



# COMPARING THE GUIDELINES TO ANTI-CORRUPTION LAWS

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# FOREWORD

## Preamble

This is a personal curation of published guidelines to anti-bribery and anti-corruption (“ABC”) laws issued with the purpose of helping business enterprises understand the said laws and implement ABC procedures into the organization. The guidelines are augmented with regulatory authorities’ purview of the ABC laws in their jurisdiction, some of them are nuanced by “*experiences in enforcement and lessons learnt from past prosecutions*”. Businesses are encouraged to understand their own legal obligations when strengthening ABC resilience around their organization’s corruption risk exposure.

## Presumptions

By now, any-size business enterprises, incorporated in Malaysia or elsewhere and conducting business in Malaysia would have caught up to MACCA’s Section 17A, the provision that addresses corporate liability for corruption, and are motivated to abide by the law. The Guidelines to Adequate Procedures pursuant to Section 17A (“GAP”) document five principles to hinder corrupt business conducts. The introduction of other guidelines to ABC laws is intended to add another dimension towards comprehending and applying the Malaysian framework of adequate ABC procedures.

## Highlights

Comparison of the Prime Minister’s Office’s first issue of the GAP with those issued to renowned anti-corruption enforcement laws - the Resource Guide to Foreign Corrupt Practices Act (Second Edition, July 2020); the Guidance to the UK Bribery Act (issued in March 2011); and the French Anti-Corruption Agency Guidelines (version 4 December 2020).

***This document aims to compress the salient points from well-known published guidelines for collation.***

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# BRIEF INTRODUCTION TO ABC LAWS

## **Foreign Corrupt Practices Act 1977 (“FCPA”)**

The US enacted this statute in 1977 to impede once rampant corruption of foreign officials by US listed companies while securing business anywhere in the world. The Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) jointly enforce the anti-bribery provisions and the financial accounting provisions of the Act.

## **UK Bribery Act 2010 (“UKBA”)**

Under the UKBA, a commercial organization can be liable for bribery committed by its associates. The disposition of the services performed for the organization shall be determined by reference to all the facts and relevant circumstances surrounding the offence, and not just the relationship of the associates to the organization.

## **Malaysian Anti-Corruption Commission Act 2009 (“MACCA”)**

An amendment to the Act had updated Section 17A, a provision that addresses corporate liability for the offence of corruption and bribery committed by commercial organizations. It is illegal to offer, promise or provide gratification in order to obtain or retain business.

## **Sapin II Law**

A law based off the provisions in the Transparency, Anti-Corruption and Economic Modernization Act 2016-1691 of France and is enacted to set out a regulatory framework to prevent and detect corruption in any organization.

# BACKGROUND

## **Published guidelines herein mentioned have a universal theme on arresting bribery and corruption**

The MACCA and the UKBA criminalize the act of providing any form of gratification to secure an improper advantage when obtaining or retaining business (the “offence”). A commercial organization could be deemed to have committed such offence even if it has not been aware of its associates having engaged in the impropriety. These associates may constitute, inter alia, employees, employees of subsidiaries, joint venture partners and agents and contractors who perform services for or on behalf of the commercial organization.

The FCPA prohibits the corrupt payment, promise to provide or offering of money, gifts, travel, entertainment and anything of value to foreign officials, whether directly or through intermediaries, in order to secure unfair advantage at business conducts. It prohibits off-the-books accounting and fraudulent financial reporting.

FCPA’s jurisdictional expanse covers foreign official bribery that takes place outside of the US as impetus to obtain or retain business. If any entity that is statutorily required to file reports with the SEC, or its affiliates are found to have committed the offence, the entity will be subject to FCPA. UKBA has jurisdictional outreach over persons committing the offence outside of the UK, by virtue of them being incorporated or formed in or being citizens of the UK, and carrying on business or part of the business in the UK. To put this business test into vantage, the UK government would presume that a non-domiciled parent company to a UK subsidiary that does not conduct business in the UK, is unlikely to be liable under the UKBA, for it is possible that the subsidiary is capable of acting independently of its parent company as far as UK-based business operations go, and granted its own offence, is therefore culpable to the law.

# SUMMARY OF THE ACTS

Highlighted here are the similarities and distinctions to the ways the Acts regulate and enforce the laws status quo:

What to note	MACCA	UKBA	FCPA
Provisions	Offence of bribing; & corporate liability for corruption	Offence of bribing; bribery of foreign officials; & corporate liability for corruption	Anti-bribery provisions; & accounting provisions
Criminalization of offences	Corruptly accepting (passive) or providing (active) gratification as an inducement or reward	Corruptly accepting or providing gratification as an inducement or reward	The willful act of bribing foreign officials & forging accounting records to conceal such payments
The intent to or success of bribe	Where a bribe has directly attributed to an improper performance	Where an improper performance has ensued as a result of bribe	Where the corrupt intent to bribe is established, FCPA is violated even if no bribe is ultimately paid
Prohibition of bribery	Commercial bribery; & bribery of public officials & foreign officials	Commercial bribery; & bribery of public officials & foreign officials	Bribery of foreign officials & those acting on behalf of foreign officials
Facilitation payments	Defined as gratification	Expressly illegal	Exception: As gratuity for expediting a routine government action, not for discretionary action, must be recorded in books
Preventive measures	Adequate procedures in preventing bribery	Controls proportionate to bribery risk areas	Hallmarks of effective compliance programs
Enforcement actions & resolutions	Criminal penalties, seizure of properties, imprisonment	Unlimited fines, confiscation orders, dismissal of persons in charge, ABC program mandate	Criminal & civil penalties, forfeiture & disgorgement of profits, deferred prosecution agreement, compliance monitorship

# BEST PRACTICES ON ANTI-CORRUPTION COMPLIANCE

Each guideline to the Act focuses on educating organizations to assess corruption risks in their operations and tailor preventive and detective measures according to those identified risks. The two foolhardy mistakes that any organization can do is to replicate an entire anti-corruption policy as nice-to-have on paper; and to either impress or hoodwink regulatory authorities with a one-size-fits-all but unsubstantiated ABC regiment.

Small to medium sized business enterprise could have different risk exposures than those of large and multinational corporations. The onus is on the business to take affirmative actions in effecting risk-based ABC procedures for its operations.

MACCA - The TRUST Principles	UKBA - The 6 Principles	FCPA - Hallmarks of Effective Compliance Programs
Top-level commitment	Top-level commitment	Commitment from senior management & a clearly articulated policy against corruption
Risk assessment	Risk assessment	Risk assessment
Undertaking control measures	Proportionate procedures	Code of conduct
		ABC policies & procedures
		Oversight, autonomy & resources
		Incentives & disciplinary measures
Systematic review, monitoring & enforcement	Due diligence	Third party due diligence & payments
	Monitoring & review	Confidential reporting & internal investigation
Training & communication	Communication, including training	Continuous improvement: periodic testing & review
		Training & continuing advice
		Mergers & acquisitions: pre-acquisition due diligence & post-acquisition integration
		Investigation, analysis & remediation of misconduct

## The French legal framework on anti-corruption

The French Anti-Corruption Agency (“AFA”) was set up under the Transparency, Anti-corruption and Economic Modernization Act 2016-1691 (also known as the Sapin II Law), to undertake the task of issuing and updating guidelines to help public and private sector entities comply with the law in the prevention and detection of bribery, influence peddling, extortion by public officials, illegal taking of interest, misappropriation of public funds and favoritism.

*Under the Sapin II Law, French companies of a certain size and operations are required to deploy an ABC Compliance Program into their organization, based on this trifecta:*

<b>Top-level Commitment</b> <b>Corruption Risk Mapping</b> <b>Risk Management</b>	
<u>Preventive measures</u>	1. Establishing a <b>code of conduct</b> which defines prohibited practices associated with bribery & corruption
	2. Awareness raising & <b>training</b> routines for employees, including leaders, who are most at risk to corruption exposure
	3. <b>Third party screening</b> system in accordance to the risk mapping, ie. critical clients, vendors and intermediaries
<u>Detective controls</u>	4. Establishing <b>internal controls</b> , including financial controls, ie. preventing and the concealing of corrupt payments
	5. Establishing a <b>whistleblowing mechanism</b> for alerting on improprieties in the organization
<u>Corrective actions</u>	6. Having a <b>disciplinary policy</b> on violations of code of conduct
	7. Assessing the implementation and effectiveness of mitigation controls, remediating and <b>managing the control gaps</b>

The AFA’s guidelines are rather comprehensive on the best practices for developing and maintaining a compliance culture in the organization. Though it is not binding on those companies to adapt the methodology described in the guidelines, it is mandatory to internalize an ABC compliance program that would meet requirements of Sapin II Law.



# LOOK AROUND, NOT THE OTHER WAY

What is now transpiring across the globe is containment of corruption through solidarity and concerted efforts. Malaysia was amongst many countries that ratified the UN Convention Against Corruption (“UNCAC”) in 2008. By 2009, the MACCA was enacted. Later in 2018, corporate liability for corruption was amended into MACCA as per Section 17A. As of June 2022, at its annual media forum, the Malaysian Anti-Corruption Commission revealed that 1,283 bribery cases were under investigation in 2021 and recorded a conviction rate of 91% of 292 cases brought to courts. Publication of the 2021 MACCA enforcement indices, violations and resolutions would not be seen until 2023-2024. As a comparison to the last published 2019 MACC Annual Report, corruption is indicatively far from receding in the country due to these recurring issues:

- Integrity-deficient government officials and politically-exposed persons who continue to push legal boundaries with their position of power, also disregard other related laws, ie. the Penal Code and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act.
- Generally unsurprising is that domestic business enterprises are not nearly as afraid of violating the laws than of extortion and harassment exerted by rogue government agencies or officials when facing red-tape restrictions pertaining to, inter alia, licenses and permits, land administration, foreign labor employment and enforcement.
- Business enterprises with a provincial mindset have no qualms ‘settling’ fines or summons with bribes instead, and decidedly retain their ‘systemically accepted non-compliant practices’.
- Even if the most sophisticated and advanced laws were to be enacted, as long as leadership at regulatory agencies have questionable integrity and leadership of commercial organizations see the opportunity to double down on such bad faith, enforcement shall remain abysmal.

Dropping to the 62<sup>nd</sup> ranking on the Transparency International’s Corruption Perception Index 2021, this decadence suffices in echoing above predicament.

# FREQUENTLY ASKED QUESTIONS

1. As a senior management employee in a local company, I have received training on Section 17A and the TRUST Principles. Is this enough to pass off as adequate procedure for the company?

Answer: Companies should provide training and communication on anti-corruption, including but not limited to Section 17A, **regularly to all employees** (new, existing and contractual). Well-documented training records may prove to be tenable against the threat of a corporate liability. Even so, merely attending Section 17A training is insufficient, as illustrated for Question 2.

2. How do I apply TRUST Principles into the organization?

Answer: Perform a bribery risk assessment in all areas of the business. Most assessments lead to a need to implement (that is issuing, updating, training on and applying procedures) a diverse range of ABC policies. Establish a Code of Conduct to represent the organization's ABC ethos and provide training as frequently as needed. The Code of Conduct and ABC policies are **instrumental to communicating explicitly** the expectations, instructions, responsibilities, remediation and disciplinary actions and clear processes for identifying and managing areas of significant bribery risks. *Policies also lay the foundation for internal controls* and facilitate monitoring, reviewing and improving an ABC compliance system. A compliant organization is helmed by a leadership that is steadfast in their ABC pledge, consistently models after the essence of their Code of Conduct and keeps an eye on the ball at all times.

3. We are a small-scale enterprise certified by the government to participate in bidding of government tenders for products supplied by multinational pharmaceutical companies. We want to retain our integrity to serve our business relationships. Where do we start?

Answer: Prioritizing, as opposed to rushing, critical resources to set up ABC compliance is key. Organize plans and strategies to facilitate the implementation of TRUST Principles. Understand that strategies are best executed when identified for the short, mid and long terms - involve budgetary considerations (negate excessive third party hospitality spends, aim to build a support system for compliance), restructure employees' roles and responsibilities (rejuvenate job scopes, hire new, engage external consulting), mobilize ABC-centric communications internally & externally and incentivize employees when they meet compliance metrics or key performance indicators.

# WHAT'S NEXT?

## Building Blocks

### Acknowledge that...

...no employees want to act on or work with nefarious agendas/ leadership.

...no business partners want to volunteer bribes or be connected to bad business ethics.

...no societies should be robbed off of rights to economic progress and to exercise democracy.

*“Stay on the right side of the law, even if everyone else is on the other side.”*

### Long-Term Prospects

Investing energy and resources into ethics is an ongoing process, keeps honest gains, dedicated employees and loyal clientele, and is contributory to ESG stewardship.

### Self-Governance v Self-Enrichment

In a business landscape, being ethical is not an outlier quality or radical. It now serves like-minded and compliant business partners that are moving away from law-breaking organizations.

### Reinforcement

Do not outsmart ABC laws in order to keep up bribes in business. Instead, turn around the business model and the organizational culture, and still be profitable.

For anything compliance, find out more with:

*Comparing the Guidelines to Anti-Corruption Laws*  
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