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DAWN RAIDS IN VIETNAM, WHAT YOU SHOULD KNOW

This Issues

- “Dawn Raids” in Vietnam
- What can the regulator do during a Dawn Raid?
- How can your company prepare for a Dawn Raid?

1. Dawn Raids in Vietnam

A Dawn Raid is a surprise inspection carried out by the officials of a regulatory body, at the business premises under suspicion/investigation, in order to obtain incriminating evidence as a precursor to regulatory proceedings. Examples of the types of crimes, which could be subject to dawn raid investigations, include allegations of abusing a dominant market position and other anti-competitive practices (i.e., price-fixing, cartels, etc.), or allegations of fraud, market abuse, insider dealing, bribery or corruption.

In Vietnam, dawn raids are rarely used by the regulatory authorities. However, when they do occur, dawn raids usually signify that the regulatory body has a specific (retaliatory) purpose. In addition to this unique feature, notably, dawn raids in Vietnam are also characterized by broad and unchecked regulatory discretion.

For instance, in the past, one of our banking clients was subject to a dawn raid after a major currency loss by government currency traders. Even though we, as lawyers, were present, the Police did not hesitate to set the bank's License for Currency Trading on fire when produced by the primary bank executive.

Indeed, dawn raids in Vietnam can be unpredictable, explosive, and retaliatory (e.g., for losing money in a bad currency trade). However, dawn raids can be managed, particularly for pharmaceutical companies and in the area of competition law. For instance, certain rules should be followed: (a) call external counsel immediately; (b) know your rights and obligations, such as the absence of privilege in Vietnam and requirements for regulators to obtain a search warrant for personal property such as cars and houses; and (c) the company should have certain policies in place, such as appointing one senior staff member to deal with the regulator/raid until external lawyers arrive or throughout the entire raid.

Below, we provide a broad outline of how investigations, audits, and dawn raids are carried out in Vietnam. Although dawn raids have been the exception in the past—largely because the regulator has not been staffed to undertake investigations—we anticipate that in the future dawn raids will become a major source of Governmental control of, and consternation in, the MNC pharmaceutical sector.

2. How dawn raids are performed in Vietnam

2.1. Audits

Since Vietnamese law is silent on circumstances and specific procedures for conducting an unannounced

audit of a company, it is subject to the sole discretion of the competent authorities, on a case-by-case basis, to determine whether an audit is required.

For example, in our experience, the Drug Administration of Vietnam (“DAV”) could unexpectedly audit warehouses of pharmacy business establishments to appraise maintenance of good storage practice requirements by such establishments. In addition, the provincial People's Committee could instruct the Department of Industry and Trade to audit representative offices or branches of foreign traders if needed or upon request of upper-level agencies.

As a result, some companies have undergone multiple unannounced audits and inspections in a single year, especially companies under the regulatory purview of various ministries, such as by the DAV for companies in the pharmaceutical industry. This creates a real challenge for Vietnamese businesses for several reasons, including: the lack of a governing law; competent authorities have wide and unchecked discretion to conduct their unannounced raids and audits; and, most notably, companies have no legal recourse after an unannounced dawn raid in conducted by their regulator.

2.2. Inspections

a) Overview

In Vietnam, governmental inspections are governed by the Law on Inspections of 2010. By law, an unexpected inspection may be conducted:

- (i) upon detecting signs of violations of laws;
- (ii) to resolve complaints or denunciations;
- (iii) for prevention of corruption; or
- (iv) as instructed by the relevant competent authority.

In the case of complex matters related to matrix management of multiple agencies, levels or industries, the heads of relevant state management authorities will issue internal decisions on unexpected inspections and the establishment of the inspection teams.

b) Right to Access to the Premises of the Company or Staff's Private Home for the Inspection

For the purpose of the inspection, including dawn raids, the inspection team is entitled to enter into the premises of a target company to conduct the inspection and request access to the company's records, which are stored at such business premises. On the other

hand, unless obtaining a properly issued search warrant, the inspection team does not have the right of access to a third party's premise that stores the target company's business documents and files. However, by law, the inspection team may request the third party to provide the relevant documents.

Prior to conducting the inspection, official(s) may visit the company to collect relevant information and documents by showing credentials as prescribed by law. Subject to different inspection levels, the official inspection could last from 30 to 45 days subject to possible extensions of up to 60 days. Dawn raids, on the other hand, are traditionally conducted on a single day and, potentially, followed-up by additional investigations.

c) Obligations of the company and its staff

Within the scope of the inspection, as requested by the inspection team, the company and its staff have the obligations to cooperate with the inspectors, particularly:

- To timely provide and be responsible for the accuracy of the information, documents and reports.
- To answer any questions from the inspection team for the purpose of the inspection.
- To appear at the inspection team's office for questioning if requested.

The law is silent on the administrative sanction for failure to cooperate with the inspection (except in competition inspections; where failure to cooperate with a competition inspection may result in an administrative fine up to VND10 million). However, any refusal to disclose any information or document during the inspection may be considered as a criminal offense punishable by imprisonment and/or fine.

2.3. Investigation

a) Overview

In Vietnam, the investigation is governed by criminal regulations. The investigating body may investigate any criminal offense (e.g., tax evasion, bribes, bid-rigging, anti-competitive behavior, anti-trust violations). For this purpose, the investigating body may visit the company in the context of an investigation into the business of the company—but the body may also do so in connection with an investigation into another party (e.g., an employee, a supplier or a customer that is under investigation).

b) Investigation body's authorities and rights over the company and its staff during an investigation

Under the Criminal Proceedings Code, during a corporate investigation or dawn raid, the investigating body will have the following rights:

- To request evidence, documents, objects, electronic data or present details related to the case from the corporation and its staff.
- To request the corporate staff to attend an interview (the requested staff has the right to refuse such a request; however, that could be seen as obstruction of the investigation).
- To administer all investigation measures (e.g., arrest, taking into custody, detention, search of person and property, and seizure of objects/documents).
- To temporarily attach objects and documents, which may become exhibits in relation to a future criminal case (If the objects are banned from storage or circulation by law, they must be seized and immediately and delivered to competent management bodies).
- To search files, including computer files, which the investigating body may consider are related to the investigation or dawn raid.

c) Privilege in Vietnam

Please note that the concept of privilege does not exist in Vietnam, so the investigating body could temporarily attach or seize any documents, including those which may be considered to be privileged in another jurisdiction.

That being said, in theory, there are some limitations on the investigating body under Vietnamese law. For instance, the investigating body must obtain a proper warrant before conducting a search of the relevant company's premises or private homes of the company's staff (except for emergency cases), or for arresting the company's staff members as suspects (unless they are caught in the act). Also, in theory, when an arrest / a search is carried out at the workplace, the legal representative of the company must be present as a witness. The law is unclear about the procedures and processes in the absence of the company's legal representative.

Notably, while there are regulations governing the power of the investigating body, a large number of those regulations are not in the public domain.

Therefore, the extent of police powers is not fully known, and, consequently, it is prudent to assume that their powers are broad, extensive, and, likely, unchecked.

3. Recommendations

Below are some recommendations to companies that could be subject to unexpected audits, inspections or dawn raids by the public authorities.

- (1) Designate an authorized representative to speak to the authorities (e.g., inspection team, investigating body, dawn raid team) in order to ensure the consistency of the contents presented to the authorities.

In case an internal team (rather than an individual) is appointed, such team/committee must authorize a sole representative to work with the authorities.

- (2) Ask the authorities: (i) to show their professional cards (e.g., the inspector card or official card); and (ii) to announce/produce the audit/inspection/investigation decision.

If possible, make a copy of the decision, as well as the inspector/official cards of the delegation, or at least note down their names and the decision number, date, issuing authority and other relevant information.

- (3) If possible, comply with the rights and obligations of the company and its staff during the audit/inspection/investigation/dawn raid as discussed in Section 2.

Subject to the conditions of the audit/inspection/investigation/dawn raid, the legal representative or the authorized representative may request the relevant staff to report certain issues for the purpose of the audit/inspection/investigation/raid.

- (4) You have a duty to co-operate with the officials and are required to provide information and documents at the officials' request. Officials may ask questions and record all answers. For this reason, the authorized person should keep his/her answers short, to the point and not answer any questions about which such person is uncertain. If necessary, request permission to answer in writing at a later stage.

- (5) Make copies of the documents that the officials request and take with them. Remember to make

a "Delivery Note" for all documents delivered to the officials/regulator.

- (6) After a visit, meeting minutes must be produced. If the authorized representative is asked to sign the minutes, he/she must double-check the minutes before signing for any factual errors. Please ensure the investigatory body also signs the minutes. To the extent that the minutes do not completely or accurately reflect what occurred during the

Please contact Eli Mazur (Founder and Managing Partner, YKVN's Healthcare Practice Group) or Mr. Nguyen Hong Ha if you, your team, or your regional colleagues have any questions arising from this Newsletter. Eli and Mr. Ha can be reached in YKVN's Ho Chi Minh City Office, or by email (eli.mazur@ykvnlaw.com or ha.nguyen@ykvnlaw.com).

Disclaimer:

Please note that YKVN's Dawn Raid Newsletter is written as a service to the Pharmaceutical and Medical Device Industry in general, and the views expressed in the Newsletters are neither legal advice nor do they reflect the position(s) of any of our past, current or future clients. Most critically, this Newsletter is not intended to reflect the collective views of the innovative foreign pharmaceutical and medical device sector. For the avoidance of any and all doubt, the views expressed herein rely on public documents, private conversations on a no-name basis with the competent authorities, when necessary and appropriate.

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KEY CONTACTS



Eli Mazur
Partner

For nearly two decades, Eli has been a trusted advisor for multinational companies operating in Vietnam, including in the health and pharmaceutical sector. Eli is the founder and Lead Partner of YKVN's Healthcare and Pharmaceutical Practice Group, and his client base includes the Vietnamese subsidiaries of Pharma MNCs comprising approximately 70% of the domestic pharmaceutical industry by revenue. **In 2018, Eli was recognized as a "Leading Lawyer" in Corporate and M&A by AsiaLaw, as well as the "Top Pharmaceutical Adviser" in Vietnam by panels at both Advisory Excellence and LinkedIn.**

Eli originally came to Vietnam in 2003 as a Senior Research Associate, under Thomas J. Valley, with the Vietnam Program, Harvard University and led the Law and Public Policy program at the Fulbright Economics Teaching Program in Ho Chi Minh City. Before joining YKVN LLC in 2010, Eli spent more than 3 years in the corporate practice of Freshfields' Hanoi office.

Eli is a U.S. qualified lawyer (Duke Law), a Registered Foreign Lawyer in Vietnam, and is highly regarded by clients as a problem-solver, a crisis mitigation expert, and a commercially-oriented, practical adviser, with the ability to add true value to a company's bottom line with, among other things, his ability to assist clients develop



Nguyen Hong Ha
Counsel

Nguyen Hong Ha has been in legal practice for over 13 years in Vietnam, with major experience in Dispute Resolution, Litigation and Arbitration.

Ha has advised a number of domestic and foreign corporations in negotiations in various trade disputes and succeeded in recovering many millions USD for his clients. In addition, he has also represented many domestic and international clients at Vietnamese courts and arbitration centers at Vietnam. Ha's clients include major Vietnamese corporates including VNPT, Vietnam Steel Corporation, Saigon Petro, Saigon Trading Group (SATRA), Saigon Construction Corporation (SGCC), Vietnam Export Import Commercial Joint - Stock Bank (Eximbank) as well as foreign-invested enterprises and multinationals like HSBC Bank (Vietnam) Ltd, Standard Chartered Bank (Vietnam) Ltd, P&G, Metro Cash & Carry, RMIT, New Zealand International College and Indochina Capital.



Nguyen Thi Thuy My
Associate

Ms. My is a key member and manager of YKVN's elite Healthcare and Pharmaceutical Practice. Ms. My is unique among Vietnamese lawyers, as her entire legal training and legal career has been dedicated to advising clients in the innovative pharmaceutical sector. After years of advising Pharma MNCs with operations in Vietnam, Ms. My has—not only built strong connections with clients—but also possesses a deep understanding of the industry, legal framework, and the central and provincial agencies and officials with the responsibility for interpreting and implementing the regulations. Ms. My's familiarity with the pharmaceutical industry enables her to capture (in her advice) the "essence" of regulations and give quality, practical, and value-added commercial advice to clients.

Ms. My remains the trusted counsel for several global leading Pharma MNCs with Vietnam operations, as well as the pharmaceutical association in Vietnam. She is an expert in advising on legislative developments and policy (such as the new pharmaceutical law, and implementing decrees, circulars, and official letters), and assisting clients to adjust business models, which maintain full legal compliance and optimize commercial results.



Tran Nam Tung
Associate

Tung is a registered foreign lawyer practicing in Vietnam. At YKVN, he focuses on Corporate/M&A and Healthcare & Pharmaceuticals matters. Tung has advised Pharma MNCs operating in Vietnam on a broad array of matters ranging from corporate and employment to litigation and FCPA investigations and audits.

Besides a Juris Doctorate Degree from the United States (i.e., J.D.), Tung also has a Masters' Degree in Business Administration (i.e., M.B.A.). With his background, Tung has advised multinational pharmaceutical corporations on transactions, advising on cross-border business frameworks to optimize local operations in Vietnam, as well as several notable M&A deals in the healthcare sector. Tung always endeavors to utilize and leverage his business acumen, foreign legal training, and local network and understanding to give the most practical, and value-added, legal advice to clients.

Tung is highly regarded by Clients as a commercially-oriented and practical adviser with the ability to assist foreign clients in developing and maintaining short and long-term business and investment relationships with local partners in Vietnam.



Nguyen Thi Phuoc Hang
Associate

Hang is a key manager, and, most importantly, leads the drafting team, in YKVN's elite Healthcare and Pharmaceutical Practice. She has experience advising on legislative developments and policy (such as the new pharmaceutical law, decrees guiding pharmaceutical regulations, tender circulars, etc.), and advising Pharma MNCs and the Pharma association in Vietnam on such legislative matters. She is actively involved in advising numerous Pharma MNCs in either adjusting or developing business models that comply with Vietnamese law, as well as models that mitigate risks (e.g., FCPA) that are at the forefront of concern for the local, regional, and global management of Pharma MNCs with operations in Vietnam.

Hang is regarded by clients as a go-to lawyer for pharmaceutical related issues, particularly with her ability to quickly analyze complex issues.



Tran Nhu Quynh
Trainee Lawyer

Quynh is a Trainee Lawyer of YKVN, Ho Chi Minh City office. Her practice focuses on Corporate/M&A and Tax.

Quynh has experience in advising foreign investors on corporate and investment matters, deal restructuring and tax implications. She has involved in some notable petition cases in relation to tax controversy with high-level authorities in Vietnam. Finally, Quynh has assisted in transactions for purchases and sales of shares in listed and unlisted companies.

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After a five-year period serving as a branch office of the historic and global New York City law firm of White & Case, YKVN was established by its Founding Partners in 1999. YKVN quickly became recognized as a premier law firm in Vietnam by fellow practitioners and clients, as well as by peer-reviewed publications such as the IFLR, Chambers and Partners, Asialaw and the Legal 500. For two decades, YKVN has consistently been listed as a top-tier firm, and YKVN has repeatedly and consecutively been awarded “Law Firm of the Year” (e.g., every year from 2009 to 2017 by AsiaLaw). YKVN is the market leader in M&A, power and energy, capital markets, private equity, project finance, banking, healthcare & pharmaceuticals, corporate, real estate, and domestic-litigation and international arbitration with a Vietnamese nexus.

YKVN’s attorneys have been at the forefront of virtually all significant legal developments in Vietnam in the past 25 years. We have intimate knowledge of the Vietnamese legal, business, and political landscape. Our attorneys have handled the most complex matters at the highest levels. To ensure the top quality of our work, we hire the best lawyers in Vietnam, who are trained and qualified by the best law schools in Vietnam, the U.S., UK, Australia, France and Singapore. Our attorneys have handled the most complex matters at the highest levels and are regularly ranked in the “First Tier” in their practices by major legal publications.

Notably, YKVN has the most experienced team in healthcare & pharmaceuticals in Vietnam. In our half-decade representation of the Pharmaceutical association, our lawyers have routinely been involved in the most important and material dialogues with the Vietnamese Government on the important and pressing issues of the day for Pharma MNCs in Vietnam. Our Practice is comprised of a team of lawyers that possesses a deep understanding of the authorities and the industry, which enables us to make “educated predictions” about the progression, enforcement, and relevance of pharmaceutical legislation and implementing regulations. Our team is capable, dedicated and diligent, with years of experience advising Pharma MNCs on critical issues with demanding timelines and deadlines. Our clients include the pharmaceutical association of Vietnam and a majority of the largest global research-based pharmaceutical companies.