The Foreign Corrupt Practices Act
What's new
What's important

Sesto E Vecchi

October 17, 2018

Russin & Vecchi

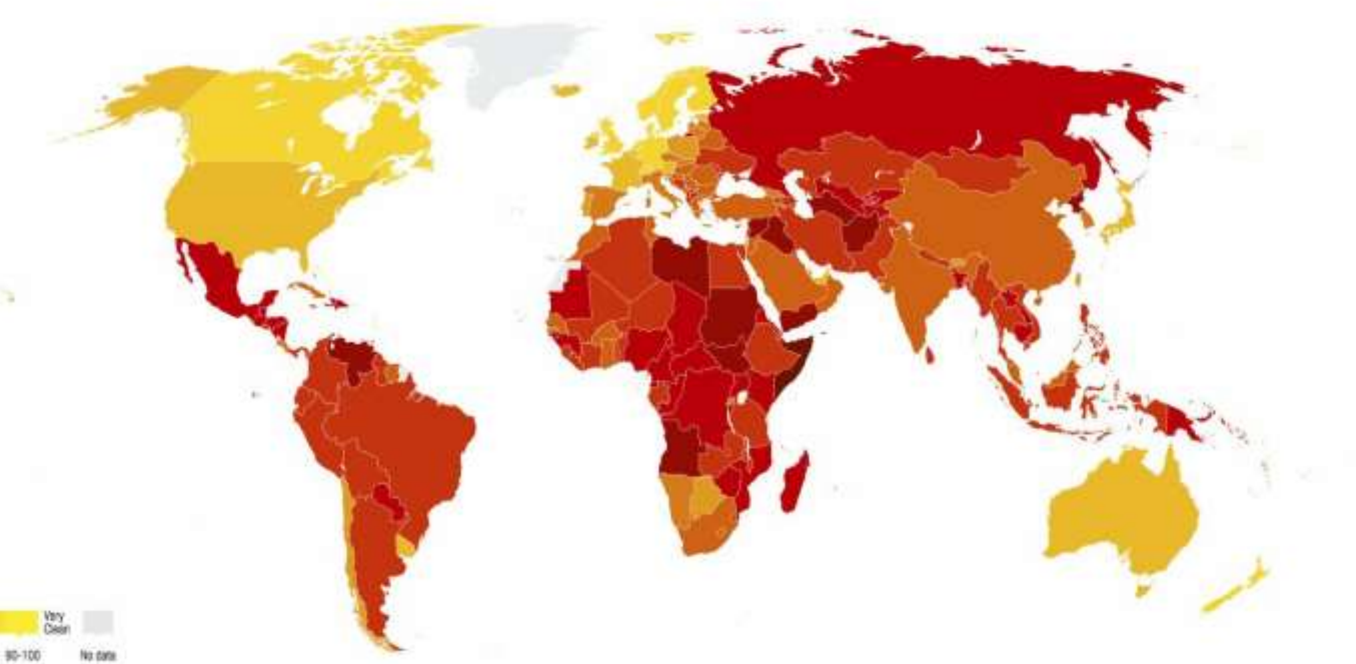
HO CHI MINH CITY
Vietcombank Tower, 14/F
5 Me Linh Square
Tel: (84-28) 3824-3026
Eml: lawyers@russinvecchi.com.vn

HANOI
Hanoi Central Office Building, 11/F
44B Ly Thuong Kiet Street
Tel: (84-24) 3825-1700
Eml: lawyers@russinvecchi.com.vn

TRANSPARENCY INTERNATIONAL
the global coalition against corruption

CORRUPTION PERCEPTIONS INDEX 2017

The perceived levels of public sector corruption in 180 countries/territories around the world.



SCORE

Highly Corrupt — Very Clean

0-9 | 10-19 | 20-29 | 30-39 | 40-49 | 50-59 | 60-69 | 70-79 | 80-89 | 90-100 | No data

RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	89
2	Denmark	88
3	Finland	85
3	Norway	85
3	Switzerland	85
6	Singapore	84
6	Sweden	84
8	Canada	82
8	Luxembourg	82
8	Netherlands	82
8	United Kingdom	82
12	Germany	81
13	Australia	77
13	Hong Kong	77
13	Iceland	77
16	Austria	75
16	Belgium	75
16	United States	75
19	Ireland	74
20	Japan	73
21	Estonia	71
21	United Arab Emirates	71
23	France	70
23	Uruguay	70
25	Barbados	68
26	Bhutan	67
26	Chile	67
28	Bahamas	65
29	Portugal	63
29	Qatar	63
29	Taiwan	63
32	Brunei Darussalam	62
32	Israel	62
34	Botswana	61
34	Slovenia	61
36	Poland	60
36	Seychelles	60
38	Costa Rica	59
38	Lithuania	59
40	Latvia	58
40	Saint Vincent and the Grenadines	58
42	Cyprus	57
42	Czech Republic	57
42	Dominica	57
42	Spain	57
46	Georgia	56
46	Malta	56
48	Cabo Verde	55
48	Rwanda	55
48	Saint Lucia	55
51	Korea (South)	54
52	Grenada	52
53	Namibia	51
54	Italy	50
54	Mauritius	50
54	Slovakia	50
57	Croatia	49
57	Saudi Arabia	49
59	Greece	48
59	Jordan	48
59	Romania	48
62	Cuba	47
62	Malaysia	47
64	Montenegro	46
64	Sao Tome and Principe	46
66	Hungary	45
66	Senegal	45
68	Belarus	44
68	Jamaica	44
68	Oman	44
71	Bulgaria	43
71	South Africa	43
71	Vanuatu	43
74	Burkina Faso	42
74	Lesotho	42
74	Tunisia	42
77	China	41
77	Serbia	41
77	Suriname	41
77	Trinidad and Tobago	41
81	Ghana	40
81	India	40
81	Morocco	40
81	Turkey	40
85	Argentina	39
85	Benin	39
85	Kosovo	39
85	Kuwait	39
85	Solomon Islands	39
85	Swaziland	39
91	Albania	38
91	Bosnia and Herzegovina	38
91	Guyana	38
91	Sri Lanka	38
91	Timor-Leste	38
96	Brazil	37
96	Colombia	37
96	Indonesia	37
96	Panama	37
96	Peru	37
96	Thailand	37
96	Zambia	37
103	Bahrain	36
103	Côte D'Ivoire	36
103	Mongolia	36
103	Tanzania	36
107	Armenia	35
107	Ethiopia	35
107	Macedonia	35
107	Vietnam	35
111	Philippines	34
112	Algeria	33
112	Bolivia	33
112	El Salvador	33
112	Maldives	33
112	Niger	33
117	Ecuador	32
117	Egypt	32
117	Gabon	32
117	Pakistan	32
117	Togo	32
122	Azerbaijan	31
122	Djibouti	31
122	Kazakhstan	31
122	Liberia	31
122	Malawi	31
122	Mali	31
122	Nepal	31
122	Moldova	31
130	Gambia	30
130	Iran	30
130	Myanmar	30
130	Sierra Leone	30
130	Ukraine	30
135	Dominican Republic	29
135	Honduras	29
135	Kyrgyzstan	29
135	Laos	29
135	Mexico	29
135	Papua New Guinea	29
135	Paraguay	29
135	Russia	29
143	Bangladesh	28
143	Guatemala	28
143	Kenya	28
143	Lebanon	28
143	Mauritania	28
148	Comoros	27
148	Guinea	27
148	Nigeria	27
151	Nicaragua	26
151	Uganda	26
153	Cameroon	25
153	Mozambique	25
155	Madagascar	24
156	Central African Republic	23
157	Burundi	22
157	Haiti	22
157	Uzbekistan	22
157	Zimbabwe	22
161	Cambodia	21
161	Congo	21
161	Democratic Republic of Congo	21
161	Tajikistan	21
165	Chad	20
165	Eritrea	20
167	Angola	19
167	Turkmenistan	19
169	Iraq	18
169	Venezuela	18
171	Korea (North)	17
171	Equatorial Guinea	17
171	Guinea Bissau	17
171	Libya	17
175	Sudan	16
175	Yemen	16
177	Afghanistan	15
178	Syria	14
179	South Sudan	12
180	Somalia	9

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DOJ Criminal Division Leniency Policy, March 2018

- Declination to prosecute now possible if a company: timely and voluntarily self-reports, discloses all relevant facts, proactively and fully cooperates, takes remedial steps--and there are no "aggravating circumstances"
- Preserves documents, makes witnesses available, addresses underlying issues, timely and appropriately remediates root causes, implements effective compliance/ethics program
- There is a presumption but no guaranty in favor of declination upon voluntary self-disclosure
- Aggravating circumstances: senior management involvement, significant profit to company, pervasiveness of misconduct, criminal recidivision
- Even when aggravating circumstances exist, 50% off low end of sentencing guidelines is possible
- Makes timely decision to cooperate, reasonably promptly after learning facts, before threat of investigation
- Generally not required for DOJ to appoint an "independent compliance monitor"
- But must still pay: disgorgement, interest, forfeiture, restitution for acts

DOJ Criminal Division
Expansion of Leniency Policy, March 5, 2018

- Why a leniency program? Prior pilot program resulted in higher rates of self-disclosure
- SEC, CFTC and other regulators do not have similar leniency programs
- Benefits of leniency only intended to benefit company (innocent shareholders). No leniency policy for complicit executives

Unnamed Confectioner (Zippo) Inadequate, FCPA risk based Investigation

- In January 2017 Unnamed Confectioner (Zippo) agreed to pay a fine of US$13 million imposed by the SEC. It neither admitted nor denied allegations. The incident centers around it's subsidiary, Zippo India.

- The situation starts with an Unrelated Company (Omega) India which hired a third party agent to obtain over 30 licenses to allow it to increase production of sweets. It hired and paid an agent with no pertinent experience, US$90,000, for a minimum amount of work to consult, complete government application forms. Licenses were issued, one was worth large sums in possible tax exemptions.

- Why was Omega India's conduct later called into question? It failed to conduct appropriate, investigation of its agent, failed to follow its own compliance controls, ie, its own anti-corruption contract language, etc.

Unnamed Confectioner (Zippo) Inadequate, FCPA risk based Investigation

- Note that Omega India (not Zippo) engaged the agent, and failed to follow its own anti-corruption processes. At all relevant times Zippo did not even own Omega (and therefore did not own Omega India).

- Why, then, was Zippo penalized? Coincident with these events, Zippo negotiated with Omega, acquiring Omega, including Omega India. The SEC asserted that Zippo did an inadequate, pre-acquisition, risk based, transactional due diligence review of Omega India, which, if done, would likely have uncovered the conduct of Omega India's agent. The reasoning is that if a proper DD had been done, the situation could have been timely discovered and remediated.

- It is a reminder that the SEC imposes a huge obligation to conduct a proactive, pre-acquisition DD and the need for the acquiring entity to deal with previous unauthorized conduct including unauthorized payments made by target companies.

Importance of DD investigation

JP Morgan Securities (Asia Pacific) Ltd*
Sons and Daughters Program

- For many years foreign banks had programs to hire children of Chinese and Asian government officials.

- The Bank's program which started out as a rigorous policy of careful selection of high quality candidates, became a policy of knowingly hiring less qualified persons if there was a relationship with a government official. "Sons and daughters" did light tasks; the bank openly allocated costs as "marketing expenses". DOJ aggressively asserted that even giving an unpaid internship was "something of value", given in return for business "with an intent to wrongfully influence the recipient".

- In November 2016, DOJ, SEC and the Federal Reserve reached settlement, whereby JP Morgan paid a fine of US$264 million for hiring sons and daughters of officials and thereby allegedly gaining millions of dollars in business and profits.

*also JP Morgan Chase

JP Morgan Securities (Asia Pacific) Ltd Sons and Daughters Program

- Parallel with the settlement, JP Morgan disciplined 29 employees, fined them US$18.3 million, and instituted a worldwide enhancement of anticorruption practices.
- Party must give “something of value” with an “intention to influence”. Intent is important.

Unnamed Hedge Fund*

- DOJ and SEC separately assessed total penalties of US$412 million on a US hedge fund for unauthorized payments to several African governments to attract investments in fund managed funds. It found criminal failure to implement adequate internal accounting controls.

- Despite being aware of high corruption risk posed by dealings with the firm's business partners (reputation, connections to senior officials), CEO/CFO personally approved/authorized, transactions in which bribes were paid, but recorded as investment loans in the firm's books and records. Executives consented to settlement.

*combined cases in Africa

Unnamed Hedge Fund

- Firm's CEO and its CFO separately settled with SEC: SEC observed that although neither executive personally knew that bribes would be paid, their actions caused books and records and internal controls violations. Without admitting SEC's allegations, executives consented to settle (penalties and) charges.

- This and several other recent investigations, suggest the DOJ's and SEC's growing interest in the financial sector.

Unnamed Company X

- In September 2016 the SEC imposed a relatively modest settlement on Company X of the US of US$765,688 for a charitable contribution it made in China. The contribution was intended to influence the decision of a Party Official.
- The claim revolved around a donation made by Company X, China to a charity. (1) there is no allegation that the charity was not a bona fide charity; (2) there is no allegation that the Party Official involved or any member of his family received a direct financial benefit as a result of the donation; (3) the Party Official involved is alleged to have had only a tenuous connection to the charity; (4) and Company X, US's internal controls flagged the transaction as high-risk and referred the matter to outside counsel. Even so, the SEC took an aggressive position. The lesson is that even legitimate, charitable contributions, constitute "something of value" when made to satisfy foreign officials.
- The history is that, in 2013, Company X, China was under investigation by a provincial entity for alleged violations of the marketing laws. Company X, China believed that an adverse finding would have a negative impact on its business. An employee of Company X, China asked a senior provincial Party Official for the name of a provincial charity to which it could contribute. The Party Official recommended a charity and two days after the contribution, Company X, China was informed that the government would not impose a fine.

Unnamed Company X

- Before the contribution, Company X, China referred the matter to Company X, US which requested Company X, China to seek advice from outside counsel. It did so. Outside counsel advised Company X, China to use anti-corruption language in the contribution agreement. It inserted the language, but unknown to Company X, US, the language was removed from the formal signed version before it was signed.

- The SEC concluded that Company X, US had insufficient controls in that it did not insure that Company X, China did an adequate due diligence investigation nor take steps to prevent (a charitable) payment clearly intended to influence government officials. Merely instructing its subsidiary what to do was inadequate.

- The lesson is that companies need to monitor charitable giving. They also need to follow up their own internal anti-corruption processes.

Something of value
Intent to influence
Internal controls

Accounting and Books and Records Provisions of FCPA

- The accounting provisions of the FCPA impose a two-fold obligation on corporations that fall within the statutory definition of "issuer"--including all companies, the securities of which are publicly traded in the United States. First, a company must "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairy reflect the transactions and dispositions" of its assets.[1] Second, it must "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that its transactions are properly carried out and recorded and that the company's assets are protected.[2]

- The accounting provisions are separate from the FCPA's anti-bribery provisions and are enforced without regard to whether there are connected allegations of foreign bribery.[3]

- The breadth of the accounting provisions makes them a powerful enforcement tool.

[1] 15 U.S.C § 78m(b)(2)(A) (Section 13(b)(2)(A) of the Exchange Act).

[2] *ld.*, § 78m(b)(2)(B) (Section 13(b)(2)(B) of the Exchange Act).

[3] See, eg, SEC v. World-Wide Coin Investment, Ltd, 567 F. Supp. 724 (N.D.Ga. 1983). This was the first litigated decision under the FCPA's accounting provisions and involved no foreign bribery. 15 Sec. Reg. & L. Rep (BNA) 1037 (June 3, 1983).

Vietnam
General Guidelines

<u>Hiring third party consultants</u>:

- Can’t outsource a corrupt payment
- Consultant’s technical qualifications
- Due diligence
- FCPA contract terms
- What will consultant actually do?
- Monitor performance

<u>Red flags in Vietnam</u>:

- Cash payments
- Request for offshore payments
- Consultants with government contacts, but no real technical capability
- Consulting agreements with vague purpose
- Are consulting fees reasonable?

Vietnam
General Guidelines

Gifts:

- customary?
- intent, extravagance
- openly given
- properly recorded

Books and records

- Record transactions accurately

Encourage compliance:

- Management commitment
- Company culture
- Internal training

Thank you