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Corporate Governance

## **Corporate Liability is not Shelved – Adequate Procedures More Crucial Than Ever in the Face of COVID-19 Corruption and Fraud Risks**

COVID-19 has forced businesses into survival mode, especially with restrictions on how businesses can operate during the Conditional Movement Control Order and, before this, the Movement Control Order (collectively, the “MCO”) period. From shifting to new methods of transacting to partnering with new business associates, businesses have had to change the way they operate to stay in the black. Post-MCO, businesses will clamber to make up for lost time and revenue. It is tempting to assume compliance responsibilities can take a back seat during such trying times, but companies cannot fall victim to this fallacy.

In light of Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (“MACCA”) coming into effect on 1 June 2020, this client update highlights the risks of corruption exacerbated by COVID-19 which companies need to be aware of, and offers some suggestions of practical adequate procedures to implement.

### **Examples of Corruption and Fraud Risks Exacerbated by COVID-19**

#### **1) Cutting Red Tape to Meet Urgent Demands**

During the MCO period, businesses providing essential services have been pressed to meet urgent demands, and their compliance teams have been pushed to expedite “routine compliance functions” such as performing proper due diligence on counterparties, making sure anti-bribery declaration forms have been signed, codes of ethics have been read and understood, etc. Post-MCO, businesses (whether providing essential services or not) will be equally pressed to restart their businesses, from retail to recommencing construction work or manufacturing products to stay afloat or simply keep up with contractual obligations.

However, businesses should be mindful not to dispense with routine compliance functions as the temptation to take short cuts may be even greater now to secure quicker approvals. Compliance measures which cannot be performed at this point in time should be rescheduled to a later date as part of ongoing due diligence instead of simply dropping such measures altogether.

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**2) Government Bailouts**

Businesses in many sectors will require financial assistance, and some will qualify for the Government incentives which are geared to stimulate the economy. Some larger businesses in strategic sectors may even receive direct Government financial assistance and this in turn may mean being subject to greater direct or indirect political influence including, in certain cases, becoming state-owned companies.

While having public officials onboard or dealing with third parties who are public officials is not wrong *per se*, it is necessary to be cautious to avoid the situation or perception that public officials are using their official positions for the company's benefit or someone else's benefit. This means ensuring there are safeguards in place to detect conflicts of interest particularly when formalising transactions involving public officials.

**3) Partnering with New Business Associates**

In a similar rush to explore new opportunities or directions given the pandemic, businesses may be tempted to bypass necessary safeguards such as conducting background checks on new business associates or the source of funds to be injected by them, the viability of new business models, etc. By doing so, these companies may risk greater exposure to corruption risks, particularly when the counterparties are from higher risk countries or sectors.

Again, care needs to be taken to ensure sufficient pre-transaction checks are conducted to avoid inadvertently partnering or contracting with tainted stakeholders. Short term business gains generally do not outlast reputational or other damage caused by corruption.

**4) Furloughing Compliance Staff**

Companies looking to trim cost will likely reduce manpower and, often, employees not performing revenue-generating functions will be the first to go. Companies will need to re-examine their position if compliance personnel are on the chopping block as trimming from this segment of the business may have negative implications on anti-corruption control measures. This is because leaner compliance teams make it difficult to ensure there is a separation of functions to prevent conflicts of interests, in addition to having insufficient manpower to undertake daily compliance functions.

A workaround is to embrace technology and to increase transparency where different stages of compliance checks can be completed and viewed online by all the relevant stakeholders, and automating processes such as record keeping and monitoring payments and claims.

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### 5) Mergers & Acquisitions

Companies on the lookout for merger and acquisition opportunities need to be mindful of assuming pre-existing liabilities of the target company, which could include contingent liabilities relating to corruption risks and charges. It is essential therefore to ensure sufficient anti-bribery due diligence is conducted, and there is a halt to, and to the extent practicable a remedy for, non-compliant practices, before completion of the transaction. Where necessary, specific indemnities for corruption-related penalties that might be imposed on the target company post-completion must be negotiated for, price adjustments factored in for such contingencies, and changing the structure of the transaction to an asset acquisition as opposed to acquiring shares in the company should be considered.

## COVID-19 is Not a Defence to a Corporate Liability Charge

Section 17A of the MACCA attaches liability to a company where a person associated to it gives, offers or promises gratification to third parties for the benefit or advantage of the company. Directors and senior management of the company will automatically be implicated as well, unless they can prove they have met the requirements for a defence under Section 17A.

COVID-19 is not recognised as a defence to a corporate liability charge, even if it exacerbates the risk of corruption. The only defence is that adequate procedures have been put in place and implemented. For more information, read our previous update on the TRUST adequate procedures which can be [accessed here](#).

To drive home the message that anti-corruption measures cannot take a back seat, the Malaysian Anti-Corruption Commission (“**MACC**”) released a statement on 22 April 2020 stating it had received 286 tip-offs and 22 reports of corruption, abuse of power and embezzlement during the MCO period, and confirmed it will continue to conduct investigations during the MCO. The MACC also recently announced it will enforce the new provisions of Section 17A from 1 June 2020 onwards, notwithstanding the MCO or economic impact of COVID-19 on businesses.

## Some Vital Adequate Procedures to Maintain or Implement Now

Whilst many companies are struggling to stay afloat and find it challenging to meet the MCO operating requirements let alone the recommended standards of adequate procedures, it is crucial to have some measures in place rather than none at all. Leveraging on existing technological tools may be the way forward. Some examples we would propose are:

- (1) *Demonstrate Top-Down Commitment to Conduct Business Ethically*: C-suites to check in with employees through virtual meetings and to reinforce anti-corruption messages during these virtual sessions.

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- (2) *Maintain Open Channels of Communication with Stakeholders:* Continue to reinforce your businesses' stance against corruption via emails, virtual meetings and trainings, and updates through your website. Reminding your employees, partners, agents and clients that you take anti-corruption compliance seriously is equally as important as having the necessary policies and procedures in place.
- (3) *Train and Inspire:* Compliance trainings can be shifted online, through virtual trainings and online questionnaires. There are numerous applications available for free or at nominal cost, which will enable you to reach out effectively and consistently, including tracking attendance and performance. Businesses should use this opportunity to step up their compliance training programmes, as online tools make it more cost and time effective to undertake such training as compared to traditional physical training sessions.
- (4) *Online Whistleblowing Procedures:* Launch a whistleblowing channel online to allow whistleblowers to speak up with confidence and anonymity about corruption issues involving your company. Minimising or doing away with physical whistleblowing channels will reduce manpower, and allow for reports to be organised, filed, and stored electronically.
- (5) *Online Due Diligence on Counterparties:* Maintain the necessary due diligence standards to the extent practicable. Consider conducting online background checks and virtual interviews with counterparties. Do not dispense with these measures simply because physical documents or meetings are inconvenient to procure.
- (6) *Monitor and Review:* Continue to monitor and review financial transactions through online banking records and enterprise risk management systems, by working more closely with the internal audit and finance teams. Also monitor and review the effectiveness of the various initiatives implemented during the MCO period to assess whether there are gaps and improvements that can be adopted throughout the business.

Whilst the observations and recommendations above are not exhaustive, they provide an overview of the need to ensure that adequate procedures are in place, more so given the MCO and the impact of COVID-19 on the economy. Like all new initiatives, concerns will continue to surface as businesses and authorities alike try to adapt to a post-COVID-19 environment. However, as can be seen from the examples above, introducing adequate procedures is not impossible or difficult given the availability of technology. Compliance teams will also need to evolve to ensure businesses are able to meet both the legal requirements and the demands of the new normal. Please free to reach out to a member of our team who would be delighted to assist with any queries or concerns you may have.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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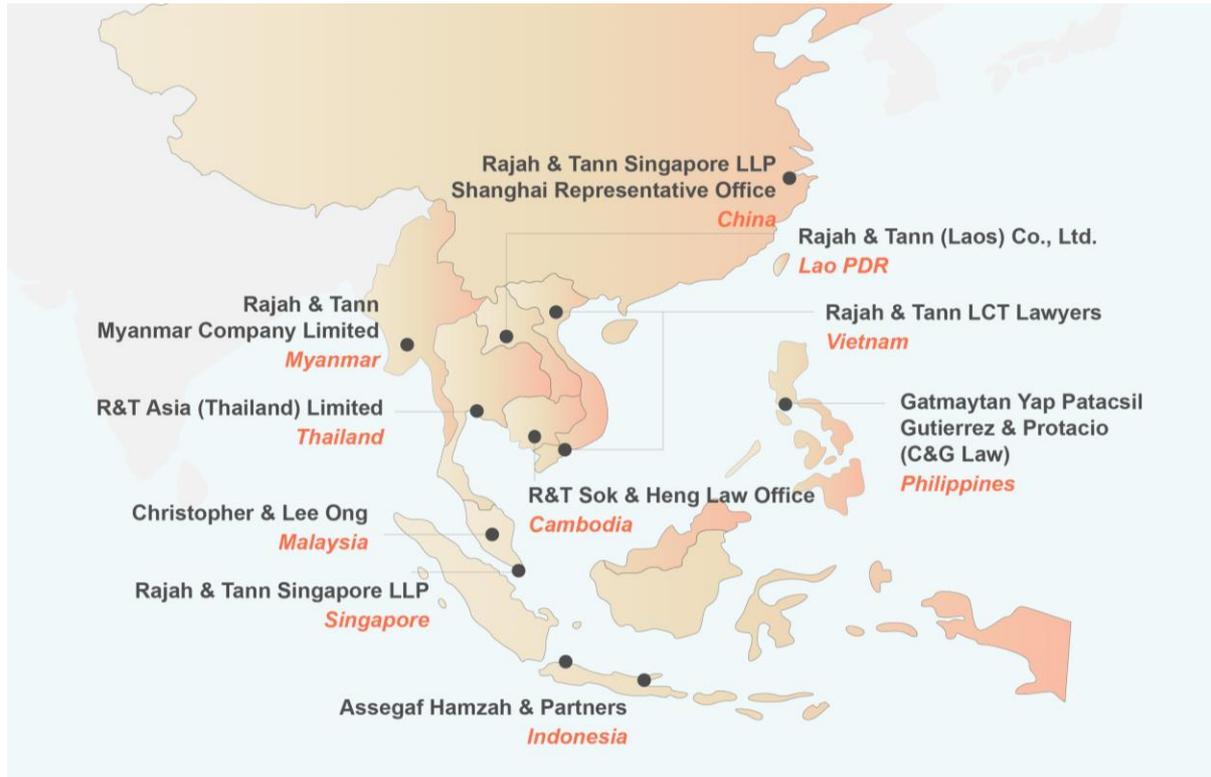
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