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THE FOREIGN CORRUPT PRACTICES ACT OF 1977: NO PEANUT GALLERY

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It's rather ironic that the introduction of the Foreign Corrupt Practices Act of 1977 ('FCPA') -- a United States (US) federal law -- was passed into US law by the 39th elected US President, Jimmy Carter, who was by all accounts considered part of the country's 'working class' people. With a very modest upbringing, as a child Carter lived in a public community house which was subsidised by the US government as part of a housing scheme for the poor. The Carter's understood the plight of the poor and similar to today -- no matter where in the world -- the poor and impoverished communities remain the most affected segment of society impacted by the scourge of corruption.

Considering that governments are meant to, amongst other, establish law and order, while also providing the necessary infrastructure and support to build and maintain a sustainable society; laws such as the FCPA may need to be bolstered even further if they are to *truly* achieve their purpose. Corruption finds its roots within systems of injustice, mistrust and suspicion and its practice creates a sense of insecurity and despondency. Left unchecked, corruption worsens the plight of the poor and exacerbates poverty and misfortune; corruption further widens the chasm of poor governance and lawlessness. It is therefore critical that governments and their employees are seen to be, and are, employing sound governance practices which are as far as possible, devoid of corruptive tendencies and unethical behavior.

Notably, the ambit of corruption is broadly defined within the United Nation's Manual on anti-corruption as "*abuse of public office for private gains*". Other definitions include the term to mean "a behavior on the part of office holders in the public or private sector whereby they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed."

As the name suggests, the Foreign Corrupt Practices Act is intended to combat the bribery of foreign government officials. The Act was signed into US law on December 19, 1977, and was amended in 1998 by the International Anti-Bribery Act of 1998 which was designed to implement the anti-bribery conventions of the Organisation for Economic Co-operation and Development (OECD). The FCPA applies to *any person* who has a certain degree of connection to the US and who engages in foreign corrupt practices.

"Corruption in South Africa has reached staggering proportions. Daily newspapers are rife with reports of widespread corruption in both the public and private sectors. The arms deals scandal, coupled to prison sentences for the former Commissioner of Police Jackie Selebi and the recent termination of his replacement, Bheki Cele, who was embroiled in a R1,8bn overspend on Police accommodation has done little to boost confidence in public sector integrity."

Steven Powell (Director: Forensic Services - Edward Nathan Sonnenbergs)

Whilst the FCPA is a foreign piece of legislation to South Africa, its extra-territorial provisions could have serious implications upon the manner in which South African companies that have a business link or association with the United States of America engage and conduct themselves with government officials, particularly in jurisdictions where there are high levels of corruption.



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Gauging from the *2012 Corruption Index Report from Transparency International*, South Africa's ratings and perceptions around corruption have not improved much, and currently the country ranks 69th most corrupt on the list of 176 countries. Understandably, even though this rating is a 'perception' which may be far from accurate, it remains a reason why some countries and or foreign businesses may choose not to do business in South Africa, which results in lost foreign investment opportunities and mistrust, amongst other matters. That said, Transparency International calculate that investing in a 'relatively corrupt' country as compared to an 'uncorrupted' country is about 20 per cent more costly.

Accordingly, it is critical that the South African government and the country's business leaders earnestly align their foreign dealings and businesses with two of the most noteworthy international anti-corruption laws, namely the FCPA and the UK Bribery Act of 2010. To this end -- and of equal importance -- all people operating in South Africa must also be compliant with our own anti-bribery and anti-corruption (ABAC) legal provisions which are found within the following legislation, namely the:

- Prevention of Organised Crime Act of 1998,
- Protected Disclosures Act of 2000,
- Financial Intelligence Centre Act of 2001,
- Prevention and Combatting of Corrupt Activities Act of 2004,
- Companies Act of 2008.

In order for South African organisations to remain compliant with the offshore foreign ABAC legislation, organisations must undertake to regularly evaluate their employees, suppliers and contractors to ensure that they have adequate ABAC measures in place. To this extent, South African organisations should also be aware that:

- they could be held liable for bribes paid to foreign officials by their subsidiaries, agents or partners in joint ventures, and
- they could be held liable for offers of payment or gifts, or the actual impartation of a payment or a gift (even if they were unaware of such offers and / or payments made by their foreign subsidiary, agent or business partner).

Whilst South African statistics in respect of corruption are difficult to obtain and are most often inaccurate, in October 2011 the head of the government's Special Investigating Unit – Willie Hofmeyr – reported that between R25bn and R30bn of government's annual procurement budget alone was lost to corruption, incompetence and negligence.

As we reflect upon the Washington research group -- Global Financial Integrity – their report on corruption in South Africa indicated that there was, between 1994 and 2008, an illegal outflow of R185bn due to corruption in both the public and private sectors. This type of 'lost' money is an amount our country cannot afford to lose, and it remains primarily the accountability of our government to enforce the strictest of sanction against those who undermine the local and international governance frameworks by which we are expected to comply with.

Gauging from the implementation of anti-bribery and anti-corruption legislation being adopted worldwide, it is clear that countries and their governments are beginning to take this matter far more seriously. Failing to do so, will ultimately deplete the public purse for economic and social development, whilst also financially distort local and international markets. Perhaps even more fundamental to these points, is that corruption directly



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impacts the dignity of human beings and our social order, furthermore threatens the prosperity, peace and stability of civilisation across the globe.

Undoubtedly, organisations in South Africa need to implement tighter controls and procedures to prevent the spread of bribery and corruption. Considering the penalties various corporations across the world have paid to the US Department of Justice and Securities Exchange Commission for non-compliance with the FCPA, which tally circa \$1.8bn up until 2010, this is certainly one piece of foreign legislation that should not be taken lightly.

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