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Promise of Integrity

MACC SEMINAR

New amendment to the MACC Act 2009 (2018)

29 July 2019, Intel PG9



SPEAKER



Mr Westmoreland Anak Ajom

Assistant Commissioner, Financial Analysis Division
Malaysian Anti-Corruption Commission (MACC) Putrajaya.

Westmoreland has over 20 years' experience in MACC (including Financial Investigation and Community Education) and currently specializes in Forensic Investigation. He has investigated several high profile cases and public interest cases. Prior to MACC, he spent 10 years in the private sector as an Internal Auditor in a hotel, and in the field of Credit Control (Ambank).

He has a Master in Forensic Accounting & Financial Criminology (MARA University of Technology, Malaysia) and is a Certified Fraud Examiner (USA). He completed the Financial Investigation Program by The Central Bank and studied the PEACE Model Interviewing Technique (UK). He also studied Fraud and Public Corruption Investigation Course (International Law Enforcement Academy ILEA, FBI Thailand), Command Course (Hong Kong) and 21ST UNAFEI UNCAC Training Programme (Japan).


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PROMISE OF

INTEGRITY

Promise of Integrity MACC Seminar, 29 July 2019, Intel PG9

PRESENTATION

New amendment to the MACC Act 2009 (2018)

by Mr Westmoreland Anak Ajom

Assistant Commissioner, Financial Analysis Division

Malaysian Anti-Corruption Commission (MACC) Putrajaya



MALAYSIAN ANTI-CORRUPTION COMMISSION
ACT 2009



OFFENCES & PENALTIES

SECTION 16 – OFFENCE OF ACCEPTING GRATIFICATION

**SECTION 17 – OFFENCE OF GIVING OR ACCEPTING
GRATIFICATION BY AGENT**

**SECTION 18 – OFFENCE OF INTENDING TO DECEIVE PRINCIPAL BY
AGENT**

**SECTION 23 – OFFENCE OF USING OFFICE OR POSITION FOR
GRATIFICATION**

SECTION 24 – PENALTY FOR OFFENCES



LAWS OF MALAYSIA

Act 694

**MALAYSIAN ANTI-CORRUPTION COMMISSION
ACT 2009**



**MALAYSIAN ANTI-CORRUPTION COMMISSION
(AMENDMENT) ACT 2018**



INTRODUCTION

Malaysian Anti-Corruption Commission (Amendment) Act 2018 [Act A1567] has been tabled in the Parliament of Malaysia, and passed as follows:

- Dewan Rakyat (House of Representatives) on 04 April 2018.
- Dewan Negara (Senate) on 05 April 2018.

A new **Section 17A – Offence By Commercial Organization** has been added to the Act, and will have the force of law once the Government announce a date for the new section come into force.



LAWS OF MALAYSIA

Act A1567

MALAYSIAN ANTI-CORRUPTION COMMISSION
(AMENDMENT) ACT 2018



Corporate Liability & Adequate Procedures

OBJECTIVES

The **aim** of this new section is **to foster the growth of a business environment that is free of corruption**, and **to encourage** all commercial organizations to take the **reasonable and proportionate measures** to ensure their businesses **do not participate in corrupt activities** for their advantage or benefit.

Two years grace period (expected until June 2020) has been given to the commercial organizations to equip themselves with **Adequate Procedures**.

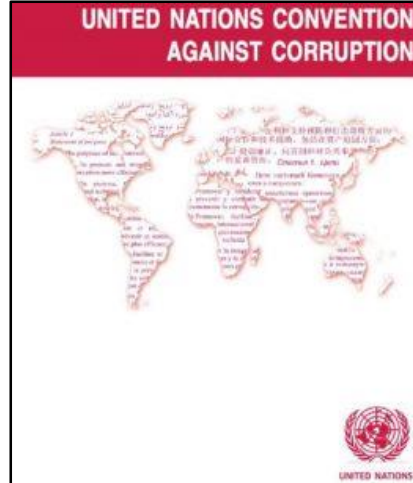




INTERNATIONAL RESPONSIBILITY

United Nations Convention Against Corruption (UNCAC) :

- Article 26 – Liability of Legal Persons.



Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) :

- Chapter 26 – Transparency & Anti-Corruption.

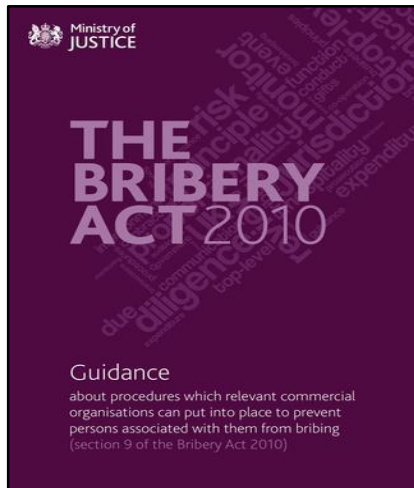




REFERENCE

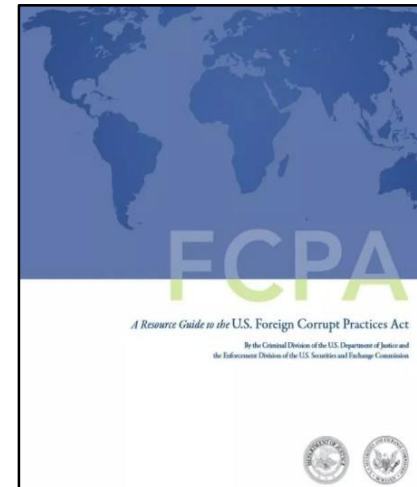
UK Bribery Act 2010 :

- Section 7 – Failure of Commercial Organizations to Prevent Bribery.



Foreign Corrupt Practices Act of 1997 (FCPA) :

- 15 U.S. Code § 78dd–1. – Prohibited Foreign Trade Practices by Issuers.





SECTION 17A

OFFENCE BY COMMERCIAL ORGANIZATION



SUB-SECTION 17A (1) – *OFFENCE*

A commercial organization commits an **offence** if a **person associated** with the **commercial organization** corruptly **gives, agrees to give, promises or offers** to any person any **gratification** whether for the benefit of that person or another person with intent –

- (a) to obtain or retain business for the commercial organization; or
- (b) to obtain or retain an advantage in the conduct of business for the commercial organization.



Under table money ?

Projects or benefits ?



SUB-SECTION 17A (2) – *PENALTY*

Any commercial organization who commits an offence under this section shall on conviction be liable to a **fine** not less than **ten times the sum or value** of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is to of pecuniary nature, or **one million ringgit**, whichever is the higher, or to **imprisonment** for a term not exceeding **twenty years** or to **both**.

10x
or **RM1.0 million fine**

OR



**20 years
imprisonment**

OR BOTH



SUB-SECTION 17A (3) – *PRESUMPTION*

Where an offence is committed by a commercial organization, a person –

- (a) who is its director, controller, officer or partners; or
- (b) who is concerned in the management of its affairs,

at the time of the commission of the offence, is deemed to have committed that offence unless that person proves that the **offence was committed without his consent or connivance** and that **he exercised due diligence to prevent the commission of the offence** as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.



Corporate Liability & Adequate Procedures

SUB-SECTION 17A (4) – PREVENTIONS

If a commercial organization is charged for the offence referred to in subsection (1), it is a defence for the commercial organization **to prove** that the commercial organization had in place **adequate procedures** to prevent persons associated with the commercial organization from undertaking such conduct.



Adequate Procedures

AND



Execute & Monitor



Corporate Liability & Adequate Procedures

SUB-SECTION 17A (5) – *GUIDELINES*

The Minister shall issue **guidelines** relating to the **procedures** mentioned in subsection (4).



Adequate Procedures

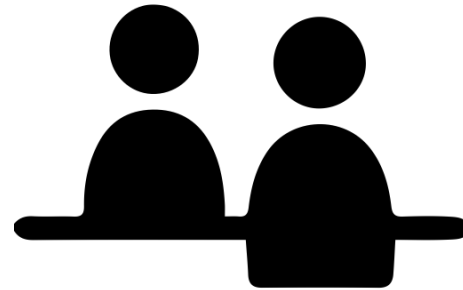


SUB-SECTION 17A (6) – *PERSON ASSOCIATED*

For the purposes of this section, a person is associated with a commercial organization if he is a **director**, **partner** or an **employee** of the commercial organization or he is a **person who performs services for or on behalf of the commercial organization.**



Director / Partner / Employee

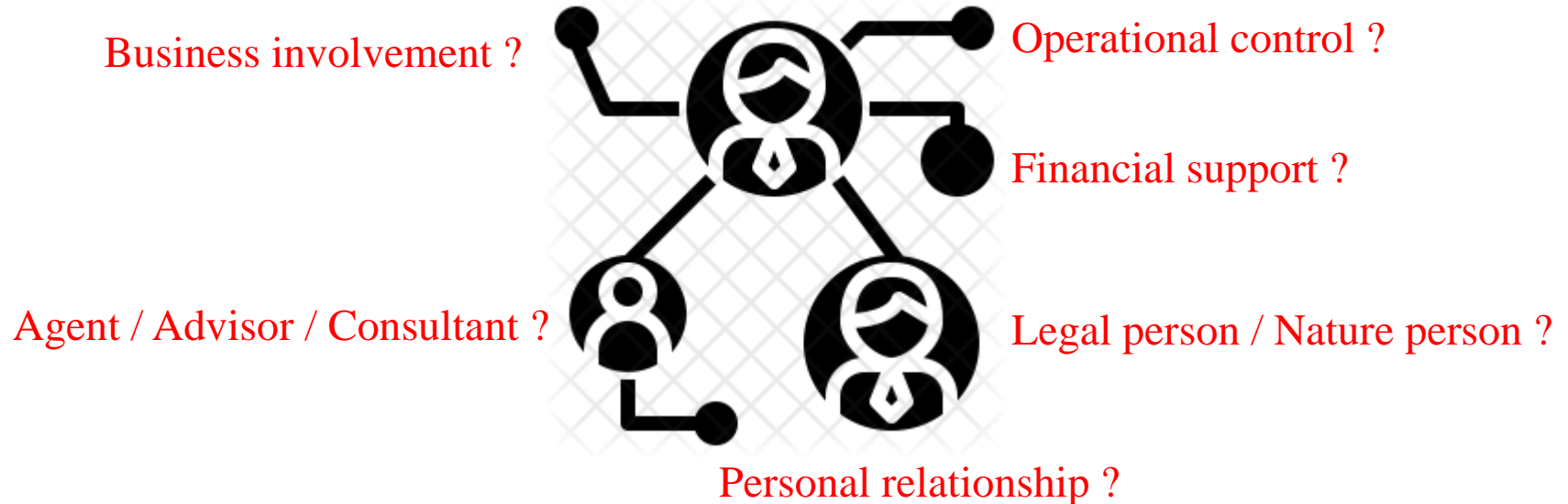


**Person who performs services
for or on behalf –
Contractor / Vendor / Supplier / Agent etc**



SUB-SECTION 17A (7) – *QUESTION OF FACTS*

The question whether or not a **person performs services for or on behalf** of the commercial organization shall be **determined by reference to all the relevant circumstances** and not merely by reference to the nature of the relationships between him and the commercial organization.





SUB-SECTION 17A (8) – *COMMERCIAL ORGANIZATION*

For the purposes of this section, “commercial organization” means –

- (a) a **company incorporated** under the **Companies Act 2016** [Act 777] and carries on a **business in Malaysia or elsewhere**; (*e.g. Sdn Bhd, Berhad*)
- (b) a **company wherever incorporated** and carries on a **business or part of a business in Malaysia**;
- (c) a **partnership** – (*e.g. & Co, & Partners*)
 - (i) under the **Partnership Act 1961** [Act 135] and carries on a **business in Malaysia or elsewhere**; or
 - (ii) Which is a limited liability partnership registered under the **Limited Liability Partnership Act 2012** [Act 743] and carries on a **business in Malaysia or elsewhere**; or
- (d) a **partnership wherever formed** and carries on a **business or part of a business in Malaysia**.



SECTION 66

LIABILITY FOR OFFENCES OUTSIDE MALAYSIA



SUB-SECTION 66 (1) – *OFFENCES OUTSIDE MALAYSIA*

The provisions of this Act shall, in relation to **citizens and permanent residents of Malaysia**, have effect outside as well as within Malaysia, and when an **offence** under this Act is **committed** in any place **outside Malaysia** by any citizen or permanent resident, he may be dealt with in respect of such **offence** as if it was **committed** at any place **within Malaysia**.



**OUTSIDE Malaysia
= INSIDE Malaysia**





Read Together With

Section 3

Interpretation Acts 1948 and 1967

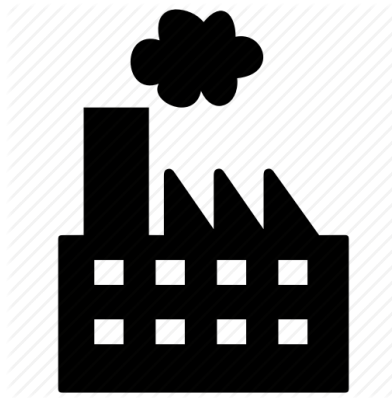
INTERPRETATION OF PERSON



SECTION 3 – DEFINITIONS

The following words and expressions have the meanings hereby respectively assigned to them, that is to say –

“**person**” include a body of **persons, corporate** or **unincorporated**.





Read Together With

Section 2 and Section 210
Companies Act 2016

INTERPRETATION OF DIRECTOR



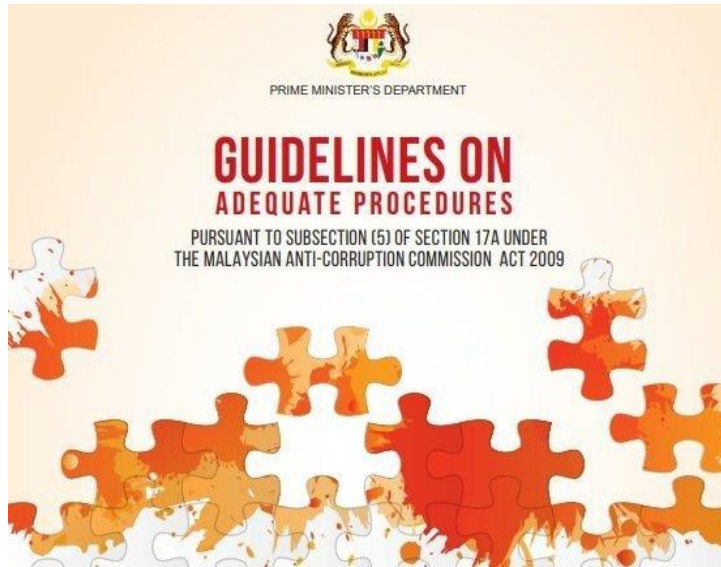
SECTION 2 – *INTERPRETATION*

In this Act, unless the context otherwise requires –

“**director**” includes **any person occupying the position of director of a corporation** by whether name called and includes a person in accordance with those directions or instructions the majority of a directors of a corporation are accustomed to act and an alternate or substitute director.

SECTION 210 – *INTERPRETATION*

For the purposes of this Subdivision, in sections 213, 214, 215, 216, 217, 218, 223 and 228, in addition to the definition of “director” in section 2, “**director**” includes **chief executive officer, chief financial officer, chief operating officer or any other person primarily responsible for the management of the company.**



Pursuant To

Section 17A

Malaysian Anti-Corruption Commission (Amendment) Act 2018

GUIDELINES ON ADEQUATE PROCEDURES



OBJECTIVES

The objective of these guidelines is to **assist commercial organizations** in understanding what are the **adequate procedures** that should be **implemented to prevent** the occurrence of **corrupt practices** in relation to their business activities.

These guidelines have been formed on the basis of **five principles** which may be used as reference points for any anti-corruption policies, procedures and controls the **organization may choose to implement** towards the goal of having **adequate procedures** as required under the above **statutory provision**.

The guidelines are designed to be principles-based and for general application by any commercial organization of any size and industry.

This guidelines are not intended to be prescriptive and it should not be assumed that “one-size-fits-all”. They should be applied practically, in proportion to the scale, nature, industry, risk and complexity of the organization.



Corporate Liability & Adequate Procedures

ADEQUATE PROCEDURES PRINCIPLES : T.R.U.S.T.

Principle I : **T**op Level Commitment

Principle II : **R**isk Assessment

Principle III : **U**ndertake Control Measures

Principle IV : **S**ystematic Review, Monitoring & Enforcement

Principle V : **T**raining & Communication





I : TOP LEVEL COMMITMENT

Top level management is primarily responsible for ensuring that the commercial organization:

- (i) practices** the highest level of **integrity and ethics**;
- (ii) complies** fully with the applicable **laws and regulatory** requirements on **anti-corruption**;
- (iii) effectively manages** the **key corruption risks** of the organization.

Commercial organizations should carry out the following:

- (i) establish, maintain, and periodically review** an anti-corruption compliance program which includes clear policies and objectives that adequately address corruption risks;



Corporate Liability & Adequate Procedures

- (iii) issue instructions on communicating the organizations' policies and commitments on anti-corruption to both internal and external parties;
- (iv) encourage the use of any reporting (whistleblowing) channel in relation to any suspected and/or real corruption incidents or inadequacies in the anti-corruption compliance program;
- (v) assign and adequately resource a competent person or function (which may be external to the organization) to be responsible for all anti-corruption compliance matters, including provision of advise and guidance to personnel and business associates in relation to the corruption program;
- (vi) ensure that the lines of authority for personnel tasked with responsibility for overseeing the anti-corruption compliance program are appropriate; and
- (vii) ensure that the results of any audit, review of risk assessment, control measures and performance are reported to all top level management, including the full Board of Directors, and acted upon.



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Tone from the top is
not what you say,
it's what you do





II : RISK ASSESSMENT

Corruption risk assessment should be **conducted periodically** as and when there is a change in law or circumstance of the business to identify, analyze, assess and prioritize the internal and external corruption risk of the organization.

Comprehensive corruption risk assessment is recommended to be done **every three years**, which may includes the following:

- (i) opportunities for corruption and fraud activities resulting from weaknesses in the organization's governance framework and internal systems/procedures;
- (ii) financial transactions that may disguise corrupt payments;
- (iii) business activities in countries or sectors that pose a higher corruption risk;





(iv) non-compliance of external parties acting on behalf of the commercial organization regarding legal and regulatory requirements related to anti-corruption.

*Note that, given the wide definition of an associated person, **a commercial organization can be liable for the acts of such third parties**; and*

(v) relationships with third parties in its supply chain (*e.g. agents, vendors, contractors, and suppliers*) which are likely to expose the commercial organization to corruption.



Corporate Liability & Adequate Procedures





III : UNDERTAKE CONTROL MEASURES

Commercial organization should put in place the **appropriate controls and contingency measures** which are reasonable and proportionate to the **nature and size of the organization**, in order to address any corruption risks arising from weaknesses in the organization's governance framework, processes and procedures.

- (a) Due Diligence** – The commercial organization should establish key considerations or criteria for conducting due diligence on any relevant parties or personnel prior to entering into any formalized relationships (*e.g. background check, document verification, and interview*).
- (b) Reporting Channel** – The commercial organization should:
 - (i) establish an accessible and confidential trusted reporting channel (whistleblower channel);
 - (ii) encourage persons to report, in good faith, any suspected, attempted or actual corruption incidents;

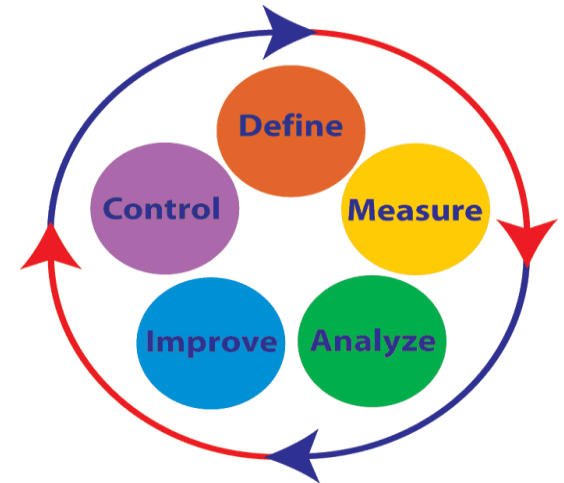


Corporate Liability & Adequate Procedures

- (iii) establish a secure information management system to ensure the confidentiality of the whistleblower's identity and the information reported; and
- (iv) prohibit retaliation against those making reports in good faith.

Commercial organization should establish **Policies and Procedures** to cover the following areas:

- (i) a general anti-bribery and corruption policy or statement;
- (ii) conflicts of interest;
- (iii) gifts, entertainment, hospitality and travel;
- (iv) donations and sponsorships, including political donations;
- (v) facilitation payments;





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- (vi) financial controls, such as separation of duties and approving powers or multiple signatories for transactions;
- (vii) non-financial controls, such as a separation of duties and approving powers or a pre-tendering process;
- (viii) managing and improving upon any inadequacies in the anti-corruption monitoring framework; and
- (ix) record keeping for managing documentation related to the adequate procedures.



Corporate Liability & Adequate Procedures





IV : SYSTEMATIC REVIEW, MONITORING & ENFORCEMENT

Top level management should ensure that regular **reviews are conducted** to assess the performance, efficiency and effectiveness of the anti-corruption program, and ensure the **program is enforced**.

Commercial organizations should consider the following:

- (i) plan, establish, implement and maintain a monitoring program**, which covers the scope, frequency, and methods for review;
- (ii) identify the competent person(s) and/or establish a compliance function to perform an internal audit**, in relation to the organization's anti-corruption measures;
- (iii) conduct continual evaluations and improvements** on the organization's policies and procedures in relation to corruption;



Corporate Liability & Adequate Procedures

- (iv) consider an **external audit** by a qualified and independent third party at least once every three years to obtain assurance that the organization is operating in compliance with its policies and procedures in relation to corruption.
- (v) **monitor the performance** of personnel in relation to any anti-corruption policies and procedures to ensure their understanding and compliance with the organization's stance in their respective roles and functions; and
- (vi) conduct **disciplinary proceedings** against personnel found to be non-compliant to the program.



Corporate Liability & Adequate Procedures





V : TRAINING & COMMUNICATION

Commercial organization should develop and disseminate **internal and external training and communications** relevant to its anti-corruption management system, in proportion to its operation, covering: **policy, training, reporting channel, and consequences of non-compliance.**

(a) Communication of Policies – Organization’s anti-corruption policy should be made publicly available, and should also be appropriately communicated to all personnel and business associates. Communication of the organization’s policies may be conducted in a variety of formats and mediums, include but are not limited to:

- (i) messages on the organization’s intranet or website;
- (ii) emails, newsletters, posters;
- (iii) code of business conduct and employee’s handbooks;
- (iv) video seminars or messages; and
- (v) town-hall sessions.





(b) Training – Commercial organization should provide its employees and business associates with adequate training to ensure their thorough understanding of the organization’s anti-corruption position, especially in relation to their role within or outside the commercial organization, include but are not limited to:

- (i) induction programs featuring anti-corruption elements;
- (ii) role-specific training, which is tailored to corruption risks the position is exposed to;
- (iii) corporate training programs, seminars, videos and in-house courses;
- (iv) intranet or web-based programs;
- (v) town hall sessions;
- (vi) retreats; and
- (vii) out-reach programs.





Corporate Liability & Adequate Procedures





PROSECUTION OF CASE

Malaysian Anti-Corruption Commission (MACC) is an enforcement body that investigate into a particular case, and make necessary recommendations to the **Attorney General Chamber (AGC)**, whether the case is having enough basis/evidence to be prosecuted in the court, or not.



However, it is the **Court** final decision/judgement whether the Adequate Procedures are :

- (i) designed;
- (ii) applied / implemented;
- (iii) executed / enforced;
- (iv) monitored; or
- (v) reviewed.



properly and in order as per guidelines.



MIDF VS CORPORATE LIABILITY



VS



ARE YOU READY ?

- (1) to build a Corruption Free Business Environment ?
- (2) to fight Corruption & Bribery ?
- (3) to design and implement Anti-Corruption / Anti-Bribery Procedures ?
- (4) to report Corruption Cases to MACC ?



Corporate Liability & Adequate Procedures





Corporate Liability & Adequate Procedures

THANK YOU

GRACIAS
ARIGATO
SHUKURIA
JUSPAXAR
DANKSCHEEN
TASHAKKUR ATU
YAQHANYELAY
SUKSAMA
EKHMET
MEHRBANI
GRAZIE
MEHRBANI
PALDIJES
BOLZIN
MERCII
BIYAN
SHUKRIA
TINGKI
TASHAKKUR ATU
SUKSAMA
EKHMET
MEHRBANI
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BOLZIN
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