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BUSINESS UNITY SOUTH AFRICA

**Draft 2.4**  
**For comment**

# Corruption

An Anti-corruption Information Guide for Foreign Investors to South Africa  
...and local SA companies !



# An Anti-corruption Information Guide for Foreign Investors to South Africa

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**Produced on behalf of BUSA by the Ethics Institute of South Africa**



**Ethics Institute  
of South Africa**

*Writing and layout by Kris Dobie*

[www.ethicsa.org.za](http://www.ethicsa.org.za)

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***Disclaimer:** This guide is intended as overview information only, and should not be used as a comprehensive legal guideline. For business decisions you should get independent legal advice.*

Published  2009

## 1 Why we published this guide

When doing business in foreign countries it is often difficult to come to grips with all the legislative and regulatory requirements that need to be complied with. Over and above these formal components there is also the informal business culture – “*the way business is done*” – that needs to be considered.

This guide is intended to give more clarity on both the South African legislative framework and the informal business culture as it relates to corruption. The primary audience is the foreign investor, but the information contained herein would be equally informative to South African businesses needing more clarity on the subject.

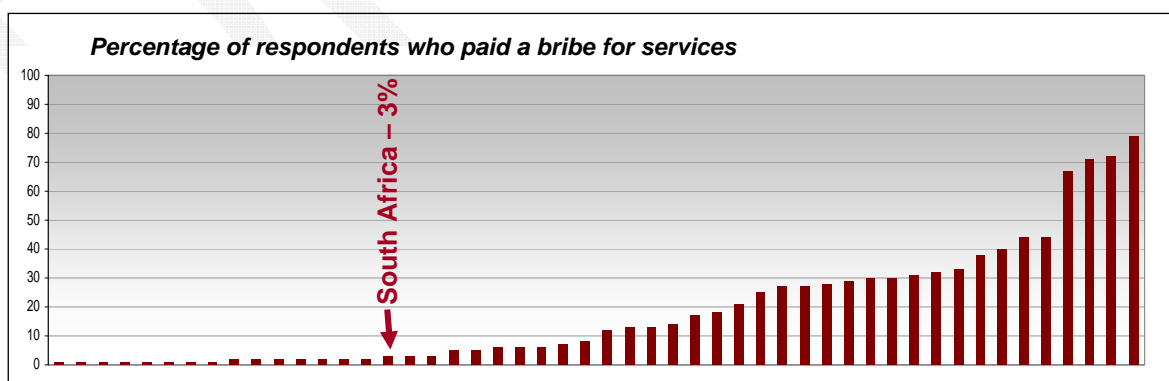
As Business Unity South Africa (BUSA) we aim to uphold a stable business environment in South Africa. We firmly believe that this can only be achieved through the promotion of ethical business practices and legal compliance. We have therefore developed this guide to help foreign investors to understand where the boundaries lie, how we do business, and how they can contribute in promoting an honest and transparent business culture in South Africa.

## 2 Is corruption a problem in South Africa?

### 2.1. What the independent assessments say

**Transparency International's Global Corruption Barometer** measures, among other things, the number of respondents who paid a bribe to obtain services (for example in the legal, tax, or police system, or for water or electricity).

In South Africa, this was only 3% of respondents, indicating that it is by far the norm to get services without any need for bribery.



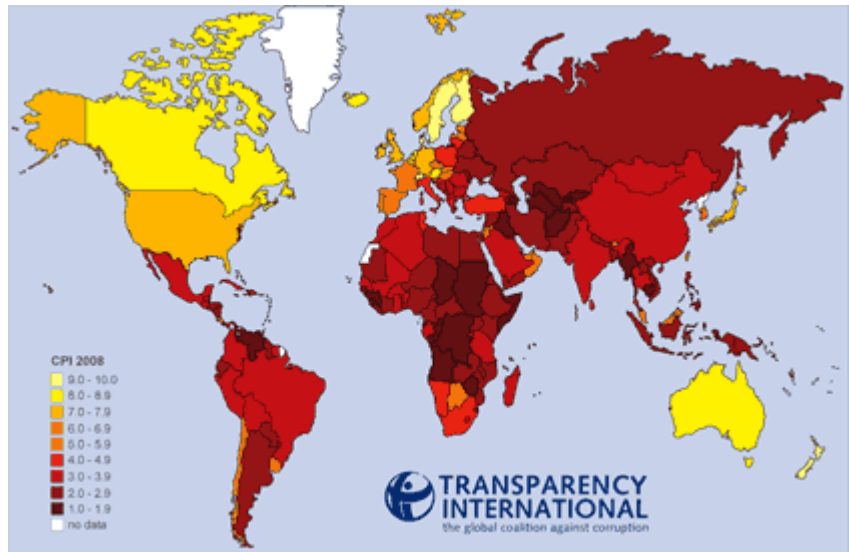
Source: Transparency International Global Corruption Barometer 2007 (the most current survey)

**Transparency International's Corruption Perception Index** gives an indication of international business people's perceptions of corruption in a country.

It ranks South Africa at number 54 out of 180 countries. On the African continent it is only Botswana that fares better, being placed in the 36<sup>th</sup> position.

While this indicates that there is definitely room for improvement, the rating could be due to a relatively small number

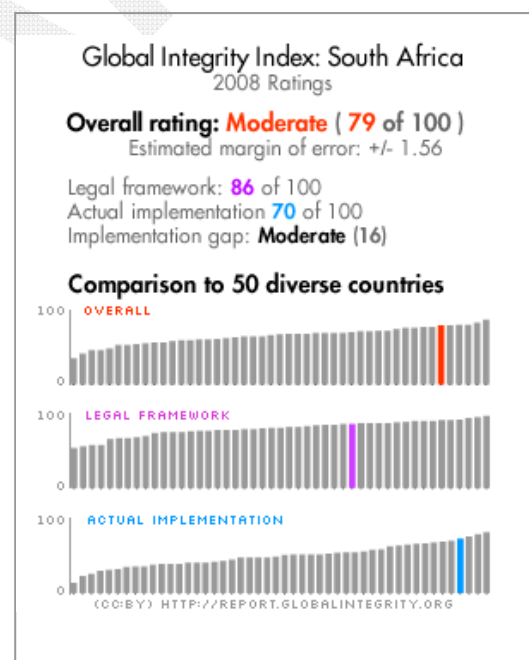
of high profile corruption scandals which have been extensively covered in the press over the past few years. On the positive side this could be an indication of the strength of investigative journalism in South Africa.



**Global Integrity** does not measure corruption, but the strength of the 'anti-corruption safeguards' in a country. Indicators are divided into 5 categories:

- Civil Society, Public Information and Media
- Elections
- Government Accountability
- Administration and Civil Service
- Oversight and Regulation
- Anti-Corruption and Rule of Law

In 2008 fifty-seven countries were assessed. South Africa received an overall rating of 79 out of 100 (which places it just outside the 'Strong' rating category).



**additional resources**

*It might be of interest to read the 'Reporter's Notebook' in the South Africa report. It gives a short overview of major corruption related events during the reporting period.*

- [www.globalintegrity.org](http://www.globalintegrity.org)

## 2.2. What we say

Many people still hold the perception that doing business in Africa requires some kind of 'greasing of the palms' and dubious business connections. In South Africa especially, this is not the case.

By far the greatest majority of business dealings happen above board. This does not mean that corruption does not take place, but it is most definitely the exception rather than the norm.

The **bottom line** is that, in South Africa, you can:

- Do business in the public and private sectors without paying unlawful 'commissions'.
- Get products through customs without 'greasing palms' of custom officials.
- Get through the necessary administrative red tape without having to pay 'facilitation payments'.

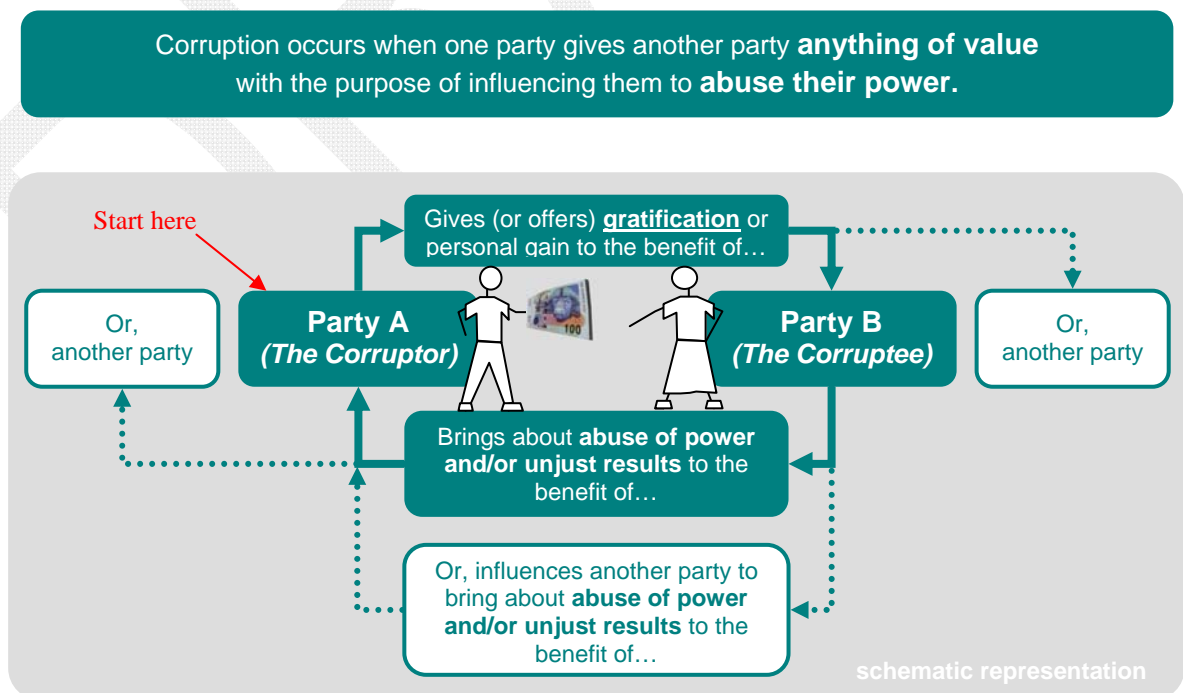
It is possible to do so, and most business is done within the law. Those who choose to pay bribes are in the minority. They do so for short term gains, but at huge reputational and legal risk.

## 3 Understanding the regulatory environment

### 3.1. Prevention and Combating of Corrupt Activities Act

In South Africa the crime of corruption is legislated through the relatively new Prevention and Combating of Corrupt Activities Act (No.12 of 2004).

In short it sets out corruption as follows:



The act also specifies that:

- If you or your business are found guilty of corruption involving contracts or tenders, your name can be put on the '**register for tender defaulters**' and no government department will be allowed to do business with you for between 5 and 10 years. This register will also be open to the public.
- 'Gratification' **does not have to be money**. It can also be gifts, entertainment, loans, employment, or any other benefit.
- You don't actually have to hand over any 'gratification'. If you **merely offer** a bribe you are already guilty of corruption. Of course, this works both ways – someone who simply asks for bribe is also guilty of corruption.
- If you are in a **position of authority** in a company (for example, being the CEO, company secretary, or a director), and you know (or should have known) of corruption, fraud, or extortion involving **more than R100 000** and don't report it, you are guilty of a crime in your **personal capacity**.
- The act also allows for **extraterritorial jurisdiction**. Among other things this means that, where corruption affects a South African entity, the perpetrator is found in South Africa, and the person is not extradited, they can also be charged for corruption in South Africa.

The one very important part of the Act which foreign companies should take note of is that **facilitation payments are a criminal offence in South Africa**.

*This is different to some other countries where these payments are allowed. The Act makes absolutely no distinction between facilitation payments and any other form of corruption.*

***Facilitation payments** are, according to the US Foreign Corrupt Practices Act, payments made to a "foreign official, political party, or party official" where the purpose is to "expedite or to secure the performance of a routine governmental action".*

### 3.2. Other South African Laws

The following laws also assist in the fight against corruption and associated crimes.

additional resources

South African laws can be downloaded at:

- [www.info.gov.za](http://www.info.gov.za)  
click on → documents → acts
- or, [www.acts.co.za](http://www.acts.co.za)

- **The Competition Act (No. 89 of 1998)**

This act legislates anti-competitive (or anti-trust) practices such as price fixing, market division, collusive tendering and abuse of a dominant market position.

The South African Competition Commission is very active and has a good track record with the uncovering of price-fixing cartels.

**additional resources**

*The Competition Act: A guide to prohibited practices* - published by the Competition Commission:

- [www.compcom.co.za](http://www.compcom.co.za)

click on →

media & publications

publications

brochures

- **Protected Disclosures Act (No. 26 of 2000)**

Protects whistle-blowers from suffering occupational detriment. If someone in your company blows the whistle on illegal or dangerous conduct in the organisation this act specifies what avenues they should follow and what protection they can get if they experience any retaliatory action from the company.

- **Promotion of Administrative Justice Act (No. 3 of 2000)**

This act specifies that, where government takes administrative action which affects someone's rights negatively they must (on demand) give written reasons explaining the rationale behind their action. If you lose a government tender and you believe corruption was involved this is one of the first tools you can use to get more information.

- **Prevention of Organised Crime Act (No. 121 of 1998)**

This act introduces “*measures to combat organised crime, money laundering and criminal gang activities*”, but also importantly provides for the forfeiture of assets gained from, or used in, criminal activity.

- **Companies Act (No. 61 of 1973)**

Deals with matters relating to companies such as registration, administration, regulation of securities, and financial reporting standards. It also deals with the registration of foreign companies doing business in South Africa.

**additional resources**

There is a new **Companies Bill** (B 61D of 2008) which will replace this Act. It will in all probability become effective sometime during 2010.

- <http://www.info.gov.za/view/DownloadFileAction?id=92510>

- **Public Finance Management Act (No. 1 of 1999) & the Municipal Finance Management Act (No. 56 of 2003)**

The PFMA and MFMA (as these acts are referred to) govern all aspects of public sector financial management, including the processes which need to be followed in procurement and supply chain.

### 3.3. *International legal instruments*

South Africa is a signatory to the following international legal instruments:

- United Nations (UN) Convention against Corruption,
- Organisation for Economic Co-operation and Development (OECD) Anti-bribery Convention,
- African Union (AU) Convention on Preventing and Combating Corruption, and
- Southern African Development Community (SADC) Protocol Against Corruption

By ratifying<sup>1</sup> these instruments the South African government has committed to implementing a range of anti-corruption interventions – most of which are already in existence.

**Of interest to foreign companies is that this also commits South Africa to international co-operation such as extradition, mutual legal assistance, and asset recovery.**

### 3.4. *Law enforcement agencies*

#### **South African Police Services (SAPS)**

Depending on its severity corruption cases will be investigated by:

- the normal branches of the SAPS;
- the SAPS Commercial Branch; or
- the soon to be formed Directorate for Priority Crime Investigation.

#### **National Prosecuting Authority**

##### ***Specialised Commercial Crimes Unit***

This unit works closely with the SAPS Commercial Branch. They were established to ensure specialised investigation and prosecution of complex commercial cases. Specialised Commercial Crimes Courts were also established to ensure a more efficient handling of these cases.

The SCCU has an average conviction rate of 95%.

##### ***The Asset Forfeiture Unit***

The AFU will attempt to recover assets through civil procedures where it can be proven that the assets were proceeds of crime. They have, since their inception in 2002, seized assets worth hundreds or millions of Rands. They have been very successful in the fight against organised crime.

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<sup>1</sup> South Africa has ratified all these instruments except the OECD Convention – which it acceded to in 2007.

## 4

## Understanding the business environment

### 4.1. Corporate governance in SA

South African listed companies have to adhere to world class standards of corporate governance. This is predominantly driven by the JSE listing requirements, the Companies Act, and the **King Report on Corporate Governance**.

The King Report has been recognised as a global benchmark in corporate governance standards since it was first launched in 1994. While not intended specifically as an anti-corruption tool, the report focuses on the ethical governance of organisations and deals with the management of ethics.

#### additional resources

*The draft of the third version of the King Report was launched early in 2009.*

- [www.iodsa.co.za](http://www.iodsa.co.za)

### 4.2. SA specific corruption risks

In terms of areas where corruption could take place South Africa is essentially like any other country.

The one difference in the business landscape is that South Africa needs to redress the economic imbalances of the past. To achieve this objective South Africa has introduced Black Economic Empowerment (BEE) legislation, charters and codes.

Foreign investors might find that they **need to partner with South African black-owned enterprises** in order to be more competitive in certain markets. The associated risk is that investors might inadvertently partner with companies owned by people who are connected to the organisations with which they want to trade. Media exposure of such conflicts of interest can cause significant damage to your reputation. It could also be seen as being criminally corrupt.

#### **Example:**

*Foreign Company A wishes to supply equipment to a South African state owned enterprise – Company X. Company X has indicated that it would prefer bidders who are BEE compliant. Foreign Company A finds a BEE business partner in Company Z. After the deal has gone through it emerges that Company Z is part-owned by the wife of the state owned enterprise's CEO. Whether it is the case or not, the external perception will always be that Foreign Company A chose the business partner to “buy” their illegal influence.*

When partnering with any South African company it would be a good idea to do a thorough due diligence check – specifically on Politically Exposed People (PEPs).

#### **What are Politically Exposed People?**

*A politically exposed person is anyone who has been active in the political arena at a high level, or holds high position in a state-run or -owned institution. It also includes close family members of such people. A politically exposed person is not by definition a bad business partner, but you have to ensure that there are no conflicts of interest or other business risks.*

Some companies, while not entering formal partnerships, might make use of ‘agents’ who know the business environment. A similar due diligence check should be done for these relationships.

In all cases it is a good idea to set specific parameters for ethical business conduct as part of the contractual negotiations.

### **4.3. Gifts and entertainment**

Entertainment, especially, is traditionally a part of the South African business environment. There is however increased awareness that this should not be excessive. Many companies are, with the growing focus on good governance, revisiting their approach to gifts and entertainment. Some even opt for an approach where no gifts or entertainment is allowed, and even at business lunches, each party will pay their own way. This indicates that business can be conducted without excessive entertainment.

In the business community there are very few cultural sensitivities around gifts. Declining a gift at a public forum might be seen as being insensitive, but in general, if it is explained that accepting gifts is not in line with company policy, it would be understood and respected.

In South African custom there is not a requirement to give gifts as there might be in some other countries.

#### **Government regulations pertaining to gifts**

Code of Conduct for the Public Service specifies that:

*“An employee does not use his or her official position to obtain private gifts or benefits for himself or herself during the performance of his or her official duties **nor does he or she accept any gifts or benefits** when offered as these may be construed as bribes”*

The Public Service Regulations specifies that a Member of the Senior Management Service should declare gifts received from anyone besides family members when:

*“..the value of gifts from a single source which cumulatively exceed the value of R350 in the relevant 12 month period.”*

## 5 What can we do as a foreign investor?

### 5.1. *Build an ethical business culture*<sup>2</sup>

The first focus of any organisation should be internal. Are all employees at all levels of the company clear on the company's policy on ethical business conduct? Are they sure what this means in practice? Do your company's practices make it possible for them to uphold the policy?

Here are a few guidelines on building an ethical business culture:

#### **i - Show leadership commitment**

Practically all the anti-corruption and business ethics literature agrees on one point – the need for a strong message from leadership that they are one hundred percent behind the programme. An anti-corruption programme cannot be seen by employees as merely another initiative of the compliance or legal unit without any serious support further up in the organisation.

#### **ii - Assess your corruption risks**

Each company's operations are different. Speak to front-line managers to determine what issues they face on a day-to-day basis. Open communication lines are essential as you can only respond to risks which you are aware of.

#### **iii - Codify**

Have a formal policy statement on how to deal with the risks that you have identified. This is often contained in a company's Code of Ethics. In some multi-national companies the situation on the ground may differ significantly from country to country and it may not be desirable to specify the detailed rules in the company Code. In such cases it might be preferable to have a broad policy statement in the Code of Ethics, and a specific set of detailed rules at country-level.

***“How do you make sure that leadership calls for anti-bribery trickle down through the whole company, down to the last employee on the ground in a different country thousands of miles away?”***

*John Sullivan,  
- The Moral Compass of Companies*

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<sup>2</sup> The approach set out here is broadly in line with what is proposed in the draft of the Third King Report on Corporate Governance.

#### iv - Integrate the policy into your business operations

Once the policy statement is in place and the rules are clear you have to ensure that it becomes part of your business practices. The following gives some pointers on what this could entail:

- Have a senior and respected executive in charge of the programme
- Train staff on the Code, and what to do in difficult situations
- Communicate your Code with business partners
- Perform due diligence on business partners
- Consider ethics management structures (such as ethics officers or champions)
- Provide an accessible, trusted and confidential ethics advice line
- Provide a safe whistle-blowing hotline
- Provide fair and effective investigative capacity
- Ensure strong and consistent disciplinary and legal action against perpetrators
- Communicate outcomes of disciplinary processes to staff members

It is easy for such programmes to become removed from the core business processes. Consider whether the practicalities of your operations support your anti-corruption stance. For example:

- Does your sales incentive scheme support or undermine your anti-corruption efforts?
- Do your business plans allow realistic timeframes for the necessary bureaucratic processes? Overly optimistic planning can cause a severe need to 'speed things up' at a later stage.

#### **Whistle-blowing**

*Remember that the Protected Disclosures Act provides for compensation to employees who blew the whistle on misconduct in your company and then faced occupational detriment. It is therefore good practice to ensure:*

- a) *that you have an anonymous hotline which employees are aware of, and*
- b) *that you have an enforced company policy guaranteeing that there will be no detriment to whistle-blowers.*

#### **Monitoring and reporting**

An anti-corruption, or ethics management programme should periodically be assessed for its effectiveness, just like any other management programme. Findings should be reported to relevant stakeholders to ensure transparency.

## 5.2. Consider collective action

Competitors sometimes co-operate in environments with a high risk for corruption. By collectively refusing to pay bribes they bring down the cost of business and level the playing field.

Collective action against corruption can be a long-term agreement, or it can relate to a specific contract. Where it relates to a contract, all parties interested in tendering can come together and sign a Code of Ethics stating they will not engage in illicit activities. It might even involve the client. An external observer could also be appointed to ensure the process is without incident.

### additional resources

For more information on using this strategy, see the World Bank Institute's handy guide: **"Fighting Corruption through Collective Action - A guide for business"**

- <http://info.worldbank.org/etools/antic/Guide.asp>

## 5.3. Report corruption

Where your staff are confronted with corrupt requests from people in the South African private and public sectors you should report this to their individual organisations. South African companies often have anonymous hotlines which could be used for this purpose.

You can report corruption anonymously to:

- **Crime Stop** – the South African Police Services' anonymous hotline
  - 08600 10111
  - Any corruption
- **The Public Service Anti-Corruption Hotline**
  - 0800 701 701
  - Public Sector Corruption
- **The South African Revenue Service's Anti-Corruption Hotline**
  - 0800 00 28 70
  - For any complaints related to corruption and extortion at ports or borders (for example - related to importing and exporting), or related to tax officials.

**Remember, if you are in a position of authority and know of corruption involving R100 000 or more, it is a crime not to report it to the police.**

*You will have to visit a branch of the South African Police Services to make this report.*

## 5.4. Support the BUSA Charter of Ethical Business Practice

BUSA has adopted a Charter of Ethical Business Practice. We appeal to all companies doing business in South Africa to adopt this Charter.

[www.busa.co.za/??](http://www.busa.co.za/??)

## Where to go for more information

### World Bank Institute – Business Fighting Corruption

[www.fightingcorruption.org](http://www.fightingcorruption.org)

This 'resource centre for business' gives information on the business case against corruption, resources for collective action, and a host of other resources such as information on specific **industry sectors** and links to detailed **country profiles**.

### Business Anti-corruption Portal

[www.business-anti-corruption.com](http://www.business-anti-corruption.com)

This site provides resources such as an integrity system guide, due diligence tools, and background to the international legal environment.

### South African National Anti-Corruption Forum

[www.nacf.org](http://www.nacf.org)

The National Anti-Corruption Forum (NACF) is a joint initiative including government, business and civil society. Here you will find more information on South African initiatives against corruption.

### Transparency International

[www.transparency.org](http://www.transparency.org)

The '*TI Business Principles for Countering Bribery Guidance Document*' and the '*TI Six Step Implementation Process*' give more detailed guidance on preventing corruption in your company.