



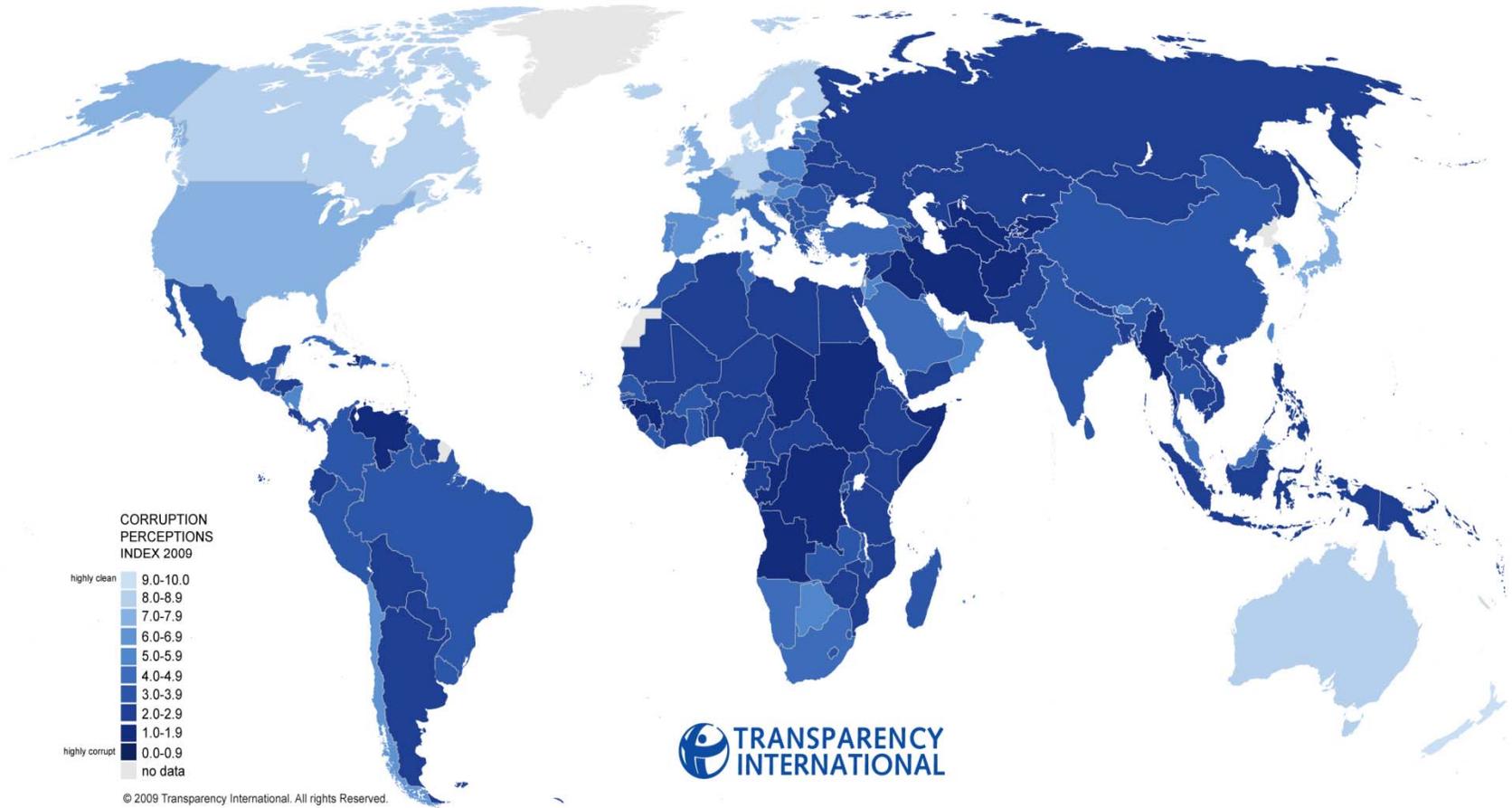
# Understanding the UK Bribery Act 2010: Extraterritorial Reach of the Act

12 October 2010

Presented by Patrick Gilfillan, Senior Associate, McGuireWoods London LLP

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## Key Offences

- Offences of bribing another person (s.1)
- Offences of being bribed (s.2)
- Bribery of Foreign Public Officials (s.6)
- Corporate offence of failing to prevent bribery (s.7)
- Individual offence by a senior officer in a company of conniving or consenting to the company bribing or receiving a bribe (s.14)

## Bribing another person (s.1)

It is an offence to **offer, promise or give** a **financial or other advantage** to another person with the intention of:

- Inducing a person **to perform improperly** a **relevant function or activity**; or
- Rewarding a person for the **improper performance** of a **relevant function or activity**.

## Being bribed (s.2)

It is an offence to **request, agree to accept or to accept** a **financial or other advantage** in return for the **improper performance** of a **relevant function or activity**.

## Bribing or being bribed – key points

- Offences apply to both the **private and public** sectors.
- Offences can be committed either **directly or indirectly** (i.e. through a third party).
- Bribery Act applies even if the relevant function or activity is **performed outside the UK**.

## Bribing a Foreign Public Official (s.6)

A Foreign Public Official (“FPO”) is an individual who:

- holds a legislative, administrative or judicial position of any kind outside the UK; or who
- exercises a public function for a foreign country or for any public agency or public enterprise of that country; or who
- is an official agent of a public international organisation.

## Bribing an FPO (s.6)

It is an offence for a person to intend to influence an FPO by **offering, promising or giving** any **financial or other advantage**:

- to an FPO; or
- to another person at an FPO's request or with an FPO's assent or acquiescence, in order **to obtain or retain business or an advantage in the conduct of business.**

## Failing to prevent bribery (s.7)

A **relevant commercial organisation** is guilty of an offence if **a person associated** with the organisation bribes another person with the intention of either:

- Obtaining or retaining business for the organisation; or
- Obtaining or retaining an advantage in the conduct of business for the organisation

# Relevant commercial organisation

A **relevant commercial organisation** is defined as either:

- A body corporate or partnership **incorporated or formed in the UK** and which **carries on a business**; or
- A body corporate or partnership **incorporated or formed outside the UK** which **carries on a business**, or part of a business, in any part of the UK.

# Associated person

A person is associated with an organisation if that person performs services for or on behalf of the organisation, e.g. employee, agent, subsidiary, joint venture partner.

## Adequate procedures (s.7(2))

It is a defence if the relevant commercial organisation can show that it has put in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking corrupt activities.

## Liability of senior officers (s.14)

Where an offence is committed under ss.1, 2 or 6 **by a company**, then:

➤ A **senior officer** of the company will be **personally liable** for the offence under ss.1, 2 or 6 if they are found to have **connived in or consented to** the offence and they have a **close connection with the UK**.

# Penalties

- Individual – an unlimited fine and/or imprisonment for up to 10 years.
- Other “person” (e.g. a company) – an unlimited fine.
- Public Procurement Directive, Art. 45 – exclusion from participation in public contracts.

## Extraterritoriality (ss.1,2 and 6)

Offences under sections 1, 2 and 6 are committed if:

- any element of the offence has been **committed in the UK**; or
- no element of the offence has been committed in the UK, but **the offender has a close connection with the UK**, for instance they are a British citizen, an individual ordinarily resident in the UK, a body incorporated under the laws of the UK.

## Extraterritoriality (s.7)

Offences under s.7 are committed if:

- the organisation **is incorporated or formed in the UK**; or
- the organisation **carries out some of its business in the UK**; and
- The offence is committed by an **associated person**, irrespective of whether the relevant acts or omissions are committed in or outside the UK.



# US Perspective: Drawing on the FCPA Experience to Build an Effective Approach to the Bribery Act 2010

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Presented by Patrick Rowan, Partner, McGuireWoods LLP – Washington, D.C.

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# FCPA Enforcement Trends

## More Cases, Larger Penalties

- Sharp rise in prosecutions – 26 cases in 2009
- Corporate Penalties Increasing
  - Siemens AG, 2008 (\$1.6 billion)
  - KBR-Halliburton, 2009 (\$579 million)
  - Daimler AG, 2010 (\$185 million)
- DOJ: 150 open FCPA investigations
- Increase in resources at DOJ, SEC, and FBI

## FCPA Enforcement Trends (cont'd)

- Increased Focus on Individual Violators
  - DOJ pursuing prosecutions and prison sentences for executives in order to produce greater deterrence
    - In April, 2010, Charles Jument received 87 months in prison for bribing Panamanian officials to secure maritime contracts
  - Government Employing Aggressive Theories
    - In July, 2009, Frederic Bourke convicted of violating FCPA and lying to FBI; prosecution theory was that Bourke, an investor, knew or consciously avoided knowing about a scheme to bribe Azerbaijani officials
    - In July, 2009, current and former CEO of Nature's Sunshine Products agreed to pay \$25,000 civil penalty to SEC because they failed to properly supervise Brazilian subsidiary that made improper payments

## FCPA Enforcement Trends (cont'd)

- More Proactive Enforcement Efforts
  - DOJ officials have touted “new chapter in white collar criminal enforcement”
  - January, 2010 sting operation involving fictitious minister of defense of foreign country nabbed 22 defendants
- Focusing on Industries with a History of Problems
  - Oil for Food; Oil and Gas; Pharmaceuticals; Military and Law Enforcement Equipment

## FCPA Enforcement Trends (cont'd)

- Greater International Coordination and Cooperation
  - Siemens case started in Germany
  - BAE and Innospec recently pursued by DOJ and SFO
  - January 2010 sting case involved simultaneous execution of seven search warrants by City of London police
  - DOJ officials have commented on their close relationship with SFO

# DOJ Compliance Guidance

- In addition to lessons learned from prosecutions and settlement agreements, DOJ issues advisory opinions that provide a presumption of compliance
- DOJ's Principles of Federal Prosecution of Business Organizations require prosecutors to consider "existence and effectiveness of corporation's pre-existing compliance program"
- US Sentencing Guidelines (USSG) for corporations list the actions that are "minimally required" for an effective compliance program

# USSG Core Elements of FCPA Compliance Program

- Written policies and procedures
- Oversight by responsible personnel with direct access to top management
- Internal controls designed to prevent and detect improper payments
- Personnel training
- Measures to reward good conduct and punish bad conduct
- Reasonable steps to ensure program is being followed

## US FCPA vs. UK Bribery Act

- FCPA focuses exclusively on foreign government officials; Bribery Act includes commercial bribery
- FCPA requires business nexus; Bribery Act's general offences require attempt to induce improper action betraying position of trust
- FCPA permits facilitation or grease payments; Bribery Act does not

## US FCPA vs. UK Bribery Act (cont'd)

- FCPA accounting provisions carry risk of criminal liability for failure to maintain adequate internal controls; Bribery Act's "failing to prevent bribery" offence (s.7) is potentially much broader
- FCPA provides an affirmative defense for payments that are bona fide business expenditures; Bribery Act does not

# UNDERSTANDING THE UK BRIBERY ACT 2010 THE NORDIC PERSPECTIVE

## Adequate Procedures

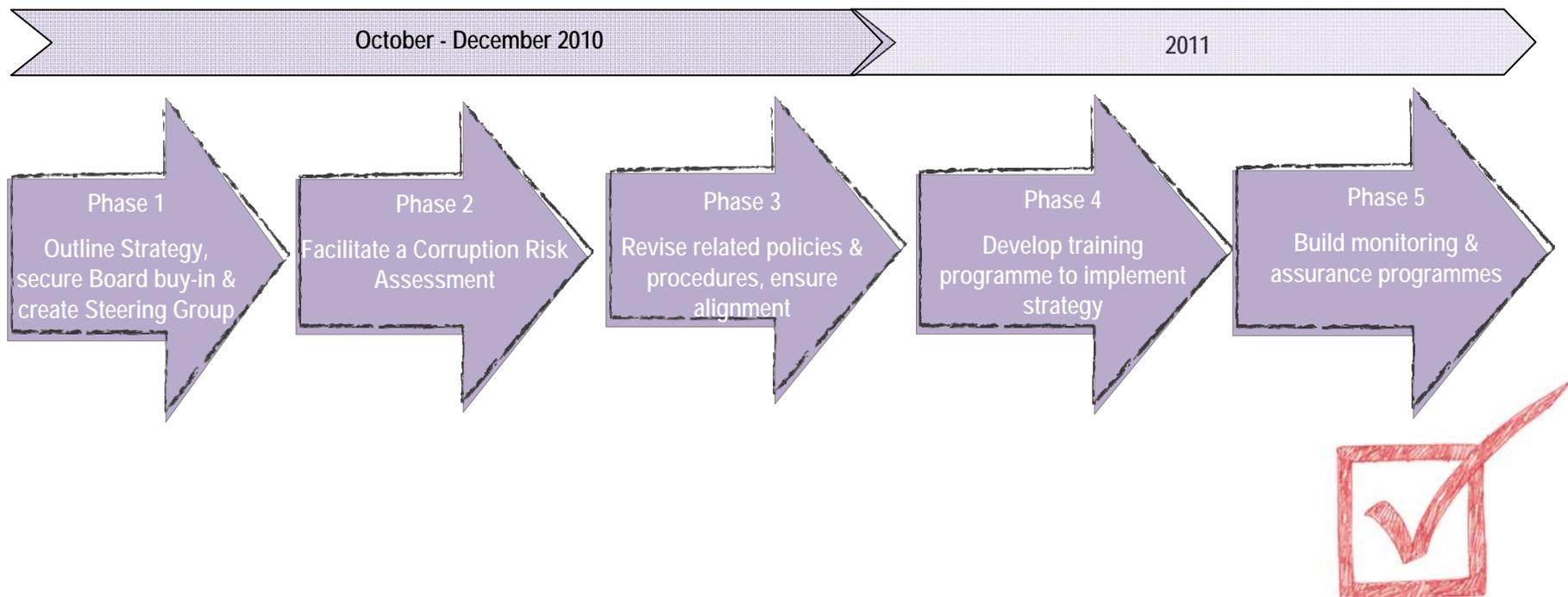
London 12 October 2010

Presented by: **Sterl Greenhalgh**  
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## Phased Approach

Our suggested approach has five phases

In acknowledging the challenges of embedding an anti-corruption strategy we have devised a phased approach:



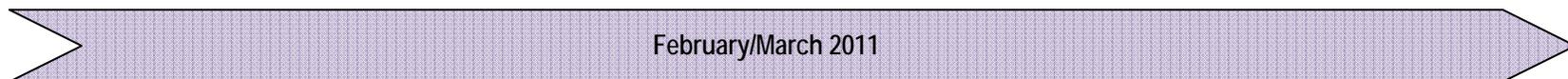
## Phase 2- Corruption risk assessment

### Corruption risk assessment

The diagram set out below illustrates a recommended approach to facilitating a Corruption Risk Assessment (CRA):



Key Phase 2

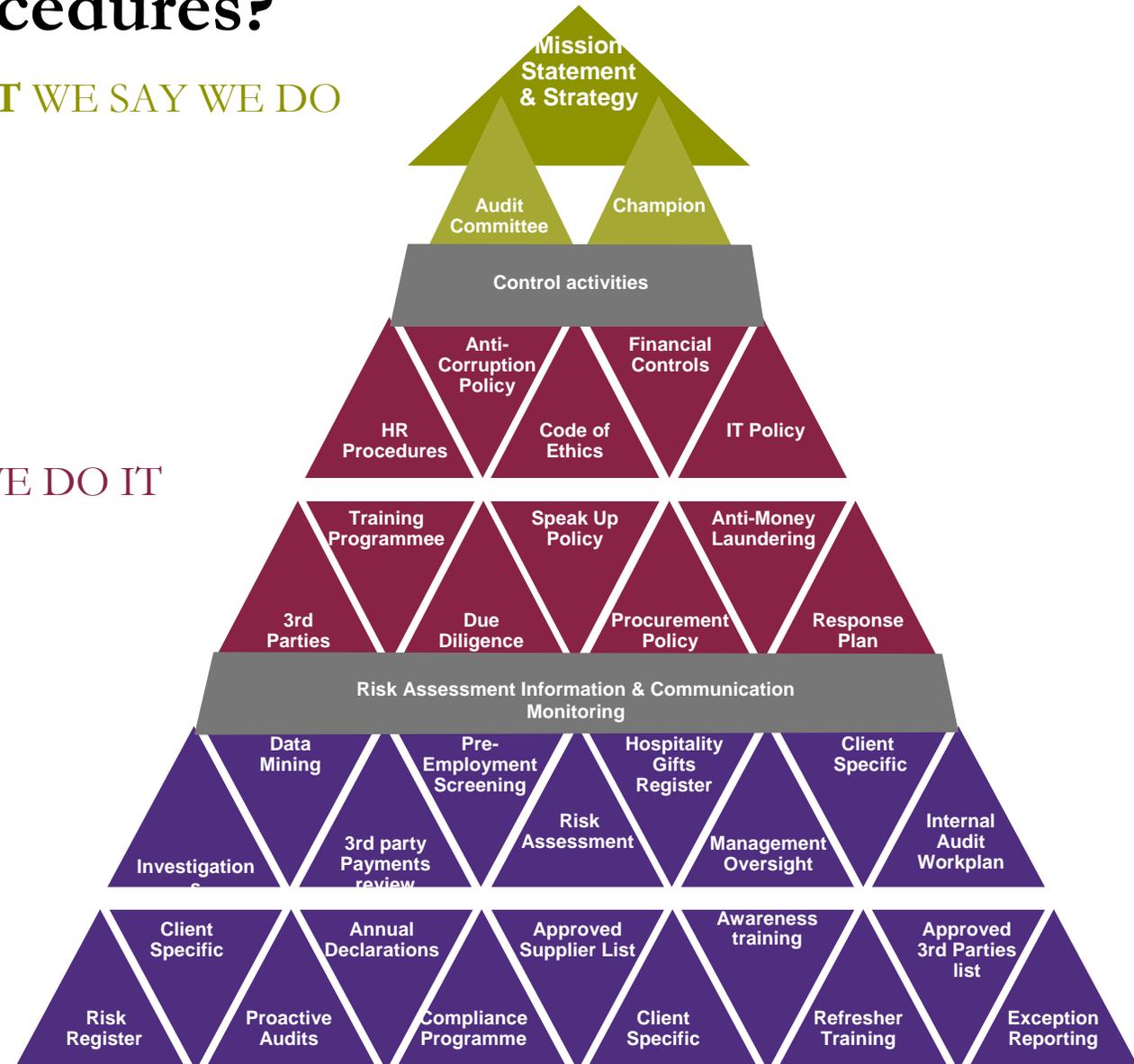


# The Ethical Triangle: Adequate Procedures?

WHAT WE SAY WE DO

HOW WE DO IT

ENSURING WE DO IT



## Corruption risk assessment - Aspects to Consider

- strategic: country presence
- operations: bribing including facilitation payments
- sector risks: government contracts
- activities: gifts, hospitality, travel, sponsorship & donations
- 3rd party: use of agents, brokers & intermediaries
- geographical



- higher risk territories
- government interaction
- quality of emerging markets accounting environment

## Corruption risk assessment: Territory Risk - TI Corruption Perception

	Rank	Score
<b>New Zealand</b>	<b>1</b>	<b>9.4</b>
<b>Denmark</b>	<b>2</b>	<b>9.3</b>
<b>Sweden</b>	<b>3*</b>	<b>9.2</b>
<b>Finland</b>	<b>6*</b>	<b>8.9</b>
<b>Norway</b>	<b>11</b>	<b>8.6</b>
<b>Germany</b>	<b>14*</b>	<b>8.0</b>
<b>UK</b>	<b>17*</b>	<b>7.7</b>
<b>USA</b>	<b>19</b>	<b>7.5</b>
<b>France</b>	<b>24</b>	<b>6.9</b>
<b>Czech Rep</b>	<b>52*</b>	<b>4.9</b>
<b>Italy</b>	<b>63*</b>	<b>4.3</b>

	Rank	Score
<b>Ghana</b>	<b>69*</b>	<b>3.9</b>
<b>China</b>	<b>79*</b>	<b>3.6</b>
<b>India</b>	<b>84*</b>	<b>3.4</b>
<b>Mexico</b>	<b>89*</b>	<b>3.3</b>
<b>Argentina</b>	<b>106*</b>	<b>2.9</b>
<b>Vietnam</b>	<b>120*</b>	<b>2.7</b>
<b>Nigeria</b>	<b>130*</b>	<b>2.5</b>
<b>Bangladesh</b>	<b>139*</b>	<b>2.4</b>
<b>Russia</b>	<b>146*</b>	<b>2.2</b>
<b>Venezuela</b>	<b>162*</b>	<b>1.9</b>
<b>Iraq</b>	<b>176*</b>	<b>1.5</b>

## Adequate Procedures: External Sources

- **OECD: Good Practice Guidance on Internal Controls, Ethics, and Compliance**
- **Serious Fraud Office**
- **FSA: Commercial Insurance Broking report**
- **Transparency International**
- **Global Infrastructure Anti-Corruption Centre**
- **Sectors: Extractive Industries (EITI)**
- **World Economic Forum: PACI**
- **World Bank Institute [www.fightingcorruption.org](http://www.fightingcorruption.org)**

## Questions or Comments?

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