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INDIAN ANTI-CORRUPTION LAW

A Checklist for Managing a Dawn Raid in India

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As if to prove the point we made in our article, “[How to Prepare for the Possibility of a Dawn Raid in India](#),” published by the Anti-Corruption Report on February 20, 2019, – that dawn raids are a serious business risk in India – it was recently and widely reported that India’s antitrust enforcement agency, the Competition Commission of India (CCI), carried out dawn raids at the India operations of Glencore and two other commodities trading companies. Reports suggest that the dawn raids were carried out in furtherance of an investigation into collusion on the price of legumes (like chickpeas and lentils) in 2015 and 2016. Such is the increased reliance on dawn raids as an investigative tool by Indian regulatory/law enforcement authorities in recent times.

A comprehensive strategy to deal with a dawn raid can potentially prevent the significant reputational backlash and serious business disruptions that such raids can otherwise cause. When a dawn raid is underway, as a general rule of thumb, it is imperative that the investigating officials be treated cordially at all times – even if the investigators are hostile or confrontational – and be allowed to carry out the search and seizure operations without any impairment. Subsequent to the raid being completed, periodic follow-up with the investigating officials should be done to ensure that all documents and information required by the investigating authority have been provided. During such follow-ups, if the investigating

officials request additional documents or information, accompanying written responses must be made available to the investigating officials in a timely manner.

Below we provide a checklist a company can use to prepare for and manage a dawn raid in India.

Planning for a Dawn Raid

Assemble a Dawn Raid Response Team: the response team should be preselected at each facility. The composition and respective roles of the team members should be as follows:

- **Team Leader** (ideally from the company’s legal department): He or she will serve as the primary onsite interface with investigators.
- **At Least One Member of Senior Management:** He or she should only intervene if the investigators treat employees with hostility or, if the situation escalates, he or she can assuage the concerns of the investigators.
- **At Least One Member of Midlevel Management:** This person should assist in facilitating responses to specific document/information requests made by the investigators.
- **Staff Members:** These team members will (1) respond to media inquiries, (2) observe and shadow investigators

during the raid and (3) maintain extensive notes/records of the inspection.

- **IT Specialist:** A specialist is necessary to assist in responding to electronic document requests of the investigating officials.^[4]
- **Outside Counsel:** An outside attorney should (1) coordinate with the investigators on site, (2) verify the legal documentation and the scope of the search and seizure, (3) collect and analyze detailed notes regarding the raid and (4) verify the documentation being prepared by the investigators recording the search and seizure operation.
- **Identify Outside Counsel:** The company should engage outside counsel with extensive criminal investigative experience to assist the company with any future antitrust dawn raids. Contact information for external counsel should be distributed to the appropriate company employees, including the dawn raid response team, office managers and receptionists.
- **Conduct a “Tabletop” Exercise:** Using the checklist in the “When the Authorities Arrive for a Dawn Raid” section below, the response team should meet and walk through how a dawn raid might transpire, who will do what and how the company will manage the event.
- **Prepare an Employee Communication Email:** Draft an email for employees that can be immediately circulated in the event of a raid. It should instruct employees to cooperate with the authorities, not to destroy, alter or remove documents, not to discuss the raid with anyone outside the company and to look to the response team leader for guidance during the raid.

It should further identify the response team and contact information.

When the Authorities Arrive for a Dawn Raid

- **Politely Greet the Authorities:** After greeting the visitors, the receptionist or front-desk employee must immediately contact the response team lead. The team lead should inform the authorities of the company’s intent to cooperate fully.
- **Assemble the Dawn Raid Response Team and External Counsel:** The team lead should immediately assemble the response team and contact outside counsel. To the extent possible, he or she should provide details about where the officials are from, note how many officials there are and fax or email a copy of the search warrant (if made available). The lead should always ask whether the inspection could be delayed until counsel arrives, but it’s important to understand that officials are not required to wait for that to happen.
- **Check the Paperwork:** Before allowing the inspection to proceed, counsel or the team lead should check the paperwork that demonstrates whether the dawn raid is legitimate. However, no steps should be taken to prevent the search and seizure operation from continuing. Counsel or the team lead should:
 - ask to see the officials’ identification cards to ensure that they are who they claim to be and should make copies of the identification cards if possible;
 - counsel may wish to confirm the authenticity of the dawn raid by calling the enforcement authority;

- examine the warrant and verify that (1) it is valid^[2], (2) the company's premises are listed as the place to be searched and (3) the scope and subject matter of the search are clearly defined; and
- if the paperwork is not made available by investigators, counsel should politely voice her or his objection regarding the same.
- **Insist on Independent Witnesses:** Counsel or the team leader should enquire if any independent witnesses have accompanied the investigators and, if not, call for their presence before commencing the raid. However, even if independent witnesses are not present, no attempts to resist the raid should be made.
- **Inform Onsite Employees:** Issue a version of the company's draft dawn raid email alert to employees on the premises.
- **Request That Nonessential Employees Be Sent Home:** Counsel or the team leader should ask the investigating officials for their permission to send all nonessential employees home. If permitted, any and all employees who are allowed to leave the facility must be instructed to remain available, should any need arise. All employees not present at the facility should be instructed to stay at home for the day. Employees with keys/access to different locations onsite should remain available onsite at all times during the raid.
- **Organize a Dawn Raid Response Team Meeting:** External counsel and the dawn raid response team should meet immediately to discuss the inspection's scope and to dole out assignments for team members.
- **Determine Whether Inspections Are Occurring at Other Company Locations:** The Dawn Raid Response Team should

try to find out from the officials whether they are also conducting investigations at any of the company's other locations or at the homes of any company employees. If they are, then the team should assemble comparable support for each of those other locations and immediately inform external counsel.

During the Inspection

- **Supervision of the Inspectors:** Designated employees should follow and observe each official at all times to ensure that the scope of the search and the authority of the officials is not exceeded. These employees should also keep written notes of the officials' actions, including the rooms they visited; the desks, cupboards, files and computers inspected; the safes opened; and the individuals with whom they spoke.
- **Create a Record of the Items Seized:** Designated employees should record documents and/or other items seized or copied by authorities. The designated employees should ensure that inspectors do not copy (1) documents covered by legal privilege or (2) documents falling outside the scope of the investigation. If there is a dispute, the employees should politely ask for the intervention of counsel. Employees should never refuse to let officials take or copy documents; instead someone should assert the company's position and document it. Company employees should not volunteer documents not expressly requested by the inspectors. Hard-copy documents should be returned to their original locations when inspectors have completed their review.

- **Requests From Inspectors Should Be Directed to Counsel:** To the extent possible, company employees should direct any requests from authorities to company counsel, including, for example, inquiries about questioning certain individuals or the location of certain documents and consent to search the same.
 - **Officials Are Allowed to Question Employees:** Officials may ask employees general questions about the subject matter of the investigation or the location of certain records and employees should answer these questions to the best of their ability. If any employee is made to give a statement, the employee should carefully review the statement and request that a lawyer be permitted to review the same before signing the statement. The employee should also request a copy of the statement.^[3]
 - **Object to the Taking of Legal Privileged Documents:** Company employees should object to the review or taking of confidential and privileged documents, including attorney-client communications and should document those objections, as well. If company counsel is aware of privileged or confidential documents potentially subject to inspection or seizure, she or he should notify the authorities and provide information substantiating the privilege claim. If the authorities decide that the documents are not privileged or confidential, company counsel should request that the documents be placed in sealed envelopes when seized.
 - **Do Not Destroy, Conceal or Falsify Company Documents:** Company employees should not destroy, tamper with or alter any documents during the raid because doing so could result in serious, potentially criminal, penalties.
 - **Do Not Speak to Anyone Outside the Company About the Raid:** Company employees should not speak to individuals outside of the company (including family members) about the raid or the investigation's content.
- ## After a Dawn Raid
- **Meet With the Inspectors:** When the raid is concluded for the day, the dawn raid response team should meet with the inspectors. The meeting should establish (1) whether the inspection will continue the following day and, if so, whether certain areas should be sealed overnight; and (2) whether documents and electronic data will be copied and/or seized. Arguments should be made to persuade the officials that certain documents are irrelevant and/or privileged at this time, as well. The counsel or the team leader should ensure that the inspectors provide the company with an index of all documents copied/seized and request a copy of any records or statements recorded during the raid, including employee interviews and disputes and objections to privileged documents or the scope of the investigation. Also, counsel or the team leader should determine a point of contact within the company for future communications with the officials.
 - **Inform Employees:** The dawn raid response team leader should inform onsite employees that the dawn raid has ended.
 - **Collect the Inspection Record:** External counsel should collect all documentation from employees who accompanied authorities during the inspection and should debrief employees who interacted with and/or were interviewed by officials during the dawn raid or who provided documents or records.

- **Debrief:** The dawn raid response team should meet with outside counsel to discuss any outstanding issues relating to the existence of potentially relevant documents that authorities did not find, the application of privilege to the documents seized and whether further explanations need to be provided to the authorities.
- **Consider Suspending Document Destruction:** The company should consult with outside counsel to consider issuing a document preservation notice to certain employees and whether to suspend any routine document destruction policy and/or prevent electronic documents from being deleted.
- **Inspection Report:** Counsel or the team leader should prepare a precise and fact-based written report of the raid as soon as possible, while the events are fresh in his or her mind.
- **Request a Copy of the Seizure Memorandum:**^[4] At the close of the investigation, a record of the dawn raid will likely be created that includes an inventory of the documents seized and a recording of any employee interviews. A request should be made to the investigators for a copy of the seizure memo, which may or may not be provided. If the memorandum is provided, the leading member of the dawn raid response team should read the document carefully and ask to make any corrections and/or additions. Moreover, if there is a request to sign the record, the company should refuse to sign if the record does not correspond with what has been taken and the company was not allowed to make any desired change(s).
- **Consider an Internal Investigation:** The company should work with external counsel to determine whether commencing an internal investigation into the subject matter of the raid is appropriate. It may be possible to limit criminal liability and penalties by identifying wrongdoing and cooperating with the enforcement authority. A dialogue with the enforcement authority should be maintained throughout the process. Importantly, the raiding authority may require that its approval is sought prior to the interviews of certain individuals.
- **Consider Notifying Concerned Parties:** The company should seek advice from external counsel as to the existence of any reporting obligations. Insurers, auditors and regulators may need to be contacted.
- **Communications Strategy:** Companies should assume that news of the dawn raid will be made public and develop an internal and external communications strategy in consultation with outside counsel to avoid, as best as possible, false and misleading publicity.

See [“How to Customize Your Compliance Program in Response to India’s Updated Anti-Corruption Legislation”](#) (Nov. 14, 2018).

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^[1] Investigating officials have been known to demand seizures of hard disks, servers, laptops, desktops, etc., which can impair the discharge of business functions. In such circumstances, IT specialists should assist in making electronic copies (if permitted) of material being seized to prevent any business disruption.

^[2] In India, a valid and authentic warrant (1) usually bears the seal of the judicial magistrate, (2) contains the basic details of the proceedings pursuant to which the warrant has been issued and (3) specifies the scope of the investigation.

For example, if law enforcement authorities conducting the raid seize certain documents, then the warrant must specifically provide the law enforcement authorities with the power to “seize” documents.

^[3] While any employee giving a statement to law enforcement authorities may request that a lawyer review the statement and ask for a copy, the investigating officials are not required to oblige. Even if the investigating officials deny the request for a lawyer, a limited statement must be given to the investigating officials if they insist. An employee providing a statement should attempt to keep the statement brief and refrain from providing any unnecessary information.

^[4] A seizure memo is also called a “panchnama.” A seizure memo/panchnama is the official record of a raid, which documents the operation and is required to be prepared by the law enforcement authorities conducting the raid. The seizure memo/panchnama is, among other things, required to specify the material particulars pertaining to the raid such as address of the site being raided, particulars of the person in occupation of the site at the time of the raid, particulars of the investigating officer(s), and details of independent witnesses present. Most importantly, the seizure memo/panchnama is required to contain a detailed statement of all the materials, documents, objects or articles seized from the site being raided. The seizure memo/panchnama is required to be vetted by two independent witnesses who observe the raid. The investigators usually request company representatives to sign the seizure memo and can provide a copy of the same upon request.