# **The A to Z of ABC** – An overview of South African & global Anti-Bribery Compliance requirements prepared by Steven Powell: Director of Forensics at ENSafrica

A robust anti-corruption compliance is absolutely essential for companies operating business activities in Africa; not only to manage heightened corruption risks on our continent, but also to ensure legal compliance to local and global compliance requirements, yet only a handful of multinationals operating in Southern Africa, (predominantly those that are subject to the enforcement jurisdiction of global regulators) have developed dedicated compliance programs, staffed by dedicated and well-resourced compliance teams.

This is like driving a motor car without insurance; you may be a reasonably good driver and drive a decent car with good brakes, but you never know when something unexpected will suddenly present itself, or worse still, when a third party will do something stupid, causing an accident which you are not covered for.

Sticking to the unpredictable third party theme it is important to point out that more than 70 % of global enforcement actions are predicated on corrupt activity by third party intermediaries, (TPI's) which, reinforces the importance of ABC programs including screening and proper due diligence on third parties.

This ENSafrica Anti-Corruption Compliance Overview summarizes the essential anti-corruption compliance obligations in terms of local South African Law, the United States Foreign Corrupt Practises Act as well as the United Kingdom Bribery Act, which is most germane to multinational businesses with operations in South Africa. In our view the United Kingdom's Ministry of Justice guidelines to "**adequate procedures**" (anti-bribery) are the most clear and practical for companies to follow. We have accordingly set out the six principles that companies are encouraged to adhere to, in order to ensure that they have adequate procedures to prevent bribery. Those guidelines should be read with the "Top ten things the DOJ expects you to have in your Anti-Corruption Compliance Program", which is also set out below, in this overview.

**The South African Anti-Corruption Compliance requirements**

South African companies have to comply with the provisions and regulations of the revised Company's Act (Act 71 of 2008). The South African Companies Act (Act 71 of 2008) has (via regulation 43), introduced an obligation for companies (subject to the Act) to establish a Social and Ethics committee to monitor the company's progress and standing with regard to the OECD recommendations on corruption, as well as the duty to observe the United Nations Global compact principles Principle 10 thereof creates a duty to reduce corruption.

1. **The SA Companies Act (Act 71 of 2008)**

Section 43 of the Regulations to the South African Companies Act requires the Social and Ethics Committee to perform a range of activities, including amongst other responsibilities monitoring the organization's anti-corruption processes and procedures (our emphasis below). In terms of the regulations, the Social and Ethics committee must perform the following roles:

**a.** *monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practise, with regards to matters relating to:*

i. *Social and economic development, including the company's standing in terms of the goals and purposes of:*

*(aa)* ***the 10 principles set out in the United Nation's Global Compact principles (Principle 10 of the Global compact stipulates that: Businesses should work against corruption in all its forms, including extortion and bribery.***

*(bb)* ***the OECD recommendations regarding corruption****;*

*(cc) the Employment Equity Act; and*

*(dd) the Broad Based Black Economic Empowerment Act;*

ii. *Good corporate citizenship, including the company's:*

*(aa) promotion of equality, prevention of unfair discrimination, &* ***reduction of corruption****;*

*(bb) contribution to development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and*

*(cc) record of sponsorship, donations and charitable giving;*

iii. *the environment, health and public safety, including the impact of the company's activities and of its products or services*

iv. *consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws*

v. *labour and employment, including*

*(aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and*

*(bb) the company's employment relationships and its contribution toward the educational development of its employees;*

**b.** *To draw matters within its mandate to the attention of the Board as the occasion requires; and*

**c.** *To report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.*

**The OECD recommendations on corruption**

As indicated above in Para (a) (1) (bb) the Social and Ethics Committee must monitor the organisations standing and progress in respect of the OECD recommendations on Corruption. In terms of the OECD recommendations for Multinational Enterprises on Combating Bribery, Bribe Solicitation and Extortion (2011) 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.

*In particular, multinational enterprises should:*

1. *Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates.*

2. *Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or 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. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.*

3. *Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records.*

4. *Ensure, taking into account the particular bribery risks facing the enterprise, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements.*

5. *Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and cooperation with the fight against bribery, bribe solicitation and extortion.*

6. *Promote employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes or measures against bribery, bribe solicitation and extortion through dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures.*

7. *Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.*

There are other South African anti-corruption requirements that organisations subject to the Act will also be required to observe including, *inter alia*, the Prevention and Combating of Corrupt Activities Act, as well as the Financial Intelligence Centre Act. These have been in force for a considerable period of time and are not repeated in this overview, save for reiterating the duty to report built into section 34 of the above Corruption Act, as set out below:

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 one of the offences below, involving an amount of R100 000 or more, must report such knowledge or suspicion to any police official, failing which he or she commits an offence carrying a maximum sentence of 10 years imprisonment.

- Any of the corruption offences (including attempt, conspiracy etc.); or
- The offence of theft, fraud, extortion, forgery or uttering a forged document

It is also important to note that the Prevention and Combatting of Corrupt Corruption Act makes provision for extra territorial jurisdiction by the South African authorities.

**The United Kingdom Bribery Act of 2010 (UKBA)**

The United Kingdom Bribery Act 2010 was introduced to update and enhance UK law on bribery including foreign bribery in order to address better the requirements of the 1997 OECD anti-bribery Convention. It is now among the strictest legislation internationally on bribery. Notably, it introduces a new strict liability offence for companies and partnerships of failing to prevent bribery.

The introduction of this new corporate criminal offence places a burden of proof on companies to show they have **adequate procedures** in place to prevent bribery. The Bribery Act also provides for strict penalties for active and passive bribery by individuals as well as companies. It also creates a new offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage.

Unlike previous legislation, the Bribery Act places strict liability upon companies for failure to prevent bribes being given (active bribery) and the only defence is that the company had in place adequate procedures designed to prevent persons associated with it from undertaking bribery.

The Bribery Act has important implications for foreign companies which do business in the UK as its territorial scope is extensive. The corporate offence set out in Section 7 of failure to prevent bribery in the course of business applies to any relevant commercial organisation defined as a body incorporated under the law of the United Kingdom (or United Kingdom registered partnership) and any overseas entity that carries on a business or part of a business in the United Kingdom.

In addition to being held accountable for the direct acts of its employees, the company is also liable for the acts of its business partners, agents, and intermediaries. Companies may be accountable for bribes paid by its appointed agents, even if it is unaware of, and did not endorse the corrupt activities. The offence makes provision for strict liability, with no need to prove direct participation, knowledge or intention.

A commercial organisation can be held vicariously liable, even if the bribery is carried out by an employee, an agent, a subsidiary, or another third-party. Section 12 of the UK Bribery Act provides that the courts will have jurisdiction over the sections 1, 2 or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

<u>However, in terms of section 7 prosecutions for failing to prevent bribery, the requirement of a close connection with the UK does not apply.</u>

It is accordingly clear that provided the organisation is incorporated or formed in the UK or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then the UK courts will have jurisdiction.

**The "Adequate Procedures" defence**

In its Guidance notes on the UKBA, the Ministry of Justice recognises the fact that no bribery prevention regime will be capable of preventing bribery at all times, and further that the objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf.

Accordingly, the UKBA provides commercial organisations with a defence, if it can show that, while bribery did take place, the commercial organisation had taken **"adequate procedures designed to prevent persons associated with [the organisation] from undertaking such conduct".** Under the Act's explanatory notes, the burden of proof in this situation is on the organisation, with the standard of proof based on a balance of probabilities.

The guidelines set out six non prescriptive fundamental principles that commercial organisations should consider when adopting "adequate procedures" to prevent bribery being committed on their behalf. These principles are:

**Principle 1: Appropriate procedures**

The commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces having due regard to the nature, scale and complexity of the commercial organisation's activities. This principle requires the organization to have a robust anti-bribery policy in place with procedures designed to foster compliance by employees, business partners as well as agents and intermediaries;

**Principle 2: Top-level commitment**

Top-level management of a commercial organisation must be committed to preventing bribery and set the appropriate ethical tone from the top. The establishment of the ethical tone would include:

- Make a statement of commitment to combat corruption in all parts of the organisation's operations
- Develop a code of conduct that communicates to employees what is expected of them
- Lead by example
- Provide a safe mechanism for reporting violations
- Reward integrity

**Principle 3: Risk assessment**

Organisations should conduct a risk assessment addressing the nature and extent of the risks relating to bribery and corruption to which it is exposed. The risk assessment should focus on identifying and addressing an organisation's vulnerabilities to internal and external corruption.

**Principle 4: Due diligence**

Organisations must practice due diligence to know who they are doing business with and to identify bribery risks associated with a particular business relationship. Management should exercise due diligence in seeking to prevent and detect criminal conduct by its employees and other associates. The benefit of the due diligence is that it will inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf. Due diligences requires careful screening of prospective employees and third parties through background checks and effective monitoring of their performance:

- Due Diligence for Employees - organisations must use due diligence to refrain from delegating considerable discretionary authority to any individuals who have a propensity to engage in illegal activities; and
- Due Diligence for Third Parties – organisation must use due diligence to ensure that it forms business relationships with reputable third parties.

**Principle 5: Communication**

Organisations must "ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation". Management must implement measures to ensure that its anti-corruption policies, standards, and procedures are communicated effectively to all employees and, where appropriate, agents and business partners. The communication should include:

- Periodic training for appropriate employees and third parties;
- Certifications from associated persons to ensure that they understand the company's anti-corruption policies, standards, and procedures; and
- A confidential system that provides parties a means to raise concerns about bribery, to provide suggestions for improving the company's anti-bribery procedures, and to seek advice.

**Principle 6: Monitoring and review**

Organisations must institute monitoring and review mechanisms to ensure compliance with anti-bribery and corruption policies and procedures, to identify any issues as they arise, and to make improvements where necessary. The monitoring and review should consist of four mechanisms:

- Internal controls – implement controls to monitor and review anti-bribery policies and programmes;
- Periodic reviews – conduct periodic reviews and reports for top-level management;
- Identify triggers – identify triggers for mandatory risk assessment and anti-corruption compliance programme review; and
- External verification – use external specialists/verification entities to independently evaluate the effectiveness of anti-corruption compliance programmes.[1]

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf

## The United States Foreign Corrupt Practices Act

The United States Congress enacted the FCPA in 1977 to prohibit certain publicly held companies from making corrupt payments to foreign officials or political organisations.

The enforcement of the FCPA is divided between the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ).

The DOJ is responsible for all criminal enforcement; the DOJ and SEC are both responsible for civil enforcement.

Principle components

There are two principle components of the FCPA: accounting procedures and bribery.

The accounting provisions apply to all United States companies (issuers), and their subsidiaries, with stock registered with the SEC.

The anti-bribery provisions are broader in scope than the accounting provisions, applying to all U.S. companies, U.S. citizens and U.S. residents.

Accounting provision

The accounting provisions are designed to compel corporate transparency in an issuer's books to prevent publicly traded entities from disguising bribes as legitimate commercial transactions. The FCPA imposes two requirements with respect to the accounting provisions.

First, issuers must maintain accurate books and records, and second, they must adopt internal controls to prevent the improper use of corporate funds.

A company is obligated to make a good-faith effort to ensure that any company, including joint ventures, in which the U.S. company or one of its subsidiaries holds 50 percent or less of the voting power comply with the FCPA accounting provisions.

Anti-bribery provision

The FCPA' s anti-bribery provisions make it unlawful to bribe foreign government officials to obtain or retain business.

Specifically, the provisions prohibit corrupt offers or payments to foreign government officials, political parties, political party officials or candidates, or to any person for payment to such foreign officials for an improper advantage.

There are five elements that must be met to constitute a bribery violation:

1. United States has jurisdiction over the party involved;
2. The regulated party makes a payment, offer, promise to pay, or authorization to pay or offer, anything of value;
3. To a foreign official (i.e., any officer or employee of a foreign government, a public international organisation or any department or agency thereof, or any person acting in an official capacity);
4. The person making or authorizing the payment must have a corrupt intent (i.e. it must be intended that the payment induce its recipient to misuse his official position); and
5. The purpose of the payment must be to influence a government official's actions or decisions, or lack of actions or decisions, that violate the official's or other government official's duties or responsibilities.

It should be remembered that there are four triggers to the anti-bribery provision:

1. The FCPA applies to non-United States companies;
2. The FCPA applies to both public and private companies;
3. The FCPA applies when doing business with employees of state owned enterprises; and
4. The FCPA applies when an agent or distributor bribes a government official.

The DOJ and the SEC recently released a 120-page Resource Guide (the "Guide"), which provides a number of clarifications on FCPA application to non-U.S. companies.[2]

In practice, U.S. authorities can more often than not find a jurisdictional "hook" allowing them to pursue an anti-bribery enforcement action, as evidenced by the numerous FCPA cases brought against non-U.S. companies. Furthermore, recent SEC matters involving foreign nationals illustrate the broad interpretation by U.S. authorities of the scope of conduct sufficient to establish personal jurisdiction in the civil context. The message from the United States Government is that, if your organisation is a target for potential prosecution, they will find a way to establish jurisdiction.

## The top 10 things the US government looks for when evaluating a Compliance Program

1. ***Commitment to compliance at the highest levels*:** Because managers and employees take cues from corporate leaders, board members and senior executives must set the proper tone for the rest of the company. Accordingly, DOJ wants to see that the highest levels of corporate leadership demonstrate a commitment to a culture of compliance.
2. ***Written, and widely disseminated, compliance policies*:** Companies must have in place a written code of conduct and compliance policies that are clear and concise. In addition, such policies must be disseminated and accessible to all employees and those acting on the company's behalf, and should be translated into local languages.
3. ***Periodic review and updates*:** Companies are evolving organizations and, accordingly, compliance policies should be regularly reviewed, updated, and appropriately communicated throughout the company.

[2] http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf

4. ***Independence and funding*:** Companies should assign responsibility for the oversight and implementation of compliance programs to senior executives who have adequate autonomy from management. Those executives should also have authority to report issues directly to independent bodies and boards of directors. In addition, compliance programs must be adequately funded to support proper implementation.
5. ***Training and guidance*:** Companies should take steps to ensure that compliance policies are communicated not just to upper management, but to every employee worldwide. This requires adequate, country-specific training. Employees should be encouraged to seek advice and guidance prior to entering into certain transactions to ensure that problematic behavior is stopped before it occurs.
6. ***Internal reporting mechanism*:** Companies should provide a convenient means for employees and others to report suspected violations of the company's compliance policies on a confidential basis and without fear of retaliation.
7. ***Investigations***: Companies should establish effective processes for handling internal investigations, with sufficient resources to respond to, investigate, and document compliance violations. A sophisticated multinational corporation is expected to expend more resources than a smaller company—but the manner and integrity in which all investigations are undertaken is of utmost importance to DOJ. A program's ability to effectively uncover wrongdoing, coupled with the company's *willingness to disclose and cooperate*, is a major consideration for DOJ in determining whether to bring charges.
8. ***Enforcement of policies and disciplinary measures for noncompliance***: Companies should implement mechanisms to enforce compliance policies and should punish those individuals who are found to have violated those policies. On this point, Varnado noted that DOJ is more committed than ever to bringing responsible individuals to justice because punishing individuals is the strongest way to deter wrongdoing. To this end, DOJ has started using, and will continue to use, law enforcement techniques historically preserved for organized crime investigations, including phone taps, secret recordings, and email search warrants.
9. ***Paying attention to third-party relationships*:** The recent Organization for Economic Co-operation and Development (OECD) Foreign Bribery Report indicated that over 70% of bribery cases reviewed for the report involved third-party agents or intermediaries. Companies must closely examine those relationships to understand why third-parties are being hired, what they are doing for the company, and whether the costs of those services appear reasonable. Simply including boilerplate language in contracts is not sufficient. Companies need to sensitize third parties to the importance of compliance and demonstrate a willingness to terminate those agents and contractors who fail to comply.
10. ***Monitoring and testing*:** Companies should continually test their compliance programs to improve effectiveness and to ensure that, given the present state of the company, the program can still prevent and detect violations. The program should evolve with changes in the law, business practices, technology, and cultural considerations in countries where the company operates.[3]

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[3] 2015 FCPA Bootcamp:Deputy Criminal Chief Jason Varnado, from the Major Fraud Section of the United States Attorney's Office for the Southern District of Texas. Views expressed were his own and not those of the DOJ