

# DISPUTE RESOLUTION ALERT

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### **CORPORATE INVESTIGATIONS: INTERNAL FRAUD AND CORRUPTION CAN CRIPPLE YOUR BUSINESS: LIMIT YOUR RISK, PLAY IT SAFE!**

There is a plethora of evidence on how fraudulent and corrupt activities within an organisation have the potential to cripple an organisation's growth and, in some instances, prospects of success. Not only does such activity hinder an organisation's growth, but the financial consequences of such activity can have dire consequences for an organisation. Most small businesses do not have the financial muscle or resources to set up or sustain sophisticated internal risk and compliance units.

### **CORPORATE INVESTIGATIONS: ABC AND AML: COMBATING CORRUPTION - THE UK INTRODUCES UNEXPLAINED WEALTH ORDERS**

As from 31 January 2018 UK Law Enforcement has a new arrow in its anti-bribery and corruption and anti-money laundering quiver namely unexplained wealth orders (UWO). In terms of this new provision of the Criminal Finance Act, those suspected of involvement in serious crime, in the UK or elsewhere, may be required in terms of a High Court order to provide a statement regarding their property and in particular an explanation as to the source of funds to purchase such property.

# CORPORATE INVESTIGATIONS: INTERNAL FRAUD AND CORRUPTION CAN CRIPPLE YOUR BUSINESS: LIMIT YOUR RISK, PLAY IT SAFE!

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*Once the key risk areas in your business have been identified, it is important to implement practical and functional controls to mitigate fraud and corruption risks.*



There is a plethora of evidence on how fraudulent and corrupt activities within an organisation have the potential to cripple an organisation's growth and, in some instances, prospects of success. Not only does such activity hinder an organisation's growth, but the financial consequences of such activity can have dire consequences for an organisation. Most small businesses do not have the financial muscle or resources to set up or sustain sophisticated internal risk and compliance units. So what can small businesses do to protect themselves from becoming the next statistic in the ever-growing scourge of fraud and corruption?

Mitigating the risk of fraud and corruption does not necessarily involve implementing sophisticated and complex processes and procedures. There are numerous practical measures that an organisation can take to protect itself from the sinister activities of those intent on enriching themselves unlawfully at the expense of others.

At the outset, one needs to understand the particular risks that one's organisation faces. All organisations are at risk internally, from employees and externally from, among others, suppliers and service providers. Employees often pose a higher risk because they have access to company information, systems and the like. Furthermore, the procurement and finance functions of any business are usually the most at risk. There are also risks that may be unique to a particular organisation given the nature of its business.

Once the key risk areas in your business have been identified, it is important to implement practical and functional controls to mitigate fraud and corruption risks.

These measures include:

- **Documenting policies and procedures**

Among others, such policies generally include:

- fraud and corruption policies (such as a fraud, anti-corruption, gifts and benefits, and whistleblowing policy);
- appropriate finance policies (detailing, amongst others, how payments will be processed, how invoices and other supporting documentation will be checked, different authorisation levels, and so on); and
- a procurement policy (setting out how the procurement of goods and services will be dealt with).

- **Raising policy awareness**

Organisations should ensure that all employees are made aware of company policies and that regular training is provided to them to ensure that they understand company policies and procedures.



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- **Setting the tone at the top**

It is important that senior management establishes a culture within an organisation driven by ethical and lawful behaviour. Employees are less likely to follow the rules if they see senior management disregard the prescripts of company policies and procedures.

- **Appropriate segregation of duties**

This is particularly important in the procurement and finance units of an organisation. This should be coupled with appropriate checks and balances to ensure that nothing 'slips through the cracks'.

- **Vetting all prospective employees**

This is particularly important when recruiting employees in high risk positions. This precaution includes employees with access to critical functions of your business.

- **Vetting all suppliers and service providers**

Get to know exactly who it is that you are doing business with. Establishing a business relationship with an unethical or corrupt organisation poses not only a financial risk to your business, but a reputational one as well.

- **Creating a culture of accountability**

Establish a culture in your organisation in which accountability flourishes. This includes establishing a mechanism for whistleblowers to report any irregular behaviour.

The above list is by no means exhaustive. Ultimately the measures an organisation implements to mitigate fraud and corruption risks will be guided by

numerous factors. These include the size of the organisation, the nature of business conducted and the risks faced by the organisation. It is advisable to seek advice on the measures an organisation can implement to protect its business.

In addition to implementing preventative measures, it is important for an organisation to have an appropriate fraud response plan. One should not be misguided into thinking that "it will never happen to me or my business". Fraudsters are not prone to warning their victims before they attack. It is important to have an appropriate plan in place to ensure that if fraudulent or corrupt activity is identified, the incident is handled in the most appropriate manner. In particular, an organisation needs to ensure that the business is protected from further fraudulent activity, that the full extent of such activity is discovered and that the perpetrators can be brought to book. Any action taken within the first few hours and days after such a discovery will significantly impact the course and/or outcome of an investigation into the matter as well as any ensuing legal process (such as civil recovery proceedings, a criminal investigation/prosecution or disciplinary proceedings against employees involved).

There is an African proverb that reads: "when there is no enemy within, the enemy outside can do you no harm". The greatest risk to the success of a business is not necessarily its competitors but its employees who can cripple a business through fraudulent or corrupt activity. Limit your risk by putting in place measures to prevent the crippling effects of fraudulent and corrupt activity from affecting your business.

*Zaakir Mohamed and Mark Morgan*

# CORPORATE INVESTIGATIONS: ABC AND AML: COMBATING CORRUPTION - THE UK INTRODUCES UNEXPLAINED WEALTH ORDERS

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As from 31 January 2018 UK Law Enforcement has a new arrow in its anti-bribery and corruption and anti-money laundering quiver namely unexplained wealth orders (UWO). In terms of this new provision of the Criminal Finance Act, those suspected of involvement in serious crime, in the UK or elsewhere, may be required in terms of a High Court order to provide a statement regarding their property and in particular an explanation as to the source of funds to purchase such property.

The new retrospective provision will apply to individuals but also to other entities including trusts. Failure to comply with such an order will expose the property to seizure and it is a criminal offence to provide false information to a UWO. The new law is retrospective and may be utilised by the Director of Public Prosecutions, her Majesty's Revenue and Customs Office, the Serious Fraud Office (SFO), the Financial Conduct Authority (FCA) and the National Crime Agency.

It is estimated that £100 billion is laundered through the UK each year. In March last year Transparency International's research identified London properties worth a total of £4.2 billion bought by individuals with suspicious wealth. Anti-Corruption activists have been pushing for this law ever since an illicit enrichment task force was convened by Transparency International in early 2014. Land registry figures show that more than 30,000 tax haven companies hold UK real estate worth more than £170 billion.

## **A new global focus point: tackling fraud and corruption**

Two years ago we sent out [an alert](#) warning global corporations that the risk inherent in global business was about to increase as fighting corruption has become a global focus point. We have also previously reported on the UK's leading role in fighting global corruption in that it has set a global standard providing for strict liability, while allowing a defence if a company could demonstrate that it had instituted adequate procedures "to prevent bribery". This new s7 of the UK Bribery Act has indeed brought about a paradigm shift in the fight against corruption: the focus in the global compliance world has moved from a wait-and-defend attitude to one where a pro-active framework is required within corporations. This new approach places the UK on par with the US with its Filip Factors approach where a company defending itself against the US Department of Justice in terms of the Foreign Corrupt Practices Act needs to produce and prove the "existence and effectiveness of the corporation's pre-existing compliance programme".

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



# CORPORATE INVESTIGATIONS: ABC AND AML: COMBATING CORRUPTION - THE UK INTRODUCES UNEXPLAINED WEALTH ORDERS

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Following on the success of s7 of the UK Bribery Act, two new "failure-to-prevent offences" became law on 30 September 2017: firstly the failure-to-prevent the facilitation of UK tax evasion, and secondly the failure-to-prevent the facilitation of foreign tax evasion. Both these provisions mirror s7 of the UK Bribery Act and send out a clear message that anyone doing business in and with the UK must have the highest possible compliance standards.

Following on the UK's lead, the Australian government has recently proposed a new set of legislation under the Crimes Legislation Amendment Bill of 2017 which will, if it becomes law, introduce a new offence of "failure to prevent bribery of foreign officials", modelled after the UK Bribery Act.

The UK has now firmly established a very powerful position in the global fight against corruption but the US has not walked away from this fight at all. Quite the contrary, one need look no further than the national strategy of the US, published three months ago which re-affirms the fight against corruption: "the United States will continue to target corrupt foreign officials and work with countries to improve their ability to fight corruption so US companies can compete fairly in transparent business climates".

The UK has also set the pace by publishing the world's first open data register of real estate owners and controllers of companies, known as "beneficial owners". In this respect the UK is aligned with

the European Union's fourth Money Laundering Directive requiring member states to ensure that corporate and other legal entities incorporated within their territories obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interest held. Such information should be held on a central register accessible to competent authorities.

#### **The way forward**

Going forward, AML/TF and ABC will be premised, more and more, on international co-operation. The need for organisations to know and identify clients and manage associated risks will probably result in governments opening up information sources to the private sector. Financial institutions will have to seriously consider developing artificial intelligence and machine learning and increasingly leverage emerging technology to enhance efficiency and cost effectiveness.

#### **Learning from others' hard lessons**

Boards of directors will have to adopt a "tone at the top" approach towards their compliance programmes. There is a serious lesson to be learnt from the reputational damage suffered by certain global companies in South Africa and Brazil.

Reputation is extremely important: it is good to be in the news, but only for the right reasons. Once damaged, reputations can be very difficult to repair, particularly



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*The complex web of international regulations have also ensured that compliance as a function of governance and risk is coming into its own.*

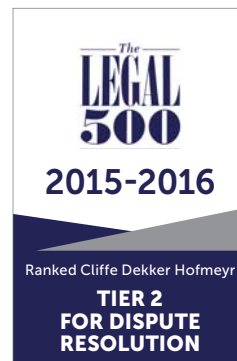
where integrity is called into question. Growth needs to be balanced by ethical conduct. By proactively dealing with corruption by introducing appropriate risk management programmes, a company ensures that the whole corporation becomes focussed on the subject. The complex web of international regulations

have also ensured that compliance as a function of governance and risk is coming into its own. Financial institutions need to prepare for global regulation and law enforcement especially with ultimate beneficial ownership rising to the surface.

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*Willem Janse van Rensburg*



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



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