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# WHITE COLLAR CRIMES IN INDO-U.S. CONTEXT

DO'S AND DON'TS

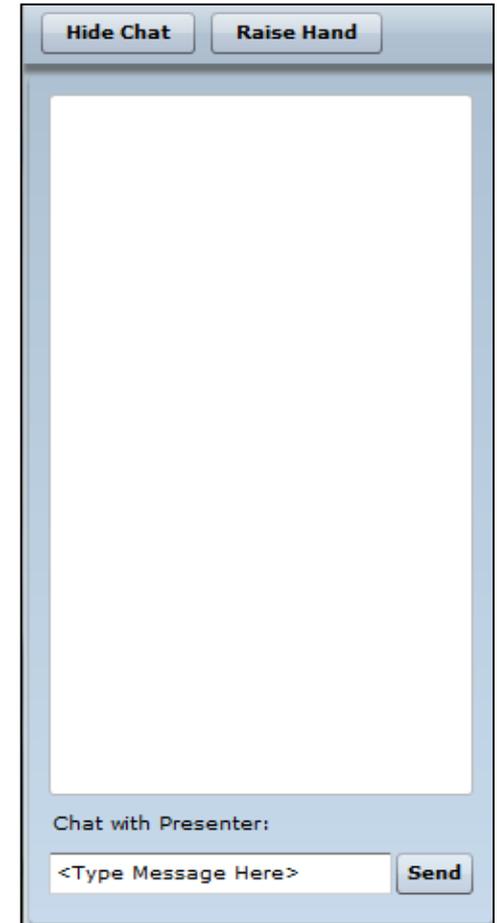
KHAITAN & CO | NORRIS McLAUGHLIN & MARCUS, P.A.

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# White Collar Crimes in Indo-U.S. context

## Do's and Don'ts

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# White Collar Crimes

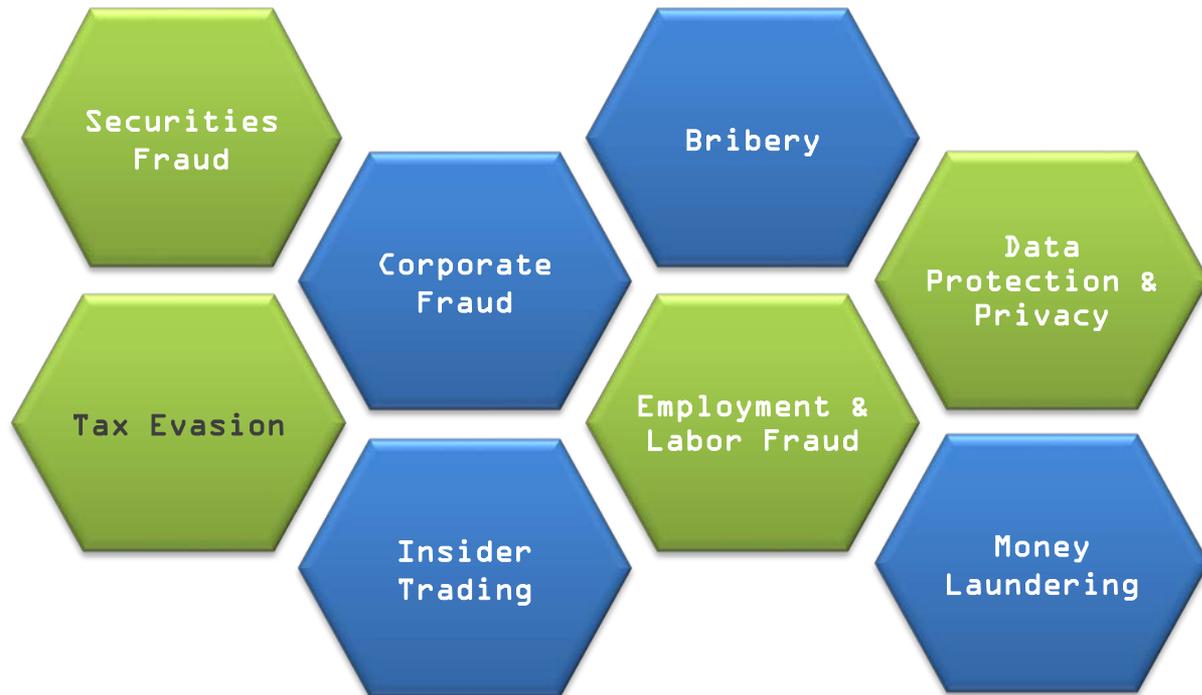
Legal Framework in India

# The universe of 'white collar crimes' in India

Understanding the context

- Increasing governance focus and regulatory compliance requirements
- Heightened cooperation between regulators globally
- Changing legal landscape
- Uptick in shareholder activism and corporate governance focus

The universe of 'white collar crimes' in India



# ‘The Usual Suspects’

White collar crimes in Indo-U.S. context

Slide 1 of 5

## Bribery

- Spurt in prosecutions involving high-profile promoters, companies, foreign entities and nationals
- Governing legislation: Prevention of Corruption Act (POCA)
- POCA criminalizes bribe taking or abuse of public office to favor private parties (MNCs, intermediaries, agents, etc.)
  - Such parties liable as co-conspirators, abettors
  - Foreign companies and citizens can also be prosecuted
- Offering bribe is also likely to be made an offence (deliberations ongoing)
- POCA does not provide for *de minimis* exemptions or bright line safe harbors

# 'The Usual Suspects'

White collar crimes in Indo-U.S. context

Slide 2 of 5

## Corporate Fraud

- India overhauled its corporate governance framework over last few years
- Companies Act, 2013 significantly strengthened and reinforced framework of criminal sanctions to ensure compliance
- Provides for a very wide definition of fraud, covering a variety of circumstances; jail term up to 10 years
  - Misleading securities offer, improper accounting, insider trading, wrong disclosures may lead to investigations
  - Can impact foreign companies and nationals, including nominee foreign directors in Indian companies
- Provides for a specialized investigation and trial procedure



# 'The Usual Suspects'

White collar crimes in Indo-U.S. context

Slide 3 of 5

## Insider Trading

- New Insider Trading Regulations have become effective 15 May, 2015
- Applies to companies, listed securities, proposed to be listed companies
- The ambit of 'unpublished price-sensitive information', 'insider' & 'connected person' significantly broadened
- Provides for defences like off-market *inter-se* transfer between two promoters
- Recognizes:
  - arms length trading decisions
  - risk mitigation measures
  - restricted exchange of sensitive information

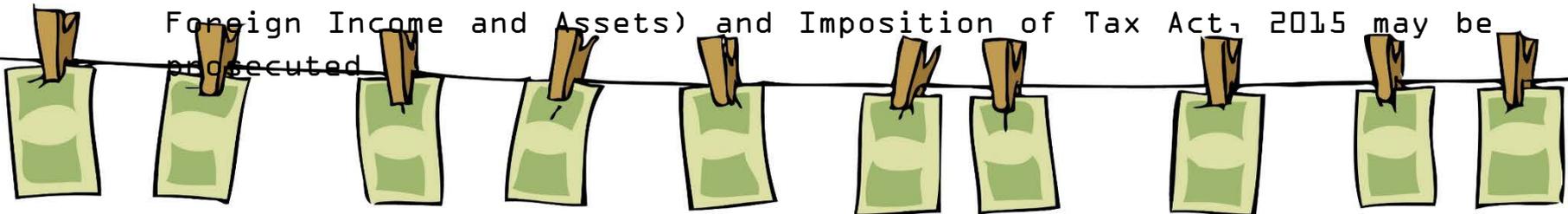
# ‘The Usual Suspects’

## White collar crimes in Indo-U.S. context

Slide 4 of 5

### Money Laundering

- Governing legislation: Prevention of Money Laundering Act (PMLA)
- Money laundering is essentially defined as being involved in any process or activity connected with ‘proceeds of crime’ and projecting it as untainted property
  - Activity includes concealment, possession, acquisition or use
- Foreign companies and citizens can also be prosecuted and property situated outside India confiscated
  - Provisional attachment can be done merely on suspicion
  - Attachment stops all commercial transaction relating to attached property
  - Those that have missed the deadline under Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 may be prosecuted



# Do's and Don'ts

Key considerations to minimize white collar crimes risk



Best practices	Things to avoid
<ul style="list-style-type: none"><li>▪ Tone at the top</li></ul>	<ul style="list-style-type: none"><li>▪ Casual meeting with public officials</li></ul>
<ul style="list-style-type: none"><li>▪ Compliance programs and risk management policies</li></ul>	<ul style="list-style-type: none"><li>▪ Employing dubious agents and consultants</li></ul>
<ul style="list-style-type: none"><li>▪ Training &amp; communication and clear reporting/escalation systems</li></ul>	<ul style="list-style-type: none"><li>▪ Offering inducements to public officials by gifts, jobs for candidates, etc.</li></ul>
<ul style="list-style-type: none"><li>▪ Robust internal SoPs and protocols; exhaustive record-keeping</li></ul>	<ul style="list-style-type: none"><li>▪ Cash transactions</li></ul>
<ul style="list-style-type: none"><li>▪ Whistleblower hotline</li></ul>	<ul style="list-style-type: none"><li>▪ Casual communications involving unpublished price sensitive information</li></ul>
<ul style="list-style-type: none"><li>▪ Contractual protections through appropriate covenants, representations and warranties</li></ul>	<ul style="list-style-type: none"><li>▪ Vague differentiation of corporate functions</li></ul>
<ul style="list-style-type: none"><li>▪ Checks on third party agents</li></ul>	<ul style="list-style-type: none"><li>▪ Improper financial reporting</li></ul>
<ul style="list-style-type: none"><li>▪ Periodic reviews and audits</li></ul>	<ul style="list-style-type: none"><li>▪ Inadequate documentation</li></ul>

# White Collar Crimes

Legal Framework in the U.S.

# FCPA

- U.S. Anti-Bribery Statute
  - Part of Securities Exchange Act of 1934
  - Anti-bribery provisions: 15 U.S.C. 78dd-1, -2, and -3
- Applies to- "Issuers," any "Domestic Concern," and any "Person" (including companies) acting "while in the territory of the United States"
- Payments: direct or indirect-Covers direct actions, and those of officers, employees, subsidiaries, agents, distributors, and joint-venture partners.
  - Exceptions for (a) facilitating payments; (b) payments for "bona fide expenditure[s]" related to promotion or demonstration of products or performance of a contract.
  - NOTE: DOJ/SEC construe exceptions very narrowly.

## Government Official-broadly defined

- "any officer or employee of a foreign government or any department, agency, or instrumentality thereof. . . or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. . . "
- Enforcement agencies (DOJ, SEC) take broad interpretation.
  - Covers employees of state owned enterprises (SOE's).

# Domestic Corruption

- Bribery, broadly speaking, refers to payments or favors given to public officials in exchange for influence. In the U.S., this could implicate at least four statutes:
  - Bribery and Illegal Gratuities— 18 U.S.C. § 201
  - Program Bribery — 18 U.S.C. § 666
  - Mail and Wire Fraud Statutes (deprivation of “intangible right of honest services”) — 18 U.S.C. §§ 1341, 1343, and 1346.
  - Hobbs Act Extortion — 18 U.S.C. § 1951 (only for bribe-takers, not bribe-payers)

## Requirements differ slightly for each offense:

- § 201 Bribery—Bribe-payer has a corrupt intent to influence a public official coupled with a “quid-pro-quo” agreement regarding an “official act,” “any fraud. . . on the” U.S., or “any act in violation of a duty.”
- § 201 Gratuity—Bribe-payer makes payment “for or because of” an “official act.”
- § 666 Program Bribery—Bribe-payer has a corrupt intent “to influence or reward” a public official, without any “quid-pro-quo” agreement or connection to an “official act.”
- Mail/Wire Fraud—Official takes a bribe with general/implicit “quid pro quo,” not necessarily connected to a specific act. The bribe-payer may

# Money Laundering

- Making Dirty Money Look Clean
- Federal and State Statutes
  - 18 U.S.C. § 1956(a)
  - State statutes contained nuanced differences

## Bank Secrecy Act

- Anti-money laundering (AML) efforts
  - CRTs
  - SARs
  - Requires financial institutions to implement AML programs
  - SARs are shared with law enforcement and are a key investigative tool

# Liability: Corporate and Employee

## Corporate Liability

- Criminal and Civil Exposure
- Federal, state, and local authorities
- Bevy of Potential Penalties

## Employee Liability

- Corporate officers, employees, and agents are individually liable for the crimes or civil wrongs they commit on behalf of their corporate employer.
- Post-2008: Focus on Individual Liability
  - Yates Memo

# Insider Trading

Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security.

- Sections 10(b) and 14(e) of the Securities Exchange Act of 1934
- SEC Rules 10b-5 and 14e-3
- Sarbanes-Oxley

## Theories of Insider Trading

- Classical Theory
  - *Chiarella v. United States*
- Misappropriation Theory
  - *United States v. O'Hagan*
- Tipper/Tippee Theory
  - *Dirks v. SEC*

The test is whether the insider personally will benefit, directly or indirectly, from his disclosure.

# Tax Evasion and Compliance

## Options

- Streamlined Compliance Program
- Offshore Voluntary Disclosure Program
- Information Returns
- Quiet?
- Nothing?

# Panelists

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Thank You



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