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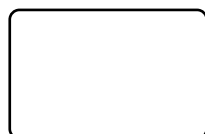
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Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. **GIR** gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, enabling them to stay on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the GIR 100) and – after a successful court decision – obliged the DOJ to release the names of unsuccessful candidates for Foreign Corrupt Practices Act monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. All authors are leaders in their field and we are grateful to them all for their time and energy. We encourage readers and co-authors to share feedback and comments.

If you would like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Asia-Pacific Investigations Review 2019*.

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August 2018

Vietnam: Compliance Risks

John Frangos
Tilleke & Gibbins

Vietnam continues to attract increasing levels of foreign direct investment. In 2017, foreign investment inflows reached US\$35.6 billion with disbursed capital of US\$17.5 billion – the highest level since 2009.¹ From 2016, registered FDI capital and disbursed FDI grew by 44.4 per cent and 10.8 per cent, respectively.² *The Economist* surmises that Vietnam is mixing the right ingredients for rapid and sustained growth, similar to South Korea, China and Taiwan before it.³ The Vietnamese government has also taken steps to improve the investment environment by revising the Enterprise Law (2014), the Investment Law (2014), the Land Law (2013) and the Law on Real Estate Business (2014).

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 and compliance officers may face many sleepless nights.

First, corruption is a big concern. Vietnam’s 2017 score on Transparency International’s Corruption Perceptions Index was 35 out of 100 (with zero being the most corrupt and 100 being the least corrupt), tied at 107th out of 180 countries ranked. However, as the country’s score was 33 in 2016 and 31 in prior years, there are indications that the situation is improving. With that in mind, to highlight the risks, in April 2017 the World Bank debarred a Danish company for fraud and corrupt payments for Vietnam infrastructure projects. In January 2017, the US Department of Justice (DOJ) charged four individuals in relation to bribery charges involving Vietnam. Also in 2017, a Boston engineering company self-reported improper business activities in Vietnam to the DOJ and the World Bank. This is in addition to a number of US companies and individuals being punished over the last few years for violations of the Foreign Corrupt Practices Act (FCPA) in Vietnam.

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 often 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. Furthermore, Vietnam’s new Penal Code, which became effective

on 1 January 2018, criminalises private-sector corruption. Private-sector corruption was previously absent from Vietnam’s anti-corruption regime. Now, individuals working for private entities, including charities, can be criminally liable for bribery offences that exclusively involve other private-sector parties. This will hopefully have a deterrent effect.

Lastly, Vietnam’s new Penal Code also introduces corporate criminal liability for a range of wrongdoings. The change is significant because under the previous Penal Code, only individuals could be criminally liable. Now, however, corporate entities can face criminal sanctions as well.

This article will give a broad overview of each of the four primary compliance risks in Vietnam: anti-corruption, regulatory compliance, employee fraud and corporate criminal liability. 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 healthcare and pharmaceuticals, to land management, natural resource extraction, and property development. Public procurement poses particular risks. Indeed, the World Bank’s Country Partnership Framework for the Socialist Republic of Vietnam (2017) identifies systemic fraud and corruption issues in the country as undermining factors in the development impact of World Bank Group engagements.⁴ Corruption is especially prevalent in the land management, transport and energy sectors.⁵

Furthermore, facilitation payments, while less common, are still often requested in business. In addition to ‘standard’ forms of corruption, such as bribing government officials, nepotism and commercial bribery often occur. But with the new Penal Code criminalising such activities, companies may be able to cut down on the practice. In short, 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 2015 World Bank Enterprise Survey, 91 per cent of firms reported they were expected to make informal payments to public officials to ‘get things done,’ which was a far higher number than the regional average. Further, firms reported the importance of state connections in accessing land and other resources.⁶ The state-owned sector is shrinking under the government’s privatisation plans, and is expected to play a less prominent 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 highlight 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 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 policy and legislation

In an effort to crack down on corruption in the public sector, the Vietnamese government has prosecuted several high-profile officials for corruption offences. In 2017, a former party leader of Ho Chi Minh City and board chairman of PetroVietnam was sentenced to prison for economic management violations and other corruption-related offences. Other high-level officials with PetroVietnam were also sentenced as part of the crackdown. They each received significant prison terms. The *PetroVietnam* case is indicative of a host of other cases. Reuters reports that over 100 people, mostly from state-owned enterprises in banking and energy, have been prosecuted.⁷

While the crackdown focuses mainly on Vietnamese officials, foreign investors should also be alert and remain in compliance with local law. By doing so, not only will they be in conformity with Vietnamese law, but 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. Moreover, Vietnamese law also criminalises private-sector corruption.

The primary laws that cover corruption are:

- Penal Code No. 100/2015/QH13, adopted by the National Assembly on 27 November 2015, as amended and supplemented by Law No. 12/2017/QH14 in 2017 (the Penal Code);
- the Law on Anti-Corruption No. 55/2005/QH11, adopted by the National Assembly on 29 November 2005, as amended in 2007 and 2012 (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, as amended by Decree No. 29/2014/ND-CP (the Gift Regulations).

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

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 gives or promises bribes, receives bribes, or acts as an intermediary for bribes.

The underlying concept stated in the Penal Code that defines corrupt activities is 'abuse of power'. Public office holders – as well as private ones – are liable for offences relating to abuses of power under the law. The term 'office holders' is broadly defined as people who are granted duties and authority 'through appointment, election, contract conclusion, or another method'. The law also states that office holders 'might or might not receive salaries'. This seemingly covers anyone who has some measure of authority within an organisation, even if they are unpaid. Private-sector organisations that fall under the law would therefore not only include corporations or for-profit enterprises, but also charities, volunteer groups and other NGOs.

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 they are given more than once. The penalty for giving or promising to give a bribe largely depends on the value of the benefit given or promised. Penalties range from relatively low fines of 20 million dong and between six months' and 20 years' imprisonment. The new Penal Code introduces a prohibition on bribery involving foreign government officials and officials with public international organisations. This is relevant as Vietnam is a significant recipient of official development assistance from other countries, as well as loans from multilateral development banks and financial institutions.

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 up to 20 years (calculated from the date of commission).⁸

Regulatory compliance

Vietnam's regulatory and investment regime is complex. New laws on investment and enterprises 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, 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. Vietnamese regulations on business sometimes seem 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. These extensive administrative procedures impose additional costs and time on a business. Furthermore, added to the burdensome and complex nature of Vietnamese laws, they are often also vague, making them

subject to various interpretations. 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 taken 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 related 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 prohibited from engaging 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 that foreign investors like to conduct through representative offices is marketing. A representative office will have numerous marketing or sales staff (perhaps even hundreds), but because it cannot invoice or engage in sales, the sale transaction is done through local partners or distributors. As is evident in this situation, beyond the fact that merely conducting most types of marketing activity 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 rife 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 from conducting promotional campaigns, many foreign representative offices conduct all aspects of the promotion except for delivery of payment or promotional material to customers, which is done by local partners or distributors.

In an 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. Victims of theft and embezzlement are likely to report it to the police, and 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 seek to improperly influence the investigators. Non-compliance on the choice of the right entity can then have a domino effect. These situations arise with surprising regularity, even to 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 wrongful use of a representative office is just one example out 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.⁹ 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, 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).

While companies are facing increased liability and risk for the employees' conduct, 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 may be able to bribe themselves out of any criminal investigation, or use connections to quell an 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 only dismiss employees' labour contracts under limited circumstances. While dismissal for theft and embezzlement is allowed under the law, 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 have been known to sometimes have 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 the risk of wrongfully dismissing an employee and complicating the power dynamic between employers and employees. 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, consequently exposing themselves to the risk of not being able to fire an employee that they know has embezzled money from them. Needless to say, companies should file their ILRs.

Corporate criminal liability

The new Penal Code prescribes corporate criminal liability for wrongdoings such as smuggling, dealing in banned and counterfeit goods, insider trading, tax evasion, money laundering, terrorism financing, failure to pay insurance to workers, insurance fraud, antitrust and environmental crimes. Importantly, corporate criminal liability does not extend to corruption in the new law. For both private-sector and public-sector corruption offences, only individuals can be punished.

Corporate entities are criminally liable when certain conditions are met. First, the crime must have been committed in the corporation's name. Second, the crime must have been done to further the company's interests. Third, the company must have approved the offence. This latter point is especially important, as a company may not necessarily bear criminal responsibility for the actions of a rogue employee.

The Penal Code sets out various punishments for companies convicted of a crime. The primary punishment consists of a fine, which starts at 50 million dong. The amount of the fine depends on the nature of the offence and a company's financial capacity. Other punishments include suspension of operations for a limited time period (with the maximum being three years) and, for more egregious offences, a permanent shutdown. The law also allows banning the company from engaging in particular fields, as well as a prohibition from raising capital. In addition, property gained from crimes can be confiscated, including illegal profits.

Leniency is applied to companies that voluntarily disclose their offences to authorities and cooperate during criminal proceedings. Leniency is also granted when a company voluntarily compensates for any inflicted damage or takes action to alleviate consequences of a crime. Interestingly, the law also describes making considerable contributions to social policies as a mitigating factor. While 'social policies' are undefined, companies should take note. A company may be exempt from punishment altogether after it repairs whatever damages the conduct caused and pays compensation. In contrast, aggravating factors include companies colluding to commit a criminal offence, a company deliberately committing the crime to its conclusion, or a company committing a crime multiple times. A company can also face stricter punishment if 'sophisticated tricks' are used to commit or hide the offence.

Conclusion

Based on the foregoing, corruption, regulatory compliance, fraud protection and mitigating the risk of corporate crime 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 negative consequences arising 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 Vietnamese regulators, divestment and corporate criminal liability.

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 first stress with local and foreign staff the importance of compliance, and conduct internal training. 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. Finally, compliance policies can be incorporated into labour contracts and ILRs.

Vietnam can be a very rewarding investment destination as companies seek to enter this hugely promising emerging market, but they must also be mindful of significant compliance risks and take active measures to mitigate them.

Notes

- 1 www.vietnam-briefing.com/news/fdi-opportunities-vietnam-2018.html/.
- 2 www.vietnam-briefing.com/news/fdi-opportunities-vietnam-2018.html/.
- 3 See www.economist.com/news/finance-and-economics/21703376-having-attained-middle-income-status-vietnam-aims-higher-good-afternoon-vietnam.
- 4 <http://documents.worldbank.org/curated/en/173771496368868576/pdf/111771-PUBLIC-Vietnam-FY18-22-CPF-FINAL.pdf>, p 24, 46.
- 5 <http://documents.worldbank.org/curated/en/173771496368868576/pdf/111771-PUBLIC-Vietnam-FY18-22-CPF-FINAL.pdf>, p 79.
- 6 <http://documents.worldbank.org/curated/en/173771496368868576/pdf/111771-PUBLIC-Vietnam-FY18-22-CPF-FINAL.pdf>, p 15.
- 7 www.reuters.com/article/us-vietnam-security-economy/investors-in-vietnam-learn-to-live-with-anti-corruption-crackdown-some-embrace-it-idUSKBN1H4oEW.
- 8 Articles 354 and 364 of the Penal Code.
- 9 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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John Frangos is a consultant in Tilleke & Gibbins' dispute resolution group. He has substantial experience assisting clients on complex disputes in Thailand and Vietnam, including anti-corruption investigations and compliance, government investigations, business crime, aviation litigation, and cross-border disputes. He leads the firm's aviation disputes practice and co-leads the firm's regional anti-corruption practice group.

Having lived and worked in Thailand and Vietnam for over 10 years, John brings strong knowledge of local business practices and customs. He also has a deep understanding of the region's political and economic landscapes that shape the legal environment that foreign investors must navigate.

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