



PRIME MINISTER'S DEPARTMENT

GUIDELINES ON ADEQUATE PROCEDURES

PURSUANT TO SUBSECTION (5) OF SECTION 17A UNDER
THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009





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1. OBJECTIVE

These guidelines are issued pursuant to subsection (5) of section 17A of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) (“MACC Act 2009”), as stated in the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (“MACC Amendment Act 2018”).

The objective of these guidelines is to assist commercial organisations in understanding what are the adequate procedures that should be implemented to prevent the occurrence of corrupt practices in relation to their business activities.

These guidelines have been formed on the basis of five principles which may be used as reference points for any anti-corruption policies, procedures and controls the organisation may choose to implement towards the goal of having adequate procedures as required under the above statutory provision.

2. TERMS AND DEFINITIONS

For the purpose of these guidelines, the terms used in this document have the same meaning and interpretation as used under the MACC Act 2009. The definition of additional terms not found in the Act may be found in the Appendix to this document.

3. INTRODUCTION

- 3.1 The provision of section 17A under the MACC Act 2009, establishes the principle of a commercial organisation’s criminal liability (corporate liability) for the corrupt practices of its employees and/ or any person(s) associated with the commercial organisation in cases where such corrupt practices are carried out for the organisation’s benefit or advantage. The commercial organisation may be liable whether or not its top level management and/or representatives had actual knowledge of the corrupt acts of its employees and/or associated persons.
- 3.2 The aim of this provision is to foster the growth of a business environment that is free of corruption, and to encourage all commercial organisations to take the reasonable and proportionate measures to ensure their businesses do not participate in corrupt activities for their advantage or benefit. These measures should take the form of policies and procedures, with training, communication and enforcement to ensure they are effective.

3.3 In the event that a commercial organisation is found liable under Section 17A of the MACC Act, the provision provides that the organisation having adequate procedures can raise it as a defence against corporate liability. In this regard the organisation must prove that the necessary procedures were in place to prevent its employee(s) and/or associated persons from undertaking corrupt practices in relation to its business activities.

3.4 Under subsection (5) of section 17A MACC Act 2009, the Minister is required to issue guidelines relating to adequate procedures. The guidelines provided in this document are designed to be principle-based and for general application by any commercial organisation of any size and industry. These guidelines are not intended to be prescriptive and it should not be assumed that “one-size-fits-all”. They should be applied practically, in proportion to the scale, nature, industry, risk and complexity of the organisation.

3.5 If a corruption incident should occur, it would be a matter for the courts to decide whether

the commercial organisation truly established the necessary safeguards which should have prevented the offence from happening. When making a decision, the judiciary is likely to take into account the particular facts and circumstances of the case, including the existence of an organisation’s policies and procedures and manner of their implementation. However, by implementing these adequate procedures, companies can gain confidence that they have established a suitable defence which can be used to protect both the commercial organisation and top management from the liabilities now arising from the MACC Amendment Act 2018.

4. ADEQUATE PROCEDURES PRINCIPLES: T. R. U. S. T.

4.1 PRINCIPLE I: TOP LEVEL COMMITMENT

4.1.1 The top level management is primarily responsible for ensuring that the commercial organisation:

- (i) practices the highest level of integrity and ethics;
- (ii) complies fully with the applicable laws and regulatory requirements on anti-corruption;

(iii)effectively manages the key corruption risks of the organisation.

4.1.2The top level management must be able to provide assurance to its internal and external stakeholders that the organisation is operating in compliance with its policies and any applicable regulatory requirements. This may include establishing the organisation’s “tone from the top” (i.e. the organisation’s “general stance against the use of corrupt practices in relation to its business activities), and spearheading the organisation’s efforts to improve upon the effectiveness of its corruption risks management framework, internal control system, review and monitoring, and training and communication.

4.1.3Thus, for this purpose, commercial organisations should carry out the following:

- (i) establish, maintain, and periodically review an anti-corruption compliance programme which includes clear policies and objectives that adequately address corruption risks;
- (ii) promote a culture of integrity within the

organisation;

- (iii)issue instructions on communicating the organisations’ policies and commitments on anti-corruption to both internal and external parties;
- (iv)encourage the use of any reporting (whistleblowing) channel in relation to any suspected and/or real corruption incidents or inadequacies in the anti-corruption compliance programme;
- (v) assign and adequately resource a competent person or function (which may be external to the organisation) to be responsible for all anti-corruption compliance matters, including provision of advice and guidance to personnel and business associates in relation to the corruption programme;
- (vi)ensure that the lines of authority for personnel tasked with responsibility for overseeing the anti-corruption compliance programme are appropriate; and
- (vii) ensure that the results of any audit, reviews of risk assessment, control measures and performance are reported to all top level management,

including the full Board of Directors, and acted upon.

4.2 PRINCIPLE II: RISK ASSESSMENT

4.2.1 A corruption risk assessment should form the basis of an organisation's anti-corruption efforts. As such, the commercial organisation should conduct corruption risk assessments periodically and when there is a change in law or circumstance of the business to identify, analyse, assess and prioritise the internal and external corruption risks of the organisation. This risk assessment should be used to establish appropriate processes, systems and controls approved by the top level management to mitigate the specific corruption risks the business is exposed to.

4.2.2 For this purpose, it is recommended that a comprehensive risk assessment is done every three years, with intermittent assessments conducted when necessary. The assessment may include the following:

(i) opportunities for corruption and fraud activities

resulting from weaknesses in the organisation's governance framework and internal systems/procedures;

(ii) financial transactions that may disguise corrupt payments;

(iii) business activities in countries or sectors that pose a higher corruption risk;

(iv) non-compliance of external parties acting on behalf of the commercial organisation regarding legal and regulatory requirements related to anti-corruption. Note that, given the wide definition of an associated person, a commercial organisations can be liable for the acts of such third parties; and

(v) relationships with third parties in its supply chain (e.g. agents, vendors, contractors, and suppliers) which are likely to expose the commercial organisation to corruption.

4.2.3 The risk assessment for corruption can be done on a stand-alone basis, but is recommended that the assessment be incorporated into the general risk register of the commercial organisation.

4.3 PRINCIPLE III: UNDERTAKE CONTROL MEASURES

4.3.1 The commercial organisation should put in place the appropriate controls and contingency measures which are reasonable and proportionate to the nature and size of the organisation, in order to address any corruption risks arising from weaknesses in the organisation's governance framework, processes and procedures. These should include the following items:

(a) Due diligence

The commercial organisation should establish key considerations or criteria for conducting due diligence on any relevant parties or personnel (such as Board members, employees, agents, vendors, contractors, suppliers, consultants and senior public officials) prior to entering into any formalised relationships. Methods may include background checks on the person or entity, a document verification process, or conducting interviews with the person to be appointed to a key role where corruption risk has been identified.

(b) Reporting channel

The commercial organisation should:

- (i) establish an accessible and confidential trusted reporting channel (whistleblowing channel), which may be used anonymously, for internal and external parties to raise concerns in relation to real or suspected corruption incidents or inadequacies of the anti-corruption programme. For smaller organisations, the reporting channel can be as simple as a dedicated e-mail address;
- (ii) encourage persons to report, in good faith, any suspected, attempted or actual corruption incidents;
- (iii) establish a secure information management system to ensure the confidentiality of the whistleblower's identity and the information reported; and
- (iv) prohibit retaliation against those making reports in good faith.

4.3.2 Furthermore, the commercial organisation should establish policies and procedures to

cover the following areas:

- (i) a general anti-bribery and corruption policy or statement;
- (ii) conflicts of interest;
- (iii) gifts, entertainment, hospitality and travel;
- (iv) donations and sponsorships, including political donations;
- (v) facilitation payments;
- (vi) financial controls, such as separation of duties and approving powers or multiple signatories for transactions;
- (vii) non-financial controls, such as a separation of duties and approving powers or a pre-tendering process;
- (viii) managing and improving upon any inadequacies in the anti-corruption monitoring framework; and
- (ix) record keeping for managing documentation related to the adequate procedures.

4.3.3 In this regard, the organisation's policies should be:

- (i) endorsed by top level management;
- (ii) kept up-to-date;
- (iii) publicly and/or easily available; and
- (iv) suitable for use where and when needed.

4.4 PRINCIPLE IV: SYSTEMATIC REVIEW, MONITORING AND ENFORCEMENT

4.4.1 The top level management should ensure that regular reviews are conducted to assess the performance, efficiency and effectiveness of the anti-corruption programme, and ensure the programme is enforced. Such reviews may take the form of an internal audit, or an audit carried out by an external party.

4.4.2 The reviews should form the basis of any efforts to improve the existing anti-corruption controls in place in the organisation.

4.4.3 For this purpose, the commercial organisations should consider the following:

- (i) plan, establish, implement and maintain a monitoring programme, which covers the scope, frequency, and methods for review;
- (ii) identify the competent person(s) and/or establish a compliance function to perform an internal audit, in relation to the organisation's anti-corruption measures;
- (iii) conduct continual evaluations and improvements on the organisation's policies and procedures in relation

- to corruption;
- (iv) consider an external audit (for example MS ISO 37001 auditors) by a qualified and independent third party at least once every three years to obtain assurance that the organisation is operating in compliance with its policies and procedures in relation to corruption;
- (v) monitor the performance of personnel in relation to any anti-corruption policies and procedures to ensure their understanding and compliance with the organisation's stance in their respective roles and functions; and
- (vi) conduct disciplinary proceedings against personnel found to be non-compliant to the programme.

- (iv) consequences of non-compliance.

Communication of Policies

4.5.2 The organisation's anti-corruption policy should be made publicly available, and should also be appropriately communicated to all personnel and business associates.

4.5.3 When planning strategies for communicating the organisation's position on anti-corruption, the organisation should take into account what key points should be communicated, to whom they should be communicated, how they will be communicated, and the timeframe for conducting the communication plan. The organisation should also consider what languages the materials will be communicated in.

4.5 PRINCIPLE V: TRAINING AND COMMUNICATION

4.5.1 The commercial organisation should develop and disseminate internal and external training and communications relevant to its anti-corruption management system, in proportion to its operation, covering the following areas:

- (i) policy;
- (ii) training;
- (iii) reporting channel; and

4.5.4 The communication of the organisation's policies may be conducted in a variety of formats and mediums. These may include, but are not limited to:

- (i) messages on the organisation's intranet or website;
- (ii) emails, newsletters, posters;
- (iii) code of business conduct

- and employee's handbooks;
- (iv) video seminars or messages; and
- (v) town-hall sessions.

Training

4.5.5 The commercial organisation should provide its employees and business associates with adequate training to ensure their thorough understanding of the organisation's anti-corruption position, especially in relation to their role within or outside the commercial organisation.

- 4.5.6 The training may be conducted in a variety of formats, including but not limited to:
- (i) induction programs featuring anti-corruption elements;
 - (ii) role-specific training, which is tailored to corruption risks the position is exposed to;
 - (iii) corporate training programs, seminars, videos and in-house courses;
 - (iv) intranet or web-based programs;
 - (v) town hall sessions;
 - (vi) retreats; and
 - (vii) out-reach programs.

5. AMENDMENT

- 5.1 The Minister may amend any of these guidelines from time to time, as may be deemed necessary.

6. CASE STUDY

- 6.1 Case studies are provided by GIACC. Visit the website for more information.



YB Datuk Liew Vui Keong
Minister in the Prime Minister's
Department, Malaysia

Putrajaya

Date: 4 December 2018

APPENDIX

The key definitions under section 17A of the MACC Act 2009 and these guidelines:

i) **“commercial organisation”**

means-

- a) a company incorporated under the Companies Act 2016 [Act 777] and carries on a business in Malaysia or elsewhere;
- b) a company wherever incorporated and carries on a business or part of a business in Malaysia;
- c) Partnership –
 - (i) under the Partnership Act 1961 [Act 135] and carries on a business in Malaysia or elsewhere; or
 - (ii) which is a limited liability partnership registered under Limited Liability Partnerships Act 2012 [Act 743] and carries on a business in Malaysia or elsewhere; or
- d) a partnership wherever formed and carries on a business or part of a business in Malaysia.

ii) **“top level management”**

means-

A person-

- a) who is its director, controller, officer or partner; or
- b) who is concerned in the management of its affairs.

iii) **“associate”** in relation to a person, means-

- a) any person who is a nominee or an employee of such person;
- b) any person who manages the affairs of such person;
- c) any organisation of which such person, or any nominee of his, is a partner, or a person in charge or in control of, or has a controlling interest in, its business or affairs;
- d) any corporation within the meaning of the Companies Act 1965 [Act 125], of which such person, or any nominee of his, is a director or is in charge or in control of its business or affairs, or in which such person, alone or together with any nominee of his, has or have a controlling interest, or shares to the total value of not less than thirty per centum of the total issued

- capital of the corporation;
or
- e) the trustee of any trust, where—
- (i) the trust has been created by such person; or
 - (ii) the total value of the assets contributed by such person to the trust at any time, whether before or after the creation of the trust, amounts, at any time, to not less than twenty per centum of the total value of the assets of the trust.
- iv) **“public body”** includes-
- a) the Government of Malaysia;
 - b) the Government of a State;
 - c) any local authority and any other statutory authority;
 - d) any department, service or undertaking of the Government of Malaysia, the Government of a State, or a local authority;
 - e) any society registered under subsection 7 (1) of the Societies Act 1966 [Act 335];
 - f) any branch of a registered society established under section 12 of the Societies Act 1966;
 - g) any sports body registered under section 17 of the Sports Development Act 1997 [Act 576];
- h) any co-operative society registered under section 7 of the Co-operative Societies Act 1993 [Act 503];
- i) any trade union registered under section 12 of the Trade Unions Act 1959 [Act 262];
- j) any youth society registered under section 9 of the Youth Societies and Youth Development Act 2007 [Act 668];
- k) any company and subsidiary company over which or in which any public body as is referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i) or (j) has controlling power or interest; or
- l) any society, union, organization or body as the Minister may prescribe from time to time by order published in the Gazette.
- v) For the purpose of these guidelines, **“public official”** means an officer to a public body.



**National Centre For Governance, Integrity and Anti-Corruption (GIACC)
Prime Minister's Department
Level 3, West Wing
Perdana Putra Building
Federal Government Administrative Centre
62502 Putrajaya**

Tel : 03- 8872 7184
Fax : 03- 8890 5440
Email : giacc@jpm.gov.my
Website : giacc.jpm.gov.my

