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NO&T Asia Legal Review 創刊のご案内

長島・大野・常松法律事務所（NO&T）は、日々目まぐるしく移り変わるアジア各国の法実務に関する最新の情報をお届けするべく、今般 NO&T Asia Legal Review（月刊英文ニュースレター）を創刊いたしました。NO&T Asia Legal Review は当事務所の各国アジアオフィスに所属するアジアの弁護士が執筆しており、日本人の皆様だけではなく、貴社内でご勤務されている日本人以外の方にもご購読いただけるよう英文で作成しております。ご関心のある方には是非ご転送いただき、今後直接ご送付できるようこちらからご登録いただければ幸いです。

Issue of "NO&T Asia Legal Review"

We, Nagashima Ohno & Tsunematsu ("NO&T"), are pleased to inform that we have launched a monthly English newsletter, "NO&T Asia Legal Review", to share updates on the rapidly changing laws and legal practices in Asian countries. The articles in the NO&T Asia Legal Review are written in English by Asian qualified lawyers, who are working in our Asian offices, not only for the Japanese expatriates but also for non-Japanese speakers who are interested in this kind of legal information. Please kindly forward this NO&T Asia Legal Review to your colleagues and ask them to register here if they are interested to receive this newsletter so that we can directly send it to them hereafter.

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This issue covers the following topics:

India

DISCLOSURE OF SIGNIFICANT BENEFICIAL OWNERS

前号では、インドネシアの資金洗浄及びテロ組織への資金供与を防止することを目的として各法人がその実質的オーナーを定め届け出ることを義務付ける規則が制定されたことを紹介したが、今般、インドでも同様の規則が制定された。インドの規則では、法人の株主である個人も届出義務を負い、これには外国人も含まれることからより留意が必要である。

Background

In compliance with India's obligations to align its regulatory framework with the recommendations of Financial Action

Task Force, an intergovernmental organisation constituted to formulate policies to combat money laundering and terror financing, the Ministry of Corporate Affairs, in June 2018, notified Section 90 of the Companies Act, 2013 ("**Companies Act**") and also introduced the Companies (Significant Beneficial Owners) Rules, 2018 (the "**SBO Rules**").

Similar to other jurisdictions, the intent behind introduction of the SBO Rules is to prevent use of companies as mere conduits for money laundering or other illegal activities and to bring transparency regarding the ultimate ownership of companies.

Key Provisions

1. Definition of Significant Beneficial Owner

A 'significant beneficial owner' has been defined in the Companies Act read with the SBO Rules to mean an individual who, either by himself or with others, directly or indirectly through persons (resident or non-resident) including trusts, holds ultimate beneficial interests of at least 10% in shares of a company or has the right to exercise significant influence or control over a company.

In case of a shareholder other than an individual, the SBO Rules provides that the significant beneficial ownership shall be determined as follows:

(a) where the member is a company, the significant beneficial owner is the natural person, who, (whether acting alone or together with other natural persons, or through trusts), holds not less than 10% share capital of the company or who exercises significant influence or control in the company or if such person cannot be identified then the person holding the position of a senior managing official;

(b) where the member is a partnership firm, the significant beneficial owner is the natural person, who, (whether acting alone or together with other natural persons, or through trusts), holds not less than 10% of capital or has entitlement of not less than 10% of profits of the partnership or if such person cannot be identified then the person holding the position of a senior managing official;

(c) where the member is a trust (through trustee), significant beneficial owner shall comprise of the settlor, the trustee, the beneficiaries with not less than 10% interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.

2. Declaration by Significant Beneficial Owner

Section 90 of the Companies Act read with the Significant Beneficial Owner Rules requires every significant beneficial owner to make a declaration to that company specifying the nature of its beneficial interest within 90 days from the commencement of the Significant Beneficial Owner Rules and within 30 days in case of any change in his significant beneficial ownership. Any person who becomes a significant beneficial owner after the SBO Rules have come into effect shall have to make a declaration regarding his ownership or change thereof within 30 days.

3. Obligations of the Company

The SBO Rules also prescribe certain obligations that every company is mandated to follow, which, inter alia, include the following:

(a) maintain a register of significant beneficial owners in the prescribed format setting out the prescribed particulars of such beneficial owners (name, address and other ownership details), which register is required to be kept open for inspection by shareholders for not less than two hours on every working day on payment of prescribed fee;

(b) file a return of significant beneficial owners of the company and changes therein with the Registrar of Companies within a period of 30 days from the date of receipt of declaration by it from such beneficial owner;

(c) give notice to any person whom the company believes to be a significant beneficial owner or who may have been so during the preceding three years and who has not made a declaration to the company.

Additionally, the Companies Act and the SBO Rules provide that if a person fails to furnish the information sought by a company within 30 days, the company must apply to the National Company Law Tribunal for an order directing that the shares in question be subjected to restrictions including those with respect to transfer of shares and suspension of dividend and voting rights attached to the shares, amongst others.

4. Non-Applicability

The SBO Rules are not applicable to the holding of shares in companies by pooled investment vehicles or investment funds such as mutual funds, alterative investment funds, real estate investment trusts and infrastructure investment trusts which are regulated by the securities regulator of India.

Steps to be taken by companies and shareholders

1. **Companies:** All Indian companies (including Indian subsidiaries of foreign companies) now have the onus of identifying and maintaining appropriate records of their significant beneficial owners. The compliance requirement for a company has increased substantially not only because it is required to identify persons who own more than 10% shares in the company but also such persons that directly or indirectly exercise significant influence or control over the company. Furthermore, each company is required to give notice to any person whom the company knows or has reason to believe is a significant beneficial owner or to have been so during the preceding three years and who is not registered with the company. Failure to comply with the requirements would attract prescribed monetary penalties.

2. **Shareholders:** The primary obligation of disclosure of significant beneficial interest is on individual shareholders who, directly or indirectly, hold 10% or more of the shareholding in an Indian company or exercise significant influence or control over such company. The obligation applies to all shareholders, irrespective of whether such shareholder is Indian or a foreigner. While direct shareholding can be easily determined, individual shareholders would have to evaluate whether they would qualify as a significant beneficial owner by virtue of their shareholding or interest in other companies or partnerships that hold any interest in an Indian company. A person who fails to comply with the requirement to make a declaration is punishable with a fine which can range from INR 100,000 to INR 1,000,000. If a person wilfully furnishes incorrect or false information or suppresses any material information, he could be liable to penal sanctions.

Conclusion

The notification of Section 90 of the Companies Act and the SBO Rules is a clear indication that the Government of India seeks to improve transparency and better corporate governance. It also enables regulators to curtail money laundering and other illicit activities by providing a clear route to identify the ultimate ownership of the company including by way of piercing the corporate veil in case of non-individual shareholders. This would allow the regulators to trace the flow of money in financial investigations. While companies and shareholders have their work cut for them, certain ambiguity is likely to persist since the meaning of the terms 'significant influence' and 'senior managing official' have not been provided either in the Companies Act or the SBO Rules and can lead to uncertainty in determining beneficial owners. It may be worthwhile for the Ministry of Corporate Affairs to issue a clarification to this effect shortly.

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Malaysia

CORPORATE LIABILITY INTRODUCED FOR CORRUPTION OFFENCES

本年５月マレーシアの反汚職委員会法が改正され、これまで個人のみが刑事罰の対象となっていた贈収賄に関して、法人も併せて刑事罰の対象となりうる両罰規定が新たに設けられた。代表権限の有無を問わず、従業員が贈収賄を犯した場合に法人も併せて処罰される可能性があることから、今後より一層贈収賄に対する法令遵守を徹底することが重要である。

Background

The primary statute governing anti-bribery and similar offences in Malaysia is the Malaysian Anti-Corruption Commission Act 2009. It came into force on January 1, 2009, repealing the Anti-Corruption Act 1997.

On April 5, 2018, the Malaysian Anti-Corruption Commission (Amendment) Bill 2018 ("**Bill**") was passed in the Malaysian Senate. The Bill received Royal Assent on April 27, 2018, and was published in the gazette as the Malaysian Anti-Corruption Commission (Amendment) Act 2018 on May 4, 2018. The Bill will come into force upon a notification of a date of appointment is made in the Federal Gazette.

Purpose

The main purpose of the Bill is to introduce a wide reaching corporate liability provision under section 17A. Currently only individuals are liable for corruption charges. With the introduction of section 17A, corporate liability will now be imposed on commercial organizations for any criminal acts committed by their employees, regardless of designations. The Bill seeks to enhance Malaysia's fight against corruption particularly those arising from commercial transactions allowing for businesses to be carried out in a corruption free environment and to ensure that adequate measures are put in place to prevent corruption. The corporate liability provisions are modelled on the Bribery Act in the United Kingdom (UK Bribery Act).

Key Changes

In summary, below are the five (5) key changes introduced by the Bill:

1. Offence by a commercial organization (section 17A(1))

A new section 17A was introduced in the Bill which provides that if a person associated with the commercial organization corruptly "gives, agrees to give, promises, or offers to any person" any gratification either for the "benefit of that person or another person" with intent to "obtain or retain business for the commercial organization" or "to obtain or retain an advantage in the conduct of business for the commercial organization", the commercial organization commits an offence.

2. Types of commercial organizations defined widely (section 17A(8))

The definition of a "commercial organization" is wide and it includes among others:

(a) A company incorporated under the Companies Act 2016 and carries on a business in Malaysia or elsewhere; and

(b) A company wherever incorporated and carries on a business or part of a business in Malaysia.

3. Person associated with commercial organizations also defined widely (sections 17A(6) and (7))

If a person is a director, partner, employee or a person who performs services for or on behalf of the commercial organization, that person will be deemed to be associated with a commercial organization. The question of whether a person provides service for and on behalf of a commercial organization is to be decided based on circumstances and not merely by reference to the nature of the relationship between him and the commercial organization.

4. Deemed offence by Directors and Management (section 17A(3))

Where a commercial organization commits an offence, the directors, officers and management are deemed to have committed the same offence unless they are able to prove that the offence was committed without their consent and that they exercised due diligence to prevent the offence.

5. Severe penalties for the corporate offence (section 17A(2))

The potential penalties are severe, and could be in the form of a fine of not less than ten times the value of the gratification (if capable of being valued), or RM 1 million, whichever is higher, or imprisonment for a term not exceeding 20 years, or both.

What should a commercial organization do to protect itself from liabilities under the Bill?

As noted above, the Bill imposes strict liability on commercial organizations, in that organizations can be held liable regardless of whether they had actual knowledge of the corrupt actions of its associated persons. The only exception is if, pursuant to section 17A(4) of the Bill, the commercial organization could prove that it had adequate procedures in place to prevent such associated persons from carrying out the corrupt conduct, then it can amount to a defense similar to the defence available under the UK Bribery Act.

To safeguard both the company itself as well as the company's directors and officers, it is crucial to have in place such a system of adequate procedures. It is anticipated that Malaysia will soon issue guidelines on the extent of adequate measures that a commercial organisation must implement.

Conclusion

The Bill seeks to enhance Malaysia's combat against corruption, in particular corruption arising from commercial transactions and it will also have the effect of promoting better corporate governance and legal compliance in Malaysia.

In light of the severe penalties, commercial organizations will need to step up monitoring of their associated persons for corrupt practices and should also revisit their anti-corruption policies and code of conduct to ensure that the internal procedures are sufficiently robust.

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Vietnam

NOVEL REGULATIONS ON CORPORATE CRIMINAL LIABILITY

ベトナムは、2018 年 1 月 1 日に施行し有効する、2017 年に改正された 2015 年 11 月 27 日付の刑法第 100/2015/QH13 号において、「法人刑事責任」の概念を初めて導入しました。これは、ベトナムの刑法制度における注目すべき変更点であり、よって会社が一定の犯罪に対して刑事責任を負う可能性がある。

Background

Before the enactment of the Penal Code 2015, only individuals may be subject to criminal liabilities in Vietnam. The Penal Code 2015, however, adopts a new approach to Vietnam's criminal law that a company may also be prosecuted for criminal offences from 1 January 2018 onwards.

This article provides some important issues that a company should be aware of in relation to the novel corporate criminal liability regime in Vietnam.

Subject of corporate criminal liability

The subject of corporate criminal liability under the Penal Code 2015 is limited to "commercial legal person". While the definition of "commercial legal person" is absent from the Penal Code 2015, a reference to the Civil Code 2015 suggests that to qualify as a "commercial legal person", an entity must be a legal person with the main objective of seeking profit which is then distributed to its members. This arguably means a non-legal person (such as a private enterprise) or a non-commercial legal person (such as a social enterprise, a state agency, or a charity fund etc.) could not be held criminally liable. As explained by a draftsman of the Penal Code 2015 in a public seminar in May 2018, the restrictive approach to impose criminal liability to "commercial legal person" only is adopted for the current Penal Code due to the novelty of the corporate criminal liability regime in Vietnam's legal system, and the legislators want to observe how it would be implemented in practice before applying the same in a more widespread scale. From this point onwards, "commercial legal person" will be referred to as "company" to make it succinct and more familiar with the readers.

On another issue, it is not clear how corporate criminal liability could be applied to a foreign company committing a criminal act in Vietnam, and whether such foreign company is also entitled to diplomatic immunity similar to a foreign individual. An official guidance or court precedent is desirable to shed some lights on this important issue.

Elements of imputation

Under Article 75 of the Penal Code 2015, a company may be held criminally liable only when the criminal offense is committed:

(i) in the name of the company;

(ii) for the interests of the company; and

(iii) align with the instruction, guidance or approval of the company.

The absence of detailed guidance on this Article 75 has given rise to many interpretations on the conditions for triggering corporate criminal liability. That being said, in light of the restrictive approach taken by the Vietnamese legislators, it seems that the most prevailing interpretation among the scholars for now is as follows:

In the name of the company: Only the legal representative or duly authorized representative of a company can undertake a criminal act on behalf of the company. In the context of the Civil Code 2015, a person will be authorized to act in name of the company once he/she obtains the valid and proper power of attorney from (or execute authorization contract with) the legal representative of such company. The acts of independent contractor, subsidiary or even mere employees of the company may not result in criminal liability imposed upon the company.

For the interests of the company: There must be intention to benefit the company, but not the other entity(ies), which benefits may include both material and non-material benefits. The wording of the Penal Code 2015 does not require the benefits of the company to be actually realized, but an intention to bring about benefits for the company already satisfies this element of imputation.

Align with the instruction, guidance or approval of the company: As per the 2016's internal guidance of the Supreme Procuracy in implementing the Penal Code 2016, a company will be subject to criminal liability only when the legal representative or the management board of such company (i) knows that the relevant individual's action is illegal and (ii) still gives instruction, guidance or acceptance to such action. Given the restrictive approach towards the Penal Code 2015, it is reasonable to interpret that the instruction or approval of the company should be carried out in a positive manner, and mere silence does not amount to acceptance. As a formality requirement, although it is well-proven if the instruction or approval is demonstrated via resolutions of top corporate body, internal policies and/or decision of the legal representative of the company, given the recognition of electronic data as a new source of evidence under the Criminal Proceedings Code 2015, the prosecutors may still rely on emails or text message to determine whether the instruction or approval exists.

33 potential criminal offences

A company can only be convicted by 33 specific offences listed under Article 76 of the Penal Code 2015, some notable

of which are summarized in the below table. It is reported that the list of corporate criminal offences was formulated based on (i) the popularity of the offences in practice, (ii) the degree of harm caused to the society and (iii) the ease of proof. Bribery is not included in the list.

Notes:

- [A]: applicable

- [N/A]: not applicable

- Additional sanction: monetary fine (in case monetary fine is not a key sanction), prohibition to engage in certain business activities, and/or prohibition to mobilize capitals for 1 – 3 years.

Criminal offence	Key sanction			Additional sanction
	Monetary fine (billion VND)	Temporary suspension (months)	Permanent suspension	
Article 188 - Smuggling	0.3 - 15	6 - 36	A	A
Article 192 – Manufacturing, trading counterfeit goods	1 - 9	6 - 36	A	A
Article 196 – Speculating	0.3 - 9	N/A	N/A	A
Article 200 – Evading tax	0.3 - 10	6 – 36	A	A
Article 203 – Illegal printing, issuing or trading of invoices or receipts	0.1 - 1	N/A	A	A
Article 209 – Deliberately publishing false information or concealing information in securities activities	0.5 - 5	N/A	N/A	A (monetary fine N/A)
Article 213 – Committing fraud in insurance business	0.2 - 7	N/A	N/A	A (monetary fine N/A)
Article 216 - Evading payments of compulsory insurances for employees	0.2 - 3	N/A	N/A	N/A
Article 217 - Violating competition regulations	1 - 5	6 – 24	N/A	A
Article 226 - Infringing industrial property rights	0.5 - 5	6 - 24	N/A	A
Article 235 - Polluting environment	3 - 20	12 – 36	A	A

Time-bar limitation

The time-limit for corporate criminal liability may be 5 years, 10 years, 15 years or 20 years depending on the seriousness of the crime, and will be determined by analogy with similar crime committed by individuals.

Mitigating factors

There are some mitigating factors which may be considered while evaluating the criminal liability of a company:

(i) prevention or mitigation of the consequences of the crime;

(ii) voluntary remedy of the damage of the crime;

(iii) the damage is immaterial;

(iv) active cooperation by the company with the authority during the criminal proceeding; or

(v) significant contribution by the company to the society.

Conclusion

Given the Penal Code 2015 has not been well established and there have been few implementing regulations on corporate criminal liability, certain analysis may change once the authorities issue official interpretation or a court precedent is acknowledged. That being said, it is still advisable for a company to stay alert to its exposure to the new regime on corporate criminal liability in Vietnam.

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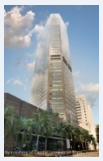

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