



Kobre & Kim's Government Enforcement Defense Contacts



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U.S. Increasingly Enforcing Against India

The termination of India's preferential trading status with the U.S. is the latest in a series of events detrimental to bilateral relations between the two countries. Below, our government enforcement defense team points out the "hot spots" where the next wave of criminal enforcement actions from the U.S. could occur, as well as what Indian entities can do to mitigate any risk of finding themselves on the wrong end of a cross-border investigation.

The U.S. is intensifying its use of criminal enforcement as a tool to influence international trade disputes across the globe, most recently with a focus on China. India could be next up in U.S. regulators' sights.

The past decade has brought an increase in U.S. investment in India, as well as Indian investment abroad. Escalating trade frictions and regulatory scrutiny are now raising the risks of U.S. enforcement against both foreign investors in India and Indian companies investing abroad.

Relations between India and the U.S. have experienced a few blows recently, including the U.S. Trade Representative's plan to terminate India's preferential trading status, as well as the U.S.'s decision to stop reissuing sanctions waivers to India for Iranian oil imports.

Meanwhile, the U.S. continues to flex its enforcement muscles: Earlier this year, the SEC reached a settlement with a U.S. IT services company for alleged violations of the Foreign Corrupt Practices Act (FCPA) occurring in the southern state of Tamil Nadu.

With the U.S. bringing a growing number of anti-bribery cases over the past decade, operating a multinational business within India continues to be a risky endeavor.

Future U.S. actions could come from any number of directions:

U.S. Criminal Laws:

The U.S. could transform trade issues into criminal issues through a variety of laws, including economic sanctions against Iran, North Korea or Russia; bribery and corruption; or fraud. For example, India's recent interest in purchasing a Russian-made air defense system could potentially trigger U.S. enforcement against India under the Countering America's Adversaries Through Sanctions Act (CAATSA).

Intellectual Property Disputes:

This content provides information on legal issues and developments of interest to our clients and friends and should not be construed as legal advice on any matter, specific facts or circumstances. The distribution of our content is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

Intellectual property is a sensitive topic between the two countries, and disputes could give way to allegations of criminal trade secret violations. The U.S. has put India on notice, with India remaining on its “Special 301” watch list based on its treatment of patents, infringement rights, and protection of trade secrets.

Calls for Extradition:

The U.S. can arrest foreign nationals, including Indian citizens, in any nation where it believes it can secure extradition. According to India’s Ministry of External Affairs, in the last 17 years, more than 25 individuals have been arrested and extradited to the U.S. on allegations, many involving some form of financial fraud.

Asset Forfeiture:

Alongside criminal enforcement, the U.S. could seize any assets that it claims are related to criminal conduct.

For future Indian defendants – both individuals and entities – it will be of paramount importance to understand the strategies and tactics of the U.S. agencies in charge of bribery, national security and fraud investigations. After all, these circumstances will call for swift action, not indefinite deliberation.

In fact, there are several ways companies investing in India (and Indian companies investing in the U.S.) can minimize risk in these uncertain times.

If your executives are detained in the U.S. or a foreign jurisdiction: Immediately open communication channels with local authorities as well as with the Indian consulate or embassy. Within the first 24 hours, prepare for a battle in court to decide whether the executive should be held pending the next hearing or possibly extradition.

If your company learns of a problem or investigation: Immediately take reasonable steps to ensure that rogue employees don’t destroy evidence or “make up a story.” This can involve (i) disseminating a notice to employees that they should continue to abide by the company’s retention policies; (ii) working with the company’s IT services to preserve data; (iii) conducting a scoped internal investigation to promptly stop the problematic issues, take the correct remedial actions and decide on next steps. Regulators won’t expect you to “boil the ocean,” but you should thoroughly understand the problem and how your compliance operations did or did not function.

If you think your assets are at risk of seizure: Conduct an Asset Vulnerability Assessment - “stress test” - which includes reviewing your assets, analyzing their current structures, testing them against common methods of seizure, and assessing potential lawful defensive measures with the help of counsel. This can maximize the chances of a successful outcome in both forfeiture litigation as well as cross-border insolvency proceedings.

When regulators come knocking, those who choose to sit idly by will find themselves at a disadvantage. Understanding the risks and consequences of an investigation and planning your response can go a long way to ensuring you navigate these treacherous waters with the least amount of damage.

About Kobre & Kim's Government Enforcement Defense Team

Kobre & Kim is an Am Law 200 global law firm that focuses exclusively on disputes and investigations, often involving fraud and misconduct. Frequently working with other law firms as special counsel, Kobre & Kim regularly represents Asian, and specifically India-based clients in cross-border government enforcement actions, including (but not limited to) investigations connected to the U.S. Foreign Corrupt Practices Act (FCPA).

Kobre & Kim’s global government enforcement defense team includes twenty-four former U.S. federal prosecutors strategically placed in key markets around the world, from Asia (Seoul, Hong Kong, Shanghai) and Europe (London, Tel Aviv) to the Americas (New York, Washington D.C., Miami, San Francisco, Sao Paulo, Rio de Janeiro) and Offshore jurisdictions (Cayman Islands, British Virgin Islands). The team frequently works with the U.S. DOJ, SEC, and other U.S. agencies that enforce trade controls, including the Bureau of Industry and Security (BIS) at the Department of Commerce and the Office of Foreign Assets Control (OFAC) at the Treasury Department.