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PRACTITIONER'S PERSPECTIVE

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FUNDAMENTALS OF ANTI-BRIBERY AND ANTI-CORRUPTION COMPLIANCE IN SOUTH AFRICA

1 INTRODUCTION

Corruption is endemic in jurisdictions throughout the world. The financial and reputational risks that follow incidents of corrupt activity within an organisation are considerable. Often they can be quite severe. The financial consequences include not only the loss that an organisation may suffer from corrupt activity, but also the money that needs to be spent investigating these type of incidents as well as that required for any ensuing legal processes. The latter include civil proceedings to recover funds that may have been misappropriated from an organisation as a result of corrupt activity, disciplinary enquiry proceedings against employees involved in such activity, criminal investigations and/or regulatory enforcement processes. In certain jurisdictions, for example, the US and the UK, the penalties that may be imposed on an organisation arising from corrupt activity can be quite severe, running even to hundreds of millions of dollars. The financial consequences of corruption for an organisation include the amount of management time spent dealing with such incidents, which time could have been utilised better in managing the organisation. The cost of this time often is difficult, if not impossible, to quantify.

Reputationally, the effect of corrupt activity upon an organisation can be crippling. Whereas it takes years for an organisation to build its reputation, it can be tarnished seriously within days and it can be difficult for such organisation to

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recover from the reputational harm that it may suffer as a result of corrupt activity. Therefore, it is important for organisations globally to place great emphasis on mitigating the risk of corruption to ensure the sustainability of their businesses. Whilst regulatory observance is critical, organisations should view anti-bribery and anti-corruption (ABAC) compliance not only as upholding relevant legislation and regulatory prescripts, but also as part of a mind-set to protect their assets and overall business from the financial and reputational consequences arising out of corrupt activity. In *Scholtz & Others v The State*, the Supreme Court of Appeal stated that: "Successful business people should set the standard by acting properly, not corruptly".[1]

As a starting point in developing an effective ABAC compliance programme, organisations should ensure that they have a strong understanding of the relevant legislative and regulatory precepts. Multi-national organisations, in particular, should be aware of the legislative requirements in each of the jurisdictions in which they operate in order to ensure that the ABAC compliance programme that is implemented adheres to the relevant domestic requirements.

2 KEY PIECES OF LEGISLATION

There are several pieces of legislation in South Africa's anti-corruption and anti-money laundering arsenal. These include the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PACCA), the Prevention of Organised Crime Act 121 of 1998 (POCA), the Financial Intelligence Centre Act 38 of 2001 (FICA), the Companies Act 71 of 2008 (Companies Act) and the Protected Disclosures Act 26 of 2000 (PDA).

Multi-national organisations with links to the US and the UK are required to comply also with the US Foreign Corrupt Practices Act of 1977 (FCPA) and the UK Bribery Act of 2010 (UKBA) respectively.

PACCA and certain other statutes are considered in more detail below insofar as they relate to ABAC compliance.

2.1 Prevention and Combating of Corrupt Activities Act

PACCA is South Africa's key piece of ABAC legislation. It was enacted on 27 April 2004 and replaced the Corruption Act 94 of 1992. PACCA consists of 37 sections and is more comprehensive than the 1992 Act. It is a wide-ranging piece of legislation geared towards "the strengthening of measures to prevent and combat

1 *Scholtz & Others v The State* (428/17, 491/17, 635/17, 636/17) [2018] ZASCA 106 (21 August 2018) paragraph 208.

corruption and corrupt activities".[2] It applies to both the public and private sectors.

PACCA contains a general offence of corruption, as well as numerous provisions dealing with specific corrupt activity, including offences relating to foreign public officials, agents, members of the legislative authority, judicial officers, contracts, the procurement and withdrawal of tenders, and sporting events.[3] There are also several unique provisions in the Act, such as the duty on certain persons holding a position of authority to report certain corrupt transactions, and the establishment of a Register for Tender Defaulters. These two provisions are considered in more detail below. The Act also provides for extraterritorial jurisdiction.[4]

2.1.1 The General Offence of Corruption

Section 3 of PACCA contains a general offence of corruption. The section itself is quite broad and it appears that its ultimate purpose is to ensure that it covers all types of corrupt activity. Basically, in terms of this section, any person who accepts (or even agrees to accept or offers to accept) any gratification from anybody else, or any person gives (or even agrees to give or offers to give) any gratification to anybody else, in order to influence the receiver to conduct himself or herself in a way which amounts to the unlawful or improper exercise of any duties, commits the offence of corruption. From the wording of section 3, it is clear that the offence of corruption is committed by the mere offering or agreeing to offer (alternatively offering to receive or agreeing to receive) the gratification in question. In other words, the gratification itself does not actually have to be given or received for the conduct to amount to the offence of corruption.

An important concept used in section 3 (and wherever the Act deals with corrupt activity) is "gratification". This concept is defined broadly in section 1(ix) of PACCA to include any money (whether in cash or otherwise), donation, gift, loan, fee, reward, office, status, honour, employment, payment, release and discharge, as well as the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage.[5] It is not necessary that the gratification be given before the corrupt activity takes place. Gratification given after the corrupt activity has been perpetrated is sufficient to amount to an act of corruption under PACCA.[6]

2 Preamble to PACCA.
3 See sections 4 to 16 of PACCA.
4 Section 35 of PACCA.
5 See section 1(ix) of PACCA for the full definition.
6 See *Scholtz & Others v The State* paragraph 131.

2.1.2 Register for Tender Defaulters

Section 29 of PACCA provides for the establishment of a Register for Tender Defaulters. This Register is open to the public[7] and is kept by the National Treasury.[8] When a court convicts a person of corruption in relation to contracts or to the procurement or withdrawal of tenders, it may order that the conviction and sentence, as well as the particulars of the convicted person, be endorsed on the Register.[9]

2.1.3 Duty to Report Corruption

Section 34(1) of PACCA provides that any person who holds a position of authority and who knows (or ought reasonably to have known or suspected) that any other person has committed an offence of corruption (or theft, fraud, extortion, forgery or uttering a forged document) involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the Central Reporting Office of the Directorate for Priority Crime Investigation of the South African Police Service. A person "who holds a position of authority" includes any head, rector or principal of a tertiary institution, the Director-General or head, or equivalent officer, of a national or provincial department, the manager, secretary or director of a company, a member of a close corporation, any partner in a partnership or any other person who is responsible for the overall management and control of the business of an employer.[10] In terms of section 34(2) as read with section 26(1)(b), failure to report can result in the imposition of a fine or to imprisonment for a period not exceeding 10 years.

2.2 PACCA Amendment Bill

During November 2017, the Department of Justice and Correctional Services published the Prevention and Combating of Corrupt Activities Amendment Bill (PACCA Amendment Bill).[11] Initial comments on the PACCA Amendment Bill were due on 15 January 2018.

The Bill proposes several amendments to PACCA, amongst the most notable of which are:

7 Section 32 of PACCA.
8 The Register is accessible on the National Treasury's website at *www.treasury.gov.za*.
9 Section 28(1)(a) of PACCA.
10 Section 34(4) of PACCA.
11 BXX—2017.

- The introduction of the definition of “facilitation payment” in section 1 of PACCA to "make it clear that South Africa does not allow facilitation payments".[12]
- The insertion of three new offences into section 18 of PACCA. These are persuading a person not to report an offence in terms of PACCA; persuading an auditor or accountant not to report an offence in terms of PACCA detected during the scope of his or her duties; and subjecting a person who has reported an offence or who is a witness in terms of PACCA to treatment which is unfair, unlawful or discriminatory.[13]
- The proposal to change the name of the Register for Tender Defaulters to the Debarment Register.[14] It is proposed also that section 28(1)(a) of PACCA be broadened to include corrupt activity and certain other offences committed in terms of PACCA,[15] as well as offences contemplated in section 4, 5 or 6 of POCA.[16] In other words, it is intended that this section be amended to apply to convictions for all of the offences under PACCA and not just to those relating to corruption pertaining to tenders and contracts.[17]
- The introduction of the following three new provisions into section 34 of PACCA:

> (5) A court may find that any person who *bona fide* filed a report as contemplated in subsection (1) may not be held liable to any civil, criminal or disciplinary proceedings in respect of the content of such report.
> (6) All institutions referred to in subsection (4) must implement appropriate internal compliance programmes in order to ensure that the offences referred to in subsection (2) are in fact detected and reported.
> (7) (a) All State-owned enterprises, private entities and individuals who engage in foreign trade are required to keep all records of all such trade, including payments made or received during the course of such trade.
> (b) Such records are to be retained for a period of 10 years from the date of the commencement of each transaction constituting foreign trade and any such person or entity who fails to maintain such records is guilty of an offence.[18]

12 Paragraph 16 of the Explanatory Memorandum to the PACCA Amendment Bill.
13 Section 4 of the PACCA Amendment Bill.
14 Section 8 of the PACCA Amendment Bill.
15 These are sections 18, 20, 21, 28(6)(b) and 34(1)(b) of PACCA.
16 These offences relate to money laundering, assisting another to benefit from the proceeds of unlawful activities, and the acquisition, possession or use of the proceeds of unlawful activities.
17 Section 7 of the PACCA Amendment Bill.
18 Section 10 of the PACCA Amendment Bill.

At present, apart from the positive duty placed on "persons in a position of authority" to report corrupt activity in terms of section 34 of PACCA, there are no positive obligations placed on organisations in relation to ABAC compliance. In its current form, PACCA is strong on setting out prohibited conduct, but it fails to address proactive conduct by organisations regarding ABAC compliance. Accordingly, it appears that the proposed amendments to section 34 of PACCA (in particular, the introduction of sections 34(6) and 34(7)) are a move towards placing greater emphasis on ABAC compliance.

2.3 ABAC Compliance and the Companies Act

2.3.1 Regulation 43 of the Companies Act

South African companies are required to comply with the provisions and regulations of the Companies Act. Regulation 43 of the Companies Act prescribes that certain companies appoint a social ethics committee.[19] These companies include every state-owned company, every listed public company, and any other company that, in any two of the previous five years, has scored above 500 points in terms of its "public interest score".[20]

According to regulation 43(5), the social and ethics committee is required, *inter alia*, to monitor the company's activities having regard to any relevant legislation, other legal requirements or prevailing codes of best practice in matters of social and economic development, including the company's standing in terms of the goals and purposes of the United Nations Global Compact Principles and the OECD recommendations regarding corruption.[21] The social and ethics committee is required also to monitor the company's activities regarding matters relating to good corporate citizenship, including the company's reduction of corruption.[22]

19 Regulation 43(2) of the Companies Act.

20 Regulation 43(1) of the Companies Act. In terms of regulation 26(2), for the purposes, *inter alia*, of regulation 43, every company must calculate its "public interest score" at the end of each financial year. Regulation 26(2) sets out the manner of calculating this score.

21 Regulation 43(5)(i)(aa) and (bb) of the Companies Act.
The relevant aspects of the UN Global Compact Principles and the OECD recommendations are considered in §2.3.2 and §2.3.3 below respectively.

22 Regulation 43(5)(a)(ii)(aa) of the Companies Act.

2.3.2 Principle Ten of the United Nations Global Compact

Principle Ten of the UN Global Compact deals with anti-corruption. It provides that:

> Businesses should work against corruption in all its forms, including extortion and bribery.

This principle was adopted in 2004. Its effect is to commit all:

> UN Global Compact participants not only to avoid bribery, extortion and other forms of corruption, but also to proactively develop policies and concrete programmes to address corruption internally and within their supply chains. Companies are also challenged to work collectively and join civil society, the United Nations and governments to realize a more transparent global economy.[23]

Needless to say, any ABAC compliance programme must be informed by the content and spirit of Principle Ten.

2.3.3 OECD Guidelines for Multinational Enterprises

The OECD Guidelines[24] are:

> recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.[25]

Chapter VII of Part 1 of the OECD Guidelines deals with "Combating Bribery, Bribe Solicitation and Extortion". It provides that:

> Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion.[26]

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23 UN Global Compact "The Ten Principles of the UN Global Compact: Sustainability Begins with a Principled Approach to Doing Business, Principle Ten: Anti-Corruption", available at *https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10* (visited 9 July 2020).

24 OECD (2011) *OECD Guidelines for Multinational Enterprises* OECD Publishing, available at *http://dx.doi.org/10.1787/9789264115415-en* (visited 9 July 2020).

25 OECD (2011) at 3.

26 OECD (2011) at 47.

In this respect, the OECD Guidelines set out the following seven directions for enterprises:

- Enterprises should not offer, promise or give to nor should they request, agree to or accept undue pecuniary or other advantage from public officials or employees of business partners, as the case may be. Furthermore, enterprises should not use third parties to channel undue pecuniary or other advantages to public officials or to employees of their business partners (or to their relatives or business associates).
- Enterprises should develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery. These should be developed on the basis of a risk assessment addressing the individual circumstances of the enterprise, in particular its bribery risks. These measures should include a system of financial and accounting procedures (including a system of internal controls), reasonably designed to ensure the maintenance of fair and accurate books, records and accounts to ensure that they cannot be used for the purpose of bribing or hiding bribery. Furthermore, bribery risks should be monitored regularly and re-assessed as necessary to ensure that the relevant measures that are implemented are adapted and continue to be effective.
- Enterprises should prohibit or discourage the use of small facilitation payments.
- Enterprises should document properly due diligence pertaining to the hiring and to the appropriate and regular oversight of agents. Furthermore, enterprises should ensure that remuneration of agents is appropriate and for legitimate services only.
- Enterprises should enhance the transparency of their activities in the fight against bribery and extortion. These measures could include making public commitments against bribery and extortion, as well as disclosing the relevant measures adopted in order to honour these commitments.
- Enterprises should promote employee awareness of and compliance with company policies and internal controls, as well as the measures implemented by the enterprise against bribery and extortion. This should be done through appropriate dissemination of such policies or measures and through training programmes and disciplinary procedures.
- Enterprises should not make illegal contributions to candidates for public office or to political parties or other political organisations. Political contributions

should comply fully with public disclosure requirements and should be reported to senior management.[27]

2.4 US Foreign Corrupt Practices Act

The US Congress enacted the FCPA[28] in 1977 in an attempt to bring a halt to the bribery of foreign officials. The two principal components of the FCPA are its anti-bribery provisions[29] and its accounting provisions.[30] The anti-bribery provisions apply to all US companies, US Citizens and US residents, whilst the accounting provisions apply to all US companies (issuers) and their subsidiaries with securities registered with the US Securities and Exchange Commission (SEC).

In terms of the accounting provisions contained in the FCPA, issuers are required to:

> make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.[31]

They are required also to "devise and maintain a system of internal accounting controls" to prevent the improper use of corporate funds.[32]

Under the anti-bribery provisions of the FCPA, it is unlawful to bribe foreign government officials to obtain or retain business. However, the FCPA allows for facilitation payments to a "foreign official, political party, or party official" in order to:

> expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.[33]

The FCPA is enforced by the US Department of Justice (DOJ) and the SEC. The DOJ is responsible for criminal enforcement whilst both the DOJ and the SEC are responsible for civil enforcement. It has been argued that the FCPA is the most aggressively enforced piece of ABAC legislation "by several orders of magnitude".[34]

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27 OECD (2011) at 47.
28 15 USC §§78dd-1 *et seq.*
29 §78dd-1 to §78dd-3.
30 §78m.
31 §78m(b)(2)(A).
32 §78m.(b)(2)(B).
33 §78dd-1(b)
34 Henderson W (2010) "Building a Robust Anti-Corruption Program" *Ernst & Young* at 1, available at *https://www.ey.com/ZA/en/SearchResults?query=building+a+robust+anti-corruption+program&search_options=country_name* (visited 17 November 2018).

2.5 UK Bribery Act

The UKBA was enacted in 2010 and came into effect on 1 July 2011. It provides a modern framework to combat bribery in the UK. It applies to both the public and private sectors. There are four principle components of the UKBA. These are offences of bribing another person,[35] offences relating to being bribed,[36] the bribery of foreign officials,[37] and the failure of commercial organisations to prevent bribery.[38]

The introduction of section 7 — dealing with the failure of a commercial organisation to prevent bribery — has strong implications from an ABAC compliance perspective. It is a strict liability offence. Basically, in terms of this section, an organisation is guilty of an offence if a person associated with the organisation bribes another person intending to obtain or retain business (or to obtain or retain an advantage in the conduct of the business) for the organisation. A person is regarded as being associated with an organisation if that person performs services for or on behalf of that organisation. The capacity in which such person performs the services in question does not matter and such person may include an organisation's employee, agent or subsidiary.[39]

However, it will be defence for an organisation if it had in place adequate procedures designed to prevent persons associated with it from paying bribes.[40] In this respect, the UK Ministry of Justice has issued, in terms of section 9 of the UKBA, detailed guidance about the UKBA and the procedures that organisations can put in place to prevent bribery (UK Guidance Procedures).[41]

3 MITIGATING THE RISK OF CORRUPTION

Implementing measures to mitigate the risk of corruption and navigating the world of ABAC compliance can become quite confusing and some may find it difficult to know where to start. In November 2013, the World Bank, the OECD and the United Nations Office on Drugs and Crime (UNODC) released the *Anti-Corruption Ethics and Compliance Handbook for Business*, in which it was acknowledged that:

35 Section 1 of the UKBA.
36 Section 2 of the UKBA.
37 Section 6 of the UKBA.
38 Section 7 of the UKBA.
39 Section 9 of the UKBA.
40 Section 7(2) of the UKBA.
41 Ministry of Justice (2011) "The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing", available at *https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf* (visited 9 July 2020).

> the myriad of existing anti-corruption principles for business can be confusing, especially for small and medium-sized enterprises with limited resources, which are looking for concrete ways to prevent corruption in their business dealings in an increasingly complex and globalised operating environment.[42]

Nevertheless, following a systematic approach in dealing with ABAC risks and developing an effective ABAC compliance programme will assist organisations in implementing appropriate measures in respective businesses. There never can be a one-size-fits-all approach when it comes to mitigating the risk of corruption by an organisation. Small– and medium-sized organisations likely will have different measures from large organisations. Ultimately, the measures that are implemented within an organisation will depend upon numerous factors, such as the legislative and regulatory requirements of the jurisdictions within which the organisation operates, the ABAC risks which the organisation faces, and the size of the organisation and the complexity of its business operations.[43]

3.1 Understanding Legislative and Other Regulatory Requirements

As a starting point, it is critically important for organisations to understand the legislative and other regulatory prescripts of the jurisdictions in which they operate to ensure that the measures which they implement meet the requirements of the laws of the relevant jurisdictions. This is particularly important in jurisdictions where the enforcement of ABAC compliance is very robust, as in the US and the UK.

ABAC legislation is emerging and constantly developing throughout the world, as countries tackle the scourge of corruption. Most of these laws are pressing companies to have ABAC compliance programmes.[44] Organisations should ensure that they are fully cognisant of conduct that is prohibited specifically in the various jurisdictions in which they do business. Furthermore, it is important to ensure that organisations are fully aware of any reporting and other positive obligations imposed upon them by the relevant domestic laws. For example, in South Africa, section 34 of PACCA places a positive duty on "persons in a position of authority" in an organisation to report fraud, theft, extortion, forgery and uttering

42 OECD, UNODC & World Bank (2013) *Anti-Corruption Ethics and Compliance Handbook for Business* at 3, available at *http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm* (visited 9 July 2020).

43 DOJ & SEC (2012) *A Resource Guide to the US Foreign Corrupt Practices Act* at 57, available at *https://www.justice.gov/criminal-fraud/fcpa-guidance* (visited 9 July 2020).

44 Kelly M (15 December 2017) "The Wisdom (and Challenge) of a Global Anti-Bribery Policy" *Navex Global Ethics & Compliance Matters*, available at *https://www.navexglobal.com/blog/article/wisdom-and-challenge-global-anti-bribery-policy/* (visited 9 July 2020).

a forged document, as well as corruption involving an amount of R100 000.00 or more to the DPCI of the SAPS.

The FCPA and UKBA are "generally the most expansive in terms of proscribed activities and jurisdictional reach" and, as a result, "these are the laws that most global companies use as the standard for their anti-corruption compliance programs".[45] In November 2012, the US DOJ and SEC released *A Resource Guide to the US Foreign Corrupt Practices Act* (FCPA Guide). This is a comprehensive roadmap to the FCPA, its provisions and its enforcement. Chapter 5 of the FCPA Guide is titled "Guiding Principles of Enforcement" and sets out certain key principles which are emblematic of effective ABAC compliance programmes. These are:

- commitment from senior management and a clearly articulated policy against corruption;
- a code of conduct and compliance policies and procedures;
- oversight, autonomy and resources;
- risk assessment;
- training and continuing advice;
- incentives and disciplinary measures;
- third party due diligence and payments;
- confidential reporting and internal investigation;
- continuous improvement: periodic testing and review; and
- pre-acquisition due diligence and post-acquisition integration relating to mergers and acquisitions.

In a similar vein, the UK Guidance Procedures proffers the following six ABAC principles which organisations may implement:

- Principle 1: Proportionate Procedures;
- Principle 2: Top-Level Commitment;
- Principle 3: Risk Assessment;
- Principle 4: Due Diligence;
- Principle 5: Communication (including Training); and
- Principle 6: Monitoring and Review.[46]

45 Henderson (2010) at 1.
46 Ministry of Justice (2011) at 20-31.

3.2 Conducting a Risk Assessment

Undertaking a corruption risk assessment is necessary when an organisation is developing an effective and meaningful ABAC compliance programme.[47] The risk assessment should be conducted systematically, traversing three stages.

The first stage of the risk assessment should focus on actual risks posed by the nature of a company's operations, the extent of its business with government entities, its use of agents and other intermediaries, the countries where it does business and the regulatory environment. The second stage should identify what policies and controls the company has in place to mitigate its corruption risk and analyse the effectiveness of or gaps in such policies and controls, that is, the residual corruption risk still facing the company. The third stage is to produce a plan to build an effective and efficient anti-corruption compliance programme based on the present risk, the current controls in place and additional resources available to provide reasonable assurance of compliance.[48]

Whilst conducting the risk assessment, the organisation should consider also the extent of its exposure to both potential internal and external corrupt activity. The results of the risk assessment will guide the organisation on the appropriate measures needed to mitigate the risk of corrupt activity. Organisations must focus on managing the most serious corruption risks. In this respect they should perform "periodic and comprehensive risk assessment[s] to identify and weigh any internal and external risks".[49] In this way, organisations will be able to identify priority areas which will ensure that resources allocated to deal with ABAC risks are utilised effectively.

3.3 Tone at the Top

The tone at the top is vital to the success of the measures implemented by an organisation to mitigate the risk of corruption. Certainly, top-level commitment to ABAC compliance is paramount in driving an ethical culture within an organisation. Those in charge of organisations are "in the best position to foster a culture of integrity where bribery is unacceptable".[50] They are ultimately both the leaders and keepers of an ABAC organisational culture.

47 Henderson (2010) at 2.
48 Henderson (2010) at 4.
49 GAN Integrity Inc (2018) "Compliance Program Guide", available at *https://www.business-anti-corruption.com/compliance-program-guide-success-kit/* (visited 9 July 2020).
50 Ministry of Justice (2011) at 23.

Management should adopt a zero-tolerance approach to all forms of corrupt activity and this message should be communicated effectively throughout the organisation. Effective communication of this message must be achieved not only by way of company policies and/or newsletters, but also by the manner in which irregular and unethical behaviour is handled in and by the organisation. All incidents of unethical and corrupt activity must be dealt with effectively in order to ensure that the message reverberates throughout the organisation that such conduct will not be tolerated.

The following excerpt from the FCPA Guide is worth noting in relation to top-level commitment:

> A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.[51]

In a word, ABAC compliance stands or falls by the tone at the top.

3.4 Due Diligence

Due diligence is key component of any effort to mitigate corruption risks. By extrapolation, then, performing due diligence forms an integral part of any ABAC compliance programme. As noted by one commentator:

> The value of due diligence is multifaceted. It provides early warning signs or "red flags" that a particular third party may create unmanageable risk. It also satisfies an element of an effective anti-corruption compliance program from the perspective of government enforcement agencies. Additionally, effective due diligence may mitigate potential penalties. If a company faces allegations of misconduct for the acts of third parties it has engaged, its demonstration of adequate due diligence and supporting documentation may significantly offset potential penalties.[52]

It is important for organisations to conduct effective due diligence on their business partners, agents, suppliers and service providers, as well as on their employees. All of these individuals and entities pose not only corruption risks to an organisation, but also the risks of theft, fraud and other commercial crime. A proportionate risk-based approach should be followed and the kind of due diligence that will be performed should be based on the particular risks which the relevant individuals and/or entities pose to the organisation.

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51 DOJ & SEC (2012) at 57.

52 Bombach KM (31 March 2014) "What Does Anti-Corruption Due Diligence Really Mean?" *Corporate Compliance Insights* Greenberg Traurig.

There are numerous procedures that may be performed during a due diligence exercise. These include "direct requests for details on the background, expertise and business experience of relevant individuals", which then may be verified through research, checking of references and the like.[53] Further procedures could include conducting background screening to identify any red flags such as adverse media reports, links to politically exposed persons, and any entries on sanctions and other watch lists. More comprehensive due diligence exercises could include interviews with key interested parties and forensic scrutiny of accounts.

Ultimately, the due diligence procedures performed will be guided by the level of risk which the individuals or entities in question pose to the organisation. This level of risk will be determined by conducting a risk assessment on the relevant individuals and entities. Basic background screening may be conducted on low-risk individuals and entities whilst more comprehensive due diligence procedures ought to be used for high-risk individuals and entities.

3.5 ABAC Policy Framework

An effective ABAC policy framework is important for establishing the standard of conduct that is expected of employees within an organisation. It also is needed for stipulating conduct which is prohibited and for setting out relevant procedures to be followed. An effective policy framework ought to include a fraud and corruption policy, a whistleblowing policy, a gifts and donations policy, a procurement policy, and financial policies and procedures. These policies should be drafted so that they are practicable and effective whilst being compliant with any legislative and/or regulatory prescripts. It has been observed that:

> Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third party agents, customers, government interactions, and industry and geographic risks.[54]

It is desirable that the ABAC policy framework formulated and adopted by an organisation should provide:

> operational guidance on how compliance will be achieved in certain high-risk areas, including:
> - ◊ Bribery of government officials
> - ◊ Commercial bribery and other corrupt activities undertaken for the financial gain of the company

53 Ministry of Justice (2011) at 28.
54 DOJ & SEC (2012) at 58.

- ◊ Misreporting and concealment in the accounting records of bribery and other improper acts
- ◊ Use of third-party agents, consultants and other intermediaries in potential bribe schemes
- ◊ Facilitating payments
- ◊ Travel, entertaining and gift giving to government customers
- ◊ Charitable giving and community payments
- ◊ Controls around cash, petty cash and certain vendor disbursements and other high-risk transactions
- ◊ Corruption risk in mergers and acquisitions
- ◊ Other areas of high risk such as customs and offset commitments.[55]

It is also important to ensure that all policies adopted are effective and current. Organisations should have an effective system for reviewing and updating their ABAC policy frameworks.

3.6 Communication and Training

Having an ABAC policy framework becomes meaningless if the policies themselves are not communicated effectively to employees of an organisation and other key parties. It is crucial that employees are made aware of and receive training on all relevant company policies. In particular, specialised training must be provided for "employees in high risk markets or business units" and "high-risk business partners" ought to receive training as well.[56] Indeed, it has been suggested that, at a minimum:

> every person in a position to obtain business through bribery or other improper means should receive anti-corruption compliance training. Also consider training all accounting, financial, legal and internal audit employees.[57]

As a rule, all new employees and high-risk business partners ought to be provided with ABAC training as part of the organisation's on-boarding process.

The value of communication and training lies in the contribution it makes to enhancing:

> awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge

55 Henderson (2010) at 5.

56 Benton L (2017) "Top 10 Tips for an Effective Anti-Corruption Compliance Program" *CREATE.org*, available at *https://insights.ethisphere.com/top-10-tips-for-an-effective-anti-corruption-compliance-program/* (visited 10 July 2020).

57 Henderson (2010) at 6.

> and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.[58]

All in all, an ABAC compliance programme which is not founded upon effective communication and efficient training is unlikely to succeed.

3.7 Whistleblower Protection

The importance of whistleblowers can never be overstated. Often, irregular conduct is discovered as a result of a whistleblower coming forward to report such conduct. Organisations ought to create a workplace milieu in which whistleblowers feel free to expose irregular conduct without fear of reprisals. In this respect, the OECD has stated that:

> Raising awareness of protections afforded to whistleblowers and of the channels for reporting is essential to ensure the effectiveness of any whistleblower reporting framework. Whistleblowers must know where, how, and when to report; that their identity as whistleblowers will be kept confidential; and also that they will be protected with anti-retaliation remedies. Raising awareness of the importance of whistleblowers can promote a "speak up" culture and de-stigmatise the disclosure of wrongdoing.[59]

In South Africa, the Protected Disclosures Act places a duty on employers to have a system for whistleblowers to report irregular conduct and to inform employees about this system.[60]

Very many incidents of bribery and corruption would remain undisclosed but for the courage of whistleblowers. All organisations need to embed this fact into their ABAC compliance programmes.

3.8 Monitoring and Review

ABAC risks do not remain static and it is important for organisations to have systems in place to monitor these risks. It is recommended that periodic risk assessments be done. The risk profile of employees and business parties are likely to change over time and organisations should develop a system for conducting ongoing due diligence on them in order to identify any risks which were not present during prior due diligence exercises. In this regard, it is important also to note that:

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58 Ministry of Justice (2011) at 29.

59 OECD (2017) "The Detection of Foreign Bribery" at 30, available at *www.oecd.org/corruption/the-detection-of-foreign-bribery.htm* (visited 10 July 2020).

60 Section 6(2)(a) of the PDA.

> A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry.[61]

Therefore, it is important that the ABAC measures implemented by an organisation evolve to ensure that they remain effective over the long haul.

The process of monitoring and reviewing an organisation's ABAC compliance programme should never be overlooked, as it will show whether the programme is working as intended and identify any new risks. Nowadays, it is accepted generally that:

> One of the most critical phases of the ABAC program is to monitor the process to determine:
> (a) whether or not the controls and procedures are working as intended, and
> (b) whether there are indicators of new risks for which no specific controls were developed.[62]

Certainly, it makes no sense to expend resources on devising and implementing an ABAC compliance programme without also making provision for monitoring and reviewing the programme.

4 CONCLUSION

Corruption is a major problem throughout the world. Organisations need to place greater emphasis on implementing measures to mitigate the risk of corruption in their businesses so as to ensure that they are protected from the financial and reputational consequences attached to these risks. In this respect, a deep understanding of the relevant ABAC legislative and regulatory requirements is critical, along with the formulation and implementation of an effective ABAC compliance programme. Such an understanding and programme are essential to enable organisations to detect, prevent and confront bribery and corruption in their ranks.

61 DOJ & SEC (2012) at 66.

62 Verver J (2018) *Bribery and Corruption: The Essential Guide to Managing the Risks* ACL Services Ltd at 18.