CHAFFETZ LINDSEY LLP

Obtaining Evidence From US-Based Individuals and Corporations Pursuant to 28 U.S.C. § 1782

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Overview of Section 1782

<u>Who</u> may seek Section 1782 discovery?

- "A foreign or international tribunal"; or
- "Any interested person" (e.g. a party involved in, or contemplating, foreign litigation).

<u>From whom</u> is discovery available?

- Any individual or entity that "resides or is found" in the judicial district in which the court sits.

  <u>Note</u>: Unclear to what extent a foreign corporation that maintains a branch or office within the judicial district is "found" there.

Overview (cont'd)

<u>What types</u> of discovery are available?

- Production of a "document or other thing" (e.g. DNA evidence); and
- Witness testimony

For <u>what purpose</u>?

- Must be "for use in a proceeding in a foreign or international tribunal."

  <u>Note</u>: This includes "criminal investigations conducted before formal accusation."

Discretionary "*Intel* Factors"

(1) whether "the person from whom discovery is sought is a participant in the foreign proceeding";

(2) "the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

(3) whether the request for discovery "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the request is otherwise "unduly intrusive or burdensome."

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

Broad Scope

"For use" requirement interpreted broadly

- Section 1782 discovery available in aid of **future** litigation if foreign proceedings are "within reasonable contemplation."

  Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

- **But** whether Section 1782 discovery is available in aid of foreign arbitral proceedings remains unsettled.

Section 1782 allows for broad, US-style discovery

- Federal Rules of Civil Procedure usually determine the scope of discovery.

Procedure

Section 1782 applications can be made *ex parte*

- If satisfied that applicant has made a *prima facie* showing, court will issue order authorizing service of a subpoena.
- Target then has the burden of moving to quash the subpoena.

Possibility of appeal

- District court's order is immediately appealable to court of appeals.
- But stay of discovery pending appeal is not automatic.

N.B.: Build in sufficient time for this process to play out!

Thank You.

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