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Vietnam: compliance risks

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Foreign investment is again flooding into Vietnam. According to *The Economist*, foreign direct investment hit a record high in 2015.¹ The first half of 2016 saw deals reach US\$11.3 billion. This marks a 105 per cent increase from the same period in 2015. *The Economist* also surmises that Vietnam is mixing the right ingredients for rapid and sustained growth, similar to South Korea, China, and Taiwan before it. The Vietnamese government has also taken steps to improve the investment environment by recently revising the Enterprise Law (2014), the Investment Law (2014), the Land Law (2013) and the Law on Real Estate Business (2013), among others. And if the Trans-Pacific Partnership is ratified, Vietnam will become an even more attractive investment locale, as additional trade barriers are lifted.

While investing in Vietnam has much to offer, foreign investors should also be cognisant of the compliance risks. Vietnam should be considered a 'high-risk' jurisdiction for compliance purposes. Without proper oversight and controls in place, general counsel may face many sleepless nights.

First, corruption is a big concern. Vietnam's 2015 score on Transparency International's Corruptions Percentage Index was 31 out of 100 (with zero being the most corrupt and 100 being the least corrupt). To highlight the risks, two US companies were penalised for violations of the Foreign Corrupt Practices Act (FCPA) in Vietnam in 2014–2015.

Second, Vietnam has a complex and often confusing regulatory environment. Investors must carefully navigate the myriad rules and regulations that cover all aspects of business activity. Vietnamese regulations involve a complex array of national laws (which are often akin to broad-reaching policy documents), and implementing rules in the form of decrees and ministerial circulars. Local agencies may also have their own set of procedures. What makes manoeuvring through this system all the more difficult is that other companies, including competitors, may appear to be ignoring the regulations with impunity. This may make wilful non-compliance tempting for some. But non-compliance is not advised, and will often lead to disastrous consequences.

Third, employee fraud should be a major concern for general counsel. Fraud usually takes the form of employee theft or embezzlement. But Vietnam's labour regime makes it difficult to terminate workers, even those found to have embezzled company funds or committed some other form of white-collar crime. As a result, the best protection is to have systems in place that can prevent or minimise the risk and damage of such occurrences in the first place.

This article will give a broad overview of each of the three primary compliance risks in Vietnam: anti-corruption, regulatory compliance and employee fraud. Relevant laws covering these areas will be discussed. Specific cases drawn from our own experience as well as public cases are also presented to give readers context. Additionally, we discuss broad ways that foreign investors can minimise their risks in these areas.

Corruption

Vietnam has been making efforts to combat corruption, but in practice, bribery is still very widespread. It is prevalent across a wide range of sectors, from health care and pharmaceuticals, to land management, natural resource extraction, and property development. Public procurement poses particular risks. Indeed, the US State Department's 2015 Vietnam Country Report on Human Rights Practices identified corruption as a continued problem in land allocation, bids for construction and infrastructure projects, and official development assistance.² According to the same report, corruption among the police is also rampant.

What is more, facilitation payments are considered routine in business. In addition to 'standard' forms of corruption, such as bribing government officials, nepotism and commercial bribery are rampant. For foreign investors and locals alike, corruption poses one of the most significant challenges for doing business in the country.

FCPA and UK Bribery Act risks

Vietnam is a high-risk jurisdiction for violations of the FCPA and the UK Bribery Act. The prevalence of the state-owned sector magnifies the risk. Approximately 40 per cent of Vietnam's economy is still controlled by state-owned enterprises, and according to a 2013 survey by the Vietnamese government's Anti-Corruption Bureau, 68 per cent of Vietnam's private enterprises said they must offer bribes to get contracts with state-owned enterprises.³ The state-owned sector is shrinking under the government's privatisation plans, and is expected to play a lesser role in the future. But at present and over the medium term, many foreign investors will likely have to do business with state-owned enterprises. Employees of state-owned companies are considered 'government officials' under the FCPA, so investors must be extra careful of the risks.

Two cases involving FCPA violations have been settled in 2014 and 2015. These cases provide examples of the corruption risks of doing business in Vietnam. Many foreign investors enter Vietnam with little or no knowledge of the local environment. As such, they must often rely on local agents, consultants, and vendors to liaise with government officials and generally navigate the business environment. While such practice by itself is innocuous, it can easily turn into an FCPA violation if proper oversight is not maintained.

In one case, a US-based construction group paid bribes to Vietnamese officials through employees, vendors and the use of a non-government organisation. The bribes through the NGO were sometimes disguised as 'donations'. Vendors were also paid for services that were not rendered. The vendors would then facilitate the payment of bribe money to the officials. The scheme was controlled by the Vietnam country manager with the assistance of employees. The company ultimately found out about the practice, self-disclosed to the US authorities, and was punished.

The second case also involved an American company. The company's country manager approved bribes to officials to get business.

Sales representatives made payments to officials at state-owned hospitals and laboratories to purchase the company's products. When an employee raised concerns about the practice, she was told that paying bribes was normal practice in Vietnam. Payments were made to agents or distributors, who in turn paid the officials. The bribes were recorded as 'commissions', 'advertising fees', and 'training fees'.

Vietnamese anti-corruption legislation

The Vietnamese government has been making efforts to deal with its corruption problems and while enforcement is generally weak, there are signs that it is changing. There have been several high-profile anti-corruption cases recently against a number of state officials, and foreign investors should remain in compliance with local law. By doing so, not only will they be in conformity with Vietnamese law, the risk of an FCPA violation will be significantly lowered. As will be seen below, the coverage of the Vietnamese corruption laws is even broader than that of the FCPA because, unlike the FCPA, it does not contain an express exception for facilitation payments meant to secure the performance of non-discretionary and routine government action.

The primary laws that cover corruption are:

- Penal Code No. 15/1999/QH10, adopted by the National Assembly on 21 December 1999, as amended in 2009 (the Penal Code);
- Law on Anti-Corruption No. 55/2005/QH11, adopted by the National Assembly on 29 November 2005 (the Anti-Corruption Law);
- Decree No. 59/2013/ND-CP Guiding the Implementation of Some Articles of the Law on Anti-Corruption (Decree 59); and
- Decision No. 64/2007/QĐ-TTg (articles 3, 5, 9, 10 and 12) dated 10 May 2007 concerning the giving of gifts to and receipt by state officials (the Gift Regulations).

Other laws also apply, such as the laws governing tendering and administrative violations.

A new Penal Code was enacted in 2015, and was supposed to become effective on 1 July 2016. However, just before the effective date, Vietnam's legislature suspended the new law because of identified drafting errors and conflicts with other legislation. It is currently uncertain when the law will go into effect.

Both the Penal Code and the Anti-Corruption Law prohibit bribery and acts facilitating bribery (such as offering bribes and acting as an intermediary for bribery). Bribery under the Penal Code exists when a person:

- abuses their position or power;
- has accepted or will accept, directly or through intermediaries, money, property or other material interests; and
- agrees to perform or not to perform certain jobs for the benefit or at the request of the offerer.

Under the Anti-Corruption Law, state officials are prohibited from receiving any money, property or other material interests from agencies, organisations, units or individuals involved in affairs that the state officials are involved with or fall under their management. Bribe givers and receivers as well as bribe facilitators are subject to liability under the Vietnamese anti-corruption laws.

There are a few safe harbours. Under the Penal Code, bribe givers are subject to criminal liability if they offer bribes with the equivalent value of 2 million dong or more. Bribes of less than 2 million dong can nevertheless be punishable if there are 'serious

consequences' or they are given more than once. There is no clear definition of what 'serious consequences' mean. Under the Gift Regulations, a state official does not have to report a gift that is worth less than 500,000 dong, provided the gift is offered on a particular occasion such as a family funeral, wedding or the Vietnamese New Year, and the gift does not otherwise constitute a bribe.

The statute of limitations for corruption-related crimes (such as bribe-giving) is from 10 to 20 years (calculated from the date of commission).⁴

Regulatory compliance

Vietnam's regulatory and investment regime is complex. New laws on investment and enterprise are in place with the aim of improving processing times for investment registrations and corporate formation, but it remains to be seen if improvements will in fact take place. Under the previous investment and enterprise laws, obtaining registration took, on average, three to eight months from the preparation of the dossier to approval. Once a local entity is established, it becomes subject to a whole host of other regulations, such as tax and accounting requirements, labour issues and other filings. The regulatory requirements can be burdensome in that they require regular filings with government authorities. Many business-related licences may need to be obtained or renewed. Many foreign nationals find Vietnamese regulations on business unnecessary and overly burdensome. For example, all promotional campaigns (such as discount programmes, lucky draws and customer loyalty programmes) must be registered with the local department of industry and trade. All this government red tape imposes additional costs and time on a business. Furthermore, added to the burdensome and complex nature of Vietnamese laws, they are often also poorly written and vague, making them subject to various interpretations. Quite often one piece of legislation will conflict with another. Last, while there is a significant administrative burden for most foreign businesses in attempting to comply with Vietnamese laws, at the same time, for various reasons, there is weak enforcement of the laws. Therefore, foreign investors may find themselves tempted to pursue non-compliant options in Vietnam since they observe other companies doing it with seeming impunity. However, over the long term, the risks of non-compliance greatly outweigh the tax, business and other benefits obtained from non-compliance.

As is often the case in jurisdictions such as Vietnam, a company might be non-compliant for a number of years in various areas of the law with no enforcement action made against it until some incident brings it to the government's attention. Often the unwanted attention is triggered by criminal investigations or regulatory agencies investigating an incident relevant to consumer protection or public health and safety. When such government attention occurs, all acts of non-compliance can come under scrutiny, whether they be in the realm of labour, corporate and commercial, or tax regulations.

One area that is commonly subject to abuse in Vietnam is the use of the 'representative office'. As in other countries, the primary function of the representative office is to act as a liaison point and to look for and facilitate business opportunities for its parent entity. It is expressly not allowed to engage in any 'profit-making activity' and most types of marketing activity, with the exception of displaying and introducing the products and services of its parent entity to potential customers within the premises of the representative office itself. In severe cases, operating outside the lawful scope of the representative office will lead to the forced closure of the representative office by regulatory bodies. Yet, despite the severely limited scope of the representative office, and knowing full well that its scope

is insufficient for its contemplated activities, many investors still opt to set up representative offices instead of licensed companies because it is easier and quicker to do so, and because representative offices do not have to pay corporate income tax.

One common *ultra vires* activity foreign investors like to conduct through the representative office is marketing. The office will have numerous marketing or sales staff (perhaps hundreds or even thousands), but since the representative office cannot invoice or consummate the sale, the sale transaction is done through local partners or distributors. As is evident in this situation, beyond the fact that the mere conducting of most types of marketing activity itself would be out of scope, for most businesses, marketing and sales are highly interdependent. To have to artificially divide the two activities between two entities – one that the foreign investor controls (ie, the representative office) and one that it does not – is ripe with compliance risk.

This situation is aggravated when representative office employees are illegally seconded to work at their distributor's offices (Vietnamese law does not support such arrangements) or when a promotional campaign is implemented, such as a monetary rebate programme. As representative offices are expressly forbidden by law to conduct promotional campaigns, many foreign representative offices conduct all aspects of the promotion except for delivery of payment or promotional material to customers – this part is done by local partners or distributors.

In a corrupt environment with a very bad track record for enforcing white-collar crime, such as Vietnam, whenever there is money or other material benefit involved there is a high risk of theft and embezzlement. The victim of the theft and embezzlement is likely to report it to the police. The ensuing criminal investigation is likely to expose the *ultra vires* activity. The desire to avoid administrative fines, tax audits, or other penalties such as the suspension of operations may even tempt the management of the representative office to bribe the investigators. Non-compliance on the choice of the right entity can then have a domino effect. These things happen with surprising regularity to even world-class, foreign, publicly listed entities that operate businesses in Vietnam. The authors of this article have witnessed similar events unfold first-hand on several occasions.

The example of the wrongful use of a representative office is just one example of many compliance issues in a highly regulated jurisdiction. Everything from labour to environment to company filings requires registrations, licences or approvals. While Vietnam has been making attempts to reduce the bureaucratic burden on investors, there is still a long way to go. A full understanding and acceptance of the regulatory regime is required. In our experience, shortcuts will lead to compliance failures and eventually, punishment or even divestment.

Employee fraud and crime

Investors should be cognisant of the risk of employee fraud and other white-collar crimes occurring in Vietnam. According to a 2013 EY survey, 20 per cent of Vietnamese people interviewed said it was justified to misstate financial statements during times of economic distress, compared with an average of 5 per cent in the rest of the Asia-Pacific region.⁵ Common examples of employee fraud include direct misappropriation of company funds or embezzlement of 'marketing' or 'promotion' funds in representative offices (as described in the preceding section); submitting false invoices and receipts; taking kickbacks from vendors or employees or potential employees to induce a promotion or hiring; misstating financial

statements; using undisclosed economic interests to their advantage (ie, conflicts of interest), and other forms of collusion with third parties (such as consultants and suppliers).

The legal tools that companies have at their disposal to deal with employee fraud are limited. First and foremost, many Vietnamese employees have very little fear of criminal prosecution for white-collar crime, which stems from the belief that they can bribe themselves out of any criminal investigation. Another reason is that it is exceedingly difficult to terminate workers in Vietnam – even those that have committed fraud, theft or embezzlement. Under Vietnam's Labour Code, employers can dismiss employees' labour contracts only under limited circumstances. While under the law, dismissal for theft and embezzlement is allowed, a formal internal hearing process is required. The company trade union, if one exists, or the district-level trade union if none exist, must be invited to participate and if the employee does not agree with the dismissal he or she has the right to sue the employer in court. The courts in Vietnam are plagued with transparency issues as well as having a generally pro-labour stance, and the penalty for wrongful dismissal of an employee is very serious, further increasing of risks of wrongfully dismissing an employee and complicating the power dynamic between an employer and employee. Lastly, companies or entities with 10 or more employees are required to file their internal labour rules (ILRs) with the local labour authorities. The primary purpose of the ILRs is to set out a company's disciplinary and dismissal policies, and failure to file ILRs will prohibit a company from disciplining or dismissing its employees. Yet, the filing process is complicated and therefore many foreign entities neglect to file their ILRs and consequently expose themselves to the indignity of not being able to fire an employee that they know has embezzled money from them. Needless to say, companies should file their ILRs.

Conclusion

Based on the foregoing, corruption, regulatory compliance and fraud protection should be priorities for general counsel advising their companies with operations in Vietnam. Addressing compliance issues and risk management in Vietnam is not much different from other jurisdictions. All the issues described in this article are interrelated. If a company has a culture of non-compliance, the chances of something bad happening are already high. This risk is magnified further in a jurisdiction such as Vietnam. The end result can be FCPA penalties, loss of reputation, trouble with the Vietnamese authorities and divestment.

In Vietnam, as elsewhere, compliance failures arise when the drive for immediate revenues overtakes effective compliance as a priority. Therefore, to prevent compliance failures in Vietnam, companies should firstly stress with local and foreign staff the importance of compliance. Second, companies should have a strong understanding of the local market and regulatory environment, and business practices in Vietnam. To stay in line with the law, companies must know this and training is vital in this regard. Third, companies must monitor, audit and supervise to prevent problems in the first place. Fourth, companies must be careful when managing their labour issues. Since terminating workers is difficult, due attention must be paid to hiring practices and having proper ILRs in place.

Vietnam can be a very rewarding investment destination as companies seek to enter this emerging market that has huge promise. But they must also be mindful of significant compliance risks and take active measures to mitigate them.

Notes

- 1 See www.economist.com/news/finance-and-economics/21703376-having-attained-middle-income-status-vietnam-aims-higher-good-afternoon-vietnam.
- 2 See www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper.
- 3 www.thanhniennews.com/business/private-firms-bribe-stateowned-companies-to-get-contracts-survey-779.html.
- 4 Articles 8.3, 23.3, 279, and 289 of the Penal Code.
- 5 See [www.ey.com/Publication/vwLUAssets/2013_Asia-Pacific_Fraud_Survey/\\$FILE/EY-Asia-Pacific-Fraud-Survey.pdf](http://www.ey.com/Publication/vwLUAssets/2013_Asia-Pacific_Fraud_Survey/$FILE/EY-Asia-Pacific-Fraud-Survey.pdf).



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Michael K Lee is a partner and the head of the corporate and commercial team in the Vietnam offices of Tilleke & Gibbins. Lauded by *Chambers Asia-Pacific* for his 'thorough approach', Michael counsels clients and manages cases on a wide range of corporate matters, including real estate, mergers and acquisitions, licensing, commercial transactions, anti-corruption, regulatory affairs (particularly for the life sciences and high-technology industries), and labour. Michael has acted as lead counsel in a number of high-profile anti-corruption and compliance matters in Vietnam.

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