RAG Strategists Advisory Note 1

"Shaping and sharing best practice in infrastructure anti-corruption"

PRECCA – Introduction of Section 34A

The corporate liability provision, known as Section 34A of the Prevention and Combatting of Corruption Act (12 of 2004) (PRECCA), which came into effect on April 3, 2024, stipulates that a commercial organisation commits an offence if any person associated with it engages in a corrupt act (such as giving, promising, or offering any form of gratification) to obtain or retain business or an advantage for the organisation. In simple terms, the organisation commits an offence if it "fails to prevent corruption".

Key features of the new Section 34A "failure to prevent" offence include:

- It is a strict liability offence, meaning that the prosecution does not need to prove a company's involvement in or knowledge of corruption for it to be held liable.
- The broad definition of "associated person" places greater responsibility on companies overseeing multiple layers of potential associated parties.
- Similar to the Section 7 offence under the UK Bribery Act (2010), there is an affirmative defence available under Section 34A if a company can prove it had adequate procedures in place to prevent associated persons from engaging in corruption.
- The amended act does not specify what constitutes "adequate procedures," but it is likely that future guidelines will align with the "Six Principles" for preventing bribery suggested by the UK's Ministry of Justice. Until South African authorities issue their own guidelines, companies would be wise to adopt practices similar to those in the UK and other countries with more established anti-corruption frameworks.
- Unlike the penalties for failing to meet reporting obligations under Section 34, Section 34A does not specify a particular penalty for non-compliance. However, the penalty provisions in Section 26 of PRECCA could be applied as a general measure. Although not extensively tested, penalties for corruption convictions under PRECCA include potentially unlimited fines and imprisonment for up to life. Given these significant penalties, it is critical for directors, partners, and management to implement systems ("adequate procedures") to avert such offenses.

According to Section 34A, if a commercial organisation commits an offence, any director, public officer, or individual involved in its management at the time is deemed to have committed that offence. The burden is on the organisation and its leadership to demonstrate that they have established "adequate procedures" to prevent corrupt actions by associated individuals.

Essential measures include strong commitment from leadership, assessment and management of corruption risks, monitoring and enforcement of internal policies and procedures, and training and communication with both internal and external stakeholders. Those responsible for integrity and compliance play a vital role in safeguarding shareholder interests by establishing anti-corruption objectives and strategies, ensuring regulatory compliance, endorsing relevant policies, and overseeing activities related to these policies and procedures.

Today, the roles of directors, public officers, senior management, and those in charge of integrity and compliance have expanded, necessitating a keen attention to detail and expertise in identifying and managing key corruption risks. This involves driving the organisation's compliance function, establishing clear lines of authority and reporting, setting anti-corruption goals, allocating resources to meet these objectives, communicating efforts to mitigate identified corruption risks, maintaining an accessible whistleblower hotline, and systematically reviewing audit findings on the effectiveness of the organisation's anti-corruption systems.

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