate it
- Right to Information Act has the potential to act as a check against corruption