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# CORPORATE & COMMERCIAL ALERT

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#### The Bribery Act: Guidelines to assist public and private entities in the preparation of procedures for the prevention of bribery and corruption

The Attorney General, in consultation with the Ethics and Anti-Corruption Commission (EACC) recently published guidelines (Guidelines) in respect of the Bribery Act 47 of 2016 (Bribery Act).

#### Amendment Bill to the rescue: A discussion of the proposed amendments to section 16 of the Companies Act

The Companies Amendment Bill, 2021 (Amendment Bill) was published for comment by the Department of Trade, Industry and Competition on 1 October 2021.



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## KENYA

## The Bribery Act: Guidelines to assist public and private entities in the preparation of procedures for the prevention of bribery and corruption

The Guidelines provide that the procedures should create a reporting mechanism, both within the entity and outside the entity, to the EACC, should an instance of bribery or corruption occur.

The Attorney General, in consultation with the Ethics and Anti-Corruption Commission (EACC) recently published guidelines (Guidelines) in respect of the Bribery Act 47 of 2016 (Bribery Act). The Guidelines are intended to give effect to section 9 of the Bribery Act, which imposes a duty on public and private entities to establish corruption and bribery prevention procedures, according to their size, scale, and nature of operation (Procedures). Section 9 of the Bribery Act, read together with section 18, further provides that an entity which fails to formulate these Procedures commits an offence, liable to a fine of up to KES 5 million (approximately USD 44,500), or imprisonment for a term not exceeding 10 years, or both. We shall highlight the salient features of the Guidelines below.

The Guidelines introduce a duty for a public or private entity to assess and map out the risks associated with bribery and corruption within the entity and to develop a plan to mitigate these risks. This plan should be included in the Procedures. Additionally, the Guidelines require each entity to develop its Procedures in writing, in one of Kenya's official languages, i.e. English or Kiswahili. However, where an entity operates internally in a language other than English or Kiswahili, for instance a foreign organisation that frequently communicates in its national language, then the Guidelines permit translation of the Procedures into the appropriate language, after they are first articulated in English or Kiswahili.

Furthermore, the Procedures must include an implementation structure that takes into account the entity's size, scale and nature of operation, alongside the identified risks and methods of mitigation. In particular, the implementation structure must include a commitment from the entity's leadership, it must involve all employees, and it must allocate and provide for the resources required for implementation, to name a few. Moreover, the Procedures must designate a person or people in authority to set up an enforcement structure that will provide for appropriate action for violations of the law, regulations, or the Procedures.

Notably, the Guidelines provide that the Procedures should create a reporting mechanism, both within the entity and outside the entity, to the EACC, should an instance of bribery or corruption occur. However, the Guidelines do not provide practical direction on how an entity can formulate these mechanisms and how this would vary based on the size of the entity, its organogram, and nature of work. This therefore leaves room for interpretation and implementation as an entity develops its Procedures, given that the practical aspects appear to be at the entity's discretion. Nonetheless, what is clear is that the reporting mechanisms must provide for the receiving, recording, processing and dissemination of reports for feedback and appropriate action. It is key to note, that these reporting mechanisms are exempt from the provisions of the Data Protection Act 2019 (DPA), as section 51 of the DPA excludes the processing of personal data that is required to be disclosed under any written law from the scope of the DPA.

## KENYA

## The Bribery Act: Guidelines to Assist Public and Private Entities in the Preparation of Procedures for the Prevention of Bribery and Corruption...continued

Notably, public and private entities are entitled to seek the EACC's advice and may collaborate with other agencies within their sector or industry as they develop their procedures.

In addition to the above, the Guidelines state that an entity's Procedure should include:

- effective measures for the protection of whistle-blowers, informants and witnesses;
- effective communication, training, awareness-creation and dissemination to internal and external stakeholders; and
- appropriate measures for monitoring, evaluating, and reviewing of the Procedures, emerging risks, and improvements.

Notably, public and private entities are entitled to seek the EACC's advice and may collaborate with other agencies within their sector or industry as they develop their Procedures.

We are happy to assist with advising and formulating Procedures in view of these recent Guidelines. Please get in touch with the authors if you so require.

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and Tyler Hawi Ayah  
Overseen by Njeri Wagacha*



## 2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

### 2020

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by BEE Deal Flow.  
1<sup>st</sup> by BEE Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by General Corporate Finance Deal Value.  
3<sup>rd</sup> by M&A Deal Value.  
Catalyst Private Equity Deal of the Year.

### 2019

**M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.**  
1<sup>st</sup> by BEE M&A Deal Flow.  
1<sup>st</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by M&A Deal Value.  
2<sup>nd</sup> by M&A Deal Flow.

### 2018

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
1<sup>st</sup> by BEE M&A Deal Value.  
2<sup>nd</sup> by BEE M&A Deal Flow.  
Lead legal advisers on the Private Equity Deal of the Year.

### 2017

2<sup>nd</sup> by M&A Deal Value.  
1<sup>st</sup> by General Corporate Finance Deal Flow for the 6th time in 7 years.  
1<sup>st</sup> by General Corporate Finance Deal Value.  
2<sup>nd</sup> by M&A Deal Flow and Deal Value (Africa, excluding South Africa).  
2<sup>nd</sup> by BEE Deal Flow and Deal Value.

## Amendment Bill to the rescue: A discussion of the proposed amendments to section 16 of the Companies Act

Section 16 of the Companies Act currently provides that an amendment to an MOI of a company takes effect on the date and time when the notice of amendment is filed with the CIPC or on a date specified in the notice of amendment.

The Companies Amendment Bill, 2021 (Amendment Bill) was published for comment by the Department of Trade, Industry and Competition on 1 October 2021. One of several amendments to the Companies Act 71 of 2008 (Companies Act) proposed in the Amendment Bill is an amendment to section 16 of the Companies Act. The proposed amendment is meant to finally clarify the effective date of an amendment to a company's memorandum of incorporation (MOI).

Parties often need to urgently create shares to implement a subscription transaction because the target company needs the funds to flow so they can use the subscription proceeds. The implementation of the transaction in such instances is subject to the amendment of the MOI of the target company. The parties will complete the required forms and send the signed forms together with the amendment to the Companies and Intellectual Property Commission (CIPC).

The inevitable question that follows is when does the amendment take effect so that the parties can implement the transaction? The answer to the question is often unsatisfactory.

Section 16 of the Companies Act currently provides that an amendment to an MOI of a company takes effect on the date and time when the notice of amendment is filed with the CIPC or on a date specified in the notice of amendment. The question that often arises is what is meant by "filed".

The conservative view is that filing takes place when the target company receives written confirmation from the CIPC that the notice of amendment has been accepted and placed on file. Submitting the amendment with the CIPC does not constitute filing, it simply means that the amendment has been sent to the CIPC for processing.

The reason for the current debate around when "filing" takes effect is that section 1 of the Companies Act provides that "filing" is mere delivery to the CIPC. However, Table CR 3 in the Companies Regulations, 2011 provides that delivery is deemed to take place to the CIPC only when the CIPC issues a receipt. That is why it is always best to follow the conservative approach and wait for the CIPC's formal receipt.

### Review Period

Processing the amendment at the CIPC and receiving written confirmation of filing from the CIPC can take anywhere between 5 to 15 business days. The CIPC does, in certain instances, issue its confirmation faster. It will depend on the circumstances and whether there is a backlog at the CIPC. The timelines can therefore fluctuate.

The Amendment Bill proposes a new filing regime that provides for a deemed filing construct that is meant to address the inconsistencies and provide certainty for the parties. The Amendment Bill provides that an amendment of an MOI will now take effect 10 business days after receipt of the notice of amendment by the CIPC (Review Period).

## Amendment Bill to the rescue: A discussion of the proposed amendments to section 16 of the Companies Act...*continued*

The Amendment Bill provides that an amendment of an MOI will now take effect 10 business days after receipt of the notice of amendment by the CIPC.

Notwithstanding that the amendment will be deemed to have taken effect after the Review Period, the CIPC will retain some measure of discretion during the Review Period. The CIPC will inspect the amendment to ensure that it complies with the requirements of the Companies Act and the provisions of the MOI of the company during the Review Period. If the CIPC does not issue any response before the expiry of the Review Period (i.e. the CIPC has not accepted the amendment, issued any query or rejected the amendment with reasons) the amendment will be deemed to take effect on the expiry of the Review Period.

While the amendment seeks to clarify the effective date of the amendment, it does not contain a provision that deals with the consequences if the CIPC rejects or queries the amendment after the expiry of the Review Period. In such instances, the amendment would nevertheless be valid as per the deemed provisions. The parties would thereafter need to address the CIPC's rejection and queries.

The one area of suggested improvement with respect to the proposed amendment, which we have suggested to the Department of Trade, Industry and Competition, is that if the CIPC happens to process the amendment faster than the 10 business days, that earlier date should be the deemed filing date as there is no point in then waiting out the expiry of the Review Period.

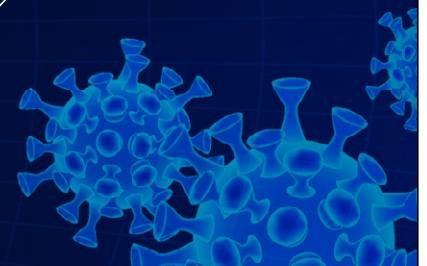
If the proposed amendments to section 16 to the Companies Act contained in the Amendment Bill become law, parties will now have certainty regarding the effective date for the amendments to MOIs for the purpose of implementing their transactions.

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*Cyprian Mthembu and Etta Chang*

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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