



AUDIT COMMITTEE FORUM

August 2016





The South African position

What is corruption in the South African context?

1

- Accepts/Agrees to accept/Offer to accept a **CORRUPT PAYMENT**
- Gives/Agrees to give/Offer to give a **CORRUPT PAYMENT**

2

- The corrupt payment influences someone to **ACT**

3

- The action taken by the influenced party must have a certain **EFFECT**

The South African Landscape: The Companies Act of 2008

Section 88 - A company secretary's duties include, but are not restricted to, making the directors aware of any law relevant to or affecting the company

Section 159 – Company policies and procedures should provide protection for whistle-blowers – create environment conducive to confidential reporting of *inter alia* corrupt behaviour

- Any provision in a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of section 159
- A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union, a supplier of goods or services who makes a protected disclosure has qualified privilege in respect of the disclosure; and is immune from any civil, criminal or administrative liability for that disclosure
- A person who made a protected disclosure is entitled to compensation from another person/entity if the latter engages in conduct with the intent to cause detriment to the first person/directly or indirectly makes an express or implied threat to the first person

Enforcement and consequences of non-compliance in South Africa

Section 332 of the Criminal Procedures Act – Prosecution of corporations

Section 18 - Prevention of Organised Crime Act (POCA)

- A corporate body can be held criminally liable for any offence
- If any act/omission was performed by, or on instructions, or with permission, express or implied, given by a director or servant of that corporate body
- In the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed / to have been omitted on the part of that corporate body
- The citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in his/her personal capacity

- Provides for confiscation orders
- Whenever a defendant is convicted of an offence the court convicting the defendant may enquire into any benefit which the defendant may have derived from the offence
- The court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate
- The amount which a court may order the defendant to pay to the State shall not exceed the value of the defendant's proceeds of the offences or related criminal activities

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Enforcement and consequences of non-compliance in South Africa

Section 214 of the Companies Act of 2008– False statements, reckless conduct and non-compliance

Reportable irregularity



- A person is guilty of an offence if the person is a party to the falsification of any accounting records of a company
- Inaccurately recording corrupt payments with the intention of obscuring the true nature of the corrupt payment/benefit may be deemed as an act of falsification of any accounting records of a company
- A person convicted of a contravention of section 214, is liable for a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment

- Violations of laws (if it has/ might have a material financial impact on the company) have to be reported by the company auditors to their regulating body IRBA
- IRBA to disclose to other regulating bodies or SAPS as it deem appropriate
- The report to IRBA has to be made without the knowledge of the client – client informed subsequently

Consider impact of shareholder and market confidence if corrupt behaviour is made known to general public



Relevance of international legislation to South African companies

Enforcement Actions touching South Africa



Compliance with international legislation as a competitive advantage



Requirement by business partners



Desirable business partners



The Foreign Corrupt Practices Act

FCPA: Two sets of provisions



1

Anti-bribery Prohibitions

- The FCPA's anti-bribery provisions make it illegal to offer, promise, or make a corrupt payment to a foreign official for the purpose of obtaining or retaining business

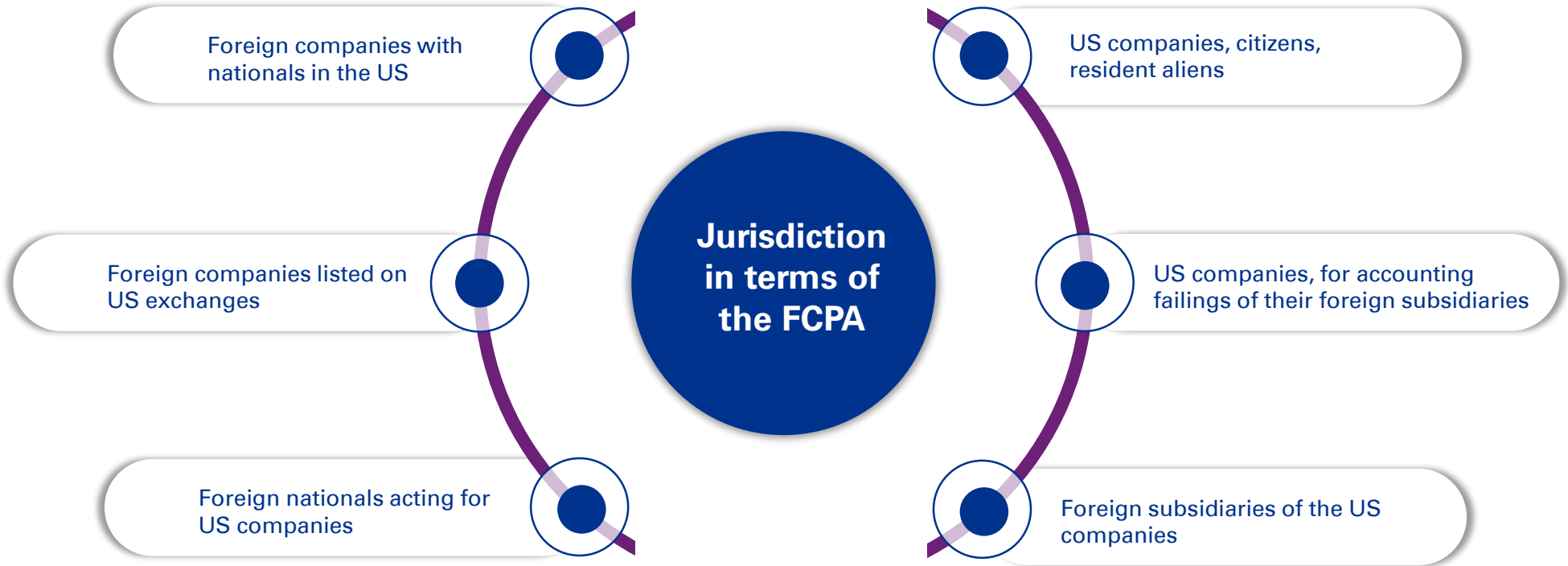


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Accounting Requirements

- Books and Records Provisions
- Internal Control Provisions

The reach of the FCPA

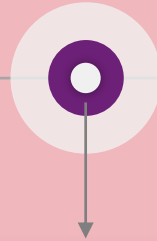




The UK Bribery Act

An overview of the UK Bribery Act

Jurisdiction



The Act applies to:

- UK citizens and those normally resident in the UK
- Commercial organisations headquartered, organised, or “carrying out all or part of a business” in the UK

“...carrying out all or part of a business” in the UK?

- Remains a grey area
- To be resolved and clarified by case law over time
- For now take a conservative view

An overview of the UK Bribery Act

Offenses of bribing another person



- Section 1 of the UK Bribery Act
- Guilty of offense
 - “Promises or gives financial or other advantage to another person”
 - Intention to induce improper performance of a “relevant function or activity” or
 - Rewarding the “improper performance of such a function or activity”

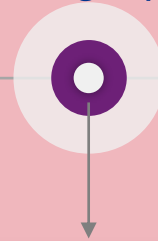
Offenses relating to being bribed



- Section 2 and 3 of the UK Bribery Act
- Prohibits
 - “request, agree, to receive or accept a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly”
 - Receiving financial or other advantage as reward for performing relevant function or activity improperly
 - “relevant function”
- Function of public nature
 - Activity connected with business
 - Activity during course of person’s employment
 - Activity performed on behalf of body of persons

An overview of the UK Bribery Act

Bribery of foreign public officials

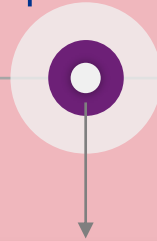


- Section 6 of the UK Bribery Act
- Per the requirements of the OECD Anti-Bribery Convention
- Specific offence relating to foreign public officials
- Prohibits
 - Bribing a foreign public official
 - With the intent to influence that official in an effort to
 - “obtain or retain business or
 - An advantage in the conduct of business”
- One exception

Written constitution, law, or judicial decision in country that permits payments

An overview of the UK Bribery Act

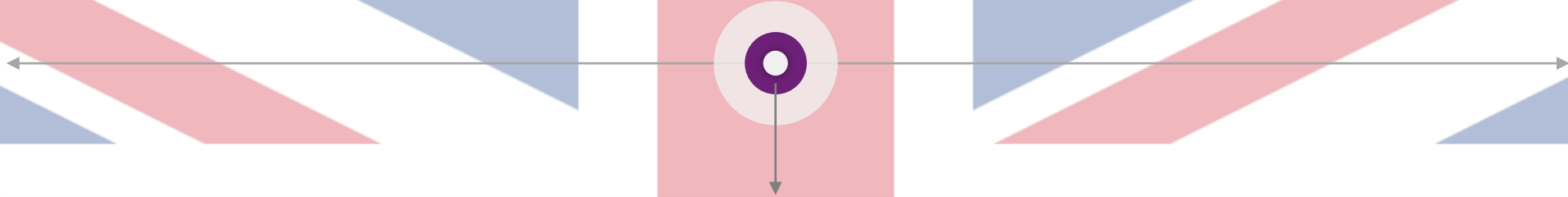
Failure to prevent bribery



- Section 7 of the UK Bribery Act
- New offense only applicable to organisations
- Organisations are liable - Associated person bribes another person intending to obtain or retain business
- “Associated persons” - Include employees, agents, distributors, intermediaries, joint ventures or subsidiaries

An overview of the UK Bribery Act

Adequate procedures – Guidance from the UK MOJ (principles based)

- 
- **Proportionate procedures** - A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities.
 - **Top Level Commitment** –The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.
 - **Risk Assessment** -The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.
 - **Due diligence** - The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
 - **Communication (including training)** – The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.
 - **Monitoring and Review** - The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary



Compliance:
Getting it right
VS
Getting it wrong

Compliance: Getting it wrong

Top 10 FCPA cases

#	Company	Country		Fine/Penalties	Year
1	Siemens	Germany		\$ 800 Million	2008
2	Alstom	France		\$ 772 Million	2014
3	KBR/Halliburton	USA		\$ 579 Million	2009
4	BAE	UK		\$ 400 Million	2010
5	Total SA	France		\$ 398 Million	2013
6	Alcoa World Alumina	USA		\$ 384 Million	2014
7	Snamprogetti Netherlands B.V / ENI S.p.A	Netherlands/Italy		\$ 365 Million	2010
8	Technip Sa	France		\$ 338 Million	2010
9	JGC Corporation	Japan		\$ 218 Million	2011
10	Daimler AG	Germany		\$ 185 Million	2010

The implications of the Yeats memo

- *“Seeking accountability from the individuals who perpetrated wrongdoing in civil and criminal matters”*
- To deter future illegal activity
- To incentivise change
- Hold proper parties responsible for their actions
- Promotes public confidence in the justice system

PURPOSE

- In large corporations it is difficult to determine culpability of high level executives

CHALLENGE

- To qualify for co-operation credit, companies must provide all relevant facts regarding individuals responsible for the misconduct
- Investigations must focus on individuals from inception
- Criminal and civil attorneys, handling corporate investigations should be in routine communication with each other
- The DoJ will not release culpable individuals from liability when resolving the matter with the corporation
- When resolving matters with corporations, attorneys must already have a clear plan to resolve individual cases.
- Civil attorneys must evaluate whether to bring suit against an individual based on considerations beyond the individual’s ability to pay.

APPROACH

Compliance: Getting it right

Lack of a Sophisticated Compliance Program

BHP Billiton:

\$25 Million in Penalties

"A 'check the box' compliance approach of form over substance is not enough to comply with the FCPA. Although BHP Billiton put some internal controls in place around its Olympic hospitality program, the company failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations."

- Antonia Chion, Associate Director, SEC Division of Enforcement

Well Established Compliance Program

Morgan Stanley:

No Fines or Penalties

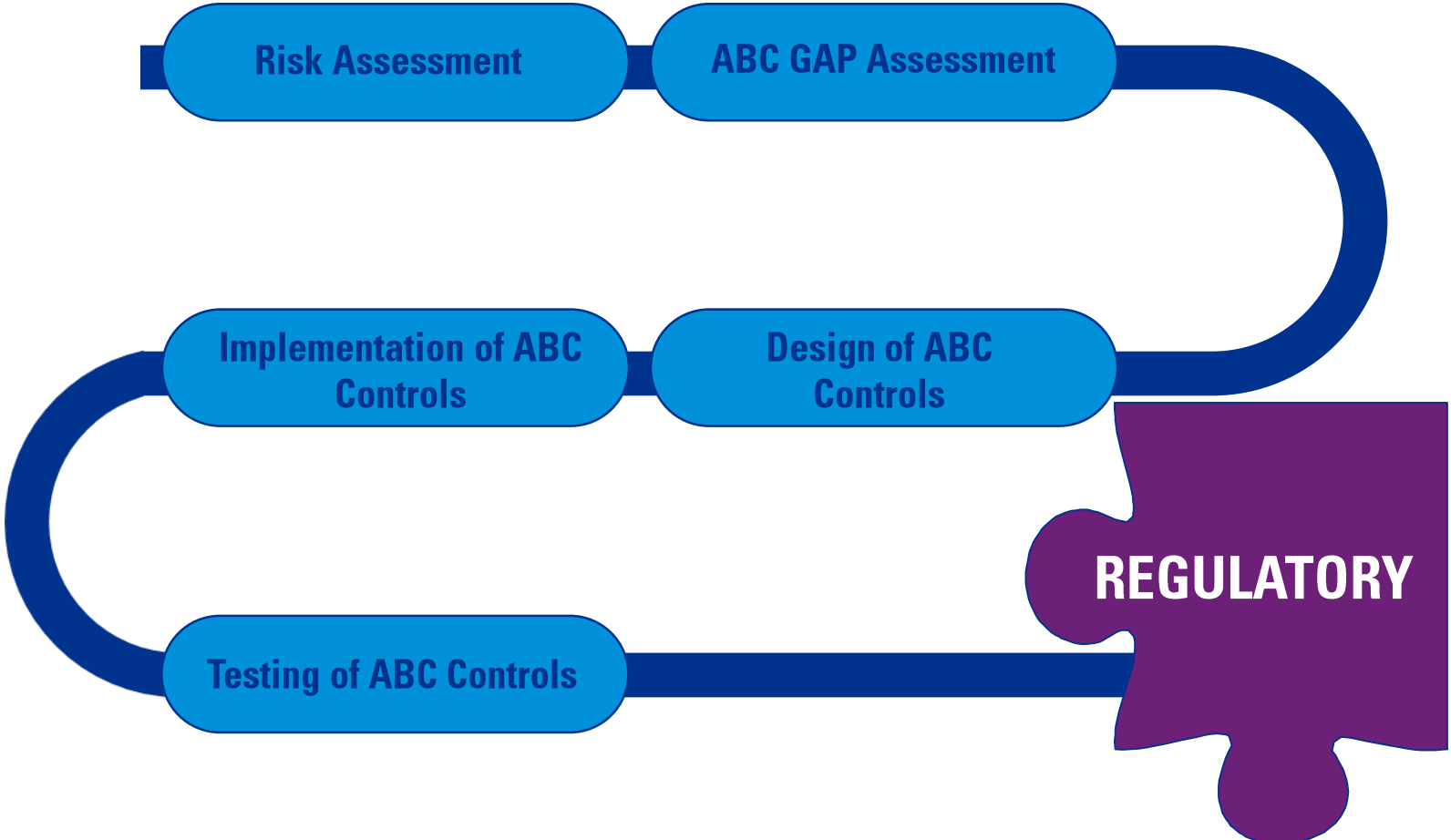
"After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct."

- DOJ Press Release (Apr. 25, 2012)

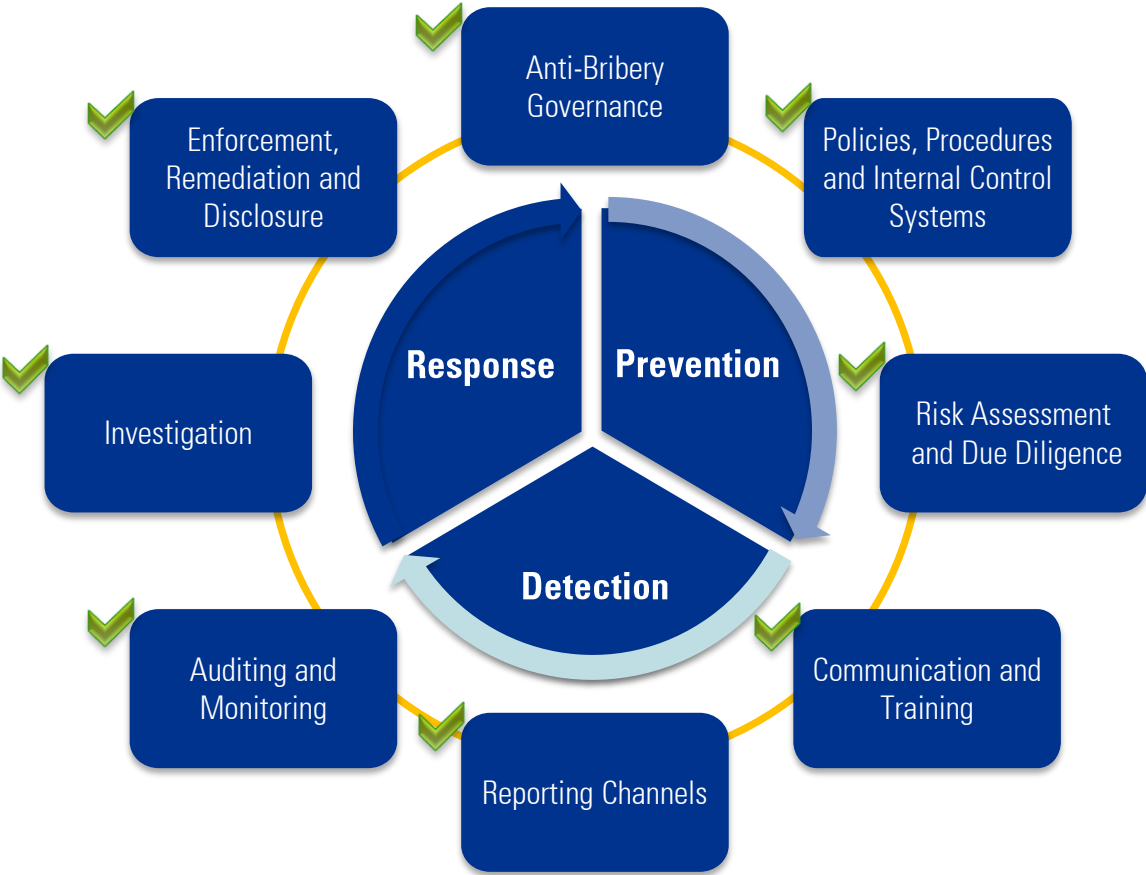


Roadmap to Compliance

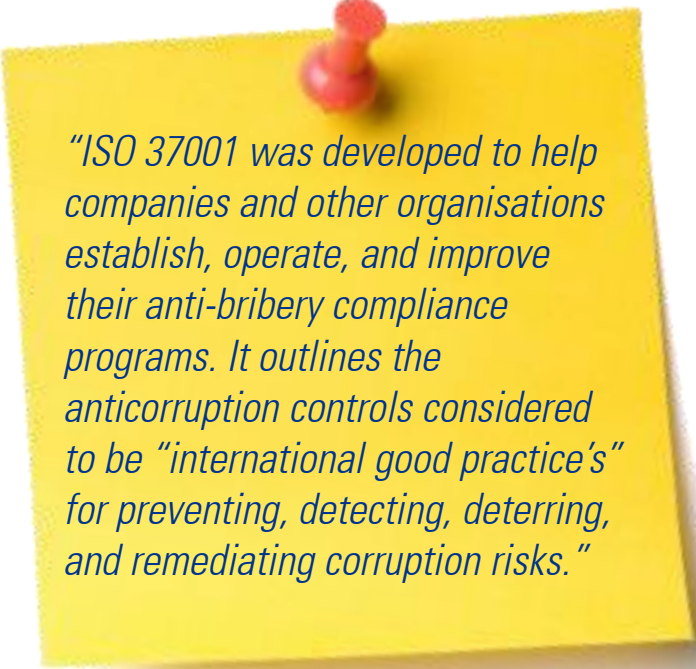
The Journey to Compliance



Roadmap to Compliance: Anti-Bribery compliance programme



The potential impact of ISO 37001



“ISO 37001 was developed to help companies and other organisations establish, operate, and improve their anti-bribery compliance programs. It outlines the anticorruption controls considered to be “international good practice’s” for preventing, detecting, deterring, and remediating corruption risks.”



To be certified as ISO 37001 compliant, an organisation will be required to:

- 👍 *Develop and implement a system*
- 👍 *Not only to prevent, detect and deter bribery*
- 👍 *But also to comply with anti-bribery laws and voluntary commitments*

The potential impact of ISO 37001

Adopting an anti-bribery policy

Requiring top management leadership and an effective tone at the top

Appointing a person to oversee anti-bribery compliance

Providing training to personnel

Undertaking risk assessments and risk based due diligence

Obtain compliance commitments from employees

Implementing commercial and financial controls

Developing reporting and investigating controls

Prohibit facilitation payments



How can ISO37001 benefit an organisation:

- *It assists an organisation to implement or enhance existing controls*
- *It provides assurance internally and externally that the organisation has implemented internationally recognised good practice anti-bribery controls*
- *In the event of an investigation, it helps to provide evidence that reasonable steps were taken to prevent bribery.*

Questions





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