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Malaysia News: Amendment to the Malaysian Anti- Corruption Commission Act 2009

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Amendment to the Malaysian Anti-Corruption Commission Act 2009

Update 26.10.18: The Malaysian Anti-Corruption Commission (Amendment) Act 2018 came into force on 1 October 2018. However, the enforcement of the new section 17A corporate liability provision has been deferred until further notice.

Introduction

The Malaysian Anti-Corruption Commission (Amendment) Act 2018 ("**Amendment**") was published in the Gazette on 4 May 2018. It amends the Malaysian Anti-Corruption Commission Act 2009 ("**principal Act**") by introducing a new corporate liability provision for corruption, discussed in more depth below.

What's new

Previously under the principal Act, only individuals could be found liable for corruption. However, the Amendment adds a new Section 17A which states that a commercial organisation commits an offence if:

- i. any person associated with said organisation commits a corrupt act, such as giving or agreeing to give to any person any gratification, whether for the benefit of that person or another;
- ii. and does so in order to obtain or retain business or an advantage for the commercial organisation.

In short, an individual who commits a corrupt act renders the whole company liable for their actions. This individual may be a director, partner, employee, or person who performs services for or on behalf of the company. Note that this applies to both Malaysian companies doing business in Malaysia or elsewhere and foreign companies doing business in Malaysia.

In addition, if it is found that an offence has been committed by a company, then its directors or those concerned with the

management of company affairs at the time of the offence shall be deemed to have committed that offence, pursuant to s17A(3), providing no defence applies.

To escape liability, a director will have to prove that the offence was committed without his consent and that he exercised due diligence to prevent the offence. He may do so by demonstrating he had adequate procedures in place to stop individuals associated with the organisation from committing corrupt acts.

The Minister has yet to issue guidelines relating to these adequate procedures. Nevertheless, this defence is similar to that found in the UK Bribery Act. The UK guidelines highlight six areas that may help to satisfy the requirement for adequate procedure, namely: proportionate procedures, top level commitment, risk assessment, due diligence, communication and monitoring and review. It is likely that the guidelines for Malaysia will be of a similar nature.

What's next

The penalties for non-compliance with the Amendment are severe. Upon conviction, the company and its directors face a fine of ten times the amount of the gratification or one million ringgit, whichever is the higher, or imprisonment for a term not exceeding twenty years, or both.

As the Amendment will not be enforced within the next two years, this grace period provides a good opportunity for companies to ensure safeguard procedures are in place, such as a robust compliance programme. This task will also become easier once guidelines regarding adequate procedures are issued.

However, this Amendment means that there will always now be an increased risk for directors, regardless of the robustness of anti-corruption policies.

To-do-list

Given the aforementioned increased risk, it is understandable that directors may want to pass on this risk to reduce their exposure to liability. Directors may check with their employers if and how far their liability may be covered by (existing) D&O insurance policies and whether they will need to upgrade their insurance protection. As an alternative, but also depending on the actual involvement in the day-to-day business, it could be considered to outsource the position as director to professional service providers.

In addition, businesses should use the grace period to implement or update adequate procedures in order to ensure compliance with the Amendment.

Please feel free to get in touch should you require further information or assistance in respect of the above.

Your Contact



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